Appeal No. UKEAT/0519/12/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 27 August 2013

Before

HIS HONOUR JUDGE DAVID RICHARDSON

MRS R CHAPMAN

MS G MILLS CBE

SINGLE HOMELESS PROJECT LTD — APPELLANT

MR S ABU AND OTHERS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

© Copyright 2013

APPEARANCES

For the Appellant	MR CHRISTOPHER MILSOM (of Counsel) Instructed by: Devonshires Solicitors 30 Finsbury Circus London EC2M 7DT
For the Respondents	MR JIMOH ADUN (Solicitor) Nieko Solicitors Rachel House 214-218 High Road London N16 4NP

SUMMARY

PRACTICE AND PROCEDURE – Costs and Wasted Costs

Wasted costs – Tribunal did not (1) apply or give reasons in respect of the appropriate tests for wasted costs and (2) afford the Appellant an opportunity to respond to substantial written submissions and evidence put in by the Respondents. Value of guidance in **Godfrey Morgan Solicitors v Cobalt Systems** [2012] ICR 305 emphasised.

Costs and wasted costs – Tribunal did not apply the correct test concerning ability to pay. **Arrowsmith v Nottingham Trent University** [2012] ICR 159 and **Vaughan v London Borough of Lewisham** UKEAT/0533/12 applied.

HIS HONOUR JUDGE DAVID RICHARDSON

Introduction

1. Applications for wasted costs tend to generate more heat than light and to cause more trouble and expense than they are worth. The leading cases both comment on the difficulties that such applications cause; see **Ridehalgh v Horsefield and Anor** [1994] Ch 205 at 225-226, and **Medcalf v Mardell** [2003] 1 AC 120 at paragraph 13. They raise troublesome issues and require careful handling.

2. For Employment Tribunals and Employment Judges faced with applications for wasted costs there is valuable guidance in the Judgment of Underhill P, as he then was, in **Godfrey Morgan Solicitors v Cobalt Systems Ltd** [2012] ICR 305, especially at paragraphs 35(1)-(5). These applications are not everyday fare, and tend to arise at the end of hearings at which Tribunals have rightly been focussed on the issues to be decided without thinking ahead to wasted costs. At such moments the summary in **Godfrey Morgan** sets out the essentials.

3. The appeal and cross-appeal before us today relate to an order for wasted costs and to underlying applications for costs and wasted costs. The order, dated 17 July 2012, provided for the firm of Nieko Solicitors to pay the sum of £500. Much more, however, is at stake, for there had been applications for costs exceeding £10,000 that the Employment Tribunal by its order effectively rejected.

The background facts

4. Mr Shaibu Abu, ("the Claimant") worked for Single Homeless Project ("the Respondent") as a locum night concierge starting in February 2010. He was a member of a pool maintained by the Respondent to provide services for hostels that it ran. In April 2011 he

was removed from the pool following failure to attend for a shift. The Claimant brought proceedings against the Respondent, alleging (1) unfair dismissal, (2) disability discrimination, (3) discrimination on the grounds of religion, (4) detriment on the grounds of public-interest disclosure relating to working conditions, (5) race discrimination, (6) age discrimination, (7) third-party racial harassment, (8) public-interest-disclosure detriment relating to system of work and (9) victimisation on the grounds of a protected act concerning race.

5. The Claimant was represented by Nieko Solicitors ("Nieko"). Specifically his case was handled by Mr Meachem, a solicitor and higher-court advocate who was associated with the firm. Mr Meachem appeared for him at the hearing. It took place between 7 and 10 February 2012. The Claimant lost the case in its entirety. The first four complaints that we have identified were struck out after the Claimant's case had ended on the basis that the Claimant's own evidence had shown them to be unsustainable. The remaining complaints were dismissed at the conclusion of the hearing.

The application for costs

6. At the end of the hearing Mr Milsom, on behalf of the Respondent, made an application for costs against the Claimant himself and against both Nieko and Mr Meachem. Mr Meachem resisted the application, but he also asked for an opportunity to make written submissions. The Tribunal said that it "had in mind" orders for costs both against the Claimant in the sum of £500 and against Mr Meachem in two respects, in the sum of £10,000 and £2,550 plus VAT, but it afforded an opportunity to both the Claimant and Mr Meachem to make legal representations before any order was finalised.

