Appeal No. UKEAT/0101/20/AT

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING,7 ROLLS BUILDINGS FETTER LANE LONDON EC4A 1NL

At the Tribunal
On 26 January 2021

Before

THE HONOURABLE MRS JUSTICE ELLENBOGEN DBE

(SITTING ALONE)

MR G KULAR APPELLANT

ATOS IT SERVICES UK LTD RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant	MR DANIEL MATOVU (Of Counsel) Instructed by Advocate
For the Respondent	MR NIGEL PORTER (Of Counsel) Instructed by Atos IT Services UK Ltd Mid-City Place 2nd Floor 7 High Holborn London WC1V 6EA

SUMMARY

PRACTICE AND PROCEDURE

An appeal from the Tribunal's decision to proceed with a costs hearing, in circumstances in which the Appellant had not received a hard copy of the hearing bundle until the morning of the hearing and had asserted that he had been unable to access parts of the electronic bundle, was dismissed. On the facts as found by the Tribunal (regarding which no ground of appeal had been permitted to proceed to a full hearing), there had been no contravention of the principle of equality of arms, or of the overriding objective, and the Tribunal's decision had fallen within the generous ambit within which reasonable decision-makers may disagree. Neither the Appellant's state of health (as evidenced before the Tribunal); nor his status as a litigant in person had obliged the Tribunal to adjourn the hearing, in all the circumstances. The Tribunal's subsequent acknowledgement of certain operational failings in the administration of the Appellant's case was unclear in its ambit and did not go to the sole ground of appeal which had been permitted to proceed to a full hearing.

THE HONOURABLE MRS JUSTICE ELLENBOGEN DBE

1. This is the full hearing of an appeal from the costs judgment of Employment Judge Gilroy, QC, sitting alone at Midlands West Employment Tribunal.

2. On 23 January 2018, the Employment Tribunal had struck out the Appellant's claims against the Respondent for non-compliance with its earlier orders. By letter dated 12 July 2018, it had refused to reconsider that decision. On 14 February 2018, the Respondent submitted an application for costs, limited to those which it had incurred in instructing counsel, in the sum £24,362 (excluding VAT), to be the subject of detailed assessment by an employment judge. That sum was later augmented by £6,500, being the cost of representation at the costs hearing, bringing the total sum claimed to £30,862 (excluding VAT).

3. The hearing of that application took place on 31 August 2018, at which the Appellant was unrepresented, and the Respondent was represented, as it is before me, by Mr Nigel Porter of Counsel. The Tribunal made an order that the Appellant should pay the Respondent's costs on the standard basis, subject to detailed assessment by the County Court, or an employment judge, at a later stage. That order was founded on its conclusion that the Appellant's conduct, throughout the claim and culminating in its being struck out, had been unreasonable and/or vexatious, for the purposes of Rule 76(1)(a) of the **Employment Tribunals Rules of Procedure 2013**, as amended, in demonstrating flagrant disregard for the orders of the Tribunal, which had effectively prevented the Respondent from understanding the case which it had to meet and had put it to considerable unnecessary expense (Judgment, paragraphs 47, 47(h) and (i)).

4. By the sole ground of appeal which has been allowed to proceed to a full hearing, the Appellant asserts that the costs hearing was procedurally unfair because, as the Respondent had been notified, until the day of the hearing he had received only a soft copy of the hearing bundle, which he had not been able to access. Thus, he had had insufficient time to prepare for the hearing, in particular as he was a litigant in person, and it was known and evidenced that he was suffering from a mental illness.

The parties' submissions

For the Appellant

5. Before me, as he was at the rule 3(10) hearing, the Appellant is represented by Mr Daniel Matovu of Counsel, who contends that the Tribunal was wrong to have proceeded with the costs hearing in the above circumstances, which had deprived the Appellant of a reasonable opportunity to present his case under conditions which did not place him at a substantial disadvantage vis-à-vis his opponent, or had run contrary to the Tribunal's duty to ensure, so far as practicable, that the parties were on an equal footing, in accordance with the overriding objective. It is said that the Appellant had had no more than one hour in which to consider the hard copy bundle, which had been well beyond him, particularly as he suffers from anxiety and stress. In so far as the Tribunal's findings were supported by its findings that the Appellant had "blatantly misled" it, having produced a document in opposition to the Respondent's application for costs in rebuttal of the matters advanced in its skeleton argument, that was unfair as the document in question had been produced by Companies House and had been provided by the Appellant simply to demonstrate that he had no means to pay an order for costs, as the private limited company which he had set up had never traded and was dormant.

