Appeal No. UKEAT/0031/17/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 5 July 2017

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MS I SMOLAREK APPELLANT

(1) TEWIN BURY FARM HOTEL LTD
(2) MR W BOBROWSKI RESPONDENTS

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MS SALLY ROBERTSON (of Counsel) Bar Pro Bono Scheme
For the Respondents	MR MARK STEPHENS (of Counsel) Instructed by: Gisby Harrison Solicitors Goffs Oak House Goffs Lane Cheshunt Hertfordshire EN7 5HG

SUMMARY

PRACTICE AND PROCEDURE - Costs

Costs - Rule 76(1) ***ET Rules 2013***

Having dismissed the Claimant's claims after a Full Merits Hearing, the ET went on to order that the Claimant pay costs of £5,200 towards the sums incurred by the Respondents (over £29,000). In making that award, the ET had regard to the fact that the Claimant had previously pursued two claims in the ET, which had also included claims of unlawful discrimination, and had faced a previous costs award; in the present case, not only had the Claimant unreasonably pursued claims that had no reasonable prospect of success so as to engage the ET's costs jurisdiction under Rule 76(1), it was appropriate to make an award of costs in the sum of £5,200, which was set at a level that the Claimant might be expected to be able to pay and also that would cause her to consider carefully before pursuing any further ET claims. Upon the Claimant applying for the ET to reconsider its Judgment, in part because it had wrongly taken into account the need to deter her from pursuing claims when making the costs award, the ET confirmed its earlier decision but said it was merely expressing a hope - not setting out its reason for making the costs award - when it referred to any future deterrence.

The Claimant appealed the original Costs Judgment.

Held: *allowing the appeal*

The ET's reasoning expressly stated that, when determining whether it was appropriate to make an award of costs and, if so, as to the level of that award, its award was at least in part informed by reference to what would cause the Claimant to consider carefully whether to bring any future claims (i.e. so as to act as a deterrence). That had been an improper consideration and had thus tainted the ET's exercise of its judicial discretion. Although the ET had re-visited this issue in its Decision on the reconsideration application, that could not be read as a clarification of its earlier reasoning and it would not be appropriate to seek to make good the error in the original

Decision by reference to the Reconsideration Judgment. That said, the Reconsideration Decision did make clear the other bases on which the ET had considered it appropriate to make a costs award in this case and that meant that the real issue was as to the appropriate level of that award absent any consideration of deterrence. In the circumstances that issue would need to be remitted to the ET for further reconsideration.

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HER HONOUR JUDGE EADY QC

Introduction

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1. This appeal concerns the approach that should be taken by an Employment Tribunal when deciding whether to make a costs award and if so, as to how much to award. In my Judgment I will refer to the parties as "the Claimant" and "the Respondents", only distinguishing between the Respondents as and when necessary.

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2. This is the Full Hearing of the Claimant's appeal against a Judgment of the Watford Employment Tribunal (Employment Judge Southam, sitting with members Mrs Smith and Mr Surrey, over six days in June 2015; "the ET"), sent to the parties on 21 July 2015. Specifically, it is a challenge to the ET's decision to order that the Claimant should pay to the First Respondent the sum of £5,200 in respect of the costs incurred in resisting the claim.

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3. Before the ET the Claimant was represented by a friend, the Respondents had the benefit of representation by Mr Stephens of counsel, as today. As from the earlier Rule 3(10) Hearing in this matter, the Claimant has however been fortunate to have been represented without charge by Ms Robertson of counsel, first acting under ELAAS and now as instructed by the Bar Pro Bono Unit.

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4. The hearing under Rule 3(10) of the **EAT Rules 1993** took place before Kerr J on 7 December 2016. After hearing submissions from Ms Robertson - as is customary, the Respondents did not appear at that stage - Kerr J allowed the appeal to proceed on the following amended grounds: whether the ET misdirected itself on its decision on costs in that (1) in relation to the first stage it took account of irrelevant factors, namely (a) behaviour arising

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before the incident proceedings were begun/were not part of the conduct of the instant proceedings, (b) the reliance upon an interpreter (not a matter that has been pursued before me), and (c) a need to punish the Claimant; (2) in relation to the second stage of the costs assessment the ET took account of the same irrelevant factors; and (3) further alternatively, the ET gave inadequate reasons so as to demonstrate that it had not erred as set out above.

