Appeal No. UKEAT/0216/13/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 28 July 2014

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR M HAMMOND — APPELLANT

THE SECRETARY OF STATE FOR WORK AND PENSIONS
(JOBCENTRE PLUS) — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR MICHAEL HAMMOND (The Appellant in Person)
For the Respondent	No appearance or representation by or on behalf of the Respondent

SUMMARY

PRACTICE AND PROCEDURE - Costs

ET Order of Costs – **Rule 41(2) ET Rules 2004**

Where threshold crossed for Employment Tribunal costs jurisdiction to be engaged (as the Employment Judge was entitled to find here), it is still a matter of judicial discretion as to whether such an award should be made. In exercising that discretion, r.41(2) **ET Rules 2004** expressly recognised that an Employment Judge may have regard to the paying party's ability to pay. This was recognised not just as a matter potentially relevant to the amount but, prior that stage, as a point that might be taken into account in deciding whether an award should be made. Here there was no indication that the Employment Judge had the considered the question of the Claimant's means. There was no requirement on the Employment Judge to take into account the Claimant's means before making an award and there may have been a question as to whether the Claimant had himself clearly raised the issue. On the other hand, as HHJ Richardson observed in **Jilley v Birmingham and Solihull Mental Health NHS Trust** UKEAT/0584/06, the Employment Tribunal was required to state whether it had considered the issue and – if relevant – to state (simply) why it had not considered it to be a relevant matter.

Where (as here) dealing with the exercise of the Employment Judge's judicial discretion, the Employment Appeal Tribunal should not interfere unless it had been plainly wrong or where the Employment Judge took into account irrelevant matters or failed to take into account relevant matters. Allowing that it was open to the Employment Judge not to take the Claimant's means into account, the difficulty was that this was still a potentially relevant factor and there was no way of telling whether it had been taken into account.

That rendered the decision unsafe and the matter should be remitted to the same Employment Judge for fresh consideration in the light of this Judgment.

HER HONOUR JUDGE EADY

1. In giving this Judgment, I refer to the parties as the Claimant and the Respondent, as they were before the Employment Tribunal. The appeal is that of the Claimant against the Judgment of the Watford Employment Tribunal; Employment Judge Southam sitting alone on 24 January 2013.

2. Of the various challenges that the Claimant originally sought to pursue, only one has been permitted to proceed to a Full Hearing (that being after the initial consideration of this matter on the papers, by HHJ Serota QC). The appeal is in respect of the Tribunal's award of costs against the Claimant in the sum of £2,551.37, specifically in respect of whether the Employment Judge had failed to explain whether or not he had taken into account the Claimant's means and, if not, why.

3. I should note that the Claimant, as was his right, sought to challenge HHJ Serota QC's dismissal of his other grounds of appeal, and an oral hearing was listed under Rule 3(10) of the **EAT Rules 1993** (as amended), which came before the Honourable Mr Justice Lewis on 28 March 2014, at which the Claimant was unsuccessful. The only matter before me at the Full Hearing of this appeal is, therefore, the ground permitted by HHJ Serota QC.

The Background Facts

4. Between 1999 and around mid-June 2000, the Claimant had been employed by the Respondent to work at a jobcentre. His employment was terminated, and the Claimant brought claims before the Employment Tribunal in or about 2001, which were subsequently

compromised, with a payment being made to the Claimant. The Claimant was not thereafter employed by the Respondent.

5. The claims made by the Claimant that form the immediate background to the present appeal arose from various other incidents in the Claimant's life, in which he alleged the Respondent had been involved and had thereby committed various acts of harassment and victimisation. Those claims were dismissed by the Employment Tribunal on the basis that they were complaints of alleged post-employment victimisation and harassment that did not relate to a matter that arose out of and was closely connected to the employment relationship which used to exist.

6. The Claimant sought to appeal that Judgment, but did not get past the Rule 3(10) Hearing, Lewis J holding that the Employment Judge had correctly understood and applied the law and that no proper basis for claiming bias or procedural impropriety had been established. Lewis J also heard the Claimant's Rule 3(10) application in respect of the other Grounds of Appeal against the costs award, but agreed with HHJ Serota QC that they did not disclose any reasonable basis for the appeal, the only arguable point being that already identified: whether or not the Employment Judge had properly considered or given reasons for not considering the question of the Claimant's means when making the costs order against him. There were other Rule 3(10) applications before Lewis J which it is unnecessary for me to summarise here.

The Tribunal Proceedings and Reasons

7. The Costs Judgment was in respect of a Tribunal claim, presented by the Claimant on 26 April 2012. There had been a Pre-hearing Review before Employment Judge Southam on

21 August 2012 at which the claim was dismissed. The reasons for that Judgment were sent to the parties on 14 September 2012, and I have alluded to those above.

