Appeal No. UKEAT/0109/14/KN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 26 August 2014

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

ONYX FINANCIAL ADVISORS LTD — APPELLANT

MR R SHAH — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR CHRISTOPHER MILSOM (of Counsel) Instructed by: Gordon Turner Employment Lawyers 5 Wormwood Street London EC2M 1RQ
For the Respondent	Written Submissions

SUMMARY

PRACTICE AND PROCEDURE - Costs

The Respondent, having successfully resisted the Claimant's claim, applied by letter for a hearing to deal with the question whether there should be an award of costs. The letter made it plain that there was further information and argument which the Respondent wished to present to the Employment Tribunal. The Employment Tribunal not only refused the application for a hearing but also the application for costs, saying there was "no prospect of the Tribunal (following a hearing or otherwise) making an order for costs".

Held: Appeal allowed. The Employment Tribunal, having refused to order a hearing, was wrong to refuse the application for costs peremptorily. It was required to give the Respondent a fair opportunity to put forward its argument before determining the application; and its reasons were in any event insufficient to address the application.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by Onyx Financial Advisors Ltd ("the Respondent") against an order of the Employment Tribunal, Employment Judge Burns presiding, dated 11 October 2013. The effect of this order, the terms of which I will recite later in this Judgment, was to refuse altogether to entertain an application for costs which the Respondent wished to make against Mr Raj Shah, the Claimant, following its successful resistance of his claim.

The Background Facts

2. The Respondent is a financial management service. It looks after the assets of wealthy people, handling confidential and sensitive financial information on a daily basis. The Claimant was employed by the Respondent as an Accounts Clerk from 2 July 2010 until his resignation by letter dated 12 March 2012.

3. The Claimant brought Employment Tribunal proceedings claiming unfair constructive dismissal, detriment arising from protected disclosures during employment and holiday pay. He claimed compensation of more than £200,000. His claims were heard by the Employment Tribunal in September 2013 and dismissed by a Judgment dated 4 October 2013.

4. The Employment Tribunal's conclusions can be outlined as follows. The Claimant had obtained his employment with the Respondent by fraudulent misrepresentation, stating that he was "travelling" when he had in fact been working for an organisation which would have been likely to give him a poor reference - indeed the organisation had accused him of theft and of damaging it by sending out anonymous e-mails containing confidential information. The Claimant's "protected disclosures" were really no more than matters drawn to the Respondent's

attention in the ordinary course of his work, and he suffered no detriment because of them. There was an altercation at work in January 2012 in which the Respondent's manager sought to "bulldoze and threaten" the Claimant into making the application to register himself with the Environment Agency and in which another manager made unwarranted and bullying comments. This conduct was a fundamental breach of contract, and the effective cause of the rupture of the Claimant's employment relationship which had been going well until that point. However, after that time the Claimant affirmed the contract by repeated indications of his willingness to return to work unconditionally. By the time of his resignation in March it was the Claimant who was in fundamental breach of contract. He had attempted to blackmail the Respondent and would for this reason have been disqualified from claiming constructive dismissal in any event. Moreover the Respondent was entitled to set out as a complete defence the fact that the Claimant had obtained the contract of employment by fraudulent misrepresentation.

5. There were, accordingly, important findings against the Respondent concerning the behaviour of two members of management in January: but the Claimant lost the case because of his anterior fraudulent misrepresentation and because he affirmed the contract and then blackmailed the Respondent.

The application for costs

6. Upon receipt of the Judgment the Respondent's solicitors wrote a letter to the Employment Tribunal, dated 11 October 2013. It began in the following way:

> **"I have received the Judgment on liability sent out on 4th October and am writing to request a hearing to determine whether some or all of the Respondent's costs should be paid by the Claimant. This application is made on the basis that:**
>
> **1 The Claimant has acted vexatiously, abusively or otherwise unreasonably in the bringing or conducting of the proceedings or a part of them; and/or**
>
> **2 Claims made in the proceedings by the Claimant had no reasonable prospects of success."**

7. The letter then gave a time estimate and Counsel's dates to avoid. Under the heading "Application" it set out what were described as "Core Reasons" for making the Application. In some respects the letter relied on the findings of the Employment Tribunal. It made the point that, if the Claimant well knew that he had lied on his CV, a point taken by the Respondent in detailed representations prior to the hearing, he should have considered the legal consequences and decided not to proceed if he could not refute the facts.

8. The letter also complained about the way in which the Claimant dealt with the litigation. It gave some examples. It said that the Claimant conducted his claim with a "scattergun approach", creating massively disproportionate costs, failing to answer questions and clarify simple truths while making wide-ranging allegations. The letter concluded by referring to the need for directions and by saying that a schedule of costs would be prepared "including those specifically wasted due to the conduct of elements of the claim and those occasioned more generally."

9. I am told that the overall figure for the costs of the litigation including Counsel's fees is about £60,000. The Employment Tribunal did not have a figure, but it must have appreciated that the costs of the litigation were very substantial.

