Appeal No. UKEAT/0258/16/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 1 March 2017

Before

THE HONOURABLE MR JUSTICE SINGH

(SITTING ALONE)

MR K ABAYA — APPELLANT

LEEDS TEACHING HOSPITAL NHS TRUST — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JESSE CROZIER (of Counsel) Bar Pro Bono Scheme
For the Respondent	MR JAMES BOYD (of Counsel) Instructed by: Hill Dickinson LLP Solicitors 1 St Paul's Square Liverpool L3 9SJ

SUMMARY

PRACTICE AND PROCEDURE - Costs

The Appellant brought claims in the Employment Tribunal for constructive unfair dismissal, racial discrimination and victimisation. The Employment Tribunal dismissed all the claims. The Respondent applied for its costs. The Employment Tribunal found that the unfair dismissal claim had not been one that had no reasonable prospect of success. However, it found that the other claims had had no reasonable prospect of success from the start. It proceeded to award the Respondent costs in the sum of £5,000.

Held, allowing the appeal:

(1) The Employment Tribunal erred in principle because it did not consider whether it should exercise a discretion to award costs at all under Rule 76(1) of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**. Rather it had gone simply from finding that the claims had in part had no reasonable prospect of success to the conclusion that costs should be awarded and then proceeded to assess the quantum of those costs.

(2) The Employment Tribunal further erred in failing to give adequate reasons to explain how it had arrived at the figure of £5,000.

(3) It had also erred in taking into account the means of the Appellant's wife without asking what, if any, impact those means had on the Appellant's own ability to pay, which is what it had decided to take into account under Rule 84 of the **ET Rules**.

THE HONOURABLE MR JUSTICE SINGH

Introduction

1. This is an appeal against a Costs Order that was made against the Claimant by the Employment Tribunal at Leeds. The Decision was promulgated on 7 December 2015 after a hearing that had taken place on 4 December. The Tribunal comprised Employment Judge Lancaster sitting with two lay members, Mr M Brewer and Mr R Webb. There had been an earlier Judgment on the merits of the claims before the Tribunal, which dismissed all of the Claimant's claims. That Decision was promulgated on 29 July 2015. A reconsideration was sought but was refused in a Decision promulgated on 12 October 2015.

The Factual Background

2. The factual background can be briefly stated for present purposes. As was summarised at paragraph 1 of the substantive Judgment, the Claimant was employed as a Dental Engineer at the Leeds Dental Institute from 31 January 2011 for a period of just over three years. He tendered his resignation on 30 January 2014. His last day of work was 18 March 2014.

3. Before the Employment Tribunal he brought claims for unfair dismissal on the ground that although he had resigned this had in fact amounted to constructive dismissal. He also brought a claim for direct discrimination on the grounds of his race and victimisation because he had done a protected act: that is, raised issues regarding potential racial discrimination. After a hearing lasting many days and having considered the evidence, the Employment Tribunal rejected all of those claims.

4. Subsequently, the Respondent applied for its costs. The Employment Tribunal decided in December 2015 to make an award of costs in the sum of £5,000. It recognised that that was only a small fraction of the costs that the Respondent was in fact claiming, which were said to be £150,000. I shall have to refer later to the reasons given by the Employment Tribunal for that decision on costs in more detail.

Material Legislation

5. The regime on costs in the Employment Tribunal is now governed by provisions in the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**, Schedule 1, in particular Rules 76, 78 and 84. Rule 76(1), so far as material, provides that:

> **"(1) A Tribunal may make a costs order … and shall consider whether to do so, where it considers that -**
>
> **…**
>
> **(b) any claim … had no reasonable prospect of success; …"**

6. Rule 78 relates to the amount of a Costs Order. Rule 84 relates to "Ability to pay" and provides:

> **"In deciding whether to make a costs … order, and if so in what amount, the Tribunal may have regard to the paying party's … ability to pay."**

The Employment Tribunal's Judgment on Costs

7. The Employment Tribunal expressly referred to the Rules to which I have made reference, although it did not set them out in terms (see paragraphs 1, 3 and 7 of its Judgment). Having introduced the issues before it, the Tribunal considered at paragraphs 4 and 5 of its Judgment the two different parts of the claims that had been before it at the substantive hearing. First, it considered the claim for constructive dismissal. In relation to that claim the Tribunal was not prepared to hold that the claim had had no reasonable prospect of success from the outset although it had been unsuccessful in the event.

