Appeal No. UKEAT/0488/13/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 16 June 2014

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

MR J A LADAK APPELLANT

DRC LOCUMS LTD RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR NATHANIEL CAIDEN (of Counsel) Instructed by: Wragge Lawrence Graham & Co LLP 4 More London Riverside London SE1 2AU
For the Respondent	MR JONATHAN COHEN (of Counsel) Instructed by: Hamilton Bradshaw Limited 60 Grosvenor Street Mayfair London W1K 3HZ

SUMMARY

PRACTICE AND PROCEDURE – Costs

It was argued by the Appellant that, by virtue of the definition of "costs" in rule 38(3) of the **Employment Tribunal Rules of Procedure 2004**, a receiving party who employed a qualified in-house legal representative was unable to recover costs in respect of the time spent by that representative, since it did not fall within the words "fees, charges, disbursements or expenses incurred by or on behalf of a party'. It was also argued that the Employment Judge had not properly addressed the question whether it was proportionate to award the whole of the costs. Held: appeal dismissed. It had long been the position that such costs were recoverable: see **Wiggins Alloys Ltd v Jenkins** [1981] IRLR 275. The 2004 Rules did not change the position. The words in question were sufficiently wide to enable an employer to recover costs in respect of time spent by a qualified in-house representative. The Employment Judge had properly addressed the question whether it was proportionate to award the whole of the costs.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by Jaffer Ali Ladak ("the Claimant") against a Judgment of Employment Judge Metcalf, sitting in Bedford, dated 4 June 2013. The Claimant had brought a claim against his former employers, DRC Locums Ltd ("the Respondent"). His claim had been struck out on 2 July 2012. By his Judgment the Employment Judge ordered that the claim should pay the whole of the Respondent's costs of the proceedings from 21 January 2012 onwards, to be assessed by the County Court. The order was made under provisions within the **2004 Employment Tribunal Rules of Procedure**, now replaced by the 2013 Rules.

2. The principal ground of appeal is that the Employment Judge took into account, in deciding whether to order the assessment of the costs by the County Court, the substantial bill of costs incurred in-house by the Respondent's employed solicitor. On behalf of the Claimant Mr Nathaniel Caiden argues that the Employment Tribunal has no power to order the payment of costs incurred in-house save for specific items of expenses and disbursement. He also argues that in this particular case the Employment Judge was required to undertake, but did not undertake, what he describes as a "proportionality exercise; and he takes a point about the incurring of VAT. On behalf of the Respondent Mr Jonathan Cohen resists these Grounds of Appeal.

The Background

3. The Claimant was employed by the Respondent for several years until 13 May 2011. His closing salary was £132,000 per year. On 12 August 2011 he brought a claim for unfair dismissal and discrimination on the grounds of religion and belief. At a hearing in January 2012 the discrimination claims were struck out. Case management directions were

given for the hearing of the unfair dismissal claim. The Claimant failed to comply with these directions. In May 2012 the Respondent applied for the claim to be struck out. On 21 June the Employment Tribunal wrote to the Claimant, warning him that the claim would be struck out unless he rejected in writing by 28 June. He did not do so. The claim was struck out on 2 July. The hearing had listed for five days, commencing on 9 July. It is part of the Respondent's case that, by the time the claim was struck out, it had undertaken substantial work of preparation and delivered Counsel's brief.

The Employment Judge's Reasons

4. On 20 July 2012 the Respondent applied for costs, relying on the Claimant's wholesale failure to comply with the Employment Tribunal's directions and to pursue his claim. The Employment Judge decided that the Claimant's behaviour crossed the threshold for an award of costs. This is not disputed for the purposes of the appeal. He directed himself that, "the unreasonableness threshold having been crossed", he had a wide judicial discretion to exercise. He noted that the Claimant did not advance any argument that he lacked the ability to pay an order for costs. It is sufficient to cite the following paragraphs from the Employment Judge's Judgment:

> **"23. The Tribunal considered the well known cases of** *McPherson v BNP Paribas* **2004 EWCA Civ 569 Court of Appeal and the subsequent decision also of the Court of Appeal in** *Barnsley Metropolitan Borough Council v Yerrakalva* **2011 EWCA Civ 1255. The claimant's behaviour in neither withdrawing the claim nor actively pursuing it, thereby failing to comply with the Tribunal's orders, plainly had a causative effect upon the Respondent incurring costs and the Tribunal does not accept that he can shift responsibility from himself by saying that as he had not complied with the orders they should not have done so either. The responsibility was the Claimant and the Claimants alone and, therefore, the Tribunal rules that he should pay all of the costs from the 21st January 2012 onwards to include Counsel's brief fee.**
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> **24. Included in the Respondent's schedule of costs are claims in respect of the Respondent's in house legal team. Mr Caiden has argued that such costs should not be allowed as the Respondent employed these people anyway and would have paid their salaries in any event. Mr Caiden directed the Tribunal's attention to Rule 38(3) of Schedule 1 to the Employment Tribunal 2004 Regulations. The Tribunal accepted Mr Cohen's submission that this did not preclude a claim for such costs. Essentially there were two issues involved in this matter. The first was whether there was jurisdiction under Rule 38 to make an order which included as a component of it such costs. The second was whether the costs being claimed were reasonable. The latter is an assessment issue. As the claim for costs exceeds substantially the sum of £20,000 the Tribunal is bound to leave any assessment issues in the hands of the Civil Courts.**

25. Today is concerned only with the jurisdiction issue. The wording of Rule 38 follows closely the wording of the Civil Procedure Rules although it is not absolutely identical. The relevant passage in Rule 38(3) reads: 'For the purposes of these rules 'costs' shall mean fees, charges, disbursements or expenses incurred by or on behalf of a party incurred by or on behalf of a party in the proceedings'. That is widely drafted. The words 'disbursements' is sandwiched between 'charges' and 'expenses'. Commonly, in a solicitors' bill, disbursements refer to matters for which invoices have been delivered and receipts can be produced; for example, for an out of town firm of solicitors, it will include paying the bill of London agents in respect of High Court proceedings, it may also include matters such as paying travel costs, paying the bill of enquiry agents, the costs of issue fees and the costs of process servers employed in the course of the proceedings. The other two terms, 'charges' and 'expenses' are rather wider and it appears to this Tribunal they are apt to include expenses related to in-house lawyers.

26. It would be an odd situation indeed if those were not allowed at all as under the Tribunal rules they couldn't be reclaimed upon the basis of a preparation time order which is a mutually exclusive application for costs; that is to say, one cannot apply both for legal costs and preparation time orders. The Tribunal was satisfied that it has jurisdiction to include in this order for costs the charges or expenses relating to the Respondent's in-house legal team but it is for the Civil Court to determine the quantum of that both in terms of the time spent and the charging rate."

Submissions

5. Mr Caiden's principal submission is that there is no jurisdiction to award in-house legal costs at least in respect of time spent on preparation. He argues that the wording of the definition for costs, found successively in rule 38(3) of the **Employment Appeal Tribunal Rules of Procedure 2004** and rule 74(1) of the **Employment Appeal Tribunal Rules of Procedure 2013** does not permit such an award, for the definition is exhaustive and the words "fees, charges, disbursements or expenses incurred by or on behalf of a party" are not apt to cover the time spent by an in-house legal representative. He accepts that a party may recover the costs of a solicitor employed in-house in civil litigation but he emphasises the many differences between civil litigation and Employment Tribunal litigation and suggests that the same rule does not, and should not, apply in the Employment Tribunal system. He points out that the definition of "costs" included in the Civil Procedure Rules has always encompassed the word "remuneration" as well as the words "fees, charges, disbursements or expenses". He recognises that there is a decision of the Employment Appeal Tribunal which he describes as "historic", which is against him: **Wiggins Alloys v Jenkins** [1981] IRLR 275. He points out that there was then no definition of the term "costs" in the Rules of Procedure.

6. In response to this submission Mr Cohen argues that the words of the definition in rule 38(3) are wide enough to cover an in-house representative. Given the structure of the 2004 and 2013 Rules, it would be remarkable if the costs of an in-house employed legal representative were not recoverable. There is no reason to suppose that the 2004 Rules, which introduced the definition, were intended to change the longstanding position, well-established in the employment and civil litigation. There would be an absurd lacuna in the Rules if an employer who had employed an in-house legal representative was unable for that reason to recover legal costs. The absence of any reference to remuneration is of no significance since the costs of an in-house legal representative are not assessed by reference to remuneration (see **In Re Eastwood** [1975] Ch 112 at 132).

7. Mr Caiden's second submission is that the Employment Judge erred in law by assuming that they had to send all the costs for detailed assessment and that he was not entitled to send only a proportion of those costs. Mr Caiden submitted that it was essential for an Employment Tribunal to conduct a proportionality exercise because a Costs Judge would not be in a position to do so, being insufficiently familiar with employment litigation to assess proportionality. He placed reliance on **Barnsley MBC v Yerrakalva** [2012] IRLR 78 (paragraph 52), to which I will return. He took me through the Employment Judge's reasoning, arguing that there was an error of law in failing to assess proportionality.

