Appeal No. UKEAT/0381/12/CEA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8JX

At the Tribunal
On 24 July 2012

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

PAREXEL INTERNATIONAL LTD — APPELLANT

MRS L ADNETT — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR M JONES (Solicitor) Turbervilles Solicitors Hill House 118 High Street Uxbridge Middlesex UB8 1JT
For the Respondent	MR D PANESAR (of Counsel) Instructed by: B P Collins LLP Solicitors Collin House 32-38 Station Road Gerrards Cross Buckinghamshire SL9 8EL

SUMMARY

PRACTICE AND PROCEDURE – Case management

The Employment Tribunal had refused a request for an adjournment but given inadequate reasons for doing so.

The Employment Appeal Tribunal allowed the appeal and set aside the decision of the Employment Tribunal but in view of the imminence of the scheduled hearing went ahead and decided the application itself. The application for an adjournment refused on the basis that the evidence in relation to the party's unfitness to attend was unsatisfactory.

HIS HONOUR JUDGE SHANKS

1. This is an appeal by the Respondents to the Employment Tribunal claim against the ET's refusal to grant an adjournment of a hearing which is fixed for next week between 1-3 August 2012. The First Respondent is the company that employed the Claimant and the Second and Third Respondents are senior employees of that company. The Third Respondent and is Ms Lucy Stevens, who will feature in this Judgment.

2. The Claimant started employment with the company on 18 April 2011. She was dismissed on a date which is yet to be determined some time in August or September 2011. She claims the dismissal was unfair and she also has a number of other claims all related to the fact that she was pregnant for all the time she was employed. On 30 November 2011 there was a case management conference at which the hearing date that I have already mentioned, namely 1-3 August 2012, was fixed as a full hearing of the claims. In about January 2012, Ms Stevens herself became pregnant. On 2 March 2012 there was a pre-hearing review; perhaps unsurprisingly, there was no mention of the fact that Ms Stevens was pregnant.

3. On 24 April 2012 however, there was an application to adjourn the hearing fixed for 1 August, made by letter by the solicitors who represent the Respondents to the claim. That letter stated the reason for the application as follows:

> **"The third Respondent is pregnant with her first child and intends to commence her maternity leave in mid-July 2012. The third Respondent has not advertised her pregnancy due to previous bad experiences. The third Respondent has suffered and continues to suffer with pre-natal illness with her pregnancy. In the circumstances the Respondents are concerned that the stress of these Tribunal proceedings could affect both the third Respondent and her unborn baby. In the light of the above, we respectfully request that the hearing is re-listed for October 2013 after the third Respondent's maternity leave and accrued holiday have ended."**

4. Unsurprisingly perhaps in view of the vagueness of those assertions and the fact that they were not supported by any medical evidence the Tribunal wrote back to the Respondents' solicitors on 4 May 2012 stating that the Employment Judge had looked at the application and he had refused it in these terms:

> **"Employment Judge Ryan has considered your request to postpone the hearing and has refused it because the Respondents will need to provide written evidence to support the contention that the third Respondent will be unable to give evidence later in 2012 allowing a proper interval after the birth of her baby. A postponement of 14 months would be exceptional and require persuasive justification. Consideration will be given to advancing the hearing. The case remains listed for hearing on 1-3 August 2012."**

5. It appears from the letter that the judge had been minded to grant an adjournment but was concerned about the proposed delay. The solicitors responded to that letter from the Tribunal with a letter dated 18 May enclosing a medical certificate dated 14 May from Ms Stevens' GP practice, which is Heene Road Practice in Worthing, West Sussex. The certificate records that the GP assessed her case on 14 May 2012 and it then says "because of the following conditions" and in that box it then states "pregnant and stress" and that is all. There is then a statement, "I advise you that" and then there are two boxes which are not filled in; one says you are not fit to work and the other says you may be fit for work taking account of the following advice. There is then another box with various smaller boxes which can be ticked, none of which are, and then these words:

> **"Due date 24 9 12. Has a court hearing in August 12, as very near to the due date I feel not fit to appear and should be postponed for at least 6 months after the delivery".**

I will have to return to the detail of that medical certificate in due course.

