Neutral Citation Number: [2022] EAT 60

Case No: EA-2020-000418-LA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date:2 March 2022

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

MR R KUMAR	**Appellant**
- and -	
MES ENVIRONMENTAL LIMITED	**Respondent**

- -
- -

Mr R Ross for the **Appellant** instructed through Advocate
The **Respondent** did not appear and was not represented

Hearing date: 2 March 2022

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

The claims of the claimant in the employment tribunal were heard at a four-day full merits hearing by a full tribunal. An oral decision was given at the hearing dismissing the claims. Following the hearing, the claimant completed and submitted to the employment tribunal form EX107, applying for a transcript of the proceedings at the hearing. The application was referred by the administration to the judge, who decided that the claimant was not entitled to apply for a transcript. The judge erred in so deciding.

Historically, proceedings in employment tribunals were not audio-recorded by HMCTS. It is therefore unsurprising that the **Employment Tribunals Rules of Procedure 2013** say nothing about transcripts. Similarly, the EAT's current practice direction proceeds, in relation to matters such as requests for a judge's notes and agreement of notes of evidence, on the implied assumption that no other or better record will be available.

Where, however, as sometimes now occurs, proceedings in the employment tribunal were in fact audio-recorded by HMCTS, a party may, as applies in other courts and tribunals where the proceedings are so recorded, apply for a transcript, subject to paying the applicable fee and complying with the associated established protocols.

HIS HONOUR JUDGE AUERBACH:

1. The claimant in the employment tribunal brought claims of direct race discrimination and victimisation arising from an unsuccessful job application. The claims were defended. There was a full merits hearing in Birmingham before Employment Judge Hughes and members from 24 to 27 February 2020. The claimant was conducting the claim as a litigant in person but at that hearing both parties were represented by counsel. At the end of the hearing, the tribunal gave an oral decision dismissing both claims. The claimant was not present on that day and his counsel requested written reasons, which have subsequently been provided.

2. Following the hearing, the claimant sent the employment tribunal administration a completed form EX107, dated 29 February 2020, applying for a transcript of the hearing. On 21 May the tribunal's written reasons for its decision were provided. Following various correspondence chasing up the EX107 the tribunal wrote to the claimant on 26 May. That letter dealt with a number of matters which had been considered by Employment Judge Hughes and, at her direction, included the following statement: "The claimant is not entitled to a transcript of the hearing."

3. Following a further email from the claimant seeking reasons for that decision, the tribunal wrote as follows on 29 May 2020:

> **"Employment Judge Hughes has asked me to inform you that the reason you cannot apply for a transcript is because you are not legally entitled to make such an application. You are referred to the Employment Tribunals (Rules of Procedure Regulations) 2013. Rule 62 allows you to ask for written reasons, which have been provided to you already."**

4. The claimant then wrote on 29 May applying for a reconsideration of that decision. His application included reference to **Civil Procedure Rules 1998** ("**CPR**") rule 39.9(3), which states:

> **"Any party or person may require a transcript or transcripts of the recording of any hearing to be supplied to them, upon payment of the charges authorised by any scheme in force for the making of the recording or the transcript."**

5. He relied on what he said was the general right of parties to obtain transcripts of proceedings.

6. The claimant also instituted an appeal to the EAT against EJ Hughes's decision.

7. On 11 June 2020 the employment tribunal sent to the parties a judgment and reasons of EJ Hughes refusing the reconsideration application. This included a statement that there was "no legal mechanism by which an application for a transcript of Employment Tribunal proceedings can be made". The judge stated that there was no prospect of her decision being varied or revoked "because there is no legal right to a transcript of Employment Tribunal proceedings".

8. The claimant also made subject access requests, by which he sought to obtain copies of the judge and lay members' notes of the hearing and the audio recording that he believed had been made of the hearing. A letter from the Ministry of Justice of 10 July 2020 refused those requests. In relation to the request for the audio recording, reference was made to schedule 2, Part 1(5) of the **Data Protection Act 2018** exempting data from the subject access provisions if the information is available by another legal route. The letter went on to state:

> **"Any party or member of the press or public who wishes to read a transcript of the whole or any part of an audio recording made at a hearing by HMCTS may do so by completing form EX107 and sending it to the regional office of Employment Tribunal region where the case was heard."**

It referred to the need to pay a fee to the selected transcription provider or to complete a separate form applying for the transcript to be provided at public expense.

