Appeal No. UKEAT/0392/12/ZT

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 8 October 2013

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

MISS C E DUNN — APPELLANT

ESTÉE LAUDER COSMETICS LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPLICATION FOR COSTS

APPEARANCES

For the Appellant	No appearance or representation by or on behalf of the Appellant
For the Respondent	MS KATE BALMER (of Counsel) Instructed by: Clyde & Co LLP St Botolph Building 138 Houndsditch London EC3A 7AR

SUMMARY

PRACTICE AND PROCEDURE – Costs

Abusive and threatening e-correspondence accompanied an application to an Employment Tribunal for unpaid wages, where the basis for claiming underpayment was never clearly set out, and when the matter was heard evidence as to how the employer had calculated payments was not challenged, although assertions were made by the Claimant's representative in an unspecific manner about the propriety of the payments. The Employment Judge rejected the claims, and awarded costs. An appeal alleged that the EJ had behaved unprofessionally and was accompanied by abusive and threatening emails against the employer and its lawyers. Though giving a clear warning as to costs, HHJ Shanks allowed the claim to proceed so that the Respondents could respond to the allegations, and the EJ comment. After they had done, and some two weeks before the appeal, it was withdrawn. But the Respondent then asked for costs. The Claimant asked that this be considered at an oral hearing, for which she then failed to turn up though it was found she or her representative knew of it, and it was proper to proceed. The EAT was satisfied that the conduct came within rule 34A EAT rules, and that it ought to make an order, but moderated the amount within r.34B so as to be considerably less than claimed.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

Introduction

1. This is an application for costs made under rule 34A of the **Employment Appeal Tribunal Rules 1993**. Those rules provide as follows:

> **"(1) Where it appears to the Appeal Tribunal that any proceedings brought by the paying party were unnecessary, improper, vexatious or misconceived, or that there has been unreasonable delay or other unreasonable conduct in the bringing or conducting of proceedings by the paying party, that Appeal Tribunal may make a costs order against the paying party."**

2. I shall not cite subsections (2) or (3), which are not material, but turn to section 34B, which deals with the amount of a costs order. It provides, so far as material, as follows:

> **"(1) […] the amount of a costs order against the paying party can be determined in the following ways—**
>
> **(a) the Appeal Tribunal may specify the sum which the paying party must may to the receiving party; […]**
>
> **(c) the Appeal 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 the High Court in accordance with the Civil Procedure Rules 1998 […].**
>
> **(2) The Appeal Tribunal may have regard to the paying party's ability to pay when considering the amount of a costs order."**

3. These matters of law arise out of and in respect of those words. First, the proceedings are those brought by the paying party. Where an application for costs is made in respect of the way in which the paying party has behaved in respect of bringing or conducting the central appeal, there may be issues as to the costs of making the application for costs. In my view, the rule is broad enough and on a proper construction includes those parts of the proceedings that are necessarily ancillary to an appeal, and that includes the making of a costs order. That point is relevant to the present case, since part of the claim made before me is that by her conduct the paying party, Miss Dunn, has, through her representative, her partner, Mr Ostick, conducted himself in such a way as to exacerbate the costs that the receiving party has had to spend to

pursue this costs application. In principle, it seems to me, that is within the scope of section 34A(1). It would be a strange lacuna in the rules if it were not.

4. Secondly, the making of a costs order is rare in this Tribunal. There is no specific test that the circumstances of an appeal have to be exceptional, but as a matter of fact it is unusual. The words "unnecessary, improper, vexatious or misconceived" and "unreasonable" thus have been given a colour by practice that means that they are to be construed restrictively.

5. Thirdly, there is no obligation upon an Appeal Tribunal to make a costs order even if it should find the necessary pre-condition that the proceedings are as described or other unreasonable delay or conduct has been made out.

