Neutral Citation Number: [2021] EWHC 371 (Admin)

Case No: CO/15/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

ON APPEAL UNDER SECTION 11 OF THE TRIBUNALS AND INQUIRIES ACT 1992 FROM THE EMPLOYMENT TRIBUNAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/02/2021

Before:

JOHN HOWLL QC
(SITTING AS A DEPUTY HIGH COURT JUDGE)

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Between:

SHIVA LIMITED **Appellant**

- and –

SHARON BOYD **Respondent**
(One of Her Majesty's Inspectors of Health and Safety)

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- -

Mr Russell Gray, one of its directors, for the **Appellant**
Mr Gordon Menzies (instructed by **Helen Wood, Health and Safety Executive**) for the **Respondent**

Hearing date: 11 February 2021

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Covid 19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts Tribunals Judiciary website. The date and time for hand down is deemed to be 10:00am 24 February 2021.

John Howell QC:

1. These are my reasons for dismissing an appeal brought by Shiva Limited under section 11 of the Tribunals and Inquiries Act 1992 against two decisions of Employment Judge Truscott QC. I dismissed the appeal at the end of the hearing, stating that I would give my reasons later.

2. At the hearing, with my permission, Mr Russell Gray (who is a director of, and the company secretary and the largest shareholder in, the Appellant) made submissions on its behalf. He also relied on a skeleton argument provided for the company by Mr Adam Ohringer. Mr Gordon Menzies appeared on behalf of the Respondent. I am grateful to all of them for their assistance.

BACKGROUND

3. In his first decision, dated November 10 2020, Employment Judge Truscott ("*the Judge*") refused a stay in the appeals brought by the Appellant against two prohibition notices issued by the Respondent under section 22 of the Health and Safety at Work etc. Act 1974 ("*the 1974 Act*") in relation to activities carried on by that company. In the second decision impugned, dated December 9 2020, the Judge refused the Appellant's application for a reconsideration of his order refusing to grant a stay.

4. The two prohibition notices were issued on February 25 2019. They concerned the Appellant's refurbishment work at its building at 55 Bermondsey Street in London. The notices were issued on the basis that the Appellant's activities involved a "risk of serious personal injury" from facade refurbishment work at the site. The first notice prohibited all work associated with a suspended cradle fabricated by the Appellant which gave access to working areas on the facade. The risk it posed was said to be that persons were liable to fall a distance causing personal injury or to be struck by a work platform in the event of a collapse of the structure. The second notice prohibited the raising or lowering of the work platform and the assembly and disassembly of the support structure from the roof. The risks posed were said to be that "working close to an unprotected edge and on or about a cantilevered support frame may result in falls likely to cause death or serious injury".

5. The Appellant decided to appeal to the Employment Tribunal against the two prohibition notices under section 24 of the 1974 Act. Such an appeal does not automatically suspend the operation of any such notice. Its operation will only be suspended if the Tribunal so directs on the appellant's application. On such an appeal, however, an appellant bears no onus of proof: it is for the respondent to show on the balance of probability *inter alia* that there was a risk of serious personal injury: see ***Readmans Limited v Leeds City Council*** [1992] COD 419. The Tribunal is entitled on such an appeal to have regard to any evidence, whether or not it was available to the inspector who issued the notice, which assists it in ascertaining what the risk (if any) in fact was: see ***HM Inspector of Health and Safety v Chevron North Sea Limited*** [2018] UKSC 7, [2018] 1 WLR 964.

6. A preliminary hearing was held by the Employment Tribunal on January 30 2020. The hearing of the appeals was then listed for five days starting on February 22 2021.

7. On August 5 2020 the Health and Safety Executive notified the Appellant of its intention to issue criminal proceedings for offences against it and Mr Russell Gray, its Managing Director. The potential allegations against the Appellant are that it failed to comply with the prohibition notices and failed to comply with the duties imposed by sections 2(1) and 3(1) of the 1974 Act, provisions which are designed to protect the health, safety and welfare of an employer's workers and the health and safety of others. Mr Gray was also informed that the Executive intended to being a prosecution against him for an offence in connection with the Appellant's failure to discharge its duty under section 3(1) of the 1974 Act. No such prosecutions have yet been begun. But Mr Gray told me that the facts in respect of the appeals to the Employment Tribunal and in any criminal prosecution would essentially be the same.

8. By the time of the hearing before the Judge the Appellant had made substantial voluntary disclosure of documents relating to its work activities, including a method statement, certificate and photographs and it had put forward its version of what happened when the inspector visited its premises. The Respondent had also provided a report by its expert, Mr Rickard, who would not available to give evidence if the scheduled hearing did not go ahead, identifying various deficiencies in what had taken place at the site at the relevant time.