6. Further, Mr Matovu submits that (skeleton argument, paragraphs 10 and 11):

> *'10. The Claimant has over a number of years frequently informed the Tribunal that he had not received correspondence, but his pleas have often been ignored. He has constantly tried to bring this to the attention of the Tribunal by writing to it, but to no avail; he has struggled to get his voice heard, as nobody would listen until, eventually, his complaints led to an investigation by the Service Customer Investigations team of HMCTS, which duly found that there had been failings in respect of the administration of his case, over a considerable time period – see HMCTS apology letter of 16.12.20 [164].*
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> *11. Accordingly, it is necessary now to review the way in which the Claimant has been generally regarded in the past. All previous correspondence needs to be assessed with extreme caution if he is not to be unfairly prejudiced by it. Great care, indeed, needs to be taken so as not to read, in particular, the ET judgment in a prejudicial manner to the extent that it p*ortrays his conduct in the poorest light, not altogether fairly, as it now appears.'

At least in so far as the Respondent might submit that the provision of a bundle on the morning of the costs hearing was mitigated by the fact that the Appellant was already familiar with much of the documentation which it contained, the above matters ought to have been taken into account, submits Mr Matovu.

7. In Mr Matovu's submission, upon receipt of a letter from the Tribunal dated 12 July 2018 (enclosing an e-mail from the Appellant dated 7 June 2018), the Respondent had been

under notice that the Appellant had not been able to access the electronic bundle. The Tribunal's letter to the parties, dated 16 July 2018, refusing the Appellant's application for an adjournment of the costs hearing, had stated that *"the question of bundle availability can also be addressed"* (at the costs hearing).

8. On instructions, Mr Matovu informed me that the Appellant's position was that he had been unable to access any part of the bundle, which had run to 471 pages, including 12-14 legal authorities, together with a 21-page skeleton argument, prepared by counsel for the Respondent. In summary, submits Mr Matovu, in every case an employment judge must have regard to all of the circumstances when determining the appropriate approach. In this case, correspondence in advance of the costs hearing had made clear that an accessible bundle had not been received by the Appellant, contrary to the Tribunal's order that a bundle be provided by the Respondent. The volume of documentation, in particular for a litigant in person of the Appellant's state of health, could not be reviewed in the hour afforded by the Tribunal and it was unreasonable for the Tribunal to have expected otherwise. The Appellant could not have known, at the outset of the hearing that, in the event, part of the material in the bundle would not be relevant to the Tribunal's decision. Accordingly, the Tribunal's decision to proceed with the hearing had constituted an error of law and the costs judgment ought to be set aside.

For the Respondent

9. For the Respondent, Mr Porter submits that the Tribunal's decision to proceed with the costs hearing discloses no error of law. The hearing had already been adjourned twice and the basis of the Appellant's application to adjourn it for a third time had been his desire to attend a wedding and because he was suffering from a mental illness, rather than

his inability to access documents. In short, the Tribunal had taken a case management decision to proceed which fell within the generous ambit within which reasonable decision-makers may disagree (see **Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Limited) (No 2)** [2014] UKSC 64), which was reasonable in all the circumstances and consistent with the overriding objective and rule 41 of the Employment Tribunals Rules of Procedure. The Tribunal had not found it necessary to receive oral submissions amplifying the Respondent's case and costs, as set out in its skeleton argument, which had been similar in form to the detailed costs application which the Appellant had received and in response to which he had prepared a document in rebuttal and been able to make oral submissions in some detail (Judgment, paragraphs 44 to 46 and 47(e)). The Tribunal had been satisfied that the Appellant understood that case (see paragraph 27 of Employment Judge Gilroy QCs comments, dated 22 November 2019, in response to paragraph 3 of the order of Laing J (as she then was): *"….The Claimant and I were entirely clear as to the basis of the application"*). It had reached its conclusions on the basis of the Respondent's argument that the earlier strike out of the Appellant's claims served to evidence his unreasonable behaviour, having allowed the Claimant adequate time in which to consider the Respondent's skeleton argument. The Respondent had served an electronic bundle, in compliance with Tribunal orders. It was accepted by the Appellant that he had not made a direct request to the Respondent for provision of a hard copy of the bundle in advance of the hearing. It was not clear why the Respondent had not provided such a bundle following receipt of the Tribunal's July letters, though no deliberate decision not to do so had been taken. A hard copy bundle (running to 201 pages) had been available for the Appellant's use on the day of the hearing, of which, as the index in the appeal bundle indicated, 147 pages had comprised the pleadings, case management orders, the application for costs,

