Appeal No. UKEAT/0240/12/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 22 November 2012

Before

HIS HONOUR JUDGE McMULLEN QC

MRS M V McARTHUR FCIPD

MRS L S TINSLEY

MR J R NOUCHIN — APPELLANT

(1) NORFOLK COUNTY COUNCIL
(2) FAKENHAM HIGH SCHOOL & COLLEGE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR S BRITTENDEN (of Counsel) Instructed by: Slee Blackwell Solicitors 31 Queen Street Exeter Devon EX4 3SR
For the Respondents	MS S BEWLEY (of Counsel) Instructed by: Norfolk County Council Legal Services County Hall Martineau Lane Norwich Norfolk NR1 2DH

SUMMARY

PRACTICE AND PROCEDURE

Costs

The Employment Tribunal made permissible findings about the Claimant's conduct of the case and was entitled to award costs against him when he withdrew after consulting his counsel in the course of his cross-examination after 9 days. The now customary reasons challenge to the Employment Tribunal's findings was unsustainable.

HIS HONOUR JUDGE McMULLEN QC

1. This case is about costs. This is the judgment of the court to which all members appointed by statute for their diverse specialist experience have contributed. We will refer to the parties as the Claimant and the Respondents. Fakenham High School and College is where the Claimant worked as a maths teacher and his employer in the usual triangular relationship in education was Norfolk County Council.

Introduction

2. Using the work done by His Honour Judge Peter Clark this case can be introduced in the following way.

> **"1. The Appellant, Mr Nouchin, was employed at Fakenham High School as a maths teacher from the autumn of 2007 until his dismissal on 31 August 2010. He brought a total of five claims before the Norwich Employment Tribunal. Those claims were combined and were opposed by the Respondents, the Local Education Authority, Norfolk County Council and the school. They came on for what was finally listed as a 25 day hearing in November 2010.**
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> **2. On the eighth day of hearing, 24 November, Mr Nouchin, then represented by counsel, withdrew all of his claims, including claims of direct discrimination, harassment, victimisation contrary to the Race Relations Act 1976, and an unfair dismissal claim and a complaint of detrimental treatment for having made protected disclosures.**
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> **3. The Respondent then made application for its costs in the proceedings. On 6 January 2011 the Employment Tribunal issued a Judgment, signed by Employment Judge Ash, who had chaired the hearing in November, which fell into two parts. First, that the claims and each of them brought by the Claimant against both Respondents are dismissed on withdrawal, and secondly directions were given for the original Employment Tribunal to be reconvened on 24 and 25 March 2011, in order to hear the Respondent's costs application. Consequential directions were given to set up that hearing.**
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> **4. On 24 March Mr Nouchin did not attend the Tribunal but was represented by counsel and, by a Judgment dated 26 April, the Tribunal upheld the Respondent's application for costs and ordered the Claimant to pay the Respondent's costs to be the subject of a detailed assessment in the County Court."**

3. The judgment with which we are concerned is a judgment on costs sent to the parties on 12 May 2011. What Judge Clark was dealing with was a late appeal against the first order of the Tribunal which was that the claims against each of the Respondents were dismissed on withdrawal by the Claimant. That opened up directions for a costs hearing which is the subject of the present appeal.

4. Judge Clark considered the merits of this appeal following his refusal to allow an out of time appeal with the following words:

> **"The Employment Tribunal which heard eight days of evidence before the Appellant withdrew all his claims was able to form a clear view of his conduct of the proceedings. The Appellant's costs order based on those findings was inevitable… This is one of those rare Employment Tribunal cases where a full costs order was justified. At that stage there was a much fuller Notice of Appeal."**

5. Dissatisfied with Judge Clark's opinion, the Claimant came before His Honour Judge Serota QC, this time with the assistance of Mr Stewart Brittenden of counsel who gave his services under the ELAA Scheme. He came bristling with a wholly fresh Notice of Appeal which Judge Serota gave permission to advance and sent to a full hearing. The Notice of Appeal could not be more succinct. It contends that the Tribunal failed to provide adequate reasons. Although the word, "Perversity" appears in the notice, Mr Brittenden before us focusses on the reasons challenge and insofar as perversity arises, it is solely in relation to his criticism of the Tribunal's want of reasons. Judge Serota considered that the reasons as they existed were wholly unclear.

