Neutral Citation Number: [2024] EAT 26

Case No: EA-2021-000935-RN

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 1 March 2024

Before :

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT

- -

Between :

MR PHILIP HALL **Appellant**

- and –

TRANSPORT FOR LONDON **Respondent**

- -
- -

The **Appellant** in person
Rebecca Thomas (instructed by Eversheds Sutherland (International) LLP) for the **Respondent**

Hearing date: 22 February 2024

- -

JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives.
The date and time for hand-down is deemed to be 10:30 on 1 March 2024

SUMMARY

Practice and procedure – application to postpone – rules 29 and 30A(3) schedule 1 Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013

Refusing the claimant's third application for a postponement of the full merits hearing, the Employment Tribunal did not unfairly fail to have regard to the limited time available to him to obtain updated medical evidence.

THE HONOURABLE MRS JUSTICE EADY, DBE, PRESIDENT:

Introduction

1. This appeal raises the question whether the Employment Tribunal ("ET") unfairly refused an application for postponement, because it failed to take into account the difficulties of obtaining updated medical evidence in the time that had been allowed.

2. In giving this judgment, I refer to the parties as the claimant and respondent, as below. This is the claimant's appeal against the decision of the East London ET (Employment Judge Gardiner sitting with lay members, Messrs Pendle and Quinn), reached after an eight day hearing that took place in August 2020 and May 2021. By its judgment, sent out on 4 June 2021, the ET dismissed the claimant's claims.

3. Upon the initial consideration of the claimant's appeal, on the papers, Her Honour Judge Tucker directed that it should be listed for an appellant-only preliminary hearing, in particular because she was concerned to clarify the circumstances of the decision taken by the ET, on 12 May 2021, not to adjourn the hearing. A preliminary hearing duly took place before His Honour Judge Auerbach on 12 April 2023, when the claimant was represented by counsel appearing under the Employment Law Appeal Advice Scheme ("ELAAS"), and the appeal was permitted to proceed on one ground only.

4. The claimant acted in person before the ET, as he has at this hearing and at all other stages apart from the preliminary hearing before HHJ Auerbach. At all material times, the respondent's interests have been represented by Ms Thomas, of counsel.

The Factual Background and the Decisions of the ET

5. The claimant was employed by the respondent as an Engineer. On 3 June 2019, he presented a claim to the ET, making complaints of disability discrimination and protected disclosure detriment relating to events dating back to February 2014. The question of disability was initially in issue between the parties but, after a preliminary hearing before the ET, it was determined that the claimant was a disabled person for the purposes of the **Equality Act 2010** from 1 November 2016; the nature

of his disability was a mental impairment diagnosed as anxiety and depression. It is the claimant's position that his health problems started as a consequence of his having raised wrongdoing with the respondent.

6. The full merits hearing of the claimant's complaints was listed to take place by CVP over six days, commencing on 11 August 2020. On the fifth day of the hearing, 18 August 2020, the claimant's application for the hearing to be adjourned part-heard was granted by the ET. A similar application had been refused the day before but, in re-making his application, the claimant was able to rely on medical evidence in support and the adjournment was allowed. At that point, the claimant had completed his evidence and had cross-examined the first of the respondent's witnesses. In allowing the application to postpone, the ET directed that the hearing was to resume on 8-10 December 2020. The gap in the listing was intended by the ET to allow sufficient time for the claimant's health to recover, whilst also attempting to achieve closure in relation to the claim as soon as possible (recognised as important from both parties' point of view).

7. On 8 November 2020, however, the claimant applied for a further postponement of the hearing, providing a letter from his doctor dated 5 November 2020, which confirmed that he was unfit to participate in the December hearing, advising that this situation would continue for the remainder of 2020 and the first quarter of 2021. Notwithstanding objections from the respondent, the ET granted this further postponement, explaining its reasons by letter of 27 November 2020, and directing that the hearing would be re-listed to resume on the first available date after 1 April 2021. In communicating its decision on this further application, the ET noted that its expectation was that this second postponement would be the last granted, unless exceptionally there was a compelling reason why this was not possible. If the claimant's health problems persisted, such that he was unable to participate in person, the ET indicated that it would consider what other directions might be given to enable the hearing to proceed, which could include the claimant drafting written questions for the witnesses. To ensure that it was best placed to determine how to proceed in the future, the ET also gave directions for the claimant's GP to answer specific questions relating to the claimant's fitness to

attend the hearing, and what reasonable adjustments would be necessary, and for the claimant to provide a brief statement, outlining any difficulties he might suffer from participating in the hearing.

