Appeal No. UKEAT/0256/18/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 15th February 2019

Before

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

(SITTING ALONE)

RINGWAY INFRASTRUCTURE SERVICES LTD — APPELLANT

MR T J CONLON — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ANTONY SENDALL Messrs Goodyear Blackie Herrington Solicitors 7/8 Innovation Place Douglas Drive Godalming Surrey GU7 1JX
For the Respondent	MR THOMAS JAMES CONLON (The Respondent in Person)

SUMMARY

PRACTICE AND PROCEDURE - Application/claim

PRACTICE AND PROCEDURE – Striking-out/dismissal

PRACTICE AND PROCEDURE – Postponement or stay

PRACTICE AND PROCEDURE – Bias, misconduct and procedural irregularity

The Employment Appeal Tribunal allowed the Respondent employer's appeal against a decision of the Employment Tribunal made on paper without a hearing. The effect of the order was to postpone the hearing of the Claimant employee's application for reconsideration of an Order striking out his claim for breach of an Unless Order, indefinitely, at the option of the Claimant employee. The Employment Appeal Tribunal allowed the appeal, holding, in short, that the Order had been made in a way that was materially irregular, and that it was irrational.

The Claimant employee attended for part of the hearing of the appeal. He contended that the language of the interpreter who had been provided (Irish Gaelic) was not his first language, and that his first language was Breton Gaelic. The Employment Appeal Tribunal heard evidence from him. It rejected his claims about his first language, and that he needed an interpreter in order to take part in the hearing of the appeal. It refused his application for an adjournment for a Breton Gaelic interpreter to be provided. He then absented himself from the hearing, and the Employment Appeal Tribunal decided the appeal without the benefit of his oral submissions.

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

11:36 – 12:00: Evidence of Mr Conlon

MR CONLON: I do solemnly sincerely and truly declare and affirm that the evidence I shall give shall be the truth, the whole truth and nothing but the truth.

ELISABETH LAING J: Right, Mr Conlon, what is your first language please?

MR CONLON: Breton Gaelic.

ELISABETH LAING J: And how does that come about?

MR CONLON: Because my grandparents were Canadian Scots and they passed the language on to my parents.

ELISABETH LAING J: And is that your grandparents on both sides or on your mother or father's side?

MR CONLON: Both sides.

ELISABETH LAING J: Alright. And where were you brought up?

MR CONLON: Oranmore, County Galway.

ELISABETH LAING J: What was the language of instruction in the school or schools that you attended?

MR CONLON: It was both Breton by tutor and Irish Gaelic.

ELISABETH LAING J: And did you go to lessons with other pupils that were conducted in Irish Gaelic.

MR CONLON: Yes, I did your Honour.

ELISABETH LAING J: What was the language of instruction in your secondary school?

MR CONLON: It started out being Irish, it started out being Gaelic and towards to end of secondary school I started getting into English.

ELISABETH LAING J: When you say Gaelic do you mean Irish Gaelic or Breton Gaelic?

MR CONLON: It was mostly Breton but it started to become more Irish Gaelic at that point.

ELISABETH LAING J: And how did it come about that most of the language of instruction in your Irish school was Breton Gaelic?

MR CONLON: I don't understand the question your Honour.

ELISABETH LAING J: Well, you were at an Irish School in Ireland how was it that you were mostly taught in Breton Gaelic?

MR CONLON: Because I had tutors.

LAING J: And were you taken out of classes for the entire week and taught by tutors?

MR CONLON: No, it was a mixture during the day you would have a morning and then an afternoon.

ELISABETH LAING J: What do you mean you would have a morning and then an afternoon?

MR CONLON: There would be a morning of lessons for example and then in the afternoon I would have Breton tutor tuition.

ELISABETH LAING J: So, a morning of lessons in Irish Gaelic?

MR CONLON: Yes.

ELISABETH LAING J: Alright, could you look at page 80 in the bundle please. Do you have that?

MR CONLON: Yes, I do your Honour.

ELISABETH LAING J: That is a letter that your solicitors wrote to the Tribunal. In the second paragraph they say that you obtained full honours at leaving certificate equivalent to British A level. Do you see that?

MR CONLON: Yes, your honour.

ELISABETH LAING J: Is that true?

MR CONLON: Yes, that is true.

ELISABETH LAING J: Alright. What subjects were those in?

ELISABETH LAING J: I am having to go from memory. One of them was Chemistry, the other one was Physics, Mathematics. I don't remember the fourth.

ELISABETH LAING J: Alright. What was the language of instruction?

MR CONLON: It was both Breton and Gaelic and some English as well.

ELISABETH LAING J: Alright. It also says you have an HND in Civil Engineering. Is that true?

MR CONLON: I have HND equivalent. I have a National Certificate in Civil Engineering, British equivalent HND.

ELISABETH LAING J: And where did you get that qualification?

MR CONLON: Galway.

ELISABETH LAING J: What institution?

MR CONLON: The RTC.

ELISABETH LAING J: What is the RTC?

MR CONLON: Regional Technical College.

ELISABETH LAING J: Alright. Okay. And how long was the course?

MR CONLON: Two years.

ELISABETH LAING J: And did you in the course of that two-year period come across a book called the "The Art of Business Communication" by Nikki Staunton?

MR CONLON: Yes, I did your Honour.

ELISABETH LAING J: And in what language did you read that?

MR CONLON: It was Gaelic. Irish Gaelic.

ELISABETH LAING J: Right, it was in Irish Gaelic.

MR CONLON: Irish Gaelic.

ELISABETH LAING J: And you were able to understand that book?

MR CONLON: I was able to study it so yes, I was able to understand it.

ELISABETH LAING J: Because you recommended it to a colleague, didn't you, when you thought that the colleague had communication problems.

MR CONLON: You are referring to Hamid Kassrai. Yes, I did. An Iranian National.

ELISABETH LAING J: Okay. Could you turn to page 86 in the bundle please? Now we have already looked at this e-mail, haven't we? This is an e-mail that you sent on the 29 January 2017? Is that right?

MR CONLON: I am just studying it please your honour.

ELISABETH LAING J: I have read it out to you.

MR CONLON: I am just taking a moment to read it right.

ELISABETH LAING J: Alright.

MR CONLON: Yes, your honour. I wrote that.

ELISABETH LAING J: You did write that. Okay. Can I just ask you about this sentence? Turn to the bottom of page 86 "these are the facts regarding my Irish language needs".

MR CONLON: Yes.

ELISABETH LAING J: Now a person reading that might think, might they not, that by that you meant Irish Gaelic?

MR CONLON: To which paragraph are you referring?

ELISABETH LAING J: Please look at the bottom of the page Mr Conlon. Three lines up from the bottom of the page.

MR CONLON: Oh, page 87?

ELISABETH LAING J: No, page 86 please. You see the following "these are the facts regarding my Irish language needs".

MR CONLON: Yes, I see that.

ELISABETH LAING J: My question is a person reading that would think, would they not, that you are referring Irish Gaelic.

MR CONLON: But why do you say that your Honour, I don't see that.

ELISABETH LAING J: I see the word Irish. Your position about Breton Gaelic is that it is a dialect of Scots Gaelic. So, what is the word 'Irish' doing?

MR CONLON: If you look at the main paragraph your honour I say of the Gaelic language aspects. So, it was a poorly worded sentence perhaps. This is two years ago. Because in the paragraph above I say Gaelic language.

ELISABETH LAING J: Yes. Yes. Alright.

MR CONLON: On the next page in the paragraph it says it is now clear from the above that my Gaelic culture is beyond doubt.

ELISABETH LAING J: Yes, and you say that by that you meant 'Breton Gaelic'?

MR CONLON: That is what I meant yes.

ELISABETH LAING J: Okay.

MR CONLON: Because as I said earlier what does it mean to an English person who is reading this letter. Whether the word Irish or Gaelic is used would they understand the difference.

ELISABETH LAING J: Well some might say, and perhaps I could comment on this, that you were claiming that you needed an interpreter. Would it not have been important to be precise about what language you required interpretation from?

MR CONLON: But as I said your honour I specifically asked for the type of interpreter in 2016. I am not sure was there a need to repeat that and how many times do I need to repeat that.

