Appeal No. UKEAT/0008/17/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 25 May 2017

Before

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

(SITTING ALONE)

MR K OPPONG — APPELLANT

TESCO STORES LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	Written submissions
For the Respondent	No appearance or representation by or on behalf of the Respondent

SUMMARY

PRACTICE AND PROCEDURE - Costs

PRACTICE AND PROCEDURE - Right to be heard

The Appellant appealed against the Decision of the Employment Tribunal to order him to pay a contribution to the Respondent's costs. The Employment Tribunal had struck out his claim because of his deliberate flouting of the procedure Rules and unreasonable conduct. The appeal was on a narrow question: whether the Employment Tribunal had deprived the Appellant of a fair hearing by not permitting him to give evidence or make submissions about his means. Neither the Appellant nor his representative appeared at the hearing of the appeal, having applied unsuccessfully for it to be adjourned. There was no material at the hearing of the appeal which undermined the Employment Tribunal's approach to the Appellant's means and the Employment Appeal Tribunal dismissed the appeal.

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

1. This is an appeal from a Decision of the Employment Tribunal ("the ET") sitting at Huntingdon on 23 July 2015. Neither party attended the appeal. I shall say more about that issue below. Due to an unfortunate delay the Decision, to which I shall refer as "Decision 2", was not sent to the parties until 1 February 2016. The ET consisted of Employment Judge Moore, Mrs Russell and Mr Chinnery. I shall refer to the parties as they were below.

2. The ET in Decision 2 dismissed the Claimant's claim and ordered him to pay a contribution of £4,800 towards the Respondent's costs of the claim. The ET described at paragraph 1 of Decision 2 the purpose of the hearing: it had been to give the Claimant the opportunity to address questions why the claim should not be struck out under two provisions of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("the Rules") and to deal with the question of costs. The ET said at paragraph 2 that the background of the matter was set out in detail in the Reasons for Orders made by the ET on 6 May 2015 and sent to the parties on 22 May 2015; I shall refer to that Decision as "Decision 1". The ET that made Decision 1 had the same constitution as the ET that made Decision 2.

3. In Decision 1 the ET recorded that the Claimant and his representative had failed to attend the second day of the hearing and that the ET had made the Orders that were set out at paragraph 1 of its Decision. The ET ordered that the case be listed for an open Preliminary Hearing before the full ET on 23 July 2015 with a time estimate of three hours. The ET would at that hearing consider (1) whether to strike out the claim under various provisions of the **Rules**; (2) whether or not, if the claim were struck out, the deposit paid by the Claimant should be forfeit; (3) whether or not the Claimant should pay the costs pursuant to the **Rules**; and (4)

whether a wasted costs Order should be made against the Claimant's representative, Dr R Ibakakombo. The ET said that the Claimant and Dr Ibakakombo were put on notice that if they failed to attend on 23 July those issues would be decided in their absence. That hearing would only be adjourned if exceptional circumstances dictated that it should be.

4. The ET went on to order that the Respondent should serve on the Claimant and on Dr Ibakakombo a Schedule of Costs and that on or before 26 June 2015 the Claimant should, if he wanted to raise arguments about his means, serve on the Respondent a statement of means and any documents on which he intended to rely to prove the sums included in his statement of means.

5. In Decision 1, to which I need not refer in detail, the ET on several occasions noted that Dr Ibakakombo had not represented the Claimant in a way that conduced to the expeditious disposal of the issues. Those passages in particular are at paragraphs 17, 19 (where two uncomplimentary references to Dr Ibakakombo's representation are made), 20, 21 and 24 of Decision 1.

6. In the second Decision, the ET said that the background had been set out in detail in the first Decision. In essence, the Claimant was bringing a claim against the Respondent for race discrimination, an unspecified claim for other payments and a complaint entitled "*breach of recognition and procedural agreement*" (paragraph 2). As the ET observed in Decision 1, that last complaint appeared not to be a complaint that was within the Tribunal's jurisdiction. The Claimant's claim was that he had been summarily dismissed for theft. He challenged the fairness of the procedure by which he was dismissed, and alleged that he had been "*targeted for*

removal because he is black, a foreigner, a shop steward and also due to his current medical condition".

7. The Respondent's case was that the Claimant had been dismissed for stealing clothing from the Respondent, that there had been a fair and reasonable investigation and that there was closed circuit television footage of the incidents that led to the Claimant's dismissal.

