Appeal No. UKEAT/0127/14/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 7 August 2014

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

MS K JOHNSON APPELLANT

UNITED KINGDOM BORDER AGENCY RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR JOE SYKES (Representative) Employment Law Centres 107 Fleet Street London EC4A 2AB
For the Respondent	MR JAMES TUNLEY (of Counsel) Instructed by: Treasury Solicitor's Department One Kemble Street London WC2B 4TS

<u>SUMMARY</u>

PRACTICE AND PROCEDURE

Striking-out/dismissal

Costs

The Claimant had an opportunity to give reasons orally why an order should not be made before her claim was struck out: rule 19(1) of the **Employment Tribunal Rules 2004** was complied with. The Employment Tribunal did not err in law in making the striking out order. Appeal against striking out order dismissed.

The Claimant did not have a proper opportunity to give reasons orally why an order should not be made before the costs order was made: rule 38(9) of the **2004 Rules** was not complied with. Appeal against costs order allowed.

HIS HONOUR JUDGE DAVID RICHARDSON

Introduction

1. This is an appeal by Ms Kiana Johnson ("the Claimant") against a Judgment of the Employment Tribunal sitting at London South, Employment Judge Sage presiding, dated 14 June 2013. The Claimant had brought proceedings against the United Kingdom Border Agency ("the Respondent") alleging unfair dismissal and race discrimination, including direct discrimination, victimisation and harassment. By its Judgment the Employment Tribunal struck out her claims and ordered her to pay costs in the sum of £10,000.

The Procedural History

2. The Claimant was employed by the Respondent from 9 January 2006 until her dismissal on 8 August 2011. It was the Respondent's case that the Claimant had repeatedly refused to produce her passport as proof of her identity for the purpose of security checks, the refusal being despite repeated requests from October 2010 onwards and despite the fact that her security clearance was revoked as a result and her suspension was necessary. It was the Claimant's case that she had been the subject of a course of unlawful discrimination and harassment, questioning her right to remain and work in the UK and questioning her honesty. She alleged that a substantial number of the Respondent's employees acted against her out of racial motivation. She said that she was "disproportionately treated and dismissed for a minor complaint".

3. A case management discussion was due to take place on 18 April 2012. The Claimant applied for an adjournment because she was depressed, anxious and terrified to attend the hearing without legal representation and support. The application was refused, the hearing

went ahead, and the Claimant attended with a friend. As it happens, the hearing took place in her absence while she was in a waiting room, but the Employment Judge was informed of her presence and explained the order to her. The case was listed for a full hearing in July 2012. The directions required her to provide Further and Better Particulars, a Schedule of Loss, a list of documents and, significantly, the preparation and exchange of witness statements by 27 June 2012.

4. The hearing could not be reached by the Employment Tribunal in July 2012. It was relisted for a full hearing to begin on 19 November 2012. The Claimant applied for a postponement on the grounds of ill-health on 15 November. The form provided said she was unfit for work due to stress-related problems and bereavement. The application was at first refused, but it was renewed at the hearing on 19 November 2012 when the Claimant was represented by a solicitor who produced a GP's certificate specifically to the effect that she was unfit to attend court. Further directions were given, including a direction for the Claimant to provide Further Particulars and for exchange of witness statements by 25 May. The hearing was listed for four days, to begin on 4 June 2013. Some particulars were provided by the Claimant's solicitors in January.

5. On 18 March 2013 a further case management hearing took place. The Claimant continued to be represented by solicitors. Counsel attended the hearing. Claims of "whistleblowing" and disability discrimination were withdrawn and dismissed by consent. Further particulars were required; these were subsequently given, and they include a lengthy schedule in Scott Schedule form. There was no suggestion on either side that the case would not be ready for hearing.

6. On 28 May 2013, however, just a week before the hearing, the Claimant applied for an adjournment herself without reference to her solicitor. She said there was a conflict of interest between herself and her representative. She said her witness statement was outstanding and the bundle incomplete. She asked for two months to arrange representation. The Respondent objected to the application; it was not granted. Her solicitor, who, as I have said, had not been informed of the application, told the Employment Tribunal of his withdrawal on 30 May.