THE DECISIONS THE SUBJECT OF THIS APPEAL

9. The basis of the application for a stay before the Judge was that criminal proceedings were intended that arose out of the same facts as were in issue in the appeals. The Appellant contended that any further steps in its appeals, including disclosure of any evidence that it might wish to adduce to show that there had in fact been no risk of serious personal injury, would prejudice it in relation to the potential criminal proceedings and that, in the circumstances, given the extent of such prejudice and the absence of any prejudice to the Respondent, a stay was justified.

10. The Judge identified the issue on the application as being whether the Appellant had shown that there would be a real risk of substantial prejudice which may lead to injustice if the stay sought was refused.

11. The Judge found that the Appellant had not identified any specific prejudice that it would suffer if the stay was refused. He stated that he was unable to follow the argument that there was material to show there was no risk to health and safety in the appeal, but which would show that there was any such risk in any criminal proceedings. He considered that it was unlikely that the appeal proceedings were being used as a fishing expedition by the Respondent (as had been argued), given the nature of the appeal in the Employment Tribunal and given that, in any event, an inspector has power to require documents to be produced and questions answered under section 20 of the 1974 Act. The Judge considered that the Appellant's case in both proceedings was likely to be that there was no risk to health and safety, so that any positive case that it wanted to make would be exculpatory and that, if it had incriminatory material, it did not need to present it as part of its appeals. There was in any event no real risk of self-incrimination as the Appellant need not present any evidence given that the burden in the appeals was on the Respondent and the Appellant could require the Respondent to prove her case.

12. The Judge also found that not granting the stay would avoid the risk of the "inconsistency" which would occur if a criminal conviction for contravention of a notice were to be followed by cancellation of the prohibition notices by the Tribunal (something which he thought was an "important consideration"), whereas the Employment Tribunal's decision would not bind the Magistrates Court.

13. Had there been a real risk of serious prejudice, however, the Judge would nonetheless have refused a stay. In his view the criminal court would have adequate power to secure fairness by use of its powers under section 78 of Police and Criminal Evidence Act 1984.

APPELLANT'S CASE ON THIS APPEAL

14. The Appellant contends that the Tribunal's decision refusing to stay the appeal proceedings was wrong in law, unfair and in breach of the Appellant's fundamental rights.

15. Mr Gray submitted, adopting the analysis in the skeleton argument, that the decision on the granting of a stay was not a mere case management decision but one engaging the Appellant's fundamental rights. He identified those rights as being the right not to incriminate oneself, the right to silence and the right of the accused to know the case in criminal proceedings it has to meet before disclosing any defence to be made in response. Accordingly, so he submitted, this court's task does not involve it simply reviewing the exercise of the Employment Tribunal's discretion. This court must itself consider whether refusing the stay was fair. Its function is not merely to review the reasonableness of the decision-maker's judgment of what fairness requires: see ***R v Chance ex p Smith*** [1995] BCC 1095 at p1100g and ***R (Osborn) v Parole Board*** [2013] UKSC 61, [2014] AC 1115 ("***Osborn***") at [65].

16. In the Appellant's skeleton that Mr Gray adopted, it was submitted that the question is whether justice requires a stay having regard to any criminal proceedings, taking account of a defendant's right to silence in a criminal case: ***Jefferson v Batcha*** [1979] 1 WLR 898, p904. A risk of prejudice to a defendant in those proceedings will not necessarily be decisive but will lean heavily in favour of a stay: ***Mote v Secretary of State for Work and Pensions*** [2007] EWCA Civ 1324, [2008] CP Rep 13, at [31].

17. Mr Gray further submitted that the Judge's reliance on ***V v C*** [2001] EWCA Civ 1509 and ***Akcine Bendrove Bankas Snoras v Antonov*** [2013] EWHC 131 (Comm) was misplaced. Those cases considered the position where there are overlapping criminal and civil proceedings, whereas, as Mr Gray stated, in the instant case there are potentially overlapping criminal and regulatory proceedings involving the same parties. Different considerations, so he contended, apply in such cases.

18. Mr Gray submitted that in civil proceedings the claimant would be prejudiced by judgment on his claim being delayed if a stay were to be granted, whereas in this case the Respondent suffers no prejudice if a stay is granted as the prohibition notices remain in operation until the appeals are determined. That was something, he submitted, that the Judge failed to recognize.

