Neutral Citation Number: [2026] EAT 179

Case No: EA-2023-001478-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 18 November 2026

Before:

HER HONOUR JUDGE JOFFE

Between:

MR H SHAH

Appellant

- and –

PROMISE CARE SERVICES LIMITED

Respondent

- -
- -

Ms P Leonard (through the Free Representation Unit) for the **Appellant**
Mr N Radu (consultant for Peninsula) for the **Respondent**

Hearing date: 6 October 2026

- -

JUDGMENT

SUMMARY

Practice and procedure

This appeal concerned a claim for unpaid holiday pay. The claim was rejected at a short remote hearing on the basis that it had been presented out of time in circumstances where it had been reasonably practicable to present it in time. This appeal raised the issue of whether there had been procedural unfairness in circumstances where the claimant said that he had been confused as to whether the hearing was a full merits hearing, had limited IT skills, had had to attend by mobile phone, and was acting as a carer for his sick mother. The claimant had left the hearing to care for his mother after the evidence was complete but before submissions and the EJ had concluded the hearing in his absence.

Held: Remote hearings can present significant challenges for litigants in person and it will often be unsatisfactory for a litigant to attend a full merits hearing on a mobile phone. Looking at the information available to the EJ in this case in what was a developing situation, he had clearly had regard to whether the hearing could fairly continue and it could not be said that the case management decisions he made fell outside the EJ's broad case management discretion or that they materially affected the outcome.

HER HONOUR JUDGE JOFFE:

Introduction

1. This is an appeal from a decision of EJ Emery sent to the parties on 18 October 2023, dismissing the claimant's claims of failure to pay holiday pay under the Working Time Regulations 1998 and a claim characterised as unlawful deductions from wages in respect of bank holiday wages. Written reasons were provided on 11 March 2024.

2. This appeal raises issues about the conduct of remote hearings involving litigants in person who face additional practical obstacles to full participation in their hearings. Short full merits hearings in the Employment Tribunal, where the claims are only for wages and/or holiday pay, are often conducted remotely. There will usually be no case management hearing prior to the full merits hearing and standard directions will have been given in writing. Although the claims are usually of limited monetary value and the listings are short, these can be difficult hearings for a judge to manage fairly and efficiently. Sometimes neither party is represented. There may be no witness statements or formal bundle of documents. The issues are likely to need clarification at the outset of the hearing. Parties may themselves struggle with any number of access issues, not limited to lack of skill with or access to IT equipment, but potentially including health issues, caring issues and language issues.

3. A remote hearing requires a participant to manage the technology as well as the usual incidents of a hearing – the documents, the evidence, the other people, the unfamiliar venue. The communications from the Tribunal may be confusing to a lay person. A litigant in his or her own home may face caring demands and other interruptions.

4. An employment judge in such a hearing will also have a large number of matters to manage and there can be a difficult balance to strike between proportionality and access to justice. The claims may include points of contractual and statutory interpretation the parties are ill equipped to assist with. It will often be in the interests of the parties in the particular case as well as the interests of the

Tribunal and other parties that the issues are determined swiftly at a short hearing with relatively little formal preparation. When a party arriving at such a hearing seems to be unprepared or is only able to participate in a way which is less than optimal, there are difficult real time decisions for the judge to make as to whether the hearing should continue, be postponed, or be converted to a case management hearing.

5. Employment tribunals in these difficult circumstances have a generous margin of appreciation as to how they manage cases and how they make these difficult calls. It is impossible for a judge in this Appeal Tribunal to fully appreciate exactly how a hearing has unfolded and employment judges cannot be expected to produce reasons which detail every feature of the hearing and everything the participants have said. There will inevitably be some cases where a difficult call is made which is outside of the margin of appreciation; for an appeal to succeed they must be cases where this Appeal Tribunal can fairly conclude that no reasonable tribunal, directing itself in accordance with the overriding objective, would have conducted the hearing in the way the particular tribunal did.

6. The real question which arises on this appeal is whether the EJ's management of this hearing fell out with that generous margin in the difficult circumstances which arose.

Background and circumstances of the hearing

7. The claimant was employed as a carer for his mother between 1 December 2021 and 31 December 2022. He said, as appears to have been accepted, that he took no holiday during that employment. After the termination of his employment, he was in due course paid £2567.77 for holiday pay and £165 for bank holiday pay. The claimant argued that he should have been paid double time for bank holidays and that he had been paid an insufficient sum for his accrued but untaken annual leave.

8. The claimant presented a claim form on 12 June 2023, following an ACAS conciliation period between 5 April and 17 May 2023.

9. The claimant relied as part of his appeal on an assertion that the communications sent by the Tribunal had been confusing. Unfortunately, there was at the appeal hearing an ultimately unresolved issue as to exactly what communications the Tribunal had sent the parties and what communications the parties had sent each other. Copies of some of the correspondence were available but other items had not been retained by the parties. Further, EJ Emery had given a description of correspondence he had seen in his reconsideration judgment sent to the parties on 9 June 2025 which did not entirely marry up with the documents I saw.

