Appeal No. UKEAT/0382/14/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 20 March 2015

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

EMPLOYMENT RIGHTS ADVICE LTD — APPELLANT

(1) MRS C THEW
(2) REASEHEATH COLLEGE — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ANDREW ALLEN (of Counsel) Instructed by: Employment Rights Advice Lester house 21 Broad Street Bury Lancashire BL9 0TH
For the Respondents	No appearance or representation by or on behalf of the Respondents

SUMMARY

PRACTICE AND PROCEDURE - Bias, misconduct and procedural irregularity

Procedural irregularity/fair hearing

Allowing the appeal on this basis. On the Second Respondent's application for wasted costs against the Appellant, the Employment Tribunal ("ET") hearing had ended with a lack of certainty as to how matters were to proceed in terms of evidence as to means (which potentially went both to the question whether any award should be made and as to the amount of such an award if made). It having been accepted that the Appellant was entitled to be afforded the further opportunity to adduce such evidence, the Appellant had not unreasonably understood that the ET would give further directions for the submission of that evidence in due course, if it considered its wasted costs jurisdiction had been engaged. Subsequently, no written record as to how things had been left was sent out to the parties. The different records available to the Employment Appeal Tribunal ("EAT") served only to confirm the potential ambiguity as to how things had been left. Thereafter, one of the ET lay members had died and the further directions that were required seemed to have been forgotten as a result. This had meant that the Appellant had been denied the opportunity to submit further evidence on a matter that was relevant to the ET's ultimate decision to award wasted costs against it. The award was thus rendered unsafe and the matter would be remitted for consideration afresh.

Apparent Bias

There had been a number of errors in the ET proceedings (including the irregularity described above). The Appellant argued that these had to be seen in the light of the Employment Judge's gratuitous disclosure of irrelevant information in the appeal proceedings, apparently designed to prejudice the Appellant in the EAT's eyes. This was a slipping of the mask and, although

occurring some time after any relevant decision, this would cause the informed, fair-minded observer to conclude there was a real risk of bias undermining the ET decision in issue.

Refusing the appeal on this basis. While a number of unfortunate difficulties had arisen during the course of the ET proceedings, none gave rise to anything that would cause the informed, fair-minded observer to conclude there was a real possibility of bias. The Employment Judge's response to the EAT did not change that position. It was plainly some time after the relevant decisions and provided in a context which allowed a different explanation. No issue of relevant bias arose relevant to the decision in issue in the appeal.

Disposal

The Employment Judge's response in the appeal proceedings was, however, relevant to the question of remission. It meant that the Appellant had lost confidence in obtaining a fair hearing before this ET. The matter should be remitted to an entirely fresh ET for re-hearing.

HER HONOUR JUDGE EADY QC

Introduction

1. This is the Full Hearing of this appeal. It was previously before me on the Rule 3(10) application (see my Judgment of 7 November 2014, when I permitted the appeal to proceed on the limited bases I have set out below). For convenience I refer to the parties by name: before the ET, Mrs Thew was the Claimant, she is now the First Respondent to the appeal; the Second Respondent to the appeal, Reaseheath College ("the College") was the Respondent to Mrs Thew's ET claim; Employment Rights Advice Ltd ("ERA") were not a party below but were, through the person of Mr Broomhead (a non-practising solicitor) represented the Claimant. ERA was the subject of a wasted costs order made by the ET, and it is against that award that ERA seeks to appeal; hence it is now the Appellant.

2. At the previous hearings before me, on ERA's Rule 3(10) application, Mr Broomhead appeared himself. For the Full Hearing, ERA has instructed Mr Allen of counsel, who appears pro bono. He tells me he was instructed late in the day, and that explains why his Skeleton Argument was served only on 19 March 2015, the day before this hearing rather than 14 days prior, as my order seal dated 25 November 2014 required. That excuses Mr Allen's default. It neither explains nor excuses that of his client. Neither Respondent to the appeal has appeared or lodged submissions in this matter. Mrs Thew does not resist the appeal. The College does resist it, and has entered a Respondent's Answer, but does not appear before me and has not lodged any written submissions. I am thus hearing solely from Mr Allen acting for ERA.

The Grounds of Appeal

3. I permitted this matter to proceed on the basis of Amended Grounds of Appeal that raise the following questions: (1) whether ERA was afforded a fair hearing in terms of being able to

make submissions as to its means before the ET made the wasted costs order against it; (2) whether the ET, either in its failure to afford ERA a fair hearing or in its conduct more generally, gave the appearance of bias.

4. When considering these matters at the Rule 3(10) Hearing, the test I applied was simply whether the proposed grounds demonstrated any reasonable basis for the appeal to proceed: that is, did they disclose arguable errors of law on which ERA had reasonable prospects of success at the Full Hearing? At this Full Hearing of the appeal, I have to address the merits of ERA's arguments to determine whether they establish that the ET erred in the way/s complained.

The Relevant Background

5. Whilst repeating the history set out in my Judgment of 7 November 2014, the following narrative sets out the relevant factual background, and it is helpful to include it here so that the complete picture can be derived from this Judgment.

