Appeal No. UKEAT/0300/17/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 5 April 2018

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

MS F GRABE — APPELLANT

SYNOD OF GERMAN-SPEAKING LUTHERAN, REFORMED AND UNITED CONGREGATIONS IN GREAT BRITAIN & ANOTHER — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS FELICITAS GRABE (The Appellant in Person)
For the Respondents	MR SIMON FORSHAW (of Counsel) Instructed by: Taylor Wessing Solicitors 5 New Street Square London EC4A 3TW

SUMMARY

PRACTICE AND PROCEDURE - Postponement or stay

The Employment Judge did not err in law in declining the Claimant's application to adjourn these proceedings until after the completion of proceedings which she had brought against the United Reformed Church in 2012.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by Ms Felicitas Grabe ("the Claimant") against an Order of Employment Judge Grewal dated 7 July 2017. The key question which Employment Judge Grewal had to decide was whether there should be a lengthy stay of the proceedings on medical grounds.

The Procedural Background

2. The Claimant has brought two sets of proceedings before the Employment Tribunal. I will describe each of them.

3. The first set of proceedings arises from the Claimant's employment within the United Reformed Church between 2008 and 2012. These proceedings were commenced in 2012; there has been lengthy delay, in part because of the Claimant's health, in part, it seems, because of administrative issues. By a Judgment dated 13 March 2017 time limit issues were determined in the Claimant's favour. A preliminary issue was listed in September 2017 to determine whether she had the requisite employment status to pursue the claims. That was the position in July 2017.

4. Since July 2017, matters have moved on in those proceedings. By a Judgment dated 24 November 2017, Employment Judge Segal QC upheld her claim to have the requisite employment status. There has been no appeal against that Judgment. The proceedings ought to be moving towards a final hearing. However, no final hearing has yet been listed.

5. The second set of proceedings, the ones with which I am concerned, arise from the Claimant's employment by the Synod of German-speaking Lutheran, Reformed and United Congregations in Great Britain and a senior pastor in that organisation, Mr Buurma ("the Respondents"). Her employment was for a period in 2015, which began at some point in the summer and ended on or about 31 October 2015.

6. These proceedings were commenced on 24 February 2016. They were first listed for trial in October 2016 but this listing was adjourned at the Respondents' request for reasons, I am told, of witness and party availability. It was then listed in January 2017 but adjourned, principally by reason of the Claimant's ill health, but also because of an issue over the translation of documents. It was then listed for July 2017, but adjourned for the same reasons; see the letter of Employment Judge Grewal dated 7 June 2017.

7. In April 2017 the Claimant applied for the 2016 proceedings to be adjourned altogether until the completion of the 2012 proceedings. She supported that application with medical evidence. I will come to that medical evidence in a moment. The application was considered by Employment Judge Grewal at a hearing on 4 July 2017 and resulted in the Order dated 7 July 2017 under appeal. Employment Judge Grewal did not accede to the application to postpone the 2016 proceedings behind the 2012 proceedings. She listed the 2016 proceedings for January 2018.

8. Events have, again, moved on since that decision. By an Order dated 14 December 2017, Employment Judge Wade postponed the hearing again until May 2018, giving directions to deal with the translation issue. She said that the Order she was making was "by agreement as a pragmatic solution to a distracting problem" and that the Claimant was committed to the May

date. I note, however, that there is now an appeal to the Employment Appeal Tribunal against that decision and against a refusal to review it. That appeal, lodged on 19 March, has not yet been sifted and is not before me today.

The Medical Evidence

9. There is no doubt that the Claimant has suffered ill health for a significant number of years. There is a section in my bundle, which I need not describe in detail, setting out medical problems which the Claimant suffered from 2009 onwards. Her problems are both physical and more particularly to do with her psychiatric health.

10. There was correspondence from her GP when the proceedings were adjourned in January 2017. That correspondence is not in my papers, but it seems the GP said that the Claimant required four months to recuperate and start, or at least try, antidepressant medication. The adjournment of the 2016 proceedings until July, of course, allowed a gap of about six months before the next hearing; but there was an important hearing in the 2012 case in March and there were Orders for continuing preparation. As we shall see, it is a complaint now that there has been no opportunity for recuperation and the administration of antidepressants.

