Appeal No. UKEAT/0438/14/DXA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 10 July 2015

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

MRS C BAELZ

BARONESS DRAKE OF SHENE

MR M RILEY APPELLANT

SECRETARY OF STATE FOR JUSTICE AND OTHERS RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR RICHARD OWEN-THOMAS (of Counsel) Bar Pro Bono Scheme
For the Respondents	MR RICHARD ADKINSON (of Counsel) Instructed by: Treasury Solicitors Department One Kemble Street London WC2B 4TS

SUMMARY

PRACTICE AND PROCEDURE

PRACTICE AND PROCEDURE - Chairman alone

JURISDICTIONAL POINTS

A Judge sat alone to determine an application for costs which was related to the conduct of the losing Claimant when he brought a claim that he had been discriminated against in a number of respects by the Ministry which employed him and a number of co-employees. The claim itself had been decided by a panel of three. It was held that the Judge was not entitled to sit alone in circumstances such as those of the present case.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. Employment Judge Gaskell, Mrs Vernon and Mr Liburd as a Tribunal of three decided at Stoke-on-Trent, for Reasons given on 30 May 2013, that the Claimant's claims that he had been victimised and unfairly dismissed should be rejected. On an earlier occasion Employment Judge Gaskell, sitting alone, at a Preliminary Hearing had dismissed other claims that the Claimant had been discriminated against on the grounds of sex, age and disability. That was on 24 August 2012.

2. The Claimant had brought his claims against 11 Respondents. Following the Decision of the Tribunal the Respondent, which had succeeded on every issue, applied for costs. The decision in respect of costs was given in a Reserved Judgment on 24 February 2014 by Judge Gaskell sitting alone.

3. Of the various grounds of appeal which were initially proposed by the Claimant, only two, both covering the same general territory, have survived to this Full Hearing of the Appeal Tribunal, all others having been rejected at the sift and Preliminary Hearing stages. Those two grounds relate to whether the Judge was entitled to hear the claim for costs sitting on his own as opposed to sitting together with Mrs Vernon and Mr Liburd, as he had when he determined the substantive claims.

4. The argument raised the two grounds contained in the amended grounds of appeal. The first was that the Tribunal which sat on 27 November 2013 and 8 January 2014 (that is, Judge Gaskell sitting on his own) to determine the Respondent's costs application was not constituted in accordance within Schedule 1 of the **Employment Tribunals (Constitution and Rules of**

Procedure) Regulations 2013, Rules 74 to 78 in that the Tribunal sat as Judge alone. The second ground was that:

> **"The Employment Judge failed to seek the parties' representations before exercising any power or discretion it [sic] may have had to sit alone to determine the costs application."**

5. It was suggested that no appellate authority could help determine this particular issue. Accordingly Mr Owen-Thomas' submissions on behalf of the Claimant relied upon general points to the effect that it was inappropriate to allow a Judge alone to make decisions on costs when he was being asked to determine issues of reasonableness in relation to the conduct at the hearing. Rule 76 of the **Tribunal Rules** prescribes the circumstances in which a costs order may be made. It reads:

> **"(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."**

6. Mr Owen-Thomas' argument envisaged the difficulties which might arise if lay members of a Tribunal who had sat through a hearing in respect of it was later said that the conduct had fallen within the description in Rule 76 took a different view of that conduct from that taken by the Employment Judge. For the Judge to sit alone was to rule out relevant decision-makers who had participated in the decision thus far. If that were wrong, it would at least be appropriate for the Judge to be invited to consider whether he should sit alone or whether he would be assisted by the lay members.

7. The skeleton, which said little more than we have quoted, was amplified in oral argument. The submissions ultimately made were that the Tribunal had no power within statute or rule to sit as a panel of one since the appropriate provisions required a panel of three. The

argument to the contrary was advanced by Mr Adkinson, who had the advantage over Mr Owen-Thomas of having been at the Tribunal itself. He sought to argue that there was an implied power which permitted a Judge in circumstances such as the present to sit alone when determining a costs application consequential upon a hearing. He argued this in two parts, first what he advertised as dealing with the case by way of analogy and, secondly, by reference to case-law.