8. The Tribunal took a different view in relation to the claims of racial discrimination and victimisation. As it explained at paragraph 5 of its Judgment, in respect of the factual issues in the case on those matters none had been established by the Claimant from which the Tribunal could have concluded that he had been discriminated against either by reason of his race or by reason of having done a protected act. The Tribunal stated, "There was simply no causal connection at all: the burden of proof never shifted". In the course of its reasoning at paragraph 5 the Tribunal also observed that it had found the Claimant to be unreliable as a witness and had preferred in every case the factual account given by witnesses for the Respondent. It concluded at the end of paragraph 5 that those parts of the case had had no reasonable prospect of success from the start.

9. At paragraph 6 of its Judgment the Tribunal stated that although the Claimant may genuinely have believed that there may have been institutional racism or that he had been discriminated against there was no evidential basis for those assertions. The Tribunal stated:

> **"6. … Without such evidential basis there was no reasonable prospect of the Claimant … establishing facts that were simply not there."**

10. Paragraph 7, as is common ground before me, contains the essence of the Tribunal's reasoning as to why it made the award of costs that it did in the present case and must be set out in full:

> **"7. So that part of the cost application succeeds we then have to determine what the appropriate course is. The primary application by the Respondent is that we remit this for further consideration to assess the full costs claim: rule 78 (1) (b). We do not consider that is appropriate. We may and do in this case have regard to the Claimant's means, his ability to pay: rule 84. In February and March of last year he entered into [an] individual voluntary arrangement with his creditors. That arrangement persists there is clearly very little surplus money, the figures we have suggest on the joint incomes of the Claimant and his wife, however those are allocated to the household expenses, that on the revised figures there may be a monthly surplus between the two of their incomes of some £327. His unsecured creditors at the time of entering into the IVA were owed the sum of some £23,000. He is currently allocating, through the appointed insolvency practitioner, £533 per month towards the agreed settlement of those debts and, there is to be a further review of the IVA in January of next year. Quite clearly the Claimant and his family have little money at the moment and we consider that is a relevant factor in reducing what otherwise would be the costs that might flow from pursuit of a claim that had no reasonable prospect. Exercising our discretion under the … Regulations we therefore conclude that it is appropriate to make a specific award of**

costs within the £20,000 limit imposed upon us on summary assessment: rule 78 (1) (a). In all the circumstances of this case particularly having regard for the limiting factor of the [Claimant's] means we consider that the appropriate sum to award by way of costs in relation to this part of the claim is £5,000."

Grounds of Appeal

11. On behalf of the Appellant Mr Crozier advances three grounds of appeal.

Ground 1

12. The first ground of appeal is that the Employment Tribunal failed to identify and/or exercise its discretion in making a costs award against the Claimant. In particular, complaint is made of the apparent leap in reasoning between paragraph 6 and paragraph 7 of the Tribunal's Judgment. Emphasis is placed on the opening word of paragraph 7, "So …". Mr Crozier submits that what in essence the Tribunal did was to leap from the premise that there was no reasonable prospect of success in relation to the discrimination and victimisation parts of the claim to the conclusion "… that part of the cost application succeeds".

13. The relevant legal principles, as I understood it, were common ground between the parties before me. My attention was drawn to a number of decisions: first, **Criddle v Epcot Leisure Ltd** UKEAT/0275/05 and UKEAT/0276/05, a judgment by HHJ Peter Clark; secondly, **Beat v Devon County Council and Anor** UKEAT/0534/05, a judgment of HHJ Altman; and thirdly, **Ayoola v St Christopher's Fellowship** UKEAT/0508/13, a judgment by HHJ Eady QC.

14. It was also common ground before me that there are, in essence, three stages in the exercise that are involved when an Employment Tribunal decides a costs application such as this. The first stage is to ask whether the precondition for making a Costs Order has been

established. For example, in the present case, whether the claim or part of the claim had no reasonable prospect of success. However, that precondition is merely a necessary condition; it is not a sufficient condition for an award of costs. This is because the second stage of the exercise that has to be performed is that the Tribunal must consider whether to exercise its discretion to make an award of costs.

