Appeal No. UKEAT/0039/18/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 26 February 2018

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR M LUNN & MRS R LUNN — APPELLANTS

(1) ASTON DARBY GROUP LIMITED
(2) MR L HEYWOOD — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR MICHAEL PAULIN (of Counsel) Direct Public Access
For the Respondent	No appearance or representation by or on behalf of the Respondents

SUMMARY

PRACTICE AND PROCEDURE - Postponement or stay

Practice and procedure - postponement - hearing of interim relief application - section 128(5)

Employment Rights Act 1996

The Appellants had lodged separate whistleblowing claims against the Respondents and had both applied for interim relief. They had instructed counsel under the Bar Council's direct access scheme and he had advised them on their claims and had settled their respective particulars of claim attached to the ET1 forms. The ET had expedited the listing of the interim relief applications for a date on which the Appellants' counsel had a prior court commitment; that was immediately drawn to the ET's attention, the Appellants' counsel applying for a postponement and re-listing of the hearing, explaining he was instructed on a direct access basis and the Appellants would be unable to obtain alternative legal representation for the interim relief hearing; and further offering a number of alternative dates, the earliest of which were within five working days of the existing listing. The ET refused the application, reasoning that a postponement of an interim relief application was prohibited under sections 128(5) **ERA 1996**, save where there were special circumstances and counsel's convenience did not amount to special circumstances. The Appellants appealed.

Held: *allowing the appeal*

Although there were good reasons for the ET to list interim applications on an urgent basis and to expect the parties to make themselves available for the hearing at short notice - postponements only being granted where there were special circumstances (section 128(5) **ERA**), that did not mean that the Appellants had to demonstrate that the circumstances in question were exceptional and the ET's construction of the statutory provision suggested it had set a higher standard than was in fact required and/or had unduly fettered its discretion. In the present case, it might not be exceptional for the Appellants to have instructed counsel on a

direct access basis but it did mean that they were faced with a particular difficulty in obtaining alternative legal representation at such short notice. Having regard to the overriding objective - in particular, to save expense, to be flexible and to seek to ensure that the parties were on an equal footing - this gave rise to a special circumstance on the particular facts of this case. Moreover, given that it seemed the parties could make an alternative listing less than a matter of five working days after the existing date of hearing, it had been perverse to refuse the application in this instance and the appeal would accordingly be allowed and the ET's decision set aside and substituted by an Order that the hearing be postponed.

HER HONOUR JUDGE EADY QC

Introduction

1. This appeal raises a question as to the Employment Tribunal's approach to the potential postponement of an interim relief application.

2. In giving this Judgment I refer to the parties as the Claimants and the First and Second Respondents, as below. This is the Full Hearing of the Claimants' appeal from a decision of the Manchester Employment Tribunal ("the ET"; as comprised by Employment Judge Horne), communicated to the parties by letter of 20 February 2018, by which the ET refused the Claimants' request for a postponement and relisting of the hearing of their application for interim relief due to take place on 27 February 2018.

3. The appeal was lodged with the EAT the following day and expedited for consideration on the paper sift on 22 February 2018, when it was determined that it should proceed to a Full Hearing - the appeal raising a reasonably arguable question of law - expedited for today. Given the strictly compressed timetable for this hearing, Mr Paulin (who has represented the Claimants throughout) has provided a skeleton argument the working day before this hearing. The Respondents have not appeared but have entered a Respondents' Answer relying on their representations before the ET.

The Relevant Background and the ET's Decision

4. The Claimants are pursuing whistleblowing claims before the ET, both claims having been lodged on 7 February 2018 and both including applications for interim relief. The particulars of claim for each Claimant, as attached to their respective ET1 forms, were stated to

have been settled by Mr Paulin, a barrister who acts for the Claimants under the Bar Council's direct access scheme and who has advised the Claimants throughout the proceedings.

5. On 16 February 2018, the parties were notified that the ET had listed the Claimants' interim relief applications for hearings on Tuesday 27 February 2018, at 10am and 2pm respectively. By letter emailed to the ET the same day at 12.30pm, Mr Paulin explained that he was representing the Claimants under the direct access scheme and was unable to attend to represent them on 27 February as he had existing court commitments in London that day and would be in court for the duration of that week. Acknowledging that the hearing of the interim relief applications needed to take place urgently, Mr Paulin requested that the hearings be relisted on any day between 5 to 9, 12, 13, 16, or 26 to 30 March 2018 - all days when he was available.

