Appeal No. UKEAT/0483/13/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 25 July 2014

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR C MARDNER — APPELLANT

(1) MR C GARDNER
(2) MR W ALI
(3) MS M PRESS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR SIMON LIVINGSTONE (of Counsel) Instructed by: TMP Solicitors LLP 29th Floor One Canada Square Canary Wharf London E14 5DY
For the first and second Respondents	MR ROBIN HOWARD (of Counsel) Instructed by: Lindops Solicitors 35 Clarence Street Southend on Sea Essex SS1 1BH
For the third Respondent	MR JONATHAN PETER BERTRAM (of Counsel) Insructed by: Holmes & Hills LLP Bocking End Braintree Essex CM7 9AJ

SUMMARY

PRACTICE AND PROCEDURE - Costs

Employment Tribunal refusal to make an award of costs – **ET Rules 2004**

When deciding it would not be appropriate to make an award of costs (having determined that the threshold for such an award had otherwise been crossed) did the Employment Judge err in taking into account: (1) the fact that the Respondents were volunteers and trustees of a charity and/or (2) that any recovered costs will inure to the benefit of the Claimant's insurers rather than to the Claimant personally?

This was a challenge to an Employment Judge's exercise of discretion. That being so, it would not be for the EAT to interfere unless it was established that the order was vitiated by an error of legal principle or was not based on the relevant circumstances (per Mummery LJ in **Yerrakalva v Barnsley MBC** [2012] ICR 420).

As to whether it amounted to an error of law for the Employment Judge to have had regard to the nature of the Respondents' positions as volunteer trustees of a charity: it could not be said that she thereby improperly fettered her discretion or took into account an irrelevant fact. The Employment Judge was not saying that it would always be the case that volunteer trustees could not face personal liability for costs, simply that she felt that it was inappropriate to make an award against volunteer trustees in these circumstances. That was a matter within her discretion and did not vitiate her decision.

The Employment Judge's reasoning did not, however, stop there. She also identified that the Claimant had been funded by an insurer and was therefore not personally out of pocket. She

took that view notwithstanding that Counsel then appearing for the Respondents had agreed that she should disregard that fact. The Respondents' position before the Employment Tribunal had been correct. The Rules did not identify the means of the receiving party as a potentially relevant question and there were good policy reasons why it should not be. Furthermore, here the potentially receiving party was only not personally suffering from the costs of the Respondents' misconceived defence and unreasonable conduct of the litigation because he had prudently entered into an insurance policy that would meet this liability. Allowing that the appeal concerned a power to award costs derived from statutory instrument rather than a common-law award of damages, the public policy principle was essentially the same as that approved in **Parry v Cleaver** [1970] AC 1. Allowing that the Respondents should avoid the costs consequences of their unreasonable conduct because the Claimant had prudently entered into this insurance would allow them to appropriate that benefit and that would be wrong. The Claimant's insurance policy was therefore an irrelevant consideration that rendered the decision unsafe.

Questions of appropriateness of costs award and possible issues as to means to be remitted to the same Employment Judge (if practicable) for fresh consideration in the light of this Judgment.

HER HONOUR JUDGE EADY QC

Introduction

1. In giving this Judgment, I refer to the parties as the Claimant and the Respondents, as they were before the Employment Tribunal. The appeal is that of the Claimant against the Judgment of the East London Employment Tribunal (Employment Judge Corrigan sitting alone, on 11 February 2013), sent to the parties on 4 July 2013, in which the Employment Judge declined to award costs against the Respondents. The Claimant was represented before the ET and on this appeal by Mr Livingstone, of Counsel. Before the ET, all five Respondents were represented by Mr Bertram of Counsel, but before me Mr Howard of Counsel appears for the first and second Respondents, and Mr Hobbs of Counsel appears for the third Respondent.

2. The appeal was permitted to proceed to a Full Hearing after consideration by Mr Recorder Luba QC on the papers, who considered that it potentially raised two issues of general importance. First, what was the relevance, if any, of the fact that the Respondents were volunteers and trustees of a charity? Second, what was the relevance, if any, of the fact that any recovered costs would inure to the benefit of the Claimant's insurance company rather than the Claimant personally?