8. On 18 January 2021 the claimant sought an extension of time to comply with the ET's directions in relation to medical evidence. He explained that he had tested positive for Covid on 15 December 2020 and had then been hospitalized with a covid infection and only discharged on 11 January 2021, which had meant he was unable to participate in a consultation with his GP. By letter dated 6 February 2021, the ET allowed the application for an extension to 12 March 2021.

9. On 11 March 2021 the claimant wrote to the ET providing his statement and his GP's answers to the questions that the ET had posed.

10. In his statement, the claimant said he was being assisted by his son, and that, for physical and mental health wellbeing reasons, he was:

> "currently unable to give my focus toward matters of the this employment tribunal case."

11. The claimant went on to explain that he was suffering from moderate depression and that, when he tried to focus on the ET hearing, this heightened his anxiety; he had been hospitalized in January and his ability to concentrate had deteriorated after that; he remained signed off work with stress and long covid and was experiencing some memory problems and he was uncertain whether this would improve. Saying that his current health situation did not enable him to participate as a litigant in person at the re-scheduled hearing (by then re-listed to commence on 12 May 2021), the claimant went on to make an application as follows:

> "Application- for Case Management Orders leading to the appointment of a Litigants friend"

Explaining that his son would not be able to assist him at the final hearing before the ET, the claimant stated that he felt that:

> "In due course … it will be determined that I no longer have the mental capacity to litigate and that this may be a case that is deserving of intervention by the Official Solicitor."

The claimant ended by saying:

> "Assuming this application is successful then hopefully it would allow the hearing to complete at the next earliest opportunity"

12. The accompanying letter from the claimant's GP (dated 3 February 2021) said that it was hoped that the claimant would be feeling:

> "considerably better from his Coronavirus infection by April"

but was unable to advise how long his depression or memory issues would continue and was unsure whether these issues would have resolved by the resumed hearing.

In response to the question when the claimant might be fit to attend the hearing, the letter stated:

> "I find it difficult to answer this question as he is definitely unfit at the moment due to his recent Coronavirus infection."

As for possible adjustments, to better enable the claimant's participation, the GP advised:

> "Mr Hall will certainly need time to think about questions and may need someone to support him throughout the process, and also to remind him of important things that may not come up at the snap of a moment."

13. It is apparent that the claimant's statement was understood by the respondent and the ET to include an application for both a further postponement and the appointment of a litigation friend. By email of 23 March 2021, the respondent set out detailed objections to any further postponement of the re-listed hearing; it reiterated that position in a follow-up email of 23 April 2021, asking that the issue be put before the ET as a matter of urgency. On 28 April 2021, the claimant also sent a further email, stating that his circumstances had not changed and he remained "*unfit to participate in the hearing scheduled for the 12th May 2021*".

14. By letter of 30 April 2021, the ET refused both applications. In relation to what it had understood to be a further postponement application, given that this was resisted by the respondent and in light of the fact that the final hearing had already been postponed on two earlier occasions, the ET considered this was an application that came within rule 30A(3) schedule 1 of the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013**. Acknowledging that "*exceptional circumstances*" for the purposes of rule 30A might include ill health relating to an existing long-term health condition or disability, the ET did not, however, consider that the medical evidence provided by the claimant (which was almost three months old) indicated that he would be medically unfit to participate in a remote video hearing. Observing that the claimant had not

suggested that he was seeking any up-dated medical evidence, the ET found there was no basis on which it could conclude that the position would change if a further delay were allowed. The ET set out a list of proposed modifications to the procedure that could be made to assist the claimant and suggested that these could be discussed at the outset of the resumed hearing. It further observed:

> "7. Where the Final Hearing has already started, the interests of justice require that it be brought to a conclusion without undue delay. Given that the hearing took place in August 2020, nine months before the scheduled date for its resumption, and its resumption has already been postponed once, it would not be in the interests of justice for there to be further delay. A further delay would prejudice the Respondent's witnesses, the Respondent and other Tribunal users, whose cases would be delayed if further Tribunal time needed to be allocated to reschedule this case again.
> 8. The public interest in avoiding multiple postponements is reinforced by the introduction of Rule 30A to the Employment Tribunal Rules 2013. In view of the matters referred to above, the current circumstances are insufficiently exceptional to warrant a further postponement of the Final Hearing."

15. In also refusing the application for the appointment of a litigation friend, the ET explained that there was a presumption that all litigants have legal capacity unless the contrary was established, and that was not the case on the evidence that had been submitted. The ET was clear that no proper medical basis had been identified for postponing the resumed hearing for further investigation into the appointment of a litigation friend.

16. On 10 May 2021 the claimant emailed the ET stating that his application was not for a postponement but for the appointment of a litigation friend; he also provided a copy of a letter he had sent to his GP on 3 May 2021, by which he sought a consultation to discuss the further medical evidence he would need to support his application for a litigation friend. The ET directed that this would be addressed on the first day of the resumed hearing.

17. On the morning of the resumed CVP hearing on 12 May 2021, the claimant attended and renewed his application for the appointment of a litigation friend. The ET adjourned to consider its decision but the claimant did not return to hear the outcome of his application. By its written decision, sent to the claimant the same day, the ET again refused the application for the appointment of a litigation friend, observing that there was no medical evidence in support and nothing to rebut the presumption of capacity. The ET again considered there was no basis for suggesting that the issue of legal capacity should be further investigated, explaining:

> "5. … To do so would require a third postponement of this case – because such an investigation could not be concluded within the existing four days when the Final Hearing has been listed. The Final Hearing has already started in August of last year. The only current evidence advanced by the Claimant is his own assertion that he is unable to present his case effectively given the extent of his anxiety. He has not been on any medication for mental health symptoms this year nor has he been receiving any medical treatment or investigation for mental health symptoms. He has, with help from his son, been able to initiate further proceedings, first by contacting ACAS on 8 April 2021 and then by issuing ET proceedings on 10 April 2021."

18. Going on to consider how to proceed with the case, the ET recorded the respondent's application that the claim should be struck out on the basis that it was not being actively pursued. The ET refused that application, explaining as follows:

> "8. We do not agree that the case should be struck out. We are unable to find, on the balance of probabilities that the Claimant is not actively pursuing his case, based on the sole indicator of his current absence. The Claimant warned the Tribunal that he may not be present at 12pm for the outcome of his application. His explanation was that he was finding it too stressful to continue to participate. We have no medical evidence to support this, but equally we are not able to say that is not a genuine summary of the Claimant's current state of stress. We make no finding either way. The onus is on the Respondent to establish that the case should be struck out. The Respondent has failed to show that the absence is due to the Claimant not actively pursuing the claim. …"

The ET also determined, however, that it would not be in the interests of justice not to proceed with the hearing, reasoning as follows:

> "9. … There is no postponement application. In any event it is in the interests of justice that the case is concluded. … We will identify with Miss Thomas the order in which she will call her witnesses. We will agree a timetable for those witnesses to give evidence and answer questions from the tribunal that is consistent with the need for the Tribunal to read back into the case. We will inform the Claimant of the timetable. If the Claimant chooses to participate again in the hearing, then he is welcome to do so – either by asking questions himself, or by asking his son or someone else to ask the questions for him. Alternatively, if the Claimant wants the Tribunal to put particular questions to each of the witnesses, questions should be sent through to the Tribunal by email in good time in advance of the time at which they are schedule to give evidence. The Tribunal will then ask those questions of the witnesses on the Claimant's behalf."