10. The Employment Tribunal's order and Reasons were brief. In full, they provide as follows:

> **"Order**
>
> **The Respondent's application in its solicitor's letter/email dated 11th October 2013 for a hearing at which to make a costs application against the Claimant, and the costs application itself (to the extent that it is made in the said letter/email), are both refused.**
>
> **Reasons**
>
> **It is the unanimous decision of the Tribunal judge and the members, who have all considered the Respondent's solicitors submissions in the said letter that, because of the matters which are referred to in paragraph 97 to 99 of the reasons signed on 2nd September 2013, (i) that it is**

inappropriate to make a costs order in the Respondent's favour in this matter and (ii) there is no prospect of the Tribunal (following a hearing or otherwise) making such an order."

11. The reference to paragraphs 97-99 of the Reasons is a reference to the finding that the conduct of the Respondent's managers in January amounted to a fundamental breach of contract and "the effective cause of the rupture of the employment relationship".

Submissions

12. On behalf of the Respondent Mr Christopher Milsom makes essentially three submissions. First, he submits that it was an error of law, a breach of the rules of natural justice, to determine the application without making any provision for a hearing or, at the very least, for full written submissions. It was plain from the letter dated 11 October that the Respondent wished to be heard and that there was detail to be given, of which the Employment Tribunal was not apprised. Justice required that the application be heard rather than dismissed peremptorily. Mr Milsom has relied on well-known cases to the effect that a body determining a dispute between parties must give each side a fair opportunity to put its case.

13. Secondly, he submits that in any event the Employment Tribunal's reasons are insufficient. The Employment Tribunal did not deal in any way with the manner in which the Claimant had conducted the litigation, a matter of which the Respondent made specific and detailed complaint. The Employment Tribunal did not address the key point that the Claimant had known all along that he had lied to get the job.

14. Thirdly, Mr Milsom argues that the decision was perverse. He argues that, while it is true that the Respondent's witnesses had downplayed their conduct in January and while it is also true that this conduct was found to amount to a fundamental breach of contract, the scale of the

Claimant's dishonesty far outweighed that matter. The conduct of the proceedings had also been unreasonable. A "final straw" on which the Claimant had relied could not be sustained.

15. The Respondent has not attended this appeal. He has explained that he was unwell and has relied, as is his right, on written submissions. I have given full weight to these. The Respondent argues that the Employment Tribunal, having dealt with the merits hearing, had received evidence and argument on all the issues in the case. It was therefore in an unrivalled position to make an assessment of an application for costs. It reached a unanimous conclusion that there was no prospect of costs being awarded. It was legitimate, given the overriding objective applicable to Employment Tribunal proceedings, not to hold a hearing which would have had no practical purpose. In truth, he submits, no question of law is raised by the appeal, which is no more than a disagreement with the decision of the Employment Tribunal.

Discussion and Conclusions

16. Rules 74 to 79 and 83 to 84 of the **Employment Tribunal Rules of Procedure 2013** set out provisions concerning the making of costs orders and preparation time orders. Rule 76(1) confers the powers upon which the Respondent relied in its letter dated 11 October. Rule 77 is the only procedural provision relating specifically to costs and preparation time orders. It provides as follows:

> **"A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application."**

17. The overriding objective applicable to Employment Tribunal proceedings is set out in rule 2. It is to enable Employment Tribunals "to deal with cases fairly and justly". The objective includes dealing with cases in ways which are proportionate to the complexity and

importance of the issues. It also includes avoiding delay, avoiding unnecessary finality, seeking flexibility in the proceedings and saving expense.

18. It is plain from rule 77 that the Employment Tribunal has a broad discretion as to the manner in which it deals with an application for costs. A hearing is not always necessary. An application may be dealt with on written submissions. Rule 77 deals specifically with the position of the paying party. That party must have a reasonable opportunity to make representations in response to the application.

19. What about the position of the applicant? Although rule 77 does not deal specifically with the position of the applicant, it is to my mind plain that the applicant too must have a fair opportunity to put its case. This is fundamental to civil procedure of all kinds and inherent in the overriding objective. The fact that an applicant must have a fair opportunity to put its case certainly does not mean that the applicant must always be afforded an oral hearing. On the contrary, it is the applicant which is putting forward the case, and it will usually be reasonable to expect the applicant to put that case in writing. But there are proceedings where a case cannot easily be developed in writing. The heavier the litigation and the greater the detail, the more difficult it may be to address the whole matter on paper without a hearing. In such a case, the applicant may ask for an oral hearing, and even if the applicant does not ask for a hearing, the Employment Tribunal may conclude that one is necessary.

20. The Employment Tribunal is of course not bound to grant an oral hearing simply because the applicant asks for one. If it considers that the applicant can have a fair opportunity to put its case in writing, it is entitled to say so. But if it refuses an oral hearing where, as in this case, it is plain that the applicant had not intended to make its case purely in writing, the Employment

Tribunal should give directions so that the applicant has a fair opportunity to put its case fully in writing.