> **"3. The proposed appeal is against a Judgment of the ET sitting at Stoke on 12 March 2013 and, in chambers, on 2 July and 21 August 2013. The Reserved Judgment was sent to the parties with Reasons on 5 September 2013. There had been earlier hearings before the ET into Mrs Thew's substantive claims, on 28 September 2012 and 1 - 9 and 10 October 2012 (that last day, I understand, being in chambers). By its Reserved Judgment, sent to the parties on 20 November 2012 the ET dismissed as withdrawn claims for unpaid holiday pay and unpaid expenses; concluded Mrs Thew was not dismissed but resigned, and, consequently, dismissed her claims of unfair dismissal and automatic unfair dismissal. There was no appeal against that Judgment. It is relevant to read in the final paragraph from that Judgment, paragraph 61:**
>
> > **"The claimant's case as presented on paper by her solicitor did not always tally with the claimant's own evidence. The tribunal was left in some difficulty in analysing exactly where her case lay. The claimant's own reluctance to comment on the contents of her ET1 on the grounds that it had been drafted by her solicitor and therefore she did not feel able to comment, was most unhelpful."**
>
> **4. Following the substantive hearing of Mrs Thew's claims, the College applied for costs against her and/or against ERA. The matter was set down for a hearing. At the outset of that hearing (12 March 2013), the ET heard an application, made by Mr Broomhead, that it should recuse itself on the ground of bias. It refused that application for reasons contained in a separate Judgment, sent out on 19 July 2013. There is no appeal against that Judgment.**
>
> **5. The ET then heard from the parties in relation to the application for costs/wasted costs. It heard evidence from Mrs Thew and from Mr Broomhead, Mr Broomhead then giving evidence for ERA. It also heard from the solicitor for the College, Mr Smart, who gave evidence regarding the costs incurred. The ET records that Mr Broomhead gave evidence as follows:**

> **"Mr Broomhead supplied an indication of ERA's situation. It is a new company with 2 directors. He is working without being paid. It could not afford an order for £10,000 costs as applied for by the respondent."**

Mr Broomhead contends that was not evidence properly concerning the ERA's means; he was not in a position to give that evidence, being a volunteer for ERA, not one of the two directors.

6. It is relevant to note at this stage that originally the ET had comprised the Employment Judge sitting together with two lay members, Messrs Savage and McKay. That was also the composition of the ET on 12 March 2013 when first sitting on the costs application and when determining the bias recusal application. Sadly Mr McKay died between 12 March and 2 July 2013, when the ET was due to meet again in respect of the costs application. The parties were offered the option of proceeding with a panel of two. The College accepted that course, and Mrs Thew (in person) also wrote in agreeing to that, but Mr Broomhead (still saying he was acting for Mrs Thew) objected. Accordingly, the Regional Employment Judge appointed a new member, Mrs Shenton, who then sat as a member of the ET on 2 July and 21 August 2013. Mrs Shenton had not been present at the hearing of 12 March 2013.

7. Ultimately, by its Judgment sent to the parties on 5 September 2013, the ET made an award of costs against ERA of £3,600.

8. Two further details of the history should be mentioned at this stage. First, after receiving the ET's oral decision on the application to recuse itself, Mr Broomhead asked for Written Reasons, which the Employment Judge confirmed would be provided. Those Reasons had, however, not been received by the time the parties were asked for their consent to the ET continuing with two members only, and ERA asked for this to be remedied. The response received from the ET, dated 17 July 2013, was relied on by Mr Broomhead as being disingenuous. Second, having received the costs Judgment, by email of 13 September 2013 ERA applied for a reconsideration, setting out detailed grounds, which included its contention that the Employment Judge had previously stated that:

> **"… if the Tribunal was minded to make an order there would be a second hearing to determine whether there should be an order to pay and that directions would be given …"**

9. The solicitor for the College, Mr Smart, responded to the detail of that application. He observed that ERA had not applied to be treated as a party to the proceedings and there was no evidence that it had properly informed all the parties - specifically, Mrs Thew - of its application. More particularly, Mr Smart commented:

> **"When considering the issue of a second costs hearing, Mr. Broomhead is mistaken in his recollection of events. Both ERA and the Claimant were ordered to provide evidence of their means at the hearing on 12 March 2013. Mr. Smart was also present at the hearing and his recollection of what the Judge Ordered was this:**
>
> **1. That the Claimant was ordered to produce evidence of her means. ERA then had the option of producing further evidence of ERA's means. However, because Mr. Broomhead had stated that he found it insulting that the Respondent had asked for evidence of ERA's means then the Judge gave ERA the choice of whether to provide it or not.**
>
> **2. In the meantime, the Tribunal would decide whether a costs Order would provisionally be made subject to the issue of whether the parties had means to pay.**
>
> **3. If the Respondent wished to cross examine the Claimant or ERA about their means then a second costs hearing would be listed to take place.**
>
> **What happened was this:**
>
> **1. The Claimant provided evidence of her means. ERA provided nothing.**
>
> **2. The Respondent confirmed that it did not wish to cross examine the Claimant about her evidence about her means to pay.**
>
> **3. The Tribunal therefore made its Judgment without a further open hearing."**

10. Unfortunately, it seems that the file was not returned to the Employment Judge for her consideration of the reconsideration application until some time around 4 December 2013. It

is said by the ET that the application and the College's response were initially sent to Mrs Thew for her comment but no response was received and the ET then failed to progress the file. Further error appears to have occurred after the Employment Judge had reached her decision on the application for reconsideration and signed that off on 4 December 2013. I am told that decision was only being received by ERA after - and apparently as a result of - the Employment Judge's providing comments in this appeal process (in or around July 2014). Certainly, when Mr Broomhead appeared before me on 29 May 2014 he told me that ERA was still awaiting a response to the reconsideration application.

11. Relevantly, in considering refusing the application for reconsideration, the Employment Judge observed as follows:

> **"There was never any suggestion that the case would be adjourned to a further hearing other than to enable the claimant to be cross examined on the issue of her means, had the respondent chosen to do so.**
>
> **Both parties had ample time to make such submissions as they chose, having challenged each others [sic] evidence as they wished.**
>
> **The Tribunal did not ask Mr Broomhead if he sought to challenge the value of the costs themselves. Mr Smart gave evidence and was cross examined by Mr Broomhead. Mr Broomhead had the opportunity to challenge the schedule had he chosen to do so at that stage.**
>
> **The decision to adjourn pending receipt of the claimant's proof of means was neither raised nor decided until close to [the] end of the hearing. By then Mr Broomhead had finished challenging Mr Smart's evidence.**
>
> **Had there been any challenge to the figures in the schedule the tribunal would have expected it to be made during Mr Smart's cross examination, or in Mr Broomhead's closing remarks."**

12. In the meantime ERA had submitted its appeal herein and had also made complaints about this process to the Regional Employment Judge."

