Appeal No. UKEAT/0443/14/DM

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 30 April 2015

Before

THE HONOURABLE LADY STACEY

(SITTING ALONE)

A APPELLANT

HOME OFFICE (UKBA) RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	A (The Appellant in Person)
For the Respondent	MR SIMON MURRAY (of Counsel) Instructed by: Treasury Solicitor's Department Employment Group - Team E1 One Kemble Street London WC2B 4TS

SUMMARY

PRACTICE AND PROCEDURE - Costs

The Employment Tribunal made an award against the Claimant of £5,000 in respect of costs. They were entitled to do so on the findings of unreasonable behaviour made by them. Appeal dismissed.

THE HONOURABLE LADY STACEY

Introduction

1. This is a Full Hearing in a case which has been given the name **A v Home Office**. The Full Hearing is on the question of costs. I will refer to the parties as the Claimant and the Respondent, as they were in the Employment Tribunal. The Decision which is sought to be appealed was made by Employment Judge Salter, Mrs Chatterton and Miss Rathbone, sitting at Reading on 10 January 2014. The Written Reasons were sent on 6 February 2014. The decision is that the Claimant is ordered to pay to the Respondent the sum of £5,000 towards costs incurred by the Respondent while legally represented in an application to the Employment Tribunal made under the **Disability Act** and the **Equality Act**.

2. The hearing concerned four separate applications made by the Claimant. The decision was that all claims were dismissed. The Written Reasons were sent to the parties in August 2013 with a corrected Judgment on 15 May 2014.

The Claimant's Case

3. The grounds of appeal which were allowed by Singh J at a Rule 3(10) Hearing are as follows, in the Claimant's words:

> **"3. … [the] Reading Tribunal in its decision made fundamental errors. The errors are:**
>
> > **(a) Their finding related to the Appellant's conduct during disciplinary proceeding not during the proceeding.**
> >
> > **…**
>
> **10. The Tribunal erred by failing to give reasons as to why it was not taking into account the Appellant's ability to pay. The Tribunal knew the Appellant was on limited means, even the Respondent mentioned the [Appellant's] means when they said in their application, "in the view of the Claimant remaining in its employment and *having limited means* the Respondent seeks a relatively modest contribution of £5,000".**
>
> **…**
>
> **12. [The] Reading Tribunal did not say why they did not consider the [Appellant's] means, hence, they fell [into] legal error." (Appellant's emphasis)**

4. The Claimant argued before me orally today and in his written skeleton argument, which I had the opportunity to read in advance, that his case could not be said to have been hopeless; that the Respondent had never sought a deposit order; that he was in ill health during the case; and that the question was not whether he had a good case but whether he reasonably thought that he had a good case. The Claimant told me that he had stood up against what he believed were wrongs done to him at work.

5. He made a preliminary oral point concerning what counsel, Mr Murray, had written in his skeleton argument concerning the Employment Tribunal making findings about the Claimant's cross-examination. The Claimant argued that the Employment Tribunal had not made such a finding. He reminded me (and I note that he reminded the Employment Tribunal in his submissions to them) that he represents himself and that he had not had the assistance of a lawyer. He reminded me that he should therefore not be judged by the standards of a professional lawyer. In his written arguments, he quoted from the case of **AQ Ltd v Holden** [2012] IRLR 648 to remind the Employment Tribunal that it is a two-stage test. Even if the threshold for an order for costs being made is crossed, it is still a matter of discretion for the Employment Tribunal to decide if it will make an order. The Claimant argued that, in all the circumstances of this case, no order should have been made. He argued in writing that the Employment Tribunal had exercised its discretion in management decisions in the case in favour of the Respondent. I understood his argument to be that that was unfair but that in any event the Employment Tribunal should exercise its discretion in his favour. He ended by stating that he was trying to rebuild his life, having been ill, and that any order for payment of money will drastically affect his wellbeing.

6. The second ground of appeal in this case was about a failure by the Employment Tribunal to take means into account and to say why it had not done that. The Claimant, in his address to me orally, appeared to agree that the Employment Tribunal had taken his means into account, but nevertheless he wished to argue that the Employment Tribunal had not said enough about why it made the decision that it made. I will have something to say later about whether I should allow any such argument to be made standing the terms of the grounds of appeal.

