Appeal No. UKEAT/0018/13/GE

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 18 July 2013

Before

THE HONOURABLE MR JUSTICE SUPPERSTONE

MR T HAYWOOD

MR P SMITH

MR K BASKARAN — APPELLANT

IMTECH TRAFFIC & INFRA UK LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR PAUL EPSTEIN (One of Her Majesty's Counsel) & MR K BASKARAN (The Appellant in Person)
For the Respondent	MR PARAS GORASIA (of Counsel) Instructed by: Gosschalks Solicitors Queens Gardens Dock Street Hull HU1 3DZ

<u>SUMMARY</u>

PRACTICE AND PROCEDURE – Costs

Procedure adopted by Employment Tribunal on costs application at the conclusion of the substantive hearing unfair in circumstances where paying party self-represented and substantial costs sought; EAT ruled it will usually be appropriate to adjourn the costs hearing for party against whom costs order sought to be given proper opportunity to consider the costs application, any costs schedule produced and any evidence he wishes to adduce as to his means. The application for costs can then proceed by way of written submissions, unless either party requests an oral hearing.

THE HONOURABLE MR JUSTICE SUPPERSTONE

1. On 24 and 25 October 2011 an Employment Tribunal sitting at Southampton, chaired by Employment Judge Cowling heard a claim by the Appellant that the Respondent company had unlawfully discriminated against him on the grounds of age and race. The basis of the claim is that the Appellant, during 2009, made several unsuccessful applications for employment with the Respondent. The Appellant is Asian and at the relevant time he was 49 years of age. By a Judgment at the end of the hearing, the Tribunal dismissed all the Appellant's claims and the Respondent made an application for costs. The Appellant was ordered to pay £10,000 towards the Respondent's costs. Reasons were requested and were sent to the parties on 10 February 2012.

2. The Appellant appeals against both the Tribunal's decisions to dismiss his claims and to order him to pay £10,000 towards the Respondent's costs. At this hearing Mr Baskaran appears in person in relation to his appeal against the Judgment on the substantive claims. Mr Paul Epstein QC, on a pro-bono basis appears on the Appellant's behalf in relation to the appeal against costs - we are very grateful to him for doing so. Mr Paras Gorasia, who appeared for the Respondent before the Tribunal appears today for the Respondent only in relation to the costs appeal. However, he has given us assistance with regard to how matters progressed before the Tribunal for which we are very grateful.

3. We shall consider first the appeal against the Judgment on the substantive claims and then the appeal against the costs order. By a Notice of Appeal lodged with this Tribunal on 5 November 2011, prior to receipt of the written reasons, the Appellant appealed both against the decision dismissing his claims and against the costs Judgment. He subsequently lodged an amended Notice of Appeal following receipt of the written reasons. That appeal was rejected

by HHJ McMullen QC, on 13 April 2012, on the basis the Notice of Appeal disclosed no point of law with a reasonable prospect of success. A further Notice of Appeal was lodged by the Appellant on 24 May 2012, but that too was rejected by HHJ McMullen on 18 June on the basis that it disclosed no error of law in the Tribunal's decisions.

4. The matter then came before Underhill J, as he then was, on 16 January 2013 on a rule 3(10) application. At paragraph 9 of his Judgment, Underhill J describes the principal theme that appears from the fresh Notice of Appeal, the details of which, as he describes, are extremely opaque. It is that the Appellant believes that he was not given all the information that was required to present his case fairly. In particular, the Judge says:

> **"[…] (1) there was a long delay on the part of the Respondent in lodging a trial bundle; (2) he did not receive a supplemental bundle of documents giving details of the successful candidates for the jobs for which he had applied until a few days before the hearing in October 2011; and (3) he did not receive the Respondent's witness statements until the day of the hearing. He says that he asked for an adjournment for those reasons but it was refused. These points do not, as I have said, appear clearly from the Notice of Appeal but I have elicited them from the Appellant."**

5. As for the first of those complaints Underhill J rejected it on the basis that whatever the rights or wrongs of it, it is of no significance in the event because it is common ground the bundle was sent to the Appellant on 23 May arriving the following day, which was almost five months before the eventual hearing. The Judge did, however, consider points (2) and (3) if they were well founded might conceivably raise a ground of unfairness. The Judge did not, he said, have clear and authoritative material before him from which he could assess what the Appellant was telling him. The Judge said he viewed with considerable scepticism the Appellant's complaints about the procedure but he did not feel that he would be justified in dismissing this aspect of the appeal on the material he had before him. The Judge made clear at paragraph 12 of his Judgment that he should not be taken to have decided that the Appellant had raised an

arguable point. At paragraphs 13 to 16 of his Judgment the Judge gave directions to enable the Tribunal to get to the bottom of what happened.