7. In March 2012 substantial additional material was provided to the Employment Tribunal: a statement of means by Mr Abu with attached documentary evidence, a statement of means by Mr Meachem with attached documentary evidence and written submissions as to why neither an order for a costs nor a wasted-costs order should be made. These documents were not copied to the Respondent either by Nieko or by the Tribunal.

8. The Employment Tribunal appears to have met on its own to discuss the question of costs on 8 May 2012. On 17 July its order was issued. The conclusion was very different to that which the Tribunal said it had in mind. There was no order against the Claimant at all. It is sufficient to quote the following paragraphs from the Employment Tribunal's Reasons:

> **"7. The Tribunal has had regard to statements of means of both Mr Abu and Mr Meacham [sic, throughout]. It is clear to us that there is not much to choose between them in terms of financial viability.**
>
> **8. We were reminded, by the solicitors in their representations at paragraph 25, of the dictum of Lord Justice Chadwick in *Kovax* [sic] *v Queen Mary and the Westfield College* [2002] EWCA Civ 352, paragraph 32, that it would not be reasonable for a Tribunal to make an award of costs that it was satisfied that the paying party could not meet.**
>
> **9. We, in this case, are satisfied that neither Mr Meacham nor Mr Abu is really in a position to be able to meet the Orders for costs that we initially considered would be appropriate to order.**
>
> **10. In relation to Nieko Solicitors, the employers of Mr Meachem, the matter is slightly different. What they say about their own financial position is set out in paragraph 27 of their representations. They say that Nieko Solicitors:**
>
> > **'are a sole practitioner firm with a legal services commission, mental health, legal aid contract. Through no fault of the firm's management, its contract was terminated for breach on 1 April 2011 but reinstated on appeal several months later. As a result it lost its client base and is close to the edge financially. Indeed to provide one example Mr Adun (who is the principal sole practitioner within the firm) currently has a County Court default judgment in respect of a debt action by a legal improvement agency incurred in recruiting a mental health supervisor. A copy of the letter from the creditors solicitors Shelbournes is attached as documentary verification. The firm is an access point into the law for young mental health caseworkers, many of whom are black Africans. A wasted costs Order would mean a significant hike in the firm's already extortionate insurance premium and would be likely to affect the validity of the firm.'**
>
> **11. We maintain the view that, for the reasons we enunciated in our Judgment on 10 February, that it would be appropriate to make an Order for the payment of costs that have been wasted in this case against the Claimant's solicitors. It is fair to say that we had indicated a preliminary view in respect of the liability Mr Meacham should bear. But all the reasons that led us to that view apply equally to the firm that employed him. We are not satisfied that making an Order against Neiko [sic] Solicitors would be to make an Order that the paying party would not be able to meet. Accordingly, we take the view that it would be appropriate to order Neiko [sic] Solicitors to pay the sum of £500 by way of contribution to the**

costs of the Respondents and we confirm that that is the sole Order for costs that we make. There will be no Order for costs against the Claimant personally, or against Mr Meacham personally."

9. Both parties are dissatisfied with this result. We will deal with their respective positions in turn. Mr Milsom again appears for the Respondent. Mr Meachem provided a skeleton argument for Nieko and the other parties concerned, but he has ceased now to represent Nieko, who have been represented by Mr Adun, the principal of the firm himself, today. Mr Adun was at one time minded to apply for an adjournment of the appeal and the cross-appeal; in the event, however, he has not done so.

The appeal

10. On behalf of the Respondent Mr Milsom makes the following submissions:

(1) It was procedurally unfair for the Tribunal to rely on representations concerning ability to pay without affording the Respondent sight of them and an opportunity to be heard about them; indeed, he says that the Respondent specifically asked for that opportunity and that it was refused.

(2) The Tribunal erred in law in its approach to the question of ability to pay. The reference to **Kovacs v Queen Mary & Westfield College and Anor** [2002] ICR 919 was incorrect, and the law has in fact changed in any event; see, for the present position, **Arrowsmith v Nottingham Trent University** [2012] ICR 159 and **Vaughan v London Borough of Lewisham** UKEAT/0533/12. There was no consideration of capital resources or professional indemnity insurance; the Tribunal's Reasons are inadequate.

11. On behalf of the Claimant, Nieko and himself, and Mr Meachem put in written submissions as follows:

(1) The jurisdiction to award costs or wasted costs are summary and must be "as simple and summary as fairness permits" (**Ridehalgh**, already cited). Fairness did not require the Respondent to be able to reply to representations on the question of ability to pay.

