Appeal Nos. UKEAT/0268/13/SM
UKEAT/0110/14/SM

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 22 May 2014

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

MR L EJIOFOR T/A MITCHELL & CO SOLICITORS — APPELLANT

(1) MS M SULLIVAN
(2) MR F AARONSON
(3) MRS L AARONSON — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ADRIAN LYNCH QC (of Counsel) Instructed by: Mitchell & Co Solicitors 781 London Road Thornton Heath Surrey CR7 6AW
For the First Respondent	MR MICHAEL MCDONOUGH (Representative) McDonough & Associates Employment Law Consultants Premier Business Centre 47-49 Park Royal Road London NW10 7LQ

SUMMARY

TRANSFER OF UNDERTAKINGS – Transfer

PRACTICE AND PROCEDURE – Case management

The ET found that there had been a TUPE transfer of a solicitors' practice. The App employer maintained in the EAT that because there had been periods when the business was not carried on lawfully (because the solicitor in charge had been struck off) there could be no transfer of the business under TUPE. It was not clear if the point had been taken below but the EAT was satisfied on the facts as found that it could not be said that the business was carried on for an unlawful purpose as such and that it could therefore be transferred for the purposes of TUPE.

Following the hearing on TUPE in the ET there was a further hearing to deal (basically) with remedies while the App was seeking to appeal on the TUPE issue. The App sought unsuccessfully to adjourn that hearing on the basis of the prospective appeal. He had chosen not put in any evidence in relation to remedies. On the morning of the hearing, the App did not attend and sent in a sick note. Counsel and the App's associate did attend but it was clear they were only in a position to apply again for an adjournment and there were no plans to challenge the remedies sought by the C. The EJ was suspicious of the sick note and found that the app for an adjournment on the basis of the App's non-attendance was simply designed to add spurious weight to the application on basis of the proposed appeal. He did not adjourn to make further enquiries in relation to his suspicions about the sick note and the App said that this was an obvious step which should have been taken in fairness to him.

The EAT found that this was one of those (possibly rare) cases where fairness did not require such a step. The crucial considerations were:

(1) there was no indication that the App's personal attendance was in fact necessary or what he was going to "bring to the party";
(2) the App's associate who had been closely involved in the case was present and representing the App and the EJ's grounds of suspicion were aired by the C's rep and the EJ in front of him; but he made no application for further time to deal with the points relied on;
(3) in the circs the EJ was entitled to make his finding of fact about the true motivation of the App.

UKEAT/0268/13/SM
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HIS HONOUR JUDGE SHANKS

Introduction

1. This is an appeal by Mr Ejiofor, trading as Mitchell & Co, against a decision of Employment Judge Stewart, sitting in the Central London Employment Tribunal, which was sent out on 8 November 2012, finding that the Claimant's, Ms Sullivan's, employment had transferred to him under the **Transfer of Undertakings (Protection of Employment) Regulations** (TUPE) on 1 April 2011. There is also an appeal by Mr Ejiofor against a decision of Employment Judge Burns sent out on 25 March 2013 whereby he declined to adjourn a subsequent hearing that dealt with Ms Sullivan's claim for unfair dismissal and remedies against Mr Ejiofor.

Facts

2. The Claimant worked for a small law firm called Aaronson & Co, which practised at 197A Kensington High Street. Mrs Aaronson, who was the third Respondent to the claim, was never a solicitor in the United Kingdom but may have been a registered foreign lawyer at times. Her husband, Mr Aaronson, the second Respondent to the claim, was a solicitor, but he was struck off the Roll on 16 June 2010.