The Relevant Legal Principles and Approach

6. The power to make an award of costs against a party's representative was provided by Rule 48 of the **Employment Tribunal Rules 2004**. Rule 48(6) permitted an ET to take into account a representative's ability to pay when considering, in circumstances when its wasted costs jurisdiction was otherwise engaged, whether it should in fact make such an award and, if so, how much the award should be. On this appeal the question arises as to whether ERA was afforded a fair hearing in respect of the College's costs application against it, specifically whether it was afforded a proper opportunity to be heard as to its ability to pay. The ET's judgment that its wasted costs jurisdiction was otherwise engaged is not in issue at this stage.

7. The issue raised potentially went to the question whether any award should be made against ERA as well as to the quantum of such an award if the ET considered it should be. In order to determine the first ground of appeal, it is therefore necessary that I first determine what happened in respect of the costs application to the extent relevant to this fair hearing issue.

8. The second ground raises a question of apparent bias. The test is that laid down in **Porter v Magill** [2002] 2 AC 357 HL; that is, whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the ET was biased. In determining this question, it is necessary for me to first establish the relevant facts. With those in mind, I must then stand in the shoes of the fair-minded and informed observer and ask whether these demonstrate a real possibility of bias.

9. For convenience I address the evidence and submissions and go on to give my conclusions separately in respect of the two issues before me.

The Appeal

Ground 1: a Fair Hearing

10. In determining the relevant facts in this respect I have had regard to the affidavit evidence submitted pursuant to my earlier order, seal dated 2 June 2014, along with the relevant documentation exhibited thereto and the other documents that touch upon this issue. In considering this material below I incorporate Mr Allen's submissions made on behalf of ERA.

11. The starting point is the College's costs application, expressly made against both Mrs Thew and, for wasted costs, against ERA as her representative. That was made by letter of 14 December 2012, which fully set out the bases upon which the application was made and

expressly asked for a direction that Mrs Thew and her representative be required to provide evidence of their means.

12. Mr Broomhead's affidavit explains that ERA is a private limited company incorporated and commencing in business on 6 June 2011. He says it was established by two directors with a view to representing clients, mainly Claimants in the ET. Whilst he says he is not employed by ERA, he explains that he volunteers his services with a view to ERA assisting him obtaining permanent employment. He deals with the arrangements for the costs hearing as follows:

> **"8. The application for costs was made by the [College] by a letter dated 14 December 2012 … Included in the said application is an application for directions. No such directions were given, in fact the only order made was one that that [sic] we produce our file of papers … however we refused as they were protected by legal professional privilege. …"**

13. It seems that there had initially been a direction that ERA was to have available its file for the purposes of the hearing of the costs application. As the Employment Judge's response in this appeal acknowledges, however, the College's request for disclosure of the file ran the risk of requiring privilege to be waived, and the ET ultimately declined to make an order for disclosure of that nature, and the College did not pursue the matter. It seems - and I can only surmise, as the point is not clear from the documentation - that the question of disclosure as to means may have got lost in the heat of that dispute relating to the case file.

14. As for what took place at the hearing, I have already summarised above the application made by Mr Broomhead for the ET to recuse itself. At this stage I am interested in what happened on the costs application. Of course, by the time evidence was provided for the purposes of this appeal some time had passed since 12 March 2013. In those circumstances, I consider that the best evidence available to me is likely to be found in the contemporaneous documentary evidence, in particular in the form of notes taken on the day of the hearing itself

where those are available. Mr Broomhead, as ERA's representative at the hearing on 12 March 2013, has not exhibited any notes. He says he has been unable to find them. He does, however, disclose his attendance note, written up that evening, which provides:

> **"MB attended the Employment Tribunal on the hearing to the respondent's application for costs.**
>
> **The following Order was made that the judgement on costs was to be reserved.**
>
> **If the Employment Tribunal were minded to make an order for costs then the party to whom the costs was [sic] being made would have to supply the statement of its means by a certain time scale with the respondent upon consideration of the statement of means to indicate whether it wished [to] challenge what was in it. If so, then this would proceed to a second hearing but if not then the Employment Tribunal would make a second reserved judgment."**

15. The affidavit for Mr Smart, solicitor for the College, sworn on 9 July 2014, did attach his notes taken at the hearing on 12 March 2013. Under the subheading "Claimant's submissions", but presumably addressing ERA's position, Mr Broomhead is noted as stating:

> **"Newly founded business:** **Cannot afford £10,000 asked for.**
>
> **Means no Order should be made.**
>
> **No salary's paid.**
>
> **£1,000 each paid to directors."**

16. It is apparent from those notes that Mr Broomhead went on to make observations about Mrs Thew's means. It is then recorded:

> **"EJ [i.e. the Employment Judge]: The ET is troubled by info re means.**
>
> **Need to consider documentary evidence and evidence on oath. Without it we have to assume she has means.**
>
> **Now that we're aware of the financial position needs to see documentary evidence and statements.**
>
> **CW [Counsel for the College at that hearing]: Have you considered that documentary evidence now? Why not?**
>
> **MB: No explanation.**
>
> **…**
>
> **EJ: Reserved Judgment in relation to first two issues. Claimant and wasted. If we decide to award costs will resume with a further hearing that info should have been available at the hearing today and that will need to be taken into account in due course.**
>
> **Once a decision is reached if decision is no costs awarded = end of the matter.**
>
> **If costs ordered against one party then get directions for appropriate material.**

Same if costs ordered against both. Same principles apply.

Indication date material will be served.

