Appeal No. UKEAT/0354/14/BA
UKEAT/0355/14/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 24 & 25 February 2015

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

MR M BAILLON — APPELLANT

GWENT POLICE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEAL AND CROSS-APPEAL

APPEARANCES

For the Appellant	MR NICHOLAS SMITH (of Counsel) Instructed by: Ashfords LLP Tower Wharf Cheese Lane Bristol BS2 0JJ
For the Respondent	MR JONATHAN WALTERS (of Counsel) Instructed by: Joint Legal Services South Wales Police Headquarters Cowbridge Road Bridgend Gwent CF31 3SU

SUMMARY

PRACTICE AND PROCEDURE - Costs

UNFAIR DISMISSAL - Compensation

The Employment Tribunal found that the Claimant had been unfairly constructively dismissed by his employer. In the course of the Remedies Hearings: (i) the Employment Tribunal assessed the Claimant's loss of income for the period after his dismissal; (ii) the Employment Tribunal stated that the Claimant would not have left his employment before he was 60, following which the parties agreed a figure for pension loss of £429,000 odd; (iii) the Employment Tribunal dismissed the Claimant's application for costs.

On appeal and cross-appeal, the Employment Appeal Tribunal:

(i) Allowed the Claimant's appeal on the assessment of his loss of income: the Employment Tribunal's figures were arbitrary and had no clear rationale;

(ii) Dismissed the employer's cross-appeal against the pension loss: although the Employment Tribunal's conclusion about the Claimant leaving employment may have been perverse, the parties had subsequently agreed the figure for pension loss without seeking to challenge the conclusion in any way;

(iii) Dismissed the Claimant's appeal against the refusal to award him costs: however egregious an employer's conduct in relation to an unfair dismissal, costs can only be awarded against them if they have acted unreasonably in their conduct of the proceedings.

HIS HONOUR JUDGE SHANKS

Introduction

1. This is an appeal and a cross-appeal arising from Judgments of the Employment Tribunal sitting in Cardiff (Employment Judge R Harper and members) which relate to compensation in this case and which were sent out on 3 January 2014 and 11 February 2014. The Claimant had succeeded at an earlier hearing in a claim of automatically unfair dismissal under section 103A of the **Employment Rights Act 1996**. He appeals against a finding by the Employment Tribunal relating to receipts following his constructive dismissal and against the Employment Tribunal's refusal to make a costs order in his favour; and the Respondent employer, the Gwent Police, cross-appeals against a finding relevant to the calculation of the Claimant's loss of pension rights.

Background

2. The background is this. The Claimant joined the Respondent police force when he was 26 on 1 March 1997. From June 2001 he was assigned to the Road Policing Unit (the RPU). That was work which he enjoyed very much. In September 2009 the Claimant was involved in an incident with a man called Mr Whatley, which was somewhat notorious. On 15 November 2011 he felt constrained to write a long complaint about the way that the Respondent police force had dealt with matters arising from that incident, and the letter of complaint included, the Employment Tribunal found, qualifying disclosures for the purposes of the "whistleblowing" provisions.

3. On 30 January 2012 the Claimant was called to a meeting with a Chief Inspector Pavett and a lady from HR. The Employment Tribunal accepted his evidence that he was told at that

meeting that, if he did not withdraw his complaint, there was a risk that he would be removed from the RPU. The Tribunal expressly found, at paragraph 41 in the Liability Judgment:

> **"… The meeting was a clear attempt by the respondent to silence the claimant. The upshot of the meeting was that the claimant would be referred for counselling and also [to] see a doctor."**

The Claimant responded to that meeting by writing to HR, making it clear that he did not want to move jobs from the RPU.

4. On 7 February 2012 there was an internal e-mail, which is quoted by the Tribunal at paragraph 44 of the Liability Judgment. It was from a James Baker, addressed to a David Johnson at the Newport Local Policing Unit. It stated this:

> **"Following the continued erratic behaviour and a clear non-acceptance to move on from the Whatley Incident it has caused the ACC [Assistant Chief Constable] to review PC Baillon's position on the Roads Policing Department. PC Baillon continues to work himself up over the incident to the point that we are concerned that his judgment may be impaired whilst driving fast cars putting himself and others in danger. Furthermore, he is in an environment where he may again come into contact with Mr Whatley and given his present thought processes that may lead to further issues for himself and the force."**