8. Mr Cohen submitted that the Employment Judge's reasoning sufficed and contained no error of law.

9. Mr Caiden finally made a submission about the incidence of VAT, referring me to the recent decision of **Raggett v John Lewis Partnership** [2012] IRLR 906 at paragraphs 51-52.

Mr Cohen accepted that a party who can reclaim VAT is not generally entitled to recover it as costs, having regard to the indemnity principle applicable to costs in both employment and civil litigation. He submitted that this was a matter for detailed assessment with which the Employment Judge was not concerned.

Discussion and Conclusions

10. The power of an Employment Tribunal to award "costs or expenses" derives from statute. The current enabling provision is to be found in section 13 of the **Employment Tribunals Act 1996**. This provision derived in turn from the **Employment Protection Consolidation Act 1978**, schedule 9, paragraph 1, which, as its name suggests consolidated earlier legislation on, among other subjects, Industrial Tribunal procedure. At no stage has been there any definition of "costs and expenses" in the primary legislation. Detailed provisions concerning the award of costs have always been included in rules of procedure. Prior to 2004 the successive sets of rules did not contain any definition of costs.

11. It was against this background that the Employment Appeal Tribunal (Browne-Wilkinson J presiding) decided **Wiggins Alloys v Jenkins** [1981] IRLR 275. In that case an Industrial Tribunal had declined to award costs, giving as one of its reasons that the receiving party had an in-house legal department. Browne-Wilkinson J said:

> **"We are satisfied that the Tribunal erred. In ordinary litigation, other than in Industrial Tribunals, it is well established that legal costs incurred in litigation by the use of in-house lawyers are as much recoverable as are the costs incurred by employing independent solicitors. If an order for costs had been appropriate, the costs incurred by the legal department of the employers would have been recoverable costs."**

12. This case seems never to have been doubted, and I am able to say, from my own experience in the Appeal Tribunal that, while awards of costs are always the exception rather than rule, it is not unusual to see awards of costs in favour of receiving parties who have used

in-house legal departments. I can for myself see not the slightest reason for doubting the correctness of **Wiggins Alloys v Jenkins**. There was, in the enabling legislation and in the procedural rules, no basis at all for drawing a distinction between the use of in-house lawyers and independent solicitors. It would, to my mind, be absurd and capricious to do so.

13. The 2004 Rules brought in a more sophisticated costs regime which made provision not only for costs but also for preparation time orders and wasted costs orders pursuant to enabling powers added to section 13 of the **Employment Tribunals Act 1996** by the **Employment Act 2002**. There was a clear distinction in the 2004 Rules between orders for costs and expenses, on the one hand, and preparation time orders on the other. Preparation time orders were designed for those who were not legally represented and they could be made only if a receiving party was not legally represented (see for the full wording rule 42(2) of the 2004 Rules). Costs orders could be made only where the receiving party was legally represented (see, for the full wording, rule 38(2) of the 2004 Rules).

14. This is the background against which the definitions of "costs" and "legally represented" in the 2004 Rules must be read:

> **"(3) For the purposes of these rules costs shall mean fees, charges, disbursements or expenses incurred by or on behalf of a party, including sums paid pursuant to an order under paragraph (1)(c), in relation to the proceedings. In Scotland all references to costs (except when used in the expression 'wasted costs') or costs orders shall be read as references to expenses or orders for expenses.**
>
> **...**
>
> **(5) In these rules legally represented means having the assistance of a person (including where that person is the receiving party's employee) who –**
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> **(a) has a general qualification within the meaning of section 71 of the Courts and Legal Services Act 1990;**
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> **(b) is an advocate or solicitor in Scotland; or**
>
> **(c) is a member of the Bar of Northern Ireland or a solicitor of the Court of Judicature of Northern Ireland."**

15. To my mind, it is plain that the 2004 Rules envisaged that an order for costs might be made in favour of a party who is legally represented by an employee. I do not see any sign in the 2004 Rules that such an order for costs was to be limited in the way in which Mr Caiden suggests. I can see no sensible reason for the definition within rule 38(5) if it was not to enable a costs order to be made in favour of a qualified employed legal representative. If Mr Caiden's submission were correct, there would be a remarkable lacuna in the Rules. A receiving party employing a qualified legal representative to do the work in-house would be unable to claim a preparation time order because it was legally represented. Yet it would also be unable to claim any significant amount of costs for his work because of Mr Caiden's restricted interpretation of the definition of "costs".