6. Pursuant to those directions, albeit seven days late, amended grounds of appeal were lodged on 28 January 2013, by letter dated 25 February 2013 this Tribunal wrote to the Appellant informing him that despite the delay Underhill J was prepared to grant the necessary extension. However, the Judge did not approve ground 4 headed, "Substantive Tribunal Decision Error", which did not correspond to any ground which the Judge said he was minded to proceed. Accordingly, the appeal proceeds on heading (1) and grounds (1) to (3) of the amended grounds.

7. Referring to the witness statement, dated 4 February 2013 that the Appellant filed, again, pursuant to the Judge's directions, the letter from this Tribunal of 25 February 2013 informed the Appellant that paragraphs 33 to 41 of that statement would be disregarded as they were directed at ground 4, which the Judge disallowed.

8. Ground 1 of the Appellant's proposed grounds of appeal dated 4 February 2013 is headed, "Relevant documentation" and concerns the supplemental bundle of documents giving details of the successful candidates for the jobs, for which the Appellant had applied. Ground 2 relates to the Respondent's witness statements that the Appellant says he only received shortly before the hearing on 24 October 2011 because they were sent to his old email address. Ground 3 is headed, "Application to adjourn" and reads as follows:

> **" — in the light of late disclosure and late service of witness statements, and perceiving himself to be at a substantial disadvantage, the Appellant applied for the Hearing to be adjourned to allow him proper opportunity to prepare. This application was refused by the Employment Tribunal but the reasons given did not address his concerns regarding late disclosure of the supplemental bundle and the Respondent's witness statements."**

9. On 25 February 2013, pursuant of the directions of Underhill J, this Tribunal sent to Judge Cowling the new grounds of appeal and the Appellant's witness statement. Judge Cowling replied by letter dated 2 April 2013. In relation to ground 3 the Judge wrote:

> **"I do not recall the Appellant making an application for the case to be postponed at the commencement of the Hearing and my notes do not support his contention."**

10. We note that there is no reference to the Appellant having made an application to adjourn the hearing in his witness statement dated 4 February 2013 (see pages 46 to 56 of the bundle). In a supplementary witness statement of the date, (see pages 64 to 68) at paragraph 4 (page 67) the Appellant says prior to the hearing he raised the issues of late service of the Respondent's witness statements and of the supplementary bundle and that he could not prepare his witness statement without them, and that he asked the Tribunal Judge to take "appropriate action". He does not say what appropriate action he wanted the Tribunal to take, and he does not say that he made an application for an adjournment. We reject this ground.

11. As for ground 1, late service of a supplementary bundle containing documents relating to comparators, Mr Flanagan, a partner in the firm of solicitors acting on behalf of the Respondent deals with this in his witness statement dated 18 March 2013. At paragraph 8 he says that his firm sent a bundle for the hearing to the Appellant on 4 June 2010, an updated bundle on 23 May 2011 and a further bundle on 14 October 2011. Mr Flanagan's statement continues:

> **"9. There is then the issue of what he refers to as the 'supplementary bundle' which he accuses us of sending him very late in the day. That bundle was actually comprised of documents he had served late in the day and which we, as a gesture of goodwill and with a view to assisting the Tribunal, put it in bundle form for him. It is made clear to him within an email of 21 October 2011 [EFF4] that it is his responsibility to seek the Tribunal's permission to have the overall bundle extended (Southampton being one of the areas where it is routinely directed that the bundle can only extend to a certain number of pages). It is disappointing, though not surprising, that Mr Baskaran now criticises us for the assistance we provided him.**
>
> **10. I also note that on an earlier occasion in September 2011 Mr Baskaran served upon us 23 documents which he said needed to be added to the bundle. Eighteen already were in the bundle and the five that were not were 'out of office' emails."**

12. We have read the Appellant's response to these paragraphs at paragraphs 6 to 9 of the Appellant's supplementary witness statement dated 4 February 2013. It is difficult to understand how that supplementary witness statement could have been made on that date when it includes the response to Mr Flanagan's witness statement which was only made on 19 March 2013. In any event, the Appellant provides no satisfactory response to the points made by Mr Flanagan.

