Appeal No. UKEAT/0147/14/KN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 9 September 2014

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR R S FLINT — APPELLANT

COVENTRY UNIVERSITY — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MISS EMILY GORDON WALKER (Appearing through the Bar Pro Bono Unit)
For the Respondent	No appearance or representation by or on behalf of the Respondent

SUMMARY

PRACTICE AND PROCEDURE - Costs

Employment Tribunal award of costs

Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004 Schedule 1 rr.38-42

Pursuant to r.41(2), the means of the paying party might be taken into account in considering (1) whether to make an award of costs; and/or (2) as to how much should be awarded.

It was not mandatory for an Employment Tribunal to have regard to paying party's means: it "*may* have regard to the paying party's ability to pay"; it was not obliged to so do. Moreover, the fact that a party's ability to pay was limited did not require the Employment Tribunal to assess a sum confined to an amount that he or she could pay (see, eg, **Arrowsmith v Nottingham Trent University** [2012] ICR 159, CA, and **Vaughan v London Borough of Lewisham** [2013] IRLR 713, EAT).

That said, discretion thus afforded to Employment Tribunal to make award of costs would have to be exercised judicially (**Doyle v North West London Hospitals NHS Trust** UKEAT/0271/11/RN). As with any exercise of discretion on the part of an Employment Tribunal, the Employment Appeal Tribunal would only interfere if a relevant matter had been taken into account or there had been a failure to have regard to a relevant matter or if the conclusion reached was perverse (**Bastick v James Lane (Turf Accountants) Ltd** [1979] ICR 778, EAT). An appeal against a costs order will be doomed to failure unless it is established that the order is vitiated by an error of legal principle or was not based on the relevant circumstances (see **Yerrakalva v Barnsley MBC** [2012] ICR 420, CA per Mummery LJ).

Here the Employment Tribunal had considered the Claimant's ability to pay to be a relevant matter in deciding to make an award of £9,000 costs against him. On the evidence before the Employment Tribunal, however, it had reached the unfounded conclusion that he had been able to obtain well paid work as a freelance consultant. The actual evidence was of two examples of

paid consultancy work from 2006. There was no evidence of a "recent history" of well paid consultancy work. The only relevant work had been undertaken some 7 years' previously; was limited in time; and had given rise to a total of £4,300 fees. Otherwise the evidence was that the Claimant had a history of low paid, temporary engagements with significant periods of unemployment, including a period of some three years prior to working for the Respondent.

Thus, having decided it was relevant to take into account the Claimant's ability to pay, the Employment Tribunal failed to take into account these relevant matters, alternatively took into account irrelevant matters or simply reached a perverse conclusion on evidence before it.

On disposal, however, this was ultimately a matter of discretion for the Employment Tribunal and it would be inappropriate for the Employment Appeal Tribunal – on the basis of submissions from one party – to usurp the Employment Tribunal's function by substituting its own decision. Even on the evidence as to the Claimant's means, it was possible that the Employment Tribunal would still consider it appropriate to make a nominal award of costs in this case. In the circumstances, the appropriate order on disposal was to direct that the matter be remitted to the same Employment Tribunal to determine the Respondent's application for costs (if still pursued) in the light of the evidence as to the Claimant's means and ability to pay.

HER HONOUR JUDGE EADY QC

1. In this Judgment, I refer to the parties as the Claimant and the Respondent as they were before the Tribunal below. The appeal is that of the Claimant against a Judgment of the Birmingham Employment Tribunal (Employment Judge Lloyd, sitting with members on 25 and 26 February 2013), which was sent to the parties on 28 February 2013.

2. By that Judgment, the ET granted the Respondent's application for costs against the Claimant, in the sum of £9,000. That award sits alongside the ET's Judgment, also of 28 February 2013, refusing the Claimant's application for an adjournment. The ET having refused the application for an adjournment, the Claimant then applied to withdraw his claim, and the ET issued a Judgment dismissing the proceedings upon that withdrawal and making an award for costs. The two Judgments need to be read together.

3. The appeal in this matter was originally more wide-ranging but, after a Rule 3(10) hearing before HHJ Hand QC, it was permitted to proceed on one basis only, which is set out by HHJ Hand QC as follows:

> **"I do think it is reasonably arguable that paragraphs 3.7 to 3.9 of the dismissal/costs judgment do not amount to an adequate assessment of his means or his ability to pay. They are based on false assumptions made from outdated documents and it is arguable they do not represent a proper consideration by the Employment Tribunal of the means of the proposed paying party."**

That, then, is the issue before me.

4. The Claimant had represented himself before the ET and at the Rule 3(10) Hearing, but at the Full Hearing of this appeal has had the benefit of representation from Miss Gordon Walker of Counsel, acting as instructed by the Bar Pro Bono Unit. The Claimant and the EAT can be grateful to her for that pro bono assistance.

5. The Respondent at the ET was represented by Miss Hodgetts of Counsel but has not chosen to play any active part in the appeal proceedings on the grounds that it does not consider it economic to do so.