8. As to analogy, he sought to argue that a Judge must, sensibly, have the power to sit alone to determine a costs application consequential on a concluded hearing. That is because there is no provision within the Rules relating to costs contained in the **Employment Tribunal Rules 2013**, which expressly gives a power to a Tribunal to sit as a panel of three, or for that matter a panel of one. But a very similar power is capable of being exercised by a Judge under Rule 37, from which Mr. Adkinson sought to draw his analogy. Rule 37 relates to striking out. The material parts for the purposes of this argument are as follows:

> **"(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds -**
>
> > **(a) that it is scandalous or vexatious or has no reasonable prospect of success;**
> >
> > **(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable, or vexatious;**
> >
> > **(c) for non-compliance with any of these Rules or with an order of the Tribunal;**
> >
> > **(d) that it has not been actively pursued;**
> >
> > **(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out)."**

The argument has to acknowledge that (c), (d) and (e) have no reflection in the provisions in Rule 76, which we have quoted, but it emphasises that there is a great degree of overlap between 76(1)(a) and (b) and the reference to "scandalous", "vexatious" and "no reasonable

prospect of success" in Rule 37. Even here, however, the correspondence is not exact, for in Rule 76 there is the addition of the words "abusively" and "disruptively".

9. If, Mr Adkinson argues, a Judge is capable at any stage of hearing a strike-out application, as he is within the **Rules**, then, taking the structure of the Rules as a whole, the effect is to imply a power which a Judge may exercise to sit in respect of an application made on similar grounds to those applying to a strike-out, albeit in respect of costs. There are good reasons why that power should be exercised. The overriding objective includes at Rule 2(d) "avoiding delay, so far as compatible with proper consideration of the issues" and (e) "saving expense". It is plainly a matter of convenience for the Tribunal and the parties if, when there has to be separate consideration of an application for costs and it does not immediately follow the hearing before the Tribunal, that should be conducted by the judicial member sitting on the Judge's own.

10. Prior to the hearing we invited the parties to have regard to three authorities which, despite the parties' best researches, had not come for their consideration. Two ploughed the same furrow: the decision of **Peter Simper and Co Ltd v Cooke (No 1)** [1984] ICR 6, a decision of this Tribunal presided over by Browne-Wilkinson J, and that of **WestLG AG London Branch v Mr Pan** again a decision of this Tribunal, on this occasion HHJ Richardson, sitting alone, UKEAT/0308/11 (19 July 2011). In **Pan** the Employment Judge on her own ordered a fresh panel to be convened to continue the hearing of a case which had began with her sitting with members. That was one of the grounds of challenge to her decision. As to that Judge Richardson said:

> **"30. Secondly, she decided the application on her own without her members. In the circumstances of this case I see no justification for her doing so. I appreciate that some administrative inconvenience might have been involved; it might even have been necessary to hear the application on the first day of the resumed hearing, unsatisfactory though that might have been. She does not seem to have considered whether the members should have been involved. Although I appreciate that she was dealing urgently with an application which**

> **should have been made some time earlier, if at all, I think she ought to have involved the members.**
>
> **31. Thirdly, her decision gives no real weight to the considerations set out in *Ansar* and in *Peter Simper (No 1)*. …"**

11. "**Ansar**" was a reference to **Ansar v Lloyds TSB Bank** [2006] ICR 1565 and "**Peter Simper**" to **Peter Simper and Co Ltd v Cooke (No 1)** [1984] ICR 6, to which we have already referred. As to that, Judge Richardson drew particular assistance from the words of Browne-Wilkinson J at page 10, between G and H:

> **"… An industrial tribunal, at the hearing, essentially consists of three people, each with an equal voice. The chairman is, in no sense, in a dominant position. Accordingly, if an application is made to abort a hearing before a tribunal of three, in our judgment a decision whether or not to put an end to the existing hearing and to direct a rehearing is one which must essentially be taken by every member of the tribunal and not by one alone."**

12. In that particular case the Appeal Tribunal had already decided that the Judge did have a general power which could, in appropriate circumstances, have been exercised on his own to adjourn a hearing. It took the view, however, that the circumstances were such that they precluded the exercise of that jurisdiction, which had to be exercised judicially.

13. The third authority deals with a slightly different point. Whereas the decisions in **Pan** and in **Peter Simper** related to the exercise of the discretion to adjourn, the question in **Birring v Rogers and Moore t/a Charity Link** [2015] ICR 1001 related to the entitlement of an Employment Judge to decide to sit alone in circumstances in which statute required that, for one of the two claims which he was considering, one under the **Trade Union (Labour Relations) Consolidation Act** in respect of suffering a detriment for trade union activity, he could only sit as a member of a panel of three. This was combined with a claim of unfair dismissal which statute provided that he should hear alone unless he exercised his discretion not to do so. He had not considered exercising that discretion.