correspondence with the Tribunal and the various orders and judgments of the employment tribunal, which the Appellant would either have received contemporaneously, or sent. The remaining 54 pages had related to a subsidiary basis of application on which the Tribunal had found it unnecessary to make any finding (namely the alleged fabrication of evidence by the Appellant). In any event, submits Mr Porter, the Tribunal had made significant findings regarding the truthfulness of the Appellant's account that he had not received and/or been unable to open documents (Judgment, paragraph 47(e)), as it had been entitled to do. It expressly had found the Appellant's contention that he had been unable to open the Respondent's skeleton argument to be false, on the basis that he had produced a document in rebuttal. In all the circumstances, the Tribunal had been entitled to proceed as it did.

10. Further insight in that connection could be gained from the Tribunal's comments in response to paragraph 3 of the order of Laing J**,** in particular at:

    a. paragraph 40: *"The account given by the Claimant in relation to his ability to open attachments to e-mails played a significant part in my assessment of his credibility generally. I refer to paragraphs 47(d) and (e) of my reasons. The Claimant told me that, whilst he had received certain emails and attachments he had been unable to open those attachments, including the Respondent's skeleton argument for the hearing conducted before me. It then transpired that he had produced a document in opposition to the Respondent's application, rebutting matters contained in the Appellant's skeleton argument, the very document that he said he had been unable to open and had only seen for the first time on the morning of the hearing before me";* and

b. paragraph 10: *" .... I concluded that in certain respects the Claimant was trying to mislead me. .... I refer to paragraph 47(c) of my reasons, and my conclusion that the Claimant was not telling the truth about his alleged lack of knowledge of hearing dates and communications from the Tribunal and the Respondent. In this regard I would also refer to paragraphs 10 to 21 of the reasoning of Employment Judge Perry when rejecting the Claimant's application for reconsideration of his decision to strike out the Claimant's claims, as set out in the Tribunal's letter of 12 July 2018."*

11. In any event, submits Mr Porter, the size of the bundle received on the morning of the hearing has to be considered in the context of its content, with which the Appellant would have been familiar, and purpose. As had been set out in the Respondent's application for costs, the fact that the claim had been struck out had given rise to the Respondent's primary contention that the Appellant's conduct of proceedings had been unreasonable and/or vexatious. There had been no order that authorities and skeleton arguments were to be provided in advance of the hearing. There could be no doubt that the Appellant had received the strike-out judgment, as, on 2 July 2018, he had written a detailed e-mail seeking its re-consideration. Similarly, on 17 July 2018, he had responded, in detail, to the Tribunal's subsequent refusal of that application. Finally, Mr Porter contends, the tribunal's acknowledgment of administrative failings had been communicated in December 2020 and had not been available to the Tribunal at the costs hearing. The lawfulness of the Tribunals' approach had to be determined by reference to the information then available to it. Mr Matovu's suggested approach impermissibly required the admission of fresh evidence on appeal. In any event, the nature and extent of the failings acknowledged could not be discerned from the tribunal's letter, though the associated offer of an ex-gratia payment in the sum of £100 might be considered to reflect their limited impact.

Discussion

The legal principles

12. As was observed by Lewison LJ, in **Broughton v Kop Football (Cayman) Limited** [**2012] EWCA Civ 1743**, at paragraph 51, case management decisions are discretionary. An appellate court does not exercise the discretion for itself. It can interfere with the exercise of discretion by a first instance judge where that Judge has misdirected himself in law, has failed to take relevant factors into account, has taken into account irrelevant factors or has come to a decision which is plainly wrong in the sense of being outside the generous ambit where reasonable decision-makers may disagree. That approach was endorsed by Lord Neuberger in **Apex Global**. It is with that test in mind that I must consider the Tribunal's decision to proceed with the costs hearing on 31 August 2018, as both parties agree.