10. Putting together the correspondence I saw and that which the EJ also had, there appear to have been the following; items in bold are those that I have seen, the remaining one is referred to by the EJ:

a. **7 July 2023: Notice of Hearing by Cloud Video Platform. This says that 'the claim will be heard' on 4 October 2023 at 12:00. The notice gives directions for joining the hearing and some advice about how to manage the technology. It says: 'The hearing has been allocated 1 hour to hear the evidence and decide the claim, including remedy'. It gives some directions, which include provision for schedule of loss and for 'documents and evidence' from both parties. It says: 'The claimant and the respondent are responsible for making sure any relevant witnesses attend the hearing';**
b. **1 August 2023: The Tribunal writes to the parties to say that the issue of time will be 'considered and decided at the final hearing', which is extended to two hours;**
c. **9 August 2023: Amended notice of hearing by video hearing. This says that the hearing will be on 4 October 2023 at 12:00. It says that 'the hearing will last about two hours'. It gives directions for joining. However the orders now require the parties to send copies of all documents and witness statements upon which they intend to rely seven days before the hearing;**

d. 11 August 2023: Email from the respondent to the claimant attaching a bundle of documents;

e. 14 August 2023: Email from the claimant to the respondent attaching a schedule of loss;

f. 29 August 2023: Acknowledgement of correspondence from the Tribunal. This thanks the claimant for an email of 15 August 2023 and says that EJ Russell has instructed: 'Time limits will be considered at the Final hearing on 9 October 2023'. Neither party was able to supply the email of 15 August 2023. The date of 9 October 2023 was an error by the Tribunal;

g. 30 August 2023: Claimant's email to the Tribunal. Part of the email raises a concern about the respondent being dissatisfied with the schedule of loss. The email continues: 'The hearing on 4 October 2023, will be at 12:000 Midday and should last for two hours. I am now a little anxious what would happen on the day if I was not able to get on line especially if there were no Internet Availability especially as I am not technically skilled.'

h. 2 October 2023: Respondent's email to the claimant attaching its witness statement and additional disclosure. The respondent's advocate says that he understands the letter from the Tribunal of 29 August 2023 to be in error. The respondent's understanding was that the hearing was on 4 October as per the notice of hearing. He says: 'You can of course confirm this for yourself'.

11. In the EJ's reconsideration decision there is also this account of the correspondence:

> 'While there was some confusion caused by two different hearing lengths being sent to the claimant, one of which said the hearing would be a one day full merits hearing and a two-hour case management hearing, the respondent's representative had contacted the claimant in the days before the hearing to make it clear it was a one-day listing. '

The hearing

12. The EJ recorded the issues as:

- What was the claimant's holiday entitlement?
- Was he entitled to pay in lieu of untaken holiday entitlement?
- Has the claimant been underpaid for bank holidays?
- Has the claim been brought in time? If so, was it not reasonably practicable for the claimant to bring his claim in time?

13. The EJ recorded that he heard evidence from the claimant without a witness statement and from a witness on behalf of the respondent. He asked questions of both witnesses and the claimant was questioned by the respondent's advocate.

14. I take the following account of what then happened from the judgment.

15. At 1:50 pm, before the end of the hearing, the claimant said he had to go, as he had to feed his mother. He said he was not prepared for the hearing as it was meant to be a preliminary hearing and not the full merits hearing.

16. The EJ suggested an adjournment and subsequently suggested a return to the hearing later that day; he observed that the claimant had a carer onsite to look after his mother. He asked the claimant to wait for one moment to discuss timings and suggested an hour's break and that the parties come back to the hearing later that day. The EJ said that the claimant refused to stay and said: 'I have to go'. He disconnected from the hearing abruptly at this point.

17. The EJ recorded that the evidence was complete at the point when the claimant left the hearing. He had given his reasons for presenting the claim out of time and his evidence of what he was owed.

18. The EJ concluded that he was fairly able to give judgment although the claimant had left the hearing.

19. In submissions, the respondent's advocate suggested that the claimant had disconnected because he was annoyed. He said that the claimant had argued that he thought it was a preliminary hearing but that, although there was an error in one tribunal letter, he had emailed the claimant to explain that that letter was in error the day before.

20. I should note that my attention was drawn by Ms Leonard to matters which the EJ would not have been aware of. I was told that the claimant had a retinal impairment. His mother was by this point so severely unwell that she very sadly died some twelve days later. The EJ could not at the time of the hearing have known how serious the claimant's mother's situation was. He had not been informed of the claimant's retinal impairment.

The decision

21. The EJ recorded the evidence he had from the claimant.

22. The claimant was dismissed without a letter of dismissal. He was told that the respondent had decided to provide another contractor. He in due course received a further wage slip sent on 25 April 2023 for unpaid holiday pay.

23. In evidence, the claimant said that he had contacted ACAS on 8 March 2023. He had been advised that his claim was in time but that, as he had not been issued with his P45, he could only be considered terminated when the P45 had been issued. The EJ said that the claimant repeated this advice in response to another question.

24. The EJ then recorded the evidence he heard about calculation of holiday pay and bank holiday pay specifically.

25. The EJ then directed himself to a substantial list of authorities on reasonable practicability.

26. That included an authority about how erroneous advice from an ACAS adviser may justify an extension of time: **DHL Supply Chain Ltd v Fazackerley** UKEAT/0019/18. The EJ also referred

to **Schultz v Esso Petroleum Ltd** [1999] IRLR 488, which directs a tribunal to focus on the closing rather than the early stages of the limitation period.