14. In paragraph 18 is said:

> **"18. … The statute provides for a discretion. The principles in *Gladwell* [that was a reference to *Gladwell v Secretary of State for Trade and Industry* [2007] ICR 264 (Elias J)] recognise that the discretion is not only to be exercised initially, though it may be negatively exercised, in effect, but also kept under review. I would add to Elias J's statement of law that the decision should be expressly and actively considered in any case in which there are combined jurisdictions, one of which requires a full Tribunal, one of which usually does not. Then the Judge will have to decide whether there should be a split hearing, one part of the claim to be heard by a full Tribunal, the other part or parts to be heard by a Judge alone. This so obviously requires good reason for it (since it will interact with the obligations of the Tribunal to apply the overriding objective) that in my view it demands specific consideration. …"**

(The Judgment then deals with the application of those principles to the particular circumstances of that case.)

15. Neither the decision of **Peter Simper** nor that of **Pan** nor that of **Birring** deals specifically with a decision on the question of costs. Each, however, deals with a situation in which the Tribunal Judge had a discretion which in each case it was held the Judge had failed to exercise but should have done.

Discussion

16. Although much of the argument before us was in general terms as to the desirability, on the one hand, of the Judge sitting with members, and on the other, sitting alone, in a statutory jurisdiction the first port of call to resolve an issue such as this must be statute. The statutory framework begins, relevantly, with section 4 of the **Employment Tribunals Act 1996**. That provides, by subsection (1), that "proceedings before an employment tribunal shall be heard by …" It then provides, in effect, for an Employment Judge alone (4(1)(a)) and, at 4(1)(b):

> **"… two other members, or (with the consent of the parties) one other member, selected as the other members (or member) in accordance with regulations so made."**

17. There is a list in section 4(3) of those proceedings which are to be heard by a Judge alone unless a Judge should exercise his discretion otherwise. At section 4(6) the statute reads:

"(6) Where (in accordance with the following provisions of this Part) the Secretary of State makes employment tribunal procedure regulations, the regulations may provide that any act which is required or authorised by the regulations to be done by an employment tribunal and is of a description specified by the regulations for the purposes of this subsection may be done by the person mentioned in subsection (1)(a) alone or alone by any Employment Judge who, in accordance with regulations made under section 1(1), is a member of the tribunal.

(6A) Subsection (6) in particular enables employment tribunal procedure regulations to provide that -

…

(b) the carrying-out of pre-hearing reviews in accordance with regulations under subsection (1) of section 9 (including the exercise of powers in connection with such reviews in accordance with regulations under paragraph (b) of that subsection), or

(c) the hearing and determination of a preliminary issue in accordance with regulations under section 9(4) …

may be done by the person mentioned in subsection 1(a) alone …"

In short, the **Act** specifically provides that, despite what is said as to the composition of a Tribunal at section 4(1) and (2), Regulations may empower an Employment Judge to sit alone at a Preliminary Hearing. It is open within the statute for such Regulations to make a provision for an Employment Judge to sit alone to make other decisions or determinations. The **Rules of 2013** are scheduled to the **Regulations** to which we have already referred. We consider that the starting point is thus to recognise that, unless the **Rules** make provision for a Judge to sit alone to hear any particular category of matter, the Tribunal must sit as constituted in accordance with section 4(1), (2) and (3) of the **1996 Act**. In the present circumstances, therefore, the starting point is that unless there is specific power to do otherwise a Tribunal must, in determining any matter which comes within the jurisdiction provided for by section 4(1), (2) and (3), sit as a panel of three. The approach of Mr Adkinson is, therefore, entirely right in seeking to see if the **Rules** make any provision expressly to confer the right to sit alone in respect of a costs application made after the determination of a substantive hearing. They do not. There is no such specific power in them. Mr Adkinson's argument would seek to imply one.

18. As to that, we note that within the **Rules** it is clear that the draftsman is careful to draw a distinction between the Tribunal, which is a description of course apt to include either a

Tribunal, sitting as two or three members or a Tribunal constituted only by the Employment Judge, and the Employment Judge. For example, in that part of the **Rules** which immediately precedes the costs provisions there are four Rules which relate to the reconsideration of Judgments. They provide for the Tribunal to make a reconsideration (see Rules 70 and 73) but when dealing with the process (see Rule 72(1)) provide that an Employment Judge shall consider an application made under Rule 71 (that is, for reconsideration). The distinction is thus drawn between the Tribunal, however constituted, and the Employment Judge. The costs Rules run from Rule 74 to Rule 84. There is no comparable provision referring just to the Employment Judge. The expression always used is "Tribunal".

