EAT overturns Tribunal's refusal to postpone 12-day Final Hearing

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Khan and Uzayr v BP plc EA-2021-000261-JOJ

Introduction

1. On 12 February 2021 an expeditated appeal was heard before the EAT President, Mr Justice Choudhury, following a decision to refuse a postponement application made by East London Employment Tribunal.

ET Rules 2013

2. Rule 30A provides as follows:

[Postponements

30A.—(1) An application by a party for the postponement of a hearing shall be presented to the Tribunal and communicated to the other parties as soon as possible after the need for a postponement becomes known.

(2) Where a party makes an application for a postponement of a hearing less than 7 days before the date on which the hearing begins, the Tribunal may only order the postponement where—

(a) all other parties consent to the postponement and—

(i) it is practicable and appropriate for the purposes of giving the parties the opportunity to resolve their disputes by agreement; or

(ii) it is otherwise in accordance with the overriding objective;

(b) the application was necessitated by an act or omission of another party or the Tribunal; or

(c) there are exceptional circumstances.

(3) Where a Tribunal has ordered two or more postponements of a hearing in the same proceedings on the application of the same party and that party makes an application for a further postponement, the Tribunal may only order a postponement on that application where—

(a) all other parties consent to the postponement and—

(i) it is practicable and appropriate for the purposes of giving the parties the opportunity to resolve their disputes by agreement; or

(ii) it is otherwise in accordance with the overriding objective;

(b) the application was necessitated by an act or omission of another party or the Tribunal; or

(c) there are exceptional circumstances.

(4) For the purposes of this rule—

(a) references to postponement of a hearing include any adjournment which causes the hearing to be held or continued on a later date;

(b) "exceptional circumstances" may include ill health relating to an existing long term health condition or disability.](**a**)

Employment Tribunal

3. On 10 February 2021 one of the Claimant's counsel suffered a medical emergency and was referred to a specialist. The medical advice provided to the EAT was that it would not be advisable for the individual to carry out any preparatory work for the final hearing.

4. Upon receipt of that information, the Claimant's solicitors applied for a postponement on 11 February 2021. The EAT described the application as "brief". No medical evidence was provided in support of the application, but it was stated as being "provided if required" and a description of the medical condition and the impact on work was given.

5. For context, the final hearing was listed for 12 days (with 3 days in reserve) and involved a bundle exceeding 1,800 pages, 48 witness statements with allegations of discrimination and unfair dismissal in the financial sector.

6. The application was <u>supported</u> by the Respondent.

7. The Regional Employment Judge refused the request for a postponement. The reasons given were as follows:

   > "*This case is very old and has taken a long time to get to hearing. The application for a postponement is refused. It has not been accompanied by any medical evidence and the unavailability of a particular representative is insufficient grounds to grant a postponement.*"

8. A reconsideration application was made by email dated 12 February 2021, which attached the medical evidence. The Tribunal refused the application for postponement as follows:

   > *"The claimants' renewed application for the postponement of the hearing is refused. The hearing will remain as listed."*

9. The Tribunal then gave case management directions which proposed that the first 4 days of the hearing be reserved for reading in of nearly 50 witness statements, updated medical information be provided on 23 February 2021, case management and timetabling would then be discussed with the hearing of the evidence commencing on 9 March and for the hearing to be adjourned to resume as soon as possible after 11 March. The Tribunal also

confirmed that a fresh hearing of 12 days wouldn't be capable of being listed until the last quarter of 2022.

10. An application for permission to appeal was made; this was unopposed by the Respondents. That application came to the attention of the EAT President at the sift stage at lunchtime on 12 February 2021. The application was allowed to proceed to a full hearing on the basis that the grounds of appeal were strongly arguable. A hearing was convened at 3:45pm on 12 February 2021.

The EAT

11. Mr Justice Choudhury stated that, whilst he did not criticise a tribunal judge, "working under the pressures that they do, for giving a brief decision on a matter such as this…that does not mean that the judge is absolved from the need to consider all relevant factors and not to consider irrelevant ones"[1].

