Appeal No. UKEAT/0238/16/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 29 June 2017

Before

THE HONOURABLE MR JUSTICE KERR

(SITTING ALONE)

MR N JONES — APPELLANT

THE SECRETARY OF STATE
FOR BUSINESS INNOVATION & SKILLS — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR PETER WARD (of Counsel) Direct Public Access
For the Respondent	MS EMILY GORDON-WALKER (of Counsel) Instructed by: Government Legal Department Employment Group One Kemble Street London WC2B 4TS

SUMMARY

PRACTICE AND PROCEDURE - Bias, misconduct and procedural irregularity

Rule 60, read with Rules 1(3), 32 and 92 of the procedural rules applying in Employment Tribunals (in Schedule 1 to the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**) did not, at least in this case, justify the Tribunal not sending a witness order, obtained by a party, to the other party.

The fairness of the subsequent trial was compromised by the omission of the Employment Judge to explain to the other party, who was not professionally represented and was taken by surprise by the attendance of the witness subject to the witness order, the right to apply for an adjournment to secure the attendance of a rebuttal witness who had provided a signed statement and whom the unrepresented party had decided not to call.

It was impossible to conclude that oral evidence from the absent witness would necessarily have made no difference to the outcome of the trial. The Decision would therefore have to be set aside. The matter would be remitted for a rehearing before a freshly constituted Employment Tribunal.

THE HONOURABLE MR JUSTICE KERR

1. This appeal is about the duty of procedural fairness and the obligation of Employment Tribunals ("ETs") to ensure that the parties are on an equal footing (often called "equality of arms") and the special effort needed to ensure that unrepresented parties are treated equally and as far as possible understand and appreciate that they have been treated equally on an equal footing with the representative's opponent.

2. Following a Preliminary Hearing attended by the Appellant only (the Claimant below), certain amended grounds were permitted to proceed to a Full Hearing. They boil down to whether the fairness of the trial was compromised by allowing oral evidence from a particular witness for the Respondent, whom the Claimant did not expect to attend, and whether the Claimant, who was not legally represented below (where the Respondent was represented by an experienced lay representative), was unfairly denied the opportunity to call evidence that could have contradicted the evidence of that witness.

3. The appeal is against the Decision of an Employment Judge sitting in Birmingham. The Decision was that the Claimant was not an employee of Bright International Training Ltd ("BIT"), a company now in liquidation, and that therefore his claims for unpaid wages and notice pay, unpaid holiday pay and a redundancy payment as against the Respondent (the Secretary of State) failed and were dismissed.

4. The Claimant claimed that he had been employed by BIT and its predecessors since June 2009. BIT went into administration in 2014 and was in liquidation by the time of the hearing below. The Claimant claimed that he had been made redundant by BIT on 27 June

2014. The Respondent did not accept that the Claimant had been employed by BIT. In the grounds of resistance, the Respondent asserted that a decision was needed as to whether the employment relationship was genuine or whether it was a "sham". Dishonesty as such was not at that stage alleged. There have been cases aplenty in which contractual arrangements have been found not to be genuine but without dishonesty on anyone's part.

5. In the run-up to the hearing, certain procedural matters are relevant. I can take them from an agreed statement of facts which the parties have helpfully produced. On 30 September 2015, there was a Preliminary Hearing attended by both parties. The Respondent's representative told the Tribunal that he intended to call a Ms Samantha Thwaites to give evidence. Ms Thwaites was the former Marketing Manager of BIT and had been in touch with the Respondent in connection with proposed possible insolvency proceedings.

6. On 30 October 2015, the Respondent provided disclosure by list. The disclosure included a draft witness statement of Ms Thwaites prepared for potential insolvency proceedings, though not signed by her. It included, at paragraphs 18 to 20, evidence tending to contradict the proposition that the Claimant had worked for BIT as its employee.

7. On 10 November 2015, the Respondent sent the Claimant documents, including a copy of that draft statement. There was then correspondence about exchange of witness statements and it is clear that the Claimant's wife, Mrs Charles-Jones (who was acting as his representative, albeit not legally qualified), intended and expected Ms Thwaites' written statement to be exchanged as part of the exchange of witness statements that had been directed. She also expected the document to be included in the bundle.

8. On 26 November 2015, the Claimant was ready to exchange witness statements, of which there were five. They were from the Claimant himself; his wife, Mrs Charles-Jones, who had been the Chief Executive Officer ("CEO") of BIT; Ms Holly Coulson, who had been the Personal Assistant to the CEO, Mrs Charles-Jones; Mrs Charles, the mother of Mrs Charles-Jones, who had been the IT Director of BIT; and Ms Wright, described as a Course Advisor and Contract Officer of BIT. The Respondent, however, was not ready to exchange as its only witness was Ms Thwaites and she had not signed her statement.