The Employment Tribunal Proceedings and Reasons

6. Given the narrowness of the point before me, I can take this fairly shortly. The ET proceedings were governed by the 2004 Regulations and therefore the **Employment Tribunal Rules 2004**. The ET expressly considered the issue of the Claimant's ability to pay a costs award. It believed it was reasonable to conclude that he had the ability to pay and made an award against him of £9,000. The ET's reasons in this regard are set out at paragraphs 3.8 and 3.9 of the Judgment:

> **"3.8 We considered the issue of the claimant's ability to pay a costs award. We believe it is reasonable to conclude that he has the ability to pay. Although he says he has been unemployed of late, he has produced a career history and profile which would indicate that he has in recent years been able to obtain and execute well paid work as a self employed freelance and consultant. He did not adequately answer the questions put to him by Ms Hodgetts about the lack of record of tax returns for periods of self-employment from about 2003/2004.**
>
> **3.9 We therefore make a costs order in favour of the respondent in the amount of £9,000.00 and the claimant shall be responsible for its payment."**

The Legal Principles

7. The relevant legislative provisions are to be found in the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004**, Schedule 1, Rules 38-42. The means of a paying party in any costs award may be considered at two stages. First, in considering whether to make an award of costs. Secondly, if an award is to be made, in considering how much should be awarded (see Rule 41(2)). Rule 41(2) did not make it mandatory for an ET (or Employment Judge) to have regard to the paying party's means: it "*may* have regard to the paying party's ability to pay"; it was not obliged to do so.

8. That said, the discretion thus afforded to ETs to make an award for costs had to be exercised judicially, see **Doyle v North West London Hospitals NHS Trust** UKEAT/0271/11/RN, at paragraph 5. In the case of **Jilley v Birmingham and Solihull Mental Health NHS Trust** UKEAT/0584/06, the EAT held that, whether or not it takes into account the ability to pay, an ET should give reasons for that Decision. In **Jilley** the EAT (HHJ Richardson) acknowledged there was no absolute duty to take ability to pay into account. That said, it observed that, in many cases, it would be desirable to take means into account before making an order as "ability to pay may affect the exercise of an overall discretion".

9. The fact that a party's ability to pay might be limited would not, however, require the ET only to assess a sum or make an award that was confined to the amount that that party could pay at that time. See, e.g. **Arrowsmith v Nottingham Trent University** [2012] ICR 159 and **Vaughan v LB Lewisham** [2013] IRLR 713; in both those cases awards were made which were of substantially greater sums than the paying party could at that stage actually pay but that was not considered to be fatal. It was held that ETs are entitled to project forward as to what might be the position in the future and make an award taking into account possible future earnings. The observation was made in **Vaughan** that any enforcement of a costs order will be in the county court, which will have the ability to take into account a paying party's means and actual ability to pay.

10. Ultimately ETs have a broad discretion in making any award of costs and Appellants generally have an uphill task in seeking to challenge such an award. As Mummery LJ observed in **Yerrakalva v Barnsley MBC** [2012] ICR 420, an appeal against a costs order will be doomed to failure unless it is established that the order is vitiated by an error of legal principle or was not based on the relevant circumstances. As an exercise of judicial discretion on the part

of an ET, an EAT will only interfere with a costs award if the Tribunal making it has taken into account some irrelevant matter or has failed to take account of some relevant matter, or has reached a conclusion that is perverse (see, for example, **Bastick v James Lane (Turf Accountants) Ltd** [1979] ICR 778 EAT).

Submissions

11. Miss Gordon Walker first observes that in this case the ET had considered it relevant to have regard to the Claimant's ability to pay. Having taken that view, it was incumbent on the ET to consider all the relevant material before it. It failed to do so. Specifically, it failed to have regard - or proper regard - to the Claimant's unemployed status, his disability and inability to work, his absence from the workplace since April 2012, his career and education history.

12. In particular, she contended that the Tribunal had erroneously concluded that the Claimant's job application from 2009 indicated a recent ability to obtain and execute well-paid work as a freelance consultant. The truth was that – according to that application – the Claimant had worked as a freelance consultant on just two occasions, seven years' prior to his application to the Respondent, earning a total of £4,300. In contrast, the employment history evidenced in that application showed a pattern of irregular work and long periods of employment (notably for three years prior to his application to the Respondent). That picture had, further, been confirmed in the Claimant's oral evidence to the ET.

13. On that basis, Miss Gordon Walker contended that, had the ET exercised its discretion judicially, it would have been bound to reach the conclusion that the Claimant had no ability to pay a costs award. That being so, she contends the EAT should uphold the appeal and itself so find.

14. To update the position, she has taken me to material that was not before the ET but that demonstrates that the Claimant has little in his bank account (he had only marginally more at the time of the ET hearing), is in receipt of benefits and is now homeless. She urges me not only to overturn the ET's Judgment but to substitute my own decision that no award should be made.

