Neutral Citation Number: [2024] EWCA Civ 332

Case No: CA-2022-002388

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
(His Honour Judge Barklem)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday, 13th March 2024

Before:

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE NEWEY
and
LORD JUSTICE WARBY

- -

Between:

ROYAL EMBASSY OF SAUDI ARABIA (CULTURAL BUREAU)	**Defendant/ Appellant**
- and -	
ANTOINETTE COSTANTINE	**Claimant/ Respondent**

- -

THE APPELLANT did not attend and was not represented

TAMAR BURTON of counsel appeared for the **Respondent**

- -

APPROVED JUDGMENT

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LORD JUSTICE UNDERHILL:

1. An appeal is listed before us this morning by the Cultural Bureau of the Royal Embassy of Saudi Arabia, to which I will refer as "the appellant". Although counsel is present for the respondent, neither counsel nor any other person purporting to represent the appellant has appeared, and the Court has established that that is intentional rather than as a result of any accident or misunderstanding. In those circumstances the most straightforward course might be for us simply to dismiss the appeal for non-appearance by the appellant. However, there is in fact a background to that non-appearance which I ought to set out and review before we take that course.

2. I need say very little about the underlying proceedings. The respondent, to whom I will refer as "the claimant", was employed in an administrative capacity in the Cultural Bureau of the Embassy. On 19th March 2018 she brought proceedings in the Employment Tribunal complaining of discrimination and harassment contrary to Part 5 of the Equality Act 2010. There was initially some uncertainty as to the legal identity and correct description of the respondent to the proceedings, but at the hearing in the Employment Tribunal to which I will refer presently it was confirmed that its correct description was "the Royal Embassy of Saudi Arabia (Cultural Bureau)": the Bureau appears to have no legal identity separate from the Embassy, which itself has no legal identity separate from that of the Kingdom of Saudi Arabia. In its response to the claim, the appellant claimed state immunity. Under section 4 of the State Immunity Act 1978, a foreign state does not generally enjoy state immunity as regards (broadly) employment-related claims by persons employed by it in this country; but, by section 16, section 4 is disapplied where the employee is a member of a mission within the meaning of the Vienna Convention on Diplomatic Relations. The appellant contended that the claimant was a member of mission in that sense. By a decision sent to the parties on 30th June 2021 Employment Judge Brown rejected that submission and held that the appellant did not enjoy state immunity as regards the claim.

3. The appellant appealed to the Employment Appeal Tribunal. The appeal was initially rejected on the papers by Mr Mathew Gullick KC, sitting as a Deputy High Court Judge, under rule 3(7) of the Employment Appeal Tribunal Rules 1993 (as amended). That decision was affirmed by His Honour Judge Barklem on 23rd November 2022 following an oral hearing.

4. The appellant filed an appellant's notice in this Court on 20th December 2022, and permission to appeal was granted by Lord Justice Bean on 8th August 2023. (There appears to have been some delay because of problems in obtaining a transcript of Judge Barklem's decision.) On 25th August the parties were notified that the case would be listed, with a one-day estimate, for today, being 13th March 2024, or tomorrow: it was in the event listed for today.

5. Before I come to the events which have led to the adjournment application, I should say something about the proceedings in the Employment Tribunal. These are not stayed. On 14th March 2023 a final hearing of the claim was fixed for 22nd April 2024, with an estimate of eight days. That estimate was given on a precautionary basis because the appellant had not participated in the case management, apparently because it was afraid of submitting to the jurisdiction: it may well be that the actual

length of the hearing will be somewhat shorter. Nevertheless, given the nature of the issues, the hearing will certainly last some days if the claim is opposed.