13. Judge Cowling in his observations in the letter dated 2 April 2013 from the Employment Tribunal refers to a discussion in relation to the addition of a supplementary bundle at the commencement of the hearing. He says the Tribunal decided it would be unreasonable at that late stage to permit either of the parties to add further documents to the bundle. The Tribunal considered that the main bundle contained all those documents relevant to the issues to be determined by the Employment Tribunal. The bundle about which the Appellant makes a complaint appears, therefore, not to be that bundle but the further bundle that Mr Flanagan says was sent to the Appellant on 14 October 2011. In any event, Judge Cowling says that:

> **"[…] Before we began hearing his evidence we were satisfied that the Appellant had become familiar with the documents in the main bundle, had been given an opportunity to read the witness statements and was in a position to deal with the issues."**

14. That, in effect, answered ground 2, the alleged late delivery of the Respondent's witness statement. At paragraph 5 of his supplemental witness statement, responding to Mr Flanagan's witness statement, the Appellant said he could not access the witness statements, sent to his old email address at that time due to malfunction. He says:

> **"[…] it was later identified in fact the respondent did send the witness statement to my old email on 24th of May 2011."**

15. But he was unaware of this. Mr Flanagan says at paragraph 7 of his witness statement that the Appellant did not notify his firm that he had changed his email address. In any event, as Judge Cowling noted, the Tribunal satisfied itself that the Appellant, before he gave his evidence, had had an opportunity to read the witness statements and was in a position to deal with the issues. The Judge said that overnight at the end of the first day the Appellant had ample time to re-read and consider all the Respondent's witness statements before his cross-examination of the Respondent's witnesses began on the second day of the hearing. The Judge concludes his observations by saying:

> **"During cross-examination the Appellant showed himself perfectly capable of understanding the issues and of challenging the evidence of the Respondent's witnesses appropriately. Although he bemoaned the fact that none of his job applications were successful, the Appellant did not suggest to any of the witnesses that they or the Respondent had discriminated against him whether on the grounds of race, age or otherwise."**

16. We have had regard to the skeleton argument that Mr Baskaran has prepared for this hearing. In his oral submissions he referred us to the case of **Jones v Corbin T/A Boo** UKEAT/0504/10 and in particular to paragraph 20 of the Judgment. The Judgment of the Tribunal was set aside because of non-compliance with directions made at a case management hearing. That case, as does each case, turned on its own facts. As such the decision does not assist the Appellant. In our judgment, none of the grounds of appeal set out in the document dated 4 February 2013 fell pursuant to the order of Underhill J, disclose any point of law with a reasonable prospect of success. The grounds of appeal are, in our view, not arguable. Accordingly this appeal is dismissed.

17. We turn then to consider the appeal against the costs order. Rule 40(2) and (3) of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004** provide:

> **"40(2) A Tribunal or Employment Judge shall consider making a costs order against a paying party where, in the opinion of the Tribunal or Employment Judge (as the case may be), any of**

> **the circumstances in paragraph (3) apply. Having so considered, the Tribunal or Employment Judge may make a costs order against the paying party if it or he considers it appropriate to do so.**
>
> **(3) The circumstances referred to in paragraph (2) are where the paying party has in bringing the proceedings, or he or his representative has in conducting the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably, or the bringing or conducting of the proceedings by the paying party has been misconceived."**

18. In **Yerrakalva v Barnsley Metropolitan Borough Council** [2012] ICR 420 Mummery LJ stated at paragraph 9:

> **"9. An appeal against a costs order 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. An appeal will succeed if the order was obviously wrong. As a general rule it is recognised that a first instance decision-maker is better placed than an appellate body to make a balanced assessment of the interaction of the range of factors affecting the court's discretion. This is especially so when the power to order costs is expressly dependent on the unreasonable bringing or conduct of the proceedings. The Employment Tribunal spends more time overseeing the progress of the case through its preparatory stages and trying it than an appellate body will ever spend on an appeal limited to errors of law. The Employment Tribunal is familiar with the unfolding of the case over time. It has good opportunities for gaining insight into how those involved are conducting the proceedings. An appellate body's concern is principally with particular points of legal or procedural error in Tribunal proceedings, which do not require immersion in all the details that may relate to the conduct of the parties."**