ELISABETH LAING J: You are unable to point to any document in which you are specific.

MR CONLON: I have to check your honour. But I believe in 2016 I emailed the court and I also made Ringway aware in 2014 about the type of Gaelic language.

ELISABETH LAING J: Alright. Okay I have not got any further questions to ask.

MR SENDALL: Madam I think you have asked most of the questions I wanted to ask but just a couple of quick questions. You said in a couple places that you started speaking English in secondary school. Is that correct?

MR CONLON: Again, I am having to go back almost 35-40 years ago. I started to speak English towards the end of secondary school to some extent.

ELISABETH LAING J: Sorry, just slow down please, I would like to get a note of that. "35-40 years ago I started to speak English towards the end of secondary school". Sorry I am just getting a note of that.

MR CONLON: Yes, your honour.

MR SENDALL: Page 80 in the bundle. A letter from Hancock Quins.

ELISABETH LAING J: Sorry just please give us a moment to find that Mr Sendall.

MR SENDALL: It says in the second paragraph on that page by bottom of hole punch, the middle of that paragraph "our client did not speak English until the age of 12 when he commenced attendance at his secondary school". Is that correct?

MR CONLON: I am not finding that paragraph.

MR SENDALL: Sorry are you on page 18 of the letter of Hancock Quins?

ELISABETH LAING J: The second paragraph, Mr Conlon, of that letter.

MR CONLON: Yes, I have it now.

MR SENDALL: Is that what you told your solicitors. That you began to speak English when you were 12 when you commenced attendance at secondary school?

MR CONLON: I don't remember precisely what I told him but trying to recount the facts today it was towards the end of secondary school.

MR SENDALL: It is unlikely your solicitor made that up, is it?

MR CONLON: I don't know [Mr Blackie] what he made up or not but what I am saying to you is that I started to learn English towards the end of secondary school but if even in the Gaeltacht

A some people speak English around you so for me to give an exact day when I started speaking English, I am sorry I don't know the answer to that.

MR SENDALL: How much of your secondary education was conducted in English?

MR CONLON: Very little.

B **MR SENDALL**: Very little but somewhat?

MR CONLON: Towards the end. It is a five-year course but towards the end.

MR SENDALL: Does that mean that some lessons were exclusively in English?

C **MR CONLON:** No, it was never exclusively English. Nothing was ever exclusively English.

MR SENDALL: And it is right say isn't it that at no time in these proceedings until today have you mentioned this particular dialect of Gaelic which you speak. Is that correct?

D **MR CONLON:** That is not correct and I have already explained that previously the Tribunal were made aware and Ringway were made aware but I would have to check, I believe it was around 2016.

E **MR SENDALL:** Simply is not true. Is it Mr Conlon. You make lots of mention of Gaelic interpreters, you make various references to the Gaeltacht and that that is where you come from. I think it is at page 87, let me find that. No, it is in your Skeleton for this hearing that is where it is or your e-mail that is marked FAO for the Judge/ letter to the Court. Madam I assume you

F have that.

ELISABETH LAING J: Let me just check that. I think I have. The question is where have I put it. Yes, it is e-mail dated 7 February 16:38.

G **MR CONLON:** Do you have a copy of that. I don't. It is over there.

MR SENDALL: Do you want to just get it. You have that in front of you now do you?

MR CONLON: Go ahead please.

H

MR SENDALL: It is a single page letter to the Court, second paragraph of that. Once again as you have always through this case you refer to needing a Gaelic interpreter. Do you see that? You don't say it is any particular dialect.

MR CONLON: Which paragraph are you referring to?

MR SENDALL: Second paragraph so it begins "I note that Cameron Blackie…" Do you see that?

MR CONLON: "I will be seriously disadvantaged if an interpreter were not provided in court".

MR SENDALL: No, that is towards the end of that paragraph. I am talking about the very first sentence of that paragraph "I note that Cameron Blackie are again trying to bring up the subject of my needing a Gaelic interpreter. Do you see that?

MR CONLON: Yes, I see that now.

MR SENDALL: Couple lines further down "three Tribunal Judges have endorsed my entitlement to the Gaelic interpreter". Do you see that?

MR CONLON: Yes, I see that.

MR SENDALL: And then a couple lines further down you say "the fact is that I am from the Gaeltacht. English is not my first language". You're from. You say you are from that area of Ireland. In that area of Ireland, the form of Gaelic that is predominantly spoken is Irish Gaelic. Isn't it?

MR CONLON: I have already explained that to the Court. Irish Gaelic is spoken there but I had tutors because of my form of Gaelic.

MR SENDALL: Yes, but the point you are making is that because you are from that part of Ireland that is why you need a Gaelic interpreter. That means, doesn't it?

MR CONLON: What do you mean by from?

MR SENDALL: An Irish Gaelic interpreter?

MR CONLON: Is that your interpretation of it?

MR SENDALL: Well is there another interpretation of it?

MR CONLON: As I explained previously to the Court [Mr Blackie] I had already notified the Court of the type of Gaelic that was involved.

ELISABETH LAING J: Why mention that you are from the Gaeltacht?

MR CONLON: Because I am from the Gaeltacht your Honour. If I worded things poorly that's unfortunate I apologise to the Court but it doesn't take away from that is how I was taught Irish, that is how I was taught Gaelic and it is Breton Gaelic. I mean it is very difficult for me to explain to you how Irish culture is divided up in Ireland both in Ireland and in the Gaeltacht. I think perhaps you are asking questions without a full understanding would be a fair comment. Am I correct?

MR SENDALL: I am only looking at what you have said about it.

MR CONLON: Yes, [Mr Blackie] but as I have explained to you. If English is not my first language both orally and written, I could be forgiven for not writing things very well. Couldn't I?

MR SENDALL: Let go back to page 80. This is the Hancock Quins letter again. Second paragraph of that letter "we confirm our client does wish to pursue the application for an interpreter. Our client was brought up the in the Gaeltacht an area in West County Galway in the West of Ireland were Gaelic is the language. So, when we are talking about Gaelic, what we are talking about is the language that is spoken in that part of Ireland. Isn't it? That is what is being said in that letter.

MR CONLON: When [Mr Irwin] wrote this letter, I have to cast my mind back I had a discussion with him, he didn't write the letter there and then in front of me, he wrote this letter a number of days afterwards and as I explained already my written English is not particularly good but he wrote this after having spoken to him maybe three days later so quite exactly what I said to him,

whether he has forgotten it and not put it in the letter. I am not responsible for what he thought and how he processed it.

MR SENDALL: But this a critically important point as I understand it for you Mr Conlon because you apparently had to have a special tutor even when immersed in the Irish Gaelic language in order to have that translated into the very the particular form of Gaelic that you speak. Is that correct?

MR CONLON: Say that again please?

ELISABETH LAING J: Sorry Mr Sendall. To be fair to Mr Conlon can you just ask one question at a time.

MR SENDALL: Sorry let's take it in stages. You were living in a part of Galway were the predominant language spoken by those around as I understand it you was Irish Gaelic**.** Is that correct?

MR CONLON: People in the area spoken Irish Gaelic but in my family with my heritage it was Scots Gaelic.

MR SENDALL: How many of your school friends spoke Breton Gaelic?

MR CONLON: Oh I don't remember. It was 30 years ago. I am sorry that is a time-sensitive question. I don't know. It was my family, I had cousins there, I am sorry it was 40 years ago.

MR SENDALL: Obviously you were born in Derby, Derbyshire in England?

MR CONLON: I was, that right.

MR SENDALL: When did you move to Ireland?

MR CONLON: I have no memories of it so I must have been a toddler.

MR SENDALL: The tutor that was provided to you at school, was that provided by the school?

MR CONLON: My parents paid for that and I think the school made some contributions along the way, very little though.

MR SENDALL: Were you taken out of classes in the afternoons to be taught separately by the tutor?

MR CONLON: Going from memory we had the mornings with the rest of the class in the afternoon then I believe from memory we were just taken to one side. In those days it was the single school house, single room for classes.

MR SENDALL: You mention the RTC. Was it the Regional Technical college?

MR CONLON: Yes, it was in Galway.

MR SENDALL: When did you go there?

MR CONLON: Sometime in the mid-eighties.

