Appeal No. UKEAT/0263/19/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 20 February 2020

Before

NAOMI ELLENBOGEN QC, DEPUTY JUDGE OF THE HIGH COURT

(SITTING ALONE)

MR P STOTT — APPELLANT

LEADEC LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS KATHERINE APPS (of Counsel) Appearing under the Employment Law Appeal Advice Scheme, but as amicus to the EAT
For the Respondent	NOT APPEARING

SUMMARY

HUMAN RIGHTS

PRACTICE AND PROCEDURE

At the outset of a Preliminary Hearing, the ELAAS representative raised concerns as to the Appellant's litigation capacity. Adjourning the hearing on terms enabling the investigation of that issue, the EAT held that section 30(3) of the **Employment Tribunals Act 1996** ('the ETA') provides the EAT with the power to regulate its own procedure, subject to the EAT Rules and any Practice Direction. The appointment of a litigation friend for a person who lacks capacity to conduct litigation falls within paragraph 13.1 of the 2018 Practice Direction, whereby, consistent with the overriding objective, the EAT will seek to give directions for case management so that the appeal can be dealt with in the most effective and just way. Furthermore, in accordance with paragraph 1.8 of the Practice Direction, it is appropriate, in such matters, that the EAT be guided by the CPR (in particular, for current purposes, Part 21).

Under section 7(1) of the ETA, the Secretary of State may, by regulations, make such provision as appears to him to be necessary or expedient with respect to proceedings before employment tribunals. Section 30(1) of the same Act provides that it is for the Lord Chancellor, after consultation with the Lord President of the Court of Session, to make rules with respect to proceedings before the EAT. Over two and a half years after the expressly 'urgent' need had been identified, in **AM Afghanistan v SoS for the Home Dept (Lord Chancellor intervening)** [2018] 4 WLR 78, CA; and in **Jhuti v Royal Mail Group Limited** [2018] ICR 1077, EAT, it was to be hoped that truly urgent consideration would now be given to the implementation of rules containing clearly defined powers in relation to proceedings involving protected parties (as defined in Part 21 of the CPR), in employment tribunals and in the EAT.

DEPUTY JUDGE OF THE HIGH COURT NAOMI ELLENBOGEN QC

1. Yesterday afternoon, I postponed a Preliminary Hearing which would otherwise have taken place in accordance with the Order of Eady J, dated 17 October 2019. I made the following orders for which I stated that I would give reasons today:

> **"(1) Today's Preliminary Hearing be adjourned generally subject to the further Orders made below.**
>
> **(2) By Friday, 17 April 2020, the Employment Appeal Tribunal be provided with:**
>
> **(a) a medical report directed at the Appellant's capacity to litigate in these proceedings. That report should include consideration of whether the Appellant is capable of:**
>
> **i) understanding, with the assistance of such proper explanation (in broad terms and simple language) from legal advisors and other experts as his appeal may require, the matters on which his consent or decision is likely to be necessary in the course of that appeal and;**
>
> **ii) using or weighing that information as part of the process of giving any necessary consent and making any necessary decision; and**
>
> **(b) details of any suitable individual who would be willing to act as the Appellant's litigation friend (including the Official Solicitor), providing the name, address and contact details for that individual.**
>
> **(3) Upon receipt of the material provided in accordance with paragraph 2 above (and, in any event, by Friday, 24 April 2020), the file will be put before a judge to consider all appropriate further orders and directions, including in relation to the relisting of the Preliminary Hearing ordered by Eady J, on 17 October 2019.**
>
> **(4) An expedited transcript of the reasons for orders 1 to 3 above be produced and provided to the Appellant, as soon as reasonably practicable."**

2. The circumstances in which I made those orders and my reasons for doing so are set out below. I refer to the parties as they appeared before the Employment Tribunal.

