Appeal No. UKEAT/0100/16/LA
UKEAT/0101/16/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 29 July 2016
Judgment handed down on 16 December 2016

Before

HIS HONOUR JUDGE DAVID RICHARDSON

MRS R CHAPMAN

MR M SMITH OBE JP

UKEAT/0100/16/LA

MR D HERRY — APPELLANT

DUDLEY METROPOLITAN COUNCIL — RESPONDENT

UKEAT/0101/16/LA

MR D HERRY — APPELLANT

(1) DUDLEY METROPOLITAN BOROUGH COUNCIL
(2) GOVERNING BODY OF HILLCREST SCHOOL — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DAVID E GRANT (of Counsel) Bar Pro Bono Scheme
For the Respondents	MS SOPHIE GARNER (of Counsel) Instructed by: Dudley Metropolitan Council Law & Governance The Council House Priory Road Dudley DY1 1HF

SUMMARY

PRACTICE AND PROCEDURE - Costs

DISABILITY DISCRIMINATION - Disability

Costs

The Employment Tribunal sufficiently explained its reasons for holding that (subject to the question of ability to pay) the Claimant should pay the whole of the Respondents' costs. However the Employment Tribunal, having decided to take account of the Claimant's ability to pay and having found that he was impecunious, did not sufficiently explain why it considered that he would have the future earning capacity to pay a Costs Judgment of more than £100,000; and did not explain why it had not considered ordering a proportion of the costs or a capped amount of costs taking account of the Claimant's ability to pay. **Arrowsmith v Nottingham Trent University** [2012] ICR 159 and **Vaughan v London Borough of Lewisham and others** [2013] IRLR 713 considered and applied. Appeal allowed on that ground alone. Remitted to same Employment Tribunal.

Note. The Respondent had taken the unusual step of serving a statutory demand on the Claimant as a precursor to bankruptcy proceedings. The Judgment discusses the potential effect of bankruptcy on further litigation brought by the Claimant; and holds that an applicant for costs who argues that the future earning capacity of the paying party should be taken into account ought to inform the Employment Tribunal if there is any intention to serve a statutory demand and commence bankruptcy proceedings in the near future.

Disability

The Employment Judge did not err in law in rejecting the Claimant's case that he had a disability during a relevant period in 2014. **J v DLA Piper UK** [2010] ICR 1052 discussed and applied in the context of absence described as "stress" or "work related stress".

HIS HONOUR JUDGE DAVID RICHARDSON

1. Mr Damieon Herry ("the Claimant") has been engaged for some years in litigation against Dudley Metropolitan Council and the Governing Body of Hillcrest School ("the Respondents") in the Birmingham Employment Tribunal. He has brought appeals against two Judgments within that litigation. They concern quite different aspects: the first relates to a Judgment concerning costs; the second to a Judgment concerning the question whether he was a disabled person. They have been heard together for convenience.

2. At the conclusion of the hearing on 29 July we invited counsel to make further written submissions to us on a particular aspect of the costs appeal - the potential effect of insolvency proceedings following a statutory demand which the Respondents have served on the Claimant based upon the Costs Judgment. We reserved judgment. Counsel subsequently made written submissions; we are indebted in particular to a helpful note prepared on the Respondents' behalf with the assistance of specialist counsel, Mr Robert Mundy. This is our Reserved Judgment on the two appeals. Since the issues are distinct we will deal with the two appeals separately within this one Judgment.

The Costs Appeal

The Background

3. The Claimant, who was aged 40 at the time of the ET's Costs Judgment, was employed as a teacher of design and technology and also as a part-time youth worker. His employment began on 8 January 2008. His take-home pay appears to have been of the order of £2,100 to £2,200 per month. In 2012 he brought proceedings against the Respondents on wide ranging grounds. He made more than 90 allegations covering a period of more than four years. The

hearing lasted some 39 days. The allegations were of a serious kind. The Respondents were represented by solicitors and counsel. By a Reserved Judgment dated 20 October 2014 all his many claims were dismissed. The Reasons given by the Employment Tribunal ran to some 317 pages.

4. The Respondents brought an application for costs. The application was heard on 25 February 2015. The Claimant represented himself and gave evidence concerning his means. Both parties made submissions. By its Reserved Judgment dated 21 April 2015 the ET (Employment Judge Dean, Mr Plant and Mrs Vernon) ordered that the Claimant must pay the whole of the Respondents' costs, the sum to be determined by way of detailed assessment by an Employment Judge. This is the Costs Judgment which the Claimant appeals.

Statutory Provisions

5. The power to make a costs order derives from the **Employment Tribunal Rules of Procedure**, which are Schedule 1 to the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013**. Three Rules are of particular relevance to this appeal.

6. Rule 76 provides the legal foundation for the Employment Tribunal's order. It states:

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

7. Rule 78 provides the legal foundation for detailed assessment by an Employment Judge. It states that a costs order may be made in a specified amount not exceeding £20,000; or it may

be made for the whole or a specified part of the costs of the receiving party, those costs to be the subject of a detailed assessment either by an Employment Judge or by the civil courts.