6. By letter of 20 February 2018, the ET responded - that is the decision that is the subject of the present appeal - refusing that request, reasoning as follows:

> **"Employment Judge Horne has considered your request to postpone the hearing and has refused it. Section 128(5) prohibits postponement of Interim Relief hearings in the absence of special circumstances.**
>
> **The Tribunal appreciates that the listing of this hearing may cause a clash of commitments that is the fault of neither the claimants nor their counsel. This will no doubt cause inconvenience. Sadly that is not a special circumstance for justifying a postponement.**
>
> **The cases remain listed for hearing on 27 February 2018."**

7. The Claimants, acting through Mr Paulin, immediately applied to the ET for a reconsideration of that decision, submitting that special circumstances did in fact exist such as would justify the relisting of the interim relief hearings, explaining:

> **"[1] The application for interim relief is made by the Claimants, and it is the Claimants who will be without representation if the 27 February hearing goes ahead. The Claimants are represented by counsel instructed under the Bar Council direct access scheme, and do not and cannot find suitable alternative representation at such short notice.**
>
> ...

> **[2] It is submitted that it cannot be and is not in the interests of justice for a public interest whistleblowing case such as the present to be case managed in such a manner that the Claimants, who make the present application, would be prejudiced by being unrepresented at the 27 February hearing. The Claimants would not be on an equal footing, the case would not be being managed in a way that is proportionate to the complexity of the issues, and any delay is in any event compatible with proper consideration of the issues.**
>
> **[3] The Claimants have still not received the salary payments to which they are entitled from the Respondent. It is in the Claimants' best interest for this application to be heard as expeditiously as possible, but only if they can be properly and adequately represented at any interim relief hearing. It is submitted that the Claimants would be gravely prejudiced were the 27 February listing to proceed because they would have to make their case as litigants in person and without the barrister whom they have instructed to date. It is submitted that this would be neither fair nor proportionate.**
>
> **[4] The present application is not merely one for a "*postponement*" within the meaning of s.128(5), it is an application for the hearing to be relisted. While this is a postponement in the sense that the application sets out a series of proximate but future dates, the Claimants have no interest in delaying the hearing of this application." (Original emphasis)**

8. In making those representations, the Claimants referred to the overriding objective and submitted that there was no prohibition to the relisting of interim relief hearings - section 128(5) of the **Employment Rights Act 1996** ("ERA") requiring only that the ET be satisfied that special circumstances exist which justify it doing so; noting that the requirement was merely that there be special, not necessarily exceptional, circumstances.

9. At that point the ET sought comments from the Respondents, who replied, by their solicitors, by letter of 21 February 2018, apparently resisting the application and specifically observing as follows:

> **"It is our view that the Claimants can seek alternative representative [sic] under the Bar [Council] Direct Access Scheme or another legal adviser. We therefore do not consider that the Claimants would be prejudiced by the unavailability of existing Counsel. The application for interim relief is by its very nature designed to be heard relatively quickly to ensure that the [Claimants'] claims are not prejudiced and we believe this is contrary to their request to postpone and relist to a later date."**

The Respondents further contended:

> **"We do not consider that the Claimants' adviser's availability gives rise to "special circumstances" pursuant to Section 128(5) ERA. It appears to us that the Claimants' application is primarily around availability of Counsel …**
>
> **We therefore do not believe that a postponement and relisting to a later date complies with the Tribunal's overriding objective and the Respondents wish to object to the application accordingly."**

I note that those acting for the Respondents did not suggest they would be unable to make any of the alternative dates Mr Paulin had identified in his first communication with the ET on 16 February.

