Neutral Citation Number: [2013] EWCA Civ 21

Case No: A2/2012/0253

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
HHJ DAVID RICHARDSON
UKEAT/247/11

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/01/2013

Before :

LORD JUSTICE MUMMERY
LORD JUSTICE ETHERTON
and
LORD JUSTICE McFARLANE

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Between :

TRANSPORT FOR LONDON	**Appellant**
- and -	
MR GREG O'CATHAIL	**Respondent**

- -
- -

MR PETER EDWARDS and MS LUCINDA HARRIS (instructed by Eversheds LLP) for the Appellant

The Respondent appeared in person

Hearing date : 19th October 2012

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Approved Judgment

Lord Justice Mummery:

Adjournments in the employment tribunal

1. This appeal arises from refusals by an employment tribunal (ET) to grant late applications made by an unrepresented claimant for an adjournment of the full hearing of his case. The date had been re-fixed nearly four months before, following a successful late application by the claimant for the postponement of an earlier fixed hearing date. Several days had been set aside for evidence and argument on his disability discrimination claim. The ground of his applications, as on the previous occasion, was that he was medically unfit to attend the hearing. The ET proceeded to hear the case in his absence and to dismiss it. A judgment, separate from the later final judgment on the merits of the case, explained in detail the cumulative reasons for taking the exceptional course of hearing and deciding the case in the claimant's absence.

2. Applications to adjourn or postpone hearing dates fixed for cases are routinely received by the ET, often at short notice. If granted, the effect is to inconvenience other users of the ET by disrupting the efficient listing and disposition of cases with a consequent loss of valuable hearing time. Other consequences are irrecoverable costs incurred by the opposite side, which has spent money preparing for an abortive hearing, and considerable delay in the final determination of cases, as the hearings have to be re-fixed for distant dates.

3. What is an ET to do when a party makes a late application to adjourn and, having been refused an adjournment, fails to attend or to be represented at the place and time fixed for a hearing?

4. It is provided in Rule 10 ("Case Management") of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 that the Employment Judge may at any time, either on the application of a party or on his own initiative, make an order in relation to any matter which appears to him to be appropriate. He may make an order, as he thinks fit, "postponing or adjourning any hearing": see Rule 10 (1) and (2) (m).

5. It is provided in Rule 27 ("What happens at the Hearing") that:-

> "(5) If a party fails to attend or to be represented for the purpose of conducting the party's case at the Hearing at the time and place fixed for the Hearing, the tribunal may dismiss or dispose of the proceedings in the absence of that party or may adjourn the Hearing to a later date.
>
> (6) If the Tribunal wishes to dismiss or dispose of proceedings in the circumstances described in paragraph (5), it shall first consider any information in its possession which has been made available to it by the parties."

6. The ET at a hearing may exercise any powers that may be exercised by the Employment Judge under the Rules; see Rule 27(7).

7. In that context the provisions of Article 6 of the European Convention on Human Rights ("Right to a fair trial") are relevant:-

> "1. In the determination of his civil rights and obligations …everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…"

8. What is the Employment Appeal Tribunal (EAT) to do on the hearing of an appeal from a decision of the ET refusing an adjournment or from a final decision reached in the claimant's absence dismissing the claim on the merits?

9. It is provided by s.21 of the Employment Tribunals Act 1996 that:-

> "(1) An appeal lies to the Appeal Tribunal on any question of law arising from any decision of, or arising in any proceedings before, an employment tribunal under or by virtue of [the specified Acts]."

10. For the purpose of disposing of an appeal the EAT may exercise any of the powers of the ET from which the appeal was brought or remit the case to the ET: s. 35 of the 1996 Act.

11. In the case of an appeal from a statutory discretion entrusted to and exercised by the ET, the EAT can only set aside the ET's decision on the ground of an error of law, such as when the ET goes wrong in principle in its approach to the discretion, or when it makes a decision which is so wrong that no reasonable ET, properly directing itself, could have made it on the material before it.

This appeal

12. This appeal by Transport for London (TfL) is against an order of the EAT dated 13 January 2012. It is called "the Postponement Appeal", which distinguishes it from "the Full Merits Appeal" against the substantive decision of the ET sent to the parties on 17 March 2011. The ET rejected the claims for discrimination, victimisation, failure to make reasonable adjustments and harassment against TfL. The substantive appeal against that judgment was dismissed by the EAT on 7 July 2011, as it raised no arguable point of law.