9. At a rule 3(10) hearing HH Judge Shanks permitted this appeal to proceed to a full appeal hearing. He also considered a proposed appeal against the substantive decision dismissing the claimant's claims and, it would appear, a proposed appeal against a later decision on a recusal application in connection with a costs application that had been made by the respondent. I understand that some grounds relating to both those appeals were also permitted by HH Judge Shanks to proceed to a full hearing, but he directed that the appeal in respect of the transcript-request decision should be heard first and expedited. That is the sole appeal which has come before me today.

10. In giving his reasons for permitting the transcript appeal to proceed HH Judge Shanks observed that he invited the employment judge to consider his reasons, and that, if upon such

consideration the judge was willing to complete the relevant form, that would dispose of the appeal. He added that, if the judge or anyone else at the tribunal wished to make observations to the EAT before the full hearing of the appeal, they should do so in writing at the earliest opportunity.

11. On 17 February 2022 the EAT received a letter, in the absence of EJ Hughes, from Regional Employment Judge Findlay. REJ Findlay stated that she considered that EJ Hughes had taken a judicial decision on the original application and the reconsideration application, and it was not open to REJ Findlay to direct a contrary approach. REJ Findlay went on to state that she had consulted HMCTS, who had confirmed that the recording had been preserved, although she also noted that such hearings are not usually recorded at Birmingham, but had been in this case for a reason she explained.

12. REJ Findlay also went on to observe, having consulted the President of Employment Tribunals in England and Wales, that it remains the case that employment tribunal proceedings in England and Wales are not routinely recorded because the facility to do so is generally not available in the great majority of venues, although there is a limited pilot in Wales using the facility within the Cloud Video Platform in respect of hearings conducted on CVP.

13. On 1 March 2022 the respondent's solicitors emailed indicating that, in light of the correspondence from REJ Findlay having confirmed that the hearing was audio-recorded, the respondent would no longer be actively taking part in the appeal and would not be attending today's hearing. It was not conceded that an error of law had been made but they observed that it was no longer possible to maintain the principal argument that had previously been advanced by them, that there had been no recording of these particular proceedings.

14. I have heard the appeal this morning and reached my decision taking into account the respondent's Answer and skeleton that had been submitted prior to its 1 March email, while noting that it is in part superseded by that email. I have also, of course, taken account of the skeleton argument, and oral argument I have heard this morning, from Mr Ross of counsel, who appeared for

the claimant under the auspices of Advocate.

15. In summary, Mr Ross argued that the judge erred by relying exclusively or too narrowly on the fact that there is no provision for an application for a transcript to be made in the **Employment Tribunal Rules of Procedure 2013** (the "**2013 Rules**"). The **2013 Rules** are, he said, silent on the matter, but that does not mean that it is not open to a litigant to apply for a transcript. The judge's reference to rule 62 was not in point as that is concerned with written reasons for an oral decision, which is a different matter from a transcript of the proceedings generally.

16. The EAT's practice direction caters for a request to be made by the EAT for a copy of some or all of the judge's notes of the proceedings and also for a process by which parties may agree a note of evidence for the purposes of an appeal. But, he submitted, these provisions are predicated on the implicit assumption that hearings in the employment tribunal are not audio-recorded at all. Where, however, as in this case, the hearing has in fact been audio-recorded, there is certainly no automatic right to be provided with a free transcript at public expense, but the default position is that a transcript can usually be requested and will be provided on payment of the appropriate transcriber's fees.

17. For illustrative purposes Mr Ross referred me to the decision of the Upper Tribunal (Administrative Appeals Chamber) in **Crossland v Information Commissioner and Leeds City Council** [2020] UKUT 260 (AAC) at [58], where the Upper Tribunal said:

> **"... recording practice also varies across tribunals. Some tribunals digitally record all hearings as a matter of course. Other tribunals rarely, if ever, digitally record hearings, relying on the judge's note. … [Others will do so] if they happen to be sitting at a venue which offers that facility, but not if they are not ... Even if the hearing is digitally recorded, there is no automatic right to a free transcript of that recording. The default position is usually that a transcript can be prepared on payment of a fee."**

18. Form EX107, he submitted, is not peculiar to the County Court. It is suitable for requesting a transcript of any hearing in any court or tribunal which has, as a matter of fact, been audio-recorded by HMCTS. However, the form itself does warn that not all tribunals audio-record their proceedings. The associated guidance notes indicate that there are certain situations where the permission of the

court is required for the approval of a transcript request; but both circumstances referred to there concern applications by non-parties for transcripts of hearings that have been conducted in private.