8. In Decision 2 the ET decided that the Claimant had shown "*a deliberate and persistent disregard*" for the ET's procedure and his conduct of the case had been unreasonable. The ET said (paragraph 5):

> **"5. … No party has a legitimate expectation of succeeding on every contested point irrespective of the merits and if disappointed they have to accept the decision for the duration of the hearing; if it proves to be wrong in law they may have the opportunity to pursue it elsewhere."**

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> **"7. … However we have taken account of the Claimant's means. He is in work and is working via an agency. He has produced a schedule of loss and bank statements. The latter show him to have under-declared his income by something in the region of £500 per month. His outgoings as stated coincide approximately with his claimed income (£957 outgoings £962 income). Since the excess we have found is not accounted for it amounts to disposable income. We accept that with agency work there may be some fluctuation. Whilst it is not open to us to make an order for time to pay we are not constrained by the amount that can be paid at this instant. We have concluded that a sum equating to £200 per month is within the Claimant's ability to pay and this would yield, over two years, the sum of £4,800 and that is the amount we order the Claimant to pay to the Respondent as a contribution towards their costs."**

11. The Claimant appealed against that Decision on various grounds, but on the paper sift HHJ David Richardson decided in brief that those grounds raised no arguable point of law. There was then a hearing pursuant to Rule 3(10) of the **Employment Appeal Tribunal Rules 1993** in front of HHJ Eady QC. She allowed the appeal to proceed on a narrow basis: in essence, that it appeared to her to be arguable that the Claimant had been deprived an opportunity to give evidence and make submissions to the ET about his means. It followed then that the appeal concerned a very narrow issue about which the Claimant was in as good a position to make submissions as was Dr Ibakakombo because the issue simply concerned what had happened at the second ET hearing and the points that the Claimant wished to make about his means in order to attack the analysis in Decision 2 that led to the award of £4,800 costs against him.

12. There have been several applications for an adjournment of this hearing. On 23 May I dealt in chambers with such an application. I refused it. The reasons I gave are as follows:

> **"1. [Dr Ibakakombo], who represents the Appellant ('A') has applied for an adjournment of the appeal in this case which is listed for 25 May.**
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> **2. On 10 May 12 [sic] the Employment Appeal Tribunal ('the EAT') emailed [Dr Ibakakombo] to say that the bundles for the appeal were late and must be lodged by noon on 12 May 2017. [Dr Ibakakombo] replied, saying that [Dr Ibakakombo's] 'mum who is in critical state and [Dr Ibakakombo] is currently planning to travel abroad until end of May therefore; the Appellant's case is that he will not have a fair hearing if acting in person consequently we apply for extension of time for lodging bundles in this case' [sic]. He also applied for the hearing to be postponed.**
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6. In view of the closeness of the hearing, the Registrar has asked me to consider this application for an adjournment of the hearing.

7. I note four points:

> **i. The appeal is on a very limited issue (essentially) whether the Appellant was deprived of the opportunity to give evidence and make submissions about his means in relation to a costs order made by the Employment Tribunal ('the ET').**
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> **ii. The decision appealed against was made as the result of a hearing about two years ago.**
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> **iii. I have read two decisions of the ET (sent to the parties on 22 May 2015 and on 1 February 2016). Both refer to [Dr Ibakakombo's] apparent lack of familiarity with the substantive law and rules of practice in the ET, and one to his 'misuse of time' (22 May decision, paragraph 3; 1 February decision, paragraphs 19, 21 and 22).**
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8. My decision is that to grant an adjournment of the hearing would not further the overriding objective. I have little confidence, given the views of the ETs to which I have referred, that the Appellant will suffer any injustice if [Dr Ibakakombo] is not, in the event, present to represent him at the appeal. The issue is a narrow factual issue, and the Appellant will be able to describe what happened at the ET hearing in order to support his grounds of appeal.

