Appeal No. UKEAT/0508/13/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 6 June 2014

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR S AYOOLA — APPELLANT

ST CHRISTOPHER'S FELLOWSHIP — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DAVID RENTON (of Counsel) Instructed by: GMSL Legal Services PO Box 2963 Purley Surrey CR8 1YB
For the Respondent	MS SCHONA JOLLY (of Counsel) Instructed by: Messrs Trowers & Hamlins Solicitors 3 Bunhill Row London EC1Y 8YZ

SUMMARY

PRACTICE AND PROCEDURE – Costs

Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004 Schedule 1 Rule 40(2) and (3)

Simply because the Employment Tribunal's costs jurisdiction was engaged, costs did not follow the event: the Tribunal still needed to be satisfied that it would be appropriate to make an award of costs, see **Robinson and Another v Hall Gregory Recruitment Ltd** UKEAT/0425/13, paragraph 15, and **Criddle v Epcot Leisure Ltd** [2005] EAT/0275/05.

In this case, it was apparent that the Employment Judge had indeed adopted such a two-stage process and permissibly exercised her discretion to award costs. The first ground of appeal was dismissed.

As to the amount awarded, there was no requirement that a Schedule of Costs had to be served on the paying party and the Tribunal had a broad discretion under the 2004 Rules. That said, it was unclear as to whether the Employment Judge had exercised any independent scrutiny of the sums claimed by the Respondent. If she had done so, the Judgment did not adequately disclose her reasoning in this regard. The appeal on the second ground was therefore allowed and the matter remitted to the same Employment Judge for re-hearing on the question of the amount of the award of costs only.

HER HONOUR JUDGE EADY QC

1. This case is about the Tribunal's award of costs against the Claimant in the sum of £10,000, his claim having been struck out for non-compliance with an unless order. In giving this Judgment I refer to the parties as the Claimant and the Respondent as they were below.

Introduction

2. This is the Claimant's appeal against a Judgment of the London (South) Employment Tribunal (Employment Judge Sage, sitting alone) on 16 November 2012 and sent with Reasons to the parties on 16 January 2013. The Claimant was represented before the Employment Tribunal by Mr Ojo, Consultant, but by Mr Renton of Counsel before me. The Respondent has been represented by Ms Jolly of Counsel both before the Tribunal and here.

3. The Tribunal was firstly concerned with an application for strike-out or relief from sanctions in respect of an unless order, with which the Claimant had failed to comply. The Tribunal had understood that the original underlying claim was one of unfair dismissal and notice pay. The Respondent had resisted the unfair dismissal claim on the basis that the Claimant was an agency worker working for Social WorkLine and had, in fact, only been employed by the Respondent for three months and therefore did not have the requisite period of qualifying service. Given that the Claimant had apparently only been employed by the Respondent for three months, the Tribunal had sent a written notice at an earlier stage of the proceedings that he should show cause as to why his claim should not be struck out as he had insufficient continuity of service to bring a complaint of unfair dismissal.

4. In early April 2012, the Claimant, responded, arguing that his was a case where, although working through an agency, he was an employee; running what has been described before me as a **James** or **Dacass** argument (referring to, respectively, the cases of **James v Greenwich LBC** [2007] ICR 577 EAT and **Dacass v Brook Street Bureau UK Ltd** [2004] ICR 1437 CA). The Claimant did not seek to suggest that he was bringing his claim on any other alternative basis such as would not require him to demonstrate continuity of service. The Claimant having thus responded to the Tribunal's notice, the matter was set down for hearing, initially to commence in late July 2012.

5. The Respondent, however, sought disclosure of documentation from the Claimant relating to his working relationship and the working arrangements with Social WorkLine; documents only he would have. These were seen as essential to enable the Tribunal to determine the issue of the Claimant's employment status in the relevant period.

