Appeal No. UKEAT/0289/12/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 16 November 2012

Before

LORD JUSTICE SULLIVAN

MS P TATLOW

MISS S M WILSON

MRS S BIRDI — APPELLANT

(1) DARTFORD VISIONPLUS LTD
(2) SPECSAVERS OPTICAL GROUP LTD — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR M WINN-SMITH (of Counsel) Instructed by: Akin Palmer LLP 3 Angel Gate 326 City Road London EC1V 2PT
For the Respondents	MR A BLAKE (of Counsel) Instructed by: Bond Pearce Solicitors Oceana House 39-49 Commercial Road Southampton SO15 1GA

SUMMARY

PRACTICE AND PROCEDURE- Postponement or stay

Application of guidance re adjournment in **Teinaz** and **Andreou**. Tribunal's refusal of an adjournment to enable further medical evidence to be obtained was unreasonable.

LORD JUSTICE SULLIVAN

1. This is the Appellant's appeal against the unanimous Judgment of the Employment Tribunal sitting at Ashford on 1 February 2012; 1) refusing her application for the postponement of the hearing which had been arranged for that day and the following two days; 2) striking out her claim on the ground that she conducted the proceedings unreasonably and had failed actively to pursue her claim and; 3) ordering her to pay costs to the Respondents in the sum of £4,055 on the ground that her conduct of the proceedings had been unreasonable.

2. In paragraph 2 of the Judgment, the Tribunal said that the case had been listed for hearing on three separate occasions; 22 August 2011, 4 January 2012 and 1 February 2012. That was true but, as Mr Winn-Smith pointed out on behalf of the Appellant, the two earlier postponements had not been the responsibility of the Appellant. It is a relevant part of the procedural background that as recently as 9 January 2012 there had been a joint application from the Appellant and the Respondents for the postponement of the hearing that had been listed for 1 February on the basis that it would take longer than the three days that had been allocated. The parties at that stage were agreed that seven days would be required for the hearing.

3. That application was refused by the Tribunal by letter dated 16 January. On 1 February 2012 the Appellant did not appear but she was represented by Mr Winn-Smith who sought an adjournment on three grounds; firstly the hearing would take longer than three days, secondly the Appellant was seeking further disclosure from the Respondents, thirdly the Appellant's medical condition. The Tribunal rejected all three grounds. In respect of the first ground the Tribunal were satisfied given the overriding objective of proportionality, expedition and fairness that a three day allocation for the hearing was sufficient. So far as the second ground is

concerned, the Tribunal noted that the bundle was already over 700 pages long and considered that further disclosure was unnecessary.

4. As the Tribunal recognised, however, the Appellant's medical condition was the main ground on which Mr Winn-Smith sought an adjournment on her behalf. The background to this ground of the application is as follows. In a letter dated 18 January 2012 the Appellant's solicitor sought a stay and a postponement on a number of grounds. Those grounds included a ground which was described as, "Claimant's ill health" The solicitor said:

> **"Not only is there a reduced timescale from the view of the Respondent's disclosure, to provide the Claimant's disclosure and to prepare witness statements. Additionally, and in any event, the Claimant has been unable to carry out these tasks due to her health status. Attached herewith is a letter from the Claimant's GP dated 18 January 2012 confirming her view that the ET Trial should be postponed. We are instructed to confirm that the Claimant had been on the waiting list for her treatment since March 2011 and had been informed that the wait would be 12 to 18 months and possibly longer. She had hoped that the hearing would have taken place well before now and due to her age when an earlier opportunity for treatment became available she had to take it.**
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> **For the same reason as that disclosed in the above letter the Claimant has not been able to work on the case in the last few weeks. She is firmly of the view that the stress resulting from the dispute with Specsavers was at least part of the cause of her previous miscarriages.**
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> **It is the stress of dealing with the voluminous disclosure of preparing her own case in the reduced timescale that she now wishes to reduce. Naturally she will have to do this work at some point. However, it is not just (or medically advisable) for her to do this now and in a far more intense time pressured situation than should be the case especially when this situation is not of her making."**

5. That letter was accompanied by a letter from Dr Witt which said:

> **"This is to certify that this patient of ours suffered 3 miscarriages between 2007 and 2009. She is now in the very early stages of an assisted pregnancy and it would definitely be in the interest of her health that the tribunal scheduled for February 2012 be postponed for several months."**