Panel left the room."

I pause in the recitation of the content of the notes at this stage to observe that up to this point it might be argued that this is not inconsistent with Mr Broomhead's attendance note. Certainly that is Mr Allen's submission on ERA's behalf. The note, however, then continues, with the ET returning to the hearing room.

"Panel came back in

Set date for specific evidence.

Consider the documents and state whether we wish to challenge what is in it and/or whether reconvene as a hearing or second reserved judgment.

Will only be necessary to reconvene if evidence is challenged.

These are no more than indications. Not even discussed this yet.

Ring ET in one week for reconvened date."

17. Mr Allen observes that Mr Smart's note still does not suggest that any specific dates were given for the disclosure of the material; at best, the record remains ambiguous as to how things were left and as to whether further directions were to be given for the provision of evidence as to means. That could again be said to be consistent or, at least not inconsistent, with Mr Broomhead's attendance note.

18. In his response to ERA's subsequent application for reconsideration of the ET's Judgment, Mr Smart then stated as follows:

"When considering the issue of a second costs hearing, Mr Broomhead is mistaken in his recollection of events. Both ERA and the Claimant were ordered to provide evidence of their means at the hearing on 12 March 2013. Mr Smart was also present at the hearing and his recollection of what the Judge Ordered was this:

1. That the Claimant was ordered to produce evidence of her means. ERA then had the option of producing further evidence of ERA's means. However, because Mr Broomhead had stated that he found it insulting that the Respondent had asked for evidence of ERA's means then the Judge gave ERA the choice of whether to provide it or not.

2. In the meantime, the Tribunal would decide whether a costs Order would provisionally be made subject to the issue of whether the paying parties had means to pay.

3. If the Respondent wished to cross examine the Claimant or ERA about their means then a second costs hearing would be listed to take place.

What happened was this:

1. The Claimant provided evidence of her means. ERA provided nothing.

2. The Respondent confirmed that it did not wish to cross examine the Claimant about her evidence about her means to pay.

3. The Tribunal therefore made its Judgment without a further open hearing."

19. To the extent that this differs from Mr Smart's contemporaneous notes from the hearing, Mr Allen submits that I should prefer the latter.

20. In his affidavit for the purposes of this appeal, Mr Smart further stated:

"20. At the Hearing, Mr Broomhead mentioned that his Company was in financial difficulty. No evidence of means of either the Claimant or Employment Rights Advice Limited had been submitted in readiness for the Hearing despite being asked to do so by me.

21. The Judge stated that there would be a reserved Judgment day to consider whether costs should be awarded. In the meantime evidence of means was to be provided by both the Claimant and Employment Rights Advice Limited if they wished to do so. Then, following receipt of the means evidence, if the Respondent wished to cross examine either the Claimant or Mr Broomhead about the means evidence provided, a further costs hearing would be convened. If the Respondent declined to challenge the evidence, then a reserved Judgment day would be convened to decide the costs application. The Judge made it expressly clear to the parties that a reconvened hearing would only be necessary if the Respondent wished to challenge any of the evidence provided by the Claimant or by Employment Rights Advice Limited about means. This is documented in my note of the evidence at Exhibits A and B."

21. I pause to observe that Mr Smart here seems to confirm that no evidence of the means of ERA had been provided for the 12 March 2013 hearing. On ERA's behalf, Mr Allen again makes the point that Mr Smart does not seek to suggest that any date for disclosure was set down by the ET.

22. Finally, in terms of the material emanating from the College in this respect, the College's Respondent's Answer (settled by counsel who appeared for the College below), states:

> **"3.1. The Appellant was given a fair hearing on the issue of the ability to pay costs. The Appellant refused and then failed to provide any evidence as to means despite (a) requests from the Second Respondent to do so, and (b) the Employment Tribunal adjourning the matter on 12th March 2013 to allow the Appellant to provide such evidence. The Employment Tribunal made it expressly clear that the matter would only be listed for a further hearing if the Second Respondent wished to challenge any evidence produced by the First Respondent and/or Appellant."**

Again, Mr Allen observes that it is not suggested that the ET gave specific directions with dates for compliance.

23. I turn, then, to the evidence from the ET. As for how matters were left on 12 March 2013, in terms of evidence and submissions on the quantum of the award and/or means to pay, the Employment Judge states, in her response on this appeal, as follows:

> **"The case had been listed to hear the respondent's application for costs against both the claimant and her representatives, and limited to £10,000 … I do not recognise the circumstances set out in Mr Broomhead's typed attendance note … his description of what happened does not match my own recollection and notes. I note that the respondent's note attached to Mr Broomhead's affidavit … closely matches my own note and recollection.**
>
> **There was a full hearing of the issues. The claimant gave evidence on oath and was asked if she had produced documents to prove her means and expenses. She said she had not. (In fact we later learned that she had most of what was needed with her, but she did not make this clear to the Tribunal).**
>
> **Mr Broomhead gave evidence on oath, and explained ERA's financial position, in much the same terms as in his Affidavit. He was asked by the respondent if he wished to produce any evidence of means for the company and refused, suggesting this was an insult. Mr Smart, solicitor, gave evidence on behalf of the respondent. He was cross examined by Mr Broomhead.**
>
> **Both representatives were invited to [make] submissions and we retired to consider the applications for costs. So far as the parties were concerned at that stage, the Hearing had been completed.**
>
> **However, in discussion, the panel concluded that we wanted to see further written information about the claimant's means - bills, bank statements etc, as she appeared to have commitments which left her with no available income. We were disappointed that she appeared not to understand that she should have brought this with her, as she was still being represented at this stage. We thought it only fair to offer ERA the same opportunity if they chose to take it.**
>
> **We returned into the hearing and the claimant was ordered to serve documents to support her financial situation on both the Tribunal and respondent within 14 days, and ERA were advised that they may do so if they chose.**
>
> **I announced that the panel would adjourn to a further Hearing date to reach a reserved decision, and the parties need not attend, unless the respondent indicated that there was a need to cross examine either the claimant or [ERA's] representative on any of the financial evidence served on them during the adjournment, in which case the parties were all to attend.**
>
> **The claimant complied with the order and produced her financial information to the respondent and Tribunal …**

The respondent indicated it did not seek to question her further. ERA did not provide any additional information. A reserved decision date was listed and the parties advised they need not attend."