7. The Claimant attended on 4 June and applied again to adjourn the hearing. The Respondent had attended with witnesses. The Employment Tribunal refused the application, for reasons that were given orally and have since been provided in writing. The key reasons given by the Employment Tribunal are to be found in paragraphs 33-37 of its Written Reasons. It is not necessary for today's purposes to set them out again.

8. After the adjournment was refused the question of the Claimant's witness statement came to the fore. The Employment Tribunal was aware that a draft statement had been prepared but not disclosed. The Claimant said that no witness statement was available and that she would be unable to produce it by the following morning because she could not use a word processor. She declined to allow her detailed particulars and Scott Schedule to stand as her evidence. The Respondent said that one of its witnesses was only available on the following day and it would be difficult to finish the evidence in three days. Since the Claimant had failed to take up reasonable proposals to provide a witness statement, it would have to consider the option of applying to strike out the claim.

9. The Employment Tribunal made the following orders, which it is important to set out and which the Claimant noted at the time (paragraph 46):

> **"1. The case is proceed at 10.00 am on 5 June 2013.**
>
> **2. The case will start at 10.00am and the Tribunal will either start its hearing**
>
> **(a) the substantive case or**
>
> **(b) the Respondents application [sic] to strike out the Claimant's on the grounds of unreasonable conduct."**

10. On the following day the Claimant did not attend. She applied in writing for a stay pending appeal to the Employment Appeal Tribunal. She produced a typed "copy of Judgment" which shows she understood that the case would continue on 5 June with either the Respondent's evidence or a strike-out. The Employment Tribunal with some expedition produced its Written Reasons on the morning of 5 June and then awaited the result of the appeal. The Employment Appeal Tribunal dealt with the appeal late that day; it was rejected. Some months later an application for permission to appeal to the Court of Appeal was refused.

The Employment Tribunal's Judgment and Reasons

11. On the following day, 6 June, the Claimant again did not attend. She applied for stay pending an appeal to the Court of Appeal. The Employment Tribunal refused that application and invited her specifically to attend at 11.00am. When she did not attend by 11.15am the Respondent made an application to strike the claim out. The submissions were that the claim was scandalous, vexatious and had no reasonable prospect of success and the manner in which the proceedings had been conducted was scandalous, unreasonable and vexatious. It was also maintained that the Claimant had not actively pursued her case and had not complied with orders.

12. The Employment Tribunal, after reciting the procedural history in some detail, continued as follows:

"46. […] In conclusion therefore from the chronology and history of this case, the Tribunal conclude that the Claimant's conduct is unreasonable and we have to conclude that from the Claimant's failure to present herself at Tribunal on two successive days, despite being requested to do so, shows conduct that is tantamount to being vexatious. The Claimant's conduct appears to have been designed to frustrate the process preventing the Tribunal from hearing the case on its merits. The Tribunal had made various suggestions to assist the Claimant in the presentation of her case but the Claimant appeared unwilling to engage in the process. The Tribunal also note that the Claimant's energies have been directed towards securing a postponement and the Claimant appears to have been able to present an appeal to the EAT and now an application to the Court of Appeal but has failed to take any action to engage in the Tribunal process by attempting to prepare and present a witness statement in order for her case to be heard. The Tribunal believe on that ground alone that the case should be struck out.

47. The Tribunal also note at the Respondent's submissions at paragraph 21-26 that the Claimant has failed to actively pursue her case. We conclude on the facts before us that the Claimant appears by her conduct to be engaging in a course of action to prevent the case proceedings, which we believe amounts to an abuse of process. There has been what appears to be an intentional default by the Claimant to comply with Orders. For example the Claimant has been aware for over a year as to the need to produce a witness statement (see our decision of 5 June). However on the first day of the Hearing this statement was not available which had resulted in the Claimant's application to postpone (and due to the fact that she no longer had legal representation). It was noted in November 2012 that the Claimant appeared to have a witness statement yet none was available on 4 June 2013 and no explanation being forthcoming as to why there appeared to be no statement available in preparation for this Hearing. The Claimant was also aware that two of the Respondent's witnesses could only attend on the Tuesday and Wednesday yet the Claimant indicated that her statement could only be available at 2.00 pm on Thursday, the Claimant appeared to show no willingness to put her urgent energies into the production of a witness statement. This not only frustrated the Tribunal process but it also caused prejudice to the Respondent and resulted in the case being unable to proceed and the Tribunal losing the only two days on which the Respondent's case could be heard. We conclude that this conduct was a failure to actively pursue under Rule 18 and a failure to comply with Orders to produce a witness statement by first 19 June 2012 and a subsequent Order made at the hearing on 19 November 2012 to produce a witness statement by 25 May 2013. It is noted that neither of these Orders were complied with. The Tribunal also note that we ourselves made an order for the Claimant to produce or to agree to present her evidence in either written formats or by relying on her ET1 and further and better particulars. The Claimant failed to comply with that Order also. This was again a failure to comply with an Order of the Tribunal.