13. The EAT, somewhat confusingly, went on, at a later hearing, to set aside the substantive judgment on allowing the claimant's appeal from the orders in February 2011 refusing to adjourn the hearing. On allowing the Postponement Appeal on 13 January 2012 the EAT remitted the case for determination by a differently constituted ET. That judgment is reported at [2012] ICR 561.

14. On 23 March 2012 Pill LJ granted permission to appeal

15. The Postponement Appeal raises some controversial points on the test to be applied (a) by the ET on applications for an adjournment and (b) by the EAT on appeals against the refusal of an adjournment. (Appeals against the grant of an adjournment are much rarer.)

Background

16. On 1 June 2007 the claimant became an employee of TfL. On 4 January 2008 he went on sick leave and never returned to work before he was dismissed on 23 December 2010.

17. Since his dismissal the claimant has presented a succession of complaints to the ET against TfL. There are 7 in all. He succeeded on part of the first complaint, but his appeal to the EAT against the unsuccessful part was out of time and he was refused permission to appeal to the Court of Appeal against the refusal of the EAT to extend the time for appealing.

18. This appeal relates to the second complaint. The hearing was originally fixed for 4 October 2010. Late in September the claimant made unsuccessful applications for an adjournment. An adjournment on the ground of medical unfitness was ultimately granted on 4 October and the hearing was re-fixed on 29 October 2010 for 21 to 28 February 2011.

19. On 21 February 2011 the ET received from the claimant an application for an adjournment, which was refused on the same day with full reasons. He made further applications on 22 and 23 February, which were also refused on the basis that the reasons in the decision of 21 February 2011 still held. The grounds of the application were that he was unfit to attend. He produced a letter from his GP stating that he was suffering from a respiratory infection, which was being treated with antibiotics and that he was unfit to attend the tribunal. The ET decided that it was "a very rare case" in which it was more unfair in general not to proceed than it would be to adjourn. The full reasons given for refusing the adjournment applications are examined below.

ET judgment

20. The ET set out in its judgment of 21 February 2011 the various factors considered by it when considering whether or not to grant an adjournment. It said that that the proceedings were stale, having been issued in August 2009 in relation to events dating back to 2008; that there had been a previous adjournment of the substantive hearing at the claimant's request; that two of TfL's witnesses had already become unavailable and a third was likely to become unavailable, if the hearing was postponed; that the delays in determining the claim affected the determination of other pending claims and an internal appeal; that costs would be wasted, if the matter were postponed; that, as a matter of proportionality, the claim did not involve dismissal and would be limited to a modest award for injury to feelings; that considerable ET resources had been dedicated to the claim; that the postponement would have an effect on other claims awaiting adjudication by the ET; and that many of the claimant's claims relied on documentary material rather than on oral evidence and could be fairly determined by the ET without the need for the claimant's evidence and submissions.

EAT judgment

21. The essence of the EAT's judgment allowing the claimant's appeal is encapsulated in the headnote summary of its reasoning. The headnote states that:-

> " ..where civil rights were being determined, as in tribunal proceedings, the law required a fair hearing to be afforded to the parties; that whether that fundamental minimum requirement had

> been met was a question of law; that, where it was contended that a decision by a tribunal to refuse an adjournment had imperilled the fairness of the proceedings as a whole, the appeal tribunal had to look for itself to see whether the effect of the decision had been to deny the appellant a fair hearing; that the question then was whether the decision was a fair solution, not necessarily *the* fair solution; and that, since the medical evidence had not been challenged and stated in plain terms that the claimant was unfit to attend, the practical consequence of the tribunal's decision nevertheless to proceed was to deny any opportunity to participate in the hearing and was unfair…"

22. That reasoning was based in the main on the EAT's reading of recent Court of Appeal cases that were not concerned with employment tribunal proceedings, but which, the EAT commented at [26], did not suggest that they were of limited application. The main case cited was *Terluk v. Berezovsky* [2010] EWCA Civ 1345 in which Sedley LJ gave the judgment of the court in which I sat with him. The appeal was against the refusal of the trial judge in a defamation case to grant an adjournment to give a party the opportunity to obtain legal representation. The test laid down regarding an adjournment decision was whether the decision was unfair rather than whether it lay within the broad band of judicial discretion. The approach in *Terluk* was followed by this court in *Osborn v. Parole Board* [2010] EWCA Civ 1409 in the context of the refusal by the Parole Board of oral hearings to serving prisoners and by the EAT in *D'Silva v. Manchester Metropolitan University* (11 February 2011-UKEAT/0336/09/LA).