(2) The reference to **Kovacs** was apposite. Chadwick LJ said that if ability to pay were a relevant factor, he could see no basis upon which it could be right to make an order for payment of an amount that the Tribunal had satisfied itself the party would be unable to pay. Ability to pay is now a relevant factor, although it was not a relevant factor at the time of **Kovacs**. The Tribunal's Reasons are adequate.

12. On this part of the case, our conclusions are as follows. In **Ridehalgh** the Court of Appeal laid down general principles applicable to an application for wasted costs. On the question of procedure it said (238G-239A):

> **"The procedure to be followed in determining applications for wasted costs must be laid down by courts so as to meet the requirements of the individual case before them. The overriding requirements are that any procedure must be fair and that it must be as simple and as summary as fairness permits. Fairness requires that any respondent lawyer should be very clearly told what he is said to have done wrong and what is claimed. But the requirement of simplicity and summariness means that elaborate pleadings should in general be avoided. No formal process of discovery will be appropriate. We cannot imagine circumstances in which the applicant should be permitted to interrogate the respondent lawyer, or vice versa. Hearings should be measured in hours, and not in days or weeks. Judges must not reject a weapon which Parliament has intended to be used for the protection of those injured by the unjustifiable conduct of the other side's lawyers, but they must be astute to control what threatens to become a new and costly form of satellite litigation."**

13. In **Godfrey Morgan** Underhill P built on this dictum. He said (320D-321A):

> **"(3) Procedure. As the Court of Appeal emphasised in *Ridehalgh* (p 238B-D and G), the right procedure for determining claims for wasted costs will depend on the circumstances of the particular case. Proportionality is an important consideration. The only essential is that the representative has a reasonable opportunity to make representations as to whether an order should be made. This does *not* necessarily mean a formal two-stage procedure; see**

> ***Wilsons Solicitors v Johnson*** **9 February 2011, para 29. It may well, however, in a particular case mean that an application for wasted costs cannot be dealt with in the same hearing as that in which the application is made. Tribunals will often understandably wish to deal with such applications there and then, in the interests of economy. I sympathise with that approach: unnecessary hearing on satellite issues are to be avoided wherever possible, and in a straightforward case there will be a lot to be said for striking while the iron is hot. But sometimes that will simply not be fair, and the representative will be entitled to more time to make representations (though not necessarily at a further hearing). ..... As the Court of Appeal said in *Ridehalgh* [1994] Ch 205, 238G, although the procedure must be as simple and summary as possible, that can only be so far as fairness permits. Applications for wasted costs orders will often involve not only quite large sums but also what may be very serious criticisms of the representative's competence or conduct which may have serious repercussions for him or her, and which cannot be properly addressed ex improviso. Judges should resist the temptation to treat wasted costs issues as in every case matters of ancillary significance that can be dealt with on the hoof."**

14. This guidance concerns applications for wasted costs, but similar considerations apply to the procedure for all kinds of costs applications. The minimum requirement is that the person against whom the order is sought has a fair and reasonable opportunity to be heard, but in a case where large sums are potentially at stake it may be essential, fair and proportionate to allow written submissions on both sides or even a hearing.

15. In this case we have no doubt that the Respondent should have been afforded an opportunity to see and comment upon the substantial written material provided to the Tribunal. The sums at stake were considerable. The Tribunal allowed the Claimant and his representatives a full opportunity to make submissions and received detailed submissions from them. The Tribunal decided the application almost entirely by reference to ability to pay, and in was in our judgment incumbent upon the Tribunal to ensure that it heard what both sides had to say on this subject. It would not have been difficult or expensive to have devised at the hearing in February a timetable for this to be done.

16. We are also persuaded that the Employment Tribunal erred in law in its reliance on an obiter dictum of Chadwick LJ in **Kovacs**. The Tribunal had a discretion whether to take ability to pay into account. It was not obliged to do so, and if it did so, it was not obliged to restrict its

order to one that the paying party could meet; see **Jilley v Birmingham & Solihull Mental Health NHS Trust** UKEAT/0584/06, **Arrowsmith** and the fuller discussion in **Vaughan** at paragraphs 26-30.