9. In late November 2015, there was correspondence between the parties making it clear that Ms Thwaites had not responded to requests to give evidence at the substantive hearing and that the Respondent might have to apply for a witness order to secure her attendance. The Claimant was aware of this position and, indeed, assisted by providing information to assist the Respondent in obtaining a service address for Ms Thwaites.

10. Mrs Charles-Jones suspected that the Respondent wished to obtain an adjournment of the forthcoming hearing which was then fixed for 21 and 22 December 2015. Pre-empting any such application, she wrote objecting to an adjournment. On 1 December 2015, the Respondent wrote to the Tribunal to apply for a witness order securing the attendance of Ms Thwaites, in accordance with Rule 32 of the Rules in Schedule 1 to the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("the ET Rules"). That application by letter was not copied to the Claimant.

11. On 2 December 2015, Employment Judge Warren wrote to the parties informing them that the case remained listed and that exchange of witness statements should take place forthwith as the Respondent had been aware of the evidence of Ms Thwaites for some time and

had not explained the delay in seeking her address. That letter went to both parties. On 8 December 2015, the Tribunal sent a witness order in respect of Ms Thwaites to the Respondent but not to the Claimant. The covering letter appears to be a pro forma making reference to Rule 32 of the **ET Rules**. It merely stated that the application for a witness order had been granted by Employment Judge Hughes, a copy of the order had been sent to the witness and a copy was enclosed to the Respondent. That letter did not go to the Claimant, nor did a copy of the enclosed witness order.

12. On 21 and 22 December 2015, the final hearing was held at Birmingham Employment Tribunal before Employment Judge Broughton, sitting alone. Ms Thwaites, in accordance with the witness order which by then had been served upon her, attended from the start of the day. Both parties were aware of her presence from the start of the day. It is said that the Respondent was surprised by her presence, but I do not see why that should be since she was required by law and on pain of punishment to attend. The Claimant and his wife, however, had not expected to see Ms Thwaites at the Tribunal as they knew nothing of the witness order that had been granted.

13. Three of the Claimant's witnesses then gave oral evidence, having previously signed written witness statements. The first witness was the Claimant himself, Mr Jones. He gave evidence to support the proposition that he had been employed by BIT as an employee and that the employment relationship was genuine. He was challenged on that in cross-examination by Mr Parag Soni, the Respondent's representative. I have the benefit of Mr Soni's notes of the evidence and, although they have not been approved by the Employment Judge, it is not suggested that they are other than a fair and accurate paraphrase of what was said in evidence.

14. The Claimant's evidence included an account of the duties that he had performed, which he said were done in the capacity of employee, including attending careers fairs at various locations. He said that he disagreed with the written evidence of Ms Thwaites who, he said, was "lying". During the evidence the Judge several times rebuked Mrs Charles-Jones for prompting him and interrupting. It is clear, to put it neutrally, that there was friction between Mrs Charles-Jones and the Judge.

15. The second witness was Mrs Charles-Jones, the Claimant's wife, also acting as his representative. She had been, according to her evidence, the CEO of BIT as her written witness statement confirmed. She gave evidence in her statement and orally to the effect that her husband, the Claimant, had been an employee of BIT. She described in her written statement the duties that he had performed, including working in the office administration correcting data, attending career fairs and marketing events, dealing with documents and presentations, and so forth. She explained the payroll arrangements which were consistent with employment. She too was challenged in cross-examination by Mr Soni, who, I infer, put to her questions to the effect that the employment was not genuine.

16. The next witness for the Claimant was Ms Jules Wright. She had been a Contract Officer for BIT from 2012 to 2014. She, too, gave evidence that she had witnessed the Claimant carrying out what she regarded as employment duties and her evidence was consistent with that of the other two witnesses. Questioned by Mr Soni, she accepted that she had not herself attended any careers fairs with Ms Thwaites, but maintained that the Claimant, Mr Jones, had attended three particular careers fairs in 2013, on dates she did not precisely remember.

17. After that, there was at some stage a 45 minute break for the purpose of locating a copy of the document that was said to be the Claimant's employment contract. Mr Soni's note also records that Ms Coulson was identified and named as a witness for the Claimant but one not attending. Her written and signed witness statement was available to the Judge. In it Ms Coulson stated that she had been Personal Assistant to the CEO from July 2011 to June 2014 and had assisted her with normal PA duties.

18. She asserted in her written statement that the Claimant was "a paid employee at the company". He was "employed on a part-time basis working 20 hours per week" and on the basis that any additional hours over and above that were done on an "invoiced basis, as per company policy". She went on to describe, consistently with the previous witnesses, duties she had seen Mr Jones, the Claimant, carrying out, including attending careers fairs and marketing events.

19. At paragraph 10 of her statement, she gave evidence that she had been handed payslips and other tax-related documents by the company finance team to be passed to the Claimant by the CEO, Mrs Charles-Jones. At paragraph 11, she gave evidence that she had attended various corporate entertainment events to promote the company, of which she gave details, and she stated that the Claimant had also attended these events in "a professional capacity as part of his employment".