8. Although the Employment Judge had been able to reach his decision on the Claimant's claim on the day of the PHR, there was insufficient time to provide the parties with his oral Reasons and they were sent out later. Having received the Reasons, by letter of 11 October 2012, the Respondent applied for its costs. The first basis for the application relied on what was characterised as a significant number of previous claims brought by the Claimant against the Respondent, whom the Respondent considered to be a serial litigant, with the Tribunal proceedings being a further attempt to pursue litigation at the expense of the public purse. The second basis of the allegation was that the claim had been misconceived. Third, the Respondent contended that the Claimant's conduct in bringing the claim was unreasonable.

9. The Employment Judge referred to a number of communications received from the Claimant post-dating the Respondent's application for costs, although not all - so far as he understood - directed at that application. Having held at the PHR that the Claimant's claim had been misconceived, and (at paragraph 25 of his Reasons) stated that the claim had had no prospect of success, let alone a reasonable prospect of success, the Employment Judge concluded that the threshold had been crossed such as to engage his jurisdiction to award costs. Having so concluded, however, he correctly observed that this did not mean he was bound to make such an award. The question then became whether it was appropriate that he should do so. In this instance the Employment Judge concluded that it was.

10. The Reasons that apparently held sway with him were that the Claimant was seeking to litigate matters arising out his earlier employment with the Respondent, as well as other

matters, for a second time. The matters that he sought to raise were so far outside the jurisdiction of the Employment Tribunal that it was unreasonable for him to have brought the proceedings. The Employment Judge expressed the view that:

> **"...the claimant must now begin to understand it is not reasonable to bring completely spurious and hopeless claims before an employment tribunal, where the result is to cause government departments to incur expense in resisting such claims."**

He concluded by stating:

> **"It is in my view entirely appropriate that the claimant should be ordered to pay the costs incurred by the respondent in resisting this claim at the Pre-Hearing Review. This is because the making of an order will, I hope, act as a disincentive to the Claimant to bring further spurious claims."**

11. As for the amount awarded, the Employment Judge considered the amount claimed by the Respondent to be reasonable and ordered the Claimant to pay the sums claimed save for VAT, which he expected the Respondent to recover.

The Appeal

12. I have already outlined the basic structure of the appeal proceedings. As stated earlier, the only ground of appeal before me is that identified by HHJ Serota QC, who put the point thus:

> **"...the ET did not as it was required to do explain why... it had decided... to take the Claimant's means into account or ignore them; see HH Judge Richardson in** *Jilley v Birmingham & Solihull Mental Health NHS Trust* **UKEAT/0584/06."**

13. Although this matter has been progressed to a Full Hearing of the appeal, the Respondent has not sought to be represented or to make any representations herein. It is only the Claimant who appears before me. In representing himself at the hearing of this appeal, the Claimant has put in a large amount of documentation and in addition has handed to me this morning further documents which includes paperwork relating to his means or, as he might put it, his lack of means, relevant to the award of costs. He appreciates, however, that it is not for me to form a

view as to his means or whether this is actually relevant to the costs order. That would have to be a matter for the Employment Judge. As I understood it, he has shown me this evidence to demonstrate that there is substance in the point that he would wish to make.

14. The Respondent's Answer in this appeal implies that it was for the Claimant to raise the question of means rather than for the Employment Judge to take the point of his own accord. It may, however, have been that the large quantity of documentation received from the Claimant made it difficult for the Employment Judge to identify whether the point had actually been raised. In that regard the Employment Judge will not have been assisted by the fact that the application was determined on the basis of written submissions, without there being any oral hearing. That may have seemed a proportionate attempt to manage the costs, but may also have resulted in the Employment Judge not being able to appreciate all the points the Claimant wished to make.

The Legal Principles

15. The relevant legislative provisions are to be found in the **Employment Tribunals (Constitution and Rules of Procedure) Regulations Schedule 1, Rule 41(2):**

> **"(2) The tribunal or chairman may have regard to the paying party's ability to pay when considering whether it or he shall make a costs order or how much that order should be."**

16. In the case of **Jilley**, as referred to by HHJ Serota QC, HHJ Richardson observed:

> **"Rule 41(2) gives to the Tribunal a discretion whether to take into account the paying party's ability to pay. If a Tribunal decides not to do so, it should say why. If it decides to take into account ability to pay, it should set out its findings about ability to pay, say what impact this has had on its decision whether to award costs or on the amount of costs, and explain why. Lengthy reasons are not required. A succinct statement of how the Tribunal has dealt with the matter and why it has done so is generally essential."**

17. Although he went on to acknowledge that there was no absolute duty on a Tribunal to take ability to pay into account, HHJ Richardson also commented that it would be in many

cases desirable for means to be taken into account before making an order, although he recognised that there may be good reason for not doing so.

