Appeal No. UKEAT/0411/14/MM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 8 February 2017

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

MS J N PINE — APPELLANT

CINVEN LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	No appearance or representation by or on behalf of the Appellant
For the Respondent	MR RICHARD LEIPER (of Counsel) Instructed by: White & Case LLP 5 Old Broad Street London EC2N 1DW

SUMMARY

PRACTICE AND PROCEDURE - Bias, misconduct and procedural irregularity

The Claimant complained about a case management Order made a long time before the substantive hearing. The result of the substantive hearing had been the subject of a separate appeal and rejected. Even if (which appeared not to be the case) there was an arguable challenge to the case management Order, events had moved on and there was no basis for allowing the appeal.

HIS HONOUR JUDGE SHANKS

1. This is an appeal by the Claimant against a case management Order that was made on 17 May 2013 by Employment Judge Lewzey, sitting in the London (Central) Employment Tribunal in a case that the Claimant brought long ago against Cinven Ltd. The Reasons for that Order were unfortunately not sent out until 4 April 2014.

Background History

2. This case has a very long and tangled procedural history. I shall try to keep my recital of the background to a minimum. Further details can be obtained from looking at: the substantive decision by Judge Lewzey on the Remedies Hearing, which was sent out on 4 December 2014; a decision by Underhill LJ in the Court of Appeal, given on 11 October 2016; and a decision of the Langstaff J in the Employment Appeal Tribunal, given on 11 November 2016.

3. The history begins on 20 June 2005 when the Claimant started work for Cinven, which is an investment company. She was working as a Database Administrator. From 23 August 2006 at the latest she was unable to work because she had chronic fatigue syndrome, and she was disabled for the purposes of the **Equality Act 2010** by reason of that condition. She was dismissed on 31 December 2006.

4. On 9 March 2007 she started proceedings in the Employment Tribunal, making numerous claims. Between 31 March and 11 April 2008 there was a hearing of those claims in front of Employment Judge Potter and members. On 8 May 2008 Reasons were sent out for a decision that the Claimant had succeeded on her claim for unfair dismissal and also succeeded

on a claim for reasonable adjustments. She failed on a number of other claims, which I need not go into.

5. The next stage in the process was to arrange a Remedies Hearing in relation to her successful unfair dismissal and reasonable adjustment claims. That Remedies Hearing was unfortunately very substantially delayed, in large part because of the Claimant's unfortunate condition but also because there have been numerous case management Orders and appeals arising from them to this Tribunal and to the Court of Appeal.

6. On one such outing to the Employment Appeal Tribunal, a Consent Order was made dated 21 June 2010. That Order, among other things, said that Employment Judge Potter should not sit as the Judge on the Remedies Hearing, remitted the case to the Employment Tribunal for the listing of the Remedies Hearing with a five-day time estimate to be heard on a date convenient to the parties after 1 September 2010, set aside one paragraph of an earlier Order relating to medical records - which I shall come back to - and provided that the Claimant should provide an updated or amended Schedule of Loss by 30 July 2010.

7. Although it is expressed to be a Consent Order, there was an appeal to the Court of Appeal by the Claimant against the Order, and that ultimately came in front of Elias LJ on a renewed application for permission to appeal. Elias LJ referred to the content of the Consent Order in two passages - which I shall come to in a moment - but he refused permission to appeal, basically on the grounds that one cannot appeal against a Consent Order. He said at paragraph 17 of his judgment that there were certain features of the Consent Order that were favourable to the Claimant: in particular, she did not want Employment Judge Potter to sit as a Judge in the case and it was agreed that there should be a freshly constituted Tribunal to

conduct the Remedies Hearing; and the date to comply with an Unless Order was varied. In addition, paragraph 2 of the original Order, which required the Claimant to pay costs, was set aside, and paragraph 1(3), which required her to provide medical information concerning her fiancé, was deleted. At paragraph 44 in the course of later comments Elias LJ said this:

> **"[The Claimant] seems to be somewhat confused about the effect of the consent order. It relieved her of the obligation to provide medical records (by paragraph 1(2)) and also of the obligation to provide her fiancé's medical information (by paragraph 12(3) [sic]). These were matters in her favour and not points of criticism."**

Looking back to the Consent Order, it is quite clear that at that stage in his remarks Elias LJ made a simple error. The Consent Order did not relieve the Claimant of the obligation to provide her medical records, which had been laid down by paragraph 1(2) in an earlier Order that was varied by the Consent Order.