24. When the Employment Judge refers to the note produced by the Respondent, she is referring to the College's e-mail response to the reconsideration application of 20 September 2013. The Employment Judge has now also provided her own note, both in manuscript and typed up form, from the hearing of 12 March 2013. To the extent that it sets out how she recorded matters to have been left, the typed up version states as follows:

"Transcribed Order

● Claimant to provide evidence of means - 14 days

● ERA can if they wish - n.t.l.

● No need for extra hearing - deal in chambers - unless GS needs to cross examine claimant or ERA

● GS to say within 7 days of receipt

Reminder - sort recusal issue"

25. The manuscript copy of the note is headed "Orders" rather than "Transcribed Order". There is also simply a number 14 in a circle rather than "14 days". I am unable to be clear as to what "n.t.l." stands for.

26. For ERA's part Mr Allen accepts that normally the Employment Judge's note would be taken to provide the best record of what took place at an ET hearing. In this case, however, he submits that it would not be safe to proceed on this basis because that note is not consistent with the other contemporaneous material. In particular, he relies on the absence of any dates recorded by any of the lawyers acting for the College. That raised the question as to whether this note really did record what the Employment Judge had actually said at the hearing on 12 March 2013 rather than, perhaps, what she considered should be contained within the directions that she had originally intended should go out to the parties but which in fact never did.

27. As for the ET's Judgment on costs, sent out to the parties on 5 September 2013, it contains no reference to any direction or opportunity having been given for ERA to produce evidence as to means, albeit that there is a reference to Mrs Thew being ordered to supply evidence as to her means. That said, the Employment Judge's decision on ERA's reconsideration application is consistent with the note that she has provided for this appeal. Specifically:

> **"As the Tribunal was adjourning in any event, Mr Broomhead was offered the opportunity of supplying further details of Employment Rights Advice's circumstances should he or they so choose."**

28. Although the lay member who had been present on 12 March 2013, Mr Savage, had also provided a response to Mr Broomhead's affidavit at the invitation of the EAT, he did not engage with ERA's case on this point.

29. Finally, it is right to say that the affidavit served by Miss Cohen, one of the directors of the ERA, stated (paragraph 26):

> **"I was under the impression that there was to be a hearing to check our means. …"**

Miss Cohen was not, however, present at the hearing on 12 March 2013. She could only be giving evidence as to what her understanding was as derived from what she was told by Mr Broomhead. It might, therefore, be corroborative of Mr Broomhead's evidence but it is inconsistent with his attendance note and I do not find this account helpful.

30. What is apparent, however, is that, as things were left at the end of the hearing on 12 March 2013, no written order or directions were sent out by the ET. Whilst that was clearly unfortunate, of itself it would not found a basis for the appeal. The issue for me, more broadly, is whether the ERA was denied a fair hearing by being denied the opportunity to put its case as

to its means, when that was a relevant issue for the ET on the wasted costs application against it? It might be said that, to the extent that it failed to provide relevant material in this regard, ERA was the victim of its own decisions. Short-circuiting any need to make a finding as to what happened at the end of the hearing on 12 March 2013, if I were satisfied that ERA had been afforded the opportunity to demonstrate its means at that hearing itself, would not that be a complete answer? I can allow that it might be, but I do not think that that is what happened here.

31. Although the College had raised the point prior to the hearing on 12 March 2013, it seems that the issue about means got lost in the heat of whether the ERA was to disclose its case file, with the potential risk of disclosure of privileged information that would entail. Whoever was most at fault in that regard, it seems to have been common ground that evidence as to means had not been provided and, if the ET was minded to make an award of costs, opportunity to provide that evidence would need to be given. That much can be discerned from the various records of the hearing of 12 March 2013. The question is whether ERA was then afforded that opportunity.

32. Can I answer this question by simply accepting the Employment Judge's note? If that is accurate, it records ERA having been given the opportunity to submit further evidence as to means if it so wished. If it did not take up that opportunity, it can hardly blame the ET for its failure. In support of this approach, I note that it seems that Mrs Thew had certainly understood that she had been given the opportunity to provide evidence as to her means. By letter of 15 March 2013 she had said:

> **"Please find enclosed documentation relating to my means. I am sending these directly to you because of the way in which Martin Broomhead 'representative' dealt with the appeal case hearing held at Hanley, Stoke on the 12th March 2013.**
>
> **At the hearing I had in my procession [sic] my bank statements which detailed most of my income and expenditure. The council tax payment was not included on my February**

> **statement and I did not have my new council tax information. I have received this today and I have now enclosed with copies or [sic] my bills. I was advised by Martin Broomhead (at the 20 minute break) that because I did not have the bills the bank statements were insufficient.**
>
> **Due to what became evident at the hearing that Mr Broomhead's status as a solicitor was questioned and because of the way he has conducted himself throughout my case. I would prefer that you receive this information direct [sic]. I was always under the impression he was a solicitor and am now very concerned in the way he has dealt with my case and I believe this could have been detrimental to how my case was presented."**

33. The ET then wrote to Mrs Thew as follows:

> **"Employment Judge Warren has directed me to say that she has noted your letter and its contents. The documents supplied without the letter have been sent to the respondents for their comments. Once it is known whether the respondent seeks to cross-examine on the issue of means, the Tribunal will write to you further."**

34. The ET duly wrote to the College on 5 April 2013. It responded on 17 April 2013 that it did not seek the opportunity to cross-examine Mrs Thew on that documentation, although it reserved its position in relation to any documentation that might be submitted on ERA's behalf.

