Appeal No. UKEAT/0298/16/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 21 April 2017

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR J TRESKA — APPELLANT

(1) THE MASTER AND FELLOWS OF UNIVERSITY COLLEGE OXFORD
(2) UNIVERSITY COLLEGE OXFORD — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JAN TRESKA (The Appellant in Person)
For the Respondents	MR JAMES DAWSON (of Counsel) Instructed by: Blake Morgan LLP Seacourt Tower West Way Oxford Oxfordshire OX2 0FB

SUMMARY

JURISDICTIONAL POINTS - Claim in time and effective date of termination

JURISDICTIONAL POINTS - Extension of time: reasonably practicable

PRACTICE AND PROCEDURE - Costs

PRACTICE AND PROCEDURE - Bias, misconduct and procedural irregularity

Reconsideration - claim struck out as out of time - correct early conciliation notification and impact on time limit - whether presentation of claim in time reasonably practicable.

Costs - finding of use of ET claims as "device" - whether Claimant given opportunity to address

The Claimant had pursued claims against the Respondents of unfair dismissal, of protected disclosure detriments and of race and disability discrimination. At an earlier Preliminary Hearing, the ET struck out the claims as having been brought out of time. On the Claimant's subsequent application for reconsideration, the ET was unable to see that any ground was disclosed on which there was any reasonable prospect of that decision being varied or revoked. It further made an award of costs against the Claimant of over £11,000, considering it appropriate to do so as, in part, he had pursued his discrimination claims as a "device", without any genuine sense of grievance or belief in those claims. The Claimant appealed.

Held: *allowing the appeal in part*

The ET had previously found the Claimant's first early conciliation ("EC") notification to have been effective; that meant that his ET claim had been presented outside extended time limit allowed by the early conciliation procedure. In applying for a reconsideration of the striking out of his unfair dismissal claim, the Claimant sought to rely on a later EC notification he had made. That, however, went nowhere: the ET had permissibly found that the first EC notification validly complied with the requirements of section 18A **Employment Rights Act 1996** (as amended) (**Mist v Derby Community Health Services NHS Trust** [2016] ICR 543

EAT applied); a subsequent EC notification was of no effect and could not serve to further extend the time limit (see **Commissioners for HMRC v Serra Garau** UKEAT/0348/16/LA).

As for the question of reasonable practicability, the reconsideration application added nothing to the case that the ET had already considered and (permissibly) rejected at the earlier hearing.

Although the ET's reasons for rejecting the reconsideration application were short, they adequately referenced the correct legal test and demonstrated that the ET had had regard to the Claimant's grounds. Given that the point raised in respect of the later EC notification could go nowhere, the ET had not been required to add to its earlier full reasoning in its Judgment on the Preliminary Hearing.

Turning to the question of costs, it was noted that the Respondents had not put the application on the basis of dishonesty or bad faith on the part of the Claimant but that was the effect of the ET's finding that he had used the discrimination claims as a "device", without any genuine grievance either in respect of race or disability and without belief in the claims he had made. Although the Claimant had the opportunity to explain the background to the claims, he was not on notice that it was being suggested that he had pursued the discrimination claims for improper reasons (**Cannock Chase District Council v Kelly** [1978] 1 WLR 1 CA, page 6E-F applied). By taking into account its apparent finding of bad faith the ET had, therefore, had regard to an irrelevant factor, which rendered the decision on costs unsafe. The matter would be remitted to a different ET for consideration afresh.

HER HONOUR JUDGE EADY QC

Introduction

1. I refer to the parties as the Claimant and the Respondents as below. I am today concerned with the Claimant's appeal from a Reconsideration and Costs Judgment of the Reading Employment Tribunal (Employment Judge Gumbiti-Zimuto sitting alone, on 12 February 2016; "the ET") sent to the parties on 1 March 2016. There had been an earlier Preliminary Hearing before the ET, on 2 to 3 June 2015, at which it had been determined that the Claimant's claims should be struck out as being time barred; the ET's substantive Judgment in that regard was sent out to the parties on 26 June 2015. The Claimant lodged no appeal against that Judgment but did apply for a reconsideration. It is the ET's subsequent rejection of the Claimant's application for reconsideration that is the subject of the present appeal, along with its Order that he should pay £11,196 towards the Respondent's costs of the proceedings. For completeness, I further observe that the Claimant separately pursued a second ET complaint, which was struck out by the ET following a further hearing on 23 February 2016. There is no appeal against that later decision.

