Appeal No. UKEAT/0172/12/LA
UKEAT/0173/12/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 15 April 2014

Before

HER HONOUR JUDGE EADY QC

MS V BRANNEY

MR D G SMITH

DR C D'SILVA APPELLANT

MANCHESTER METROPOLITAN UNIVERSITY RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR RAMBY DE MELLO (of Counsel) Direct Public Access Scheme
For the Respondent	MR PAUL GILROY (One of Her Majesty's Counsel) Instructed by: Messrs Addleshaw Goddard LLP 100 Barbirolli Square Manchester M2 3AB

SUMMARY

PRACTICE AND PROCEDURE – Costs

Employment Tribunal's refusal to recuse itself from hearing costs application having reached view as to the Claimant's credibility at earlier liability hearing. Whether award of £10,000 costs excessive.

Dismissing the Appeal:
The Employment Tribunal had been entitled to express its views as to the Claimant's credibility in its earlier judgment on liability and, in so doing, to have regard to the wider background evidence relating to the Claimant's approach to litigation against his employer. The Tribunal had not over-stepped the mark in terms of how it had expressed those views and there was no proper basis on which it obliged to recuse itself from hearing the subsequent costs application (principles laid down and approved in **Ansar v Lloyds TSB Bank plc** [2007] IRLR 211 applied).

Furthermore, the language used by the Tribunal in its judgment on liability did not amount to an expression of a concluded view as to any later application for costs. This case was not on all fours with **Oni v NHS Leicester City (formerly Leicester City Primary Care Trust)** [2013] ICR 91 EAT.

The Tribunal was not guilty of taking into account irrelevant factors and had not put the administration of justice before the principle of fair hearing. It had done no more than recognise the point (recognised in **Ansar**) that it was obliged to judge the case before it and was not to be de-railed from that task by unmeritorious allegations of bias. Equally, it had not fallen into the trap of visiting the sins of the representative onto the party: the Tribunal had clearly had regard to the conduct of the Claimant and expressly not to the conduct of his former representative. As for the amount of costs awarded, that sum was a small fraction of the costs actually incurred by the Respondent. Although not obliged to do so, the Tribunal had regard to the Claimant's ability to pay and the amount of costs awarded was firmly within its discretion of the Employment Tribunal.

HER HONOUR JUDGE EADY QC

Introduction

1. In this judgment we refer to the parties as the Claimant and the Respondent as they were below. We are concerned at this hearing with two joined appeals,

2. The first appeal (UKEAT/0172/12/LA) is an appeal against a judgment (sent to the parties on 13 April 2011) of the Employment Tribunal sitting at Manchester on 4 April 2011 under the chairmanship of Employment Judge Sneath - "the Costs Judgment". By this judgment the Employment Tribunal (1) declined to recuse itself from hearing a costs application by the Respondent, and (2) went on to order the Claimant to pay £10,000 towards the Respondent's costs of defending the claims made in the substantive proceedings heard by that same Tribunal in 2010.

3. The second appeal (UKEAT/0173/12/LA) is against the refusal of the Tribunal to review that earlier Costs Judgment - "the Review Judgment" (sent out to the parties on 24 May 2011).

4. At the hearing of the costs application the Claimant was then represented by Mr T Muman of counsel and the Respondent by its Solicitor, Mrs Martin. Before us the Claimant has been represented by Mr de Mello of counsel, the Respondent by Mr Gilroy QC.

The factual and procedural background

5. The Claimant was formerly a Senior Lecturer at the Respondent University, having joined its academic staff in its Department of Chemistry in 1993. We are concerned with proceedings that were previously the subject of a full merits hearing before the Employment Tribunal under the chairmanship of Employment Judge Sneath ("the Sneath Tribunal").

6. Before those proceedings, the Claimant had previously made five prior claims of race discrimination (using that term to cover various forms of such discrimination) against the Respondent in the Employment Tribunal. The first such claim was made in 2002. That was compromised when the Claimant agreed to withdraw this claim and the parties entered into a "no recriminations" agreement and agreed that there should be no application for costs.

7. On 8 December 2003, the Claimant presented a second claim of race discrimination, harassment and victimisation against the Respondent, relating to a failure to promote him to a Chair in the 2002/3 promotions round. He submitted a third claim on 31 March 2004 and his fourth claim on 17 May 2004, the last relating to a decision not to short-list him for the post of Principal Lecturer. His fifth claim was presented on 23 August 2004, which included a complaint about the Respondent's decision not to promote him to either the post of Reader or Professor in the 2003/2004 promotions round.

