Appeal No. UKEATS/0007/19/SS

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 20th and 21st August 2019
At 10.30am

Before

THE HONOURABLE LORD SUMMERS

(SITTING ALONE)

E & O Laboratories — APPELLANT

Miss M Miller — RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant	Mr Rad Kohanzad (Counsel) Instructed by Peninsula Business Services Ltd. The Peninsula Victoria Place Manchester M4 4FB
For the Respondent	Mr Russell Bradley (Counsel) Instructed by Messrs. Sandemans Solicitors 34 Union Road Falkirk FK1 4PG

SUMMARY

The Employment Appeal Tribunal considered an appeal where a claim had been struck out because the Appellants' witnesses had sat in during the evidence. The EAT concluded that notwithstanding Scottish practice, the terms of Rule 43 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 presupposed the right of a witness to be present in the Tribunal room unless excluded by the ET. In this situation the EAT considered that the Appellants' legal representative had not conducted the case unreasonably despite her failure to follow Scottish practice. The EAT likewise considered that where witnesses had discussed another witness's evidence during a break in evidence and while she was on oath, this could not be said to be unreasonable conduct under rule 37(1)(b) because the EJ had not admonished the witness not to discuss her evidence while on oath. The EAT held that she could not be held to appreciate the sensitivity of the matter and hence the EAT concluded that the conduct in question was not unreasonable under rule 37(1)(b). The EAT also concluded that there were insufficient grounds to justify strike out under rule 37(1)(e) as there was no evidence to indicate that the hearing had been contaminated by perjured or partisan evidence.

THE HONOURABLE LORD SUMMERS

1. In this appeal the Appellants, E&O Laboratories, submit that the Employment Judge (EJ) ought not to have struck out their defence under rule 37(1)(b) and (e) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, schedule 1 (hereafter "the Rules"). Rule 37(1) provides as follows -

> 37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds - (a) that it is scandalous or vexatious or has no reasonable prospect of success; (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious; (c) for non-compliance with any of these Rules or with an order of the Tribunal; (d) that it has not been actively pursued; (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

2. The circumstances of the strike out were as follows. The claimant, a farm manager, brought a claim for unpaid wages. She gave evidence on her own account on the morning of the first day of the hearing. Thereafter the respondents' representative Ms Lucey gave evidence. Two other witnesses for the respondents were present in the Tribunal room during the evidence. During the morning break the claimant overheard Ms Lucey and the two other witnesses discuss the evidence in one of the witness rooms. She overheard a further conversation between Ms Lucey and the other witnesses during a mid-afternoon break. This led the legal representative of the claimant to seek strike out. The grounds upon which he did so and the EJ's assessment appear from the discussion hereunder. The EJ upheld his submission and struck the respondents' defence out save in one minor particular.

Failure to Exclude Witnesses

3. In reaching her decision to strike out the EJ had regard to a number of factors. One of those was that the witnesses for the Appellants sat in the Tribunal room during the evidence of the claimant and during the evidence of Ms Lucey, the first witness for the Appellants. Scottish practice is that witnesses should remain outside the Tribunal room unless they are permitted to be present by the Employment Tribunal (ET) (**Employment Tribunal Practice in Scotland** 3rd ed. para. 8-176; MacPhail Sheriff Court Practice para. 16.52; **Gerrard v R W Sieves Ltd** 2003 SC 475; Evidence (Scotland) Act 1840 s. 3). The practice may be varied in suitable circumstances as where an expert is to give evidence or in such circumstances as may be agreed.

4. In this connection my attention was drawn to rule 43 which provides, so far as relevant –

> 43.… The Tribunal may exclude from the hearing any person who is to appear as a witness in the proceedings until such time as that person gives evidence if it considers it in the interests of justice to do so.

5. It was submitted to me that the wording of Rule 43 assumes that a witness is entitled to be present in the Tribunal room. If that were not the case there would be no need to apply to exclude a witness until his or her evidence was completed. It was submitted that the de quo of the power to exclude a witness is that he or she is otherwise entitled to be present. I was advised that the practice of ETs in England and Wales is to permit witnesses to be present unless excluded. That practice is aligned with the wording of the Rules.

6. This power to exclude is exercisable by the Tribunal. Thus, if a party wishes to exclude a witness who is or who it is anticipated may be in the Tribunal room, a motion may be made to the EJ. The EJ may accede to the motion if it is thought that it is in the interests of

justice. From time to time it may be thought that a witness will be influenced in the giving of their evidence by the presence of another witness in the Tribunal room. Likewise, a witness may be influenced by hearing evidence given by another witness. This issue will be at its most acute when the witnesses in question speak to the same matters and where there are issues of credibility to resolve. The risk of contamination may be anticipated where the parties' legal representatives have notice e.g. in the form of witness statements, of the risk of contradiction. I should also note that the ET may on its own motion exclude a witness if it considers that it is in the interests of justice.