3. For completeness, I note that there had been two other Respondents to the ET proceedings, but I am not concerned with their respective positions at this stage, and they are not parties to this appeal.

4. I also note that there is a cross-appeal in respect of the Employment Judge's conclusion that her costs jurisdiction had been engaged at all. That has been stayed pending this appeal, and, again, I do not consider it further at this stage.

The Background Facts, the Employment Tribunal's Conclusions and Reasoning

5. The Respondents were volunteer members of the management committee of a charitable body titled "The Essex Racial Equality Council", or "the charity". The Claimant was employed as its director. During the latter part of his tenure the charity ran out of money. Without money, the charity could not continue to function and could not pay the Claimant's wages. Accordingly, his employment was terminated as from 22 December 2009.

6. The management committee of the charity comprised volunteers, including the three Respondents. Members of the management committee were alive to the risk of personal liability for the charity's debts. There had been an intention formed back in 2007 to create a company limited by guarantee to protect the management committee in this regard, but that had still not been put into effect by the time of the Claimant's dismissal in 2009.

7. The Claimant therefore brought ET proceedings naming, relevantly, the three Respondents as members of the management committee. The Respondents sought to avoid liability by taking the point in the proceedings that the company limited by guarantee had been formed and was the responsible party. They sought to maintain that position from the time they lodged their ET3 in November 2011 until ultimately the matter was settled by means of a consent order in November 2012, i.e. some 12 months later. The Employment Judge considered that the Respondents' defence in this regard had been misconceived (paragraph 5) and that maintaining that position for so long had been unreasonable (paragraph 6).

8. The Claimant then applied for his costs in the ET proceedings against the three Respondents. Given the view she had formed as to the misconceived nature of the defence and the unreasonable nature of the Respondents' position, the Employment Judge agreed that her costs jurisdiction was engaged pursuant to Rule 40, Schedule 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004**. Having so found, she correctly directed herself that she then needed to consider whether it was appropriate to make such an order; she concluded that it was not.

9. In reaching that view, the Employment Judge first observed that the three Respondents were volunteers and trustees of a charity and that they were already personally liable for the Claimant's substantive claims, and she did not consider it appropriate to order costs against them in addition. Secondly, she noted that the Claimant had been funded by an insurer and was "therefore not personally out of pocket".

10. In conclusion, in her final paragraph (paragraph 8), she said this:

> **"I have heard what the parties' representatives have said about the situation where someone is funded by an insurer (namely that that should be disregarded as a matter of principle) but I am not persuaded that within the rules in relation to costs in the Employment Tribunal that there is a legal principle that prevents me making this order, i.e. no order as to costs, which is the order that I consider to be appropriate."**

The Appeal

11. The Grounds of Appeal can be summarised under two main headings. First, whether it was relevant for the Employment Judge to have regard to the means and financial circumstances of the Claimant as the potentially receiving party, in particular, as a discrete sub-point, to the fact of his having had the benefit of legal expenses insurance. The Claimant's submission was that these factors were irrelevant and should properly have been disregarded by the Employment Judge. Second, whether the Employment Judge should have disregarded the

fact that the Respondents were volunteers and trustees of a charity; the Claimant urging that that, without more, was not relevant to their ability to pay. Properly understood, that second ground has to be a challenge on the basis that the Employment Judge wrongly fettered her discretion, alternatively, took into account an irrelevant circumstance, as she was considering the appropriateness of making an award of costs, not the Respondents' means as such.

The Relevant Legal Principles

12. The relevant legislative principles are to be found in the **ET Rules 2004**, schedule 1. Rule 38 provides generally for the power of an Employment Tribunal or Employment Judge to make a costs order and makes it clear that costs can mean "those fees, charges, disbursements or expenses incurred by or on behalf of a party".