6. Shortly before the Full Merits Hearing was initially due to commence, by letter of 11 July 2012 the Claimant's representatives wrote to the Employment Tribunal under the heading "Amendment to claim (unfair dismissal)". In that letter reference was made to the contents of the Claimant's ET1 form, which it was said:

> **"Prima facie expressed and/or implied a breach of health and safety rules that subsequently led to the unfair dismissal of the Claimant by the Respondent. Therefore there is thus an issue of statutory breach by the Respondent. Consequently the length of service by the Claimant before bringing an unfair dismissal case in this matter is of no relevance pursuant to section 100(1), section 104 and 104A of the Employment Rights Act 1996."**

I pause to observe that in fact there is a typographical error. There should be a reference to the protected disclosure provisions in section 103A of the 1996 Act.

The letter went on:

> **"In the circumstances we respectfully request that the ET1 be accordingly amended under Rule 10(2)(q) of the Employment Tribunal Procedure 2004 to include the above issues as the Claimant would be arguing these issues at the final hearing."**

7. The Respondent objected to that application to amend. It was an application that was never in fact determined by the Tribunal because it was overtaken by events relating to the unless order.

8. On 7 August 2012, the Tribunal issued an unless order following the Respondent's request for disclosure. That required the Claimant to provide disclosure of specified documentation relating to his working relationship with Social WorkLine, failing which his claim would be struck out. The Claimant did not apply for the order to be varied but failed to comply with it (see paragraphs 44 and 45 of the Judgment). The issue for the Employment Judge was, therefore, whether the Claimant was entitled to relief from sanction. She concluded that he was not (see paragraph 47).

9. The Respondent then made an application for costs, which it quantified in the region of something over £15,000, but asked for an order capped at £10,000, the maximum the Tribunal could then award without sending the matter for detailed assessment. The Employment Judge granted that application and made an award of £10,000 costs against the Claimant.

The Tribunal's Reasons

10. The Employment Judge first found that the Claimant's claim had been misconceived. He did not have one year's service. He had not been employed by the Respondent until December 2011 and had been unable to show any evidence that he was employed by the

Respondent before that date. The Employment Judge held, further, that the Claimant's conduct of the case was unreasonable. He had failed to comply with an unless order and provided no reason as to why there should be relief from sanction in that respect. The Tribunal also referred to the Claimant having included an injury to feelings claim in his Schedule of Loss, which could not arise in an unfair dismissal claim, and referred to his having latterly sought to bring claims for whistleblowing and health and safety breaches to get round the problem of service required for his unfair dismissal complaint.

11. The Judge also referred to the fact that in without prejudice correspondence the Respondent had previously warned the Claimant of its intention to seek costs if his claim was struck out and she recorded the Claimant's representative's only response to the costs application as being that "there was an issue", i.e that the claim was not misconceived, and that if the Respondent had provided the right environment (a reference to the alleged health and safety breach), they "would not be here". There was also some reference to there being no basis or business for an award as sought by the Respondent; thus putting the amount claimed in issue (or so the Employment Judge apparently understood, as confirmed in her response to the EAT).

12. The Employment Judge concluded that the Claimant had not put forward any compelling submission to show that his claim was not misconceived and she found it had been. She also concluded his conduct had been unreasonable. For those reasons, she awarded the Respondent's costs of £10,000.

The Appeal

13. There is no appeal against the striking out of the Claimant's claim. The challenge is solely against the costs award. Two grounds of appeal were permitted to proceed. Ground 1 was that the Judge erred in proceeding directly from a finding that the case had been misconceived or unreasonable without finding or giving any adequate reasons for finding that the conduct of the Claimant had been so misconceived or so unreasonable as to attract costs. Ground 2 contended that the Judge erred in granting costs of £10,000 or in failing to provide adequate reasons for granting costs at that amount.

14. In responding to that appeal by way of its answer, its formal answer in this court, the Respondent raised a preliminary point in respect of the second ground, observing that there had been no objection before the Employment Tribunal to the amount of costs claimed so that this was not a point that could properly be taken on appeal.

