Appeal No. UKEAT/0074/18/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 1 November 2018

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

CITY OF LONDON CORPORATION APPELLANT

MR L McDONNELL RESPONDENT

Transcript of Proceedings

JUDGMENT

© Copyright 2018

APPEARANCES

For the Appellant	MS I OMAMBALA (of Counsel) Instructed by: The Corporation of London Comptroller & City Solicitors Department PO Box 270 Guildhall London EC2P 2EJ
For the Respondent	MR L McDONNELL (The Respondent in Person)

SUMMARY

PRACTICE AND PROCEDURE - Postponement or stay

Following a Liability Hearing, the Respondents were found liable for unfair dismissal. They appealed against that finding to the Employment Appeal Tribunal ("EAT") and the appeal was allowed through the sift and directions given.

Following directions being given by the Employment Tribunal ("ET") on Remedies, the parties were given nine working days' notice of a Remedies Hearing. The Respondents immediately applied for a postponement of the Remedies Hearing until after the hearing of the Appeal mainly on the grounds that counsel and the HR representative were not available for the scheduled Remedies Hearing. The Employment Judge ("EJ") simply responded by saying that he refused the application because the existence of the Appeal was not a sufficient ground for postponing a Remedies Hearing and that further delay was not in the interests of justice. The Respondents immediately applied for a reconsideration pointing out that the existence of the Appeal was not the primary ground for the application and reminding the EJ of counsel's availability. The EJ responded in almost identical terms.

The Appeal was allowed: the EJ had either failed to engage with the application as he should have or had given inadequate reasons for his decision. The matter was remitted to the Regional EJ to decide in the light of all relevant matters when the Remedies Hearing should take place.

HIS HONOUR JUDGE SHANKS

Introduction

1. This is an Appeal by the City of London Corporation against the refusal of Employment Judge Hodgson in the Central London Employment Tribunal in March 2018, to adjourn a Remedies Hearing which had been arranged for 3 to 5 April 2018. The President of the Employment Appeal Tribunal ("EAT") allowed the Appeal to proceed on the sift very urgently on 27 March 2018 but it was not possible to arrange for a hearing of the Appeal before 3 April 2018. However, a Tribunal Judge (not EJ Hodgson who was apparently away), having been notified of the President's Decision on the sift, postponed the Remedies Hearing and it has remained in abeyance ever since.

2. In that sense, this Appeal is really pretty academic. However, it was set down for a Full Hearing today and I have heard both parties and read the documents and because what I say may impact somewhat on the future conduct of this case, I will give a full Judgment.

3. The Claimant was employed by the City of London Corporation on 5 August 2005 as a Senior Surveyor. Over 10 years later on 11 May 2016, he was dismissed. On 20 August 2016, he brought unfair dismissal proceedings in the ET.

4. On 4 November 2016, there was a Preliminary Hearing. It was clear at that stage if not before that the Claimant was relying on a whistleblowing claim, i.e. a claim under section 103A of **the Employment Rights Act 1996,** as well as a claim of ordinary unfair dismissal under section 98. The case was set down for a Hearing between 30 January 2017 and 6 February 2017 to deal with Liability and (if possible) Remedy. The Hearing took place; it only covered Liability.

A

The Claimant was successful and on 7 April 2017, full Reasons were sent out for the Judge's Decision that he had been dismissed unfairly both on the basis of section 98 and specifically on section 103A.

B

5. On 17 May 2017, the City of London Corporation put in a Notice of Appeal against the Liability Judgment. Unfortunately, it was not sifted until 11 August 2017 when Judge Eady said that the Appeal itself should be listed for a Preliminary Hearing.

C

6. In the meantime, on 7-9 August 2017, there was a Hearing to deal with Remedies which in fact only dealt with the question of reinstatement or reengagement. The Claimant failed on his

D

application that he should be reinstated or reengaged. An oral Judgment was given but Reasons were requested and those Reasons were delivered on 9 October 2017.

E

7. On 20 December 2017, directions were given for the Remedies Hearing in relation to compensation. There is in Mr McDonnell's bundle at document 48 a copy of these directions which comprise simply a letter to the parties signed by an official setting down a timetable; this is one of the documents that, it seems to me, probably should have been in the bundle prepared

F

by the Corporation for the Appeal. The directions required first that the Claimant produce a Schedule of Loss by 25 January 2018. It required the Respondents to prepare a single joint bundle of documents and that was to be done by a process which was to end on 9 March 2018 with the

G

Respondent providing the Claimant with a complete index to the paginated bundle. The parties were to exchange witness statements on 16 March 2018 and they were to exchange skeleton arguments by 23 March 2018. Unfortunately, no actual date was given for the Remedies Hearing although in the ordinary course that timetable would have accommodated a Hearing in April

H

2018. The Claimant says that he provided his Schedule and witness statement in time. He also

A

suggested the Respondents had not prepared a witness statement, but I have been assured today that they had prepared their witness statement for 16 March 2018 as required by the Order.

B

8. In the meantime, on 24 January 2018, the Preliminary Hearing in the EAT took place before Mr Justice Langstaff. He allowed the Appeal to proceed and gave detailed directions for the evidence to be obtained as to what happened in front of the EJ at the Liability Hearing and for the EJ to make comments and so on.