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5. The Respondents have resisted the appeal largely relying on the reasoning of the ET as provided in the Decision against which the current appeal lies, but also on the subsequent Reconsideration Judgment

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The Relevant Background

6. The Claimant was employed by the First Respondent from the 20 January 2012, latterly as Senior Supervisor of Housekeeping and Laundry, until her resignation on 1 November 2014. She lodged her ET claim on 1 December 2014, complaining of constructive unfair dismissal, sex discrimination including harassment, unpaid wages, victimisation and breach of contract.

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7. The Second Respondent is the First Respondent's Housekeeping and Laundry Supervisor; he was named by the Claimant as an individual Respondent to her discrimination claims. The First Respondent did not seek to rely on a statutory defence to avoid liability for any of the Second Respondent's actions and the interests of both were represented by the same solicitors and counsel throughout.

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8. The Full Merits Hearing of the Claimant's claims took place before the three-member ET over the six days I have already indicated. It gave its oral judgment at the end of the hearing, dismissing all of the Claimant's complaints, for the most part because it rejected her

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case on the facts. The ET having thus announced its reasoned decision in this matter, the Respondents made an application for costs against the Claimant.

9. In considering that application the ET took into account the fact that the Claimant had previously pursued two separate ET claims which had included complaints of discrimination. In the present case, the Claimant had not made any complaint of sex discrimination until 1 September 2014. The ET further concluded that the Claimant and her representative had conducted the proceedings unreasonably: she had failed to comply with an earlier agreed direction thus acting in a way that would have increased the costs for the Respondents; her witness statement was unhelpful and badly structured and her case evidenced a lack of thought and focus. Although the Respondents had written to the Claimant suggesting she take legal advice, she had not done so but had continued to pursue a claim of discrimination without addressing the comparator issue and had made no attempt to link the matters of which she complained to her resignation. The Claimant's claims had had no reasonable prospect of success and she had conducted the proceedings unreasonably. The ET was thus satisfied that the threshold in Rule 76 Schedule 1 of the **Employment Tribunals (Constitutional and Rules of Procedure) Regulations 2013** had been crossed and its costs jurisdiction engaged. It was further satisfied that it was fair to make an award of costs against the Claimant in this case. It noted that in the second of her previous ET claims the Claimant had been the subject of an adverse costs award but that had apparently failed to dissuade her from bringing a further claim.

10. The costs incurred by the Respondents had come to some £29,122, excluding VAT. The ET noted that the Claimant was earning £24,000 per annum; more than when she had been working for the First Respondent. It considered that any award made should be both of an amount the Claimant could afford to pay but also such as would make her consider very

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carefully whether or not to bring any claims in the future (see its reasoning at paragraph 70). On that basis, the ET considered the appropriate costs award would be £5,200.

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11. Subsequently, by email of 4 August 2015, the Claimant applied for a reconsideration of the ET's Costs Judgment. That was the subject of a further hearing on 24 March 2016, when the ET upheld its earlier decision. In so doing, it revisited part of its earlier reasoning, answering a point taken by the Claimant in the reconsideration application as follows:

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> **"17. Lastly the claimant challenges the costs order on the basis that it appears that the tribunal was seeking to penalise the claimant for bringing a claim which had no reasonable prospects of success and to warn her that she should not take bring [sic] such proceedings in the future. The basis for the tribunal's decision was that the claimant's conduct of the proceedings was unreasonable in that she brought claims which had no reasonable prospect of success and because, in part, of her unreasonable conduct prior to the hearing. The expression of hope in paragraph 70 of the tribunal's decision was to the effect that the claimant might be discouraged from bringing further unreasonable claims before the tribunal. It was not a reason for making the order but simply an indication to the claimant of something that she might consider in the future."**

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<u>The Relevant Legal Principles</u>

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12. By Rule 76(1) of Schedule 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**, it is provided:

> **"(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that -**
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> > **(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or**
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> > **(b) any claim or response had no reasonable prospect of success."**

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13. The approach to an award of costs by an ET on this basis was considered (albeit under the previous **ET Rules**) - by the EAT in the case of **<u>Power v Panasonic (UK) Ltd</u>** UKEAT/0439/04, when the two stages in the ET's assessment were identified. First, consideration of the threshold question: do any of the circumstances identified in Rule 76(1) apply? If so, secondly, the separate consideration as a matter of discretion whether it would be appropriate to make an award in the particular circumstances of the case and if so, in what amount (see

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paragraph 12(2) **Power**). In **Power**, it was further emphasised that a costs award in this context is to be compensatory not punitive (see paragraph 12(3)).