The legal principles applied

The relevance of the Appellant's health and status as a litigant in person

13. The Tribunal noted (Judgment, paragraph 42) that it had been provided with medical evidence in the form of a psychiatric report dated 23 December 2014 and a more recent letter, dated June 2018, assumed to have been written by a general practitioner, which stated, *"This gentleman has had anxiety and depression since 2013. He has had cognitive behaviour therapy and medication, but still feels he is struggling mentally and as yet he is unable to cope with the extra stress of a tribunal. He is currently taking Mirtazapine at night and is being supported by his family. He is looking for some more counselling appointments. I have given him another Fit Note today until the end of July when he will be reassessed. At the moment, I think the extra stress of tribunal would be detrimental*

to his recovery." At paragraph 47(b), the Tribunal *"accepted that the Claimant has a form of depression. Reference is made to the letter dated 5 June 2018… (see paragraph 42 above), and the bundle contains certain "fit notes". Whilst the Tribunal did not reject the suggestion that the Claimant has some form of depression, that did not in any way explain the various accounts he gave as to his receipt or normal receipt of documentation during the course of these proceedings, and it would appear that exactly the same position was put before Judge Perry on the occasion of the application for reconsideration."* In my judgment, that finding puts to bed the Appellant's submission that the Tribunal did not pay due regard to the Appellant's state of health, so far as evidenced. Having done so, it concluded that his depression did not account for the unsatisfactory nature of his evidence as to his receipt of documentation (see below). That was a conclusion which was open to it on the available evidence and which was unaffected by the Appellant's status as a litigant in person. Moreover, there is no separate ground of appeal to the effect that the Tribunal's conclusions by reference to the medical evidence were perverse. By order of Laing J (as she then was), dated 20 September 2019, under rule 3(7) of the **Employment Appeal Rules 1993**, ground 4 of the original notice of appeal, which challenged those findings, has not been allowed to proceed. Such recent medical evidence as had been provided to the Tribunal did not support the conclusion which I am urged to draw, to the effect that the Tribunal ought to have concluded that the Appellant's state of health itself obliged the Tribunal not to proceed on 31 August in the absence of earlier provision of a hard copy bundle. In my judgment, its wording was careful and distinguished the feelings of the Appellant himself from the medical practitioner's own stated professional opinion, which was that the extra stress of a tribunal would be detrimental to his recovery. That is not synonymous with an opinion that he could not

proceed with the hearing. Particularly in such circumstances, the Tribunal is not to be criticised for failing so to conclude.

14. In all the circumstances of this case, I reject the contention that the Appellant's status as a litigant in person ought to have inclined the Tribunal to adjourn the costs hearing, particularly in the context of its findings, at paragraphs 47(d) and (e) of its judgment (considered below).

Alleged breach of an agreed protocol/earlier Tribunal order

15. At paragraph 46 of its judgment, the Tribunal recorded the Appellant's complaint that there had been a "protocol" whereby the Tribunal had agreed only to communicate with him by hard copy correspondence, observing that, in his form ET1, he had ticked as his correspondence preference, "e-mail". The Tribunal further recorded that, in any event, there had been no order made to the effect that communication with the Appellant would be by hard copy only.

16. By order dated 1 June 2018, the Respondent had been directed to provide the Appellant with a bundle of all relevant correspondence/documents in support of its costs application. The Tribunal was correct to record that there had been no order that the bundle be provided in hard copy. The Tribunal's e-mail of 1 February 2019, upon which the Appellant relies, simply noted (materially) that the Tribunal itself could not accept bundles by e-mail, and that e-mail attachments in certain formats would not be opened. Nothing in that e-mail required the Respondent to provide a hard copy of the bundle to the Appellant.

17. As to the allegedly agreed protocol between the parties, I have been shown an e-mail, sent by the Respondent to the Appellant, dated 2 November 2016, in the following terms:

"Please find attached to this email a letter documenting the [redacted]

As per the agreed process, this letter will also be sent by post to your home address, and I will also ensure that your brother is sent a text message on the mobile number you have previously provided, to notify of this email…."

