Appeal No. UKEAT/0071/14/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 18 June 2014

Before

HER HONOUR JUDGE EADY QC

(in Chambers)

HORIZON SECURITY SERVICES LIMITED — APPELLANT

(1) MR F NDEZE
(2) THE PCS GROUP — RESPONDENTS

Transcript of Proceedings

JUDGMENT

REVISED

APPEARANCES

For the Appellant	Written representations prepared by MR ANDREW WORTHLEY (of Counsel) Instructed by: Jay Vadher & Co., 185 Romford Road, Stratford, London E15 4JF.
For the First Respondent	No written representations
For the Second Respondent	No written representations

SUMMARY

PRACTICE AND PROCEDURE – Costs

On an application under **rule 34A(2A) EAT Rules 1993**, as amended, the EAT has 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. There was no requirement that the thresholds laid down under **r.34A(1)** need to have been crossed by a Respondent before such an award was made. Although costs did not simply follow the event in the EAT - and allowing that exceptions might need to be made in particular cases - the introduction of fees had changed the landscape and the general expectation must be that a successful Appellant will be entitled to recover the fees paid from a Respondent that had actively sought to resist the appeal - **Portnykh v Nomura International Plc** UKEAT/0448/13/LA followed.

Application under **r.34A(2A)** duly allowed. PCS ordered to pay costs in the sum of £1,600 to Horizon

HER HONOUR JUDGE EADY QC

Introduction

1. In this Judgment I refer to the parties as the Claimant and either Horizon or PCS, as appropriate. This should be read along with the earlier Judgment in this matter, addressing the substantive appeal (heard on 19 May 2014).

2. Having given my Judgment, allowing the substantive appeal in this matter, Horizon applied for an award of costs against PCS, in the sum of £1,600, to represent the fees it had paid in pursuit of its appeal. In order to allow PCS the opportunity to properly respond to this application, I directed (with the consent of the parties) that both Horizon and PCS should be permitted to submit written submissions on this question and I would then consider the application on the papers.

3. Horizon duly sent in written submissions in support of its application but nothing was received from PCS within the time-scale set. The submissions received from Horizon suggest that PCS has not agreed that it should pay the sum in question, albeit that it has not indicated any resistance to the application (pursuant to my Order seal dated 23 May 2014).

The application and Horizon's submissions in support

4. As outlined above, Horizon seeks an order for costs against PCS, limited to the fees that it had to incur (1) at the time of lodging its appeal (£400), and (2) at the time this matter was listed for a full hearing of the appeal (£1,200). That application is made under the **Employment Appeal Tribunal Rules 1993 (as amended) rule 34A(2A)**, which provides that:

> **"If the Appeal Tribunal allows an appeal, in full or in part, it may make a costs order against the respondent specifying the respondent pay to the appellant an amount no greater than any fee paid by the appellant under a notice issued by the Lord Chancellor."**

5. Observing that there was little guidance or authority on the point (the new fees regime still being at an early stage of implementation), Horizon placed reliance on the EAT authority of **Portnykh v Nomura International Plc** UKEAT/0448/13/LA, in which His Honour Judge Hand QC awarded the successful Appellant his fees as costs on the general principle that:

> **"… subject to specific exceptions arising from the particular circumstances, … where a party had succeeded, the unsuccessful party, after consideration of, and subject to, the means of the paying party to make such a payment, should pay the fees incurred by the successful party."**
> **(see the learned Judge's Summary in that case)**

6. Having set out that general principle, His Honour Judge Hand QC further observed:

> **"The issue should be looked at broadly and whether or not the appellant has succeeded on all points argued would be a relevant consideration but where, as here, there had been substantial success, payment of the equivalent of the full fee(s) should be the usual outcome."**

7. Horizon also noted support for that statement of general principle in the Judgment of LJ Moses (sitting in the High Court) in **R (on the application of Unison) v Lord Chancellor** [2014] IRLR 266, where it was observed (see paragraph 15), albeit strictly in respect of fees in Employment Tribunals, as follows:

> **"At the time these proceedings were launched there was no stated presumption that an employer would pay the costs of the issue of the proceedings or the hearing fee, I the event that a claimant was successful. By rule 76(4) a tribunal is given the power to make a Costs Order after a tribunal fee has been paid but there is no default position in relation to a winning claimant. The Government's Guidance merely pointed out that judges would have the power to order respondents to pay fees back tot eh claimants where an employment judge considers it appropriate. By the time of the adjourned hearing the Government had, however, relented, and has amended the Guidance to say 'the general position is that, if you are successful, the respondent will be ordered to reimburse you'. Apparently, this amended Guidance will be placed on the Ministry of Justice website 'as soon as possible'. Consideration is being given to amending rule 76(4) of the ET Procedure Rules and rule 34 of the EAT Rules so as to make this expectation clear."**

8. In the present case, Horizon submitted that:

(1) It was incontestable that it had demonstrated "substantial success" on its appeal.

(2) That meant that PCS, as the unsuccessful party, should pay the fees incurred in bringing and pursuing the appeal.

(3) To the extent that it was relevant to have regard to PCS's means, there was not suggestion that it (a large and long-established business) was unable to pay the sum in question (£1,600).

Discussion and conclusions

9. The introduction of fees in the Employment Appeal Tribunal in 2013 was a very significant change. It introduced for the first time a requirement that an Appellant must (unless they were entitled to fee remission) pay a fee to bring an appeal and an additional fee for that appeal to go to a full hearing. If successful, the Appellant might well feel aggrieved at having had to pay for the correction of an error of law on the part of the Employment Tribunal below. That sense of grievance might be all the greater if the appeal had been resisted by the other party, which had not had to pay any fee to respond to, or be heard on, that appeal.

10. As a statement of broad principle, however, it remains the case that the EAT is generally a "no-costs" jurisdiction: the usual rule applicable in civil proceedings, that costs follow the event, does not (in the normal course) apply in EAT appeals. That said, the EAT has the power to award costs (**r. 34**) in particular circumstances, as set out at **r. 34A EAT Rules 1993**. That rule was specifically amended to take account of the introduction of fees (see **r. 34A(2A)),** which is now expressly identified as a potentially relevant consideration for the exercise of the discretion afforded to the EAT to made a costs order. It is, further, a potentially relevant matter that stands separate from the discretion afforded to the EAT to award costs under **r. 34A(1)**

(where it appears to the EAT that the proceedings were unnecessary, improper, vexatious or misconceived or that there was unreasonable delay or other unreasonable conduct).

11. Thus, where an appeal has been allowed (in full or in part), the EAT is given a broad discretion to order that a Respondent to the appeal pay to the Appellant a sum no greater than the fee/s incurred by that Appellant. There is no requirement that the thresholds laid down under **r.34A(1)** need to have been crossed by the Respondent before such an award is made.

12. As the Government apparently recognised in the alteration of its position during the lifetime of the Unison Judicial Review proceedings before the High Court, the introduction of fees changes the landscape. As a statement of general principle in the EAT, it might well seem unjust if a successful Appellant were unable to recover the fees they have had to pay from the party that had resisted the appeal. That statement of general principle might need to be tempered to take account of the particular facts of an appeal. The issue may not be so clear-cut where, for example, the Appellant has only been partly successful. It might also be considered inappropriate or unjust to make such an award if the Respondent's means are such that they could not pay the sums in question. The EAT retains a broad discretion in such matters. That said, however, I concur with His Honour Judge Hand QC: following the introduction of fees, the general expectation must be that a successful Appellant will be entitled to recover the sums paid from a Respondent that had actively sought to resist the appeal.

13. In the present case, there can be no doubt that Horizon achieved substantial success on its appeal. It does not seek to recover any costs against Mr Ndeze, who played no active part in the appeal (and, indeed, has at all times been neutral as to the outcome of this preliminary issue in his case). The application is made solely against PCS, which sought to resist the appeal on all grounds.

14. Moreover, although PCS has not provided any written representations on this application itself, I have no reason to suspect that it would not have the means to meet an award of £1,600. In the circumstances, I allow the application under **r.34A(2A)** and duly order PCS to pay the costs in the sum of £1,600 to Horizon.