27. It is useful to set out the EJ's conclusions in detail:

> '24. At the time the claimant left the hearing, the evidence had concluded. The claimant had asked questions of the respondent witness, and he had presented his own evidence, in particular his spreadsheet of hours and holiday entitlement. He had given his reasons for presenting the claim out of time and his evidence of what he is owed.
> 25. I concluded that I was fairly able to give judgment on the issues to be determined, even though the claimant had left the room.
> 26. What was the reason for the missed employment tribunal claim deadline? The claimant says that he received positive advice from ACAS that time had not started to run as he had not received his P45. This was queried by the respondent. The claimant says he receives this advice in a phone call, but we have no date of the call or who he spoke to. Also, the claimant's evidence was that he looked up information online, He has provided no further reason why, after he received the ACAS conciliation certificate, he waited a further 4 weeks before presenting his claim.
> 27. It is not the role of ACAS to provide legal advice to employees. I accept that ACAS officers are under real pressure and will be asked questions by employees. The claimant says that the advice he received from ACAS that he must issue a claim within 3 months of the end of his employment.
> 28. I do not accept that an ACAS officer would also have given information suggesting the claimant's employment had not ended as he had not received his P45. The claimant specifies on his claim form that his employment ended 31 December 2022. He accepted in his evidence he was told by his employer that his employment would end 31 December 2022 and that he was given reason for his employment ending.
> 29. If the claimant was given contrary advice from ACAS, that his employment was continuing, I conclude that he would have (i) queried this (ii) conducted further research on the point. His evidence was that he was aware of the 3-month time limit and the requirement to conciliate through ACAS. Yet, his evidence is he accepted without further check or query what he says he was told in a call with ACAS.
> 30. I found the claimant's evidence to be contradictory on the issue of time limits. I do not accept he placed sole reliance on what he says he was told by ACAS about the requirement to have a P45 before his employment ended. He knew his employment ended on 31 December 2022, he knew the time limit was 3 months, and he carried out his own research.
> 31. It follows I do not accept that the claimant relied on advice from ACAS that his employment had not ended as he had not received his P45. If this advice was given, which I very much doubt, the claimant had enough awareness to conduct. internet searches, such that he was fully aware of time limits to bring a claim to tribunal. If he was given this advice, he would have known to double-check, rather than on the one hand accept his employment ended on 31 December 2022 (the claim form, his evidence) and on the other somehow believe his employment was continuing because that was what ACAS told him.
> 32. I found that the claimant did not bring a claim in time, and then has retrospectively attempted to argue he relied on advice from ACAS, when this is not the case.
> 33. I therefore find that the claimant was aware of deadlines, did not comply with them, and accordingly the argument that it was not reasonably practicable to submit his claim in time fails.'

28. It is unclear from this account exactly what evidence the EJ heard as to the claimant's online researches.

Reconsideration

29. The EJ gave a judgment refusing to reconsider the original judgment on 9 June 2025. In that judgment he said that 'all evidence and submissions had been completed' by the time the claimant left the hearing, which, insofar as it relates to submissions, appears to have been an error of recollection. I say that with some hesitation since the original judgment records that the claimant had given 'his reasons' for presenting his claim out of time. That could be a reference to his evidence or to him also having made some submissions. The EJ referred in the reconsideration judgment to the claimant having said there was a carer on site with his mother. He said that the claimant shared paperwork during the hearing about the ACAS conciliation process and his holiday pay calculations. As I have noted above, the EJ also referred to there being two different accounts of the length of hearing sent to the claimant – one for a full day merits hearing and one for a two hour case management hearing. He said that the respondent had been in touch with the claimant to make clear it was a one day listing. It appears that in this respect the EJ had misremembered or misinterpreted the respondent's email of 2 October 2023 explaining that the respondent's understanding was that the hearing date remained 4 October 2023 and not 9 October 2023. The 'one day' listing is not reflected in any of the correspondence which I saw.

The history of the appeal and the ground

30. The appeal was permitted to proceed to a full appeal at a preliminary hearing on 11 June 2025 by HH Tayler, who said this

> 'It is reasonably arguable that the remote hearing was unfair in circumstances in which the claimant joined on his mobile telephone having, he states, previously explained his difficulties in attending a remote hearing; and it appears that submissions continued in the claimant's absence after he left to care for his mother who was extremely unwell. This may be of practical significance as the claimant could have had a better opportunity to persuade the judge that it was not reasonably practical to submit the complaint within the primary time limit because he had relied on ACAS advice and/or because of the challenges he faced as primary carer for his mother.'

31. HHJ Tayler directed that the claimant and the respondent prepare statements setting out what happened in the lead up to and at the hearing and for those to be provided to EJ for his comments.

32. The claimant prepared a witness statement in which he said that, after he had exchanged messages with the respondent and it remained adamant about the holiday pay issue, he realised that he would have to bring a claim. He learned that he had to apply to ACAS and get a certificate and this was challenging for him as he is not very IT literate.

33. The claimant said that he spoke to ACAS on about 8 March 2023 and was told that as he had not had a P45, he was technically still employed by the respondent. He therefore asked for his P45. As to the advice he received from ACAS, the claimant said that he understood from the person he spoke to that employees in care sector were often kept on the books by care agencies even when a particular role had come to an end and that, until a P45 was issued, it was impossible to say that the employment had come to an end. He said he relied on that advice.

34. After he involved ACAS, the claimant did receive a payment of holiday pay in April 2023 but not the full amount he believed he was owed. He said that he then realised that he needed to submit a claim. He said that he did not think that he could have submitted the claim earlier because of the ACAS advice and his caring responsibilities for his mother. I note that no detail is provided of the latter or how they prevented him from presenting his claim.

35. The claimant said that he received a letter listing a preliminary hearing. He did not give a date or attach that letter. He sent an email to the Tribunal on 30 August 2023, which he did attach to his witness statement and which said, after raising some concerns about discussion he had had with the respondent about the schedule of loss:

> 'The hearing on 4 October 2023, will be at 12:00 Midday and should last for two hours. I am now a little anxious what would happen on the day if I was not able to get on line especially if there were no Internet availability especially as I am not technically skilled.'

36. The claimant said in his statement that he could just about do emails and Zoom but was not confident about anything else. The claimant received no response to his 30 August 2023 email from the Tribunal.