23. *Terluk* was considered in *Dhillon v. Asiedu* [2012] EWCA Civ 1020 in the context of the refusal of an adjournment at the commencement of the trial of a civil action in the County Court. In *Dhillon* the court referred to the determination of fairness by considering the position of both sides, by taking all relevant matters into account and by conducting a balancing exercise and to the fact that the Appeal Court will only interfere with the first instance decision, if it is plainly wrong.

24. The EAT also cited the guidance in earlier Court of Appeal cases on adjournments of ET hearings: *Teinaz v. London Borough of Wandsworth* [2002] ICR 1471 at [20]-[22] and *Andreou v. .Lord Chancellor's Department* [2002] IRLR 728. The EAT commented that, although those cases used language "suggestive of a broad discretionary test," that was "implicitly subject to the fundamental principle" whether the effect of the decision to refuse an adjournment has been to deny a fair hearing to that party: see [35] and [36].

25. On that basis the EAT, while accepting that it will not intervene, unless it is demonstrated that the ET erred in law in granting or refusing an adjournment, concluded that it would intervene, if the decision to grant or refuse an adjournment imperilled the fairness of the proceedings as a whole. It concluded that the ET's decisions on 21 and 23 February were "plainly wrong." They denied the claimant a fair hearing by depriving him of any opportunity to participate in the hearing and to test the evidence of the witnesses for TfL. The ET ought not to have proceeded with the hearing. Even if the ET was justified in proceeding to hear the evidence of TfL's witnesses, the hearing could then have been adjourned to give the claimant an opportunity to hear and answer submissions made on TfL's behalf, rather than refusing altogether the applications to adjourn.

26. The EAT set aside the substantive decision of 17 March 2011, which had been upheld by the EAT at the earlier Full Merits hearing, and remitted the case for hearing by a freshly constituted tribunal all over again.

Submissions of Transport for London

27. Mr Peter Edwards, counsel for TfL, submitted a procedural chronology and made the following principal points in support of the appeal:-

(1) TfL's appeal related to the case management powers of the ET. They were cast in very wide terms and specifically envisaged in Rule 27(5) circumstances in which the ET could exercise its discretion to refuse an adjournment and proceed, in the absence of a party, to hold the hearing and to decide the case against him.

(2) The ET recognised that this was a "very rare" case in which it would be unfair *not* to proceed with the hearing.

(3) The EAT has a limited jurisdiction to interfere with the ET's exercise of its discretions, such as in relation to adjournments. Its jurisdiction is confined to appeals on questions of law.

(4) In overturning the decisions of the ET to refuse an adjournment, the EAT had not applied the well established principles of having to identify whether an irrelevant factor has been taken into account by the ET, or whether a relevant factor has not been taken into account, nor had it considered, let alone concluded, that it was perverse to refuse the claimant's late applications.

(5) Instead, the EAT had impermissibly usurped the discretion entrusted to the ET by enunciating and applying the test that it was for the EAT to "look for itself to see whether the effect of the decision had been to deny a fair hearing" to the claimant. By taking that course the EAT had wrongly substituted its own discretionary decision for that of the ET. It was for the ET to exercise the discretion by itself looking at the circumstances of the application and the consequences of its decision, as it had. It was for the EAT to decide whether or not the ET's decision strayed outside the limits of its discretion and was wrong in law. It was not for the EAT to decide how it would have dealt with the application to adjourn, if it had been the ET, which it was not.

(6) The EAT wrongly purported to apply the reasoning of the Court of Appeal in cases such as *Terluk*, which were not decisions on the discretionary powers of the ETs, but related to appeals under the CPR. It failed to apply other decisions of the Court of Appeal which laid down the proper approach to appeals from the ET's adjournment decisions.