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14. The Respondents do not disagree with that principle but observe that the receiving party is being compensated for the expense to which they have unreasonably been put (see **Benyon & Others v Scadden & Others** [1999] IRLR 700 EAT). They further observe that the EAT should not be quick to assume that an ET has sought to punish the paying party simply by loose

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language in this regard (see, by way of example, **Vaughan v London Borough of Lewisham (No. 2)** [2013] IRLR 713 EAT).

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15. As further explained in **Power** (see paragraph 12(7)), the question as to whether or not it is appropriate to make a costs award in any particular case is a matter of discretion for the ET. In exercising that discretion, the ET will wish to have regard to the guidance given by

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Mummery LJ in **Barnsley Metropolitan Borough Council v Yerrakalva** [2012] IRLR 78 CA:

> **"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. …"**

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16. More generally, the discretion to make a costs award is very much a matter for the ET and not for the EAT; as Mummery LJ observed in **Yerrakalva**:

> **"7. As costs are in the discretion of the ET, appeals on costs alone rarely succeed in the EAT or in this court. The ET's power to order costs is more sparingly exercised and is more circumscribed by the ET's rules than that of the ordinary courts. There the general rule is that costs follow the event and the unsuccessful litigant normally has to foot the legal bill for the litigation. In the ET costs orders are the exception rather than the rule. In most cases the ET does not make any order for costs. If it does, it must act within rules that expressly confine the ET's power to specified circumstances, notably unreasonableness in the bringing or conduct of the proceedings. The ET manages, hears and decides the case and is normally the best judge of how to exercise its discretion.**

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> **8. There is therefore a strong, soundly based disinclination in the appellate tribunals and courts to upset any exercise of discretion at first instance. In this court permission is rarely given to appeal against costs orders. I have noticed a recent tendency to seek permission more frequently. That trend is probably a consequence of the comparatively large amounts of legal costs now incurred in the ETs.**

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> **9. An appeal against a costs order is doomed to failure, unless it is established that the order is vitiated by an error of legal principle, or that the order was not based on the relevant circumstances. An appeal will succeed if the order was obviously wrong. As a general rule it is recognised that a first instance decision-maker is better placed than an appellate body to make a balanced assessment of the interaction of the range of factors affecting the court's discretion. This is especially so when the power to order costs is expressly dependent on the unreasonable bringing or conduct of the proceedings. The ET spends more time overseeing the progress of the case through its preparatory stages and trying it than an appellate body will ever spend on an appeal limited to errors of law. The ET is familiar with the unfolding of the case over time. It has good opportunities for gaining insight into how those involved are conducting the proceedings. An appellate body's concern is principally with particular points of legal or procedural error in tribunal proceedings, which do not require immersion in all the details that may relate to the conduct of the parties."**

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And, further, continued:

> **"49. I am conscious that, as orders for costs are based on and reflect broad brush first instance assessments, it is not the function of an appeal court to tinker with them. Legal microscopes and forensic toothpicks are not always the right tools for appellate judging."**

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17. Thus, as an exercise of judicial discretion, an appeal against an ET's decision to make an award of costs can only succeed if the ET applied the wrong legal test or reached a perverse decision or took into account that which was irrelevant or failed to have regard to a factor that was relevant. It is in this regard that the Claimant relies on the EAT's judgment in **Davidson v John Calder (Publishers) Ltd** [1985] IRLR 97, in which it was emphasised (see paragraph 9), that it is the conduct in the course of the proceedings alone that is to be considered in making an award of costs in respect of unreasonable conduct.

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18. Finally, and again picking up the guidance laid down in **Yerrakalva**, where an ET has made an award of costs it is not open to the EAT to seek to deconstruct its reasoning for signs of error. Similarly, however, it would be impermissible to comb through a deficient decision for signs of missing elements and to try to amplify these into an adequate set of reasons (see per Sedley LJ at paragraph 26, **Anya v University of Oxford** [2001] IRLR 377 CA).