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15. Dr Ibakakombo sent a further email to the EAT timed at 9.39am today in which he said this:

> **"Further to the hearing due to start today at 10:30 and in absence of the Appellant and his Representative, we write to as you [sic] to place the Appellant's attached Written Submission before the EAT Judge as a matter of urgency and; to invite the Court Judge to consider and examine [the] Appellant's attached Written Submission before making his (or her) decision."**

16. The attached written submission referred to the costs Order in the sum of £4,800. It is said that it is not supported by evidence as the Respondent has applied for costs an amount of £29,755. I do not understand this point, but it seems to me that it does not matter because in any event the ET referred to the Respondent's costs being an amount of £13,000 rather than £29,000, which was favourable to the Claimant. The submission says that the Claimant was working with an agency and was getting £960 monthly average and has no savings. It is said that it was unreasonable for the Respondent to apply for costs in the amount of £13,000 and for the ET to order the Claimant to pay £4,800 as a contribution towards the Respondent's costs for not attending a one-day hearing.

17. It is also said that the Claimant had been ordered to pay the Respondent a punitive sum of £200 per month when he was working for an agency and was only getting £960 a month on

A average and had no savings. It was said that the ET had denied the Claimant the right of a fair hearing under Article 6(1) of the **European Convention on Human Rights and Fundamental Freedoms** ("the Convention") by ordering that sum to be paid to the Respondent as a contribution to its costs as: first, the Tribunal hearing in May 2015 did not address the costs issue or go behind the costs issue as the costs issue was to be addressed after the decision about the Claimant's failure to attend the hearing on 5 May, and that the ET had erred because the Claimant was not given an opportunity to give evidence about his means. This is said to be supported by the fact that Employment Judge Moore did not refer to the Claimant's oral evidence about his means. It is said that if the Claimant had been given the opportunity to give oral evidence about his ability to pay a certain amount per month, given that he was getting £960 a month and had no savings, he could not pay as much as £200 a month. It is also said that the Claimant was not given an opportunity to make submissions about his means. That was supported by the fact that Employment Judge Moore did not refer to the Claimant's submissions about his means. It is said that the Employment Judge had failed to examine oral submissions, arguments and evidence adduced by the Claimant and Article 6 applied. The Claimant then asked the EAT to allow the appeal to be heard before:

> **"… an independent and impartial tribunal who will give [the] Appellant opportunity to give factual evidence and make submissions about his means in relation to costs under Article 6.1 and 14 of [the] convention."**

18. I have very limited documents about the Claimant's means. All I have seen in the bundle that I have is a document on page 75 of the bundle which is apparently a statement of means signed by the Claimant on 25 June 2015. The bank statements to which the ET referred in their Decision are not in the bundle. I note that the written submissions do not explain in any way the significance of the bank statements or attack the inferences that the ET drew from the bank statements, and, as I say, the Claimant is not here to argue in support of his grounds of appeal.

A

19. In the light of the lack of any argument from the Claimant substantiating the points that are made in his written submission, and in the light of the fact that no attack is made on the ET's reasoning about the existence and significance of the bank statements, I am wholly unable to say that there is any arguable error of law in the approach that the ET took. Moreover, since the Claimant is not here to make good his Article 8 argument about being deprived of the opportunity to contribute to the ET's decision by evidence, oral submissions or otherwise, I am unable to uphold that ground of appeal. I would simply add that it is, to say the very least, curious that the ET was able to refer to the Claimant's bank statements if in fact he had not in some way given evidence or made submissions to the ET, because it is wholly unclear otherwise how the ET came to have the bank statements and to be in a position to analyse what those bank statements showed.

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20. I note that permission has not been given to take forward the argument that the ET was wrong in principle to make a costs Order. Any such argument is in any event plainly hopeless given the conduct of the Claimant to which the ET briefly referred in Decision 2 and to which it referred at greater length in Decision 1. In all those circumstances, then, in my judgment, the written submissions that were made this morning do not persuade me that I should overturn the Decision of the ET. For those reasons, therefore, I dismiss this appeal.

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A average and had no savings. It was said that the ET had denied the Claimant the right of a fair hearing under Article 6(1) of the **European Convention on Human Rights and Fundamental Freedoms** ("the Convention") by ordering that sum to be paid to the Respondent as a contribution to its costs as: first, the Tribunal hearing in May 2015 did not address the costs issue or go behind the costs issue as the costs issue was to be addressed after the decision about the Claimant's failure to attend the hearing on 5 May, and that the ET had erred because the Claimant was not given an opportunity to give evidence about his means. This is said to be supported by the fact that Employment Judge Moore did not refer to the Claimant's oral evidence about his means. It is said that if the Claimant had been given the opportunity to give oral evidence about his ability to pay a certain amount per month, given that he was getting £960 a month and had no savings, he could not pay as much as £200 a month. It is also said that the Claimant was not given an opportunity to make submissions about his means. That was supported by the fact that Employment Judge Moore did not refer to the Claimant's submissions about his means. It is said that the Employment Judge had failed to examine oral submissions, arguments and evidence adduced by the Claimant and Article 6 applied. The Claimant then asked the EAT to allow the appeal to be heard before:

> **"… an independent and impartial tribunal who will give [the] Appellant opportunity to give factual evidence and make submissions about his means in relation to costs under Article 6.1 and 14 of [the] convention."**

18. I have very limited documents about the Claimant's means. All I have seen in the bundle that I have is a document on page 75 of the bundle which is apparently a statement of means signed by the Claimant on 25 June 2015. The bank statements to which the ET referred in their Decision are not in the bundle. I note that the written submissions do not explain in any way the significance of the bank statements or attack the inferences that the ET drew from the bank statements, and, as I say, the Claimant is not here to argue in support of his grounds of appeal.

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19. In the light of the lack of any argument from the Claimant substantiating the points that are made in his written submission, and in the light of the fact that no attack is made on the ET's reasoning about the existence and significance of the bank statements, I am wholly unable to say that there is any arguable error of law in the approach that the ET took. Moreover, since the Claimant is not here to make good his Article 8 argument about being deprived of the opportunity to contribute to the ET's decision by evidence, oral submissions or otherwise, I am unable to uphold that ground of appeal. I would simply add that it is, to say the very least, curious that the ET was able to refer to the Claimant's bank statements if in fact he had not in some way given evidence or made submissions to the ET, because it is wholly unclear otherwise how the ET came to have the bank statements and to be in a position to analyse what those bank statements showed.

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20. I note that permission has not been given to take forward the argument that the ET was wrong in principle to make a costs Order. Any such argument is in any event plainly hopeless given the conduct of the Claimant to which the ET briefly referred in Decision 2 and to which it referred at greater length in Decision 1. In all those circumstances, then, in my judgment, the written submissions that were made this morning do not persuade me that I should overturn the Decision of the ET. For those reasons, therefore, I dismiss this appeal.

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Appeal No. UKEAT/0008/17/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 25 May 2017

Before

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

(SITTING ALONE)

MR K OPPONG — APPELLANT

TESCO STORES LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	Written submissions
For the Respondent	No appearance or representation by or on behalf of the Respondent

SUMMARY

PRACTICE AND PROCEDURE - Costs

PRACTICE AND PROCEDURE - Right to be heard

The Appellant appealed against the Decision of the Employment Tribunal to order him to pay a contribution to the Respondent's costs. The Employment Tribunal had struck out his claim because of his deliberate flouting of the procedure Rules and unreasonable conduct. The appeal was on a narrow question: whether the Employment Tribunal had deprived the Appellant of a fair hearing by not permitting him to give evidence or make submissions about his means. Neither the Appellant nor his representative appeared at the hearing of the appeal, having applied unsuccessfully for it to be adjourned. There was no material at the hearing of the appeal which undermined the Employment Tribunal's approach to the Appellant's means and the Employment Appeal Tribunal dismissed the appeal.

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

1. This is an appeal from a Decision of the Employment Tribunal ("the ET") sitting at Huntingdon on 23 July 2015. Neither party attended the appeal. I shall say more about that issue below. Due to an unfortunate delay the Decision, to which I shall refer as "Decision 2", was not sent to the parties until 1 February 2016. The ET consisted of Employment Judge Moore, Mrs Russell and Mr Chinnery. I shall refer to the parties as they were below.

2. The ET in Decision 2 dismissed the Claimant's claim and ordered him to pay a contribution of £4,800 towards the Respondent's costs of the claim. The ET described at paragraph 1 of Decision 2 the purpose of the hearing: it had been to give the Claimant the opportunity to address questions why the claim should not be struck out under two provisions of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("the Rules") and to deal with the question of costs. The ET said at paragraph 2 that the background of the matter was set out in detail in the Reasons for Orders made by the ET on 6 May 2015 and sent to the parties on 22 May 2015; I shall refer to that Decision as "Decision 1". The ET that made Decision 1 had the same constitution as the ET that made Decision 2.