The Legislation and the Relevant Legal Principles

15. Fundamentally this is an adequacy of reasons appeal. The test is that laid down in **Meek v City of Birmingham DC** [1987] IRLR 250 CA, i.e. that the parties are entitled to be told why they have won or lost. There was also an issue as to whether the Claimant was raising points on appeal that were not properly taken below. As these appeal proceedings have progressed, however, that point has largely fallen away, but it is fair to observe that an Employment Judge is not under an obligation to introduce into the case issues which did not figure in the presentation below, see **Kumchyk v Derby CC** [1978] ICR 1116 at page 1123.

16. I turn to the relevant legislative provisions, which are in this case to be found in the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004** Schedule 1, Rule 40(2) and (3).

> **"(2) A tribunal or [Employment Judge] shall consider making a costs order against a paying party where, in the opinion of the tribunal or [Employment Judge] (as the case may be), any of the circumstances in paragraph (3) apply. Having so considered, the tribunal or [Employment 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."**

17. As for the principles that apply to an award of costs in the Employment Tribunal under the 2004 Rules, the first principle, which is always worth restating, is that costs in the Employment Tribunal are still the exception rather than the rule, see **Gee v Shell UK Ltd** [2002] IRLR 82 at page 85, **Lodwick v London Borough of Southwark** [2004] ICR 884 at page 890, **Yerrekalva v Barnsley MBC** [2012] ICR 420 at paragraph 7. Second, it is not simply enough for an Employment Tribunal to find unreasonable conduct or that a claim was misconceived. The Tribunal must then specifically address the question as to whether it is appropriate to exercise its discretion to award costs. Simply because the Tribunal's costs jurisdiction is engaged, costs will not automatically follow the event. The Employment Tribunal would still have to be satisfied that it would be appropriate to make such an order, see **Robinson and Another v Hall Gregory Recruitment Ltd** UKEAT/0425/13 at paragraph 15.

18. On this point, albeit addressing the previous costs jurisdiction under the 2001 Employment Tribunal Rules, the EAT (HHJ Peter Clark) in **Criddle v Epcot Leisure Ltd** [2005] EAT/0275/05 identified that an award of costs involves a two-stage process: (1) a finding of unreasonable conduct; and, separately, (2) the exercise of discretion in making an order for costs. In **Criddle** there was no indication in the Tribunal's Reasons that the Tribunal

Chairman had carried the second stage of the requisite exercise and the EAT was not satisfied, in the absence of such indication, that the Chairman had in fact done so. The appeal was thus allowed against the costs order.

19. The extension of the Tribunal's costs jurisdiction to cases where the bringing of the claim was misconceived has been seen as a lowering of the threshold for making costs awards, see **Gee v Shell UK Ltd** per Scott Baker LJ. In such cases the question is not simply whether the paying party themselves realised that the claim was misconceived but whether they might reasonably have been expected to have realised that it was and, if so, at what point they should have so realised, see **Scott v Inland Revenue Commissioners** [2004] ICR 1410 CA per Sedley LJ at paragraphs 46 and 49. Equally, in the making of a costs order on the basis of unreasonable conduct, the Tribunal has to identify the conduct, stating what was unreasonable about it and what effect it had, see **Barnsley MBC v Yerrekalva** per Mummery LJ at paragraph 41.

20. That said, an appeal against 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 being 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. Again, see **Yerrekalva** per Mummery LJ at paragraph 9, and note also the observation at paragraph 49 that

> **"...as orders for costs 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."**

21. It is of course equally impermissible to comb through a patently deficient decision for signs of the missing elements and to try to amplify these by argument into an adequate set of reasons, see **Anya v University of Oxford** [2001] ICR 847 CA per Sedley LJ at paragraph 26.