15. The position was summarised by HHJ Eady QC in the **Ayoola** case at paragraphs 17 and 18. As she said at paragraph 17, at the second stage of the exercise:

> **"17. … The Tribunal must then specifically address the question as to whether it is appropriate to exercise its discretion to award costs. Simply because the Tribunal's costs jurisdiction is engaged, costs will not automatically follow the event. The Employment Tribunal would still have to be satisfied that it would be appropriate to make such an order …"**

16. The third stage of the exercise only arises if the Tribunal decides that it is appropriate to make an award of costs. The third stage is to assess the quantum of that award of costs. In essence, in the present case Mr Crozier submits that the Employment Tribunal fell into error as a matter of law because it simply omitted the second stage completely. True it is, he submits, that at paragraph 7 the Tribunal addressed such questions as the Claimant's ability to pay. However, he submits that it did not pass through the second stage of the exercise at all before starting to assess the appropriate quantum of costs.

17. On behalf of the Respondent Mr Boyd submits that the Judgment of the Employment Tribunal, as always, must be read fairly and as a whole, not in a linear fashion. He reminds me that the Employment Tribunal expressly referred to the relevant provisions in the procedural **Rules** that it had to apply. The Tribunal must have been aware, submits Mr Boyd, of the existence of its discretion. Finally, he reminds me that towards the end of paragraph 7 of its

A Judgment it expressly referred to the fact that it was exercising its discretion under the **Regulations**.

B 18. In my judgment, Mr Crozier is right in the submissions that he has made to this Appeal Tribunal. Even reading the Judgment of the Employment Tribunal fairly and as a whole, I am unable to find any stage in its reasoning where the Tribunal directed itself to the question of whether, even though the precondition for the exercise of its discretion had been established in C part, it should go on to exercise the discretion at all. In my judgment, it did fall into error, as submitted by Mr Crozier, in simply proceeding from stage one to stage three. Insofar as it considered matters relating to stage two, it simply proceeded on the assumption that because D stage one had been satisfied so the costs application must succeed. In my judgment, on a fair reading, that is the consequence of its reasoning at paragraphs 5 to 7, in particular the first sentence of paragraph 7, which I repeat:

> **"7. So that part of the cost application succeeds we then have to determine what the** E **appropriate course is. …"**

Ground 2

19. The second ground of appeal is that the Employment Tribunal failed to properly F scrutinise and/or give reasons for the amount of costs awarded against the Claimant: that is, the sum of £5,000. At first sight, this ground of appeal might be thought to face some difficulty. After all, the Employment Tribunal concluded paragraph 7 of its Judgment by stating that:

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> **"7. … In all the circumstances of this case particularly having regard for the limiting factor of the [Claimant's] means we consider that the appropriate sum to award by way of costs in relation to this part of the claim is £5,000."**

20. All cases such as this are fact-sensitive. Everything depends on the particular H circumstances of each case. How much reasoning is required will therefore depend on the facts of each case. Nothing I say should be construed as suggesting that in the exercise of

A discretionary powers, such as this, an Employment Tribunal is required to set out elaborate or extensive reasons. Nevertheless, that said, what the Employment Tribunal must do is provide adequate reasoning so that the parties know why it has decided what it has. Mr Crozier submits that in the circumstances of the present case the Employment Tribunal could not properly do what it appeared to do at paragraph 7 and give just a broad-brush reason for why it arrived at the sum of £5,000. He places reliance on the reasoning of HHJ Eady QC in the **Ayoola** case at paragraphs 50 to 53 by way of analogy, although he accepts that the facts are not on all fours with the present case. As HHJ Eady QC said at paragraph 51:

> **"51. Although no particular procedure is laid down in the Tribunal Rules for a summary assessment of costs, the discretion as to the amount of an award must still be exercised judicially. One can take it a bit further. Although not bound by the same rules as the civil courts and although the discretion under the 2004 Tribunal Rules is very broad [and I would say the same of the 2013 Rules], the costs awarded should not breach the indemnity principle and must compensate and not penalise; there must, further, be some indication that the Tribunal has adopted an approach which enables it to explain how the amount is calculated …"**

21. On behalf of the Respondent Mr Boyd submits that, reading the Judgment fairly and as a whole, in particular paragraph 7, it is adequate in its reasoning. Nothing extensive was required; the Tribunal was simply exercising its discretion and was entitled to have regard to all the circumstances of the case and in particular to what it described as the limiting factor of the Claimant's means.