37. The claimant said that, on the day of the hearing, he could not log in on a computer. He tried to call the Tribunal but could not get through; he was eventually able to connect on his mobile phone. He explained the delay to the EJ, who appeared to be sympathetic and talked of adjourning and said that no party should be disadvantaged in getting a fair hearing and that holding a mobile phone for the duration of a hearing was not satisfactory.

38. The claimant said that he was made anxious by discovering it was a full hearing as he had thought it was going to be a preliminary hearing. The hearing proceeded notwithstanding. The claimant did not suggest in his statement that he asked for an adjournment.

39. The claimant said that it was difficult to follow what was happening on his phone when he was already very stressed by difficulties getting online. He also had to forward documents during the course of the hearing.

40. The claimant said that he explained at the outset that his mother was very sick and required two carers to be with her; he might be interrupted to attend to her. The claimant said that he believed she might be entering her final days. I did not understand him to be saying that he had told the EJ about this belief.

41. The claimant said that the hearing overran by 30 minutes and he was pressured to stay by the respondent's representative and the EJ; he eventually just had to sign off to be with his mother. He believed that the time this happened was 2:30 pm not 1:50 pm as the EJ said. He felt that he was unable to do justice to his case.

42. The attachments to the claimant's witness statement include an email of 9 March 2023 from the claimant to the respondent saying he had spoken to ACAS and that ACAS said to obtain a final confirmation that the respondent said he was not owed any money. He asked for a reply within one week as he 'had time limit for the early conciliation certificate'.

43. There was a copy of a subsequent email to the respondent with the top cut off so the date of the email is not visible. This email complains about the respondent's failure to respond to the 9 March email. In this email, the claimant said that he had spoken to ACAS that day and had been advised that he should have received a P45 on termination of his employment on 31 December 2022:

> 'It is now almost three months since termination and therefore I will be grateful if I could kindly be sent the P45 by return to enable me to obtain the Conciliation Certificate to go to the Employment Tribunal within the set time frames'

44. I note the following from the EJ's comments on the claimant's witness statement:

a. The claimant's evidence did not refer to a comment from ACAS that in the care sector a lot of people are kept on the books by care agencies, or that ACAS informed him it was 'impossible to say' whether he had been dismissed;

b. The claimant's evidence did not refer to any issue with computer literacy causing an issue in finding out what to do to initiate a claim;

c. The claimant did not refer to his caring responsibilities being a reason for delay in presenting his claim;

d. As to the claimant's email to the Tribunal of 30 August 2023, he could not locate it on the electronic file and it appeared that the claimant had not received any reply to it;

e. His notes recorded that: 'I made it clear that fairness/a level playing field was paramount, and if there was any suggestion of unfairness, we would adjourn.

At no point during the hearing did the claimant say that he was having difficulties following the hearing. He was able to answer questions and ask questions of the respondent's witness.'

f. Documents had to be sent during the hearing as the claimant had not complied with an order to provide them; they had two breaks to enable the documents and the claimant's working calculations to be sent, between 12:35 – 12:45 pm and 13:12 – 13:25 pm;

g. He did not have a record of the claimant saying he might be interrupted to attend to his mother but it was quite possible that he had not noted the full exchange due to

difficulties the claimant had had joining the hearing;

h. His notes of the point when the claimant left the hearing were:

> 'Claimant – I have to go – it was a 3 hour hearing and mother needs feeding
> Judge - 15 mins break?
> Claimant – No need an hour – in fact it was only a 2 hour hearing – did not know going beyond that, I have to go
> Judge – we can have an hour's break? Give us one minute to chat through – Mr Baker?
> Claimant - no must do lunch, late already
> Judge – give us one minute to work out timing for hearing - carer there.
> Claimant - did not answer and left hearing.'

45. In terms of what notice of the hearing there had been, the EJ noted that

- The first notice of hearing dated 7 July 2023 said the 'claim will be heard' on 4 October with an estimated time limit of an hour;
- On 1 August 2023, the Tribunal wrote to the parties to say that the issue of time would be considered at the final hearing, which was extended to two hours;
- There was a further notice of hearing on 9 August 2023 saying that there would be a public hearing on 4 October 2023 for two hours.

Legal framework

46. The following rules from the Employment Tribunals Rules of Procedure 2013 then in force were relevant:

> **'41.** The Tribunal may regulate its own procedure and shall conduct the hearing in the manner it considers fair, having regard to the principles contained in the overriding objective. The following rules do not restrict that general power. The Tribunal shall seek to avoid undue formality and may itself question the parties or any witnesses so far as appropriate in order to clarify the issues or elicit the evidence. The Tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts
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> **…**
>
> **46.** A hearing may be conducted, in whole or in part, by use of electronic communication (including by telephone) provided that the Tribunal considers that it would be just and equitable to do so and provided that the parties and members of the public attending the hearing are able to hear what the Tribunal hears and see any witness as seen by the Tribunal.
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> **47.** If 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. 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.'

47. I was referred to **Bennett v London Borough of Islington** [2024] EAT 118 for the familiar proposition that the right to a fair trial is both a feature of the common law and protected under Article 6 of the European Convention on Human Rights.

48. The importance of that right was emphasised, in the context of adjournments, by Peter Gibson LJ in **Teinaz v London Borough of Wandsworth** [2002] EWCA Civ 1040, [2002] ICR 1471, CA:

> '21. A litigant whose presence is needed for the fair trial of a case, but who is unable to be present through no fault of his own, will usually have to be granted an adjournment, however inconvenient it may be to the tribunal or court and to the other parties. That litigant's right to a fair trial under Article 6 of the European Convention on Human Rights demands nothing less. But the tribunal or court is entitled to be satisfied that the inability of the litigant to be present is genuine, and the onus is on the applicant for an adjournment to prove the need for such an adjournment.'