19. Mr Gray submitted that the fact that Respondent may also be prosecuting authority in any related criminal matter has a further significant consequence that gives rise to the real prejudice which the Appellant would suffer unless the appeals were stayed, one to which again, he submitted, the Judge failed to give proper weight. He accepted that any evidence that the Appellant adduced in the appeals would be largely exculpatory. But the appeals would give the Respondent as a prosecuting authority the opportunity to test the strength of its evidence and arguments and to subject the Appellant's evidence and arguments to scrutiny before embarking on a prosecution. What the Appellant's evidence would do would be to show the factual errors, the technical incapacity, the wild hypotheses, and negligent conduct of this matter by the Respondent, evidence that would be so prejudicial and embarrassing that it was likely that any prosecutor would have to abandon any criminal proceedings. If a stay was not granted, the Appellant would lose the ability to discredit the prosecution, or the defence would be deprived of the effect, that it might otherwise have had if the prosecutor were to be taken by surprise. Further the Respondent would be able to test the strength of the arguments that the Appellant might make in response to any charges. The Respondent would thus be able to test the anticipated criminal charges before she decides how to frame them, enabling her to minimize the number of false assertions that might otherwise be made and to avoid similar embarrassment, thereby prejudicing the defence that could otherwise be mounted by the Appellant in any criminal proceedings.

20. Mr Gray further submitted that the appeals would require the Appellant to advance its defence before the Respondent may embark on a prosecution. But that, he submitted, would be unfair: the person accused in criminal proceedings is entitled to know the case he has to meet before disclosing and making his defence.

21. A number of further complaints were advanced in respect of the Judge's decision. It was alleged that he wrongly placed the onus on the Appellant of showing how the absence of a stay would prejudice it in practical terms, something that it was impossible to do given it had not yet been informed of the criminal case against it. It is also alleged that the Judge failed to recognize or to give proper weight to a number of features of the case: (i) section 78 of the Police and Criminal Justice Act 1984 provided no protection in any event against the Respondent's use of that evidence in her capacity as investigator and prosecutor; (ii) refusing the stay substantially interfered with the Respondent's rights to challenge the Prohibition Notices in the Employment Tribunal; (iii) the refusal of a stay also substantially interfered with Mr Russell Gray's rights, as his position could be jeopardised in the criminal case without him even being party to the Prohibition Notice proceedings; and (iv), by contrast, the Respondent would suffer no prejudice if the Tribunal proceedings were stayed as the Prohibition Notices remained in force and as no application has been made for them to be suspended.

DISCUSSION

(a) The relevant test for a stay in view of criminal proceedings

22. The Judge identified the relevant issue for him as being whether the Appellant had shown that there would be a real risk of substantial prejudice which may lead to injustice if the stay sought was refused. In doing so, and in his consideration of that

issue, he relied on ***V v C*** supra and ***Akcine Bendrove Bankas Snoras v Antonov*** supra.

23. In my judgment the Judge was correct to treat the need to show a real risk of substantial prejudice which may lead to injustice as a requirement that an applicant for a stay pending the determination of any related criminal proceedings must satisfy.

24. As the Privy Council stated in ***Panton v Financial Institutions Services Limited*** [2003] UKPC 8 at [7], "the issue of a stay in civil proceedings when criminal prosecutions arising out of the same events are also pending is a matter of discretion to be exercised by reference to the competing considerations." But it "is a power which has to be exercised with great care and only where there is a real risk of serious prejudice which may lead to injustice": see ***R v Panel on Takeovers and Mergers, ex p Fayed*** [1992] BCC 524, per Neill LJ at p.531e-f, per Steyn LJ at p954c-d (cited with approval in ***A-G of Zambia v Meer Care & Desai & Ors*** [2006] EWCA Civ 390). The Human Rights Act 1998 does not require any material change in that approach: see ***Mote v Secretary of State for Work and Pensions*** supra per Richards LJ (with whom Lloyd LJ and Sir Peter Gibson agreed) supra at [30]-[31].

25. The Appellant contended that the cases establishing that the requirement to show substantial prejudice only considered the position in which there are overlapping criminal and civil proceedings, whereas these were regulatory rather than civil proceedings and that these appeals and the criminal proceedings would involve the same parties. In such cases different considerations apply. Mr Gray suggested that the rationale for the requirement was that the party bringing the proceedings in which the stay was sought had a right to have his case determined which would be prejudiced by delay, whereas here the Appellant was seeking the stay and the Respondent would not be prejudiced by it, as the Prohibition Notices would remain in operation.