8. Rule 84 provides the Employment Tribunal with a discretion relating to ability pay. It states:

> **"In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay."**

The Employment Tribunal's Reasons

9. The ET found that the Claimant had acted unreasonably in bringing and pursuing the proceedings. It gave considerable detail in paragraphs 8-37 of its Reasons. He had gone ahead despite receiving advice from his union which said that he had no reasonable prospects of succeeding and further advice from two separate legal advice centres which gave no support to his case. He ignored plain words which identified the shortcomings of the complaints; and he proceeded in the face of clear advice and costs warnings. The claims were "unreasonably commenced and unreasonably pursued". The Respondents' conduct of their defence was "proportionate and reasonable throughout" (paragraph 37). The Claimant ignored costs warnings. The ET summarised the position in paragraphs 36 and 37. It said:

> **"36. … The claimant steadfastly and unreasonably refused to accept the non discriminatory explanations provided for the acts of which he had complained. Moreover, the vast majority of the complaints were known by him to be out of time. The claimant has argued that he had reason to believe the complaints were well founded as a result of (i) advice which he had received, which we find he at best unreasonably misconstrued, and (ii) the respondents' attempts to settle the complaints, which we found did not undermine their claim for costs.**
>
> **37. We have considered whether or not there were reasonable grounds for the allegations to be made by the claimant in the first place. In the light of the findings of fact we have made we conclude that there were not. The claimant unreasonably refused to accept that there were non-discriminatory explanations for the acts of which he complained. We conclude that the first threshold has been satisfied in determining whether or not costs might be awarded in these circumstances. We turn to the second limb as confirmed in *Vaughan* paragraph 5, whether we should exercise our discretion and award costs to the respondents having regard to the claimant's means."**

10. On the question of means the ET said the following:

> **"38. In deciding whether to make a costs award we may have regard to the paying party's ability to pay, we note we are not required to do so. However, in this case we consider that there are no reasons why we should disregard the claimant's means, the claimant has provided a statement of means; of expenditure and assets. …"**

11. The ET then summarised the Claimant's means. He was currently unfit for work and by this time no longer entitled to sick pay. He was in receipt of Employment Support Allowance in the sum of £123.65 per week and housing benefit. After essentials and gym membership the ET found his disposable income to be £22.08 per month. The ET found the Claimant's position to be "impecunious".

12. Nevertheless the ET ordered the Claimant to pay the whole of the Claimant's costs, a sum which it must have realised would be very substantial and which was subsequently assessed in the sum of £110,111.89. The key part of its reasoning was as follows:

> **"39. We adjudicate the claimant's means at present to be impecunious. However, we are mindful that the claimant is a qualified teacher. He is 40 years of age. Although currently unfit for work because of stress at work, we have no reason to expect that the claimant will not, putting this litigation behind him, aware that he has not been discriminated against by the respondents as he alleged, be able to resume an active working life whether with the respondents returning to the West Midlands, albeit on a week day only term-time only basis in lodgings, or in some other employment. The claimant has savings of £2,000.00 in the bank albeit earmarked he tells us as a fund for his baby daughter who is currently 15 months old. In light of the claimant's future earning potential we consider that it is highly likely that the claimant will return to full time employment whether with the respondents or at another School or working as a supply teacher as he had done for many years before his appointment at the respondent. We are of the view that any award of costs, in the sum to be assessed, is a sum which the respondents may choose to enforce, if not immediately, then at such time as they consider that the claimant is in a position to discharge any liability.**
>
> **40. Mindful of the observation of [Rimer LJ] in *Arrowsmith v Nottingham Trent University* [2011] EWCA Civ 797 para 37, we are of the view the claimant's circumstances may well improve and, exercising our discretion, we award costs of the respondents and each of them to be paid by the claimant."**

13. The ET did not set out any further reasoning for awarding the full amount of costs; it recognised that even though the threshold for awarding costs was crossed it had a discretion, and in the exercise of its discretion awarded the whole of the costs from the commencement of the proceedings until their determination.

14. A detailed assessment of the costs took place on 30 July 2015: the costs were assessed at £110,111.89. The Claimant had by this time been dismissed from his employment as a teacher.

Insolvency Proceedings

15. After the detailed assessment the Respondents caused the Judgment to be registered for enforcement in the County Court by form N322 dated 9 October 2015. They immediately served statutory demands - first in October 2015 and again (apparently by mistake) in December 2015. The Claimant has made an application to set the statutory demand aside; directions have been given for a hearing of that application; but since Simler P ordered (in April 2016) that this appeal proceed to a Full Hearing the application has been stayed.

16. The service of a statutory demand is a precursor to the commencement of bankruptcy proceedings: see sections 267 and 268 of the **Insolvency Act 1986**. A statutory demand may be served, and bankruptcy proceedings may follow, either on the basis of a debt which is immediately payable or on the basis of a debt which is not immediately payable where the debtor has no reasonable prospect of paying the debt when it falls due.

17. In this case the statutory demand was based upon the Costs Judgment which was immediately payable and which the Respondent was pursuing in the County Court. The Claimant could have applied in the County Court for an order staying the Judgment by reason of his inability to pay on such terms as were just, for example as to instalments: see section 88 of the **County Courts Act 1984**. If such an order were made the debt would not have been immediately payable. We note, however, that form N322 which told the Claimant that the award could be enforced in the County Court did not inform him of his right to apply to stay the

Judgment on such terms as might be just; and the Respondents proceeded immediately to serve a statutory demand, which again did not inform him of this right.