6. I come to the circumstances leading to the appellant's non-appearance. Throughout these proceedings, from the Employment Tribunal onwards, the appellant has been represented by Reynolds Porter Chamberlain LLP, to whom I will refer as "RPC": it appears that they had a long-standing relationship with the Cultural Bureau. On 20th February 2024 RPC filed an application in this court under CPR 42.3 for an order declaring that they had ceased to act for the appellant. In support of that application they filed a copy of a letter from them to the appellant dated 18th December 2023, giving notice that they were terminating all their engagements with it with effect from 31st December 2023 as a result of prolonged non-payment of their bills. The letter made explicit reference to the current appeal and said that the relevant partner, Mr Brodie, would be getting in touch to notify the Bureau of the applicable deadlines. The evidence of Mr Brodie in the appellant's notice itself explains that that letter had led to discussions between the appellant and RPC under which it was understood that they would be paid the outstanding fees, and a sum on account of brief fees for these proceedings, by no later than "early February", and on that basis RPC continued to act to the extent at least of filing the bundles which were required by 31st January. However, Mr Brodie says, no payment had been received and the first due date for payment of brief fees had passed. It was on that basis that the order was sought. The application of 20th February also sought directions as to how any order should be served.

7. That application came before me on 4th March. On my direction the Civil Appeals Office wrote to RPC asking what notice of the application had been given to the appellant, together with confirmation that the individual to whom notice had been particularly given was the person with responsibility for the litigation within the Cultural Bureau. Mr Brodie replied on March 5th as follows:

> "We informed the Royal Embassy of Saudi Arabia (Cultural Bureau) on 20 February 2024 by email that we were applying that day to come off the record in the light of non-payment of fees. Due to an oversight, however, a copy of the application notice was not provided to the Cultural Bureau immediately. The sealed application notice was provided to the Cultural Bureau by email and personal delivery on 29 February 2024. We have since been given oral consent by our instructing contact at the Cultural Bureau to disclose her name and email address to the court. On that basis, in response to your questions, we can confirm:
>
> - The application notice was sent by email on 29 February 2024 to [an address which I need not read out but which is that of a Professor Fatani, to whom I will refer shortly].
>
> - The hard copy application notice was delivered by hand by a trainee solicitor of this firm to the address in Chiswick on the application notice at approximately 1539 on 29 February 2024.
>
> - Both the email and the hard copy communications were for the attention of Professor Amal Fatani. To the best of our

> knowledge she has responsibility within the Cultural Bureau for the conduct of this litigation."

8. Having considered that email, on 6th March I made the order sought, which was served on that day by RPC in the manner which I had specified in the order. On the same day, Master Bancroft-Rimmer of the Civil Appeals Office emailed Professor Fatani in the following terms:

> "The court has today made an order on the application of Reynolds Porter Chamberlain of which I understand you have had notice, declaring that they have ceased to act for the Embassy in these proceedings. It will be formally served by them but I attach a copy for your information. Reynolds Porter Chamberlain have notified the court office that you are the person within the Embassy with responsibility for this litigation. Accordingly, I write to notify you of your obligation under rule 6.23(1) of the Civil Procedure Rules to notify the court of an address for service on the Embassy of communications in relation to the litigation. If you propose to instruct solicitors to replace Reynolds Porter Chamberlain, that will of course be their address. You will appreciate that this is particularly urgent in view of the imminence of the appeal hearing on 13th March".

Later the same day, the Civil Appeals Office wrote to Professor Fatani about the filing of bundles.

9. Early in the morning of Friday 8th March, i.e. last Friday, Professor Fatani replied to both emails. Her replies can be summarised as follows. She says that she had only just received the emails since she had been travelling. She said she was the Cultural Attaché to the Embassy, that she is a scientist and has no legal background, but that she had been "submitting letters from RPC law firm to parties involved in the Embassy and the Ministry during the last couple of years as part of my administrative role". She said that the relevant persons had been contacted "to take it forward", and various persons with Saudi government email addresses are cc'd to her email. She says that those persons are "resolving financial matters with RPC within the next couple of days" and that she hoped that RPC would resume representing the appellant. She asked for a "delay of the hearing" until RPC resumed representation or "the legal team in the Ministry understand the case and the requirements". Mr Brodie of RPC was copied in on the emails, as also were the claimant's solicitors.