12. In *Teinaz v London Borough of Wandsworth* [2002] EWCA Civ 1040, an authority before the EAT, Peter Gibson LJ stressed the following (at para 20):

> *"Every tribunal or court has a discretion to grant an adjournment, and the exercise of such a discretion, going as it does to the management of a case, is one with which an appellate body is slow to interfere and can only interfere on limited grounds, as has repeatedly been recognised. But **one recognised ground for interference is where the tribunal or court exercising the discretion takes into account some matter which it ought not to have taken into account**"*
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> *"Although an adjournment is a discretionary matter, some adjournments must be granted **if not to do so amounts to a denial of justice**. Where the consequences of the refusal of an adjournment are severe, such as where it will lead to the dismissal of the proceedings, the tribunal or court must be particularly careful not to cause an injustice to the litigant seeking an adjournment"* [emphasis added]

13. The EAT were also directed to *Lunn & Lunn v Aston Darby Group Limited & Anor* UKEAT/0039/18/BA which considered the issue of adjournments in the context of counsel unavailability. HHJ Eady QC (as she then was) expressed her views on the normal

[1] Para 10, EAT judgment

approach that cases would not be listed with counsel's convenience at the forefront. She said as follows (at para 21):

> *"That expression does not refer to convenience in any normal sense of that term, but it means that the prior professional commitments of representatives will not be permitted to dictate the listing of hearings in most cases; an approach that is necessary if Courts and Tribunals are to be able to manage their workload in a just and proportionate way."*

14. The EAT was asked to consider three grounds of appeal, which were as follows:

> **Ground 1: that the Tribunal failed to take into account relevant considerations**
>
> **Ground 2: the tribunal erred in placing weight on the supposed absence of medical evidence**
>
> **Ground 3: that in proceeding on a false footing that the unavailability of a particular representative is insufficient grounds to grant a postponement, the tribunal failed to have regard to, amongst other matters, the presidential guidance and the context in which the particular unavailability arose.**

15. In respect of ground 1, the relevant considerations were put as follows (see para 13):
    - impossibility of obtaining alternative representation at such short notice
    - the need to ensure a level playing field
    - the importance and complexity of the proceedings
    - the fact that the respondent supported the application
    - the prejudice that a refusal of postponement would cause and the impossibility of a fair trial
    - the health and well-being of counsel

16. The Respondent's counsel before the EAT, added that the judge was right to take into account the avoiding of delay but submitted that it was an error of law to avoid delay if it enforces unfairness (see para 15).

17. Mr Justice Choudhury, in allowing the appeal, held that it had not been appreciated that there was a practical impossibility in instructing counsel to be ready for a hearing to commence, either on 16 February or 9 March in circumstances in which, due to the

complexity, it would have taken “a solid two weeks or more to prepare for”. There was one working day between the hearing of the appeal and the final hearing commencing. The EAT held that it would be “*impossible to instruct anybody, assuming anybody is available for a three-week hearing at such short notice, to get the case up and ready*” (para 17).

18. Furthermore, it was stressed that this was not a situation of counsel convenience, but rather a situation “*where a party has properly instructed counsel in good time for the hearing but, through no fault of their own and due to an unfortunate occurrence, has found themselves in a position that counsel is unavailable. It seems to me that that is an important circumstance which ought to have been taken into account but which, on the face of the tribunal's decision, was not taken into account”* (para 18).

19. The EAT allowed the appeal on all three grounds and noted that ground 2 was “if anything…the strongest” (para 21). The President held that “it would be exceptional not to grant a postponement on the basis of unchallenged medical evidence” (para 23). Finally, Mr Justice Choudhury commented that whilst the case management suggestions were “commendable” in terms of avoiding delay, the matter would still go part-heard and there was no indication of when the hearing would resume.

Summary

20. The outcome of this appeal was perhaps always inevitable. What is perhaps most interesting as a take-away from this case are the factors set out at paragraph 15 of this article as matters to be considered as part of an application for postponements. It is very surprising that, in the face of agreement from the Respondent and the provision of medical evidence in the application for reconsideration, that the Tribunal still refused to postpone the final hearing. It would be worthwhile restating the principle set out within the Judgment that it would be an error of law to avoid if it enforced unfairness.

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