Paragraph 44 goes on:

> **"The Tribunal were told that this wording largely mirrors the wording in a letter or memo from Chief Constable Prince. [It is accepted that that is an error. It should read Assistant Chief Constable Prince, and I note at this stage that as Assistant Chief Constable I am told he was Number 3 in the organisation.] This is because James Baker told the Tribunal that he had sent the file to the HR Department which contained the instruction from Chief Constable Prince [again, an error], but that file appears to have gone missing. It is deeply regrettable that one of the most important documents in this case has been lost by the respondent."**

It was clear from the date and the time of the e-mail on 7 February 2012 that a decision to move the Claimant was entirely related to the protected disclosures which had been made.

5. On 9 February 2012 the Claimant was visited by James Baker and the same lady from HR. The Tribunal record what happened in the course of that visit at paragraph 47 of the Liability Judgment:

> **"… At that meeting there was a discussion about the locker incident and a discussion about the report of the scrap metal theft incident. Mr Baker's statement at Paragraph 31 states:**
>
> > **"I then informed him that following these concerns he would be moved to Newport LPU."**
>
> **As a matter of record this is incorrect because a decision had already been made to move the claimant to the Newport LPU before the incidents relating to the locker and to the scrap metal theft. The Tribunal reject the contention that the move to the LPU had anything to do with welfare issues and had everything to do with trying to "punish" the claimant for having had the perceived audacity to write complaints and make protected disclosures relating to Senior Officers of the Police Force."**

6. Following that the Claimant was off sick, and indeed the Tribunal record that he was going to be off for three months having an unrelated operation. On 31 July 2012 the Claimant lodged an appeal against the decision to remove him from the RPU, but he was told that he could not appeal because the decision had been taken by the ACC, namely Assistant Chief Constable Prince. In response the Claimant resigned on 31 August 2012. The Employment Tribunal found that his resignation amounted to a constructive dismissal and that it was an automatically unfair constructive dismissal by virtue of section 103A of the **Employment Rights Act**.

7. The Liability Decision, which I have quoted from already, was sent out on 27 February 2013. There was a Remedies Hearing on 13 November and 9 December 2013. At the conclusion of that hearing the Employment Tribunal issued the Judgment sent out on 3 January 2014. In that Judgment they made various findings and they also recorded, expressly, that the basic award was agreed at £6,450, that a number of types of award would not be pursued by the Claimant and that there would be a further hearing on 5 February 2014 to "deal with any residual remedies issues" and to deal with costs.

8. After the further hearing, which took place on 5 February 2014, the Employment Tribunal issued another Judgment on 11 February 2014, which rejected the Claimant's application for costs and clarified a specific finding related to damages, which is the subject of the first head of appeal, which I will deal with now.

Appeal on Loss of Income

9. The Claimant earned £38,000 per annum gross as a police officer so that the starting point for his claim to loss of income arising from his unfair dismissal was obviously going to be £38,000 per annum net of tax.

10. After he resigned from the Respondent he started in business making wooden reindeer and in due course incorporated the business as Celtic Woodcraft Ltd. It was accepted in the course of the Remedies Hearing by the Respondent that this was a very good decision and that the business was lucrative. It is implicit in that that the Claimant had, by setting up that business, properly mitigated his prospective losses. In those circumstances he would obviously have to give credit for any net income he received from having that business and indeed, had running that business resulted in losses to him, the Respondents would have had to compensate him in respect thereof.

11. The Claimant produced a schedule for the Employment Tribunal setting out his claim for loss of income. In its amended form it appears at page 268 of my bundle. Under the headings "Loss of earnings as a police officer" the Claimant sets out his net loss of earnings for the period 1 September 2012, the day after his resignation, up until 16 November 2015, which was a date two years after the hearing. The total projected net loss of earnings was given as £91,895.94.