MR SENDALL: You could probably do better than that can you if you apply your mind. We would like to know exactly when?

MR CONLON: I think I started in '86.

MR SENDALL: And you were there for two years, I think you said.

MR CONLON: Yes, I was. Yeah.

MR SENDALL: What was the name of the course you did?

MR CONLON: It was Civil Engineering.

MR SENDALL: And the language in which that course was conducted was?

MR CONLON: A mixture of Breton Gaelic and Irish Gaelic.

MR SENDALL: Is that because some of the teachers were Breton Gaelic?

MR CONLON: I don't remember. I remember being taught in the language but I don't remember asking people where they were from.

MR SENDALL: Who was conducting it in Breton Gaelic?

MR CONLON: What do you mean?

MR SENDALL: Who was teaching you in Breton Gaelic, some of your teachers?

MR CONLON: Yes.

MR SENDALL: So, some of your teachers spoke Breton Gaelic as their first language? Is that right?

MR CONLON: Yes, they did yeah and some of them didn't. Some of them spoke Irish Gaelic.

MR SENDALL: But your colleagues on the course where they all Breton Gaelic speakers or where they Irish Gaelic speakers?

MR CONLON: No, no, no. The majority were Irish Gaelic speakers.

MR SENDALL: But they didn't have any difficulty understanding the Breton Gaelic?

MR CONLON: Why would they be listing to Breton Gaelic?

MR SENDALL: I think you just said that some of your teaching was in Breton Gaelic.

MR CONLON: Yeah, they would explain to me specifically, it was a classroom type environment.

MR SENDALL: So, you would be taught, there would be a break, the teacher would then explain to you in Breton Gaelic?

MR CONLON: No, no. If you imagine this is a classroom, we had drawing boards, it was specific to Engineering, the teachers who spoke Breton would come to me at this desk, let's say and give me a quick go through with things that maybe they explained in Gaelic Irish but that wasn't always available sometimes I would have to make the best of it.

MR SENDALL: I have got no further questions Madam.

1. I will refer to the parties as they were below. An issue has arisen in the course of the hearing of this appeal. For the purposes of this hearing, the Claimant had said that he needed an interpreter in order to be able to participate in the appeal. The attendance of an interpreter from the Irish Gaelic language was therefore arranged by the Employment Appeal Tribunal ("EAT"). Such an interpreter attended, Ms Cliodhna Ni Cheileachair. She was duly sworn in as an interpreter at the start of the hearing. I established with her, at the beginning of the hearing, the

basis on which she would be providing her interpretation services. She agreed that it was on the basis set out in a letter written by the Claimant's solicitors to the Employment Tribunal back in May 2016, which is at pages 80 and 81 in the bundle. In that letter they said, among other things:

> **"…It is appreciated that in the normal course of events the attendance of an interpreter at a trial would prolong the trial. The claimant does not believe that will be the case here. He does not require a verbatim translation of everything that is said but rather requires an interpreter to explain to him what has been said when any particular difficulties arise."**

2. She confirmed that it was her understanding that it was on that basis that she would be providing her interpretation services for the purposes of this hearing.

3. In the course of the hearing, quite early on, it seemed that the Claimant was having a long and animated discussion with the interpreter. He then asked to mention a matter. He said that, Ms Cliodhna Ni Cheileachair was an interpreter from the Irish Gaelic language but that his first language is Breton Gaelic, that is a dialect of Scots Gaelic which is spoken in the Breton Peninsula in Nova Scotia in Canada. He explained that when he was told the name of the interpreter who would be present at this hearing, he had looked her up on the Internet and had seen that she had been to Harvard Law School. He had therefore assumed that she was Canadian and had thought no more of it. He only realised that there was a problem when she started to interpret the phrase 'substantive hearing'. This led me, initially, to ask the Claimant some questions, informally, in order to try and understand what the problem was. It was apparent to me from my reading of the papers that this was the first time that Breton Gaelic had ever been mentioned. The only references in the papers that I have read are to 'Gaelic', but in context those references it seemed to me must be understood as references to Irish Gaelic. For example, I refer again to the document on page 80. The Claimant's then solicitors referred to a direction from Employment Judge Hildebrand that if the Claimant's application for:

> **"'…. a Gaelic Interpreter…. was to be pursued then we should write to you….**
>
> **We confirm our client does wish to pursue the application for an interpreter: our client was brought up in the Gaelteacht an area in West County Galway in the West of Ireland where**

> **Gaelic is the language. Our client did not speak English until the age of 12 when he commenced attendance at a secondary school. He attained the following educational qualifications: 4 honours leaving certificate (equivalent to British A Level), and an HND in civil engineering.**
>
> **Having learnt English through Gaelic our client does not have an adequate command of English grammar and vocabulary. He struggles with regional accents. It is appreciated that in the normal course of events the attendance of an interpreter at a trial would prolong the trial…"**

4. The letter continues then with the passage that I have already referred to. It is clear to me, in context, that the reference in that letter to 'Gaelic' must be understood as a reference to Irish Gaelic. The reader would have no way of guessing that the language that was in fact being referred to, if that was the case, was Breton Gaelic.

5. The Claimant's reference, therefore, to Breton Gaelic gave me some concern and I decided, at that point, that the Claimant should be sworn and should give evidence. I then asked him some questions. I gave Mr Sendall, who represents the Respondent, that is the Appellant, an opportunity to cross-examine him. I have already referred to the document on page 80 of the bundle. Another of the many documents which is potentially relevant to this issue is an email sent by the Claimant on 29 January to the Employment Tribunal, at page 86 of the bundle, addressed to the Employment Judge. In that email, he says this:

> **"i am glad that the court are now recognising the importance of the language difficulty this matter has caused me and the true input that recognition of this will have on my case. Your recognition of the gaelic language aspect means that the process that the employer used in their internal disciplinary process and their decision to dismiss me was unsafe ie if i had assistance with language as i asked the employer to provide at the time, then my answers and therefore the outcome may have been different. it is unfortunate that Mr Blackie has chosen to try to muddy the waters with weak and ill informed comments which he has tried to present as "evidence". His comments are ill informed and show an ignorance of bi lingual matters, perhaps deliberately so he feels it some how gains advantage when in reality it shows an attempt to clutch at straws in the face of a rapidly collapsing defence.**
>
> **….."**

6. He then made a suggestion which is irrelevant to this point. He continued:

> **"These are the facts regarding my irish language needs.**
>
> **1. i have never mentioned my place of my birth for the simple reason it is not relevant. i was born in derby but moved to ireland as an infant and received my national school, secondary school; and college all in gaelic.**
>
> **2. i did not speak english until i was in my teens.**

> **3. mr blackie has referred to documents that he says i have written as examples of my abilities in the english. on closer examination of these documents and the many 100s of others i may have written you will see that although written in english sentences are constructed in gaelic were by the nouns verbs etc appear in a different location to english a fact mr blackie has obviously missed.**
>
> **4. language is not simply the written word and is of course verbal. my argument all along has been that i struggle with non written english ie oral questions in british regional accents which sometimes make no sense to me.**
>
> **5. my college course was numerically based engineering formulas etc so language played only a small part. the book referred to by blackie written by niki staunton was translated into gaelic and my communication module taught in gaelic also."**

7. One of the questions I asked the Claimant was about this book. He told me that it had been translated into Irish Gaelic, not Breton Gaelic. In his skeleton argument for this hearing, dated 7 February 2019, the Claimant again referred to, "The subject of my needing a Gaelic interpreter." He said, "I believe that the court should not give their argument any further consideration. Three Tribunal judges have endorsed my entitlement to the Gaelic interpreter." He then refers to the judge at the Croydon court in February 2017 saying, "Only Mr Conlon can decide if he needs interpreter." He goes on to say:

> **"This is clear, unequivocal, indisputable, and yet Cameron Blackie [10.30] attempts to bring this up again, this is a waste of court time. I also consider it to be a good indicator of the weakness of Ringway's defence in that old arguments that have been settled with are being brought up again and again before the court. The fact is that I am from the Gaeltacht and English is not my first language. I would be seriously disadvantaged if an interpreter were not provided at court."**

8. When the Claimant gave evidence, I asked him what his first language was. He has told me that it was Breton Gaelic. He said his grandparents were Scots and had passed the language on to his parents. He said that that was his grandparents on both sides. He was brought up in Oranmore in County Galway. He said that the language in the schools that he went to was Breton Gaelic by tutor and Irish Gaelic. He went to lessons where the pupils were taught in Irish Gaelic but he also had a Breton Gaelic tutor. I asked him what the language of instruction in secondary school was and he said it started out Gaelic and it was mostly Breton Gaelic. He said he had tutors, the lessons were in Irish Gaelic in the morning, and then a tutor would come in the afternoon. I asked him about the four honours subjects he had studied at secondary school and

he said they were Chemistry, Physics, Maths, and a fourth one which he could not remember. He said that the language of instruction was both Breton Gaelic and some English as well.