49. The judgment of Barling J in **Drysdale v Department of Transport** [2014] EWCA Civ 1083 contains important reflections on the Tribunal's duties with respect to unrepresented parties:

> '49. From the authorities to which Mrs Drysdale referred (see above) I derive the following general principles:
> (1) It is a long-established and obviously desirable practice of courts generally, and employment tribunals in particular, that they will provide such assistance to litigants as may be appropriate in the formulation and presentation of their case.
> (2) What level of assistance or intervention is 'appropriate' depends upon the circumstances of each particular case.
> (3) Such circumstances are too numerous to list exhaustively, but are likely to include: whether the litigant is representing himself or is represented; if represented, whether the representative is legally qualified or not; and in any case, the apparent level of competence and understanding of the litigant and/or his representative.
> (4) The appropriate level of assistance or intervention is constrained by the overriding requirement that the tribunal must at all times be, and be seen to be, impartial as between the parties, and that injustice to either side must be avoided.
> (5) The determination of the appropriate level of assistance or intervention is properly a matter for the judgment of the tribunal hearing the case, and the creation
> of rigid obligations or rules of law in this regard is to be avoided, as much will depend on the tribunal's assessment and 'feel' for what is fair in all the circumstances of the specific case.
> **(6) There is, therefore, a wide margin of appreciation available to a tribunal in assessing such matters, and an appeal court will not normally interfere with the tribunal's exercise of its judgment in the absence of an act or omission on the part of the tribunal which no reasonable tribunal, properly directing itself on the basis of the overriding objective, would have done/omitted to do, and which amounts to unfair treatment of a litigant.'**
> [Emphasis added]

50. I was also taken to authorities on tribunals dealing with cases in the absence of a party.

51. In **Southwark LBC v Bartholomew** [2004] ICR 358, the respondent local authority did not put in a response or attend the full merits hearing, which was then conducted in its absence. The claimant's complaint was upheld and the tribunal ordered that the claimant be reinstated.

52. The EAT (Burton J and members) allowed an appeal against those decisions and said this about the proper approach to be taken by a tribunal when a party fails to attend:

> '11. A number of matters appear from those paragraphs, (1) that the Tribunal noted and understood that it was indeed unusual for a local authority not to enter a Notice of Appearance. (2) That there was a minor difference in the address to which the Originating Application and the Notice of the hearing had been sent from that which was on the letter, and, (3) that there was such a letter, which both contained more details than the address, including the contact numbers and e mail for Mr Bucknill, and an indication that there was material which might have been relevant in opposition to a claim for unfair dismissal.
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> …
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> 13. There is a note in Harvey on Industrial Relations and Employment Law, at paragraph T829. That sets out what the editors of Harvey plainly consider to be not only the normal but the proper practice in the event of an appearance by a respondent, or indeed an applicant, at a hearing. The passage reads as follows:
>
> > "In practice, when a party fails to appear at the hearing, the tribunal clerk will endeavour to contact him by telephone at his last known address and enquire whether or not he intends to appear. If he does so intend, and is able to get to the tribunal within a reasonable time, the tribunal will ordinarily stand the case back until he arrives. However, if as a result of a delay, the case does not finish within the day and has to be further adjourned, he is likely to have an order for costs made against him under rule 14(4), unless he has a valid explanation for the delay. If he intends to appear, but is unable to do so on that day for a good reason, then the appropriate order is to adjourn the case to a future date … If, on the other hand, he indicates that he does not intend to appear, the tribunal will generally dismiss the case, if the absent party is the applicant, and award costs under rule 14(1), or, if the absent party is the respondent, it will hear the case in his absence and, if the applicant is successful, perhaps award costs against the respondent."
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> 14. It is to be noted that no costs were awarded against the Respondent on this occasion. It is quite manifest that that practice, which is set out by Harvey, is not only what ought to occur but what ordinarily does occur and we expressly approve it. Mr Aziz himself, in his submissions to us, indicated that in his experience, appearing as a consultant in the Tribunals, that is ordinarily, although he says not universally, the practice. If it is not universally the practice, it should be. It is certainly the practice of this Appeal Tribunal that, if a party is not here when the case is called on, the case will not automatically proceed in the absence of the party; and we are in the situation in which the remedy of the Appeal Tribunal, if the party does not appear, is to proceed to decide the matter on the papers, which is what we ordinarily do, rather than to dismiss the appeal. The position at the first instance Tribunal is consequently far more drastic if it means that the result is that the application is either dismissed or granted summarily. Of course, the Employment Tribunals must protect themselves from incompetence and disregard by parties, and it is sadly very often the case that one party or the other will have decided not to take part, not to proceed with or not to oppose an application, and, consequently, not turn up, no doubt just as GP surgeries have many un-complied with appointments; but there must be a compromise, and Harvey records what it is, between insisting on going ahead willy nilly at exactly the time specified, and giving at least some opportunity to find out why a party has not attended.
>
> 15. The course which we follow at this Appeal Tribunal is for a telephone call to be made to the available telephone numbers, no doubt including a mobile number nowadays very often, in relation to unrepresented litigants, to see whether there is someone answering the telephone or at any rate an answerphone message, and usually the position will then be that, if there is no response, no one at home, no one answering the telephone, the Tribunal will continue, but sometimes it is discovered that people are delayed in public transport, not being able to get to a telephone to phone in and that they come in a little later. Sometimes it is discovered that they have no intention of attending, but that is not at all the most frequent situation, and, of course, the Appeal Tribunal, just like an Employment Tribunal, will then have to continue, after a short break and do the best it can. It would be likely to deal with liability, and possibly even with compensation: but it would be wholly inappropriate for a 'default' reinstatement order to be made also, at least without proper consideration of the matters that are contemplated in section 116 of the Employment Rights Act 1996 , including subsection 1(c) , namely whether it would be just to order reinstatement when the applicant may have "caused or contributed to some extent" to his dismissal.
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> 16. What is wholly impermissible, in our judgment, is for the Tribunal to record that it is "unusual" for a local authority not to attend, and yet not to take any steps to find out whether there has been an oversight, particularly where telephone numbers and e mails are available on the very document before the Court; and it appears to us quite plain that all this process which has subsequently occurred, which