8. On 17 May 2013 the Order that I am concerned with was sent out. By that Order Judge Lewzey ordered that the proceedings were stayed for two months until 10 July 2013 (paragraph 1) and that the Claimant do a number of things before the Remedies Hearing (paragraph 2): first, provide a witness statement; second, comply with an Order made on 5 November 2008 (in summary, requiring her to provide copies of GP records for various periods, to be disclosed initially only to the Respondent's legal advisers); third, consent to a further examination by the Respondent's medical expert; and fourth, commit to a mechanism for the hearing on remedies, in the light of her continuing inability to attend in person, one of the possibilities being a hearing using written representations. Those orders were made the subject of an Unless Order and they had to be complied with by 22 July 2013. There was a separate Order requiring the Claimant to provide the updated or amended Schedule of Loss by 22 July 2013. There was also a note in standard form saying that if anybody wished to, an application could be made to the Tribunal to vary or set aside any provision in the Order.

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9. I am told that at some stage the Claimant did indeed provide the medical records that were required by that Unless Order and the Remedies Hearing eventually took place on 22 October 2014 in front of Employment Judge Lewzey. The Claimant was not present at the Hearing and the procedure adopted is explained in her Judgment sent out on 4 December 2014 at paragraphs 2 to 29, which I incorporate by reference here. By the Judgment the Claimant was awarded a total of £25,491.70 by way of compensation for the unfair dismissal and reasonable adjustments claims.

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10. In the meantime Reasons for Employment Judge Lewzey's Order of 17 May 2013 had been sent out on 4 April 2014 and on 16 May 2014 this appeal was launched. Without going into the detail of it, the remedy sought was that Employment Judge Lewzey no longer deal with the matter on the basis that she had lost sight of justice in handling the case and also for a declaration that the Respondent was bound by Consent Orders in accordance with Court of Appeal rulings. I understand that - looking to the remedy sought - to be a reference to what Elias LJ had said in the paragraph I quoted from his judgment at paragraph 44.

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11. On 28 November 2014 HHJ Eady QC allowed this appeal to go to a Full Hearing on the sift. In her reasons for doing so she mentioned in particular what Elias LJ had said at paragraph 44, which I have referred to already, which obviously on the face of it caused her concern and was one of the reasons she allowed this appeal to proceed.

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12. So, by late 2014 there was a substantive decision on compensation, but the Claimant had up to six appeals, including this one, extant in the EAT, including one against the Remedies Decision itself, the others all being against case management directions leading up to it. Since late 2014 there have unfortunately been long delays in the EAT and a number of stays of the

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proceedings because of the Claimant's medical condition and inability to carry on with the proceedings. At one stage HHJ Peter Clark refused a further stay, on 27 August 2015.

13. Although that was totally overtaken by events, there was an appeal by the Claimant against HHJ Peter Clark's refusal, which itself came before Underhill LJ on a renewal of an application for leave on 11 October 2016. As I have already mentioned, Underhill LJ gave a full judgment and refused permission to appeal. In the course of his judgment he made two remarks that may be relevant for today's purposes. At paragraph 16 he said:

> **"16. … What is now before me is the oral renewal hearing. The applicant has been represented by … Ms Charlotte Thomas of counsel acting *pro bono* under the auspices of the Royal Courts of Justice Citizens' Advice Bureau. I am most grateful to her for her assistance, as I am sure the applicant is also. She has produced a clear and helpful skeleton argument. The applicant was herself intending to be present in order to support Ms Thomas, but this morning she wrote to the court explaining that owing to an unexpected child care emergency she would be unable to attend. She did raise the question whether the hearing might be postponed, but she acknowledged the problems about doing so and Ms Thomas has confirmed that no application for an adjournment is being made."**