16. To my mind it is plain that the words "fees, charges, disbursements or expenses" are not to be read restrictively in the way in which Mr Caiden suggests. I consider that it is a normal and permissible use of language to describe the costs of an in-house legal department as a charge or expense upon the employer. I note that in the commercial context the Oxford English Dictionary includes the following definition of charge:

> **"Expenses incidental upon business or commercial operations especially such as do not come under other particular headings of the profit and loss account."**

17. I see no reason to suppose that there was any legislative intention when enacting the 2004 Rules to change the established position as regards the costs of in-house legal representatives. I have no doubt that, if there had been any desire to achieve this result, it would have been accompanied by clear words in the legislation.

18. I agree also with Mr Cohen's submission that no particular importance should be attached to the absence of the word "remuneration" from the definition employed in the rules. The cost

of an in-house legal department's work is not to be defined by the remuneration of a particular employee: there are many other cost elements to be taken into account. Fundamentally the same exercise is involved whether the costs concerned are those of an independent firm of solicitors or of an in-house legal department (see **In Re Eastwood** at pages 130-132 per Russell LJ).

19. For these reasons I have no hesitation in rejecting Mr Caiden's argument and in holding that a receiving party may claim costs where he is legally represented by a qualified employee and that the definition within rule 38(3) does not place any artificial restriction on such a claim.

20. For completeness I should say that in the **2013 Rules of Procedure** the distinction between a costs order and preparation time order is largely maintained by Rule 75(1), although there is scope for a costs order to be made while the receiving party is represented by a lay representative. The definition of "costs" and "legally represented" are materially the same (see rule 74(1) and (2)). There is no reason to suppose that these rules of procedure have changed the established position as regards qualified in-house representatives.

21. I turn to Mr Caiden's subsidiary submission. He is, of course, correct to say that the Employment Tribunal, when providing for a determination by detailed assessment in the County Court, may make an order that the whole or a specified part of the costs should be paid (see the express words of rule 41(2)(b) of the 2004 Rules). The equivalent now is rule 78(1) of the 2013 Rules, which also allows for an Employment Judge to make the detailed assessment. I see no reason to suppose that the Employment Judge lost sight of that provision. Having exercised his broad discretion, for reasons which he gave, he expressly decided that the Claimant should pay all the costs from 21 January 2012.

22. Mr Caiden's relied on a dictum of Mummery LJ in **Yerrakalva** for the proposition that the Employment Judge should have considered the litigation conduct of the Respondent. Mummery LJ said:

> **"In my judgment, although the ET had jurisdiction to make a costs order, it erred in law in the exercise of its discretion. If, as should have been done, the criticisms of the Council's litigation conduct had been factored into the picture as a whole, the ET would have seen that the claimant's unreasonable conduct was not the only relevant factor in the exercise of the discretion. The claimant's conduct and its effect on the costs should not be considered in isolation from the rest of the case, including the Council's conduct and its likely effect on the length and costs of the Pre-Hearing Review."**

23. To my mind the Employment Judge specifically considered the Respondent's litigation conduct in paragraph 15 of his Reasons. I need not set that paragraph in full, but it showed proper appreciation and application of this aspect of **Yerrakalva**, a case to which the Employment Judge made reference.

24. Mr Caiden submitted that an Employment Tribunal, before making an order for detailed assessment by a county court, had to make its own assessment of the proportionality of the amount of costs claimed rather in the way a District Judge would, on detailed assessment. To my mind, this submission was wrong. Once granted that the Employment Tribunal has decided that the whole of the costs ought to be the subject of detailed assessment, that task is part of the process of detailed assessment of costs on the standard basis (see **Civil Procedure Rules**, 44.3). To my mind, a Costs Judge or District Judge who undertakes detailed assessment is perfectly well able to make an assessment of what was at stake in the litigation for the purposes of dealing with proportionality.

25. Mr Caiden also argued insufficiency of reasoning on the part of the Employment Judge. I disagree. I consider that the Employment Judge covered the matters in issue before him admirably and fully.

26. Finally I return to the question of VAT. There was no real dispute before me concerning the law. The key point, however, is that there was no requirement on the Employment Judge at that stage in the litigation to make any particular ruling or observation on the question of VAT. It is a matter for consideration, if it turns out to be in dispute at all, upon the detailed assessment.

27. As I leave this case, I note that there is a new power in the 2013 Rules, not contained in the 2004 Rules, for the Employment Judge to conduct a detailed assessment (see rule 78(1)(b)). That is a valuable additional power which may result in the saving of time and trouble for the parties.