Neutral Citation Number: [2025] EAT 140

Case No: EA-2022-000180-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 3 September 2025

Before:

JOHN BOWERS KC
DEPUTY JUDGE OF THE HIGH COURT

- -

Between:

BS EATON LIMITED

Appellant

- and -

MR A HUGHES

Respondent

- -
- -

MR COLIN BARAN (instructed by **Averta Employment Lawyers**) for the **Appellant**
MR HUGHES appeared in Person

Hearing date: 3 September 2025

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JUDGMENT

SUMMARY

Practice and procedure

The tribunal misapplied the burden of proof which is on the employee to show that he was ready, willing and able to work when this is challenged.

JOHN BOWERS KC, DEPUTY JUDGE OF THE HIGH COURT

1. This appeal is brought against the order of 29 November 2022 of the West Midlands Employment Tribunal, Employment Judge Amy Smith, following a reserved judgment with written reasons of the same date. It upheld the claimant's claim of unlawful deductions in the sum of £4,755.58.

2. The background is quite complex but can be summarised as follows. The Tribunal found that the claimant had originally reasonably been laid off work pursuant to an implied term of his contract of employment by reason of COVID, and subsequently, that he was reasonably suspended on 6 May 2020 following an email and a Zoom meeting where he made allegations and used offensive language in respect of the employer's senior personnel (paragraphs 28 to 30 and 72 of the decision). Crucially, however there was a finding that there was no basis for the claimant to remain on layoff from 22 June 2020 and that he ought to have been paid his full, non-layoff payment from then until 30 August 2020. In reaching this conclusion the Employment Tribunal found that the burden was on the respondent employer to establish that the claimant was not ready, willing and able to return to work Mr Baran, on behalf of the appellant, said that this was a crucial error. It is certainly a curious conclusion by the Tribunal. It can be found at paragraph 71 and is then repeated at paragraph 78 of the decision The seminal decision of the Court of Appeal in **North West Anglia NHS Foundation Trust v Greig** [2019] ICR 1279 was cited to the Employment Tribunal. It is not referred to in the legal part of the reasons which deal extensively with the implied term as to layoff, but there is nothing on the burden of proof in relation to this point.

3. The ground of appeal on this point is commendably short, that the Employment Tribunal erred in paragraphs 71 and 78 and the appellant's position is that the burden of proof was central to the Employment Tribunal's decision and therefore the decision should be overturned. His Honour Judge

Tayler said that there was no reasonably arguable point of law in a letter dated 28 June 2023 but after a rule 3.10 hearing Mr Gullick, sitting as a Deputy Judge of the High Court, reinstated it but recognised that:

> "Any such error might not matter in the event that the employment judge had made a positive factual finding."

4. The relevant facts found by the Tribunal are really as follows. The Respondent is a concrete manufacturer, a family-run business, employing some 90 staff in a central location. Mr Hughes' job was as an officer worker; his tasks involved controlling materials going in and out of the business. The Tribunal records in paragraph 28 that the Claimant sent an email on 3 April making various allegations against senior people in the business. Mr Eaton responded, saying that he needed some time to cool off. The claimant was then suspended. Then, and this is very important, the company decided that the best way forward would be to conduct a mediation between the parties and on 7 July 2020 Mr Eaton made that suggestion to the claimant. An independent professional mediator was appointed but thereafter the claimant withdrew from the mediation process, saying, "How can I have any confidence in returning to work?" He was concerned about the lack of confidentiality and lack of investigation into his allegations. The claimant was specifically invited to return to work on 1 September 2020. He did not return then because of sickness but then eventually did return.

5. The Tribunal refer at paragraph 74 to the claimant "withdrawing" from the mediation process. At paragraph 75 they say the claimant raised serious allegations against his manager and made those complaints in "an unhelpful and aggressive manner" but said at paragraph 76 that it was "incumbent on the employer to confirm with the employee whether they would be willing and able to return to work". Then they say at paragraph 78:

> "I conclude that the respondent has not established that the claimant was not willing and able to return to work from mid-June 2020."

This is clearly incorrect as a matter of law because the burden of proof rests on the employee.