22. Where, however, 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 been most recently considered by the Court of Appeal in the case of **Jafri v Lincoln College** [2014] EWCA Civ 499 where Laws LJ set out the approach that the EAT is to adopt as follows:

> **"21. I must confess with great respect to some difficulty with the 'plainly and unarguably right' test elaborated in *Dobie.* It is not the task of the EAT to decide what result is 'right' on the merits. That decision is for the ET, the industrial jury. The EAT's function is (and is only) to see that the ET's decisions are lawfully made. If therefore the EAT detects a legal error by the ET, it must send the case back unless (a) it concludes that the error cannot have affected the result, for in that case the error will have been immaterial and the result as lawful as if it had not been made; or (b) without the error the result would have been different, but the EAT is able to conclude what it must have been. In neither case is the EAT to make any factual assessment for itself, nor make any judgment of its own as to the merits of the case; the result must flow from findings made by the ET, supplemented (if at all) only by undisputed or indisputable facts. Otherwise, there must be a remittal."**

23. Although expressing some regret with that conclusion in cases where the EAT might be thought as well-placed as the Employment Tribunal to decide the issue in question, Underhill LJ, a former President of this court, noted:

> **"The disadvantages of this ruling can be mitigated to some extent if the EAT always considers carefully whether the case is indeed one where more than one answer is reasonably possible ... even where more than one outcome is indeed possible, there is in my view no reason why the EAT cannot still decide the issue if the parties agree; and in an appropriate case they should be strongly encouraged to do so."**

24. This is not one of the latter cases where there is agreement between the parties. If, therefore, I find that the appeal or any part of the appeal is made out, the question for me will be whether there is more than one outcome reasonably possible in this matter.

Submissions

The Claimant's Case

25. On the question of adequacy of reasons, it was stressed that the Claimant was not seeking to take issue with the Judgment on the strike-out. He understood from the reasons given why he had lost on that point. That stood in contrast to the reasons given on the decision to award costs or the amount awarded. On behalf of the Claimant it was submitted, first, that the Employment Tribunal's Judgment simply stated that the costs had been ordered on the grounds that the bringing and conducting of the proceedings was unreasonable and that the case was misconceived. It referred to the test in Rule 40(3) without mentioning appropriateness under Rule 40(2). Second, the Reasons provided for the Judgment did not assist. From a natural reading of the Judgment it appeared that the Employment Judge had concluded that, once persuaded that there was unreasonable conduct or that the case was misconceived, costs would automatically follow. If the Employment Judge was seeing this as a case where she did not need to consider the appropriateness of a costs order - it was so obvious - then she would have needed to have said so, see per Sedley LJ at paragraph 22 (albeit in a different context) in the case of **Anya**:

> **"If nevertheless the Industrial Tribunal thought that this was the class of case in which they could take the short cut, the least they were obliged to do was to say so."**

26. Having demonstrated that error of law, the appropriate course in this case must be to remit. Following **Jafri**, it could not be said that the error was immaterial. First because the very fact of the unless order presupposed some arguable point to the Claimant's case; so the Tribunal could not reasonably have found the Claimant's case to have been misconceived from the outset. Second, the Tribunal would have needed to assess at what point the case was misconceived and to give reasons for that view. The difficulty was that the Tribunal was looking only at the question of compliance with the unless order and never engaged with the

Claimant's case on employment status. He was always clearly asserting that his period of service as an agency worker was employment with the Respondent. Saying that the Claimant had failed to produce evidence to demonstrate an arguable case was not sufficient.

27. The Employment Tribunal was further wrong to conclude that the Claimant had no basis for including a claim for injury to feelings in his Schedule of Loss. That might have been a permissible heading of loss in a whistle-blowing case. Allied to that, it was also wrong to state that the Claimant had only latterly introduced claims for whistle-blowing and health and safety breaches when those had been foreshadowed in his ET1.

28. As for unreasonable conduct, it was wrong to suggest, as the Respondent did, that the Tribunal clearly found wilful non-compliance on the Claimant's part. At best, there was a statement that his failure to obtain evidence of his contractual terms with Social Workline "must be viewed as intentional" (paragraph 47). But that did not set out any degree of intentionality. Moreover the basis on which the Respondent had sought costs was that the Claimant always knew he did not have a chance to succeed on this case, and that was putting it far too high. That would require a very serious finding on the part of the Tribunal, which was not apparent from its Reasons.