Background

3. The Claimant's appeal is from the judgment of Employment Judge Ryan and members, sitting at Liverpool Employment Tribunal, sent to the parties on 9 July 2018. The Claimant was employed by the Respondent as a sequence picker. The Respondent operated a so-called "bell-to-bell" policy, under which its staff were to remain in their work cells throughout their shifts, unless granted permission to leave by a team leader, supervisor or manager. By letter dated 22 December 2016, the Claimant was dismissed for having breached that rule on two occasions, in

the context of a live final written warning for similar misconduct which had made clear that any repeated absence from his work cell, in breach of the rules, would result in his dismissal.

4. By the time of the hearing giving rise to the judgment under appeal, the issues in dispute had been clarified and were set out in the nine sub-paragraphs, at paragraph 1 of the Tribunal's Reasons. Materially, for current purposes, the Tribunal found that:

a. the Claimant was disabled by reason of a mental impairment; anxiety, as the Respondent had accepted. The Claimant's sprained ankle and alleged degenerative disc disease did not constitute disabilities under the Equality Act 2010 ("the EqA") (Judgment, paragraph 2; Reasons, paragraphs 2.7 and 4.2);

b. the Respondent had neither directly discriminated against the Claimant because of his disability, by dismissing him, nor acted in breach of any duty to make reasonable adjustments. In relation to the latter, there had been no provision, criterion or practice which had put the Claimant at the requisite substantial disadvantage (Judgment, paragraphs 5 and 3; Reasons, paragraph 4.4).

c. the Claimant's dismissal had not been unfair, substantively or procedurally (Judgment, paragraph 4; Reasons, paragraphs 4.6 to 4.8, read with the Tribunal's findings of fact at paragraphs 2.2 to 2.6); and

d. at the Respondent's application, the Claimant must pay a contribution towards it costs, in the sum of £2,000 plus VAT (Judgment, paragraph 6; Reasons, paragraphs 5.1 and 5.2).

5. The Claimant has appealed from the above findings, so far as adverse to him. To date, he has personally settled the form ET1; represented himself before the Tribunal; settled the Notice of Appeal and applied for an extension of time in which to lodge that appeal; settled a skeleton argument, dated 4 February 2020, for the Preliminary Hearing; and, on 10 February 2020, sent a notice to the Registrar of the Employment Appeal Tribunal stating that he has a "*disability that includes a problem with communication, making himself understood and with mobility*." He stated that he would be attending the Preliminary Hearing with a friend who would support him with his mobility problem. He also referred to a diagnosis of Autism Spectrum Disorder and stated that, "*the matters may* [a]*ffect the length of the hearing*."

6. Ms Katherine Apps of Counsel was the ELAAS representative yesterday. I am grateful for her assistance. At the outset of the hearing, she informed me that she was sitting alongside the Claimant, but addressing me as a friend of the Court, rather than on his behalf. That was because, she told me, she had concerns as to his litigation capacity. She informed me that, in 2019, an Order had been made in unrelated possession and committal proceedings appointing the Claimant's father as his litigation friend, following the Court's determination that he lacked litigation capacity. Ms Apps drew my attention to a certificate as to capacity to conduct proceedings, dated 28 February 2019, signed by Dr Luis Rojo, LMS MRCPsych, following his assessment of the Claimant on 14 February 2019. Dr Rojo had certificated that, in his opinion, the Claimant lacked capacity (within the meaning of the **Mental Capacity Act 2005**) to conduct the relevant proceedings. He had identified the relevant impairments, or disturbance in the functioning, of the Claimant's mind or brain as being schizotypal disorder and depressive disorder. He had stated that the Claimant was incapable of conducting the relevant proceedings because he was *"unable to understand the injunction order, the reasons behind it and practical implications"* and *"unable to weigh and respond appropriately to legal advice from his*

solicitors." Dr Rojo had gone on to state that, "*Potentially* [the Claimant] *could regain capacity to conduct proceedings when his mental state is more stable. I could not provide* [a] *timeframe for this."* Ms Apps also informed me that an earlier capacity assessment, in 2004/5, had concluded that, at that time, the Claimant had lacked capacity to litigate, although no detail of the circumstances, or of those proceedings, was provided.