7. It is of course open to a party to decide that it would be desirable if its witnesses were not present in the Tribunal room. Such a decision may be made on advice from the party's legal representative. If there is a risk that the testimony of a witness will affect the testimony of another witness then it will usually be in the party's interest to dispel any suggestion that his or her evidence has been influenced by another witness. Such a choice is a matter for the party in question and is not prescribed by Rule 43.

8. In this case Ms Lucey, the Appellants' representative, was present in the Tribunal room with two other witnesses to fact during the evidence of the claimant. The Appellant's legal representative did not follow Scottish practice and keep the two witnesses who were not present in a representative capacity in a witness room. The legal representative was a barrister who had passed her bar exams but not completed her pupillage. She was employed by a company that supplied a variety of services including representation at Employment Tribunals. She was aware of Scottish practice. She indicated that she forgot to ask the witnesses to remain in the witness room outside the Tribunal room. Had she remembered she would have done. Her lapse of memory may be explained by the fact that she did not appear in Scotland very often. Most of her cases were in England and Wales.

9. Ms Lucey was of course entitled to be present during the claimant's evidence. Ms Lucey represented the Appellants. Ms Lucey was entitled to be present in the Tribunal room so as to give instructions as necessary. In this situation she was bound to hear the claimant's evidence.

10. In assessing matters, I remind myself that the Employment Tribunal is a creature of statute and as a consequence the rules that govern its practice and procedure are to be found in statute and the regulations made thereunder. In this case it was agreed that the Rules regulate the conduct of the hearing. If it can be shown that practice deviates from the Rules then I consider that I must have regard to the Rules in determining whether the conduct complained of is objectively unreasonable. In this case no party made an application to exclude the appellants' witnesses, nor were they excluded by the ET on its own motion.

11. In my opinion it is not possible to characterise a state of affairs that was compliant with Rule 43 as "unreasonable" for the purposes of Rule 37(1)(b). In assessing the reasonableness of a party's conduct weight must be attached to fact that the conduct complied with Rule 43 even if it did not comply with Scottish practice. In these circumstances I do not consider the presence of the witnesses in the Tribunal room during the claimant's evidence or during Ms Lucey's evidence to be relevant to a Rule 37 strike out. No weight should have been attached to that factor.

12. I acknowledge that there are arguments in favour of the practice that has been adopted in Scotland as there no doubt are arguments in favour of the practice followed in England and Wales. I do not consider that these arguments are relevant to the issue I have to decide. I also acknowledge that the extensive use of witness statements in England and Wales in

contrast to the preference for oral testimony in Scotland is part of the larger background. I do not consider however these issues to be relevant to the question of the reasonableness of the Appellants' conduct for the purpose of rule 37(1)(b).

13. In light of that conclusion I do not find it necessary to review the submissions made about the state of the Appellant's legal representative's qualifications and their bearing on her culpability. In the circumstances of this case her qualifications are as irrelevant to the issue in hand as her forgetfulness on the day of the hearing.

Failure to Heed a Warning

14. Another factor relevant to the EJ's decision was her conclusion that Ms Lucey, the first witness for the Appellants, breached a warning not to discuss her evidence with other persons. The EJ indicates that this was the main factor in her decision (paragraph 63). The matter arose in this way.

15. The claimant was put on oath and gave evidence during the morning session. There was a break in her evidence and the EJ warned her not to discuss her evidence with any person. The claimant overheard Ms Lucey discussing the evidence with the other witnesses during the morning break. I will return to the contents of the discussion later in the Judgement. The claimant resumed her evidence and there was then a lunch break

16. Ms Lucey was put on oath and began her evidence in the afternoon. There was thereafter a break in her evidence. The EJ did not warn her that she should not discuss her evidence with any other person. During an afternoon adjournment the claimant again overheard Ms Lucey discussing the case with the two other witnesses in a witness room.

17. The following day the claimant's representative founded on the discussions that had taken place as a basis for strike out. At this stage I will focus on whether the EJ was entitled to accept that these discussions represented "unreasonable" conduct.

18. The EJ thought that the witnesses for the Appellants should have appreciated that they should not speak to one another about the evidence since the claimant had been warned not to discuss her evidence at the mid-morning break. Ms Lucey and the two other witnesses had been present in the Tribunal room during the morning session and had heard this warning administered to the claimant. The EJ took the view that the witnesses should have appreciated from the warning given to the claimant that Ms Lucey was subject to the same restriction. The witnesses stated that they had not heard the warning given in the morning or had not appreciated its meaning.