(7) The result of following the approach of the EAT and applying the test whether the claimant had been deprived of a fair hearing by

> the refusal of a postponement was that it would be hard to envisage any case in which the refusal of an adjournment and the ensuing judgment on the merits would be upheld on appeal. The effect of the EAT's approach was to fetter the exercise of the ET's broad discretionary powers in respect of adjournments to the sole issue of whether the refusal has the effect of denying a fair hearing to the party, who had failed to obtain an adjournment and had his case decided *in absentia*.

28. In those circumstances the court ought to allow the appeal and set aside the order of the EAT as erroneous in law.

Claimant's submissions

29. The claimant seeks to uphold the decision of the EAT for the reasons given in its judgment. He submitted various documents in relation to TfL's application for permission to appeal, which was granted by Pill LJ. At the hearing of this appeal he handed up a 31 page written submission at about 12 noon on the first day. It was accompanied by a 202 page supplementary document bundle. He stated his intention to read out his submission at the hearing and requested that the final judgment on the appeal record his submission and his reliance on it. We rejected a submission by Mr Edwards that we should not allow the claimant to participate in the appeal.

30. I hesitate to summarise the claimant's written submissions. I propose to take the course of stating that this judgment is deemed to incorporate every page of the 31 page submission.

31. In addition to that I will highlight the main points showing that I have read and understood the claimant's submissions.

32. He says that the Postponement Appeal, which had a reasonable prospect of success, should have been heard *before* the Full Merits Appeal. As for the delays in the proceedings, he explains at length why he thinks that the ET and TfL are at fault in blaming him for delays in the proceedings. He complains of ongoing discrimination by TfL towards him as an employee and alleges unreasonable behaviour by it in the ET proceedings. He complains that the ET has not considered three outstanding applications made by him in March 2010, December 2010 and January 2011 respectively.

33. He then explains the circumstances in which he made his applications to adjourn the hearing fixed for February 2011 on the basis that he was medically unfit to attend. His GP had carried out a full and proper medical examination and found that he was unfit to participate in a full merits hearing, which would involve him having to represent himself over several days.

34. He sets out in detail his criticisms of the ET's reasoning in its merits decision, alleging that TfL, from its unchallenged position as a result of his absence, told the ET all manner of lies and half-truths, which the ET accepted at face value and adopted in its reasoning for refusing a postponement and ultimately for dismissing his claim. The refusals of postponement, which he had sought on medical grounds, were "plainly wrong" and deprived him of a fair hearing.

35. He says that the underlying fact of great significance is that he did not have a fair hearing/trial, which "underpins everything that the law stands for." The denial of a fair hearing was contrary to common law and to Article 6 of the Convention. He cited cases in support of that fundamental principle. Although there was a hearing in the ET, *he* has not been heard by the ET and could not contest the lies told on oath in the evidence against him. There was no proper scrutiny of TfL's case.

36. The claimant commented in detail on each ground of TfL's appeal. He submitted that the EAT's decision was both correct and permissible and rightly overturned the decision of the ET, which erred in principle. The EAT applied the correct test that the law requires a fair hearing to parties where their civil rights are being determined. TfL's submissions were flawed and made out of context.

37. I should record that the claimant made other points about the trial bundles before the ET, which he said were not agreed and were incomplete, and about TfL's lack of co-operation

Discussion and conclusions

38. I agree with the claimant that it would have been preferable for the Postponement Appeal to be heard before the Full Merits appeal. They were heard and decided the wrong way round. Ideally they should have been listed together; but, in my view, although the course taken was confusing and involved an unnecessary duplication of effort and cost, no error of law was committed by the EAT. The real question is whether there was an error of law in the decision of the ET in refusing the applications for adjournment, so that the hearing took place and the case was decided in the claimant's absence.

39. I have reached the conclusion that this appeal should be allowed on the short ground that there was no error of law in the judgment of the ET refusing to exercise its broad discretion to grant the adjournments requested.

40. First, I have never seen such a scrupulously detailed and careful decision by an ET or, indeed, by any court or tribunal, on the question whether or not to grant an adjournment. It is clear that the most anxious consideration was given to taking the exceptional step of refusing an adjournment applied for on unchallenged medical grounds.

