Neutral Citation Number: [2022] EAT 120

Case No: EA-2021-000293-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 6 May 2022

Before :

THE HONOURABLE MRS JUSTICE STACEY

- -

Between :

MRS T KOSTAKOPOULOU	**Appellant**
- and -	
UNIVERSITY OF WARWICK & ORS	**Respondents**

- -
- -

Peter Herbert OBE (representative) for the **Appellant**
Akua Reindorf (instructed by Shakespeare Martineau) for the **Respondent**

Hearing date: 4 May 2022

- -

JUDGMENT

SUMMARY

ET PRACTICE AND PROCEDURE

The decisions under appeal were case management decision not to postpone an interim relief hearing which were well within the ambit of the broad discretion of the ET in case management matters. The refusal of the ET to reconsider its case management decisions not to postpone the interim relief hearing did not give grounds for appeal as it was not necessary in the interests of justice to reconsider the earlier decisions.

THE HONOURABLE MRS JUSTICE STACEY:

1. This appeal concerns narrow procedural points on the exercise of the employment tribunal's case management powers, (rule 29 and 30 of the **Employment Tribunal Constitution and Rules of Procedure Regulations 2013)** in relation to applications to postpone interim hearings brought under section 128 of the **Employment Rights Act 1996**, reconsideration of the case management decisions and rule 47 concerning proceeding with a hearing in the absence of a party.

2. The appellant, Professor Kostakopoulou, was the claimant before the tribunal and the respondents to the appeal, the University of Warwick and Professor Christine Ennew, were the respondents below. I shall continue to refer to the parties as they were before the tribunal.

3. In the briefest of outlines, the claimant applied for a postponement of an interim relief hearing listed for 3 November 2020. It was refused on 2 November 2020 by Employment Judge Findlay ("the EJ Findlay Decision"). The hearing proceeded on 3 November 2020 before Employment Judge Dean and the application for interim relief was refused in a reserved decision sent to the parties on 17 December 2020 ("the EJ Dean Decision").

4. The claimant then applied for a reconsideration of the EJ Dean Decision, challenging both the outcome and the decision to proceed with the hearing, since a further postponement request had been made the day before and given the claimant's non-attendance at the hearing. The reconsideration application was refused ("the EJ Dean Reconsideration Decision"). (The EJ Dean Decision and the EJ Dean Reconsideration Decision together shall be referred to as the EJ Dean Decisions).

5. Two appeals to this tribunal were lodged in relation to this matter challenging the EJ Dean Decisions which were consolidated and listed to be heard together. However, it is clear from a reading

of the papers that the claimant also seeks to challenge the EJ Findlay Decision. The respondent has addressed the EJ Findlay Decision in its skeleton argument. The respondent has agreed that this hearing may include a consideration of the EJ Findlay Decision in addition to the EJ Dean Decisions, notwithstanding the procedural shortcoming in that there is no formal appeal against the EJ Findlay Decision to this tribunal.

Background and procedural history

6. The background facts are these. The claimant was employed by the respondent university as a professor in the School of Law from 2012 until her summary dismissal for gross misconduct on 29 July 2020. It resulted in the ET1 claim form which is the subject of this appeal. The claimant first brought employment tribunal proceedings against the respondent whilst still in employment in 2017 (case number 1301587/17) for whistleblowing, race and sex discrimination, following a disciplinary warning she had received in 2016 ("the 2017 ET Claim").

7. The 2017 ET Claim was struck out in two stages, partly in November 2018, and the remainder struck out the following year. Both strike out decisions were appealed but the appeal was ultimately unsuccessful. The claimant also brought proceedings in the High Court in January 2021 in a claim for libel and malicious prosecution against the respondent and a number of individuals employed by the university in relation to the disciplinary allegations and the findings which had led to the disciplinary warning in 2016 and the 2017 ET Claim. The High Court proceedings were struck out on 21 December 2021 in a judgment and by order of Sir Andrew Nicholl ([2021] EWHC 3454 QB).

8. Meanwhile, in December 2019, disciplinary proceedings were started again against the claimant and she was then suspended from 16 January 2020. The claimant had lodged a grievance against the institution of disciplinary proceedings and following her suspension, she lodged employment tribunal proceedings (case number 130445720 "the February 2020 ET claim") on 24

February 2020 alleging protected interest disclosure detriment in breach of section 46B of the **Employment Rights Act 1996** and unlawful victimisation contrary to section 27 of the **Equality Act 2010**. The respondent resists and defends the February 2020 ET claim.