29. The second ground took issue with the amount awarded. Although no particular procedure was laid down in the Tribunal rules for the summary assessment of costs, the discretion as to the amount of the award must still be exercised judicially. In this case the application was made orally. There was no written explanation of the figures sought by the Respondent and no breakdown of the costs incurred. At the time the award was made, the Claimant had never seen any Schedule of Loss. The award made was the highest the Tribunal

could then make without sending it for detailed assessment and yet it was made at a stage when very little had occurred which would seem to justify such a large expenditure. The sum claimed cried out for some kind of scrutiny.

30. This ground was not, as the Respondent's Answer sought to suggest, a new point. The Claimant's solicitor had objected to the excessive amount of the costs claimed, as confirmed by Employment Judge Sage's response to the affidavit served in the appeal. The key question for the appellate court was whether the Employment Judge was aware that the point had been taken (per **Jafri** paragraph 39) "that such a distinct case was before them".

The Respondent's Case

31. On behalf of the Respondent it was first observed that the points being made by the Claimant demonstrated how hindsight could colour the submissions on appeal and placed an unfair burden upon an Employment Judge in terms of the reasons provided. In this case, all the notes taken at the hearing accorded with the Employment Judge's rehearsal of the Claimant's representative's submissions at paragraph 53 of her Judgment. He had simply failed to engage with the costs application even after the Employment Judge had invited him to do so. That said, the Respondent had to accept that the Employment Judge's response in the EAT proceedings acknowledged that she had understood the Claimant's representative to have raised a point of objection to the excessive amount of the cost claimed by the Respondent. That being so - although surprising to Counsel who had appeared below and had not understood the Claimant's representative to have raised the point - the Respondent accepted that it could not continue run an objection to the second ground of appeal on the basis that it was not a point taken below at all. It did, however, continue to submit that the EAT needed to see the Employment Judge's reasoning in the light of how limited the representations were which were

put on the Claimant's behalf before the Employment Judge. The Employment Judge could not be criticised for not setting out reasons on points of detail never taken before her. She was - per **Kumchyk** - not under any obligation to introduce into her Reasons issues which had not figured in the presentation before her.

32. Turning to the first ground of appeal, the Judgment of the Tribunal needed to be read as a whole. The court could not simply take paragraphs 55-57 in isolation but needed to read back into paragraphs 47 and 48 as to the facts and background and, in particular, those findings in relation to the substantive decision to strike out, which the Employment Judge had expressly incorporated into her reasons on the costs award. The case had been clearly put by the Respondent on the basis that the Claimant had known that he did not have a chance to succeed on his case below (see paragraph 49). That was obviously right and equally obviously so found by the Employment Judge. First, the focus of the claim was plainly the unfair dismissal claim, which depended upon the Claimant establishing employment status when he was an agency worker. The Employment Judge did not need to set out again, under the costs award reasoning, why she considered that claim was misconceived or why the conduct of that case had been unreasonable. That was apparent from what had gone earlier. It was a difficult argument and required the Claimant establishing the requisite contractual relationship with the Respondent. To do that, he would have needed to disclose the Social WorkLine documentation. He had not done so, and the Employment Judge had plainly found that he had not done so intentionally.

33. As for the suggestion that there were other claims before the Employment Tribunal, that was not the case. The Claimant had previously been on notice that his claim would be struck out, as he had insufficient service, if he did not show cause. In April 2012, he had responded solely raising the agency worker point. The matter had then been set out down for a hearing,

due to start on 24 July. The Claimant had not sought to suggest that he was running the claim on any other bases, which would avoid the continuity of service point. He had resisted a strike-out of his claim on the basis of his agency worker employee alone.

34. Just before the first listed hearing, those representing the Claimant had written to the Tribunal under the document headed "Amendment to claim – unfair dismissal". That letter made clear that the Claimant knew he was applying for an amendment and knew he needed the Tribunal's leave. It demonstrated that the Claimant knew he could not show sufficient service to bring an unfair dismissal claim; that was why he was seeking to amend to add new claims.

