Appeal No. UKEAT/0370/14/LA
UKEAT/0371/14/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 17 February 2015

Before

THE HONOURABLE MRS JUSTICE SIMLER

(SITTING ALONE)

MRS M ONI — APPELLANT

UNISON — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR O ONI (Representative)
For the Respondent	MR ANDREW SMITH (of Counsel) Instructed by: Leigh Day Solicitors Priory House 25 St Johns Lane London EC1M 4LB

SUMMARY

PRACTICE AND PROCEDURE - Costs

The Tribunal erred in law in assuming that once it had been established that there was unreasonable conduct in persisting with proceedings following a deposit order, a costs order should follow subject only to considering means. Even where unreasonable conduct has been found, a Tribunal has discretion as to whether costs should be awarded, and if so, in what amount, and must consider all relevant circumstances in exercising that discretion.

The question whether costs should be awarded and if so in what amount involved the exercise of discretion and, inherently therefore, a range of possible outcomes. There was not "only one outcome" and accordingly the Employment Appeal Tribunal had no jurisdiction to determine this issue absent agreement from both parties.

Although unusual, given a number of matters referred to in the Tribunal's Reasons that led to the conclusion that there was insufficient confidence that the Tribunal was not so committed to its decision that a rethink was likely, the matter would be remitted to a differently constituted Tribunal.

THE HONOURABLE MRS JUSTICE SIMLER

Introduction

1. This is an appeal against the decision of an Employment Tribunal sitting in Nottingham on 20 February 2014, presided over by Employment Judge Britton, with a written Judgment promulgated on 3 March 2014. The Tribunal ordered the Appellant, who I shall refer to as the Claimant, to pay the whole of the Respondent's costs of the action, to be subject to a detailed assessment by the county court. The Claimant had unsuccessfully pursued a number of claims against the Respondent, some of which had been struck out at a Preliminary Hearing in October 2011, and the remainder of which were dismissed following a final hearing on 8 August 2012 and 10 and 11 December 2012, having earlier been made the subject of a deposit order.

2. The appeal, as originally presented, sought to raise a number of separate challenges to the Tribunal's Decision. At a Rule 3(10) Hearing I allowed one only of those grounds to go forward, namely that the Tribunal failed to recognise and address the fact that it had a wide discretion, despite the unreasonable conduct that had been found, either not to make any award of costs at all or alternatively to make a costs award that was proportionate in the circumstances; and further, to send the matter for a detailed assessment to the county court without considering sending it to a Tribunal, as could have been done, supports the argument that the Tribunal did not exercise any real discretion in this case.

3. By letter dated 4 December 2014, sent by e-mail to the Appeal Tribunal from Leigh Day and copied to the Claimant, the Respondent informed the Appeal Tribunal that the parties had been unable to agree an order following that limited grant of permission despite having tried to do so. In the circumstances it was suggested on behalf of the Respondent that the appropriate

way forward would be for the Appeal Tribunal to allow the appeal and to remit the matter back to the Britton Tribunal (as I shall call it) for a decision on whether the Britton Tribunal, having found that there was unreasonable conduct by the Claimant, should exercise its discretion to make an order for costs and, if so, in what amount.

4. This hearing has accordingly focussed on the consequences of allowing the appeal rather than on the substantive appeal itself. Mr Oni has appeared on behalf of his wife, the Claimant, and Andrew Smith of Counsel has appeared on behalf of the Respondent, Unison, and made submissions consistently with the position realistically adopted in the letter of 4 December 2014.

5. It is unnecessary, in the circumstances, to deal in detail with the underlying facts that led to the conclusion that the Claimant was guilty of unreasonable conduct within the meaning of the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013**, Schedule 1 ("the Rules"). These are not in issue on this appeal.

The Costs Judgment

6. Following a substantive hearing in which the Britton Tribunal dismissed the Claimant's claims against Unison, Unison sought its costs. In the Costs Judgment the Tribunal directed itself at paragraph 13 that the first and principal issue for determination was whether, following the making of an earlier deposit order by Employment Judge Rogerson, the Tribunal had at any stage decided the specific allegation or argument against the Claimant for substantially the reasons given in the deposit order (see Rule 39(5)). If the Tribunal reached the conclusion that it had made a decision for substantially the reasons given in the deposit order that would lead to the conclusion that the Claimant had acted unreasonably in pursuing the proceedings for the

purposes of Rule 76 unless she could prove the contrary. In other words there would be a presumption that she had behaved unreasonably for the purposes of that Rule unless and until that presumption was displaced.