9. The claimant was then dismissed on 29 July 2020 at a hearing at which she did not attend. Following her dismissal, a further employment tribunal claim form was lodged on 4 August 2020, case number 130689420 ("the August 2020 ET claim"). That claim alleged discrimination on grounds of sex and race, unfair and wrongful dismissal.

10. Both the February and August 2020 ET claims were stayed pending the outcome of the libel proceedings in relation to the 2016 disciplinary matters issued in 2021 at the claimant's request.

11. The August 2020 ET claim form itself does not specifically identify protected interest disclosure dismissal as a cause of action. It merely states unfair dismissal under Part X of the **Employment Rights Act 1996** which is listed as one of the claims at paragraph 1 of the form. Part X in fact covers a number of different forms of unfair dismissal, so-called ordinary unfair dismissal and automatically unfair dismissal for reasons such as pregnancy, health and safety and public interest disclosure. Detailed particulars of claim annexed to the claim form state the following at paragraph 14:

> **"I believe the University of Warwick's stated reason is just a pre-text and that the principal reason for my summary dismissal was the making of protected disclosures under section 103A of the ERA and thus the dismissal is automatically unfair."**

12. And at paragraph 15 she said:

> **"For this reason, I wish to tender an application for interim relief under section 128 of the ERA, which is presented within the seven day period following the effective date of termination under section 128 (2) of ERA."**

13. It appears that the tribunal did not initially pick up on the fact that the claimant had made an

application for interim relief. On 4 September 2020, the tribunal served the respondent with the claimant's claim form but failed to include the annexe containing the particulars of claim, which included the protected interest disclosure unfair dismissal allegation and interim relief application.

14. On 8 September 2020, a preliminary hearing in the February 2020 ET claim took place. At that stage the tribunal had not yet linked the two claims together and the respondent had not yet been served with the particulars of claim that had been attached to the August 2020 ET claim and was unaware of the section 103A whistleblowing allegation or the application for interim relief. Towards the end of the preliminary hearing, the claimant referred to the August ET claim for the first time. The fact of the August 2020 ET claim had not yet filtered through to the universities external lawyers instructed at the preliminary hearing.

15. The file for the August ET claim was reviewed by Regional Employment Judge Monk on 30 September 2020, after the 8 September preliminary hearing in the February 2020 ET claim. REJ Monk noted that only the ET1 form and not the grounds of complaint appear to have been served on the respondent. The respondent had asked the tribunal for a copy of the tribunal of the particulars of claim on both 8 and 18 September 2020, but their request had not been dealt with because of staff shortages due to the pandemic. REJ Monk directed the grounds to be served on the respondent and for them to be given an extension of time until 27 October 2020 for filing the ET3 because of the error by the tribunal in failing to serve the particulars of claim.

16. REJ Monk also directed an urgent listing of the interim relief application. A notice of hearing of 8 October with a one-day time estimate was attached to the letter sent to both parties by email at 15.24 on 30 September. Both parties were asked to inform the tribunal immediately whether they wished the hearing to be held by video or in person.

17. On 1 October at 9.41, the respondent requested a postponement of 8 October hearing on

grounds of non-availability of both their counsel and instructing solicitor. They provided alternative dates from 14 October onwards and they also complained that they had only been given six working days' notice of the hearing. The claimant was copied into the application.

18. On 2 October at 16.46, both parties were emailed with a letter from the tribunal postponing 8 October 2020 listing, the letter from the tribunal saying:

> **"On the Tribunal's own initiative and so that any representations made by the parties, Employment Judge [unnamed] orders that the hearing fixed for 8 October 2020 be postponed and on the direction of REJ Monk the claimant will be asked to confirm whether she could attend the hearing on 15 October."**

19. The letter appeared to be an adaptation of a pro forma standard postponement order letter. I find that the postponement decision must have been made in response to the respondent's application and that the reference to the decision having been made on the tribunal's own initiative, is an inadvertent typing error. There would have been no reason for the tribunal to make the postponement decision of its own initiative six days before a hearing at a time when the tribunal was under immense and extreme pressure in the midst of the pandemic lockdown. The claimant did not reply to the tribunal's listing letter asking for confirmation of whether she wished the hearing to be held by video or in person and nor had she responded to the respondent's postponement application prior to the ET's email of 2 October 2020.

