Neutral Citation Number: [2022] EAT 3

Case No: EA-2019-001147-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 19 July 2021

Before :

THE HONOURABLE MRS JUSTICE STACEY DBE

- -

Between :

MR HAZIZ RAHIM **Appellant**

- and -

THE COMMISSIONER OF POLICE OF THE METROPOLIS **Respondent**

- -
- -

Mr H Rahim the **Appellant in person**

Ms S Keogh (instructed by Directorate of Legal Services, Metropolitan Police Service) for the **Respondent**

Hearing date: 15 July 2021

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

There was no error by the tribunal in not allowing the appellant/claimant to appear by video link or telephone from abroad at the open preliminary hearing as it does not appear that an application was made to request it.

THE HONOURABLE MRS JUSTICE STACEY:

1. This matter comes before the appeal tribunal on the appellant's appeal from the judgment of Employment Judge Hildebrand (sitting alone) at London Central Employment Tribunal which was sent to the parties on 30 October 2019. The appellant (who I shall refer to as "the claimant") was the claimant before the tribunal. The employment judge struck out the claimant's claims of race and religion or belief discrimination as being out of time and ordered that it would not “be appropriate for the claimant to give evidence via video link from Afghanistan".

2. Permission to appeal was granted, in part, at an oral hearing under rule 3(10) of the **EAT Rules of Procedure** before HHJ James Tayler on 3 December 2020 when the claimant was very ably represented by Mr Stephen Lennard of counsel under the Employment Law Appeal Advice Scheme (ELAAS) on the following, limited, grounds:

> "The failure to permit and/or make arrangements for the Claimant to attend the Preliminary Hearing on 23 October 2019 by video link rendered the hearing unfair as it prevented the Appellant from giving, or limited his opportunity to give, evidence and/or instructions to Counsel to persuade the Employment Judge that the allegations of failure to pay overtime were allegation[s] of discrimination (with the consequence that the claim was less substantially out of time than was determined to be the case by the Employment Judge) and/or that the claim should be amended to add matters such as the refusal of permission to withdraw his resignation as an act of discrimination that could be relied upon to argue that the claim was submitted within three months of the last of a number of acts that constituted conduct extending over a period of time up to October 2018 and/or to support an argument that it was just and equitable to apply a time limit in excess of 3 months to the claims of discrimination."

In short that the claimant was unable to participate effectively in his hearing on 23 October 2019, which rendered the hearing unfair and non-article 6 compliant as Mr Rahim has ably explained to me today.

3. The other grounds of appeal were dismissed as there was no challenge to the 3(10) judgment of HHJ Tayler.

The Background

4. The claimant served as a probationer police constable in the Metropolitan Police Force from 30 August 2016 until his resignation effective on 20 October 2018. He brought complaints of unfair dismissal, unpaid overtime and for discrimination on grounds of religion or belief and also on grounds of race. In its ET3, the respondent raised jurisdictional and limitation issues, asserting that the claim had been lodged outside the primary time limit of three months and applied to strike out the complaint of discrimination on that basis.

5. The complaints of unfair dismissal and unlawful deduction of wages, which it was acknowledged were outside the scope and jurisdiction of the employment tribunal for police officers were withdrawn at a closed preliminary hearing on 19 September 2019, also before Employment Judge Hildebrand.

6. At the 19 September 2019 hearing Employment Judge Hildebrand listed the strike out application of the discrimination complaint on limitation grounds to be heard on 23 October 2019 at an open preliminary hearing. The date of 23 October had previously been fixed and identified as the first day of a three day substantive hearing, but on Employment Judge Hildebrand's 19 September 2019 order, the substantive hearing listed for 23 October 2019 was substituted for a three-hour preliminary hearing instead.

7. On 7 October 2019, the claimant's solicitor, Ms Anwar of Winston Rose Solicitors, applied for a postponement of 23 October hearing for "at least one or two weeks" on grounds that her client was abroad and they were having difficulty in obtaining proper instructions from him in relation to his statement and would need further time. The request was refused, but the parties were given more time to exchange witness statements and the timetable for preparation prior to the hearing was extended by Employment Judge Glennie on 11 October 2019, which he considered would enable the hearing date to be retained. One can see why he did that, because the concern expressed by the claimant's solicitors was that they needed a little more time to prepare the statement which was duly given.

