Appeal No. UKEAT/0509/12/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 30 April 2013

Before

THE HONOURABLE MR JUSTICE KEITH

MS V BRANNEY

MR S YEBOAH

MR G HOWMAN — APPELLANT

THE QUEEN ELIZABETH HOSPITAL KINGS LYNN — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR GARY MORTON (of Counsel) Free Representation Unit
For the Respondent	MR MARTIN FODDER (of Counsel) Instructed by: Mills & Reeve LLP Solicitors Botanic House 100 Hills Road Cambridge CB1 1PH

SUMMARY

PRACTICE AND PROCEDURE - Costs

The employment tribunal ordered the employee, following the dismissal of his claim for unfair dismissal, to pay his employer's costs of defending the claim, those costs to be the subject of a detailed assessment by the county court on the indemnity basis. The appeal was on the ground that the assessment should not have been on the indemnity basis, and that the tribunal had failed to take into account the employee's inability to pay a large award of costs. The appeal was allowed on the basis that the tribunal did not appear to have considered (a) the effect of the order it made, which was that the employee would have to sell his home where he lived with his wife and two dependant children, his half-share in the home representing a very substantial proportion of his life savings, and (b) the possibility of putting a cap on the amount he had to pay. The EAT also held that an order for indemnity costs should only be made when the conduct of the paying party had taken the case away from even that very limited number of cases in the employment tribunal when it is appropriate to make an order for costs.

THE HONOURABLE MR JUSTICE KEITH

1. The Claimant, Mr Gary Howman, was employed by the Respondent, Queen Elizabeth Hospital Kings Lynn NHS Foundation Trust ("the Trust"), from 7 July 2008, latterly as its communications manager, until he was summarily dismissed on 18 March 2011. His claim for unfair dismissal was dismissed by an employment tribunal at Norwich (Employment Judge Postle presiding). The Trust then applied for an order that Mr Howman should pay its costs of defending Mr Howman's claim (which it put at £43,076 plus other disbursements) to be the subject of a detailed assessment by the county court on the indemnity basis. The tribunal made an order in those terms. Mr Howman now appeals against that order. It is not said on his behalf that the tribunal was wrong to have a made an order for costs, or that a detailed assessment of those costs was inappropriate. The appeal is brought on the basis that the tribunal should not have ordered him to pay the Trust's costs on an indemnity basis, and that it should either have capped the costs which he was required to pay or taken some other measure which took into account his inability to pay such a large award of costs.

2. In view of the limited issues which the appeal raises, it is unnecessary for us to set out the facts of the case in any detail. All that needs to be said is that a letter which purported to come from the Trust's chief executive was posted on the news section of the Trust's intranet. It was not a genuine letter at all, and the Trust took steps to find out who had posted it. Mr Howman was one of only four people whose access to the Trust's intranet enabled them to post the letter on the news section. The four of them were interviewed, and each of them denied having posted it. However, as a result of information given to the Trust following an order for disclosure made by the High Court, the registered user of the e-mail address which had been

used to post the letter was found to be Mr Howman's wife. She had been nominated by Mr Howman as the person who the Trust should contact in the event of an emergency. Not surprisingly, the evidence that it had been Mr Howman who had posted the letter was regarded as sufficiently robust to justify disciplinary proceedings being brought against him. At the disciplinary hearing, Mr Howman continued to deny that he or anyone from his household had posted the letter. He claimed that there were elements within the Trust who wanted to see the back of him, and they had managed to use his wife's e-mail address to post the letter. His denial was not believed, and his conduct was regarded as so serious that he had to be dismissed.

3. Mr Howman advanced much the same case in the employment tribunal, though, of course, the issues there were not whether it had been him who had posted the letter, but whether the Trust had had reasonable grounds for believing that it had been him, whether that belief had been arrived at following a fair and sufficiently thorough investigation in which Mr Howman had been given the opportunity to put forward his case properly, whether his dismissal had really been for what the Trust had believed him to have done (and was not just a convenient pretext which the Trust had used to conceal some hidden agenda for getting rid of him for some other reason), and whether his dismissal had been within the range of reasonable options open to a reasonable employer believing what the Trust believed Mr Howman to have done. The tribunal decided all those issues in the Trust's favour.