19. At paragraph 41 Mummery LJ said:

> **"41. The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the Claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had."**

20. In respect of the Tribunal's award of costs, the Notice of Appeal identifies four grounds of appeal. First, to the extent that the award of costs was based upon the finding that the Appellant's bringing of his claim was unreasonable or that the claim was misconceived that conclusion was founded upon the characterisation of the Appellant as a "serial litigant". That characterisation was perverse (if it is to suggest that any past cases brought by the Appellant demonstrated bad faith), and/or insufficient to justify an order for costs in these circumstances.

21. Second, if the Appellant succeeds in the first ground, the Tribunal's order that it should pay costs to the Respondent fails to set out any causal link between the Appellant's conduct of the proceedings, (the remaining basis of the Tribunal's costs order) and the award of costs actually made.

22. Third, as to the amount of the costs order, having rightly decided to consider the Appellant's means, the Tribunal ought properly to have ensured that he had been given sufficient notice that he would need to give evidence as to his means and sufficient time to adduce any relevant material in this regard.

23. Fourth, in carrying out its summary assessment of the Respondent's costs, the Tribunal ought properly to have ensured that the Appellant had been given sufficient notice of the Respondent's costs schedule and reasonable opportunity to address it (which he had not as he was only handed it when it was handed to the Tribunal at the time of the costs application) and the Tribunal ought to have set out some explanation for its summary assessment.

24. We shall consider each ground in turn. Ground 1: Mr Epstein submits that the Tribunal erred in basing its finding at paragraph 53 of its Reasons that the Appellant acted vexatiously and unreasonably and that the claims were misconceived on the characterisation of the Appellant as a serial litigant. In our judgment, on a proper reading of the Tribunal's reasons, the finding of the Tribunal was not so based. Paragraph 53 makes clear that in reaching its conclusion the Tribunal properly took into account all the circumstances in this case. The reference in the next sentence in paragraph 53 to the Tribunal taking into account the Appellant's:

> **"previous knowledge and experience of bringing claims of age and race discrimination against other employers and different Employment Tribunals"**

is made in the context of noting that he was unrepresented in these proceedings and, we think, for the purposes of considering whether his conduct can be explained by the fact that he was unrepresented in these proceedings.

25. Mr Epstein points to the fact that in Mr Gorasia's oral submissions on costs he referred to the Appellant as being a serial litigant. However, significantly, at no point in its Reasons, when dealing with the costs application, does the Tribunal indicate that its finding that the Appellant acted vexatiously and unreasonably, and the bringing of the proceedings has been misconceived, was based in whole or in part on the Respondent's contention that the Appellant is a serial litigant. In any event, in our view, there is no finding by the Tribunal that the Appellant is a serial litigant. Having referred in paragraphs 47 and 48 of its reasons to the evidence that it had heard about previous claims of age and race discrimination brought by the Appellant against other organisations which have rejected his applications for employment, the Tribunal, noting the results of some of those claims, observed at the end of paragraph 48:

> **"This series of events lends credence to the Respondent's submission that not only could the Claimant be described as a serial job applicant but also a serial litigant."**

26. We reject Mr Epstein's submission that this amounts to a finding by the Tribunal that the Appellant is a serial litigant.

27. In our view, the findings made by the Tribunal plainly entitled the Tribunal to make an order for costs against the Appellant. We have regard in particular to the following passages in the Tribunal's Reasons. First, although the Appellant cross-examined all the Respondent's witnesses, he never suggested to any of them during cross-examination that they or the Respondent had discriminated against him whether on the grounds of race or age or otherwise

(paragraph 41). Second, in making his applications for employment with the Respondent, the Appellant adopted a scattergun approach. If the Respondent advertised a vacancy he would apply to fill it whether or not he was suitably qualified for the post. A good example was the Appellant's application for the post of Field Engineer at the Respondent's St Alban's office. His claim that he failed to secure the post on the grounds of either age or race lacked any credibility (paragraph 43). Third, the Appellant failed to discharge the onus of proof on him to adduce evidence from which the Tribunal could conclude that the Respondent had committed an act of discrimination (paragraph 50).