3. On 16 August 2010 Mr Aaronson informed the Claimant and the other three members of staff, who included a Mr Brown, that he had been struck off and would be unable to continue practising after 18 August. The staff were told that they would continue to work under the instruction of Mrs Aaronson and that an arrangement would be entered into with another firm of solicitors, Hamptons. Mr Aaronson continued to give instructions through September and

October 2010, and all bills raised were backdated to 16 August or before. Then, quoting from the Tribunal Judgment at paragraph 9 and 10:

> **"During the period August 2010 to March 2011, Mrs Aaronson and the remaining staff, the Claimant and Mr Brown, continued working on Aaronson and Co existing client files as prior to August 2010. During this time arrangements were variously entered into with a succession of solicitors, Hamptons, ACS Law, Moroneys and Bromptons. The precise dates of these arrangements were unclear, as were the dates of various transfers of client files and funds as between Aaronson and Co and those firms. Mr Brown told the Tribunal that he understood that Mrs Aaronson was a consultant for these various firms and that he was working for her in a support role. Mr Brown understood the Law Society requirement for current practising Solicitor oversight and insurance cover, and he expressed his strong professional concern at meetings at the offices on 8 and 9 March 2011 to Mr and Mrs Aaronson, at which the Claimant was also present, about the offering of legal services without these requirements being firmly in place. Mr Aaronson stated that arrangements with Bromptons were in process of being finalised.**
>
> **10. […] On 22 November 2010 the Claimant reluctantly agreed with Mr Aaronson to allow a payment of over £8,000 in cash to pass through her account in order to facilitate payment of the rent and the offices were again opened […] [having been closed for a brief time] on 23 November. Mr Aaronson as well as Mrs Aaronson continued to give the Claimant instructions on client matters, by text messages, through to May/June 2011, as well as both Mr and Mrs Aaronson attending meetings with staff during March 2011. At the end of March 2011 there were 30 to 40 current client files being attended to by Mrs Aaronson, the Claimant and Mr Brown."**

4. It is not disputed that Mr Ejiofor, who was in effect the sole principal of Mitchell & Co, wanted to establish a solicitors' practice at 197A Kensington High Street and that he did so with effect from 1 April 2011, and that he employed Mr Brown and the Claimant from that date. He had an employee who features in the story hereafter called Mr Sood, who I was told was a trainee solicitor whom he had known for some three years before 2011, and Mr Sood had visited the offices at 197A Kensington High Street during October 2010 and been introduced to the Claimant by Mrs Aaronson as manager of Mitchell & Co.

5. Mr Ejiofor and Mr Sood's evidence to the Employment Tribunal was that they did not take over the business being carried on at 197A Kensington High Street and that the employment of the Claimant and Mr Brown resulted from distinct and separate offers made directly to them on 24 March 2011. The Employment Judge found the evidence of both

Mr Ejiofor and Mr Sood to be unconvincing, contradictory and incredible, and in particular firmly rejected their evidence of conversations with the Claimant and Mr Brown about their employment on 24 March 2011.

6. What did happen on that day was that two agreements were entered into between the Appellant and the Aaronsons. The first was a licence to occupy 197A Kensington High Street, which included an obligation on the part of Mr Ejiofor to pay the rent, which he duly did. 197A was to be the London office of Mitchell & Co, the head office remaining in Woodbridge. The second agreement was a consultancy agreement between Mr Ejiofor and Mrs Aaronson, which I shall come back to later.

7. Reading on in the Tribunal's Judgment at paragraphs 19-21, they say that on 24 March 2011 the Claimant was called by Mrs Aaronson on her way home to return to celebrate Mr Ejiofor "taking over the business":

> **"19. She duly returned and everyone went out to eat together in happy celebration at a local Italian restaurant; Mr Ejiofor, Mr Sood, the Aaronsons, Mr Brown and the Claimant."**
>
> **20. From 1 April 2011 Mr Ejiofor and Mr Sood began to attend the office on about two days a week. The Claimant and Mr Brown continued to work in their same roles in the same way as before on the existing files. The Claimant told the Tribunal that there were 30 to 40 existing clients at the end of March 2011 and that the First Respondent [Mr Ejiofor] brought in only two to three new clients to the London office up to June 2011. Client moneys [sic] of some £65,000 on a probate file were transferred in from Moroneys to the First Respondent. On 11 May 2011 Mrs Aaronson signed a client care letter on Mitchell & Co's letter head paper. Her name appeared at the foot of the letterhead paper with her overseas qualifications underneath the names of Mr Ejiofor and 'A H Mitchell, Consultant Solicitor'.**
>
> **21. Staff salaries for April and May were paid by the First Respondent at the end of the month. The Claimant's was £2,000 instead of the previous £2,200.77. […]"**