20. For the purpose of this appeal, affidavits were obtained from Mrs Charles-Jones and Mr Soni concerning their experiences at the hearing before the Judge. Mrs Charles-Jones deposed that Ms Thwaites gave evidence during the afternoon of the first day and that she, Mrs Charles-

Jones, had become "too scared and nervous to say anything" having been repeatedly rebuked by the Judge for interrupting.

21. She said that Ms Thwaites gave evidence that the Claimant's witnesses had been untruthful, that the Claimant had not attended careers fairs and that it was she, Ms Thwaites, who had managed the sales force. Mrs Charles-Jones stated that when she cross-examined she "found the courage to firstly complain to the judge that we had had no witness statement", to which the Judge had replied, "she's swearing on oath". Mrs Charles-Jones says that with hindsight she should have asked for more time, but felt too intimidated to do so and asked only a small number of questions in cross-examination.

22. She stated in her affidavit that she could be "categoric" that, had she been aware that Ms Thwaites would be giving oral evidence, she would have secured the presence of Ms Coulson and that she had been under the impression from earlier case management discussions that Ms Thwaites' evidence would not be received unless it had been the subject of an exchanged witness statement, which had not occurred. She came away from the hearing, she said, feeling that her husband had not had a fair trial and that the Respondent had "got away with disobeying tribunal orders to boot".

23. She accepted that she was aware she could have applied for a witness order in respect of Ms Coulson, but said she had refrained from doing so so as not to "abuse her generosity" and because no witness statements had been received from the Respondent. She therefore had assumed that no witnesses would be giving evidence for the Respondent and, accordingly, concluded that Ms Coulson's attendance was not necessary. She said, finally, that it had not occurred to her or her husband that a postponement could be applied for.

24. She did, however, point out to the Judge the existence of Ms Coulson's written witness statement. According to her affidavit, he said he had not read it. He then asked her why Ms Coulson was not present, to which she replied that she, Ms Coulson, had had to go to Germany for work purposes. The Judge then asked her to obtain documentary evidence of the reason for her absence. During the overnight adjournment between the first and second days, according to Mrs Charles-Jones' affidavit, she tried to telephone Ms Coulson without success and was unable to obtain any documentary evidence of the reason for her absence. According to Mrs Charles-Jones' affidavit, the Judge stated verbally at the end of the hearing that he would disregard Ms Coulson's written evidence as she had not attended.

25. For his part, Mr Soni also produced an affidavit. He pointed out that the Claimant had been aware of the presence of Ms Thwaites from the start of the first day and he considered that they had time during the day to prepare to cross-examine her, in particular because of the 45 minute break that was allowed for an unconnected purpose by the Judge. He noted that neither the Claimant nor his wife asked for additional time to prepare cross-examination of Ms Thwaites. His account of what was said about the absence of Ms Coulson from the hearing did not add anything, though it was less full than Mrs Charles-Jones' account.

26. The final witness, it is now agreed after the parties were reminded by the Judge, was Mrs Alison Charles, the Claimant's mother-in-law and the mother of Mrs Charles-Jones. She gave evidence, departing from the usual order, after the evidence of Ms Thwaites. She had been the IT Manager of BIT and had provided a written and signed witness statement. Her evidence was again consistent with that given by the previous witnesses for the Claimant. She too was questioned by Mr Soni and appears from his note to have maintained the account given in her written witness statement.

27. The Judge provided a reserved Written Decision dated 3 February 2016 and sent to the parties on 8 February 2016. He dismissed the claims. He found that the employment relationship was not genuine. He pointed to various anomalies and inconsistencies in the documents said to evidence the employment relationship which, he said, included false and misleading statements.

28. He referred to the Claimant's witnesses and did not accept their account insofar as it pointed to the conclusion that the employment relationship was genuine. Referring to the absence of Ms Coulson he said at paragraph 20:

> **"20. … One further Witness Statement was produced although she did not attend. No documentary evidence was available, before me, regarding the alleged reasons for her absence."**

29. Referring to Ms Wright's evidence, he said that as regards the work she had seen the Claimant doing, she could not say whether it had been done in the capacity of employee or of a self-employed person rendering invoices or, indeed, merely by way of helping his wife.

30. At paragraph 23, he made a similar comment about the evidence of Mrs Charles, the Claimant's mother-in-law. At paragraphs 25 and following, he commented that he preferred the evidence of Ms Thwaites and another witness (not called orally) who "[i]n light of their positions … were likely to know what, if any, marketing or administrative tasks the claimant was undertaking".

31. He went on to accept Ms Thwaites as a witness whose evidence he found to be "measured, independent and reliable". He said at paragraph 36 that he "preferred her evidence to that of the claimant or his wife, both of whom had been forced to admit their own dishonesty".