8. There has been no appeal from the decision made on 11 October 2019 refusing the postponement application. However, on 13 October 2019 the claimant wrote directly to the employment tribunal stating that he:

> "… would like to be excused from hearing until March 2020. Can you please advise. See attached statement from myself and my employer to excuse me from hearing."

He attached a handwritten letter dated 20 September 2019 explaining that he was working for NATO Special Forces, for a British private military company in Afghanistan. He explained the importance of his role in Afghanistan at that time and the difficulty it would cause his employer if he had to give up the job to return to the UK for the tribunal hearing. He stated:

> "I have expressed everything in the files [if they] are read thoroughly then I don't think there would be a need for me to be there. I am available on video link at any time."

9. He enclosed a letter from his employer, TBW Global Limited, dated 15 September 2019 which reinforced the operational necessity of the claimant remaining in Afghanistan during his important work, which requested in the unique circumstances (or at least circumstances that they said were unique) that he be able to provide his evidence by video link instead of returning to the UK.

10. Ms Keogh for the respondent stated that the 15 September letter was also before the employment tribunal on 19 September when she says that the possibility of the claimant not attending the substantive hearing was discussed, but there is no record of that discussion, nor indeed a record of any decision about such a discussion (if it had taken place) in the case management summary produced by the employment judge after the hearing. Ms Keogh said that there was no request for the 23 October hearing that had been converted to a preliminary hearing to be by video link. The case management order is silent on the matter which indicates that no such request was made. The claimant was not at the hearing on 19 September and there is no note from his then representative as to what took place.

11. The claimant sent a further email on 14 October (the day after his 13 October letter) repeating his request and resending his email of the previous day. He did not receive a substantive reply to his emails of 13 and 14 October and it is not clear to me if either of those emails were before Employment

Judge Hildebrand at the hearing on 23 October. Neither letter was sent to the respondent, which is a breach of rule 30(2) by the claimant. I will say more about that in a moment.

12. At the hearing on 23 October the claimant was not present. He was represented by Ms Angela Delbourgo and the respondent was represented, as before, by Ms Keogh who also represented the respondent today. It would seem from the judgment that no renewed application for a postponement was made at that hearing, certainly no order is made, and Ms Keogh says that no application was made and it proceeded in the claimant's absence.

13. The employment judge said this:

> "2. … Despite the letter from the Claimant's employer dated 15 September 2019, unusually seeking leave on behalf of the Claimant to give evidence by video link, I had anticipated that since this date was fixed for the final hearing the Claimant would be in a position to attend for this hearing. His clarification would have been of assistance. I do not see how given the law in relation to the burden of proof and the complexity of the history covered by this case it could be practicable for this case to be heard without the oral evidence, capable of challenge in cross-examination, of the Claimant."

14. The judge then considered the respondent's strike out application. Since the appeal has been refused in relation to the strike out application itself it is not necessary to set out the tribunal's reasoning for it, although I note that if this appeal succeeds on the permitted grounds, the strike out decision must be set aside and re-heard, but the freestanding challenge to the strike out decision is not being proceeded with.

15. At the end of the strike out decision the employment judge stated that, "the Claimant has expressed a clear wish not to attend the hearing" (paragraph 32) which he considered to be an:

> "32. … unusual aspect [which] must at the least negate any benefit normally accruing to the claimant under the balance of prejudice heading."

To conclude that there was no basis for him to say that it would be just and equitable to extend time to consider the claim that he considered to have been lodged out of time and the strike out application was successful.

16. Before me, the claimant appeared as a litigant in person but very sensibly relied on the excellent skeleton argument prepared by Ms Courtney Step-Marsden (who had been hitherto acting under the

ELAAS scheme) which raised three points. Once again, I would like to pay tribute to the written work conducted by Ms Step-Marsden in anticipation of this hearing.

17. Ms Courtney Step-Marsden's three points were as follows. Firstly, that the claimant had made an application for the hearing of 23 October 2019 to be postponed, or in the alternative, to be provided with a video link to attend. The tribunal erred in that it did not address this application, thus incorrectly characterising the claimant as expressing a "clear wish not to attend the hearing", as I have recorded above. Secondly, that even if an application had not been made, the tribunal should have considered a postponement, an adjournment or a video hearing on its own initiative under the principles of natural justice and a right to a fair hearing. The third point made was that, had the application been properly considered, the tribunal would have considered it appropriate to postpone the hearing or provide a video link.