7. At paragraph 14 the Tribunal went on to say this:

> **"Therefore if our adjudication covered the same findings territory as EJ Rogerson's reasons for making the deposit order, it would follow that pursuant to Rule 76 the Claimant would therefore be treated as having acted unreasonably and it is for the Claimant to show us to the contrary: if he does not, then we shall make a costs order subject to our discretion to consider rule 84 in terms of ability to pay …"**

8. Having given itself that direction the Tribunal went on to consider and to compare the terms of Judge Rogerson's Judgment and, in particular, paragraph 6.5 and its own findings at the substantive hearing. Having carried out that comparison the Tribunal concluded that the reasons it rejected the Claimant's claims against Mrs McGregor and Unison were substantially the same reasons as those given for making the deposit order. It considered whether the Claimant had persuaded it that the presumption that she had therefore acted otherwise unreasonably should not apply. Paragraphs 24 to 26 it dealt with the arguments advanced on the Claimant's behalf by Mr Oni, who appeared there on her behalf, concluding:

> **"… Mr Oni has not established to us any convincing contrary argument that goes against the otherwise consequences of the deposit order. Thus it follows that the Claimant "has otherwise acted unreasonably"."**

9. That conclusion having been reached, the Tribunal went on immediately to say at paragraph 27:

> **"Left is Rule 84 of the Rules.**
>
> > **"In deciding whether to make the costs order … and if so in what amount, the Tribunal may have regard to the paying party's … ability to pay"."**

10. The Tribunal then proceeded to consider the Claimant's means at paragraphs 28 and 29. At paragraph 30 the Tribunal said:

> **"What it means that even allowing for mortgages, we therefore do not find that the possible assets of Mr Oni and his wife in one shape or form mean that we should not make a costs order."**

At paragraph 31 the Tribunal referred to the length of the hearing, the amount of costs sought not appearing unreasonable and said that, as the costs exceed the £20,000 limit on the Tribunal's powers of assessment, a detailed assessment by a county court should be directed, and the Claimant was ordered to pay the whole of the costs of the Respondent subject to assessment in consequence.

11. It is clear that the Tribunal accordingly went directly from finding that Mrs Oni had behaved unreasonably to a decision as to whether to make a costs order by reference only to means and as to what amount. What the Tribunal did not do, expressly or by implication, is to consider whether, despite the unreasonable behaviour of the Claimant, it was appropriate and proportionate to make the costs order sought leaving aside means but by reference to all the circumstances of the case.

The relevant legal principles

12. The relevant legal framework is as follows. Rule 39(5) of the **Rules** provides:

> **"(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order -**
>
> > **(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown …"**

Rule 76 provides:

> **"(1) A Tribunal may make a costs 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 …"**

Rule 78 deals with the amount of a costs order providing for assessment by the Tribunal of a specified amount up to £20,000 and at (b) that it may order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party with the amount to be paid to be determined by way of detailed assessment carried out either by a county court or an Employment Judge applying the same principles.

13. 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.

14. Accordingly it is clear that Rule 76 imposes a two-stage exercise. At the first stage the Tribunal must determine whether the paying party has acted unreasonably or in any other way such as to invoke the jurisdiction to make an order for costs. If satisfied that there has been unreasonable or other relevant conduct at that stage, the second stage is engaged. At the second stage the Tribunal is required to consider making a costs order but has a discretion whether or not to do so.

15. There are a number of authorities that deal with that second stage exercise, and a number of principles have been identified in those authorities, as Mr Smith helpfully described in his Skeleton Argument without contradiction from Mr Oni.