10. On the morning of Monday 11th March, the claimant's solicitors wrote opposing the application for an adjournment, giving reasons drafted by Ms Burton of counsel, who appears for them today. Those reasons read as follows:

> "The adjournment is opposed for the following three reasons:
>
> 1. The only information given by Professor Fatani is that the appellant is 'resolving financial matters' with their former solicitors. This is not an appropriate reason for an adjournment. A bundle of authorities was due to be filed by the appellant on 6 March 2024. The claimant's barrister (who was acting *pro bono* in the appeal) chased the appellant's Silk and Junior for a response about the bundles and was

> informed on 7 March after the deadline had passed that the Silk and Junior were no longer instructed.
>
> …
>
> The claimant's position is that the appellant has not adhered to its procedural obligations to the court to date. The appellants have been aware of this hearing since 25 August 2023. The appellant has vast resources and it is unsatisfactory that it now seeks an adjournment so late in the day and for an insufficient reason. No formal application to adjourn has been made and the email is unsupported by any evidence.
>
> 2. The substantive decision which the appellant appeals from was sent to the parties on 29 June 2021. Her claim was presented to the Employment Tribunal on 19 March 2018. The claimant has still not had a hearing of the substantive matters in her claim nearly six years on. There is a personal injury that the Employment Tribunal has jurisdiction to hear whichever way the Court of Appeal decides the state immunity appeal. The claimant remains out of work and anxious to have this matter finally disposed of. Any further delay in this matter is not in the interests of justice.
>
> 3. The claimant's final hearing is listed to begin in the Employment Tribunal on 22 April 2024. It has been listed since 14 March 2023. Any delay in the Court of Appeal hearing will jeopardise that listing and mean that the claimant will face further unjustifiable delay."

In connection with point 2, I should say that I should, when referring initially to the state immunity claim, have said that in so far as the claimant is claiming for personal injury caused by the discrimination and harassment it would appear that no claim for immunity could arise in any event by reason of section 5 of the 1978 Act.

11. Later that morning I considered the application for an adjournment and the claimant's solicitors' objection. I did not believe that I should grant an adjournment at that stage. In an email sent at 12.47 p.m., cc'd to all those to whom Professor Fatani had copied her own email, Mr Brodrick of the Civil Appeals Office wrote:

> "Your email of March 8th and the Respondent's solicitors' reply of this morning have been considered by the Vice-President of the Court of Appeal (Civil Division). He is not prepared at this stage to grant an adjournment of the hearing fixed for Wednesday. Any such application needs to be made formally and supported by a witness statement giving full evidence, explaining the circumstances leading to the application and why it is said to be necessary in the interests of justice, addressing the objections raised in the respondent's solicitors' email. Any such application should of course be served on the respondent's solicitors at the same time as it is served on the Court.
>
> If any such application is made, the Court will consider it at the start of the hearing on Wednesday. You are <u>strongly</u> advised to arrange to be legally represented for that purpose, whether by RPC or by other

> solicitors. Arranging such representation at short notice will not be impossible for an entity with the resources of the Embassy, particularly as the present situation cannot have been unexpected.
>
> The Vice-President expresses no view about what the outcome of the application, if made, will be but you should be prepared for the eventuality that it will be refused. In that case your counsel or solicitors (or, with the permission of the Court, some member of the Embassy staff with authority to represent it) will have to proceed with the presentation of the Embassy's case in support of the appeal. If it does not, the Court will be entitled to dismiss the appeal."

12. Professor Fatani replied to that email at 3.33 p.m. on the same day. She repeated that she had been away from the office until March 8th, adding that she had been travelling for more than two weeks. She acknowledged that "lately" there had been problems with putting RPC in funds "due to change in payment systems" and that they had said that they would "stop representing us until due payments are sent". She said that some money had been paid on Friday and that she had been trying all weekend to expedite payments. She concludes:

> "All overdue payments have been approved, as I informed RPC on several occasions and written that as well. Financial transactions from government entities to overseas beneficiaries takes its course and will be paid in full after auditory quality assurance sectors have done their due diligence, which is in the last stages. Two instalments were received and the remaining on its way. Unfortunately, we do not have in the Cultural Bureau any expert in employment tribunals and were dependent on RPC law firm. The lawyer at the Embassy is, moreover, currently not there", and then omitting a paragraph.
>
> "We respectfully request a delay until we convince RPC to continue to represent us until all amounts have been fully transferred for the sake of fairness and giving the Appeal Court a chance to hear from both sides rather than dismiss the appeal".