18. It seemed to us surprising that the Respondents should seek to pursue insolvency proceedings for the purpose of enforcing the Order for costs where, as here, the ET had recently made an assessment of the paying party's means as impecunious and had made its Order on the basis that his means might improve at some time in the future. Ms Garner suggested that insolvency proceedings might protect the Respondents from further litigation by the Claimant. We asked counsel to provide us with written submissions as to the effect of bankruptcy insolvency proceedings on the award of costs itself and on further litigation between the parties.

19. The effect of bankruptcy on the award of costs itself may be stated quite briefly. The duty of the trustee in bankruptcy is to realise and distribute the bankrupt's estate and to pay the expenses of bankruptcy and the bankruptcy debts in the Order laid down by the **1986 Act**. An award of costs against a bankrupt in proceedings issued before his bankruptcy is a bankruptcy debt: see for example in the case of a company in liquidation **In re Nortel GmbH** [2014] AC 209 at paragraphs 89 and 136. It is not a preferential debt. If, as the ET found, the Claimant is impecunious, the trustee in bankruptcy will be unable to make any significant payment in respect of the award of costs. The Claimant will be discharged from bankruptcy automatically after one year: section 279(1) of the **1986 Act** (although the period may be extended in certain circumstances). The effect of the discharge will be to release the Claimant from the award of costs: see section 281 of the **1986 Act**.

20. The effect of bankruptcy on further litigation is more complex. Most claims will form part of the bankrupt's estate and will vest in the trustee in bankruptcy. The trustee can litigate

such claims, settle them, assign them or disclaim them. A claim for wrongful dismissal is such a claim.

21. But there is an exception for what are known as personal claims. These are mainly claims where "the damages are to be estimated by immediate reference to pain felt by the bankrupt in respect of his body, mind, or character, and without immediate reference to his rights of property": **Khan v Trident Safeguards Limited** [2004] ICR 1591 at paragraph 42.

22. Some claims are entirely personal. A claim solely for pain and suffering or injury to feelings will fall within this category. So, perhaps more surprisingly, will a claim for unfair dismissal: **Grady v Prison Service** [2003] ICR 753 (Court of Appeal). The rationale is that a claim for unfair dismissal may include a claim for re-instatement or re-engagement; and so it is "a claim of a unique kind which offers restoration to the claimant of something which only the claimant can do" (Sedley LJ, paragraph 25).

23. Other claims, however, are known as "hybrid": see **Khan** at paragraphs 60-63, following **Ord v Upton** [2000] Ch 352. A discrimination claim which seeks not only an award for personal injury or injury to feelings but also compensation for financial losses will vest in the trustee. However, if the bankrupt is prepared to limit his discrimination claim to a claim for personal injury or injury to feelings, he will be permitted to pursue it: see **Khan** at paragraphs 88 and 103.

24. It is therefore not easy to see how it will assist the Respondents to bring bankruptcy proceedings against the Claimant. He will be able to pursue an unfair dismissal claim and a discrimination claim in so far as it consists of personal injury or injury to feelings. He may not

- unless he persuades the trustee - be able to pursue a claim for financial loss arising from discrimination; but, if there were no bankruptcy proceedings, the Respondents would in any event have the Judgment for costs which they could off-set against any award.

25. The ET plainly did not make the Order for costs in the expectation that the Respondents would bring bankruptcy proceedings: it made the Order, not on the basis that the Claimant would be bankrupted and the debt released, but on the quite different basis that the debt would remain in place and the Claimant's earning capacity would enable him to make payment in due course.

The Grounds of Appeal

26. The Claimant sought to appeal against the finding that the threshold for an award of costs had been crossed, but his appeal in this respect was rejected by Simler P. She allowed two grounds through to this hearing. These were (1) that the ET failed to explain why the Claimant should pay 100% rather than some lesser sum; and (2) that the ET failed to consider the Claimant's means properly having purported to do so. We shall take these points in turn.

100% or Less?

27. This ground of appeal is concerned with the question whether, having regard to issues other than ability to pay, the ET erred in making an award of 100%.

28. On behalf of the Claimant Mr David E Grant submits that the ET did not recognise at all that it could make an award of less than 100%; it assumed it had to make an award in the full amount. This was an error. Rule 78 made it plain that an award could be for less than the full amount; it would be an error of law for the ET to conclude that it must make a 100% Order: see

Barnsley MBC v Yerrakalva [2012] IRLR 78 at paragraph 31. The ET was required specifically to consider making an award less than 100%; its Reasons would not be sufficient if it did not do so, especially having regard to what was at stake. He submitted that the ET should have considered (i) the Respondent' failure, as he put it, to apply to strike out the claim or apply for a deposit order; (ii) awarding costs only from the point when the Claimant should have known that his claims were unreasonable; (iii) why the case exceptionally justified a 100% award of costs. The ET should have made an award which properly identified and reflected the behaviour said to be unreasonable.

29. On behalf of the Respondents Ms Sophie Garner submitted that the ET's Reasons demonstrated why it made an Order for the whole of the costs: it found that the litigation had been brought and pursued unreasonably. It was not obliged to go through a separate "check box" exercise to demonstrate that it had considered the possibility of making an order for less than the whole amount of costs. So long as the ET explained why it made its order for costs, it was not obliged to explain why it had not made a diverse range of other possible orders.