Then, to complete the story of what happened to the Claimant, paragraphs 22 and 23 say:

> **"22. At 6.30pm on Friday 10 June 2011 the Claimant was called to a meeting with Mr Sood and Mr Ejiofor and was told by Mr Sood that her salary of £35,490 was being cut to £18,000, that she had the weekend to think about it and if she did not agree she need not return the following week and if she did 'she would be sacked'. She was extremely distressed and declined to attend a planned social**

> **evening with the Aaronsons and Mr Brown. Mrs Aaronson, who had been in a meeting with Messers [sic] Sood and Ejiofor earlier that afternoon, told the Claimant that 'she had no idea' [sic] that this was going to happen.**
>
> **23. On Monday 13 June the Claimant went to work as usual. Mr Sood phoned into the office and asked if she agreed. She said that she needed more time to consider. Mr Sood then shouted at her that she was sacked and must leave the office at once and that if she did not he would call the police and have her removed. […]"**

She was then sent a dismissal letter backdated to 13 June 2011, and soon after she presented claims for unfair and wrongful dismissal, claiming that her employer was Mitchell & Co by virtue of TUPE, and also there were claims for unpaid salary relating back to 2010.

ET findings on TUPE

8. So far as the TUPE issue is concerned, the important findings of the Tribunal are set out at paragraphs 29, 30 and 31 of the Judgment. At paragraph 29 the Tribunal made findings about the situation between 18 August 2010 and 31 March 2011. They found that:

> **" […] the Claimant continued to be employed by "the partners collectively at any particular time practising as Aaronson & Co or their successors in title", the definition of her employer as set out in a contract of employment signed and dated on 25 August 1998, for the following reasons […]."**

They then give various reasons, which include, from (ii):

> **"(ii) Aaronson & Co did not *in fact* cease trading, whatever the legalities and formalities of the situation may have been. Client files continued to be serviced, and clearly bills were paid and monies received by the firm on the firm's account. The bank was not told that trading had ceased and the accounts continued to operate whenever funds were sufficient.**
>
> **(iii) Continuing to offer legal services would in any event be permissible under Law Society rules so long as there were proper oversight arrangements and insurance cover by a qualified solicitor/another solicitor's firm. It appears that these arrangements were in place with a succession of firms during this period, albeit that there may well have been gaps and/or failed arrangements also during that period. Moroneys, one of these firms, paid staff wages directly, and gross, on one occasion because the Aaronson & Co account was overdrawn.**
>
> **(iv) Even if Aaronson & Co had been operating 'illegally' at least at times, and at least in the sense of operating outwith the Law Society regulations, this does not entail that it thereby, and without more, ceased to be the Claimant's employer for the purposes of the relevant employment legislation. It cannot be the case that employees automatically lose their status and protection as employees because their employers are (without their own knowledge or connivance) operating illegally, for example in relation to companies legislation or in any other way."**

Paragraph 30 was as follows:

> **"*As at 31 March 2011* the Tribunal concluded there was an organised grouping of resources, namely; staff allocated to structured tasks, Mrs Aaronson as manager, whether described as a consultant or otherwise, the Claimant as legal secretary, Mr Brown as fee earner and paralegal, all working on some 40 client files and matters, functioning in a suite of offices at 197A Kensington High Street with the usual equipment and organisational arrangements enabling it to pursue the economic activity of a solicitors' legal practice for profit, namely the provision of a service to the public. Despite its financial vicissitudes of autumn 2011 and its numerous attempts to find the right solicitors' practice with which to finalise a lasting umbrella arrangement, oversight or takeover, this was, in everyday practical respects, an identifiable economic entity, namely a solicitors' practice, providing a legal service to its clients for economic gain. The fact that it operated under other names or none, changed its letterhead according to which other firm it was working in arrangement with and lots it's [sic] original name of Aaronson & Co, does not mean that it ceased to be an economic entity for the purposes of regulation 3 of [TUPE] and within the meaning of the *Law Society* [*of England and Wales v Secretary of State for Justice and Anor* [2010] EWHC 352] case 2010. It continued to be a structured and autonomous operating entity throughout.**