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Submissions

The Claimant's Case

19. The Claimant first observes that the ET's only relevant self-direction on costs was at paragraph 64 and was minimalist, doing no more than rehearsing the content of Rule 76(1) and evidencing a failure by the ET to remind itself that costs were to be compensatory, not punitive. Moreover, the reasoning reflected the way in which the Respondents had put the application - an approach that was capable of leading the ET to see deterrence as a legitimate part of its reasoning at the second stage of the costs exercise (see paragraph 63 of the ET's Decision).

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20. Accepting that it would be difficult for the Claimant to demonstrate that the ET had not been entitled to find that the threshold had been crossed for the purposes of Rule 76(1), the focus of Ms Robertson's argument was on the second stage of the Costs Judgment - the exercise of the ET's discretion. The ET had taken into account behaviour arising before the proceedings, largely focusing on the previous claims. It specifically referred to the previous claim in which the Claimant had faced a costs award, observing that this "*does not appear to have dissuaded her from bringing this claim*" (paragraph 68). Further, when determining the appropriate level of the costs award, the ET considered it should be such as "*should make her consider very carefully whether or not to bring any claims in the future*" (paragraph 70). It had thus taken into account irrelevant factors; the need to punish the Claimant and further to deter her from bringing further future claims.

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21. Moreover, the ET's error of approach - adopting a punitive rather than compensatory approach to the exercise of its discretion - was not rescued by its Reconsideration Decision: a straightforward reading of the original Judgment made clear deterrence was part of the ET's reasoning; that error could not be undone by the reasoning on the reconsideration application.

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22. As for the appropriate disposal of the appeal, the issue of costs would need to be remitted; there could be no one answer on the second stage questions, in particular, as to the amount of any award when the irrelevant factors tainting the original decision were removed. That said, the way in which the ET had expressed itself on the Reconsideration Judgment meant that it would be appropriate for this matter to be remitted to a differently constituted ET.

The Respondents' Case

23. For the Respondents, it was first submitted that the EAT should not disregard the Reconsideration Judgment: the Claimant had asked the ET to reconsider its Judgment and it did so. Its reasoning at paragraph 17 of that Decision confirmed there had been two gateways to the making of the award - unreasonable claim and unreasonable conduct - and that the ET's decision to award costs was untainted by any irrelevant consideration. Either the Reconsideration Judgment should be read as a clarification of the ET's earlier core reasoning or, in any event, it demonstrated that there was only one answer to the appeal.

24. As for the matters raised by the specific grounds of appeal, and starting with the submission that the ET had taken into account an irrelevant factor, namely, the past bringing of ET claims, this was a mischaracterisation of the reasoning: the ET was entitled to have regard to the fact that the Claimant and her representative had previous experience of ET litigation and of costs awards in that context. This was a potentially relevant factor, just as a litigant's lack of familiarity with ET procedure might be seen as relevant (see, for example, **AQ Ltd v Holden** [2012] IRLR 648 EAT per His Honour Judge Richardson at paragraph 32). The ET was thus entitled to have regard for the Claimant's previous experience of ET proceedings, not with a view to punishing her but because it was material that she and her representative could

A reasonably have been expected to have known the ET would require them to put the case clearly and in good order and there was a risk of a costs award if they failed to do so.

B 25. As for the suggestion that the ET was seeking to punish the Claimant - as demonstrated by its reference to her considering very carefully whether or not to bring any claims in the future - that formed no part of the causative reasoning. As the ET had confirmed on the reconsideration application, it was an expression of hope for the future, not a reason for making

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D expressing an ET's decision without undermining its reasoning (see **Vaughan v London Borough of Lewisham**). In any event that had been clarified by the reconsideration reasoning at paragraph 17 or, in the alternative, the reconsideration reasoning informed the EAT as to

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Discussion and Conclusions

F 26. In developing her arguments at this hearing, Ms Robertson for the Claimant, has focused on the second stage of the exercise the ET had to undertake. Accepting it would be difficult to say that the ET's costs jurisdiction had not been engaged at the first stage (there being a number of findings of unreasonable conduct), the Claimant has argued that this is a case

G where at the second stage the ET allowed its exercise of discretion - as to whether it would be appropriate to make an Order of costs in this case and if so, as to such an amount of such an award - to be tainted by irrelevant factors. In considering these arguments, I remind myself of

H the very limited basis of challenge that can properly be made to an ET's exercise of its discretion on costs (see the guidance in the case law I have already referenced, above).

