Appeal No. UKEAT/0178/14/DXA

EMPLOYMENT APPEAL TRIBUNAL

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

Before

HIS HONOUR JUDGE SHANKS

(ON THE PAPERS)

MR L GOLDWATER & OTHERS — APPELLANTS

SELLAFIELD LTD — RESPONDENTS

RULING ON COSTS APPLICATION

HIS HONOUR JUDGE SHANKS

1. Following my Reserved Judgment allowing the Claimants' appeal, handed down 24 November 2014, Thompsons have applied for a costs order on behalf of the Appellants under Rule 34A(2A) of the **EAT Rules** in the sum of £1,600 comprising the £400 issue fee and the £1,200 hearing fee. I have received two sets of written submissions from each side.

2. Rule 34A(2A), which was added to the Rules with effect from 29 July 2013, says this:

> **"If the Appeal Tribunal allows an appeal, in full or in part, it may make a costs order against the respondent specifying that the respondent pay to the appellant an amount no greater than any fee paid by the appellant under a notice issued by the Lord Chancellor."**

3. Eversheds on behalf of the Respondents have raised four points against the making of an order in this case. First, it is said that the appeals were not wholly successful, because only Mr Whitefield was successful and he only in relation to one aspect thereof, namely the shift allowance. Rule 34A(2A) does not require complete success in an appeal but, in any event, this is a false, indeed almost disingenuous, point. As is clear from the Judgment, the appeal related, and related only, to a specific point of construction which was relevant to Mr Whitefield's claim and potentially to those of other Claimants whose cases had not been the subject of the substantive hearing before the ET and of other Sellafield employees. On that sole point the Appellants were wholly successful.

4. Their second and fourth points relate to the exercise of the EAT's discretion under Rule 34A(2A). They rightly say that the Judge has a wide discretion and that a successful Appellant has no *entitlement* to an order. They also say that it was "perfectly appropriate and reasonable" of them to have resisted the appeal. I would accept that resisting the appeal was reasonable and proper in this case and that that is a relevant consideration in the exercise of the discretion.

However, looking at the whole picture, I would as a matter of discretion nevertheless have been inclined to make an order in favour of the Appellants in this case: the issue was a narrow one of construction; the Appellants persuaded me that the Employment Judge had gone wrong on it; it was a matter of potential financial importance to a number of the Appellants and other employees of the Respondent; both sides were represented by well known solicitors who must "know the score"; the Appellants were obliged to bring the appeal to a hearing in order to correct the Judge's error; there was no other consideration pointing against making an order.

5. The third point raised is of more substance: Eversheds say that the fees were not paid by the Appellants but by their union, the GMB, so that no award can be made under Rule 34A(2A). This is a matter of construction of the relevant rules in the light of the facts as they appear. In addition to Rule 34A(2A) itself, it is relevant to note the definition of "costs" in Rule 34(2) which says:

> **"… "costs" includes fees … incurred by or on behalf of a party … in relation to the proceedings …"**

6. So far as the facts are concerned, it is not disputed that the claims and the appeal in this case were supported by the GMB and that the GMB paid the fees in question. I am not told anything more about the relationship between the GMB and Thompsons. As for that between the Appellants and their union, Eversheds have drawn my attention to a provision in the GMB rulebook (Rule 26(5)) which indicates that members will not, provided they follow the rules, have to pay any legal costs. I accept that that provision must negate any implied obligation there may have been on members to indemnify the union in respect of these fees. Thompsons have not suggested that the rulebook does not contain that provision and have not suggested that the Appellants have in fact paid anything to the GMB by way of reimbursement.

7. Given those facts it seems to me a moot point whether the Appellants have personally "incurred" any fees; however, the fees were clearly incurred *on their behalf* by the GMB and they therefore come within the definition of the word "costs" as used in Rule 34A. But Rule 34A(2A) limits the *amount* of a costs order which can be made under it to "… any fee *paid by the appellant*". It seemed to me that this provision may be fatal to the Appellants' claim and I therefore invited further submissions. Although I was referred to various authorities relating to Rules 34 and 34A and the meaning of the word "incurred" I have not been shown anything which can avoid the difficulty I identified: the plain fact is that the Appellants have paid no fees at all in this case and that the maximum order that can be made is therefore nil.

8. It follows that I can make no costs order and that the application must therefore be dismissed. I should emphasise that this decision arises from the facts of this case and the specific wording of the newly introduced Rule 34A(2A). Rules 34A(1) and 34B-D do not include similar words.