6. Fourthly, it is said here by Ms Balmer, who appears for the applicant, the successful Respondent below and successful on the appeal, that writing abusive emails and uttering unreasonable threats at the same time as taking steps to pursue an appeal or engaging in correspondence relating to the appeal is capable of coming within the description "bringing or conducting of proceedings". That, it seems to me, is a question of fact. I do not accept that simply because a party may express himself or herself in intemperate terms about the past behaviour of another party, and because that has some origin in the litigation, it is necessarily linked to or within the phrase "bringing or conducting of proceedings". Everything, I think, must properly be determined by the context.

7. Finally, by way of observation on the underlying law, the discretion, for such it is, to make a costs order extends, as it is plain from section 34B, not simply as to the making of the order if and only if a proper ground is shown in 34A, but also as to the amount of that order,

and extends yet further as a separate discretion that if the Appeal Tribunal considers that some amount should be made it may, but does not have to, have regard to the paying party's ability to pay. That discretion is always likely to be informed by whether the paying party has taken the step, which the paying party is enjoined to do by the Practice Direction, of filing an affidavit of means so that if the question arises, this court can properly be informed as to the means of that party. In the absence of that information, it is plainly less likely that the Appeal Tribunal will have regard to the paying party's ability to pay, though I do not rule out there being some circumstances in which that might occur.

The history

8. The history of this sad case began when Employment Judge John Warren, sitting in Reading, rejected claims made by the Claimant that she had suffered unlawful deductions from her wages and ordered her to pay costs. He struck out the claims for wages, breach of contract and accrued holiday pay on the basis that they had no reasonable prospect of success. The costs order, in the sum of £6,915.50, was made on the basis that the conduct of the claim by the Claimant and her representative was scandalous, vexatious and unreasonable and the claims misconceived.

9. On 22 September 2011, only a month after receiving that decision, Miss Dunn appealed. The grounds for appeal began at paragraph 1 with complaining that she was entitled to but did not receive "anything remotely resembling a fair hearing from the lone sitting judge". Reference is made to a letter of complaint sent to the Judge personally, the decision was described as utterly perverse, and it was said the Judge had been utterly hostile towards the Claimant's representative and then the Claimant herself, and shockingly so. There are

allegations that he had attempted humiliation of the Claimant's representative and went far beyond the behaviour one would or should expect from any Judge.

10. These complaints, it occurred to me, were stated, as is regrettably the case with a number of lay litigants, in terms that seek by their emphatic nature to convey a sense of injustice that from a lawyer might be put, and should be put, in much more restrained terms. It had occurred to me that they may well have owed quite a lot to the fact that Mr Ostick, the representative and partner, is not, so far as I know, a lawyer and claims no experience in litigation but was pitted against a large corporation that had the advantage of a solicitor from Clyde & Co instructing counsel, Ms Balmer, before a Judge, all of whom were qualified lawyers and one could take to be well experienced in legal proceedings.

11. The claim, by the time it reached the Judge, was about whether Miss Dunn had been paid money properly due to her. She was dismissed in mid-February 2010. She had had by then approaching 11 years' employment with the Respondent. She was dismissed, having first been suspended for about a month, for sending abusive and aggressive emails to some of her fellow employees. The Judge described in his decision that that was not disputed; Mr Ostick has since challenged that. But by the time the matter came to the Tribunal the unfair dismissal allegations were no longer pursued.

12. The Claimant had suffered from sickness. There was an ill-health scheme that provided for the payment of sick pay. In the first year of service, an employee would have five days maximum during which any days off sick would be paid at higher rate that corresponded exactly to the daily rate at which salary was paid. Accordingly, it needed no separate explanation in the payslip given at the end of each month, though it would require to be

recorded as a day's sickness in the sickness records. Each year any unused portion of the previous year's five days would be carried forward and a further five days added to it. This process continued until an employee had a maximum permitted of 40 days' sick pay entitlement at full rate. Once that was exhausted, sick pay would be at a lower rate. That is what is contractually provided for in the contract that I have seen in the papers.

13. Sarah Abbott made a witness statement, which was her evidence-in-chief, I am told, before Judge Warren, that set out the sickness record of Miss Dunn. That showed that in the year 2010 18 days had been carried over from 2009; 5 days were added to that, making 23. Four days were spent sick in March, 17 in November and a number of days in December. After the first two days sick in December the entitlement to full sickness pay was, according to Ms Abbott, exhausted. That would correspond, if the days of sickness were accurately recorded, with the contractual agreement between the parties.