Then, paragraph 31:

> **"The Tribunal concluded that on 1 April 2011 there was a relevant transfer of an identifiable economic entity to the First Respondent within the meaning of Regulation 3 of the TUPE Regulations for the following reasons:**
>
> **(i) The entity, qua solicitors firm, retained its identity. It continued to operate exactly as before without any break or substantive change save for the arrival of Mr Sood/Mr Ejiofor on some days each week. A change of name is nothing to the point.**
>
> **(ii) The staff, including the Claimant, the client files, the operating systems and functions, the service to the public, remained the same.**
>
> **(iii) The premises were taken over by the First Respondent by virtue of the licence to occupy the premises – all of the premises and not simply individual rooms – for which the First Respondent paid all of the quarterly rental.**
>
> **(iv) The Tribunal did not find credible the evidence of the First Respondent's witnesses that the consultancy arrangement with Mrs Aaronson had materialised out of the air, as if by chance mentioning, on 24 March 2011. All of the evidence indicated there had been intensive negotiations between the Aaronsons and the First Respondent from September 2010 onwards, including a draft consultancy agreement produced on 2 October, and that discussions had covered all the operating costs of the business, including the Claimant and Mr Brown's salaries, named as such in the final agreement.**
>
> **(v) The licence to occupy the premises and the Consultancy Agreement were signed on the same day, 24 March 2011, at the end of the same day-long meeting. The fine details were thrashed out between the parties on that day. In reality, even if not formally, these were related contracts. Their net effect was that the First Respondent took over the operating entity including premises, all staff and all of the 40 existing client files. Mrs Aaronson's name appeared on the new letterhead and she signed new client care letters, for example on 11 May 2011. The First Respondent took over responsibility for paying the rent, the bills and the salaries of Mr Brown and the Claimant as from 1 April 2011. Client funds were transferred into the First Respondent's account.**
>
> **(vi) The Tribunal did not believe the evidence of Mr Ejiofor and Mr Sood that the staff were told that they were being taken on on new employment contracts and that they were on probation. […]**

9. The Claimant therefore succeeded on the TUPE question, and the remaining questions were put off for directions at a case management discussion to be listed.

Appeal on TUPE

10. On this appeal, Mr Lynch QC, on behalf of Mr Ejiofor, makes two main points in relation to the Tribunal's finding that there had been a TUPE transfer that he says mean that the Tribunal's conclusions cannot be supported. First, he says that the Employment Tribunal have relied for their main finding in relation to TUPE, which I have just read out from paragraph 31 of the Judgment, on the proposition that the existing client files from the practice at 178A Kensington High Street were taken over by Mitchell & Co on 1 April 2011.

11. He referred me to paragraphs 31(ii) and (v) which substantiate that submission, and it is certainly right that the finding about the transfer of the files was part of the factual matrix that led to the Employment Tribunal finding that there had been a TUPE transfer. It seems to me that that finding was one of fact for which, looking at the whole picture, there was ample evidence in front of the Tribunal, which must mean, in effect, that Mr Lynch's point cannot succeed. But, he says, the consultancy agreement, which I have mentioned, properly construed as a matter of law, did not involve the transfer of the files. It seems to me that, whatever the strict legal interpretation of the consultancy agreement standing alone, the Employment Tribunal's job was to look at the economic reality based on the whole picture, and so, in a sense, it cannot help him to look in detail at the terms of the consultancy agreement.

12. Nevertheless, I allowed him to take me to that agreement and to show me the terms that he said meant that the Tribunal were wrong in their finding that the files had been transferred.