35. The application to amend was never dealt with. It was overtaken by events. The only claim before the Employment Tribunal at the stage when it was considering an award of costs was thus that of unfair dismissal or notice pay. Accepting that an award of costs requires a two-stage process (per **Criddle)**, it was apparent from reading the Judgment as a whole that the parties could understand the reasoning and the matters taken into account by the Employment Judge in concluding that it was appropriate to award costs in this case. The Tribunal found in terms:

> **"19.1 That the Claimant had not bothered to produce any evidence of an employment relationship that lasted one year;**
>
> **19.2 That he had suppressed evidence that would have shown he could not have been employed for one year;**
>
> **19.3 He had deliberately failed to produce evidence of contract which the Tribunal found must have existed;**
>
> **19.4 That the Claimant must have had knowledge that he did not meet the service requirements and to that end, sought to bypass that obstacle by belatedly seeking to amend his claim to include whistleblowing and health and safety aspects; and**
>
> **19.5 He then sought to deny that the contract existed at all."**

36. Those points could be made good by referring to the Employment Judge's Reasons at paragraphs 47-58 and paragraphs 55-57. At paragraph 47, having set out the different failings on the Claimant's part, the Employment Judge expressly concluded that she must view this as "an intentional failure to comply". One had to see paragraph 48 also in that light. The Employment Judge was raising the questions set out in that paragraph as expressing her disbelief as to the assertion on the Claimant's case that there was no contract.

37. The Respondent also noted that the Employment Judge expressly referred to Rule 40(2), i.e. the issue of appropriateness. Then - in her Reasons on the actual decision to award costs - she did not simply refer to the headline issues engaging the costs jurisdiction, she expressly referred to the Respondent's without prejudice correspondence, which put the Claimant on notice of the costs application. She also expressed her conclusion that the Claimant had latterly tried to bring claims for whistle-blowing and health and safety breaches. That referred back to the Respondent's submissions, which made it clear that the Claimant knew he had no chance of succeeding on the unfair dismissal complaint. Moreover the Employment Judge did not put a burden on the Claimant to demonstrate why there should not be an award of costs against him. The Employment Judge's remark that the Claimant had not put forward any compelling submission to show the case was not misconceived related to the merit of the case and the failure of the Claimant's representative to engage with the submissions on costs.

38. Returning to ground 2, in terms of the amount awarded, the claims claimed by the Respondent were set out in some detail in argument and clearly amounted to something considerably above £10,000. Given the entire lack of engagement with the issues on the part of the Claimant's representative, the Employment Judge was entitled to take a broad-brush approach and to award a sum capped at £10,000.

Discussion and Conclusions

39. This appeal, as Mr Renton has described it, is really all about adequacy of reasons. I accept that the Claimant's case on appeal has been put squarely on the basis that the adequacy of reasons on the Strike-out Decision stands in sharp contrast to those given on the decision to award costs or the amount so awarded. That said, my consideration is not limited to the final three paragraphs of the Judgment, expressly giving the decision on the costs award. I bear in mind that a Judgment of an Employment Tribunal may well contain infelicities, awkwardnesses of expression and apparent inconsistencies that derive from the pressures under which Tribunals operate. I must look at the Judgment as a whole. That does not mean to say that I should make good inadequacies in the reasoning myself or find permissible shortcuts where none have been flagged up by the Tribunal. On the other hand, I am entitled to stand back and take my understanding of the reasons from the entirety of the Judgment, not just one part.

Ground 1

40. The question under this ground is whether the Employment Judge failed either to have regard to the second stage of the process, the question of the appropriateness of the order, or, if she did, to give adequate reasons showing that she had done so and why. On behalf of the Claimant it is submitted that the Tribunal's Judgment simply states that the costs were ordered on the grounds of bringing and conducting the proceedings was unreasonable and the case was misconceived and that the reasons provided for that Judgment do not further assist. It is not thereby being suggested that this Employment Judge was obliged to set out the different stages under Rules 40(2) and (3) in the formal part of her Judgment. Obviously she would not be obliged to do that. It did, however, need to be apparent that she had appreciated that there were those two stages and had turned her mind to those two stages in her Reasons.