The legislation

6. The relevant provisions of the legislation are not in dispute and they are cited by the Employment Tribunal. The power to award costs is exceptional and is to be found in rule 40 where a party has in conducting the proceedings acted vexatiously, abusively, disruptively or otherwise unreasonably in bringing or conducting the proceedings or if they are misconceived. No issue arises as to the watershed set out in the rule having been reached in this case, if it is held that the reasons are adequate.

7. A Tribunal is obliged to give reasons (see rule 30) setting out, broadly speaking, its findings of fact, the questions of law and the resolution of disputes before it.

The facts

8. The Employment Tribunal upheld the respondents' case for it to be paid its costs sending the matter for a detailed assessment at the County Court. We are told today that the sum exceeds £180,000.

9. There is not much we can say by way of setting out the facts of the relationship for the Claimant withdrew before the end of the case; there are no findings since the case was then dismissed. But the agreed chronology indicates that the Claimant had been a maths teacher at the school. On 23 March 2009 he made his first of five claims alleging race and sex discrimination. He cited 39 incidents of race discrimination between 2007 and 2008 involving pupils, the head teacher, the deputy head and the head of maths. He said of these, 16 had been fully reported to the deputy on the day of each incident itself and then there were further incidents after 2008 and further claims were filed. The Respondents set out the principal dispute in the case which was that the Respondents had grave concerns about the performance of the Claimant and in due course, on 18 November 2008 in a further response there is this:

> **"The Claimant asserts that there were no concerns about his performance until he raised issues of discriminatory conduct is not sustainable on the evidence and that he is a competent teacher is not sustainable on the evidence. There clearly are issues with his competence, and these were apparent in time from the beginning of his time with the school. There have been plain concerns plainly expressed to him and have been expressed since he has been at the school."**

10. Further claims were submitted. The Claimant was given a final written warning in relation to capability issues. He raised a grievance on 20 July 2009 and further claims were made. At that stage, a further response was submitted by the Respondent in which there is this:

> **"15. It is averred that the Claimant's allegations against both the School and Norfolk County Council are nothing more than a device intended to divert the School's attention away from the very real issues which have existed in relation to the Claimant's capabilities as a teacher from the outset.**
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> **16. For the reasons aforesaid the Claimant's allegations, his grievances and his claims to the Employment Tribunal have all been made and continue to be made in bad faith.**
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> **17. The Respondents consider the Claimant's claims to be vexatious, misconceived, unreasonably brought and/or an abuse of the Employment Tribunals within the meaning of Rule 40(3) Schedule 1 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004. Accordingly the Claimant is on notice that the Respondents will seek to recover the entirety of their costs in defending the Claimant's claims at the conclusion thereof.'"**

11. A further claim was uttered by the Claimant on the grounds of race discrimination and redundancy. He was made redundant but in fact reinstated. On 30 September 2010 a yet further response was made by the Respondents indicating that they would seek to recover the entirety of their costs because the claims were misconceived, vexatious and unreasonable if they continued to be pursued. Costs were estimated at £70,000. The Claimant did not pay any attention to these and over seven to eight days out of the 25 days listed, the Claimant gave his evidence to the Employment Tribunal.

12. Evidence had been exchanged in advance which included the Claimant's witness statements which are voluminous and 90 witness statements of the Respondent's witnesses. The Claimant was represented by counsel A. He was cross-examined by counsel for the Respondent, who we will call counsel X. During his evidence his wife was interposed by agreement but an application was made by counsel A towards the end of 9 days for him to talk to his client who was then in the witness box. Permission was given. After receiving advice from his counsel, the Claimant sought leave to withdraw his claims. They were withdrawn and then they were dismissed; that is the normal procedure in the face of the Tribunal. Directions were then given for a hearing on costs at the Respondents' instance. The same Tribunal gathered to hear the costs issue and there the Claimant was represented by counsel B and the Respondent retained counsel X.

