Case No: EA-2021-000261-JOJ
(previously UKEAT/0017/21/JOJ)

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 12 February 2021

Before :

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

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Between :

MR A KHAN AND MR M UZAYR	**Appellants**
- and -	
BP PLC	**Respondent**

- -
- -

Mr T Coghlin QC (instructed by Russell-Cooke LLP Solicitors) for the **Appellants**
Mr D Dyal (instructed by Pinsent Masons LLP) for the **Respondent**

Hearing date: 12 February 2021

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

ET refused postponement of a large scale hearing after counsel for one of the parties was incapacitated for medical reasons.

Held, allowing the appeal, that the ET had erred in treating the position as if there was no medical evidence in circumstances where there was an unequivocal summary of the position from an officer of the court which was agreed by both sides, and an undertaking to provide the medical evidence in short order.

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT):

1. This is an expedited appeal to consider whether the East London Employment Tribunal erred in refusing to grant a postponement request in respect of a hearing due to commence next Tuesday 16 February 2021. The hearing is listed to be heard over 12 days, with a further three days held in reserve. The case is substantial with over 48 witness statements in total and 28 witnesses for the respondent. Of course, the claimants themselves have their own witness statements and evidence to give.

2. The bundle, I am told, is in excess of 1800 pages. The issues, arising as they do out of allegations of discrimination and unfair dismissal in the financial sector, are numerous and complex.

3. On 10 February 2021, one of the claimant's counsel team suffered a medical emergency and was referred to a specialist, The current information is that counsel's position will be monitored for a few days. The medical advice, as it appears to me, is that it would not be advisable for counsel to carry out any preparatory work for the hearing at this time.

4. Upon receiving that information, the claimants' legal team, unsurprisingly, applied for a postponement. That application was made to the tribunal by way of an email on 11 February. That application for postponement was brief. It referred to the medical position as it was understood. The application acknowledged that medical evidence was not provided but it was stated that this could be provided if required. There was, however, a description of the position, the medical condition in question and the medical advice as to counsel's inability to work as normal for a period of time.

5. The respondent supported that application by a letter dated 11 February. The Regional Employment Judge, Employment Judge Taylor, refused the request for a postponement. The reasons for refusing the request were as follows:

> "This case is very old and has taken a long time to get to hearing. The application for a postponement is refused. It has not been accompanied by any medical evidence and the unavailability of a particular representative is insufficient grounds to grant a postponement.

The case remains listed for hearing on **16th February 2021**."

6. The claimants applied for a reconsideration of that decision, this time attaching the medical evidence in question by an email dated 12 February (that is, earlier this afternoon). The tribunal refused the application for a postponement stating that:

> "The claimants' renewed application for the postponement of the hearing is refused. The hearing will remain as listed."

7. The tribunal proceeded to give some case management directions, purportedly taking account of the medical advice as to counsel's inability to work until about 8 March 2021. Those case management directions proposed that the first four days of the hearing be reserved for the tribunal to read into the 50 witness statements and the corresponding documents, that the matter then resume for a case management and timetabling discussion on 23 February, by which stage the claimant is to have provided updated medical information. Then the intention as stated in the case management directions is that the hearing of the evidence will commence on 9 March, on the first of the three reserved dates, and for the hearing to adjourn to resume as soon as possible after 11 March. The tribunal indicates that a fresh hearing of this length would currently be listed in the last quarter of 2022.

8. An urgent application for permission to appeal was made today by the claimants' team. This was unopposed by the respondent. The matter came before me on the sift at around lunchtime today. I allowed the matter to proceed to a full hearing on the basis that the grounds of appeal were strongly arguable. The EAT has managed to convene a hearing at extremely short notice and the hearing commenced at 3.45pm this afternoon. I am grateful to all concerned, and in particular the staff of the EAT, for managing to arrange the hearing at such short notice.

9. The legal principles are well-established. I was referred to the case of **O'Cathail v Transport for London** [2013] EWCA Civ 21 in which Mummery LJ set out the relevant principles. In doing so it was stated that the tribunal in that case had given the question of an adjournment the most anxious consideration having been provided with medical advice. Mummery LJ at paragraph 40 said:

> "40. First, I have never seen such a scrupulously detailed and careful decision by an ET or, indeed, by any court or tribunal, on the question whether or not to grant an

> adjournment. It is clear that the most anxious consideration was given to taking the exceptional step of refusing an adjournment applied for on unchallenged medical grounds."

10. Although I note the commendation given by Mummery LJ to the detailed decision in that case, I would not criticise a tribunal judge, working under the pressures that they do, for giving a brief decision on a matter such as this. However, that does not mean that the judge is absolved from the need to consider all relevant factors and not to consider irrelevant ones.