28. Ground 2; the grounds of appeal suggest that this ground only arises for consideration if the Appellant succeeds on ground 1, which in our view he does not. However, Mr Epstein submits that there is a discrete point with regards to the following sentences in paragraph 53 of the Tribunal's decision:

> **"We have also taken into account the Claimant's failure to comply with Case Management Orders including his failure to provide a witness statement which has added to the difficulties in determining his claim. It has also added to the costs incurred by the Respondent."**

29. Mr Epstein submits that contrary to the approach an Employment Tribunal is required to adopt in accordance with **Yerrakalva**, the Tribunal failed to specify what costs were attributed to these failures. In our view, the Tribunal identified the conduct which lead to increased work for the Respondent, which resulted in increased costs. It would, in our view, be unrealistic to require Tribunals to state precisely what costs are attributable to such conduct. In any event, we think that these sentences in paragraph 53 are part of the Tribunal's general reasoning in support of their decision to make a costs order. The Tribunal was, in our view, entitled to take into account the Appellant's failure to comply with case management orders, to conclude that that added to the difficulties in determining the claim and to find that added to the costs incurred by the Respondent.

30. We agree with Mr Epstein that it is convenient to take grounds 3 and 4 together, since they raise similar procedural points. At the rule 3(10) Hearing, Underhill J expressed the view at paragraph 5 of his Judgment that there may be a point of some general importance about what is a fair procedure to adopt in a case such as the present, where at the conclusion of a hearing an application for costs is made, which in the circumstances of the particular case may call for some substantial inquiry into either the quantum of the amount sought or the means of the party against whom the order is sought. In the present case what happened was that at the conclusion of the substantive hearing the parties withdrew and then returned after a short interval when the Tribunal announced its decision.

31. At that point Mr Gorasia made an application for costs. Mr Gorasia told us that there was no advance notice of the application and that the first the Claimant would have known of it was when in the break between the conclusion of the hearing and when the parties were called back before the Tribunal to hear the decision he handed, or at least attempted to hand, to the Appellant a copy of the Respondent's costs schedule, which he said the Appellant did not want to accept. There may be a dispute about this particular point, but nothing turns on it.

32. Mr Gorasia and the Appellant confirm that the application for costs was made and proceeded in the way set out in the Chairman's notes of evidence, which appear at pages 72 to 74 in the bundle. The Tribunal invited the Claimant to give evidence of his means, which he did. The Tribunal found (paragraph 55) that the Appellant's evidence in relation to his means was "indecisive and lacked credibility" for the reasons set out at paragraphs 55 and 56 of the Judgment. In addition to noting the inconsistencies in his evidence, the Tribunal criticised the Appellant for producing no documents to support his financial circumstances and for not giving any clear indication of his financial circumstances or means. The Tribunal then took into

account his inability to give any clear evidence in relation to his ability to pay as part of the reason for ordering that he pay the Respondent the sum of £10,000 as a contribution towards the Respondent's costs. However, as Mr Epstein observes, the Tribunal made no express finding as to the Appellant's ability to pay. In paragraph 56 of the decision the Tribunal merely states, insofar as is material:

> **"Bearing in mind […] his inability to give any clear evidence to the Employment Tribunal in relation to his ability to pay we are unanimously of the view that the Claimant be ordered to pay to the Respondent the sum of £10,000 as a contribution towards the costs of £28,007.04 which the Claimant has caused the Respondent to incur in defending this claim."**

33. Rule 41(2) of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004** provide:

> **"41.(2) The Tribunal or Employment Judge may have regard to the paying party's ability to pay when considering whether it or he shall make a costs order or how much that order should be."**

34. Mr Epstein referred us to a number of authorities on the procedure to be adopted if the Tribunal does have regard to a party's ability to pay. In **<u>Oni v NHS Leicester City</u>** [2013] ICR 91, HHJ David Richardson made two general observation with which we agree:

> **"45. First, whether or not it is obligatory to do so as a matter of law, *<u>Doyle</u>* [that is *<u>Doyle v Northwest London Hospital NHS Trust</u>* UKEAT/0271/11] shows the wisdom of the Tribunal raising, at the very least in a case where the costs are substantial, the question of means.**
>
> **46. Secondly, litigants in person, even if they appreciate that the Tribunal may take their means into account, may not know what to do in order to prepare for that issue. They may think it will be sufficient to make a submission on the question to the Tribunal. Tribunals are likely to require more; but litigants will not necessarily know that. If the Tribunal does not take means into account, and the case subsequently goes to the county court, the form upon which the paying party will set out his or her means is form EX 140. A possible solution to this problem, at least where the Tribunal is giving directions in advance relating to a costs hearing, is to say that a party who wishes his or her means to be taken into account should complete this form."**

35. Mr Epstein submits, and we agree, that the reasoning underlying **<u>Oni</u>** suggests that as a matter of fairness a litigant in person who elects to give evidence of his means ought to be

given sufficient time to enable him to assemble the material information in order to do so. What is relevant time will depend on the facts of the case. The relevant factors will include the amount of costs ordered and the litigant's grasp of English. We also accept Mr Epstein's submission that in relation to costs sought by the receiving party the paying party must have sufficient time to consider the amount of costs sought. Again, what is sufficient time will depend on the facts of the case. It is likely to include whether the receiving party has given the litigant in person notice of the amount of its costs and an opportunity to query or challenge them (see **Rogers v Dorothy Barley School** UKEAT/0013/12 at paragraph 9).

36. In **Jilley v Birmingham and Solihull Mental Health NHS Trust** UKEAT/0584/06 and 0155/07 this Tribunal said at paragraph 44:

> **"44. Rule 41(2) gives to the Tribunal a discretion whether to take into account the paying party's ability to pay. If a Tribunal decides not to do so, it should say why. If it decides to take into account ability to pay, it 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. Lengthy reasons are not required. A succinct statement of how the Tribunal has dealt with the matter and why it has done so is generally essential."**

37. In the recent case of **Howman v Queen Elizabeth Hospital** EAT/0509/12 Keith J said at paragraph 13 in relation to rule 41(2) of the Rules:

> **"13. […] Obviously, that discretion has to be exercised in a judicious and measured way, bearing in mind that as a general rule it is not appropriate to make an order which simply cannot be complied with."**

38. We wish to emphasise that in a case such as the present one in particular where the party against whom the order is sought is self-represented the Tribunal needs to consider with care whether the procedure it is adopting is fair. In our view, the procedure adopted by the Tribunal in the present case was defective and unfair to the Appellant. We accept the submission of Mr Epstein, with which Mr Gorasia did not dissent, that in a case such as the present when no

advance notice is given of a costs application and the paying party is self-represented, it would usually be appropriate to adjourn the costs hearing. This is particularly so when such a person has difficulty with the English language, as in the present case, and substantial costs are being sought. The party against whom costs are being sought must be given a proper opportunity to consider the application, any costs schedule that is produced and any evidence that he wishes to adduce as to his means. The application for costs can then proceed by way of written submissions unless either party requests an oral hearing.

39. On 10 November 2011 the Appellant applied for a review of the Tribunal's decisions, including the award of costs (see Appellant's letter at pages 116 to 121). The review hearing took place on 29 March 2012 before Employment Judge Cowling, who confirmed the earlier decisions. Mr Gorasia and the Claimant have informed us that there was an oral hearing at which they both attended and that the Claimant gave evidence on the issue of costs. No further evidence has been adduced on this appeal by the Appellant in relation to his ability to pay, save for three pages at the end of the bundle relating to a statement of account that takes the matter no further, and no further submissions have been made about that matter or about the Respondent's schedule of costs.

40. As there has been a review hearing, we have given careful consideration as to whether there is any point in remitting the issue of quantum to the Tribunal for reconsideration. On balance we think that we should do so on the basis that the procedure before the Tribunal at the original costs hearing was defective and that the issue of quantum should be considered afresh. There is no reason why this case should not be remitted to the same Tribunal and every reason why it should. Accordingly, we allow this appeal to that limited extent and remit the issue as to the amount of any costs award to the Tribunal for reconsideration. We wish to make it clear, if

it is not already clear, that the jurisdiction of the Tribunal to make a costs award is not to be reopened.

41. We refuse permission to appeal. The grounds of appeal before this Tribunal were not arguable and disclosed no error of law in the Employment Tribunal decision. There are no arguable grounds of appeal with any realistic prospect of success for the reasons that we have already given.