19. Mr Ross also observed that it is apparent that there has recently been at least one successful application to the employment tribunal administration for a transcript of parts of a hearing that was partially recorded by HMCTS, as is apparent from the decision in **Werner v University of Southampton** EA-2019-000973, 15 September 2021. He also referred me to a practice direction issued in Scotland in June 2020, regarding conduct of remote hearings, which refers to this possibility.

20. In summary, Mr Ross submitted that, whilst historically employment tribunals did not audio-record their hearings, if (as in this case) an audio recording has been made by HMCTS, then, just as in other courts and tribunals, it should be possible to apply for a transcript. No rule of procedure is necessary to enable that. If, contrary to his primary submission, some rule needs to provide an umbrella for that process, then it could be found either in rule 2 (the overriding objective), rule 29 (case management orders) or rule 41 (regulation of procedure in relation to hearings).

21. Mr Ross submitted that, if the present judge was right to have refused this request, that would mean that, despite a recording existing, not only could no transcript be obtained by the parties. It would appear the EAT could not ask for one to be produced or made available, either. That, he said, would be a surprising and unjustifiable outcome. It would also be out of kilter with **CPR** 39.9. It would not be right to infer that, because the **CPR** contained such a provision and the **2013 Rule** did not, the intention was that this facility should not be available in relation to employment tribunal proceedings, given that the silence of the **2013 Rules** was merely a reflection of the historical fact that in the past such hearings were not audio-recorded at all by HMCTS. But, where such a recording did exist, the **CPR** approach should be followed.

22. Mr Ross also sought to rely on the letter that the claimant in this case received from the MOJ in response to his subject access request. This indicated that, absent an alternative route being

available, he would have had some access to this material under the **GDPR**. But it would seem more straightforward for him to be permitted such access through the route of simply filling up the transcript request form and paying the fee.

23. Mr Ross also referred me to the *obiter* observation of Choudhury P in **Heal v University of Oxford** [2020] ICR 1294 at [49(d)]:

> **"The Tribunal's notes of evidence will continue to be the conclusive record of the hearing before it, certainly whilst it remains the position that Employment Tribunal proceedings are not routinely the subject of official digital recording. The fact that a Tribunal has consented to a recording being made by a party, and the undisputed content of that recording appears to conflict with the Tribunal's written notes of evidence, would not mean that the recording automatically takes precedence. Whether or not it should take precedence in respect of any issue will be a matter for the Tribunal to determine having regard to all the circumstances."**

He suggested that this was an indication that a different approach at least might be required in a case where an HMCTS audio recording does in fact exist.

24. For the respondent, the principal submissions in the skeleton argument that was originally prepared and submitted rested on the assumption that the hearing in question in this case had not been audio-recorded. As I have noted, it has now been acknowledged that it in fact was. But it was also argued that there is no power to order a transcript because the **2013 Rules** provide for requests for written reasons for tribunal's decisions, and the EAT can also request copies of judges' hearing notes. The latter, it was submitted, is the appropriate recourse for someone who seeks to rely on a record of what happened during an employment tribunal hearing, for the purposes of an appeal.

25. Reference was also made to the discussion of these provisions in **Henry v Unison**, PA/0693/03, 26 November 2003, (a decision arising from a rule 3(10) hearing) which also refers to the power of the EAT to direct affidavit evidence to be given and for comments to be sought from the members of the tribunal panel regarding what did or did not occur during the course of a hearing, where there is an allegation on appeal of some procedural irregularity.

26. I turn to my conclusions. It is now clear that this particular hearing was audio-recorded by

HMCTS, although REJ Findlay's letter explains that this is not the usual practice in Birmingham, nor routine in England & Wales at the moment, in particular because the facilities are not available in the great majority of venues. These developments come against a backdrop of the fact, of which I can take notice, that historically hearings in employment tribunals were not generally audio-recorded by HMCTS at all. Although I do not have any detailed information before me, I can take notice of the fact that the advent of recording in some instances, is, in the timescale over which employment tribunals (known before 1998 as industrial tribunals) have existed, a relatively recent development.

27. Appeals to the EAT lie only on a point of law and, for the purposes of most appeals, reference is needed only to the employment tribunal's written decision and relevant materials that may have been before it. Even where an issue arises in relation, for example, to how the employment tribunal dealt with an application or matter that arose during the course of a full merits hearing, if it was of any significance, it is likely to be addressed in the tribunal's principal decision or sometimes in a distinct ruling. In so far as the tribunal needs to make reference to the evidence that it heard, in order to explain its decision or findings, again the material will usually be found in the decision itself.