The Respondent's Case

7. Counsel for the Home Office, Mr Murray, submitted that the decision of the Employment Tribunal could be subject to appeal only if it was made in error of law. He reminded me that it was not for me sitting in the Employment Appeal Tribunal to review the facts and to make a different decision even if I were minded to do so; rather I had to consider whether the decision made was one that the Employment Tribunal was entitled to make. If it was such a decision and if they gave cogent reasons for it, then the decision had to stand.

8. Mr Murray took issue with the Claimant's main point on his first ground of appeal. That point was that, according to the Claimant, he had been punished for the stance that he took at work and not for anything that he had done in the course of the proceedings before the Employment Tribunal. Mr Murray argued that that ground of appeal was not made out because the Employment Tribunal had considered the conduct of the Tribunal case. It found that the Claimant had made unwarranted accusations of discrimination which were plainly hurtful to the people against whom they were made. The Employment Tribunal was well aware that the Claimant had a disability but found that he conducted the case in such a way as to show that he was able to conduct the case. The Employment Tribunal had taken his disability into account in the arrangements for the hearing. It was clear, Mr Murray argued, that in paragraph 35 of the

Costs Judgment the Employment Tribunal referred to "in the course of his conduct of the case". Therefore, argued Mr Murray, it was plain that the Employment Tribunal were taking into account all of the claims that the Claimant had made both at work, in his ET1 forms and in the Tribunal. He argued that it was not possible to separate these matters out because after all the Tribunal was about the claims that the Claimant had made.

9. He drew my attention to the terms of Rule 76 of the **Employment Tribunal Rules**, which are in the following terms:

> **"(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that -**
>
> > **(a) a party … has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings … or the way that the proceedings … have been conducted …"**

Mr Murray argued that the Employment Tribunal was plainly entitled, in all the circumstances of this case, to decide that the Claimant had acted unreasonably in the bringing of the proceedings because the Tribunal found that the Claimant had made allegations which he, the Claimant, must have known were baseless.

10. When it came to the second ground of appeal, the argument for the Respondent put up by Mr Murray was that the Employment Tribunal had taken account of the Claimant's limited means and had shown that they had done so. They had repeated the Respondent's written submission to the effect of applying only for £5,000 out of costs of over £100,000 because the Claimant was of limited means. That is what the Respondent said. The Employment Tribunal plainly read it because they repeated it. Further, the Employment Tribunal noted that there was information supplied by the Claimant about his means and it referred to that. The Employment Tribunal referred itself to the decided cases and directed itself correctly in law that it may have

regard to means, but it is not obliged to do so and it is not obliged to restrict any order to an amount that the Claimant might be able to pay at the time.

11. In connection with that, counsel at my request took me through the procedure which would follow if the award stood but was not paid. He explained that the procedure entails an application by the Respondent to the county court for enforcement. The Claimant will have an opportunity to answer that application and in that court to explain his financial situation once again and to ask the court to make an order for payment in instalments.

12. Counsel made reference to the decided cases and, in particular, to the case of **Vaughan v Lewisham LBC** [2013] IRLR 713. In that case a Claimant was found to have acted unreasonably, and an order was made for her to pay one third of the costs, which order was in the sum of approximately £87,000. Counsel pointed out that that case, which has not been disapproved in the Court of Appeal, came after the case of **Jilley v Birmingham and Solihull Mental Health NHS Trust** UKEAT/0584/06 and UKEAT/0155/07, which is an EAT case in which His Honour Judge David Richardson stated that the Tribunal making an award of costs and taking means into account should set out its findings about the ability to pay and should then decide whether a costs order should be made in the light of the paying party's means and, if it does, what the order should be. It should also give succinct reasons for its conclusions. Mr Murray argued that the later case of **Vaughan** showed that affordability was not the sole criterion and that an award may be made of a sum which it is unlikely that any individual could afford. He did not argue, of course, that that was so in this case, as the sum sought was £5,000 and that was awarded. That sum was, Mr Murray argued, a good deal less than the costs already incurred, which as I have said, are at over £100,000. He noted that, in the case of

Vaughan, the President of the EAT had found nothing wrong in principle in the Employment Tribunal setting a high amount because affordability was not the sole criterion.

13. He reminded me that, in the current case, the costs do not take into account the large amount of time taken up by 13 employees in public service having to attend and give evidence at the Employment Tribunal. He also made reference to the case of **Barnsley v Yerrekalva MBC** [2012] ICR 420.