[…] 49. In conclusion therefore we are prepared to strike out the Claimant's claim due to her unreasonable and/or vexatious conduct, failing to actively pursue her case and failing to comply with Orders made by the Tribunal.

50. We have considered the case of *Blockbuster Video v James* and the warnings cited at paragraph 19 of that case. We understand that striking out is a draconian measure but having given the Claimant three days to come to the Tribunal to present her case in whatever format is most acceptable to her, she has failed to attend. The Tribunal conclude that the Claimant has refused to proceed with her claim and set out to frustrate all attempts to encourage and assist her to access a fair Hearing. We have also considered the issue of proportionality of our actions, we understand that our decision has serious implications, but having considered the already considerable delay in this case resulting from the Claimant's failures to comply with Orders and subsequently making applications and appeals resulting in further delay and putting the possibility of a fair trial out of reach of both parties. The Respondent now finds itself in a situation where it may no longer have the witnesses pivotal to the case available to it (especially in respect of the Claimant's claim for unfair dismissal as Ms Beasley has now been out of the service for some considerable time). The case is over two years old and it is no closer to a Hearing than it was a year ago and there is no indication from the Claimant's actions that the Claimant will be in a position to proceed in the near future. We believe therefore that striking out is a proportionate measure on the facts before us and it is a fair course to take taking into account the overall fairness of justice to both parties. The Claimant's claim therefore stands to be struck out."

13. The Respondent then made a costs application. Counsel said that the Claimant was on notice of the application by virtue of a letter sent "without prejudice save as to costs" in June 2012 and a further letter of a similar nature dated 31 May 2013, where it was said that the costs would be in the region of £40,000. The costs were in fact put at the hearing at £42,762.66. The application was, however, limited to the sum of £10,000.

14. The Employment Tribunal's principal conclusions are in these paragraphs:

> **"52. It was submitted on behalf of the Respondent that the Claimant was warned by Judge Hall-Smith at page 23 of the bundle that she may face an application for costs and the Claimant was informed in a without prejudice letter in June 2012 about the risk of costs on the grounds that the Claimant's claim had no reasonable prospect of success. Again on 31 May 2013 the Claimant was placed on notice that the Respondent would be seeking costs in the region of £40,000 if the case went ahead. By the date of the Hearing the cost had escalated to £42,762.66. The Respondent confirmed that they asked the Tribunal to make an award of costs up to the limit of £10,000 being the limit in force at the time of presentation of the Claimant's ET1, relying o the unreasonable conduct of the case and on the findings made by the Tribunal in striking out the Claimant's claim.**
>
> **53. The Tribunal took into account the Respondent's application for costs and the Tribunal believe that this is a case where costs should be awarded. The Tribunal conclude that the Claimant has in bringing the proceedings and conducting the proceedings acted unreasonably and at times abusively due to our above conclusions when striking out the Claimant's claim. The Tribunal were unable to take into account the Claimant's ability to pay any award. The reason why the Claimant's claim was struck out and the reason why the Claimant's ability to pay cannot be considered is due to her behaviour and the failure to attend the Tribunal. The Tribunal has taken into account the behaviour of the Claimant throughout this case as referred to above and in our decision of 5 June 2013 and we conclude that the Claimant has put herself out of reach and produced no evidence of her ability to pay any costs award that we are entitled to proceed to make an Order in the absence of any evidence as to means. We therefore conclude that the Respondent's request for a costs order in the sum of £10,000 should be made. The Claimant is therefore ordered to pay to the Respondent costs in the sum of £10,000."**

Statutory Provisions

15. In June 2013 Employment Tribunal procedure was governed by Schedule 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004**. As to striking out, rule 18(6) provided that such an order may be made at a Pre-Hearing Review or a hearing. Rule 18(7) set out grounds upon which an Employment Judge or Employment Tribunal might strike out a claim or part of a claim. A claim might be struck out on the basis that the manner in which the Claimant had conduced proceedings had been scandalous or

unreasonable (rule 18(7)(c)) or for non-compliance with an order (rule 18(7)(e)). These were the principal Rules on which the Employment Tribunal reached its conclusions.