10. Within around 20 minutes of the Respondents' solicitor's letter having been emailed to the ET and Mr Paulin, Mr Paulin emailed a response making the following points:

> **"[2] The Respondent has <u>failed</u> to set out any basis whatsoever for it having suffered prejudice by the interim relief hearing being re-listed three working days later, namely on the 5 March (for example). It is submitted that there could be no reasonable objection to the Claimants' application. The inference is that no prejudice would be suffered by the Respondent.**
>
> **[3] The Respondent purports to base its argument on potential prejudice suffered by the Claimants by a relisting three days later. This point is both irrational and misconceived. The Claimants are seeking to preserve their existing legal representative who has in-depth knowledge of their claims. That is beyond scrutiny or criticism, and moreover, the Respondent has no basis to set out its stall on what is best for the Claimants. This is their application." (Original emphasis)**

The Claimants further submitted that the Respondents had provided no rationale for suggesting that their application did not accord with the overriding objective.

11. In the circumstances, however, Mr Paulin explained that the Claimants had felt they had no choice but to also issue an interim expedited appeal to the EAT, albeit that they were still seeking a response to their reconsideration application as a matter of urgency. Appearing before me this morning, Mr Paulin has explained that he is still unaware of any decision having been reached by the ET on the reconsideration application.

<u>The Relevant Legal Provisions</u>

12. The ability to apply for interim relief is governed by section 128 of the **ERA** which, relevantly, provides as follows:

"128. *Interim relief pending determination of complaint*

…

(3) The tribunal shall determine the application for interim relief as soon as practicable after receiving the application.

(4) The tribunal shall give to the employer not later than seven days before the date of the hearing a copy of the application together with notice of the date, time and place of the hearing.

(5) The tribunal shall not exercise any power it has of postponing the hearing of an application for interim relief except where it is satisfied that special circumstances exist which justify it in doing so."

13. The ET has a general power to postpone a hearing by virtue of Rule 30A Schedule 1, **Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013** ("ET Rules") which, relevantly, provides as follows:

"30A. *Postponements*

(1) An application by a party for the postponement of a hearing shall be presented to the Tribunal and communicated to the other parties as soon as possible after the need for a postponement becomes known.

(2) Where a party makes an application for a postponement of a hearing less than 7 days before the date on which the hearing begins, the Tribunal may only order the postponement where -

(a) all other parties consent to the postponement and -

(i) it is practicable and appropriate for the purposes of giving the parties the opportunity to resolve their disputes by agreement; or

(ii) it is otherwise in accordance with the overriding objective;

(b) the application was necessitated by an act or omission of another party or the Tribunal; or

(c) there are exceptional circumstances.

…

(4) For the purposes of this rule -

(a) references to postponement of a hearing include any adjournment which causes the hearing to be held or continued on a later date;

(b) "exceptional circumstances" may include ill health relating to an existing long term health condition or disability."

14. In exercising any power given to it under the **ET Rules**, the ET is required to seek to give effect to the overriding objective as provided by Rule 2, as follows:

"2. *Overriding objective*

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable -

(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.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

The Appeal and the Parties' Respective Cases

15. By their appeal, the Claimants contend the ET erred in law as a matter of statutory interpretation and/or reached a perverse decision. Specifically, by construing section 128(5) as prohibiting the postponement of interim relief applications, the ET wrongly interpreted it as a prohibitory statutory provision and/or had elevated the requirement of *special* circumstances to *exceptional* circumstances. It had, moreover, failed to see how its power to postpone the hearing ought properly to be informed by the overriding objective, which included the saving of expense, the need to ensure the parties were on an equal footing, proportionality and flexibility. In this case, the Claimants had sought to save expense by instructing counsel via the Bar Council's direct access facility. That, however, impacted upon their ability to obtain alternative representation at short notice, something that underlined the importance of flexibility on the part of the ET. The request for the hearing to be relisted would only lead to a very short delay; the first available date being only three working days after the current listing. There was, moreover, no suggestion that the ET or the Respondents could not accommodate the alternative dates suggested. It was, further, proportionate to allow the application: the importance of the interim relief applications to the Claimants was self-evident, as was the potential prejudice they would suffer if unable to be represented because of the ET's rigid listing. The Employment

Judge had appeared to consider that section 128(5) fettered his discretion; that was not the case and had given rise to an error of approach, see per Lord Browne-Wilkinson in **R v Secretary of State for the Home Department ex parte Venables** [1998] AC 407 at pages 496G-497C.