21. The Employment Appeal Tribunal has a limited role to play in supervising matters of case management such as whether and how to determine a costs application. The Employment Appeal Tribunal is empowered to intervene only on a question of law. In a matter of case management there will be no error of law unless the Employment Tribunal has adopted the wrong legal approach, left out of account that which it was essential to take into account, taken into account that which was irrelevant or reached a decision outside the generous ambit within which reasonable disagreement is possible.

22. I have reached the conclusion that the manner in which the Employment Tribunal dealt with the Respondent's letter dated 11 October 2013 is unsustainable. The letter made an application for a hearing to determine costs at the conclusion of a quite substantial piece of litigation. I would not go so far as to say that the Employment Tribunal was bound to order a hearing, although it seems to me that it would have been a sensible course to take. But I think the Employment Tribunal was plainly wrong not only to refuse the application for an oral hearing but also to proceed immediately to determine the application for costs, when it was clear that the letter dated 11 October was not intended to set out the whole of the Respondent's case. The absolute minimum required of the Employment Tribunal was that the Respondent should be given an opportunity, if an oral hearing was to be refused, to develop in writing the submissions it wished to make and to produce the costs breakdown on which it wished to rely.

23. The Respondent's key point in his submissions is that the Employment Tribunal had reached a strong view that it was not inclined to make an order for costs. Why then, he asks,

should it order a hearing to no purpose? The Employment Tribunal had, however, reached its view without hearing submissions which the Respondent wished to make and it did not even know how the Respondent would develop its case concerning the manner in which the Claimant had conducted the litigation. The Employment Tribunal was required to keep an open mind until it had given the Respondent a fair opportunity to make those submissions.

24. Further, I do not think that the Employment Tribunal's reasons for rejecting the application meet the basic minimum standard to be expected of such reasons. The first question for the Employment Tribunal to consider was whether the threshold conditions for an award of costs were met: in other words, whether the Claimant had, as alleged, acted vexatiously, abusively or otherwise unreasonably. This would have involved reasoning on the central point made by the Claimant, namely whether the Claimant, knowing that the point about fraudulent misrepresentation was being taken and knowing the true position, as he must have done, could reasonably have continued with the proceedings. If the Employment Tribunal considered that the Claimant's behaviour was unreasonable, it would then have needed to explain why it was unjust to make any award of costs at all when the Claimant had affirmed the Respondent's breach of contract and subjected the Respondent to blackmail.

25. I would not go so far as to say that it was perverse for an Employment Tribunal to make no award of costs in circumstances such as these. If the Employment Tribunal had given a fair opportunity to both parties to make submissions and had given proper reasons for its decision, I cannot rule out the possibility that the result might have been no order for costs. The test for a finding of perversity in the Employment Appeal Tribunal is pitched high, and the Employment Tribunal did reach a conclusion on the question of fundamental breach in January, which, while it made no practical difference to the result, was adverse to the Respondent. The question

whether to make an order for costs and, if so, how much and on what basis is one for an Employment Tribunal on remission after giving both parties a fair opportunity to make submissions.

26. The next question is whether to remit the application to the same Employment Tribunal or to a differently constituted Employment Tribunal. This decision is taken in accordance with criteria set out in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763.

27. On a question of costs following a full hearing I would strive, if it was just to do so, to remit to the Employment Tribunal which dealt with the case. The reasons which the Employment Tribunal gave, in dealing with the full hearing, are of a good standard, indicative of care and professionalism. In this case, however, the Employment Tribunal has expressed itself so strongly when taking a premature view of the application for costs that I think justice requires that the matter be remitted to a differently constituted Employment Tribunal. It will be a matter for the Regional Employment Judge but, so far as I can see, the matter may be heard by an Employment Judge sitting alone.

28. That Employment Judge will have the benefit of a full set of written submissions by the Respondent, setting out its case on costs. He will also have the benefit of the Schedule of Costs with the promised breakdown to which the Respondent's solicitors referred in the letter dated 11 October. I will order those today. It will then be for the Employment Judge to decide how to proceed. I make it clear that the Employment Judge will start from the findings made in the Employment Tribunal's Liability Judgment. It will be no part of his task to re-open or reconsider any of those findings. But it will be for the Employment Judge to reach his own conclusions on the application of the statutory test, on whether in his discretion to award costs

and, if so, how much and on the question of ability to pay if the Claimant asks for ability to pay to be taken into account.

29. It will also be for the Employment Judge to decide whether there should be an oral hearing. While I have said that an oral hearing appears sensible, the Claimant is entitled to be heard on that question. If the Claimant is unwell and produces medical evidence, the Employment Judge may well consider it just to determine the matter on written submissions giving the Claimant an opportunity to reply to the Respondent's full submissions. Ultimately, however, these are matters to be considered on remission, and it will be for the Employment Judge to devise a fair procedure.