41. Secondly, the judgment cited the guidance in the relevant decisions of this court on the established approach to adjournment applications to the ET. It is not contended that the ET took into account irrelevant factors or that it left relevant factors out of account in balancing the various factors for and against an adjournment. The decision was reached solely on the basis of relevant considerations.

42. Thirdly, the ET correctly took the overarching fairness factor into account in assessing the effect of its decision on *both* sides. The position of the potentially absent claimant is highly relevant in all cases of adjournment refusal, but it is not determinative of every case. The ET expressly stated that this was "a very rare case", in which it was more unfair in general for the matter not to proceed than it would be to adjourn.

43. Fourthly, there was no error of law in failing to take the approach laid down in *Terluk*. That case is distinguishable on the ground that it was not a decision on the wide management powers of the ET or on the more limited appellate jurisdiction of the EAT, as compared with appeals under the CPR. I should add that, in any event, the difference in the approach taken in *Terluk* can be overstated. In many cases, I would expect in the vast majority of cases, the outcome will in practice be the same, even though the relevant statutory provisions and procedural rules are different and the emphasis in the formulation of approach differs: see the comments of Langstaff J in *Pye v. Queen Mary University of London* (23 February 2012 – UKEAT/0374/11/ZT) at [20]-[21]. Rule 4 of the 2004 Regulations provides that "the overriding objective of these Regulations and the rules …is to enable tribunals and Employment Judges to deal with cases justly." That is the CPR objective transposed to the ET. "Justly" means that overall fairness is paramount in the exercise of the discretion. The claimant did not have a monopoly of the fairness factors in this case. It would not be fair for TfL to be repeatedly denied a hearing on the ground of the claimant's recurrent health problems.

44. The crucial point of difference from *Terluk* is that decisions of the ET can only be appealed on questions of law, whereas under the CPR the appeal is normally by way of review and the decision of a lower court can be set aside, if it is wrong, or if it is unjust by reason of a serious procedural or other irregularity in the proceedings. In relation to case management the ET has exceptionally wide powers of managing cases brought by and against parties who are often without the benefit of legal representation. The ET's decisions can only be questioned for error of law. A question of law only arises in relation to their exercise, when there is an error of legal principle in the approach or perversity in the outcome. That is the approach, including failing to take account of a relevant matter or taking account of an irrelevant one, which the EAT should continue to adopt rather than the approach in *Terluk* as summarised in the headnote quoted above. It is to be hoped that this ruling will put an end to the "apparent confusion in authority" on the point pointed out by Wilkie J in *Riley v. The Crown Prosecution Service* (13 June 2012 – UKEAT/0043/12/SM) at [55]-[56],

45. Overall fairness to *both* parties is always the overriding objective. The assessment of fairness must be made in the round. It is not necessarily pre-determined by the situation of one of the parties, such as the potentially absent claimant who is denied an adjournment.

46. Fifthly, the EAT's application of the *Terluk* approach led it into substituting its own decision on the exercise of the discretion for that of the ET. That was an error of law on its part. The ET did not err in law by reaching a decision that the EAT would not have made, had it been considering the application to adjourn. What is fair in the interests of the parties is, in the first instance, a matter for assessment by the ET. The EAT ought only to intervene if the ET has erred in principle or produced a perverse outcome in the sense that no reasonable tribunal could have concluded that it was fair in all the circumstances to refuse the adjournment.

47. Finally, Article 6 of the Convention does not compel the ET to the conclusion that it is always unfair to refuse an application for an adjournment on medical grounds, if it would mean that the hearing would take place in the party's absence. There are two sides to a trial, which should be as fair as possible to both sides. The ET has to

balance the adverse consequences of proceeding with the hearing in the absence of one party against the right of the other party to have a trial within reasonable time and the public interest in prompt and efficient adjudication of cases in the ET.

Result

48. I would allow the appeal. There was no error of law in the decisions of the ET to refuse adjournments either in its approach in principle to the exercise of the ET's discretion or in the lawfulness of the outcome.

Lord Justice Etherton:

49. I agree

Lord Justice Mc Farlane:

50. I also agree.