19. I accept that Rule 37 is wide enough to cover conduct of this description. It seems to me that if a witness contrary to judicial admonition discusses his or her evidence with another witness, that failure to heed the EJ may be described as the "manner" in which the respondent has conducted proceedings. I accept that this may be conduct which can be characterised as unreasonable for the purposes of Rule 37 In this case Ms Lucey was the Appellants' representative. Her conduct is therefore capable of being attributed to the Appellants. I should note however that not every witness is the personal responsibility of the party for whom he or she gives evidence.

20. The first issue is whether the Appellants' witnesses should not have discussed the claimant's evidence during the mid-morning break. As I have noted (above) Rule 43 is based on the proposition that a witness is entitled to be present unless excluded. No motion to exclude was made. In this situation Ms Lucey as the Appellant's representative was

entitled to be present and the two other witnesses were also entitled to be present. In that situation I consider it would have been perfectly natural for them to discuss the evidence during the break. Even if the two witnesses other than Ms Lucey had been outside the Tribunal room I see no reason why Ms Lucey should not have been entitled to discuss the evidence during the break. There is no rule that prohibits witnesses discussing evidence. The second issue is whether they were entitled to discuss Ms Lucey's evidence once she began to give her evidence. The EJ did not issue a warning to Ms Lucey that she should not discuss her evidence with any other person In that situation she was in my judgement at liberty to discuss the evidence. I do not think that it is possible to hold that Ms Lucey or the other witnesses should have deduced that if a warning had been given to the claimant that by implication it extended to them. They might reasonably have concluded that if a warning had been given to the claimant but no warning had been issued to Ms Lucey, that they were at liberty to discuss the evidence. It is unrealistic to suppose that witnesses do not discuss their evidence before giving evidence. To my knowledge there is no rule of law that prohibits discussion. If there were in many cases it would be virtually impossible to enforce. In the absence of any direction from the judge, or their legal representative, they cannot in my opinion be blamed for what they did.

21. More generally I would observe that judges are not obliged to give an admonition to a witness during a break in testimony. The judge may have no reason to anticipate that the witness will discuss his or her evidence or the judge may have no reason to think that such a discussion will pose a threat to the truthfulness or reliability of the witness. It is a matter of context. It is a matter of judgement.

22. The primary responsibility for admonishing a witness to refrain from contact with other persons during an adjournment lies with the judge. The reasons for this are obvious. The

judge is usually best placed to assess whether the stricture is necessary or desirable. If the judge's admonition is flouted then the judge can apply sanctions penalising the witness for non-compliance. I accept of course that a legal representative may invite the judge to direct a witness to refrain from discussing his or her evidence. If so advised the judge may do so.

23. It was suggested that the Appellants' legal representative should have warned Ms Lucey not to speak with the other witnesses or indeed anyone else, during the break. I accept that the Appellants' legal representative could if she had thought it necessary have advised Ms Lucey not to speak to the other witnesses. But I have no information to suggest that she thought it was necessary nor on the information available to me do I consider that her failure to do so raises an issue of "conduct" under Rule 37.

24. The Appellant's legal representative was not with Ms Lucey and the two witnesses during the breaks in evidence and did not know that they were discussing the evidence. I do not consider that it was her responsibility to warn Ms Lucey not to discuss her evidence. In that situation there is no room for the finding that the Appellants acted unreasonably because of the failure of their legal representative.

25. In conclusion I see no basis for holding that Ms Lucey or the two other witnesses for the Appellant's behaved unreasonably. If Ms Lucey had ignored an admonition from the EJ matters would have been different. I can see no basis for holding that the Appellants' legal representative acted unreasonably.

The Fairness of the Hearing.

26. If there was evidence that Ms Lucey or the two witnesses altered their evidence, then the issue of perjury arises. I accept that if the EJ became aware of discussions between witnesses that inferred perjury or subornation of perjury then the EJ would be entitled to strike out the claim or defence of the party responsible for that state of affairs. I also accept that such a power would be exercisable in circumstances falling short of perjury where for example one witness exerted pressure on another witness to give evidence in a partisan way. The EJ may be satisfied that a fair trial is no longer possible in a wide variety of circumstances. This power would appear to arise independently of any personal fault on the part of the claimant or respondent (rule 37(e)). The EJ simply requires to be satisfied that a fair trial is not possible. The EJ concluded that in light of the issues that arose in this case that the witnesses for the Appellants were no longer "impartial" (paragraph 69). The question of the fairness of the hearing therefore arises (see article 6 of the ECHR).

27. It is evident from the Judgement that the claimant's legal representative did not appreciate that the Appellants witnesses as well as Ms Lucey were in the Tribunal room. The other two witnesses were the Administration Manager and Financial Director of the respondents. The underlying issue is whether their presence created a risk that Ms Lucey's evidence and, in course of time, their own evidence would be contaminated. In other words, would the interests of justice have been best served by their exclusion?