28. But, in broadly two types of case, some further recourse to a record of what happened during the course of the hearing itself may be said, and accepted by the EAT, to be relevant to an arguable ground of appeal and necessary in order fairly to determine it. Those are, broadly speaking, cases in which there is an arguable allegation of what may be called procedural irregularity, or an arguable basis for alleging perversity in the legal sense. The EAT's practice direction enables a party to ask the EAT to request a copy of parts of the judge's notes of evidence, or to permit an agreed note of evidence to be put before the EAT, so far as necessary to the fair disposal of the appeal. In procedural irregularity appeals, the EAT may also invite comments from the judge and (if applicable) members, and also admit witness evidence as to what occurred during the course of the tribunal hearing.

29. The plain unspoken premise of these various provisions is that recourse to such materials may

be needed because there will be no other official record of the proceedings. Further, I note, in cases of alleged procedural irregularity, sometimes the issue about what occurred during the course of the hearing may not be resolved solely by a record of what was said by the relevant participants.

30. This is also, it seems to me, the reason behind the principle that the judge's note is the official record of the proceedings. That is why it is regarded as part of the responsibility of the judge to take a careful note of the evidence and the proceedings (see the discussion, for example, in **Houston v Lightwater Farms Ltd** [1990] ICR 502). Further, as discussed in **Heal**, even if a party is permitted to make their own audio recording (which is prohibited without the tribunal's permission) that recording cannot automatically be assumed to be definitive as against the judge's note.

31. Given that employment tribunal proceedings were not historically recorded by HMCTS at all, it is therefore hardly surprising that the **2013 Rules**, which were produced approaching a decade ago, do not say anything at all about transcripts. I agree with Mr Ross, therefore, that the fact that they do not deal with this topic is not a sign that it has been decided by Parliament that a party may not request a transcript. Rather, it must be inferred that it was simply assumed that this was not a topic that needed to be addressed at all. I also agree with Mr Ross that the provisions of rule 62 are not directly in point on this general topic. The rules about the giving of reasons, whether oral or written, address a distinct and self-contained topic, a point to which I will return.

32. By contrast with the historical position in employment tribunals, **CPR** 39.9(1) provides that hearings in the High Court or the County Court are recorded unless the judge directs otherwise. I have already cited 39.9(3) regarding requests for transcripts in that context. The default position that a party may request a transcript is also reflected in the framing of form EX107. The starting point is that a party may seek a transcript, provided they are prepared to pay for it. The mechanisms referred to in form EX107 are designed to ensure that the process is controlled and mediated through HMCTS, so that no transcriber is put to the cost of producing a transcript without being paid, including

provision for payment in advance. Mediating the process through HMCTS also ensures that there is appropriate control in cases where there may be a good reason for refusing an application or subjecting permission in some way to a qualification or restriction.

33. Against the historical background that I have described, and having regard to the position in other courts and tribunals where audio recording of proceedings is more widely and longstandingly established, I do not think that the fact that the **2013 Rules** are silent on the matter signifies that it is not possible for a party to make an application for a transcript of an employment tribunal hearing which has in fact been audio-recorded. It would be better if the position were expressly addressed in the rules or in a practice direction. It appears that they have yet to catch up with the changing and evolving practice in this regard, which is not altogether surprising. But the absence of any such rule or practice direction at present, does not signify that is not possible for such an application to be made.

34. As I have noted, where there is no audio recording and it is argued that the EAT may need sight of the judge's notes or an agreed record of part of the evidence or proceedings in the tribunal, this process is controlled by the EAT. A party does not have the right to insist on a judge's notes of the whole hearing, for example, being requested or put before the EAT for the purposes of an appeal. There are good reasons for this. From a practical point of view, invocation of these processes inevitably means that the appeal will take longer to progress, and imposes significant burdens on the administration of the EAT, the employment tribunal administration and, in some cases, judges and/or lay tribunal members. Further, such material can be extremely voluminous. The EAT therefore exerts control whereby it must be satisfied as to what, if any, material is necessary in order to ensure the fair adjudication of an arguable ground of appeal, and give an appropriate direction. This applies to cases involving allegations of both procedural irregularity and perversity.

35. Accordingly, whilst I consider that where proceedings in the employment tribunal have in fact been audio-recorded by HMCTS, a party should in principle, subject to paying and complying with

the appropriate protocols, apply for a transcript, that does not mean that a party also has a right to insist on such material being put before the EAT for the purposes of adjudicating an appeal. The EAT controls that process, and a party who wishes to rely on some part of a transcript for the purposes of an appeal will be required to seek the permission of the EAT to introduce it, and to advance a reasoned case as to why that is necessary to the fair disposal of an arguable ground of appeal.