30. On this part of the case we have no hesitation in preferring the submissions of Ms Garner.

31. The ET's duty was to explain why it made its Order for costs; this it did, in considerable detail. Its Reasons recognised that it had first to apply a threshold test and then to exercise its discretion. The ET's Reasons plainly justified the making of an order for the whole costs: the ET found that the Claimant had acted unreasonably throughout in both bringing and conducting the proceedings, whereas the Respondents had acted reasonably and proportionately throughout. These Reasons provided a proper foundation and explanation for its award of the

whole of the costs. Contrary to the submission of Mr Grant, in our judgment the ET did identify and reflect in its Order the behaviour said to be unreasonable; it awarded costs only after that point; and the behaviour justified an award of 100% costs.

32. In **Barnsley Metropolitan Borough Council v Yerrakalva** [2012] IRLR 78 at paragraph 41 Mummery LJ said:

> **"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. …"**

33. Whether an ET should expressly address in its Reasons the making of a partial award of costs will depend on its findings when it considers the application in accordance with **Yerrakalva**. Where, as here, the ET has found that the claim was unreasonably brought and pursued, and that the other parties acted proportionately and reasonably throughout, we do not think the ET was required to say expressly why it ordered the whole of the costs so long as its Reasons made it plain that it was conscious of its duty to exercise its discretion. Different considerations would apply if the ET's findings as to the unreasonable conduct of the Claimant were more restricted; if so the ET would be expected to make a partial order by reference to a cap, or a time period or a proportion of the costs incurred, and to explain why it made that order. But that is not this case.

34. Nor do we accept that the ET is open to criticism because it did not specifically address the possibility that the Respondent might have applied for the ET to strike out the claims or make deposit orders. As the EAT explained in **Vaughan v London Borough of Lewisham and others** [2013] IRLR 713 at paragraph 14(1), there are sound reasons why a Respondent may choose not to apply for such orders. In this case the Claimant had received advice from

three sources as a result of which he should have appreciated the difficulty of his claims; and the Respondents had written costs warning letters in clear terms.

35. For these reasons we reject the first ground of appeal. The ET did not err in law in making an award of the full amount of costs. But this conclusion is subject to the question whether the ET took proper account of the Claimant's means. We now turn to that question.

Taking Means into Account

36. On behalf of the Claimant Mr Grant submitted that the ET, having stated expressly that it would take account of the Claimant's means, and having found him to be impecunious, gave no satisfactory reason for making a full award which it was aware would exceed £100,000. In effect, having decided that the Claimant was impecunious, it permitted the Respondents to disregard its finding and choose to enforce the award immediately - as indeed it did, instituting insolvency proceedings when it was well aware of the finding that the Claimant was impecunious. The ET made an award on the basis that the Claimant might have future earnings, but it did not ask itself whether it was making an order which it would ever be realistic to ask the Claimant to pay. He had not returned to teaching at the time of the ET hearing; and even if he did it was unrealistic to suppose that he would ever be able to repay more than £100,000. Having decided to consider the Claimant's earning capacity when assessing his means, it should have reflected those means in its assessment of what sum he should pay.

37. On behalf of the Respondents Ms Garner submitted that the ET sufficiently explained its reasoning. It was entitled to take into account not only the Claimant's current financial circumstances but also his future earning capacity. Given that his reason for not working was

A the ongoing stress of his grievance disputes (as the ET had found in the Reasons for its Substantive Judgment) it was entitled to find that he would be able to return to work. The ET was required only to give a succinct statement of its reasons; this it had done.

B

38. It is well established that Rule 84 does not require the ET to take account of the paying party's ability to pay. It has an open discretion whether to do so; but, if it is asked to take account of ability to pay and declines to do so, it should explain why. The ET may, for C example, decline to take ability to pay into account if it considers that it does not have satisfactory evidence of means (see **Jilley v Birmingham and Solihull Mental Health NHS Trust** (UKEAT/0584/06) at paragraph 53) or if there is outstanding litigation, and it would be D just to permit recovery of costs from any future award to the paying party (see **Vaughan** at paragraph 30).

39. If the ET decides to take account of the paying party's ability to pay, its task will be to E make an assessment of the paying party's means and reflect those means in its assessment of the amount the paying party should pay: see **Arrowsmith v Nottingham Trent University** [2012] ICR 159 at paragraph 38. It is, however, not limited to an assessment of the paying F party's current means; it may have regard to the prospect that these means may improve: **Arrowsmith** at paragraphs 38 and 39.