8. The Claimant's second to fifth claims were originally heard in his absence by an Employment Tribunal chaired by EJ O'Hara (the O'Hara Tribunal) in April and May 2005. The initial decision of the O'Hara Tribunal was to dismiss a number of the Claimant's claims but to find that there was race discrimination in respect of six matters. Those findings were then appealed by the Respondent to the EAT, which overturned five of the findings of discrimination and remitted the sixth back to the O'Hara Tribunal for re-hearing. That re-hearing took place over five days, in December 2008 and March 2009, and resulted in the Tribunal dismissing the outstanding matter of complaint.

9. Meanwhile the Claimant had presented his sixth and seventh Employment Tribunal claims against the Respondent on 15 September 2005 and 14 September 2006. These included complaints of race discrimination and/or victimisation in respect of the Respondent's failure to appoint him as a Reader or Professor in the promotion exercises of 2004/2005, the subject of the sixth claim, and 2005/2006, the subject of the seventh claim. It was thus that the sixth and seventh claims were heard by the Sneath Tribunal in 2010.

10. Those claims were dismissed in their entirety in a judgment sent to the parties on 30 December 2010.

11. The Claimant appealed against the Sneath Tribunal's judgment and was ultimately permitted to proceed to a full hearing on limited grounds after a preliminary hearing before the EAT (Slade J presiding) on 27 March 2012. That appeal came before the present division of the EAT on 4 December 2012 and, for the reasons given at the time, we determined it should be dismissed.

12. In the meantime, on 4 October 2010, the Claimant had presented his eighth Employment Tribunal claim against the Respondent. That claim was struck out by an Employment Tribunal chaired by Employment Judge Robertson as having no reasonable prospect of success. That judgment was sent to the parties on 31 May 2011

13. The Claimant appealed against the dismissal of his eighth Tribunal claim. On the basis that he was raising substantially the same issues that had already been permitted to proceed to a full hearing, that was also permitted to proceed and formed part of the joined appeal hearing

before us on 4 December 2013. It was common ground before us on that occasion that the second appeal was wholly dependent on the first.

14. To update the history further, the Claimant was subsequently dismissed by the Respondent. We understand that to have led to two further claims, the ninth and tenth Tribunal claims.

15. Meanwhile, on 26 January 2011, the Respondent made an application for costs incurred in the substantive proceedings before the Sneath Tribunal. An application which was heard by that Tribunal on 4 April 2011.

16. At the outset of that hearing the Claimant applied for the Tribunal members to recuse themselves from considering the costs application. That application was refused, and the Tribunal went on to order the Claimant to pay £10,000 towards the Respondent's costs in the proceedings. At that time the Claimant was facing disciplinary proceedings, with a possibility of dismissal, a matter drawn to the attention of the Tribunal during the hearing.

17. The Claimant subsequently applied for a review of that judgment whilst also lodging an appeal with the EAT. In his application for review, the Claimant drew the Tribunal's notice to the fact that he had by then been dismissed from his employment. The Tribunal refused the application for review on the basis that it had no reasonable prospect of success.

18. The application for review having been refused, the Claimant lodged a further appeal against that decision. Those two appeals were considered on the papers by Bean J, who took the view that they disclosed no error of law. The Claimant exercised his right to an oral hearing,

and his application under rule 3(10) of the EAT Rules 1993 was duly heard by Slade J, who observed that there was an outstanding appeal against the Merits Judgment and for that reason allowed that these appeals should be permitted to proceed. She directed that these appeals should be listed after the Merits Judgment appeal on the basis that the current appeals could be affected by the outcome of that appeal. Thus the matter comes before us.

The grounds of appeal

19. The first ground of appeal in respect of the Costs Judgment relates to the refusal of the Tribunal to recuse itself on the ground of apparent bias. The bases for this challenge were put in the Notice of Appeal as follows:

(1) There had been animosity between the Employment Judge and the Claimant's former representative, Dr Deman, resulting in complaints raised by the latter against Employment Judge Sneath and a complaint of actual bias in the subsequent appeal to the EAT.

(2) The Tribunal had applied the wrong approach, setting too high an evidential test for the Claimant.

(3) The Employment Tribunal took into account irrelevant factors when remarking on the Claimant's having impugned the decisions of all the decision makers without evidence including decisions by members of the judiciary. That, it was contended, was irrelevant for the Employment Tribunal's costs jurisdiction and would suggest apparent bias.