13. That wording was considered by the EAT, Langstaff P presiding, in **Taiwo v Olaigbe and Anor** UKEAT/0254/12 and UKEAT/0285/12, in which it was held that the rule covered the situation where a party to litigation in ET proceedings is supported by another who incurs a fee or charge or makes a disbursement or incurs and expense on that party's behalf. At paragraph 69, the President observed:

> **"There is every good reason of policy why Parliament might provide in a Tribunal such as the Employment Tribunal for costs incurred by another to be recovered if the occasion were appropriate – for such Tribunals frequently hear claims brought by those who have lost their employment and are likely to be without income, who may well be in difficult social and financial circumstances as a consequence. They may need financial help if they are to access justice. It is not at all surprising that the legislature should recognise that, and make provision for reimbursement if the conduct of the other party sufficiently merits it. Similarly, where Respondents are named as employees of an institutional Respondent against whom a claim is also brought (as, for instance, where claims of discrimination are brought against a corporation, and those of its employees whom it is said committed acts of discrimination against a Claimant) it is not uncommon for the employer to pay the costs of all in defending the claim."**

14. Costs in the ET do not, however, simply follow the event. They can be awarded where particular circumstances are found to arise (see, relevantly, Rule 40(2) and (3)):

> **"(2) A tribunal or judge shall consider making a costs order against a paying party where, in the opinion of the tribunal or judge (as the case may be), any of the circumstances in paragraph (3) apply. Having so considered, the tribunal or judge may make a costs order against the paying party if it or he considers it appropriate to do so.**
>
> **(3) The circumstances referred to in paragraph (2) are where the paying party has in bringing the proceedings, or he or his representative has in conducting the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably, or the bringing or conducting of the proceedings by the paying party has been misconceived."**

15. Costs awards in the Employment Tribunal are still the exception rather than the rule (see **Yerrakalva v Barnsley MBC** [2012] ICR 420, per Mummery LJ, at paragraph 7).

16. Moreover, although regard may have been had to the conduct of the paying party to found such an award, a costs order remains compensatory not punitive. The receiving party is being compensated for the expense to which she has been unreasonably put (see **Benyon and Ors v Scadden and Ors** [1999] IRLR 700 EAT, Lindsey J presiding). Even if the relevant circumstances are found - i.e. the ET or Employment Judge finds that a claim was misconceived or there was unreasonable conduct - that will still not be sufficient. The ET or Employment Judge must then specifically address the question as to whether it is appropriate to exercise the discretion to award costs (see **Robinson and Anor v Hall Gregory Recruitment Ltd** UKEAT/0425/13 and **Criddle v Epcot Leisure Ltd** UKEAT/0275/05). As the answering of this question involves the exercise of a broad discretion, an appeal against the costs order (or, as here, a refusal to make a costs order) will be doomed to failure, unless it is established that the order is vitiated by an error of legal principle or was not based on the relevant circumstances. The original decision-taker will be better placed than the appellate body to make a balanced assessment as to the interaction of the range of factors affecting the court's discretion, see **Yerrakalva**, per Mummery LJ, at paragraph 9. I also note the observation at paragraph 49 of that case, as follows:

> **"[…] as orders for cots are based on and reflect broad brush first instance assessments, it is not the function of an appeal court to tinker with them. Legal microscopes and forensic toothpicks are not always the right tools for appellate judging."**

17. In the present case it is indeed contended that the Employment Judge erred in law, in taking into account the Claimant's means, in particular the fact that he had the benefit of legal-expenses insurance. This is said to be contrary to the principle laid down in **Bradbourn v Great Western Railway Co** [1874] LR 10 Ex 1, where it was held that it would be contrary to fairness and justice if a wrongdoer should get the benefit of an insurance policy for which the innocent party has paid. That approach was approved by the House of Lords in **Parry v Cleaver** [1970] AC 1 and the principle thus laid down recently characterised by Popplewell J in **Fulton Shipping Inc of Panama v Globalia Business Travel SAU (formerly Travel Plan SAU of Spain)** [2014] EWHC 1547 CC, paragraph 36, as follows:

> **"[…] benefits do not fall to be taken into account, even where caused by the breach where it would be contrary to fairness and justice for the defendant wrongdoer to be allowed to appropriate them for his benefit because they are the fruits of something the innocent party has done or acquired for his own benefit."**

18. Where there is an error of law in the making of a costs order, the question will arise as to how the appeal is to be disposed of. That question has most recently been considered by the Court of Appeal in the case of **Jafri v Lincoln College** [2014] EWCA Civ 499, per Laws LJ. Effectively, if the EAT detects a legal error on the part of the Employment Tribunal, it is bound to send the case back unless it concludes (a) that the error cannot have affected the result - in such a case, the error will have been immaterial and the result as lawful as if that error had not been made; or (b) that without the error the result would have been different but the EAT is able to conclude what it must have been in any event. Where there is more than one possible outcome, however, the case must be remitted.