3. In Decision 1 the ET recorded that the Claimant and his representative had failed to attend the second day of the hearing and that the ET had made the Orders that were set out at paragraph 1 of its Decision. The ET ordered that the case be listed for an open Preliminary Hearing before the full ET on 23 July 2015 with a time estimate of three hours. The ET would at that hearing consider (1) whether to strike out the claim under various provisions of the **Rules**; (2) whether or not, if the claim were struck out, the deposit paid by the Claimant should be forfeit; (3) whether or not the Claimant should pay the costs pursuant to the **Rules**; and (4)

whether a wasted costs Order should be made against the Claimant's representative, Dr R Ibakakombo. The ET said that the Claimant and Dr Ibakakombo were put on notice that if they failed to attend on 23 July those issues would be decided in their absence. That hearing would only be adjourned if exceptional circumstances dictated that it should be.

4. The ET went on to order that the Respondent should serve on the Claimant and on Dr Ibakakombo a Schedule of Costs and that on or before 26 June 2015 the Claimant should, if he wanted to raise arguments about his means, serve on the Respondent a statement of means and any documents on which he intended to rely to prove the sums included in his statement of means.

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removal because he is black, a foreigner, a shop steward and also due to his current medical condition".

7. The Respondent's case was that the Claimant had been dismissed for stealing clothing from the Respondent, that there had been a fair and reasonable investigation and that there was closed circuit television footage of the incidents that led to the Claimant's dismissal.

8. In Decision 2 the ET decided that the Claimant had shown "*a deliberate and persistent disregard*" for the ET's procedure and his conduct of the case had been unreasonable. The ET said (paragraph 5):

> **"5. … No party has a legitimate expectation of succeeding on every contested point irrespective of the merits and if disappointed they have to accept the decision for the duration of the hearing; if it proves to be wrong in law they may have the opportunity to pursue it elsewhere."**

9. The ET noted that a finding of unreasonable conduct alone was not ordinarily a basis for a claim to be struck out. The ET had asked the Claimant at the hearing if he was prepared to proceed responsibly with the hearing, but he told the ET that he was unrepentant of his actions and would not give that assurance. The ET therefore concluded that a fair trial was not possible, and they dismissed the claim on that basis.

10. The ET then went on at paragraph 7 to deal with costs. They decided that they were not in that instance concerned with technical breaches; they were concerned with "*an individual who with no good cause just does not turn up*". They referred to their previous finding that the Claimant had acted unreasonably and decided that circumstances justified the making of a costs Order. The costs incurred by the Respondent amounted to some £13,230 including VAT. The ET then said this (paragraph 7):

> **"7. … However we have taken account of the Claimant's means. He is in work and is working via an agency. He has produced a schedule of loss and bank statements. The latter show him to have under-declared his income by something in the region of £500 per month. His outgoings as stated coincide approximately with his claimed income (£957 outgoings £962 income). Since the excess we have found is not accounted for it amounts to disposable income. We accept that with agency work there may be some fluctuation. Whilst it is not open to us to make an order for time to pay we are not constrained by the amount that can be paid at this instant. We have concluded that a sum equating to £200 per month is within the Claimant's ability to pay and this would yield, over two years, the sum of £4,800 and that is the amount we order the Claimant to pay to the Respondent as a contribution towards their costs."**

11. The Claimant appealed against that Decision on various grounds, but on the paper sift HHJ David Richardson decided in brief that those grounds raised no arguable point of law. There was then a hearing pursuant to Rule 3(10) of the **Employment Appeal Tribunal Rules 1993** in front of HHJ Eady QC. She allowed the appeal to proceed on a narrow basis: in essence, that it appeared to her to be arguable that the Claimant had been deprived an opportunity to give evidence and make submissions to the ET about his means. It followed then that the appeal concerned a very narrow issue about which the Claimant was in as good a position to make submissions as was Dr Ibakakombo because the issue simply concerned what had happened at the second ET hearing and the points that the Claimant wished to make about his means in order to attack the analysis in Decision 2 that led to the award of £4,800 costs against him.