11. The Claimant relied on two particular letters in support of her application for a stay of the 2016 proceedings. The first is a letter of Elizabeth Smith, a Psychotherapist, dated 11 April 2017. She said:

> **"As Ms. Grabe's psychotherapist, I am writing to recommend the ordering of a stay in the second (2016) case until such a time as the first case in which she is also self-represented is complete. It would be challenging for any healthy person to do justice to two complex cases at the same time. Ms. Grabe faces health issues which have been documented and examined by the Tribunal, and because of which adjustments have been agreed to facilitate fair and just hearings.**
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> **I have been engaged in therapy with Ms. Grabe since 2011, meeting weekly for the most part. During that time she has been diagnosed by her doctors with eg reactive depression, trauma-induced anxiety, insomnia, Post Traumatic Stress Disorder, fibromyalgia. I observe these and their effects during therapy sessions. They have an impact on her ability to concentrate,**

fogging her brain, especially when she is under time pressure, which is why adjustments were agreed.

…

I have noticed there are repeated occasions in the second (2016) case since the Orders were given in July 2016 where timescales are not adhered to and the trauma responses of fear and paralyis [sic] are triggered, to the detriment of Ms. Grabe's health and ability to function. Unexpected changing of goals and deadlines is especially disabling as it repeats experiences which were part of the original trauma. When the process goes smoothly and the adjustments are in place, then she can function well enough to present her case.

It is clear to me that dealing with one case at a time would be a wise course of action to enable Ms. Grabe to do her part in ensuring a fair hearing. She would then be able to recover from the current burnout and mental paralysis and function more effectively. Accordingly, I recommend a stay of the second (2016) case, and that the adjustments are implemented at every point."

12. The second is a much shorter letter by Dr Gowribalan dated 13 April 2017. Dr Gowribalan said:

"I am writing to you with regards to the above patient who has suffered from depression and anxiety for a significant amount of years following work related stress. I understand she has two court cases running simultaneously and she is no longer coping under the stress and pressure of this. I think she would be able to cope better if one of the two cases could be postponed until the one case has been adequately dealt with.

She has seen the GP multiple times with worsening symptoms of anxiety, agitation and suspected faints as a result of the pressure of the court cases. I am concerned her health will continue to deteriorate if a compromise is not reached with regards to her court cases."

13. That was the state of the medical evidence before Employment Judge Grewal. Again, there have been developments since.

14. There is a letter by Dr Garlick, dated 6 December 2017. He says:

"I confirm once again that Felicitas has been issued with statutory sick notes continuously since early 2011. She has been diagnosed with both physical and mental disabilities and chronic health conditions e.g. severe Fibromyalgia, Insomnia, Post Traumatic Stress Disorder.

I repeat Felicitas needs both cases to be heard and has proven to be able to deal with the Tribunal's demands whenever the very few required medical adjustments are in place. However, the German case seems not to have honored [sic] this requirement for the past year and consequently Felicitas' health has severely declined. I am concerned that no medical request including those of a stay of this case and time for Felicitas to restart a psychopharmaceutical medication were dealt with. It seems to me she gets instead ordered to do more work than even a healthy person could manage. Constantly trying to do as the Tribunals ask her to she has not been able to fight any, often serious infections and mentally she is totally exhausted."

15. There were also further letters of Ms Smith dated 12 December 2017 and 5 March 2018. It is difficult to do justice to the 2018 letter without reading it in full, but it will, I think, suffice to quote two paragraphs:

> **"I observe a deterioration in Miss Grabe's health in the 11 months since then. She had two hospital admissions, in November 2017 suffering from septicaemia and again in February this year with anaphylactic shock, both life threatening conditions and both, as I understand it in the view of the doctors who treated her, brought on by stress and consequently her body's immune system being unable to fight anymore. Also since she has been unable to take a break due to the pressure of completing tasks in two ET cases, she has had no chance to recuperate or to take the couple of months required for her GP to prescribe antidepressants for her and monitor their effectiveness. It is evident in my regular contacts with Miss Grabe as her psychotherapist that she is becoming more unwell physically and psychologically.**
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> **…**
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> **I believe the Tribunal would be well served by healthy management of this case cutting across these repeating cycles and debilitating processes. In addition overall case management of two ongoing cases by establishing complete separation in time by way of a stay would in my view remove from Miss Grabe a massive source of stress and confusion. …"**

16. This medical evidence is more powerful than anything which was before Employment Judge Grewal. It re-states, specifically, the need for an opportunity to recuperate and to try antidepressants; and it indicates the impact of the litigation upon her.