22. In my judgment, on the very specific facts of the present case, Mr Crozier, again, is correct to submit that the Tribunal either erred in law or failed adequately to set out its reasoning. At least two factors may have played a part in the appropriate quantum of costs in this case, but the Tribunal did not explain how and to what extent it had taken them into account. The first of those factors is the important finding, which the Tribunal itself had made earlier in its Judgment, that part of the claim before it had had a reasonable prospect of success, namely the claim for constructive unfair dismissal. The Tribunal therefore did not address, at

least on the face of its reasoning, questions such as what costs might have been incurred in any event.

23. The second factor to which Mr Crozier draws specific attention is one that I shall have to return to when considering ground 3 of the appeal, but it arises under ground 2 also. This factor is that the Employment Tribunal appears to have taken into account the means not only of the Claimant himself but also of his wife. I am informed that in fact it was his ex-wife. When the Employment Tribunal said that the monthly surplus between the two of their incomes was some £327 and when the Tribunal concluded that it would be just to make an award of costs in the sum of £5,000, Mr Crozier submits - correctly, in my judgment - that it is impossible to say how much of those figures is attributable to the Claimant alone and how much may have been attributable to his wife or ex-wife. For those reasons, in my judgment, ground 2 of the appeal succeeds also.

Ground 3

24. The third ground of appeal is that the Employment Tribunal erred in taking into account an irrelevant consideration, namely the Claimant's wife's income. In fact, as the oral argument before me developed, as I understood it, it became common ground, at least at the level of principle, that there is no hard and fast rule of law to that effect. As I understood it, it was common ground before me that as a matter of principle an Employment Tribunal can take into account the position of a third party. However, the burden of Mr Crozier's submission to me has been that what it must then do is consider what impact the third party's position has, if any, on the Claimant's ability to pay. As I understood his submissions, Mr Boyd did not dissent from that as a matter of principle.

25. In my judgment, that is correct. One has to operate this kind of discretion according to common sense and having a very real regard to the real world. There may be an almost infinite variety of circumstances. A person who is a party to an Employment Tribunal case may have ready access to funds from a third party source, whether by way of loan or by other means. In appropriate cases, an enquiry may have to be undertaken about what those means are. However, as Mr Crozier submits - correctly, in my judgment - the ultimate purpose of such an enquiry is to determine what the party's ability to pay is and what impact therefore the third party's position may have on his or her ability to pay, if any.

26. In the present case, Mr Boyd submits that on any view the Tribunal clearly explained in its reasoning at paragraph 7 of its Judgment that "the Claimant and his family have little money at the moment". Mr Boyd therefore submits that there was no error as a matter of principle into which the Tribunal fell, and, furthermore and in any event, he submits that it would have made no difference because the Employment Tribunal knew that the family had "little money" and so the award of £5,000 would have been made in any event.

27. I am unable to accept that submission on behalf of the Respondent. Although the Employment Tribunal was aware that the Claimant and his family had "little money", £5,000 will be a lot of money to many people in our society. What the Employment Tribunal did not do anywhere in its Judgment was enquire or set out how the figure of £327 was to be broken down as the monthly surplus between the two relevant people's incomes. The Claimant could reasonably, in my judgment, complain that if it had gone about the exercise in a different way, focusing on the correct question, namely his own ability to pay, albeit possibly indirectly having access to a third party's funds, the Tribunal might have concluded that the appropriate quantum of costs should not be as high as £5,000 but might be a lower figure. In my judgment,

A therefore, again, whether one analyses this ground of appeal as an error of principle or as one of inadequacy of reasoning, Mr Crozier's submissions must be accepted.

B **Disposal**

28. At one time there was a difference between the parties as to the appropriate disposal of this appeal should it be allowed either in whole or in part. However, as the oral submissions developed before me it became common ground, as I understood it, that if I were to allow the C appeal I should not continue to substitute my own decision as to the award of costs and its quantum, if any; rather, it was agreed that the appropriate course would be, in accordance with well-known principle and authority from this Appeal Tribunal, that the matter should be D remitted to the Employment Tribunal. Furthermore, in the circumstances of the present case it was common ground, as I understood it, that there is no reason why the case should not be heard by the same Tribunal that has previously considered it. In my judgment, that would make good practical sense. After all, the Employment Tribunal has already become very familiar E with the evidence in this case, having considered the substantive claims over many weeks, and it is familiar with the matters that will be relevant at the stage of the decision as to costs.

F **Conclusion**

29. For the reasons I have given, this appeal is allowed. The issue of costs will be remitted to the same Employment Tribunal as has previously considered the matter to reconsider it in G accordance with the Judgment of this Appeal Tribunal.

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