20. On 5 October at 16.38, the claimant replied to 2 October ET postponement letter stating that, *"She would be pleased to attend the interim relief hearing following seven days from the receipt of the respondent's ET3 and ET's acceptance of it."* Meanwhile, the respondent wrote to the tribunal to say that of the dates offered, 15 October was no longer suitable. No notice of hearing was ever issued for 15 October, which may well be explained by the written responses of both the claimant and the respondent, who were in effect both saying that 15 October was not suitable – the respondent for non-availability of chosen legal representative and the claimant's request that the interim relief hearing

take place only after service of the ET3.

21. On 27 October the respondents lodged their ET3 and on the same date, the tribunal sent a notice of hearing to the parties that the interim relief hearing was to take place on 3 November. The email was sent at 17.51.

22. On 29 October the claimant through her husband and representative, Dr Everton Dochery, applied for a postponement of the interim relief hearing on the basis that the claimant would seek professional legal representation for the interim relief hearing in light of the ET3. It was stated that they intended to provide available dates by no later than Tuesday, 3 November, and would endeavour to inform the tribunal as soon as possible. Meanwhile, the respondent's solicitor, David Brown, attempted to liaise with Dr Dochery about the preparation of the bundle for the forthcoming hearing. Dr Dochery resisted the request, explaining on 30 October that the claimant would prepare bundles a few days before the rescheduled and asked Mr Browne to refrain from suggesting that the respondent would prepare the bundle as the claimant was well-versed in such matters.

23. On 2 November Dr Dochery informed the tribunal of the claimant's available dates between 20 November and 2 December 2020 for their legal representative and asked for the interim hearing to be scheduled on one of those available dates. Later that day, EJ Findlay refused the postponement request on the ground that under section 128(3) Employment Rights Act 1996 the tribunal must determine the application for interim relief as soon as practicable and legal representation is not required (the EJ Findlay Decision that I have already identified).

24. The letter containing the EJ Findlay Decision appears also to have been adapted from a standard postponement refusal letter, which included two pro forma paragraphs that did not apply in this case. They are a distraction and a red herring and it is clear that it was merely an administrative

oversight that the paragraphs were not deleted, and they have no relevance to the EJ Findlay Decision. The parties were therefore informed that the case remained listed for the following day.

25. At 16.40 that day Dr Dochery emailed further representations seeking a reconsideration of the decision to refuse the postponement application (i.e. the EJ Findlay Decision). He pointed out that two of the three reasons given - the two erroneously included pro forma paragraphs - did not apply to the case. The letter stated that he, Dr Dochery, had scheduled work-related activities, lectures to students which could not be postponed at such short notice and that there will be no-one available to attend court the next day and the letter repeated the request for a relisted hearing. There was no mention of the claimant herself, Professor Kostakopoulou, being unavailable for the hearing.

26. The respondent continued to seek the co-operation of the claimant in the preparation of the bundles for the interim relief hearing, but eventually prepared their own.

27. On 3 November 2020, the case came before Employment Judge Dean resulting in the EJ Dean Decision. There was no appearance or representation by the claimant. The respondents attended remotely in accordance with the coronavirus restrictions then in place, represented by Ms Akua Reindorf, as they are today. EJ Dean did not adjourn the case but proceeded to hear the application in the absence of the absence of the claimant. At the end of the hearing, she reserved her decision. Judgment with reasons was sent to the parties on 17 December 2020. The application for interim relief was refused for a number of reasons. EJ Dean found that from the information before the tribunal, it was not possible to identify the precise nature of the alleged protected disclosures, nor whether they amounted to public interest disclosures, or whether they had been made in good faith. Causation was also problematic and, on the information, presented by the claimant, the Employment Judge was not satisfied that the predictive test required in interim relief hearings of establishing that the claimant would have a pretty good chance of succeeding at a full hearing, had been met and that

the reason or principal reason for the dismissal was on the proscribed ground of protected interest disclosure.

28. On 20 December 2020 the claimant applied for the decision to be reconsidered on a number of grounds including a breach of rule 47 which provides that where 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, but before doing so the tribunal shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence. Breach of rule 29, entitling the tribunal to vary, suspend or set aside an earlier case management order where it is necessary in the interests of justice, was also alleged. Finally breach of regulation 30, applications for case management orders was relied on by the claimant in her application. The claimant submitted a lengthy, 27 page, witness statement in support of her reconsideration application and on a bundle of documentary evidence consisting of 392 pages.