12. There was then a heading "Mitigation", and it was divided into two sections: "Sums obtained through mitigation to 31.12.2013" and then "Future mitigation to 31.12.2015". In the first section there were figures which totalled £60,482, which represented gross sums invoiced in respect of reindeer sales up to Christmas 2013. There was then a heading "Less start up costs/running costs of Celtic Woodcrafts Ltd to 31.12.2013", which had figures for "Expenses incurred starting up business", £20,000; "Expenses incurred running business", £20,000; "Business premises rent", £8,800; "Wages", £4,500; "Insurance", TBC, which gave a total figure for cost to 31.12.2015 of £53,300 and a total obtained through mitigation of £4,675 to be set off against the net financial loss of £91,000-odd. So far as future mitigation was concerned there was a figure for "Further gross income" over the next two years of £53,500 per year and "Less future anticipated running costs", which gave a total future gross income figure for the following two years of £54,000. The result of that was that from the £91,895.94 the Claimant was volunteering credit of a total of £58,675 gross, although the net figure would presumably have been less than that. In any event it was clear that he was claiming at least £30,000 by way of financial loss for the three-and-a-quarter years following his resignation.

13. He also produced at the hearing a document which is at pages 217 to 226 in my bundle, which I understand was supported by a number of other documents. That lists various expenses by reference to page numbers, which I assume are invoices and so forth which relate to them. The important thing is the totals, which are in two columns: start-up cost, £10,487.81; ongoing business cost, £19,096.29. Those figures do not seem to relate clearly to the figures set out in the schedule that I have already mentioned.

14. The relevant findings of the Employment Tribunal on this part of the case are at paragraphs 15, 16 and 17 of the Judgment sent out on 3 January 2014. They read as follows:

> **"15. Having established Celtic Woodcraft Ltd, the claimant clearly worked very hard making the reindeer and doing some marketing of them. He appeared however, to entirely neglect the paperwork side of the business. The consequence of a lack of business plan, a budget, invoices or accounts was that the two parties, and indeed the Tribunal, had to use their respective best efforts to establish what income/profit had been generated by this business and what income/ profit would be produced in the future. Mr Green confirmed in his evidence that "As it happens his business has proved lucrative" but such conclusion could only also have been based on a total lack of hard information. The inference to be drawn from the lack of financial information is that the Claimant's financial position is in fact much rosier than he has submitted through Counsel. He has been given every opportunity to provide his financial details but has failed [to do so].**
>
> **16. The consequence of such paucity of information is that the claimant asserted that in the next 2 years he will be receiving an income of £20,000-£25,000 gross per year rising to £30,000-£35,000 per annum gross in the 3-5 year period [it is not clear where exactly those figures come from]. The respondent's submissions in paragraph 54-58 in relation to the point "within 2 years the claimant should be at an income level commensurate with that which he enjoyed as a police officer", replied "If not before". The claimant's gross annual pay as a police officer was £38,000 so, by answering the question in that way, the respondent accepted that the business was indeed lucrative. Obviously the respondent had a vested interest in making such assertion in order to keep ongoing income loss to a minimum.**
>
> **On the balance of probabilities given the apparently good existing sales, good projected sales, project diversification and no more start up costs being incurred, the Tribunal finds that £30,000-£38,000 for each of the first 2 years and the same figures for each of the period years 3-5 is a reasonable assumption."**

The Tribunal then deal with the issue of tax and make the point that, by paying himself dividends out of the company, the Claimant's net position may be improved as against his position if he was still an employee. At paragraph 17 they said this:

> **"The consequence of this unsatisfactory state of affairs with regard to the lack of hard evidence is that the Tribunal has been placed in the situation of having to make a pot with what little clay it has been given. There was no useful purpose in seeking further clarification because the claimant had been given extensive opportunity to produce this documentation and had conspicuously and stubbornly failed to do so. He had the opportunity especially between the two dates of the remedy hearing to rectify the situation and apply to be recalled at the adjourned hearing on 10th December 2013 to give evidence to produce any further documents, but did not do so."**

15. Clarification was sought at the hearing on 5 February, and the Tribunal at paragraph 1 of the Judgment sent out on 11 February 2014 said this:

> **"To clarify the Tribunal's decision set out in the remedy judgment in paragraph 16, those figures were his personal income not profit and the anticipation is that the claimant would have received £30,000 gross in the first year, £32,000 gross second year, £34,000 gross third year, £36,000 gross fourth year and £38,000 gross in the fifth year. The parties are to agree the loss of earnings accordingly."**

It seems that on that basis the parties did agree net loss of earnings, although because of the point the Tribunal had made about the taxation treatment of his earnings from the new business, the net result came out, perhaps rather surprisingly, at a figure of only £2,500 roughly.