14. Accordingly, although she had spent some days sick, Miss Dunn received in November a pay statement that showed her full usual pay. She had not exhausted her sick pay entitlement, and there was no difference between remuneration for days sick and those spent at work whilst not off sick. In December, it appears, by what was described as a mistake, an original pay slip was issued for the full usual monthly amount. That was reversed, and pay of £450 net instead of £1,650.79 gross was substituted. During January, for the first 17 days, 1-17 January, the Claimant was off sick and entitled only to the lower rate of sick pay, but having been suspended on the 18 January was entitled contractually to full pay. Ms Abbott's evidence was that that was what she received.

15. The allegation made by Miss Dunn appears to have been that she had had deductions made from her wages that should not have been made in respect of the December payment and that she had not been paid for untaken holidays. The evidence before Judge Warren was that the pay in her last payslip had indeed shown pay for holidays, and no further appeal has been allowed on that matter, in any rate, since the proceedings in this Tribunal, which I shall soon describe. I suspect that it may well be the case, though I do not know, that the Claimant and her partner thought that she had been done an injustice by the way in which the pay in December had been dealt with and did not then appreciate that holiday pay may have been paid later.

16. The contentions made on her behalf were made with vigour and force beforehand by Mr Ostick, which appeared to the Respondent, for good reason, to have overstepped the bounds of what was acceptable. Accordingly, it was determined, since the last of the emails were made on 18-21 July 2011, therefore immediately prior to the hearing, that the Respondent would make an application to strike out the claims because of the improper, vexatious and unnecessary behaviour of the Claimant, who had associated herself entirely with Mr Ostick: she had said in an email of 27 December that emails from him were sent with her knowledge as he was dealing with the case from then on.

17. Accordingly, matters at the Tribunal took this turn. The Judge wished to be clear what the basis was for the claim that there had been deductions and non-payment of holiday pay. He therefore addressed Mr Ostick at the outset. After he had done so, perhaps only for a short period, Ms Balmer interposed to make her application on behalf of the Respondent to strike out the claim because of the offensive, aggressive and threatening tone of the emails. In doing so, she had necessarily to set out a lot of the content of those emails, which the Judge would have heard for the first time.

18. I would not have been surprised, though, as I say, I do not know, if Mr Ostick had not felt that he was being disadvantaged by an attack of which he had had no prior notice being launched as a pre-emptive strike at a hearing when he had anticipated the allocated two hours being spent on determining whether indeed his partner had had the sums properly paid to her or whether she was right that she had been underpaid. It may be that his sense of the Judge's reaction to the information that he was given coloured his perception of what then took place, albeit that he has expressed it in language that is, on any view, unacceptable and extreme.

19. He complained that the hearing had been unfair, that the Judge after this beginning had shown an unremitting hostility to him, and in particular that when Ms Abbott gave her evidence he could not properly cross-examine because the Judge would not let him and would not listen to his attempted explanations as to what he, Mr Ostick, made of the financial documents and arguments.

20. The Judge recorded that the Claimant did not challenge the calculations spoken to by the Respondent's witnesses in evidence. There being no positive case and no challenge, the inevitable result was that on the facts the Claimant was bound to lose.

21. She entered the appeal, as I have said, on 22 September 2011. The next day, she received an email from the Respondent issuing a costs warning. That arose not because the Respondent had had sight of a Notice of Appeal but because there had been without-prejudice conversations in which it was indicated there might be an appeal. It was an attempt to head off an appeal at the outset. Having received the Notice of Appeal, there was a further costs warning, on 13 January 2012. At the outset of that Clyde & Co asked the Claimant not to correspond with

members of the Respondent's staff, repeating a request that had been made on a number of occasions and, they asserted, ignored by Mr Ostick, indicating that his conduct in doing so was vexatious and inappropriate and would be drawn to the attention of this Tribunal.