32. In conclusion, he reiterated that the Claimant and his wife "lacked all credibility in their evidence" and that Mrs Charles-Jones had "despite several warnings, repeatedly sought to prompt, or even answer on behalf of, her husband and others" (paragraph 53). At paragraph 57, he referred to the absence of "supporting evidence" beyond that of the Claimant and his wife, who lacked all credibility, and "the mere fact that he was regularly paid as an employee is not enough to meet the legal test of employment status".

33. At paragraph 67 he returned to Ms Thwaites' evidence, reiterating that he found her to be:

> **"67. … a credible witness who had no real reason to lie. She had been summoned against her will to be before me. Her evidence was that the claimant didn't work when he said he did. She was at most of the career fairs, including those the claimant argued that he had attended as an employee, as opposed to those separately invoiced."**

At paragraph 68, he said he accepted Ms Thwaites' evidence that:

> **"68. … other than in the summer of 2012 when he separately invoiced for office work, the claimant did not work in the office. She, rightly, acknowledged that it was possible that the claimant did do some work at home …"**

That essentially was the reasoning on the basis of which the Judge dismissed the claim.

34. The appeal to this Appeal Tribunal was at first brought on wider grounds than now and included an allegation of actual or apparent bias, which is no longer live. The question in the appeal that remains is whether the trial was fair. On 14 September 2016, the Employment Judge, then responding to an allegation of actual or apparent bias as well as the grounds now relied upon, provided written comments in the usual way. He said at paragraph 3:

> **"3. It is my standard practice to explain procedural matters to all parties who are not professionally represented, to invite questions and to allow breaks when requested."**

A And at paragraph 4:

> **"4. I did not at any stage prevent or limit such questions or requests. It appears to be acknowledged that no such requests were made."**

B 35. He then referred to the interruptions during evidence from Mrs Charles-Jones, which I have already mentioned. He continued:

> **"7. The principal ground of appeal appears to be based on the suggestion that the claimant was unaware that Samantha Thwaites had been summoned to be a witness. It appears clear, however, that he was aware that the respondent was applying for a summons."**

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36. He went on to refer to aspects of the hearing that I have already covered. He described as an "inconvenient truth" the proposition that Ms Thwaites was "a reluctant witness as opposed to someone with a grudge or seeking retaliation". He said that dishonesty had been D "the principal thrust of the respondent's whole case from the outset"; that it was in part admitted during oral evidence and that "the appeal is strikingly silent on such key matters", so that even without Ms Thwaites' evidence they would have "caused the claimant considerable E difficulty in proving his case". Such were the Employment Judge's comments.

37. The main submissions of Mr Ward for the Claimant were these. First, the trial had been F unfair; Ms Thwaites' presence had taken the Claimant by surprise. He should have been made aware of the witness order and received a copy. That was a procedural irregularity rendering the trial unfair because Mrs Charles-Jones was denied the opportunity to call Ms Coulson to G corroborate the account of the Claimant's witnesses, to the effect that the Claimant was employed and not self-employed. Ms Coulson was, like Ms Wright, an independent witness and not a family member.

H 38. Second, Mr Ward submitted that the situation here was analogous to that in **Aberdeen Steak Houses Group Plc v Ibrahim** [1988] IRLR 420 in which this Appeal Tribunal set aside

A a decision in a case where a Tribunal had allowed the process of giving evidence to be conducted in an unfair way and had exercised its discretion in relation to the calling of evidence in a manner that was not fair or judicial.

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39. Mr Ward went on to submit that the Tribunal had been under an obligation under Rule 60 of the **ET Rules** to send a copy of the witness summons to the Claimant as well as the Respondent. He accepts that Rule 32 exempts a party applying for a witness summons from

C copying that application to the other side: see Rule 92, which creates an exception in such a case from the otherwise universal requirement to copy in the other party when communicating with the Tribunal.

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40. He accepts also that the concluding sentence of Rule 92 creates a power in the Tribunal to exempt in a specific case a party from copying to the opposite party a communication to the

E Tribunal; but that exemption was not invoked in this case. Mr Ward suggested that the rationale for the exemption in Rule 32 is to protect a potentially vulnerable witness, such as one still working for an employer who might fear reprisals should he or she have the temerity to give evidence against the employer.

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41. He argued that if there is any power to withhold a witness summons at all from the opposite party, it was not a power that was even considered, or the exercise of which was

G justified, in this case. Ms Thwaites did not work for BIT any longer and there was no reason to protect her identity from the Claimant.

H 42. Rule 60 provides that a decision made without a hearing "shall be communicated in writing to the parties, identifying the Employment Judge who has made the decision". Mr

A Ward says that was straightforwardly not complied with in this case. He reminded me of what was said by Neuberger J (as he then was) in **Maltez v Lewis** (unreported, 27 Apr 1999, Chancery Division), an early case under the **CPR** in which Neuberger J ruled that he did not have power to deprive a party of a legal representative of choice. At the fourth page of the transcript he said:

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> **"So far as the hearing is concerned, the court is under a heavy duty to ensure that there is a fair trial. The court is well used to dealing with cases where for one reason or another it appears that one side is more competently or expertly represented than the other."**

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Elsewhere in the judgment, he gave examples of measures needed to level the playing field in such cases; for example, placing the duty to compile a bundle on the represented party.

