Appeal No. UKEAT/0027/18/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 16 February 2018

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

REMPLOY LTD — APPELLANT

MR J LOWEN-BULGER — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR CHRISTOPHER HOWELLS (of Counsel) Instructed by: Capital Law LLP Capital Building Tyndall Street Cardiff CF10 4AZ
For the Respondent	MR NICHOLAS BIDNELL-EDWARDS (of Counsel) Instructed by: Lawson West Solicitors Ltd Millers House Roman Way Market Harbrough LE16 7PQ

SUMMARY

PRACTICE AND PROCEDURE - Case management

Case management - witness order - exercise of ET's discretion - overriding objective

The Claimant was pursuing complaints of race discrimination before the ET, specifically contending the real reason for his dismissal by the Respondent was because of racial dislike of him on the part of his line manager, Mr Pandya. Just over a week before the commencement of the Full Merits Hearing, the Respondent applied for a witness order in respect of Mr Pandya, who had left its employment and had stopped responding to its communications. The ET refused the application, questioning whether the Respondent had shown that Mr Pandya was an unwilling witness and expressing concern regarding the late timing of the application and the problem this might cause for the witness. The Respondent appealed.

Held: allowing the appeal

In considering an application for a witness order, the ET had to be satisfied both that the evidence in question would be relevant and that it was necessary to make the order (**Dada v Metal Box Company Ltd** [1974] IRLR 251 NIRC). This involved an exercise of discretion by the ET, which it was required to carry out judicially. In the present case, there was no indication that the ET has considered the relevance of the proposed evidence. Even if it had (although not stated in the Reasons provided for refusing the application), there was no indication that it had assessed the significance of the evidence - whether it was of marginal relevance or (as the Respondent urged) was central to the issues to be determined. Undertaking that exercise, as it was common ground that Mr Pandya's evidence would be of considerable relevance in this case, it would be perverse to find the matters cited by the ET outweighed the grant of a witness order in these circumstances; at the time of the ET's decision, there was no basis for concluding that granting the application might lead to a postponement of the hearing (as the Claimant contended) and the ET's concern for the difficulties that might (but might not)

be faced by Mr Pandya was disproportionate to the interests of justice in seeking to ensure that he give evidence.

HER HONOUR JUDGE EADY QC

Introduction

1. The appeal in this matter concerns the refusal on the part of an Employment Tribunal ("ET") to grant a witness order; it being argued that there was a failure to consider the relevance and significance of the evidence of the witness in question in the light of the issues to be determined, alternatively, that inadequate Reasons were provided. In giving my Judgment I refer to the parties as the Claimant and Respondent, as below.

2. This is the Full Hearing of the Respondent's appeal from a decision of the Leicester Employment Tribunal (Employment Judge Ahmed, sitting alone), communicated to the parties on 30 January 2018. By its decision, the ET refused the Respondent's application for a witness order for a Mr Pandya - that application having been made on 25 January 2018 - to attend a hearing before the ET, due to take place over seven days, commencing on 5 February 2018 (albeit the order was only sought for 7 and 8 February). The Respondent's appeal against the ET's decision having been permitted to proceed to a Full Hearing after consideration on the papers by Her Honour Judge Stacey, the ET hearing has since been postponed.

3. The issues raised by the Respondent's appeal can be summarised as follows:

   (1) Whether there was an error of approach:

      (a) in the ET's refusal to consider the relevance and significance of Mr Pandya's evidence in the context of the main proceedings;

      (b) in its requiring evidence that Mr Pandya had been warned in advance of the possibility of a witness order being made; and

(c) in its refusal of the order because the application had been made too close to the hearing date;

(2) Whether the ET provided inadequate Reasons for its decision.

4. The Claimant resists the appeal, largely on the basis of the ET's reasoning, but further contending that the ET had implicitly accepted Mr Pandya's evidence was relevant but had found that other factors had outweighed this consideration. He further submits that, even if it should be concluded that the ET erred in its decision, the Employment Appeal Tribunal should find that any such error would have made no difference to the outcome given that the Respondent's application was inadequately particularised.

The Relevant Background and the ET's Decision

5. The underlying ET proceedings flow from a claim lodged by the Claimant on 15 February 2017. According to the pleadings, the Claimant was employed by the Respondent as a Digital Services Manager from 9 May 2016 until 8 November 2016, when he was dismissed. The Respondent says this was because his performance was unsatisfactory. It is the Claimant's case, however, that the reason for his dismissal was fabricated; the real reason was the racial dislike of the Claimant on the part of his line manager, Mr Pandya.