2. The Claimant's proposed grounds of appeal against the ET's Reconsideration and Costs Judgment were originally considered on the papers, by HHJ Richardson, to disclose no reasonable basis to proceed. After a hearing under Rule 3(10) of the **EAT Rules 1993**, before HHJ Peter Clark on 19 October 2016, however, the Claimant (then represented by counsel acting under ELAAS) was permitted to proceed with his appeal on amended grounds. Aside from the *pro bono* representation afforded to the Claimant at the Rule 3(10) Hearing, he has acted in person, albeit with the assistance of a non-practising barrister and fellow of University

College Oxford, and has represented himself before me today. For their part, the Respondents have appeared throughout by Mr Dawson of counsel.

The ET's Decision and Reasoning

3. The Claimant, who had been employed by the Respondents as a resident handyperson/ caretaker from 27 November 2006 until his dismissal on 6 August 2014, made claims against the Respondents of unfair dismissal, of protected disclosure detriments, and of race and disability discrimination. As I have noted, at a Preliminary Hearing in June 2015, the ET struck out those claims as having been brought out of time. At the hearing on 12 February 2016, the ET was unable to see that the Claimant's application for reconsideration disclosed any ground on which there was any reasonable prospect of that decision being varied or revoked.

4. Turning then to the Respondents' application for costs, the ET noted that in the course of giving its earlier Judgment, it had observed that the claims of disability discrimination and protected disclosure had no reasonable prospect of success. At the costs hearing it was further persuaded that the claim of race discrimination similarly had no reasonable prospects; describing it as fanciful for the Claimant to suggest otherwise. The ET was, therefore, satisfied that its jurisdiction to award costs was indeed engaged but was concerned as to whether it was an appropriate case to make such an award.

5. Although accepting it had not considered all the evidence that the Claimant might have been able to present in support of his claims, and, allowing that he had a genuine sense of grievance as to how he had been treated, the ET concluded that the complaints of race and disability discrimination did not truly reflect that grievance but were, rather, a device by which the Claimant felt he could obtain a forum to play out the dispute he considered he had with the

Respondents; that had led him to make allegations of unlawful discrimination against individuals who were then required to defend themselves with the potential of facing reputational damage. Noting that the Claimant had been given a clear steer at an earlier case management hearing on 23 March 2015 as to the difficulties associated with his case, and even allowing for the fact that he was acting in person, the ET considered that a Costs Order was appropriate given that the Claimant did not have a genuine belief in the claims he had pursued.

6. The ET also had regard to the Claimant's means, apparently considering it was bound to do so, albeit that an inability to make immediate payment would not preclude a costs reward. It recorded that at the earlier hearing the Claimant had said he would have been able to pay a £1,000 Deposit Order, but noted that at the reconsideration and costs hearing he was saying he was currently homeless and in receipt of Employment Support Allowance. Proceeding to carry out a summary assessment of the Respondents' schedule of costs, the ET concluded that a total award of £11,196 should be made.

The Appeal

7. By his amended grounds of appeal, the Claimant takes the following points.

(1) The ET erred in law or reached a perverse decision in failing to find it was in the interests of justice to reconsider and revoke its earlier strike out Judgment in respect of his claim of ordinary unfair dismissal when the Claimant had adduced new evidence to show that the relevant early conciliation ("EC") notification had in fact been made on 5 November 2014, thus, meaning that his claim - presented on 5 January 2015 - would have been lodged on the last day of the extended limitation period arising from that notification.

(2) Relatedly, the ET had failed to give adequate reasons for refusing the reconsideration application, failing to address the new material and arguments advanced by the Claimant, i.e. as to the EC notification point set out above.