Submissions: the Claimant's Case

19. For the Claimant the general observation was first made that to the extent that the Respondents sought to rely on some view as to the level of their default that was not relevant to

the discrete issues to be determined today. The threshold had been crossed, and the Employment Judge had not suggested that the particular level of fault had informed her decision not to make an award of costs.

20. In respect of the Grounds of Appeal, three points were made. First, as to the Claimant's means, this was an irrelevant consideration; in particular, because when Parliament specifically allowed for means to be taken into account with the introduction of Rule 41(2) of the 2004 Rules it only directed that question as a potentially relevant factor in relation to the means of the paying party. If it was relevant to have regard to the means of the receiving party, then Parliament would have said so.

21. That leads, secondly, into the question of the Claimant's insurance policy. In this regard, the Claimant relied on the well-known principle laid down in **Bradbourn** and **Parry** and the reasoning underpinning that principle as described by Popplewell J in **Fulton Shipping Inc** (see above). In any event, the ET Rules 2004 allowed that costs might be awarded even if the receiving party herself was not personally out of pocket (see Rule 38 and **Taiwo**). There were, moreover, potentially wider public-interest points. Insurers may simply exclude some claims from policies in future. Ultimately, to take into account the Claimant's insurance would be akin to treating him as if his means precluded his being able to recover his costs. What the Claimant was seeking to recover were the fruits of his prudent behaviour; that should not be excluded.

22. Third, turning to the account taken of the role of the Respondents as volunteer trustees of a charity, the Claimant made the point that it could not be assumed that they thereby were without means. All kinds of people with varying levels of means take on roles as volunteer trustees. Potentially, an Employment Judge would have to make assessments about the

worthiness of a cause or the financial means of volunteers in such situations. Whilst recognising a wide discretion vested in the Employment Judge in this regard, here the Employment Judge had effectively fettered that discretion by considering that she should not make an award against this status of Respondent.

The Respondents' Case

23. For the first and second Respondents Mr Howard reminded me that the award of costs in the ET remained exceptional. He further submitted that the Employment Judge gave an impeccable self-direction as to the approach on costs and reached a decision that was entirely open to her. Contrary to the way in which his clients' case had been argued below, Mr Howard said that the Employment Judge was entitled to have regard to the fact that the Claimant would not be out of pocket as a result of receiving the benefit of his insurance policy. As the Employment Judge rightly identified, the statutory rules did not preclude her having regard to the fact that costs were covered by an insurance policy and she rightly had regard to the wording of the rule (see the guidance to that effect of Mummery LJ in **Yerrakalva**) rather than to cases dealing with insurance policies in personal injury damages.

24. More generally, this was not the most obvious example of behaviour crossing the threshold. Volunteer trustees would not have taken on their roles with the possibility in mind that they may be individually liable for costs in ET proceedings. The Employment Judge was entitled to have regard to the nature of their involvement in exercising her broad discretion.

25. On the question of the Claimant's insurance, the Employment Judge plainly had taken that into account and had gone out of her way to do so. Accepting that the Rules allowed for costs to be recovered where those had been incurred *on behalf of* a party, a costs order in the ET

was still different to the award of damages in, e.g., personal injury cases. The Claimant would not be affected by the outcome; the only impact would be on the insurers and the Respondents, and there was nothing in the rule that prevented the Employment Judge taking this into account.

