Appeal No. UKEAT/0208/12/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 8 November 2012

Before

HIS HONOUR JUDGE BIRTLES

(SITTING ALONE)

ADECCO UK LTD — APPELLANT

MR S ALDWINKLE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS PIA PADFIELD (of Counsel) Instructed by: Adecco Group UK & Ireland Legal Services Hazlitt House 4 Bouverie Street London EC4Y 8AX
For the Respondent	Debarred

SUMMARY

The Claimant deliberately took no part in the proceedings once his solicitor came off the records. He failed to co-operate with the Respondent, ignored an ET order and did not appear at the hearing. The ET was wrong to refuse the Respondent its costs. **Mirikwe v Wilson & Co Solicitors** UKEAT/0025/11/RN applied.

HIS HONOUR JUDGE BIRTLES

Introduction

1. This is an appeal against the refusal of Employment Judge McLaren sitting at the East London Hearing Centre on 9 September 2011 to make a costs order against Mr Aldwinkle. This morning the Appellant, Adecco (UK) Ltd is represented by Ms Pia Padfield, an in-house solicitor. The Respondent is not present because Mr Aldwinkle was debarred from taking part in the appeal by order of the Deputy Registrar dated 30 May 2012.

The factual background

2. The factual background is set out in the very helpful chronology which has been prepared by Ms Padfield. On 10 January 2011 Mr Aldwinkle submitted his claim through solicitors against both Adecco (UK) Ltd and Proctor and Gamble. On 8 February 2011 Adecco submitted its ET3 and on 28 June 2011 the Tribunal listed the matter for a pre-hearing review. On 29 June 2011, Mr Aldwinkle's solicitors informed the Employment Tribunal that they were no longer acting for him.

3. On 9 July 2011 the Tribunal sent out a notice for the pre-hearing review to be held on 9 September 2011. On 2 August, the Tribunal wrote to Mr Aldwinkle, now acting in person, requesting information. He was asked to reply by 9 August 2011 but he did not reply. On 2 August 2011, the same date, the Tribunal made orders in anticipation of the preliminary hearing review being converted into a full hearing. The order specified what sanctions might be imposed by a failure to comply with the orders. On 15 August 2011, Adecco wrote to Mr Aldwinkle enclosing its disclosure list and asking him whether he had any disclosure to make; he did not reply. On 17 August 2011, Adecco applied to the Tribunal for a strike out order on the basis of Mr Aldwinkle's non-compliance. On 24 August 2011, Adecco served a bundle of documents and witness statements on Mr Aldwinkle, but there was no reply or response from

him. He was put on notice that if he intended to withdraw his claim he was required to notify the Tribunal and Adecco. Adecco issued Mr Aldwinkle with a costs warning. On 9 September 2011, Adecco and the second Respondent, Proctor & Gamble, attend the pre-hearing review and both parties were represented by counsel, Mr Aldwinkle did not attend. The claim was struck out due to Mr Aldwinkle's non-compliance with the case management directions made by the Tribunal on 2 August. Both Respondents made an application for costs but the Employment Judge declined to make any such order.

4. The Judge was requested to give reasons and she did so.

The Employment Judge's reasons

5. These are very short and I will therefore read them:

> **"1. In this matter costs were sought in accordance Rule 40(3) namely on the grounds of the Claimant's unreasonable conduct. Where the tribunal considers that the Claimant's conduct may have been unreasonable there is an obligation on the Employment Tribunal to actively consider whether costs should be awarded. However, the decision to award those costs still remains within the Employment Tribunal's discretion. In exercising that discretion the Tribunal should take into account a number of factors.**
>
> **2. These factors would include the Claimant's ability to pay. This could not be ascertained as the Claimant did not attend and neither Respondent was able to assist the Tribunal with any information as to the Claimant's means.**
>
> **3. The Tribunal should also consider whether any costs warnings have been issued. It does appear from the correspondence that this is certainly the case, at least in relation to the first Respondent. In relation to the second Respondent, a costs warning was issued but it was issued the day before the PHR hearing and insufficient notice was given to the Claimant in accordance with rules and therefore I am not taking into account that warning.**
>
> **4. The Tribunal should take into account whether the Claimant had legal advice in bringing their claim. In this case, the Claimant was legally advised and continued to be so up until 29th June 2011.**
>
> **5. Taking all these factors into account, and bearing in mind that costs still remain the exception rather than the rule, my decision is not to award costs. While I have considered all of the above points, I make my decision based on two particular factors, firstly there is no information as to whether the Claimant would be able to pay any such costs order. Secondly, the question of the identity of an employer can be a complex one without an immediately obvious answer so the pursuit of the claim was not unreasonable."**