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27. On the question whether the ET erred by having regard to the Claimant's conduct outside and prior to these proceedings, it is important to respect the fact- and case-sensitive nature of the ET's reference to this matter in this case. The conduct in question was the Claimant's past bringing of and participation in ET claims, in particular, discrimination claims and in the particular circumstances of this case the ET was entitled to have regard to the fact that the Claimant and her representative had previous experience of ET litigation and of costs awards in that context - this was a potentially relevant factor, just as a litigant's lack of familiarity with ET procedure might be seen as relevant. It is apparent that the ET considered this a material factor in this case because the Claimant and her representative could reasonably have been expected to have known the ET would require them to put the case clearly and there was a risk of a costs award being made if they failed to do so. That was particularly so in respect of the discrimination claims. The Claimant's prior knowledge and experience of discrimination claims was thus relevant to the question whether the present claim had been conducted reasonably and whether she could reasonably have been expected to realise that certain complaints should not have been pursued at all (see the ET's reasoning at paragraph 66). I do not consider that these were other than entirely permissible considerations for the ET to take into account. It was not relying on the earlier proceedings in this context as a basis for punishing the Claimant for bringing yet further proceedings, but was referencing those earlier claims as being relevant to ascertaining what the Claimant could reasonably have been expected to understand would be expected of her; thus, the earlier proceedings became part of the relevant context.

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28. As for the separate suggestion that the ET was seeking to punish or deter the Claimant, as demonstrated by its reference to her considering very carefully whether or not to bring any claims in the future, the Respondents contend that this in reality formed no part of the causative

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reasoning but was merely loose language or rhetoric (see **Vaughan**): as the ET confirmed in the Reconsideration Decision, they say it was an expression of hope for the future not a reason for making the award.

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29. Notwithstanding the persuasive way Mr Stephens puts the Respondents' argument in this regard, I am not persuaded that this is the right way of characterising the ET's reasoning. The second stage of the costs exercise required the ET to consider not just whether it was appropriate to make an award but - if so - as to the appropriate level of that award. In this case, when undertaking that exercise, the ET explained the basis on which it had come to its decision as to the level of award that it should make:

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> **"70. … We take on board Mr Stephens' submission that an order should not be made in such an amount that it breaks the claimant or that she would find it difficult to pay but we think it is important, especially bearing in mind that the claimant has previously been the subject of a costs order, that it is an amount firstly that she should be able to pay, but secondly that it should make her consider very carefully whether or not to bring any claims in the future. …"**

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30. The ET thus went further than looking at the proportionality of the amount of any award given the Claimant's means - which is how it understood Mr Stephens to be putting the Respondents' application - it stated that it was setting the award at a level that would act as a deterrent. That was not an appropriate factor for the ET to allow influence the exercise of its discretion. On this question I therefore consider the Claimant is right in her challenge. Moreover, I do not consider it possible to avoid this taint in the ET's reasoning by reference to the Reconsideration Decision. True it is that the ET there referred to the other bases for its award, which would justify a Costs Order in any event, but when it went on to address the reasoning at paragraph 70 of its original Decision I again agree with Ms Robinson, this was not simply a clarification or fleshing out of its earlier reasoning as might occur, for example, on a **Burns/Barke** reference from this Court. So, whilst I can allow that the reasoning provided on a Reconsideration Decision can sometimes be helpful in assisting the EAT to understand what the

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ET intended to say in its original Judgment, to seek to utilise the ET's reconsideration reasoning to make good the problem identified in the first Decision in the present case would be to undertake the exercise warned against in **Anya**.