The Reasons of the Employment Judge

17. The Employment Judge's Reasons, given in summary form as was appropriate to a case management decision at a Preliminary Hearing, were as follows:

> **"3. The Claimant applied for the current case to be listed for a hearing after the conclusion of the 2012 case. The Respondent opposed that application and asked for the current case to be listed for hearing as soon as possible. Having vacated the July [hearing] date, the earliest that the Tribunal can now list the case for a hearing is in January of next year. There is no clear indication as to when the 2012 case will conclude. The preliminary hearing on 13 and 14 September is to determine the Claimant's employment status and whether the Tribunal has jurisdiction to consider any of her complaints. Depending on the outcome of that hearing, one or both sides may appeal to the higher courts. We do not know at this stage when the claim will be heard (if the Tribunal has jurisdiction to consider any of the claims) and when any such hearing would conclude. There is no factual overlap between the two cases and each case will be decided on the basis of the evidence adduced in relation to that case. The outcome of the 2012 case will have no impact on the present case.**
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> **4. In deciding when to list this case, I took into account the overriding objective (which provides, among other things, that the Tribunal should ensure that the parties are on an equal footing and should avoid delay), the Claimant's medical condition and the Tribunal's duty to make reasonable adjustments and both parties' Article 6 rights to a fair and public hearing within a reasonable time. I had to balance the Claimant's need for additional time to prepare and the Respondent's right to have the case against it heard without delay and within a reasonable time.**

5. Having considered all the above, I concluded that the fairest way to deal with this case was to postpone it for six months and not to make any orders, with which the Claimant had to comply, until September 2017. That would give her additional time and alleviate the pressure on her and would avoid excessive and unreasonable delay."

18. When this appeal came under Rule 3(10) of the **Employment Appeal Tribunal Rules** before HHJ Tucker, she asked questions of the Employment Judge under the EAT's **Burns/Barke** procedure. The Employment Judge answered on 13 December. She said:

"1. I took into account the medical evidence that the Claimant found it difficult to deal with two cases at the same time and that dealing with one case at a time would be a wise course of action, and took the following steps to ensure that she would only be dealing with one case at a time -

(a) On 7 June 2017 I adjourned the hearing in this case (the second case) which had been listed to take place from 4 to 13 July 2017 (see attached letter sent to the parties on that date);

(b) At the preliminary hearing on 4 July, I did not make any orders for the second case with which the Claimant had to comply before 6 October 2017. The preliminary hearing in the 2012 case (the first case) was due to take place on 13 and 14 September 2017. Therefore, between 4 July 2017 and 13 September 2017 the Claimant would only have to work on the first case.

(c) I listed the second case for hearing … from 24 January to 2 February. Therefore, from 15 September 2017 to 23 January 2018 the Claimant would have to work only on the second case (see attached note of the preliminary hearing on 4 July 2017).

2. I informed the Claimant that EJ Snelson (who was case managing the first case) and I were liaising, and would continue to liaise, to ensure that she did not have to work on or prepare for both cases at the same time. I informed her that … if the first case were to proceed after the preliminary hearing in September, in listing and making case management orders EJ Snelson would take into account that she was preparing for the second case until the beginning of February 2018."

The Appeal

19. In her submissions to me today, the Claimant argues that Employment Judge Grewal did not take proper account of her medical evidence which had said it was advisable to stay the 2016 proceedings until after the 2012 proceedings. She has directed my attention to articles about the way Courts should assist people who suffer from disability. It is, she submits, the role of the EAT to ensure that there is a level playing field for people with disability. She submits that the key adjustment she requires is time. The 2012 case has been managed in such a way as to give her time, but Employment Judge Grewal, in managing the 2016 proceedings, lost sight of the need attested by her medical evidence to give her that time. The effect of Employment

Judge Grewal's direction was that she, the Claimant, was under the pressure of preparation or actual hearings continually. The Employment Judge never considered or allowed a break as the medical evidence had suggested and, in any case, ought to have adjourned the 2016 proceedings until after the 2012 proceedings.

20. On behalf of the Respondent, Mr Forshaw submits that there was no error of law in the approach of the Employment Judge. She plainly took account of the medical evidence; but the overriding objective, to which the Employment Judge also expressly referred, required the Employment Judge to take account of other factors as well. It would have been perverse for the Employment Judge, in the circumstances obtaining in July 2017, to have adjourned the 2016 proceedings in the manner suggested. The Employment Judge was never asked, in July 2017, for a short adjournment for antidepressant medication to be administered. She cannot be faulted for failing to consider that point. The decision of Employment Judge Grewal is in any event academic, having been overtaken by that of Employment Judge Wade in December. In any event, there is nothing to prevent the Claimant from making a further application to the Employment Tribunal, relying on medical evidence about her worsening condition.