11. I was also referred to the decision of the Court of Appeal in **Teinaz v London Borough of Wandsworth** [2002] EWCA Civ 1040, in which Peter Gibson LJ considered the scope of the discretion relevant to tribunals and at paragraph 20 said as follows:

> "20. … I would make some general observations on adjournments. Every tribunal or court has a discretion to grant an adjournment, and the exercise of such a discretion, going as it does to the management of a case, is one with which an appellate body is slow to interfere and can only interfere on limited grounds, as has repeatedly been recognised. But one recognised ground for interference is where the tribunal or court exercising the discretion takes into account some matter which it ought not to have taken into account: see, for example, Bastick v James Lane Ltd [1979] ICR 778 at 782 in the judgment of Arnold J giving the judgment of the EAT (approved as it was in Carter v Credit Change Ltd 1980 1 All ER 252 at page 257 per Lord Justice Stephenson, with whom Cumming-Bruce and Bridge LJJ agreed). The appellate body, in concluding whether the exercise of discretion is thus vitiated, inevitably has to make a judgment on whether that matter should have been taken into account. That is not to usurp the function of the lower tribunal or court: that is a necessary part of the function of the reviewing body. Were it otherwise, no appellate body could find that a discretion was wrongly exercised through the tribunal or court taking into account a consideration which it should not have taken into account or, by the like token, through failing to take into account a matter which it should have taken into account. Although an adjournment is a discretionary matter, some adjournments must be granted if not to do so amounts to a denial of justice. Where the consequences of the refusal of an adjournment are severe, such as where it will lead to the dismissal of the proceedings, the tribunal or court must be particularly careful not to cause an injustice to the litigant seeking an adjournment. …"

12. Finally, I was taken to the decision in **Lunn & Lunn v Aston Darby Group Limited & Another** UKEAT/0039/18/BA, a decision of HHJ Eady QC (as she then was), which dealt with the question of adjournment in the context of the unavailability of counsel. At paragraph 21, HHJ Eady QC considered the normal approach that cases will not be listed for the "convenience of counsel". She said:

> "21. … That expression does not refer to convenience in any normal sense of that term but it means that the prior professional commitments of representatives will not be permitted to dictate the listing of hearings in most cases; an approach that is necessary if Courts and Tribunals are to be able to manage their workload in a just and proportionate way. Here, however, the Claimants were not complaining of what might be called the normal difficulties impacting from counsel's prior professional commitments, but from the particular difficulties they faced given (1) the very short notice of hearing and (2) the problems of finding alternative legal representation having instructed counsel under the direct access scheme. The former consideration plainly could not be special - it is inherent in an interim relief application - although it remains a relevant part of the factual matrix. The second point, however, was of a different nature. Although instructing counsel under the direct access scheme may not be an exceptional circumstance in modern times, it does give rise to special difficulties for the party concerned. Those are, moreover, difficulties that the overriding objective would suggest are relevant to the ET's consideration of its powers to postpone given that they plainly go to questions of saving expense and ensuring the parties are on an equal footing."

13. The grounds of appeal are simply stated in the skeleton argument prepared by Mr Coghlin QC, who was instructed at very short notice on behalf of the claimants. There are three grounds of appeal. The first is that the tribunal failed to take into account relevant considerations. These include the impossibility of obtaining alternative representation at such short notice, the need to ensure a level playing field, the importance and complexity of the proceedings, the fact that the respondent supported the application, the prejudice that a refusal of postponement would cause and the impossibility of a fair trial, and also the health and well-being of counsel. Ground 2 is that the tribunal erred in placing weight on the supposed absence of medical evidence in circumstances where there was reliance on credible evidence as to the medical position. Ground 3 is that in proceeding on a false footing that the unavailability of a particular representative is insufficient grounds to grant a postponement, the tribunal failed to have regard to, amongst other matters, the presidential guidance and the context in which the particular unavailability arose.

14. Mr Coghlin developed those submissions orally this afternoon by reference to authorities and made the point that in the circumstances the decision reached by the tribunal was simply unsustainable. Moreover, the reconsideration decision does not remedy matters, given that, firstly, it persists in refusing the postponement, and secondly, proposes a case management structure which is unworkable.

15. Mr Dyal, who appears for the respondent (and, as I understand it, is junior counsel instructed in the case with Mr Martin QC as his leader), agrees with Mr Coghlin and adds that the judge was right to take account of avoiding delay but says that it was an error of law to avoid delay if it enforces unfairness. He also highlights the implausibility of preparing for the case in the time available and agrees that the tribunal's approach to the medical evidence/advice was erroneous.

16. In my judgment, whilst the tribunal does have a very broad discretion in respect of such case management issues and whether or not to postpone the case, the tribunal here did err in law in that it failed to take account of relevant matters and/or took into account irrelevant ones.

