Appeal No. UKEAT/0088/19/OO

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 16 January 2020

Before

JUDGE KEITH

(SITTING ALONE)

MRS A DIMITRIU — APPELLANT

TESTERWORLD LTD t/a DE PHARMACEUTICAL — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR OVIDIU MURGU (Representative)
For the Respondent	MR TIMOTHY WILKINSON (of Counsel)

SUMMARY

PRACTICE AND PROCEDURE – appearance/striking-out

The Claimant was represented by her husband, who is not legally qualified. They attended and participated in a Preliminary Hearing, at which an ET considered whether the Claimant's claims had no, or little reasonable prospect of success, and allowed them to proceed without making a deposit order. The Claimant was notified of the substantive Hearing of her claims and was aware of the date of the Hearing, but failed to attend the Hearing, and failed to contact proactively the ET to explain that she could not attend; or to seek an adjournment.

Given the Claimant's non-attendance, a clerk of the ET telephoned and spoke to the Claimant's husband, who was identified as her representative. He informed the clerk that the couple's son was ill; he was looking after the son; and his wife was at work but hoped to be at the ET in hour or two. He was informed that this was not satisfactory, and the ET dismissed the Claimant's claims as she had failed, without good reason, to attend the ET Hearing.

The Claimant's husband then wrote to the ET, which the ET treated as a reconsideration request, asserting that the couple had not attended because of the husband's ill health and a refusal by a family friend, who had been due to babysit, to look after their son. The Claimant had attended work, as she had responsibility to take colleagues to work.

An EJ rejected the submissions as providing adequate explanations for the Claimant's non-attendance, including why someone else could not have taken colleagues to work and the inconsistency of that explanation with the Claimant's husband's verbal explanation that the Claimant was at work; a previous failure to explain the family friend's reluctance to look after the son; the failure by the husband or the Claimant to contact the ET; the lack of evidence that the husband was unable to look after the son, to permit the Claimant's attendance; and on the

Claimant's explanation, a lack of satisfactory arrangements for her son to be looked after, about which the ET had been kept in ignorance. The EJ concluded that the Claimant had chosen not to attend the hearing.

In her appeal, which the Claimant subsequently sought to amend, the Claimant asserted that where an ET was in contact with a party which had failed to attend a hearing, it was bound to notify that party of the consequences of non-attendance and their ability to apply for a postponement. That proposition was rejected by (as she then was) Her Honour Judge Eady QC at a hearing under **Rule 3(10)** of the **Employment Appeal Tribunal Rules 1993,** as it would place an undue burden on ET staff, where the obligation was on the Claimant to contact the ET if there were obstacles to her attendance.

Permission was granted to proceed with the remainder of the grounds, which were (1) that the ET had erred in concluding that no satisfactory childcare arrangements had been put in place, and it was wrong for the ET not to consider that there were unforeseen consequences preventing the Claimant's attendance. (2) The ET and EJ had erred in concluding that the Claimant had made a conscious decision not to attend the ET Hearing, by placing undue weight on her attendance at work, when she had only attended to take colleagues. (3) The ET and EJ had placed impermissible weight on what had been reported to them by the ET clerk, when the Claimant's husband had only provided verbal comments and there was no written record of the discussion. (4) The ET and EJ had failed to consider adjourning the Hearing, when the Claimant and her husband had attended the previous hearing.

Held: The ET and EJ were entitled to conclude that the Claimant had failed, without good reason, to attend the ET Hearing. Applying **Transport for London v O'Cathail** [2013] EWCA Civ 21, overall fairness to both parties is consistent with the overriding objective and the assessment of

fairness must be made in the round. The Claimant had not been entitled to assume that because of her personal circumstances and the fact that her claims had not been struck out previously, or had deposit orders made in respect of them, the ET Hearing could not proceed in her absence. The Claimant had not been proactive or timely in her communications with the ET and EJ and had provided limited information to them, which the ET and EJ were entitled to treat as inconsistent and unsatisfactory. The EJ was entitled to conclude that the Claimant had chosen not to attend the ET Hearing and the ET and EJ were entitled to consider, and rely on, the verbal communications from the Claimant's husband. In his reconsideration request, the EJ had considered all the factors relevant to whether the ET should have adjourned the Hearing.

JUDGE KEITH

1. I shall refer to the parties as they were before the Employment Tribunal ("ET") as Claimant and Respondent. This appeal is brought by the Claimant.

Background

2. The Claimant presented a claim form on 1 March 2018. She claimed unfair dismissal; a failure to pay notice pay; and discrimination based on her sex; and nationality, specifically as a Romanian national. There was no dispute that the Respondent had employed and dismissed her.

3. Following receipt of her claim form, the ET issued a strike-out warning on 2 March 2018, in respect of her unfair dismissal claim. This was because the Claimant did not appear to have sufficient continuous employment to bring an unfair dismissal claim, and did not appear to meet other requirements, where sufficient continuous employment is not required. The ET's warning letter made clear that it did not affect the other complaints in her claim form.

4. The Claimant failed to respond. In a decision dated 16 April 2018, EJ Lancaster struck out the unfair dismissal claim. The Reasons stated:

> **(1) The Claimant complains of unfair dismissal;**
>
> **(2) Section 108 of the Employment Rights Act 1996 requires a Claimant to have not less than of two years' service to make an unfair dismissal complaint;**
>
> **(3) The Claimant was employed by the Respondent for less than two years;**
>
> **(4) Therefore, the Claimant is not entitled to bring such a complaint;**
>
> **(5) The Claimant has failed to give an acceptable reason despite being given the opportunity to do so, on the correspondence sent to the parties on 7 March 2018 why the complaint should not be struck out;**
>
> **(6) Accordingly, the complaint of unfair dismissal is struck out. The Claimant's other complaints are not affected by this Judgment.**

The Claimant did not appeal EJ Lancaster's Order.

5. On 13 July 2018, a Preliminary Hearing took place. The Claimant and Mr Murgu attended, and engaged in, that Hearing. I do not recite in full the various directions that were given, but at that Hearing, EJ Brain also assessed whether the complaints either had 'no' or 'little' reasonable prospect of success. EJ Brain concluded that those two tests were not made out and so he allowed the remainder of the Claimant's claims to proceed to a full hearing.

6. A Notice of Hearing was sent to parties and the Hearing was listed for 22 October 2018. The Claimant and Mr Murgu do not assert that they were unaware, in advance, of the date of the Hearing. EJ Brain chaired the Hearing. Neither the Claimant, nor Mr Murgu, attended the Hearing. In contrast, the Respondent's representatives and witnesses attended.

7. The Claimant has asserted that Mr Murgu and their son both became ill: their son on 20 October 2018; and Mr Murgu, who has separate ongoing health issues, on 21 October 2018; and that both continued to be ill on 22 October 2018. The ET's precise knowledge of those matters is at the core of this appeal.

8. As a consequence of the lack of attendance by the Claimant or Mr Murgu and without any apparent explanation for their absence, or any contact initiated by them, an ET clerk telephoned Mr Murgu, who was identified as the Claimant's representative on the claim form. Mr Murgu told the clerk that he was at home, looking after his ill child, and that the Claimant was at work. He did not seek an adjournment of the Hearing. For reasons explained later in this Judgment, and despite some initial confusion, Mr Murgu's initial explanation, given that morning, was correct. Mr Murgu has never asserted that he informed the ET on the morning of the Hearing of his own illness; nor on that morning did he distinguish between the Claimant merely taking colleagues to work, as opposed to being at work herself, a distinction he later sought to make.

The ET's dismissal of the remainder of the claims

9. In a Judgment dated 22 October 2018, the ET recorded the Claimant's failure, without good reason, to attend the Hearing and dismissed the remainder of the Claimant's claims. The ET also issued directions in relation to the Respondent's costs, which are not the subject of this appeal.

Reconsideration request

10. On 8 November 2018, on the Claimant's behalf, Mr Murgu wrote to the ET in the following terms:

> **"(1) Our absence on 22 October 2018 was because my health conditions was badly affected. Actually, I had big problems with my health but starting with evening 21 October 2018 came another problem. All this can be confirmed by the GP from Ashville Medical Practice Barnsley because they made tests, investigate and give treatment by prescription and recorded everything about my health situation. This is about me, Ovidiu Murgu.**
>
> **(2) Our son [J] three years and four months old started to have flu from 20 October 2018 and because on 22 October 2018 he does not go to nursery, we have tried to bring a person for babysitting but she when saw the health condition of the child she refused to stay.**
>
> **(3) The Appellant was gone to work on the morning of 22 October 2018 because she has a responsibility for transport for other three persons who can work at the same company and she supposed to come back for Hearing if I can resolve with our son.**
>
> **(4) For all of this if are necessary, we can provide evidence from doctors, nursery and witness statement."**

11. EJ Brain treated Mr Murgu's correspondence as a request for reconsideration. In a Decision dated 28 November 2018, he refused the request, stating:

> **"(1) The Claimant has not explained why it was necessary to take her colleagues to work when other arrangements could have been made for them to get to work that day. She knew the date of the Hearing as long ago as 13 July 2018. She had plenty of time to sort this out.**
>
> **(2) The explanation now given is at odds with the Tribunal Hearing being told on 22 October (by Mr Murgu) that the Claimant had gone into work (not that she was just taking others in) and Mr Murgu's suggestion that if the matter was adjourned to 12.30 that day he would try and find someone to look after the child. He did not say that someone had already declined to do so: omitting to say that was misleading.**
>
> **(3) The information relayed by and on behalf of the Claimant followed an enquiry from the Tribunal. There has been no explanation as to why the Claimant did not telephone the Tribunal herself.**

(4) There is no medical evidence that Mr Murgu's illness prevented him from looking after the child or to corroborate what was said about the child's health.

(5) On the Claimant's own explanation there was a risk of arrangements falling down on the day, and of satisfactory arrangements not being made to look after the child, yet the Tribunal and the Respondent were kept in ignorance of this difficulty. Arrangements did fall down and the Claimant did not attend (although as I have said I am not satisfied that Mr Murgu could not have looked after the child).

I am compelled to the conclusion that the interests favour the Respondent and that there is no reasonable prospect of the Claimant persuading the Tribunal that it is in the interests of justice to revoke or vary the Judgment of 22 October. She chose not to attend the Hearing and must take the consequences.

The application is therefore refused."

Appeal to the EAT

12. The Claimant subsequently appealed the ET's dismissal of her claims, and refusal of the reconsideration request, to this Tribunal. When the appeal came for consideration on the papers under Rule 3(7) of the **Employment Appeal Tribunal Rules 1993**, His Honour Judge Auerbach doubted whether the appeal was arguable given that the apparent grounds of appeal did not engage with the ET's reasoning. However, he thought it fair, noting that the Claimant was legally unrepresented, to convene a Preliminary Hearing to consider arguability.

13. In written submissions for the purposes of the Preliminary Hearing, the Claimant adduced evidence that her son had not attended nursery on 22 October 2018; a witness statement from a family friend who refused to babysit the son; and correspondence from Mr Murgu's GP regarding his illness, which had begun on 21 October 2018. That correspondence did not confirm that Mr Murgu was not fit enough to look after the couple's son.

The issues

14. In granting permission to proceed, Her Honour Judge Eady QC, as she then was, provided the following reasoning:

"Counsel appeared for the Appellant. (the Claimant before the ET) under ELAAS explained (on instructions) what had occurred on morning of the Hearing. Shortly before the ET Hearing the Claimant's son had fallen ill; initially it had been thought that the

Claimant's partner (with whom she has four children including the child who was ill on the day of ET Hearing) would be able to look the him but he (the Claimant's partner) had been taken ill on the evening before the Hearing. The Claimant's partner had a long-standing serious health problem and this had been a troubling incident that meant he was unable to care for their sick child on the day of the Hearing. The Claimant had, however, believed that the alternative arrangements could still be made and therefore felt able to meet her customary obligation to drive her colleagues to work - this was very early in the morning and would meant that she could still attend the ET Hearing on time. In the event the neighbour/friend who had initially seemed able to care for their child was not willing to do so and that is why the Claimant had to return home. When she was doing so the ET clerk had spoken to the Claimant's partner who had not appreciated that he needed to provide all the details set out above and explained about his and their child's ill health and said that the Claimant might be able to make the Hearing if it could start later. The clerk had said that this information would be relayed to the EJ; no advice had been given as to the possible consequences of not attending or the Claimant's right to seek a postponement.

By the first proposed amended ground of appeal, it was suggested where an EJ makes contact with a party who has failed to attend, it will be an error for it to have regard to that contact without having ensured that the party in question understands the consequences of non-attendance and/or their ability to apply for postponement.

I was not persuaded of the merit of this point. This seemed to me to be placing an undue burden on the ET staff. The primary obligation to attend an ET Hearing was on the Claimant and it was also her obligation to make contact with the ET if problems arose such as to make it difficult for her on the day. ET staff are not obliged to advise litigants and the ET was not bound to disregard evidence of contact that had been made in the circumstances."

Secondly, it was argued that the ET had erred by having regard to the irrelevant/inaccurate matters and/or had failed to take into account relevant factors:

(i) the ET had wrongly concluded no satisfactory arrangements had been put in place to provide the care for the Claimant's child. That was not the case (the Claimant's husband was originally going to look after the child and when the evening before it was discovered that he could not do so, it had been thought that a neighbour would assist) and having stated (see the ET Decision on reconsideration application) that the Claimant's account was accepted. It was wrong for the ET not to have seen this as a case where unforeseen circumstances had led to the Claimant's difficulties on the day.

(ii) the ET had also wrongly assumed that the Claimant had made a conscious decision not to attend, apparently thinking that this was demonstrated by the fact that she had taken colleagues into work that morning. That was an irrelevant factor as the Claimant would still have been able to attend the ET Hearing. It was her need to return home due to care for her child that meant she could not.

(iii) The ET had also given undue weight to what the clerk had reported but when there was no written record of this, and no allowance was made for the Claimant's partner's ill health.

Thirdly, it was further contended that the ET had erred in failing to consider whether or not to adjourn the Hearing, given that this was a Claimant who had engaged with the proceedings before and had attended the earlier Preliminary Hearing."

15. Her Honour Judge Eady QC was persuaded that the second and third groups of grounds (which I have renumbered for ease of reference) gave rise to reasonably arguable questions that should be permitted to proceed to a full Hearing. She directed that the Claimant should lodge

any witness statements and other evidence on which she intended to rely, including that of Mr Murgu, within 14 days of the Order.

The hearing before me

16. The Claimant attended the hearing before me, but was represented by her husband, Mr Murgu, who is not legally qualified. Given his lack of legal qualifications, I asked Mr Murgu to let me know if he did not understand any part of the proceedings and I asked the Respondent's Counsel, Mr Wilkinson, to provide his comments in clear terms, without legal jargon.

17. Mr Murgu also indicated that he had hearing difficulties. I emphasised to him that if he had any difficulties in hearing what was being discussed or did not understand any of the legal discussions then he should let me know me know straightaway. He did not express any difficulty in understanding or hearing any part of the discussions in the Hearing.

18. While indicating to me that the Claimant would have had been unable to participate alone in any full ET Hearing without an interpreter in Romanian, because of her lack of confidence in oral English (for which he had never sought an interpreter), Mr Murgu confirmed that he was able to represent the Claimant today, as his oral English was sufficiently good. He confirmed that there was no need not to proceed with the Hearing today because of any language difficulties.

