Appeal No. UKEAT/0259/14/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 19 February 2015

Before

THE HONOURABLE MRS JUSTICE SIMLER

(SITTING ALONE)

MRS D M CHADBURN APPELLANT

(1) DONCASTER & BASSETLAW HOSPITAL NHS FOUNDATION TRUST
(2) MS J MANN RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS GEORGIA HICKS (of Counsel) Bar Pro Bono Scheme
For the Respondents	No appearance or representation by or on behalf of the Respondents

SUMMARY

PRACTICE AND PROCEDURE - Costs

1. Although reference was made to the possibility of a payment on divorce being available to discharge a costs award, it was not a material consideration in the decision to award costs which was principally based on the Claimant's age and the likelihood that she would earn sufficient in the rest of her working life to pay such an award.

2. Further, there was no error in the failure to reduce the costs award in light of the Claimant's more serious debt position, since no precise estimate of what was affordable had been made, and the award amounted to less than a third of the costs incurred by the Respondent in defending the unreasonably pursued, false claim of race discrimination.

3. Accordingly the appeal failed.

THE HONOURABLE MRS JUSTICE SIMLER

1. Mrs Chadburn unsuccessfully pursued a number of claims of unlawful discrimination against her former employer - the Doncaster and Bassetlaw Hospital NHS Foundation Trust - and a named Respondent. Importantly, the Tribunal that rejected those claims found that she had invented race discrimination allegations as a means of giving the Tribunal jurisdiction over her complaints of harassment. This was regarded by the Employment Tribunal sitting at Sheffield comprising Employment Judge Franey, Mr Firkin and Mr Fields as unreasonable conduct for the purposes of a costs application. This appeal seeks to challenge the costs award subsequently made by the same Tribunal of £10,000 against Mrs Chadburn.

2. The costs Judgment was promulgated on 15 November 2013, and by a Notice of Appeal dated 30 December 2013 lodged by Mrs Chadburn, whom I shall refer to as the Claimant, as she was before the Tribunal, permission to appeal that costs decision was sought. This was initially refused on paper, but at an oral hearing on 23 July 2014 Mitting J directed a full appeal hearing. One of the issues that particularly concerned him was a suggestion that the Tribunal did not take into account the full evidence about the Claimant's current means; so, it was at least arguable that the costs award was made on a false basis.

3. Following the hearing before Mitting J there was correspondence between the Claimant and the Employment Appeal Tribunal, including a letter dated 7 October 2014 in which the Claimant identified evidence she wished to have included in the Appeal Tribunal bundle but that had not been put before the Employment Tribunal. Subsequently the Claimant made an application to the Appeal Tribunal for admission of this additional evidence under paragraph 9.1 of the **EAT Practice Direction on Procedure 2013**. Following confirmation from

Employment Judge Franey that the documents sought to be admitted in evidence were not available to the Tribunal at the costs hearing, in November 2014 the Registrar stayed the appeal and invited the Claimant to apply to the Employment Tribunal for reconsideration on the basis of the documents contained in the supplementary bundle that had been lodged for the Full Hearing of this appeal.

4. By a further Judgment promulgated on 25 November 2014 Employment Judge Franey considered the application (dated 20 November 2014) for reconsideration of the costs Judgment. Although outside the time limit specified by the Rules the Employment Judge concluded that it was in the interests of justice to reconsider the costs Judgment, giving the application preliminary consideration under Rule 72(1) of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** as to whether there was any reasonable prospect of the Tribunal varying or revoking its decision on the basis of the new information. The Judge concluded that the core point raised by the new information is that the Claimant's debts were not £600 as the Tribunal thought (see paragraph 9.3 of the first costs Judgment) but £4,285 or something of that order. The Employment Judge accepted that the financial position advanced on behalf of the Claimant at the hearing was not therefore the full picture and that the true position was worse than had previously been recognised. Nevertheless, the Judge concluded that there was no reasonable prospect of the Tribunal varying or revoking its decision, even once made aware of the true figure for her debts. At paragraph 5 he observed as follows:

> **"… We had regard to the claimant's means, but the Rules do not limit any award to the amount which the paying party can currently afford. Our award was made in the full appreciation that the claimant could not currently afford to pay anything at all (costs reasons paragraph 25). The aspect of the claimant's means which weighed most heavily was the prospect that the claimant might at some point in the remainder of her working life be able to afford to pay an award of this size (costs reasons paragraph 26). The respondent can make some recovery of costs if and when that occurs. The new information does not give rise to any reasonable prospect of the Tribunal taking a different view of that likely future ability to pay. It might at best be thought to likely to delay the date from which the claimant becomes able to satisfy the award we made, but when, and at what rate, the award is paid is a matter for the County Court in enforcement proceedings if not agreed between the parties."**