At paragraph 25 Underhill LJ said this:

> **"25. More generally - though this point is no more than background - I think I must record the fact that while it is a great misfortune for the applicant to suffer from the condition that she does, and it behoves the tribunals and this court to take all reasonable steps to accommodate her in her difficulties, her health can nevertheless not be an over-riding consideration in every situation. She is not the only party to the litigation. The respondent, too, is entitled to some finality and the prospect of indefinite postponement is not acceptable."**

14. On 11 November 2016 four of the appeals I have mentioned came before Langstaff J on Rule 3(10) applications. They were all dismissed, and they included the appeal against the substantive Remedies Decision by Employment Judge Lewzey. Langstaff J made some remarks at paragraphs 25 and 26 of his judgment that are also apposite to what I have to deal with today. He said:

> **"25. In general, it can be said that great latitude is given by appellate courts to decisions that are of a case management nature. Decisions made, particularly some time in advance of the hearing, by way of case management are rarely set in stone. Their object is to secure a fair hearing. It is rare that an appeal against a preliminary and case management decision will succeed, though it does occur. In this case, if it could be shown, for instance, that the decision made ultimately on the application for remedy was one that was affected by a procedural flaw that was the consequence of a previous ruling by a Judge during case management, then it**

> **would be sensible both to allow the appeal against the case management ruling and then consequently the appeal against the Remedy Decision.**
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> **26. However, if none of the case management decisions has affected the fairness of the ultimate decision or the fairness of the procedures by which it was reached, then I take a rather different view. It would be pointless, it might be thought, to allow an appeal against a case management decision where that decision had no real impact on the ultimate decision made. It would be a waste of time and resource and something that would be contrary to the overriding objective of the Rules. Accordingly, I shall look first at the ultimate decision and consider the appeal against that."**

15. Langstaff J went on to do that at paragraphs 27 to 47 of his decision, rejecting, as I say, the appeal against the substantive Remedies Decision. Of particular relevance are paragraphs 45 to 47, which I shall read into this decision:

> **"45. When HHJ Eady QC rejected the appeal against that hearing [a reference to the Remedy Hearing] she said that had it not been that the appeal related to a separate substantive Judgment of the Employment Tribunal she would have ruled that it was wholly without merit. She did not, however, do so. She said that to the extent that the Claimant repeated her contentions that she had previously been denied a fair hearing or the Tribunal failed to make reasonable adjustments, discriminated against her or erred in its approach to the conduct of the hearings in her absence, she could not accept that the Claimant had demonstrated any proper basis of appeal. I agree.**
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> **46. She noted that insofar as those complaints related to earlier hearings, Orders and directions they had been the subject of reasoned rejection in previous appeals [and he makes an exception of the three appeals that he is yet to consider]. She said that to the extent that the Claimant was making the complaints in respect of the Remedy Hearing itself, she failed to engage with the extensive history of the proceedings, the Tribunal's need to balance the rights of the Respondent to a hearing, and the various adjustments that the Tribunal had actually made to its procedures to ensure that the Claimant was provided with an opportunity to make written submissions and otherwise participate. The challenge to the Tribunal's award was general and without Particulars, and without Particulars there could be no basis for an appeal. I agree entirely with those observations, save to the extent that I have mentioned, and it follows that I see no basis upon which the appeal [in relation to the substantive Remedy Judgment] could succeed.**
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> **47. This of itself would give no reasonable ground for proceeding with any of the other three appeals [which relate to case management decisions], since there is no tenable case that any of the procedural grounds of appeal against the Remedy Judgment can be made out, and it follows that the decisions as to case management did not even arguably result in any unfairness at the hearing itself, but, for completeness, I shall deal with each of them further and separately to that point."**

The Hearing Today, Documents and Applications to Adjourn

16. The hearing today is the substantive hearing of the appeal that HHJ Eady QC allowed through on the sift, which relates to a much earlier case management Order, namely that made by Employment Judge Lewzey on 17 May 2013. Formal notice of this hearing was sent out to the parties on 15 December 2016 and confirmed in an email sent out on 20 December 2016.