9. He told me that is HND Civil Engineering was in fact a National Certificate and that the National Certificate is the equivalent of an HND. He received that qualification at Regional Technical College in Galway. It was a two-year course and in the course of that study he had read the Art of Business Communication by Nicky Staunton, and that book was in Irish Gaelic. He was able to understand it and yes, he had recommended it to a colleague.

10. When I asked him about the documents on page 86 of the bundle, that is his email of 29 January 2017, and about this reference to Irish in that document, he said, "It was a poorly worded sentence perhaps," what he had meant to say was Breton Gaelic. I then asked him whether it was not important to be precise about language for which required interpretation and he told me that he was specific with the Employment Tribunal in 2016. He believed he sent an email to them then, he would need to check, and that he had also told the Respondent about that in 2014.

11. He was then cross-examined by Mr Sendall.

12. In the light of these developments, there are in my judgement two issues. The first, is whether it is true that the Claimant requires an interpreter into Breton Gaelic. The second issue is whether he requires an interpreter at all for the purposes of this hearing. I deal first with the question whether he requires an interpreter from Breton Gaelic. Having heard the Claimant's evidence, and having heard him cross-examined, I do not accept his evidence that Breton Gaelic is his first language. I have four main reasons for that conclusion. The first reason is that today is the first time this has ever been mentioned. I reject his evidence that he told the Employment

Tribunal about this in 2016, or that he told the Respondent about it in 2014. The second reason is that the only sensible reading of all the documents in the bundle, in their context, is that the Claimant has been asking throughout for an interpreter from the Irish Gaelic language, his references to being educated in the Gaeltacht make no sense otherwise. Third, his account of being educated in the Gaeltacht with Breton Gaelic tutors, and that there were Breton Gaelic tutors at the Technical College in Galway, is wholly implausible and I reject it. Fourth, it is far-fetched that he had four grandparents all from the Breton Peninsula, in Nova Scotia, in Canada and that he was born in Derby, and that he was then brought up in the Gaeltacht by parents who then brought him up speaking Breton Gaelic rather than Scots Gaelic.

13. I turn to the second issue. In my judgement the more fundamental question is whether the Claimant needs an interpreter at all for the purposes of this hearing. Although I have not timed it precisely, I have now listened to him for about an hour. First, when I was asking him questions informally, then when he was giving evidence in answer to my questions, and when he was being cross-examined by Mr Sendall. He gave no sign at all in the course of giving evidence and being cross-examined that he was experiencing difficulty in understanding the questions that were put to him, other than one or two occasions when for example, Mr Sendall asked him a question which consisted of more than one question bundled up into one. By and large, in the course of his evidence, he expressed himself in English clearly and articulately, for example he explained to me that an HND was the English equivalent of an Irish National Certificate. Of particular note, I consider, is that when Mr Sendall asked him how many of his school friends in Ireland spoke of Breton Gaelic, he replied, "That is a time sensitive question." This is a sophisticated reply on any view and in my judgment, shows an accurate and full understanding of English and ability to express a complex idea in English. He then went on to say that he could

not answer the question and referred to his cousins and his family, implying that they spoke Breton Gaelic.

14. When pressed about the document on page 86, his response was, "It was a poorly worded sentence, perhaps." Again, in my judgment this is a response that shows a lively understanding of the question and all of its implications and a ready ability to express himself in accurate and clear English in response to the question. Another of his responses, when a difficult passage in the documents was put to him was, "If English is not my first language, I could perhaps be forgiven for not writing things very well." Again, in my judgement that shows a sophisticated understanding of the question, of its implications for his case, and an ability to respond in clear and accurate English to the question.

15. Another of his responses when a difficult passage in documents was put to him was, "If English is not my first language, I could perhaps be forgiven for not writing things very well close." Again, in my judgement that shows a sophisticated understanding of the question, of its implications for his case and an ability to respond in clear and accurate English to the question. For those Reasons I have no doubt at all in concluding that the Claimant is perfectly able to conduct this Hearing without an interpreter of any kind.

Case adjourned at 12.49pm

Case resumed at 1.08pm

16. I have just, for the reasons which I explained in my oral Judgment, made two rulings about the hearing of this appeal. I ruled first of all, that I did not accept that the Claimant needs a Breton Gaelic interpreter, and, second, that I did not accept that for the purposes of this hearing

A he needed an interpreter or any kind. In the light of those two rulings the Claimant has applied for an adjournment of this appeal, so that a Breton Gaelic interpreter can be obtained.

B 17. It is clear from his submissions in support of that application that the Claimant does not agree with my two rulings. He submitted that I have made assumptions about language in the course of those rulings. He submitted that language is more complex than that. The fact that he is apparently able to use complex phrases is no indication of his ability in the English language.

C

18. He is not happy for the appeal to continue without an interpreter; he having made it clear throughout that he did need an interpreter. He submitted that he was 50 years old and had lived

D in this country for 20 years and that might give rise to an appearance of fluency in the English language, but that that was superficial, in the sense that it was no real indication of his actual fluency in English or of his ability to understand the English language.

E

19. He submitted that I had been wrong to make a decision based simply on asking him questions. That was not a sufficient basis for establishing his fluency in English. He hastened to add that the fact that he had made submissions for three minutes or so was not an indication either

F that he had sufficient fluency in English in order to be able to conduct the proceedings without an interpreter. None of that showed how good his English was.

G 20. He went on to submit that he would guess that no one in the court was bilingual and that nobody had a sufficient understanding of those sorts of issues. Nobody in the court had sufficient expertise and that he had appeared to understand the questions that he was asked, he had not in

H fact understood them.

21. He was unhappy for the proceedings to continue without a Breton interpreter. He referred to Ms Ni Cheileachair's presence in the hearing. He pointed out that she spoke Irish Gaelic and that there had been a muddle, if that was the right English word, and he was in an awkward position. He told me that he felt disadvantaged without a Breton Gaelic interpreter.

22. He did not understand the situation he found himself in and when he expressed himself he did so using phrases that he had heard many times in the course of his residence here. However, they were not in any way sophisticated use of language. He maintained that he could not continue with the appeal unless he had a Breton translator.

23. Mr Sendall opposed the Claimant's application for an adjournment. He submitted that the Claimant was looking for ways to avoid having a hearing of the appeal and that it was clear that the Claimant's **Article 6** rights were not engaged as he was sufficiently able to follow what was going on and to express himself in English.

24. In his reply the Claimant submitted that none of the points made by Mr Sendall changed the fact that assumptions were being made without any proper foundation. He submitted that no checks had been made into his background and that phrases like "implausible" and so on had been used by people who did not know about his Breton heritage. He submitted that those types of assumptions were not a proper foundation for a decision to proceed without a Breton interpreter.

25. I consider on the basis of all that I have heard from the Claimant, and my conclusion is reinforced by his articulate and eloquent submissions in support of his application for an adjournment, that he has a sufficient understanding of the English language and a sufficient

ability to express himself in it to be able to participate in this appeal without any breach of his **Article 6** rights and without any consequent unfairness. For those reasons it is my decision that I will not adjourn the hearing of this appeal today and that I will continue with it.

Case adjourned at 1.15pm

Case resumed at 1.19pm

26. I have just refused the Claimant's application for an adjournment of this appeal. I sought to explain to him that that was my ruling and that it would help me to hear his arguments before I decided the appeal. He claimed not to understand what I was saying.