6. It seems that there had been an early case management hearing on 10 April 2017 and amended statements of case and grounds of resistance followed on 24 April. On 15 July 2017, the case was listed for a Full Merits Hearing to last seven days, starting on 5 February 2018.

7. Thereafter, it seems that case management proceeded without difficulty. Although witness statements had originally been due to be exchanged in June 2017, it seems the parties

had agreed to depart from that course: on 19 December 2017, they had agreed to exchange witness statements on 22 January 2018, with that timeframe then being extended by agreement (after subsequent requests by the Respondent) and the parties apparently ultimately settling on 29 January 2018 as the date for exchange.

8. That was the position when, just over a week before the hearing was due to start, the Respondent applied (by email sent at 14:41 on 25 January 2018) for a witness order for Mr Pandya to be required to attend to give evidence at the Full Merits Hearing due to commence on 5 February. The basis of that application was explained as follows:

> **"Mr Pandya is pivotal to the Respondent's defence. The Claimant has issued a claim for race discrimination comprising of seven acts, of which six involve Mr Pandya. Of those six alleged acts, three allegedly occurred in the presence of the Claimant and Mr Pandya only. There is no other first-hand evidence. Without Mr Pandya's evidence the Respondent would be unable to adduce any alternative evidence to refute the majority of the Claimant's allegations and would, therefore, be fatally prejudiced.**
>
> **Mr Pandya no longer works for the Respondent. He had previously kept in the touch [sic] with the Respondent and had confirmed his willingness to attend the hearing to give evidence. More recently, however, Mr Pandya has failed to respond to any correspondence or communication. As such his draft statement, which we believe to be almost complete, has not yet been finalised. We do not know whether his failure to respond is attributable to a change of heart. On that basis the Respondent is also unsure as to whether he still proposes to attend the hearing. Given the absence of communication, it has no choice but to assume that he does not.**
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> **We respectfully suggest that a witness order will further the overriding objective set out in rule 2 of the ET rules in that, in particular, it:**
>
> - **will ensure that the Respondent is able to put forward its case on an equal footing with the Claimant;**
> - **reflects the gravity of the allegations made by the Claimant;**
> - **will avoid the potentially expensive and disruptive need to apply for a postponement of the substantive hearing.**
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> **The hearing is listed for 6 days commencing on 5 February 2018. We understand that the first day is likely to be a reading day and the second day (6 February) is likely to be taken up by the Claimant's evidence. We therefore respectfully suggest that the Tribunal order Mr Pandya to attend the hearing on 7 and 8 February 2018 to give his evidence."**

9. The ET's response came by email sent at 09:42 on 30 January 2018, as follows:

> **"2. The application for a witness order against Mr Avnesh Pandya is refused for the following reasons:**
>
> > **2.1. the application is made too close to the hearing. There is no reason why the application for a witness order could not have been made earlier;**

2.2. there is no indication that Mr Pandya was 'warned' in advance that he would be required, if necessary, to attend under a witness order. It is a matter of considerable inconvenience to any witness to potentially cancel other plans and to attend a hearing at short notice. Witness statements were due to be exchange on 17 June 2017. As Mr Pandya did not apparently finalise his statement it must have been evident then that he was a reluctant witness yet no efforts appear to have been made to secure his attendance then or shortly thereafter. The Respondent is professionally represented and would have appreciated the need to apply for a witness order in good time.

2.3. I am not satisfied that sufficient efforts have been made to secure Mr [Pandya]'s attendance without an order. It is assumed he is unwilling to attend but there does not appear to be any evidence that he is actually unwilling, only that he is uncommunicative."

10. It is against that decision that the Respondent now appeals. As already recorded, the appeal having been permitted to proceed to this Full Hearing, the Full Merits Hearing of the ET claim has now been postponed. That raises a question as to whether this appeal is now academic. I was, however, persuaded by both counsel that that is not the case, there being outstanding issues as to the approach the ET should take when considering any future application for a witness order for Mr Pandya and, potentially, as to any consequential applications arising on the postponement of the ET hearing.

The Relevant Legal Principles

11. The ET's power to make a witness order is provided by Rule 32, Schedule 1, **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("ET Rules"), as follows:

"The Tribunal may order any person in Great Britain to attend a hearing to give evidence, produce documents, or produce information."