36. But, for the foregoing reasons, I conclude that the employment judge did err in this case in rejecting the claimant's request for a transcript of the proceedings. Generally, such requests should simply be processed by the administration, without judicial input, unless there is a concern, in the given case, that there may be a particular reason why a transcript should not be permitted, or restricted, such as the scenarios contemplated in the **CPR**. Given that there was an HMCTS audio recording of the proceedings in this particular case, that no such issue or concern appears to have arisen in this case, but that the administration nevertheless referred the request to her, the judge ought, therefore, to have simply indicated that the request should be actioned and processed by the administration.

37. There is, however, an important qualification to what I have said so far. That is that everything that I have said so far applies to requests for a transcript of the proceedings *other than* any part of the proceedings in which an employment tribunal gives oral reasons for a decision. The fact that a hearing has been audio-recorded by HMCTS does *not* mean that a party has the right to request, upon payment or otherwise, a verbatim transcript to be provided to them of the part of the hearing in which the judge gave an oral decision, in the sense of a raw verbatim transcript derived from the HMCTS audio recording of that part of the proceedings. There is no such right. That is for the following reasons.

38. Firstly, as a general proposition, where a court or tribunal gives an oral decision, and a written decision is then also produced, the written decision, whether or not it is customarily called a transcript, or written reasons, is not required to be a pure verbatim transcript of the reasons that were given orally. The content of the written decision is determined by the judge or tribunal. It will record their

final and definitive statement, articulation and expression of their reasons for their decision, and may differ from the way in which the oral reasons were expressed accordingly. See further the discussion in **The Partners of Haxby Practice v Collen**, UKEAT/0120/12, 29 November 2012.

39. This is expressly catered for and reflected in the **2013 Rules**, which stipulate that written reasons may be requested, subject as set out there, and indeed eschew the term "transcript" in favour of the more descriptively accurate "written reasons". Accordingly, where written reasons are produced, it is the written reasons which constitute the definitive record of the tribunal's reasons for its decision. Accordingly, to permit a party access to a raw verbatim transcript of the oral reasons is not only not necessary, but would be contrary to the principle that it is the written decision that is the definitive record of the tribunal's reasons for its decision.

40. Although historically proceedings in employment tribunals were not generally audio-recorded by HMCTS, when an employment judge came to the point of giving an oral decision, they would customarily audio-record what they were saying on some device. That was done in order to provide a resource to assist the judge, if later called upon to produce written reasons. No doubt it still is. For reasons I have explained, the advent of audio recording of some employment tribunal hearings by HMCTS does not in my view affect the position that parties are not entitled to request a transcript of any audio recording that may have been made of the delivery of the oral reasons. Nor are they entitled to request sight of any such transcript that may have been produced to assist the judge.

41. Accordingly, while the judge in the present case in my view erred in the way that she rejected this claimant's application for a transcript of the proceedings during the course of the substantive full merits hearing, that does not apply in respect of the part of the hearing in which, on the last day, the judge gave the tribunal's oral reasons for its substantive decision. The claimant is not entitled to request, or be provided with, a raw transcript of the delivery of the oral decision on the day. It is fair to note that, when I raised this point with Mr Ross during the course of his oral submissions this

morning, he confirmed that that was not part of the outcome sought by the claimant from this appeal.

42. I should also note that what I have been addressing is specifically the right to request a transcript in the sense of a hardcopy document containing a typed record (so far as it can be produced) of what can be heard by the professional transcriber on the audio recording. Where this is requested using the appropriate procedure, the transcript is produced by a professional transcriber, who, for that purpose, is provided directly with a copy of the audio recording by HMCTS. But that is not provided to the applying party. What they get is the written transcript, not access to, or a copy of, the audio-recording itself. Nothing I have said in this decision alters the position in that regard.

43. Finally, I should be clear that all I have had to decide is what the position is where, as a matter of fact, HMCTS has audio-recorded an employment tribunal hearing and a party who is prepared to pay has applied, using the appropriate procedure, for a transcript. It has not been necessary for me to consider what, if any, may be the implications of the current position being that some employment tribunal hearings are audio-recorded and some not. Nor does my present decision have any bearing on the position where a hearing is not being audio-recorded by HMCTS, but a party applies to be permitted to make their own such recording. That scenario was considered by the EAT in **Heal**.