> we shall now be describing, would not have occurred if there had been such a call originated by the Employment Tribunal to the Council. This is not a question of an unrepresented litigant whose phone might not have been answered; there would have been an immediate response by the Council, and the whole position would have been speedily dealt with, possibly even by the matter being capable of being dealt with on the day, or more likely by virtue of there being an adjournment.'

53. In **Cooke v Glenrose Fish Co** [2004] ICR 1188, Burton J adjusted that guidance to take account of then extant Presidential Guidance which said:

> 'What if a party is absent? Remember that there is no obligation on a party to attend the hearing. Subject to your judicial discretion in any particular case, it is usually best to hear and determine the case. Experience shows that attempting to contact the missing party or representative is unsatisfactory. If a party did intend to attend but is genuinely absent, the matter can be put right on review.'

Burton J said at paragraph 10 of the judgment:

> 'It is to be emphasised that Judge Meeran's direction specifically does say "subject to your judicial discretion in any particular case". It is plainly essential for the employment tribunal to exercise that judicial discretion, and consequently, whereas it may be wrong to say that in every case a tribunal must telephone if there is an absent party, it is on the other hand clearly right to say that in every case a tribunal must *consider* whether to telephone, and must, as it appears the tribunal did not in this case, inquire further particularly of a represented party what news there is or was of the other party, and as to whether in those circumstances it is possible that the other party is delayed or has forgotten about the matter but was, so far as can be understood, intending to come. Of course, the represented other party will be required to exercise the highest standards of probity but at the same time be acting in the interests of his or her client. There is no need for volunteering of assistance if it be not called for.'

Authorities on reasonable practicability

54. In support of the contention that the outcome might have been different had the hearing been conducted differently, Ms Leonard relied on several authorities on reasonable practicability, in particular:

a. **Schultz v Esso Petroleum Ltd** [1999] IRLR 488 says that, when assessing practicability, the focus should be on the closing stages of the limitation period. Tribunals should consider whether and when there have been changes in a claimant's circumstances during that period;

b. **DHL Supply Chain Ltd v Fazackerley** UKEAT/0019/18 was a case where the EAT held the Tribunal had not erred in finding that it was not reasonably practicable for a claimant to present a claim in time, having reasonably relied on erroneous advice from the ACAS helpline.

Claimant's submissions

55. In addition to the aspects of the hearing identified by HHJ Tayler as potentially creating unfairness, Ms Leonard also relied on the claimant's confusion about whether the hearing was a preliminary hearing or a full merits hearing. That issue was not identified by the claimant in his Notice of Appeal but it emerged from the witness statement the claimant produced in response to HHJ Tayler's orders and the respondent did not raise any objection to the claimant pursuing this as another feature which it was said rendered the hearing unfair. I therefore considered it as a factor which might have led to unfairness.

56. Ms Leonard pointed to a number of difficulties the claimant faced. Some of these the EJ would have been aware of, such as the fact that the claimant was caring for his sick mother and was attending on his mobile phone. She said that the EJ should have checked how the claimant was able to access documents and whether he had hard copies.

57. The EJ would of course not have known that the claimant had what was described as a retinal problem affecting his vision. Ms Leonard said that this required the claimant to magnify documents to the extent that a single word could take up the whole of his phone screen.

58. Looking at what the EJ was or should have been aware of, the decision to proceed with the hearing was outwith the broad margin of appreciation. The claimant had emailed on 30 August 2023 email raising concerns about technology. That was copied to the respondent but the representative did not raise it with EJ Emery. As to the claimant's IT literacy, had the Tribunal dealt appropriately with the claimant's email, the EJ would have known that he had concerns about his technical abilities. Ms Leonard said that the respondent's representative was also under a duty to bring to the attention of the EJ the fact that the claimant's needs had not been recognised. Had the email been explored, Ms Leonard suggested that the claimant's retinal impairment would also have become clear.

59. EJ Emery indicated that the claimant did have difficulty joining and did not contradict the

claimant's account that the EJ was aware he was trying to participate by telephone; he remarked that it was not satisfactory and talked about an adjournment.

60. It was not an answer to say that the claimant did not say at the hearing that he was struggling with the technology. He was not well placed to raise the issue. It would take a lot of courage and insight by a litigant in person to raise these issues and to understand what might be possible. The EJ was under a continuing duty to consider whether it remained just and equitable to continue the hearing by CVP.

61. The reasons did not record any reference to the terms of rule 46 and consideration being given to whether it remained just and equitable to proceed by CVP in circumstances where the claimant was attending by his mobile phone.

62. There was confusion about the nature of the hearing. The respondent sent its witness statement to the claimant two days before the hearing but the claimant had no witness statement. The claimant's evidence about ACAS was therefore given in answer to questions rather than having been prepared by him. That evidence did not contain the level of detail which would be expected if the claimant had been aware that the hearing was the final hearing. The EJ did not consider whether it was fair to proceed to a final hearing in those circumstances. Taken collectively, the claimant's difficulties were overwhelming.