19. The analogy which Mr Adkinson seeks to draw, upon which he bases his argument for it to be implied that there is nonetheless the power for an Employment Judge to sit alone in circumstances such as the present, cannot, in our view, stand. There is an express provision under those parts of the **Rules** which relate to Preliminary Hearings (Rule 53 to Rule 56), which provides (53(1)) that a Preliminary Hearing is a hearing at which the Tribunal "may do one or more of the following" and amongst them is (c) "consider whether a claim or response, or any part, shall be struck out under rule 37". Rule 55, however, is expressly headed "Constitution of tribunal for preliminary hearings". It provides: "Preliminary Hearings shall be conducted by an Employment Judge alone …".

20. There is then a possible exception to that, where an Employment Judge decides it will be desirable to do otherwise in the circumstances specified. There is no commensurate provision dealing with costs. We do not think that it can be sensibly argued as an analogy from a provision which requires, and has, a specific rule relating to constitution to the conclusion that there should be a similar rule implied but not expressed in respect of the costs provisions.

Accordingly, as it seems to us, once it is established, as it was in this case, that the Tribunal would only properly be constituted as three without at least the consent of the parties otherwise, there would need to be a provision which permitted it to consist of one when making any relevant decision. There is no such provision which can be derived by analogy from other provisions. Nor does it come from within the Rules relating to costs.

21. Accordingly the statute and the **Rules** are to be construed as not permitting any power to the Tribunal to sit other than statute requires. Nor do we consider that the overriding objective has anything to add to this discussion despite Mr Adkinson's argument to the contrary. It is true that it talks about avoiding delay but the rule is to give effect to the overriding objective "in interpreting, or exercising any power given to it by, these Rules." Where there is no power there is no question of interpretation.

22. The argument was floated in the skeleton argument for the Respondent that the power to make a costs order was a case management order or closely analogous thereto. Though in Rule 62, headed "Reasons", there is a provision requiring a Tribunal to give reasons for its decision on any disputed issue, "whether substantive or procedural (including any decision on an application for reconsideration or for orders for costs, preparation time or wasted costs)", we have had no developed argument that the part in parenthesis helps to define what is procedural. The description given to it by Mr Owen-Thomas as an explanatory note is, we think, appropriate. It makes it clear to the parties that within the scope of "substantive or procedural" is to be included those matters which might have been thought to take place after a decision had been reached or, for that matter, ancillary to it. But the matter, it seems to us, is put beyond doubt in any event because that which is a case management order is defined in Rule 1. Rule 1(3) provides, so far as material:

> **"(3) An order or other decision of the Tribunal is either -**
>
> > **(a) a "case management order", being an order or decision of any kind in relation to the conduct of proceedings, not including the determination of any issue which would be the subject of a judgment …"**

A judgment is defined (Rule 1(3)(b)) as:

> **"… a decision, made at any stage of the proceedings … which finally determines -**
>
> > **(i) a claim, or part of a claim, as regards liability, remedy or costs (including preparation time and wasted costs) …"**

The one thing, therefore, which a decision on costs is not, is a case management order.

23. Part of Mr Adkinson's argument sought to draw comfort from the **Presidential Guidance** given by the President of Employment Tribunals (then His Honour Judge David Latham) on 13 March 2014. It is guidance on general case management. At paragraph 15 of that guidance the text reads, "These are examples of Case Management situations"; a number are given. Relevant to the present discussion are 15.4, disability; 15.5, remedy; 15.6, costs; and 15.7, timetabling. The gentle suggestion was made in the Respondent's skeleton argument that, although this is guidance and therefore not itself statutory, it showed that it was recognised that a decision as to costs was on a par, at any rate, with case management decisions which one would expect generally to be taken by a Judge alone and which would not involve or necessarily involve the decision of a Tribunal as a whole. We think this is an unfortunate misreading of that which Judge Latham plainly meant to say. In describing a case management situation as "remedy" he could not sensibly be suggesting that a decision on remedy was a matter of case management. The words would have to be inserted, "making case management orders or giving directions as to the hearing in respect of" remedy. Exactly the same words it would be necessary to add in front of the word "costs" and for that matter probably the word "disability". Part of the confusion may be because they are followed by matters such as

timetabling which, on any showing, is always likely to be a question of case management even though it may have serious implications for the cases of either party.