16. The Claimant says in the appeal, through Mr Smith, that the Tribunal's decision on this point was perverse; in particular, that the figure apparently for his gross receipts of £30,000 in the first year of the business, which is presumably 1 September 2012 until 31 August 2013, cannot have taken proper account of the start-up costs and that the subsequent years cannot have taken proper account of the expenses. Mr Smith says there was evidence, supported by vouchers, for figures in respect of start-up and running expenses. He says that, when the Tribunal say there was no evidence in relation to such matters, they are wrong.

17. Mr Walters for the Respondents is right, I think, when he says that what the Employment Tribunal were unhappy with was not a lack of evidence of expense but a lack of evidence of income and a lack of supporting documentation for the figures for income that appear in the schedule I have referred to. In my view it was open to the Employment Tribunal in assessing the Claimant's receipts from the sale of his reindeer to draw an inference against him, based on the lack of documentary evidence he produced, to the effect that his income from those sales was greater than that which he was asserting, even though the Tribunal had found that in general he was an honest man.

18. However, it seems to me that there are some very obvious problems with the approach taken by the Employment Tribunal. First of all, there appears to have been a period of four months before the business got going. I take that from paragraph 14, where the Tribunal said that Mr Green, the Respondent's expert, had confirmed that it was wise for the Claimant to

have spent the four-month period from August 2012 to December 2012 making arrangements for the establishment of Celtic Woodcrafts Ltd coming on stream and at the bottom of that paragraph, where they say they agree that it was reasonable for the four-month period to be spent setting up the new limited company.

19. The second thing is that there must inevitably have been some start-up costs. There was some supporting material for start-up costs. The Tribunal acknowledged, in paragraph 16, that there were start-up costs. So it is very odd that the gross receipts by the Claimant for the first year should be at a figure just £2,000 lower than that for the second year when the start-up costs, as he had put them forward, were £10,000.

20. The third thing is it is not at all clear why the Employment Tribunal gave figures projected for five years. The claim was only for three-and-a-quarter years, as I have said, and it is accepted by Mr Walters that they were just wrong and had done something which was unnecessary. Furthermore the findings which I have quoted are, on any view, muddled and difficult to follow. In particular, the finding that there were good existing sales, good projected sales and no more start-up costs, which I take from paragraph 16, would indicate that the Tribunal there have in mind matters going forward from the date of the hearing in December 2013. However, I am told that the finding that they made somehow related back to September 2012.

21. The solution which the Employment Tribunal hit upon when it came to give hard figures has the look to me of an arbitrary decision with no clear rationale behind it. It may indeed have resulted from frustration with the Claimant and with his failures to produce relevant documents. It may, therefore, be understandable. But it seems to me that the decision is inadequately

reasoned, is muddled and that, if the Employment Tribunal had applied their minds properly to the problem with a little more rigour, they might have reached a somewhat different conclusion, although that would be a matter for a Tribunal on a remitted hearing.

22. In all the circumstances I am going to allow the appeal so far as it relates to that finding.

Cross-appeal on pension

23. That brings me to the second matter I must deal with, the cross-appeal in relation to pension. The Claimant was 41 when he was constructively dismissed. The normal retirement ages for police officers, as I understand it, would be 60. He would by then have accrued a very good pension. The finding that it was reasonable of him not only to resign but to start his own business inevitably meant that he was going to claim a substantial sum for loss of pension which was going to comprise the major part of any compensation. Accordingly experts were instructed on both sides to report on his loss of pension, and it was agreed between the parties that the Employment Tribunal would address various questions, which would in due course enable those experts to agree a figure for loss of pension. One of the questions that the Tribunal were asked to address is set out at page 189 in my bundle in the summary to the report by Mr Palmer, who was the Respondent's expert. That question was in these terms. Mr Palmer said:

> **"… In order to quantify the pension loss I will require the following further information;**
>
> …
>
> - **the allowance that should be made for the likelihood that Mr Baillon would, in the normal course of events, left the police force at some future date on an entirely voluntary basis;**
>
> …"

I am bound to say it is not clear to me why the question was phrased in exactly those terms, namely contemplating Mr Baillon leaving the police force "on an entirely voluntary basis",

given that one can imagine many reasons for him leaving the police force which would not have been on an entirely voluntary basis. There we are - that was the question that was asked.