19. On the morning of the second day of the resumed hearing, 13 May 2021, the claimant emailed to the ET in response to the decision sent out the previous day, saying that the ET's delay in dealing with his application of 11 March 2021 for a litigation friend had made it "*unfeasible to source further medical evidence that is requested*". Attaching two statements from his children to support what he said, the claimant confirmed he would not be attending the hearing due to ill health and submitted that the fair thing to do would be to adjourn, postpone or stay the hearing pending further medical

evidence from his GP.

20. That application was refused by the ET by letter sent out the same day, observing that there was no medical evidence to support the contention that the claimant was not well enough to attend the hearing. The ET explained its view that the claimant:

> "… has had ample time to provide up to date medical evidence. He could have done so at any time. His ability to do so has not been affected by the time it took the Tribunal to consider his application for the appointment of a litigation friend. Indeed, such medical evidence may well have supported his pending application for a litigation friend to be appointed.
> … A postponement would cause a significant delay to the resolution of this case which is already part heard from August 2020. It would not be in accordance with the overriding objective balancing the Claimant's interests against the interest of the Respondent and its witnesses, and the needs of other users of the Tribunal. It is unclear when such medical evidence will be available or what it will say. We will therefore continue with this hearing and refuse the application to postpone. We will, of course, consider whether the content of any medical evidence requires us to adopt a different course if such evidence is provided."

21. The hearing thus proceeded on 13 and 14 May 2021. The ET heard from the respondent's five remaining witnesses, seeking to explore that evidence so as to address points that the claimant might himself have made had he been present to ask questions. The respondent's counsel spoke to her written submissions, and was asked questions by the ET regarding the matters identified in the list of issues. The claimant was sent a copy of the respondent's closing submissions on 14 May 2021, and he was given until 21 May 2021 to provide any comments on those submissions. He did not do so.

22. The ET had explained to the claimant that it would not reach a final decision on his case until after 21 May 2021. It was, however, only after that date, by email of 2 June 2021 that the claimant made further contact with the ET, sending a letter from his GP of 27 May 2021, which recorded as follows:

> "Mr Hall continues to experience difficulties with stress and associated anxiety and depressed mood, and has been signed off work in relation to these difficulties on an on-going basis for some time.
> I understand from Mr Hall that he was unable to attend a recent tribunal hearing which proceeded without him, and Mr Hall reports that his difficulties with anxiety prevented him from attending.
> At his most recent review on 21.5.21 Mr Hall underwent a more formal assessment of his mood and anxiety by way of a PHQ9 score, on which he scored 21, suggestive of possible severe depression, and a GAD7 scale of 15 suggestive of severe anxiety. Mr Hall has been provided with information with regards to local services that are able to offer support and taking therapies in relation to both depression and anxiety,

> and he has been provided with information with regards to medical treatment for his difficulties which he is considering."

23. It is unclear whether the claimant's email of 2 June 2021 reached the ET before the written decision was signed off on 3 June 2021 and sent out on 4 June 2021.

24. In any event, the ET dismissed the claimant's claims for the reasons set out in its written decision, of some 49 pages, 225 paragraphs. There is no appeal before me relating to any of the findings or conclusions set out in the detailed reasons thus provided on each of the claimant's claims.

The Legal Framework

25. By rule 29 of schedule 1 to the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013** ("the ET Rules") the ET is given broad case management powers, as follows:

> The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order. Subject to rule 30A(2) and (3) the particular powers identified in the following rules do not restrict that general power. A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice, and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made.

26. Rule 29 is expressly subject to rule 30A(2) and (3); rule 30A(3) is relevant to the present case and provides as follows:

> (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.

27. In the prescribed situations (where an application is made less than seven days before the hearing is due to start (rule 30A(2)), or where two or more postponements have been granted in the same proceedings on application by the same party and that party applies for a further postponement (rule 30A(3))), the ET's general case management discretion is thus restricted: it will

only be able to order a postponement if one or more of the stated conditions are met. Where one or more of those conditions are met, however, the ET then has a discretion as to whether to grant a postponement: that it *may* only order a postponement if a stated precondition is met is plainly a permissive, not a mandatory, provision; effectively, the precondition will serve to reinstate the ET's general powers of case management under rule 29 (see **Ameyaw v PricewaterhouseCoopers Services Ltd** UKEAT/0291/19, per DHCJ Gullick KC obiter, at paragraph 63).