35. My concern, however, is that the Employment Judge's note contains a reference to a time period for Mrs Thew's evidence to be provided, which is simply absent from any other record of the 12 March hearing and I find it difficult to accept that lawyers present for the College would not have made a note of that time period if, indeed, it had been set down by the ET at the end of the hearing. That suggests to me, on the balance of probabilities, that the note may well have been more of an aide-memoire for the Employment Judge, setting out the specific directions she intended to give when sending out the ET's order to the parties following the 12 March hearing. That is something that might also be suggested by other aspects of the note including the manuscript heading and the reference at the bottom to "Reminder - sort recusal issue". The fact that no order ever went out may be because it was overlooked when one of the ET lay members then died. On the balance of probabilities, on the evidence before me, I am not satisfied that the Employment Judge's note records what was actually said at the

end of the 12 March hearing, rather than what the Employment Judge intended to set out in a subsequent direction to the parties (which, for whatever reason, unfortunately never was sent).

36. I appreciate that the Employment Judge, in responding to the reconsideration application and in her response to this appeal, has essentially stated that what is recorded in her note was indeed said at the hearing. I bear in mind, however, the length of time that has passed between the hearing in question and the Reconsideration Decision (nearly nine months), let alone the further delay before the response to this appeal. I also bear in mind the potential difficulty in distinguishing between an aide-memoire and a note of what was actually said at the hearing after such a period of time. Further in this respect I note the absence of any such reference in the actual costs decision and in Mr Savage's response on the appeal.

37. What has caused me most pause is the fact that Mrs Thew seems to have understood that she had the opportunity to provide evidence as to her means. If she understood this to be the case, why did ERA not similarly realise that it had this opportunity? The difficulty with my drawing any inference from Mrs Thew's behaviour, however, is that it may simply have reflected her sense of upset with how she felt she had been served (or not served) by her representative at the ET hearing and an understandable desire on her part to demonstrate to the ET that she could supply the documentation in question. There is nothing in her letter which confirms that she was doing so, pursuant to a specific direction of the ET (let alone within a particular time-scale).

38. I am then left with Mr Smart's notes from the hearing and Mr Broomhead's attendance note. On the basis of that documentation I have to agree with Mr Allen: the position was unfortunately left ambiguous as to the course the ET was then to follow. As I have already

said, it seems clear that it was recognised that both Mrs Thew and ERA needed to be provided with the opportunity to submit evidence as to means. It also seems apparent that a further hearing would only be listed if the College indicated it wished an opportunity to cross-examine once it had seen any evidence as to means. Where I think that things were left uncertain was as to whether Mrs Thew and ERA were first to provide the material they relied on as to means or whether the first step was for the ET to determine whether it was minded to make a costs award against one or other of them (whether its costs jurisdiction was engaged). If the latter, then it seems that the parties would be informed of this, and it would only be then that Mrs Thew and ERA would need to submit evidence as to means.

39. That second possibility is consistent with Mr Broomhead's attendance note. It seems to me that it is equally not inconsistent with Mr Smart's notes from the hearing; it would make sense of the ET's apparent failure, on 12 March 2013 itself, to set down any time limit for evidence as to means to be disclosed: it would be unnecessary for it to do so as the opportunity for such evidence to be submitted would not arise until such time as the ET had indicated its preliminary view on the costs application. Moreover, I would tentatively suggest that subsequent events demonstrate why matters did not progress in the way that might have been expected after 12 March 2013. After an initial difficulty for the ET in meeting again, one of their number then died, and the focus turned to how matters should progress in the light of that event. Nobody seems to have picked up on the fact that no direction or order had gone out after 12 March 2013, and it may be that the way in which things had actually been left was then obscured when Mrs Thew sent in her documentation regardless of any specific direction.

40. Whilst I do not consider that ERA did much to help the situation - the heat generated in the correspondence emanating from ERA has done very little to assist in these proceedings - I

conclude that Mr Broomhead reasonably took the view that ERA was to wait for an indication as to whether the ET was minded to make an award of costs against it and, if so, directions would at that stage be given such as to enable it to have the opportunity, if it so chose, to disclose any relevant evidence as to its means.

41. Given my findings as to what took place, I take the view that this ground of appeal is made out. ERA was denied proper opportunity to put forward evidence as to its means, and to that extent, the ET's award of wasted costs against it is rendered unsafe.

Ground 2: Bias

42. Having reached my view on the facts relevant to the fair hearing ground of appeal, I turn to the facts relied on in support of the bias appeal. Again, for ease of reference, I take ERA's submissions into account as I address the evidence relevant to this question.

43. For its part, ERA says that almost everything that could go wrong did go wrong in this case and this background all has to be taken into account on the bias challenge. The relevant points in this regard are summarised by Mr Allen as follows: (1) the Costs Judgment was only sent to the parties six months after the hearing; (2) if ERA was correct on its first ground of appeal, that Judgment had been reached after a procedural unfairness; (3) it had, moreover, been reached by an ET panel that was different from the original panel: whilst that was nobody's fault, a question arose as to whether the ET was correct in then going on to determine the costs application with a substitute lay member who had not been present at the original hearing and without hearing on the point to be determined; (4) a further question arose as to how the parties were informed about this, the letter from the Regional Employment Judge failing to state, as it should have done (see **Rabahallah v BT plc** [2005] ICR 440 EAT), which

panel the deceased member had been drawn from; (5) the Costs Judgment required correction: the ET had even made an error in the identification of the party against whom the wasted costs order was made and then failed to properly make the necessary amendments in the corrected version of the Judgment; (6) there was then the failure of the ET to send out written Reasons for its decision on the recusal application; and then, (7) the response to the reconsideration request, although apparently completed in December 2013, was not sent to ERA until July 2014.