The second ground of appeal attacked the award of costs as being wrong in principle. First, because it was said that the Tribunal had in part awarded costs on the basis that the claim was misconceived, whilst its reasons for the award were that the Claimant had made false

allegations in bad faith and so the only basis for such an award would have been unreasonable conduct. Alternatively, no proper reasons or inadequate reasons were provided for the ruling. Finally, as for the basis of costs being held to be the Claimant's vexatious conduct in bringing the claim, the Tribunal erred in taking this into account: it was an irrelevant factor, given that this basis for the application for costs had been abandoned by the Respondent's representative at the hearing. It was also irrelevant for the Tribunal to have had regard to the Claimant's having impugned all decision-makers without evidence including members of the judiciary. That was not a factor related to the conduct of the litigation and so was irrelevant.

20. The third ground of appeal attacked the award of £10,000 as being an excessive amount, particularly given that the Tribunal was aware that the Claimant was facing disciplinary proceedings which could and did result in his dismissal.

21. Although there was a separate Notice of Appeal in respect of the Review Judgment, Mr de Mello accepted that those grounds really duplicated the grounds relating to the Costs Judgment and did not stand alone as separate grounds for our consideration.

Submissions for the Claimant

22. Before us, it is fair to say that Mr de Mello has put the Claimant's arguments on appeal slightly differently to how they were foreshadowed in the Notice of Appeal.

23. On the recusal ground, whilst acknowledging that the substantive complaints of bias had been dismissed as part of the merits appeal and not allowed to proceed at the rule 3(10) hearing before Slade J, he submitted that the Employment Tribunal erred in its approach to the application to recuse itself. First, by having regard to an irrelevant consideration, namely the

impact on such an application on the administration of justice. That could not be a relevant consideration if there was an appearance of bias. Second, he contended that the way in which the Tribunal treated the submissions being made by the Claimant set too high an evidential test.

24. Mr de Mello submitted, further, that at paragraphs 259-260 of the Employment Tribunal's Liability Judgment at the full merits stage, the Tribunal had gone beyond the boundaries of the Claimant's claim and the issues in those proceedings and even beyond the Respondent's pleaded case of bad faith.

25. In particular, he relied on paragraph 260, where the Tribunal stated:

> **"Whilst it might be argued the above is sufficient to justify a finding that in bringing these proceedings, the claimant has acted vexatiously, that is not something the Claimant has had the opportunity to address, and it is a matter for the respondent to decide whether to put that issue before us, given that the claimant remains its employee."**

26. Mr de Mello contended that this was effectively an invitation to the Respondent to make such an application and thus gave rise to a perception of an appearance of bias. On Mr Gilroy QC's objection to this point being taken, given that it had not been raised in the Notice of Appeal, Mr de Mello countered that it needed to be seen as arising from the Tribunal having been influenced by the animosity between the Employment Judge and the Claimant's former representative and was thus foreshadowed by the Notice of Appeal. It was effectively evidence demonstrating how that factor might be seen as influencing the Tribunal such as to give rise to an appearance of bias.

27. On the substantive argument on this point, Mr de Mello made the point that the Respondent's application for costs had expressly relied on paragraph 259 and thus it was correct to characterise paragraph 260 as an invitation for such an application to be made. By

analogy with the authority of **Oni v NHS Leicester City** [2013] ICR 91 EAT, Mr de Mello suggested that the Tribunal had demonstrated that it had reached a concluded view which went to its costs jurisdiction. It should therefore have recused itself from hearing that subsequent application.

28. Mr de Mello further contended that the Tribunal took into account wholly irrelevant matters when, at paragraph 16 of its Costs Judgment, it stated:

> **"...bringing these proceedings was an abuse of the Employment Tribunal process... he brought hopeless claims out of spite and harassed his employer and for the other improper motive of seeking to influence future decisions about promotion rather than in order to recover compensation."**

29. Those statements went further than the finding on liability. The costs jurisdiction provided by rule 40(3) of the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004** required the Tribunal to have regard to "the proceedings" not to other proceedings or to statements made by the Claimant more generally. This was a point that went to both the recusal and the costs grounds of appeal.

30. Moreover the reference to the possible impact of the recusal application on the general administration of justice in the Employment Tribunal system (see paragraph 10) was an irrelevant factor, as the case-law made clear, in particular see the judgment of Mummery LJ in **AWG Group Ltd v Morrison** [2006] 1 WLR 1163 CA: if the issue of bias was properly raised against a Judge in court proceedings, that Judge should not go ahead to hear the case, notwithstanding the possible delay, expense and inconvenience that might thus result.