63. It was also an error for the EJ to continue the hearing in the claimant's absence without directing himself to rule 47, the overriding objective, or the fact that the listing had been exceeded, in circumstances where the EJ knew the claimant's mother was very unwell and he might be interrupted to care for her. The EJ should have recognised what the claimant said as in effect an application to adjourn and should have adjourned the hearing and caused the claimant to be contacted later in the afternoon. Submissions were an important part of the case which the claimant had no opportunity to make or respond to.

64. In terms of the materiality of the alleged procedural errors, Ms Leonard submitted that they led to the EJ misdirecting himself in finding that it was reasonably practicable for the claimant to present his claim in time. He disbelieved what the claimant told him about the advice from ACAS and found something close to dishonesty. The claimant had no witness statement as he believed the hearing was a preliminary hearing and so had not had a fair opportunity to provide the particulars which might have persuaded the EJ. The EJ nonetheless held him to the standard of a person who had had proper notice to prepare his evidence.

65. Ms Leonard was also critical of a number of aspects of the EJ's reasoning; it was not clear that the suggestion of dishonesty was put to the claimant or that he was questioned about the inference the EJ drew about what he would have done had he received the ACAS advice he said he had received. The EJ relied on the claimant having looked things up online but failed to factor in his technical limitations and his retinal impairment, which he should have been aware of. There was no enquiry about the effect of the claimant's mother's health on his ability to conduct research. The EJ failed to closely consider the closing stages of the period. Ms Leonard argued that those matters could have been explored with the claimant had he been present for submissions. Ms Leonard said that the EJ also failed to make any finding on the bank holiday issue and that could have been explored had the claimant attended to make submissions.

Respondent's submissions

66. The respondent pointed out that a tribunal has a wide discretion to manage its own procedure.

67. The EJ had repeatedly referred to the need for fairness and explored breaks when the claimant had difficulties. The claimant did not make a formal application to adjourn the hearing before absenting himself and the EJ was entitled to conclude that the hearing remained fair, particularly as the evidence was complete.

68. The claimant was able to engage, to ask and answer questions, and did not say he was having

difficulties, which demonstrates that the decision to continue via CVP was correct.

69. There was no serious irregularity in proceeding in the claimant's absence. The EJ properly explored the possibility of an adjournment but the claimant did not engage and simply left the hearing. The EJ permissibly exercised discretion to continue the hearing; no prejudice was caused to the claimant. Any further submissions the claimant was likely to have made were unlikely to have assisted his position.

70. The respondent said further that the claimant would have to show that any procedural unfairness was material and he had not done so. The EJ had found that the claimant knew the date of termination, knew the time limits and had conducted internet research. He either had not received the advice he described from ACAS or could not reasonably rely on it. Given the stringency of the reasonably practicability test, it was difficult to see what argument the claimant could have made which would have affected the result. The alleged unfairness made no difference.

Discussion and conclusions

71. It was important to be clear about what I could properly find about the conduct of the hearing. That was a composite of what was recorded in the reasons, what was in the claimant's statement for the appeal, and what was in the EJ's comments in response.

72. The matters which would or should have been apparent to the EJ were these:

- The claimant had concerns about his skill with technology and about whether he would be able to join the hearing. In the events that happened, he appeared on his mobile phone;
- He thought that the hearing was a preliminary hearing, although it appears that this was likely only raised by the claimant late in the hearing;
- That the claimant was involved in caring for his mother, who was very sick, and he might be interrupted to help care for her.

73. It is clear that the EJ properly recognised that it was undesirable for a party to attend a final hearing on a mobile phone. Although he had not had the claimant's email of 30 August 2023 referred to him, he will have understood from the delay and the way that the claimant had had to join that he had some issues with the technology. The email had raised a concern about being able to get online; the claimant had achieved that, albeit not on his computer. It was regrettable that the claimant's email had not been picked up by the Tribunal so that the EJ had advance warning of the issue but that fact did not of itself mean that there could not be a fair hearing once the claimant had joined.

74. The EJ clearly raised the possibility of an adjournment; the claimant does not appear from his own statement to have attempted to pursue that matter. He did not raise any further issues he was experiencing with technology. Again it seems apparent from the EJ's accounts that the EJ remained alive to the issue, but satisfied himself that the claimant was able to ask and answer questions and to identify and send in relevant documents. Whilst it is understandable that a litigant in person might be reticent about asking for an adjournment, the EJ had done what was appropriate by saying that it was a possibility.

75. It would not be right for me to assume that the EJ did not ask the claimant if he was able to access documents, as Ms Leonard suggested in submissions. This would be a standard question at a remote hearing and so routine that it would probably not often be remarked on in the written reasons unless there had actually been a difficulty with access. The claimant did not raise the issue in his witness statement for the appeal so there was no reason for the EJ to comment on it in his response to that statement.

76. The fact that the claimant indicated that he thought it would be a preliminary hearing could in some circumstances make it unfair to proceed. I should say it was not ultimately clear that there had ever been correspondence saying that it was a preliminary hearing, but it seemed to me to be appropriate to proceed as if there had been, given what the EJ said in the reconsideration decision.

The circumstances were that this was a short full merits hearing and the claimant had received the respondent's documents and witness statement. He had not produced a witness statement, however many short hearings of this type proceed perfectly fairly without statements. He had been informed that the issue of time limits was going to be discussed at this hearing and so would have known it was something he should be ready to speak about. It also appears that the claimant himself did not raise the issue of his misunderstanding at the outset of the hearing, but only at the end, by which point the EJ had had the opportunity to take a view as to the claimant's ability to engage fairly. I should say that it was clearly very unfortunate that the Tribunal had sent a number of items of correspondence with different instructions and, in one case, the wrong date, and there would certainly be circumstances where a hearing could not fairly proceed because a party was insufficiently prepared as a result of confusing correspondence. This is generally a matter for the judgement of the employment tribunal, which is best placed to assess these matters, and in particular to assess a party's ability to engage fairly. I cannot say that, against the background of the correspondence, and in all of the circumstances identified, no reasonable employment tribunal could have formed the view that it was fair to proceed.

