Neutral Citation Number: [2024] EAT 126

Case No: EA-2022-000772-OO

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 16 July 2024

Before:

HIS HONOUR JUDGE SHANKS

- -

Between:

(1) LESLIE EASTON & CO LTD

(2) MR JUSTIN EASTON
(on behalf of the estate of MR LESLIE EASTON deceased)

Appellants

- and -

MISS TINA DONLON

Respondent

- -
- -

MR RAD KOHANZAD (instructed by **Croner Group Ltd**) for the **Appellants**

MISS SARA IBRAHIM (instructed by **Gullands Solicitors**) for the **Respondent**

Hearing date: 16 July 2024

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JUDGMENT

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SUMMARY:

PRACTICE AND PROCEDURE

The claimant brought a claim of sexual harassment against her employer and one of its directors, Leslie Easton (the respondents).

When Leslie Easton came to give evidence after the claimant had done so the consultant who was representing both the company and him became concerned that he was not fit to give evidence and participate in the case and applied for an adjournment to enable the instruction of a joint medical expert on that issue, stating that he would not call him to give evidence without such a report. When the concern was initially raised by the consultant, the ET asked Leslie Easton direct questions about his state of health and his memory.

The ET refused the application for an adjournment, finding that they could not accept that Leslie Easton was not fit to give evidence on the material they had and that they must therefore proceed on the basis that he had chosen not to give evidence in his and his company's defence. In so ruling the ET criticised the respondents for not raising the issue sooner and said that they could not be sure that the problem did not arise from the consultant's failure to take proper instructions or that the concerns expressed were genuine.

The claim for sexual harassment against both respondents was upheld.

The respondents appealed against the judgment on the basis that the ET were wrong to refuse the application for an adjournment. The EAT allowed the appeal on the basis that the ET ought to have taken account of the principles in the Equal Treatment Bench Book in relation to incapacity and adjourned so that the issue could be properly investigated when it arose and that they ought not to have reached their own conclusion on the issue without medical evidence; the EAT also considered that the ET should not have concluded that the consultant may not have taken proper instructions or that his concerns may not be genuine, which were conclusions unfair to the consultant.

Although Leslie Easton was now deceased and could not give evidence, the case should be remitted to a new employment tribunal so that they could consider it again and decide what inferences could properly be drawn from the fact that there was no evidence from him.

JUDGE SHANKS:

1. This is an appeal by the respondents below against a judgment of the employment tribunal sitting in London South (EJ Ferguson, Ms Christofi and Ms Saunders) which was dated 20 May 2022. The judgment followed a four-day hearing earlier in May 2022. The claimant's claims for unfair dismissal and wrongful dismissal were withdrawn and dismissed, but those for sexual harassment and victimisation were upheld by the Tribunal. The claimant was awarded £19,000 compensation against the first respondent, Leslie Easton & Co Ltd, her employer, and against the second respondent, Mr Leslie Easton, who was a director and co-owner of that company. At the hearing, the claimant represented herself, and the respondents were represented by Mr Hoyle, a consultant with Croner Group Ltd.

2. This appeal was allowed to a full hearing by Judge Tayler on one ground only. As Judge Tayler put it, that ground was that the Employment Tribunal erred in law in not granting an adjournment so that up-to-date medical evidence could be obtained as to Leslie Easton's fitness to give evidence and/or on any adjustments that may be required to enable him to do so. Mr Kohanzad does not pursue the appeal in so far as it relates to adjustments. He says only that the Employment Tribunal should have adjourned to allow investigations to be made as to Mr Easton's fitness or capacity to give evidence.

3. The first respondent’s company is a family company which has a glass business. It was owned by the second respondent, Leslie Easton, and his son Justin, and they were both directors. Unfortunately, Leslie Easton recently died, and I have ordered that the appeal be continued on behalf of his estate by Justin, who is his executor.