G 40. The nature of the ET's task was explained more fully in **Vaughan**. In that case the successful Respondent made a very substantial claim for costs. The Claimant had been earning £30,000 but was presently off sick. The ET made an Order against her for one-third of the costs, to be the subject of detailed assessment. It took into account her means; but found that H she would be able to return to work and said that it would be unjust if she walked away from

A the litigation with no financial repercussions. The EAT, which proceeded on the basis that the Claimant's liability under the Order would be about £60,000, dismissed the appeal. On the question of ability to pay, Underhill P said:

> **"28. The starting point is that even though the tribunal thought it right to 'have regard to' the appellant's means that did not require it to make a firm finding as to the maximum that it believed she could pay, either forthwith or within some specified timescale, and to limit the award to that amount. That is not what the rule says (and it would be particularly surprising if it were the case, given that there is no absolute obligation to have regard to means at all). If there was a realistic prospect that the appellant might at some point in the future be able to afford to pay a substantial amount it was legitimate to make a costs order in that amount so that the respondents would be able to make some recovery when and if that occurred. That seems to us right in principle: there is no reason why the question of affordability has to be decided once and for all by reference to the party's means as at the moment the order falls to be made. And it is in any event the basis on which the Court of Appeal proceeded in *Arrowsmith*, albeit that the relevant reasoning is extremely shortly expressed. It is necessary to remember that whatever order was made would have to be enforced through the County Court, which would itself take into account the appellant's means from time-to-time in deciding whether to require payment by instalments, and if so in what amount.**
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> **29. On that basis the question for the tribunal - given, we repeat, that it thought it right to have regard to the appellant's means - was essentially whether there was indeed a reasonable prospect of her being able in due course to return to well-paid employment and thus to be in a position to make a payment of costs; and, if so, what limit ought nevertheless be placed on her liability to take account of her means in that scenario and, more generally, to take account of proportionality. As to the former question, views might legitimately differ as to the probabilities, but the tribunal was well-placed - better than we are - to form a view that there was indeed a realistic prospect, and we see no basis on which that judgment can be said to be perverse. As to the latter, we see the force of the argument that it would be pointless, and therefore not a proper exercise of discretion, to require the appellant to pay more, even in the optimistic scenario envisaged, than she could realistically pay over a reasonable period; and we have been concerned whether the cap was simply set too high. But those questions of what is realistic or reasonable are very open-ended, and we see nothing wrong in principle in the tribunal setting the cap at a level which gives the respondents the benefit of any doubt, even to a generous extent. It must be recalled that affordability is not, as such, the sole criterion for the exercise of the discretion: accordingly a nice estimate of what can be afforded is not essential. Approached in that way, we cannot in the end say that the limit of one-third of the respondents' costs - whether that comes to £60,000 or some other figure in the range - was perverse. It was of course rough-and-ready, but there is in truth no means of arriving at a more precise figure. We cannot conscientiously say that a proportion of, say, a quarter would have been right while a third was wrong. The respondents are the injured parties, and even if the order does indeed turn out to be recoverable in full at some point in the future, they will be out-of-pocket to the tune of two-thirds of their assessed costs: it is difficult to say in those circumstances that the award is disproportionate. …"**

41. We have reached the conclusion that the ET has not given sufficient or adequate reasons for awarding the whole costs against the Claimant; it has not sufficiently explained why its award was reasonable and proportionate; and, unlike the ET in **Vaughan**, it has not considered whether it ought to have awarded a proportion of the costs or capped the costs, having regard to the Claimant's ability to pay.

42. The ET was entitled, as we have explained by reference to **Arrowsmith** and **Vaughan**, to bring into the equation the Claimant's future earning capacity. If so, however, it was bound to consider what that earning capacity might be and whether an award of the whole costs was reasonable and proportionate having regard to that earning capacity. The ET said only that the Claimant could return to work as a teacher or supply teacher; it made no findings as to his likely earnings if he did so; and the figures in the ET1 and ET3 forms suggested an income of about £2,000 per month net. From this, once he was earning, he would have to pay his rent, travel and support for his child as well as other outgoings. It is difficult to see how he could pay off a figure remotely close to £100,000; and the ET did not explain how he could do so. Once granted that the ET decided to take ability to pay into account there was an obvious case for capping the award or ordering a proportion of the award; the ET did not explain why it did not consider this option.

43. It follows that the appeal must be allowed in part. The ET's finding that, subject to the question of ability to pay, the Claimant ought to pay the whole of the costs will be upheld. But the ET must consider entirely afresh the issues raised by Rule 84 - whether and how to have regard to the Claimant's ability to pay. We think these questions are too closely linked to be considered separately: they are both aspects of a decision in respect of Rule 84, and the ET must reconsider both whether and how to have regard to ability to pay. We have no doubt (applying the criteria **Sinclair Roche Temperley v Heard** [2004] IRLR 763) that remission to the same ET is fair and appropriate, and that it will reconsider its judgment having regard to the issue of ability to pay.

44. We wish to say a word about two matters which the parties and the ET may wish to bear in mind when the matter is reconsidered.

45. One is the potential impact of interest on any Judgment. We did not hear submissions on this point, but in at least some circumstances an ET's Judgment in respect of costs will attract interest at the (currently high) statutory interest rate: see section 15(1) of the **Employment Tribunals Act 1996**, section 74(2)(b) of the **County Courts Act 1984** and the **County Courts (Interest on Judgment Debts) Order 1991**. If interest will accrue on any Judgment the ability of the Claimant to pay will be markedly affected.

46. Another is the question of bankruptcy proceedings. The existing statutory demands will fall away as a result of this Judgment. It may be that the Respondents, having regard to the analysis earlier in this Judgment, will take the view that bankruptcy proceedings have little to offer. But a party who applies for costs to the ET and relies wholly or in part on an argument that the paying party's future earning capacity is to be taken into account ought to say if there is any intention in the near future to serve statutory demands and bring bankruptcy proceedings. Bankruptcy may result in the extinguishment of the debt before any future earning capacity can be brought to bear; and it may have other severe consequences for the paying party - both personal and financial.

