Neutral Citation Number: [2024] EAT 187

Case Nos: EA-2024-001226-AT
EA-2024-001414-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 7 November 2024

Before :

JUDGE SUSAN WALKER KC

- -

Between :

MS N ORBAN **Appellant**

- and -

ROHAN DESIGNS LTD **Respondent**

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- -

MR SIMON PLATTS for the **Appellant**
MS LAURA KEARSLEY, Counsel (instructed by **Nelsons Solicitors**) for the **Respondent**

Hearing date: 7 November 2024

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

In the first decision appealed against, the Employment Judge directed that the relevant Presidential Guidance should be complied with for a witness wishing to give evidence from abroad. He has since confirmed that there was no objection to a witness giving evidence from Canada, and therefore he has implicitly agreed to a hybrid hearing. There was no error of law in the original decision. This was a matter of case management within the normal discretion of an employment judge. In any event, the appeal is now unnecessary as the Judge has confirmed that the witness can give evidence from Canada.

In the second appeal, the Employment Judge rejected an application for disclosure of documents on the ground that they were not relevant. However, the documents are *prima facie* relevant to the claims before the employment tribunal and the decision does not explain why the Judge considered that they were not relevant.

JUDGE SUSAN WALKER KC:

1. This hearing was to consider two appeals relating to case management decisions. I will refer to the parties as the "claimant" and "respondent" as they are below.

2. One of the appeals refers to Presidential Guidance on taking oral evidence by video or telephone from persons located abroad issued on 27 April 2022 by the Presidents of Employment Tribunals (England and Wales) and the then President of the Employment Tribunals (Scotland). This can be found at www.judiciary.uk/wp/content/uploads/2015/03/Presidential-guidance-evidence-from-abroad-April2022.pdf . I will call that "the Guidance".

3. I raised with the parties that I am one of the authors of a later version of the Guidance that was issued on 25 July 2022. It did not seem to me that there was any issue in this appeal about the content of the Guidance itself and I did not think there was any impediment to me hearing this appeal. However, I gave the parties the opportunity to provide any objections to my deciding the appeal and there were none.

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4. The first appeal relates to a letter sent by the Watford Employment Tribunal on 20 September 2024 on the direction of Employment Judge Postle. The letter was in response to an application from the claimant dated 12 August 2024. That letter contained three applications:

   i) an application for a variation of the case management orders under rule 29. Specifically the claimant requested that the type of hearing be changed from an in-person to a partly remote hearing;

   ii) an application for permission from the Tribunal to allow Ms Frank to give oral evidence from abroad; and

iii) an application for a witness order under rule 32.

5. In the bundle for this hearing was a separate letter from the claimant dated 10 August 2024 addressed to Watford ET. That letter sets out the reasons for the application. It narrated that one of the claimant's witnesses, Ms Frank, was residing in Canada and it set out the evidence that she would give and why it was relevant to the case. The claimant said she had provided these details in accordance with the Guidance.

6. It seems likely to me this letter was not in fact before Judge Postle and in fact Mr Platts, who represents the appellant, had correctly distinguished between the administrative process in the Guidance and any judicial decision that might be made and written two separate letters.

7. In any event, the response sent on the directions of Judge Postle to the application was:

> "If a party requires a witness to give evidence from abroad, they will need to follow the Guidance set out in the President's Guidance document of 27 April 2022. The hearing remains as an in-person hearing as agreed at the hearing on 27 April 2024."

8. The claimant understood that response to be a refusal of her application and she has appealed against that refusal. The grounds of appeal are:

i) She submitted her application complying with the Guidance and the Tribunal erred in not taking that into account.

ii) The Tribunal failed to provide the claimant with a reasonable opportunity to make representations before refusing to vary the case-management order to a partially remote hearing to allow a key witness to give evidence from abroad.

iii) The refusal to vary the case-management order is not in line with the overriding objective as the claimant would be disadvantaged, the witness is a key witness,

and the hearing would be unfair.

iv) The employment tribunal failed to balance the prejudice between the parties.

v) No reasons were provided.