44. The main focus of ERA's case on the question of bias, however, arose from the Employment Judge's response to the EAT on the current appeal. Having been asked to respond to Mr Broomhead's affidavit, the Employment Judge volunteered the following observation, under the subheading "Paragraph 2" relating to Mr Broomhead's affidavit:

> **"Although Mr Broomhead describes himself as a volunteer, on 5 January 2012 [Employment Judge] Tucker found as fact, in another case, that Mr Broomhead had received payments from ERA, and did not accept the veracity of his explanation that it was a payment from two individuals to assist him with buying [Christmas] presents. He had initially given evidence that he was only in receipt of incapacity benefit. I was not aware of this at the time of the hearing of this case."**

45. At the request of the EAT the Employment Judge provided further clarification in respect of this comment, by note dated 28 November 2014, stating:

> **"1. I was totally unaware of the case heard by EJ Tucker at the time of the Hearing of this matter at any stage whilst the case was 'live'. After it was concluded, and I had dealt with the last matter i.e. the reconsideration, I discussed the case with Regional Employment Judge Monk. I cannot give a precise date for this but it would have been after December 4th 2013. There had been a number of administrative problems in the case, and we were discussing matters generally. She mentioned that EJ Tucker had ordered costs against Mr Broomhead in person.**
>
> **2. I then read EJ Tucker's judgment and discussed it with her very briefly in passing. My tribunal had never been asked to make a costs order against Mr Broomhead, and so the circumstances were totally different.**
>
> **I simply noted the finding made by EJ Tucker, and recalled it when I read Mr Broomhead's affidavit to the EAT in this case.**
>
> **3. As I was aware that a tribunal had made a finding of fact about Mr Broomhead's circumstances, which differed to that set out in his affidavit, and because I had been asked to comment on the affidavit, I felt I should refer to it. I discussed this with Regional Employment Judge Monk before sending my comments."**

46. For ERA, Mr Allen submitted this was evidence of the mask slipping. The Employment Judge was effectively saying to the EAT that Mr Broomhead was a liar. The point in question - whether or not Mr Broomhead was a volunteer - was not relevant to the issues on appeal and the conclusion had to be drawn that the information provided was designed to prejudice the EAT's view of ERA and/or Mr Broomhead. Although this matter was apparently not in the Employment Judge's mind before the actual decisions on costs, the fact that she felt she should tell the EAT about this evidenced apparent bias against Mr Broomhead and/or ERA. Taking that, together with all the other matters (including the submissions on the fair hearing ground), Mr Allen submits that I can properly read back (as the fair-minded and informed observer would) and see that a real possibility of bias arose such as to taint the costs decision.

47. On this ground the facts are not really in dispute. A number of things went wrong. Even if some of the events were outside anyone's control, the record shows (I put it neutrally) that this is not a model of how an ET case should proceed. Putting to one side at present the comment volunteered by the Employment Judge in the appeal proceedings, I do not consider, however, that the history of the proceedings would cause the informed and fair-minded observer to conclude that there was any possibility of bias. There is simply nothing to demonstrate that the procedural errors arose from anything other than genuine oversight; nothing to suggest any risk of animus towards ERA or Mr Broomhead. Even my finding on the first ground of appeal, which relates to the fair hearing concern, does not suggest anything such as would cause the fair-minded, informed observer to consider there was a possibility of bias.

48. I turn then to the Employment Judge's response to the EAT pursuant to my initial order in this matter. I agree with Mr Allen that it does seem to gratuitously volunteer a point of

peripheral relevance. The most that could be said is that it might go to Mr Broomhead's credibility when he sought to emphasise the limited means of ERA and his relationship with the organisation. It is, however, hard to see why the Employment Judge chose to include this information unless it was intended to prejudice how the EAT viewed Mr Broomhead and/or ERA. As such, it might seem to suggest that the Employment Judge was descending into the arena; if not seeking to influence the outcome of the appeal, then certainly encouraging the EAT to a particular view of Mr Broomhead's credibility.

49. Taking the part of the fair-minded observer, however, I can also allow that there might be other explanations for the inclusion of this material in the Employment Judge's response. Having come across the previous ET decision of Employment Judge Tucker, when faced with Mr Broomhead's assertion that he was a volunteer, the Employment Judge might have felt she was simply duty-bound to notify the EAT of that which she then knew, which suggested this might not be the whole picture.

50. Even if I felt the most likely explanation for the inclusion of this material was the first of those possibilities - the desire to influence the EAT in a way that showed a descent into the arena - I am now informed as to the timing of the Employment Judge's knowledge in this regard and I can see that it was some time after any relevant decision in this matter. Thus, as an informed observer - even adopting the approach most adverse to the Employment Judge - I cannot see any basis on which this would suggest to me that it evidenced the possibility of bias before the costs award, which is the subject of this appeal.

51. I ask myself whether my view in this regard changes if I then bring back into the picture all the other errors and mishaps that arose in this case. Doing so, I am quite clear that it does

not. The concern in respect of this comment is of a very different nature to any concerns that might arise in respect of the procedural history (even allowing for what I have found to be the ET's error leading to the denial of the opportunity for ERA to submit evidence on a relevant issue). I am satisfied that there is nothing in the bias appeal and I duly dismiss it.