The consultancy agreement is between Mitchell & Co, with an address in Woodbridge, and Mrs Aaronson, giving her address as 197 Kensington High Street. It says at clause 1:

> **"The consultant [Mrs Aaronson] will provide her services to the firm from 24 March 2011 unless and until this agreement is terminated in accordance with clause 5."**

Clause 5 entitles the firm to terminate the engagement after three years and entitles Mrs Aaronson to terminate the engagement on three months' written notice. It then has a heading, in paragraph 2, "Fees and Expenses", and it says this:

> **"2.1 Income generated at 197A Kensington High Street or elsewhere agreed by the parties to be the firm's [Mitchell & Co's] place of business engaging the consultant shall be divided and attributed in the following manner: in respect of all previous clients of Aaronson & Co, (a) 40% of the firm, (b) 60% to the consultant; in respect of all new clients, (a) 50% to the firm, (b) 50% to the consultant." [Quote unchecked]**

It is notable that all "new clients" would, as I read the agreement, include any client who came to Mitchell & Co as practising at 197A Kensington High Street. Then:

> **"2.3 The firm agrees to pay for all operating costs and not to incur costs other than for usual operating costs.**
>
> **2.4 The firm will maintain professional indemnity insurance and other forms of insurance.**
>
> **2.5 Operating costs to be deducted from the consultant's share of the earned income are 50% of rent, business rates, Mrs Sullivan's and Mr Brown's salary, electricity, heat, light and so on."**

There is also a provision at 3.1 that:

> **"The consultant will not be involved in any capacity with the business which does or could compete with the business of the firm without the written consent of the firm."**

And, at 3.2:

> **"The firm shall not take any steps to solicit away from the consultant any clients introduced directly or indirectly by her."**

13. Against the general background of the transaction of which it clearly formed a part, it seems to me that the provision at clause 2.1 implicitly involves and recognises the transfer of

the previous clients of Aaronson & Co to the Mitchell & Co firm, as well as any new clients acquired by Mrs Aaronson whilst practising from 197A Kensington High Street. That is simply, in my view, the only sensible reading of the agreement as a matter of law. Further there are two considerations relevant to the whole debate which seem to me significant, in addition: (1) the work that was to be done on previous clients' files other than that to be done by Mrs Aaronson herself was to be done by the Claimant and Mr Brown, who, it is accepted, were employees of Mitchell & Co and were paid by Mitchell & Co after 1 April 2011; (2) Mrs Aaronson could not do anything with the files, because she was not an English solicitor, unless she was acting under the auspices of a proper solicitor, and, in the light of clause 3.1, she had to do that through Mitchell & Co unless they gave her permission to go off to another firm. I do not regard clause 3.2 as an indication that Mrs Aaronson somehow kept her own clients and her own files. It looks to me like a standard term designed to prevent Mrs Aaronson being deprived of income that she should be entitled to, having started work with a client she had introduced through 197A Kensington High Street. So, for all those reasons, I reject Mr Lynch's first point.

14. His second point in relation to TUPE is that the business carried on before the notional transfer was unlawful because Mr Aaronson had been struck off the Roll but the firm was continuing to provide legal services and the consequence of that unlawfulness was that the business could not be transferred under TUPE. Again, he says that this was a point that the Employment Tribunal simply did not consider. That immediately led me to ask whether in fact the point was ever taken before the Tribunal by his clients, because it was not clear from the Judgment that it was. I was referred to paragraph 29, which I have read out, and in particular (iv); but it is clear in the context of the pleadings that those paragraphs were really designed to address a point made by the Aaronsons which was an unattractive point but was that the

Claimant could not claim anything against them because their contracts of employment were void for illegality.

15. Nevertheless, I was assured that the point was taken; when I asked for some further material to substantiate that, I was told that Mr Ejiofor's statement took the point. Mr Ejiofor went to his office in the course of the hearing and came back early afternoon with his witness statement. I have not looked at it but I am told it refers to the fact that Mr Aaronson was stuck off and so on and how the Aaronson company firm had continued to operate, but, as I understand it, it does not in terms say there could not be a transfer because the business was unlawful. I therefore continue to doubt that the point was taken, but nevertheless, for the purposes of today, I will assume that it was.