41. In my judgment, it is so apparent. Paragraph 55 is the Rule 40(3) finding that the claim was misconceived. Paragraph 56 performs the same function in respect of the finding that the Claimant's conduct was unreasonable. Paragraph 57 shows the Employment Judge then going on to consider whether it was appropriate to make an award of costs. She was not obliged to label the exercise she was undertaking. She had expressly referred to Rule 40(2) a little earlier in her Decision. Paragraph 57 is not simple repetition. It is the reasoning that explains, her costs jurisdiction having been engaged, her reason for exercising the discretion to award costs.

42. In that regard, the Employment Judge had regard to the fact that the Respondent had warned the Claimant of its intention to seek costs in various without prejudice communications. Those had been detailed by her when she set out the Respondent's submissions earlier in her Reasons. She refers back to her previous reasoning in the substantive part of her Judgment on the strike-out, which included, at paragraph 47, the damning finding regarding the Claimant's conduct, i.e. that his failure to obtain evidence of his relationship with Social Workline "must be viewed as an intentional failure". I do not accept that she was obliged to then set out the level of intentionality found; that finding speaks for itself.

43. The Claimant's criticisms - that the Tribunal was here only looking at the question of compliance with an unless order, that she never engaged with the Claimant's case on employment status and that it was insufficient to say that the Claimant had failed to produce evidence to demonstrate an arguable case - does not, in my judgment, properly engage with the reasons provided by the Employment Judge. It suggests, moreover, that the Claimant is saying that the parties would need to waste more time and costs conducting a mini-trial on employment status when the very point regarding non-compliance with the unless order was that the Claimant had failed to make that possible.

44. The Employment Judge was entitled to find unreasonable conduct in this regard, which plainly went to the heart of the claim. That was the effect of the Claimant's non-compliance with the order. Further, the finding of intentional default and the clear scepticism regarding the Claimant's account (paragraph 48) makes plain that the Employment Judge did accept that the Claimant knew that his claim was misconceived or should reasonably have known it was misconceived at an early stage. That ties in with the Employment Judge's finding at paragraph 57 that the Claimant had latterly tried to bring alternative claims to "get round the one-year service requirement". Those are clear findings of intentional conduct and again demonstrate the reasoning *why* the Employment Judge concluded it was appropriate to award costs; they are not simply a re-statement that the costs jurisdiction was engaged.

45. As for the suggestion made by the Claimant that the Tribunal had been wrong to conclude that there was no basis for including an injury to feelings award in the Schedule of Loss and then, tied to that, to state that the Claimant had only latterly introduced claims of whistle-blowing and health and safety breaches when those had been foreshadowed in his ET1, I cannot accept the Claimant's arguments on this. In April 2012, the Tribunal had put the Claimant on notice that his claim would be struck out because he did not have sufficient continuity of service with the Respondent unless he could show cause. The Claimant's response, which avoided the otherwise inevitable strike-out, was to put forward the argument that, when he had worked for the Respondent through an agency, he had in fact been an employee, thus relying on what have been referred to as the **James** and **Dacass** arguments.

46. If he had understood that he was not simply claiming a standard form of unfair dismissal but had also put his case on the basis of a breach of health and safety and/or as a whistle-blowing claim, then that is what he would have responded at that time. Thus it was that the

claim was not struck out; because the Tribunal had been told by the Claimant that his claim was as an agency worker employee of the Respondent. There was, on everybody's understanding, only an unfair dismissal claim before the Employment Tribunal; the Claimant's subsequent application to amend to include other claims never having been adjudicated upon. As there was only an unfair dismissal claim before the Employment Tribunal, the Employment Judge was entitled to find that the Claimant had later tried to bring claims for whistle-blowing and health and safety breaches and to make a finding as to what she concluded had been his motivation for so doing. She was also right to state that it was unreasonable and misconceived to include a claim for injury to feelings in a Schedule of Loss in an unfair dismissal claim.