12. There have been several applications for an adjournment of this hearing. On 23 May I dealt in chambers with such an application. I refused it. The reasons I gave are as follows:

> **"1. [Dr Ibakakombo], who represents the Appellant ('A') has applied for an adjournment of the appeal in this case which is listed for 25 May.**
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> **2. On 10 May 12 [sic] the Employment Appeal Tribunal ('the EAT') emailed [Dr Ibakakombo] to say that the bundles for the appeal were late and must be lodged by noon on 12 May 2017. [Dr Ibakakombo] replied, saying that [Dr Ibakakombo's] 'mum who is in critical state and [Dr Ibakakombo] is currently planning to travel abroad until end of May therefore; the Appellant's case is that he will not have a fair hearing if acting in person consequently we apply for extension of time for lodging bundles in this case' [sic]. He also applied for the hearing to be postponed.**
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> **3. The Respondent's solicitors emailed the EAT on 12 May. They said that they were not opposing the appeal, but considered, in the light of the length of time the case had taken, that an adjournment should only be granted if appropriate evidence were provided.**

4. On 12 May 2017 the EAT emailed [Dr Ibakakombo] asking for evidence of his period of absence from the United Kingdom by 16 May 2017. He replied on 16 May, saying that 'I am unable to provide the EAT with evidence of my period of absence … by 16 May because I have applied for a Congolese visa and I am waiting for my Passport to purchase my ticket therefore, the EAT will be provided with above evidence by 19/05/2017'. [Dr Ibakakombo] emailed the EAT on 19 May. He was unable to provide any evidence. He repeated the reasons given in the email of 16 May. The EAT replied on 19 May: the appeal would stay in the list as he had not provided any evidence. The matter would not be considered further until he did so.

5. On 22 May 2017, an email was sent to the EAT from an email address used by [Dr Ibakakombo]. It said that his mother was 'in critical condition' and that he would be in Paris from 22 May 2017 to 30 May 2017 to meet his brother and sister 'in order to find a family resolution before any trip to Congo'. A coach ticket apparently costing £27 was attached.

6. In view of the closeness of the hearing, the Registrar has asked me to consider this application for an adjournment of the hearing.

7. I note four points:

> **i. The appeal is on a very limited issue (essentially) whether the Appellant was deprived of the opportunity to give evidence and make submissions about his means in relation to a costs order made by the Employment Tribunal ('the ET').**
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> **ii. The decision appealed against was made as the result of a hearing about two years ago.**
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> **iii. I have read two decisions of the ET (sent to the parties on 22 May 2015 and on 1 February 2016). Both refer to [Dr Ibakakombo's] apparent lack of familiarity with the substantive law and rules of practice in the ET, and one to his 'misuse of time' (22 May decision, paragraph 3; 1 February decision, paragraphs 19, 21 and 22).**
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> **iv. [Dr Ibakakombo] has provided limited evidence about the reasons for his sudden absence from the United Kingdom: notably, there is no medical evidence about his mother's condition or when it arose, and nothing to substantiate his initial apparent claim that he is going to go [to] the Congo.**

8. My decision is that to grant an adjournment of the hearing would not further the overriding objective. I have little confidence, given the views of the ETs to which I have referred, that the Appellant will suffer any injustice if [Dr Ibakakombo] is not, in the event, present to represent him at the appeal. The issue is a narrow factual issue, and the Appellant will be able to describe what happened at the ET hearing in order to support his grounds of appeal.

9. I refuse the application for an adjournment."

13. What happened next was that on 24 May Dr Ibakakombo emailed the EAT and made various points. He said he was not asked for medical evidence about his mother's condition or when it arose or evidence to substantiate his claim that he was going to Congo. He said it was not reasonable to have little confidence in him because of the view of the ETs, which "*is not supported by any material evidence*". He also said that his mother was suffering from cancer and he travelled to France to collect her medications for cancer before travelling to Congo. A document was attached from the Le Centre Hospitalier Universitaire de Brazzaville from its Service de Carcinologie et Radiothérapie. This document is handwritten and stamped

apparently by Dr Eliane NDounga. It contains a handwritten list, apparently of medications. It is written in French, and there is no document explaining its significance. I refused that second application for the same reasons as I refused the first application.