26. In my judgment, however, that does not mean that an applicant does not need to show a real risk of some serious prejudice which may lead to injustice if no stay is granted. Unless the party can show such prejudice, there would be no sufficient reason to justify the stay sought. Indeed Mr Gray did not dispute the need for an applicant for a stay to show a real risk of prejudice. Moreover there is, in any event, a public interest in civil proceedings being determined in a reasonable time. Thus, one aspect of the overriding objective of the Employment Tribunals Rules of Procedure (which govern the appeals in this case) is "avoiding delay": see rule 2(d). Ensuring that a case is dealt with expeditiously is likewise part of the overriding objective in civil proceedings generally. Further the longer any proceedings last the longer any defendant or respondent will have them hanging over them and will be at risk of finding it more difficult or costly to present its case. In this case, for example, the Judge was informed that the Respondent's expert was unlikely to be available after the scheduled date for the substantive hearing as he was retiring.

27. There is a further consideration in appeals such as this to which the Judge rightly attached importance. It would not serve the interests of justice for a person to be convicted of contravening any prohibition imposed by a prohibition notice (an offence under section 33(1)(g) of the 1974 Act) only for that notice or that prohibition to be subsequently cancelled by an Employment Tribunal on an appeal on the merits. The public interest to that extent clearly favours an appeal against a prohibition notice being determined before any criminal proceedings alleging such an offence.

28. Of course civil proceedings come in a number of forms of which an appeal to an employment tribunal such as this is one. The type of appeal in this case is no doubt different in some respects from other civil proceedings and other types of appeal: its subject matter is a notice served by a public authority; the onus on the appeal is on the Respondent, and the parties to this appeal may also become the prosecutor and accused in criminal proceedings. But, for the reasons I have given, in my judgment that does not mean that an applicant for a stay need not to show a real risk of substantial prejudice which may lead to injustice, although the particular factors relevant to any appeal and any related criminal proceedings will be relevant when considering whether that requirement is met in any particular case.

(b) This court's role

29. In ***Sarah Jane Hague (One of Her Majesty's Inspectors of Health and Safety) v Rotary Yorkshire Limited*** [2015] EWCA Civ 696, the Court of Appeal considered the scope of an appeal to the High Court from an Employment Tribunal under section 11 of the Tribunals and Inquiries Act 1992 in a case relating to a prohibition notice. Laws LJ stated, at [21], that:

> "The scope of a section 11 appeal is….the same as that of any other statutory appeal on a point of law only. There is no particular magic in the words, "dissatisfied in point of law", the appellant must show that the Employment Tribunal has perpetrated a material legal error, a misconstruction of a relevant statutory provision, a finding of fact not rationally supportable on the evidence or a procedural error leading to unfairness."

30. The Employment Appeal Tribunal has been found to have applied correctly a similar approach on an appeal against the exercise of an employment tribunal's discretion whether or not to grant a stay given related criminal or civil proceedings and to have required an appellant to show in such cases that the employment tribunal's decision was perverse. It was not the function of the appeal tribunal itself to exercise the tribunal's discretion: see e.g. ***Bastick v James Lane (Turf Accountants) Limited*** [1979] ICR 778 per Arnold J at p782a-d; ***Carter v Credit Change Ltd*** [1979] ICR 908 per Stephenson LJ at p918-9; ***Tienaz v Wandsworth London Borough Council*** [2002] EWCA Civ 1040 per Peter Gibson LJ at [20] and [24].

31. That approach was reasserted by the Court of Appeal in ***O'Cathail v Transport for London*** [2013] EWCA Civ 21, [2013] ICR 614 when considering appeals to the Employment Appeal Tribunal from an employment tribunal's decision on whether or not to grant an adjournment. In that case the Employment Appeal Tribunal had determined for itself whether the decision refusing an adjournment was fair (reflecting the approach adopted by the Court of Appeal on an appeal from the High Court in ***Terluk v Berezovsky*** [2010] EWCA Civ 1345). As Mummery LJ stated (in a judgment with which both Etherton and McFarlane LJJ agreed):

> "43. … That case is distinguishable on the ground that it was not a decision on the wide management powers of the employment tribunal or on the more limited appellate

> jurisdiction of the Employment Appeal Tribunal, as compared with appeals under the CPR ….
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> 44. The crucial point of difference from *Terluk's* case is that decisions of the employment tribunal can only be appealed on questions of law, whereas under the CPR the appeal is normally by way of review and the decision of a lower court can be set aside, if it is wrong, or if it is unjust by reason of a serious procedural or other irregularity in the proceedings. In relation to case management the employment tribunal has exceptionally wide powers of managing cases brought by and against parties who are often without the benefit of legal representation. The tribunal's decisions can only be questioned for error of law. A question of law only arises in relation to their exercise, when there is an error of legal principle in the approach or perversity in the outcome. ….
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> 46. … the Employment Appeal Tribunal's application of the *Terluk* approach led it into substituting its own decision on the exercise of the discretion for that of the employment tribunal. That was an error of law on its part."