That e-mail preceded the presentation of the Appellant's form ET1 by almost four months and related to communications between the parties in the course of an internal disciplinary process. As the Tribunal noted, the specified preferred means of contact in the latter, (in section 1.8) was e-mail and, in any event, there had been no order by the Tribunal to the effect that communication with the Appellant would be by hard copy. Mr Matovu's submission (skeleton argument, paragraph 9) that, *"When the Claimant subsequently submitted his claim form, he was required to indicate his required means of communication but was precluded from specifying more than one option; however, he advised the Tribunal at an early hearing of his problems and he understood the process which had been agreed between himself and the Respondent would continue"*, constitutes the impermissible giving of evidence — and evidence which goes to a finding outwith the ambit of this appeal.

18. Nonetheless, in e-mails to the Tribunal respectively dated 7 June; 15 July; 17 July; and 30 August 2018 (none of which was copied to the Respondent), the Appellant stated that he had not received a hard copy bundle and that he had been unable to open documents sent to him by e-mail. Enclosed with the Tribunal's letter to both parties of 12 July 2018

was a copy of the first such e-mail, although it is right to note that nothing in the Tribunal's letter required any action on the part of either party and the Appellant acknowledges that at no point had he asked the Respondent, directly or by copy, to provide him with a hard copy of the bundle. On 16 July 2018, at a time when the costs hearing had been listed to take place on 18 July 2018, the Appellant was informed that his application to postpone the hearing had been refused by Employment Judge Gaskell: *"It is important that the parties allow and enable the Judge to assess the situation. The Claimant's application may be further considered. The question of bundle availability can also be addressed."* (In the event, the costs hearing was postponed to 31 August 2018, for different reasons.)

19. The difficulty for the Appellant in relying upon such matters, however, lies in the Tribunal's findings of fact, having received submissions and evidence from him at the costs hearing. At paragraphs 47(d) and (e) of its judgment, the Tribunal found:

> **"(d) The case put by the Claimant in relation to the matters resulting in Employment Judge Perry's refusal to reconsider his decision to strike out the Claimant's claims has a strong resonance with the arguments placed before the Tribunal by the Claimant in opposition to the Respondent's application for costs. There is a consistent theme in the submissions then and now that the Claimant did not receive certain key documents during the course of these proceedings and therefore to the extent that he had not complied with Tribunal orders, he was not in default in so doing, the explanation being that he had simply not received the relevant documentation. Employment Judge Perry was not impressed by the Claimant's case on that issue and I was equally unimpressed with the explanations proffered by the Claimant in the context of the Respondent's application for costs as to his knowledge of the key events in these proceedings.**
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> **(e) To give but one example, the Claimant having made submissions in opposition to the Respondent's costs application was invited to adopt those submissions as sworn oral evidence. He accepted that invitation. He stated that certain documentation relating to the proceedings had been received by him by e-mail but that he had been unable to open the attachments to those e-mails. This included the Respondent's skeleton argument for the purposes of its costs application. It then transpired that he had produced a document in opposition to the Respondent's application by way of rebuttal of the matters advanced in the Respondent's skeleton argument, despite the fact that this was a document which he had earlier maintained he had only seen for the first time on the morning of the hearing on 31 August 2018. As recorded at paragraph 4 above, having informed the Tribunal at the commencement of the hearing on 31 August 2018 that he had only seen the Respondent's skeleton argument for the first time on the morning of the hearing, the Claimant was given one hour to consider its contents. In securing that indulgence, the Claimant blatantly misled the Tribunal. The above is but one example of conduct on the part of the Claimant which led the Tribunal to conclude that it simply did not accept the Claimant as a witness of truth."**

I also bear in mind the Tribunals' comments in response to paragraph 3 of the order of Laing J, at paragraphs 10 and 40, set out at paragraph 10, above.

20. There is no separate ground of appeal to the effect that the above findings were perverse, and Mr Matovu's submission to the effect that they failed to reflect the explanation now proffered is not encompassed by the ground of appeal which has been allowed to proceed, which, as set out at paragraph 2 of the order of Choudhury P, dated 4 March 2020, is as follows:

" The appeal be set down for a full hearing in respect of the following issues only: that the Appellant was not provided with a hard copy of the Employment Tribunal hearing bundle and that he was unable to open the electronic version of the said bundle. All other grounds be dismissed…".

