Appeal No. UKEATS/0034/13/BI

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH EH3 7HF

At the Tribunal
On 7 August 2013

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

MISS J A GASKELL

MR M SMITH OBE JP

MR TIMOTHY HENRY JONES APPELLANT

STANDARD LIFE EMPLOYEE SERVICES LIMITED RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant

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For the Respondent

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<u>SUMMARY</u>

PRACTICE AND PROCEDURE – Costs

An appeal was made against the decision of a Tribunal to award costs of £880 to the Respondent when a hearing on a Monday morning was adjourned on an application first made at 16.55 on the Friday beforehand. The central argument was that the Tribunal acted prematurely because the Claimant's reason for adjournment was to allow him to appeal an earlier decision by a Tribunal Judge to refuse to order the Respondent to produce a number of documents which the Claimant had (belatedly) come to regard as potentially of importance to his case. This was rejected. In any event, the appeal as to documents had been rejected (case UKEATS/0023/13/BI): but a Judge was not bound to wait for the result of the appeal before considering the question of costs, and what had caused them to be expense for the Respondents was the lateness of the application to adjourn, which did not depend on success or failure on the appeal. Appeal rejected.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. This is an appeal against a decision by an Employment Tribunal at Edinburgh made after an abortive hearing on 4 February to award the Respondent expenses of £880 to be paid by the Claimant. The matter was determined by Judge Kearns together with Mr Cowan and Mr Buchanan. The background is set out more fully in a decision that was made earlier today by the judicial member of the present Tribunal. Briefly, what happened was this. The Claimant made an application for documents that he considered had not been supplied by the Respondent, but should be, and would assist him in the forthcoming hearing. When they were not provided by the Respondent, eventually he made an application that they should be. That application was not made at an early stage during the claim when opportunities might have presented themselves at a case management discussion of 21 August 2012 or at a Pre-Hearing Review on 2 November 2012. Instead, it was made for the first time as an application to the court on 23 January, 12 days before the hearing. The Respondent responded quickly to that application on 25 January. Thereafter, it took some days for the matter to come before a Tribunal Judge, Judge Macleod, who took the view that the application should be refused, in part because it had been made for a considerable number of documents too close in time to the hearing of the Tribunal case.

2. That decision was announced to the parties on 30 January; that was a Wednesday. It was not until 4.55pm on the Friday that the Claimant indicated through his solicitor, Mr Eadie, that he intended to appeal against that decision to the Appeal Tribunal and for that reason wished there to be an adjournment of the hearing otherwise due to start at 10.00am on the following Monday. This was therefore very late in the day. The application came too late for a Judge to consider it and decide in time to call off the hearing scheduled for the Monday. When the

matter came before the Tribunal on the Monday, therefore, it was not an effective hearing, though the Respondent had prepared for it on that basis, because the Tribunal acceded to the application that there should be an adjournment.

3. Then Mr Cran, for the Respondent, invited the Tribunal to make an order under rule 40(1) of the then **Employment Tribunals (Constitution and Rules of Procedure) Regulations**. That provides as follows:

> **"A tribunal […] may make a costs [or expenses] order when on the application of a party it has postponed the day or time fixed for or adjourned a hearing or pre-hearing review. The costs order may be against or, as the case may require, in favour of that party as respects any costs incurred or any allowances paid as a result of the postponement or adjournment."**

4. The focus that the law requires is, we would emphasise, a narrow one. It relates to the expenses that are incurred or paid as a result of the postponement or adjournment. Thus in circumstances in which an application is made to adjourn, that subsequently turns out to have been a proper application in the sense that an appeal to which it relates is allowed, it will normally have no impact upon the question of what costs or allowances may be paid, because the issue is essentially responsibility for the adjournment within the immediate context relating to that particular hearing.

5. The Judge here expressed the view of the Tribunal on the application made to it in paragraph 12. She said this:

> **"The Tribunal's decision on the document order application was communicated to the parties at 15.38 on Wednesday 30 January. Despite this, the request to postpone the hearing was not made until 16.55 on Friday 1 February by which time it was too late for the matter to be decided in advance and the respondent was put to the expense of attendance and representation which might have been avoided had a postponement been sought earlier. It was not clear to the Tribunal why it had been left until 16.55 on the Friday before the hearing to seek a postponement and we considered that the claimant was at fault in leaving it so late. The Tribunal therefore awards the respondent the expenses incurred by them as a result of the adjournment."**

6. No issue arises here as to the quantification of those costs.

7. The Notice of Appeal against that decision argued that the Tribunal was unable when it made the decision on costs to have any certainty about the outcome of the Claimant's appeal and how that would impact upon the conduct by the Claimant of this case. In the Notice of Appeal it is said that if the Claimant's appeal was unsuccessful, the Claimant would have to accept that the postponement request had resulted in the proceedings being delayed and the Respondent incurring additional expense, and as a result the Claimant would quite properly then have to deal with an application by the Respondent for expenses. As a result, it is argued, it would then be a matter for the Tribunal to consider to what extent the Claimant should be liable for those expenses having heard submissions from both parties by reference to the entire factual position. On that basis, the submission made in the Notice of Appeal was that the outcome of the appeal against the refusal to grant an order for the production of documents would largely determine the question of expenses. That matter, it is said, should be capable of a simple resolution at that time.