4. When it came to the Trust's application for costs, the tribunal took the view that the bringing of the case by Mr Howman had been misconceived, which was one of the circumstances set out in rule 40(3) of the Employment Tribunals Rules of Procedure ("the Rules") contained in Schedule 1 to the **Employment Tribunals (Constitution and Rules of**

Procedure) Regulations 2004 ("the Regulations"), which would trigger the tribunal's power to make an order for costs against Mr Howman. The reason why the tribunal thought that the bringing of the case had been misconceived was because it had had no reasonable prospect of success, which was one of the meanings given to the word "misconceived" by reg. 2(1) of the Regulations. On that issue, the tribunal found that Mr Howman "must have known [that] his case … never had a chance of success" in the light of the evidence which the Trust had assembled which showed irrefutably that his wife's e-mail address had been used to post the letter. Despite that, and despite the advice he had been given by another employment judge at a case management discussion a few weeks before the case was heard to "carefully consider his position" in the light of that evidence, Mr Howman had "persisted in prosecuting this case to the considerable inconvenience and expense of a public sector employer". Those were the factors which caused the tribunal to conclude that this was a case in which it should exercise its power to order Mr Howman to pay the Trust's costs of defending the claim.

5. Two things should be added to that. First, it is not as if Mr Howman was not alive to the possibility that an application for costs might be made if he lost his case. Even before the case management discussion, the Trust's solicitors had written to Mr Howman to inform him that they were likely to be instructed by the Trust to apply for costs if the claim was unsuccessful. A note made by the employment judge who presided over the case management discussion, which was incorporated into the order made following the case management discussion had reminded Mr Howman of that. Secondly, in addition to concluding that the bringing of the case had been misconceived, the tribunal decided that in one respect Mr Howman's conduct of the proceedings had bordered on the unreasonable. Indeed, it may have amounted itself to unreasonable conduct. That would have been another of the circumstances set out in rule 40(3)

of the Rules which triggered the tribunal's power to make an order for costs against Mr Howman. The conduct had consisted of him insisting that a particular witness be called by the Trust to give oral evidence when his evidence was not challenged and there was nothing relevant which he could have been asked.

6. That is the background against which the two issues which this appeal raises have to be decided. We deal first with the challenge to that part of the tribunal's order which required the assessment of the Trust's costs to be on the indemnity basis. The difference between the indemnity basis for assessing costs and the standard basis for doing so is explained in rules 44.4(1) and 44.4(2) of the Civil Procedure Rules. When costs are assessed on the standard basis, only those costs which are proportionate to the matters in issue in the case may be allowed, and if there is any doubt about whether they are proportionate in that sense or whether any of the costs were reasonably incurred or whether the amount of those costs was reasonable, that doubt must be resolved in favour of the paying party. On the other hand, when costs are assessed on the indemnity basis, the question of whether they are proportionate to the matters in issue in the case is taken out of the picture, and if there is any doubt about whether any of the costs were reasonably incurred or whether the amount of those costs was reasonable, that doubt must be resolved in favour of the receiving party.

7. The diligent researches of Mr Gary Morton for Mr Howman have thrown up only four cases in which orders for costs to be assessed on the indemnity basis have gone to appeal. In one of them, the employee's trade union was liable for the costs. In another, the award for costs was made against a corporate litigant. In the third, there was no appeal against the order that the costs should be assessed on the indemnity basis. Mr Howman's case is therefore the only

case which Mr Morton has found in which an ex-employee is appealing against an order requiring him to pay costs on an indemnity basis out of his own pocket.

