Appeal No. UKEAT/0448/13/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 5 November 2013

Before

HIS HONOUR JUDGE HAND QC

(SITTING ALONE)

DR VLADIMIR PORTNYKH — APPELLANT

NOMURA INTERNATIONAL PLC — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR MARCUS PILGERSTORFER (of Counsel) (Appearing through the Bar Pro Bono Unit)
For the Respondent	MR DALE MARTIN (of Counsel) Instructed by: Mayer Brown International LLP Solicitors 201 Bishopsgate London EC2M 3AF

SUMMARY

PRACTICE AND PROCEDURE - Costs

On an application under rule 34A(2)(a) of the Employment Appeal Tribunal Rules, as amended, the successful Appellant asked this Tribunal to exercise its discretion to order the Respondent to pay him the amount of that fee as costs. An order to that effect was made on the general principle, subject to specific exceptions arising from the particular circumstances, that where a party had succeeded, the unsuccessful party, after consideration of, and subject to, the means of the paying party to make such a payment, should pay the fees incurred by the successful party. The issue should be looked at broadly and whether or not an appellant has succeeded on all points argued would be a relevant consideration but where, as here, there had been substantial success, payment of the equivalent of the full fee(s) should be the usual outcome. Where an application had been made for fee remission this Tribunal has power to postpone payment until the outcome of the application for fee remission is known and to make payment conditional upon the application for remission being rejected.

HIS HONOUR JUDGE HAND QC

1. Not having done so at the outset, I should take this opportunity to formally hand down my Judgment in appeal UKEAT/0448/13, Dr Vladimir Portnykh and Nomura International PLC, a Judgment that I should observe may well still contain – and, indeed, I think the very first paragraph indicates it does likely still contain – some typographical errors, because it has not been through the usual process. I hasten to add counsel have not had a draft circulated so that they have not had an opportunity to correct it, and it may well be that a corrected version, which will be in the form substantively of this version, corrected only in terms of typographical errors (it will not in fact contain any textual substitutions or corrections) will ultimately be circulated to the parties.

2. In consequence of that Judgment, I need to give directions. It is quite clear that the parties agree that first of all this Judgment should be embargoed – that is to say, it should not be shown to anybody save the parties, who now have it – until the Judgment and Reasons in the full merits hearing have been promulgated. Secondly, it is again common ground, and I direct, that Employment Judge Lewzey should not sit at the full merits hearing. Thirdly, the Reasons for her Judgment, which are pages 6-8 of the appeal bundle, should be sealed and kept on the file, not to be unsealed until after the merits hearing Judgment and Reasons have been promulgated. At paragraph 42 of my Judgment, I did my best to attempt to resolve issues that might perhaps lie at the borderline of this case. That has not been entirely successful, because the parties are not in agreement as to the consequential redactions that should be made to the fourth page of the Grounds of Resistance, page 48 of the supplementary bundle, and in particular to paragraphs 17 and 18.

3. Mr Pilgerstorfer submits that perhaps the safest course would be to redact everything in paragraph 17 down to that part of the second sentence where the "and" appears; that is to say, to the third word of the third line of paragraph 17, and that the safe course would be not to have any of that material before the Employment Tribunal. Mr Martin's position is that all of paragraph 17 should be before the Employment Tribunal but that the problem really arises in the second and third sentences of paragraph 18, where there is indirect reference to precisely the material that I have concluded is inadmissible because it is covered by the without prejudice exclusion.

4. I accept Mr Martin's submission as to the second and third sentences of paragraph 18. It seems to me that the safest course is to remove them, and they will be redacted and I shall direct that they do not appear in the version that goes before the Employment Tribunal at the full merits hearing. I do so because it seems to me fairly clear that chronologically they occur at a time after the correspondence has been, to use the old-fashioned terminology, "closed" by the letter of 13 March 2012.

5. Paragraph 17, in my view, creates a somewhat different problem, because Mr Martin's position is that the factual material contained in the second part of the second sentence after and including the conjunction and in the third sentence may well have occurred on 9 March, which, as I endeavoured to explain at paragraph 42 of my judgment, I take the view has not been covered by the without prejudice labelling that applied on 13 March. One rather cumbersome method of approaching this might be to make a complicated direction that the material might become admissible according to how the evidence in the case developed. I do not doubt for one moment Mr Martin's instructions are based on an entirely honest and reasonable view of how

the evidence is likely to turn out, but of course that does not mean that the evidence will necessarily turn out that way.