24. We do not therefore think that that, relating to case management proper (we may term it that), has anything to add to the discussion of the principles which must apply to the case before us. We acknowledge that, if at the Preliminary Hearing in the present case there had then been an application for costs, the Tribunal Judge would have been within his entitlement then and there to determine it. He would have been the Tribunal which is referred to in the costs Rules. He would have been the Tribunal because he was entitled to sit and exercise his jurisdiction in respect of the Preliminary Hearing by reason of the Rules we have already quoted. If the application in the present case for costs had turned entirely upon matters which related to that Preliminary Hearing, then we could see that there might be an argument that the Judge could, albeit after the hearing in respect of the substantive issues had been determined, have been considered to have jurisdiction to determine that application. It would then relate not to the substantive hearing which had occurred but rather to the matter of the Preliminary Hearing which he had determined himself, when alone constituting the Tribunal. However, whatever may be the position in respect of a case such as that, it is not the case before us. We have considered the basis for the application for costs here. It related in part to what had happened before the hearing was held before the panel constituted as three. But it also, and to a considerable extent, appears to us to relate to what happened in front of that panel.

25. Taking the view we do of the underlying law and the absence of any power in the Judge in such a case to sit on his own, we have concluded that the Judge should not have taken the decision on his own and the appeal must succeed.

Discretion

26. If we were wrong on that conclusion, then we would in any event have considered that the Judge here should have considered exercising his discretion. If we were wrong, he would have a discretion whether to sit on his own or with two others. Relevant to the exercise of that discretion would be whether, for instance, the claims for costs related to matters which all three members of the panel had witnessed and upon which each would have had their own individual views that may well have coincided. The authorities of **Peter Simper v Cooke**, **Pan**, and **Birring** here come into play. Where there is a discretion it is in general terms to be exercised as in the **Peter Simper** and **Pan** cases it was recognised the circumstances might demand. Though the nature of the discretion is that a Judge might, rightly, decide to take either course open to him for good and proper reason, as best he considered met the fairness of the case, he must first consider whether to exercise that discretion. This is not one of those circumstances in which it can be said that he is entitled to assume from the silence of the parties that there is no challenge to what might seem to be an obvious course. The lay members sitting with me are keen to emphasise that this case is, if anything, the reverse. Lay litigants, having heard a case determined adversely to them by a panel of three, would be surprised to find that a subsequent claim against them was to be heard only by one of those three. This is capable in their view of giving rise to a real sense of injustice.

27. There is nothing, in short, in the circumstances which suggest that the Judge here could take it for granted that he should sit as one. For my part I would think that, if anything, the circumstances would suggest the opposite and at least that he should have made enquiry as to whether there was consent (if consent could give him the jurisdiction, which may be questionable) as to whether he should sit on his own. It should be added that there are three aspects to a decision in respect of costs. The first is whether or not the conduct of the party

meets the standard set out in Rule 76(1). The second is whether, assuming that standard to have been met, the Tribunal in any event would think it right that there should be an order for costs. The third relates to the amount in which the costs will be ordered. On the latter point, in the present case, the Judge considered at paragraphs 29 and 30 whether the evidence which he had in respect of means was such that the request for £20,000 of costs which he ordered to be paid was one which he should order in full. There is a sense that the Judge felt that he had insufficient evidence of the financial position of the Claimant. This in part may involve an assessment of the general reliability of that which the Claimant was saying and of its nature is an assessment which is often best made by the differing perspectives of those who constitute a panel of three.

28. Accordingly we have come to the conclusion that where, at any rate, a concluded decision as to liability is reached by a panel of three and thereafter a costs application is made which relates, in sufficient part at any rate, to the conduct of that hearing, there is no jurisdiction for that application to be considered other than by a panel of three, that being the panel so far as it may be assembled as heard the substantive question. And, if that were wrong, then in any event the Judge would, under the applicable statutory provisions, have a discretion which he should, in these circumstances, have exercised. There is no material to show that he turned his mind to it. The inference in the present circumstances is that he did not. Accordingly, on both grounds of appeal, though they are alternative, this appeal would succeed.

Consequence

29. The parties are agreed that if we came to that conclusion, the matter should be remitted to the same Tribunal, constituted as three, for it to make a determination. We so order.