Discussion and Conclusions

15. This is not a case where the ET did not consider it relevant to take the account of the Claimant's means. Here the Tribunal expressly considered the Claimant's ability to pay to be a relevant matter in deciding to make an award of £9,000 against him. The question is whether it then took into account all relevant matters or, because it misunderstood the evidence, took into account irrelevant matters and/or reached a perverse conclusion.

16. The first three matters raised by the Claimant as not having been properly taken into account (that is: (1) the Claimant's unemployed status; (2) his disability and the impact of that on his ability to work; and (3) his absence from the workplace since April 2011) can be taken together. The ET obviously had some regard to what the Claimant had stated about his unemployed status (see paragraph 3.8), but it then referred to what it described as his "career history and profile" (which seems to be a reference for his application for employment with the Respondent) as suggesting that he had, in recent years, been able to obtain and execute well-paid work as a self-employed freelance consultant.

17. As Miss Gordon Walker observes, the evidence that was before the ET, which included medical evidence from Occupational Health advisors, was in fact of a history of unemployment,

with the Claimant's prospects in the labour market being severely limited as a result of the impact of his disabilities upon his ability to work. From what I have seen, the evidence before the ET from the Claimant was that he had left school with no qualifications. On entering the workplace, he had undertaken a series of temporary jobs. That was the picture of his employment history which continued to the period with which the ET was concerned. As he described the position, he was stuck in the trap of low-paid employment. He also testified that he had applied unsuccessfully for hundreds of jobs before applying to the Respondent.

18. That evidence was consistent with the Claimant's application for work with the Respondent, which was understood by the ET to set out his career history and profile. If - as paragraph 3.8 of the ET's Reasons suggests - the ET understood that to be evidence that the Claimant had been able to obtain well-paid work as a freelance consultant, that would be a perverse reading of the document. The actual evidence was of two examples of paid consultancy work, most recently in 2006. There was no evidence of any "recent history". Indeed the profile corroborates the Claimant's evidence that he had been unemployed prior to his application to the Respondent.

19. Moreover, the only possibly relevant entries in the profile are limited and gave rise to a total in fees of £4,300, not the "well-paid" consultancies the ET's Reasons suggest. It is hard not to agree that, had the ET properly read that document, it would have understood that the Claimant had experienced a long period of unemployment of some three years before the application to the Respondent and a prior history of intermittent employment in temporary positions, most of which were low-paid, with a large number of periods of unemployment.

20. All that being so, and the ET having decided that it was relevant to take into account the Claimant's ability to pay, I am bound to reach the conclusion that this ET failed to take into account relevant matters that went to that question; alternatively it took account irrelevant matters or simply reached a perverse conclusion on the evidence before it.

21. I turn, then, to the question of disposal of the appeal. On my judgment, the award cannot stand. Does that mean, however, that I can simply substitute my own decision? Miss Gordon Walker submits that, in the light of the evidence - in particular as to the Claimant's history of unemployment, his current unemployment and the limitations on his ability to work - the only Order really open to the ET was that no order for costs should have been made. That being so, she submits that I am in a position to make that decision myself today. She further contends that, the ET having felt that ability to pay was the important consideration in this case, it must follow that there is no alternative but to make an Order that no award should be made.

22. I see the force of that submission and came close to simply substituting my own view to that effect. I do not do so, however, because ultimately this is a matter of discretion for the ET and it is a decision that it should make. Even if the ET accepts that the Claimant is unable to pay an award in the sum as previously made, it might still consider it appropriate to make an award of some nominal sum. Costs orders are not common currency in ETs and when made it is for good reason. For the EAT to simply overturn an Order in its entirety because, having heard from only one side, it has sympathy with the paying party's limited means, would be to interfere with the function of the ET. Ultimately, therefore, I consider this matter must go back to the ET.

23. My preliminary view was that this would need to go back to the same ET to reconsider the Respondent's application for costs in the light of the evidence, properly understood, as to the Claimant's means and ability to pay. Those had already been accepted to be relevant factors by this ET, which also had knowledge of the relevant background to the decision to make an award of costs in principle. It might be that the Respondent would take the view that it would not commercial to continue with its application and, in such circumstances, the application could simply be withdrawn from the ET. If, however, the application was to be still pursued, then it would be for the ET to take a view as to whether it was appropriate to make any award given the evidence of the Claimant's means.

24. Having indicated that preliminary view as to the question of remission to the same ET, I afforded Miss Gordon Walker the opportunity to address me further on that point, as it had not been specifically canvassed in the earlier argument. She did not object to the matter going back to the same ET but considered it did not need to do so; it could be remitted to any ET given that the only issue was to consider the Claimant's means.

25. I see that that has some attraction in terms of expediting a possible hearing, and it may be that it will not be practical for the same ET to determine this point in any event. By preference, however, I consider that it should go back to the same ET. That ET, as I have said, has in mind the background to the making of the costs award, and it is also the ET that took the view that ability to pay would be relevant, and that is the issue that is to be considered.

26. I therefore allow the appeal, and I remit the Respondent's application for costs to be determined by - to the extent it remains practicable - the same ET in the light of the evidence as to the Claimant's means and ability to pay.