17. Firstly, it appears not to have been appreciated by the tribunal that it was in the circumstances a practical impossibility for the claimants to instruct counsel to be ready for the hearing to commence, whether on 16 February or even by 9 March. I am told and I accept that a case of this scale and complexity will take a solid two weeks or more to prepare for, and clearly the one working day between now and the hearing renders it impossible to instruct anybody, assuming anybody is available for a three week hearing at such short notice, to get the case up and ready.

18. This is not a matter of refusing the postponement because one party is asserting the convenience of counsel; this is a situation where a party has properly instructed counsel in good time for the hearing but, through no fault of their own and due to an unfortunate occurrence, has found themselves in a position that counsel is unavailable. It seems to me that that is an important circumstance which ought to have been taken into account but which, on the face of the tribunal's decision, was not taken into account.

19. There is undoubted prejudice caused to a party losing representation at such a late stage and it would not be consistent with the overriding objective and the need to ensure that parties are on a level playing field for the case to proceed in these circumstances.

20. Ground 1 of the appeal is upheld.

21. Ground 2 is in relation to the medical evidence. It seems to me that this, if anything, is the strongest ground of appeal. The tribunal's decision yesterday is surprising in that it referred to the

absence of medical evidence. However, this was not a situation where there is no indication of what the medical condition was, or where there was a mere assertion by a litigant in person without any evidence in support; this was a clear statement of the medical position and the consequences of that provided by a solicitor from a reputable firm and relaying what he had been told by counsel. It is obviously a relevant factor to take into account that the source of the information came from officers of the court and was on the face of it obviously credible and in respect of which there was no reason whatsoever to doubt its veracity.

22. It seems to me that by effectively treating the matter as if there was no medical evidence, the tribunal failed to take into account relevant material and that is the solicitor's letter setting out the position.

23. I note the comments of Mummery LJ in the **O'Cathail** case that it would be exceptional not to grant a postponement on the basis of unchallenged medical evidence. That, it seems to me, is the position here and a postponement ought to have been granted on that basis.

24. The third ground of appeal is also upheld. The tribunal appears to have treated the unavailability of a particular representative as providing no justification in any circumstances for the granting of a postponement. That, of course, is not the correct position. There is no general rule to that effect. Much will depend on the context and circumstances of the unavailability arising. Moreover, the presidential guidance itself refers to some unavailability of counsel as being a relevant factor that may be taken into account.

25. In my judgment, in applying effectively a general blanket approach to this discretionary question, the tribunal erred in law and thereby undermined the exercise of discretion.

26. I should of course take account of the reconsideration decision. It seems to me that that does not remedy the difficulties with the original decision. In the first place, as counsel correctly point out, the decision was simply to refuse the renewed application for a postponement. On that basis, all the reasons for the original decision being an error of law would continue to apply. However, I do

consider whether the further factors referred to in the reconsideration decision make any difference. It seems to me that they do not for the reasons counsel have set out.

27. In terms of the medical advice, whilst that is referred to in the tribunal's judgment, it does not appear to have been taken into account in any meaningful sense. Whilst it notes that counsel should not carry out work until 8 March 2021, by listing the resumed hearing to commence from 9 March 2021, the tribunal appears to be taking no account of the fact of the inability to work and appears to be expecting counsel to attend immediately after the medical monitoring period is over and without having had a chance to prepare.

28. As to the suggested case management directions, the judge is not to be criticised for attempting to find a way around this by way of case management. However, the particular case management directions in this case, which have been formulated without reference to counsel's submissions, do not, in my judgment, address any of the problems that arise by reason of the medical problems in this case and in fact make things somewhat worse. In particular, for a hearing of this nature, to go part-heard, which is what the proposed case management directions clearly envisage, is not satisfactory for anybody concerned and nor is it for the tribunal. I am told that the respondent's cross-examination of the claimants alone will take more than three days, so it is inevitable that the case will go part-heard.

29. Whilst the rationale for the tribunal's directions appears to be the commendable desire to avoid extensive delay, the case management directions proposed do not avoid that delay; the matter is still going to be adjourned part-heard and there is no indication as to when the resumed hearing will take place. In particular, there is no indication as to whether that resumed hearing, which will potentially take another nine days, would be any shorter or any quicker than the relisting of the hearing in its entirety.

30. There were also concerns, and I agree with Mr Dyal's submission that, whilst it is right to take account of avoiding delay, it is an error of law to avoid delay if it enforces unfairness. The avoidance

of delay in this case would enforce unfairness and would result in a trial which may be the subject of an appeal on the grounds of fairness in any event.

31. So for all those reasons, I will allow the appeal. I will now invite submissions on disposal.

Disposal

32. The rules permit me to make any order that the tribunal could have made upon the disposal of this appeal. I order that this matter in the employment tribunal be adjourned and it be relisted for a case management hearing in accordance with the original directions for the first available date after 8 March 2021, for half a day.