Accordingly (Order, paragraph 4), leave was given to amend the grounds of appeal to contend as follows:

"The Tribunal hearing that took place on 31 August 2018 was procedurally unfair in that the Appellant had previously been sent by the Respondent a soft copy of the version of the hearing bundle which (as the Respondent was duly notified) he could not open and was only served with a hard copy version on the very day of the hearing; and yet he was given insufficient time to consider this properly or to prepare adequately for the hearing, also bearing in mind that he was unrepresented and it was known at the time he was suffering from a long term mental illness (supported by a doctor's note)."

21. The Appellant's challenge to the Tribunal's conclusions, at paragraph 47(d) of its judgment, was the subject of ground 5 of his original notice of appeal, which was ruled unarguable by Laing J (at paragraph 24). Laing J also considered (at paragraphs 25 and 26) original grounds 6 and 7, which had challenged the Tribunal's finding as to the Appellant's veracity and the understanding on which it was based, to be unarguable. The amended single ground of appeal which has been allowed to proceed does not extend to a challenge to the Tribunal's conclusion (at paragraph 47(e) of its judgment), that it did not accept the Appellant as a witness of truth and it is clear that that finding encompassed the Appellant's statement *"…that certain documentation relating to the proceedings had been received by him by e-mail, but that he had been unable to open the attachment to those emails."* Furthermore, as the Tribunal recorded (Judgment, paragraph 22), Mr Porter's skeleton argument essentially relied upon and developed the detailed application for costs. It was not suggested that the Appellant had not received that application and, in any event, he was given an hour at the outset of the costs hearing in which to consider the Respondent's skeleton argument. As Mr Porter submitted, in responding to paragraph 3 of Laing J's order, the Tribunal expressed its view (at paragraph 27) that the Appellant had been entirely clear as to the basis of the Respondent's application. It is in that context that the Appellant was given time to review the materials provided on the morning of the hearing.

The relevance of the Tribunal's recent acknowledgement of administrative failings

22. By letter to the Appellant dated 16 December 2020, the Tribunal's Operations Manager, acknowledged certain *"failings in the administration of your case covering a number of years and I would like to apologies* [sic] *on behalf of the department, for any undue stress any of this might have caused*", offering an ex gratia payment of £100. The letter referred

to an e-mail from the Appellant, dated 3 December 2020; his initial complaint; and the response to the latter issued by a Mrs Mukul. None of those documents has been included in the appeal bundle, such that it is not possible comprehensively to discern from the material provided which administrative failings had been alleged, or considered to have been established. A partially redacted e-mail from the Appellant to the Tribunal, dated 5 December 2019 (13:43) complains of events surrounding a hearing on 7 December 2017. Yet, as the Tribunal recorded (Judgment, paragraph 30), in response to the Appellant's earlier application for reconsideration of the decision to strike out his claims, *"It was pointed out to the Claimant that whilst the basis of his application was that he had not received notice of the hearing of 7 December 2017, that was not the reason his claim had been struck out. He was reminded that the reason for the strike out had been twofold, namely his non-compliance with various requirements set out in the Employment Tribunal's order of 22 June 2017 and his failure to explain why he had not complied with that order."* At paragraph 47(a) of its judgment, the Tribunal found that the Appellant *"…was present at the hearing on 22 June 2017. He knew or must have known of the importance of directions given at that hearing. Yet he simply disregarded the order made at that hearing. His complete failure to comply with the order caused the respondent significant inconvenience and prejudice."* Thus, any administrative failings in connection with the hearing of 22 June and/or of 7 December 2017 are of no relevance, for current purposes. Moreover, there was no appeal from Employment Judge Perry's decision refusing the Appellant's application (out of time) for reconsideration of the decision to strike out his claim, for reasons which the Tribunal recited, at paragraph 31, of its judgment.

23. Mr Matovu's contention that, *"....it is necessary now to review the way in which the Appellant has been generally regarded in the past. All previous correspondence needs to be assessed with extreme caution if he is not to be unfairly prejudiced by it. Great care, indeed, needs to be taken so as not to read, in particular, the ET judgment in a prejudicial manner to the extent that it portrays his conduct in the poorest light, not altogether fairly, as it now appears"* is put too high, and, in any event, does not go to the sole ground of appeal which has been allowed to proceed.