The Disability Appeal

47. The Claimant brought a further set of proceedings against Dudley Metropolitan Council ("the Respondent") alleging discrimination because of disability and race. The material period for these proceedings was 4 April to 27 June 2014. The Respondent did not accept that the Claimant had a disability during this period. That question came before Employment Judge Goodier for hearing on 25 April 2015. By his Judgment dated 27 April 2015 the Employment Judge found that the Claimant was not at the material time a disabled person.

The Background Facts

48. The Claimant had been diagnosed as suffering from dyslexia in 1996 when he went to university to study architecture. Following successful completion of his degree he obtained a teaching qualification. He was employed by the Respondent as a teacher of design and technology from January 2008. While he taught at the Respondent's school he did not mention dyslexia to his colleagues or ask for adjustments.

49. From May 2010 the Claimant lodged many sickness certificates; and the Employment Judge found that the Claimant had been continuously away on sick leave from June 2011. Analysis of his sickness certificates shows that they fall into two main periods. From May 2010 until April 2013 the certificates usually refer to a physical injury: they refer to a fractured ankle, to post-operative recovery, to "leg pain and stress" and to "ankle pain and stress". But then, from October 2013 onwards, they cease to refer to any physical problem, giving the description "stress at work", "work related stress", "stress", or "stress and anxiety".

50. The Claimant had begun his first set of proceedings against the Respondent in 2012. They were being heard between February and August 2014. He had told the ET that he was dyslexic and asked for adjustments; the ET made adjustments for him. The ET found that, while he may require time to digest written and oral instructions, he was "intelligent and able to analyse, with the benefit of a short period of time, documents and instructions and to fully comprehend them". During the material period - April to June 2014 - the certificates stated "work related stress" (30 April 2014) and "stress" (8 July 2014). The latter certificate said that he might be fit for work, benefiting from a phased return to work. No certificate referred to depression. There was a reference to depression in a GP's letter dated 25 November 2014, but this was after the result of the 2014 ET proceedings.

51. There is a dearth of information in the medical documents as to the nature of the "work related stress". The GP's letter dated 25 November 2014 and an Occupational Health report dated 17 March 2015 both referred to the stress of Tribunal proceedings. The latter document said that the Claimant took no medication for stress and was mentally and physically fit to perform his role. It said that from the medical point of view he could return to work as soon as possible; but there were "still outstanding management (non-medical) issues at the workplace which are causing stress". A certificate dated 31 March 2015 said that "Patient feels the behaviour of certain individuals [is] what is stopping him from returning to work at the school and causing his stress".

Statutory Provisions

52. The Employment Judge quoted relevant statutory provisions from the **Equality Act 2010**. A person (P) has a disability if P has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities: section 6(1) of the **Equality Act 2010**. "Substantial" means more than minor or trivial: section 212(1). The effect of an impairment is "long-term" if it has lasted 12 months, or if the period for which it lasts is likely to be at least 12 months: Schedule 1, paragraph 2. An impairment is to be treated as having the requisite substantial adverse effect if measures are being taken to correct it and but for those measures, the impairment would have that effect: Schedule 1 paragraph 5(1), a principle requiring what are often called "deduced effects" to be brought into account.

J v DLA Piper

53. The Employment Judge quoted at some length from **J v DLA Piper UK** [2010] ICR 1052. In one important passage his conclusions are framed by reference to it. It is therefore

convenient to quote from it and discuss it now. In that case the EAT was concerned with the question whether conditions described as "depression" will amount to impairments.

54. Underhill P said:

> **"42. The first point concerns the legitimacy in principle of the kind of distinction made by the tribunal, as summarised at para 33(3) above, between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs is a mental illness - or, if you prefer, a mental condition - which is conveniently referred to as "clinical depression" and is unquestionably an impairment within the meaning of the Act. The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or -if the jargon may be forgiven - "adverse life events". We dare say that the value or validity of that distinction could be questioned at the level of deep theory; and even if it is accepted in principle the borderline between the two states of affairs is bound often to be very blurred in practice. But we are equally clear that it reflects a distinction which is routinely made by clinicians - it is implicit or explicit in the evidence of each of Dr Brener, Dr MacLeod and Dr Gill in this case - and which should in principle be recognised for the purposes of the Act. We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most lay people, use such terms as "depression" ("clinical" or otherwise), "anxiety" and "stress". Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at para 40(2) above, a tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more, it would in most cases be likely to conclude that he or she was indeed suffering "clinical depression" rather than simply a reaction to adverse circumstances: it is a common sense observation that such reactions are not normally long-lived."**

55. This passage has, we believe, stood the test of time and proved of great assistance to Employment Tribunals. We would add one comment to it, directed in particular to diagnoses of "stress". In adding this comment we do not underestimate the extent to which work related issues can result in real mental impairment for many individuals, especially those who are susceptible to anxiety and depression.