6. On 30 May 2012 the Claimant's solicitors wrote a two-page letter setting out detailed arguments as to why an adjournment should not be granted and enclosing a medical certificate in relation to the Claimant, which is itself dated 24 May 2012. That certificate recorded that the

Claimant had had a number of stressful life events, that she had been depressed and anxious since November 2010 and that her feelings had been made worse by various medical issues to do with her own pregnancy and also by the stress of the Employment Tribunal; and then it said over the page that her current state is largely caused by the Tribunal stress as her physical problems are resolving and the doctor says "I think she will feel a lot better once the Tribunal is over". I should say that the letter of 30 May also points out that counsel have been reserved for the hearing, which I assume is a reference to Mr Panesar who has appeared today and told me that he was going to be appearing at the hearing.

7. On 8 June 2012 that application for an adjournment (or re-application as it should perhaps be described) was refused by a different Employment Judge, Judge Mahoney, and he said the following:

> **"It is not in the interests of justice to postpone this case until late March 2013 at the earliest. The Respondents' application for a postponement is therefore refused. The case remains listed for hearing on Wednesday 1-3 August 2012 at 10am."**

8. Today, just to complete the history, is 24 July 2012; the hearing is scheduled for next week as I have said; and the due date for the birth of Ms Stevens' child, as I have already mentioned, is 24 September.

9. I turn then to the appeal. The law in relation to granting adjournments is that this is a matter for the discretion of the Employment Tribunal; provided they exercise their discretion judicially and take account of relevant factors and do not take account of irrelevant factors, an appeal will not succeed. Obviously, a common factor to be taken into account in these kind of applications is the inability of a witness or a party to attend a hearing for health reasons. Although the citation of authority on adjournments is generally unnecessary and unhelpful, I

have been referred to a few passages in decisions relating to the proper approach to the question of fitness to attend hearings which are helpful and I will refer to them now.

10. In the case of **Teinaz v London Borough of Wandsworth** [2002] EWCA Civ 1040 at paragraph 21, Lord Justice Peter Gibson said this:

> **"A litigant whose presence is needed for the fair trial of a case but is unable to be present through no fault of his own will usually have to be granted an adjournment however inconvenient it may be to the tribunal or court or to the other parties. A litigant's right to a fair trial under Article 6 of the European Convention on Human Rights demands nothing less, but the tribunal or court is entitled to be satisfied that the inability of the litigant to be present is genuine and the onus is on the applicant for an adjournment to prove the need for such an adjournment.**
>
> **22. If there is some evidence that a litigant is unfit to attend, in particular if there is evidence that on medical grounds the litigant has been advised by a qualified person not to attend but the tribunal or court has doubts as to whether the evidence is genuine or sufficient, the tribunal or court has a discretion whether or not to give a direction such as would enable the doubts to be resolved. […] All must depends on the particular circumstances of the case. I make these comments in recognition of the fact that applications for an adjournment on the basis of a medical certificate may present difficult problems requiring practical solutions if justice is to be achieved."**

11. The other case is called **Andreou v Lord Chancellor's Department** [2002] EWCA Civ 1192. I will briefly outline the facts of that case: Mrs Andreou was a Crown Court usher; she presented an application to an employment tribunal complaining of race discrimination and the case was listed for a 10 day hearing commencing 6 November 2000. On 27 October she sent a letter to the tribunal asking for a postponement of the hearing on the grounds that she would not be able to attend because of ill health. She enclosed a certificate from her GP which stated that she was suffering from anxiety and stress and should refrain from working for 13 weeks. The tribunal refused the application and said it could be renewed at the hearing. Mrs Andreou did not attend the hearing herself but was represented by a solicitor. At the commencement of the hearing he renewed the application for an adjournment on the grounds that Mrs Andreou was ill and could not attend. The employers opposed the application and argued that if the adjournment was refused the claim should be struck out by reason that Mrs Andreou was not present to prove her case.

12. The tribunal concluded that it could not decide the matter on the basis of the medical evidence that had been supplied. It accordingly adjourned the hearing for one week to 13 November and ordered Mrs Andreou to provide a medical report by 4pm on 9 November giving answers to four specific questions. Skipping a bit, shortly before the deadline Mrs Andreou's representative faxed to the tribunal a report from her GP which for the most part was in the same terms as an earlier report which was already before the tribunal and then Mrs Andreou did not attend the hearing when it resumed on 13 November. Her solicitor attended solely for the purpose of renewing the application for an adjournment. The employment tribunal concluded that Mrs Andreou had failed to provide the additional medical evidence required by the order and that it was not possible to infer from the available evidence that her illness was serious. It therefore refused the application for an adjournment and ordered her originating application to be struck out. That approach by the employment tribunal was upheld by the Court of Appeal and in the course of their Judgment there were two paragraphs which I will refer to. One is paragraph 46 from Peter Gibson LJ's Judgment where he said this:

> **"The Tribunal in deciding whether to refuse an adjournment had to balance a number of factors. They included not merely fairness to Mrs Andreou (of course, an extremely important matter made more so by the incorporation into our law of the European Convention on Human Rights, having regard to the terms of Article 6): they had to include fairness to the respondent** [that is the other party in this case]**. All accusations of racial discrimination are serious. They are serious for the victim. They are serious for those accused of those allegations, who must take very seriously what is alleged against them.** [I say in parenthesis here we have pregnancy related claims which are serious as well.] **It is rightly considered that complaints such as this must be investigated, and disputes determined, promptly; hence the short limitation period allowed. This case concerned events which took place very many years ago, well outside the normal three months limitation period. The Tribunal also had to take into account the fact that other litigants are waiting to have their cases heard. It is notorious how heavily burdened employment tribunals are these days. Fairness to other litigants may require that indulgences given to those who have had the opportunity to justify an adjournment but have not taken that opportunity adequately are not extended."**

Mr Panesar for the Claimant relies strongly on that last sentence, which I will come back to.

13. There is also a relevant paragraph in the decision of Lady Justice Arden, paragraph 65, where she said this:

> **"Finally, I would add this. Stress and anxiety are generic terms. Mr John Cavanagh QC, who has appeared for the appellant, has not suggested that stress and anxiety cannot constitute an illness. However, as I see it those terms are likely to cover a range of symptoms differing widely in their severity. Where a party seeks an adjournment on the basis of stress or anxiety, he should expect to produce details of the symptoms, the causes, severity, and so on, or to explain why those details cannot be supplied to the Tribunal. When a party applies for an adjournment he must bear in mind the need for complaints to employment tribunals in these sorts of matters to be heard promptly, the need to consider the interest of other parties to the proceedings and the need to avoid unnecessary waste of tribunal time and scarce resources."**

14. I turn then to the substance of the appeal. As I indicated at the outset of this hearing, it seems to me that the appeal must be allowed and Mr Panesar only faintly opposed that course. The reasons it seems to me in brief are three-fold. First of all, the reasons given by EJ Mahoney in the letter dated 8 June which I have quoted, give really no indication of the factors he took into account and fail to make any kind of assessment of the medical evidence. Second, such reasons as are given appear to relate to the question of whether there should be an adjournment until after March 2013 but do not appear to consider whether it may be appropriate to have an adjournment to some earlier date. The third reason is that the Employment Tribunal may have taken into account the letter dated 3 May 2012 from the Claimant's solicitors to which I have referred and the medical report into the Claimant's condition which was attached to it. That letter was not sent to or seen by the Respondents before the Tribunal made its decision; that cannot be fair or correct and therefore vitiates the decision so far as procedure is concerned.

15. So for those three reasons at least I allow the appeal and I set aside the Employment Tribunal's decision of 8 June 2012 refusing the adjournment. However, given that the hearing is listed for next week and the parties need to know where they stand, it seems to me that the obvious course was, having set aside the Employment Tribunal's decision, for me as the

Employment Appeal Tribunal to simply proceed to hear the application myself and give a ruling on it.

16. Mr Jones for the Respondents says in support of the application for an adjournment that Ms Stevens is both a party and the central witness for the employing company. If she is unfit to attend the hearing next week for medical reasons outside her control, it would be a breach of Article 6 for the hearing to go ahead without her. As I understand it, Mr Panesar accepts that proposition in general terms whilst of course pointing out to the Tribunal and reminding me of the prejudice to the Claimant of any adjournment, the prejudice to other litigants and the prejudice to the administration of justice.

17. What he says in response to the application is that the evidence relating to Ms Stevens' inability to attend is simply not good enough. That brings me back to the certificate at page 86 of the bundle dated 14 May 2012 to which I have referred. It seems to me looking at it that there are a number of problems with it. First of all, it relates back to 14 May 2012 and seeks to deal with the position as it will be in August 2012. Secondly, the only conditions referred to are "pregnancy" which in itself cannot be a ground for unfitness to attend a hearing and "stress" without any details being given as to the cause, the effect, the prognosis or the symptoms of the stress (and I remind myself of the words I have just quoted from Lady Justice Arden in the **Andreou** case in relation to that). The third thing is that the certificate appears to contemplate that the hearing will be very near to the due date and it simply refers to a hearing in August 2012. The due date as I have already said is 24 September 2012. It seems the doctor was unaware of what date in August the hearing was scheduled for but as it happens it is scheduled for 1 to 3 August, so it is as far away from the due date as it could have been and in fact it is about seven weeks; but the doctor did not address his mind to that length of time specifically. The fourth thing about it is that it is vague and brief in general. The fifth thing is that it was

clearly produced in order to support the application and in response to instructions no doubt given by the solicitors when they received the ET letter that I have mentioned dated 4 May 2012; so it was not a freestanding existing piece of advice given by the doctor; rather, it was produced with something specific in mind.