(3) As to the award of costs, the ET erred in determining that it was appropriate to make such an Order against the Claimant and/or in assessing the amount of that Order, in particular, given that the Claimant had not properly been put on notice of the ET's serious finding of bad faith - the "device" finding.

The Relevant Legal Principles

8. Before a claim of unfair dismissal can be brought in the ET, a Claimant must first contact ACAS under the early conciliation provisions. The relevant legislative provisions relating to the EC procedure are found at section 18A of the **Employment Tribunals Act 1996** inserted by section 7 of the **Enterprise and Regulatory Reform Act 2013**. Thus, from 6 April 2014, it is provided:

> **"18A.** ***Requirement to contact ACAS before instituting proceedings***
>
> **(1) Before a person ("the prospective claimant") presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter.**
>
> **…**
>
> **(3) The conciliation officer shall, during the prescribed period, endeavour to promote a settlement between the persons who would be parties to the proceedings.**
>
> **(4) If -**
>
> > **(a) during the prescribed period the conciliation officer concludes that a settlement is not possible, or**
> >
> > **(b) the prescribed period expires without a settlement having been reached,**
>
> **the conciliation officer shall issue a certificate to that effect, in the prescribed manner, to the prospective claimant.**
>
> **…**
>
> **(8) A person who is subject to the requirement in subsection (1) may not present an application to institute relevant proceedings without a certificate under subsection (4).**
>
> **…**
>
> **(10) In subsections (1) to (7) "prescribed" means prescribed in employment tribunal procedure regulations.**

…

(12) Employment tribunal procedure regulations may (in particular) make provision -

(a) authorising the Secretary of State to prescribe, or prescribe requirements in relation to, any form which is required by such regulations to be used for the purpose of providing information to ACAS under subsection (1) or issuing a certificate under subsection (4);

(b) requiring ACAS to give a person any necessary assistance to comply with the requirement in subsection (1);

(c) for the extension of the period prescribed for the purposes of subsection (3);

(d) treating the requirement in subsection (1) as complied with, for the purposes of any provision extending the time limit for instituting relevant proceedings, by a person who is relieved of that requirement by virtue of subsection (7)(a).”

9. The schedule to the **Employment Tribunals (Early Conciliation: Exemptions and Rule of Procedure) Regulations 2014** SI 2014/254 (“the 2014 Regulations”) sets out the **Early Conciliation Rules of Procedure** (“the EC Rules”). Rules 1 to 3 of the **EC Rules** set out the requirements of early conciliation, which are limited, and simply require that a form must be submitted in writing or online, or alternatively a telephone call made to ACAS, stating the names and addresses of the parties; albeit that the requirement is not for the precise or full legal title to be provided (**Mist v Derby Community Health Services NHS Trust** [2016] ICR 543 EAT at paragraph 54).

10. By Rule 6 of the **EC Rules** it is then provided that the period of early conciliation is up to one calendar month - starting on the date of receipt by ACAS of the early conciliation notification and ending up to one month later - subject to a possible extension, once only, of up to 14 days. Further, provision has been made for modifying the limitation regime in respect of the early conciliation requirements being complied with, see section 207B of the **Employment Rights Act 1996**, which relevantly provides:

“207B. ***Extension of time limits to facilitate conciliation before institution of proceedings***

(1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a “relevant provision”).

But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A.

> **(2) In this section -**
>
> > **(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and**
> >
> > **(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.**
>
> **(3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.**
>
> **(4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.**
>
> **(5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section."**

11. In **Commissioners for HMRC v Serra Garau** UKEAT/0348/16/LA the EAT, Kerr J presiding, was concerned with the question whether more than one certificate can be issued by ACAS under the statutory procedures and what effect, if any, a second such certificate has on the running of time for limitation purposes. The EAT concluded that there was only one mandatory process enacted by the statutory provisions and that the scheme of the legislation was such that only one certificate was required for proceedings relating to any matter in section 18A(1); a second certificate was unnecessary and would not impact on the prohibition against bringing a claim that had already been lifted by the operation of the first certificate. That being so, Kerr J explained as follows:

> **"21. It follows, in my judgment, that a second certificate is not a "certificate" falling within section 18A(4). The certificate referred to in section 18A(4) is the one that a prospective claimant must obtain by complying with the notification requirements and the Rules of Procedure scheduled to the 2014 Regulations.**
>
> **22. Section 207B then deals with the impact of the section 18A regime (and the 2014 Regulations) on unfair dismissal time limits. Section 140B of the Equality Act deals in the same way with discrimination claims, as is agreed. I can therefore confine myself to section 207B.**
>
> **23. That section modifies the limitation regime by defining "Day A" and "Day B" and discounting for limitation purposes periods falling between them, and giving the claimant a further month in which to claim after the end of Day B, where the primary period of limitation would expire during the period between one day after Day A and Day B. There is no provision requiring Day A and Day B to fall within a primary limitation period however; either or both may or may not do so.**
>
> **24. I am satisfied that the definition of "Day A" in section 207B(2)(a) refers to a mandatory notification under section 18A(1). It does not refer to a purely voluntary second notification**

> **which is not a notification falling within section 18A(1). Similarly, I am satisfied that the definition of "Day B" in section 207B(2)(b) of the Employment Rights Act refers to a mandatory certificate obtained under section 18A(4) of the Employment Tribunals Act. Section 207B(2)(b) says as much. It does not refer to a purely voluntary second certificate not falling within section 18A(4).**
>
> **25. Therefore such a voluntary second certificate does not trigger the modified limitation regime in section 207B or its counterpart in the Equality Act section 140B. Such a second voluntary certificate is not required under the mandatory early conciliation provisions and does not generate the *quid pro quo* of a slightly relaxed limitation regime."**

12. Additionally, the Claimant seeks to rely on the case of **Tanveer v East London Bus & Coach Company Ltd** [2016] ICR D11, in which I concluded the corresponding date principle (approved by the House of Lords in **Dodds v Walker** [1981] 1 WLR 1027) applied to the calculation of the extended time limit under the EC procedure. **Tanveer** does not, however, assist the Claimant in relation to his later EC application, not least as there was a concession in that case that the first of the two EC certificates was the relevant one. Moreover, as Kerr J observed in **Serra Garau**:

> **"30. … the second certificate was not a certificate failing within the statutory scheme at all; it was a purely voluntary exercise with no impact on the running of time."**

13. As for the requirement on an ET in terms of its reasoning for the purposes of a reconsideration application, I have had regard to Rule 62 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** which relevantly provides:

> **"62. *Reasons***
>
> **(1) The Tribunal shall give reasons for its discretion on any disputed issue, whether substantive or procedural (including any decision on an application for reconsideration or for orders for costs, preparation time or wasted costs).**
>
> **…**
>
> **(4) The reasons given for any decision shall be proportionate to the significance of the issue and for decisions other than judgments may be very short."**

14. I note further that, in considering the detail needed to be given by an ET on what was then a review application, the EAT in **Oyesanya v South London Healthcare NHS Trust** UKEAT/0335/13/JOJ allowed that it could be sufficient - taking into account the particular

procedural history of the case - for the reasoning to be limited to, effectively, a rejection of the application on the basis that it had no reasonable prospect of success.

15. Turning to the challenge to the Costs Judgment in this case, the real issue raised by the amended ground of appeal in this regard is one of fair hearing, whether the ET's finding relevant to its conclusion that it was appropriate to make an award was one of bad faith and, thus, of dishonesty such that the Claimant should have been put on notice that this was the point he had to meet and given the opportunity to address that characterisation of his conduct in terms (see **Cannock Chase District Council v Kelly** [1978] 1 WLR 1 CA, page 6E-F and **Carter & Ors v Chief Constable of Cumbria Police** [2008] EWHC 1072 QB at paragraphs 69 to 71), and further that the ET's finding in this regard needed to be carefully and properly explained (see **Serco Ltd v Dahou** [2015] IRLR 30 EAT paragraph 65).