32. Mr Gray submitted that such an approach cannot stand with the decision of the Supreme Court in ***Osborn*** supra. He also sought support for that approach from a decision of the Divisional Court in ***R v Chance*** supra in which the court itself determined whether a stay was required, but in fact it only did soon the basis of an agreement between the parties to that case on the approach to be adopted.

33. The issue in ***Osborn*** was whether a fair hearing before the Parole Board required an oral hearing in the circumstances of the cases before the court. Giving the judgment of the Court, Lord Reed stated (at [65]) that:

> "The first matter concerns the role of the court when considering whether a fair procedure was followed by a decision-making body such as the board. In the case of the appellant Osborn, Langstaff J [2010] EWHC 580 at [38] refused the application for judicial review on the ground that "the reasons given for refusal [to hold an oral hearing] are not irrational, unlawful nor wholly unreasonable". In the case of the appellant Reilly, the Court of Appeal in Northern Ireland stated [2012] NI 38, para 42: "Ultimately the question whether procedural fairness requires their deliberations to include an oral hearing must be a matter of judgment for the Parole Board." These dicta might be read as suggesting that the question whether procedural fairness requires an oral hearing is a matter of judgment for the board, reviewable by the court only on Wednesbury grounds: see *Associated Provincial Picture Houses Ltd v Wednesbury Coprn* [1948] 1 KB 223. That is not correct. The court must determine for itself whether a fair procedure was followed: *Gillies v Secretary of State for Work and Pensions* [2006] 1 WLR 781, para 6, per Lord Hope

> of Craighead. Its function is not merely to review the reasonableness of the decision-maker's judgment of what fairness required."

34. Mr Gray submitted that it follows that the court must determine for itself in this case whether or not fairness requires a stay to be granted. Effectively, therefore, he contends that the cases to which I have referred should not be followed in the light of the decision of the Supreme Court in ***Osborn***.

35. Mr Menzies submitted that there was a difference between the test to be applied in a claim for judicial review (such as ***Osborn***) and one on an appeal on a point of law (such as this). The approach in the latter type of case should reflect that of the Court of Appeal in ***O'Cathail v Transport for London*** supra. In my judgment there are two difficulties in treating that feature as a basis for distinguishing ***Osborn***. First an appeal to the Employment Appeal Tribunal is "on any question of law arising from any decision, or arising in any proceedings before an employment tribunal". The issue when a decision is impugned on judicial review is whether or not it is lawful. In my judgment there is no good reason, therefore, why there should be any distinction between the test which the Employment Appeal Tribunal and a court on judicial review should apply in determining whether any decision impugned was unlawful on the basis that it was unfair. Secondly, and more significantly, Mummery LJ attached significance to the fact that an appeal to the Employment Appeal Tribunal was on a question of law (rather than under the CPR) as justifying the approach it should adopt which he endorsed. The difficulty in relying on that to distinguish ***Osborn*** is that the decision of the Appellate Committee in ***Gillies v the Secretary of State for Work and Pensions***, on which Lord Reed relied for the proposition that "the court must determine for itself whether a fair procedure was followed", itself concerned the approach to be adopted on an appeal from a tribunal on the ground that the decision of the tribunal was erroneous in point of law: see [2006] UKHL 2, [2006] 1 WLR 781, per Lord Hope at [4].

36. These two points, however, may already have been apparent to the Court of Appeal in ***O'Cathail v Transport for London***. It appears that that court was referred to ***Gillies v Secretary of State for Work and Pensions*** in the skeleton arguments it received and Mummery LJ himself referred to the decision of the Court of Appeal in ***Osborn*** in which it was common ground that, on the application for judicial review, the question of fairness was ultimately one of law for the court: see ***R (Osborn) v Parole Board*** [2010] EWCA Civ 1409 at [39], [57]-[58].

37. But, even if the fact that this is an appeal against the Employment Tribunal's decision only on a point of law does not of itself justify a different approach from that which the court will adopt on a claim for judicial review when a decision is impugned on the ground of procedural fairness, it does not necessarily follow, as Mr Gray submitted, that it for the court on an appeal on a point of law simply to decide for itself whether a tribunal reached the right decision on an application for an adjournment or stay.