12. In interpreting or exercising any power given to it under the **ET Rules**, the ET is obliged to give effect to the overriding objective (Rule 2) - that is to deal with cases fairly and justly, which will mean, so far as possible:

"(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense."

13. Under Rule 7 of the **ET Rules**, it is provided that the Presidents of Employment Tribunals may publish guidance as to matters of practice and as to how powers conferred by the Rules may be exercised. The current relevant **Presidential Guidance**, as amended on 22 January 2018, provides (see Guidance Note 3, paragraph 7):

> **"7. An application for a witness order may be made at a hearing or by an application in writing to the Tribunal. In order that the Tribunal can send the witness order to the witness in good time before the hearing, it is important to make any application as early as possible. A witness order might be refused if the attendance of the witness cannot be ensured in time."**

14. More generally, the question whether an application for a witness order should be granted is a matter for the discretion of the ET, albeit that discretion must be exercised judicially. In the early case of **Dada v Metal Box Company Ltd** [1974] IRLR 251 NIRC, Sir John Donaldson observed (see paragraphs 12 to 15) that: "*There is no automatic right to witness orders*", stating that this would be a matter for the ET's discretion. Providing further guidance for ETs in this regard, Sir John Donaldson opined that there are only two matters of which an ET should be satisfied before issuing such an order: (1) "*that the witness ... can [apparently] give evidence which is relevant to issues in dispute*" and (2) "*that it is necessary to issue a witness order*". In considering the second question, it was made clear that it would be wrong, as a matter of policy, to refuse to issue a witness order unless satisfied that the person concerned was unwilling to attend voluntarily:

> **"13. … We think that this policy is erroneous to the point of amounting to an error of law.**
>
> **14. … We do not seek in any way to fetter the discretion of Tribunals. What we are saying is that Tribunals should be satisfied that the witness can give relevant evidence and that it is necessary to issue a witness order. But if they are satisfied on both those matters they ought to issue such an order."**

15. As to whether the evidence of the proposed witness is sufficiently relevant to the issues to be determined, the ET will generally be best placed to make that assessment; see **Noorani v Merseyside Tec Ltd** [1999] IRLR 184 CA. It is, however, common ground in the present case that Mr Pandya's potential evidence met the test of relevance.

16. Further guidance on the question of witness orders was also provided by the EAT (His Honour Judge Clark presiding) in **Haydock v G D Cocker & Sons Ltd** UKEAT/1143/99 and UKEAT/215/02, in which it was observed:

> **"21. … refusal to attend without an Order by a witness who can give prima facie relevant evidence will not automatically lead to the making of an Order. …"**

17. As for the ET's obligation to provide Reasons for any decision in this respect, the starting point is provided by Rule 62 of the **ET Rules**, which relevantly provides as follows:

> **"(1) The Tribunal shall give reasons for its decision on any disputed issue, whether substantive or procedural (including any decision on an application for reconsideration or for orders for costs, preparation time or wasted costs).**
>
> **…**
>
> **(4) The reasons given for any decision shall be proportionate to the significance of the issue and for decisions other than judgments may be very short."**

18. In reading any decision of the ET, it is necessary to avoid overanalysing the Reasons provided and engaging upon a pernickety critique; see Mummery J at paragraph 30 of **Fuller v London Borough of Brent** [2011] ICR 806 CA.

> **"30. Another teaching of experience is that, as with other tribunals and courts, there are occasions when a correct self-direction of law is stated by the tribunal, but then overlooked or misapplied at the point of decision. The tribunal judgment must be read carefully to see if it has in fact correctly applied the law which it said was applicable. The reading of an employment tribunal decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which the decision is written; focusing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid."**

19. The key requirement is, however, that the parties are entitled to be told why they have won or lost; see per Bingham LJ in **Meek v City of Birmingham District Council** [1987] IRLR 250 CA.

Submissions

The Respondent's Case

20. The Respondent complains that the ET's decision failed to refer to the relevance of the evidence in issue. That was not an overly pernickety criticism: (1) because the degree to which the witness' evidence was relevant was critical to the balancing exercise; (2) because six of the claims of race discrimination in this case solely concerned Mr Pandya and his evidence was significant to the remaining claims; and (3) because it could not be inferred that the Employment Judge's earlier involvement in the proceedings meant he had fully understood the significance of Mr Pandya's evidence.