26. On behalf of the third Respondent, Mr Hobbs sought to contend that the key consideration for the Employment Judge was the volunteers point, and that was a matter entirely within her discretion. The subsidiary point as to whether the receiving party was insured was not of such importance. When looking at the roles of the Respondents, the Employment Judge had not unduly fettered her discretion. She was not excluding the possibility of a volunteer trustee being liable for costs but was having particular regard to the fact that these were the volunteer trustees of a charity that had no funds and had already met the liability to the Claimant under the consent order. The Employment Judge was entitled to ask who, should she award costs, would actually be picking up the tab. That was akin to the approach approved by the EAT in **Benyon**.

27. Turning to the question of the Claimant's insurance, Mr Hobbs urged me to take the view that this was not in fact an important consideration. In any event, the Employment Judge was entitled to take a different approach to that taken to an award of damages where the policy would pay out to the Claimant. Moreover, this was the exercise of a statutory discretion, not a question of damages at common law. Ultimately - Mr Hobbs asked rhetorically - what was wrong with the Tribunal taking into account fairness as a whole: on the one hand, the Claimant was insured, on the other hand, the Respondents had been volunteer trustees of a charity?

The Claimant's Response

28. In response, the Claimant submitted that the underlying principle in relation to a policy of insurance was that the wrongdoer should not benefit, and that applied to a costs award in the ET as much as it did to common law damages. Here the Respondents stood to gain by avoiding the cost consequences of their behaviour by reason of the Claimant's prudence.

Discussion and Conclusions

29. My starting point has to be that this is a challenge to an Employment Judge's exercise of her discretion. This Employment Judge might not have been steeped in the case in the same way as might normally arise – she was considering a costs application after a consent order rather than after the full merits hearing of the claim – but the position remains that it is not for me to interfere in an Employment Judge's exercise of discretion in this regard unless it is established that the order is vitiated by an error of legal principle or was not based on relevant circumstances (see **Yerrakalva**).

30. I do not consider it relevant to try to second-guess the Employment Judge's view as to the level of the Respondents' default. She had decided that their defence to the claim was misconceived and that they had acted unreasonably in maintaining that position for so long. She did not state that her decision not to award costs was related to any view she had formed as to the nature of the Respondents' default.

31. The first point identified as relevant to the decision whether it was appropriate to make a costs award related to the Respondents' positions as volunteers and trustees of a charity that had run out of money, thus fixing them with personal liability; a liability that already meant they would have to meet the payment made to the Claimant under the consent order. She did not

consider the question of their individual means but saw the nature of their involvement as a relevant consideration of itself. Was that an error of law? Should I find that the Employment Judge thus wrongly fettered her discretion or took into account an irrelevant fact?

32. I do not think that she did. She was not saying that it would always be the case that volunteer trustees will not face personal liability for costs, simply that she felt that it was inappropriate to make an award against these volunteer trustees in these particular circumstances. For the Respondents, it was suggested that this might be because volunteer trustees do not give of their time with a view to facing such personal liabilities. That is not how I read the reasoning here. If it were, then I am not sure I would agree with it. Volunteer trustees may face personal liability if the body with which they are involved is an unincorporated association. I do not think that many trustees are blind to that possible risk. On the other hand – and this is what I read as having been of relevance to the Employment Judge here – they are people who are giving up their time on a voluntary basis, and that is a public good that should not be discouraged. Whether that will be a relevant factor in considering the appropriateness of an application for costs in Tribunal proceedings in any particular case will be for that Tribunal or Employment Judge to determine. It may be relevant that the body itself no longer has any funds. It may also be relevant to note that, as well as of giving up their time, the particular volunteer trustees have also had to personally meet financial liabilities of the charity. Those – and, no doubt, other factors - would all be for the ET or Employment Judge in the particular case. Whether I would have taken the same view as the Employment Judge in this case I cannot say, but I do not think it amounts to a fettering of her discretion or an error of law such as to vitiate the view she formed.

33. The Employment Judge's reasoning, however, did not stop there. She also identified that the Claimant had been funded by an insurer and was therefore not personally out of pocket. She took that view notwithstanding the fact that both Counsel then appearing said that she should disregard it. The Respondents have resiled from that position in this appeal. The Claimant has taken no point on that, presumably considering that they were entitled to try to support the Employment Judge's Judgment, notwithstanding their position below.