16. For the Respondents, it is objected that these do not amount to special circumstances. It had been open to the Claimants to seek to instruct an alternative representative under the direct access scheme or to seek other representation. An application for interim relief was necessarily designed to be heard quickly to ensure no prejudice to the Claimants' rights and their applications must have appreciated that point. It was contrary to those applications to now seek this postponement.

Discussion and Conclusions

17. The hearing of an application for interim relief is necessarily to be treated as a matter of urgency and there is an entirely correct expectation that the parties will ensure that they are available and will do everything to assist the ET in meeting the requirement that the application can be heard and determined with all due expedition. Moreover, there are good public policy reasons why the ET's ability to expedite the listing of such applications should not be hampered in any way, and those considerations will generally inform the EAT's approach on any appeal such as the present.

18. Those preliminary observations are informed by an understanding of what interim relief applications involve. More specifically, however, they are given statutory form by section 128 of the **ERA**, in particular by subsection (5). Given the expedited nature of an interim relief application hearing, it will often be listed in such a way - in terms of date and/or timetable - that it will be inconvenient for one or more of the parties. Section 128(5) makes clear that the

convenience of the parties is not, however, the issue: there will be no postponement unless there are special circumstances. That said, it is to be noted that the language used is that of "special", not "exceptional" circumstances (in contrast, for example, to the terminology used at Rule 30A(2) of the **ET Rules**). Furthermore, section 128(5) does not remove the ET's discretion to permit a postponement of the hearing; it informs the ET as to the kind of circumstances that must exist before a postponement is granted: they must be special, even if not exceptional.

19. Thus the question for the ET was whether special circumstances existed. In order to answer that question, the ET needed to actually determine what the relevant circumstances were. Carrying out that assessment, it would have been apparent that the circumstances included the relisting of the hearing to (potentially) a date less than five working days later; the particular difficulties arising from the fact that the Claimants had sought to save expense by instructing counsel under the direct access scheme; the apparent absence of any prejudice to the Respondents if the postponement was granted, in contrast to the prejudice that would arise for the Claimants, who would then be left without representation.

20. The ET here characterised the circumstances as arising from a "clash of commitments" and as giving rise to "inconvenience". It did not consider that to amount to a "special circumstance".

21. Traditionally, of course, it has been said that cases will not be listed for the "convenience of counsel". That expression does not refer to convenience in any normal sense of that term but it means that the prior professional commitments of representatives will not be permitted to dictate the listing of hearings in most cases; an approach that is necessary if Courts and Tribunals are to be able to manage their workload in a just and proportionate way. Here,

however, the Claimants were not complaining of what might be called the normal difficulties impacting from counsel's prior professional commitments, but from the particular difficulties they faced given (1) the very short notice of hearing and (2) the problems of finding alternative legal representation having instructed counsel under the direct access scheme. The former consideration plainly could not be special - it is inherent in an interim relief application - although it remains a relevant part of the factual matrix. The second point, however, was of a different nature. Although instructing counsel under the direct access scheme may not be an exceptional circumstance in modern times, it does give rise to special difficulties for the party concerned. Those are, moreover, difficulties that the overriding objective would suggest are relevant to the ET's consideration of its powers to postpone given that they plainly go to questions of saving expense and ensuring the parties are on an equal footing.

22. In my judgment, on the particular facts of this case, by failing to allow that there were special circumstances arising from the Appellants' instruction of counsel on a direct access basis, the ET fell into error. It unduly fettered its discretion and construed section 128(5) of the **ERA** too restrictively. Further, given the apparent lack of prejudice to the Respondents, the very short delay involved in the Claimants' requests and the fact that the interests of justice so overwhelmingly fell in favour of their application, I would go further and say this was a perverse decision. Adopting the correct approach in this case, there was only one answer, which was to allow the applications for a postponement together with the urgent relisting of the interim relief application hearings.

23. I therefore allow this appeal and duly exercise the powers of the ET, substituting a decision that the Claimants' applications for the postponement of the hearing due to take place tomorrow are allowed. It will be for the Regional Employment Judge to urgently relist those

A hearings, which will necessarily need to be expedited given the nature of the applications for interim relief.

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