24. The relevant findings are in the Judgment sent out on 3 January 2014 at paragraph 36 where the Tribunal said this:

> **"An important question of fact for the Tribunal to decide is whether the claimant would have left the police force before his 60th birthday on an entirely voluntary basis. As earlier stated the Tribunal find that it was extremely likely that he would have remained until his 60th birthday doing a driving job which he loved and in relation to which people spoke highly of him. The police pension, as part of the public sector pension arrangements, is a very valuable asset. The accrual of such pension is difficult to match with an individual providing a pension from a personal pension scheme. It is therefore unlikely that the claimant who is a married man with 2 young children would have walked away from it voluntarily. The claimant's 60th birthday would be on 4 January 2031."**

Then, at paragraph 41, the Tribunal expressly set out the answer to the bullet point in these terms, "The claimant would not have left the respondent before he was aged 60." It will be noted that is not really an answer to the question for two reasons. One is that the Tribunal was being asked to provide the allowance that should be made. And, secondly, the Tribunal in those words do not seem to be confining themselves to the Claimant leaving voluntarily.

25. Following the Judgment sent out on 3 January 2014 the parties agreed a figure for pension loss of £429,434.64 on a grossed-up basis. That is recorded in paragraph 1 of the Reasons sent out on 11 February 2014. That figure was reached on the basis, I was told by both parties, that there should be a zero percent discount to reflect voluntary departure, although as I have already indicated, the Tribunal did not say zero percent or any other percent in their answer at paragraph 41 of the Judgment sent out on 3 January 2014.

26. The Respondents now appeal against the ruling in paragraph 41 of the Employment Tribunal's Decision. They say that the Decision should be read as a finding that there is a 0%

chance, as the parties have apparently read it, that the Claimant would have left before he was 60 and that such a conclusion cannot be right.

27. Although the Claimant through Mr Smith sought to persuade me that that was indeed the finding of the Employment Tribunal and that it was one that was open to the Tribunal, I cannot accept that it was a decision open to any Tribunal. There must be some chance, even if quite small, that someone in the Claimant's position would indeed have left voluntarily over the period of almost 20 years from when he was 41 to when he was 60. And there must have been a bigger chance that he would have left voluntarily or because of some involuntary reason like an accident or because he was dismissed for some perfectly proper reason like redundancy. The latter was the chance that the Employment Tribunal ought to have been asked to assess but, in any event, if they were indeed finding that there was a zero percent chance, then it seems to me that that finding must be perverse either way.

28. However, notwithstanding that conclusion, it seems to me that the Respondent's appeal on this point is hopeless for a reason which I raised myself. As recorded by the Employment Tribunal the parties had, after the Judgment sent out on 3 January 2014 and shortly before the hearing on 5 February 2014, agreed a grossed-up pension loss figure of £429,000 odd. Given that the amount was agreed, I do not see how it can be open to the Respondent now to appeal, as they state in the cross-appeal document (page 77 of the bundle) "against the level of the award of pension compensation made by the Cardiff Employment Tribunal". Apart from anything else the Cardiff Employment Tribunal did not make any award in respect of pension loss.

29. The proper course, if the Respondent was unhappy with the answer which had been given to the question put to the Employment Tribunal, was to ask the Tribunal to reconsider it at the hearing on 5 February 2014 and/or to appeal the finding before finally agreeing the figure of loss of pension. Indeed I am baffled as to why they did not do the first of those things given, in particular, that the hearing on 5 February 2014 was specifically arranged to deal with any "residual remedy matters" and that the Employment Tribunal, as I have already said, was specifically asked to clarify their decision on the loss of personal income. What the Respondents cannot do is raise a cross-appeal on this point, having agreed the figure for pension loss without any kind of reservation and indeed having paid it in full to the Claimant. I dismiss the cross-appeal.

Appeal on Costs

30. That brings me to the Claimant's appeal on costs. Fortified, no doubt, by the strong findings made by the Tribunal on liability, the Claimant applied for the costs of the whole proceedings on an indemnity basis. The basis for the application was set out in a document which is at pages 227 to 230 of my bundle. I quote from paragraphs 8 to 13 of that document:

> **"8. It is clear that the decision to remove him was as a direct consequence of his failure to withdraw his complaint. CC [should read ACC] Prince abused his position and power in a grotesque fashion. Absent the missing 'dossier', the ET was able to ascertain the content of the instructions to James Baker by his instruction to David Johnson, as can be seen at para 44 of the judgement.**
>
> **9. Put simply it is as scandalous and shocking as it is blatant and punitive. It is a gross abuse of power.**
>
> **10. The ET findings reflect this abuse. The suggestion at the time that this was a decision made as a consequence of the 'locker room' incident was a feeble attempt to mask the truth.**
>
> **11. The Respondent's defence of the case has been equally reprehensible and should be met with indemnity costs as it sails past the lowest threshold of unreasonable conduct."**

Paragraph 12 I won't quote. It deals with a High Court case relating to indemnity costs. Paragraph 13 says:

"Has the ET ever seen clearer evidence of the conduct of the 'employer' being unreasonable to a high degree? It is astonishing that the matter was contested in the first place remains seemingly doggedly contested."