The law

19. I considered the Court of Appeal's decision in **Transport for London v O'Cathail** [2013] EWCA Civ 21.

> **"44. The crucial point of difference from *Terluk* is that decisions of the ET can only be appealed on questions of law, whereas under the CPR the appeal is normally by way of review and the decision of a lower court can be set aside, if it is wrong, or if it is unjust by reason of a serious procedural or other irregularity in the proceedings. In relation to case management the ET has exceptionally wide powers of managing cases brought by and against parties who are often without the benefit of legal representation. The ET's**

decisions can only be questioned for error of law. A question of law only arises in relation to their exercise, when there is an error of legal principle in the approach or perversity in the outcome. That is the approach, including failing to take account of a relevant matter or taking account of an irrelevant one, which the EAT should continue to adopt rather than the approach in *Terluk* as summarised in the headnote quoted above. It is to be hoped that this ruling will put an end to the "apparent confusion in authority" on the point pointed out by Wilkie J in *Riley v. The Crown Prosecution Service* (13 June 2012 – UKEAT/0043/12/SM) at [55]-[56],

45. Overall fairness to both parties is always the overriding objective. The assessment of fairness must be made in the round. It is not necessarily pre-determined by the situation of one of the parties, such as the potentially absent claimant who is denied an adjournment.

46. Fifthly, the EAT's application of the *Terluk* approach led it into substituting its own decision on the exercise of the discretion for that of the ET. That was an error of law on its part. The ET did not err in law by reaching a decision that the EAT would not have made, had it been considering the application to adjourn. What is fair in the interests of the parties is, in the first instance, a matter for assessment by the ET. The EAT ought only to intervene if the ET has erred in principle or produced a perverse outcome in the sense that no reasonable tribunal could have concluded that it was fair in all the circumstances to refuse the adjournment.

47. Finally, Article 6 of the Convention does not compel the ET to the conclusion that it is always unfair to refuse an application for an adjournment on medical grounds, if it would mean that the hearing would take place in the party's absence. There are two sides to a trial, which should be as fair as possible to both sides. The ET has to balance the adverse consequences of proceeding with the hearing in the absence of one party against the right of the other party to have a trial within reasonable time and the public interest in prompt and efficient adjudication of cases in the ET."

20. In referring to the above authority, I am reminded that overall fairness is to both parties and that I should not substitute my own view on the ET's exercise of its discretion. The question is whether the ET erred in law in taking to account matters which it should not have done; or in failing to consider appropriate matters that it should have done; or alternatively, in reaching conclusions that no Tribunal could have reached, based on the evidence before the ET.

The Claimant's submissions

21. Mr Murgu relied on a written skeleton argument, the gist of which was to reiterate that both he and his son had been ill; that his son had not been able to attend nursery, because there was no funded place for him to attend the nursery in the week in which the ET hearing on 22 October 2018 had taken place; and he referred to the witness statement of the family friend, Ionut Tabirna, which had not been submitted to the ET. He also referred to his GP's certificate of fitness to attend work (commonly referred to as a GP 'sick note') for a period of from 22

A September 2018 to 14 December 2018, i.e. for a 12-week period which did not relate specifically to the date of the ET Hearing, but pre-dated it by a month and did not express a view as to Mr Murgu's ability to look after his son.

B 22. Mr Murgu added, in oral submissions, that the Claimant had in fact worked a full shift on the morning of the ET Hearing and had not, as might otherwise have been understood, merely attended work to give colleagues a lift to work. He confirmed this not by way of additional C evidence but simply to confirm what the Claimant's position was. He further asserted that, while accepting that the issue was not drawn to the ET's attention, the Claimant could not have attended and participated in the Hearing by herself, as she was not confident in her English language proficiency and so would have required an interpreter, although none had been requested. D Nevertheless, the Claimant had initially travelled to work and completed her early shift, with the intention of then traveling on to the Hearing.

E 23. Mr Murgu further submitted that following the unwillingness of the family friend to look after the couple's son, Mr Murgu had contacted the Claimant and suggested that she attend the ET alone, but she indicated to him an unwillingness to do so and wanted instead to return home to look after their son.

F 24. Mr Murgu argued that the ET had failed to consider that he had only become ill the night before the ET Hearing, which was why the crisis arose. Mr Murgu had intended to call the ET when the general telephone enquiries desk opened, but the ET clerk called him before he could G do so. At this stage, the Claimant was still at work, so he had suggested a delay, not as recorded by the ET until 12.30pm, but for an hour or so, but subsequently received a call back from the ET to say that the request and explanation for the delay was not satisfactory.

H

25. Mr Murgu submitted that the Claimant and he had assumed, and were entitled to assume, that the Claimant's claims would not simply be dismissed in her absence, because they had not been struck out or had been the subject of a deposit order at the previous Preliminary Hearing, as they had arguable merits.

The Respondent's submissions

26. Mr Wilkinson submitted that a number of Mr Murgu's submissions referred to, or amounted to, evidence that was not before the ET. While he did not object to that evidence being adduced, Mr Murgu's submissions were at odds with what the Claimant's Counsel had represented to Her Honour Judge Eady QC. Mr Murgu now suggested that the Claimant could not have attended the ET hearing on her own, in the absence of Mr Murgu. The Claimant had never asked for an interpreter and never raised the issue at the Preliminary Hearing in July 2018. Mr Murgu now confirmed that the Claimant had attended to complete a work shift and not merely to drop work colleagues off at work.

27. Mr Wilkinson referred to his written skeleton argument, to which he added with oral submissions, the gist of which was to emphasis the ET's knowledge at the time of its two decisions. At the time of the initial dismissal of the Claimant's claims on 22 October 2018, the ET knew the following:

(1) the Claimant had not attended or initiated contact with the ET;

(2) the Claimant's son was ill and was being looked after by Mr Murgu; and

(3) the Claimant had gone to work.

28. By the time of the ET's decision of 28 October 2018 in relation to reconsideration, and following further information from Mr Murgu, the ET was informed of the following:

(1) Mr Murgu had a long-term health problem. It had worsened on the evening of 21 October 2018;

(2) the Claimant's son began to have flu-like symptoms on 20 October 2018 and these symptoms had continued on 22 October 2018. The couple had tried to arrange a babysitter, but the babysitter saw the son's ill-health and refused to look after the child; and

(3) the Claimant had gone to work in order to take colleagues, but had aimed to come back for the Hearing if her son's situation had resolved.

Submissions on ground (1) – error by concluding that no satisfactory arrangements had been put in place

29. Mr Wilkinson submitted that at the time of the initial decision of 22 October 2018, all that the ET was aware of was that the Claimant's son was ill, that Mr Murgu had had to stay at home to look after him and that the Claimant had gone to work. At that stage, the need for childcare was not presented as a reason for the Claimant's failure to attend the Hearing, and the ET could not be criticised for concluding that the Claimant had not made satisfactory arrangements for childcare.

30. In the reconsideration, EJ Brain had noted the Claimant's explanations, but regarded them as being at odds with what Mr Murgu had told the ET clerk and was now admitting to this Tribunal, that the Claimant had gone to work and in fact worked her full shift, not, as Mr Murgu had stated in the reconsideration request, nor as repeated to Her Honour Judge Eady QC, merely to drop colleagues off at work. EJ Brain had also considered the representation that the Claimant had planned to attend the ET after work and also Mr Murgu's representation on the morning that she may be attend the ET Hearing later that day. EJ Brain did not accept the explanation that the

reason for the Claimant's non-attendance was because Mr Murgu was not well enough to look after their son. EJ Brain's conclusion was unarguably correct, noting that Mr Murgu confirmed at this hearing that he had offered to continue to look after their son.

31. By the time of the reconsideration request, EJ Brain knew that the son's illness had started on 20 October 2018, two days prior to the Hearing. It followed that there was a risk that he would need looking after on 22 October 2018. However, whilst the EJ was conscious and considered that Mr Murgu had problems with his health on the evening prior to 21 October 2018 and noted the assertion that the family friend had refused to babysit when he saw the Claimant's condition, there was no indication that the family friend had been pre-warned or consulted on 21 October; or whether any steps were taken for alternative arrangements, noting that the son's illness had begun on 20 October 2018.

32. Even on the Claimant's case before this Tribunal, Mr Murgu had confirmed that the Claimant had left for work at 5.15am; and the family friend had come to the family home at 7.30am, so that Mr Murgu had looked after the couple's child for over two hours by that stage. There was no explanation for why, if Mr Murgu was able to look after his son for over two hours, he was unable to look after his son, even for a little longer, while the Claimant attended the ET to explain her difficulties and if necessary to seek an adjournment.

33. In summary, EJ Brain was entitled to conclude that Mr Murgu had not presented evidence sufficient to demonstrate that he was too ill to look after the couple's son; and was entitled to conclude that the Claimant and not made satisfactory childcare arrangements.

Submissions on ground (2) - error by concluding that the Claimant had taken a conscious decision not to attend the ET Hearing

34. Mr Wilkinson argued that on the day of the ET Hearing, the Claimant had made the conscious decision to attend work and that was what Mr Murgu had informed the ET. In his reconsideration decision, ET Brain had not concluded that her decision was conscious solely because she now claimed be dropping colleagues off at work, rather than working, but also because of her failure to keep the ET informed of developments and the lack of evidence that Mr Murgu was unable to look after the couple's son, all of which were relevant to a conscious decision not to attend the ET Hearing. Those were all factors which EJ Brain was unarguably entitled to consider.

Submissions on ground (3) – error when considering what was reported to the ET clerk

35. Mr Wilkinson submitted that the ET was entitled to consider what the ET clerk informed them; other than a difference in how much of a delay to the start of the hearing to later that morning Mr Murgu had asked for, which was not material, there was no dispute as to what the ET clerk had conveyed to the ET, so the ET had been entitled to place weight on the representations made via the ET clerk.

Submissions on ground (4) – error by failing to consider whether to adjourn the ET Hearing

36. The ET had dismissed the remainder of the Claimant's claim on the basis that the Claimant had failed, without good reason, to attend the ET Hearing. It was implicit in that reasoning that the question of whether there was such a 'good reason' had been considered. In any event, EJ Brain considered the question of adjournment in his reconsideration decision.

Discussion and conclusions on grounds of appeal

Ground (1) – satisfactory arrangements

37. At the time of the ET's dismissal of the claims on 22 October 2018, and on the basis of the evidence before it, I conclude that the ET was unarguably entitled to conclude that the Claimant had no satisfactory childcare arrangements in place. Mr Murgu had not suggested, at that stage, that he was medically unfit to look after the couple's son. The ET was entitled to distinguish this from a case where unforeseen circumstances prevented the Claimant attending the ET. On the basis of the Claimant's representations on the day of the Hearing, it plainly was not such a case, as the Claimant had attended work.

38. By the time of the reconsideration decision, EJ Brain considered the representations that both Mr Murgu and the couple's son were unwell, but was also entitled to take into account the fact that the son had been unwell since 20 October 2018, and there was no explanation for what attempts, if any, had been for someone other than the couple's friend to help; or why the Claimant had not contacted the ET; or attended the ET in person, as indeed Mr Murgu now accepts that he had advised the Claimant to do, to inform them of the issue and if necessary, to explain the need for an adjournment. The suggestion now that the Claimant could not attend without Mr Murgu, because of her need for an interpreter, was never suggested to EJ Brain. Based on the representations made to EJ Brain at the time, EJ Brain was unarguably entitled to conclude that the Claimant had not provided satisfactory explanations for her non-attendance, noting the son's illness for several days and the lack of contact by the Claimant; and the lack of evidence about Mr Murgu's inability to look after the son.

39. In summary and applying the principles in **Transport for London v O'Cathail,** EJ Brain's conclusions about unsatisfactory arrangements did not amount to an error of law. For

reasons set out in relation to grounds (2) to (4) below, he did not consider impermissible factors; or fail to consider factors of which he had been informed. The Claimant's assumption that her claims would not be dismissed in her absence adopts the erroneous view that her personal situation pre-determined that the ET or EJ Brain would adjourn the Hearing.

Ground (2) – error on conscious decision

40. I conclude that at both stages, the ET and EJ Brain were entitled to assess that the Claimant had made a conscious decision not to attend the ET Hearing. At the time of the first decision, all that the ET knew was that the couple's son was unwell; Mr Murgu was looking after their son; and that the Claimant was at work. The ET was unarguably entitled to infer that the Claimant had chosen to attend work, rather than the ET Hearing.

41. By the time of EJ Brain's reconsideration, in reaching the decision that the Claimant had chosen not to attend the ET Hearing, he was careful to note multiple factors; the Claimant's attendance at work; and also her failure to attempt to contact the ET in advance of the Hearing, if her absence was not out of choice. I also accept Mr Wilkinson's submission that EJ Brain was entitled to consider, as a third factor, that Mr Murgu was not so unwell as to be unable to look after his son. The GP's sick certificate indicated Mr Murgu's unfitness to work for a period substantially pre-dating the ET Hearing and was just that – a general sick-note relating to his ability to attend work. A subsequent written statement produced by the family friend had not been provided to the ET or EJ Brain.

Ground (3) – error when considering what was reported to the ET clerk

42. I do not accept the proposition that the ET and EJ Brain impermissibly considered what Mr Murgu had informed the ET clerk, on the basis that there was no written record of the

A conversation. Other than one issue (the period of time when Mr Murgu said that the Claimant might attend later that day – either an hour or so, or around 12.30pm) the contents of the conversation were undisputed and indeed Mr Murgu only raised that one area of dispute before this Tribunal. In any event, whether the delay would have been "for an hour or so" (from around 10.00m) or 12.30pm does not feature as a reason, rather than a background fact, in EJ Brain's reasoning – instead, his focus was on an inconsistency in accounts; and a lack of evidence and explanation. In summary, the ET and EJ Brain were entitled to take into account what had been relayed to them by the ET clerk of Mr Murgu's oral representations. I am fortified in that conclusion, having considered Rule 47 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**, which states as follows:

> **"If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence."**

In this case, there had been such enquiries and the ET was obliged to consider the information that had been received, regardless of whether Mr Murgu had conveyed this in writing.

Ground (4) – error by failing to consider whether to adjourn the ET Hearing

43. I accept that in the ET's original decision of 22 October 2018, the Judgment is brief, referring to the Claimant having failed without good reason to attend the Hearing. However, the Judgment referred to oral reasons having been given at the Hearing and advising the Claimant of her right to request written reasons for the decision. She never requested written reasons, and I do not accept that the ET can be criticised for failing to expressly include a reference in the Judgment (as opposed to written reasons) to consideration of an adjournment.

44. By the time of the reconsideration decision of 28 November 2018, EJ Brain considered whether, in the circumstances, the dismissal of the Claimant's claims was inappropriate or whether there was a reasonable prospect of persuading the ET that it was in the interests of justice to revoke that order. Consideration of that question necessitated consideration of the same factors which were relevant to the question of adjournment and in the circumstances, EJ Brain did not err in not referring expressly to an adjournment in his reconsideration decision.

Summary

45. Returning to the authority of **Transport for London v O'Cathail**, this was a case where the Claimant and Mr Murgu had given the ET very limited information on the morning of the Hearing; the limited information which was provided and which the Claimant appeared to qualify or resile from now appears to be correct, namely that she was at work and Mr Murgu was looking after their son. That information was deficient, as it failed to mention the current, changed position, only now mentioned to this Tribunal, that the Claimant could not have attended the ET alone, as she needed Mr Murgu to translate for her. Mr Murgu and the Claimant were not proactive or timely in their contact with the ET; and the ET and EJ Brain were entitled to take that into account, in concluding that the Claimant had not put in place satisfactory child-care arrangements and that the Claimant had chosen not to attend the ET Hearing, which in light of Mr Murgu's submissions, was a correct conclusion.

46. The ET and EJ Brain were required to consider fairness to both parties, in accordance with the overriding objective. The respondent had attended the ET Hearing with its witnesses, ready to proceed. In contrast, the Claimant assumed that the ET Hearing would not proceed in her absence; was not proactive in her contact, and provided limited information, when contacted. In reaching a conclusion to proceed, the ET and EJ Brain considered all relevant information and

A did not consider impermissible factors. Their conclusions were unarguably open to them to reach on the information provided. There was no perversity, reliance on impermissible assumptions, or error of law in their conclusions.

B 47. The ET and EJ Brain did not err in law. The appeal fails and is dismissed.