28. In exercising its powers under the **ET Rules**, the ET – assisted by the parties - is required to seek to give effect to the overriding objective, as provided by rule 2:

> The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
> (a) ensuring that the parties are on an equal footing;
> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
> (d) avoiding delay, so far as compatible with proper consideration of the issues; and
> (e) saving expense.

29. Where an application is made that falls under rule 30A, the specified preconditions to the exercise of the ET's discretion cannot, however, be avoided by the application of the overriding objective; see **Ameyaw** at paragraph 55.

30. As rule 30A(4) makes clear "*exceptional circumstances*" may include:

> "ill health relating to an existing long term health condition or disability"

31. Whether thus considering an application for a postponement due to ill health as an exceptional circumstance under rule 30A, or under the ET's general case management powers under rule 29, the following principles may be discerned from the case-law:

(1) The exercise of a discretion to grant an adjournment is one with which an appellate body should be slow to interfere, and can only interfere with on limited, or "**Wednesbury**" (**Associated Provincial Picture Houses Ltd v Wednesbury Corpn** [1948] 1 KB 223 CA) grounds (**Teinaz v London Borough of Wandsworth** [2002] ICR 1471 CA, paragraph 20;

O'Cathail v. Transport for London [2012] ICR 614 CA, paragraph 11; **Phelan v Richardson Rogers Ltd** [2021] ICR 1164 EAT, paragraphs 73-74).

(2) Where the application is to postpone a trial or other hearing, the outcome of which may dispose of the claim, or some other substantive issue in the case, the applicant's article 6 rights under the **European Convention of Human Rights** ("ECHR") and common rights to a fair trial will be engaged; thus, while an adjournment is a discretionary matter, some adjournments must be granted if not to do so amounts to a denial of justice, and an applicant whose presence is needed for the fair trial of a case, but who is unable to be present through no fault of their own, will usually have to be granted an adjournment; (**Teinaz**, paragraphs 20-21; **Phelan** paragraph 75).

(3) Article 6 **ECHR** and common law rights to a fair trial do not, however, 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 the hearing would take place in the applicant's absence; the ET has to balance the adverse consequences for the applicant with the rights of the other party to have a trial within a reasonable time, and the public interest in prompt and efficient adjudication of cases in the ET (**O'Cathail**, paragraph 47; **Phelan** paragraph 76).

(4) In any event, the ET is entitled to be satisfied that the inability of the applicant to be present is genuine, and the onus is on the applicant to prove the need for such an adjournment; if there are doubts about medical evidence, the ET has a discretion whether or not to give a direction allowing such doubts to be resolved, which may include directing that further evidence be provided promptly, although it is not necessarily an error of law to fail to take such steps (**Teinaz**, paragraphs 21-22).

(5) Fairness to other litigants may require that if an applicant has not adequately taken the opportunity to justify a postponement that indulgence is not extended (**Andreou v Lord Chancellor's Department** [2002] IRLR728 CA, paragraph 46).

The Appeal and the Claimant's Submissions in Support

32. Permission for this matter to proceed to a full hearing was given on the following ground:

> "The ET's judgment was unfairly determined in the absence of the claimant due to medical reasons."

That ground was further explained within the notice of appeal, as follows:

> "At the recommencement of the final hearing on the 12th May 2021, I was unable to provide fresh medical evidence to support a further adjournment of the hearing. It was not reasonable for me to obtain evidence at such short notice. I was disadvantaged by the delay incurred in the Tribunal's response to my application for Case Management Orders for the appointment of a Litigants friend.
> Further, I do not believe the Tribunal took into account whether continuing with the hearing would be detrimental to my recovery from Covid. I was prejudiced to a fair hearing, being the Tribunal reached decisions on a number of grounds that had not been argued."