13. The Employment Tribunal made a number of findings as to its jurisdiction, some of which are unchallenged today. The Tribunal said this:

> **"2. At the centre of his complaints was the very serious allegation that capability proceedings had been instigated against him both formal and informal because he, Mr Nouchin, had complained of victimisation and race discrimination directed against him. That claim was bolstered by the assertion from Mr Nouchin that he was a good teacher and that he did not need and should not have been subjected to capability proceedings. There is overwhelming evidence, on any view of the matter, from the documents alone that he was not a good teacher; he was incapable of admitting that fact to himself. Suggestion that he was to blame or at fault for the way he dealt with children was met with vitriolic and defamatory responses towards his colleagues and, in due course, his head teacher and representatives of the local authority. His conduct throughout his time at Fakenham School was disgraceful."**

14. At paragraph 3 the issue appears to have been set out as to the way in which at the trial would unfold:

> **"3. [Counsel] reminded us that at the start of the original merits hearing last November it was submitted that like many seemingly complex cases the real issue was one of causation: why was the Claimant subjected to these procedures and interviews and suggestions that he needed help with his teaching and in due course disciplinary matters. If it was a result of him complaining about race discrimination then quite clearly his claim was likely to be upheld. However, if were the case that his complaints of race discrimination and victimisation post dated the start of capability proceedings and that those proceedings were based on cogent and adequate evidence from others then quite clearly, it was a scurrilous and cynical claim."**

15. As can be seen, the Tribunal set the issue of causation within the context of a timeline and came to this conclusion:

> **"4. This Tribunal is satisfied on the Claimant's evidence after cross-examination and overwhelmingly on the documents, that he, Mr Nouchin, did not complain about matters relating to race until May 2008 and that the dye [sic] was already cast in the sense that procedures, informal at least, were being invoked against him by reason of his inability to teach and control his classes. We do not know if he was subject to any actual overt racist abuse by his pupils in the period leading up to May, that mayor may not be the case, but what we do know is that he did not complain about it and indeed he made up, invented and lied about the number of complaints and their nature on a persistent basis thereafter.**
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> **5. That in itself, namely his mendacious approach to this litigation, not to mention the manufacture of complaints, both in his mind and on paper, submitted to Mr Moore in October that year are sufficient to put this claim at the top end of vexatious, misconceived and abusive."**

16. Thus, the watershed is that the Claimant raised discrimination in May 2008. Ms Bewley says the date is 19 May which is the date on which it is plain the Claimant was making a claim

of race discrimination. We consider that to be correct having seen the relevant material. Thus, neatly opposed in those two paragraphs is the issue before the Employment Tribunal and so the Tribunal would be required to give reasons for its finding as to whether this was a careless and cynical claim based upon the timing of the allegations of race discrimination. Was it a freestanding claim or was it a response to long-standing concerns expressed by the Respondents about his performance?

17. The Tribunal then made very strong findings about the conduct of the Claimant and said this:

> **"6. It gives this Tribunal no pleasure to state that in their collective experience, and in the case of the Judge some 22 years of sitting, they have not come across a more sustained and cynical attempt to cause disruption, expense, embarrassment and hurt to innocent parties, namely the School, the Head and other teachers.**
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> **7. We also note that in the course of these proceedings his [sic] was reluctant, to the point of blatant refusal at one stage to in any way moderate his approach to those he quite clearly had hurt by his actions and his pursuit of this litigation."**

18. The Tribunal acknowledged the difficulty counsel B was in, in trying to run this case afresh because the Claimant did not turn up at the costs hearing in order to defend himself. However, the Tribunal noted that all of the documents, and the case was very substantially documented, were known to the Claimant and he had known about them for a long time. The Tribunal further elaborated its opinion of the Claimant:

> **"9. He is quite right to point out that the Claimant right from the start talked in the language in [sic] litigation, of no cooperating, of effectively getting his own back, of being a nuisance; all these things are true. But we doubt that Mr Nouchin set out in the sense that he thought right from the start he would be going to a Tribunal. We think he is a man that threatens without necessarily understanding what he is saying. However, someone is [sic] in a hole should stop digging. Mr Nouchin is not someone who stops. His pride would not allow him to back off. He continued throughout to make hurtful accusations. Possibly to some extent he lives in a fantasy world."**

19. The Tribunal said it did not take account of the Claimant's witness statements. We understand that to mean a witness statement for the costs hearing presumably because he was

not there to be cross-examined upon it; no point is taken about that. No issue is taken about the ability of the Claimant to pay. The Tribunal sets out the law (see paragraphs 11 and 12) and then makes a comment about the proceedings as to whether or not it would be appropriate to refer the matter elsewhere. Its final conclusion is this:

> **"14. Thus for all the above reasons we find Mr Nouchin to be both dishonest and vindictive. He had ample opportunity to withdraw these proceedings, he failed to do so and insofar as he feels aggrieved he has only himself to blame."**

The Claimant's case

20. Essentially, this is a reasons challenge. Mr Brittenden contends that the Tribunal fell way below the standard required of an Employment Tribunal in any case, and particularly in a case where such condign criticism is made, for his client to understand the reason why an order was made. On authority, he contends that the conclusions are not there to support the costs order because they are not backed up with findings of fact as to, for example, documents which were fabricated and so on. Documents are relied upon which Mr Brittenden contends prove that prior to the May 2008 watershed the Claimant was complaining of race discrimination which is at odds with the firm finding by the Tribunal. We were taken to these documents, the subject of considerable cross-examination. The Tribunal had not indicated which documents it had found to be fabricated.

The Respondents' case

21. On behalf of the Respondents, Ms Bewley contends that these claims were as the pleadings show, attempts to distract away from capability proceedings which were on foot from as early as November 2007 against the Claimant. The Tribunal made firm findings that the Claimant was dishonest and that his conduct was unreasonable. Again, on authority, Ms Bewley contends that the standard for the giving of reasons has to relate to the nature of the dispute. A long race discrimination claim or an unfair dismissal requires careful attention to the

details, whereas a short costs hearing requires the less, although she accepts that the findings here are serious. In terms of the watershed date, Ms Bewley contends that the document Mr Brittenden put forward with the date of March 2008 on it was not produced by the Claimant until after May 2008 and therefore, do not assist in the Claimant's case that he had made race discrimination complaints earlier. Further, the Claimant alleges he was threatened and bribed on 28 April 2008, which of course pre-dates May, yet in his own pleadings he asserts this was sometime after 11 July 2008. (See pages 60 and 240 of our bundle.)

22. As to the unfortunate remark made by the Tribunal about whether there may be proceedings elsewhere, Ms Bewley contends that that in itself is not an error, it is not a finding. As to the fabrication of documents, Ms Bewley referred us to two documents said by the Claimant to be contemporaneous about conduct of pupils in his class at dates when school was in the summer or half-term holidays. A finding of dishonesty was correctly made and that gave rise to the award of costs.