16. As to procedure rule 19(1) provided as follows:

> **"Before a chairman or tribunal makes a judgment or order described in rule 18(7), except where the order is one described in rule 13(2) or it is a temporary restricted reporting order made in accordance with rule 50, the Secretary shall send notice to the party against whom it is proposed that the order or judgement should be made. The notice shall inform him of the order or judgment to be considered and give him the opportunity to give reasons why the order or judgment should not be made. This paragraph shall not be taken to require the Secretary to send such notice to that party if that party has been given an opportunity to give reasons orally to the chairman or the tribunal as to why the order should not be made."**

17. As to costs, rules 38-41 set out the powers of an Employment Tribunal to award costs. It is not necessary to set out all those rules in this Judgment. It is, however, necessary to refer to rule 38(9). This provided:

> **"No costs order shall be made unless the Secretary has sent notice to the party against whom the order may be made giving him the opportunity to give reasons why the order should not be made. This paragraph shall not be taken to require the Secretary to send notice to that party if the party has been given an opportunity to give reasons orally to the chairman or tribunal as to why the order should not be made."**

Submissions

18. This appeal was allowed to proceed to a Full Hearing on four grounds identified both by an order of HHJ Eady QC and in the Judgment that she gave at a rule 3(10) hearing, a transcript of which I have in my papers. These grounds have all been developed by Mr Sykes on the Claimant's behalf. The first two relate to the striking-out order; the remaining grounds relate to the costs order.

19. Firstly, he submits that it was an error of law for the Employment Tribunal to strike out the claim when there were alternative courses available and it was not established that a fair trial was impossible (see **Abegaze v Shrewsbury College of Arts and Technology** [2010]

IRLR 238). In support of this ground he argues that to require the Claimant to proceed to trial and prepare her own cross-examination in person was a breach of the overriding objective applicable to Employment Tribunal proceedings (see Regulation 3 of the **2004 Regulations**); indeed, a breach of her right to a fair hearing under Article 6 of the **European Convention On Human Rights and Fundamental Freedoms** ("the Convention"). Mr Sykes does not submit that the Employment Tribunal should simply have proceeded with the hearing on 6 June; he accepts that that would have been unrealistic. He submits that there should have been an adjournment with or without an "unless order" to give the Claimant an opportunity to prepare witness evidence and cross-examination and to obtain representation. To refuse an adjournment and strike out the claim was, he submitted, disproportionate and unfair.

20. To this submission, Mr Tunley, on behalf of the Respondent, replies that the Employment Tribunal in paragraph 50 of its Reasons plainly directed itself to the question of whether a fair trial was possible and whether striking out was proportionate. Appropriate reference was made to **James**. There was no error of law on the part of the Employment Tribunal, nor was the outcome perverse. There was, accordingly, no basis for an appellate court to intervene; see **O'Cathail v Transport for London** [2013] ICR 814 at paragraph 44. Similarly, the Employment Tribunal's refusal of an adjournment was lawful and not perverse. The Claimant's appeal against that refusal was rejected both by the Employment Appeal Tribunal and the Court of Appeal. A fair trial was indeed impossible by 6 June. Key witnesses, including the person responsible for the dismissal, no longer worked for the Respondent and had been able to come only for two days. The Employment Tribunal was not required, having refused an adjournment on 4 June, to adjourn the case on 6 June. A further adjournment would indeed have been unfair.

21. Mr Sykes' next ground is that there was a breach of rule 19(1) of the **2004 Rules**. He says that the Claimant was not given notice by the Secretary; in this, he is plainly correct. He submits then that she was not "given an opportunity to give reasons orally" to the Employment Tribunal because she was not on notice of the application. It was not sufficient that she was told on 4 June that the application was one of the alternatives for 5 June. This was not sufficiently certain and gave no notice at all for a hearing on 6 June. To this, Mr Tunley replies that the Claimant was specifically on notice of the application by virtue of what she was told on 4 June. She could not improve her position by deliberate absence from the hearing.