5. Consequently, the Employment Judge refused the application for reconsideration.

6. The current position is that the Claimant seeks to appeal both the original costs Judgment and the refusal to reconsider that Judgment. Two grounds of appeal are advanced:

> (i) The Employment Tribunal took into account a speculative factor as to which it had no evidence, namely the likelihood that the Claimant's husband would on divorce be required to make financial provision for her. The marriage was very short and childless, and there was no evidence as to his means.
>
> (ii) The Employment Tribunal was perverse or failed to take into account a material consideration in that upon reconsideration of the Claimant's true debt, which was £4,285-odd and not £600, it concluded that that made no difference to a costs award of £10,000.

The appeal is accordingly confined to the second stage of the Tribunal's reasoning and conclusions and does not seek to challenge in any way the conclusion that there was unreasonable conduct that gave the Tribunal jurisdiction to make an award of costs in this case.

7. On this appeal the Claimant is represented under the Pro Bono Scheme by Ms Georgia Hicks of counsel, who has made helpful, focused submissions on her behalf, both in writing and orally. The Respondents have not appeared but have submitted a Skeleton Argument setting out the basis for their opposition to the appeal.

Legal Principles

8. The relevant legal framework is as follows. Rule 76 of the **Rules** provides:

> **"(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that -**
>
> > **(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted …"**

9. Rule 78 deals with the amount of a costs order, providing for assessment by the Tribunal of a specified amount up to £20,000 or, alternatively, an order requiring the paying party to pay the receiving party the whole or a specified part of the costs with an order for the amount to be paid to be determined either on detailed assessment by the County Court or by an Employment Judge applying the same principles as would a Judge in the County Court. Rule 84 provides that in deciding whether to make a costs order - and if so, in what amount - the Tribunal may have regard to the paying party's ability to pay. Accordingly, there is a two-stage exercise. At the first stage, the Tribunal must determine whether the paying party has acted unreasonably as a gateway to any order for costs. If satisfied that there has been unreasonable conduct, at the second stage the Tribunal is required to consider whether to make a costs order but has a discretion in that regard, and may decide not to do so.

10. The applicable principles identified by Ms Hicks in writing and developed orally in relation to the exercise of the Tribunal's discretion in this area are well established, but it is convenient to summarise them as follows:

> (i) Tribunals have a broad discretion in making any award of costs. That discretion must nevertheless be exercised judicially, and reasons ought to be given. The broad discretion means that appeals against costs orders will rarely succeed, and such an appeal is doomed to failure unless it is established that the order is vitiated by an error of legal principle or that the order took into account irrelevant considerations, failed to take into account material considerations or was perverse.
>
> (ii) It is not necessary for a Tribunal to identify a precise causal link between a party's unreasonable conduct as found and the specific costs claimed by the receiving party. Causation is not, however, irrelevant, and the totality of the relevant circumstances should be considered, including, where appropriate, the

nature, gravity and effect of the conduct looked at in the round. As Mummery P (as he then was) said in **Yerrakalva v Barnsley Metropolitan Borough Council** [2012] ICR 420 at paragraph 41:

> **"The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. The main thrust of the passages cited above from my judgment in *McPherson* [*v BNP Paribas (London)* [2004] IRLR 558] … was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the employment tribunal had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances."**

(iii) Costs are intended to be compensatory and not punitive.

(iv) Rule 84 makes clear that the means of a paying party in any costs award may be considered twice. First, in considering whether to make an award of costs the Tribunal may take into account the paying party's ability to pay. Secondly, if an award is to be made, it may take ability to pay into account in deciding how much should be awarded. If means are not to be taken into account, it is desirable that the Tribunal explain why that is the case. Where means are taken into account, the Tribunal should set out its findings about ability to pay, identifying broadly what impact that has had on its decision, whether or not to make an award of costs or as to the amount and explaining why, albeit that this can be done briefly and succinctly: **Jilley v Birmingham and Solihull Mental Health NHS Trust** UKEAT/0584/06 (HHJ Richardson at [4]).

(v) The fact that a party's ability to pay is limited does not oblige a Tribunal to limit the amount of costs ordered to a sum that can be paid either at the time of the order or within some specified timescale. However, there must be "a realistic prospect that the Appellant might at some point in the future be able to afford to pay"; see **Arrowsmith v Nottingham Trent University** [2012] ICR 159 and **Vaughan v**

London Borough of Lewisham [2013] IRLR 713 [28]. In both cases awards were made that were of significantly higher sums than the paying party was able to pay. In both cases the courts held that even an extremely limited ability to pay did not require the Tribunal to assess a sum that was confined to an amount that the paying party could pay. As Rimer LJ expressed it in **Arrowsmith**, where the Claimant was on maternity benefits, unemployed and about to make a further application for additional benefits, "her circumstances may well improve, and no doubt she hopes that they will".