Submissions

16. Before turning to the specific submissions made by the parties, I should observe that although the Claimant had initially sought an adjournment of this hearing on the basis, in part, that he considered that he was not adequately prepared to address me (an application I rejected for reasons given orally in my earlier preliminary judgment in that regard), his oral representations have been made very fully, with relevant reference to authorities and documentation in the hearing bundle. For the record, I also note that reasonable adjustments have been made for the Claimant during the course of this hearing, including the taking of breaks as and when sought by him, by Mr Dawson keeping his submissions very much to his skeleton argument to enable the Claimant to follow what he was saying, and by ensuring that the Claimant's submissions have remained focused on the amended grounds of appeal. I have also allowed the Claimant to hand up additional documentation during the course of his reply.

A

The EC Notification and Adequacy of Reasons Points

The Claimant's Case

17. The Claimant's case in this regard is set out in his amended grounds of appeal as follows (the Claimant there being referred to as "the Appellant"):

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> **"1.1. The Appellant was dismissed on 6 August 2014. The normal time limit for bringing a claim pursuant to section 111(2) of the Employment Rights Act 1996 ('ERA') therefore expired on 5 November 2014. On 15 October 2014, the Appellant made two notifications of early conciliation (one of which was treated as a duplicate), in respect of which the early conciliation period ended (after an extension) on 29 November 2014. However, on 5 November 2014, the Appellant had made further notifications of early conciliation, in respect of which (if valid) the early conciliation period expired on 5 December 2015. The claim was issued on 5 January 2015. Therefore, the question whether the claim was in time in respect of ordinary unfair dismissal depended on which early conciliation notification applied in respect of that claim: if the notification on 15 October 2014 was valid and applied in respect of the ordinary unfair dismissal claim then the extended limitation period pursuant to ERA, s207B(4), expired on 29 December 2014 and the claim was out of time; but if the notification on 5 November 2014 was valid and applied, that extended limitation period expired on 5 January 2015 and the claim was in time.**
>
> **1.2. The [Employment Judge's] conclusion that the unfair dismissal claim was brought out of time therefore depended on the his [sic] finding that notifications of early conciliation made by the Appellant on 15 October 2014 were valid and applied in respect of the claim for ordinary unfair dismissal, which was based on his understanding that the Appellant had identified the Respondent in those notifications as 'University College' (Strike-Out Judgment, para 30).**
>
> **1.3. At the reconsideration hearing held on 12 February 2016, the Appellant had provided, and was relying upon, new material from both ACAS and on his own account which, *prima facie*, shows that**
>
> > **(a) The name given in the initial Acas Early Conciliation notifications was not 'University College' as recorded at paragraph 30 of the 26 Strike-Out Judgment, but was in fact 'Sir Ivor Crewe - University College' [117-120]; and**
> >
> > **(b) The Appellant was advancing an account that there had been discussion between the Appellant, the Respondent's representative (Mike Wilson of Blake Morgan Solicitors) and the Acas Early Conciliation officer (Stephen Shilton), to the effect that the Appellant had incorrectly identified the Respondent, and needed to correct that mistake by making a second early conciliation notification to ACAS.**
>
> …
>
> **1.6. In the 15 October 2015 notifications the Appellant had failed to name the correct Respondent in respect of his claim for ordinary unfair dismissal as he named an individual rather than his employer. That conclusion is reinforced by the advice he received from ACAS and the comments of the Respondent's representative, to the effect that he had failed to name the correct Respondent."**

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18. Given that history, he argues:

> **"1.7. In the circumstances, the only proper conclusion upon the Appellant's application for reconsideration was that it was necessary in the interests of justice, pursuant to rule 70 of Schedule 1 to the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, that this element of the Strike-Out Judgment be reconsidered and revoked.**
>
> **1.8. The Appellant's second early conciliation notification on 5 November 2014 and the corresponding early conciliation certificates should have been held to be the valid and**

H

applicable notification for the purposes of the Appellant's unfair dismissal claim, with the consequence that that claim was in time.