16. First in **Vaughan v London Borough of Lewisham** UKEAT/0534/12/SM Underhill J, (as he then was) observed that it is tempting for tribunals to treat costs orders as merely ancillary and as not requiring the same detailed reasons as more substantive issues. The difficulty with that approach is that costs orders can be substantial and can create a significant liability for a paying party. Accordingly they warrant appropriately detailed and reasoned consideration and conclusion. Secondly, costs are compensatory and not punitive. Thirdly, the fact that a party is unrepresented is a relevant consideration. The threshold tests may be the same whether a party is represented or not, but the application of those tests should take account of whether a litigant has been professionally represented or not. As HHJ Richardson observed in **AQ Ltd v Holden** [2012] IRLR 648, (followed with approval in **Vaughan**) a tribunal cannot and should not judge a litigant in person by the same standards as a professional representative. Lay people may lack the objectivity of law and practice brought to bear by a professional advisor, and this is a relevant factor that should be considered by the tribunal even if the threshold of unreasonable conduct is crossed when deciding, in light of all the circumstances, whether to make a costs order and, if so, how much.

17. Fourthly, as Rule 84 makes clear, the means of a paying party in any costs award may be considered twice: first, in considering whether to make an award of costs; secondly, if an award is to be made in deciding how much should be awarded. There is no obligation on a tribunal to take ability to pay into account, although this Appeal Tribunal has commented about the desirability of taking means into account before making an order, in **Jilley v Birmingham and Solihull Mental Health NHS Trust** UKEAT/0584/06 and UKEAT/0155/07 in particular. Whether or not ability to pay is a factor in a tribunal's decision, reasons for whichever approach is adopted should be given, particularly where means are not taken into account. As HHJ Richardson said in **Jilley**, if means are to be taken into account, the tribunal should set out its

findings about ability to pay, say what impact this has had on its decision whether to award costs or on the amount of costs, and explain why, recognising that that can be done briefly and succinctly.

18. So far as means are concerned, a paying party's means are not restricted to income, but may include capital: for example, the individual's share of a matrimonial home. But importantly the fact that a party's ability to pay is limited does not oblige a tribunal to limit the amount of a costs order to a sum that can be paid presently or within a specified timescale. If there is a realistic prospect that a claimant might at some point in the future have the ability to pay a costs order, it would be legitimate to make a costs order in that amount so that the respondent could make some recovery when and if that occurred: see **Vaughan v Lewisham BC**.

19. Fifthly, there is no requirement that the costs awarded must be found to have been caused by or attributable to the unreasonable conduct found though causation is not irrelevant. What is required is for the tribunal to look at the whole picture of what happened in the case and to identify the conduct; what was unreasonable about the conduct and its gravity, and what effects that unreasonable conduct had on the proceedings: see **Yerraklava v Barnsley MBC** [2012] IRLR 78 at paragraph 41.

20. That leads, sixthly, to the broad discretion a tribunal has in making an award of costs. But however wide or broad that discretion is, nevertheless it must be exercised judicially and reasons ought to be given. That 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 was not based on the relevant circumstances.

Conclusion on the appeal

21. Against that background I am quite satisfied that no criticism or challenge can be made of the Employment Tribunal's finding of unreasonable conduct by the Claimant in this case. Nor has Mr Oni suggested that there could be any justifiable criticism or challenge. That finding gave the Tribunal jurisdiction to make an order for costs. The real question on this appeal, and the only question on which the Claimant has permission to challenge the decision, is whether there was an error of law in the Employment Tribunal decision to order the Claimant to pay 100% of those costs. So far as that is concerned, I am satisfied, in agreement with the points raised on her behalf by Mr Oni, that there is an error of law in the Tribunal's Costs Judgment and that the costs order made cannot stand.

22. Having held correctly that it had jurisdiction to make a costs order, the Tribunal failed to consider the discretion it had pursuant to Rule 76 at the second stage, whether or not to make a costs order having regard to all the circumstances. The Tribunal's Reasons read fairly and as a whole, make clear that it proceeded on an assumption that costs should be ordered subject only to the question of the Claimant's means. That is an error of law. At the second stage the Tribunal had a discretion whether or not to order costs and, if so, in what amount. It had a discretion whether to have regard to the Claimant's means. If it thought it right to consider her means that would involve looking at the prospects of her being able to pay costs, and if so in what amount. Proportionality would be a factor in that exercise, and there are other factors identified by Mr Oni on her behalf that may also require consideration. Moreover, in determining the amount of costs that should be awarded, the Tribunal should give consideration

to the possibility of a detailed assessment, to be carried out by an Employment Judge rather than a county court, as identified in Rule 78.