Equality of arms

24. In advancing his submission that the principle of equality of arms had been infringed by the Tribunal, Mr Matovu relied upon **Regner v The Czech Republic** (Application no. 35289/11), 19 September 2017, a decision of the Grand Chamber of the European Court of Human Rights. In that case, the applicant had complained that he had been denied access by the administrative courts to decisive evidence, classified as confidential, which had been provided to those courts by the defendant. That was said to have been a violation of his Article 6 right to a fair hearing (paragraph 73). He submitted that the principle of equality of arms was infringed where one of the parties to administrative proceedings had not had an opportunity fully to acquaint himself with all of the evidence which had served as the main basis for an unfavourable decision (paragraph 129). At paragraph 146, the court held:

"The court reiterates that the adversarial principle and the principle of equality of arms, which are closely linked, are fundamental components of the concept of a "fair hearing" within the meaning of Article 6 §1 of the Convention. They require a "fair balance" between the parties: each party must be afforded a reasonable opportunity to present his

case, under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent or opponents…"

25. Mr Matovu further relied upon **Dombo Beheer, B.V. v The Netherlands** (Application no. 14448/88), 27 October 1993, ECHR. In that case (see paragraph 30), the applicant company had complained about the refusal by the national courts to allow its former managing director to give evidence, whereas another individual, who had been the only other person present when the relevant oral agreement had been concluded, had been able to testify. At paragraph 33, the Court held *"…The Court agrees with the Commission that as regards litigation involving opposing private interests, "equality of arms" implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – on conditions that do not place him at a substantial disadvantage vis-à-vis his opponent."* Mr Porter accepts the principle on which Mr Matovu relies, submitting that it was not infringed in this case.

26. In my judgment, neither **Regner** nor **Dombo** is on point here, where the Tribunal did not accept the Appellant as a witness of truth; found that it had been misled by him as to his knowledge of relevant material; and expressly was unimpressed with the explanations which he had proffered as to his knowledge of key events in these proceedings. There was no relevant material of which he was found to have been deprived.

27. I further note that the Appellant's e-mails to the Tribunal, respectively dated 2 July 2018 (10:47) (which was treated by the Tribunal as an application for reconsideration) and 17 July 2018 (10:35), in reply to the Tribunal's letter dated 12 July 2018, which had communicated Judge Perry's refusal to reconsider the strike out decision and its rationale, set out in detail the Appellant's contentions as to why it was that proceedings had been

conducted in the way in which they had been. That, too, indicates that the Appellant was aware of and able to address the conduct which underpinned the Respondent's application for costs and the e-mails were written during the month before the costs hearing. The vast majority of the documents in the hearing bundle (as distinct from the skeleton argument and authorities provided by the Respondent) had been sent to the Appellant at the time at which they had come into being (recognising that the Appellant's position was that he had not received all of them), or had emanated from him. The balance went to an issue which, in the event, formed no part of the Tribunal's rationale for the costs order made. I bear in mind, too, paragraphs 10 and 27 of the Tribunal's comments in response to paragraph 3 of the order of Laing J and the fact that there had been no order for provision of the Respondent's skeleton argument and authorities in advance of the hearing.

28. Thus, whilst I acknowledge the principle set out in **Regner a**nd in **Dombo**, the Tribunal's findings of fact in this case serve to indicate that no inequality of arms which placed the Appellant at a substantial disadvantage vis-à-vis his opponent had been created by the absence of a hard copy bundle at an earlier stage. By the same reasoning, there was no failure by the Tribunal to give effect to the overriding objective; in particular to ensure, so far as practicable, that the parties were on an equal footing. In my judgment, in all the circumstances, there was no infringement of either requirement.

Conclusion

29. In summary, the Tribunal concluded that the Appellant was well aware of the basis of the Respondent's application for costs and that he was not a truthful witness in relation to his knowledge of material events, or the documents of which he had been in receipt prior to the provision of a hard copy bundle. None of those findings may be challenged in this

appeal, nor is it affected by the Appellant's state of health or status as a litigant in person. Whilst I acknowledge that a differently constituted tribunal might have been willing to grant a further adjournment, I do not consider that this Tribunal's decision was plainly wrong in falling outside the generous ambit where reasonable decision-makers may disagree, or otherwise disclosing an error of law in the **Broughton** sense. In particular, it did not infringe the principle of equality of arms or the relevant aspect of the overriding objective.

Disposal

30. There having been no error of law in the Tribunal's approach, I dismiss this appeal.