The cross-appeal

17. In his skeleton argument Mr Meachem submitted that the Employment Tribunal ought not to have made an order for wasted costs against Nieko at all and that it had not decided the case in accordance with the law. The skeleton argument took us through leading cases on wasted-costs orders, in particular **Ridehalgh** and **Medcalf**, which had been applied in the Employment Appeal Tribunal in **Mitchells Solicitors v Funkwerk Information Technologies York Ltd** [2008] UKEAT/0541/07, **Ratcliffe Duce & Gammer v Binns** [2008] UKEAT/0100/08 and **Godfrey Morgan** itself. The Tribunal had not addressed these principles in its reasons for making the wasted-costs orders. He drew two particular points from the authorities: (1) it was not without more a foundation for a wasted-costs order that the representative had pursued a hopeless case on behalf of his client; and (2) full allowance must be made for the inability of a representative to put forward matters in his defence that were the subject of legal professional privilege. He submitted that when the authorities were taken into account there was no foundation for making a wasted-costs order.

18. On behalf of the Respondent Mr Milsom accepted that the Tribunal had not expressly applied the authorities in question. He submitted, however, that he had supplied copies of **Ridehalgh** and **Godfrey Morgan**, among others, to the Tribunal and that the Tribunal must have had regard to them. He took us though the cases on wasted costs today, arguing that privilege was not a trump card to be played on a wasted-costs-order application and that the Tribunal was entitled to reach the conclusion that a wasted-costs order was appropriate.

19. We do not think it is necessary for today's purposes to set out a detailed exposition of the law concerning wasted costs. Guidance as to the approach to be taken by a Tribunal is helpfully set out in **Godfrey Morgan** at paragraphs 35(1) and (2). We repeat, however, the guidance given in paragraphs 35(4) and (5):

> **"(4) Privilege. In any case where privilege has not been waived the tribunal must give full weight to the warnings in *Ridehalgh* at pp 236-237 and ought always to make clear that it has done so. However, it will not always be necessary for a tribunal to consider privileged material in order to decide whether a representative is at fault: cf [*Johnson*].**
>
> **(5) Reasons. The amount of detail required in the written reasons in relation to a wasted costs order (which are mandatory if sought in time—see rule 48(9)) will of course vary enormously. But, as I have already observed, the issues will sometimes be important and will not always be straightforward, and in some cases thorough treatment will be required. Wasted costs orders are also disproportionately likely to generate appeals, so that this tribunal will need to have a clear account of the tribunal's reasoning."**

20. In this case, having given an opportunity to the Claimant and his representatives to make detailed submissions on the principles concerned, the Tribunal did not deal with those submissions. There is no adequate reasoning in the Tribunal's conclusions in either the liability hearing itself or when making the order for wasted costs to address basic questions concerning such an award. In our judgment the Tribunal's conclusion cannot stand in the absence of such reasoning. If and in so far as Mr Milsom submitted to us that the Tribunal's order was inevitably correct, we do not agree; the matter was one for the Tribunal after applying the correct legal tests.

21. We do not, however, accept Mr Meachem's further submission that there could be no foundation at all for an order for wasted costs. Both in the Tribunal's liability reasons (see paragraphs 26-28) and in the submissions of Mr Milsom there were features that might be said to go some distance beyond the mere pursuit of a hopeless case and that might justify a wasted-costs order. It is not for the Employment Appeal Tribunal, which hears questions of

law only, to reach its own judgment on such matters, nor are we in any real position to do so on the limited material before us; except in a plain case, which, in our judgment, this is not, it is our duty to remit the matter for consideration by the Employment Tribunal.

22. When we consider whether to remit the matter to the same Tribunal or a different Tribunal, we apply criteria set out in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763, and we have taken those criteria into account in this case. There is, of course, great value in applications for costs and wasted costs being heard and decided by the Tribunal which heard the case from which they arise. We are confident that the Tribunal will approach the matter afresh and professionally in the light of the guidance given in **Godfrey Morgan** and in this case. We think the Tribunal attempted unsuccessfully to take an impermissible shortcut; now that it has been reminded of the principles that must be applied, we have no doubt that the same Tribunal will consider the matter entirely afresh in the light of submissions before it. The Tribunal would be wise to give full opportunity for written submissions on both sides with a careful timetable allowing for submissions in reply. If any party wishes to apply to the Tribunal for a hearing, it may do so giving reasons, and the Tribunal will consider that application having given opposite parties an opportunity to address it.

23. For those reasons, the appeal and the cross-appeal will both be allowed.