47. For those reasons I dismiss the first ground of appeal.

Ground 2

48. As for the second ground, relating to the amount awarded, the first question that arises is whether this is properly described as a new point, a point not taken below. As Employment Judge Sage has confirmed in her response in these appeal proceedings, the Claimant's solicitor had objected to the excessive amount of the costs claimed. Given that there was no schedule of costs such that the solicitor could take a more detailed point, that seems to me to have been sufficient. The Employment Judge was aware that the point had been taken as to the amount of costs in issue, so such a distinct case was before her (per Laws LJ, paragraph 39, **Jafri**).

49. That said, I do not consider that the Employment Judge was then obliged to deal with this point at a level of detail that simply did not begin to be foreshadowed by the Claimant's representative's objection at the hearing.

50. Against that background, the question for me is whether the Employment Judge erred in granting costs at £10,000 or in failing to provide adequate reasons for granting that sum.

51. Although no particular procedure is laid down in the Tribunal Rules for a summary assessment of costs, the discretion as to the amount of an award must still be exercised judicially. One can take it a bit further. Although not bound by the same rules as the civil courts and although the discretion under the 2004 Tribunal Rules is very broad, the costs awarded should not breach the indemnity principle and must compensate and not penalise; there must, further, be some indication that the Tribunal has adopted an approach which enables it to explain how the amount is calculated for the purpose of Rule 30(6)(f).

52. The Claimant, rightly, does not suggest that the question of procedural justice on a costs application requires the prior service of a Schedule of Costs or any particular process. Nor is he saying here that there is insufficient reasoning in terms of the calculation of costs such as to amount to a breach of Rule 30. He does contend, however, that this is a surprising sum given how little had transpired by this stage.

53. That is not an entirely fair picture. The case had previously been listed for hearing in July and apparently aborted late in the day. There had had to be various procedural steps taken as a result of the lack of clarity on the Claimant's case. More generally, Tribunal litigation costs tend, as with most civil cases, to be front-loaded. That said, it is fair to observe that £10,000 is a high award and the overall sum said to have been incurred, over £15,000, might seem surprising. I reach no final view on that. My concern is that there is no written explanation by the Employment Judge of her scrutiny of the figures sought by the Respondent.

Although she has set out, as the Respondent no doubt did in submissions, some detail as to the amount the Respondent was seeking, what she does not do is indicate that she has conducted any independent scrutiny of those sums herself or set out the reasons for her conclusion that it was appropriate to award £10,000. That may be an error of approach in terms of the lack of scrutiny of the sum claimed or it may simply be an error in terms of adequacy of reasoning. I cannot be sure as to which. In those circumstances, having found fault with the Employment Judge's reasons on this point alone, I allow the second ground of appeal but inevitably find I am not in a position to simply fill the gap myself. There is the possibility of more than one outcome. It may be that, upon scrutinising the amount properly, the Employment Judge reaches a different conclusion. On the other hand, it may be that it is simply a matter of stating her reasoning for the amount awarded. That would obviously be more straightforward; but it is not something I can determine at this stage.

54. Not being able to dispose of the matter myself, I have considered what would be best in terms of a remittal to the Employment Tribunal. The Claimant says there should be a remission to a different Employment Tribunal. The Respondent says it should be to the same Employment Judge. I have considered the factors laid down in the guideline case of **Sinclair Roche Temperley v Heard and Fellows** [2004] IRLR 763. This is a case where this Employment Judge fully considered the background. She has obviously taken a very full note - a copy of which has provided in these proceedings - and has taken all the other steps necessary before considering the amount to be awarded. The fault I have found in the Decision is in respect of the scrutiny of the amount of the award or as to the adequacy of the reasons provided. There is no reason to think that the same Employment Judge will not be able to approach that task fairly and with the confidence of the parties. It seems to me that, to the extent it is possible

to do is, it is obviously proportionate to remit this matter back to the same Employment Judge and I so order.