A The bundles were to be lodged by 11 January 2017, and skeletons were to be provided by 25 January 2017.

B 17. On 10 January 2017 the Claimant asked for extra time to put in the bundle because she said she was seeking assistance from the Bar Pro Bono Unit to represent her and she had not yet obtained confirmation of that assistance or the identity, I think, of the person who was going to assist her. On 12 January 2017 the Registrar extended time for the lodging of bundles to 23 January 2017. On 24 January 2017 the Claimant wrote to the Tribunal complaining about some of the documents that the Respondent was seeking to put into the bundle; in short, she was saying that since they did not exist at the time of the Order appealed against they should not be put into the bundle at all; she also said, again, that because she had no counsel instructed yet and she was unable to attend she required a reasonable adjustment that the appeal be dealt with purely on the papers, and she mentioned her disability and the fact that she had a teething baby.

E 18. So far as the contents of the bundle are concerned, the Claimant rightly quotes parts of the **EAT Practice Direction**, which do emphasise that any documents put in have to be documents that were before the Employment Tribunal. It is not expressly stated, I think, in the **Practice Direction**, but clearly decisions of this Tribunal, the Employment Tribunal or the Court of Appeal on related appeals are relevant and material that should be put in the bundle, albeit they post-date the Order that is appealed against, and I would hope that that would be obvious.

H 19. The Registrar in response to the email of 24 January 2017 wrote saying that any objection to any direction was to be taken at the hearing and that the Claimant could rely on written submissions if she so wished and if her bundle was not provided by close of business on

2 February 2017 the EAT would ask the Respondent to co-operate in preparing a bundle. I have before me a bundle prepared in that way, which includes the decisions that post-date the Order appealed against. I have mentioned the three substantive decisions. There was also a note from HHJ Eady QC, which is in an email dated 21 October 2015, sent to the Claimant. I should also say that in addition to the core bundle, the EAT office have prepared for me a chronological bundle containing correspondence between the EAT and the parties in this case, to which no possible objection could be taken.

20. On Wednesday 1 February 2017 the Claimant applied to vacate this hearing altogether for a number of reasons. She said she was still awaiting a reply from the Bar Pro Bono Unit, she was still awaiting a response in relation to the documents for the bundle and that, although the EAT had noted that she should have representation, she had been unable to get such representation from various schemes. So, she said that it would "appear prudent to vacate the hearing" and list it for a date for which her Bar Pro Bono Unit representative is available with sufficient time to prepare and for her to instruct her and prepare the bundle, and she said she could not provide dates to avoid because she had not heard from the Bar Pro Bono Unit. The Registrar refused that application to vacate. The Claimant asked for the matter to be referred to a Judge. On Monday 6 February 2017, this week, I refused the application to vacate and said I would give reasons today.

21. The main point that the Claimant appears to be making is that she is expecting assistance from the Bar Pro Bono Unit and until she has it she cannot be represented and cannot say what should go in the bundle. She says that somebody agreed to represent her when the matter was before Underhill LJ. Unfortunately, she supplied no name or details but on Monday 6 February 2017 Ms Muir from the EAT spoke to the Bar Pro Bono Unit and they confirmed

A that they have received no application from the Claimant for assistance in connection with this matter.

B 22. The Tribunal unfortunately cannot wait indefinitely for the Claimant to organise representation. She has known for a long time that a hearing would happen. She has known for nearly two months of this date. She says that representative from the Bar Pro Bono Unit was in some way organised but that appears not to be the case. So, that ground for vacating the C hearing today, I am afraid, fails. So far as the documents that the Respondent put into the bundle are concerned, I have already commented and need say no more. So, I have, on those grounds, rejected the application to adjourn this hearing.