27. First of all, I said to him, "I am going to carry on with the appeal." He said that he did not understand me. I then said, "It would help me to hear your arguments." He claimed not to understand that. Thirdly I said, "It would help you if I had your arguments." He claimed not to understand that either.

28. In the light of my earlier rulings I do not believe that the Claimant has not understood those three sentences. I am satisfied that he has understood them and that he does understand that if he takes no further part in the appeal it will be decided without the benefit of his arguments.

Case adjourned at 1.21pm

Case resumed at 2.08pm

29. This is an appeal from an order of the Employment Tribunal sitting at Watford ("the ET") dated 1 February 2018 ("the Order"). The Order provided that "the hearing fixed for [blank] be postponed." No date is referred to in the Order. The Employment Judge who made the Order is

not named in the Order. I will refer to him or her as ("the EJ"). I will refer to the parties as they were below.

30. I consider the grounds of appeal in this case on the papers pursuant to Rule 3(7) of the **Employment Appeal Tribunal Rules 1993**. I considered that they were arguable and ordered and that there should be a Full Hearing. That Order was stamped by the EAT on 14 November 2018.

31. On this appeal the Respondent has been represented by Mr Sendall of counsel. The Claimant initially represented himself. At the Claimant's request an interpreter from the Irish Gaelic language, Ms Ni Cheileachair attended the hearing. In the course of the hearing, after a discussion with the interpreter, the Claimant told me that there was a problem.

32. In short, he said that his first language was Breton Gaelic, a dialect of Scots Gaelic, which is spoken on the Breton Peninsula in Nova Scotia in Canada and that the interpreter's language was Irish Gaelic. In short that caused me to investigate a little further. In due course I heard the Claimant give evidence on oath and he was cross-examined.

33. After that I made two rulings for the reasons which I explained at the time. I decided first, that the Claimant did not need a Breton Gaelic interpreter, essentially because I did not believe his account that Breton Gaelic was his first language. I decided second, that he did not need an interpreter at all, in short because I had heard him speak and asked him questions and heard him answer questions in cross-examination and had concluded that his ability in English was such that he was perfectly able to express himself and to understand the English language to a sufficient degree to enable him to take part in the appeal.

34. He then applied for an adjournment in order to get a Breton Gaelic interpreter. I refused that application for the reasons which I gave at the time. I then explained to him and I am satisfied that he understood my explanation, although he told me that he did not understand it, that it would help his case for him to take part in the appeal and put forward his arguments. He said that he would not do so.

35. It was 1.15pm at that point and I said that I was going to adjourn the hearing until 2pm when I would give Judgment. I have been told that the Appellant wishes to take no further part in the hearing. Therefore, this Judgment is based on the submissions which I heard from Mr Sendall for the Respondent and a written document which the Claimant sent to this Tribunal. I had not had the benefit of oral argument from the Claimant.

36. One of the many issues that has bedevilled the litigation in the ET in this case is the very question of whether or not the Claimant required an interpreter for the Tribunal proceedings. I should perhaps say a little bit about the parties' positions on that before I deal with any other issues.

37. The Claimant's case has been set out in more than one place. It is set out in an email of 29 January 2017 to the ET for example, and in an earlier email sent in 2016 by his then solicitors, which is at page 80 of the bundle.

38. In short, he told the ET that he moved to Ireland as an infant. He was brought up in the Gaeltacht, the Gaelic speaking part of Ireland, and received all his education in Gaelic, including a module in Business Communication in which he read a book called "The Business of

A Communication" by somebody called Nicky Staunton. That book had been translated into Gaelic.

B 39. He did not speak English either until he was 12 or perhaps until his teens. He said that his sentence construction showed a different use of word order than is normal in English. He said that he struggled with spoken English, especially regional accents.

C 40. The Respondent's case in short is that the Claimant's passport shows that he is a British citizen who was born in Derby. He is apparently well-educated and has worked in a customer-facing role for many years in which he used English in written and oral communication without D apparent difficulty. The only time according to the Respondent when he claimed to have any difficulty with the English language was when he was asked to the meeting which led to his dismissal in May 2015.

E 41. The ET has on various occasions considered whether or not the Claimant should be provided with an interpreter for particular hearings, but it is not necessary for me to say anything about that for the purposes of this Judgment.

F

The parties' respective cases as they appear from the pleadings

42. The Claimant was employed by the Respondent as a Local Network Technician. G According to the Respondent's ET3 he was employed to develop a programme of "pro-active preventative highway maintenance works" to respond to enquiries from the public about highway maintenance issues in the road network in Hertfordshire.

H

43. The Claimant said in box 8.2 of his ET1 that he had "a 20-year unblemished local authority track record before **Transfer of Undertakings (Protection of Employment) Regulation 2006** ("TUPE") transferring to ringway on 1 November 2012." In the ET3 the Respondent agreed the Claimant's dates of employment.

44. The Claimant claimed that he made a protected disclosure in May 2014 about one of the Respondent's managers who, he asserted, "was acting fraudulently with public funds." The Respondent's case was that the Respondent had investigated this allegation and had discovered nothing untoward.

45. The Claimant's case was that his protected disclosure led to bullying, harassment and false allegations of poor performance. This he said culminated in an assault upon him by a manager Barry Lee on 3 November 2014.

46. The Claimant said that he had two witnesses to the assault. His case was that the Respondent made further "false and vexatious claims" about him after November 2014; see bundle page 20. He was on long-term sick leave from 12 November 2014.

47. The Respondent dismissed him without a hearing on 21 May 2015. The Respondent, he said, did not tell him he had been dismissed until a letter dated 4 August 2015. In further information provided in an email dated 28 January 2016 and further and better Particulars dated 11 May 2016, the Claimant mentioned his activities on behalf of a trade union.

48. The Respondent's case was that it had accepted that it had raised issues with the Claimant about his performance, but its case was that this course of action was justified by his poor

performance. The Respondent's case about the allegation of assault was that two independent managers, including Mr Lee, had gone to see the Claimant on 3 November to investigate the Claimant's failure to comply with an instruction.

49. The Claimant had walked out after a few words. Mr Lee had followed the Claimant to his desk to ask whether the Claimant understood, that if he refused to answer their questions that could lead to disciplinary proceedings. The Respondent's case was that the Claimant later alleged that Mr Lee had assaulted him and claimed that the Respondent should pay him £110,000 compensation for that assault.

50. The Claimant said he had witnesses to the assault and that he had a video of it. He sent an email on 13 November 2014 saying the police wanted his statement. The Respondent set in train its grievance process about this alleged assault. The Claimant was invited to take part.

51. He declined to name the witnesses or to provide the video. The Respondent investigated. None of the Claimant's immediate colleagues had seen an assault. In the light of the available evidence the Respondent dismissed the allegation on 16 January 2015.

52. The Respondent then held an investigation meeting on 17 March 2015. The Claimant was interviewed. A disciplinary meeting was arranged for 21 May 2015. The date of the meeting had been rearranged at the Claimant's request.

53. The Claimant did not attend it. A Regional Director Mr Goddard decided to dismiss the Claimant. The Claimant was told that in a letter dated 27 May 2015.

The involvement of the ET and the correspondence from the parties

54. There was a case management Order from a Preliminary Hearing on 8 December 2015. That Order was sent to the parties on 31 December 2015. The Claimant attended the hearing in person and the Respondent was represented by counsel. The Claimant was ordered to provide further information about his claim.

55. A further Case Management Preliminary Hearing was listed for 11 March 2016 among other things to finalise the issues for the hearing. Paragraph 3 of the Reasons records that at that hearing the Claimant was shown an email dated 10 November 2014, apparently from him, which raised the alleged assault.

56. He was unable to confirm whether he had sent or written the email. He was unable to confirm or meaningfully engage with any of the details of the claim; see paragraph 5. That was the reason why the ET ordered him to provide further information.

57. After that hearing the Claimant's solicitors wrote to the ET on 20 May 2016 to say that the Claimant did pursue his application for a Gaelic interpreter. In that letter they said that he had been brought up in the Gaeltacht, that is the part of Ireland where most people speak Gaelic as their first language in West County Galway.

58. He did not speak English until the age of 12 when he went to secondary school. He has four honours, the equivalent of A levels, and an HND in Civil Engineering. Having learnt English through Gaelic the Claimant did not have "an adequate command of English grammar and vocabulary."