14. The Claimant on 24 May 2017 sent an email to the EAT headed "*Hearing postponement*". He asked for the hearing to be postponed because his representative:

> **"… is currently out [of] the UK for family matters and I will not have a fair hearing if I will act in person because I do not know the law and at the previous meeting Employment Appeal Judge was saying we deal with matter of law not facts."**

15. Dr Ibakakombo sent a further email to the EAT timed at 9.39am today in which he said this:

> **"Further to the hearing due to start today at 10:30 and in absence of the Appellant and his Representative, we write to as you [sic] to place the Appellant's attached Written Submission before the EAT Judge as a matter of urgency and; to invite the Court Judge to consider and examine [the] Appellant's attached Written Submission before making his (or her) decision."**

16. The attached written submission referred to the costs Order in the sum of £4,800. It is said that it is not supported by evidence as the Respondent has applied for costs an amount of £29,755. I do not understand this point, but it seems to me that it does not matter because in any event the ET referred to the Respondent's costs being an amount of £13,000 rather than £29,000, which was favourable to the Claimant. The submission says that the Claimant was working with an agency and was getting £960 monthly average and has no savings. It is said that it was unreasonable for the Respondent to apply for costs in the amount of £13,000 and for the ET to order the Claimant to pay £4,800 as a contribution towards the Respondent's costs for not attending a one-day hearing.

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19. In the light of the lack of any argument from the Claimant substantiating the points that are made in his written submission, and in the light of the fact that no attack is made on the ET's reasoning about the existence and significance of the bank statements, I am wholly unable to say that there is any arguable error of law in the approach that the ET took. Moreover, since the Claimant is not here to make good his Article 8 argument about being deprived of the opportunity to contribute to the ET's decision by evidence, oral submissions or otherwise, I am unable to uphold that ground of appeal. I would simply add that it is, to say the very least, curious that the ET was able to refer to the Claimant's bank statements if in fact he had not in some way given evidence or made submissions to the ET, because it is wholly unclear otherwise how the ET came to have the bank statements and to be in a position to analyse what those bank statements showed.

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Appeal No. UKEAT/0008/17/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 25 May 2017

Before

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

(SITTING ALONE)

MR K OPPONG — APPELLANT

TESCO STORES LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	Written submissions
For the Respondent	No appearance or representation by or on behalf of the Respondent

SUMMARY

PRACTICE AND PROCEDURE - Costs

PRACTICE AND PROCEDURE - Right to be heard

The Appellant appealed against the Decision of the Employment Tribunal to order him to pay a contribution to the Respondent's costs. The Employment Tribunal had struck out his claim because of his deliberate flouting of the procedure Rules and unreasonable conduct. The appeal was on a narrow question: whether the Employment Tribunal had deprived the Appellant of a fair hearing by not permitting him to give evidence or make submissions about his means. Neither the Appellant nor his representative appeared at the hearing of the appeal, having applied unsuccessfully for it to be adjourned. There was no material at the hearing of the appeal which undermined the Employment Tribunal's approach to the Appellant's means and the Employment Appeal Tribunal dismissed the appeal.

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

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> **ii. The decision appealed against was made as the result of a hearing about two years ago.**
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> **iii. I have read two decisions of the ET (sent to the parties on 22 May 2015 and on 1 February 2016). Both refer to [Dr Ibakakombo's] apparent lack of familiarity with the substantive law and rules of practice in the ET, and one to his 'misuse of time' (22 May decision, paragraph 3; 1 February decision, paragraphs 19, 21 and 22).**
>
> **iv. [Dr Ibakakombo] has provided limited evidence about the reasons for his sudden absence from the United Kingdom: notably, there is no medical evidence about his mother's condition or when it arose, and nothing to substantiate his initial apparent claim that he is going to go [to] the Congo.**

8. My decision is that to grant an adjournment of the hearing would not further the overriding objective. I have little confidence, given the views of the ETs to which I have referred, that the Appellant will suffer any injustice if [Dr Ibakakombo] is not, in the event, present to represent him at the appeal. The issue is a narrow factual issue, and the Appellant will be able to describe what happened at the ET hearing in order to support his grounds of appeal.

9. I refuse the application for an adjournment."

13. What happened next was that on 24 May Dr Ibakakombo emailed the EAT and made various points. He said he was not asked for medical evidence about his mother's condition or when it arose or evidence to substantiate his claim that he was going to Congo. He said it was not reasonable to have little confidence in him because of the view of the ETs, which "*is not supported by any material evidence*". He also said that his mother was suffering from cancer and he travelled to France to collect her medications for cancer before travelling to Congo. A document was attached from the Le Centre Hospitalier Universitaire de Brazzaville from its Service de Carcinologie et Radiothérapie. This document is handwritten and stamped

apparently by Dr Eliane NDounga. It contains a handwritten list, apparently of medications. It is written in French, and there is no document explaining its significance. I refused that second application for the same reasons as I refused the first application.