The scope of the further consideration

23. In the circumstances, in my judgment, this appeal must be allowed and there will have to be further consideration of the question of costs. Before addressing how that further consideration should take place, it is important to clarify for the benefit of another Judge tasked with dealing with this application what the terms of any such further consideration should be. It is not and would not be open to the Claimant before a future Tribunal of any sort to revisit the Tribunal's finding that the gateway for an award of costs has been satisfied, on the basis that the Claimant acted unreasonably in pursuing her claims following the making of a deposit order for the purposes of Rule 76. The Tribunal's further conclusions that the claims had no prospect of success (see paragraph 25) and that the Claimant ignored the Respondent's costs warnings and pressed on with what was really a hopeless case despite the making of a deposit order, and the costs implications set out in the accompanying notice are also valid and binding (see paragraph 26) and it would not be open to the Claimant to seek to go behind them at any future hearing.

24. The two questions open for reconsideration are, accordingly, limited to the following: (i) whether it is appropriate in all the circumstances to make a costs order against the Claimant; and (ii) if so, what form that order should take: for example, whether it should be an order that the Claimant pay the whole of the Respondent's costs of the proceedings with the amount to be paid determined by way of detailed assessment, either by an Employment Judge or the county court; or whether there should be an order that a specified part only of the Respondent's costs of the proceedings should be paid, again with the amount to be paid determined by way of

detailed assessment as before, or whether there should be an order for a specified amount not exceeding £20,000.

Who should deal with the reconsideration?

25. Having dealt with the questions that will have to be considered in future, there is a dispute between the parties as to who should deal with the reconsideration. Mr Smith contends that the proper (and obvious) course of action in these circumstances is for the Appeal Tribunal to remit the question of costs to the Tribunal comprising Employment Judge Britton and members. Mr Oni strongly disagrees. In a careful and cogent submission he urged that the EAT should itself deal with the question of costs which would be proportionate, cost-effective and would avoid delay. His alternative submission is that the matter should be remitted to a different Employment Tribunal rather than to the Britton Tribunal to decide these questions in future.

26. Taking these points in turn and addressing first the question whether this Appeal Tribunal can exercise the costs jurisdiction here, I have been reminded of the principles in **Jafri v Lincoln College** [2014] IRLR 544 as recently reaffirmed in **Burrell v Micheldever Tyre Services Ltd** [2014] EWCA Civ 716. There the Court of Appeal made clear that the EAT is not entitled to make a factual assessment for itself. It is only entitled to substitute its own decision where that decision necessarily flows from the findings made by a Tribunal as supplemented by either undisputed or indisputable facts.

27. The question is whether this is such a case. If not, it is possible for parties to appeals to consent to the EAT disposing of an issue pursuant to its powers under section 35(1)(a) of the **Employment Tribunals Act 1996** even where the EAT does not consider that the appeal

before it is an "only one outcome" case. In this appeal, the Respondent does not agree to the EAT itself disposing of the question of costs, largely because the point was only raised very recently and the Respondent has not come prepared to address it. Accordingly the EAT has no jurisdiction to determine the question of costs unless only one answer is possible, namely that there should be no order for costs in the circumstances of this case.

The Claimant's argument that the EAT should determine the costs questions

28. In seeking to persuade me that I do have the necessary jurisdiction because only one answer is possible in relation to costs, Mr Oni relied on three broad factors: firstly, relevance factors; secondly, personal circumstances factors; and thirdly, the question of retrospective effect. I deal with each briefly in turn.

29. So far as relevance is concerned, Mr Oni submits that there is no need for a precise causal link between the unreasonable conduct and the costs that are awarded, which is of course correct. He submits, nevertheless, that a tribunal should have regard to the nature of the unreasonable conduct, its gravity, and its effect on the proceedings. The starting point, he submits, is the Pre-Hearing Review, at which only half the picture emerged of what had happened that led to the litigation between the Claimant and her union, that half picture emerging because there was no evidence at that stage from the Respondent. He submits that two critical issues were left unresolved following the Pre-Hearing Review: the first relating to the conversation between Mrs McGregor and Mr Kotecha, whether it occurred and to what end; and secondly, in relation to the leaking by Mrs McGregor of a personal letter between her and her union. Mr Oni submits that, although the Tribunal made a deposit order at that stage, without understanding what the response was and what the Respondent's evidence was in

relation to those points of real concern to the Claimant, a Full Hearing was inevitable since the Pre-Hearing Review could reach no conclusion.