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Substantive Appeal

23. That brings me to the substantive appeal. I have already alluded to the remedy being sought, which is on page 6 of the bundle. The grounds of appeal are at pages 7 to 10 of the E bundle. It was observed many years ago that they seem to end at the middle of a paragraph, but, although the Claimant has been notified of the point, I do not think we have ever seen page 7 of 7 of the Notice of Appeal itself. In the grounds of appeal basically a number of procedural F points are raised about the Order made on 13 May 2013, and there is also reliance on what Elias LJ said at paragraph 44 of his judgment. I have before coming into court considered all the papers before me. At the hearing I have heard from Mr Leiper, and he has in the traditional G way when a party is absent helped the court and drawn my attention to anything that may assist the Claimant although she is not here.

H 24. So far as the appeal is based on what Elias LJ said, the fact is that it is clear that he simply made an error and nothing he said was in any event binding on the Employment

Tribunal, on this Tribunal or on any other court. Further, even if it was wrong of the Employment Tribunal to make an Unless Order that required the Claimant to produce her medical records before the Remedies Hearing, the fact is that although the records were produced and were seen by Mr Leiper and his instructing solicitors they were not used at all at the Remedies Hearing and were not seen by Employment Judge Lewzey (that is recorded in the Remedies Judgment at paragraph 21). So, even if the Order should not have been made, in practice it has had no impact. For that reason there is no point in the appeal relating to the requirement to produce medical records and I reject it.

25. The Notice of Appeal takes things somewhat further, objecting to the whole of the Order. There is a point taken in ground 1 to the effect that at the time that Order was made the Claimant had some outstanding applications of her own which should have been dealt with first, in chronological order, as she puts it. It is not clear from the Notice of Appeal to what she is referring there, and Mr Leiper has made clear that he has looked into the point and does not know what she is referring to. So, I am afraid that that ground of appeal cannot go anywhere.

26. She also says that Employment Judge Lewzey should have waited for some comments from her before making the Order of 17 May 2013, to which there are I think at least three answers. Mr Leiper says, first, that the Claimant had an opportunity between 2 May 2013 and 15 May 2013 to make any points she wished. Second, the Order itself was simply a "rehashing" of old Orders that had been made many years before - including Consent Orders, including the Consent Order in the EAT to which I have referred - and simply brought in a time guillotine to enable the Remedies Hearing to finally take place. The third point is that it was open to the Claimant to apply to set aside or vary the Order at any stage before the Remedies Hearing.

27. The overall general point is that this Order was completely overtaken by events. There were numerous other case management Orders, and then there was the substantive hearing relating to remedies. Those have all been the subject of appeals that were dismissed, as I have said, by Langstaff J back in November, and, in the circumstances, it is really not open to the Claimant now to be complaining about a case management Order made well before the Remedies Hearing.

28. Mr Leiper also in fairness suggested another thing that the Claimant might have put before the Tribunal based on her Notice of Appeal, which was to say that the way Employment Judge Lewzey dealt with this case management Order indicated that she had lost sight of the justice of handling the case and that in those circumstances Employment Judge Lewzey should have recused herself before the substantive Remedies Hearing in October 2014. The answer to that is that the proper remedy was to appeal against the Remedies Decision and say that Employment Judge Lewzey was biased; indeed, that point may well have been taken as part of the appeal against the substantive Remedies Judgment, and if it was not, it should have been. As I have already said a number of times, that appeal was finally dismissed by Langstaff J in November 2016.

Disposal

29. For all these reasons I dismiss this appeal.

30. There is apparently still one extant appeal to the Court of Appeal arising out of this claim, although I am told the Respondent does not know the details of it. Subject to that, I hope that this decision finally brings an end to these proceedings, which started, as I have said, in 2007, nearly ten years ago.