22. At this time Mr Ostick sent emails directly to Ms Balmer giving her notice that he intended to bring proceedings for defamation and slander. He sent an email on 26 January to a solicitor, Ms Ruddy, copied to her principal, James Major, at Clyde & Co that accused her of continuing to deny the clear evidence that showed that Miss Dunn's claim was always valid, accused her of taking money from the client basically to perpetuate and front their lie, describing their behaviour as corrupt and way beyond the boundaries of normal professional practice, and that, "You put money before integrity and honesty, which you should both be utterly ashamed of". He indicated that the Solicitors' Regulatory Authority would be in touch. A complaint was, I am told, made to them, to the Bar Council and to the Legal Services Ombudsman about their behaviour.

23. In a later email direct to Mr Major of 18 February Mr Ostick referred to an apology he had made to Judge Warren for the intemperate language he had used in earlier and similar emails as one that he had been forced into making by a "very incompetent and twisted and clearly worn-out Judge Warren", and he withdrew it. He described Mr Major as not deserving of any apology but quite the reverse, adding:

> **"Your years of training compared to my lack of it in legal matters have taught you nothing but how to evade the truth on behalf of your paying client."**

24. He added that if Mr Major chose, he could send this email back to the Judge or go and tell somebody else about it; it was of no concern to him.

25. In an email of the same date but later that day he said to Mr Major that he intended coming to his office within a couple of weeks, "to meet you along with Ms Ruddy, who is very proud of her sister, I understand": no source of that information, which I am told is not freely available, was indicated. On the same day, later still in the evening, an email was sent to counsel referring to her "profile" and describing her as "scum", with a lying type of personality, and he detested liars and greedy people such as her. There is no place in proper litigation, however robustly conducted, for such words, which ought never to be put in those terms.

26. The appeal came in the first place before HHJ Peter Clark, who rejected it as showing no reasonable prospect of success. That was appealed by way of a renewed application for permission to appeal and came before HHJ Shanks. On 12 July 2012, ex tempore, he rejected there being any point in respect of the holiday pay. In summary, he took the view that if what Mr Ostick and Miss Dunn said about the way in which the hearing had been conducted before Judge Warren was accurate, there arguably had been an unfair hearing. That of course was a possibility reached in the absence of knowing what, if anything, the Judge would say about the allegations and what those present at the Tribunal on behalf of the Respondent would have to say, and, accordingly, the Judge twice reminded Mr Ostick that he might have to pay costs if it later appeared to this Tribunal that the grounds in rule 34A were made out. He also wondered whether, if there had been an unfair hearing, it might have any real substantial effect. It is plain that he considered the first point, that the Claimant was entitled to 36 and not 23 days off sick at full pay in year 2010, was something that might give rise to a claim if it were made out. That would demand a calculation going back before the end of 2010 showing that the 23 days to which I have already referred was actually 36, by reason of the sick pay there had been in previous years and the accumulation of the five-day allowances year by year.

27. What happened was that the Respondent necessarily took care to prepare its affidavit material. It filed an answer on 27 July 2012 and an affidavit of Ms Ruddy on 14 December 2012. In the meantime, I am told, Mr Ostick had been warned by police in respect of the potential offence of harassment of those who represented the Respondent. I in reaching this decision have confined myself to those matters that are verified by emails of which I have copies; I have not, because Mr Ostick is absent, in circumstances to which I shall come, considered other matters that are asserted but not proved evidentially, other than to note that they have not been denied by Mr Ostick. Judge Shanks' record of the reasons why he allowed the matter to proceed, a second document from his Reasons given orally in court, says that he issued the "strongest possible" EAT costs warning to both the Claimant and Mr Ostick orally about three times. I accept that that would have been, and was, the case.

28. On 6 February 2013 the Claimant asked to withdraw her appeal. No reason was given for this, but the request was granted and leave given on 13 February by the Registrar. The Respondent wished to pursue an application for costs. It had in mind the way in which Mr Ostick had behaved on behalf of the Claimant and for which the Claimant was responsible and the expense that they had incurred in dealing with allegations that, if stripped of their extreme language, had little prospect of success in showing apparent bias, and, if incorporating their extreme language, were capable, unless substantiated, of coming within rule 34A. It asked that the matter be determined on paper.