29. EJ Dean's Reconsideration Decision was sent to the parties on 5 August 2021. One explanation for the delay was the stay of the February and August ET Claims granted at the claimant's request pending the outcome of the libel proceedings.

30. EJ Dean refused the application for reconsideration on the grounds that there was no reasonable prospect of the decision being varied or revoked pursuant to rule 72. The only part relevant to this appeal is the challenge to the refusal to postpone the interim relief hearing. EJ Dean confirmed the decision to proceed with the hearing was taken after she had read the claimant's correspondence subsequent to the EJ Findlay Decision refusing the postponement application, namely the email of 16.40 on 2 November 2020. EJ Dean noted that the respondent objected to the postponement. EJ Dean found that the 16.40 email was clear and unequivocal, that the claimant did not intend to attend the hearing. EJ Dean's decision to proceed with the hearing was taken after she had considered the plain information which was available which she concluded rendered any further enquiries redundant.

31. Furthermore she noted that

> **"the object of an interim relief application is to undertake a predictive exercise as to the likely outcome of the full hearing as if it were a final determination of the matter. Time is of the essence in consideration of interim relief applications."**

She found that there was nothing in the arguments advanced by the claimant which could lead the tribunal to vary or set aside its decision.

Procedural history to the appeals and grounds

32. Let us turn now to the appeal against EJ Findlay's Decision to refuse the postponement, and both EJ Dean's Decisions of 17 December 2020 and the reconsideration decision of 5 August 2021. All eight grounds of appeal against the EJ Dean Decision and thus the current appeal, 2021-000293, were rejected on the rule 3(7) sift by Choudhury J, then President of this Tribunal of 6 December 2021, as were all five grounds of appeal from the EJ Dean Reconsideration Decision. That has the current appeal file number 2021-000942. As explained above, the EJ Findlay Decision was never directly appealed but the respondent consented to the scope of this hearing being expanded to enable it to be dealt with at the claimant's request.

33. On an oral renewal hearing under rule 3(10) on 1 March 2022 before HHJ Beard, the appeal against the EJ Dean Decision was allowed to proceed to a full hearing on grounds four and five in the appeal, and in the appeal against the EJ Dean Reconsideration Decision, ground five was permitted to proceed and the remaining grounds were dismissed.

34. HHJ Beard in his authority to proceed form, stated his reasons for allowing the matter to proceed as follows:

> **"It appeared to me that there was a real possibility of injustice in the way in which the decision to proceed with the interim hearing in the Appellant's absence, after she had requested a postponement to obtain representation and where the respondent had already been granted a postponement for the same reason. The**

> **interim hearing was already a considerable time beyond the date of application, so the urgency of holding a hearing had less force than it would have earlier. The reasons for refusal given by EJ Findlay had been challenged as incorrect, and further information put before EJ Dean as to the availability of the Appellant's representative along with that. Rule 29 in conjunction with rule 47 seems to me would have permitted EJ Dean to adjourn in the circumstances. On that basis I consider the grounds that I have allowed to go forward to be reasonably arguable."**

35. Let me now address the specific grounds. Ground four of the appeal against the EJ Dean Decision, rely on a breach of rule 47, which provides:

> **"If a party fails to attend or 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."**

36. It is asserted by Mr Herbert that it is not apparent that this obligation was met in EJ Dean's Decision.

37. Ground five, based on rules 29 and 30 cites the wide case management powers and the tribunal's ability to vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice. It is effectively the same criticism for failing to postpone the hearing on 3 November 2020 by exercising the case management powers to revisit the EJ Findlay Decision.

38. Ground five of the appeal against the EJ Dean Reconsideration Decision is somewhat discursive and opaque on a first reading, but addresses effectively the same point: the refusal to postpone and proceed with the hearing in the claimant's absence. It also alleges that the employment judge reframed the arguments in the absence of the claimant, although it appeared to be that it was the claimant's absence at the hearing which was the primary source of the discontent (i.e. the refusal to grant the postponement application), rather than the way in which it was said that the claim had been reframed by the tribunal.

39. To conclude the appellate procedural history to date, the claimant then applied for a review of HHJ Beard's judgment of 1 March 2022, challenging his dismissal of all the remaining grounds and, in the alternative, seeking permission to appeal to the Court of Appeal. By his judgment on 23 March 2022, HHJ Beard rejected both applications, but he acceded to the applications for both a transcript of his judgment of the hearing and an expedited full hearing in light of the delays to date. The claimant has applied to the Court of Appeal for permission to appeal the HHJ Beard judgment and review decision and I understand that she is awaiting a permission decision on the papers.