18. Apart from that medical certificate, no other evidence, in particular no evidence of subsequent developments, was produced for today's hearing, in spite of the fact that it must have been in the contemplation of the parties, or should have been in the contemplation of the parties, that the EAT might well proceed as I have to decide the adjournment application itself and in spite of the fact that it is now seven weeks since the ET refused the application.

19. In the Respondents' skeleton dated 17 July 2012 prepared for this appeal, it is stated at paragraphs 11 and 12 that on 24 June 2012 the third Respondent was admitted to hospital due to complications with her pregnancy and that on 29 June 2012, she was advised by her GP to avoid any stressful situations. Mr Jones in the course of submissions also told me that the third Respondent Ms Stevens was in fact off work for three days last week and that both she and her employer, the First Respondent, have made a decision that she will not attend the hearing next week. As Mr Panesar rightly says the latter point, namely their intention that she should not attend the hearing, is irrelevant. The issue is whether she is medically unfit to attend the hearing or likely to be so. While on occasion a tribunal or court will act on instructions or evidence given through counsel, in this case Mr Panesar says that that would not be appropriate and he reminds me of the sentence from the Judgment of Peter Gibson LJ in the **Andreou** case, to which I have already referred. I agree that in this case, fairness to the Claimant would indicate that it is not appropriate to be indulgent to the Respondents in the question of the kind of evidence that they produced as to Ms Stevens' health and her ability to attend the hearing.

20. After I had retired to consider my decision, a document was produced to the Tribunal by the Respondents. It is on the headed paper of the Heene Road Practice, is dated 29 June, is addressed "to whom it may concern" and states:

> **"Lucy Stevens is 28 weeks pregnant, she has been under a lot of stress and [something illegible] had to go Worthing Hospital on Sunday 24 with complications of the pregnancy. Fortunately there were no serious ongoing problems but in my opinion it would be in Lucy's best interests if she was not placed under situations of too much stress."**

The signature is illegible but does not appear to be that of the doctor who gave the earlier certificate that I have referred to. Although it was produced so late Mr Panesar reasonably did not object to it going in as part of the evidence before this Tribunal.

21. So far as that letter is concerned, it suffers from a number of deficiencies similar to those in the certificate. It gives no details at all of the complication; it says that there are no serious ongoing problems, so to that extent it does not assist the Respondents; it talks about it being in Lucy's best interests if she is not placed under a situation of too much stress without identifying exactly what is meant by 'best interests'. It does not address the question of whether she should attend the Tribunal and it does not define what a situation of too much stress is. In my view, it adds little to the evidence of the medical certificate.

22. For the reasons that I have already indicated, the evidence as a whole is unsatisfactory and in my view insufficient to warrant a conclusion that Ms Stevens' will be medically unfit to attend the hearing next week or even that there is a sufficient risk of that to warrant an adjournment. I therefore refuse an adjournment: unless the Employment Tribunal adjourns the hearing itself hereafter, it will proceed whether Ms Stevens attends or not.

23. Let me say finally, that it is obviously likely that the First Respondent will come to the hearing next week and apply again for an adjournment on the basis of Ms Stevens' health. Clearly, they cannot be prevented from so applying and if the basis of the application is some new development between today and next week, of which the ET is persuaded, then they would not be prevented from granting an adjournment. But given my refusal of the adjournment application today, and my ruling about the evidence, it will not be open to the Respondents to rely in support of such an application on any evidence as to Ms Stevens' medical condition as at today or on any events leading up to today. Nor will it be open to them to rely on a continuation of an existing state of affairs as at today so far as pregnancy and stress and anxiety are concerned since it would have been open to the Respondents to bring such evidence to this hearing and they have not done so. I can foresee the possibility that the ET may be involved in a difficult decision if matters do proceed as I have suggested they may, but what I have just said is the best guidance I can give them. A transcript of this judgment will be prepared to assist the Tribunal.