1.9. In the alternative, if (contrary to the Appellant's primary case) the first notification on 15 October 2014 was valid and applied, the only proper conclusion in light of the new material was that it was not reasonably practicable for the Appellant to have presented his claims within the time limit because he reasonably believed, based on representations both by ACAS and the Respondent's representative, that the time limit expired on 5 January 2015 and was entitled to rely on that understanding."

19. The Claimant has explained to me, at some length and with regard to the additional documents he relies on, his confusion in complying with the EC requirements; not least given what he contends was advice given to him by the Respondent and/or ACAS; he had understood he had until 5 January 2015 to make his ET claim, that being the impression given to him, he says, in his dealings with ACAS and the Respondents. He further considers the Respondents are taking overly technical points and also objects that the issue of the different EC certificates and the potential implications of a further certificate had not been properly identified as an issue in advance of the Preliminary Hearing. He yet further objects that the ET did not revisit the question of reasonable practicability on his reconsideration application. Failing to address his arguments in this regard, and the new material he had presented, meant that the ET had further erred in providing inadequate reasons; there was nothing to show the ET had addressed his case and no reasoning that would demonstrate that the ET had conducted any review of its earlier decision in this regard.

The Respondents' Case

20. For the Respondents, however, it is contended that the EC notification point is founded upon a misapprehension of the factual position. Specifically, and contrary to what was stated at paragraph 1.3(b) of the amended grounds of appeal, the name given in the initial EC notifications was not Sir Ivor Crewe but University College itself. Whilst a further application for EC was made on 15 October 2014, that case was closed because it was considered to be a duplication of the first and ACAS was unable to confirm whether an EC certificate was ever

issued in respect of the later notification. Moreover, the ET had concluded that the first EC notification in respect of University College had been effective (see paragraphs 46 to 47 of the substantive Preliminary Hearing Judgment) and, in so finding, had correctly disregarded the minor variation between the Respondents' legal title and the name used in the EC notification, consistent with the approach laid down by the EAT in **Mist v Derby**. The ET had further considered the argument that the presentation of a second EC application caused time to start running again but had rejected any such contention that this could be possible, section 207B **Employment Rights Act 1996** not providing for repeated compliance (**Serra Garau**).

21. As for the additional argument raised by the amended grounds of appeal - that it was not reasonably practicable for the Claimant to have brought his claim within the relevant time limit - given that the parties had correctly operated on the basis that the first EC notification was valid, it was equally not in the interests of justice to reconsider the decision on this basis, not least as the ET had effectively addressed the substance of this issue in its original Judgment on the Preliminary Hearing (see paragraph 61 setting out the Claimant's arguments in this regard and paragraphs 62 and 65).

22. As for the adequacy of reasons, although the reasons rejecting the reconsideration application were short, Rule 62(4) of the **ET Rules** allowed that they should be proportionate to the significance of the issue and that, for decisions other than Judgments, they might be very short. Here, the reasoning showed the ET had in mind the correct legal test under Rule 72 (which dealt with reconsiderations) and had considered the grounds advanced by the Claimant; it was not obliged to go through each paragraph of the application. Further, regard should be had to the procedural history of the case; although the Claimant had not given evidence at the

Preliminary Hearing, that was because he had failed to comply with the ET's Order and had only served a witness statement the evening before.

The Costs Appeal

The Claimant's Case

23. The ET's decision to award costs was largely founded upon its conclusion that he made allegations of discrimination as a device. That was a serious finding of bad faith which could not be made unless adequate notice had been given in advance and sufficient particulars identified such as would support the allegation and the person about whom the allegation was made had the opportunity to give evidence and state his response (see **Cannock Chase District Council v Kelly**, **Carter v Chief Constable of Cumbria Police** and **Serco v Dahou** above). The ET had failed to ensure these steps were taken in this case and had failed to identify any or any adequate facts or grounds capable of supporting the serious finding of bad faith made. The Claimant additionally asserted that it was an error of law to award costs when his claims had not been heard and when there had been no earlier strike-out. To the extent it was felt there was any basis for the Costs Order, but that the ET had erred in its reasoning, the matter, he submitted, should be remitted to a different ET and the parties directed to seek to mediate.