7. Ms Apps told me that, following discussions with the Claimant earlier that day, she had concerns as to his capacity to understand information regarding the issues which were before the Employment Tribunal; what it was that that tribunal had decided; and the necessity for him to set out grounds of appeal before the Employment Appeal Tribunal. She was also concerned that he lacked the capacity to give her instructions; to weigh any legal advice which she might give him; and to make associated decisions. Given that Eady J had listed a Preliminary Hearing *"… in particular so that the EAT might be assisted in understanding how the case was argued below,"*, instructions on that point, at least, would be required. Ms Apps informed me that, without waiving privilege in any legal advice, one of the Claimant's concerns in connection with his appeal was that *"he might end up in prison."* She directed my attention to **Jhuti v Royal Mail Group Ltd** [2018] ICR 1077, EAT; **AM (Afghanistan) v Secretary of State for the Home Department (Lord Chancellor Intervening)** [2018] 4 WLR 78, CA; and part of Chapter 8 of *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers, 4th Edition*, edited by Mr Alex Ruck Keene, contending that, in all the circumstances, were I to proceed with the Preliminary Hearing at this stage, I would be acting unlawfully. She invited me to adjourn that hearing to enable the Claimant to seek a suitable litigation friend and to allow for a capacity assessment to take place.

The Law

8. Having regard to the authorities and practitioner texts to which Miss Apps referred me, I consider the applicable legal principles to be as follows:

a. In civil proceedings to which the Civil Procedure Rules 1998 apply, an adult who lacks litigation capacity (referred to a "protected party") must have a "litigation friend" to conduct proceedings on his behalf: *CPR, Part 21*.

b. CPR, Part 21 defines lack of capacity to conduct proceedings to mean lacking capacity within the meaning of the Mental Capacity Act 2005. In **Dunhill v Burgin** [2014] I WLR 933, the Supreme Court, applying the test contained in the CPR, endorsed the approach adopted by the Court of Appeal in **Masterman-Lister v Brutton & Co** [2003] I WLR 1511, indicating that common law principles remain of assistance in applying the statutory test.

c. Any proceedings involving a protected person conducted without a litigation friend will be invalid unless the court otherwise orders: **Dunhill.**

d. The test to be applied is whether a party to legal proceedings is capable of understanding, with the assistance of such proper explanation from legal advisors and other experts in other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary in the course of those proceedings: **Masterman-Lister**.

e. Capacity depends upon time and context: a decision in one court as to capacity does not bind another which has to consider the same issue in a different context. A final decision as to capacity rests with the Court, but, in almost every case, the Court will need medical evidence to guide it: **Masterman-Lister**.

f. The question of capacity to litigate is not something to be determined in the abstract. The focus must be on the particular piece of litigation in relation to which the issue arises. The question is always whether the litigant has capacity to litigate in relation to the particular

proceedings in which he is involved: **Sheffield City Council v E (An Alleged Patient)** [2004] EWHC 2808 (Fam), at paragraph 38.

g. As a matter of practice, courts should always, at the first convenient opportunity, investigate the question of capacity whenever there is any reason to suspect that it may be absent. That means that, even where the issue does not seem to be contentious, a District Judge who is responsible for case management will almost certainly require the assistance of a medical report before being able to be satisfied that incapacity exists: **Masterman-Lister**.

h. Whilst there is no express power in the **Employment Tribunals Act 1996** ("the ETA") to provide rules for the appointment of litigation friends, the wide drafting of Section 7(1) of that Act, which permits the regulation of any aspect of employment tribunals as appears necessary or expedient, provides the power to make rules which enable the appointment of litigation friends for people who lack capacity to conduct litigation. The appointment of litigation friends falls within Rule 29 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("the ET Rules") which empowers employment tribunals to make case management orders at any stage of the proceedings. To continue with a hearing with an unrepresented litigant who lacks mental capacity to conduct litigation would be tantamount to continuing with the hearing in that party's absence and would fly in the face of the overriding objective, in rule 2, that tribunals should deal with cases fairly and justly and put parties on an even footing. Similarly, it would be incompatible with the common law duty of fairness and the strong interpretive obligation in section 3 of the **Human Rights Act 1998** to read section 7(1) of the ETA, or rule 29 of the ET Rules, as not empowering employment tribunals to appoint a litigation friend, where a litigant lacks litigation capacity. It would be contrary to the rule of law if access to courts and tribunals were restricted without explicit wording to that effect: **Jhuti v Royal Mail Group Ltd**.