59. The Claimant did not believe that the attendance of an interpreter would prolong the trial because he did not require a verbatim translation of everything. He only needed an interpreter to explain to him what had been said when "particular difficulties arise": see page 80 of the bundle.

60. On 6 December 2016 the Respondent's solicitors emailed the ET. Attached to the email was a PDF of the Claimant's passport and an email of 14 September 2016. They expressed their frustration that a hearing listed for eight days from 5 December 2016 had been adjourned at the last moment for want of a Gaelic translator. That issue had been flagged up at a hearing on 12 April 2016.

61. They suggested that various matters should be dealt with at a Case Management Hearing before the case was relisted. The application for a translator should formally be dealt with. The Respondent did not accept that the Claimant needed one.

62. In an email in 2014 to a colleague, said the Respondent, the Claimant had criticised that colleague's communication skills and had said that he, the Claimant, had studied Communication for two years at university. One of the books he had studied was "The Business of Communication" by Nicky Staunton. The Respondent contended that the passage from the email showed that the Claimant's English was perfectly adequate and that it seemed that he had studied Communication at University in English.

63. He had worked for an English Local Authority in a public-facing role since 1999 and for the Respondent after a **TUPE** transfer in 2012. He had never suggested any communication problems until his disciplinary proceedings began in 2015. He was British and born in Derby, as his passport showed.

64. The ET was also invited to deal with the issue of the Claimant's video evidence. Employment Judge Hildebrand had ordered, without a hearing, that the Claimant should not be able to rely on that evidence. The Claimant wished to challenge that decision.

65. The Respondent wished to avoid being ambushed by such evidence at the last moment. The Respondent asked the Claimant to be ordered to deal with the Respondent's requests made in an email dated 14 September 2016.

66. On 29 January 2017 the Claimant emailed the ET. The ET forwarded that email to the Respondent on 30 January. The Claimant thanked the EJ for his previous correspondence. He set out "the facts" about his "Irish language needs." I have summarised those already.

67. There was a Case Management Summary made after a hearing on 6 February 2017. The Reasons were sent to the parties on 13 February 2017. EJ Sage made various case management Orders by consent, to the extent that they were not made by consent. The Order recited that EJ Sage had given reasons at the time and did not recall them in the document.

68. Paragraph 1 of the Order recorded that the Claimant had confirmed that he had video evidence in his possession which was relevant to the issues. He was ordered to disclose it to the Respondent's solicitors by 13 February 2017. He was also ordered to provide an original photo file said to show his injured arm, together with the metadata.

69. Under the heading "Consequences of non-compliance" the parties were warned that a failure to comply with a disclosure Order was a criminal offence and that the ET could make an

"unless Order" which provided that unless it was complied with, the claim or response should be struck out without further consideration or hearing.

70. The Claimant sent a further email to the ET on Friday 8 September 2017. He asked the ET to reconfirm that a Gaelic interpreter would be provided for the hearing listed on 11 September 2017. In a second email sent that day timed at 17.25 he asked for that hearing to be adjourned until an interpreter was found.

71. The Respondent sent an email to the ET on 11 September 2017 opposing that application. The Respondent did not accept that the Claimant needed an interpreter. The purpose of the hearing was to draw the ET's attention to the Claimant's breach of the disclosure Order. The final hearing had already been adjourned once.

72. The hearing was due to start in eight weeks' time. There was a risk of a further adjournment. The current hearing was a simple one. The Respondent was applying for an Unless Order.

73. The Claimant had attended all previous applications and hearings without an interpreter. He had participated fully following discussions providing instructions and responding to questions. On two occasions he had represented himself with no apparent difficulty.

74. The member of the ET staff sent an email to the parties on 11 September on behalf of EJ Henry. His view was that an interpreter was not needed for that afternoon's hearing in order for the Claimant to explain the production of the video and photographic evidence which he said was in his possession, "The issues can be fully addressed without interruption. The Claimant appears

to have a working knowledge and proficiency in English." It seems from later emails from the parties and from the fact that a case management Order was made on 11 September that that hearing went ahead.

75. According to the Respondent in the course of that hearing the Claimant assured the ET that he still had the video of the assault. That is confirmed in paragraph 10 of a witness statement of Mr Cameron Blackie, the Respondent's solicitor, dated 29 September 2017. It also appears, see paragraph 43.5 of Mr Cameron Blackie's witness statement of 19 January 2018, that the Claimant at that hearing renewed an application that he had to have an interpreter in order to have a fair hearing. EJ Henry rejected that application having listened and spoken to the Claimant.

76. The Case Management Summary for 11 September 2017 records at paragraphs 7 and 8:

> **"7. I also here recall that the Claimant has objected to the Preliminary Hearing being heard today on a Gaelic translator not being available for the Hearing in circumstances where it had previously been ordered that a Gaelic interpreter would be available for further Hearings and for which the Claimant has sought a postponement of today's Hearing.**
>
> **8. I have not granted postponement as the issues to be addressed are issues for which the services of an interpreter are not necessary. The issues to be addressed going to disclosure of documents where the only issue appears to be one of facilitating the delivery of the relevant documents."**

77. The Order which the ET made on 11 September provided, so far as relevant, that by paragraph 3 that the parties should on 29 September 2017 at 12 noon in the Holiday Inn, Clarendon Road, Watford give inspection of the following documents and/or recordings as are in their possession and control, "3.1. The Claimant was to give inspection of his mobile phone (phones) containing the video recording of the assault on which he relies and the photo images of the injury on which he relies." The Claimant was also ordered to furnish the Respondent with a DVD recording of the recording from his phone and with a photographic copy of the image of the injury.

78. That was the Order made on 11 September 2017. It seems from an email sent by the Respondent on 5 December 2017 that the Claimant had sent the Respondent an email on 22 September 2017, saying that he could not go to the meeting on 29 September 2017 because he had to travel to Ireland, but that he could go to a meeting in Watford that afternoon. The Respondent's solicitor, however, was not able to travel to Watford that afternoon at short notice. His case was that he told the hearing on 11 September 2017 that he would be in court on 22 September 2017.

79. The email of 22 September 2017 is summarised in paragraph 12 of Mr Cameron Blackie's witness statement of 29 September 2017 and exhibited to that witness statement. Mr Cameron Blackie's witness statement of 29 September 2017 describes the further efforts which he made to agree an alternative arrangement for inspecting the evidence. He also emailed the Claimant on 22 September 2017 asking for evidence of his travel arrangements.

80. On 26 September 2017 the Claimant emailed Mr Cameron Blackie. He said that Mr Cameron Blackie appeared to have sent him an email on 22 September 2017; that he could not open it and did not know what was in it. The local internet service he said was unreliable.

81. On 29 September 2017 the Respondent made an application for an Unless Order supported by the witness statement of Mr Cameron Blackie, which described the Claimant's failure to comply with the Order of 11 September 2017. Mr Cameron Blackie personally served the application on the Claimant's home address; see paragraphs 27 and 28 of his witness statement dated 19 January 2019 and the photograph, which is contained in the witness statement.

82. On 26 October 2017 an Unless Order was signed by Regional EJ Byrne "pursuant to Rule 63." The heading of the Order recited that it had been made by EJ Henry. The Order recited that it was made on the application of the Respondent and "having considered any representations made by the parties." EJ Henry granted the Respondent's request made in a letter dated 29 September 2017 for an Unless Order.

83. In short, the Order required the Claimant to go to the Respondent's solicitors' office by prior arrangement during normal office hours, no later than 6 November 2017, and to allow the Respondent's solicitors to inspect his mobile phone or phones containing the video recording of the assault on which he relied, and the photo image of the injury he relied on, to give the Respondent a DVD recording from his phone, and an electronic copy of the image of the injury. At the foot of the Order was a heading in bold capitals "**CONSEQUENCES OF NON-COMPLIANCE**." The Order then said, "**TAKE NOTICE THAT** unless this Order is complied with, the claim shall be struck out without further consideration of the proceedings or the giving of any notice or the holding of any hearing."