8. We note that the judicial member of this Tribunal earlier today rejected the appeal in respect of the order for production of documents but, tantalisingly perhaps in the context of this case, indicated that if a more focussed application were made with proper grounds for it, then a Tribunal would wish to consider that application carefully.

9. The Notice of Appeal continued:

> **"In trying to reach a decision on the question of expenses before them, the Employment Tribunal acted prematurely and was simply not in a position to make a fair decision on the Respondent's application for expenses at that stage."**

10. Prematurity is the main ground advanced before us here by Mr Eadie in support of the appeal. He argues that the Tribunal would have been better placed to assess responsibility for costs once the outcome of the appeal had been known. It was reasonable to wait until then and unreasonable to exercise the discretion in the absence of that knowledge. Secondly, he argued that there was prejudice in determining the application at the time; that was because it could be oppressive for a man in the position of the Claimant to have a costs award in a substantial sum – as it happens, £880 – made against him. Mr Eadie, however, accepted that he did not invite this Tribunal to have any regard to the means of the Claimant. Accordingly, we focus upon the ground of prematurity.

11. The legal context is clear. It is rare for an appeal in respect of a costs decision to succeed. An error of law has to be shown. The reason why such an error will rarely be shown in the context of costs is that a considerable discretion is given to the Employment Judge or Tribunal. There is a generous ambit within which there is a scope for different decisions to be made. It has to be shown that a matter was left out of account that had to be taken into account as a matter of law, or one taken into account that should not have been, or that the decision that was reached was simply wholly unreasonable to the extent that it might be said to be perverse.

12. Secondly, the scope for arguing widely in respect of an adjournment is limited. The rule itself requires a focus upon the actual adjournment and the costs paid as a result of it. It requires a focus, therefore – a narrow focus – upon what led to that particular adjournment. Here, the factual conclusion of the Tribunal was that it was the fault of the Claimant. Unless that conclusion could be shown to be unjustified, it is one that we, as a Tribunal, must loyally accept. There was a basis for it. That shows it was not perverse. The chronology demonstrates

that. The Judge and members knew both that, and that the adjournment sought had been properly asked for, otherwise they would not have granted it. They knew that if it had been asked for earlier, the unnecessary costs of attending on the Monday that were incurred would have been avoided. They were entitled to ask what the cause was. On the information available to them that suggested there was no good reason it had not been asked for earlier. The immediate cause of the incurring of costs in consequence of the adjournment was the lateness of the application on Friday, very much at the very last working moment of the day. The conclusion by the Judge that it was too late by then realistically to adjourn the Monday hearing is one that she was entitled to make. If she had asked further why there was that delay, then she would have been directed back to 30 January, which gave the Claimant only a short window of time between the Wednesday and the Friday for him to instruct his solicitor and for his solicitor, who might well have been busy, quite responsibly, on other matters, to have considered it and to have taken action.

13. But why was that the position? There would be two possibilities. One was the time taken by the Tribunal to resolve the application for documentation. The time taken is not inherently unreasonable; it is not so exceptional that a solicitor or litigant was entitled to expect that it would have been different. It must have been anticipated by any experienced solicitor putting an application in on 23 January that there might well be that sort of time period before the application was dealt with. That takes one back to 23 January, the time that another Employment Judge had to the knowledge of the Kearns Tribunal regarded as simply too late within the chronological context of the litigation. There was no material, so far as we are aware, that was before the Employment Judge, to suggest that that application was made only then because some conduct on behalf of the Respondent had made it that late. Applying the narrow focus that the law requires, the Judge's conclusion was thus one that was justified unless

there is something about the argument in respect of prematurity that shows it was an error of law for her to ignore the fact that there might be a later development that would affect the liability for expenses.

14. As to this, we would make two comments. First, given that the scope of the enquiry is focussed narrowly upon the adjournment and the expenses incurred in consequence of that and the reasons for it, and given the fact that a conclusion as to fault was permissible, it is very difficult to see how a later development in the case would show that the decision should have been any different. If it were supposed, putting matters at their possible highest for the Claimant, that Standard Life had deliberately and wrongfully been sitting upon documents that should have been disclosed, it would still not explain why the application for disclosure of those documents, justified as it would be shown to be, had not been made until the time it was, and it would have nothing to say in respect of the timetabling argument, which was that which the Judge accepted.

15. The second comment we would make is this: that a Judge is entitled, but not obliged, to take the wider context into account in deciding whether or not to make an application for costs or expenses as and when she does. If in the general context of the litigation it may be thought that issues of expenses may arise legitimately at a later stage, we do not consider it would be required of a Tribunal to make an immediate decision upon the costs of an adjournment that then might be seen in context, but that is not to say that it was wrong in law for the Employment Judge here to do so. We have been invited to find an error of law and could not interfere with her decision unless there were one. For the reasons we have expressed, we are unable to find such an error.

16. Accordingly, this appeal is dismissed.