16. The law on this point is not, I think, laid down clearly in any authority, but everyone is agreed, and I am certainly happy to adopt the words in paragraph 24 of the decision of Elias J, as he then was, in **Rose & Hymes PLC v Duke**, EAT, 10 December 2012, which records agreement about propositions that I take to be the law. I would summarise them as follows:

> **The undertaking that is to be transferred ought itself to be a legal one in the sense that if the undertaking itself is for an unlawful purpose as such – a man, for example involved in money laundering or improper drug dealing or something of that nature – then the terms of the Regulations, namely TUPE, would not be applicable. In other words, "undertaking" within the terms of Regulation 3 means a lawful undertaking. But the Regulations do not require that all the activities of the undertaking being transferred must be entirely lawful.**

I have already read out the findings of fact that may be relevant to this debate: they are at paragraphs 7, 9, 10 and 29 of the Judgment. It is not at all clear to me from those findings that there was any unlawfulness still in operation at the point of transfer on 31 March 2011, nor is it clear when and to what extent the business was operating outside the requirements for legal services before that.

17. Mr Lynch accepted, as he was bound to do, that the business carried on by his client at 197A Kensington High Street after the transfer on 1 April 2011 was totally lawful. Although the Respondents, taking this point, would in my view have had the obligation to establish the factual basis for it, and the facts are not, as I have indicated, entirely clear from the Judgment, it seems to me that the correct result is entirely clear without any further factual enquiry. The business involved at 197A Kensington High Street, which the Tribunal described as a solicitors' legal practice for profit, was not unlawful per se; it is perfectly lawful to provide legal advice. It may be that the way that it is done or the lack of certain qualifications would make some activities carried on by some people unlawful from time to time, but the business as such, in my view, is not carried on for an unlawful purpose, and for that reason alone it seems to me that Mr Lynch's point, even if it was run in front of the Tribunal, was hopeless. So, I reject the appeal so far as it relates to the decision of the Tribunal that there had been TUPE transfer.

The 18 March 2013 hearing

18. That decision was the subject of an appeal, obviously, but the original Notice of Appeal was, as I understand it, rejected on the sift on the basis of Rule 3(7) of the **Employment Appeal Tribunal Rules**. A new Notice of Appeal was lodged on 15 March 2013 in accordance with the old rules and that new Notice of Appeal went before HHJ Serota QC, who on 21 May 2013 ordered that it be listed for a Full Hearing.

19. In the meantime, on 5 December 2012, there had been a telephone case management discussion to deal with the outstanding issues in the Employment Tribunal attended by Mr Sood on behalf of Mitchell & Co and by the Aaronsons in person. It was recorded that various issues remained outstanding, including unfair dismissal and various money claims, and at paragraph 4 of the note it says:

> **"The parties confirmed that a Schedule of Loss has been provided and disclosure completed, except for there may be some additional documents from the Second and Third Respondents [the Aaronsons]. A trial bundle has been prepared, witness statements have been exchanged, covering the full spectrum of evidence, except that the Second and Third Respondents have not produced witness statements and have not seen the witness statements of the other parties."**

Then there was an order at paragraph 5 that on or before 12 December 2012 the Claimant was to provide to the Respondent and the Tribunal an updated Schedule of Loss, and that, I am told, was done. At paragraph 8:

> **"The matter is listed for a two-day hearing on liability and remedy on 18 and 19 March 2013 at the London Central Regional Office of the Tribunals in Kingsway."**

20. The new Notice of Appeal was put in on 15 March 2013. On 18 March 2013 at the hearing Mr Ejiofor was represented by Mr Sood, the Aaronsons did not attend, and Mr McDonough, who has represented Ms Sullivan today, also represented her there. There had been a number of applications for an adjournment on the basis that there was an appeal pending. It is not clear to me whether that was the appeal put in on 15 March 2013 and/or the earlier appeal that was rejected on the sift, but in any event those applications had been turned down by the Employment Tribunal on paper.