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Appeal No. UKEAT/0088/19/OO

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 16 January 2020

Before

JUDGE KEITH

(SITTING ALONE)

MRS A DIMITRIU — APPELLANT

TESTERWORLD LTD t/a DE PHARMACEUTICAL — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR OVIDIU MURGU (Representative)
For the Respondent	MR TIMOTHY WILKINSON (of Counsel)

SUMMARY

PRACTICE AND PROCEDURE – appearance/striking-out

The Claimant was represented by her husband, who is not legally qualified. They attended and participated in a Preliminary Hearing, at which an ET considered whether the Claimant's claims had no, or little reasonable prospect of success, and allowed them to proceed without making a deposit order. The Claimant was notified of the substantive Hearing of her claims and was aware of the date of the Hearing, but failed to attend the Hearing, and failed to contact proactively the ET to explain that she could not attend; or to seek an adjournment.

Given the Claimant's non-attendance, a clerk of the ET telephoned and spoke to the Claimant's husband, who was identified as her representative. He informed the clerk that the couple's son was ill; he was looking after the son; and his wife was at work but hoped to be at the ET in hour or two. He was informed that this was not satisfactory, and the ET dismissed the Claimant's claims as she had failed, without good reason, to attend the ET Hearing.

The Claimant's husband then wrote to the ET, which the ET treated as a reconsideration request, asserting that the couple had not attended because of the husband's ill health and a refusal by a family friend, who had been due to babysit, to look after their son. The Claimant had attended work, as she had responsibility to take colleagues to work.

An EJ rejected the submissions as providing adequate explanations for the Claimant's non-attendance, including why someone else could not have taken colleagues to work and the inconsistency of that explanation with the Claimant's husband's verbal explanation that the Claimant was at work; a previous failure to explain the family friend's reluctance to look after the son; the failure by the husband or the Claimant to contact the ET; the lack of evidence that the husband was unable to look after the son, to permit the Claimant's attendance; and on the

Claimant's explanation, a lack of satisfactory arrangements for her son to be looked after, about which the ET had been kept in ignorance. The EJ concluded that the Claimant had chosen not to attend the hearing.

In her appeal, which the Claimant subsequently sought to amend, the Claimant asserted that where an ET was in contact with a party which had failed to attend a hearing, it was bound to notify that party of the consequences of non-attendance and their ability to apply for a postponement. That proposition was rejected by (as she then was) Her Honour Judge Eady QC at a hearing under **Rule 3(10)** of the **Employment Appeal Tribunal Rules 1993,** as it would place an undue burden on ET staff, where the obligation was on the Claimant to contact the ET if there were obstacles to her attendance.

Permission was granted to proceed with the remainder of the grounds, which were (1) that the ET had erred in concluding that no satisfactory childcare arrangements had been put in place, and it was wrong for the ET not to consider that there were unforeseen consequences preventing the Claimant's attendance. (2) The ET and EJ had erred in concluding that the Claimant had made a conscious decision not to attend the ET Hearing, by placing undue weight on her attendance at work, when she had only attended to take colleagues. (3) The ET and EJ had placed impermissible weight on what had been reported to them by the ET clerk, when the Claimant's husband had only provided verbal comments and there was no written record of the discussion. (4) The ET and EJ had failed to consider adjourning the Hearing, when the Claimant and her husband had attended the previous hearing.

Held: The ET and EJ were entitled to conclude that the Claimant had failed, without good reason, to attend the ET Hearing. Applying **Transport for London v O'Cathail** [2013] EWCA Civ 21, overall fairness to both parties is consistent with the overriding objective and the assessment of

fairness must be made in the round. The Claimant had not been entitled to assume that because of her personal circumstances and the fact that her claims had not been struck out previously, or had deposit orders made in respect of them, the ET Hearing could not proceed in her absence. The Claimant had not been proactive or timely in her communications with the ET and EJ and had provided limited information to them, which the ET and EJ were entitled to treat as inconsistent and unsatisfactory. The EJ was entitled to conclude that the Claimant had chosen not to attend the ET Hearing and the ET and EJ were entitled to consider, and rely on, the verbal communications from the Claimant's husband. In his reconsideration request, the EJ had considered all the factors relevant to whether the ET should have adjourned the Hearing.

JUDGE KEITH

1. I shall refer to the parties as they were before the Employment Tribunal ("ET") as Claimant and Respondent. This appeal is brought by the Claimant.

Background

2. The Claimant presented a claim form on 1 March 2018. She claimed unfair dismissal; a failure to pay notice pay; and discrimination based on her sex; and nationality, specifically as a Romanian national. There was no dispute that the Respondent had employed and dismissed her.

3. Following receipt of her claim form, the ET issued a strike-out warning on 2 March 2018, in respect of her unfair dismissal claim. This was because the Claimant did not appear to have sufficient continuous employment to bring an unfair dismissal claim, and did not appear to meet other requirements, where sufficient continuous employment is not required. The ET's warning letter made clear that it did not affect the other complaints in her claim form.

4. The Claimant failed to respond. In a decision dated 16 April 2018, EJ Lancaster struck out the unfair dismissal claim. The Reasons stated:

> **(1) The Claimant complains of unfair dismissal;**
>
> **(2) Section 108 of the Employment Rights Act 1996 requires a Claimant to have not less than of two years' service to make an unfair dismissal complaint;**
>
> **(3) The Claimant was employed by the Respondent for less than two years;**
>
> **(4) Therefore, the Claimant is not entitled to bring such a complaint;**
>
> **(5) The Claimant has failed to give an acceptable reason despite being given the opportunity to do so, on the correspondence sent to the parties on 7 March 2018 why the complaint should not be struck out;**
>
> **(6) Accordingly, the complaint of unfair dismissal is struck out. The Claimant's other complaints are not affected by this Judgment.**

The Claimant did not appeal EJ Lancaster's Order.

5. On 13 July 2018, a Preliminary Hearing took place. The Claimant and Mr Murgu attended, and engaged in, that Hearing. I do not recite in full the various directions that were given, but at that Hearing, EJ Brain also assessed whether the complaints either had 'no' or 'little' reasonable prospect of success. EJ Brain concluded that those two tests were not made out and so he allowed the remainder of the Claimant's claims to proceed to a full hearing.

6. A Notice of Hearing was sent to parties and the Hearing was listed for 22 October 2018. The Claimant and Mr Murgu do not assert that they were unaware, in advance, of the date of the Hearing. EJ Brain chaired the Hearing. Neither the Claimant, nor Mr Murgu, attended the Hearing. In contrast, the Respondent's representatives and witnesses attended.

7. The Claimant has asserted that Mr Murgu and their son both became ill: their son on 20 October 2018; and Mr Murgu, who has separate ongoing health issues, on 21 October 2018; and that both continued to be ill on 22 October 2018. The ET's precise knowledge of those matters is at the core of this appeal.

8. As a consequence of the lack of attendance by the Claimant or Mr Murgu and without any apparent explanation for their absence, or any contact initiated by them, an ET clerk telephoned Mr Murgu, who was identified as the Claimant's representative on the claim form. Mr Murgu told the clerk that he was at home, looking after his ill child, and that the Claimant was at work. He did not seek an adjournment of the Hearing. For reasons explained later in this Judgment, and despite some initial confusion, Mr Murgu's initial explanation, given that morning, was correct. Mr Murgu has never asserted that he informed the ET on the morning of the Hearing of his own illness; nor on that morning did he distinguish between the Claimant merely taking colleagues to work, as opposed to being at work herself, a distinction he later sought to make.

The ET's dismissal of the remainder of the claims

9. In a Judgment dated 22 October 2018, the ET recorded the Claimant's failure, without good reason, to attend the Hearing and dismissed the remainder of the Claimant's claims. The ET also issued directions in relation to the Respondent's costs, which are not the subject of this appeal.

Reconsideration request

10. On 8 November 2018, on the Claimant's behalf, Mr Murgu wrote to the ET in the following terms:

> **"(1) Our absence on 22 October 2018 was because my health conditions was badly affected. Actually, I had big problems with my health but starting with evening 21 October 2018 came another problem. All this can be confirmed by the GP from Ashville Medical Practice Barnsley because they made tests, investigate and give treatment by prescription and recorded everything about my health situation. This is about me, Ovidiu Murgu.**
>
> **(2) Our son [J] three years and four months old started to have flu from 20 October 2018 and because on 22 October 2018 he does not go to nursery, we have tried to bring a person for babysitting but she when saw the health condition of the child she refused to stay.**
>
> **(3) The Appellant was gone to work on the morning of 22 October 2018 because she has a responsibility for transport for other three persons who can work at the same company and she supposed to come back for Hearing if I can resolve with our son.**
>
> **(4) For all of this if are necessary, we can provide evidence from doctors, nursery and witness statement."**

11. EJ Brain treated Mr Murgu's correspondence as a request for reconsideration. In a Decision dated 28 November 2018, he refused the request, stating:

> **"(1) The Claimant has not explained why it was necessary to take her colleagues to work when other arrangements could have been made for them to get to work that day. She knew the date of the Hearing as long ago as 13 July 2018. She had plenty of time to sort this out.**
>
> **(2) The explanation now given is at odds with the Tribunal Hearing being told on 22 October (by Mr Murgu) that the Claimant had gone into work (not that she was just taking others in) and Mr Murgu's suggestion that if the matter was adjourned to 12.30 that day he would try and find someone to look after the child. He did not say that someone had already declined to do so: omitting to say that was misleading.**
>
> **(3) The information relayed by and on behalf of the Claimant followed an enquiry from the Tribunal. There has been no explanation as to why the Claimant did not telephone the Tribunal herself.**

(4) There is no medical evidence that Mr Murgu's illness prevented him from looking after the child or to corroborate what was said about the child's health.

(5) On the Claimant's own explanation there was a risk of arrangements falling down on the day, and of satisfactory arrangements not being made to look after the child, yet the Tribunal and the Respondent were kept in ignorance of this difficulty. Arrangements did fall down and the Claimant did not attend (although as I have said I am not satisfied that Mr Murgu could not have looked after the child).

I am compelled to the conclusion that the interests favour the Respondent and that there is no reasonable prospect of the Claimant persuading the Tribunal that it is in the interests of justice to revoke or vary the Judgment of 22 October. She chose not to attend the Hearing and must take the consequences.

The application is therefore refused."

Appeal to the EAT

12. The Claimant subsequently appealed the ET's dismissal of her claims, and refusal of the reconsideration request, to this Tribunal. When the appeal came for consideration on the papers under Rule 3(7) of the **Employment Appeal Tribunal Rules 1993**, His Honour Judge Auerbach doubted whether the appeal was arguable given that the apparent grounds of appeal did not engage with the ET's reasoning. However, he thought it fair, noting that the Claimant was legally unrepresented, to convene a Preliminary Hearing to consider arguability.

13. In written submissions for the purposes of the Preliminary Hearing, the Claimant adduced evidence that her son had not attended nursery on 22 October 2018; a witness statement from a family friend who refused to babysit the son; and correspondence from Mr Murgu's GP regarding his illness, which had begun on 21 October 2018. That correspondence did not confirm that Mr Murgu was not fit enough to look after the couple's son.

The issues

14. In granting permission to proceed, Her Honour Judge Eady QC, as she then was, provided the following reasoning:

"Counsel appeared for the Appellant. (the Claimant before the ET) under ELAAS explained (on instructions) what had occurred on morning of the Hearing. Shortly before the ET Hearing the Claimant's son had fallen ill; initially it had been thought that the

Claimant's partner (with whom she has four children including the child who was ill on the day of ET Hearing) would be able to look the him but he (the Claimant's partner) had been taken ill on the evening before the Hearing. The Claimant's partner had a long-standing serious health problem and this had been a troubling incident that meant he was unable to care for their sick child on the day of the Hearing. The Claimant had, however, believed that the alternative arrangements could still be made and therefore felt able to meet her customary obligation to drive her colleagues to work - this was very early in the morning and would meant that she could still attend the ET Hearing on time. In the event the neighbour/friend who had initially seemed able to care for their child was not willing to do so and that is why the Claimant had to return home. When she was doing so the ET clerk had spoken to the Claimant's partner who had not appreciated that he needed to provide all the details set out above and explained about his and their child's ill health and said that the Claimant might be able to make the Hearing if it could start later. The clerk had said that this information would be relayed to the EJ; no advice had been given as to the possible consequences of not attending or the Claimant's right to seek a postponement.

By the first proposed amended ground of appeal, it was suggested where an EJ makes contact with a party who has failed to attend, it will be an error for it to have regard to that contact without having ensured that the party in question understands the consequences of non-attendance and/or their ability to apply for postponement.

I was not persuaded of the merit of this point. This seemed to me to be placing an undue burden on the ET staff. The primary obligation to attend an ET Hearing was on the Claimant and it was also her obligation to make contact with the ET if problems arose such as to make it difficult for her on the day. ET staff are not obliged to advise litigants and the ET was not bound to disregard evidence of contact that had been made in the circumstances."

Secondly, it was argued that the ET had erred by having regard to the irrelevant/inaccurate matters and/or had failed to take into account relevant factors:

(i) the ET had wrongly concluded no satisfactory arrangements had been put in place to provide the care for the Claimant's child. That was not the case (the Claimant's husband was originally going to look after the child and when the evening before it was discovered that he could not do so, it had been thought that a neighbour would assist) and having stated (see the ET Decision on reconsideration application) that the Claimant's account was accepted. It was wrong for the ET not to have seen this as a case where unforeseen circumstances had led to the Claimant's difficulties on the day.

(ii) the ET had also wrongly assumed that the Claimant had made a conscious decision not to attend, apparently thinking that this was demonstrated by the fact that she had taken colleagues into work that morning. That was an irrelevant factor as the Claimant would still have been able to attend the ET Hearing. It was her need to return home due to care for her child that meant she could not.

(iii) The ET had also given undue weight to what the clerk had reported but when there was no written record of this, and no allowance was made for the Claimant's partner's ill health.

Thirdly, it was further contended that the ET had erred in failing to consider whether or not to adjourn the Hearing, given that this was a Claimant who had engaged with the proceedings before and had attended the earlier Preliminary Hearing."

15. Her Honour Judge Eady QC was persuaded that the second and third groups of grounds (which I have renumbered for ease of reference) gave rise to reasonably arguable questions that should be permitted to proceed to a full Hearing. She directed that the Claimant should lodge

any witness statements and other evidence on which she intended to rely, including that of Mr Murgu, within 14 days of the Order.

The hearing before me

16. The Claimant attended the hearing before me, but was represented by her husband, Mr Murgu, who is not legally qualified. Given his lack of legal qualifications, I asked Mr Murgu to let me know if he did not understand any part of the proceedings and I asked the Respondent's Counsel, Mr Wilkinson, to provide his comments in clear terms, without legal jargon.

17. Mr Murgu also indicated that he had hearing difficulties. I emphasised to him that if he had any difficulties in hearing what was being discussed or did not understand any of the legal discussions then he should let me know me know straightaway. He did not express any difficulty in understanding or hearing any part of the discussions in the Hearing.

18. While indicating to me that the Claimant would have had been unable to participate alone in any full ET Hearing without an interpreter in Romanian, because of her lack of confidence in oral English (for which he had never sought an interpreter), Mr Murgu confirmed that he was able to represent the Claimant today, as his oral English was sufficiently good. He confirmed that there was no need not to proceed with the Hearing today because of any language difficulties.