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43. Mr Ward submitted that the Employment Judge's comment at paragraph 12 of his written comments made it plain that he had given little or no weight to the written evidence of Ms Coulson. At paragraph 12 he said:

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> **"12. I made it clear that the evidence of absent witnesses on either side could be given little weight. The evidence of all witnesses was considered, given appropriate weight and addressed in the judgment."**

Mr Ward submitted that, quite simply, Ms Coulson's evidence contradicted that of Ms Thwaites

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and she would have been there if the procedural irregularity had not occurred and that it was incumbent on the Judge to canvass the options with the unrepresented Claimant, including that of asking for an adjournment.

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44. For the Respondent, the main points made by Ms Gordon-Walker were these. She said that it was for the ET to decide for itself, subject only to a challenge on **Associated Provincial Picture Houses Ltd v Wednesbury Corporation** [1948] 1 KB 223 grounds, whether to inform the Claimant about the existence of the witness order at the time it was made and subsequently

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A at the hearing before Employment Judge Broughton. It was also a matter for his discretion, Ms Gordon-Walker submitted, whether to inform the Claimant about her options, such as that of seeking an adjournment to secure the attendance of Ms Coulson.

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45. She said that these were case management decisions and whilst they needed to be informed by the overriding objective, the decisions are only challengeable on **Wednesbury** grounds. She accepted that the overriding objective includes in this jurisdiction - as under the

C **Civil Procedure Rules** - a duty to ensure that the parties "are on an equal footing". That was of course the duty referred to by Neuberger J (as he then was) in **Maltez**. But Ms Gordon-Walker submitted that it was not for the Appeal Tribunal lightly to interfere with what

D amounted to case management decisions that were within the ambit of the Judge's discretion.

46. She submitted that the analysis and guidance given in **Drysdale v Department of Transport (The Maritime and Coastguard Agency)** [2014] EWCA Civ 1083 at paragraph 49

E in the judgment of Barling J, with which Christopher Clarke LJ and Arden LJ agreed, supported her position. Mr Barling there set out six propositions, which I will not set out here save for the last three:

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> **"(4) The appropriate level of assistance or intervention is constrained by the overriding requirement that the tribunal must at all times be, and be seen to be, impartial as between the parties, and that injustice to either side must be avoided.**
>
> **(5) The determination of the appropriate level of assistance or intervention is properly a matter for the judgment of the tribunal hearing the case, and the creation of rigid obligations or rules of law in this regard is to be avoided, as much will depend on the tribunal's assessment and "feel" for what is fair in all the circumstances of the specific case.**
>
> G **(6) There is, therefore, a wide margin of appreciation available to a tribunal in assessing such matters, and an appeal court will not normally interfere with the tribunal's exercise of its judgment in the absence of an act or omission on the part of the tribunal which no reasonable tribunal, properly directing itself on the basis of the overriding objective, would have done/ omitted to do, and which amounts to unfair treatment of a litigant."**

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47. Ms Gordon-Walker drew an analogy with cases involving relief from sanctions and reminded me that the approach in this Appeal Tribunal is not as strict as in the High Court: see

Harris v Academies Enterprise Trust & Ors [2015] IRLR 208 per Langstaff J (President) at paragraph 39. She submitted that it was not, applying those principles, incumbent on the Judge at the hearing to say to the Claimant's representative and wife that she could if she wished apply for an adjournment and that it was not unfair for him not to have done so.

48. As regards Rule 60 of the **ET Rules**, she submitted that it did not bear the meaning contended for by Mr Ward. She said that it had to be read sensibly in the light of Rule 32 which, as I have said, exempts a party from copying the other side when applying for a witness order. Ms Gordon-Walker submitted that Rule 32 would be of little use if Rule 60, applied literally, required a copy of the order to be sent to the opposite party. That would enable intimidation of the witness, which it is the purpose of Rule 32 to avoid.

49. She added that there is nothing unfair in a party being confronted at a hearing with a witness attending under a witness order whose presence the party did not expect. How to react in such a situation is a matter for the discretion of the Employment Judge. Ms Gordon-Walker accepted that Employment Judge Hughes could have invoked Rule 92 and decided in the exercise of her judgment not to send a copy of the witness summons to the Claimant by way of exception, but did not accept that it was incumbent upon her to do so or even to consider whether to do so; the default position being that Rule 60 by implication does not apply to the sending of a witness order because of the exception created by Rule 32.

50. Ms Gordon-Walker went on to submit that if she were wrong in her analysis and if there was a procedural irregularity in not sending the witness order to Mrs Charles-Jones, it will still not be incumbent on the Judge at the hearing to give her further time or alert her to the possibility that she might wish to apply for an adjournment: that was not required because there

had been sufficient time during the day to prepare for the cross-examination of Ms Thwaites. Furthermore, she submitted that Ms Thwaites' evidence was only material to the question of attendance at careers fairs and whether the Claimant had attended them. The Claimant, she said, had not been denied any opportunity either before or, indeed, after Ms Thwaites gave evidence of calling evidence in rebuttal of what she had said on that point.