6. In a letter of 20 January the Appellant's solicitor asked for the letters of 18 January to be put before a Judge as a matter of urgency. On 20 January, the Respondents' solicitor wrote to the Tribunal with a copy to the Appellant opposing the application for a stay and postponement. So far as the health ground was concerned, the letter said this in part:

> **"The Respondents have no desire to act unreasonably and of course would not wish to do anything that would endanger the Claimant's pregnancy. However, the Respondents are concerned that the Claimant's Doctor has provided no detail as to the likely duration of any postponement or details as to why the Claimant being in the early stages of pregnancy renders**

> **her unfit to attend a Tribunal hearing. Further, it is not clear whether it is suggested that the Claimant should not attend a Tribunal hearing during merely the first few months of her pregnancy or for its entire duration. Some clarity on that may assist the Tribunal."**

7. The letter went on to say that the Appellant intended to conduct proceedings in the High Court and questioned how she would be able to conduct those proceedings but not be able to conduct proceedings in the Tribunal, and it is also refuted the Appellant's contention that the stress from the earlier proceedings had been the cause of her earlier miscarriages.

8. Pausing there, it seems to us that the Respondents were not challenging the information that had been given to the Tribunal about the Appellant's medical condition - that she had had a number of miscarriages and that she was in the very early stages of an assisted pregnancy - rather they were seeking clarification as to why this medical condition meant that she could not attend the hearing that was due to commence on 1 February, and they were also seeking clarification as to what the implications were in terms of the duration of a postponement of any hearing.

9. In a letter dated 23 January the Tribunal said that the hearing might go into a third day and the parties should make themselves available to enable that to happen. The letter from Tribunal did not refer to the Appellant's application for a postponement. The Appellant's solicitor replied on 25 January saying:

> **"While the Claimant's representatives are available on 3rd February, we regret that for the medical reasons already given by the Claimant she will not be available on this day or indeed the 1st or 2nd February 2012."** [It should be remembered that at this stage the Appellant's solicitors have not had any response from the Tribunal to their request for a postponement on inter alia medical grounds]

10. In a letter dated 25 January 2012 the Respondents' solicitor said:

> **"We have verbally been advised by Ashford Employment Tribunal that a Judge has considered but rejected the Claimant's application for a postponement and that the hearing will go ahead as scheduled on 1 to 3 February 2012."**

11. The Respondents' solicitor's letter went on to deal with certain aspects of case preparation and further correspondence ensued between the parties between 25 and 30 January which dealt with various aspects of case preparation but did not deal with the medical issue.

12. It is common ground that the Appellant's solicitor were told by the Tribunal by telephone that their application for a postponement had been refused and that the hearing would proceed the following day at 15.55 on 31 January. In a letter sent by email later that day the Appellant's solicitor told the Tribunal that their application for a postponement would be renewed by counsel on behalf of the Appellant and they went on to give the Tribunal further information about the Appellant's medical condition:

> **"The Claimant went on the waiting list for this treatment in March 2011 and was informed at that time that the waiting would be 12-18 months or possibly longer. Due to her particular circumstances the hospital in fact informed her that it was likely to be longer.**
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> **Her expectation, at the time of going onto the waiting list for her treatment, was that the hearing would have taken place well before now. She was first informed in early November 2011 that her treatment may begin very much earlier than had originally been expected as it appeared that a match had been found for her. She started to receive medication in anticipation of treatment, if all went as expected, from 28th November 2011. She was not in a position to decline the earlier than expected opportunity for treatment due to her age with her biological clock ticking, especially in light of having 3 previous miscarriages which her GP and other medics have attributed to the stress she was under.**
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> **The course of medication (injections) which started on 28th November 2011 was followed by scans. Even so, the treatment date could not be confirmed as this depended on the effects of the treatment and whether any embryos would be fertilised. The week before Christmas she came down with a severe bug which took her 3 weeks to recover from, therefore, over the Christmas period she was unable to do any work. The 6 lever-arch volumes of disclosures from the Respondents arrived with this firm on 22nd December 2011.**
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> **She had to take more hormone medication around 28th December 2011 followed by steroid medication on 2nd January followed by intravenous intralipid infusion which made her very unwell which was followed by more hospital appointments and a further increase in hormonal medication. She was informed on 6th January 2012 that there was a possibility that she would be going ahead with treatment the following week but this had yet to be confirmed. On Sunday 8th January 2012 she received a call from the hospital telling her to attend the hospital on Monday 9th January 2012, on Wednesday 11th January 2012 she was told that there were viable embryos and she was asked to attend the hospital on Thursday 12th January for embryo transfer.**
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> **We wish to stress to the following points. The first is that the Claimant was able to attend court as a witness in the case brought by the Directors of the Uckfield store against Specsavers in October 2011 because her medication for the treatment only started on 28th November 2011. The second is that the Claimant's incapacity is temporary and limited and that it is only the volume of work to be done (reviewing 3000 documents) in a very compressed timescale coming on the back of her embryo transfer on 12th January 2012 that she cannot do. The fact that the Claimant has some of the 3000 documents comprised within the six lever arch files does not take away the fact that she must still review the files disclosed to identify the ones she has and the ones she does not have before determining the relevance. The Claimant is not saying she will not be able to pursue her claim in this Tribunal and/or in the High Court."**