21. I cannot emphasise highly enough that the role of the EAT is limited by Parliament. It is empowered only to determine appeals on questions of law arising from decisions of Employment Tribunals. Case management decisions, such as whether to grant an adjournment and for how long, are matters for Employment Judges to decide. They involve exercises which are essentially discretionary in nature, where an Employment Judge has to weigh up a variety of factors and reach a conclusion. The EAT can interfere only if the Employment Judge has applied wrong legal principles or if the Employment Judge has altogether left out of account something which she was legally bound to take into account, or if she has applied importance to

A something which was legally irrelevant, or reached a perverse decision. In any other case, the decision of the Employment Judge must stand.

B 22. I would add that these principles apply to applications for adjournment as much as they do for any other aspect of case management: see **O'Cathail v Transport for London** [2013] ICR 614. Where issues of health are concerned, applications for adjournment and other related case management matters often raise difficult issues where the competing interests of the C parties and the interests of justice must all be borne in mind by a Judge. There is often no single correct answer.

D 23. I have listed the different grounds upon which there can be an appeal to the EAT against such a discretionary decision. I do not think any of the grounds are made out here. The Employment Judge applied correct legal principles derived, in particular, from the overriding objective set out in Rule 2 of the **Employment Tribunal Rules 2013**. The overriding objective E required her, of course, to give fair consideration to the Claimant's state of health, but it also required her to avoid delay, so far as compatible with proper consideration of the issues.

F 24. To my mind the Employment Judge followed that approach. She had regard to the medical evidence - as she expressly stated in her Reasons and confirmed more fully when the EAT made its **Burns/Barke** request. The only point which has given me pause for thought is G that there had been, in January, a letter asking for a break for recuperation and administration of medication; this had never happened. But it is important to keep in mind that Employment Judge Grewal was not being asked to grant a short break for the administration of H antidepressants; she was being asked to adjourn the case for a lengthy and, at that time, indeed still, indefinite period; and the medical evidence specifically relied on did not repeat the request

for a period for antidepressant medication to be administered. I do not think the Employment Judge can be faulted for failing to consider this point, given the very different and much more radical application for adjournment which was being advanced before her.

25. I can see no error of law in the approach the Employment Judge took, which was explained further in her December letter. She sought to case manage the two sets of proceedings so that hearings were well spaced out. She devised a procedure which meant that from July to October the Claimant was relieved from Orders in the 2016 proceedings. Given the limitations on her ability to predict the future, this seems to me to have been an entirely proper course to take. I do not think that Employment Judge Grewal reached an illegal or perverse decision.

26. It follows that the appeal will be dismissed; but I have three further comments.

27. Firstly, I make it clear that it is open to the Claimant to make a further application to the Employment Tribunal for an adjournment based on the updated medical evidence which I have seen. The letter from Ms Smith is a powerful one and helpful to her case. Ms Smith is a psychotherapist; she will not be the treating doctor who will prescribe antidepressant medication. The Claimant would be wise, also, to have evidence from a medical practitioner who will treat her. This is because, if the Employment Tribunal is going to adjourn the May hearing or accedes to a request to postpone the 2016 proceedings even further, the Employment Tribunal will want to know the timescale for her treatment.

28. My second comment is this. I note that the 2012 proceedings have not yet been given a final hearing date. It is not entirely clear to me why this is; if I have understood the Claimant

correctly, it may be that there is an application by her to amend which has to be determined. I quite understand that different Employment Judges may need to deal with final hearings, which are lengthy hearings. I do think it might be helpful if the same Employment Judge dealt with case management in both sets of proceedings; though that is not a matter for me - it is a matter for the Regional Employment Judge.

29. I would finally say a word for the Claimant's benefit about delay generally. There are good reasons in her interests why Employment Judges seek to avoid delay; here are two of them. Firstly, delay may imperil her case. If there is long delay and if the Respondents are prejudiced by delay, there may come a time when a fair trial is not possible. This is a matter which she should bear carefully in mind. Secondly, the longer the proceedings go on, the more difficult it may be for her to put issues behind her and move on with her life. Experience shows that it is often beneficial to litigants to deal with litigation as soon as they can and move on. These are matters which the Employment Judges will have had in mind. They will not have had them in mind in order, in any way, to do harm to her but because the avoidance of delay is as much in her interests as it is in the interests of anyone else.

30. In all of this, of course, her health must be balanced into the equation and that is why, as I say, she has a right to make an application to the Employment Tribunal based on the updated material which I have seen which relates to her current state of health and it is why, as I have said, she would be wise to supplement that with some careful material from the doctor who is treating her or will treat her.

31. There will be an expedited transcript of this Judgment, the expedited transcript of the Judgment will go to both parties; it will also go to the Regional Employment Judge.