6. It does seem to me, however, that the safest course at the present time is to redact that part of paragraph 17, but unlike the redaction in relation to paragraph 18, which I would not envisage being altered by the evidential material because of the chronological sequence that is clear on the face of paragraph 18, in terms of paragraph 17 it seems to me perfectly possible that it will become clear that that should be part of the Respondent's case. I will redact it, therefore, for the time being, but that redaction will be subject to the Respondent's right to apply at any stage, if so advised, during the course of the full merits hearing to restore that wording as part of its Grounds of Resistance.

7. The third issue that has been raised is the question of whether I should order all or any part of the fees that the Claimant has paid to be re-paid in the form, in effect, of a costs order under rule 34A(2)(a) of the Employment Appeal Tribunal Rules as amended, which reads

> **"If the Appeal Tribunal allows an appeal, in full or in part, it may make a costs order against the respondent specifying 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."**

and, of course, in the light of the new Practice Direction. The Claimant has paid a hearing fee but has applied for fee remission. His application has not yet been processed to a conclusion. I do not know what the outcome will be, nor can I guess. I do not read the Rules or the Practice Direction as making any express or even implied provision for the situation that might arise where a costs order is made in respect of fees in a case like the present and it turns out that fee remission is granted. Were I to make an order requiring the fees to be repaid, would that be a lawful order in the light of the fact that the Rules and the Practice Direction? I am doubtful that

it would be because I think the Rules make no express provision for me to do so. But, as it seems to me, I could make a contingent order postponing payment until the outcome of fee remission application is known and making payment conditional upon the applications being rejected and I think that that would stand on a firmer foundation than if I made an order that the costs would have to be repaid. It has the merit of eliminating what might prove cumbersome procedures to re-coup the money, assuming that were possible.

8. Mr Martin submits that this is by no means a case where the repayment of fees should be ordered against the Respondent by way of a costs order. He submitted, and I accept, there can be no criticism of the Respondent for having sought to defend the Judgment that is the subject of this appeal. He described it as a highly arguable matter in a difficult area, and, having laboured to produce the written Judgment, I entirely agree. Also – and he did not submit this but it seems to me to be a factor that should be borne in mind in a situation like this – this is what might be called an interlocutory appeal. It is an appeal in order to get the case moving and get the issues defined; it is not an appeal against a decision on the merits. But on the other hand the Claimant has to come to this Tribunal to get the situation corrected, as he sees it, and in the light of the Judgment I have given, correctly sees it.

9. I would not have thought there should be any distinction between somebody who has to expend fees in order to get a case put back onto the right track and somebody who appeals the outcome of a merits hearing. It can be said that the outcome in the latter is more substantial and more definite but in my view that should not place such an appellant in a stronger position to recover fees than somebody appealing an interlocutory decision.

10. Mr Martin submits that the Claimant has not, whilst conducting the case himself, conducted the litigation in a helpful or co-operative way. I have studied quite a lot of the correspondence that has not been deployed in this hearing; Mr Pilgerstorfer has not had that opportunity. He is at a disadvantage, so he must take it on trust from me that Mr Martin's characterisation of the stance taken by the Claimant is entirely correct, in my judgment. On the other hand, whilst it does not assist for bundles not to be prepared and for authorities not to be disclosed, this Appellant is by no means the only person representing himself who takes that kind of approach to litigation. In the end, I do not take Mr Martin's submission on conduct into account, because it does not seem to me that it has actually made any significant difference to the conduct of the appeal. The Claimant has been most fortunate to have obtained the services of Mr Pilgerstorfer through the Bar Pro Bono Unit. He has worked hard and late in order to present the arguments that I have largely accepted. As Mr Martin submitted, it is not entirely the way that it was put to Employment Judge Lewzey, and I have been, I hope, at pains in my Judgment to emphasise those passages where I think it would not be fair to criticise her; and I have not reached any conclusion on part of Mr Pilgerstorfer's submissions. That could be said not to be entire success so far as he is concerned. All of these factors are to be borne in mind by a Tribunal like myself, who is given the widest of discretions by the Rules and the Practice Direction and should take a broad view, in my judgment.

11. I have come to the conclusion that in this case, however, the Respondent should pay the Claimant's fee of £1,600. The Respondent has the means to pay and, looking at the matter broadly, has substantially lost. But I will order that sum will only be payable if the Claimant's application for fee remission is refused. So, I shall order costs in the sum of £1,600 to be paid, if the application for fee remission is refused, and to be paid within 14 days of that refusal in that event.