8. The tribunal did not say why it ordered the costs to be assessed on the indemnity basis. It was requested to do so by Langstaff P. In his response on behalf of the tribunal, the employment judge said that the tribunal had been "astonished", given the "overwhelming and conclusive" evidence which Mr Howman knew from the disciplinary process he would be facing, that he had embarked on this litigation. It was "a case which never stood a chance from the outset". The employment judge referred again to a particular witness being required to attend the hearing when there was no challenge to his evidence, and he noted that Mr Howman had made "scurrilous and unsupported allegations" about one of the Trust's staff, which had "clearly" been intended to embarrass him and in no way supported Mr Howman's case, and which had only been withdrawn "at the last moment". The employment judge concluded with the following passage:

> **"At the end of the day, the Tribunal felt that [Mr Howman], in bringing the case which stood absolutely no chance on the overwhelming evidence before him, had brought a public-funded body to the Tribunal at great expense, and in those circumstances this was one of those very rare situations where the [employee] should be responsible for the [employer's] entire costs on the indemnity basis."**

9. It is not suggested that the tribunal did not have the power to order that the costs be assessed on an indemnity basis. Rule 41(1)(c) of the Rules provides:

> **"… the tribunal may order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party with the amount to be paid being determined by way of detailed assessment in a County Court in accordance with the Civil Procedure Rules 1998 … as shall be directed by the order."**

The words "as shall be directed by the order" gave the tribunal the power to direct the basis on which the county court should assess the costs. That was the view reached by the Employment Appeal Tribunal in **Beynon v Scadden** [1999] IRLR 700 (Lindsay J presiding) at [30] on the predecessor to rule 41(1)(c), namely rule 12(6) of the **Industrial Tribunals (Constitution and Rules of Procedure) Regulations 1993**. Nor is it alleged that it was not appropriate to order that the costs be assessed on the indemnity basis because that would have been to penalise Mr Howman twice over: his unreasonable conduct in bringing a claim which had no chance of success had resulted in an award for costs being made, and it was the same conduct which had resulted in the costs being ordered to be assessed on the indemnity basis. An argument along those lines was rejected in **Beynon** at [31]. As Lindsay J said, "it is not correct to regard an order for costs as penal: it is, rather, compensatory, compensating the successful respondent for the expense to which it has unreasonably been put."

10. So when should an assessment on the indemnity basis be ordered? In civil proceedings in the courts, costs will be assessed on the indemnity basis rather than the standard basis where the conduct of the party has taken the situation away from the norm. The norm in civil proceedings in the courts has been that the unsuccessful party would be ordered to pay the costs of the successful party. That is to be contrasted with proceedings in employment tribunals where it is only in the particular circumstances identified in rule 40(3) that a party will be ordered to pay the other party's costs. In our view, therefore, costs incurred in proceedings in employment tribunals should only be assessed on the indemnity rather than the standard basis when the conduct of the paying party has taken the situation away from even that very limited number of cases in the employment tribunal where it is appropriate to make orders for costs. That is why we think that the employment judge was right to say that it was very rare for an order to be

made for costs to be assessed on the indemnity basis. In our opinion, it was open for the reasons which the employment judge gave to treat this case as one of those very rare cases in which such an order was appropriate. We did not understand Mr Morton to suggest otherwise.

11. So on what basis is it said that the tribunal erred in law in ordering the costs to be assessed on the indemnity basis? The argument is that it prevented the county court from taking into account Mr Howman's ability to pay such costs as are assessed. Whatever his ability to pay those costs may be, he will have to pay them and suffer the consequences if he does not. In our opinion, there are two answers to that argument. First, it is not the fact that the costs were ordered to be assessed on the indemnity basis which has resulted in the county court not being able to take into account Mr Howman's ability to pay when it assesses the costs. It is the fact that the costs were ordered to be assessed by the county court, whether on the standard basis or the indemnity basis. The fact that only costs which are proportionate to the matter in issue may be awarded when the assessment is on the standard basis does not mean that the county court can take the paying party's ability or inability to pay into account when it assesses the costs.