18. In separate submissions prepared by the claimant himself, he addressed the substantive merits of his case and his arguments as to why the claim should not have been struck out and, if this matter is allowed to proceed to a full hearing, why his claim is likely to be successful.

19. Ms Keogh for the respondent argues that the appeal was misconceived as no application was ever made for the claimant to attend the preliminary hearing on 23 October 2019 by video link. She seeks to distinguish between the preliminary hearing and a possible future substantive hearing which in fact would have been academic because of the strike out.

20. Ms Keogh's second point is that the original application to attend via video link was made at the 19 September 2019 hearing when the letter from the employer was discussed and no appeal has been made in respect of that decision.

21. Her third point is that, even if an application had been made, it would not have been unfair to the claimant to refuse to grant such an application in all the circumstances.

22. Her fourth point is that no unfairness arose in any event, as the claimant could and should have provided full instructions to his representatives prior to the hearing or made himself available by telephone for instructions to be taken during the hearing if necessary.

23. Ms Keogh has helpfully produced a note of both the preliminary hearing of 19 September 2019 and also 23 October 2019. The claimant has been unable to accept them as he was not present and there is no criticism of him in this regard, although he could perhaps have asked his lawyers to confirm whether they considered they were accurate, but I accept Ms Keogh, who owes a duty to the court as do her solicitors, that the notes are broadly accurate. It would seem from those notes that the issue of a video link is dealt with cursorily by the judge and somewhat dismissively, apparently stating:

> "It's not practicable to conduct a discrimination case for a claimant on video link. It just doesn't work. It might work for a short period, but when the claimant is going to be cross-examined … if you want to pursue this case he has to come back to the UK to deal with it. If you want to pursue a case he has to make arrangements to attend."

24. To be fair to the judge, the comment was made in September 2019 when none of us had heard of the Coronavirus and no-one had fully explored the scope and possibility of video link hearings and the very satisfactory way in which they can be used, but that is by the by.

25. At the 23 October 2019 hearing it appears that the claimant's counsel raised the issue of the claimant being excused from giving evidence or giving evidence via video link at a substantive hearing, referring to the letter from his employer. I accept the point that Mr Rahim makes and which was picked up in the rule 3(10) hearing, that the wording of the order by the employment judge is not entirely clear and it would, of course, have been much more helpful if it had been. But it seems to me on the basis of the submissions, the correspondence and all that I have read about this case, that the only plausible interpretation of paragraph 2 of the judge's order is that the reference to giving evidence and appearing by video link can only have referred to some future hearing and did not apply to the hearing of 23 October itself. Unfortunately the judge did not spell that out, but that seems to me to be the only possible explanation and interpretation of the decision.

26. Turning to the hearing on 19 September 2019, there is nothing in the record of the case management discussion to record that the judge had considered or made an order in relation to the claimant's application for a postponement, or for his evidence to be given via video link. An observation made during the course of the hearing whilst engaging with claimant's counsel does not amount to a

tribunal order. It simply does not appear to have been dealt with or reflected in the case management summary as an order and, in the absence of such an order, I have to conclude that none was made. That is not to dispute Ms Keogh's account but to endorse the importance of tribunals recording in writing the orders that they have made. The claimant's solicitor's application of 7 October 2019 for a postponement is also indicative of the fact that the application did not reach a concluded outcome (in other words was not dealt with) at the 19 September 2019 hearing.

27. Ms Keogh has referred to the failure of the claimant in his two emails of 13 and 14 October 2019 to copy in the respondents in accordance with rule 32. That rule does not, however, as I read it, set out any automatic consequences of non-compliance. Although the rule (and reference also rule 6 and rule 92) is mandatory and uses the word "shall" and although the appellate courts have often emphasised the importance of the rules, see for example **Jones v Secretary of State for Business, Innovation and Science** [2017] 6 WLUK 624 or **Mohamed v Secretary of State for Foreign and Commonwealth Affairs (No.2)** [2010] EWCA Civ 158, there is no automatic sanction. So other than to note non-compliance it seems to me that nothing turns on it on the facts of this case. The tribunal has a number of powers it can make in response to non-compliance with rule 32, but in this case the tribunal does not seem to have exercised any of those powers. All that can be said is that the tribunal did not deal with it prior to the 23 October 2019 hearing. It is not, interestingly, referred to by the claimant's representative and it is not even clear if she knew of it or if Mr Rahim had even informed his solicitors about it.