31. The relevant rule is Rule 76(1) of the **Employment Tribunal Rules**. That says:

"(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 (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

(b) any claim or response had no reasonable prospect of success."

32. The Employment Tribunal dealt with the costs claim at paragraphs 3 and 4 of the decision sent out on 11 February when they said this:

"3. In our view, the claim which the claimant brings for costs against the respondent is misconceived because the main basis of it is to rely on a finding of fact, which is highlighted in the skeleton argument at paragraph 6, namely that a meeting was a clear attempt by the respondent to silence the claimant. The claimant also relies on paragraph 7 of the skeleton argument which highlights a passage which reads as follows:

"Whilst he remains a member of this force, however, he accepts that there is a possibility that by continuing in this vain. He may continue to cause others to question his suitability to drive high performance vehicles and thereby jeopardise his position as an RPU officer."

Those are the alleged facts of the case. They do not amount [to] conduct of the party during the case. The question is rhetorically posed in paragraph 13 of the skeleton argument: Has the Employment Tribunal ever seen clearer evidence of the conduct of the employer being unreasonable to a high degree? The conduct referred to pre-dated the issue of proceedings.

4. In this case the liability hearing caused the Tribunal panel to have lengthy discussions in order to reach our findings. Although it is a fact that the respondent lost the case, we do not find that it was unreasonable for the respondent to defend the case. Therefore we strongly disagree with Mr Smith's observations about whether or not the case should have been contested. …"

33. Mr Smith now says that the Employment Tribunal wrongly excluded consideration of background findings which may have been relevant to considering whether to make an award under Rule 76(1). The background to any finding on liability is obviously and inevitably relevant to an application for costs. But it cannot by itself form the basis of an award of costs, however egregious the conduct of the employer. A party seeking costs has to identify and demonstrate how the other party has behaved unreasonably in bringing, or in the way they have

conducted, the proceedings. Costs flow from conduct during the proceedings. On the basis that the costs application was being put forward, I can see nothing wrong with the Employment Tribunal's reasons at all. The mere fact that someone in the organisation, even high up, had been found to have behaved badly does not mean that it was unreasonable of the organisation to resist a claim based on that behaviour. The Employment Tribunal were entitled to take into account the fact that their decision in the case had involved them in lengthy discussions in reaching the view that the Respondent had been reasonable in defending the case. The Respondent through Mr Walters also reminds me that there were many issues apart from the one on which the Claimant conspicuously succeeded on the facts. In particular there was the question of causation of his resignation, affirmation, a number of alleged detriments that were found not be established, time bars in relation to those, and claims for personal injury, injury to feelings, and aggravated damages, which were ultimately not pursued.

34. In the course of his oral submissions Mr Smith sought to suggest that the failure to put in a witness statement or seek to call Assistant Chief Constable Prince until the second day of the hearing, when the Employment Tribunal said they could not call him, was unreasonable conduct which could form the basis of an award of costs. Apart from the fact that this point did not feature in his Grounds of Appeal or, as far as I can see, in submissions before the Employment Tribunal, as Mr Walters rightly points out, it is obviously hopeless. The fact that the Respondent did not take the trouble to call the ultimate decision maker in the case was obviously only to the advantage of the Claimant. If they had called him, the Claimant's case may have been more difficult.

Disposal

35. I therefore dismiss the appeal in relation to costs. I dismiss the cross-appeal. I allow the appeal in relation to paragraph 1 of the Judgment sent out on 11 February 2014 and the prior finding at paragraph 16 of the Reasons sent out on 3 January 2014. I will set aside those findings and they will have to be remitted in some way, on which I will now hear submissions.

[The loss of income issue was remitted to the same ET with a direction that the parties could not present further evidence but could make further submissions in the light of this judgment based on the evidence already before the ET.]