21. As for whether the order was necessary, this had been explained in the application and the ET's reasoning was inconsistent in terms of whether this had been accepted or not. It had first stated (see paragraph at 2.2) that "*Witness statements were due to be exchanged on 17 June 2017. As Mr Pandya did not apparently finalise his statement it must have been evident then that he was a reluctant witness*", but had then concluded (at paragraph 2.3) "*It is assumed he is unwilling to attend but there does not appear to be any evidence that he is actually unwilling*".

22. Moreover, the ET had apparently taken into account an irrelevant factor - that there was no indication Mr Pandya was warned in advanced. There was no legal requirement that a witness be so warned and, in any event, the Respondent had explained how there had been a breakdown in communication.

23. As for the timing of the application, Rule 32 made no prescription as to timing, and it was noted that the Presidential Guidance allowed that an application might be made at the hearing itself. Certainly, there was no reason to think the present application had been made too late.

24. The ET had further irrelevantly speculated upon the potential inconvenience to Mr Pandya but that overlooked the difficulty facing the Respondent, given that Mr Pandya was no longer communicating with it, so it could not know whether he was available or not.

The Claimant's Case

25. For the Claimant, it was urged that, as the case law made plain, this was a matter for the ET's discretion. It should not be assumed that the ET had failed to consider the relevance of Mr Pandya's evidence; indeed, the ET's reasoned refusal had not taken issue with the Respondent's assertion that "*Mr Pandya is pivotal to the Respondent's defence*" and the ET's observation that the Respondent was professionally represented and would have appreciated the need to apply for a witness order in good time, carried with it the implicit acceptance that his evidence was relevant. The question was, therefore, whether the order was necessary. As the case law again made clear, an order would not be granted - even if in relation to evidence of significant relevance - if it were not necessary that it should be made. Here, it was apparent that the ET was not satisfied that the Respondent had shown an order was necessary, not least as it could have applied for an order earlier.

26. In taking this view, the ET had relevantly had regard to the history of the proceedings, referring to the original case management order requiring witness statements be exchanged in June 2017, and it evidenced familiarity with the issues to be determined. It was entitled to have

regard to the very late timing of the application - a week and one working day before the start of the hearing - and to what this might mean for the witness. If the application had been granted, it was likely it would have arrived in the post on 31 January 2018, given the witness only a week's notice of his mandatory attendance. The ET was entitled to consider this unfair to the witness, hence the permissible reference to the lack of warning to Mr Pandya. All these matters were relevant to the exercise of the ET's discretion (and see in this regard the guidance provided both in the case law and in the ET **Presidential Guidance**).

27. More broadly, the ET was entitled to have regard to the pressure on ET resources (not least, given the increase in ET claims since fees ended) and to the fact that the Respondent was professionally represented and that its conduct of the proceedings put the Claimant at risk of wasted costs and put undue pressure on the ET itself.

28. As to the adequacy of the ET's Reasons, Rule 62 had distinguished between that which was required for a judgment and that necessary for a decision, as here. The ET had done sufficient.

29. Moreover, even if the ET had erred in law, it should be held that this would have made no difference to the outcome. Whilst Mr Pandya was likely to give relevant evidence, the application would inevitably have been refused because of the difficulty of retaining the hearing date arising from the practical difficulties for the witness being given such short notice, all brought about by the failings of a professionally represented party, and without regard to the potential impact on the Claimant and the ET. More generally, the Respondent's application contained inadequate detail for the purposes of proving the necessity of a witness order and had

not been made promptly, albeit the question of when witness statements would be exchanged had remained live.

Discussion and Conclusions

30. This appeal concerns the exercise of judicial discretion on the part of the ET. As such, it would be inappropriate for the EAT to interfere with the decision reached unless satisfied that the approach adopted demonstrated an error of law, was properly to be characterised as perverse, took into account irrelevant factors or failed to have regard to that which was relevant, or that the ET had failed to provide adequate reasons for its decision.

31. I bear in mind that the decision whether or not to grant a witness order is one that an ET is particularly best placed to make. In making that decision, however, the ET will first need to be satisfied that the evidence of the witness in question is relevant to the issues to be determined and to form a view as to the potential significance of that evidence. That is an important matter because it is a factor that the ET will need to put into the balance - assuming it is satisfied that the evidence is relevant - when exercising its discretion as to whether or not to grant an order. Failure to carry out that initial assessment of relevance will, therefore, impact upon the correctness of the ET's approach as a matter of law.