56. Although reactions to adverse circumstances are indeed not normally long-lived, experience shows that there is a class of case where a reaction to circumstances perceived as adverse can become entrenched; where the person concerned will not give way or compromise over an issue at work, and refuses to return to work, yet in other respects suffers no or little

apparent adverse effect on normal day-to-day activities. A doctor may be more likely to refer to the presentation of such an entrenched position as stress than as anxiety or depression. An Employment Tribunal is not bound to find that there is a mental impairment in such a case. Unhappiness with a decision or a colleague, a tendency to nurse grievances, or a refusal to compromise (if these or similar findings are made by an Employment Tribunal) are not of themselves mental impairments: they may simply reflect a person's character or personality. Any medical evidence in support of a diagnosis of mental impairment must of course be considered by an Employment Tribunal with great care; so must any evidence of adverse effect over and above an unwillingness to return to work until an issue is resolved to the employee's satisfaction; but in the end the question whether there is a mental impairment is one for the Employment Tribunal to assess.

57. Underhill P also confirmed (paragraph 40) that it remains good practice in every case for a Tribunal to state conclusions separately on the questions of impairment, adverse effect, substantiality and long-term nature - see **Goodwin v The Patent Office** [1999] IRLR 4. The Employment Judge specifically referred to **Goodwin**.

58. Underhill P then said, in a passage on which Mr Grant places reliance:

> **"(2) However, in reaching those conclusions the tribunal should not proceed by rigid consecutive stages. Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense, for the reasons given in para 38 above, to start by making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected (on a long-term basis), and to consider the question of impairment in the light of those findings."**

59. In paragraph 38 Underhill P had suggested (as he repeated in paragraph 42, which we have quoted) that an Employment Tribunal might start with the question whether the

A Claimant's ability to carry out normal day-to-day activities had been impaired. This would assist it to resolve, in difficult cases, whether an impairment existed.

B *The Employment Judge's Reasons*

60. The impairments relied on by the Claimant were (1) dyslexia and (2) stress and depression.

C 61. The Employment Judge, having dealt with the law and made findings of primary fact, set out his key conclusions in paragraphs 21 and 22 of his Reasons. We will set these out in full, splitting paragraph 21 into sub-paragraphs for ease of reading.

D **"[21.1.] As to dyslexia, the respondent does not deny that Mr Herry has the condition, but does not concede that it amounted to a disability. It points out that for the first two and a half years of his employment he was able to function effectively as a teacher without his asking for any adjustments, or his colleagues knowing of his condition. That, I am sure, is as a result of his coping strategies.**

[21.2.] The Guidelines issued by the Government Office for Disability Issues says "Account should be taken of how far a person can reasonably be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the
E **effects of an impairment on normal day-to-day activities. In some instances a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and a person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities … In some cases, people have coping or avoidance strategies which cease to work in certain circumstances (for example, where someone who has dyslexia is placed under stress). If it is possible that a person's ability to manage the effects of an impairment will break down so that effects will sometimes still occur, this possibility must be taken into account when assessing the effects of the impairment" (Paragraphs B7 and B10).**
F **…**

[21.3.] I take notice of the obvious fact that teaching is itself a very demanding occupation, and must in the nature of things be stressful from time to time: the fact that Mr Herry was able to work in that capacity is, I think, a helpful indication of the effectiveness of his acquired coping strategies in most situations. It is true that the period when he was working is well before the time material for this case, but there has been no suggestion from him that his dyslexia has become more severe, or his strategies less effective, over the intervening time. He has not
G **discharged the burden on him of showing that his condition of dyslexia had a substantial adverse effect on his ability to carry out normal day to day activities.**

22. As to stress and depression, Mr Herry has been off work for a very lengthy period, including the whole of the time material for this case, and the reason given has been stress. He has, however, put before me little or no evidence that his stress had any effect on his ability to carry out normal activities, other than occasionally to exacerbate his dyslexia. The material before me suggests that his stress is very largely a result of his unhappiness about what he perceives to have been unfair treatment of him, and to that extent is clearly a reaction to life events. The only medical use of the term "depression" is in the GP's letter of November 2014.
H **He has not discharged the burden on him of showing that stress and/or depression had a substantial adverse effect on his ability to carry out normal day to day activities."**

The Appeal

62. At a hearing under Rule 3(10) the appeal was allowed to proceed on amended grounds. Mr Grant argued all these grounds on the Claimant's behalf. We will, for the purpose of this Judgment, re-order somewhat the grounds of appeal.

63. *Ground 2*. Mr Grant submitted that the Employment Judge, having correctly noted that the Claimant needed some adjustment to his dyslexia when conducting ET proceedings, was required to find that he needed adjustments, hence was suffering a substantial adverse effect, when teaching. The act of conducting litigation involves reading writing and comprehension of the written word just as in teaching. He relied on **Paterson v Commissioner of Police of the Metropolis** [2007] ICR 1522 (a case concerned with dyslexia) which itself followed and applied a decision of the ECJ in **Chacon Navas** [2007] ICR 1. Ms Garner submitted that, while both activities required reading, writing and comprehension, they were fundamentally different. It did not follow that the Claimant was at a disadvantage as a teacher because he required some assistance when representing himself at an Employment Tribunal.