The legal principles

23. The legal principles to be applied in this case emerge from the following authorities: In **Ucatt v Brain** [1981] IRLR 234, Donaldson LJ said the following:

> **"Industrial Tribunals' reasons are not intended to include a comprehensive and detailed analysis of the case, either in terms of fact or in law. This was a reserved decision, but in practice they are more usually given off the cuff, and by that I do not mean to say without thought but I do mean extempore, to the parties present in court by people who, though lawyers, are not professional judges. The reasons are then recorded and no doubt tidied up for differences between spoken English and written English. But their purpose remains what it has always been, which is to tell the parties in broad terms why they lose or, as the case may be, win. I think it would be a thousand pities if these reasons began to be subjected to a detailed analysis and appeals were to be brought based upon any such analysis. This, to my mind, is to misuse the purpose for which reasons are given."**

24. That passage was repeated and approved in **Tran v Greenwich Vietnam Community** [2002] IRLR 735 in the judgment of Sedley LJ where this occurs:

> **"14. Mr Westgate, in a cogent submission, has argued that these grounds amounted to the same thing as a challenge to the adequacy of the extended reasons. There may well be cases in which this would be right; but in the present case the distinction corresponds with a real difference. The difference is that explained by the EAT: so long as the extended reasons are treated as doing what they purport to do - that is, to explain the tribunal's conclusions - it is permissible to look to the documents to which the reasons refer for the explanation, and to read them in the sense favourable to the respondent employer in which the employment tribunal evidently read and construed them. It is only if the reasons are frontally attacked for inadequacy that the distinct *Meek v City of Birmingham* issue arises. But it is unfair to a respondent to let it in by stealth if it has not been squarely posed in the grounds of appeal.**
>
> **[…]**
>
> **17. For these regrettable reasons, the appeal to this court cannot succeed. But it is necessary to make clear what is being decided and what is not. Mr Fodder, in his generally well-directed submission for the respondent, was prepared if necessary to defend the tribunal's extended reasons as (to coin a phrase) *Meek* compliant. While for the technical reasons set out above this appeal does not depend on the answer, no employment tribunal and no advocate or representative practising in the employment field should imagine that a decision as short on reasoning as the present one complies with the legal obligation, if asked, to explain how the tribunal has got from its findings of fact to its conclusions. It may be done economically, but simply to recite the background and the parties' contentions and then to announce a conclusion is not to do it at all; and an opaque reference to the evidence which has been given does not save it. The giving of adequate reasons fulfils many functions, among them the important one of concentrating decision-makers' own minds on what they are doing and demonstrating to the parties and (if necessary) to appellate tribunals that they have given acceptable answers to the right questions. I find it disturbing that an experienced lay representative appears to have resigned himself to grappling with reasons which were not there instead of confronting their absence as a primary ground of appeal; and I hope that it does not signify that extended reasons like those given in the present case are becoming usual."**

25. Substantially agreeing with him was Arden LJ. It has to be noted that those observations were part of the decision because the Tribunal judgment was upheld on other grounds, but they are powerful guidance in our case. In **Deman v Association of University Teachers** [2003] EWCA Civ 139, Potter LJ referred to the relevant authorities (see paragraph 35) and then went on to say this:

> **"40. Whilst in no sense wishing to detract from the importance of the decision of this court in *Anya*, we do not think it has the panacean qualities Mr Davies claimed for it, nor do we see it as breaking any new ground. The extensive citations contained within the judgment of the court from the well established decisions of *King v Great Britain-China Centre* and *Quereshi v Victoria University of Manchester* are illustrative of its mainstream credentials. Following *Quereshi* in particular, it rightly emphasises the need for clear findings of fact and the careful evaluation of inconsistencies in the evidence. It cites a decision of Morison J sitting as Chairman of the EAT in *Tchoula v Netto Foodstores Ltd* (unreported) which is in the following terms…."**

26. There is then a citation from **Tchoula** but we hold that that has limited impact because there has not been a balance of the evidence. The only evidence coming in the case was from

the Claimant and his wife and there was no need for a balancing and making comparative findings as to credibility between the Claimant and the Respondents' witness. Nevertheless, Potter LJ went on to say this:

> **"44. It seems to us that any variation in emphasis discernible in the authorities referred to paragraphs 31 and 35 above, is no more than a reflection of the practical difference in the task of the Tribunal as between cases of unfair dismissal on the one hand and racial discrimination and victimisation on the other. In the former, having established the facts, the assessment of the fairness or unfairness of the dismissal generally depends on applying objective norms and accepted standards of fairness in the field of employment rather than assessing nuance and drawing inferences as to the "true" motivation underlying particular actions or a course of events in respect of which more or less plausible reasons consistent with non-discrimination are advanced in answer to the allegations made. The latter type of case will usually involve the necessity for a more careful and elaborate statement of reasons than the former if the Tribunal is to fulfil the parties' entitlement to be told why they have won or lost with a sufficient statement of the reasoning to enable the EAT or this court to know that the Tribunal has made no error of law in coming to its conclusion."**

27. Of course, no discussion of a reasons challenge is complete without reference to **English v Emery Reimbold & Strick** [2002] 1 WLR 2409 where of particular relevance to our case is the introduction by Lord Phillips MR indicating the cottage industry for barristers of the emerging trend to complain of want of reasons (para 2). In relation to costs, a particular segment of the judgment in this sequence of cases was considered and the court said this:

> **"27. At the end of a trial the Judge will normally do no more than direct who is to pay the costs and upon what basis. We have found that the Strasbourg jurisprudence requires the reason for an award of costs to be apparent, either from reasons or by inference from the circumstances in which costs are awarded. Before either the Human Rights Act or the new Civil Procedure Rules came into effect, Swinton Thomas LJ, in a judgment with which the Vice-Chancellor, who was the other member of the Court, agreed, said this in *The Mayor and Burgess of the London Borough of Brent v Aniedobe* (unreported) 23 November 1999, in relation to an appeal against an order for costs:**
>
> > **"…this Court must be slow to interfere with the exercise of a judge's discretion, when the judge has heard the evidence and this court has not. It is also, in my view, important not to increase the burden on overworked judges in the County Court by requiring them in every case to give reasons for their orders as to costs. In the great majority of cases in all probability the costs will follow the event, and the reasons for the judge's order are plain, in which case there is no need for a judge to give reasons for his order. However, having said that, if a judge does depart from the ordinary order (that is in this case the costs following the event) it is, in my judgment, incumbent on him to give reasons, albeit short reasons, for taking that unusual course."**
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> **28. It is, in general, in the interests of justice that a Judge should be free to dispose of applications as to costs in a speedy and uncomplicated way and even under CPR this will be possible in many cases.**
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> **29. However, the Civil Procedure Rules sometimes require a more complex approach to costs and judgments dealing with costs will more often need to identify the provisions of the rules**

that have been in play and why these have led to the order made. It is regrettable that this imposes a considerable burden on Judges, but we fear that it is inescapable.

30. Where no express explanation is given for a costs order, an appellate court will approach the material facts on the assumption that the Judge will have had good reason for the award made. The appellate court will seldom be as well placed as the trial Judge to exercise a discretion in relation to costs. Where it is apparent that there is a perfectly rational explanation for the order made, the Court is likely to draw the inference that this is what motivated the Judge in making the order. This has always been the practice of the Court - see the comments of Sachs LJ in *Knight v Clifton* [1971] Ch 700 at 721. Thus, in practice, it is only in those cases where an order for costs is made with neither reasons nor any obvious explanation for the order that it is likely to be appropriate to give permission to appeal on the ground of lack of reasons against an order that relates only to costs."

28. Of course, a reasons challenge must have in the forefront of consideration the postscript of the Court of Appeal which is in these terms:

"118. … There are two lessons to be drawn from these appeals. The first is that, while it is perfectly acceptable for reasons to be set out briefly in a judgment, it is the duty of the Judge to produce a judgment that gives a clear explanation for his or her order. The second is that an unsuccessful party should not seek to upset a judgment on the ground of inadequacy of reasons unless, despite the advantage of considering the judgment with knowledge of the evidence given and submissions made at the trial, that party is unable to understand why it is that the Judge has reached an adverse decision."