The law

19. I considered the Court of Appeal's decision in **Transport for London v O'Cathail** [2013] EWCA Civ 21.

> **"44. The crucial point of difference from *Terluk* is that decisions of the ET can only be appealed on questions of law, whereas under the CPR the appeal is normally by way of review and the decision of a lower court can be set aside, if it is wrong, or if it is unjust by reason of a serious procedural or other irregularity in the proceedings. In relation to case management the ET has exceptionally wide powers of managing cases brought by and against parties who are often without the benefit of legal representation. The ET's**

decisions can only be questioned for error of law. A question of law only arises in relation to their exercise, when there is an error of legal principle in the approach or perversity in the outcome. That is the approach, including failing to take account of a relevant matter or taking account of an irrelevant one, which the EAT should continue to adopt rather than the approach in *Terluk* as summarised in the headnote quoted above. It is to be hoped that this ruling will put an end to the "apparent confusion in authority" on the point pointed out by Wilkie J in *Riley v. The Crown Prosecution Service* (13 June 2012 – UKEAT/0043/12/SM) at [55]-[56],

45. Overall fairness to both parties is always the overriding objective. The assessment of fairness must be made in the round. It is not necessarily pre-determined by the situation of one of the parties, such as the potentially absent claimant who is denied an adjournment.

46. Fifthly, the EAT's application of the *Terluk* approach led it into substituting its own decision on the exercise of the discretion for that of the ET. That was an error of law on its part. The ET did not err in law by reaching a decision that the EAT would not have made, had it been considering the application to adjourn. What is fair in the interests of the parties is, in the first instance, a matter for assessment by the ET. The EAT ought only to intervene if the ET has erred in principle or produced a perverse outcome in the sense that no reasonable tribunal could have concluded that it was fair in all the circumstances to refuse the adjournment.

47. Finally, Article 6 of the Convention does not compel the ET to the conclusion that it is always unfair to refuse an application for an adjournment on medical grounds, if it would mean that the hearing would take place in the party's absence. There are two sides to a trial, which should be as fair as possible to both sides. The ET has to balance the adverse consequences of proceeding with the hearing in the absence of one party against the right of the other party to have a trial within reasonable time and the public interest in prompt and efficient adjudication of cases in the ET."

20. In referring to the above authority, I am reminded that overall fairness is to both parties and that I should not substitute my own view on the ET's exercise of its discretion. The question is whether the ET erred in law in taking to account matters which it should not have done; or in failing to consider appropriate matters that it should have done; or alternatively, in reaching conclusions that no Tribunal could have reached, based on the evidence before the ET.

The Claimant's submissions

21. Mr Murgu relied on a written skeleton argument, the gist of which was to reiterate that both he and his son had been ill; that his son had not been able to attend nursery, because there was no funded place for him to attend the nursery in the week in which the ET hearing on 22 October 2018 had taken place; and he referred to the witness statement of the family friend, Ionut Tabirna, which had not been submitted to the ET. He also referred to his GP's certificate of fitness to attend work (commonly referred to as a GP 'sick note') for a period of from 22

A September 2018 to 14 December 2018, i.e. for a 12-week period which did not relate specifically to the date of the ET Hearing, but pre-dated it by a month and did not express a view as to Mr Murgu's ability to look after his son.

B 22. Mr Murgu added, in oral submissions, that the Claimant had in fact worked a full shift on the morning of the ET Hearing and had not, as might otherwise have been understood, merely attended work to give colleagues a lift to work. He confirmed this not by way of additional C evidence but simply to confirm what the Claimant's position was. He further asserted that, while accepting that the issue was not drawn to the ET's attention, the Claimant could not have attended and participated in the Hearing by herself, as she was not confident in her English language proficiency and so would have required an interpreter, although none had been requested. D Nevertheless, the Claimant had initially travelled to work and completed her early shift, with the intention of then traveling on to the Hearing.

E 23. Mr Murgu further submitted that following the unwillingness of the family friend to look after the couple's son, Mr Murgu had contacted the Claimant and suggested that she attend the ET alone, but she indicated to him an unwillingness to do so and wanted instead to return home to look after their son.

F 24. Mr Murgu argued that the ET had failed to consider that he had only become ill the night before the ET Hearing, which was why the crisis arose. Mr Murgu had intended to call the ET when the general telephone enquiries desk opened, but the ET clerk called him before he could G do so. At this stage, the Claimant was still at work, so he had suggested a delay, not as recorded by the ET until 12.30pm, but for an hour or so, but subsequently received a call back from the ET to say that the request and explanation for the delay was not satisfactory.

H

25. Mr Murgu submitted that the Claimant and he had assumed, and were entitled to assume, that the Claimant's claims would not simply be dismissed in her absence, because they had not been struck out or had been the subject of a deposit order at the previous Preliminary Hearing, as they had arguable merits.

The Respondent's submissions

26. Mr Wilkinson submitted that a number of Mr Murgu's submissions referred to, or amounted to, evidence that was not before the ET. While he did not object to that evidence being adduced, Mr Murgu's submissions were at odds with what the Claimant's Counsel had represented to Her Honour Judge Eady QC. Mr Murgu now suggested that the Claimant could not have attended the ET hearing on her own, in the absence of Mr Murgu. The Claimant had never asked for an interpreter and never raised the issue at the Preliminary Hearing in July 2018. Mr Murgu now confirmed that the Claimant had attended to complete a work shift and not merely to drop work colleagues off at work.

27. Mr Wilkinson referred to his written skeleton argument, to which he added with oral submissions, the gist of which was to emphasis the ET's knowledge at the time of its two decisions. At the time of the initial dismissal of the Claimant's claims on 22 October 2018, the ET knew the following:

(1) the Claimant had not attended or initiated contact with the ET;

(2) the Claimant's son was ill and was being looked after by Mr Murgu; and

(3) the Claimant had gone to work.

28. By the time of the ET's decision of 28 October 2018 in relation to reconsideration, and following further information from Mr Murgu, the ET was informed of the following:

(1) Mr Murgu had a long-term health problem. It had worsened on the evening of 21 October 2018;

(2) the Claimant's son began to have flu-like symptoms on 20 October 2018 and these symptoms had continued on 22 October 2018. The couple had tried to arrange a babysitter, but the babysitter saw the son's ill-health and refused to look after the child; and

(3) the Claimant had gone to work in order to take colleagues, but had aimed to come back for the Hearing if her son's situation had resolved.

Submissions on ground (1) – error by concluding that no satisfactory arrangements had been put in place

29. Mr Wilkinson submitted that at the time of the initial decision of 22 October 2018, all that the ET was aware of was that the Claimant's son was ill, that Mr Murgu had had to stay at home to look after him and that the Claimant had gone to work. At that stage, the need for childcare was not presented as a reason for the Claimant's failure to attend the Hearing, and the ET could not be criticised for concluding that the Claimant had not made satisfactory arrangements for childcare.

30. In the reconsideration, EJ Brain had noted the Claimant's explanations, but regarded them as being at odds with what Mr Murgu had told the ET clerk and was now admitting to this Tribunal, that the Claimant had gone to work and in fact worked her full shift, not, as Mr Murgu had stated in the reconsideration request, nor as repeated to Her Honour Judge Eady QC, merely to drop colleagues off at work. EJ Brain had also considered the representation that the Claimant had planned to attend the ET after work and also Mr Murgu's representation on the morning that she may be attend the ET Hearing later that day. EJ Brain did not accept the explanation that the

reason for the Claimant's non-attendance was because Mr Murgu was not well enough to look after their son. EJ Brain's conclusion was unarguably correct, noting that Mr Murgu confirmed at this hearing that he had offered to continue to look after their son.

31. By the time of the reconsideration request, EJ Brain knew that the son's illness had started on 20 October 2018, two days prior to the Hearing. It followed that there was a risk that he would need looking after on 22 October 2018. However, whilst the EJ was conscious and considered that Mr Murgu had problems with his health on the evening prior to 21 October 2018 and noted the assertion that the family friend had refused to babysit when he saw the Claimant's condition, there was no indication that the family friend had been pre-warned or consulted on 21 October; or whether any steps were taken for alternative arrangements, noting that the son's illness had begun on 20 October 2018.

32. Even on the Claimant's case before this Tribunal, Mr Murgu had confirmed that the Claimant had left for work at 5.15am; and the family friend had come to the family home at 7.30am, so that Mr Murgu had looked after the couple's child for over two hours by that stage. There was no explanation for why, if Mr Murgu was able to look after his son for over two hours, he was unable to look after his son, even for a little longer, while the Claimant attended the ET to explain her difficulties and if necessary to seek an adjournment.

33. In summary, EJ Brain was entitled to conclude that Mr Murgu had not presented evidence sufficient to demonstrate that he was too ill to look after the couple's son; and was entitled to conclude that the Claimant and not made satisfactory childcare arrangements.

Submissions on ground (2) - error by concluding that the Claimant had taken a conscious decision not to attend the ET Hearing

34. Mr Wilkinson argued that on the day of the ET Hearing, the Claimant had made the conscious decision to attend work and that was what Mr Murgu had informed the ET. In his reconsideration decision, ET Brain had not concluded that her decision was conscious solely because she now claimed be dropping colleagues off at work, rather than working, but also because of her failure to keep the ET informed of developments and the lack of evidence that Mr Murgu was unable to look after the couple's son, all of which were relevant to a conscious decision not to attend the ET Hearing. Those were all factors which EJ Brain was unarguably entitled to consider.

Submissions on ground (3) – error when considering what was reported to the ET clerk

35. Mr Wilkinson submitted that the ET was entitled to consider what the ET clerk informed them; other than a difference in how much of a delay to the start of the hearing to later that morning Mr Murgu had asked for, which was not material, there was no dispute as to what the ET clerk had conveyed to the ET, so the ET had been entitled to place weight on the representations made via the ET clerk.

Submissions on ground (4) – error by failing to consider whether to adjourn the ET Hearing

36. The ET had dismissed the remainder of the Claimant's claim on the basis that the Claimant had failed, without good reason, to attend the ET Hearing. It was implicit in that reasoning that the question of whether there was such a 'good reason' had been considered. In any event, EJ Brain considered the question of adjournment in his reconsideration decision.

Discussion and conclusions on grounds of appeal

Ground (1) – satisfactory arrangements

37. At the time of the ET's dismissal of the claims on 22 October 2018, and on the basis of the evidence before it, I conclude that the ET was unarguably entitled to conclude that the Claimant had no satisfactory childcare arrangements in place. Mr Murgu had not suggested, at that stage, that he was medically unfit to look after the couple's son. The ET was entitled to distinguish this from a case where unforeseen circumstances prevented the Claimant attending the ET. On the basis of the Claimant's representations on the day of the Hearing, it plainly was not such a case, as the Claimant had attended work.

38. By the time of the reconsideration decision, EJ Brain considered the representations that both Mr Murgu and the couple's son were unwell, but was also entitled to take into account the fact that the son had been unwell since 20 October 2018, and there was no explanation for what attempts, if any, had been for someone other than the couple's friend to help; or why the Claimant had not contacted the ET; or attended the ET in person, as indeed Mr Murgu now accepts that he had advised the Claimant to do, to inform them of the issue and if necessary, to explain the need for an adjournment. The suggestion now that the Claimant could not attend without Mr Murgu, because of her need for an interpreter, was never suggested to EJ Brain. Based on the representations made to EJ Brain at the time, EJ Brain was unarguably entitled to conclude that the Claimant had not provided satisfactory explanations for her non-attendance, noting the son's illness for several days and the lack of contact by the Claimant; and the lack of evidence about Mr Murgu's inability to look after the son.

39. In summary and applying the principles in **Transport for London v O'Cathail,** EJ Brain's conclusions about unsatisfactory arrangements did not amount to an error of law. For

reasons set out in relation to grounds (2) to (4) below, he did not consider impermissible factors; or fail to consider factors of which he had been informed. The Claimant's assumption that her claims would not be dismissed in her absence adopts the erroneous view that her personal situation pre-determined that the ET or EJ Brain would adjourn the Hearing.

Ground (2) – error on conscious decision

40. I conclude that at both stages, the ET and EJ Brain were entitled to assess that the Claimant had made a conscious decision not to attend the ET Hearing. At the time of the first decision, all that the ET knew was that the couple's son was unwell; Mr Murgu was looking after their son; and that the Claimant was at work. The ET was unarguably entitled to infer that the Claimant had chosen to attend work, rather than the ET Hearing.

41. By the time of EJ Brain's reconsideration, in reaching the decision that the Claimant had chosen not to attend the ET Hearing, he was careful to note multiple factors; the Claimant's attendance at work; and also her failure to attempt to contact the ET in advance of the Hearing, if her absence was not out of choice. I also accept Mr Wilkinson's submission that EJ Brain was entitled to consider, as a third factor, that Mr Murgu was not so unwell as to be unable to look after his son. The GP's sick certificate indicated Mr Murgu's unfitness to work for a period substantially pre-dating the ET Hearing and was just that – a general sick-note relating to his ability to attend work. A subsequent written statement produced by the family friend had not been provided to the ET or EJ Brain.

Ground (3) – error when considering what was reported to the ET clerk

42. I do not accept the proposition that the ET and EJ Brain impermissibly considered what Mr Murgu had informed the ET clerk, on the basis that there was no written record of the

A conversation. Other than one issue (the period of time when Mr Murgu said that the Claimant might attend later that day – either an hour or so, or around 12.30pm) the contents of the conversation were undisputed and indeed Mr Murgu only raised that one area of dispute before this Tribunal. In any event, whether the delay would have been "for an hour or so" (from around 10.00m) or 12.30pm does not feature as a reason, rather than a background fact, in EJ Brain's reasoning – instead, his focus was on an inconsistency in accounts; and a lack of evidence and explanation. In summary, the ET and EJ Brain were entitled to take into account what had been relayed to them by the ET clerk of Mr Murgu's oral representations. I am fortified in that conclusion, having considered Rule 47 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**, which states as follows:

> **"If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence."**

In this case, there had been such enquiries and the ET was obliged to consider the information that had been received, regardless of whether Mr Murgu had conveyed this in writing.

Ground (4) – error by failing to consider whether to adjourn the ET Hearing

43. I accept that in the ET's original decision of 22 October 2018, the Judgment is brief, referring to the Claimant having failed without good reason to attend the Hearing. However, the Judgment referred to oral reasons having been given at the Hearing and advising the Claimant of her right to request written reasons for the decision. She never requested written reasons, and I do not accept that the ET can be criticised for failing to expressly include a reference in the Judgment (as opposed to written reasons) to consideration of an adjournment.

44. By the time of the reconsideration decision of 28 November 2018, EJ Brain considered whether, in the circumstances, the dismissal of the Claimant's claims was inappropriate or whether there was a reasonable prospect of persuading the ET that it was in the interests of justice to revoke that order. Consideration of that question necessitated consideration of the same factors which were relevant to the question of adjournment and in the circumstances, EJ Brain did not err in not referring expressly to an adjournment in his reconsideration decision.

Summary

45. Returning to the authority of **Transport for London v O'Cathail**, this was a case where the Claimant and Mr Murgu had given the ET very limited information on the morning of the Hearing; the limited information which was provided and which the Claimant appeared to qualify or resile from now appears to be correct, namely that she was at work and Mr Murgu was looking after their son. That information was deficient, as it failed to mention the current, changed position, only now mentioned to this Tribunal, that the Claimant could not have attended the ET alone, as she needed Mr Murgu to translate for her. Mr Murgu and the Claimant were not proactive or timely in their contact with the ET; and the ET and EJ Brain were entitled to take that into account, in concluding that the Claimant had not put in place satisfactory child-care arrangements and that the Claimant had chosen not to attend the ET Hearing, which in light of Mr Murgu's submissions, was a correct conclusion.

46. The ET and EJ Brain were required to consider fairness to both parties, in accordance with the overriding objective. The respondent had attended the ET Hearing with its witnesses, ready to proceed. In contrast, the Claimant assumed that the ET Hearing would not proceed in her absence; was not proactive in her contact, and provided limited information, when contacted. In reaching a conclusion to proceed, the ET and EJ Brain considered all relevant information and

A did not consider impermissible factors. Their conclusions were unarguably open to them to reach on the information provided. There was no perversity, reliance on impermissible assumptions, or error of law in their conclusions.

B 47. The ET and EJ Brain did not err in law. The appeal fails and is dismissed.