4. The claimant started work as an admin assistant for the company on 14 April 2014. She reported mainly to Leslie Easton. Her employment ended during the Covid crisis on 5 or 6 May 2020. In a letter dated 8 May 2020, she complained about the way her employment had been ended and she also complained in general terms about sexual harassment by Leslie Easton during

her employment. She said she had contacted ACAS. On 9 May 2020, Leslie Easton texted her saying: "I assume you mentioned that you worked 16 hours a month, plus cash in hand for cleaning". That text was found by the Employment Tribunal to contain a veiled threat and to be an act of victimisation.

5. On 3 September 2020 the claimant brought proceedings claiming, as I have indicated, unfair dismissal, wrongful dismissal, sexual harassment and victimisation. The details of the sexual harassment given were that Leslie Easton had made two specific inappropriate comments in 2018 and 2019, and that he had sent her WhatsApp messages of a sexual nature between 21 February 2018 and 1 March 2020. The company put in an ET3 on 6 November 2020. Justin was named as the relevant contact. That document raised no issue in relation to Leslie Easton's comments, and as to the WhatsApp messages, it stated that the claimant was part of a group in which Leslie Easton and his family and friends exchanged messages and jokes, and that she could have left the group at any stage if she was offended. The ET3 ended, importantly, with this statement:

> "On 1 September [and that must be 1 September 2020] Mr Leslie Easton suffered a severe stroke and had a fall. He was then found on the floor 13 hours later. He remained in hospital until 16 October and is now housebound. He has lost most of the use of his right side. His cognitive thinking is impaired and has also suffered severe memory loss and confusion."

6. A year later on 22 October 2021 there was a preliminary hearing in the case. At that hearing the claimant appeared in person, although accompanied by her mother and father. For the respondents, Mr Leslie Easton and his son Justin attended. The Tribunal on that occasion made a number of orders and observations. They said this at para.18:

> "18. Mr L Easton's health is not good. He is waiting for another heart operation and he has had a triple heart bypass. He asked what would happen if a date for compliance with a direction coincided with his future operation. To the extent that Mr J Easton cannot step in, then Mr L Easton should write to the Tribunal, copied to Ms Donlon, and explain. He needs to send evidence of his incapacity (there has been no evidence in respect of his health to date and the matters recorded here are based on what the Tribunal

> was told by Mr L Easton) and have confirmation of how long his recovery will take.
>
> 19. Mr L Easton is aged 78. He does not understand why he is a respondent to these proceedings. It is his view that the claimant should have made a criminal complaint and used the criminal justice system in respect of her allegations."

Then the tribunal record that explanations were given to Mr Easton and he was told that the claimant was entitled to choose to bring civil proceedings if she wished.

7. The final hearing of the case was set on that occasion for 16 May 2022 to 20 May 2022. Witness statements were ordered to be provided by each side by 8 April 2022. In spite of that order, neither Justin nor Leslie Easton served any witness statement but, nevertheless, the final hearing began on 16 May 2022. As I have said, Mr Hoyle represented the respondents. He had been instructed on the Wednesday before the hearing started. On the first day of the hearing, Mr Hoyle told the employment tribunal (presumably in the presence of both the Eastons) that Leslie Easton would rely as his evidence on a document which was in the bundle, apparently unsigned and undated, which appeared to be a letter from Mr Leslie Easton, which the claimant later told the Employment Tribunal was indeed a letter that her solicitors had received on 2 September 2020 from Mr Leslie Easton.

8. Various preliminary matters were dealt with by the tribunal, including, importantly, that they decided to extend time for the bringing of the complaints, and therefore found that the tribunal did have jurisdiction to consider those complaints. That decision is recorded at the very outset of the judgment at para.3 of the reasons. The claimant, and the witness that she called on her behalf, then gave evidence and she was cross-examined by Mr Hoyle.

9. After Justin Easton had given evidence, Mr Leslie Easton was called by Mr Hoyle on day 3 of the hearing. When at the outset Mr Leslie Easton was taken to the document which was to stand as his evidence, which I have referred to, he denied that he had written it and, furthermore (according to para.15 of the grounds of appeal at p.31 of the bundle), he also denied the

conversations that he had had with Mr Hoyle and Justin Easton that this would be his evidence-in-chief. He further denied ever having read it prior to his being sworn in. He said it was not true and anyone who said so was lying. That account - contained, as I say, in the grounds of appeal - has not been disputed or challenged.