18. The fact that a party's ability to pay is limited would not, however, require a Tribunal to either make no award of costs or to assess a sum confined to an amount that the party could actually pay, **Arrowsmith v Nottingham Trent University** [2012] ICR 159. There may be various reasons as to why it is appropriate to make an order for costs notwithstanding the fact that a party will be unable to meet that award immediately.

19. Further, there may be circumstances where there is an obligation on the part of the Employment Tribunal itself to raise the questions of means when considering making a costs order even if that question has not been raised by the potentially paying party, **Doyle v North West London Hospitals NHS Trust** UKEAT/0271/11 (20 April 2012, unreported). In **Doyle**, the EAT (HHJ Shanks) considered it relevant that the Tribunal was considering making an award for costs against the Claimant in the sum of nearly £100,000. There was nothing to indicate that the Claimant was going to be able to pay such an amount and there was a risk that the representative had overlooked the point. In those circumstances the EAT held that the failure by the Tribunal to raise the question of means amounted to an error of law, which may have led to a substantial injustice to the Claimant. HHJ Shanks held that, where a party is completely unrepresented and is faced with an application for costs, the Tribunal ought to raise the issue of means before making an order.

Discussion and Conclusions

20. This court sees frequent appeals against costs orders in the Employment Tribunal. Putting to one side the question of possible entitlement to costs by way of repayment of fees,

the Employment Tribunal essentially remains a no-costs jurisdiction; costs do not follow the event in the same way as in other civil courts. Even where the threshold is crossed - as the Employment Judge plainly found had occurred in this case - it is still a matter of judicial discretion as to whether such an award should be made. In exercising that discretion, Rule 41(2) expressly recognised that an Employment Judge may have regard to the paying party's ability to pay. It was not just a matter recognised as potentially relevant to the amount but, prior to that stage, as a point that might properly be taken into account when deciding whether an award should be made.

21. Here there was no indication as to whether the Employment Judge considered the question of the Claimant's means either at the stage of deciding that it was appropriate to make an award of costs or at the stage when he was considering the amount to be awarded.

22. It is quite possible that the Claimant himself failed to clearly raise the point. Does that make a difference? In certain circumstances, it may do. The process before an Employment Tribunal remains an adversarial one. It is not for an Employment Tribunal to take every possible point on behalf of a party even if that party is either unrepresented or badly represented. Moreover, there is no requirement on an Employment Tribunal to take into account a party's means before making an award of costs. It is merely a potentially relevant matter. A Tribunal is not required to have regard to it, and there is no requirement that the amount of any award made should be restricted to what the paying party can actually pay. There may be broader considerations in issue than simply the Claimant's means.

23. All that said, the means of the paying party still do amount to a potentially relevant matter. The difficulty in this case is in not knowing whether the Employment Judge turned his

mind to the question of means - a relevant consideration - or not. If he did, but decided that the likely inability of the Claimant to immediately pay the award made would not dissuade him from making it in this case, he did not explain that, as he might have been expected to do. As HHJ Richardson observed in **Jilley**, this is not a particularly onerous requirement, simply to state why in a particular case the Judge did not consider it to be a relevant matter.

24. Where, as here, this court is concerned with reviewing an Employment Judge's exercise of his or her judicial discretion, the EAT should not interfere unless that exercise was plainly wrong or where the Employment Judge took into account irrelevant matters or failed to take into account a relevant matter. I do not say that the award of costs in this case was plainly wrong. Equally, however, I cannot say that the Employment Judge took into account all relevant matters. The Claimant's means were a potentially relevant matter. On the facts before the Employment Judge a question naturally arose as to whether the Claimant could begin to meet the award of costs that the Respondent was seeking. I cannot tell from the reasons given as to whether this potentially relevant matter was taken into account and, in my judgment (and in this regard I follow HHJ Richardson in **Jilley**), that amounts to an error of law on the part of the Employment Judge.

25. For that reason, I allow this appeal and direct that this matter go back to the Employment Judge to be considered afresh. In so doing, he may well form the view that it is right to make the award in the same amount as before and it would be appropriate to do so notwithstanding any issues relating to the Claimant's means. On the other hand, he might take the view that, although it is appropriate to make the award, he needs to revisit the amount in the light of the Claimant's means. All possibilities are open for the Employment Judge. Equally, whether he feels it appropriate and proportionate to hold an oral hearing to determine this

matter will be a matter for him and for such representations as the parties might make. At this stage the only order I make is that the matter needs to go back to the same Employment Judge for fresh consideration in the light of this Judgment.