Appeal No. UKEAT/0141/17/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 12 December 2017

Before

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

(SITTING ALONE)

MR A HAYDAR APPELLANT

PENNINE ACUTE NHS TRUST RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MISS MARGARET PENNYCOOK (of Counsel) Free Representation Unit
For the Respondent	MISS RACHEL WEDDERSPOON (of Counsel) Instructed by: Weightmans 100 Old Hall Street Liverpool Merseyside L3 9QJ

SUMMARY

PRACTICE AND PROCEDURE - Costs

The Employment Tribunal erred in law by erroneously placing the burden on the Claimant to satisfy it that costs should not be ordered under Rule 76, and dealt with this question before considering whether the Respondent had satisfied it that there was unreasonable conduct of some kind within Rule 76 to trigger the costs jurisdiction. The case was remitted to the same Tribunal to consider the whole picture and exercise its broad discretion as to whether a costs order is appropriate in all the circumstances of the case, and having regard to all relevant factors to be weighed fairly in the balance.

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

Introduction

1. This is an appeal from a Judgment of the Manchester Employment Tribunal (comprised of Employment Judge Sherratt, sitting with members Mr Roxburgh and Mr Clissold, and promulgated on 21 July 2016) awarding costs against Mr Haydar, who I shall refer to as "the Claimant" for ease of reference.

2. The costs award was made on two bases: first, there was an award of 80% of the costs incurred by the Respondent in connection with the strike out application under Rule 37 of the **Employment Tribunal Rules** (an application that was dealt with earlier by Employment Judge Ross in a Judgment promulgated on 18 December 2013); and secondly, 60% of the costs incurred by the Respondent in connection with the substantive liability hearing. The Judgment resulting from the substantive liability hearing was a Judgment promulgated on 14 April 2014, and the Tribunal dealing with the liability issues was the same Tribunal as dealt with the costs award that is challenged on this appeal.

3. There are two grounds of appeal pursued by the Claimant. First, he argues that the Tribunal made an error of law when it placed the burden of proof on him to establish why the discretion to order costs should not be exercised by the Tribunal. Secondly, and separately, he argues that the award of costs in respect of the strike out application was in error of law because it did not, at least broadly, reflect the effect of the unreasonable conduct found by the Employment Tribunal.

4. The appeal is advanced on the Claimant's behalf by Miss Margaret Pennycook of counsel, appearing as a representative of the Free Representation Unit, for which I am particularly grateful. She did not appear below. The appeal is resisted by the Respondent represented here, as below, by Miss Rachel Wedderspoon of counsel. I am grateful to both counsel for their assistance in dealing with this appeal.

The Factual Background

5. The factual background can be briefly stated for present purposes. The Claimant was a medical doctor and fellow of the Royal College of Surgeons, employed by the Respondent for a number of sessions in a sexual health clinic at the Royal Oldham Hospital. He was dismissed for serious misconduct following a number of investigations into his conduct and his appeal against that decision was refused. Following his dismissal, there were proceedings before the GMC and he was found guilty of serious misconduct in two respects, and ordinary misconduct in respect of a third charge. He was suspended from practise and pursued proceedings in the Employment Tribunal, raising wide-ranging claims.

6. Before the full merits hearing, both parties made applications to strike out the other side's grounds on the basis that the manner in which the proceedings had been conducted by the opposing party was unreasonable, vexatious or scandalous. Those applications were dealt with at a hearing on 16 and 17 December 2013 by Employment Judge Ross, as I have already indicated, by a Judgment promulgated on 18 December 2013. Neither application succeeded.

7. Nonetheless, it is relevant to record that the Employment Judge found a number of letters written by the Claimant contained highly intemperate language, particularly for a professional man acting in the course of litigation, including correspondence from him to

employees of the Respondent in April 2013 and the Respondent's solicitor, Mr Hatfield, in July, November and December, all of which was held to be a misuse of the legal process designed to vilify and threaten the solicitor for the Respondent and/or upset and harass potential witnesses of the Respondent, to bring pressure to bear on them so that the litigation might be settled. Despite those findings the Employment Judge concluded that a fair trial could still take place with adjustments as appropriate, and that it was not proportionate to strike out the claim.