Parties' submissions

40. I am very grateful to both parties for their helpful submissions. I note especially that Mr Herbert was instructed at short notice compared to the Ms Reindorf, who has been involved in this matter since 2017. Mr Herbert was, through clever diary management, able to devote the whole of Tuesday to preparing for Wednesday's hearing and had the benefit of lengthy telephone conferences with his client on both Monday and Tuesday night and was given time to take further instructions before concluding his submissions during the course of the hearing.

Claimant's submissions

41. Mr Herbert clearly and carefully made submissions partially based on the lengthy and helpful written skeleton argument prepared by the claimant and Dr Dochery and he highlighted what he considered to be the apparent unfairness in the differential treatment as between the respondent's postponement request and the claimant's subsequent postponement request, which he submitted was suggestive of the overriding objective not being complied with. There appeared to be a stark difference. How could, he asked, the non-availability of respondent's chosen counsel and instructing solicitor be sufficient to grant their postponement request, but when the claimant gives the same reason in her postponement request, is told that legal representation is not necessary, and the claim must proceed as listed?

42. It is for the claimant to decide whether and if she wants to instruct lawyers. It was not for the tribunal or the respondent to say that just because Professor Kostakopoulou who was a law professor, had previously represented herself, including in the High Court libel proceedings, in the EAT and the Court of Appeal, that she could not decide to instruct lawyers for an ET interim relief hearing after having seen the respondent's ET3. Article 6 of the European Convention on Human Rights was relied on. The claimant was perplexed, (to put it at its mildest and most polite), that the need for speed was given as a further reason not to postpone when the delays had been the fault of the employment tribunal. It was also submitted that only a very short further stay would be necessitated by the claimant's request.

43. A further and separate point is that 27 October 2020 letter did not give the seven days' notice of a hearing as it was sent outside office hours and the parties had had in reality only six days and a matter of hours in order to prepare. The claimant had not consented to short notice and it was submitted that there was no power to truncate notice, even if the respondent had agreed.

Respondent's submissions

44. The respondent's submissions can be stated equally succinctly. Ms Reindorf pointed out that there had been no appeal against the 2 October 2020 postponement by REJ Monk from which she said two conclusions flowed. Firstly, it indicated that the claimant was content with the postponement decision at that time, but if she had not been, she should have, and was well able to exercise, her appellate, reconsideration or review rights and she failed to exercise either.

45. In any event, Ms Reindorf submitted, there is an asymmetry between the claimant and respondent in interim relief applications. The respondent is the one taken by surprise and required to act, at short notice, whilst the claimant is assumed to be ready to go at a moment's notice as it is the claimant seeking to put the clock back and preserve the pre-dismissal status quo insofar as procedure

permits. It followed that a symmetrical approach to applications from both sides was not necessarily appropriate. Furthermore, the three decisions taken fell well within the wide case management powers available to an employment tribunal and this appeal tribunal could not interfere, Ms Reindorf submitted.

The law

46. Turning next to the law. Section 128 of the **Employment Rights Act 1996** provides:

> **"An employee who presents a complaint to an employment tribunal that he [or she] has been unfairly dismissed …[For, amongst other things, a protected interest disclosure reason contrary to section 103A]** …**may apply to the tribunal for interim relief."**

Very strict time limits apply in such cases:

> **"(2) The tribunal shall not entertain an application for interim relief unless it is presented to the tribunal before the end of the period seven days immediately following the effective date of termination (...)."**

If lodged within the time limit, it is then incumbent upon the tribunal to **"determine the application for interim relief as soon as practicable after receiving the application"** by section 128(3).

The general rules relating to the notice to be given in advance of a hearing by the tribunal periods do not apply to interim relief applications since, by section 128(4):

> **"The tribunal shall give to the employer not later than seven days before the date of the hearing a copy of the application, together with notice of the date, time and place of hearing."**

There is no mention of the notice requirement for a claimant. The normal notice periods required for a hearing is 14 days under the rules. Subsection 5 of section 128(5) provides:

> **"The tribunal shall not exercise any power it has of postponing the hearing of an application for interim relief except where it is satisfied that special circumstances exist which justify it in doing so."**

47. Special provisions concerning the procedure for a hearing of an interim relief application is

set out in section 129 which are not relevant for the purposes of this appeal.