51. As to the evidence of Ms Coulson, Ms Gordon-Walker submitted in effect that it could have added nothing of substance to the evidence that the Claimant was able to call. While she accepted that Ms Coulson's evidence was relevant to the issue whether the Claimant was employed or not and that a witness summons to compel her attendance would, if sought, probably have been granted, it was not realistic to suppose that her attendance could have made any difference to the outcome, given the damning findings of dishonesty and lack of credibility made in relation to matters that were unrelated to Ms Thwaites' evidence. Ms Coulson, submitted Ms Gordon-Walker, would not herself have been able to say whether what she had witnessed had been work done in the capacity of an employee or not.

52. Those, then, were the main contentions of the parties. I come to my reasoning and conclusions. First, in my judgment, there was a procedural irregularity with regard to the granting of the application for a witness order in respect of Ms Thwaites. It seems to me that the provisions of Rule 60 must be taken to mean what they say and that read together with Rule 1(3), which defines what a "decision" is, it is clear that this was a "decision" made "without a hearing".

53. Rule 60 on its face requires that decision to be communicated to both parties, identifying the Employment Judge who has made the decision, and that was not done. The

Claimant was not on notice of the witness order made in respect of Ms Thwaites and the Employment Judge did not consider whether she should have sent notification of that order to the Claimant. It is clear from the pro forma letter, referring as it does to Rule 32, that the Tribunal did not consider itself bound to send the witness order to the Claimant.

54. That position would require an exception to be read into Rule 60, along the lines contended for by Ms Gordon-Walker. I am unable to accept her invitation to read in such an exception. I do not accept her interpretation because it is inimical to the principle of open justice. Derogations from transparency in communications between the Tribunal and parties must be strictly construed in favour of open justice and transparency and the clearest possible words are required to override that principle. That is not to say that it can never be overridden. Indeed, Rule 32 creates an example where it is expressly overridden.

55. I do not need to decide whether it is ever permissible for an ET to determine, whether at the request of the party applying under Rule 32 for a witness order or of its own motion, to withhold from the opposite party the fact that a witness summons has been granted and to refrain from sending a copy of it to the opposite party. The **ET Rules** do not make any express provision for such a power. It would have to be implied by reading it into Rule 32 read with Rule 92. As I have said, I am not prepared to go that far, but if the power does exist, say in a case where an employee needs to be protected from the risk of reprisals by a current employer, this is not such a case.

56. Furthermore, in my judgment, an Employment Judge deciding to withhold information about a witness order would have to consider that question carefully and should formulate

reasons for being willing to withhold it. Here that was not considered because of the assumption made in the pro forma letter, as I have mentioned.

57. What is the impact of the Claimant not having known about a witness attending under a witness order obtained by the other side? The starting point is that the impact must be regarded as in principle significant. The whole point of advance exchange of witness statements in the modern era is to avoid evidence by ambush, now a deprecated relic of litigation in bygone days. Where an opposing party knows that a witness is reluctant to give oral evidence for the party proposing to call her, the reluctance is important information influencing tactical thinking and trial preparation.

58. A seasoned lawyer normally makes a nuanced appraisal of the impact. Will the witness attend voluntarily? Will a witness order be obtained? Will it be obeyed? If it is obeyed, what will the witness say? Every lawyer knows the risks of summoning a reluctant witness; even one who has signed a statement and still more in the case of one who has not. That appraisal for an experienced lawyer would be likely to affect decisions about which witnesses to call in rebuttal. Taking the present case as an example, should the Claimant, had he known the true position, apply for a summons to compel the attendance of Ms Coulson if unable to secure her voluntary attendance?

59. In the present case, there is no evidence that the Respondent requested the Tribunal to keep secret from the Claimant the fact of the witness order application; and I cannot see any good reason why the Claimant was not informed of it. It is said that there was some evidence emanating from Ms Thwaites of pressure from the Claimant on Ms Coulson to give evidence. Provided the line is not crossed that separates proper enquiry of a witness from improper

pressure on her, contacting a relevant witness is perfectly proper. ETs and parties sometimes need to remind themselves not to lose sight of the proposition that there is no property in a witness. It would not have been improper for the Claimant to contact Ms Thwaites about giving evidence, nor for the Respondent to have contacted Ms Coulson.

60. For those reasons, the ET was wrong not to send a copy of the witness order to the Claimant. Because it did not do so, the Claimant was unaware that Ms Thwaites was very likely to attend since she would be subject to punishment if she did not. The Claimant also had the dubious benefit, to a non-lawyer, of the assurance that a witness whose statement had not been exchanged would be unlikely to be heard. She knew that Ms Thwaites' statement had not been exchanged and could therefore be forgiven for thinking that Ms Thwaites was unlikely to be heard.