9. The appeal was stayed to give the employment tribunal the opportunity to reconsider its decision.

10. Judge Postle responded to the Employment Appeal Tribunal that if the claimant had satisfied the requirements for her witness to give evidence from abroad then "there is no problem" and he was "not sure why an appeal was necessary".

11. There was then further correspondence between the Employment Appeal Tribunal and Judge Postle to confirm the updated position, given that the claimant has made a second application that is not the subject of this appeal, to lead evidence by video from the same witness from Switzerland. Judge Postle responded on 30 October 2024 as follows:

> "The situation is quite straightforward if a witness is giving evidence from abroad to an ET. If the witness giving evidence from Canada can do so without permission, therefore Presidential Guidance need not be followed as it is a permitted foreign state. However, latest guidance of permitted states requires evidence from Switzerland needs to obtain permission and follow the guidance laid out in the President's Guidance of April 2022."

12. Judge Postle confirmed he had not yet seen the claimant's second application and he considered that, in the circumstances, no variation or revoking was required.

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13. I do not consider that Judge Postle made a final decision to refuse the claimant's application for a partially remote hearing in his response of 20 September 2024. I understand that letter to simply refer the claimant to the Guidance for the administrative procedure that should be followed if a party wishes to lead evidence by video from abroad. He did not refuse to allow the witness to give evidence by video. The letter is simply confirming that, until the Guidance was followed (and that would by implication include the obtaining of any necessary permissions for the witness to give evidence from the relevant country), the hearing remained in person.

14. I note that Judge Postle referred to the earlier version of the Guidance issued in April 2022 and not to the later version issued in July 2022. However, nothing turns on that and the relevant paragraphs referred to below are unaffected.

15. I accept that the claimant had separately provided the information required under paragraph 13 of the Guidance when making the application. However, that is not the end of the process. Paragraphs 15 to 18 of the Guidance provide that the administration then has to:

- check the position with the Foreign and Commonwealth Development Office;
- find out what the position is in respect of the particular foreign state, and
- advise the claimant of the position, including whether there are any conditions where the state has given consent.

16. Judge Postle has since confirmed that if the witness is giving evidence from Canada, then, no consent is necessary. That is, in effect, agreement to a partially remote hearing as requested by the claimant. No further order is required. It is a matter for the claimant to confirm to the Tribunal that a witness will be giving evidence from Canada

and then for the administration to ensure the necessary equipment is available for that to happen.

17. Therefore I reject the first appeal. I do not consider there was an error of law in directing the claimant to follow the administrative process set out in the Guidance. This was a case management decision that was within the discretion of the Judge. Judge Postle did not make a final decision to refuse the claimant's application to convert the hearing to a partially remote one. It is tolerably clear that he was simply making that conditional upon the Guidance being followed and the position about consent from the Canadian authorities being confirmed. In any event, that position has now been clarified and Judge Postle has agreed the witness can attend remotely from Canada and therefore such a hearing would be a partially remote hearing.

18. The appeal is dismissed.

19. Note: It seems that the claimant has now made an application for the same witness to give evidence from Switzerland. Judge Postle has indicated in correspondence with the Employment Appeal Tribunal that this will be less straightforward and that consent will be required from the Swiss authorities. However, he has not yet made a decision on that application and so that matter is not before me at this hearing.

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20. A second appeal was added to this hearing to be considered as an expedited matter. This related to a decision by Judge Postle to refuse the claimant's application for an order for specific disclosure of documents. The respondent has asked that the individual named in the order for disclosure be anonymised. I will refer to her as Ms X as I consider that her right to privacy outweighs any considerations of open justice at this hearing. It will be a matter for the employment tribunal whether they agree to anonymise her in any

subsequent hearing.

21. The claimant has brought four claims. A key issue was the respondent's refusal to allow the claimant's flexible working request. She says that the managing director's reason for refusal was that working from home for the claimant's team would have a detrimental impact on the business and performance.