C

9. Following that Hearing, there was an application on 26 January 2018 by the Corporation to postpone or stay the Remedies Hearing. Again, I learnt of this from a document which is in

D

Mr McDonnell's bundle at document 51 and I would not have been aware of it from simply reading the Appellant's bundle. The application was on the basis that the Liability Appeal had been allowed through the sift on the Preliminary Hearing, and it did not make sense to have a

E

Remedies Hearing which may prove of no use in the end and may waste money. The application was apparently refused but I have not seen from either side any evidence of the Judge's decision, although I was told that it was extremely brief and simply said something to the effect that the existence of an Appeal does not mean the Remedies Hearing should not go ahead.

F

10. On 9 March 2018, Ms Omambala, who represented the Corporation throughout and has represented them very ably today, made a 34 page affidavit in support of the Appeal as a

G

consequence of the directions given by Mr Justice Langstaff. This dealt with what had happened at the Liability Hearing because it was thought that it would be relevant for the Hearing of the Appeal. I asked her about this at the outset because I was concerned that it meant that she could

H

no longer represent the Corporation and that impacted on the application for an adjournment which I will come to in just a moment. She told me she considered that it did not prevent her

continuing to represent the Corporation and, given the nature of the evidence she was giving, which was really about what had happened procedurally at the Liability Hearing, that seems to me probably right, although I was concerned about it for a moment.

11. On 16 March 2018, the Tribunal sent out a Notice of Remedy Hearing and it stated that the Hearing would take place at Victory House on Tuesday and Wednesday, 3-4 April 2018. That was, in fact, nine full working days after the date of the Notice and, as I say, it must have been at least within the contemplation of the parties that, given the timetable, the Remedy Hearing should take place in April.

12. However, on 19 March 2018 the Corporation put in an application running to 15 paragraphs seeking to postpone the Remedy Hearing: that document is at pages 133-135 of the main bundle in this appeal. It said, first, that there had been only nine working days' Notice; it pointed out that the claim as put forward by the Claimant was for a large sum namely, nearly £600,000 (in fact, he tells me today that it is £2.5 million). Then it was said that Ms Omambala who had been representing the Corporation throughout and was familiar with the complexities of the claim and so on, would not be available because of a pre-existing judicial commitment (she has told me today that it was a Hearing of the GMC on which she is a Legal Chairman and that had obviously been arranged well before the Notice of the Hearing was sent out); it went on to say that the Corporation would be prejudiced by having to instruct an alternative counsel at short notice and it referred to the high costs involved. It then referred again to the Appeal which was going on and it said that the Hearing of the Appeal was likely to take place between May and July 2018 (although that was rather optimistic, I accept that that was the information that they were in receipt of at the time). Then they made the point again about the Remedies Hearing being

A

a waste of time if the Appeal was successful and that that would throw costs away which could not be recovered. They then referred to the overriding objective and paragraph 14 said this:

> **"14. Accordingly, the Respondent respectfully invites the Employment Tribunal to postpone the scheduled Remedy Hearing in this matter pending the determination of the appeal to the Employment Appeal Tribunal. Such an approach would be in accord with the overriding objective and represent a proportionate and practical solution having regard to the complexity and importance of the issues which arise for determination."**

B

Then it says, "Given the imminent Hearing, it is respectfully asked that this application be placed before an EJ as a matter of urgency." The Corporation were therefore asking for the postponement of the Remedies Hearing pending the determination of the Appeal; that may, to some extent, have influenced the way the EJ dealt with it, but clearly the points being made had to be addressed and, for example, it may have been that the right answer was to re-fix it for a date when counsel was available or something like that.

C

D

13. On 22 March 2018, the Corporation wrote a further email to the ET which pointed out that their HR Representative, Ms Afoakwa, would be unable to attend the Tribunal on 3 April because she had a pre-existing hospital appointment. She was the Senior HR Manager and it was said that her presence was necessary for the Hearing and she was the signatory of a witness statement that had been prepared. So that additional factor was added to the reasons why the scheduled Remedies Hearing should be postponed.

E

F

14. The following day, on 23 March 2018, a letter came from the Tribunal which said this:

G

> **"Employment Judge Hodgson has considered your request to postpone the hearing and has refused it.**
>
> **The Judge's reasons for refusing the request are:**
>
> **the fact that there is an appeal is not sufficient grounds to prevent the remedy hearing proceeding. Further delay in this case is not in the interests of justice.**
>
> **The case remains listed for hearing on 3 to 5 April 2016."**

H

A

15. The same day, the Corporation asked for a reconsideration of that refusal and made it clear that existence of the Appeal was not the primary ground for seeking the postponement. They expressly reminded the Judge of Ms Omambala's availability. The response to that was sent by the Tribunal on 26 March 2018 and was almost identical to what was sent out on 23 March and it just says this:

B

> **"I refer to your letter of 22 March.**
>
> **Employment Judge Hodgson has considered your request to postpone the hearing and has refused it.**
>
> **The Judge's reasons for refusing the request are the fact that there is an appeal is not sufficient grounds to prevent the remedy hearing proceeding. Further delay in this case is not in the interests of justice.**
>
> **The case remains listed for hearing on 3 to 5 April 2018."**

C

D

16. As mentioned previously, an Appeal was launched immediately and it was sifted by the President. She considered that there was an arguable Appeal. There was no time for a Hearing of the Appeal but the Remedies Hearing was adjourned anyway at the invitation of the EAT. The grounds of the appeal were that the ET had failed to take into account material factors in reaching its decision on the postponement application. In particular, the Tribunal had failed to engage with the grounds upon which the application for postponement was made and/or it had reached a decision which was perverse.

