Appeal No. UKEATPA/1919/12/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 26 November 2012

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

MR IAN KIRKHAM — APPELLANT

OUTWARD HOUSING LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	No appearance or representation by or on behalf of the Appellant
For the Respondent	MS J OLIVER (Representative) Outreach Housing Ltd 109 Anthill Road Bow London E3 5BW

SUMMARY

PRACTICE AND PROCEDURE – Postponement or stay

C had asked for a case to be transferred nearer to his home address. This request was based on his wife's condition – he said he needed to care for her throughout most of the day. This request was rejected as unsupported by medical evidence. 6 days prior to a PHR (arranged some time previously) to consider jurisdiction (on time grounds) C asked for a postponement; two days later he supplied a medical report, redacted, which probably related to his partner's condition. His request for postponement was rejected by an EJ without reference to the request for transfer (which would have rendered the postponement probably unnecessary) and the medical report. Held A discretion of this sort would rarely be subject to successful appeal, unless **Wednesbury** grounds applied. Here, they did, since a relevant consideration had not been taken into account. The case had been due to start on the day of the appeal: the next date it was listed was in two days time, and the question of venue and postponement would be remitted to the EJ for reconsideration at that hearing. C could attend (as he had offered) by telephone.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. This is an appeal which has come on with remarkable haste against a decision said to be contained in a letter of 23 November 2012, written by the Employment Tribunals Service on the instructions of Employment Judge Gilbert to the Claimant. The Claimant had raised claims in 2008 that he had been unfairly dismissed, that he had not been paid what he should have been paid in respect of sleep-ins during his work as a support worker for an adult with learning disabilities, when in the employment of the local authority, and that he had been not given written terms and conditions as he should have been in accordance with the **Employment Rights Act 1996**.

2. Having applied for interim relief and been unsuccessful in that, he appealed. The appeal was dismissed. The next day, 22 May 2009, he withdrew the three cases he had brought. The cases however were not dismissed on withdrawal. When the Respondent wrote to the Tribunal to seek that order, the Claimant objected. In August 2009 therefore, over 3 months even after he had withdrawn the claims, themselves brought only just within the 3 months after his dismissal date, which was 31 March 2009, he re-submitted claims to the Employment Tribunal. He did so on 4 August, 6 August and 8 October 2009.

3. On the face of it, each claim was out of time. The Respondent took the point. The cases were initially listed for a case management discussion. It is unclear precisely when an effective case management decision first took place because it appears from what I have been told, over the phone by Jackie Oliver representing the Respondent, that some were ineffective for various reasons connected with the Claimant. I should add the Claimant does not appear before me today by telephone, I shall deal with the circumstances of that later in this Judgment.

4. When the CMD was held and it addressed the need for there to be a pre-hearing review, again for various reasons, the pre-hearing review to consider the question whether the claims had been brought out of time and therefore whether the Tribunal had no jurisdiction to hear them, were ineffective. On one occasion, in July 2010, it appeared this was because the Claimant required treatment for glaucoma and on another occasion, he needed to take his wife who was not well on holiday, and on a third occasion he had been engaged in taking an exam. In any event, by July this year the Tribunal were writing to the Claimant to invite him to say what days would be available on which he might attend at the East London Hearing Centre for the pre-hearing review to take place.

5. In a letter of 18 July, the Claimant asked for a number of matters. He sought reasonable adjustments, as he put them, he sought flexible sitting dates and hours, he asked that a location be found for the hearing nearer to his home, he asked that the Tribunal sit on Saturdays. A suggestion that he had specifically identified his only being available on 24 November, 1 December and 8 December, being Saturdays, was later rejected by him in terms that:

> **"I am unable to attend on any other dates than between Saturday 24th November 2012 and Sunday 8 December 2012. I would also be available for 3 non-consecutive dates within this 3-week period should this be of assistance to the court."**

6. Plainly, therefore, the Claimant appeared on the face of it to be indicating an availability for attending a hearing at any non-consecutive dates within that 3-week window. As to the hearing location, he had asked, but given no detailed reasons at this stage for it, that that be nearer his home. He made requests for a mental health support worker, for a note-taker and for matters relating to his visual difficulties. I am told by Ms Oliver that to an extent they have been accommodated by the Tribunal at East London in preparing for a note-taker to be available to attend him.