31. Mr de Mello further submitted that paragraph 16 of the Tribunal's Reasons could be seen by the objective observer to read as a reference to the way in which the Tribunal viewed

Dr Deman's conduct of the proceedings before the Tribunal. The apparent reference to the misuse of the Tribunal process, he submitted, must be read as a reference to Dr Deman's conduct and the Tribunal's view of it. As the Respondent had expressly abandoned its application for costs on the basis of Dr Deman's conduct, that was an approach that gave rise to the appearance of bias.

32. Initially, Mr de Mello also contended that the Employment Tribunal's had made the costs award on the basis that the bringing of the claims had been vexatious but that was not a ground that had been pursued by the Respondent. That also gave rise to a perception of apparent bias given that the Tribunal was apparently prepared to go beyond the scope of the application being made. In this regard, the Claimant's counsel below had provided an attendance note indicating that that ground had been abandoned by the Respondent's solicitor at the hearing and that note had not been disputed.

33. Mr de Mello recognised, however, that there was a real difficulty for the Claimant on this point in that paragraph 4 of the Employment Tribunal's Costs Judgment recorded:

> **"Mrs Martin abandoned that part of that application that relied upon the claimant's and Mr Deman's conduct of the full merits hearing. Thus, this application proceeds on the basis that the claimant brought the claims vexatiously and/or unreasonably and that they were misconceived on the basis that they had no reasonable prospect of success."**

34. Given that record, it is apparent that the Employment Tribunal understood that the Respondent was still pursuing its application for costs on the basis that the Claimant had brought the claims vexatiously. The abandonment was limited to the question of the conduct of the proceedings. No directions had been sought by the Claimant in the appeal proceedings such as to go behind the Tribunal's record in this regard, and Mr de Mello fairly accepted that this was not a point he could pursue, either on the recusal or the costs grounds of appeal.

35. Finally, it was submitted on this point that the Claimant's counsel's attendance note also recorded that the Employment Judge had asked the Respondent's representative why the Respondent had limited its application to £10,000, and it was contended that this suggested that the Employment Judge had made up his mind before the hearing to impose the maximum costs.

36. On the second ground of appeal - that the costs award was wrong in principle - Mr de Mello accepted he was in difficulty in pursuing the substance of his ground given that the real argument on this point had been that the Tribunal's award had been made on a basis (i.e. that the bringing of the claims had been vexatious) that had not been relied on by the Respondent. Given that he did not go behind the record at paragraph 4 of the Costs Judgment, Mr de Mello fairly accepted it was not a point he could pursue.

37. That really left only the arguments already addressed on the recusal ground: i.e. that the Tribunal had taken into account irrelevant factors, in particular the reference to the Claimant impugning the decisions of all decision-makers without evidence including members of the judiciary.

38. On the third ground of appeal - that the award was excessive - Mr de Mello submitted that the Tribunal was required to act judicially and therefore to consider the Claimant's ability to pay and thus to take into account the risk of the Claimant losing his job. The Tribunal had also erred in assuming that the Claimant would be able to ask for time to pay by instalments.

The Respondent's submissions

39. For the Respondent Mr Gilroy QC made a general observation that there was really no dispute on the law in this case. The principles were well-rehearsed in the case-law, and there was no real issue between the parties to that extent.

40. He also made two preliminary points. First, that the bias points had been fully argued before Slade J, and it was not open to the Claimant to go behind the judgment she gave rejecting those points. Secondly, he objected to the Claimant seeking to take what we will describe as the **Oni** point when that had not been foreshadowed in the Notice of Appeal. In any event, on the substance of that point, he submitted that the Tribunal plainly did not fall foul of the **Oni** test. The crucial distinction between the **Oni** case and this was apparent when one considered what the Tribunal had said in the **Oni** case, which had been a statement of a clear and concluded view on the test relevant for an award of costs whilst, in the present case, the Tribunal had not overstepped that line.

41. On the recusal ground, Mr Gilroy submitted that this was an exercise of discretion by the Tribunal in which the EAT should be slow to interfere. The Tribunal had identified the correct legal test, and it could not be an error of law for the Tribunal to decline to recuse itself merely because it had declined to accede to an earlier bias application.

42. Further, the Claimant had given evidence at the full merits hearing before the Tribunal that, over the course of his numerous claims and appeals, the six members of the judiciary (other than EJ Sneath) had been biased against him and had discriminated against him. Those allegations had never been upheld or substantiated, and the Sneath Tribunal had been entitled to have regard to that background at the full merits hearing stage. Generally, an

Employment Tribunal was entitled to take into account the fuller context and background in reaching its view as to the credit of a party and, where appropriate, was entitled to express that view in trenchant terms. That did not preclude it from then going on to hear further applications in those proceedings.