The law in relation to costs

6. The **Employment Tribunal Rules 2004** provide for costs in Schedule 1, Rule 40;

> **"1) A tribunal or [Employment Judge] may make a costs order when on the application of a party it has postponed the day or time fixed or adjourned a Hearing or pre-hearing review. The costs order may be against or, as the case may require, in favour of that party as respects any costs incurred or any allowances paid as a result of the postponement or adjournment.**
>
> **2) A tribunal or [Employment Judge] shall consider making a costs order against a paying party where, in the opinion of the Tribunal or [Employment Judge] (as the case may be), any of the circumstances in paragraph (3) apply. Having so considered, the tribunal or [Employment Judge] may make a costs order against the paying party if it or he considers it appropriate to do so.**
>
> **3) The circumstances referred to in paragraph (2) are where the paying party has in bringing the proceedings, or he or his representative has in conducting the proceedings acted vexatiously, abusively, disruptively or otherwise unreasonably, or the bringing or the conducting of the proceedings by the paying party has been misconceived."**

7. These provisions have been considered in two relevant cases. In **McPherson v BNP Paribas (London Branch)** [2004] IRLR 558 Mummery LJ at paragraphs 25 to 26 said this:

> **"25. Although employment tribunals are under a duty to consider making an order for costs in the circumstances specified in rule 14(1), in practice they do not normally make orders for costs against unsuccessful applicants. Their power to make costs orders is not only more restricted than the power of the ordinary courts under the Civil Procedure Rules; but it has also for long been generally accepted that the costs regime in ordinary litigation does not fit the particular function and special procedures of the employment tribunals […].**
>
> **26. When a costs order made by an employment tribunal is appealed to the Employment Appeal Tribunal or to this court the prospects of success are substantially reduced by the restriction of the right of appeal to questions of law and by the respect paid by appellate courts to the exercise of discretion by lower courts and tribunals in accordance with legal principle and relevant considerations. Unless the discretion has been exercised contrary to principle, in disregard of the principle of relevance or is just plainly wrong, an appeal against the tribunal's cost order will fail. If, however, the appeal succeeds, the appellate body may substitute a fresh order or, if it is necessary to find further facts, the matter may be remitted to the Tribunal for a fresh hearing of the costs application."**

8. In the later case of **Yerrakalva v Barnsley Metropolitan Borough Council** [2012] 2 All ER at page 214 Mummery LJ said this at paragraphs 40-41:

> **"40. The actual words of r 40 are clear enough to be applied without the need to add layers of interpretation, which may themselves be open to differing interpretations. […]**
>
> **"41.The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had."**

9. The grounds of appeal are set out in paragraph 7.13 and 7.14 of the Notice of Appeal. Paragraph 7.13 refers to the failures by Mr Aldwinkle in the conduct of his case which it is

specifically alleged make his conduct of the case unreasonable and in particular: 7.13.1 he did not make contact with or respond to requests for contact from either Respondent to the Tribunal or ACAS; 7.13.2 that his claim had no reasonable prospect of success; 7.13.3 he failed to prosecute his case; 7.13.4 that he was put on notice that the Respondents would seek costs in the event of his non-attendance at the PHR and; 7.13.5 his failure to attend the hearing and not notify the Respondents of his intention to withdraw his claim.

10. To this could be added his disregard of the case management directions given by the Tribunal to prepare for the hearing on 9 September 2011. Paragraph 7.14 of the grounds of appeal goes on to say this:

> **"7.14. In reaching it decision not to award costs the Tribunal took account of the fact that the Claimant did not attend the hearing and therefore no evidence concerning the Claimant's financial means was available to it. The decision of the Tribunal not to award costs in those circumstances was the perverse effect that the Claimant benefited from his own failure to attend. The First Respondent's contention is that this was a decision that no reasonable tribunal could have reached."**