7. On 21 September in response to that letter, the Claimant was told of the hearing date. The day before, 20 September, the application to transfer was refused. The Claimant was told that for that application to succeed, he must provide medical evidence in support that he had thus far declined to do. Some correspondence followed in September and on 18 October and 25 October letters from the Tribunal to the Claimant. There had at this stage been no request by the Claimant to postpone the hearing at the East London Centre. The first such request came from him on 20 November only 6 days prior to the date of the hearing. That I am told was made by email at 20.15 on the 20th. He asked that the case be transferred to Watford: he said it was impossible for him to attend at East London because of the condition of his wife. He needed to be in close proximity to her and Watford was close to his home.

8. There was a response from the Employment Tribunal saying that transfer had already been refused. If that was to be re-considered, medical evidence would need to be supplied. The request in any event was very late in the day, since the Claimant had had plenty of advance notice of the hearing date. On 22 November at 6.52am, the Claimant emailed the Tribunal to say that he would forward a document substantiating his wife's medical disability, that the Tribunal should receive on 22 November by recorded delivery. The Employment Tribunal replied on 22 November in a letter in which the view was attributed to Judge Gilbert that the request for transfer had been refused for reasons given previously and that there was no medical evidence. I am told by Ms Oliver that a medical report did arrive at the Tribunal on 22 November.

9. I should interpose that one of the difficulties that Ms Oliver had in assisting me through the chronology and some of the correspondence was that apparently the Claimant would write directly to the Tribunal and would not copy his letters to the Respondent. The same was true of the medical report. I have to say that this is a completely unacceptable way of conducting

Tribunal proceedings. It is a matter upon which I have expressed myself at some length in another case, deprecating the idea that it can be any part of justice for one party to have a private correspondence with the Tribunal.

10. However, the report is not one I have seen but I am told that it contains these features because it has been read to me by Ms Oliver. It shows that somebody who is plainly female and lives at the same address as does the Claimant, suffers from an AVM, that is an Arterio Venous Malformation of the brain. She had radio surgery for that, non-invasive if gamma rays can be described in those terms. A consequence has been a progressive left-sided hemiparesis. That has affected in particular the left shoulder from which she suffers pain extending up the left side of her head, it has given a seriously clawed left hand and had created some slight increase in problems with mobility and on occasions has caused her to fall. Associated with it a mild quadrantonopia. She needs regular reviews and is for an MRI scan in the near future and must be kept under review. It is likely that there will be a gradual evolution of the AVM and it may be that physiotherapy can in due course assist. At a later stage in the report, reference is made to a fixed flexion deformity of the left elbow to 150 degrees which is undoubtedly to a serious extent.

11. Nothing in the report speaks itself to the practical consequence of those disabilities. The Claimant in a letter in response to the one on 22 November from the Tribunal, however described life with his partner in respect of whom he claimed the medical evidence had been supplied, in these terms:

> **"The condition that she has, has the secondary effect of causing spasticity to the left arm, hand, leg and foot…. As such she requires assistance in all activities of daily living, including but not exclusionally confined to washing, bathing, dressing and preparation of meals. She relies upon the Claimant as her sole carer to carry out these functions. If the Appellant is not available to assist her, she will neglect her basic physiological needs."**

He goes on to say that the travelling time to East London was such that he would be away from her for 11 or more hours during which time she would not be able to care for herself unaided, that he had a duty of care to her as her sole carer, which if he were to neglect might result in his facing proceedings, and he was concerned that it was possible that she might fall and lie unattended without receiving medical attention and that might result in a fatality.