12. Secondly, although the county court cannot take into account Mr Howman's ability to pay when it assesses the costs, it was open to the tribunal to take that into account. In other words, if the tribunal thought that the costs Mr Howman should have to pay should be capped, it could still have ordered that the costs be assessed by the county court, and assessed on the indemnity basis, while at the same time ordering that the sum which the assessment produces should be limited to such sum as the tribunal thought appropriate. The real question, then, is not so much whether the costs should have been ordered to be assessed on the standard as

opposed to the indemnity basis, but whether the order should have been modified in some way to reflect what Mr Howman could afford.

13. That brings us to the second ground of appeal. The starting point is rule 41(2) of the Rules which provides that the tribunal "may have regard to the paying party's ability to pay when considering whether it … [should] make a costs order or how much that order should be". So it was up to the tribunal to decide whether it would take what Mr Howman could afford to pay into account. 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. Moreover, as the Employment Appeal Tribunal said in **Jilley v Birmingham and Solihull Mental Health NHS Trust** (UKEAT/ 0584/06) (Judge Richardson presiding) at [44], if a tribunal decides not to take the paying party's ability to pay into account, it should say why. However, once the tribunal has decided that it will have regard to the paying party's ability to pay, then as the Employment Appeal Tribunal went on to say in **Jilley**:

> **"… 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."**

Indeed, if the tribunal has decided that it will have regard to the paying party's ability to pay, it has to take into account what it has found to be his ability to pay. As was said in **Jilley** at [47], the rules "are wide enough … to allow a Tribunal to take account of ability to pay by placing a cap on an award of costs even where it orders a detailed assessment". It is true that the Court of Appeal said in **Arrowsmith v Nottingham Trent University** [2012] ICR 159 at [37] that "[t]he fact that [the employee's] ability to pay was … limited did not … require the tribunal to assess a sum [for costs] that was confined to an amount that [the employee] could pay", but we

note that **Jilley** was not referred to by the Court of Appeal in that case. In the final analysis, if the tribunal decides to have regard to someone's ability to pay in deciding what order for costs it should make, what it needs to do is to balance the need to compensate the litigant who has unreasonably been put to expense against the other litigant's ability to pay. The latter does not necessarily trump the former, but it may do so.

14. Mr Howman's case was one in which the tribunal decided that it would have regard to his ability to pay. In paras. 14-16 of its judgment, it summarised Mr Howman's evidence about his income, his expenditure and his capital. It referred to a schedule he had produced which showed an income which he and his wife had of £1,257 a month, consisting of his allowance as a local councillor, his wife's salary, child benefit and child tax credit, and expenditure of £638 a month excluding food, clothing and petrol which varied from month to month. He had only modest savings if the statements of his bank and building society accounts which he produced were anything to go by. His only asset was the house which he and his wife jointly owned and where they lived with their two dependent children. As for that house, what the tribunal said about it in para. 17.20 of its judgment was this:

> **"[Mr Howman] clearly is the joint owner with his wife of a freehold property, 3 bedroom semi-detached house purchased approximately 9-10 years ago for £89,000 with a mortgage at that time of £48,000 and at today's date there is approximately £48,000 outstanding. During the last decade it has not escaped anyone's notice that property prices certainly up until the last 2 or 3 years rose significantly, tailed off and in some cases property prices have fallen. However the Tribunal are entirely satisfied that the value of [Mr Howman's] property would be well in excess of the purchase price he paid of £89,000 approximately 10 years ago. The authorities also tell us that when taking into account [someone's] means we are perfectly entitled to take into account capital as well."**

15. It is not disputed that it is open to an employment tribunal, once it decides to have regard to the paying party's ability to pay, to take into account their capital as well as their income and

expenditure. As the Employment Appeal Tribunal said in **Shields Automotive Ltd v Grieg** (UKEATS/0024/10) (Lady Smith presiding) at [47]:

> **"Assessing a person's ability to pay involves considering their whole means. Capital is a highly relevant aspect of anyone's means. To look only at income where a person also has capital is to ignore a relevant factor. We would add that we reject [the] submission to the effect that capital is not relevant if it is not in immediately accessible form; a person's capital will often be represented by property or other investments which are not as accessible as cash but that is not to say that it should be ignored."**

Importantly, though, the Employment Appeal Tribunal added:

> **"In any event, no case was made to the Tribunal that the Claimant would have difficulty in realising his interest in the house or using its value in some other way so as to meet his liability for expenses [which is the Scottish word for 'costs']."**

That suggests that if the claimant had had to sell his house in order to pay the costs he was ordered to pay, the outcome of the appeal might have been different. Indeed, Mr Morton says that there is support for that in the Government's recent proposals relating to the remission of fees which will have to be paid when you bring a claim in the employment tribunal. When it comes to deciding what someone's disposable capital is, the current proposal is that their home is not to be taken into account, though a second and subsequent home is.

16. The criticism of the tribunal in the present case is that it did not think through the implications of the order it was making in two respects. First, the order for costs once assessed was not likely to be less that £40,000 and could be very much more. Since Mr Howman's savings were modest, and since such income as exceeded his expenditure was likely to be small, the only ways in which Mr Howman could meet the order for costs would be either to raise capital on the strength of the house or to sell the house. He would not have been able to raise the amount of capital which was necessary given his modest savings and income. His

liabilities, which included the sum he had been ordered to pay, and his inability to service any loan once the loan had been used to pay the debt, meant that if he was to be able to meet the order for costs, the house would have to be sold unless the Trust decided not to enforce its order for costs for a while. The question for the tribunal, therefore, was whether in all the circumstances of the case, including, of course, the extent of his unreasonable conduct and the need for a public sector employer to be compensated for having had to incur costs so unreasonably, it would be appropriate to make an award for costs which had that effect on Mr Howman and his family.

17. In that connection, we have not overlooked the argument advanced by Mr Martin Fodder for the Trust that the tribunal would have been entitled to conclude that this scenario was not set in stone. Although the county court cannot take into account the paying party's ability to pay when it assesses the costs, it can take it into account when it comes to enforcing the order for costs. The county court is the court which enforces the payment of sums ordered to be paid by employment tribunals, and the order is enforced as if it was an order of the county court: see section 15(1) of the **Employment Tribunals Act 1996**. When it comes to enforcing such an order, section 71(2) of the **County Courts Act 1984** provides:

> **"If at any time it appears to the satisfaction of the court that any party to any proceedings is unable from any cause to pay any sum recovered against him (whether by way of satisfaction of the claim or counterclaim in the proceedings or by way of costs or otherwise) or any instalment of such a sum, the court may, in its discretion, suspend or stay any judgment or order given or made in the proceedings for such time and on such terms as the court thinks fit, and so from time to time until it appears that the cause of inability has ceased."**

That is sufficiently wide to enable the county court "at any time" – although in this context that means at any time after the assessment has taken place – to take Mr Howman's ability to pay into account to the extent that his ability to pay is such that he can truly be said to be "unable"

to pay. Moreover, the county court has similar powers under section 1(5) of the **Charging Orders Act 1979** and section 15(1) of the **Trusts of Land and Appointment of Trustees Act 1996** to take into account Mr Howman's personal and family circumstances if it was asked to make a charging order over the house in favour of the Trust and later on to make an order for sale. For example, if it was asked to make an order for sale, it could order that such sale as it orders be postponed until such time as the children are grown up.

18. These are not unimportant considerations. However, as Mr Fodder acknowledged, there is a limit to what the county court would be prepared to do if it was asked to enforce a properly obtained judgment. Moreover, at whichever stage in the process the county court may be considering Mr Howman's ownership and occupation of the house, it will at all times give great weight to the opinion of the employment tribunal, which the county court will assume decided to make its order for costs in the knowledge that the house would have to be sold if the order it was making were to be satisfied. In other words, it may be that the opportunities which Mr Howman would have had in the future to persuade the county court to let him keep his home even for the time being may be more theoretical than real.