43. On the second ground of appeal - that the costs award was wrong in principle - Mr Gilroy QC submitted that we were bound to accept the record at paragraph 4 of the Tribunal Reasons. That accorded with the Respondent's view of what had taken place, and Mr de Mello was right to accept that the point could not be pursued further. In any event, as set out in his skeleton argument, Mr Gilroy QC submitted that the Tribunal was itself entitled to make the award of its own volition.

44. As for the suggestion that the Tribunal had taken into account irrelevant considerations, it was plainly entitled to take account of the wider aspects of the Claimant's behaviour in deciding whether this was a calculated vexatious course of conduct. The Liability Judgment had recognised a pattern of conduct and the Tribunal was entitled to take that into account at the costs application stage, noting in its Costs Judgment that it was to be read in conjunction with its judgment on the merits.

45. As for the ground relating to the excessive amount, Mr Gilroy QC observed that the award of £10,000 was in fact a small proportion of the Respondent's costs incurred in these proceedings; around 20% of counsel's fees. The Claimant had been in continuous employment with the Respondent for some ten years, earning at the end around £45,000 per annum. The Tribunal had regard to all those relevant considerations and made an award of £10,000, which was not excessive, even taking into account the possibility of the Claimant's dismissal.

The legal principles

46. We would not characterise a Court's response to an application for recusal on the ground of bias as an exercise of judicial discretion. Of course there has to be an exercise of judgment in determining such an application, but that has to be in accordance with the legal principles laid down by the case-law.

47. A useful summary of those principles we find to be provided in the case of **Ansar v Lloyds TSB Bank plc** [2007] IRLR 211 in which the Court of Appeal, at paragraph 14, approved the principles laid by Burton J in the EAT in that case:

> **'Burton J on that issue considered the authorities relating to bias … and he summarised the law with some care in his judgment …**
>
> > **'1. The test to be applied … in determining bias is: whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased.**
> >
> > **2. If an objection of bias is then made, it will be the duty of the Chairman to consider the objection and exercise his judgment upon it. He would be as wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance ….**
> >
> > **3. Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour ….**
> >
> > **4. It is the duty of a judicial officer to hear and determine the cases allocated to him or her by their head of jurisdiction. Subject to certain limited exceptions, a judge should not accede to an unfounded disqualification application ….**
> >
> > **5. The EAT should test the Employment Tribunal's decision as to recusal and also consider the proceedings before the Tribunal as a whole and decide whether a perception of bias had arisen….**
> >
> > **6. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without something more found a sustainable objection ….**
> >
> > **7. Parties cannot assume or expect that findings adverse to a party in one case entitle that party to a different judge or tribunal in a later case. Something more must be shown ….**
> >
> > **8. Courts and tribunals need to have broad backs, especially in a time when some litigants and their representatives are well aware that to provoke actual or ostensible bias against themselves can achieve what an application for adjournment (or stay) cannot ….**

> **9. There should be no underestimation of the value, both in the formal English judicial system as well as in the more informal Employment Tribunal hearings, of the dialogue which frequently takes place between the judge or Tribunal and a party or representative. No doubt should be cast on the right of the Tribunal, as master of its own procedure, to seek to control prolixity and irrelevancies ….**
>
> **10. In any case where there is real ground for doubt, that doubt should be resolved in favour of recusal ….**
>
> **11. Whilst recognising that each case must be carefully considered on its own facts, a real danger of bias might well be thought to arise (*Locabail* at para 25) if:**
>
>> ***'a. there were personal friendship or animosity between the judge and any member of the public involved in the case; or***
>>
>> ***b. the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or,***
>>
>> ***c. in a case where the credibility of any individual were an issue to be decided by the judge, the judge had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or,***
>>
>> ***d. on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on their ability to try the issue with an objective judicial mind; or,***
>>
>> ***e. for any other reason, there were real grounds for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues.'"***

48. We, however, agree with Mr Gilroy QC that Employment Tribunals are entitled to express themselves freely and forcefully when explaining their reasons and may, if appropriate, make trenchant findings about a party's credibility when dealing with questions of liability. That said, they must be careful not to overstep the mark, and we have had regard to the case of **R v Inner West London Coroner ex parte Dallaglio and Another** [1994] 4 All ER 139 where the coroner's public description of one of the relatives of the deceased as "unhinged" was held to be not merely injudicious and insensitive but also a gratuitous insult such as to give rise to an appearance of bias.