12. Those assertions by him do not sit altogether easily with information which emerged from Ms Oliver's survey of the material before me, from which it emerged that the Claimant had said that he worked 30 hours a week as a carer for another disabled person and there had been a suggestion that the period which he thought appropriate for the PHR to be held, was one in which he was effectively on holiday from that job. Be that as it may, if the medical material related to someone who was his partner, and is his partner, and if the spasticity justifies the conclusion that he did need to care for her in something of the manner that he describes, a transfer of his case for hearing to Watford might well be a reasonable adjustment and it would be difficult to see why justice would necessarily require that it should continue to be heard in East London.

13. Accordingly, the question of venue needed to be addressed by the judge in the exercise of her discretion. What Employment Judge Gilbert said as I have already indicated was that the hearing dates fell within the dates earlier indicated as appropriate by the Claimant. She did not address the question of venue. It is right however, to point out that the question of venue had been addressed, and had been addressed by her in earlier correspondence which was not referred to me in the Notice of Appeal and documentation supplied by the Claimant and in my view should have been. However, it is accepted by Ms Oliver on behalf of the Respondent that no judge has yet considered the question of transfer in the light of a medical report. There is a good reason for that it might be thought: a medical report which probably, though not

definitely, relates to the Claimant's partner, did not come to the Tribunal until 22 November. For a condition which seems to be intrinsic and of long standing, it is very difficult to understand why it should have taken so long for the Claimant to have afforded that material. One can well understand how an employment judge might focus upon timing, taking the not unreasonable view that the Claimant was here seeking to stave off a hearing date which he might well have attempted to postpone earlier had there been justification for it.

14. True it is, that he mentioned the medical reasons relating to his partner at an earlier stage but had never until 22 November forwarded a medical report and even then redacted those parts which would show clearly to whom it related. I am told by Ms Oliver and I am prepared to admit at this appeal, that those instructing her have researched the electoral roll and that shows that indeed the Claimant does live with a Samantha and a Denise Carr at his address and that it may well be that one of those two ladies is his partner, but if so, it might appear that the two ladies having the same surname are related such that there might be some care available from other than the Claimant.

Submissions

15. I have had no submission in support of the appeal for these reasons. The appeal came to me this morning. It came as a matter of urgency because the Appellant sought to restrain, in effect, the continued hearing of a case today at East London. That case, a PHR, was plainly quite likely to determine the question of time against the Claimant unless he were there to face cross-examination upon his witness statement, saying why it was not reasonably practicable for him to make his claim before he did and if it was not reasonably practicable to make it within 3 months that he brought it within a reasonable time thereafter. That would effectively require evidence. If the hearing was in his absence that that evidence would be impossible to put forward: therefore it was important for his appeal to be heard, and determined before it became

an appeal against an adverse decision reached against him in circumstances when (he says) he could not reasonably be present.

16. Accordingly, bearing in mind that the Claimant had said in his Notice of Appeal that he was prepared to represent himself via a telephone link to the East London Tribunal Service, I determined that this appeal should be heard this afternoon with such assistance as I could be given in the meantime by the Tribunal as to documentation, and hearing the Respondent's submissions. The Tribunal has been entirely accommodating and I am thankful for them for that. The Claimant was emailed twice by this Tribunal. He was told of the date and time of this appeal. Taking up the implied offer that he was available for hearing by phone to which I have just referred, he was invited to participate by telephone to advance his appeal. There has been no answer to this communication. Yet he must be at home, because the whole basis of his application to transfer to Watford, and explanation for his non-attendance at East London, is that he had to be at home in order to look after his wife. I conclude that there is no very good reason apparent to me why he has not attended before me. I therefore proceed to hear the appeal.