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31. What the Reconsideration Decision reasoning does demonstrate, however, is that there were a number of reasons why the ET had considered it appropriate to make an award of costs in this case. Any thoughts of deterrence or punishment could be stripped out and - as Ms

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Robertson acknowledged when addressing me on the question of disposal - some form of Costs Order would remain. What I am unable to accept, however, is that it answers the question as to - absent any thought of punishment of the Claimant or deterrence of future claims - what

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amount of costs should then be awarded. That was the specific question being addressed at paragraph 70 of the original Decision and I do not consider it safe to assume that the Reconsideration Decision demonstrates the ET has then reconsidered the amount of the award

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that should be made, stripping out any negotiation of punishment or deterrence. Mr Stephens says the amount of the award itself can be seen to have done that. That, however, would be to assume the ET's assessment of what would be proportionate - given the level of costs incurred resulting from the Claimant's unreasonable conduct and given her means - would be the same

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even if the ET's express aim of making sure the Claimant consider very carefully whether or not to bring any claims in the future, was removed. That might be so, but I do not consider the Reconsideration Decision provides a basis on which I can assume it inevitably would be.

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32. For those reasons, I allow the appeal but must order that question of the amount of the costs award be remitted. I have considered the submissions from the parties as to whether it should be to the same or to a different ET and, having due regard to the guidance laid down in

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Sinclair Roche & Temperley v Heard [2004] IRLR 763, conclude it should be to the same

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ET. That is plainly proportionate; it conducted the Full Merits Hearing and I have largely left undisturbed its findings relevant to the first stage of the costs exercise, ultimately taking issue with its conclusion as to the amount of the award alone - the latter part of the second stage. Moreover, there is no suggestion of bias and this is an experienced and professional ET that can be entrusted with further reconsideration of this issue. The fact that I did not accept that the reasoning on the Reconsideration Decision clarified the earlier explanation for the level of the award is not, contrary to the Claimant's submission, fatal. It was there focused on the making of the award; I am now asking that it revisit the amount of that award, making sure that it removes from its mind any notion of punishment or deterrence. On that basis, I allow the appeal and remit this matter to the same ET for further reconsideration.

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Costs

33. Having given my Judgment in this matter, the Claimant has applied for her costs in terms of her fees incurred in lodging and pursuing this appeal; the sum of £560 in total - that is £400 by way of lodgement fee and £160 hearing fee (reduced on remission). The application is made under Rule 34A(2)(a) of the **Employment Appeal Tribunal Rules 1993** (as amended), the Claimant having succeeded, at least in part, on her appeal.

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34. The Respondents resist that application. First, because the appeal as originally lodged was not permitted to proceed. Second, because the appeal even as permitted to proceed after the Rule 3(10) Hearing was not pursued on all points. And third, the Claimant was then only successful in part on the matters pursued, effectively on one aspect of one part of the costs challenge. Moreover the Respondents contend, ultimately, the matter has to be remitted to the ET and the Claimant may well then find she has a pyrrhic victory because the costs award would be upheld as previously made in any event. Additionally, Mr Stephens has drawn my

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attention to the fact that, prior to the Full Hearing of the appeal, on 16 March 2017, the Respondents had written to the Claimant offering to accept a very discounted sum in costs - reduced to a total of £2,320 - that would have avoided any need for the hearing of this appeal in any event. Ms Robertson observes that whilst that might seem a generous offer, in fact the Claimant, pursuant to a County Court direction, was already paying a substantially reduced amount in instalments and the Respondents would have been aware that she had already paid £320 and could not afford to immediately pay a further £2,000.

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35. The Claimant having been successful at least in part on her appeal, my costs jurisdiction under Rule 34A(2)(a) is engaged. I then have a broad discretion as to whether it is appropriate to make an Order for costs, and if so as to the amount. Here, the Claimant's success has indeed been limited. I can also see that the Respondents here put forward a - on its face - reasonable proposal that might have allowed the Full Hearing of the appeal to be avoided. That said, the offer made was only made after the Claimant had already incurred her lodgement and hearing fees - the Respondents' offer might therefore be of some relevance in the underlying ET proceedings, but is less so for the purposes of answering an application under Rule 34A(2)(a). Given the Claimant's partial success, but not wishing to discourage Appellants from dropping points when focusing their arguments on appeal, I consider the appropriate award to make in this case is of £400. As it seems likely that the Claimant will still have to pay some award of costs to the Respondent after this matter has been remitted to the ET, I further direct that the costs awarded are not to be paid to the Claimant until such time as she pays the sums finally held to be due from her to the Respondent as determined by the ET; the payment of costs pursuant to my Order can be made by way of set-off.

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