38. I note that, in ***Leeks v Norfolk and Norwich University Hospitals NHS Foundation Trust*** (2018) UKEAT/50/16, [2018] ICR 1257, the Employment Appeal Tribunal rejected (at [65]-[82]) the contention that it should adopt a different approach to appeals in respect of adjournment decisions in the light of the decision of the Supreme Court in ***Osborn*** than it adopts in respect of any other case management decision.

39. In my judgment the mere fact that a decision on an application for an adjournment or stay engages the case management powers of a tribunal does not of itself necessarily relieve the court of any responsibility to determine for itself whether a fair procedure has been followed or what fairness required in the circumstances. That would be to depart from what the Appellate Committee decided in ***Gillies*** and the Supreme Court decided in ***Osborn***. But, in considering what this court's role is on an appeal on a point of law, it is necessary to consider both the nature of the issue which the tribunal may have had to consider and the factual basis on which the court must determine any such appeal.

40. It is important to note the type of unfairness alleged in cases such as ***Osborne*** and ***Gillies***. In both the issue was whether there was a breach of the rules of natural justice. In ***Osborn*** the question was whether fairness required an oral hearing. In ***Gillies*** the question was whether a member of a tribunal was apparently biased. In each, as Lord Hope put it in ***Gillies*** at [6],

> "the question... requires a correct application of the legal test to the decided facts…there can only be one correct answer to the question…so to answer the question incorrectly is an error of law. If [so] it must follow that there was an error of law which was open to correction by the appellate court."

By contrast decisions on adjournments and stays involve (as Mummery LJ noted) the exercise of a case management discretion which may involve balancing the potential prejudice that one party may suffer (if no adjournment or stay is granted) against the potential prejudice that the other party and third parties may suffer (if it is) as well as in some cases taking into account the public interest.

41. In some such cases there may only be one correct answer which any tribunal could give when the facts have been determined. That may be the case, for example, when the result of any refusal is to deny a party of any fair opportunity to be heard or to present its case before the tribunal[1]. But that will not necessarily be so in all applications for an adjournment or a stay or in all such cases where claims of unfairness are raised. In some cases the tribunal may be seeking the least worst solution given the competing interests involved. That may be the case, for example, where an adjournment or stay is sought in view of related criminal or civil proceedings. In such cases there may be more than one possible correct answer on the facts. Where that is so, because the relevant discretionary power is vested in the tribunal, not the appellate body, it is only if it can be shown that the tribunal's decision was not one open to it on the established facts that an appellate body can properly find that it was erroneous in law.

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[1] This may explain the decision of the Court of Appeal in Northern Ireland in ***Galo v Bombadier Aerospace UK*** [2016] NICA 25. That court, following the approach in *Osborn*, itself decided that a fair procedure had not been followed by an Industrial Tribunal as insufficient allowance had been made by that tribunal for the claimant's disability, thereby denying him a fair opportunity of presenting his case. Gillen LJ (giving the judgment of the court) stated (at [65]) that the court did not need to deal with the approach in cases such as ***O'Cathail v Transport for London*** "in detail simply because the issue of procedural fairness goes much wider than the narrow issue of failing to adjourn" (which was one of the complaints in that case which was not upheld). That judgment thus recognizes that the nature of the decision on unfairness involved is relevant to the approach that an appellate court ought to adopt.

42. That does not necessarily mean, however, that, in such a case, an appellate body can only find such an error if the tribunal's conclusion on the established facts is one that is perverse. As Sedley LJ in ***Terluk v Berezovsky*** supra at [20],

> "the question whether a procedural decision was fair does not involve the premise that in any given forensic situation only one outcome is ever fair…one can recognise that that there may be more than one fair solution to a difficulty…it is where it can say with confidence that the course taken was not fair that an appellate or reviewing court should intervene. Put another way, the question is whether the decision was a fair one, not whether it was "the" fair one."

In ***General Medical Council v Hayat*** [2018] EWCA Civ 2796 the Court of Appeal considered that the appellate court could intervene with a tribunal's decision on an adjournment, which involved balancing a number of factors, only if the tribunal was "plainly wrong" and that there was no "significant incompatibility" between this test and that in ***Turluk v Berezovsky***: see per Coulson LJ (with whom Moylan and McCombe LJJ agreed) at [65]-[69], [71]. I need not decide in this case, however, which of these tests (if they would in fact produce a different answer in practice) is the correct test to apply. There is no relevant practical difference in this case.