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Appeal No. UKEAT/0088/19/OO

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 16 January 2020

Before

JUDGE KEITH

(SITTING ALONE)

MRS A DIMITRIU — APPELLANT

TESTERWORLD LTD t/a DE PHARMACEUTICAL — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR OVIDIU MURGU (Representative)
For the Respondent	MR TIMOTHY WILKINSON (of Counsel)

SUMMARY

PRACTICE AND PROCEDURE – appearance/striking-out

The Claimant was represented by her husband, who is not legally qualified. They attended and participated in a Preliminary Hearing, at which an ET considered whether the Claimant's claims had no, or little reasonable prospect of success, and allowed them to proceed without making a deposit order. The Claimant was notified of the substantive Hearing of her claims and was aware of the date of the Hearing, but failed to attend the Hearing, and failed to contact proactively the ET to explain that she could not attend; or to seek an adjournment.

Given the Claimant's non-attendance, a clerk of the ET telephoned and spoke to the Claimant's husband, who was identified as her representative. He informed the clerk that the couple's son was ill; he was looking after the son; and his wife was at work but hoped to be at the ET in hour or two. He was informed that this was not satisfactory, and the ET dismissed the Claimant's claims as she had failed, without good reason, to attend the ET Hearing.

The Claimant's husband then wrote to the ET, which the ET treated as a reconsideration request, asserting that the couple had not attended because of the husband's ill health and a refusal by a family friend, who had been due to babysit, to look after their son. The Claimant had attended work, as she had responsibility to take colleagues to work.

An EJ rejected the submissions as providing adequate explanations for the Claimant's non-attendance, including why someone else could not have taken colleagues to work and the inconsistency of that explanation with the Claimant's husband's verbal explanation that the Claimant was at work; a previous failure to explain the family friend's reluctance to look after the son; the failure by the husband or the Claimant to contact the ET; the lack of evidence that the husband was unable to look after the son, to permit the Claimant's attendance; and on the

Claimant's explanation, a lack of satisfactory arrangements for her son to be looked after, about which the ET had been kept in ignorance. The EJ concluded that the Claimant had chosen not to attend the hearing.

In her appeal, which the Claimant subsequently sought to amend, the Claimant asserted that where an ET was in contact with a party which had failed to attend a hearing, it was bound to notify that party of the consequences of non-attendance and their ability to apply for a postponement. That proposition was rejected by (as she then was) Her Honour Judge Eady QC at a hearing under **Rule 3(10)** of the **Employment Appeal Tribunal Rules 1993,** as it would place an undue burden on ET staff, where the obligation was on the Claimant to contact the ET if there were obstacles to her attendance.

Permission was granted to proceed with the remainder of the grounds, which were (1) that the ET had erred in concluding that no satisfactory childcare arrangements had been put in place, and it was wrong for the ET not to consider that there were unforeseen consequences preventing the Claimant's attendance. (2) The ET and EJ had erred in concluding that the Claimant had made a conscious decision not to attend the ET Hearing, by placing undue weight on her attendance at work, when she had only attended to take colleagues. (3) The ET and EJ had placed impermissible weight on what had been reported to them by the ET clerk, when the Claimant's husband had only provided verbal comments and there was no written record of the discussion. (4) The ET and EJ had failed to consider adjourning the Hearing, when the Claimant and her husband had attended the previous hearing.

Held: The ET and EJ were entitled to conclude that the Claimant had failed, without good reason, to attend the ET Hearing. Applying **Transport for London v O'Cathail** [2013] EWCA Civ 21, overall fairness to both parties is consistent with the overriding objective and the assessment of

fairness must be made in the round. The Claimant had not been entitled to assume that because of her personal circumstances and the fact that her claims had not been struck out previously, or had deposit orders made in respect of them, the ET Hearing could not proceed in her absence. The Claimant had not been proactive or timely in her communications with the ET and EJ and had provided limited information to them, which the ET and EJ were entitled to treat as inconsistent and unsatisfactory. The EJ was entitled to conclude that the Claimant had chosen not to attend the ET Hearing and the ET and EJ were entitled to consider, and rely on, the verbal communications from the Claimant's husband. In his reconsideration request, the EJ had considered all the factors relevant to whether the ET should have adjourned the Hearing.

JUDGE KEITH

1. I shall refer to the parties as they were before the Employment Tribunal ("ET") as Claimant and Respondent. This appeal is brought by the Claimant.

Background

2. The Claimant presented a claim form on 1 March 2018. She claimed unfair dismissal; a failure to pay notice pay; and discrimination based on her sex; and nationality, specifically as a Romanian national. There was no dispute that the Respondent had employed and dismissed her.

3. Following receipt of her claim form, the ET issued a strike-out warning on 2 March 2018, in respect of her unfair dismissal claim. This was because the Claimant did not appear to have sufficient continuous employment to bring an unfair dismissal claim, and did not appear to meet other requirements, where sufficient continuous employment is not required. The ET's warning letter made clear that it did not affect the other complaints in her claim form.

4. The Claimant failed to respond. In a decision dated 16 April 2018, EJ Lancaster struck out the unfair dismissal claim. The Reasons stated:

> **(1) The Claimant complains of unfair dismissal;**
>
> **(2) Section 108 of the Employment Rights Act 1996 requires a Claimant to have not less than of two years' service to make an unfair dismissal complaint;**
>
> **(3) The Claimant was employed by the Respondent for less than two years;**
>
> **(4) Therefore, the Claimant is not entitled to bring such a complaint;**
>
> **(5) The Claimant has failed to give an acceptable reason despite being given the opportunity to do so, on the correspondence sent to the parties on 7 March 2018 why the complaint should not be struck out;**
>
> **(6) Accordingly, the complaint of unfair dismissal is struck out. The Claimant's other complaints are not affected by this Judgment.**

The Claimant did not appeal EJ Lancaster's Order.

5. On 13 July 2018, a Preliminary Hearing took place. The Claimant and Mr Murgu attended, and engaged in, that Hearing. I do not recite in full the various directions that were given, but at that Hearing, EJ Brain also assessed whether the complaints either had 'no' or 'little' reasonable prospect of success. EJ Brain concluded that those two tests were not made out and so he allowed the remainder of the Claimant's claims to proceed to a full hearing.

6. A Notice of Hearing was sent to parties and the Hearing was listed for 22 October 2018. The Claimant and Mr Murgu do not assert that they were unaware, in advance, of the date of the Hearing. EJ Brain chaired the Hearing. Neither the Claimant, nor Mr Murgu, attended the Hearing. In contrast, the Respondent's representatives and witnesses attended.

7. The Claimant has asserted that Mr Murgu and their son both became ill: their son on 20 October 2018; and Mr Murgu, who has separate ongoing health issues, on 21 October 2018; and that both continued to be ill on 22 October 2018. The ET's precise knowledge of those matters is at the core of this appeal.

8. As a consequence of the lack of attendance by the Claimant or Mr Murgu and without any apparent explanation for their absence, or any contact initiated by them, an ET clerk telephoned Mr Murgu, who was identified as the Claimant's representative on the claim form. Mr Murgu told the clerk that he was at home, looking after his ill child, and that the Claimant was at work. He did not seek an adjournment of the Hearing. For reasons explained later in this Judgment, and despite some initial confusion, Mr Murgu's initial explanation, given that morning, was correct. Mr Murgu has never asserted that he informed the ET on the morning of the Hearing of his own illness; nor on that morning did he distinguish between the Claimant merely taking colleagues to work, as opposed to being at work herself, a distinction he later sought to make.

The ET's dismissal of the remainder of the claims

9. In a Judgment dated 22 October 2018, the ET recorded the Claimant's failure, without good reason, to attend the Hearing and dismissed the remainder of the Claimant's claims. The ET also issued directions in relation to the Respondent's costs, which are not the subject of this appeal.

Reconsideration request

10. On 8 November 2018, on the Claimant's behalf, Mr Murgu wrote to the ET in the following terms:

> **"(1) Our absence on 22 October 2018 was because my health conditions was badly affected. Actually, I had big problems with my health but starting with evening 21 October 2018 came another problem. All this can be confirmed by the GP from Ashville Medical Practice Barnsley because they made tests, investigate and give treatment by prescription and recorded everything about my health situation. This is about me, Ovidiu Murgu.**
>
> **(2) Our son [J] three years and four months old started to have flu from 20 October 2018 and because on 22 October 2018 he does not go to nursery, we have tried to bring a person for babysitting but she when saw the health condition of the child she refused to stay.**
>
> **(3) The Appellant was gone to work on the morning of 22 October 2018 because she has a responsibility for transport for other three persons who can work at the same company and she supposed to come back for Hearing if I can resolve with our son.**
>
> **(4) For all of this if are necessary, we can provide evidence from doctors, nursery and witness statement."**

11. EJ Brain treated Mr Murgu's correspondence as a request for reconsideration. In a Decision dated 28 November 2018, he refused the request, stating:

> **"(1) The Claimant has not explained why it was necessary to take her colleagues to work when other arrangements could have been made for them to get to work that day. She knew the date of the Hearing as long ago as 13 July 2018. She had plenty of time to sort this out.**
>
> **(2) The explanation now given is at odds with the Tribunal Hearing being told on 22 October (by Mr Murgu) that the Claimant had gone into work (not that she was just taking others in) and Mr Murgu's suggestion that if the matter was adjourned to 12.30 that day he would try and find someone to look after the child. He did not say that someone had already declined to do so: omitting to say that was misleading.**
>
> **(3) The information relayed by and on behalf of the Claimant followed an enquiry from the Tribunal. There has been no explanation as to why the Claimant did not telephone the Tribunal herself.**

(4) There is no medical evidence that Mr Murgu's illness prevented him from looking after the child or to corroborate what was said about the child's health.

(5) On the Claimant's own explanation there was a risk of arrangements falling down on the day, and of satisfactory arrangements not being made to look after the child, yet the Tribunal and the Respondent were kept in ignorance of this difficulty. Arrangements did fall down and the Claimant did not attend (although as I have said I am not satisfied that Mr Murgu could not have looked after the child).

I am compelled to the conclusion that the interests favour the Respondent and that there is no reasonable prospect of the Claimant persuading the Tribunal that it is in the interests of justice to revoke or vary the Judgment of 22 October. She chose not to attend the Hearing and must take the consequences.

The application is therefore refused."

Appeal to the EAT

12. The Claimant subsequently appealed the ET's dismissal of her claims, and refusal of the reconsideration request, to this Tribunal. When the appeal came for consideration on the papers under Rule 3(7) of the **Employment Appeal Tribunal Rules 1993**, His Honour Judge Auerbach doubted whether the appeal was arguable given that the apparent grounds of appeal did not engage with the ET's reasoning. However, he thought it fair, noting that the Claimant was legally unrepresented, to convene a Preliminary Hearing to consider arguability.

13. In written submissions for the purposes of the Preliminary Hearing, the Claimant adduced evidence that her son had not attended nursery on 22 October 2018; a witness statement from a family friend who refused to babysit the son; and correspondence from Mr Murgu's GP regarding his illness, which had begun on 21 October 2018. That correspondence did not confirm that Mr Murgu was not fit enough to look after the couple's son.

The issues

14. In granting permission to proceed, Her Honour Judge Eady QC, as she then was, provided the following reasoning:

"Counsel appeared for the Appellant. (the Claimant before the ET) under ELAAS explained (on instructions) what had occurred on morning of the Hearing. Shortly before the ET Hearing the Claimant's son had fallen ill; initially it had been thought that the

Claimant's partner (with whom she has four children including the child who was ill on the day of ET Hearing) would be able to look the him but he (the Claimant's partner) had been taken ill on the evening before the Hearing. The Claimant's partner had a long-standing serious health problem and this had been a troubling incident that meant he was unable to care for their sick child on the day of the Hearing. The Claimant had, however, believed that the alternative arrangements could still be made and therefore felt able to meet her customary obligation to drive her colleagues to work - this was very early in the morning and would meant that she could still attend the ET Hearing on time. In the event the neighbour/friend who had initially seemed able to care for their child was not willing to do so and that is why the Claimant had to return home. When she was doing so the ET clerk had spoken to the Claimant's partner who had not appreciated that he needed to provide all the details set out above and explained about his and their child's ill health and said that the Claimant might be able to make the Hearing if it could start later. The clerk had said that this information would be relayed to the EJ; no advice had been given as to the possible consequences of not attending or the Claimant's right to seek a postponement.

By the first proposed amended ground of appeal, it was suggested where an EJ makes contact with a party who has failed to attend, it will be an error for it to have regard to that contact without having ensured that the party in question understands the consequences of non-attendance and/or their ability to apply for postponement.

I was not persuaded of the merit of this point. This seemed to me to be placing an undue burden on the ET staff. The primary obligation to attend an ET Hearing was on the Claimant and it was also her obligation to make contact with the ET if problems arose such as to make it difficult for her on the day. ET staff are not obliged to advise litigants and the ET was not bound to disregard evidence of contact that had been made in the circumstances."

Secondly, it was argued that the ET had erred by having regard to the irrelevant/inaccurate matters and/or had failed to take into account relevant factors:

(i) the ET had wrongly concluded no satisfactory arrangements had been put in place to provide the care for the Claimant's child. That was not the case (the Claimant's husband was originally going to look after the child and when the evening before it was discovered that he could not do so, it had been thought that a neighbour would assist) and having stated (see the ET Decision on reconsideration application) that the Claimant's account was accepted. It was wrong for the ET not to have seen this as a case where unforeseen circumstances had led to the Claimant's difficulties on the day.

(ii) the ET had also wrongly assumed that the Claimant had made a conscious decision not to attend, apparently thinking that this was demonstrated by the fact that she had taken colleagues into work that morning. That was an irrelevant factor as the Claimant would still have been able to attend the ET Hearing. It was her need to return home due to care for her child that meant she could not.

(iii) The ET had also given undue weight to what the clerk had reported but when there was no written record of this, and no allowance was made for the Claimant's partner's ill health.

Thirdly, it was further contended that the ET had erred in failing to consider whether or not to adjourn the Hearing, given that this was a Claimant who had engaged with the proceedings before and had attended the earlier Preliminary Hearing."

15. Her Honour Judge Eady QC was persuaded that the second and third groups of grounds (which I have renumbered for ease of reference) gave rise to reasonably arguable questions that should be permitted to proceed to a full Hearing. She directed that the Claimant should lodge

any witness statements and other evidence on which she intended to rely, including that of Mr Murgu, within 14 days of the Order.

The hearing before me

16. The Claimant attended the hearing before me, but was represented by her husband, Mr Murgu, who is not legally qualified. Given his lack of legal qualifications, I asked Mr Murgu to let me know if he did not understand any part of the proceedings and I asked the Respondent's Counsel, Mr Wilkinson, to provide his comments in clear terms, without legal jargon.

17. Mr Murgu also indicated that he had hearing difficulties. I emphasised to him that if he had any difficulties in hearing what was being discussed or did not understand any of the legal discussions then he should let me know me know straightaway. He did not express any difficulty in understanding or hearing any part of the discussions in the Hearing.

18. While indicating to me that the Claimant would have had been unable to participate alone in any full ET Hearing without an interpreter in Romanian, because of her lack of confidence in oral English (for which he had never sought an interpreter), Mr Murgu confirmed that he was able to represent the Claimant today, as his oral English was sufficiently good. He confirmed that there was no need not to proceed with the Hearing today because of any language difficulties.