Disposal

52. I therefore allow the appeal on the first, fair hearing, ground. That does not, however, bring matters to a close. My Judgment does not disturb the ET's conclusion that its wasted costs jurisdiction was engaged such as to make it appropriate for it to consider making such an award against ERA, albeit that the ET's Judgment still needs to be corrected in this regard to make sure the award is being considered against the correct entity. In the circumstances it seems to me that the appropriate course is for me to remit this matter to be considered by the ET as if matters fell, as least so far as the wasted costs application against ERA is concerned, to be considered after 12 March 2013. The view has already been taken that the ET is minded to make such an order. It is against this background that the ET charged with this matter on remission may wish to then give further directions as to what steps now need to be taken, which will need to include providing the opportunity for ERA to (within a specified period of time) adduce such evidence as to means as it wishes to rely on. Nothing I have said in this Judgment should lead any party to conclude that the ET would not be entitled to take precisely the same view as before as to the appropriateness of making an award of wasted costs against ERA or indeed as to the amount so awarded. Those two questions will be for the ET determining this matter on the remission.

53. The final question arises as to whether or not remission should be to the same ET. There would be an obvious advantage in its being the same ET given that at least two of its

members had originally heard the case below and it was the ET which reached the view that it was appropriate to make an award. That said, and having due regard to the guidance laid down in **Sinclair Roche Temperley v Heard and Fellows** [2004] IRLR 763 EAT, I do not consider it appropriate to make such a direction in this case. Whilst it may not have infected the original decision, the fact is that, on one view, the Employment Judge has subsequently been seen to descend into the arena. That does, in my judgment, change the position. In these circumstances, I can understand that ERA would consider that it would not get a fair hearing and I can see that the informed, objective observer would see that, for the future, a possibility of bias might arise. I therefore direct this matter is remitted to a differently constituted ET. It should, for consistency if nothing else, remain a three-member panel.

Costs

54. Having given my Judgment in this matter, ERA has made an application for costs pursuant to Rule 34A(2A), limited to the fees that it has had to pay in order to lodge and pursue this appeal. The application is made solely against the College; Mrs Thew having expressly not taken any part in these proceedings and not resisted the appeal.

55. In seeking to make good this application, Mr Allen has referred me to Judgments of the EAT in the cases of **Portnykh v Nomura International plc** UKEAT/0448/13/LA, a Judgment of HHJ Hand QC sitting alone, and **Horizon Security Services Ltd v Ndeze and PCS Group** UKEAT/ 0007/14/JOJ, a Judgment of mine made in June 2014. I have also drawn to Mr Allen's attention the subsequent Judgment of the President in the case of **Look Ahead Housing and Care Limited v Chetty and Eduah** UKEAT/0037/14/MC.

56. It seems to me that, drawing together such guidance as can be discerned from those cases, given the fees regime that now applies, the approach nowadays is to accept that, in a successful appeal, there may well be an award of costs under Rule 34A(2A).

57. That said, this is a court where still costs are not the rule and do not simply follow the event. The court is given a broad discretion under Rule 34A(2A) and can take into account a number of matters. Some of those matters are alluded to in the authorities I have cited above. One such matter might be any attempt made by the appealing party to avoid the necessity of a contested appeal, such as by asking for a reconsideration of the Judgment in question and/or approaching the other side to seek agreement as to how the appeal should be progressed.

58. In this case, ERA did indeed seek a reconsideration of the ET's Judgment, and cannot be criticised in that regard. Further, in correspondence which seems to have started on 17 November 2014 (that is, subsequent to the Rule 3(10) Hearing), it appears that ERA then approached those acting for the College seeking an agreement that the appeal be disposed of by consent in the following terms: "that the order for costs against Employment Rights Advice Ltd be set aside, and the application for costs be remitted to a differently constituted Employment Tribunal". For ERA, it is said that is precisely the outcome that it has ultimately obtained.

59. Moreover, I am told that ERA is an organisation which does not have substantial means; paying the requisite fees to pursue this appeal has put it under some strain.

60. Another relevant consideration is, however, as to how successful an appeal has been. If a party succeeds on only one aspect of an appeal, it might be relevant to have regard to that fact in determining whether an award of costs should be made under this provision or whether this

might go to the quantum of any such award. In the present case there were two aspects to the appeal: (1) the question of fair hearing, and (2) bias. On that second ground, ERA has been unsuccessful.

61. Moreover I take into account that the approach to those acting for the College (in which ERA sought to avoid the need for a full hearing of the appeal) was only made in November 2014. On any case ERA had already had to incur the lodgement fee of £400. The best it could seek to avoid at that later stage was the hearing fee of £1,200 (depending upon the actual terms of any settlement; the EAT would not simply allow an appeal by consent without some form of judicial consideration, see **EAT Practice Direction 2013** paragraph 18.3).

62. Noting that I have a wide discretion in this matter and seeking to do justice as best I can on this point, I duly allow the application for costs in respect of the fees incurred in part. The approach to the College was made late in the day at a time when the lodgement fee had already been incurred. As for the hearing fee, I have regard to the fact that ERA has been only successful on half of its appeal and was unsuccessful in its allegation of bias. I therefore allow the application in respect of 50% of the hearing fee. The hearing fee was £1,200 so that will be £600. I therefore make the award against the College of £600 costs.

63. Having given my decision on the application for costs Mr Allen seeks permission to appeal to the Court of Appeal on that point. Specifically, he contends that it is an error of law not to award ERA the full hearing fee as it is wrong to apportion the award in the way that I have done simply because one of the grounds was unsuccessful.

64. I refuse the application for the following reasons. First, the power to make a costs award under this provision leaves this matter very largely for the EAT's discretion. Given the discretionary nature of the power, any appeal would need to demonstrate that I had either taken into account an irrelevant factor; ignored a relevant factor; or reached a perverse decision. Mr Allen seeks to put the point as saying that it amounts to an error of law to adopt an approach which allows 50% of the costs when the appeal has been half successful. That does not strike me as meeting the right test: taking into account the failure of one of the two grounds of appeal is not an irrelevant factor and I do not consider it perverse. In those circumstances, I do not give permission. No doubt the question of the correct approach to this particular power will need to go to the Court of Appeal at some stage. I do not, however, consider there to be any compelling reason for it to be in this case.