24. In addition, although going beyond the amended grounds of appeal, the Claimant contends the ET took into account an irrelevant factor in considering that the Claimant had been prepared to pay a deposit of £1,000 as that did not assist in showing that he had the ability to pay the far-higher sum awarded. He submits the ET was there by punishing him rather than compensating the Respondents. In the alternative, should it be found that the ET erred by failing to reconsider the striking out of his unfair dismissal claim, he contends it must follow

A that the Costs Order was flawed as it was based, in part, on the proposition that the Claimant's claims had been dismissed in their entirety.

B *The Respondents' Case*

25. On behalf of the Respondents it is observed that the ET conspicuously applied the two-stage test not only finding that its costs jurisdiction was engaged but separately going on to consider whether it was nevertheless appropriate to make an award of costs in the C circumstances of this case and had only taken into account relevant factors. The Respondents had not put the application on the basis that the Claimant had been dishonest, but it was permissible for the ET to have regard to the Claimant's reason for his pursuit of a case in which D he did not genuinely believe - the "device" point. That was not a finding of which the Claimant needed to have prior notice but simply an acknowledgment that litigants sometimes inappropriately advance a case by whatever means are available to them. The ET was not, E thereby, finding that the Claimant had acted dishonestly but that he was inappropriately pursuing an unjustified sense of grievance. In any event, although the Claimant had not given evidence, he had been given the opportunity to set out the background to his claims. Ultimately, the ET's decision on costs was an exercise of its discretion (**Yerrakalva v** F **Barnsley Metropolitan Borough Council** [2012] IRLR 78) and the EAT should not interfere. If, however, it was minded to allow the appeal against a Costs Order then the Respondents accepted that the matter would need to be remitted to the ET.

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Discussion and Conclusions

The EC Notification and Adequacy of Reasons Points

H 26. The issue raised by the Claimant's reconsideration application related to the ET's earlier calculation of the relevant time period for the bringing of his claim of unfair dismissal. The ET

had all the ACAS certificates before it at the Preliminary Hearing, although not all the Claimant's correspondence with ACAS at that stage. It made a finding that the first EC application had been made in the name of "*University College, High Street, Oxford, Oxfordshire OX1 4BH*". It observed that although the full title of the entity that needed to be named for the unfair dismissal claim was "*The Masters and Fellows of University College Oxford*" everyone involved in the proceedings knew who was being referred to and the parties had agreed an extension to the period for conciliation, evidencing that all concerned believed there was a reasonable prospect of the relevant parties achieving a settlement. Pre-empting the approach I subsequently approved in **Mist v Derby**, the ET found that the Claimant had thereby complied with the EC requirements for the purposes of section 18A of the **Employment Tribunals Act** on 15 October 2014.

27. Consistent with the view I took in **Mist v Derby** (see paragraph 56 of that case), I consider the ET was entitled to reach that conclusion. That being so, Day B for the purposes of section 207B of the **Employment Rights Act 1996** was 29 November 2014 and so the extended limitation period expired one month later, thus meaning the ET1 had been presented out of time. For the reasons explained by Kerr J in **Serra Garau** (see above), that position was not - and could not be - changed by any later application for EC made by the Claimant in respect of the same matter. That being so, the Claimant's "new evidence" of his later EC notification could not provide any proper basis on which the ET could reconsider its decision.

28. As for the question of reasonable practicability, the ET had addressed the Claimant's argument in this regard in its first Judgment. There was nothing new raised by the reconsideration application and the ET was, therefore, entitled to reject that.

29. These points effectively also deal with the adequacy of reasons challenge. Having given a fully reasoned explanation for rejecting the Claimant's case at the Preliminary Hearing, the ET was not bound to give further extensive reasons for rejecting, effectively, the same points on the reconsideration application. The only new point was the material relating to the subsequent further EC notification, but that took matters no further (and could not do so) and, thus, left the ET's earlier reasoning in place, which answered the substantive point in play in the far-fuller Judgment given on that occasion.