61. She therefore had reason to suppose that Ms Thwaites' written evidence would not be taken into account for that reason, while Ms Coulson's would be accorded some weight because it was contained in a signed statement that was exchanged, albeit without oral attendance. Mrs Charles-Jones says that she was thereby influenced in the direction of not abusing the generosity of Ms Coulson, as she put it, and that had she known Ms Thwaites was coming, she would have secured the attendance of Ms Coulson. That makes good sense.

62. The next issue is whether any of this matters and, in particular, whether what happened at the trial was then unfair. Provided the fairness of the trial was not compromised, there was nothing wrong in the Employment Judge deciding to entertain and hear the oral evidence of Ms Thwaites; even though, from the Claimant's perspective, it was unexpected. The procedural irregularity that I have already mentioned might or might not be material. Nor was there

anything wrong with the Employment Judge deciding to hear from Ms Thwaites orally, despite her not having signed a witness statement. It is in the nature of a situation in which a witness order is granted that the witness will, very often, not have signed such a statement.

63. The Judge did not necessarily act wrongly by treating her draft statement as a starting point for her evidence-in-chief. Although not signed by her, it was a draft she had seen. It would have no evidential status unless and until approved by her, but it was likely that she would adopt it because she had not disputed its contents in the email correspondence to which I have referred. Nor was it wrong, provided the fairness of the trial was not compromised, for Ms Thwaites to supplement what was in her written draft statement with further oral evidence-in-chief, despite her not having signed any witness statement.

64. I therefore agree with the Respondent that there was no further procedural irregularity in receiving the evidence of Ms Thwaites, provided that was done on terms that were fair to the parties and did not compromise the fairness of the trial. The surprise appearance - from the Claimant's perspective - of Ms Thwaites under the witness order and the reception of her evidence was easily capable of fair handling by sensitive case management, despite the procedural irregularity that had led the Claimant to remain in ignorance of the witness order until the start of the hearing.

65. The issue of failure to notify the Claimant was not considered and addressed at the oral hearing. It is right that no application to adjourn was made. Mrs Charles-Jones said that that was because it did not occur to her. She felt intimidated because of the friction in exchanges that had occurred between her and the Judge.

66. The question that remains, concerns the evidence of Ms Coulson. The point was put by Mrs Charles-Jones to the Judge that the Claimant wished to call her and that she was abroad. The Judge's response was to require documentary evidence of the reason for her absence. Her evidence was, it is accepted by Ms Gordon-Walker, in principle relevant to the issue that was before the Tribunal.

67. In my judgment, there was further procedural unfairness in that the Judge did not adequately deal with the problem of the absence of Ms Coulson in the light of the Claimant's sudden discovery at the hearing of the unexpected presence of Ms Thwaites.

68. The Judge said in his written comments that it is his "standard practice to explain procedural matters to all parties who are not professionally represented, to invite questions and to allow breaks when requested". He did not say whether he followed that standard practice in the present case and he does not suggest, and nor does Ms Gordon-Walker, that he made any reference to the possibility of arrangements being made for Ms Coulson's attendance. On the contrary, his position was that unless it could be shown in writing why she was not present the Claimant would not be in a position to take that issue further.

69. I do not accept Ms Gordon-Walker's suggestion that it was for the Employment Judge to decide how far his duty of fairness required him to go in assisting the unrepresented party. I do not read the passage relied upon in the **Drysdale** case as authority that goes that far. It would be tantamount to the proposition that the Employment Judge is himself the arbiter of whether he has conducted the trial fairly subject only to challenge on **Wednesbury** grounds.

70. That cannot be right. An appellate Tribunal such as this is invested with the function of deciding objectively whether or not the trial has been fair. I do not agree that the decision not to canvass with Mrs Charles-Jones the question of an adjournment can be relegated to a mere case management decision. If a fair trial required that issue to be discussed, then it was a duty mandated by the overriding objective to conduct the hearing fairly.

71. The Respondent then goes on to say that even on that basis, any procedural unfairness does not matter because Ms Coulson's evidence could have added nothing of substance. I have had to reflect carefully on this submission. It cannot be said that her evidence was irrelevant in principle. It was clearly relevant. It corroborated that of the existing witnesses, including that of Ms Wright, described as the most independent.

72. Ms Coulson, too, it appears would have been accorded to the status of an independent witness since she is not a member of the family. Her statement was signed by her. I cannot say how her demeanour and truthfulness in the witness box would have been assessed if she had given oral evidence. It appears that the Judge gave little or, more probably, no weight to her evidence, to judge by what he said in the Judgment itself and subsequently his written comment.

73. Nor, in my judgment, was it reasonable to expect the Claimant to have had at her fingertips documentary evidence of the reason for Ms Coulson's absence. She had no reason until the unexpected appearance of Ms Thwaites to have ready such written evidence.