33. The claimant says that he had suffered particular trauma in the early part of 2021, after his period of hospitalisation due to covid; it was not so much his own condition, but what he saw of the suffering of others at that time that had been so traumatic. The ET's delay in addressing the application made in his statement of 11 March 2021 meant that he was prejudiced: his GP was offering a limited service at that time and he was unable to then obtain updated medical evidence in advance of the recommencement of the hearing.

34. The claimant submits that the guidance provided in the case-law had to be viewed in the context of the pandemic in early 2021: a week-long adjournment in **Andreou**, to allow the claimant time to obtain medical evidence, could not be compared to the situation that was prevailing at the relevant time in the present case. He further observes that the pandemic had also impacted upon the ET's ability to carry out its case management functions in a timely manner. Given what had happened to him in early 2021, on top of his existing disability, the claimant contends that his situation plainly met the requirement to demonstrate exceptional circumstances.

35. The claimant also sought to make complaints about the fact that the ET hearing had been conducted by remote video link; he says that he found this difficult (and that one of the lay members had experienced IT difficulties during the hearing) and it would have been fairer had his application for a postponement been granted so that the hearing could have resumed once the ET offices had re-

opened. In the circumstances, he considered the ET's decision had been perverse.

The Respondent's Case

36. For the respondent it is submitted that it was necessary to view the ET's decision in the context of the wider procedural history and in light of all the reasons provided for refusing the various applications that had been made. The lack of medical evidence to support a postponement had been clearly identified by the ET in its decision of 30 April 2021. Given his applications on 17 and 18 August 2020, the claimant would have been aware of the need to provide relevant medical evidence to support a postponement application; he was also aware of the questions that that evidence would need to address, as these had been set out for him in the ET's decision of 27 November 2020. The claimant did not, however, seek to obtain evidence to demonstrate that he could not participate in the hearing, but instead sought to renew his application for the appointment of a litigation friend and to obtain evidence in support of that application.

37. In reaching its decision on 12 May 2021, the ET had had regard to all the materials before it, including the medical evidence (the most recent letter from the claimant's GP being that of 3 February 2021). It was entitled to have regard to the lack of any evidence of treatment for mental health symptoms and to the claimant's ability to initiate further proceedings in April 2021. The ET had made clear the various adjustments that would be put in place to enable the claimant to participate in the hearing. It had taken into account all relevant factors and had not had regard to any matter that was irrelevant; in the circumstances, it was entitled to refuse the application to postpone and to decide to proceed even if that was in the absence of the claimant.

38. In response to the claimant's further application on 13 May 2021, the ET had permissibly rejected the suggestion that he had been prejudiced by the time it had taken to respond to his application of 11 March 2021. On this issue, it was relevant to note that, in the claimant's letter to his GP of 3 May 2021, there was no evidence of his taking any positive step to obtain medical evidence relevant to the question of postponement.

39. It could not be said that the ET's decision to proceed was **Wednesbury** unreasonable. The ET was faced with an impasse: the claimant was focused on obtaining a litigation friend notwithstanding the fact that it was apparent that he did not lack the necessary mental capacity; reasonable attempts had been made to propose adjustments to the process; and there was no realistic indication of anything changing within a reasonable period of time. This was a case where the allegations were old (some dating back to 2014) and the ET was entitled to conclude that the balancing exercise weighed in favour of the case continuing.

Analysis and Conclusions

40. In addressing the claimant's further application for a postponement of the (part-heard) final hearing, the ET correctly identified that it was required to exercise its discretion through the prism of rule 30A(3) **ET Rules**: the claimant had previously successfully applied for two earlier postponements of the hearing and the ET could, therefore, only exercise its discretion to grant a further postponement where one or more of the specified preconditions applied. As the ET had recognised, however, exceptional circumstances – such as to permit the possible grant of the further application – could be demonstrated by ill health relating to an existing long term health condition or disability.