48. The relevant tribunal rules are, firstly, the overriding objective, which is set out in rule 2 of the **Employment Tribunal Procedures** and provides:

> **"The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable –**
>
> **(a) ensuring that the parties are on an equal footing;**
>
> **(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;**
>
> **(c) avoiding unnecessary formality and seeking flexibility in the proceedings;**
>
> **(d) avoiding delay, so far as compatible with proper consideration of the issues; and**
>
> **(e) saving expense.**
>
> **A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."**

49. Rule 29 provides:

> **"The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order. … the particular powers … do not restrict that general power. A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice, and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made."**

50. Applications for case management orders are set out in rule 30 and they are not especially relevant, and I will not read them into the record.

51. The reconsideration provisions are set out in rules 72 to 73:

> **"Process**
>
> **72.—(1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the**

> **original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.**
>
> **(2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.**
>
> **(3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it, and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part.**
>
> **Reconsideration by the Tribunal on its own initiative**
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> **73. Where the Tribunal proposes to reconsider a decision on its own initiative, it shall inform the parties of the reasons why the decision is being reconsidered and the decision shall be reconsidered in accordance with rule 72(2) (as if an application had been made and not refused)."**

52. It is trite law that tribunals have a wide discretion as to the exercise of case management decisions and only if the exercise of its discretion is outside the generous ambit within which reasonable disagreement is possible: see **G v G** [1985] 1 WLR 647, or if the decision is perverse or such that no reasonable tribunal could have come to it. Classic examples include taking an irrelevant matter into account or not taking a relevant matter into account. Other examples include a mistake of law, acting in disregard of a principle, misunderstanding the facts, or failing to exercise the discretion at all and therefore not having thought about it: see for example **Teinaz v LB of Wandsworth** [2002] EWCA Civ 1040, which is also a case concerning the exercise of a discretion

concerning a postponement decision. **Lunn & Lunn v Aston Darby Group Limited** UKEAT 0039/2018/BA, 26 February 2018 is the only EAT case specific to postponement of an interim relief hearing that the parties have been able to identify. Again, I am grateful to them for their research and conscientiousness in this regard. HHJ Eady (as she then was) concluded that the tribunal in that case had made a perverse decision in not adjourning an interim relief hearing for a period of five days to a date suitable to both parties which would have enabled the claimants to be represented by the Direct Access counsel who had represented them throughout, and it was also relevant that they were unable to obtain alternative legal representation on the date originally listed by the tribunal.

53. On the particular facts of that case and having regard to the overriding objective, in particular saving expense, flexibility and seeking to ensure that the parties are on an equal footing, given the minimal delay that would have been occasioned by granting the request, HHJ Eady considered that special circumstances applied, and the ET decision was set aside.

54. The exercise of case management decisions must be taken in light of all the circumstances known to the tribunal and **Lunn & Lunn** is expressly stated not to lay down any particular principles or be a guideline case, turning as it did on its own facts.

Analysis and conclusions

55. Employment tribunals are under a statutory obligation to arrange interim relief hearings as soon as practicable. There is particular urgency given the nature of the relief sought. A delay generally militates to the prejudice of a claimant rather than a respondent. By the end of October 2020, for a number of reasons there had been a considerable delay in the listing of the interim relief application.

56. It is to be remembered that the events with which we are concerned occurred in the height of the Coronavirus pandemic restrictions, which included travel restrictions at that time, and which

particularly affected, and had a particularly severe effect, on the paper based administration of the employment tribunal system, and both the availability of administrative and judicial resource. It is easy, in May 2022, to overlook quite how difficult the circumstances were in the autumn and winter of 2020. Some of the delays that occurred in this case must be read in light of the pandemic.

57. But the causes were little to do with any fault by the tribunal. The claimant had not specifically alerted the tribunal to the fact of the interim relief application. Ms Reindorf's description of the request for an interim relief hearing being "buried" in the particulars of claim annexed to the ET1 in paragraph 5 was not unreasonable. There was no mention of it in the claim form itself, nor in a covering letter to the claim form, nor was there a separate application for an interim relief hearing. It is understandable why it was overlooked by the tribunal. It was incumbent on the claimant to draw her application to the tribunal's attention which she did not do.