22. Mr Sykes' third ground is that there was a breach of rule 38(9); there was no notice and no opportunity to give reasons orally relating to the costs application. The Employment Tribunal had not informed the Claimant in any way at all that a costs application was to be heard. Although there had been a threat in correspondence of an application for costs, there was nothing to indicate when it would be made.

23. Mr Tunley accepts that the Claimant was not specifically put on notice that an application would be made when it was made, but he submits that she had been adequately informed about the likelihood of an application in a "without prejudice save as to costs" letter in June 2012 and a further letter in May 2013. He says this was sufficient notice and the Claimant had an opportunity to give reasons orally at the hearing.

24. Mr Sykes' final ground is that the Employment Tribunal failed to make even the most rudimentary assessment of costs despite the amount they were said to be, £42,000 for a claim listed for just four days, and the amount actually awarded, £10,000. Mr Tunley responds that, since the application for costs was limited to £10,000 and the actual costs were plainly much

more, no further detailed assessment of the Respondent's costs was necessary. The Employment Tribunal had a schedule of costs, and it was required to do no more than make a rough and ready assessment of them; see, in this respect, **Sood v London Borough of Ealing** CA, 30 July 2013.

Discussion and Conclusions

25. It is convenient to begin with the question of whether the Claimant had "an opportunity to give reasons orally" to the Employment Tribunal concerning the striking-out application. In my judgment, she did have such an opportunity. Before she left the Employment Tribunal on 4 June she was expressly informed that one of two things would happen when the case proceeded: either the substantive case would proceed, which would happen if the Claimant had prepared her witness statement or was willing for her existing Particulars to stand as her evidence-in-chief; or the Respondent's application to strike out the claim on the grounds of unreasonable conduct would be dealt with. She could have been left in no doubt that if a substantive case was not going to proceed, a striking-out application would be heard there and then. She was therefore informed by the Employment Tribunal of the order to be considered and told when it would be considered. This is what she would have been told by a notice from the Secretary.

26. Given that the application was to be made at a hearing that had been listed for many months for her to attend, I consider that the procedure that the Employment Tribunal adopted before she left on 4 June gave her a proper opportunity to be heard. Rule 19(1) does not require the party concerned to be notified in writing of all the grounds on which the application would be made. In fact, however, the Claimant knew perfectly well from what had occurred in her presence on 4 June the essential nature of the Respondent's case. I do not think it matters that

the Claimant absented herself from the hearing on 5 June with the result that it was further adjourned to 6 June. The Claimant was expected to attend on 6 June, which was still part of the allotted time for the hearing. She knew that if the substantive case was not going to proceed on that day, a striking-out application would be heard.

27. I turn to the question of whether there is any error of law in the determination of the Employment Tribunal concerning striking out. The proper approach of an Employment Tribunal to striking out where proceedings have been conducted scandalously or unreasonably, or whether there has been non-compliance with an order is summarised by Sedley LJ in **James** at paragraphs 5 and 20-21:

> **"5. This power, as the employment tribunal reminded itself, is a Draconic power, not to be readily exercised. It comes into being if, as in the judgment of the tribunal had happened here, a party has been conducting its side of the proceedings unreasonably. The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible. If these conditions are fulfilled, it becomes necessary to consider whether, even so, striking out is a proportionate response. The principles are more fully spelt out in the decisions of this court in *Arrow Nominees v Blackledge* [2000] 2 BCLC 167 and of the EAT in *De Keyser v Wilson* [2001] IRLR 324, *Bolch v Chipman* [2004] IRLR 140 and *Weir Valves v Armitage* [2004] ICR 371, but they do not require elaboration here since they are not disputed. It will, however, be necessary to return to the question of proportionality before parting with this appeal.**
>
> **[…] 20. It is common ground that, in addition to fulfilling the requirements outlined in §5 above, striking out must be a proportionate measure. The employment tribunal in the present case held no more than that, in the light of their findings and conclusions, striking out was "the only proportionate and fair course to take". This aspect of their determination played no part in Mr James's grounds of appeal and accordingly plays no part in this court's decision. But if it arises again at the remitted hearing, the tribunal will need to take a less laconic and more structured approach to it than is apparent in the determination before us.**
>
> **21. It is not only by reason of the Convention right to a fair hearing vouchsafed by article 6 that striking out, even if otherwise warranted, must be a proportionate response. The common law, as Mr James has reminded us, has for a long time taken a similar stance: see *Re Jokai Tea Holdings* [1992] 1 WLR 1196, especially at 1202E-H. What the jurisprudence of the European Court of Human Rights has contributed to the principle is the need for a structured examination. The particular question in a case such as the present is whether there is a less drastic means to the end for which the strike-out power exists. The answer has to take into account the fact – if it is a fact – that the tribunal is ready to try the claims; or – as the case may be – that there is still time in which orderly preparation can be made. It must not, of course, ignore either the duration or the character of the unreasonable conduct without which the question of proportionality would not have arisen; but it must even so keep in mind the purpose for which it and its procedures exist. If a straightforward refusal to admit late material or applications will enable the hearing to go ahead, or if, albeit late, they can be accommodated without unfairness, it can only be in a wholly exceptional case that a history of unreasonable conduct which has not until that point caused the claim to be struck out will now justify its summary termination. Proportionality, in other words, is not simply a corollary or function of the existence of the other conditions for striking out. It is an important check, in the overall interests of justice, upon their consequences."**

28. The Employment Tribunal directed itself in accordance with this approach. It specifically considered whether a fair trial was possible and whether a striking-out order was proportionate. I can see no error of law or perversity in its reasoning. By 6 June it was plain that the Claimant was not intending to participate in a hearing during the listed period. No doubt there are many cases where the best course is for the Employment Tribunal simply to proceed in the absence of one party or the other. In this case, however, some of the Respondent's witnesses had left, and in the absence of the Claimant or any witness statement from the Claimant it was not sensible or realistic to proceed with the hearing. So, the only realistic alternative would have been the one that Mr Sykes suggests, namely to adjourn either with or without an unless order. Adjournment was the very course that the Employment Tribunal had rejected two days earlier for good reason. The Employment Tribunal was fully entitled to conclude that striking out was proportionate and that there was no lesser sanction that could fairly deal with the matter. I see no error of law in the Employment Tribunal's conclusion in paragraph 50 either on the question of whether a fair trial was possible or on the question of proportionality.

29. I now turn to the appeal concerning costs. As to procedure, there is a significant difference between the application to strike out and the application for costs. As regards the application to strike out the Claimant had been expressly informed in her presence when and in what circumstances it would be heard, namely at the resumption of the hearing if the full case could not be proceeded with. The same cannot be said of the application for costs. The Employment Tribunal did not inform the Claimant on 4 June that an application for costs was to be considered if the hearing continued. Indeed, at that time no application had been made, although the possibility of it had been prefigured in "without prejudice save as to costs" correspondence, nor was the Claimant informed of the application on 5 June or 6 June. She

was therefore not on notice of the application itself or when it would be heard. In my judgement, she should have been. It is one thing for a party to absent herself from a hearing if the result will be that the claim is struck out, another thing altogether if the result might be a substantial order for costs against her. She was entitled, in my judgment, to know that that application was going to be made and when it was going to be made. I therefore conclude that the order for costs cannot stand.

30. I reject, however, Mr Sykes' alternative submission that the Employment Tribunal did not make even the most rudimentary assessment of costs. It was plain to everyone that the costs in this case would substantially exceed £10,000. Given that the application for costs was limited to £10,000, I do not think any more detailed assessment was necessary in the particular circumstances of this case. Of course, if at a subsequent hearing the Claimant attends and makes reasoned objections to the amount of costs, the Employment Tribunal will then consider them.

Disposal

31. I have considered with the parties whether remission should be to the same Tribunal or to a differently constituted Tribunal. Both representatives submit that remission should be to the same Tribunal. I have considered, as always in these cases, the criteria set out by the Employment Appeal Tribunal in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763; I agree that remission should be to the same Tribunal. The Tribunal can be trusted to listen to the Claimant's submissions on all aspects of the case concerning costs and to revisit its conclusions independently.