49. Moreover, any such expressions of a view must not be given or made in such as way as to pre-judge a subsequent application that might be made in the proceedings, such as an application for costs in Employment Tribunal proceedings (see **Oni v NHS Leicester City**

(formerly Leicester City Primary Care Trust) [2013] ICR 91 EAT. In that case the Employment Tribunal (when dismissing the claimant's claims of unfair dismissal, race discrimination and victimisation but before any application for costs had been made) stated:

> **"In our view, not only was the bringing of the various claims unreasonable but the manner in which they have been conducted was also unreasonable."**

When an application for costs was subsequently made, the Tribunal ordered the claimant to pay the whole of the respondent's costs. The EAT in that case held that the Tribunal's words echoed the threshold test for awarding costs and demonstrated that the Tribunal had expressed its concluded view on the application of that test. In those circumstances EAT held that the Tribunal should properly have recused itself on the ground that the fair-minded and informed observer would conclude that there was a real possibility that it had prejudged the question of costs.

50. On the Employment Tribunal's power to award costs, we have had regard to the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004**, Schedule 1, to the general power to award costs given at rule 38 and to the circumstances in which such an award might be made at rule 40, which provided (relevantly) that:

> **"When a costs or expenses order may be made**
>
> **40**
>
> **...**
>
> **(2) A tribunal...shall consider making a costs order against a paying party where, in the opinion of the tribunal... any of the circumstances in paragraph (3) apply. Having so considered, the tribunal...may make a costs order against the paying party if it...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."**

51. By rule 41, provision was made as to the amount of the costs order an Employment Tribunal might make. At the relevant time, that was limited to £10,000 as the sum that, absent agreement, the Tribunal might award without referring the matter for detailed assessment to the county court.

52. By virtue of rule 41(2) it was, further, expressly provided that:

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

So, the means of the paying party would be a potentially relevant matter that the Employment Tribunal might take into account - although it was not obliged to do so - first, at the stage of considering whether to award costs and, second, if having decided to make such an award, then as to the amount.

Discussion and conclusions

53. As we have indicated, we agree with the Respondent that it can be appropriate for an Employment Tribunal to express itself forcefully where the findings in issue justify such force of expression. Tribunals should not be put in fear of expressing themselves forcefully because of the risk of a complaint of bias. That is true of any Court but we think it can particularly be so in the context of the Employment Tribunals operating in the industrial relations context and with real-world knowledge and experience imparted by lay members.

54. We have had regard to the detailed judgment on the merits in this case, which went through each of the complaints made in careful detail. We note the length of time taken on these proceedings at the full merits hearing, the number of witnesses heard by the Tribunal and

the amount of documentation considered. We also note the Employment Tribunal's expression of regret at paragraph 252 of the Liability Judgment:

> **"We pause to reflect that we are dealing with a claimant who appears to us to be working at the leading edge of science and technology and yet the deployment of his talent has been deflected his personality which has driven him head long to confront his employers regularly over a protracted period of time at the expense of his research."**

55. We agree with the Respondent that the proceedings before the Sneath Employment Tribunal were not to be seen in isolation. As that remark we have just cited makes clear, there is a whole history of litigation and earlier trenchant findings against the Claimant. Those include, for example, the earlier O'Hara Tribunal (to which reference was made by the Sneath Tribunal, at paragraph 258), speaking of the Claimant's claim being "riddled with contradiction, misrepresentation, duplicity and opportunism".

56. Plainly the Sneath Tribunal was unable to simply ignore this background in reaching its view as to the Claimant's credibility. This was all part of the background before it, to which it was entitled to have regard in its views at the full merits hearing.

57. Having reached its views on the Claimant's credibility, in part having regard to that background material, those matters could quite properly feed into the Tribunal's approach to the costs application. It was entitled to hear that application and was not required to recuse itself from doing so.

58. We considered carefully the language used by the Sneath Tribunal, particularly at paragraphs 259-260, and asked ourselves whether that overstepped the mark and amounted to the expression of a concluded view on the threshold test for a costs application in a similar way to the Tribunal in the **Oni** case.

59. Before answering that question, there is some difficulty for the Claimant in that it is certainly arguable that this point was not taken as part of the Notice of Appeal. We were not convinced by Mr de Mello's arguments as to how it might be seen to have been foreshadowed by the grounds of appeal.