21. On the day of the hearing a further application for an adjournment was made by Mr Sood, and the Tribunal record that three grounds were put forward. The first was that fresh Grounds of Appeal had been lodged, and the Tribunal found that that was not a good reason for an adjournment. The third, which is not being pursued any further, was that the Claimant's witness statement had been served late. As to that, amongst other things, the Tribunal recorded that Mr Sood said that he had no intention of cross-examining the Claimant in any event if the case proceeded that day.

22. The important ground for today's purposes was the second as to which the Tribunal said the following:

> **"Secondly it is said that R1 [the First Respondent, Mr Ejiofor] is ill. He did not attend the hearing. At 10.08 am today, after the start time for the hearing, he sent from his work email address an email to the tribunal stating that he is ill and unable to attend the hearing. A copy of a sick note with an illegible signature stating that he is 'unfit for work by reason of diarrhoeal illness' was attached. I am suspicious about this alleged reason for non-attendance. I do not know who signed the sick note. It does not say he cannot attend the Tribunal hearing, but that he is unfit for work for a period of 18/3/2013 – 20/3/2013 which appears excessive even if the diarrhoeal illness is genuine. If R1 cannot work, then I don't know why he is sending emails from his work email address. I think it unlikely that any diarrhoea is the real reason for non-attendance. R1 has not served a witness statement for today and given no prior indication of any intention to give evidence today or otherwise fight the case even if he was well. Mr Butler of Counsel initially attended the Tribunal to represent R1 and told Mr M McDonough […] that he intended to renew the application for a stay or adjournment solely on the basis of the EAT appeal, making no reference to any illness argument. Mr Butler departed from the Tribunal as he had not been given any instructions by R1. Both Mr Sood and R1 were found to be witness [sic] who gave unconvincing, contradictory and incredible evidence at the PHR. I think it is more likely than not that the sick note was being produced simply to add spurious weight to a weak and very late application for an adjournment, which itself is a vain attempt to postpone the inevitable."**

I have been provided with a copy of the email to the Tribunal (timed, actually, at 10.07am); it attached a copy of the certificate, which is dated 18 March 2013, stamped by what looks like a GP practice. There is a signature that is illegible on the back. On that basis the Employment Judge refused to grant an adjournment, at which point Mr Sood simply left without saying anything else, without seeking to cross-examine the Claimant or make any submissions at all of any nature as to the merits of any of the claims or, more importantly, the quantum thereof.

Appeal on adjournment decision

23. Mr Lynch has referred me to the relevant law as set out in the authorities. At paragraph 37 of the **O'Cathail v Transport for London** [2012] ICR 561 the EAT said:

> **"We emphasise, as Sedley LJ said in *Terluk* [*v Berezovsky* [2010] EWCA Civ 1345], there may be more than one fair solution to a difficulty. The question is whether the decision is a fair solution, not whether it is *the* fair solution. *Teinaz* [*v London Borough of Wandsworth* [2002] IRLR 721] and *Andreou* [*v The Lord Chancellor's Department [2002] IRLR 728*] continue to provide valuable guidance as to what is fair. Thus, *Teinaz* […] contains guidance to tribunals as to the manner in which disputes may be addressed by giving directions for further evidence; and *Andreou* is an example where of a case where it was there for the**

> **tribunal to proceed, when it had not received evidence for which it had given directions."**

In **Teinaz** Peter Gibson LJ says the following at paragraph 20:

> **"[…] before I consider these points in turn, I would make some general observations on adjournments. Every tribunal or court has a discretion to grant an adjournment, and the exercise of such a discretion, going as it does to the management of a case, is one with which an appellate body is slow to interfere and can only interfere on limited grounds, as has repeatedly been recognised."**

At paragraph 21 and 22 he deals with circumstances which are relevant to this case:

> **"21. A litigant whose presence is needed for the fair trial of a case, but who is unable to be present through no fault of his own, will usually have to be granted an adjournment, however inconvenient it may be to the tribunal or court and to the other parties. That litigant's right to a fair trial under Article 6 of the European Convention on Human Rights demands nothing less. But the tribunal or court is entitled to be satisfied that the inability of the litigant to be present is genuine, and the onus is on the applicant for an adjournment to prove the need for such an adjournment.**