11. The question of non-attendance by a party and therefore his/her ability to pay costs has been considered in two recent cases of this Tribunal. The first is **Jilly v Birmingham and Solihull Mental Health NHS Trust & Others** UKEAT/0584/06/DA and UKEAT/0155/07/DA. That was a decision of HHJ David Richardson sitting with lay members. At paragraph 53 Judge Richardson said this:

> **"53. The first question is whether to take ability to pay into account. The Tribunal has no absolute duty to do so. As we have seen if it does not do so, the County Court may do so at a later stage. In many cases it would be desirable to take means into account before making an order; ability to pay may affect the exercise of an overall discretion, and this course will encourage finality and may avoid lengthy enforcement proceedings. But there may be cases where for good reason ability to pay should not be taken into account: for example, if the paying party has not attended or has given unsatisfactory evidence about means."**

12. That case was referred to in the later case of **Mirikwe v Wilson & Co Solicitors and others** UKEAT/0025/11/RN a decision of Mr Recorder Luba QC sitting alone. The relevant passage is at paragraphs 29 to 31. Mr Recorder Luba said this:

> **"30. In any event, in a case where the primary source of evidence about means to pay would be given by a party in person such as in the instant case, their non-attendance may be very or highly relevant to the exercise of the rule 41(2) discretion. It is likewise not capable of dispute that unreasonableness of the paying party's conduct may weigh in the exercise of the discretion on whether to have regard to their means or ability to pay. Where, as here, the non-attendance by the party is treated by the Employment Tribunal as another instance of unreasonable behaviour, it cannot be irrelevant to the exercise of the discretion whether to have regard to the means of the non-attending party.**
>
> **31. Once it is admitted, as I consider that it must be, that non-attendance is a relevant consideration, the weight to be given to it on the exercise of this "discretion within a discretion" is, in my judgement, singularly a matter for the body charged with the exercise of that discretion."**

13. In that case, the Claimant did not attend the hearing and in her absence the claim was struck out and a costs order was made by the Employment Tribunal. In this case is the reverse situation: the Claimant did not attend, the claim was struck out but the Employment Judge refused to make a costs order in favour of the First Respondent. In my judgment the Employment Judge was in error in her reasoning. She quite properly considered the Claimant's ability to pay but stated that this could not be ascertained as the Claimant did not attend and neither Respondent was able to assist the Tribunal with any information as to the Claimant's means. That was to ignore the systematic refusal or failure by Mr Aldwinkle to do anything in respect of prosecuting his claim from the date that his solicitors came off the record, that was 29 June 2011.

14. From the factual background that I have recited, it is clear that Mr Aldwinkle as Claimant did nothing whatsoever to prosecute his claim. He did not answer any letter from the first Respondent's legal department; he did not comply with the case management directions of the Tribunal on 2 August; he did not reply to the Tribunal's request for information; he did not notify the Tribunal, or indeed Adecco, that he was going to fail to appear on 9 September 2011. The Employment Judge did not consider that factual background and therefore did not consider whether the Claimant's conduct was unreasonable in conducting the proceedings. The words of rule 40(3) are wide:

> **"Where he or his representative has in conducting the proceedings acted vexatiously, abusively, disruptively or otherwise unreasonably or the bringing or conducting of the proceedings to the paying party has been misconceived."**

15. Those words seem to me to clearly apply to the way Mr Aldwinkle conducted the proceedings by acting unreasonably.

16. The Employment Judge's second reason for refusing an order for costs was that the question of identity of an employer can be a complex one without immediate obvious answers so the pursuit of the claim was not unreasonable. That reason focuses on the second part of rule 40(3) only, but there are two parts to the rule: the first is in the conduct of the proceedings and the second is in the bringing of them in the first place. It may well have been reasonable in the circumstances of this particular case to bring the claim but once the solicitors have fallen out of the picture it was up to Mr Aldwinkle to prosecute his case, to conduct the proceedings and he failed to do so in a reasonable manner by his non-compliance and non-participation and, indeed, non-attendance on 9 September 2011.

17. For those reasons, the decision of the Employment Judge not to award costs was an error of law for the reasons I have given. In the circumstances I propose to substitute my discretion for that of the Employment Judge. The amount claimed by the Appellant is only for counsel's fee of £375; that does not include VAT. The reason for that claim being so limited is because the proceedings, so far as Adecco have been concerned, have been conducted an in-house solicitor. The sole sum claimed for costs against Mr Aldwinkle is £375 and I therefore make the order that he should pay that sum to the only Appellant.