29. When Mr Ostick was told of a costs application, he responded on 29 May 2013. At his request all correspondence was conducted by email to a given email address. He opted for an oral hearing. He knew that as I had indicated such a hearing might take about half a day. He

wished to be clear that he disputed that any further costs should be awarded, on the grounds that the first award made at the Reading ET was perverse, the claim was never misconceived and the Judge was in absolute contempt of court by not listening, handling or reading the claim properly. He was invited by this Tribunal to put in a skeleton argument. The Respondent had been told with a view to saving costs that the application, which was detailed, could stand as the skeleton argument for the Respondent. In the event, the Claimant did not put in any skeleton argument in opposition. The Respondent submitted a statement of costs; there has been no response to that statement of costs.

30. The hearing was thus, to the knowledge of both parties, due to take place in the near future. On 25 September the EAT emailed a notice of the hearing to the Claimant. It received a response from Mr Ostick's email account timed at 4.09pm. It simply said "unavailable"; this was not a bounce-back in the usual form. The Respondent attempted to make contact with the Claimant, supplying updated documentation, being a new schedule of costs, and received, for its part, an "undeliverable" message of 7 October. That message indicated that there was a telephone number to which reference might be made. I am told that accordingly Mr Major telephoned Mr Ostick. Ms Balmer tells me that when he said who he was Mr Ostick indicated that he had asked Mr Major never to contact him again and then went on to say that he knew nothing about the hearing and that he was the first to tell him about it, and then the phone call ended. There had been no communication by Mr Ostick to this Tribunal asking what was happening with the hearing.

The application

31. In those circumstances, and taking into account also what I am told by the listing officer, that a voicemail message was left on Miss Dunn's mobile asking her to make contact in respect

of the hearing, and the report (I am told by Ms Balmer) that Mr Major was told by Mr Ostick that if any costs order were made, it would not be paid, I am satisfied that Mr Ostick has had a proper opportunity of being present to argue about costs. Rule 34(5) provides that no costs order shall be made unless the Registrar had sent notice to the party or advocate against whom the order may be made giving him the opportunity to give reasons why it should not be made. Here, it is plain, from what I have set out, that that opportunity has over some months been afforded to the Claimant, and I conclude the Claimant and Mr Ostick were aware of the date of this hearing and have chosen not to come. If I am wrong in that conclusion, and if that represents an unfairness to them procedurally and there is something that they would wish to say that this Tribunal has, for the reasons I have given, not heard, they have the option of seeking a review of the decision that will follow.

32. The argument that has been put to me is that the appeal was unnecessary, improper, vexatious and misconceived because, in effect, there was no substance to the allegations and the appeal was destined to fail from the start. A costs order would not be unfair, because of the warnings that had been given, both by the Respondent, twice, and by Judge Shanks, and such indication as given by Judge Peter Clark's refusal on the sift. Moreover, this was the case of a party once bitten who should have been twice shy, given the order that was made at the Tribunal. The conduct in making the offensive, unnecessary, abusive and threatening emails, coupled with the bringing and conducting of the proceedings themselves and the late withdrawal that caused the Respondent to incur the expense of preparation almost in full, were such that the order would be justified. Further, the insistence upon there being an oral hearing of this costs application and then not affording any skeleton argument, making any enquiry as to the progress, taking any steps to put forward documentation or reasoning for it and simply

not turning up in the circumstances I described caused, again, the Respondent to incur unnecessary expense when the matter could have been decided on paper.

33. I note that when the matter first came to me for directions as to the hearing of a costs application I noted on the file, though this may not have been reported to the parties, that as matters stood I would not be particularly inclined to award costs but would listen, of course, to any argument before deciding. Since I had read the file, the matter would probably be conveniently listed before me.