The Costs Judgment and Reconsideration

11. Against that background I turn to consider the costs Judgment in this case. The Tribunal recognised that there was a two-stage process and dealt with the first stage (whether the power to award costs had arisen) at paragraphs 19 to 22, concluding the Claimant was guilty of unreasonable conduct in inventing allegations of race discrimination, she knew to be misconceived, albeit that her unfair-dismissal claim was tenable and reasonably pursued. There is no challenge, as I have indicated, to the findings made there.

12. At paragraph 24 the Tribunal considered the broad effect of the unreasonable and false allegations of race discrimination, concluding that:

> **"… The broad effect was that the scope of the case was hugely expanded from what would have been a significant but relatively constrained unfair dismissal claim. The hearing was at least twice as long as it would have been had it been an unfair dismissal claim only and Mr Webster was right, we concluded, to submit that the witnesses who were the Claimant's colleagues and immediate line managers would almost certainly not have been needed to give evidence had it been an unfair dismissal claim alone. Consequently we concluded that the Claimant's false allegations of race discrimination had put the First Respondent to significant additional cost, albeit not the whole of the figure excluding VAT of approximately £72,500.00. A good proportion of that must have been attributable to the unfair dismissal claim."**

13. At paragraph 25 the Tribunal held that the main factor militating against an award of costs was the Claimant's means and her current inability to pay an award. At paragraph 26 the Tribunal considered the possibility of an award being satisfied in future. It held as follows:

> **"… we took into account that the Claimant is 39 at present and has plenty of working years left to her. One hopes that when these Tribunal proceedings are finally concluded, she will have an opportunity to recover her health and return to earning. Further, any future divorce proceedings might impact positively upon her financial position. Therefore, we found it likely that, at some point, the Claimant's financial position will improve beyond the rather dire straits in which she finds herself at present."**

14. It is apparent, accordingly, that the Tribunal's starting point was that something in the order of £35,000 had been incurred by reference to the unreasonable conduct of the Claimant in pursuing a false claim. Nevertheless, the Tribunal took into account the Claimant's means, and, recognising that the Claimant had no ability to pay currently but concluding that she was likely at some point in the future to be in a position where her financial position had improved, it reached the conclusion that some form of costs order was appropriate. It decided that a detailed assessment of a sum greater than £20,000 was not realistic in the circumstances but concluded that a summary assessment of part of the costs was appropriate, and (paragraph 28):

> **"Balancing the substantial additional costs incurred by the First Respondent in defending the false race discrimination allegations against the Claimant's current financial position, and the prospect that there will be an improvement in her financial position in due course, we concluded in the round that the appropriate award of costs was £10,000.00."**

15. In refusing the reconsideration application, at paragraph 5 the Employment Judge held that the knowledge of the true financial position of the Claimant could not have altered the Tribunal's decision. In particular it held:

> **"… Our award was made in the full appreciation that the claimant could not currently afford to pay anything at all …"**

The Grounds of Appeal

16. The first ground of appeal involves a challenge to the conclusion that at some point the Claimant's financial position will improve beyond the dire straits in which she finds herself at

present, are even worse than had originally appeared. Ms Hicks submits that there was no evidence on which to base that assumption, which she contends was primarily or at least 50 per cent based on the prospects of divorce proceedings impacting positively on the Claimant's financial position. Ms Hicks points firstly to the Tribunal's own finding that the Claimant was not in a position financially to go through divorce proceedings, and secondly, even if she could afford divorce proceedings, there was no evidence as to her separated husband's means, assets, salary, debts or pension. Although both the Claimant and Mr Khamis gave evidence, neither was asked any questions about this. Moreover, at paragraph 9.4 the Tribunal found that Mr Khamis was making no financial contribution to support the Claimant. This was a childless and short-lived marriage in any event. In short, Ms Hicks submits that there was no evidence as to what if any ancillary relief the Claimant might expect to receive so that the basis for the award of costs here was an entirely speculative divorce settlement.