> **22. If there is some evidence that a litigant is unfit to attend, in particular if there is evidence that on medical grounds the litigant has been advised by a qualified person not to attend, but the tribunal or court has doubts as to whether the evidence is genuine or sufficient, the tribunal or court has a discretion whether or not to give a direction such as would enable the doubts to be resolved. Thus, one possibility is to direct that further evidence be provided promptly. Another is that the party seeking the adjournment should be invited to authorise the legal representatives for the other side to have access to the doctor giving the advice in question. The advocates on both sides can do their part in assisting the tribunal faced with such a problem to achieve a just result. I do not say that a tribunal or court necessarily makes any error of law in not taking such steps. All must depend on the particular circumstances of the case. […]"**

24. Mr Lynch says, very simply, that in this case the Tribunal should have hesitated before refusing an adjournment when faced with the medical certificate and the statement that Mr Ejiofor would not be able to attend notwithstanding their doubts about that evidence. It would have been a simple matter, which would have taken little time, to make further enquiries. That would have avoided substantial possible prejudice against Mr Ejiofor. The hearing was listed for two days, which allowed more than sufficient time for such enquiries to be carried out. Mr Lynch says this was a clear case where an elementary step was not taken.

25. In my judgment, looking at the whole picture as it presented itself to the Employment Tribunal, this is a case, perhaps rare, where the circumstances did not require the Employment Tribunal to take any further steps before refusing the adjournment. There are, it seems to me, two overwhelming considerations that the Tribunal had in mind when deciding to proceed in that way. The first is this: the Employment Judge was given no indication of what it was that Mr Ejiofor was going to bring to the hearing. The fairness of the dismissal could not, it was accepted, have been in dispute. No witness statement had been put in on behalf of the Respondents, from Mr Ejiofor or anyone else, as had been recorded at the case management discussion. Counsel had been instructed on behalf of Mr Ejiofor but he had not been given any instructions to do anything more than apply for another adjournment on the basis of the appeal. Mr Sood or Counsel could have been instructed, if there had been a genuine intention to do so, to cross-examine the Claimant with a view to showing that the amounts she was claiming were not valid or that she had not mitigated her loss, but it is apparent that they had no instructions. Even now I am not clear what it was that required the attendance of Mr Ejiofor, save for the fact that he was a party to the proceedings. It does not seem to me that the reality was that Mitchell & Co were in a position to put forward any evidence or cross-examination or submissions on 18 March 2013 that required his attendance, and that is the view that the Employment Tribunal took. In those circumstances, there was no reason to decide that his presence was needed for a fair trial of the case.

26. The second consideration is this: even after Mr Butler of Counsel had left, Mr Sood was still there representing Mr Ejiofor. The points that the Employment Tribunal relied on as to doubts thrown up about the genuineness of the reason being put forward for Mr Ejiofor's non-attendance were, I am satisfied, aired in the presence of Mr Sood both by Mr McDonough and by the Tribunal Judge. Mr Sood could have put forward material to show how important it

was for Mr Ejiofor to be at the hearing and he could also have asked for more time to satisfy the Employment Judge's doubts. Furthermore, when the Employment Judge announced his decision he could have sought some kind of review and he could have stayed and made whatever points could be made on behalf of Mr Ejiofor. But he did none of those things; he simply stood up and left.

27. In those circumstances, it seems to me that the Employment Judge was entitled to reach the finding of fact that he did, namely:

> **"I think it is more likely than not that the sick note has been produced simply to add spurious weight to a weak and very late application for an adjournment, which itself is a vain attempt to postpone the inevitable."**

Having made that finding of fact, it seems to me, the Tribunal were entitled to proceed, not to grant an adjournment and not to spend further time investigating matters. In those circumstances, it seems to me that the Tribunal proceeded in a fair way and that the decision to proceed was within the Employment Judge's discretion and the second appeal must also fail.