i. Employment tribunals should tread carefully, if invited to embark down the road of investigating a party's mental capacity, and should only accede to such an approach where there is clear evidence to support it: **Jhuti v Royal Mail Group Ltd.**

9. I have neither been referred to nor found any authority directly concerning the Employment Appeal Tribunal's power to appoint a litigation friend where a party lacks litigation capacity. Nonetheless, in my judgement the analysis set out by Simler P, as she then was, in **Jhuti**, applies by parity of reasoning:

a. By Section 30(3) of the ETA, the EAT has power, subject to the **Employment Appeal Tribunal Rules 1993 (as amended)** ("the EAT Rules"), and directions under section 28(1) or 29A(1) of the ETA, to regulate its own procedure;

b. By Section 29A(1) of the ETA, directions about the procedure of the EAT may be given by the President of the EAT;

c. Rule 2A of the EAT Rules provides that the overriding objective of those rules is to enable the EAT to deal with cases justly, including, so far as is practicable, as set out at rule 2A(2);

d. **Practice Direction (Employment Appeal Tribunal – Procedure) 2018** contains the following material provisions:

(i) (at paragraph 1.3) Where the EAT Rules do not otherwise provide, the following procedure will apply to all appeals to the EAT;

(ii) (at paragraph 1.4) By section 30(3) of the ETA, the EAT has power, subject to the EAT Rules, to regulate its own procedure. In so doing, the EAT regards itself

as subject in all its actions to the duties imposed by rule 2A. It will seek to apply the overriding objective when it exercises any power given to it by the EAT Rules, or interprets any rule;

(iii) (at paragraph 1.5) The overriding objective of the Practice Direction is to enable the EAT to deal with cases justly. Dealing with a case justly includes, so far as is practicable:

A. ensuring that the parties are on an equal footing;

B. dealing with the case in ways which are proportionate to the importance and complexity of the issues;

C. ensuring that it is dealt with expeditiously and fairly;

D. saving expense;

(iv) (at paragraph 1.8) Where it is appropriate to the EAT's jurisdiction, procedure, unrestricted rights of representation and restricted costs regime, the EAT is guided by the Civil Procedure Rules;

(v) (at paragraph 13.1) Consistent with the overriding objective, the EAT will seek to give directions for case management so that the appeal can be dealt with quickly, or better considered, and in the most effective and just way;

e. Thus, section 30(3) of the ETA provides the EAT with the power to regulate its own procedure, subject to the EAT Rules and any Practice Direction. The appointment of a litigation friend for a person who lacks capacity to conduct litigation falls within paragraph 13.1 of the 2018 Practice Direction, whereby, consistent with the overriding objective, the EAT will seek to give directions for case management so that the appeal can be dealt with in the most effective

A and just way. Furthermore, in accordance with paragraph 1.8 of the Practice Direction, it is appropriate, in such matters, that the EAT be guided by (Part 21 of) the CPR. To continue with a hearing with an unrepresented litigant who lacks mental capacity to conduct litigation would fly in the face of the overriding objective in Rule 2(a) of the EAT Rules that the EAT should deal with cases justly, so far as practicable ensuring that the parties are on an equal footing and that cases are dealt with fairly. Similarly, it would be incompatible with the common law duty of fairness and the interpretative obligation in section 3 of the **Human Rights Act 1998** to read section 30(3) of the ETA, or paragraphs 1.4 and 13.1 of the Practice Direction as not empowering the EAT to appoint a litigation friend where a litigant lacks litigation capacity. It would be contrary to the rule of law if access to courts and tribunals were restricted without explicit wording to that effect.