74. The Decision itself shows the considerable weight the Employment Judge placed on Ms Thwaites' evidence, which he contrasted with that of the Claimant's witnesses in a manner that

A was plainly devastating for the prospects of the claim: see paragraphs 25, 28, 36, 67 and 68 in particular of the Decision. The statement of Ms Coulson, by contrast, is mentioned only obliquely in passing (see paragraph 20 of the Decision), although what she said was strongly supportive of the Claimant's case.

B

75. For those reasons and after considerable reflection, I have come to the conclusion that this Decision cannot stand and must be remitted. I have reflected carefully on the point made

C by Ms Gordon-Walker that the result could not have been affected because of the damning findings of dishonesty made against the Claimant and Mrs Charles-Jones. The difficulty is that it is impossible to say whether those findings would have been the same if the trial had been

D conducted fairly, without the two unfair aspects of it to which I have alluded. I will therefore remit the matter.

76. I have considered in the light of the well-known criteria set out in **Sinclair Roche & Temperley v Heard and Anor** [2004] IRLR 763 EAT, in the judgment of Burton J (President),

E whether to remit the matter to a fresh Tribunal or to the same Tribunal. It seems to me that in the light of the way in which the Judge expressed himself in the Judgment and his subsequent

F comments, it is plainly appropriate for the matter to be remitted to a different Employment Judge.

G 77. I say that with no disrespect to the Judge. I sympathise with him in the situation that confronted him when the Claimant was unaware that Ms Thwaites was going to give evidence for reasons that were not of his making; but I think it is clearly appropriate that the Tribunal

H should be differently constituted next time and I would add that the Decision below should be

omitted from the bundle and the Judge dealing with the case should be one that has not read it, and should not read it.

78. This case provides the opportunity to give emphasis to the importance of procedural fairness.

79. First, I do not read the judgment of Barling J in the **Drysdale** case - see in particular at paragraph 49 - as meaning that the question whether a trial is fair or unfair is a **Wednesbury** issue or a case management issue. It is not.

80. Secondly, unrepresented parties whose case seems weak may, it is well known, sometimes behave in a manner that would try the patience of a saint. Employment Judges sometimes have to have the patience of a saint to do their job and are appointed because they are considered to have it, among other reasons.

81. Third, in this jurisdiction as in many others, the "equal footing" aspect of the overriding objective means taking particular care to observe the duty referred to by Neuberger J in the **Maltez** case, to ensure a party is not procedurally prejudiced through absence of representation. The duty is as important where the unrepresented party appears to have a weak case as where her case appears strong. The apparent weakness of the party's case is not, it goes without saying, a reason to treat that party with any disfavour in procedural matters.

82. Fourth, communication from one party to the ET without copying the other party should almost never occur and requires specific justification in accordance with the **Rules**, as the Lord

A Judge LCJ said at paragraph 7 of his judgment in **Mohamed v The Secretary of State for Foreign and Commonwealth Affairs (No. 2)** [2010] EWCA Civ 158:

> **"7. It is an elementary rule of the administration of justice that none of the parties to civil litigation may communicate with the court without simultaneously alerting the other parties to that fact. …"**

B Other than in the case of Rule 32, the **ET Rules** provide in Rule 92 to the same effect. Unfortunately, there are cases where Rule 92 is not observed.

C 83. The impropriety is particularly serious where the party communicating unilaterally with the Tribunal is represented while the other party is not. Communications going the other way, from the Tribunal to one side and not the other, require specific justification and very careful D thought indeed, especially when the party omitted from the communication is the unrepresented one. There is a real risk of undermining confidence in the impartiality of Judges and the administration of justice if that principle is not scrupulously observed.

E 84. Fifth, I recognise that the obligation to explain procedural matters to an unrepresented party is not always easy. It includes, in particular, the tension - baffling to a non-lawyer - F between conflicting propositions: (1) that a witness attending under compulsion may give evidence without having provided a written statement; (2) that the Court will normally not hear a witness who has not provided a prior written statement; and (3) that the Court may attach little G weight, or such weight as it thinks fit, to a signed statement from an absent witness. Those propositions can be difficult to reconcile for lawyers as well as non-lawyers and I am not surprised that the tension between them caused confusion in this case.

H 85. Finally, Employment Judges responding to allegations of bias, which are frequently made and much less frequently justified, should avoid language which smacks of advocacy

when responding. To do so can lend credence to otherwise unjustified allegations. In the present case, rhetorical flourishes using language such as "strikingly silent" and "inconvenient truth" were misplaced and regrettable.

86. It would be useful if Employment Judges could consider observing a practice I have often myself observed, which is to introduce a hearing at which one party is represented but the other is not, by explaining to the unrepresented party that both the represented party and the Tribunal have a heavy responsibility to ensure that the unrepresented one will not in any way be prejudiced by lack of representation.

87. The appeal is allowed and the case will be remitted for a retrial before a different Employment Judge.