41. The ET's first consideration of the claimant's further postponement application (which it understood to have been made in his witness statement of 11 March 2021) was set out within its decision of 30 April 2021. At that stage, the ET referred to the medical evidence that had been adduced by the claimant, which took the form of his GP's letter of 3 February 2021, and concluded that this did not indicate that the claimant would be medically unfit to participate in a remote video hearing in May 2021. As the ET found, that letter provided a reasonably optimistic prognosis in relation to the difficulties the claimant had suffered as a result of his covid infection at the start of the year, although the GP was unable to say how long the resulting memory issues might continue. Otherwise, the difficulties identified related to the claimant's long-standing depression, and the ET

was unable to see any basis on which it could be confident that the position would significantly improve if there was further delay to the resumption of the hearing.

42. The ET then returned to this question on the first day of the resumed hearing, on 12 May 2021; it is the decision it reached on that occasion that is the subject of this appeal. Although the claimant had not in fact made an application for the hearing to be postponed on 12 May, he had made clear that he did not consider he could continue to participate and he had then absented himself from the hearing. It was in those circumstances, in determining how it should then proceed, that the ET considered the question of postponement.

43. In permitting this matter to proceed to a full hearing, HHJ Auerbach observed as follows:

> "The nub of ground 1 is that the tribunal erred by refusing the claimant's application for postponement at the start of the resumed hearing, as it should have allowed him a further opportunity to obtain and present up-to-date medical evidence in support of it. The premise is that the 11 March application had requested that further directions be given in relation to his request for a litigation friend. The tribunal did not respond until 30 April. After he received the response, which referred to the lack of medical evidence, the claimant contacted his GP on 3 May, but was not able to get further medical evidence by 12 May. Had the tribunal responded to his application sooner, he would have appreciated the need to get up-to-date medical evidence, and had enough time to do so. The tribunal is said to have unfairly failed to take this into account."

44. Although this was not a point that the claimant had in fact raised with the ET until his email of 13 May 2021, the suggestion that he had been prejudiced by the delay in dealing with his application of 11 March 2021 was firmly rejected in the ET's response to that email. As the respondent submits, that response needs to be seen in the context of the procedural history, and, in particular, in light of the claimant's previous applications for postponements made during the course of the full merits hearing.

45. The claimant's initial application to postpone, made on 17 August 2020, had been unsuccessful because it was not supported by medical evidence; whereas his renewed application the following day had succeeded because he was able to produce medical evidence that had stated he was not well enough to continue to present his case. In then allowing the further postponement application on 27 November 2020, the ET had again expressly referred to the fact that it had been supported by medical evidence from his GP. In giving directions for the re-listing of the hearing, the ET had also

referenced the medical evidence, which suggested that the claimant should be fit enough to continue by April 2021, and had attached a letter for the claimant's GP, which set out the relevant questions that would assist the ET in making any future decisions regarding the claimant's participation in the hearing.

46. In considering the postponement application understood to have been made within the claimant's witness statement of 11 March 2021, it was open to the ET to see the GP's letter of 2 February 2021 as the medical evidence relied on by the claimant relevant to the question of his ability to participate in the hearing that was due to resume on 12 May 2021. As the ET noted, the claimant had not said that he was seeking any updated medical evidence; even in his further email of 28 April 2021, whilst asserting that he remained unfit to attend the hearing, the claimant had neither referred to any further medical evidence in support nor suggested that he was waiting for any such evidence. Indeed, the focus of the claimant's statement of 11 March 2021, and his renewed application on 12 May 2021, was firmly on the question of his capacity to litigate and his application for the appointment of a litigation friend: when the claimant referred to being "*unfit to participate*", the suggestion was that he meant he did not have mental capacity to do so.

47. The straightforward answer to the point identified by the appeal is, therefore, that this was not a point that the claimant had raised with the ET prior to the decision in issue and there was no reason for it to consider that he had been placed at a disadvantage in obtaining updated medical evidence to support a third application for a postponement. Put simply: the ET did not err in failing to have regard to a point that the claimant had not raised.

48. That said, it is right to observe that there was a delay between the claimant's statement of 11 March 2021 (which the ET took to include a further application for a postponement) and the ET's decision on 30 April 2021. Given the difficulties facing the ET during the period of the pandemic, that delay might be explicable, but it did mean that the claimant only had 12 days to obtain further medical evidence if he wished to make a postponement application at the outset of the resumed

hearing. Moreover, whilst not a point raised at an earlier stage, it is also true that this was at a time when it was not always easy to obtain an appointment with a GP.