32. In the present case, the ET's explanation for its decision makes no reference to the potential relevance of Mr Pandya's evidence and provides no indication of the view it took in this respect. For the Claimant, it is said that it can be inferred that the ET had regard to this issue, that it had accepted that the evidence was relevant and had then gone on to consider whether to grant the application (so, assuming this point had been made out). Even if the Claimant is correct in that submission, however, that would not provide a complete answer.

First, because, given the importance of the point, it is a matter that the parties are entitled to see referenced in the ET's reasoning and it is not. Second, and more substantively, because it is impossible to see that the ET formed a view as to the potential significance of Mr Pandya's evidence. Had it, for example, taken the view that his evidence was potentially relevant but did not have the importance the Respondent claimed, that might legitimately have fed into the balancing exercise the ET was required to carry out. In fact, in this case, it seems to be common ground that Mr Pandya's evidence is likely to be of considerable significance, given the focus of the Claimant's case and the allegations made. In the circumstances, the Respondent was entitled to be able to understand from the ET's reasoning whether it had accepted that was the case and, if not, why not. Thus, even if the ET had assumed that the evidence was relevant, its decision does not demonstrate that it carried out an assessment of the degree of relevance, and that was either an error in approach or a failure to provide adequate reasons. In either respect, it renders the decision unsafe.

33. Even if I am wrong about that, and I assume (as the Claimant submits) that the ET proceeded on the basis that Mr Pandya's evidence was of considerable significance (as the Respondent had urged in its application), I cannot see that it then carried out its task correctly in balancing this consideration against the question of the necessity of making the order in this case.

34. For the Claimant, it is urged that the ET was entitled to have regard to the late timing of the application and to the fact that the Respondent was professionally represented and should have made the application sooner and given more detailed reasons for making it when it did. Specifically, he contends the late timing of the application potentially jeopardised the ET

hearing and thus put the Claimant at risk of wasted costs and placed undue pressure on ET resources.

35. Had the ET been dealing with an application for a postponement of the hearing, to enable the Respondent to secure Mr Pandya's attendance, these may all have been good points, but it was not. Moreover, the potential risks of such an application following on from the grant of the witness order so late in the day is not a matter to which the ET itself refers. That is understandable, as there was, at that stage, no suggestion that either party was seeking a postponement. The timing of the application may have meant that there was a risk that Mr Pandya would not be able to attend - he might not even have been in the jurisdiction at the relevant time and the Respondent might then have found itself in some difficulty - but that was not the position the ET was dealing with in making its decision.

36. As for the factors that the ET apparently did take into account - the lack of warning to Mr Pandya, the late timing, and the question whether or not Mr Pandya was an unwilling witness in any event - to some extent these might have been matters of peripheral relevance to the ET's consideration of necessity but, in the circumstances of this case, I cannot see that they could properly have outweighed the issue of relevance. Even if, therefore, I assume that the ET had regard to relevance - although that was not stated - I would have to find that the decision was perverse. Moreover, I agree with the Respondent that there is a lack of consistency in the reasoning: the ET initially appearing to accept that the Respondent had established that Mr Pandya was not a willing witness, but then concluding that this had been merely assumed rather than proved.

37. I can appreciate the ET's concern that the application, made by experienced professional advisors, had been made so late in the day. I can also allow that it might not have understood the full background to the application, although I am satisfied that sufficient had been explained. Ultimately, however, in exercising its judicial discretion the ET was required to first determine the question of relevance and then - if satisfied the evidence of the witness was indeed potentially relevant to the issues to be determined - to turn to the question whether it was necessary that an order should be made in the particular circumstances of this case. Adopting that approach, it would have been apparent that Mr Pandya's evidence was likely to be highly relevant to the determination of the issues raised in these proceedings. That was an important factor that needed to be weighed by the ET, and I am not satisfied that it was - first, because the decision fails to say so, and second, because if that factor was taken into account, then the decision reached is simply perverse. Of course, the ET's fears in terms of the potential difficulties for Mr Pandya, given the timing of the application, may have been realised but, given the significance of his evidence (and the absence of any suggestion that a postponement of the hearing was being sought at that stage), any assumption the ET was making in that respect was disproportionate to the interests of justice in this case more generally.

38. Therefore, for all those reasons, I duly allow this appeal.