Discussion and conclusion

34. First, it is regrettable that the application to strike out the claim before Judge Warren in the first place was made when it might have interfered with the hearing of the substantive issues. It is always far better that the substantive issues be resolved than that spats between parties who may have expressed themselves in inappropriate language should take place. However, I understand why the Respondent, in the light of the emails I have been shown, wished to put a marker down. Judge Warren, far from being hostile at the outset, did not accede to that application made at that time. There is a very considerable latitude that I consider needs to be given to lay litigants and lay representatives who may very well misinterpret proper case management and conduct of proceedings, and may conclude that there has been body language in a Tribunal indicating a settled determination to resist their claims, when any experienced advocate would know that is simply not the case. It is a pity, but not unfamiliar, that some litigants express umbrage at this in extreme and inappropriate terms. That does not excuse what is said, but it does put it perhaps in context.

35. However, here, I have no basis other than speculation for concluding that that is actually the case here. I do have copies of offensive correspondence for which there seems to have been no real, proper basis and that has apparently been intended to alarm and distress. It should not have happened. I am less certain that it is in respect of the bringing or conducting of proceedings, but it plainly has a relationship to them. I regard it, as I have indicated to Ms Balmer, a bit rich that the Respondent should complain about the bringing of the appeal at all and then complain about it being abandoned two weeks before the hearing, but I do accept, on reflection, the point that in the interim significant expense had been caused. I am satisfied that there has been the conduct referred to in rule 34A(1), the conduct in respect of the bringing or the conducting of the proceedings has been unreasonable, and I link the emails with the continuation of the appeal because in the circumstances of this case that seems to be factually appropriate. I consider that the decision by Mr Ostick to ask for an oral hearing and then not to attend has caused significant additional expense to the Respondent.

36. I am less convinced that the appeal is misconceived, having survived the application in front of Judge Shanks, but accept that much of the case lies in the force of the expression of view, which is no more than that, rather than identifying anything factually objectively ascertainable, that Judge Warren did that he should not have done, and, on balance, I have come to the conclusion that the appeal was misconceived.

37. Taking those matters together, I do not have to make an order for costs. I would, following my initial inclination, as I have mentioned, have been less inclined to do so had it not been for the additional costs incurred in respect of these current proceedings today before me, but, satisfied as I am that the grounds are made out, it seems to me that the Respondent ought to have an order for costs in its favour in a modest amount to mark the fact as it is that litigation is

not to be conducted in offensive, inappropriate and scandalous terms, and that if an appeal is brought, there must be a very clear understanding of the reason why it is a good appeal and an articulation of the underlying fact. Further, as Ms Balmer points out, here, once one looks at the evidence of Ms Abbott, there has to be some proper challenge to that evidence if there simply is to be any basis at all in the underlying merits of the appeal, which there never was, because there never was any challenge. It is that, principally, that leads me to think that the claim was misconceived. The appeal would have no prospect of success. Albeit that unfairness itself is an independent ground of appeal, the allegations of unfairness have, in my view, to be seen in the context generally of the complaints made and the terms in which they are made by Mr Ostick. It is therefore appropriate that I should exercise my discretion to make an award.

38. As to the amount, I take it from the papers that Miss Dunn was able to earn at a reasonable level – though below the national average wage, not by much – and that, though I do not know, she may have secured alternative employment. Mr Ostick objects to Judge Warren's submitting her to a means enquiry before the Tribunal; that showed that then she had significant debts. I have no reason to think that she has recently come into any substantial funds. She is subject already to the costs order made by Judge Warren. Ms Balmer does not invite me to make an order for the full amount of the costs claimed, which are in excess of £30,000. In my view, an appropriate order in these circumstances must be more than merely minimal but need be little more than that if its purpose is, as she submits, to mark the behaviour whilst being a small proportion only of the sum claimed, again, in respect of which there has been no challenge over time. Taking all into account, the sum that I award in terms of costs is £5,000. There will be an order for the payment of that sum by Miss Dunn to the Respondent, Miss Dunn having had a representative for whose actions she has throughout appeared to have accepted responsibility.