6. The first case in time I was referred to at the hearing was **Miles v Wakefield MBC** [1987] ICR 368, which although it refers to an "officer" created under statute, a superintendent registrar of births, marriages and deaths, the terms of that office were effectively equiparated to a contract of employment. At p391 D Lord Templeman says:

> "It cannot be right that an employer should be compelled to pay someone for nothing, whether he dismisses or retains a worker on a contract. Wages and work go together … In an action by a worker to recover his pay he must allege and be ready to prove that he worked or was willing to work. Different considerations apply to a failure to work by sickness or other circumstances …"

I have also gained important support for my decision from what Lord Templeman said at p395 B to C and Lord Oliver at p406 C to D.

7. There is also the case of **Greig v North West Anglia NHS Foundation Trust** [2019] ICR 1279, which is different on the facts because it involved a consultant anaesthetist who was subject to an interim order suspending his registration to practice. In other words, it was not an internal issue brought about by the employer itself but something external. Coulson LJ, who gave the only substantive judgment, said at paragraph 47:

> "The development of the related common law doctrine of ready, willing and able to work can be traced back to **Petrie v MacFisheries Ltd** [1940] 1KB 258, where this court held that there was no general principle the servant is entitled to wages during his absence through sickness. Atkinson J said that it had to be ascertained from the contract whether the consideration for the payment was the actual performance of the work or whether the mere readiness and willingness or ability to do so is the consideration."

He then referred to **Miles v Wakefield**. Coulson LJ discerned clear principles from the authorities at paragraph 52 and he says:

> "If an employee does not work he or she has to show that they were ready, willing and able to perform that work if they wished to avoid a deduction to their pay (*Petrie v MacFisheries*)."

He also says at paragraph 65:

> "I do not consider that the ready, willing and able concept fits easily into a complex, modern-day employment contract such as this. In addition, as the cases show, there has been an inconsistent approach to the application of this principle but in the circumstances of this case I consider, as the judge did, that applying the principles noted at paragraphs 52 and 53 above Dr Greig was ready, able and willing to work."

8. I take from these authorities that there may be various gradations or conditions applied in relation to the readiness and willingness and ability to work. For example, someone may say, "I am ready and willing to work provided that the health and safety issues that I raise are addressed," or subject to particular conditions. The burden of proof however remains on the employee.

9. So, it seems to me that there is a clear error of law in this decision. The crucial further question is whether that misdirection has an effect on the outcome of this case because, as His Honour Judge Tayler said in the rule 3.7 hearing, usually the burden of proof is not vital, as the Tribunal will weigh up the evidence on each side. I think however that unusually in this case it was vital because the Tribunal did specifically decide this case on the burden of proof and I think that there is an issue as to whether, given that the claimant withdrew from the mediation designed to assess whether there were bases for return to work, he was truly ready, willing and able to return to work.

10. Mr Hughes put in helpful written submissions and made oral submissions. He said that he always responded to any suggestions by the employer and made himself available for work, that he did meet with a mediator on a Zoom call, that he withdrew from the mediation because the suggested meeting point was a pub (and he did not think such a location was appropriate) and he found out that there was no investigation. When I asked him about the offensive emails he said that they were both emailing to each other late at night. I did not find this point easy to fit into the findings made by the Tribunal and this also leads me to the conclusion that this matter should be remitted for a further hearing. I think that this is not a situation B case in **Jafri v Lincoln College** [2014] ICR 920. I do not think, on appeal, I can conclude this. I think it is a factual matter.

11. I am accordingly going to remit the case to the same Employment Tribunal to decide whether, applying the proper burden of proof, the claimant was, during the relevant period, ready, willing and able to work. I would anticipate that this would be a short hearing given the findings already made. It is clear that at the remitted hearing the parties would not be able to go behind these findings of fact. Mr Hughes would simply assert, I imagine, that he was, at all stages, ready, willing and able to work and Mr Baran, representing the appellant on remission, would be able to cross-examine him.

12. The outcome of this caseis that this brief matter is remitted to the same Tribunal for rehearing. I thank both parties for the reasonable manner in which they have presented their respective cases,