14. The Claimant on 24 May 2017 sent an email to the EAT headed "*Hearing postponement*". He asked for the hearing to be postponed because his representative:

> **"… is currently out [of] the UK for family matters and I will not have a fair hearing if I will act in person because I do not know the law and at the previous meeting Employment Appeal Judge was saying we deal with matter of law not facts."**

15. Dr Ibakakombo sent a further email to the EAT timed at 9.39am today in which he said this:

> **"Further to the hearing due to start today at 10:30 and in absence of the Appellant and his Representative, we write to as you [sic] to place the Appellant's attached Written Submission before the EAT Judge as a matter of urgency and; to invite the Court Judge to consider and examine [the] Appellant's attached Written Submission before making his (or her) decision."**

16. The attached written submission referred to the costs Order in the sum of £4,800. It is said that it is not supported by evidence as the Respondent has applied for costs an amount of £29,755. I do not understand this point, but it seems to me that it does not matter because in any event the ET referred to the Respondent's costs being an amount of £13,000 rather than £29,000, which was favourable to the Claimant. The submission says that the Claimant was working with an agency and was getting £960 monthly average and has no savings. It is said that it was unreasonable for the Respondent to apply for costs in the amount of £13,000 and for the ET to order the Claimant to pay £4,800 as a contribution towards the Respondent's costs for not attending a one-day hearing.

17. It is also said that the Claimant had been ordered to pay the Respondent a punitive sum of £200 per month when he was working for an agency and was only getting £960 a month on

A average and had no savings. It was said that the ET had denied the Claimant the right of a fair hearing under Article 6(1) of the **European Convention on Human Rights and Fundamental Freedoms** ("the Convention") by ordering that sum to be paid to the Respondent as a contribution to its costs as: first, the Tribunal hearing in May 2015 did not address the costs issue or go behind the costs issue as the costs issue was to be addressed after the decision about the Claimant's failure to attend the hearing on 5 May, and that the ET had erred because the Claimant was not given an opportunity to give evidence about his means. This is said to be supported by the fact that Employment Judge Moore did not refer to the Claimant's oral evidence about his means. It is said that if the Claimant had been given the opportunity to give oral evidence about his ability to pay a certain amount per month, given that he was getting £960 a month and had no savings, he could not pay as much as £200 a month. It is also said that the Claimant was not given an opportunity to make submissions about his means. That was supported by the fact that Employment Judge Moore did not refer to the Claimant's submissions about his means. It is said that the Employment Judge had failed to examine oral submissions, arguments and evidence adduced by the Claimant and Article 6 applied. The Claimant then asked the EAT to allow the appeal to be heard before:

> **"… an independent and impartial tribunal who will give [the] Appellant opportunity to give factual evidence and make submissions about his means in relation to costs under Article 6.1 and 14 of [the] convention."**

18. I have very limited documents about the Claimant's means. All I have seen in the bundle that I have is a document on page 75 of the bundle which is apparently a statement of means signed by the Claimant on 25 June 2015. The bank statements to which the ET referred in their Decision are not in the bundle. I note that the written submissions do not explain in any way the significance of the bank statements or attack the inferences that the ET drew from the bank statements, and, as I say, the Claimant is not here to argue in support of his grounds of appeal.

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19. In the light of the lack of any argument from the Claimant substantiating the points that are made in his written submission, and in the light of the fact that no attack is made on the ET's reasoning about the existence and significance of the bank statements, I am wholly unable to say that there is any arguable error of law in the approach that the ET took. Moreover, since the Claimant is not here to make good his Article 8 argument about being deprived of the opportunity to contribute to the ET's decision by evidence, oral submissions or otherwise, I am unable to uphold that ground of appeal. I would simply add that it is, to say the very least, curious that the ET was able to refer to the Claimant's bank statements if in fact he had not in some way given evidence or made submissions to the ET, because it is wholly unclear otherwise how the ET came to have the bank statements and to be in a position to analyse what those bank statements showed.

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20. I note that permission has not been given to take forward the argument that the ET was wrong in principle to make a costs Order. Any such argument is in any event plainly hopeless given the conduct of the Claimant to which the ET briefly referred in Decision 2 and to which it referred at greater length in Decision 1. In all those circumstances, then, in my judgment, the written submissions that were made this morning do not persuade me that I should overturn the Decision of the ET. For those reasons, therefore, I dismiss this appeal.

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