77. So far as the claimant raising the possibility that he might be called away to care for his mother was concerned, the EJ accepts this may have been said but not recorded by him at the beginning of the hearing. It cannot be said that this of itself, or indeed taken with the other matters, obliged the EJ to decide to adjourn the hearing of his own motion when it does not appear that the claimant pursued the suggestion of an adjournment. The fact that someone has caring commitments which may intrude on a remote hearing is not an issue that is necessarily addressed by either an adjournment (since the caring commitments are likely to remain) or an in person hearing, if there is no one to provide care in place of the litigant. Provided allowances are made for caring commitments and they are not so onerous as to prevent fair engagement with the hearing, they would not of themselves oblige a tribunal to conclude that there must be an adjournment. In this case, the claimant's caring commitments do

not appear to have intruded until late in the hearing.

78. I was also not persuaded by Ms Leonard's submission that, had the EJ conducted the hearing differently, or had there been an adjournment, the claimant's retinal issues would have been revealed. The claimant had not raised the issue with the Tribunal when he wrote in about his concerns about technology nor had he mentioned it in his ET1. He was able to raise at the hearing the fact that he might be interrupted to care for his mother. It was not obvious why different handling of the hearing would have led him to volunteer this further information, nor did he explain in his witness statement why he did not raise the issue or how it affected his participation in the hearing.

79. It is right to recognise that the circumstances of the hearing were not ideal, but the EJ was having to balance the fact that the claimant had some difficulties against other considerations such as proportionality, a fair allocation of resources, and the interests of these parties in a prompt resolution to their dispute. He appropriately raised the possibility of an adjournment if the hearing became unfair and he was satisfied that the claimant was able to participate as the hearing unfolded. It cannot be said, in my judgement, that his implicit conclusion that it was a *good enough hearing* and that it was fair was one no reasonable and properly directed tribunal could reach.

80. Did that situation change when the claimant left the hearing? This was not the same as a situation where a party has not attended at all, in which circumstances a tribunal may have no information as to the reasons for non-attendance. The claimant had left the hearing for reasons which he gave. The EJ, having initially offered a 15 minute break, then said that the claimant could have the hour he said he needed. He asked for a 'minute' to discuss the situation but the claimant left. It may or may not be that the hearing had overrun by this point; the EJ and the claimant gave different accounts.

81. The question for me is whether no reasonable EJ would have failed to adjourn the hearing and ask Tribunal staff to telephone the claimant to ascertain whether he would rejoin at a later stage. I

note that the telephone call could not sensibly have been made immediately since the claimant had indicated he needed an hour. A telephone call after an hour might or might not have led to the claimant's further engagement with the proceedings. I note that the EJ does not refer explicitly to having given consideration to whether to ask staff to telephone the claimant but the absence of a record of that possibility does not mean that he did not think of it. In any event, it does not seem to me that the guidance of Burton J in **Cooke v Glenrose Fish Co** , which applies to situations where there is an absence of information about a party's non-attendance, is really apposite in these circumstances. The EJ noted that the evidence was complete. Although the claimant may not have made formal submissions, he had 'given his reasons for presenting his claim out of time and his evidence of what he is owed.' Many tribunals might have decided to take a break and ask tribunal staff to telephone the claimant. It was, however, in my judgement open to the EJ to conclude that any formal submissions by the claimant were likely to add little to what he had said on what were essentially two issues before the EJ.

82. If I am wrong about whether a) it was unfair to proceed with the hearing at all and/or b) it was unfair to continue with the hearing after the claimant left, I was in any event not persuaded that any procedural unfairness had any material effect on the outcome.

83. The parts of the EJ's reasons which Ms Leonard criticised did not appear to be flawed, if flawed they were, because of the alleged unfairness of the hearing. The EJ did not focus on the end of the limitation period, but he had no specific evidence which would have caused him to do so. The claimant's witness statement for the appeal refers to caring responsibilities in very general terms and does not say that there were specific obstacles for the claimant at the end of the limitation period. It is not apparent that he would have said anything, had he been more prepared, which would have caused the EJ to look more closely at that period. It was not for the EJ to have suggested to the claimant that his caring commitments might have had an effect on his ability to submit his claim in time; that was properly something for the claimant to raise if it was an issue. Ms Leonard was also

critical of how the EJ reached conclusions about the claimant's account of the advice he received from ACAS and what independent research he did, but there is nothing in the claimant's witness statement for the appeal hearing which suggests that, given a postponement, he would have given further or other evidence or made other submissions which would have been likely to materially alter the position. The other flaws Ms Leonard identified in the EJ's reasons might have given rise to other grounds of appeal, but they do not seem to me to be matters which would have been materially affected by a postponement either of the hearing at the outset or at some later point.

84. For these reasons, I dismissed the appeal. I should add that this was not an easy appeal to decide. The increase in remote hearings since the pandemic has created challenges for both litigants and tribunals and there will certainly be circumstances in which it is not fair to conduct a trial with a litigant who is attending by mobile phone, particularly in a case of any length or complexity.

85. I should also add that Ms Leonard, who appeared pro bono for the claimant, presented a thorough and compelling account of his case on appeal and I am grateful to both representatives for their accomplished submissions.