17. In considering this argument it is necessary first to consider the materiality of a future divorce settlement to the Tribunal's decision. In my judgment paragraph 26 of the costs Judgment indicates that the principal matter relied on by the Tribunal in concluding that the Claimant's financial position was likely to improve in the future was the fact that she is only 39 and had plenty of working years left in her. The Tribunal expressed the hope and, one might add, the expectation in those circumstances that once the Tribunal proceedings had finally concluded she would have an opportunity to recover her health and return to earning. In addition the Tribunal identified the possibility that future divorce proceedings might impact positively upon her financial position; the Tribunal put it no higher than this, and it is clear in those circumstances that this was not the only basis, nor even an equally important basis, upon which the Tribunal's reasoning and ultimate conclusion was or could be justified. That reading of paragraph 26 is confirmed by the reconsideration Decision at paragraph 5, in which the

Employment Judge made clear that the fact that weighed most heavily was the prospect that the Claimant might be able to afford to pay an award of costs at some point in the remainder of her working life.

18. Ms Hicks submitted that paragraph 5 of the reconsideration takes the position no further and refers both to a return to employment and to the divorce settlement. I disagree. The word "working" demonstrates that this is a reference to future earning prospects and not to any divorce settlement. The reality of the Claimant's age and the prospect of her returning to work in the future were matters that the Tribunal was plainly entitled to have regard to. They have not been challenged on this appeal. They involve a certain amount of speculation about future events about which there can be no certainty, but that is inevitable in an exercise of the kind with which the Tribunal was concerned and gives rise to no error of law. There was no positive evidence to the effect that the Claimant had no realistic prospects of obtaining employment ever again in future or of improving her financial position as a consequence. She is only 39, after all. On that basis alone, in my judgment, the Tribunal was entitled to conclude that there was a realistic possibility of an improvement in the Claimant's financial position in future such as to justify an award of costs here.

19. Even if a divorce settlement was not a matter that the Tribunal was entitled to consider at all, absent the detailed information identified by Ms Hicks, it does not follow, accordingly, that this appeal must be allowed. Since I am satisfied that the Tribunal was entitled to reach its conclusion irrespective of the possibility of future divorce proceedings impacting positively on her future financial position, it follows that this consideration had no material impact on the outcome of the case.

20. So far as ground 2 is concerned, Ms Hicks contends that in taking into account her means to pay an award the Tribunal initially concluded that her financial situation was dire based on a debt position of £600 and concluded accordingly that an award of £10,000 costs was reasonable. Having regard to her true debt of £4,800-odd, it follows that the award of costs should have been lower, and to conclude that the true debt position made no difference amounted to a failure to take account of a material consideration.

21. The Tribunal was not obliged to have regard to the Claimant's means at all in deciding to make an award of costs. Nevertheless, Ms Hicks is right to say that it decided to do so and in doing so was required to act judicially in exercising its discretion. However as Underhill J said in **Vaughan**:

> **"28. … even though the tribunal thought it right to 'have regard to' the appellant's means that did not require it to make a firm finding as to the maximum it believed she could pay, either forthwith or within some specified timescale, and to limit the award to that amount. That is not what the rule says (and it would be particularly surprising if it were the case, given that there is no absolute obligation to have regard to means at all). …"**

22. As was said in **Vaughan**, there is no reason why the question of affordability has to be decided once and for all by reference to the party's means as at the moment the order falls to be made. Indeed, as Underhill J observed, until the **2004 Rules** Tribunals were positively prohibited from taking into account the means of the paying party in dealing with costs awards at all. The award made by the Tribunal here is limited to £10,000. The Tribunal formed the view that there was a realistic prospect that in future the Claimant would return to employment and thus be in a position to make a payment of those costs. Given that affordability is not the only criterion for the exercise of discretion, nor does the Tribunal's Decision suggest it was regarded as the only criterion; and given that nothing in the **Rules** require a precise estimate of what can be afforded, nor did the Tribunal make any such precise estimate, I am unable to

conclude that the Tribunal failed to take account of a material consideration in affirming the costs award of £10,000 even with knowledge of the Claimant's greater debt liability.

23. The Respondents' costs of the race discrimination aspect of this case amounted to £35,000, and the award, accordingly, amounted to less than a one-third contribution toward those costs. I accept that represents a significant liability for the Claimant, but the Respondents have been required to defend vexatious, false allegations she knew to be untrue, which had the effect of doubling the length of the hearing, significantly expanding the issues and involving witnesses who would otherwise not have needed to be involved in the Tribunal proceedings at all. There could, in those circumstances, be nothing wrong in principle in the Tribunal making a broad-brush assessment of the limit of the award of costs at a level that would give the Respondents the benefit of the doubt as to the Claimant's future ability to pay but having recognised that at the current time she was in no position to pay and had significant debts.

24. In the result, despite the attractive way in which the case was presented by Ms Hicks, I have concluded that the Tribunal's Decisions cannot be impugned as in error of law in either of the respects contended for on behalf of the Claimant. For those reasons, the appeal is accordingly dismissed.