49. Even having regard to those factors, however, I cannot see that this would change the position. First, in his email of 10 May 2021, the claimant had been clear: he was not seeking a postponement but the appointment of a litigation friend; to the extent that he was seeking further medical evidence (by his letter to his GP of 3 May 2021), it was to support that application, not to address the question of a postponement. Second (and allowing that there might be some overlap in the evidence relevant to the appointment of a litigation friend and that directed at the question of a postponement), the evidence in fact suggests that the claimant was due to have a review on 21 May 2021 (as referenced in his GP's later letter of 27 May 2021): had the claimant wished to rely on that as providing updated evidence of his ill health, he could have said so. Third, to the extent that it might be permissible to have regard to the further evidence subsequently obtained from the claimant's GP, the letter of 27 May 2021 would not have taken matters any further: it certainly would not have served to rebut the presumption of capacity and it still did not engage with the questions the ET would need to grapple with in considering whether the claimant could participate in a resumed hearing. Fourth (and in any event), as the ET had observed, the timeframe for obtaining updated medical evidence was, of course, not 12 days; it had been open to the claimant to ask his GP for an up-dated letter at any time after 3 February 2021.

50. On the material before it on 12 May 2021, the ET did not feel able to determine whether or not the claimant's absence from the hearing was on medical grounds (see paragraph 8 of its decision of that date). As such, it was entitled to find that exceptional circumstances had not been shown such as to allow for the possible grant of a third postponement at his behest. Given the history of the earlier applications made by the claimant, and the reasoning the ET had provided on each occasion, it cannot be said that any error of law arose from its failure to then provide a further opportunity for the claimant to seek further medical evidence (**Teinaz**). Even if the ET had not been required to see the issue of a

further postponement through the prism of rule 30A(3), it was not bound to provide the claimant with yet further time to justify why the hearing should not resume (**Andreou**).

51. More generally, it is apparent that the ET gave careful consideration to the competing rights engaged in this case. It had been mindful of the claimant's rights in allowing the first postponement of the final merits hearing, and again in later granting a postponement of the part-heard listing. When faced with what it had understood to be a third application, the ET had had careful regard to the available evidence, noting that this was really limited to what the claimant had himself said (there was no evidence that he had been on any medication, or had received medical treatment or investigation for mental health symptoms, and the only advice from his GP relating to his covid infection was reasonably optimistic), and further observing that he had (with help from his son) been able to initiate further legal proceedings during the course of April 2021. On the other side of the balance, the ET permissibly weighed the prejudice arising from the further adjournment of the full merits hearing of a case in which the allegations went back many years. The trial had already been adjourned part-heard for some nine months and there was no evidence before the ET that could provide it with any certainty as to what the position might be if an attempt was to be made to re-list it at some future date.

52. Moreover, although the ET plainly did not discount the importance of the claimant's continued presence, it had made a number of proposals that would permit his continued participation, even if he was unable to personally remain on-line throughout the resumed hearing. The claimant had already given his evidence and this was not, therefore, a case where the ET was bound to consider it must grant an adjournment: there were other steps that could be taken to ensure the fair trial of his claims. In the circumstances, it was open to the ET to conclude that the adverse consequences for the claimant were outweighed by the rights of the respondent and its witnesses to conclude the trial within a reasonable time. More generally, it was entitled to have regard to the need to resume the hearing so that the ET could itself continue to fairly determine the case, and to the wider impact of a further postponement and re-listing on other parties before the ET.

Conclusion and Disposal

53. This is not a case where the ET erred in its approach to the test it was required to apply. Having carefully considered the criticism raised by this appeal, I am also satisfied that the ET had regard to all relevant considerations, and did not take into account any irrelevant matters. There is no proper basis on which the conclusion reached by the ET could be characterised as perverse, and equally no basis on which the Employment Appeal Tribunal would be entitled to interfere with the decision to proceed. For all these reasons, I therefore dismiss this appeal.