28. Turning to my analysis and conclusions arising from the narrative set out above and the arguments of the respective parties, I find that the solicitor's letter of 7 October 2019 was not an application for evidence to be given via video link, it was for a postponement and on different grounds to the reasons later advanced by Mr Rahim himself.

29. Even if I give the claimant the benefit of the doubt and if I accept that the 13 and 14 October 2019 emails are a clear request for the preliminary hearing to be conducted by video link, and if I ignore the non-service on the respondent and the fact that the letter was from the claimant when he had

solicitors on the record, even with all of those significant assumptions, the difficulty with Mr Rahim's letters of 13 and 14 October 2019 is they do not make a clear request. He effectively puts forward three alternatives: firstly, to "hear the case in my absence. I think you have all the information"; secondly, "if not or as an alternative" (and not even perhaps in the alternative) "how about postponing but it will be for a very long time"; and thirdly (again it is not clear if it is as an alternative or just a different option from the menu) "can I have it via video link?"

30. But even if I ignore the ambiguity after having assumed all other prior matters in the claimant's favour and if it was a matter that had not but should have been dealt with prior to the hearing, the reason why this appeal cannot succeed is that it was up to the claimant's representative to raise it at the hearing and they do not appear to have done so.

31. If there is an outstanding application that has not been addressed, it is incumbent on the parties to address it with the tribunal and to make sure that they receive a decision on it. But instead, no mention appears to have been made of it. No application was made by Ms Delbourgo for either a postponement of the 23 October 2019 hearing or for a video link or a short adjournment perhaps while the video link was set up (assuming the wherewithal at that time). It was the duty of the claimant's representative to raise it at the hearing if there was an outstanding application that the tribunal had not dealt with. I do not say that as necessarily being a criticism of the claimant's legal team because if Mr Rahim had not informed his solicitors of his letters of 13 and 14 October 2019 or made his instructions clear, the representative on the day may well have had no idea of them.

32. Procedural rigour is important in tribunal proceedings. It was bound to be a muddle when a party and his representative were both corresponding with the Tribunal independently. There should be one voice: either a litigant in person using his or her own voice, or instructing solicitors, or employment advisers to use their voice, so that there can be clarity and the parties can understand what is being requested by whom and the tribunal will know what is being sought and can make appropriate orders.

33. In this case the manner in which the claimant conducted the litigation was confusing and it would seem that everybody proceeded on the assumption that the 23 October 2019 hearing could be conducted in the claimant's absence, but not any future substantive hearing. Given the confusion around the history, it is not surprising that that assumption had been reached, whether it was correct or incorrect.

34. It follows that the discussion concerning giving evidence via video or not returning to the UK for the hearing was, as Ms Keogh submits, a reference to a possible future hearing of substantive issues. That would also explain the judge's reference to the factual complexity and burden of proof, which was not intended to refer to the 23 October 2019 hearing itself. Had the claimant and his lawyer's position been that he was at a disadvantage and would not receive a fair hearing if he was not able to participate at the 23 October 2019 preliminary hearing, they failed to communicate that fact to the tribunal and for that reason, it would seem, the tribunal did not deal with it.

35. The reference, therefore, to not giving video evidence from Afghanistan was academic following the success of the strike out application because, as a consequence of the strike out application, there will be no full hearing. I accept that the order is somewhat confusing. I also accept that the judge appears to have been a little testy. As to the claimant’s submission that had he been able to participate via video link that there would have been a different outcome at the preliminary hearing, I consider it to be possible (but not much more than that). He submits that he could have given instructions as to why the allegations amounted to a continuing act and a course of conduct that culminated in his decision to resign and were therefore not out of time, but that could and should have been done in advance of the hearing. He also stated that he would have had the opportunity to give evidence and be cross-examined on matters relevant to the extension of time, if it had been found that the claim was in fact lodged outside the applicable time limits, which was a better point- but again there should have been a witness statement served in advance setting out such matters. He submitted that none of that happened because he was not able to be present or able to participate via video link at the 23 October hearing.

36. But in light of what appears to have been a failure to make the application for the 23 October hearing to take place by video link, it must follow that the appeal must fail and is therefore dismissed. The tribunal cannot be criticised for failing to deal with something that has not been raised, or alerted to them as an outstanding application, on the facts of this case.