58. After the claim had been lodged on 6 August 2020, there was no contact by the claimant to check the progress of the listing, even though she and Dr Dochery were in regular correspondence with the tribunal on other matters, such as the February 2020 ET claim, and even an amendment application to the August 2020 claim. There was no mention by her or Dr Dochery of the interim relief application and nothing appears to have been done to chase up the listing of the hearing. The fact that the claimant did not even mention the August 2020 ET claim and the interim relief application at the preliminary hearing for the February 2020 claim on 8 September 2020 until towards the end of the hearing strikes me as odd when it was highly relevant to the case management and progress of the February 2020 claim.

59. When REJ Monk reviewed the file on 30 September and appreciated the oversight, she immediately directed the interim relief hearing to be listed the case at the earliest opportunity in accordance with the rules and it was duly listed for 8 October 2020.

60. The claimant did not object to the respondent's postponement application of 1 October 2020, although I accept she had only 24 hours before the tribunal granted the postponement request. However her consent to the postponement is implicit from the claimant's letter of 5 October in which she specifically asked for the hearing to be heard seven days after receipt of the ET3. That would take us to 3 November 2020, since the respondent had been granted until 27 October to file its response to the claim. The claimant did not object to the extension of time given to the respondent for filing it's ET3, in light of the initial oversight by the tribunal in not sending the respondent the details of claim annexed to the ET1 form.

61. It is not necessary for an ET3 to have been served or filed prior to an interim relief hearing. In fact, it is most unusual for that to have occurred given the need for speed and usually the interim relief hearing will take place before the ET3 is even due to be filed. The purpose of the hearing is to see if the claimant has shown a pretty good case and the preparation of the ET3 is not a ground for delaying an interim relief hearing. It is generally seen as a tactical advantage to hold an interim relief nearing in advance of a respondent being able to set out its stall in its defence. At this stage of the proceedings it is not about the respondent, but the claimant's case. But nevertheless the tribunal tacitly agreed to the claimant's request and did not list the case for an interim relief hearing until after the ET3 had been submitted.

62. The tribunal then acted expeditiously on the claimant's request and listed the interim relief hearing application on the day that it received the ET3 and on the first available date, given the seven-day time limit stipulated in s.128(4).

63. I conclude that as at the date of the EJ Findlay Decision, the tribunal was entitled to conclude that the hearing should not be further postponed, no matter that the first postponement had been granted at the request of the respondent and on grounds of the non-availability of their counsel and

instructing solicitor.

64. Whilst I agree entirely with Mr Herbert that it is not for the tribunal or the respondent to say whether the claimant should choose to instruct lawyers or not, it is surprising that the claimant considered that she needed to await the ET3 before deciding whether to do so, especially when she had expressly stated that she would be ready for a hearing seven days after receipt of it. Why not instruct lawyers earlier? They would then be up to speed and ready when the ET3 arrived. It is not an unreasonable inference from the events set out above that the claimant was stalling at this stage and that further delays to the interim relief hearing should not be countenanced by the tribunal. The claimant had had plenty of time to instruct lawyers had that been her intention, considerably earlier than she appears to have done so.

65. The superficially attractive argument that the claimant's postponement request should have been acceded to because the respondent's application had been granted a month previously, does not withstand close scrutiny. Many of the circumstances were materially different. As is apparent from the chronology set out above, the claimant had not objected to the respondent's application to postpone and had represented that she would be content - the word "happy" is used in her letter - with a hearing seven days after the ET3, which would take us to 3 November. The tribunal was entitled to take a holistic view and look at the whole of the period of the delay to find and conclude that by 2 November the delays had been too long and that the statutory obligation to list the interim relief hearing expeditiously was paramount. It is not a straight comparison between the respondent's application and the claimant's a month later because of those different circumstances. The claimant appears to have chosen not to instruct lawyers until after receipt of the ET3, thus giving her a different explanation for a further delay.

66. It is to be borne in mind that it was the respondent who had the disadvantage of surprise when

they received the interim relief application and they had had a reasonable point that the delay would just be a few days since they provided their counsel and instructing solicitor's availability at the same time as the postponement application. It was also reasonable that the same counsel and instructing solicitor who had been involved for three years by then, would be helpful to be at the hearing and given the minimal additional delay that their availability could reasonably be accommodated.