60. In any event, giving the Claimant the benefit of doubt on this point, having considered the matter quite carefully, we take the view that the Employment Tribunal's language does not overstep the mark. The Tribunal expressed itself forcefully but it still left the point open. There was no expression of a concluded view. Indeed, by expressly recognising that the Claimant would need the opportunity to address the question of whether, in bringing the proceedings he had acted vexatiously, the Sneath Tribunal was keeping open its view on this matter for such further submissions and representations as might be made.

61. Turning to the other bases on which this ground of appeal was pursued before us, we note that whilst accepting that the substantive complaints of bias had been dismissed as part of the merits appeal (which had not been allowed to proceed at the rule 3(10) hearing), the submission was nevertheless made that the Tribunal had somehow set too high a test for the Claimant in making good his allegations of apparent bias at this costs application stage. We also note the criticism that the Tribunal had regard to an irrelevant matter: i.e. the more general interests of the administration of justice.

62. We do not accept those criticisms. Dealing with the second point first: paragraph 10 does not put the administration of justice before the principle of fair hearing. It does no more than recognise the point (recognised in the case-law we have already cited), that it is a Judge's duty

to judge cases, and that is not to be de-railed by unmeritorious allegations of bias (see the principles set out in **Ansar**, cited above).

63. As for the suggestion that too high an evidential test was set for the Claimant, we do not see that point. Moreover, given the conclusions on the bias point expressed by Slade J - after hearing very full arguments on this question - we do not think this point can be sustained. In particular, we have had regard to paragraphs 42 and 49 of her judgment, as follows:

> **"42. In support of the allegation that there was an appearance of bias in the EJ Sneath hearing his claims the Claimant relied on the history of adverse decisions made against him by EJ Sneath, complaints by his representative, Dr Deman, against the EJ and his unsuccessful request that EJ Sneath recuse himself. The Claimant could and has appealed some of the Sneath ET's interlocutory decisions. Even if any of those appeals were to succeed, in our judgment the fact that interlocutory decisions had been taken which the Claimant sought to challenge could not found a conclusion that there was an appearance of bias by EJ Sneath concluding the substantive hearing. Judges cannot be precluded from conducting a substantive hearing because they have made interlocutory decisions adverse to one party.**
>
> **...**
>
> **49. We have carefully considered all the many bases set out in the Claimant's Notice of Appeal for alleging bias or the appearance of bias on the part of the Sneath ET. In our judgment none of them collectively or individually give the ground of appeal alleging bias or appearance of bias a reasonable prospect of success."**

64. There was, in truth, simply no merit in the points being made, and that was the real point the Employment Tribunal was making.

65. On the more general criticism that the Tribunal took into account irrelevant considerations going beyond the actual proceedings before it, we think that is an unfair challenge. The Tribunal was entitled to have regard to the broader matters it referred to when assessing the Claimant's credibility at the liability stage. That assisted it in reaching its conclusion on those claims. It was thus entitled to take forward that view into its consideration of the costs application and the question whether the Claimant's bringing of the claims was vexatious. It would be simply false and unrealistic to expect an Employment Tribunal to

disregard its views of the party's credit on the basis that it had reached that view taking into account the party's conduct more generally.

66. Moreover, in taking this view, we do not read the Tribunal as falling into the trap of visiting the sins of the representative onto the party. Paragraphs 14 to 16 of the Costs Judgment refer expressly to the conduct of the Claimant, not to his former representative. To read these paragraphs otherwise would not only require us to go behind the Employment Tribunal's express self-direction that it was not dealing with the conduct of Dr Deman (see paragraph 13) but would require us to effectively rewrite these reasons to refer to the conduct of Dr Deman when it is plain that it is the Claimant's own conduct that was in issue.

67. Finally, the fact that the Employment Judge asked the Respondent's representative why the Respondent had limited its application to £10,000 would not suggest to any objective observer that the Employment Judge had made up his mind before the hearing to impose the maximum sum the Tribunal could award. It was a sensible question to enable the Tribunal to understand the basis of the application being made, particularly when it had been presented with Schedules of Costs far in excess of the amount claimed. It would not suggest any pre-judgment of the issues.

68. As for the second ground of appeal - that the award of costs was wrong in principle - that really falls away given Mr de Mello's concession that there is no basis on which we can go behind the record at paragraph 4 of the Tribunal's Reasons. For completeness, we should make clear that, in any event, we would consider that a Tribunal would be entitled to make an award on this basis of its own volition. As the Tribunal's reasons make clear, however, the principal

ground on which it made the award was one the Respondent continued to rely on in its application.