The law

19. I considered the Court of Appeal's decision in **Transport for London v O'Cathail** [2013] EWCA Civ 21.

> **"44. The crucial point of difference from *Terluk* is that decisions of the ET can only be appealed on questions of law, whereas under the CPR the appeal is normally by way of review and the decision of a lower court can be set aside, if it is wrong, or if it is unjust by reason of a serious procedural or other irregularity in the proceedings. In relation to case management the ET has exceptionally wide powers of managing cases brought by and against parties who are often without the benefit of legal representation. The ET's**

decisions can only be questioned for error of law. A question of law only arises in relation to their exercise, when there is an error of legal principle in the approach or perversity in the outcome. That is the approach, including failing to take account of a relevant matter or taking account of an irrelevant one, which the EAT should continue to adopt rather than the approach in *Terluk* as summarised in the headnote quoted above. It is to be hoped that this ruling will put an end to the "apparent confusion in authority" on the point pointed out by Wilkie J in *Riley v. The Crown Prosecution Service* (13 June 2012 – UKEAT/0043/12/SM) at [55]-[56],

45. Overall fairness to both parties is always the overriding objective. The assessment of fairness must be made in the round. It is not necessarily pre-determined by the situation of one of the parties, such as the potentially absent claimant who is denied an adjournment.

46. Fifthly, the EAT's application of the *Terluk* approach led it into substituting its own decision on the exercise of the discretion for that of the ET. That was an error of law on its part. The ET did not err in law by reaching a decision that the EAT would not have made, had it been considering the application to adjourn. What is fair in the interests of the parties is, in the first instance, a matter for assessment by the ET. The EAT ought only to intervene if the ET has erred in principle or produced a perverse outcome in the sense that no reasonable tribunal could have concluded that it was fair in all the circumstances to refuse the adjournment.

47. Finally, Article 6 of the Convention does not compel the ET to the conclusion that it is always unfair to refuse an application for an adjournment on medical grounds, if it would mean that the hearing would take place in the party's absence. There are two sides to a trial, which should be as fair as possible to both sides. The ET has to balance the adverse consequences of proceeding with the hearing in the absence of one party against the right of the other party to have a trial within reasonable time and the public interest in prompt and efficient adjudication of cases in the ET."

20. In referring to the above authority, I am reminded that overall fairness is to both parties and that I should not substitute my own view on the ET's exercise of its discretion. The question is whether the ET erred in law in taking to account matters which it should not have done; or in failing to consider appropriate matters that it should have done; or alternatively, in reaching conclusions that no Tribunal could have reached, based on the evidence before the ET.

The Claimant's submissions

21. Mr Murgu relied on a written skeleton argument, the gist of which was to reiterate that both he and his son had been ill; that his son had not been able to attend nursery, because there was no funded place for him to attend the nursery in the week in which the ET hearing on 22 October 2018 had taken place; and he referred to the witness statement of the family friend, Ionut Tabirna, which had not been submitted to the ET. He also referred to his GP's certificate of fitness to attend work (commonly referred to as a GP 'sick note') for a period of from 22

A September 2018 to 14 December 2018, i.e. for a 12-week period which did not relate specifically to the date of the ET Hearing, but pre-dated it by a month and did not express a view as to Mr Murgu's ability to look after his son.

B 22. Mr Murgu added, in oral submissions, that the Claimant had in fact worked a full shift on the morning of the ET Hearing and had not, as might otherwise have been understood, merely attended work to give colleagues a lift to work. He confirmed this not by way of additional C evidence but simply to confirm what the Claimant's position was. He further asserted that, while accepting that the issue was not drawn to the ET's attention, the Claimant could not have attended and participated in the Hearing by herself, as she was not confident in her English language proficiency and so would have required an interpreter, although none had been requested. D Nevertheless, the Claimant had initially travelled to work and completed her early shift, with the intention of then traveling on to the Hearing.

E 23. Mr Murgu further submitted that following the unwillingness of the family friend to look after the couple's son, Mr Murgu had contacted the Claimant and suggested that she attend the ET alone, but she indicated to him an unwillingness to do so and wanted instead to return home to look after their son.

F 24. Mr Murgu argued that the ET had failed to consider that he had only become ill the night before the ET Hearing, which was why the crisis arose. Mr Murgu had intended to call the ET when the general telephone enquiries desk opened, but the ET clerk called him before he could G do so. At this stage, the Claimant was still at work, so he had suggested a delay, not as recorded by the ET until 12.30pm, but for an hour or so, but subsequently received a call back from the ET to say that the request and explanation for the delay was not satisfactory.

H

25. Mr Murgu submitted that the Claimant and he had assumed, and were entitled to assume, that the Claimant's claims would not simply be dismissed in her absence, because they had not been struck out or had been the subject of a deposit order at the previous Preliminary Hearing, as they had arguable merits.

The Respondent's submissions

26. Mr Wilkinson submitted that a number of Mr Murgu's submissions referred to, or amounted to, evidence that was not before the ET. While he did not object to that evidence being adduced, Mr Murgu's submissions were at odds with what the Claimant's Counsel had represented to Her Honour Judge Eady QC. Mr Murgu now suggested that the Claimant could not have attended the ET hearing on her own, in the absence of Mr Murgu. The Claimant had never asked for an interpreter and never raised the issue at the Preliminary Hearing in July 2018. Mr Murgu now confirmed that the Claimant had attended to complete a work shift and not merely to drop work colleagues off at work.

27. Mr Wilkinson referred to his written skeleton argument, to which he added with oral submissions, the gist of which was to emphasis the ET's knowledge at the time of its two decisions. At the time of the initial dismissal of the Claimant's claims on 22 October 2018, the ET knew the following:

(1) the Claimant had not attended or initiated contact with the ET;

(2) the Claimant's son was ill and was being looked after by Mr Murgu; and

(3) the Claimant had gone to work.

28. By the time of the ET's decision of 28 October 2018 in relation to reconsideration, and following further information from Mr Murgu, the ET was informed of the following:

(1) Mr Murgu had a long-term health problem. It had worsened on the evening of 21 October 2018;

(2) the Claimant's son began to have flu-like symptoms on 20 October 2018 and these symptoms had continued on 22 October 2018. The couple had tried to arrange a babysitter, but the babysitter saw the son's ill-health and refused to look after the child; and

(3) the Claimant had gone to work in order to take colleagues, but had aimed to come back for the Hearing if her son's situation had resolved.

Submissions on ground (1) – error by concluding that no satisfactory arrangements had been put in place

29. Mr Wilkinson submitted that at the time of the initial decision of 22 October 2018, all that the ET was aware of was that the Claimant's son was ill, that Mr Murgu had had to stay at home to look after him and that the Claimant had gone to work. At that stage, the need for childcare was not presented as a reason for the Claimant's failure to attend the Hearing, and the ET could not be criticised for concluding that the Claimant had not made satisfactory arrangements for childcare.

30. In the reconsideration, EJ Brain had noted the Claimant's explanations, but regarded them as being at odds with what Mr Murgu had told the ET clerk and was now admitting to this Tribunal, that the Claimant had gone to work and in fact worked her full shift, not, as Mr Murgu had stated in the reconsideration request, nor as repeated to Her Honour Judge Eady QC, merely to drop colleagues off at work. EJ Brain had also considered the representation that the Claimant had planned to attend the ET after work and also Mr Murgu's representation on the morning that she may be attend the ET Hearing later that day. EJ Brain did not accept the explanation that the

reason for the Claimant's non-attendance was because Mr Murgu was not well enough to look after their son. EJ Brain's conclusion was unarguably correct, noting that Mr Murgu confirmed at this hearing that he had offered to continue to look after their son.

31. By the time of the reconsideration request, EJ Brain knew that the son's illness had started on 20 October 2018, two days prior to the Hearing. It followed that there was a risk that he would need looking after on 22 October 2018. However, whilst the EJ was conscious and considered that Mr Murgu had problems with his health on the evening prior to 21 October 2018 and noted the assertion that the family friend had refused to babysit when he saw the Claimant's condition, there was no indication that the family friend had been pre-warned or consulted on 21 October; or whether any steps were taken for alternative arrangements, noting that the son's illness had begun on 20 October 2018.

32. Even on the Claimant's case before this Tribunal, Mr Murgu had confirmed that the Claimant had left for work at 5.15am; and the family friend had come to the family home at 7.30am, so that Mr Murgu had looked after the couple's child for over two hours by that stage. There was no explanation for why, if Mr Murgu was able to look after his son for over two hours, he was unable to look after his son, even for a little longer, while the Claimant attended the ET to explain her difficulties and if necessary to seek an adjournment.

33. In summary, EJ Brain was entitled to conclude that Mr Murgu had not presented evidence sufficient to demonstrate that he was too ill to look after the couple's son; and was entitled to conclude that the Claimant and not made satisfactory childcare arrangements.

Submissions on ground (2) - error by concluding that the Claimant had taken a conscious decision not to attend the ET Hearing

34. Mr Wilkinson argued that on the day of the ET Hearing, the Claimant had made the conscious decision to attend work and that was what Mr Murgu had informed the ET. In his reconsideration decision, ET Brain had not concluded that her decision was conscious solely because she now claimed be dropping colleagues off at work, rather than working, but also because of her failure to keep the ET informed of developments and the lack of evidence that Mr Murgu was unable to look after the couple's son, all of which were relevant to a conscious decision not to attend the ET Hearing. Those were all factors which EJ Brain was unarguably entitled to consider.

Submissions on ground (3) – error when considering what was reported to the ET clerk

35. Mr Wilkinson submitted that the ET was entitled to consider what the ET clerk informed them; other than a difference in how much of a delay to the start of the hearing to later that morning Mr Murgu had asked for, which was not material, there was no dispute as to what the ET clerk had conveyed to the ET, so the ET had been entitled to place weight on the representations made via the ET clerk.

Submissions on ground (4) – error by failing to consider whether to adjourn the ET Hearing

36. The ET had dismissed the remainder of the Claimant's claim on the basis that the Claimant had failed, without good reason, to attend the ET Hearing. It was implicit in that reasoning that the question of whether there was such a 'good reason' had been considered. In any event, EJ Brain considered the question of adjournment in his reconsideration decision.

Discussion and conclusions on grounds of appeal

Ground (1) – satisfactory arrangements

37. At the time of the ET's dismissal of the claims on 22 October 2018, and on the basis of the evidence before it, I conclude that the ET was unarguably entitled to conclude that the Claimant had no satisfactory childcare arrangements in place. Mr Murgu had not suggested, at that stage, that he was medically unfit to look after the couple's son. The ET was entitled to distinguish this from a case where unforeseen circumstances prevented the Claimant attending the ET. On the basis of the Claimant's representations on the day of the Hearing, it plainly was not such a case, as the Claimant had attended work.

38. By the time of the reconsideration decision, EJ Brain considered the representations that both Mr Murgu and the couple's son were unwell, but was also entitled to take into account the fact that the son had been unwell since 20 October 2018, and there was no explanation for what attempts, if any, had been for someone other than the couple's friend to help; or why the Claimant had not contacted the ET; or attended the ET in person, as indeed Mr Murgu now accepts that he had advised the Claimant to do, to inform them of the issue and if necessary, to explain the need for an adjournment. The suggestion now that the Claimant could not attend without Mr Murgu, because of her need for an interpreter, was never suggested to EJ Brain. Based on the representations made to EJ Brain at the time, EJ Brain was unarguably entitled to conclude that the Claimant had not provided satisfactory explanations for her non-attendance, noting the son's illness for several days and the lack of contact by the Claimant; and the lack of evidence about Mr Murgu's inability to look after the son.

39. In summary and applying the principles in **Transport for London v O'Cathail,** EJ Brain's conclusions about unsatisfactory arrangements did not amount to an error of law. For

reasons set out in relation to grounds (2) to (4) below, he did not consider impermissible factors; or fail to consider factors of which he had been informed. The Claimant's assumption that her claims would not be dismissed in her absence adopts the erroneous view that her personal situation pre-determined that the ET or EJ Brain would adjourn the Hearing.

Ground (2) – error on conscious decision

40. I conclude that at both stages, the ET and EJ Brain were entitled to assess that the Claimant had made a conscious decision not to attend the ET Hearing. At the time of the first decision, all that the ET knew was that the couple's son was unwell; Mr Murgu was looking after their son; and that the Claimant was at work. The ET was unarguably entitled to infer that the Claimant had chosen to attend work, rather than the ET Hearing.

41. By the time of EJ Brain's reconsideration, in reaching the decision that the Claimant had chosen not to attend the ET Hearing, he was careful to note multiple factors; the Claimant's attendance at work; and also her failure to attempt to contact the ET in advance of the Hearing, if her absence was not out of choice. I also accept Mr Wilkinson's submission that EJ Brain was entitled to consider, as a third factor, that Mr Murgu was not so unwell as to be unable to look after his son. The GP's sick certificate indicated Mr Murgu's unfitness to work for a period substantially pre-dating the ET Hearing and was just that – a general sick-note relating to his ability to attend work. A subsequent written statement produced by the family friend had not been provided to the ET or EJ Brain.

Ground (3) – error when considering what was reported to the ET clerk

42. I do not accept the proposition that the ET and EJ Brain impermissibly considered what Mr Murgu had informed the ET clerk, on the basis that there was no written record of the

A conversation. Other than one issue (the period of time when Mr Murgu said that the Claimant might attend later that day – either an hour or so, or around 12.30pm) the contents of the conversation were undisputed and indeed Mr Murgu only raised that one area of dispute before this Tribunal. In any event, whether the delay would have been "for an hour or so" (from around 10.00m) or 12.30pm does not feature as a reason, rather than a background fact, in EJ Brain's reasoning – instead, his focus was on an inconsistency in accounts; and a lack of evidence and explanation. In summary, the ET and EJ Brain were entitled to take into account what had been relayed to them by the ET clerk of Mr Murgu's oral representations. I am fortified in that conclusion, having considered Rule 47 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**, which states as follows:

> **"If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence."**

In this case, there had been such enquiries and the ET was obliged to consider the information that had been received, regardless of whether Mr Murgu had conveyed this in writing.

Ground (4) – error by failing to consider whether to adjourn the ET Hearing

43. I accept that in the ET's original decision of 22 October 2018, the Judgment is brief, referring to the Claimant having failed without good reason to attend the Hearing. However, the Judgment referred to oral reasons having been given at the Hearing and advising the Claimant of her right to request written reasons for the decision. She never requested written reasons, and I do not accept that the ET can be criticised for failing to expressly include a reference in the Judgment (as opposed to written reasons) to consideration of an adjournment.

44. By the time of the reconsideration decision of 28 November 2018, EJ Brain considered whether, in the circumstances, the dismissal of the Claimant's claims was inappropriate or whether there was a reasonable prospect of persuading the ET that it was in the interests of justice to revoke that order. Consideration of that question necessitated consideration of the same factors which were relevant to the question of adjournment and in the circumstances, EJ Brain did not err in not referring expressly to an adjournment in his reconsideration decision.

Summary

45. Returning to the authority of **Transport for London v O'Cathail**, this was a case where the Claimant and Mr Murgu had given the ET very limited information on the morning of the Hearing; the limited information which was provided and which the Claimant appeared to qualify or resile from now appears to be correct, namely that she was at work and Mr Murgu was looking after their son. That information was deficient, as it failed to mention the current, changed position, only now mentioned to this Tribunal, that the Claimant could not have attended the ET alone, as she needed Mr Murgu to translate for her. Mr Murgu and the Claimant were not proactive or timely in their contact with the ET; and the ET and EJ Brain were entitled to take that into account, in concluding that the Claimant had not put in place satisfactory child-care arrangements and that the Claimant had chosen not to attend the ET Hearing, which in light of Mr Murgu's submissions, was a correct conclusion.

46. The ET and EJ Brain were required to consider fairness to both parties, in accordance with the overriding objective. The respondent had attended the ET Hearing with its witnesses, ready to proceed. In contrast, the Claimant assumed that the ET Hearing would not proceed in her absence; was not proactive in her contact, and provided limited information, when contacted. In reaching a conclusion to proceed, the ET and EJ Brain considered all relevant information and

A did not consider impermissible factors. Their conclusions were unarguably open to them to reach on the information provided. There was no perversity, reliance on impermissible assumptions, or error of law in their conclusions.

B 47. The ET and EJ Brain did not err in law. The appeal fails and is dismissed.