13. On the following day, 1 February, Mr Winn-Smith applied for a postponement. He referred the Tribunal to the letter from Dr Witt and to the letters from the Appellant's solicitor, to which I have referred above and at paragraph 13 of the Tribunal's Judgment records:

> **"He added that he had been told of a further development by a telephone call from the Claimant's solicitor this morning that the Claimant had lost the implanted embryo on Monday 30 January 2012 and that she was due to see her GP next Monday. He said that he was also told that the Claimant was not ill at present but was shaken up. He said that the earlier letter from the GP dated 18 January 2012 was brief because it was not her regular GP."**

14. In paragraph 9 of its Judgment, the Tribunal referred to the Respondents' solicitor's letter of 20 January objecting to a postponement, "Namely on the grounds that the GP's report was inadequate." Paragraph 9 continues:

> **"An Employment Judge considered the application and refused it, preferring the submissions made by the Respondent."**

15. It is fair to observe that the Appellant's solicitor application for postponement in their letter dated 18 January had not been answered by the Tribunal until less than 24 hours before the hearing on 1 February. It is to be inferred, although it has never been stated expressly, that the application was refused because the Judge considered that the doctor's letter of 18 January 2012 was inadequate. If the Appellant's solicitor had been told at an earlier stage by the Tribunal that it considered that the doctor's letter was inadequate then the solicitor could, and no doubt would, have obtained further medical information. The kind of medical information which they would have been able to obtain is demonstrated by a subsequent letter from Dr Witt, which in essence confirms that which the Tribunal had been told by Mr Winn-Smith on 1 February.

16. In the letter which is dated 3 April 2012 Dr Witt says:

> **"To begin with I must explain that I am not Mrs Birdi's regular GP, but unfortunately the doctor whom she normally sees has been off sick for some time so that is the reason why I was asked to write the original letter.**
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> **Swarandeep was suffering from lethargy and exhaustion, headaches, abdominal pains and bloating, anxiety and mood swings whilst undergoing the fertility treatment. She found that as the dose of her medication was increased so her symptoms tended to worsen causing her to feel quite unwell. She has a past history of miscarriages and failed pregnancies so was understandably very anxious throughout her fertility treatment. When undergoing this kind of treatment it is clinically very important to avoid stress at all costs. By the end of December 2011 when she was given a large volume of documents to read by Specsavers she was not well enough to take on the pressurised work involved.**
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> **On 30th January 2012 her IVF treatment failed and she was very distraught and depressed which was compounded by the courts refusal to postpone the hearing. She is being treated for the depression with the anti-depressant Sertraine. She was in no fit state to attend the hearing from 1st - 3rd February 2012 as the Tribunal has already been informed.**
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> **It was thought at the time that our previous letter would have been sufficient, if the court had specifically requested a more detailed letter it would of course been provided."**

17. In paragraph 14 of its Judgment, the Tribunal said:

> **"When asked by the Tribunal today why the Claimant was not present at the hearing Counsel did not know. He also did not know whether the Claimant was unfit to attend the hearing, and did not know why no medical report had been provided since 18 January 2012."**

We would observe that it is not in least surprising that counsel did not know whether or not his client was clinically unfit to attend the hearing. That was a question for her GP. So far as his lack of knowledge as to why a medical report had not provided since 18 January 2012 is concerned, as we have already noted, the Tribunal had not said that the report of 18 January was inadequate until the afternoon of the day prior to the hearing.