69. On the question whether the Tribunal took into account irrelevant factors, we have already stated our conclusions on these points under ground 1. There is nothing in this objection.

70. On the third ground of appeal - that the award was excessive - we note the wide discretion given to Employment Tribunals in terms of the amount of costs appropriate to be awarded in any particular case. Of course, that discretion must be exercised judicially, and we consider that this Tribunal properly exercised its discretion in this case.

71. Here the award of costs was a small fraction of the sum actually incurred by this Respondent. Although the Tribunal was not obliged to have regard to the Claimant's ability to pay, we can see that it is good practice for Tribunals to do so and we can also see that it might be arguable that a Tribunal would need to give reasons for failing to do so. Those points, however, do not arise here because this Employment Tribunal expressly did have regard to the Claimant's means. That is apparent at paragraph 17, where reference is made to the Claimant's earnings over a number of years, and the Employment Tribunal was entitled to take that evidence into account. We consider it was also entitled to have regard to the possibility that the Claimant might be able to make payments in instalments. Whilst the Tribunal was not able to make such an order itself, it is certainly not irrelevant to consider that a Claimant might offer to pay in instalments and that a Respondent might consider that to be a commercial way of recovering any costs awarded.

72. The amount of costs was firmly within the discretion of the Employment Tribunal and there is no error of law in its judgment in this regard.

73. There is nothing further in the review appeal, and so for all the above reasons, we dismiss both these appeals.

74. Having given our judgment in this matter, the Respondent then made an application for its costs of this appeal, under rule 34A of the EAT Rules 1993, putting that application on the bases either that the appeal was unnecessary or that it was misconceived. Putting his submissions summarily, Mr Gilroy QC made the point that the principal point advanced on ground 1 had not been contained in the Notice of Appeal. The second ground could not be sustained because the Claimant was unable to go behind the Tribunal's record on the point. The third ground of appeal really sought to challenge a matter which was wholly within the discretion of the Employment Tribunal and was therefore bound to fail.

75. For the Claimant Mr de Mello resisted that application, observing that the matter had been allowed to proceed to a full hearing by the EAT at an earlier stage; that the first ground main point had, in his submission, been foreshadowed by the Notice of Appeal, and the EAT had in any event dealt with it on an alternative basis. Secondly, on the second ground, a concession had been given during the course of oral argument, and the Claimant should not be penalised for that. On the third ground, an arguable case had been put forward, albeit that the Claimant had lost.

76. Mr de Mello also observed that pursuant to rule 34B(2) of the EAT Rules 1993, the Appeal Tribunal may have regard to paying party's ability to pay when considering the amount

of the costs order. The Claimant was not working and had no income at present and we should take that into account.

77. In terms of the sum claimed, Mr Gilroy did not put a Schedule of Costs before us and put his application for costs of £6,000 orally, explaining to us how those costs were split between solicitors' and counsel's fees.

78. We consider that this was an appeal which came close to the edge in terms of engaging the EAT's costs jurisdiction. We see the force of the points made by Mr Gilroy as to the main point in the appeal having not been properly foreshadowed by the Notice of Appeal and as to the difficulties facing the Claimant in going behind the Employment Tribunal's record when no earlier directions had been sought in these proceedings such as to enable him to do so. On balance, however, we felt that the appeal still fell on the right side of the line. In saying that, we observe that we have not been provided with any correspondence drawing to the attention of the Claimant or his representative the points now being made by the Respondent in support of his application. We also observe that, in the course of his submissions before us, Mr de Mello is to be commended for properly making concessions at appropriate times and that it is not the purpose of rule 34A to punish a party but simply to enable the EAT to compensate a party for costs incurred in appropriate circumstances.

79. Whilst we noted that the appeal had been permitted to proceed at an earlier stage but we did not consider that this should be seen as giving an appellant a shield against a potential costs order. That would be unfair on the EAT Judge at the rule 3(10) or preliminary hearing, who will generally only be presented with one side of the argument at that stage. We have considered the merit or otherwise of his application for costs on the basis of the arguments before us and how

the appeal has been run before us. On balance, we feel this falls just the side of the line and we therefore adopt our usual approach, that costs do not follow the event.

80. Were we wrong on that, we would in any event have felt it inappropriate to make an award. We would have felt it appropriate to have regard to the Claimant's ability to pay and thus to the fact that he has no income and already has an outstanding award of £10,000 costs against him. Having regard to the absence of means, we would not have considered it appropriate to make the costs order sought.

81. For those reasons, we do not grant the Respondent's application for costs.