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Appeal No. UKEAT/0088/19/OO

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 16 January 2020

Before

JUDGE KEITH

(SITTING ALONE)

MRS A DIMITRIU — APPELLANT

TESTERWORLD LTD t/a DE PHARMACEUTICAL — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR OVIDIU MURGU (Representative)
For the Respondent	MR TIMOTHY WILKINSON (of Counsel)

SUMMARY

PRACTICE AND PROCEDURE – appearance/striking-out

The Claimant was represented by her husband, who is not legally qualified. They attended and participated in a Preliminary Hearing, at which an ET considered whether the Claimant's claims had no, or little reasonable prospect of success, and allowed them to proceed without making a deposit order. The Claimant was notified of the substantive Hearing of her claims and was aware of the date of the Hearing, but failed to attend the Hearing, and failed to contact proactively the ET to explain that she could not attend; or to seek an adjournment.

Given the Claimant's non-attendance, a clerk of the ET telephoned and spoke to the Claimant's husband, who was identified as her representative. He informed the clerk that the couple's son was ill; he was looking after the son; and his wife was at work but hoped to be at the ET in hour or two. He was informed that this was not satisfactory, and the ET dismissed the Claimant's claims as she had failed, without good reason, to attend the ET Hearing.

The Claimant's husband then wrote to the ET, which the ET treated as a reconsideration request, asserting that the couple had not attended because of the husband's ill health and a refusal by a family friend, who had been due to babysit, to look after their son. The Claimant had attended work, as she had responsibility to take colleagues to work.

An EJ rejected the submissions as providing adequate explanations for the Claimant's non-attendance, including why someone else could not have taken colleagues to work and the inconsistency of that explanation with the Claimant's husband's verbal explanation that the Claimant was at work; a previous failure to explain the family friend's reluctance to look after the son; the failure by the husband or the Claimant to contact the ET; the lack of evidence that the husband was unable to look after the son, to permit the Claimant's attendance; and on the

Claimant's explanation, a lack of satisfactory arrangements for her son to be looked after, about which the ET had been kept in ignorance. The EJ concluded that the Claimant had chosen not to attend the hearing.

In her appeal, which the Claimant subsequently sought to amend, the Claimant asserted that where an ET was in contact with a party which had failed to attend a hearing, it was bound to notify that party of the consequences of non-attendance and their ability to apply for a postponement. That proposition was rejected by (as she then was) Her Honour Judge Eady QC at a hearing under **Rule 3(10)** of the **Employment Appeal Tribunal Rules 1993,** as it would place an undue burden on ET staff, where the obligation was on the Claimant to contact the ET if there were obstacles to her attendance.

Permission was granted to proceed with the remainder of the grounds, which were (1) that the ET had erred in concluding that no satisfactory childcare arrangements had been put in place, and it was wrong for the ET not to consider that there were unforeseen consequences preventing the Claimant's attendance. (2) The ET and EJ had erred in concluding that the Claimant had made a conscious decision not to attend the ET Hearing, by placing undue weight on her attendance at work, when she had only attended to take colleagues. (3) The ET and EJ had placed impermissible weight on what had been reported to them by the ET clerk, when the Claimant's husband had only provided verbal comments and there was no written record of the discussion. (4) The ET and EJ had failed to consider adjourning the Hearing, when the Claimant and her husband had attended the previous hearing.

Held: The ET and EJ were entitled to conclude that the Claimant had failed, without good reason, to attend the ET Hearing. Applying **Transport for London v O'Cathail** [2013] EWCA Civ 21, overall fairness to both parties is consistent with the overriding objective and the assessment of

fairness must be made in the round. The Claimant had not been entitled to assume that because of her personal circumstances and the fact that her claims had not been struck out previously, or had deposit orders made in respect of them, the ET Hearing could not proceed in her absence. The Claimant had not been proactive or timely in her communications with the ET and EJ and had provided limited information to them, which the ET and EJ were entitled to treat as inconsistent and unsatisfactory. The EJ was entitled to conclude that the Claimant had chosen not to attend the ET Hearing and the ET and EJ were entitled to consider, and rely on, the verbal communications from the Claimant's husband. In his reconsideration request, the EJ had considered all the factors relevant to whether the ET should have adjourned the Hearing.

JUDGE KEITH

1. I shall refer to the parties as they were before the Employment Tribunal ("ET") as Claimant and Respondent. This appeal is brought by the Claimant.

Background

2. The Claimant presented a claim form on 1 March 2018. She claimed unfair dismissal; a failure to pay notice pay; and discrimination based on her sex; and nationality, specifically as a Romanian national. There was no dispute that the Respondent had employed and dismissed her.

3. Following receipt of her claim form, the ET issued a strike-out warning on 2 March 2018, in respect of her unfair dismissal claim. This was because the Claimant did not appear to have sufficient continuous employment to bring an unfair dismissal claim, and did not appear to meet other requirements, where sufficient continuous employment is not required. The ET's warning letter made clear that it did not affect the other complaints in her claim form.

4. The Claimant failed to respond. In a decision dated 16 April 2018, EJ Lancaster struck out the unfair dismissal claim. The Reasons stated:

> **(1) The Claimant complains of unfair dismissal;**
>
> **(2) Section 108 of the Employment Rights Act 1996 requires a Claimant to have not less than of two years' service to make an unfair dismissal complaint;**
>
> **(3) The Claimant was employed by the Respondent for less than two years;**
>
> **(4) Therefore, the Claimant is not entitled to bring such a complaint;**
>
> **(5) The Claimant has failed to give an acceptable reason despite being given the opportunity to do so, on the correspondence sent to the parties on 7 March 2018 why the complaint should not be struck out;**
>
> **(6) Accordingly, the complaint of unfair dismissal is struck out. The Claimant's other complaints are not affected by this Judgment.**

The Claimant did not appeal EJ Lancaster's Order.

5. On 13 July 2018, a Preliminary Hearing took place. The Claimant and Mr Murgu attended, and engaged in, that Hearing. I do not recite in full the various directions that were given, but at that Hearing, EJ Brain also assessed whether the complaints either had 'no' or 'little' reasonable prospect of success. EJ Brain concluded that those two tests were not made out and so he allowed the remainder of the Claimant's claims to proceed to a full hearing.

6. A Notice of Hearing was sent to parties and the Hearing was listed for 22 October 2018. The Claimant and Mr Murgu do not assert that they were unaware, in advance, of the date of the Hearing. EJ Brain chaired the Hearing. Neither the Claimant, nor Mr Murgu, attended the Hearing. In contrast, the Respondent's representatives and witnesses attended.

7. The Claimant has asserted that Mr Murgu and their son both became ill: their son on 20 October 2018; and Mr Murgu, who has separate ongoing health issues, on 21 October 2018; and that both continued to be ill on 22 October 2018. The ET's precise knowledge of those matters is at the core of this appeal.

8. As a consequence of the lack of attendance by the Claimant or Mr Murgu and without any apparent explanation for their absence, or any contact initiated by them, an ET clerk telephoned Mr Murgu, who was identified as the Claimant's representative on the claim form. Mr Murgu told the clerk that he was at home, looking after his ill child, and that the Claimant was at work. He did not seek an adjournment of the Hearing. For reasons explained later in this Judgment, and despite some initial confusion, Mr Murgu's initial explanation, given that morning, was correct. Mr Murgu has never asserted that he informed the ET on the morning of the Hearing of his own illness; nor on that morning did he distinguish between the Claimant merely taking colleagues to work, as opposed to being at work herself, a distinction he later sought to make.

The ET's dismissal of the remainder of the claims

9. In a Judgment dated 22 October 2018, the ET recorded the Claimant's failure, without good reason, to attend the Hearing and dismissed the remainder of the Claimant's claims. The ET also issued directions in relation to the Respondent's costs, which are not the subject of this appeal.

Reconsideration request

10. On 8 November 2018, on the Claimant's behalf, Mr Murgu wrote to the ET in the following terms:

> **"(1) Our absence on 22 October 2018 was because my health conditions was badly affected. Actually, I had big problems with my health but starting with evening 21 October 2018 came another problem. All this can be confirmed by the GP from Ashville Medical Practice Barnsley because they made tests, investigate and give treatment by prescription and recorded everything about my health situation. This is about me, Ovidiu Murgu.**
>
> **(2) Our son [J] three years and four months old started to have flu from 20 October 2018 and because on 22 October 2018 he does not go to nursery, we have tried to bring a person for babysitting but she when saw the health condition of the child she refused to stay.**
>
> **(3) The Appellant was gone to work on the morning of 22 October 2018 because she has a responsibility for transport for other three persons who can work at the same company and she supposed to come back for Hearing if I can resolve with our son.**
>
> **(4) For all of this if are necessary, we can provide evidence from doctors, nursery and witness statement."**

11. EJ Brain treated Mr Murgu's correspondence as a request for reconsideration. In a Decision dated 28 November 2018, he refused the request, stating:

> **"(1) The Claimant has not explained why it was necessary to take her colleagues to work when other arrangements could have been made for them to get to work that day. She knew the date of the Hearing as long ago as 13 July 2018. She had plenty of time to sort this out.**
>
> **(2) The explanation now given is at odds with the Tribunal Hearing being told on 22 October (by Mr Murgu) that the Claimant had gone into work (not that she was just taking others in) and Mr Murgu's suggestion that if the matter was adjourned to 12.30 that day he would try and find someone to look after the child. He did not say that someone had already declined to do so: omitting to say that was misleading.**
>
> **(3) The information relayed by and on behalf of the Claimant followed an enquiry from the Tribunal. There has been no explanation as to why the Claimant did not telephone the Tribunal herself.**

(4) There is no medical evidence that Mr Murgu's illness prevented him from looking after the child or to corroborate what was said about the child's health.

(5) On the Claimant's own explanation there was a risk of arrangements falling down on the day, and of satisfactory arrangements not being made to look after the child, yet the Tribunal and the Respondent were kept in ignorance of this difficulty. Arrangements did fall down and the Claimant did not attend (although as I have said I am not satisfied that Mr Murgu could not have looked after the child).

I am compelled to the conclusion that the interests favour the Respondent and that there is no reasonable prospect of the Claimant persuading the Tribunal that it is in the interests of justice to revoke or vary the Judgment of 22 October. She chose not to attend the Hearing and must take the consequences.

The application is therefore refused."

Appeal to the EAT

12. The Claimant subsequently appealed the ET's dismissal of her claims, and refusal of the reconsideration request, to this Tribunal. When the appeal came for consideration on the papers under Rule 3(7) of the **Employment Appeal Tribunal Rules 1993**, His Honour Judge Auerbach doubted whether the appeal was arguable given that the apparent grounds of appeal did not engage with the ET's reasoning. However, he thought it fair, noting that the Claimant was legally unrepresented, to convene a Preliminary Hearing to consider arguability.

13. In written submissions for the purposes of the Preliminary Hearing, the Claimant adduced evidence that her son had not attended nursery on 22 October 2018; a witness statement from a family friend who refused to babysit the son; and correspondence from Mr Murgu's GP regarding his illness, which had begun on 21 October 2018. That correspondence did not confirm that Mr Murgu was not fit enough to look after the couple's son.

The issues

14. In granting permission to proceed, Her Honour Judge Eady QC, as she then was, provided the following reasoning:

"Counsel appeared for the Appellant. (the Claimant before the ET) under ELAAS explained (on instructions) what had occurred on morning of the Hearing. Shortly before the ET Hearing the Claimant's son had fallen ill; initially it had been thought that the

Claimant's partner (with whom she has four children including the child who was ill on the day of ET Hearing) would be able to look the him but he (the Claimant's partner) had been taken ill on the evening before the Hearing. The Claimant's partner had a long-standing serious health problem and this had been a troubling incident that meant he was unable to care for their sick child on the day of the Hearing. The Claimant had, however, believed that the alternative arrangements could still be made and therefore felt able to meet her customary obligation to drive her colleagues to work - this was very early in the morning and would meant that she could still attend the ET Hearing on time. In the event the neighbour/friend who had initially seemed able to care for their child was not willing to do so and that is why the Claimant had to return home. When she was doing so the ET clerk had spoken to the Claimant's partner who had not appreciated that he needed to provide all the details set out above and explained about his and their child's ill health and said that the Claimant might be able to make the Hearing if it could start later. The clerk had said that this information would be relayed to the EJ; no advice had been given as to the possible consequences of not attending or the Claimant's right to seek a postponement.

By the first proposed amended ground of appeal, it was suggested where an EJ makes contact with a party who has failed to attend, it will be an error for it to have regard to that contact without having ensured that the party in question understands the consequences of non-attendance and/or their ability to apply for postponement.

I was not persuaded of the merit of this point. This seemed to me to be placing an undue burden on the ET staff. The primary obligation to attend an ET Hearing was on the Claimant and it was also her obligation to make contact with the ET if problems arose such as to make it difficult for her on the day. ET staff are not obliged to advise litigants and the ET was not bound to disregard evidence of contact that had been made in the circumstances."

Secondly, it was argued that the ET had erred by having regard to the irrelevant/inaccurate matters and/or had failed to take into account relevant factors:

(i) the ET had wrongly concluded no satisfactory arrangements had been put in place to provide the care for the Claimant's child. That was not the case (the Claimant's husband was originally going to look after the child and when the evening before it was discovered that he could not do so, it had been thought that a neighbour would assist) and having stated (see the ET Decision on reconsideration application) that the Claimant's account was accepted. It was wrong for the ET not to have seen this as a case where unforeseen circumstances had led to the Claimant's difficulties on the day.

(ii) the ET had also wrongly assumed that the Claimant had made a conscious decision not to attend, apparently thinking that this was demonstrated by the fact that she had taken colleagues into work that morning. That was an irrelevant factor as the Claimant would still have been able to attend the ET Hearing. It was her need to return home due to care for her child that meant she could not.

(iii) The ET had also given undue weight to what the clerk had reported but when there was no written record of this, and no allowance was made for the Claimant's partner's ill health.

Thirdly, it was further contended that the ET had erred in failing to consider whether or not to adjourn the Hearing, given that this was a Claimant who had engaged with the proceedings before and had attended the earlier Preliminary Hearing."

15. Her Honour Judge Eady QC was persuaded that the second and third groups of grounds (which I have renumbered for ease of reference) gave rise to reasonably arguable questions that should be permitted to proceed to a full Hearing. She directed that the Claimant should lodge

any witness statements and other evidence on which she intended to rely, including that of Mr Murgu, within 14 days of the Order.

The hearing before me

16. The Claimant attended the hearing before me, but was represented by her husband, Mr Murgu, who is not legally qualified. Given his lack of legal qualifications, I asked Mr Murgu to let me know if he did not understand any part of the proceedings and I asked the Respondent's Counsel, Mr Wilkinson, to provide his comments in clear terms, without legal jargon.

17. Mr Murgu also indicated that he had hearing difficulties. I emphasised to him that if he had any difficulties in hearing what was being discussed or did not understand any of the legal discussions then he should let me know me know straightaway. He did not express any difficulty in understanding or hearing any part of the discussions in the Hearing.

18. While indicating to me that the Claimant would have had been unable to participate alone in any full ET Hearing without an interpreter in Romanian, because of her lack of confidence in oral English (for which he had never sought an interpreter), Mr Murgu confirmed that he was able to represent the Claimant today, as his oral English was sufficiently good. He confirmed that there was no need not to proceed with the Hearing today because of any language difficulties.