84. On 4 November 2017 the Claimant emailed EJ Henry. He copied in the Respondent's solicitor. He said:

> **"i must notify the court that i appear to have mislaid the video of the assault on me by barry lee. this is unfortunate and i will continue to look for it and as soon as i locate it i will forward it to the relevant parties. please rest assured that i will do everything within my power to locate it as it is within my interest to do so."**

85. He then offered a "re-cap" about "your recent Order." He said that he had attended the Jury's Inn in Watford having invited Mr Cameron Blackie to view his mobile phone. Mr Cameron Blackie had failed to attend. The Claimant could not afford to travel to Mr Cameron Blackie's office.

86. The Claimant had forwarded the photograph of the injury with the metadata. The Kodak Technician in Rickmansworth had confirmed that the photograph was definitely fit for court purposes. "As the court can see, I have done everything within my power subject to financial constraints to comply with the court order as I understand it."

87. As Mr Cameron Blackie observed in his 19 January 2019 witness statement, it is implausible that the Claimant could have lost the video and even more so that he had lost it by 4 November 2017 when he claimed to have had it when he went to Jury's Inn in Watford on 1 November 2017.

88. On 6 November 2017, the Respondent's solicitor emailed EJ Henry and copied in the Claimant. The email referred to the Unless Order made on 26 October 2017. The Respondent's solicitor summarised the Order. The Claimant had defaulted. No meeting had been arranged. The Claimant had refused to travel to Godalming, which is where the Respondent's solicitors' offices are.

89. The Respondent accepted that the Claimant had now electronically sent a photograph of an arm and the metadata. The Claimant was now saying that he had "lost" the video having assured the ET at the hearing on 11 September 2017 that he still had it. The Respondent's solicitor said that the Claimant, having failed to comply with the Unless Order, the ET had no discretion whether the claim should be struck out.

90. A 10-day a trial had been listed for 20 November 2017. The Respondent asked for urgent confirmation that that had been taken out of the list.

91. On 9 November 2017 the ET wrote to the parties. The letter was headed "Confirmation of dismissal of claim." It referred to Rule 38 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulation 2013**. It said that the hearing listed on 20 November to 1 December 2017 had been cancelled.

92. On 12 November 2017 the Claimant emailed the ET and copied in the Respondent's solicitors. He complained that the decision to dismiss his case was unusually draconian and heavy-handed. He made four points:

a. He complained that he had had no interpreter at the hearing on 11 September and had failed to understand the consequences of not complying with the order for disclosure which was made at that hearing.

b. He had complied to the fullest extent possible with the unless order within the financial means available to him. He had arranged to meet the Respondent's solicitor in Watford and the solicitor had failed to attend.

c. He had told the court before the deadline that he had mislaid the video "…i fully intend to locate the video and to present it to the court and all parties."

d. He had never seen the Respondent's request for an unless order dated 29 September 2017. He asked the court that "the unless order be set aside/amended and/or the resubmitting of my claim and relief from sanction."

93. On 13 November 2017 the Respondent's solicitors responded to the Claimant's application of 12 November 2017. The Respondent made submissions based on the Decisions of the Court of Appeal in **Mitchell MP v News Group Newspapers Ltd** [2013] EWCA (Civ) 1537 to which the Claimant had referred.

94. The Respondent referred to the later Decision in **Denton v TH White Ltd** [2014] EWCA (Civ) 906. The Respondent repeated that the Claimant has said on 11 September 2017 that he had the video. The Claimant's application to set aside the Order of 26 October 2017 was out of time.

95. If there was to be a hearing of the Claimant's application, the Respondent wanted disclosure of his bank statements so as to test his claims about his means. The Respondent had provided the Claimant with all the material which the 11 September 2017 Order had required it to provide.

96. The Respondent attached a copy of the relevant letter. It was the second time that the Respondent said it had provided the Claimant with that material. The application for 29 September 2017 had been personally served at the Claimant's flat. The Respondent invited the ET to reject the Claimant's application.

97. On 13 November 2017 the Respondent's solicitors sent a further email to the ET correcting the assertion that the Claimant's application was out of time. It was not out of time but had not been made as soon as possible.

98. The Claimant emailed Regional EJ Byrne on 13 November 2017. He made four points in reply to the Respondent's solicitors' emails of that date. On 3 December 2017, the ET sent a Notice of Hearing to the parties. It said that "the claim will be heard…. on… 2 February 2018" by an EJ alone. Two hours had been allocated "to hear the evidence and decide the claim." The parties were to tell the ET if that was not long enough.

99. The Respondent's case was that it had understood that the hearing on 2 February 2018 had been listed to consider the applications which the Claimant had made in his email of 12 November 2017. On 5 November 2017 the Respondent's solicitors emailed the ET about the Hearing Notice. They copied in the Claimant.

100. The Respondent set out the background and said that in the light of that, the nature of the proposed hearing seemed inappropriate. There was no current claim. The Respondent asked the ET to amend the Notice of Hearing to avoid further confusion.

101. The Respondent then made some points about the Claimant's application. The Respondent considered that two hours would not be long enough and asked for a Directions Hearing for the Claimant's application. The Respondent made several points about the Claimant's claim that he needed an interpreter.

102. The ET had never decided that the Claimant needed an interpreter, yet 28 hearing days have been lost as a result. The Respondent asked for a day to be set aside in which the ET would decide whether the Claimant needed an interpreter, relying on the dictum by Langstaff J in paragraph 41 of **Hak v Christopher's Fellowship** UKEAT/0446/14/DA. The Respondent wanted disclosure from the Claimant about his educational background.

103. The Respondent then summarised the requirements of the ET's Order of 11 September 2017; see above. The Claimant had sent an email on 22 September 2017, saying he could not go to the meeting on 29 September 2017 because he had had to travel to Ireland. The Respondent asked for voluntary disclosure of his travel documents. The Claimant had not provided that.

104. That had prompted the Respondent's application for the Unless Order and further application for disclosure of the travel documents as they would be relevant to the exercise of the ET's discretion. It would be sensible to book an interpreter for the Directions Hearing in Order to avoid further problems.

105. On 9 December 2017, the Claimant emailed the ET objecting to all the Orders which the Respondent had asked for. In paragraph 1 he said this:

> **"the court agreed to the provision of a gaelic interpreter several months ago. blackie did not object to this at the time. he is simply re raising this at the moment I can only guess for some strategic reason through which he hopes to gain advantage. indeed, there is no need for me to satisfy Blackie of my need for interpreter. the court is satisfied that i need one and that is sufficient. on the principle of "if it is true for 1 then it must be true for all" if the tribunal required me to pass some form of language test to satisfy the tribunal of the need for an interpreter then everyone who makes a similar request to the tribunal would be required to do so. working in an office for 20 years is not relevant because the language used in the office is not the same as the legalistic language used in court which i am not used to."**

106. He then made various other points about the merits of the case. He finished by saying that he had a right to be heard which was fundamental to the Tribunal Service. The Respondent's requests for various Orders:

> **"seem to be a tactic to try to prevent a further hearing from taking place preventing me from being heard. also, i believe that the defence has always been waifer thin from the outset. it appears to be based around discrediting my character rather than sound legal arguments. i suggest that blackie is wasting the courts time and if it is possible for the court to make a ruling even an interim ruling at this time in my favour then i would be grateful if the court could do so. it was his request to strike out my case which wasted the last tribunal hearing spot for 10 days in november."**

107. On 19 January 2018 Mr Cameron Blackie made a further witness statement. He set out the full history of the Claimant's failures to comply with Orders to produce the video evidence. He made clear that he was not able to attend the hearing on 2 February 2018 because of a previously booked holiday.

108. On 23 January 2018 the ET sent a somewhat garbled letter to the parties from EJ Henry acknowledging unidentified correspondence and apparently refusing the Respondent's

applications. The general thrust of the letter however was that the ET would be considering the seriousness of the Claimant's default and his explanation for it at the hearing on 2 February 2018.