13. The court replied to that email on Monday evening:

> "Your email of earlier this afternoon has been considered by the Vice-President. He understands your difficulties as an individual without legal expertise. However, the relevant responsibility is that of the Embassy as an institution. If it is the case that you personally do not have the knowledge or authority to engage alternative lawyers (assuming the issue with RPC cannot be resolved) who can prepare and present an application for an adjournment, he urges you at once to pass responsibility to whoever in the Embassy is in a position to do so. He repeats, there should be no insuperable difficulty in engaging solicitors in London at short notice. Most of the major firms have the resource to take on cases at very short notice. Although the shortness of the notice appears to be a problem entirely of the Embassy's making, the Court is prepared to assist to a limited extent by adjourning the hearing by 24 hours, that is, to 10.30 a.m. on Thursday

> – provided that the Respondent's counsel has no unbreakable professional commitments on that day."

14. That email was copied to Ms Burton and she was asked to confirm her position forthwith. She responded overnight that she did unfortunately have unbreakable professional commitments, of which she gave particulars; and accordingly the hearing remained listed for this morning.

15. It appeared from emails from Professor Fatani last night and earlier this morning that she was initially intending to attend the hearing. However, she was not in court at 10.30 a.m., and in response to enquiries she emailed the court at 11.01 as follows (omitting an irrelevant paragraph):

> "I have tried again today and yesterday for RPC to attend. Unfortunately, I did not succeed. I will not be able to attend as I have no expertise in this matter. I request respectfully that you take into consideration the information sent; and if possible delay or set another follow-up meeting to hear from us, to be fair to both sides, as I am not specialised to represent this matter and working hard to have representation from experts as soon as possible".

16. The result of that history, and of the appellant's non-appearance, is that there is in fact no formal application for an adjournment before the court and no formal evidence in support of one. Nevertheless, I think I should say that the Court would not, on the evidence supplied in correspondence, have thought it right to adjourn the appeal, for essentially two reasons – first, that an adjournment would cause serious prejudice to the claimant; and second that there appears to be no excuse at all for the predicament that the appellant finds itself in.

17. As regards the prejudice to the claimant, the essential point is that she has, as Ms Burton said in her written submissions, been waiting for over six years for a hearing of her complaint. If there were to be an adjournment of this appeal it may be that that hearing would proceed, but it certainly cannot be guaranteed that it would. If it did, it would proceed only on part of the claim, that is to say the claim under section 5, pending the resolution of the outcome on the issue of immunity under section 4 and section 16. Any adjournment would, given the pressure of work on the Employment Tribunal, mean an adjournment of many months – certainly into 2025. Given the history of this case to date, that would be wholly unacceptable.

18. Equally substantially, there is, as I have said, no possible excuse for the fact that the appellant finds itself unrepresented for the hearing of this appeal. Although the order formally declaring that RPC was no longer representing the appellant was only made a week ago, it had notice over three weeks ago that such an order was being sought. Indeed it was put on notice almost three months ago that RPC intended to cease to represent them with effect from the end of 2023: the only reason why a formal order was not sought and made sooner was that RPC were promised payment by early February but that that did not transpire. In those circumstances, the appellant has had ample time to go through whatever internal procedures were necessary to see that RPC were paid, and it has no-one to blame but itself for the fact that that has not happened. Separately, but to the same effect, it has also had ample time, if it was not willing to make full payment to RPC, to instruct other solicitors to conduct the appeal

or at least to make a proper application for an adjournment. It is not for this Court to work out why none of this happened. It may well be that no blame is to be attached to Professor Fatani herself; but, as was said in the earlier email from the Court, it can only deal with the Embassy as an institution. There can be no excuse for it being unable to arrange for legal representation at the hearing of an appeal which it is itself bringing.

19. Had there been a developed application for an adjournment there might have been more that it would have necessary or appropriate to say. However, in the present circumstances that is a sufficient indication of the reasons why, on the material before the Court, any application for an adjournment would have had to be refused.

20. I would accordingly dismiss this appeal.

Newey LJ:

21. I agree.

Warby LJ:

22. I also agree.

(This Judgment has been approved by the Judges.)

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