29. What is the court to do when the case stops halfway? For this, both parties relied upon **Yerekalva v Barnsley** [2012] IRLR 78 CA which is said to be the only Court of Appeal case where there has been consideration of costs for a case which ended without findings. This was after a part-heard PHR and the claims were withdrawn. Mummery LJ acknowledged that costs were rarely ordered in the Employment Tribunal and would not be interfered with unless there was an error of legal principle or if the order was not based on relevant circumstances or was obviously wrong (see paragraph 9). The subject of the Court of Appeal's judgment in the case was a detailed costs judgment as they put it, running to 40 paragraphs. 100 per cent of the respondent's costs were ordered to be paid by the claimant. On appeal to the EAT, Underhill J, President, it was reduced to zero and on appeal to the Court of Appeal, 50 per cent was ordered. Mummery LJ said this:

"23. The ET was, however, swayed against the Claimant on the matter of costs by its view that at the Pre-Hearing Review the Claimant had said things which the ET believed "not to have

been truthful" about the state of her health, about her personal injury claims and about her financial means.

[…]

25. The Claimant had falsely claimed, on an application form for a disability allowance in April 2007, that, prior to the onset of her back problems, she had been an active sportswoman going to the gym, running, and playing tennis and badminton and doing other sports 3 or 4 times a week, whereas now she could do none of those things following a traffic accident in 2004. She later accepted in her witness statement that she had not engaged in the sporting activities mentioned by her in the application form for disability allowance.

26. The Claimant had stated untruthfully that she had not made a claim for personal injury arising out of a traffic accident. The ET considered that she had not been frank about that, finding that she had instructed two firms of solicitors in connection with the accident.

[…]

43. Next, on the evidence before the ET, I agree with the Council that the ET was entitled to proceed to a decision on the Council's costs application on the basis that the Claimant's conduct of the proceedings was unreasonable and that it had jurisdiction under Rule 40 to make an order for costs against her. When, as here, the case has been withdrawn before it has run the full course to a final conclusion on the merits, difficulties on costs applications are bound to arise from the absence of findings of credibility, the absence of findings of disputed facts and the absence of findings on issues of liability. The Tribunal or court has to do the best it can with such material as it has in a case that has never been fully tried."

30. That was the way in which the matter was resolved. In fact, there is another case on costs when a claim has been withdrawn and that is **Dean and Dean & Co** [2011] EWCA Civ 1332. In that case the employment judge declined to exercise her discretion in favour of a costs order when a claimant had withdrawn a sex discrimination claim. On appeal to the EAT, I upheld the Judge's decision and the Court of Appeal upheld mine in the following terms:

"22. As happened in *Barnsley*, this is a case of three rounds of legal argument about costs in the ET. Even more costs have been run up on the sort of appeal that is doomed to fail, unless it is shown that the discretion appealed was flawed by error of legal principle, or by failure to give proper consideration to all the relevant circumstances, or was obviously wrong.

23. There was no error of legal principle by the ET: express reference was made to the relevant rule, so that the ET was fully aware of the nature of the discretion and the specified conditions for its exercise.

24. The ET could hardly fail, after a PHR lasting 2 days, to be fully aware of the nature and context of the claims, of the fact that most of them were struck out for being out of time or by reason of non-compliance with the Dispute Resolution Regulations and of the difficulties that Claimants, tribunals and courts had encountered in the application of those complex, unsatisfactory and since repealed Regulations.

26. In those circumstances the ET had to do the best that it could with what it did know. In my view, it did so fairly and adequately. This court is not entitled to interfere with its discretion, even if, had it been exercising the ET's discretion, this court might have analysed the situation of the parties in greater depth, or given more detailed reasons for its decision, or acceded to the application to the extent of making an order for payment of some of the costs."

31. That reference to, "doing the best it can" started with **Barnsley**, Mummery LJ in both cases expressly recognising the difficulty facing a Court or a Tribunal on a costs application where there has been no completion of the proceedings.