10. **AM (Afghanistan)** was an appeal from the Upper Tribunal (Immigration and Asylum Chamber). In that context, at paragraph 4, Ryder LJ stated, *"I shall ask that this decision be considered by the Tribunal Procedure Committee for them to independently advise whether any further or consequential issues arise."* At paragraph 44, he held as follows:

> **"I have come to the conclusion that there is ample flexibility in the tribunal rules to permit a tribunal to appoint a litigation friend in the rare circumstance that the child or incapacitated adult would not be able to represent him/herself and obtain effective access to justice without such a step being taken. In the alternative, even if the tribunal rules are not broad enough to confer that power, the overriding objective in the context of natural justice requires the same conclusion to be reached."**

11. At paragraph 49, Underhill LJ observed that a litigation friend has wide authority to dispose of a party's legal rights, either directly, by bringing and/or compromising proceedings, or indirectly, by the way in which he or she conducts those proceedings. He considered that those powers ought to be clearly defined and regulated, as they are by CPR Part 21, in cases which come under the CPR and that it was, "*very unsatisfactory that they should be exercised simply on the basis of the general case-management powers.*" He expressed the hope that the Tribunal

Procedure Committee ("TPC") would consider that aspect, as a matter of urgency. In **Jhuti,** at paragraph 37, Simler P held:

> **"Having circulated my judgment in draft, I have been provided with the judgment in *AM (Afghanistan) v. SSHD* [2017] EWCA Civ 1123 where the Senior President comments on further guidance available on these issues and indicates that the Tribunals Procedure Committee is to consider rules defining and regulating the way in which issues of capacity are dealt with, and the appointment and conduct of litigation friends. This must be addressed as a matter of urgency."**

AM (Afghanistan) and **Jhuti** were decided at the end of July 2017.

12. Pursuant to sections 22(1) and (2) and Schedule 5 of the **Tribunals, Courts and Enforcement Act 2007**, Tribunal Procedure Rules govern the practice and procedure to be followed in the First Tier and Upper Tribunals (of which neither employment tribunals nor the EAT form a part) and are to be made by the TPC. Under section 7(1) of the ETA, the Secretary of State may, by regulations, make such provision as appears to him to be necessary or expedient with respect to proceedings before employment tribunals. Section 30(1) of the same Act provides that it is for the Lord Chancellor, after consultation with the Lord President of the Court of Session, to make rules with respect to proceedings before the EAT. Over two and half years after the expressly "urgent" need had been identified in **AM (Afghanistan)** and in **Jhuti**, it is to be hoped that truly urgent consideration will now be given to the implementation of rules containing clearly defined powers in relation to proceedings involving protected parties (as defined in Part 21 of the CPR), in employment tribunals and in the EAT.

The principles applied to the facts

13. The unusual feature of this case is that, prior to yesterday's Preliminary Hearing, no suggestion had been made that the Claimant lacked litigation capacity in relation to these proceedings. The Employment Tribunal, which had observed him throughout the two-day Hearing in June 2018, apparently raised no concern. No concern has been raised by the Claimant

himself (appreciating that that cannot be determinative). To date, the Claimant has settled, personally, all documents in these proceedings and complied with the EAT's directions.

14. Nonetheless, Ms Apps has properly drawn my attention to orders made in other proceedings to which the Claimant has been a party; the certification provided by Dr Rojo; and her own assessment and concerns. Whilst Dr Rojo's opinion was based upon an assessment now 12 months old and does not establish that the Claimant necessarily lacks capacity in these proceedings (in particular given the nature of an appeal in the EAT), I am satisfied that, in combination, the matters to which Ms Apps has referred give reason to suspect that litigation capacity may be absent and oblige this Tribunal to seek assistance in the form of a medical report directed at the questions which a judge will need to address when determining whether the Claimant in fact has capacity to litigate in these proceedings and making all appropriate Orders. That is the purpose behind the orders which I made yesterday.