17. Having given leave this morning for this to be heard this afternoon at short notice in these circumstances, I nonetheless have a case which I have to determine in accordance with proper principles of justice. The case involves the exercise of what is a discretion. The authorities are clear as to the limited extent to which an appellate court may interfere with the Tribunal's exercise of discretion. In **X v Z Ltd** [1998] ICR 43 Waite LJ said at pages 54D-E:

> **"This case provides a salutary example of the value of the rule that the tribunals themselves are the best judges of the case management decisions which crop up everyday as they perform the function, an important but seldom an easy one, of trying to do justice with the maximum of flexibility and the minimum of formality to the problems that arise from the employment relationship and its termination. Decisions of the kind that the Chairman is required to make in this case frequently call for a balance to be struck between considerations of time, cost and convenience as well as fairness to the parties. The vast majority of cases can and should be left to the tribunals to resolve for themselves without interruption from the appellate process."**

In another Court of Appeal decision, that of **Noorani v Merseyside TEC Ltd** [1999] IRLR 184, Henry LJ said at paragraph 32:

> **"I am satisfied… the ET were here exercising the classic discretion of the trial judge in the issue of witness summonses and in like matters. Such examples of such a discretion lie not only in the issue of witness summonses but whether to grant an adjournment or whether to order the trial of a preliminary issue etc. These decisions are entrusted to the discretion of the court at first instance. Appellate courts must recognise that in such decisions different courts may disagree without either being wrong, far less having made a mistake in law. Such decisions are, essentially, challengeable only on what loosely may be called Wednesbury grounds, when the court at first instance exercised the discretion under a mistake of law, or disregard of principle, or under a misapprehension as to the facts, where they took into account irrelevant matters or failed to take into account relevant matters, or where the conclusion reached was 'outside the generous ambit within which a reasonable disagreement is possible'".**

18. It may be said that in an exercise of the power of postponement or adjournment a court may more closely be concerned with ensuring that a reasonable opportunity is given to a litigant to advance his or her case. I emphasise a reasonable opportunity is all that a claimant can in fairness require. This Claimant seems to think that he must actually be heard: that is not the law, he must have a reasonable opportunity of having his case heard. That said, and applying the **Wednesbury** test, the question whether to adjourn on the basis of medical material which was probably linked to his partner was never considered by the employment judge. For the discretion to properly be exercised on an application consisting as it did of two elements, one time but the other importantly, venue, linked perhaps but still separate issues, it was in my view important that she should do so.

19. On that basis, limited as it is, this appeal must in my view be allowed. However, I do so knowing that the case was listed for 3 days this week at East London: Monday, today, Wednesday 28 November and Friday 30 November. The next hearing day is Wednesday 28 November. I suggested to Ms Oliver, and she agreed, that I should if I were to allow the appeal on this basis remit this matter for re-consideration and fresh determination by an employment judge and presumably it will be Judge Pritchard on 28 November. I am satisfied that this,

despite the short time period, is entirely practicable. I have an email from the Tribunal which tells me that the judge proposed himself to consider a full review of the refusal of the postponement/transfer request by himself with a Judgment with full written reasons on the postponement.

20. It seems to me that if and to the extent that the Claimant is disadvantaged and cannot arrange at short notice for respite support if it is truly necessary, then he may as he offered in his own email, attend that application or re-consideration by telephone. A decision made by Judge Pritchard will then stand or fall by its own reasoning but I would bear in mind that so long as it addresses those matters which in a **Wednesbury** test must be addressed before a discretion such as this can properly be exercised, it is unlikely that any appellate court could or should interfere. I have done so on the basis which I have expressed as to Judge Gilbert's reasoning in the circumstances that I have set out. I am pleased to say that though allowing this appeal there will be very limited, if any effect, on the future conduct of the hearing at least in the immediate future before East London, I leave it to Judge Pritchard to determine whether further hearings should be there or at Watford.

21. For those reasons, with thanks again to the Employment Tribunal to Ms Oliver for the assistance which she has endeavoured to give as neutrally as she can in the circumstances, this appeal is allowed with the consequence that it will be remitted for further consideration and re-determination on Wednesday of this week before the East London Tribunal.