34. In my judgment, however, they were right in their position before the ET and wrong in their submissions on this appeal. I start with the question of the relevance of the Claimant's means. The rule does not identify this as a potentially relevant question, and it is easy to see why it should not be. If the relevant circumstances have been met, does the unreasonable litigant avoid the potential costs award simply because the party making the application is well-off or has substantial means? That would seem to me to be contrary to public policy and potentially to lead Tribunals into making very difficult Judgments that would seem irrelevant to the exercise of discretion they are engaged in. If costs are compensatory and the relevant criteria are met, then why should it be relevant that the receiving party has not actually been placed into straitened circumstances because of having to fund the proceedings? There may be cases where the means of the receiving party will be relevant but this will be highly fact-specific and examples do not immediately come to mind.

35. Furthermore, here the potential receiving party was only not personally suffering from the costs of the Respondents' misconceived defence and unreasonable conduct of the litigation because he had prudently entered into an insurance policy that covered these costs. Whilst I am here concerned with a power to award costs derived from a statutory instrument rather than a common-law award of damages, I consider the public policy principle is essentially the same.

It is that approved in **Parry**, and serves to prevent Respondents avoiding the cost consequences of their unreasonable conduct because the Claimant prudently entered into a policy of insurance, which would otherwise allow them to appropriate the benefit for themselves.

36. In my judgment, the Claimant's insurance policy was an irrelevant consideration, and, to the extent that her Judgment relied on it, the Employment Judge erred in law. I did wonder whether this was one of those cases identified in **Jafri** where I might take the view that this was not a material part of the reasoning and could thus uphold the Judgment simply on the view formed by the Employment Judge as to the appropriateness of making an award against volunteer trustees in these circumstances. That is, however, not how the first and second Respondents have put the case; indeed, they have stressed that the Employment Judge went out of her way to take this factor into account. I think that is probably right, and I am therefore bound to find that this decision is unsafe and I allow the appeal.

Disposal

37. Having given my Judgment on this appeal, I discussed with Counsel the appropriate order. It was common ground that the result of my Judgment must require this matter to be remitted and that it would be most appropriate for it to be remitted, in so far as it is practicable, to the same Employment Judge for fresh consideration of the question of the appropriateness of making an award in the light of this Judgment (the Employment Judge having already concluded that her threshold for making an award had been crossed), and also to consider the question, if relevant, of means.

38. Also by consent, the cross-appeal will remain stayed pending the final outcome of the Employment Judge's consideration of this matter. Should there then be any challenge to the

fresh consideration of this matter, that can come back up to the EAT and everything can be considered in the round. That would also have the advantage of avoiding the possible proliferation of hearings before this Court.

Costs

39. Having given my Judgment and my reasons for the order in this case, the Claimant has asked for his costs in respect of the fees paid, that application being made under Rule 34A(2)(a) **Employment Tribunal Rules 1993,** as amended. That rule gives me a broad discretion to make a costs order in favour of a successful Appellant in the sum of any fee paid under a notice issued by the Lord Chancellor. Here, the total of those fees is £1,600, the issue fee and the hearing fee.

40. As I have observed previously (see **Horizon Security Services Ltd v Ndeze and Anor** UKEAT/0071/14), given the new world in which we operate - with fees being required to be paid in order to use the services of the court - it will, in the general course of events, be likely that a successful Appellant will recover those fees against unsuccessful parties that have sought to resist the appeal. That will not always be the case; there may be occasions where the means of those resisting the appeal are such that it would not be appropriate to make such an order or where those resisting the appeal have taken such a neutral stance that again it might not be relevant to make such an order. In the present case the only submission that has been made to me by those acting for the Respondents is that, given that I have remitted this matter for further consideration by the Employment Judge, we are not yet at the end of the road.

41. That may or may not be so, but we are at the end of this particular appeal, in respect of which the Claimant has incurred the fees in question. No indication has been given to me that

the Respondents' means are such that such an order would be inappropriate, nor has any other ground been relied on before me. In those circumstances, I allow the application, and order that the Respondents are jointly and severally liable for costs of £1,600 in the Claimant's favour.