10. At that point, Mr Hoyle told the employment tribunal that he believed that what Mr Leslie Easton was saying was the result of memory problems. The employment tribunal proceeded to question Leslie Easton direct and they record what was said at para.15 of the judgment:

> "15. …The Tribunal then asked Leslie Easton some questions about his medical history, which he answered clearly and straightforwardly. He said he had had a heart bypass operation in Thailand in 2017. He then had a stroke in September 2020. He said the stroke had not had any long-term impact on his cognitive skills, but he had ongoing mobility problems. He mentioned having had Covid and said that this has affected his long-term memory but it was coming back. He confirmed that he had documents at home relating to all of those medical issues. When the Tribunal asked if there was anything in his documents that mentioned the effects on his memory he said 'I don't suppose there is'. Mr Hoyle claimed to have specific instructions from Leslie Easton that he wished to rely on the document in the bundle as his witness statement. Leslie Easton told us that was not true."

The Tribunal then gave a short adjournment for the respondents to sort themselves out.

11. On the resumption of the hearing, Mr Hoyle applied for a further adjournment to enable the instruction of a joint medical expert on the "issue whether Leslie Easton was fit to give evidence and participate in the proceedings". For reasons that are given at paras. 16 to 19 of the judgment, the employment tribunal refused that application. In short, the tribunal criticised the respondents for not raising the issue earlier or providing any evidence relating to capacity at any earlier point. The employment tribunal stated that they could not be sure that the whole problem did not arise from Mr Hoyle's failure to take proper instructions, and they could not be sure that the concerns raised mid-hearing were genuine. They said it would be unfair to the claimant to allow an adjournment at this stage because the respondents had suddenly changed their mind on the fitness of Leslie Easton to give evidence and participate.

12. After lunch the application was renewed by Mr Hoyle on the basis of a report which is in the bundle at p.118. That report was dated 15 October 2020, so, shortly after Mr Leslie Easton's stoke. It was from a neuropsychologist at King's College Hospital. It indicated that he had problems with short-term memory, but said that expressive language function was not a problem. It set out various strategies for dealing with these issues. It did not give any kind of prognosis. The employment tribunal looked at that report but refused to change their decision, and they noted that the only explanation for the report not being produced earlier was that Leslie Easton had not wanted anyone to see it. Having decided not to adjourn, they said that they could not accept that Leslie Easton was not fit to give evidence on the material they then had, and that they must therefore proceed on the basis that he had made a choice not to give evidence in his and his company's defence.

13. In the event, Mr Hoyle, as he had indicated earlier, did not call Leslie Easton to give evidence. The explanation for Mr Hoyle's decision is clear from his affirmation made for the purposes of this appeal at p.126 in the bundle, where he says at para.21 that in the course of his application he explained that Mr Leslie Easton had a disability and if he had dementia, then this is likely age-related; it was indeed possible that since his stroke Mr Easton had gone on to develop a form of dementia, and this was a question for a qualified and practising professional to determine. He says:

> "I implored the Tribunal to permit the adjournment and expressed my view that to fail to do so would amount to an act of discrimination against Mr Easton because of both his disability and potentially his age."

I had at one stage wondered why Mr Hoyle had not simply gone ahead with calling Leslie Easton once the employment tribunal had made its decision not to adjourn. On reflection, I accept Mr Kohanzad's submission that, having reached his own view that Leslie Easton may indeed not be fit to give evidence or participate, it would have been wrong of him to expose Mr Easton to giving evidence and in particular being cross-examined.