64. We reject this ground of appeal. **Chacon Navas** and **Paterson** are authority for the proposition that "day to day activities" encompass activities which are relevant to participation in professional life - including, in that case, the taking of a professional examination. This is now well established law: see the further decision of the ECJ in **HK Danmark, acting on behalf of Ring v Dansk Almennyttigt Boligselskab** [2013] IRLR 571 and more recent EAT decisions up to and including **Banaszczyzyk v Booker Limited** [2016] IRLR 273. But appearing at an Employment Tribunal was not an activity relevant to participation in his professional life as a design and technology teacher; and the Employment Judge was not bound to conclude that, because the ET had made some adjustments to assist him as a litigant in

person at an Employment Tribunal the Claimant was necessarily hindered in his professional life as a design and technology teacher. It is true that both activities require reading, writing and comprehension; but the nature of the reading, writing and comprehension required is quite different. This is particularly the case with the ET proceedings in 2014; as we have observed, they lasted some 39 days, encompassed many different allegations, and resulted in a Judgment running to more than 300 pages. It is not at all surprising that the Claimant required some adjustments to deal with these proceedings as a litigant in person. It does not follow that he was at a disadvantage in his ordinary professional life.

65. *Ground 3*. Mr Grant submitted that the Employment Judge erred in law in its approach to the question whether there was "substantial" adverse effect; and on its approach to the question whether activities were "normal" day-to-day activities. In agreement with the submissions of Ms Garner, we detect no such errors of law in the Employment Judge's Reasons. The Employment Judge correctly defined "substantial" as meaning more than minor or trivial. The Employment Judge did not decide the case against the Claimant by reason of any narrow or inappropriate definition of normal day-to-day activities. For the reasons we have already given, we consider that he was entitled to conclude that the activity of conducting litigation was not a normal day-to-day activity.

66. *Ground 4*. Mr Grant argued that the Employment Judge erred in law by focusing on what the Claimant could do rather than what he could not do. This, he submitted, was an error of law: see **Aderemi v London and South Eastern Railway Limited** [2013] ICR 591 at paragraph 28. Ms Garner submitted that the Employment Judge's Reasons show that he was looking for precisely such evidence, and did not find it. We agree with Ms Garner's submission. It is well known that it would be an error of law to focus on what a person can do:

A the legislation requires an Employment Tribunal to consider whether there is a substantial adverse effect on normal day-to-day activities; such an effect may exist even if there are other areas of activity in which a person is highly competent. But we consider that the Employment Judge's Reasons show that he both stated and applied the correct legal test. He looked for evidence that the Claimant's dyslexia and stress had a substantial adverse effect on his normal day-to-day activities: he did not find it.

C 67. *Grounds 1 and 5.* It is convenient to take these grounds together. They both relate to the undoubted fact that the Claimant was off work with a condition stated to be "stress" or "work related stress" during the period in question.

D 68. Mr Grant argued that the Employment Judge's findings failed to take account of the Claimant's substantial absences from work and the terms of the certificates. The Claimant may have been able to survive by adopting coping strategies until his long-term absence began; but his long-term absence establishes that he had lost the ability to do so. Moreover the Employment Judge did not apply the guidance in **J v DLA Piper**. The Claimant's long-term absence, supported by certificates, showed that there was a long-term adverse effect on his day-to-day activities: he could not teach. In line with the guidance in **J v DLA Piper** the Employment Judge should have started by making findings to this effect; and he would then have found also that there was a mental impairment.

G 69. Ms Garner submitted that paragraph 40(2) of **J v DLA Piper** does not lay down a rigid rule that an Employment Tribunal must consider the issues, or set out its findings, in any particular order. It provides guidance as to an approach which may be helpful. In this case, in any event, the Claimant did not produce evidence of any substantial adverse long-term effect.

A The Employment Judge was not bound to accept that his case was established by virtue of the certificates he provided.

B 70. It is to our mind plain, as both counsel accepted, that the Employment Judge concluded that the Claimant did not establish any mental impairment by reference to stress, which was the basis upon which his absence was certified. The Employment Judge, when he said that the Claimant's stress was "clearly a reaction to life events" was drawing the distinction identified in C paragraph 42 of **J v DLA Piper** between a mental impairment and a reaction to life events.

D 71. It is true that in paragraph 42 Underhill P said that in a case where mental impairment was disputed the ET might begin with findings as to whether there was a long-term effect on normal day-to-day activities, because reactions to adverse circumstances were not usually long-lived. He was, however, not setting out any rule of law; he was considering a case where the E principal diagnosis in issue was depression; and he did not rule out the possibility of a reaction to adverse circumstances which was long-lived. As we have explained above, when commenting on **J v DLA Piper**, there can be cases where a reaction to circumstances becomes entrenched without amounting to a mental impairment; a long period off work is not conclusive F of the existence of a mental impairment.

G 72. In this case the Employment Judge found that the Claimant's "stress" was "very largely a result of his unhappiness about what he perceives to have been unfair treatment of him"; and he also found that there was "little or no evidence that his stress had any effect on his ability to carry out normal activities". The Employment Judge considered these two aspects together. H We do not think he committed any error of law in doing so; and we do not think he was bound to find that the Claimant had a disability because he had been certified unfit for work by reason

of stress for a long period. The Claimant failed to establish that he was under a disability for the linked reasons that he did not establish a mental impairment and he did not establish the requisite substantial long-term adverse effect. We see no error of law in the Employment Judge's reasoning; it follows that the appeal against the Disability Judgment will be dismissed.