14. Thus the Claimant had submitted to me that he had been punished because the Tribunal had taken into account what had happened before the Tribunal started. Mr Murray argued that that was so but only to the extent that the Tribunal had considered what claims had been pressed in the Tribunal relating to what had happened at work. Mr Murray also argued that the Tribunal had plainly taken into account the means of the Claimant. I allowed the Claimant a right of reply, and he argued that he had not acted unreasonably in the Employment Tribunal in the sense of behaving badly. He said that he had not intended to hurt anyone and he did not accept that he had caused damage to anyone's health.

15. Lastly, he reminded me that he had been unwell at the time and he reminded that he had produced from a psychiatrist confirming his poor health. That report was before the Employment Tribunal when it made its decision.

Conclusions

16. I have considered carefully all that has been written in the skeleton arguments and I have considered carefully the underlying Judgment of the Employment Tribunal, together with their Judgment on costs. I have listened carefully to all that has been said to me. I have come

to the view that the Claimant has not shown that the Employment Tribunal erred in law. I note in the case of **Barnsley** referred to above what was said by Mummery LJ at page 422 as follows:

> **"7. As costs are in the discretion of the employment tribunal, appeals on costs alone rarely succeed in the Employment Appeal Tribunal or in this court. The employment tribunal's power to order costs is more sparingly exercised and is more circumscribed by the employment tribunal's rules than that of the ordinary courts. There the general rule is that costs follow the event and the unsuccessful litigant normally has to foot the legal bill for the litigation. In the employment tribunal costs orders are the exception rather than the rule. In most cases the employment tribunal does not make any order for costs. If it does, it must act within rules that expressly confine the employment tribunal's power to specified circumstances, notably unreasonableness in the bringing or conduct of the proceedings. The employment tribunal manages, hears and decides the case and is normally the best judge of how to exercise its discretion."**

17. Therefore it is clear that, despite the fact that his Lordship was dealing with the **Rules** then in force, that the current **Rules** are essentially in the same terms as the **Rules** to which he was referring. He makes it clear that the Employment Tribunal is best placed to decide whether or not there has been unreasonableness and that appeals from such a decision will not often succeed. As Mr Murray has correctly submitted, I should interfere only if it can be seen that the Employment Tribunal has plainly gone wrong, and there is no way in which that can be said in the present case. The first ground of appeal is not made out.

18. The claims which the Claimant made were found by the Employment Tribunal to be ones without a basis. He made those claims at work and then in the forms initiating his claim before the Tribunal and he conducted his case by pressing them and cross-examining on them. There is no substance in his opening criticism of counsel's skeleton argument. The normal procedure was followed. There were witness statements and the Claimant then cross-examined the witnesses. I emphasise that no-one has suggested that he was particularly impolite or aggressive or that he acted in some way which was disruptive. That is a separate matter within the **Rules**. What has been found is that he made claims that did not have a basis, and it has been pointed out more than once in decided cases that claims of discrimination are very

distressing to those against whom they are made. The Employment Tribunal found that the Claimant must have known that these claims had no basis.

19. As the Claimant very frankly accepted today, it is the task of the Employment Tribunal to decide on cases brought before it. I emphasise that the Employment Tribunal did not find that the Claimant behaved disruptively, but I emphasise that that is not required in terms of the **Rules**. Rather, they found that he acted unreasonably in going ahead with and persisting in these complaints. That was well within the discretion of the Employment Tribunal to decide. They were required to consider the whole picture, and their Judgment shows that they did so.

20. The second ground of appeal is not made out either. That ground of appeal, as written, is that the Employment Tribunal did not take into account the Claimant's limited means and failed to explain why not. That ground of appeal is hopeless because it is plain on the face of the Judgment that the Employment Tribunal did take into account means. If I were to take a lenient view of fair procedure and allow the Claimant to argue that, despite the terms of his ground of appeal, he actually meant to argue that the Employment Tribunal had not given sufficient reasons for its decisions, then once more I would have to disagree with him. The Employment Tribunal has stated succinctly, in paragraph 36, that it has applied the law as set out in the decided cases and that it was aware that affordability of any amount it ordered was not the essential criterion. In my judgment the Employment Tribunal did not need to give any further explanation.

21. I am aware, in making this decision, that £5,000 is a lot of money for an individual to pay and I appreciate that the decision may seem harsh. I emphasise, however, that it is for the county court to decide on payment terms. The law is clear. Those who persist in claims before

an Employment Tribunal where there is no good basis in fact for them run the risk of being found to have proceeded unreasonably. I must therefore refuse this appeal.