30. Whilst he accepts that the Claimant could have decided not to pursue a claim at all at that stage, he urges a realistic consideration of the context. The Claimant had been a member of the union for 40 years. She had paid her dues, and was entitled to expect the union to honour its side of the bargain by promoting its members' interests including her own. The union had promised to provide a minimum guaranteed standard of advice, representation and service and it was because Mrs McGregor failed in her promise that the Claimant raised her concerns. It was only because this failed to elicit a satisfactory response from the union that she went to the Tribunal in the first place. Moreover the effect of her conduct on the case was a relevant consideration. In total Mr Oni submits there were two hearings, lasting a total of four days. The Pre-Hearing Review lasted a day and led to a partially successful strike-out. The Full Hearing was spent at least in part hearing evidence from Mrs McGregor, who had made statements that were factually inaccurate and required exploration. The same point is true of Mrs McKenna's position. That, he contends, is relevant context when looking at the Claimant's unreasonable conduct, its gravity and its effect on the proceedings.

31. I agree that these are relevant factors and may well be persuasive when a tribunal comes to consider the question of costs, but they are fact-sensitive and necessarily involve a factual assessment. Their consideration is not capable of only one outcome since a proportionate costs order may equally follow.

32. The second category of factors is personal circumstances. Two points are relied on by Mr Oni. First the fact that his wife was a litigant in person. I have already indicated that this is

an obviously relevant factor and I agree that it is a factor here. He says (persuasively, in my judgment) that, having made a deposit order, the Claimant as a litigant in person was required to predict what a tribunal might decide on the balance of probabilities and on the basis of the information she had available to her. That information included her knowledge that Mrs McGregor had spoken to Mr Kotecha, contrary to what was said in her witness statement, that Mrs McGregor had disclosed a personal letter to the Respondent, and she reasonably regarded those acts as appearing to violate rules governing the relationship between the Claimant and her union / Mrs McGregor. Looked at in this way, Mr Oni submits, the decision to pursue the claim despite the deposit order was not an unreasonable one.

33. Moreover he relies also on Mrs Oni's ill-health. She was, as the Rogerson Tribunal found, suffering from depression. She has been significantly unwell and has been on medication. He submits that it is well known and well established that depression affects concentration and intellectual functioning. It may cause difficulties with decision making. Depressed patients, Mr Oni submits, make decisions that are less likely to further their interests and may in fact be adverse to their interests. That is so even where they are advised and supported by others.

34. Again, I agree that these 'personal circumstances' factors are capable of being considered and may well be regarded as relevant to any decision as to whether to order costs and, if so, how much. But again, I cannot conclude that they lead to only one outcome. Again they are fact-sensitive and require careful evaluation and assessment.

35. The third factor relied on by Mr Oni, albeit somewhat hesitantly (because he accepts it may not be a good point after all) is that Rule 39(5) was not in force at the time the Claimant

made her decision to pursue these proceedings beyond the costs order in 2011. He submits that the rule change that led to the introduction of Rule 39(5) involves a retrospective application of a law that did not exist and a breach, in effect, of Article 7 of the **European Convention on Human Rights**.

36. I do not accept that argument. Rule 39(5) had a predecessor rule in the **2004 Rules** and it was on the basis of the **2004 Rules** that a deposit order was made. Although the deposit order does not itself identify the costs consequences that could flow from that order, the Respondent's solicitors wrote to the Claimant by letter dated 31 July 2012, making express reference to the deposit order and to the relevant Rules in the **2004 Regulations** and setting out the costs consequences to the Claimant if she continued with the case and was unsuccessful, as they envisaged she would be. In those circumstances it seems to me that there is little by way of substantive change between old Rule 40(7)(1) and Rule 39(5) of the current **Rules**.