18. The Tribunal referred to the cases of **Teinaz v London Borough of Wandsworth** and **Andreou v The Lord Chancellor's Department** in paragraph 15 of its Judgment. In that paragraph the Tribunal summarised the position as follows:

> **"In Teinaz the Court of Appeal suggested that a right to a fair trial under Article 6 of the European Convention on Human Rights will usually require a postponement when a litigant cannot attend the scheduled hearing through no fault of his or her own however inconvenient that may be to the trial or the other parties. In Andreou the Claimant requested a postponement on the basis of a medical certificate which stated that she was unfit to attend work. It therefore adjourned the proceedings for one week with directions that a medical report be produced detailing the nature of and prognosis of the illness and the reasons why the Claimant was unfit to attend the Tribunal hearing. The Claimant failed to provide adequate information about her inability to attend the hearing and as a result the Tribunal struck out her claim on the ground that she had failed to comply with a direction. The Court of Appeal said it was necessary for a Tribunal to balance fairness to the Claimant with fairness to the**

employer and with that in mind, included that in that case the Tribunal's decision had not been perverse."

19. The Tribunal continued in paragraphs 16 to 21 of its Judgment:

"16. There is no hard and fast rule that because a party is indisposed that an adjournment or postponement must necessarily follow. Although in Teinaz the Court said that this will usually be the case where a party has adequate medical evidence. The court went on to say that in considering such matters the Tribunal may take account of the fact that other litigants are waiting to have their cases heard.

17. This Tribunal has already said that it found the GP's letter of 18 January 2012 to be inadequate. There is no more. The Claimant's solicitor would be aware that for an application for a postponement on medical grounds the Tribunal would look for sufficient medical evidence in support. The Tribunal could reasonably expect such evidence to be made available by the Claimant or by her solicitors. We note that there is no statement from the Claimant herself setting out her health problems.

18. So the Tribunal is faced with an application for postponement based on medical grounds with no adequate medical evidence in support, and with no explanation as to why she has not attended the Tribunal today. It is clear that the Claimant made the decision on or before Wednesday 25 January 2012 that she would not attend the hearing today.

19. We have heard Counsel's confirmation that the Claimant has not prepared her case and has not prepared or provided a witness statement even at this late stage. We also heard that the grounds for postponement have shifted over the course of the last two weeks. Initially the ground was that ill health would prevent the Claimant's attendance and then later the ground was that it has prevented her from preparing for the hearing.

20. The Claimant has failed to attend the hearing whereas the Respondent has attended, at considerable expense, represented by Counsel and solicitor and four witnesses ready to proceed with the hearing over three days. Everyone necessary is here and ready to proceed but for the Claimant. It is her case and it is for her to pursue it.

21. The Tribunal finds that the balance of fairness weighs heavily in favour of the Respondent's resistance to the application and the application for postponement on the grounds of ill health is refused."

20. As I have observed, the Tribunal had not said that the medical report of 18 January was inadequate until shortly before the hearing. However, even without a further medical report it did have information about the Appellant's medical condition. That information included the fact that the Appellant had suffered three previous miscarriages, that she had been in the early stages of an assisted pregnancy which had involved her taking the medication that was referred to in her solicitor's letter dated 31 January. The Tribunal had also been told that following that medication the Appellant had had an embryo transfer on or about 12 January and, crucially, it had also been told by counsel that the Appellant had lost the implanted embryo on 30 January.

21. Whatever inadequacies there were in the doctor's letter dated 18 January, the new information that the Appellant had received and had then very recently lost the implanted embryo cried out for further investigation if the Tribunal was going to conclude that the Appellant's application for a postponement on medical grounds was not well founded. Had the course in **Andreou** been adopted and had an opportunity been given to the Appellant to obtain further medical evidence and had no further medical evidence been provided then, of course, the case could properly have been struck out.

22. The Appellant's counsel requested an adjournment to allow the Appellant to provide further medical evidence. In paragraph 23 of its Judgment, when dealing with the issue of strike out, the Tribunal rejected that submission saying:

> **"The Tribunal rejects that course. The Claimant is assisted by qualified solicitors who would know what is required, and there has been ample opportunity to obtain such evidence over the last two weeks."**

23. On behalf of the Respondents Mr Blake submitted that the Appellant's solicitor should have realised that the medical evidence that they had supplied on 18 January was inadequate and they therefore had plenty of time to rectify that position.