14. So the hearing proceeded without any evidence from Mr Easton, and the employment tribunal made their findings of fact which are set out at paras. 25 to 54 of the judgment. Unsurprisingly, the claimant's evidence on all issues relating to Mr Leslie Easton was accepted, the employment tribunal recording a number of times when considering whether to accept that evidence, that Leslie Easton had not been called to give evidence: see in particular paras. 35, 38, 40, 46 and 64. Having reached their findings of fact, judgment was given in the terms I indicated at the very start of this judgment.

15. After judgment there was an application by the claimant for a preparation time order. The employment tribunal awarded her £2,279 on this basis. In the course of their judgment on the point, dated 23 June 2023, the tribunal recorded at para.8 on p.107 of the bundle:

> "8. On 1 December 2022 the Tribunal wrote to the respondents saying that medical evidence was required to support the assertions that (1) Mr Leslie Easton was unable to participate because of his health and (2) Mr Justin Easton required an in-person hearing in order to participate. It was noted that it was not clear why it was cause Mr Justin Easton difficulties if the Claimant's application were determined on the papers. The Respondents were ordered to provide any medical evidence within 7 days. The Respondents were given a further opportunity to provide medical evidence by 20 January 2023. They did not do so."

In the original grounds of appeal attached to the notice of appeal, Mr Hoyle stated at para. 47 on p.25, under the heading "Leslie Easton, current situation":

> "The respondents' representative has been instructed that Leslie Easton is to attend upon a qualified professional in order to obtain a medical report. A copy of this should be made available in the appeal bundle to demonstrate what would have been available had the Tribunal permitted an adjournment. No such report was provided."

As I have said, Mr Leslie Easton is now deceased.

16. The issue on the appeal is whether the employment tribunal ought to have adjourned the hearing so that a report could be obtained on Mr Easton's fitness to give evidence and participate. I remind myself that the decision not to adjourn was a case management decision and therefore an appeal can only succeed if one of a number of things is established: either a mistake in law or a

disregard of some principle, a misunderstanding of the facts, a failure to take into account a relevant consideration or taking into account an irrelevant consideration, or that the employment tribunal struck a balance in a way that no employment tribunal could properly do - that is perversity, in effect. The EAT must make its decision on the basis of the factual material which was before the employment tribunal at the time of the application.

17. Mr Kohanzad referred me to Chapter 5 of the Equal Treatment Bench Book, which deals with incapacity. It is right to say that Mr Hoyle does not appear to have used that word in the tribunal when applying for the adjournment, but I am satisfied that his representations amounted to a submission that Leslie Easton may have lacked capacity to give evidence or to participate in the technical sense. The guidance therefore seems to me relevant, and there are a number of passages that I was specifically referred to. At p.102 in the authorities bundle, it says this:

> "The legal system relies on the assumption that people are capable of making, and thus being responsible for, their own decisions and actions. It is therefore necessary to be able to recognise a lack of mental capacity when it exists, and to cope with the legal implications.
>
> False impressions of lack of capacity can be caused by communication difficulties or a person's physical appearance. ...
>
> There is a presumption that an adult is capable, though this may be rebutted by a specific finding of incapacity. When there is good reason for cause for concern and legitimate doubt as to capacity to litigate, the presumption cannot be used to avoid taking responsibility for assessing and determining capacity."

At p.104 there is reference to para. 8, headed "Assessment of Capacity", which says:

> "8. Legal tests vary according to the particular transaction or act involved, but generally relate to the matters which the individual is required to understand. It has been stated (in regard to medical treatment, though the test is no doubt universal) that the individual must be able to (a) understand and retain information and (b) weigh that information in the balance to arrive at a choice."

At p.110 in the authorities bundle, under the heading "Civil and family proceedings - procedure", and specifically under "Assessment of capacity", at paras 42 to 44 it says:

> "42. Courts should always investigate the question of capacity at any stage of the proceedings when there is any reason to suspect that it may be absent. This is important because, if lack of capacity is not recognised, any proceedings may be of no effect …
>
> 43. The presumption of capacity is important and ensures proper respect for personal autonomy. Courts should not allow arguments about litigation capacity to be used unscrupulously. However, when there is good reason for cause for concern and legitimate doubt as to capacity to litigate, the presumption cannot be used to avoid taking responsibility for assessing and determining capacity.
>
> 44. Solicitors acting for a party may have little experience of such matters and may make false assumptions of capacity on the basis of factors that do not relate to the individual's actual understanding. Even where the issue does not seem to be contentious, a judge who is responsible for case management may require the assistance of an expert's report."