19. Secondly, the property was jointly owned by Mr Howman and his wife. That meant that Mr Howman would have been entitled to only a half-share of the net proceeds of sale. If the value of the house had, say, doubled since it was bought, it might be sold for £180,000.00. Mr Howman's share of the net proceeds of the sale would have been in the region of £65,000.00. The question for the tribunal was whether, in all the circumstances of the case, it would be appropriate to make an award which could come quite close to wiping out Mr Howman's life savings.

20. It looks to us as if considerations of this kind did not come up on the tribunal's radar. If they had, we would have expected the tribunal to have said something about all of that in its judgment. They were the sort of points which ought to have been specifically dealt with. The fact that they were not suggests that they were not considered at all. We have not overlooked Mr Fodder's point that the implications of the order for costs would have been so obvious that the tribunal cannot have failed to have considered them, and we note that when announcing the tribunal's decision orally the employment judge is said to have referred to the likely equity in the property. However, we do not think that the tribunal must have considered the implications of its order simply because those implications were so obvious, and as for the employment judge's reference to the likely equity in the property, he could have been referring just as easily to the value of Mr Howman's capital as to how that capital might be realised.

21. There is another criticism which we think can properly be made of the tribunal. The tribunal was reminded by Mr Fodder that even where it was ordering that the receiving party's costs be assessed (on whatever basis) by the county court, it was open to the tribunal to order that only a specified part of the costs which were assessed should be paid by Mr Howman, or that the award should be subject to a financial limit. In other words, the tribunal could have ordered Mr Howman to pay a specified percentage of the assessed costs, or that the costs to be assessed should exclude a particular part of the proceedings (for example, the Trust's costs up to and including the lodging of the ET3 because from then on Mr Howman could not be said to have had anything other than a clear idea of the nature of the case he had to meet), or that the award be capped by an amount which reflected the economic impact on Mr Howman and his family of having to sell their home. There is no consideration of any of those possibilities in

the tribunal's judgment. We imagine that if they had been considered the tribunal would at least have referred to them.

22. We understand entirely why the tribunal thought that Mr Howman's bringing of the case, and his persistence in pursuing it when he should have realised that it was hopeless, was so unreasonable. But it looks as if its understandable criticisms of Mr Howman's conduct may have resulted in it taking its eye off the ball when it came to consider his ability to pay the costs it was ordering. Its failure to factor into the balancing exercise which it had to conduct considerations of that kind, in our judgment, fatally undermined the conclusion which it reached.

23. In the circumstances, we allow the appeal, and we remit the question of what the terms of the order for costs should be to the tribunal. We have thought long and hard about whether we should decide for ourselves what the appropriate order for costs should be, but on balance we think that the exercise should be conducted by the tribunal, and despite the robust and trenchant terms in which it expressed itself by the same tribunal which made the order in the first place. Indeed, since the issue involves a balancing exercise of the kind to which we have referred, that balancing exercise is best conducted by the tribunal which has all the relevant facts. Apart from anything else, things have moved on since the original hearing in the tribunal: the house has now been valued; the costs awarded by the tribunal have now been assessed at £49,052.12, including the fixed costs of the assessment, though the assessment went through by default; the judgment debt has been registered in the county court for enforcement in the sum of £51,335.40 including interest and costs; and a charging order has been made in respect of the property. It will not be open to Mr Howman to argue that an order for costs should not have been made, nor

that they should not have been ordered to be assessed by the county court, nor that that assessment should not have been ordered to be on the indemnity basis. It will only be open to the tribunal to consider whether its order should be modified, if necessary substantially, to take into account in the balancing exercise it has to conduct the factors set out in the relevant paragraphs of this judgment.