The Order which is the subject of this appeal

109. On 1 February 2018, apparently out of the blue, the ET at Watford sent an Order to the parties. It was made on a template 5.11C Postponement Order – Claimant. It was headed "Postponement Order." It reads as follows, "On the Tribunal's own initiative and having considered any representations made by the parties, Employment Judge orders that the hearing fixed for be postponed." Neither the name of the EJ nor the date of the hearing is mentioned in that part of the Order**.** The Order continues:

> **"The Judge's reasons for making this Order are** ***The hearing is postponed on the basis that a Irish Gaelic interpreter can not be obtained. Until a Gaelic interpreter can be obtained in light of the claimant position regarding an interpreter the case will not be able to proceed. The Tribunal accordingly will stay proceedings pending the claimants advising how the proceedings can progress in the absence of a Gaelic interpreter*****.**"

110. In the light of the correspondence to which I have referred it seems overwhelmingly likely to me that this Order must have been prompted or provoked by some intervention from the Claimant. However, there is nothing in the bundle which gives any clue about what that intervention was. In my judgement, it is extremely unsatisfactory in a case such as this for a written Order to be made which does not identify the materials which were considered by the Tribunal before making the Order as is the case here.

Submissions

111. In his email of 7 February 2019, the Claimant sought to expand on his grounds for resisting the appeal. He said first of all that he noted that the Respondent was bringing up the subject of his needing a Gaelic interpreter again. He believed that that argument should not be

given further consideration. He said that three Tribunal Judges had endorsed his entitlement to a Gaelic interpreter.

112. He then referred to what he claimed a Judge at Croydon Court had said in February 2017. He contended that it was a waste of the court's time for the Respondent's solicitors to be raising this question and that it was an indication of the weakness of the Respondent's defence. He went on to say, "The fact is that I am from the Gaeltacht. English is not my first language. I will be seriously disadvantaged if an interpreter were not provided at the court."

113. He said that working for the Council was not a valid test of English proficiency. It was a closed environment in which the same words and sentences came up again and again, for example; pothole, tarmac, drainage. He contended that Judge Henry was right to postpone the hearing (that must be the hearing listed for 2 September) until an interpreter could be found.

114. He then contended that the Respondent's solicitors were lying when they said that he had not complied with the Unless Order. He explained the basis for that contention in the following paragraph. He said that it was a simple case of wrongful and unfair dismissal which had been greatly complicated by the Respondent's arguments which were irrelevant.

115. He then summarised the facts as he saw them in five propositions in the rest of the email. He again asked for the court to make an interim ruling in his favour, if it were possible to do so. As he pointed out earlier this morning he finished the email by saying, "Please note that I have had receive assistance in writing this email as English is not my first language."

116. In the Respondent's Answer the Claimant said that he resisted the appeal. He contended, first, that EJ Henry did not err in law in the Order of 1 February as Watford ET had already confirmed that he needed a Gaelic interpreter. The second point he made was that Watford ET could not get an interpreter for the 2 February hearing. A postponement would have wasted court resources as a further date might have had to be cancelled or postponed.

117. He went on to say, third point, that he had been trying to get a Gaelic interpreter and attached emails of 12 June 2018 and 26 July 2018. It was very difficult because they were all leaving due to Brexit.

118. The fourth point he made was that he was right to apply for relief from sanctions and that was because he had in fact complied with the Order, except for not being able to attend the Respondent's solicitors' offices, because he could not afford to. It was unduly harsh to strike out his case. His case had already been moved to Watford from Croydon because of his lack of means and the court knew that. He then suggested that the Notice of Appeal had been lodged out of time. At the end of the Respondent's answer, following an asterisk, he said this, "Please note that I had to receive help with filling this form as English is not my first language*."

119. The Appellant's skeleton argument, after making some background submissions about the case, and about the availability of interpreters in the Tribunal system, and after referring to the Decision of the EAT in **Hak**, which I have already mentioned, sets out the errors of law which the Respondent argues the ET made. The first error of law is that ET erred in that, contrary to the overriding objective to deal with cases fairly and justly, the Respondent had been unjustly prejudiced by the decision to stay the proceedings and to give the Claimant the ability to seek to lift the stay at an indeterminate time in the future.

120. The second error of law is suggested to be that contrary to the Respondent's rights under **Article 6** of the **European Convention on Human Rights**, the impact of the Order was such that the proceedings could be stayed for an indeterminate period with conditional but otherwise unconstrained power for the Claimant to seek to lift the stay to time that suits him, but which is likely to seriously prejudice the Respondent.

121. The third point which is made is that the ET decided that a stay was the appropriate Order rather than either an adjournment for the Claimant's applications to be heard on another date when an interpreter could be provided by the ET or (b) an Order that no interpreter was necessary in order to deal with the Claimant's applications.

122. That point is expanded by the submission that there was no basis for staying the proceedings at all. That was a completely inappropriate form of Order. The hearing should either have been adjourned with provision for an interpreter to be obtained or the ET should have considered whether or not an interpreter was necessary either at the hearing listed on 2 February 2018 or at an adjourned hearing following the provision of disclosure.

123. The fourth point that is made in the skeleton argument is that the ET failed to give any or any adequate directions for relisting the Claimant's applications and, in particular, failed to make Orders or directions, either that no interpreter was required and that the hearing could continue without one or an Order that the hearing should be adjourned for a date when an interpreter could be made available, or directions for a hearing to take place to decide whether or not an interpreter was required in order to deal with the Claimant's applications justly and fairly and in accordance with the overriding objective.

124. The fifth point that is made is that the ET had failed to decide whether the proceedings struck out in November 2017 should stay struck out and/or "has created an anomalous and unjust situation where the Hearing of Mr Colon's applications and the potential consequent reinstatement of Mr Colon's claims could remain pending for an indeterminate period."

125. I have set out the arguments and the underlying facts at some length. I can state my reasons, I hope, relatively shortly. It is clear from the background that as far as the Respondent was concerned, a hearing had been listed for 2 February 2018 at which the Claimant's application to reinstate his claim would be considered.

126. The Respondent had submitted a long witness statement explaining why the claim should not be reinstated. The Respondent had been assured by the ET in the email of 23 January 2018 that that was what would be considered on 2 February 2018.

127. In that situation, in my judgment, it was a breach of natural justice and a material irregularity for the EJ, of his own motion, and without asking for any submissions from the Respondent on the matter, to make the Order which he made. For all the reasons advanced in the Respondent's skeleton argument, the Order is an extraordinary Order to have made and one which leaves the claim in limbo at the option of the Claimant, for an indefinite period. It was incumbent on the ET, before even considering making an Order of that extraordinary character, to have notified the Respondent that that was what it had in mind and to have asked the Respondent's submissions on the matter.

128. I also consider that the ET has failed to explain in any way why it made the Order which it made. The Order advertises that the reasons for the Order are set out in the document, but no

reasons whatsoever have been given for the making of this extraordinary Order. What is recited instead is the effect of that extraordinary Order. On that ground also therefore, I consider that ET erred in law in making the Order.

129. I also consider thirdly, that the ET erred in law in making the Order it made. It has all the flaws identified by Mr Sendall in his skeleton argument. In particular the claim having been struck out, one effect of the Order is that it somehow revives the claim and then puts it into a potentially indefinite limbo which will only be ended at the Claimant's option.

130. In my judgement, further, Order staying the proceedings "pending the Claimant's advising how the proceedings can progress in the absence of a Gaelic interpreter" is simply irrational. The Claimant was never going to explain to the Tribunal how the claim could progress in the absence of a Gaelic interpreter because it was his case that he had to have a Gaelic interpreter in order to enable the claim to progress. In short, for all those reasons I consider that this was an Order which the ET should not have made.

Conclusion

131. I allow this appeal.

Disposal

132. As I think Mr Sendall accepted in the course of his oral submissions, it is not for this Tribunal to decide whether the Unless Order should be set aside or not. That quintessentially is a matter for the ET. I would, subject to anything that Mr Sendall may wish to say about the detail of the Order, remit the claim to the ET for it to hold the Case Management Hearing at which it

will hear submissions about what it should do next and make appropriate Orders for the disposal of the Claimant's application for reconsideration of the striking out of his claim.

Postscript

133. It is perhaps obvious from what I have said so far in the judgment, that I consider that it is unsatisfactory for an ET to make an Order on the papers which refers to "any representations made by the parties" without specifically identifying what representations and from which party it has considered and taken into account in making the Order which it has made. I do understand the pressure of work under which ETs operate, but it really is best practice for an ET to record in a written Order such as this what material it has considered before making the Order.