18. It seems to me that there was in this case good reason for concern and legitimate doubt as to Leslie Easton's capacity. It was known that he had had a stroke with serious short-term effects. More importantly, Mr Hoyle, whose view as his representative should have been afforded some respect, was sufficiently concerned by what occurred when Mr Easton started to give his evidence against the background of his, Mr Hoyle's, conversations with Leslie Easton, to raise the issue with the Employment Tribunal and, furthermore, to make clear that he was not going to call Mr Easton back to give evidence without a report having been obtained. It seems to me that the employment tribunal at that point should have followed the guidance and allowed time for a report to be obtained as to whether Leslie Easton was fit to give evidence. The fact that the issue had not been raised earlier was really beside the point if (as I think was the case) a legitimate doubt had arisen at this stage. It was not good enough, in my judgment, for the employment tribunal to ask Leslie Easton himself some questions, particularly about his cognitive skills. I also agree with Mr Kohanzad that the conclusions that Mr Hoyle may not have taken proper instructions or that his concerns may not be genuine had no adequate basis and were unfair on Mr Hoyle.

19. In those circumstances, I am satisfied that the decision not to adjourn to obtain a report disregarded the principles in the Equal Treatment Bench Book and took account of considerations which were either wrong or irrelevant in relation to the conduct of the respondents and Mr Hoyle.

It follows that the employment tribunal's finding that Mr Easton chose - and I stress, chose - not to give evidence cannot stand. In those circumstances, I must allow the appeal.

20. The difficult question is what the consequences of that decision should be. Miss Ibrahim submitted that I should decide that the outcome would have been no different if an adjournment had been granted. I am afraid I cannot accept that. Either Mr Hoyle's concerns would have been allayed and Mr Leslie Easton could have made a genuine choice and probably given evidence or, if there was a finding that he was genuinely unfit to give evidence, the employment tribunal would have been able to proceed without his evidence, but without drawing any kind of negative inference based on him making a deliberate choice not to give evidence, which is certainly what they recorded. Now, of course, he is dead and he will definitely not be giving evidence, but if the matter is remitted to an employment tribunal, they will be able to consider what inferences, if any, can properly be drawn against the respondents as a consequence of there being no evidence from Mr Easton, and they can look again at the claimant's evidence in the light of any points that can be made to undermine it.

21. Mr Kohanzad also suggested that the question of time limits may be open to consideration on a remittal. As I have indicated, the employment tribunal decided against the respondents on this issue before any issues arose on Leslie Easton's evidence, and there has been no appeal on that decision. So I am quite sure that it would be wrong to remit that part of the judgment, which will stand.

22. Mr Kohanzad then suggested that it may be open to his clients to seek a reconsideration out of time on the time-bar issue. I suppose that must be right. He cannot be prevented from making such an application, although I must say I would not regard it as very promising, and certainly events since May 2022 would plainly be relevant to any assessment in the interests of justice.

23. I am therefore satisfied that the main liability issues, i.e. relating to whether there was sexual harassment and whether there was victimisation, must be remitted to the employment

tribunal.

24. The next issue is whether they should be remitted to the same or a different employment tribunal. I think, regrettably, that it will have to be a new tribunal. A long time has passed, so there will be no particular benefit in having the same tribunal from that point of view but, more importantly, I am persuaded that this employment tribunal would find it very difficult to approach matters with an open mind.

25. The effect of that decision is, I am afraid, that there will probably have to be a further hearing at which the claimant will have to give her evidence again. I am conscious of how unfair that may feel to her, who is not in any way responsible for what has happened, but I have to apply the law, and I see no choice in the matter.