24. Even if this submission is accepted, notwithstanding the fact that there was no indication from the Tribunal to the Appellant's solicitor until very late in the day that the medical evidence was inadequate, the Tribunal's reasoning in paragraph 23 simply fails to grapple with the fact that it had been told by the Appellant's counsel on 1 February that the Appellant, who had had three previous miscarriages, had only two days before the hearing lost her embryo which had been very recently implanted after a lengthy course of medication. Of course the Tribunal was not medically qualified but it did not, in our judgment, require any medical expertise whatsoever to realise that an Appellant in such circumstances might well be very distraught and

distressed and in no fit state to attend the hearing of her appeal. If the Tribunal was in any doubt as to whether that was the case, then the obvious course, and in our unanimous judgment, the course which would have been taken by any reasonable Tribunal would have been to accede to the Appellant's request to adjourn to enable her to obtain further medical evidence so that it could be authoritatively ascertained whether or not she was in a fit state to present her appeal.

25. The Tribunal also placed weight on the fact that the grounds for postponement had shifted over the period prior to the hearing from an inability to prepare for her case to an inability to attend her appeal; see paragraph 19 of the Judgment. If there had been no change in circumstances that might have been a factor which would have cast doubt on the justification for an adjournment. However, the Tribunal had been told that circumstances had changed; the embryo which had been implanted on 12 January had been lost on 30 January. The proposition that the medication the Appellant was taking prior to the implantation prevented her from properly preparing her case was not in any way inconsistent with the proposition that on 1 February she was in no fit state to attend the hearing because of what had occurred on 30 January. The Tribunal also relied on the fact that the Appellant had already said on 25 January that she would not attend the hearing because she had been unable to prepare her case; see paragraph 18 of the Tribunal's Judgment. Even if the Tribunal had felt that that position, as adopted by the Appellant at that date, was unjustified, that in no way addressed the issue of the Appellant's fitness to attend on 1 February in the light of circumstances as they had developed after 25 January.

26. However generous the ambit of the Tribunal's discretion in such matters, we were unanimously of the conclusion that the Tribunal's decision to refuse a postponement to allow further medical evidence to be obtained was one to which no reasonable Tribunal could have come.

27. Mr Blake accepted that if the Tribunal's decision to refuse an adjournment was legally flawed then the Tribunal's decision to strike out the claim could not stand. He submitted however that the Tribunal's order for costs should be upheld on two grounds; firstly that the Appellant's decision not to attend the hearing, as conveyed by the letter of 25 January 2012 was unreasonable, and secondly that if application for a postponement was to be made on medical grounds then it should have been made earlier than 18 January and should in any event have contained more information than was provided in the doctor's letter of that date.

28. The test is unreasonable conduct. The Tribunal's decision that the Appellant's conduct had been unreasonable was based squarely on its conclusion in the earlier part of its Judgment that the Appellant had failed to prepare her case and had failed to attend the hearing and had done so without providing any medical justification for those failures. If there had been no medical justification for those failures then the conclusion that the Appellant's conduct had been unreasonable was one which the Tribunal would have been entitled to reach. That perhaps illustrates why it was so important to obtain reliable medical information before deciding to refuse the application for an adjournment and to strike out the case.

29. If there was a medical justification for the Appellant's inability to prepare her case, then the indication to that effect in the letter of 25 January 2012 and the statement that she would not therefore be attending the hearing could not sensibly be described as unreasonable behaviour, unwise perhaps but not unreasonable. The complaint that the 18 January application on grounds of ill health should have been made earlier is not in our judgment well founded. It must be remembered that up until 16 January the Appellant was able to proceed on the basis that there had been a joint application by both parties for a postponement so that a seven day hearing could be accommodated. That expectation ceased on 16 January when the Tribunal refused that

application. Once that application had been refused then of course it became necessary to refer to the Appellant's medical condition and that was done promptly on 18 January. It is true as Mr Winn-Smith has fairly acknowledged that the doctor's letter of 18 January could, and probably should, have provided more information but it is a very fair cry from behaving unreasonably to put in a letter that does not contain sufficient information, particularly in circumstances where the Tribunal does not make it clear that the information provided is inadequate until it is too late to remedy the position. We are therefore satisfied that the costs order must also be set aside.

30. For these reasons the appeal is allowed, the Tribunal's orders are set aside and the matter must be remitted to a different Tribunal.