43. What is important for the purpose of this appeal, and more generally, is that, as Sedley LJ stated in ***Terluk v Berezovsky*** supra at [19], "what the appellant court is concerned with is what was fair *in the circumstances identified and evaluated by the judge*." (emphasis added) The appeal remains one only on a point of law: it is not a new hearing on the facts. A judge or tribunal's identification and evaluation of the circumstances relevant to any application for an adjournment or stay can be challenged on an appeal on a point of law. But doing so would involve showing that a material matter that had to be taken into account was not, or that an immaterial matter was; or that the judge's or tribunal's factual finding was otherwise flawed in law. Those circumstances identified and evaluated by the Employment Tribunal in this case would include, for example, its evaluation of, and its conclusion on, whether or not there would be a real risk of substantial prejudice to a party in the circumstances if an adjournment or stay were to be refused.

(c) Whether the Judge erred in law

44. In his submissions Mr Gray sought to rely on the right not to incriminate oneself. The Judge concluded in his first decision (at [30]) that "the right not to self-incriminate has either a very limited or no role to play in these proceedings. The protection is directed at the compulsion to self-incriminate. In these proceedings, the appellant can choose whether or not to give evidence or, because the burden is on the respondent, say that it should prove its case."

45. The Judge was plainly correct in his view of the nature of the right not to incriminate oneself. The right in any civil proceedings is against being "compelled", on pain of punishment, to provide evidence or information: ***V v C*** supra per Waller LJ at [11] and [21]. As Lord Mustill stated in ***Reg v Director of Serious Fraud Office ex p. Smith*** [1992] AC 1 at p42g-h,

> "[the] privilege against self-incrimination…aims to protect all citizens against being compelled to condemn themselves. But the law has never set out to protect a subject who condemns himself whilst acting of his own free will. Its only concern has been to ensure that he really does so act".

46. In my judgment his conclusion was equally impeccable. There appears to have been no suggestion that the Appellant has been, or will be, compelled, on pain of punishment, to provide any information or evidence.

47. The main thrust of Mr Gray's submissions, however, was the prejudice which he claimed the Appellant would suffer in the contemplated criminal proceedings if it were to disclose in the appeals its likely defence to those proceedings. In paragraph [29] of his first decision the Judge considered whether the appellant would be left with a difficult choice between pursuing its appeal and giving an indication of its defence in the criminal proceedings. Relying on ***V v C*** supra and ***Jefferson v Bhetcha*** supra, he found that such a choice was not enough to provide a good ground for staying civil proceedings.

48. Mr Gray submitted, however, that that failed to take account of the fact that the parties to these appeals would also be the prosecutor and accused in the contemplated criminal proceedings. That had not been considered in any of the cases. The appeals would give the Respondent as a prosecuting authority the opportunity to test the strength of her evidence and arguments, and to subject the appellant's evidence and arguments to scrutiny, before embarking on a prosecution.

49. In my judgment it is plain from the Judge's first decision that he appreciated the fact that the parties in the appeal could also be involved in subsequent criminal proceedings. He referred, for example, in his first decision (at paragraph [15]) to the notices given by the Respondent to the Appellant of an intended prosecution and (at paragraph [16]) to the fact that that the application for a stay was based on the claim that criminal proceedings arising out of the same facts were intended. His decision was clearly based on a recognition that the parties in the appeal could also be involved in subsequent criminal proceedings and that it was likely to involve examining the same facts.

50. The argument that an appeal would provide an unfair opportunity for a rehearsal of a criminal trial (as the same parties would be involved) has in fact considered by the Court of Appeal in ***Mote v Secretary of State for Work and Pensions*** supra. In that case it was submitted that the appeal would give the prosecutor the opportunity to study the appellant's reaction and to assess what questions to ask in the criminal trial. Richards LJ held (in his judgment with which the other members of the Court agreed), at [36], that:

> "In general, as it seems to me, the fact that the prosecution has had a previous opportunity to rehearse its case cannot be said to give rise to substantial prejudice to the defendant in a subsequent criminal trial. If it were otherwise, it would provide a ground of objection to a retrial in criminal proceedings where the jury have been unable to agree in the first trial or where a conviction in the first trial has been quashed on appeal. If this

> were a point of substance, I would also expect it to have been mentioned in the previous cases."

51. The Judge considered that it was not likely that the appeal process was being used to assist the criminal prosecution not merely because of the nature of the appeals but also because the Respondent had available to her the powers of the prosecuting authority to require any documentation necessary to be produced under section 20(k), or to ask any of its officers (or anyone else) questions and compel answers under section 20(j) of the 1974 Act.