22. The claimant says she did not believe this was a genuine reason for refusing her request and that she had recently been made aware that someone in her team, Ms X, also had made a request for hybrid working almost at the same time as the claimant but Ms X's application was granted. The claimant has spoken to Ms X, who has shared the details of her application with the claimant and also advised that she had an initial trial period before it was fully granted.

23. The claimant asked the respondent to disclose the documents around Ms X's application. The respondent refused to disclose them. The claimant then submitted a specific disclosure request on 30 August 2024 for:

"… the documentation of [Ms X's] flexible working request in the first half of 2022, just like myself. The documentation on and around her flexible working request I consider to be key evidence in my case."

24. The respondent objected to the application on grounds of relevance. I do not have those objections before me. However, Judge Postle wrote on 28 October 2024 that

"the claimant's application for specific disclosure is refused as it appears it has no relevance to the issues to be determined".

This second appeal relates to that decision.

25. The ground of appeal is that the employment tribunal did not follow the correct process as it should have first considered the Civil Procedure Rules test (paragraph 31.6) and then decided whether disclosure was necessary for a fair disposal of the proceedings when determining whether to make an order for specific disclosure (*Tesco Stores v Element* UK EAT 0228/20/18 paragraphs 24 to 26).

26. The claimant contends that the employment tribunal had enough information before it to understand that the documents concerning Ms X's flexible working request would have had an adverse effect on the respondent's case and the judge should have ordered disclosure.

27. On the sift, Judge Burns considered the documents sought were *prima facie* relevant to the claim and should proceed to a full hearing. There was a second ground of appeal alleging bias that was rejected at the sift and that is not before me at this hearing.

28. In the meantime, the respondent has now provided documents voluntarily to the claimant about Ms X's application, although they still dispute that they are relevant. The respondent says it has provided material that shows Ms X made an application to work two days from home in 2022. This was based on her disability and related fatigue. The respondent says it was agreed to as a reasonable adjustment and that the arrangement was later varied to specific days in the week in 2023. The respondent maintains Judge Postle was right to refuse disclosure. The documents related to another worker in totally different circumstances, who was provided with home working as a reasonable adjustment, and this sheds no light on the claimant's case. However, in any event, the respondent says the claimant now knows exactly what the position was with Ms X.

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29. It is not possible to assess whether the judge ignored the guidance in *Tesco*, as stated in the grounds of appeal. His reference to "relevance" may be a shorthand for considering whether the documents were likely to support or adversely affect the case of one or other party. However, critically, the decision does not adequately explain why the judge concluded the documents were not relevant.

30. I agree with the sift judge that the documents sought appear to be *prima facie* relevant to the issues in the case. The claimant alleges that she was told that working from home was not permitted within her team but Ms X, it appears, was permitted to work from home. It may be that the documents do not, in fact, assist the claimant's case, as the respondent contends. However, that requires explanation. I therefore consider that the judge's decision was an error in law as it does not adequately why Judge Postle considered they were not relevant.

31. The appeal succeeds and the decision is revoked.

Further procedure

32. As to further procedure, I do not consider it necessary or in accordance with the overriding objective for me to issue an order for specific disclosure or to remit the matter for the decision to be taken again. The respondent has now provided documents on a voluntary basis. These documents include Ms X's application for flexible working and the respondent's agreement to it. Mr Platts submitted that an order was still necessary as the claimant believes there will be other documents, such as meeting notes. However, Ms Kearsley for the respondent advised the Tribunal that while there may have been meetings, there are no notes of such meetings.

33. In these circumstances, a further order for disclosure would serve no purpose. The respondent has provided documents and has set out what it says were the circumstances

around Ms X's application. That explanation can be tested by the claimant during the hearing in cross-examination. A further order is not necessary for a fair hearing.

34. Of course if the claimant wishes to make an application for disclosure of any specific documents, such an application can be made to the employment tribunal dealing with the case. They are best placed to deal with such applications and the respondent, of course, remains subject to its duty of disclosure.

35. That concludes my decision on the two appeals that were before me today.