Discussion and conclusion

32. We prefer the arguments of Ms Bewley and have decided to dismiss the appeal. The Tribunal made very firm findings against the Claimant. The reasons are apparent on the document itself. It must be borne in mind this Tribunal had listened to the Claimant for almost nine days and had watched him being cross-examined. Many of the documents in the bundle were referred to. We are told the Respondents' case was put in cross-examination through the 19 witness statements as set out in the chronology, that is, the simple proposition that the Claimant was making this up in order to defend himself from proper complaints and concerns about his performance.

33. The principal finding about the date has been the subject of close debate before us. Bear in mind that the Tribunal had accepted that the issue was one of causation and therefore the propositions as set out in its paragraphs 3 and 4 would have to be proved. The finding that the die was already cast in that procedures were already under way is one which it was entitled to make. We have ourselves seen in the bundles the way in which the concerns were expressed from a time prior to May 2008. It is said they go back to December 2007, but in any event, the only matter is whether or not these were on foot before the Claimant made his claims of race discrimination. The documents in the bundle before us plainly show that, since they are at least in January and February.

34. The other part of this is whether or not a race discrimination claim was made in advance of that and the two documents we have been referred to by Mr Brittenden from March 2008 at

first sight seem to show that. Ms Bewley rightly objected to the reliance placed on these documents because the Claimant was cross-examined as to the date when these documents were produced. Had she known that these two particular pages were to be relied upon, she would have adduced the notes of what was said by the Claimant when these documents were put to him. From that position of weakness, Ms Bewley was nevertheless able to show us that the documents relied upon were not made in March but were made sometime after May 2008 and the document from the County Council acknowledging the report form in November 2008 was made shortly after it had received the reports. The point is, reports about race discrimination by, for example, pupils have to be reported from the school to the Local Authority. No response having been made to challenge that assertion, we hold that the Tribunal had a basis upon which it could find that the Claimant had not made a claim of race discrimination before, we daresay, 19 May 2008. These documents on their face saying March were not so.

35. The second proposition is that the Claimant fabricated some of his claims and his documents. For this, reference was made by Ms Bewley to two complaints the Claimant made in 2008 when the evidence before the Employment Tribunal in documentary form shows these to have been made during the school holidays. Again, there was no resistance to us being taken to these pages, demonstrating that the Claimant had not produced a document which was a contemporaneous report of an event at the school since it was shut. We uphold the contention of Ms Bewley that the Tribunal did have a basis for making those findings and one does not have to look very deeply to see illustrations of the facts which caused the Tribunal to make those findings.

36. We bear in mind this is a costs hearing and is therefore supposed to be relatively short, robust and not to involve large amounts of time. No doubt, the Tribunal expressed itself in the most forthright terms but the threshold which had to be crossed by the Respondent in order for

the submission to be made good was that the Claimant had behaved unreasonably. On the basis of the material here that was open to it. As is clear from my judgment, upheld in **Arrowsmith** [2012] ICR 797 CA, where there has been dishonesty, a costs order is certainly available applying with modification the judgment in **Daleside** UKEAT/519/08.

37. We then turn to the remark which we have described as "unfortunate". This was a matter which ought to have been canvassed with the Claimant at the time. We understand oral reasons were given, no complaint was made by counsel B at the time pursuant to counsel's duty which is if there is a lack of clarity, an error or something missing in an oral judgment, then is the time to make the judge aware of it. This was not done. The unfortunate passage goes beyond what is required in the costs order. It is pejorative beyond the adverbs used in rule 40. It is not a finding as to the consequences of its decision. It should not have been put in here. But it does not affect the substantive findings in relation to costs. We say that by reference to the passage we have cited in **Ucatt v Brain**. "Infelicitous" may be a rather mild way of describing this but it is a category of comment which, made in a judgment where there are other freestanding robust findings, does not vitiate it.

38. In those circumstances, the appeal is dismissed and an order for a detailed costs assessment will stand. We would very much like to thank both counsel for their help in accordance with the usual practice.

39. Application for permission to appeal refused [for reasons not transcribed].