37. In the end these points, apart from the last one about retrospective application which I have rejected, are points that can properly be made by Mr Oni to the Tribunal that ultimately deals with the questions on remission. But what they do not do is afford a basis for concluding that the costs application must inevitably be dismissed altogether. Once the gateway for making an award of costs is established, the Tribunal has discretion to make an award. It is inherent in the exercise of that discretion that a range of possible outcomes can be reached. Even if I concluded that one or all of the factors relied on by Mr Oni was overwhelming, and even if I take his points at their highest, as I do in assessing this argument, I cannot conclude that no tribunal directing itself properly could make an award of costs here. That means that the EAT does not have jurisdiction to determine the questions that will now have to be dealt with on remission.

Remit to Britton Tribunal or a differently constituted Tribunal?

38. That leaves the dispute as to whether it should be the Britton Tribunal or a different Employment Tribunal that deals with those further questions. I have found this a most difficult question to decide. I start from the position that since remission involves an assessment of whether costs should be awarded and if so how much, the Tribunal that dealt with liability should be the costs Tribunal determining these questions. Moreover factors of proportionality favour that result. As Mr Smith submitted and I agree, Employment Judge Britton is familiar with the complex history of this litigation and would be in a better position in that sense to conduct a remitted costs hearing in the most efficient and cost-effective manner possible. A hearing before Judge Britton may be shorter, and there may be a saving of time and expense accordingly. I do not consider that the passage of time militates against that approach. This was a four-day liability hearing. The facts are quite unusual, and I would be surprised if the Britton Tribunal had forgotten about this case.

39. Other factors are however relied on by Mr Oni as supporting remission to a different Tribunal. These factors have given me considerable pause for thought. It is accepted by Mr Smith that the decision on costs is not a model of judicial decision making in relation to the second stage. Mr Smith, however, relies on the Tribunal's approach to the first stage, which is, he submits, well-reasoned and contains a clear and careful analysis. He submits that there was a misdirection and a mistaken approach in that the Tribunal appears to have followed a "costs follow the event" approach, which was wrong and in error of law, but with guidance there is no reason to doubt that the Tribunal will approach its task with anything but a conscientious and proper approach to the law and to its assessment of the circumstances and the relevant factors. Moreover he submits that there is no foundation whatever for concluding that bias or partiality prevents that approach.

40. In submitting that the Britton Tribunal displayed an unsympathetic attitude towards the Claimant and to Mr Oni, and an unduly sympathetic attitude towards the Respondent, Mr Oni relied on a series of points outlined in writing and developed orally. I have considered these carefully. I do not deal with them all in detail, but I identify now some features of the Tribunal's Costs Judgment that have troubled me.

41. First, at paragraph 2 the Tribunal recorded the fact that it had read the comprehensive documentation Mr Oni presented to it. Mr Oni has told me, and I have no reason to doubt, that he was interrupted and cut short when trying to make submissions and trying to develop his argument. That is supported by paragraph 2 where the Tribunal said:

> **"… It has cut short his additional oral submissions and because it is so obvious that his applications are misconceived. …"**

That is an unfortunate approach for the Tribunal to have adopted and not one that leaves me feeling comfortable or confident in light of Mr Oni's submissions.

42. Paragraph 25 on page 7 (there are two paragraphs 25 and this is the second of the two) refers to the following matters:

> **"What we find here is that unfortunately, and [it] has all to do with Mr Oni's great loyalty to his wife and her complete obsession that she has been the subject of (a) discriminatory treatment by the PCT and thence (b) betrayal by Unison, that neither of them can let go of this litigation. They have lost the ability to stand back. …"**

I regard the reference to "her complete obsession" as unfortunate, particularly in the context of a Claimant who had recognised mental health difficulties, as was found by the Rogerson Tribunal and was found by the Rogerson Tribunal to be suffering from depression.

43. The Tribunal go on to say:

> **"… we make allowance for the fact that Mr Oni is a lay representative, but nevertheless we equally have to take into account the fact that he is highly intelligent and has represented his wife at every stage over the years of this litigation starting with the claim against the PCT."**

Again, however intelligent Mr Oni is, and he is undoubtedly both intelligent and articulate, nevertheless he is a lay representative and not a lawyer. The Tribunal's finding in this case was based on Rule 39(5) and the consequences of persisting in a claim despite the making of a deposit order. That is something a lawyer would be very familiar with but may not be something that a lay representative is familiar with, however intelligent or educated.