The law

19. I considered the Court of Appeal's decision in **Transport for London v O'Cathail** [2013] EWCA Civ 21.

> **"44. The crucial point of difference from *Terluk* is that decisions of the ET can only be appealed on questions of law, whereas under the CPR the appeal is normally by way of review and the decision of a lower court can be set aside, if it is wrong, or if it is unjust by reason of a serious procedural or other irregularity in the proceedings. In relation to case management the ET has exceptionally wide powers of managing cases brought by and against parties who are often without the benefit of legal representation. The ET's**

decisions can only be questioned for error of law. A question of law only arises in relation to their exercise, when there is an error of legal principle in the approach or perversity in the outcome. That is the approach, including failing to take account of a relevant matter or taking account of an irrelevant one, which the EAT should continue to adopt rather than the approach in *Terluk* as summarised in the headnote quoted above. It is to be hoped that this ruling will put an end to the "apparent confusion in authority" on the point pointed out by Wilkie J in *Riley v. The Crown Prosecution Service* (13 June 2012 – UKEAT/0043/12/SM) at [55]-[56],

45. Overall fairness to both parties is always the overriding objective. The assessment of fairness must be made in the round. It is not necessarily pre-determined by the situation of one of the parties, such as the potentially absent claimant who is denied an adjournment.

46. Fifthly, the EAT's application of the *Terluk* approach led it into substituting its own decision on the exercise of the discretion for that of the ET. That was an error of law on its part. The ET did not err in law by reaching a decision that the EAT would not have made, had it been considering the application to adjourn. What is fair in the interests of the parties is, in the first instance, a matter for assessment by the ET. The EAT ought only to intervene if the ET has erred in principle or produced a perverse outcome in the sense that no reasonable tribunal could have concluded that it was fair in all the circumstances to refuse the adjournment.

47. Finally, Article 6 of the Convention does not compel the ET to the conclusion that it is always unfair to refuse an application for an adjournment on medical grounds, if it would mean that the hearing would take place in the party's absence. There are two sides to a trial, which should be as fair as possible to both sides. The ET has to balance the adverse consequences of proceeding with the hearing in the absence of one party against the right of the other party to have a trial within reasonable time and the public interest in prompt and efficient adjudication of cases in the ET."

20. In referring to the above authority, I am reminded that overall fairness is to both parties and that I should not substitute my own view on the ET's exercise of its discretion. The question is whether the ET erred in law in taking to account matters which it should not have done; or in failing to consider appropriate matters that it should have done; or alternatively, in reaching conclusions that no Tribunal could have reached, based on the evidence before the ET.

The Claimant's submissions

21. Mr Murgu relied on a written skeleton argument, the gist of which was to reiterate that both he and his son had been ill; that his son had not been able to attend nursery, because there was no funded place for him to attend the nursery in the week in which the ET hearing on 22 October 2018 had taken place; and he referred to the witness statement of the family friend, Ionut Tabirna, which had not been submitted to the ET. He also referred to his GP's certificate of fitness to attend work (commonly referred to as a GP 'sick note') for a period of from 22

A September 2018 to 14 December 2018, i.e. for a 12-week period which did not relate specifically to the date of the ET Hearing, but pre-dated it by a month and did not express a view as to Mr Murgu's ability to look after his son.

B 22. Mr Murgu added, in oral submissions, that the Claimant had in fact worked a full shift on the morning of the ET Hearing and had not, as might otherwise have been understood, merely attended work to give colleagues a lift to work. He confirmed this not by way of additional C evidence but simply to confirm what the Claimant's position was. He further asserted that, while accepting that the issue was not drawn to the ET's attention, the Claimant could not have attended and participated in the Hearing by herself, as she was not confident in her English language proficiency and so would have required an interpreter, although none had been requested. D Nevertheless, the Claimant had initially travelled to work and completed her early shift, with the intention of then traveling on to the Hearing.

E 23. Mr Murgu further submitted that following the unwillingness of the family friend to look after the couple's son, Mr Murgu had contacted the Claimant and suggested that she attend the ET alone, but she indicated to him an unwillingness to do so and wanted instead to return home to look after their son.

F 24. Mr Murgu argued that the ET had failed to consider that he had only become ill the night before the ET Hearing, which was why the crisis arose. Mr Murgu had intended to call the ET when the general telephone enquiries desk opened, but the ET clerk called him before he could G do so. At this stage, the Claimant was still at work, so he had suggested a delay, not as recorded by the ET until 12.30pm, but for an hour or so, but subsequently received a call back from the ET to say that the request and explanation for the delay was not satisfactory.

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25. Mr Murgu submitted that the Claimant and he had assumed, and were entitled to assume, that the Claimant's claims would not simply be dismissed in her absence, because they had not been struck out or had been the subject of a deposit order at the previous Preliminary Hearing, as they had arguable merits.

The Respondent's submissions

26. Mr Wilkinson submitted that a number of Mr Murgu's submissions referred to, or amounted to, evidence that was not before the ET. While he did not object to that evidence being adduced, Mr Murgu's submissions were at odds with what the Claimant's Counsel had represented to Her Honour Judge Eady QC. Mr Murgu now suggested that the Claimant could not have attended the ET hearing on her own, in the absence of Mr Murgu. The Claimant had never asked for an interpreter and never raised the issue at the Preliminary Hearing in July 2018. Mr Murgu now confirmed that the Claimant had attended to complete a work shift and not merely to drop work colleagues off at work.

27. Mr Wilkinson referred to his written skeleton argument, to which he added with oral submissions, the gist of which was to emphasis the ET's knowledge at the time of its two decisions. At the time of the initial dismissal of the Claimant's claims on 22 October 2018, the ET knew the following:

(1) the Claimant had not attended or initiated contact with the ET;

(2) the Claimant's son was ill and was being looked after by Mr Murgu; and

(3) the Claimant had gone to work.

28. By the time of the ET's decision of 28 October 2018 in relation to reconsideration, and following further information from Mr Murgu, the ET was informed of the following:

(1) Mr Murgu had a long-term health problem. It had worsened on the evening of 21 October 2018;

(2) the Claimant's son began to have flu-like symptoms on 20 October 2018 and these symptoms had continued on 22 October 2018. The couple had tried to arrange a babysitter, but the babysitter saw the son's ill-health and refused to look after the child; and

(3) the Claimant had gone to work in order to take colleagues, but had aimed to come back for the Hearing if her son's situation had resolved.

Submissions on ground (1) – error by concluding that no satisfactory arrangements had been put in place

29. Mr Wilkinson submitted that at the time of the initial decision of 22 October 2018, all that the ET was aware of was that the Claimant's son was ill, that Mr Murgu had had to stay at home to look after him and that the Claimant had gone to work. At that stage, the need for childcare was not presented as a reason for the Claimant's failure to attend the Hearing, and the ET could not be criticised for concluding that the Claimant had not made satisfactory arrangements for childcare.

30. In the reconsideration, EJ Brain had noted the Claimant's explanations, but regarded them as being at odds with what Mr Murgu had told the ET clerk and was now admitting to this Tribunal, that the Claimant had gone to work and in fact worked her full shift, not, as Mr Murgu had stated in the reconsideration request, nor as repeated to Her Honour Judge Eady QC, merely to drop colleagues off at work. EJ Brain had also considered the representation that the Claimant had planned to attend the ET after work and also Mr Murgu's representation on the morning that she may be attend the ET Hearing later that day. EJ Brain did not accept the explanation that the

reason for the Claimant's non-attendance was because Mr Murgu was not well enough to look after their son. EJ Brain's conclusion was unarguably correct, noting that Mr Murgu confirmed at this hearing that he had offered to continue to look after their son.

31. By the time of the reconsideration request, EJ Brain knew that the son's illness had started on 20 October 2018, two days prior to the Hearing. It followed that there was a risk that he would need looking after on 22 October 2018. However, whilst the EJ was conscious and considered that Mr Murgu had problems with his health on the evening prior to 21 October 2018 and noted the assertion that the family friend had refused to babysit when he saw the Claimant's condition, there was no indication that the family friend had been pre-warned or consulted on 21 October; or whether any steps were taken for alternative arrangements, noting that the son's illness had begun on 20 October 2018.

32. Even on the Claimant's case before this Tribunal, Mr Murgu had confirmed that the Claimant had left for work at 5.15am; and the family friend had come to the family home at 7.30am, so that Mr Murgu had looked after the couple's child for over two hours by that stage. There was no explanation for why, if Mr Murgu was able to look after his son for over two hours, he was unable to look after his son, even for a little longer, while the Claimant attended the ET to explain her difficulties and if necessary to seek an adjournment.

33. In summary, EJ Brain was entitled to conclude that Mr Murgu had not presented evidence sufficient to demonstrate that he was too ill to look after the couple's son; and was entitled to conclude that the Claimant and not made satisfactory childcare arrangements.

Submissions on ground (2) - error by concluding that the Claimant had taken a conscious decision not to attend the ET Hearing

34. Mr Wilkinson argued that on the day of the ET Hearing, the Claimant had made the conscious decision to attend work and that was what Mr Murgu had informed the ET. In his reconsideration decision, ET Brain had not concluded that her decision was conscious solely because she now claimed be dropping colleagues off at work, rather than working, but also because of her failure to keep the ET informed of developments and the lack of evidence that Mr Murgu was unable to look after the couple's son, all of which were relevant to a conscious decision not to attend the ET Hearing. Those were all factors which EJ Brain was unarguably entitled to consider.

Submissions on ground (3) – error when considering what was reported to the ET clerk

35. Mr Wilkinson submitted that the ET was entitled to consider what the ET clerk informed them; other than a difference in how much of a delay to the start of the hearing to later that morning Mr Murgu had asked for, which was not material, there was no dispute as to what the ET clerk had conveyed to the ET, so the ET had been entitled to place weight on the representations made via the ET clerk.

Submissions on ground (4) – error by failing to consider whether to adjourn the ET Hearing

36. The ET had dismissed the remainder of the Claimant's claim on the basis that the Claimant had failed, without good reason, to attend the ET Hearing. It was implicit in that reasoning that the question of whether there was such a 'good reason' had been considered. In any event, EJ Brain considered the question of adjournment in his reconsideration decision.

Discussion and conclusions on grounds of appeal

Ground (1) – satisfactory arrangements

37. At the time of the ET's dismissal of the claims on 22 October 2018, and on the basis of the evidence before it, I conclude that the ET was unarguably entitled to conclude that the Claimant had no satisfactory childcare arrangements in place. Mr Murgu had not suggested, at that stage, that he was medically unfit to look after the couple's son. The ET was entitled to distinguish this from a case where unforeseen circumstances prevented the Claimant attending the ET. On the basis of the Claimant's representations on the day of the Hearing, it plainly was not such a case, as the Claimant had attended work.

38. By the time of the reconsideration decision, EJ Brain considered the representations that both Mr Murgu and the couple's son were unwell, but was also entitled to take into account the fact that the son had been unwell since 20 October 2018, and there was no explanation for what attempts, if any, had been for someone other than the couple's friend to help; or why the Claimant had not contacted the ET; or attended the ET in person, as indeed Mr Murgu now accepts that he had advised the Claimant to do, to inform them of the issue and if necessary, to explain the need for an adjournment. The suggestion now that the Claimant could not attend without Mr Murgu, because of her need for an interpreter, was never suggested to EJ Brain. Based on the representations made to EJ Brain at the time, EJ Brain was unarguably entitled to conclude that the Claimant had not provided satisfactory explanations for her non-attendance, noting the son's illness for several days and the lack of contact by the Claimant; and the lack of evidence about Mr Murgu's inability to look after the son.

39. In summary and applying the principles in **Transport for London v O'Cathail,** EJ Brain's conclusions about unsatisfactory arrangements did not amount to an error of law. For

reasons set out in relation to grounds (2) to (4) below, he did not consider impermissible factors; or fail to consider factors of which he had been informed. The Claimant's assumption that her claims would not be dismissed in her absence adopts the erroneous view that her personal situation pre-determined that the ET or EJ Brain would adjourn the Hearing.

Ground (2) – error on conscious decision

40. I conclude that at both stages, the ET and EJ Brain were entitled to assess that the Claimant had made a conscious decision not to attend the ET Hearing. At the time of the first decision, all that the ET knew was that the couple's son was unwell; Mr Murgu was looking after their son; and that the Claimant was at work. The ET was unarguably entitled to infer that the Claimant had chosen to attend work, rather than the ET Hearing.

41. By the time of EJ Brain's reconsideration, in reaching the decision that the Claimant had chosen not to attend the ET Hearing, he was careful to note multiple factors; the Claimant's attendance at work; and also her failure to attempt to contact the ET in advance of the Hearing, if her absence was not out of choice. I also accept Mr Wilkinson's submission that EJ Brain was entitled to consider, as a third factor, that Mr Murgu was not so unwell as to be unable to look after his son. The GP's sick certificate indicated Mr Murgu's unfitness to work for a period substantially pre-dating the ET Hearing and was just that – a general sick-note relating to his ability to attend work. A subsequent written statement produced by the family friend had not been provided to the ET or EJ Brain.

Ground (3) – error when considering what was reported to the ET clerk

42. I do not accept the proposition that the ET and EJ Brain impermissibly considered what Mr Murgu had informed the ET clerk, on the basis that there was no written record of the

A conversation. Other than one issue (the period of time when Mr Murgu said that the Claimant might attend later that day – either an hour or so, or around 12.30pm) the contents of the conversation were undisputed and indeed Mr Murgu only raised that one area of dispute before this Tribunal. In any event, whether the delay would have been "for an hour or so" (from around 10.00m) or 12.30pm does not feature as a reason, rather than a background fact, in EJ Brain's reasoning – instead, his focus was on an inconsistency in accounts; and a lack of evidence and explanation. In summary, the ET and EJ Brain were entitled to take into account what had been relayed to them by the ET clerk of Mr Murgu's oral representations. I am fortified in that conclusion, having considered Rule 47 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**, which states as follows:

> **"If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence."**

In this case, there had been such enquiries and the ET was obliged to consider the information that had been received, regardless of whether Mr Murgu had conveyed this in writing.

Ground (4) – error by failing to consider whether to adjourn the ET Hearing

43. I accept that in the ET's original decision of 22 October 2018, the Judgment is brief, referring to the Claimant having failed without good reason to attend the Hearing. However, the Judgment referred to oral reasons having been given at the Hearing and advising the Claimant of her right to request written reasons for the decision. She never requested written reasons, and I do not accept that the ET can be criticised for failing to expressly include a reference in the Judgment (as opposed to written reasons) to consideration of an adjournment.

44. By the time of the reconsideration decision of 28 November 2018, EJ Brain considered whether, in the circumstances, the dismissal of the Claimant's claims was inappropriate or whether there was a reasonable prospect of persuading the ET that it was in the interests of justice to revoke that order. Consideration of that question necessitated consideration of the same factors which were relevant to the question of adjournment and in the circumstances, EJ Brain did not err in not referring expressly to an adjournment in his reconsideration decision.

Summary

45. Returning to the authority of **Transport for London v O'Cathail**, this was a case where the Claimant and Mr Murgu had given the ET very limited information on the morning of the Hearing; the limited information which was provided and which the Claimant appeared to qualify or resile from now appears to be correct, namely that she was at work and Mr Murgu was looking after their son. That information was deficient, as it failed to mention the current, changed position, only now mentioned to this Tribunal, that the Claimant could not have attended the ET alone, as she needed Mr Murgu to translate for her. Mr Murgu and the Claimant were not proactive or timely in their contact with the ET; and the ET and EJ Brain were entitled to take that into account, in concluding that the Claimant had not put in place satisfactory child-care arrangements and that the Claimant had chosen not to attend the ET Hearing, which in light of Mr Murgu's submissions, was a correct conclusion.

46. The ET and EJ Brain were required to consider fairness to both parties, in accordance with the overriding objective. The respondent had attended the ET Hearing with its witnesses, ready to proceed. In contrast, the Claimant assumed that the ET Hearing would not proceed in her absence; was not proactive in her contact, and provided limited information, when contacted. In reaching a conclusion to proceed, the ET and EJ Brain considered all relevant information and

A did not consider impermissible factors. Their conclusions were unarguably open to them to reach on the information provided. There was no perversity, reliance on impermissible assumptions, or error of law in their conclusions.

B 47. The ET and EJ Brain did not err in law. The appeal fails and is dismissed.

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