30. Although, therefore, the ET's reasoning rejecting the reconsideration application was short, it referenced the relevant legal test and demonstrated that regard had been given to the grounds of the application. Allowing for the particular procedural history of this case, in particular, the very fully-reasoned Judgment given on the Preliminary Hearing, I am satisfied that the reasons given for rejecting the reconsideration application were adequate to the task.

The Costs Appeal

31. Turning to the challenge to the Costs Decision I note that the ET properly reminded itself of the two-stage test required: (1) to ask whether its costs jurisdiction was engaged, and (2) even if it was, to ask whether it was appropriate to make any such award (see **Ayoola v St Christopher's Fellowship** UKEAT/0508/13/BA). The challenge is, thus, to an exercise of judicial discretion and I acknowledge the limited role that the EAT has in this regard (see **Yerrakalva v Barnsley MBC**). That said, if the ET determined to make an award of costs on the basis that the Claimant had acted in bad faith when he had not properly had the opportunity to address that point, that would, in my judgment, be taking into account an irrelevant factor.

32. In this regard, I note that the Respondents' application for costs was not put on the basis of dishonesty or bad faith on the part of the Claimant. The application could not, therefore, put the Claimant on notice that that was the case he had to meet.

33. That said, it is right to observe that, whilst he did not give evidence, the Claimant had the opportunity to explain the background to the claims. Furthermore, Mr Dawson urges me to find that the ET's reasoning fell short of a finding of dishonesty or bad faith; the ET made a finding as to the Claimant's background motivation that was permissible in the circumstances.

34. Although I would accept that there were a number of factors at play in the ET's reasoning on costs, I am not persuaded that it would be right to characterise it in the way the Respondents urge. The costs award was certainly not made simply on the basis that the ET had found that the claims had no reasonable prospect of success. Having found that its costs jurisdiction was thus engaged, the ET expressly recognised that it still needed to go on to consider whether it was appropriate to make any award of costs. It was in determining that question that the ET referred to the Claimant having pursued complaints of race and disability discrimination as a "device", when he had no genuine sense of grievance about either his race or disability and when he had then conducted claims in those respects in which he had no genuine belief (see, in particular paragraphs 15, 17 and 21 of the ET's Judgment). In so holding, I am satisfied that the ET was making a finding of improper motive and bad faith and, as such, the Claimant was entitled to be put on notice and given the opportunity to address that contention. Although he had the opportunity to explain the background to the claims in his submissions, the Claimant had not been put on notice of the point he had to address in that respect and had no opportunity to give evidence to counter the suggestion that he had acted in

bad faith. In those circumstances I consider the ET took into account an irrelevant factor - a finding of bad faith that had not been properly addressed.

35. Allowing that there were plainly other factors that also weighed with the ET I cannot ignore the fact that the "device" point appears to have been a significant matter in the ET's reasoning and, as such, I consider it renders the costs award unsafe. At the same time, I am unable to say that there could be no basis for a finding of bad faith: properly allowing the Claimant to address the point to give evidence on the understanding of the case being put against him might well still lead to that conclusion. Even if it did not, I can also allow that the ET might take the view that the other reasons it relied on could be sufficient to justify the award in any event. These are matters of assessment for the ET, not the EAT. The issue of costs must, therefore, be remitted to the ET.

36. The question that then arises is as to whether the remission should be to the same ET? The Claimant says not: he says he could not have confidence in a fair hearing before the same ET given the finding of bad faith made. Allowing that (as the Respondents would urge) there is a certain attraction in sending this matter back to the same ET, which made the earlier substantive decisions at the Preliminary Hearing and which could be expected to approach the remitted hearing with all due professionalism, I am persuaded that the Claimant is right. Weighing the factors set out in **Sinclair Roche & Temperley v Heard & Anor** [2004] IRLR 763, I consider it would be difficult for the parties, in particular the Claimant, to have confidence that remitting this issue to the same ET would allow for an open mind to be brought to bear on any issue of bad faith; an issue, I remind myself, that had not been raised by the Respondent. In these circumstances, I consider it is appropriate for the matter to be remitted to a different ET.