44. At paragraph 27 the Tribunal said, having quoted Rule 84, which deals with means:

> **"There is no application for a wasted costs order. This is a straightforward application: the Claimant stands in the shoes of her representative."**

I find that an odd comment to make. Either this was a wasted costs order or it was not. Having said that it was not a wasted costs order, it is difficult to see why the Claimant stood in the shoes of her representative. It betrays a blurring of the lines between Mr Oni as representative, which is what he was, and the Claimant. That line is further blurred in later paragraphs of this Judgment.

45. At paragraph 28 the Tribunal refers to matters about which it had taken judicial note. Mr Oni told me, and again I have no reason to doubt, that the Tribunal produced a bundle of documents that included decisions of Regional Employment Judge McMillan, a letter in which Mr Oni was complaining about Employment Judge Ahmed and, somewhat surprisingly, a copy of an e-mail addressed to Mr Oni from E H Platt at Pump Court Chambers. There is no suggestion that this bundle of documents was kept from the parties. Indeed it was not. It was

copied to the parties. But it is odd to see a Tribunal gathering together documents that it must regard as relevant and producing them for the parties. Mr Oni described it as reflecting a certain level of zeal on the part of the Tribunal in its approach to making the whole costs order. I do not go that far, but it is, in my judgment, an odd thing to have done and creates the appearance that the Tribunal was looking at means, since this is what they largely drew from those documents, even before it had heard submissions as to whether the first stage had been established before coming on to the question of means and the second stage.

46. Also at paragraph 28 the Tribunal refers to Mr Oni having previously had savings in the region of £45,000 jointly with his wife and having spent some of it on his "preference for travelling first class by aeroplane". The way he spent the money is irrelevant. This is not a case where the Tribunal was making a wasted costs order against Mr Oni as the Claimant's representative, as it had already held. The sentence suggests a somewhat dismissive approach, and appears to personalise issues in relation to Mr Oni. What Mr Oni earned or spent was no part of the Tribunal's consideration. Nevertheless, in addition to that, the Tribunal went on to refer to Mr Oni being a most distinguished doctor with a private practice. They said:

> **"… we have no doubt that once he puts this litigation behind him he has considerable potential to enjoy as he did in the past substantial earnings as a distinguished Consultant Orthopaedic Surgeon."**

47. Again, I find that a troubling reference. There was no evidence to support this speculative statement. Further, while the Tribunal had been shown **Beynon v Scadden** [1999] IRLR 700, there is nothing in that authority to suggest that somebody else's earnings can be taken into account when determining a paying party's means. It is one thing to identify joint assets but these points about Mr Oni's earnings, apart from the fact that they may be far from factually correct in any event, as Mr Oni has indicated, had little if any relevance to the issues

the Tribunal was deciding and once again suggest a personalisation in relation to Mr Oni that I find troubling. In fact Mr Oni has told me that the Tribunal was wrong: he last performed surgery three years ago, but has had to put his surgical practice largely on hold because of this litigation and aged 66 and not having practised significantly for three years, it may be very difficult for him to resume that distinguished practice.

48. It seems to me that each of these points on its own might be capable of being ignored as simply illustrative of a mistaken approach, but taken together I am left feeling not confident that this Tribunal will approach this case without preconceptions and with a concern that it may be so committed to its decision that a rethink is not possible. I have therefore come to the conclusion after anxious consideration, particularly in light of the persuasive and cogent submissions made by Mr Smith, all of which I have given careful consideration to, that the questions to be reconsidered should go to a fresh Tribunal and not to the Britton Tribunal despite the points I have referred to earlier.

49. Moreover to avoid any suggestion that there might be discussion among Judges at the Leicester or Nottingham hearing centres, however unjustified that might be, I have also concluded that it would be better for the remitted hearing to be dealt with at another hearing centre that has not hitherto dealt with a case concerning Mr Oni and his wife. I have in mind the Birmingham hearing centre, but I will hear the parties on this because I have not raised it previously.

50. For all those reasons this appeal is allowed. Two questions are remitted to a fresh Tribunal at a hearing centre that is neither Leicester nor Nottingham. First, whether it is appropriate in all the circumstances to make a costs order against the Claimant and second, if

so, what form the order should take. The remaining findings, as I have already indicated, being valid and binding on the future Tribunal that deals with these matters.

51. Having discussed it with the parties, I will say London as the hearing centre.