52. But, in any event, whether the Appellant choses to adduce evidence which may be subject to cross-examination in the appeals is a matter for it, as the Judge stated.

53. Mr Gray's main point, however, appeared to be that, if the Appellant disclosed its defence and gave evidence in the appeal, that would deprive it of the forensic advantage of surprise in any criminal proceedings and it would enable the Respondent to frame the prosecution case in any such proceedings in such as a way as to avoid advancing matters that were untrue or that would embarrass her or undermine her credibility.

54. The Judge found that there was no real risk of serious prejudice which may cause injustice to the Appellant, among other reasons, on the basis that "positive evidence produced by the appellant to substantiate its appeal will be likely to exculpate rather than implicate": "it is likely that the central argument for the appellant in both civil and criminal cases will be a denial that there was a risk to health and safety" and "there is therefore no real risk of serious prejudice": see his first decision at [27] and [30]. Mr Gray did not seek to impugn the finding about what the Appellant's central argument was likely to be. Indeed, as the Judge pointed out in his first decision (at [27]), "if the appellant believed that bringing an appeal might incriminate it, it is difficult to understand why it chose to bring an appeal at all."

55. If Mr Gray's contentions about the merits of the Appellant's defence are right, no prosecution may follow the determination of these appeals. But in any event in my judgment Mr Gray's argument does not disclose anything that could be regarded as constituting a real risk of serious prejudice that may cause an injustice, even were it to be assumed that the Appellant's case presented in the appeals would not wholly exonerate it in any criminal proceedings. Litigation by ambush is no more fair in criminal, than in civil, proceedings. It is no part of a fair criminal trial "that questions of guilt or innocence should be determined by procedural manoeuvres. On the contrary fairness is best served when the issues between the parties are identified as early and as clearly as possible": see paragraph 1A.1 of the Criminal Practice Directions 2015.

56. There is thus now provision, but not one with which an accused can be compelled to comply, for a defence statement meeting the requirements of section 6A of the Criminal Procedure and Investigations Act 1996 to be made. Such a requirement does not infringe any claim to a right to pre-trial silence in respect of the giving of advance notice of any defence and issues to be raised at trial. The accused is not compelled to give or to call evidence, either directly or indirectly. The requirement involves no compulsion to give or to call evidence nor does it compel the accused to incriminate himself: he may simply leave to the prosecution to prove its case. It does not affect

the presumption of innocence; nor need it affect the fairness of the trial: see ***Sexius v Attorney General of Saint Lucia*** [2017] UKPC 26, [2017] 1 WLR 3236, at [38], [47], [54]-58.

57. Such a defence statement falls to be provided after any prosecution has been begun and the charges known. Mr Gray submitted that disclosing its defence in the appeals would require the Appellant to disclose its defence before the Respondent may embark on a prosecution. But that, so he submitted, would be unfair: the person accused in criminal proceedings is entitled to know the case he has to meet before disclosing and making his defence. If and when the Respondent prosecutes the Appellant, it will then know the charges it has to meet before it has to disclose its defence to those charges. But, since the Appellant is likewise under no compulsion to disclose its defence or adduce evidence in the appeals, choosing to do so does not infringe its pre-trial right to silence, any rights it has in the criminal proceedings or put at risk a fair trial. A fair trial is not put at risk by the prosecution being able to frame its case so that it does not rely on allegations that it should not make or on evidence on which it should not rely. Justice will be better served if it does not do so.

58. In my judgment there is no basis for the contention that refusing the stay substantially interfered with the Respondent's rights to challenge the Prohibition Notices in the Employment Tribunal. The Judge recognised that the intended prosecutions might leave the Appellant with a difficult choice about presenting its case in the Tribunal. But in my judgment he was well entitled to find, given the nature of the appeal, that that was not sufficient to create a real risk of substantial prejudice which may cause injustice to the Appellant.

59. The Judge did not consider that Mr Gray's position was relevant as he was not a party to the appeals but he stated that, if relevant, such a third party would need to show sufficient prejudice to justify a stay and, as Mr Gray's position appeared to the same as the Appellant's, the reasoning applicable to the Appellant would apply likewise to him. In my judgment that reasoning does not indicate any error of law that would warrant allowing this appeal.

60. In my judgement, therefore, the Appellant has not shown that the Judge erred in law in concluding that it had not discharged the burden on it of showing that there would be a real risk of serious prejudice which may cause injustice if the appeals were not stayed until any criminal proceedings had been determined.

61. For that reason the appeal was dismissed.