28. The answer to that question cannot be decided in the abstract. It is necessary to examine the facts and circumstances. In this case there was a sharp conflict between the evidence of the claimant who testified that Ms Lucey had agreed to pay her more and Ms Lucey who denied any such agreement. The claimant gave evidence of meetings with Ms Lucey when they had shaken hands on an agreement. The claimant in support of the motion to strike out relied on a discussion between Ms Lucey and the two witnesses during the break in the morning

session. Ms Lucey and the two witnesses did not dispute the claimant's evidence about the contents of their conversations.

29. The EJ records (paragraph 10) that Ms Lucey told the witnesses that she had not touched the claimant and had not shaken hands with her. The Judgement goes on –

> **"The claimant overheard (the witnesses) agreeing with (Ms Lucey) and stating that they would say the same."**

30. The issue at this stage in the discussion was whether Ms Lucey had agreed to a wage increase for the claimant and shaken hands on such an agreement. The other witnesses were heard saying that "they would say the same thing". They were therefore in agreement with Ms Lucey that no wage improvement had been agreed. I am not clear whether they were also agreeing that Ms Lucey had never shaken hands with the claimant.

31. The claimant then overheard the witnesses discussing a gentleman called Chris Bainbridge who it would seem worked at the Appellants' establishment. He had gone on sick leave. His absence affected the claimant's work levels and was therefore relevant to the legitimacy of her request for a wage increase. This issue was raised by one of the witnesses who had noticed that the claimant had omitted to mention Mr Bainbridge's return to work.

32. Finally, the claimant overheard a discussion about whether Ms Lucy had sworn or not in a Disciplinary Hearing (paragraph 22).

33. I do not detect any hint from what was overheard in the witness room that the two witnesses intended to give perjured testimony or that they intended to change their evidence or that this discussion infers that the evidence of the two witnesses would be unreliable in some other way. The EJ accepted the witnesses were truthful (paragraph 26). As to Mr

Bainbridge, if he did return to work then reminding Ms Lucey that he had done so would presumably be helpful. I do not know whether Ms Lucey did refer to Mr Bainbridge but I do not see how this element of the discussion was unfair to the claimant. The issue as to whether Ms Lucey had sworn or not in a disciplinary hearing is inconsequential.

34. The claimant was unable to supply much detail of what she overheard during the afternoon break in evidence. The claimant and the three witnesses all accepted that during the afternoon break there had been a discussion of the claimant's working hours (paragraphs 23 and 24). As I have held in the absence of an admonition from the EJ I am unable to say that there was anything unreasonable about this discussion. Nor am I able to say that what was overheard should be regarded as giving rise to any concern.

35. The Appellants also argued that the EJ's conduct of the hearing was susceptible to criticism. The Appellants were critical of the EJ's warning that she was considering referring the papers to Crown Office. The Appellants advised that the warning was given during evidence and also during the hearing that took place to determine the strike out motion. I do not propose to say anything about this matter. It is open to an EJ to refer the papers to Crown Office where it is thought that perjury may have been committed. This was a case where the evidence of the claimant and the evidence of Ms Lucey could not be reconciled. The EJ evidently thought that it was possible one of them were lying on oath. In giving a similar warning during the hearing about what had occurred during the adjournments the EJ was no doubt anxious to ensure that the parties understood how serious the issue was. The Appellants complained that her approach was heavy handed and placed unnecessary pressure on witnesses. In light of my findings above this matter does not require determination. I would simply observe that it is within the power of an EJ to refer a case to the Crown Office if appropriate. I accept that it is a power that should be used sparingly

having regard to the factors mentioned by the Appellants but I have no indication in this case that the threat was inappropriate or productive of injustice. .

36. In conclusion I should say that I was referred to **Bolch v Chipman** [2004] IRLR 140 and have taken into account its guidance in considering the matters referred to above. I was also referred to **Chidzoy v BBC** UKEAT/0097/17. This case is far removed on its facts from the present case and was of little assistance.

Postscript

37. I am quick to acknowledge how difficult this case must have been for the EJ. Nothing I have said should be taken as criticism of her. The arguments placed before me were not placed before the EJ and the she did not have the benefit of a leisurely scrutiny of the law and facts.

Disposal

38. I consider that the EJ was not entitled to strike this claim out. The appeal is accordingly allowed. I shall remit the matter back to the ET. I consider that it would be better if the case was allocated to a different EJ. I shall leave it to the EJ appointed to take charge of procedure to decide whether a new hearing is necessary or whether the hearing can proceed under reference to notes and/or agreed evidence