67. So looking at it closely, this is not a case where different sauce is being served with the goose to that of the gander. At the risk of stretching the metaphor to breaking point, one is a goose and the other a different bird altogether and in any event the same principles were applied to both applications – the overriding objective – as in the recipe for the sauce was the same for both dishes. As noted above, s.128(5) provides a more restrictive regime to postponements in interim relief cases, the tribunal must be satisfied that "special circumstances" exist. Here the special circumstances in EJ Findlay Decision were the loss of just a few days when the claimant had not objected and her decision fell within her discretion and powers of case management. It is possible that other employment judges might have taken a different view, but that is not the test to be applied. The test is whether a decision falls outside the generous ambit of case management discretion and assessment of special circumstances. I find no error of law in her decision.

68. The second decision under appeal, the EJ Dean Decision, is challenged as a breach of rule 47. A complete answer is given, however, in the EJ Dean Reconsideration Decision that explains that EJ Dean had considered the email of 16.40 of 2 November 2020 before she made the EJ Dean Decision and she had concluded that no further enquiry was necessary. It was a perfectly proper decision: she knew that the claimant and her representative would not be attending and so there was nothing more to know and she was entitled to proceed in the claimant's absence. Paragraph 7 of the EJ Dean Reconsideration Decision reads:

> **"7. The conduct of an Interim Relief application is by nature a summary consideration of the claim without reference to oral evidence. Before commencing**

> **the consideration of the application the correspondence from the claimant with the tribunal, EJ Findlay's decision on not to grant the postponement request and in particular the claimant's last email to the tribunal asking for a postponement was considered as too were the respondent's representations to oppose the application to postpone. The claimants [sic] email to the tribunal at 16:40 on 2 November 2020 was clear and unequivocal that the claimant did not intend to attend the hearing and the decision to proceed with the hearing was taken having considered the plain information which was available which rendered any further enquiries redundant."**

69. The second challenge to the EJ Dean Decision is made under rule 29 which contains a power to vary a previous case management order. The test is whether it is necessary in the interest of justice. There is case law on the point and the cases of **Hart v English Heritage (Historic Buildings and Monuments Commission for England)** [2006] IRLR 915, **Onwuka v Spherion Technology UK Limited** [2005] ICR 567 and **Goldman Sachs v Montali** [2002] ICR 1251, make clear that the power to vary or set aside any case management order should not be used unless there has been a change of circumstances.

70. In this case, there had been no change of circumstances between the EJ Findlay decision and the EJ Dean Decision since the 16:40 on 2 November email does not make new points and accordingly EJ Dean was correct not to vary her colleague's decision of the day before. The fact of Dr Dochery's unavailability on 2 November for work related activities, is not sufficient to amount to changed grounds. But even if it had been and it was open to EJ Dean to consider varying the previous day's order, EJ Dean was entitled to conclude that the 16:40 email did not amount to special circumstances and deciding not to postpone the hearing on the day.

71. There is a mistaken apprehension in the 16:40 email that 14 days' notice of a hearing is required, but as we can see from the statutory provisions set out above, the 14 day hearing notice requirement is specifically disapplied in interim relief applications by section 128(4) ERA 1996.

72. The third decision under appeal is the EJ Dean Reconsideration Decision. Reconsideration

decisions, following a change of rules in 2013 have clarified and simplified the previous grounds for reconsideration to the single broad-brush category of whether it is necessary in the interests of justice. It confers a discretion to be exercised judicially and with regard not just to the interests of the party seeking the review, but also the interests of the other party and the public interest requirement that there should be, so far as possible, finality of litigation. The reference to "finality of litigation" is the need for some certainty and limits to the ability of the party who is dissatisfied with the outcome of a point in a particular decision to be able to endlessly revisit it.

73. It rather follows from my decision on the EJ Findlay Decision and the EJ Dean Decision that on both occasions each employment judge was acting within her case management powers within her judicial discretion and s.128(4) and their decisions were perfectly proper ones, that the reconsideration of those decisions would be unsuccessful. Nothing new and further reasons have been provided that would suggest that the first decisions were wrong. If the first decisions were not wrong, it cannot be in the interests of justice to allow a full consideration hearing of either of the earlier two decisions. EJ Dean's Reconsideration Decision which dismissed the application on the papers without allowing it to go forward for a reconsideration hearing was entirely appropriate in the circumstances of the case.

74. For the above reasons, the superficially attractive comparison between the treatment of the respondent's postponement request and that of the claimant's postponement request a month later, do not withstand close scrutiny and the employment judges' decisions do not demonstrate any error of law such as to entitle the claimant to succeed in this appeal.

75. The appeal is therefore dismissed.