E

F

17. Meanwhile, the main Substantive Appeal has drifted and until a few moments ago it had not been listed for a Full Hearing. When I saw the papers in this Appeal, I restored it to be listed today for directions.

G

18. As I say, the grounds for this appeal are that the Judge failed to engage with the postponement application. Reasons can, of course, be very brief, particularly in relation to case management decisions, but it seems to me obviously correct that in this case the Judge has simply

H

A

not given sufficient reasons for the parties or the EAT to see what he took into account when he decided not to allow an adjournment or postponement of the Remedies Hearing or whether he exercised his discretion judicially. I cannot say that his decision was perverse because, given the history, it may have been legitimate for him to have insisted that the Remedies Hearing go ahead

B

even notwithstanding Ms Omambala's availability but it was necessary for him to engage with the points being raised by the Corporation in favour of an adjournment and explain why he rejected them. Mr McDonnell, who has represented himself today, did not really have an answer

C

to this point, though he no doubt takes the view that the Respondents were playing for time and ought not to have been granted an adjournment.

D

19. Given those conclusions, it seems clear to me that the Appeal must be allowed on the basis that the EJ failed to engage with the grounds for the application, or if he did engage with them, he failed to give adequate reasons for his decision. Although we are now in November,

E

the matter must obviously be remitted to the ET to decide when the Remedies Hearing should now take place. There is an issue between the parties as to whether EJ Hodgson or someone else should decide that issue. It seems to me having thought about it, that EJ Hodgson has, indeed, unfortunately demonstrated in the Reasons given in March 2018, and in particular in the Reasons

F

given in response to the Reconsideration Application, an unwillingness to consider the matter with an open mind. In those circumstances, I think the right course must be to remit the matter to another EJ in London Central to decide as soon as possible, in the light of the position as it

G

now is, when the Remedies Hearing should proceed. There was a suggestion it should be the Regional EJ and unless Mr McDonnell has submissions to the contrary, I would be willing to specify that it should be the Regional EJ that deals with it.

H

20. It will be for the parties to make whatever representations they think fit on when the Remedies Hearing should now take place and I am not going to add anything further to this Judgment which may influence them or the Regional EJ in that decision except for this one possibly relevant point. As I have said, I called yesterday for the file in the Substantive Liability Appeal so that I could give some directions so that the case was brought on for Hearing as soon as possible. The parties basically agreed that that Appeal is ready for Hearing and I asked for the office to give us the earliest available date which is suitable for everybody and that date is 1 February 2019. I have ordered that the Substantive Liability Appeal is listed at the EAT to be heard on that date. It has already been given a Category A listing and a one-day time estimate.

21. I mention one other application made by Mr McDonnell relevant to the directions for the Substantive Appeal. He said that the Appeal should be heard in another building, not in Fleetbank House where the EAT sits, in effect because the City of London Corporation own this building and also because some of the witnesses are high-ranking City Officials and they will attend the Appeal Hearing. All I say, is that I am quite satisfied that the venue of the Hearing will have no impact on the fairness of the proceedings. I can see no basis on which any reasonable well-informed observer would consider that that could conceivably be the case. I reject the application. Therefore, the Hearing will take place in the normal way at Fleetbank House.

22. Mr McDonnell raised complaints about the bundle and the conduct of the Respondents in this case in relation to the bundle. In fact, it appears that the Corporation's lawyers prepared the first draft, sent it to Mr McDonnell, he sent back quite a bundle of documents that he said should be put in the bundle and the Corporation's lawyers responded by saying that they were irrelevant and they would not put them into the normal bundle for the Appeal. They may have been wrong in their view on some of those documents which may have been helpful and perhaps came within

A

the rubric of documents that should have been included. I have mentioned two of them, but they advised Mr McDonnell what to do. They said he should apply to the Registrar if necessary to put in his own bundle. That is what he did. The Registrar allowed him to put his documents before

B

me, they were before me, so as things have turned out, no harm has been done. Although there may, as I have said, be some documents which could or should have been included, I am not suggesting that the Corporation's solicitors were behaving in any way improperly. They did exactly the right thing by advising Mr McDonnell what to do and he did it and no harm was done

C

as I have said.

23. I finally record that Mr McDonnell stood up and abruptly left the court room while I was

D

delivering this judgment at the point when I mentioned that the Hearing of the Substantive Appeal would in the normal way take place in Fleetbank House. He has therefore chosen not to be here to say anything more, in particular about whether the matter should be remitted to the Regional EJ.

E

F

G

H