8. The application made by the Claimant against the Respondent was also rejected and the Employment Judge found that Mr Hatfield acted reasonably and conducted the litigation reasonably in the face of what she found to be unacceptable correspondence from the Claimant.

9. The strike out applications having been dealt with there followed a lengthy substantive hearing before the Sherratt Tribunal which took 30 days. The Sherratt Tribunal's Judgment held ultimately that the Claimant's dismissal was unfair because dismissal was not within the band of reasonable sanctions available. The Tribunal concluded that the Claimant was 50% to blame for his dismissal and listed a remedy hearing. All other claims pursued by him failed and were dismissed. In short summary, the Tribunal concluded that there was no *prima facie* case of unlawful direct discrimination on any ground. No comparator was established for the part-time worker claim, which was itself out of time. The allegation of race harassment was not accepted on its facts. As far as disability discrimination is concerned, no proper evidence of the alleged disability of the Claimant's mother was provided on which to base the claim of associative discrimination, and this claim was also, in any event, out of time. The claim for discrimination on grounds of religion was dismissed because the Tribunal found that there was in fact no differential treatment. As far as the claim relating to dependent carer's leave is

concerned, that was not accepted and was also out of time. Finally, the claims relating to whistleblowing were founded on allegations that were held not to have been made in good faith.

10. The Sherratt Tribunal dealt with remedy, refusing applications for reinstatement or reengagement, and instead awarding compensation made up of a basic award of £3,600 and a compensatory award of £34,964.

11. Following those hearings, the Respondent applied for its costs. The first application made by letter, dated 2 January 2014, related exclusively to the strike out application. The second application, which is undated, but made under cover of an email dated 19 August 2015, was an application for the costs of the whole proceedings. The applications were heard on 21 March 2016, and 20 and 21 June 2016.

12. On the first day of the hearing to deal with the strike out application the Tribunal addressed a submission made by the Claimant that the cost applications were not made in time. The result of dealing with that submission was to use up time that had otherwise been allocated to deal with the broader costs application, which could not be concluded on that day. It was therefore relisted for 20 and 21 June, as I have indicated, and resulted in the Judgment that is challenged by the Claimant on this appeal.

The Tribunal's Judgment and Reasons

13. The Tribunal set out the history and submissions made by both sides. It referred to the submissions on the law made on behalf of the Respondent at paragraphs 41 to 45, and adopted the principles identified there at paragraph 128. It is significant in the context of the issues

raised by this appeal that those paragraphs adopted by the Tribunal do not refer to the staged approach to be adopted by Tribunals when considering whether to order costs.

14. The Tribunal, having summarised the submissions, at paragraphs 123 onwards set out its conclusions. In summary, it held for the purposes of Rule 74 that the Respondent was legally represented and had incurred costs; it held that the Respondent's application for a costs order was made in time. At paragraphs 125 and 126 it dealt with the Claimant's ability to pay costs. The Tribunal found that the Claimant had no income from employment to speak of, and treated him as having not even a nominal earning capacity. On the other hand, the Tribunal concluded that the Claimant had some capital assets that could be realised in order to pay a costs order and noted that he is a member of the NHS pension scheme, and will be able to take his pension without actuarial reduction from April 2017.

15. At paragraphs 129 to 136, the Tribunal dealt with a number of disparate points raised in the course of the parties' submissions. I shall return to those points below.

16. At paragraph 137 the Tribunal said, "*The claimant has not satisfied us that this is a case where there should not be an order for costs if the respondent is able to satisfy us as to the matters set out in Rule 76*".

17. Thereafter, under the headings, first, "*The strike out Application considered by Employment Judge Ross*" and then "*Other Costs*", the Tribunal canvassed the behaviour exhibited by the Claimant, both in the conduct of the proceedings and the claims that were pursued, and concluded that there was vexatious and unreasonable conduct of the proceedings by the Claimant in relation to the correspondence he had engaged in, as referred to by

Employment Judge Ross in the strike out Judgment, and that was conduct that gave jurisdiction to make a costs award.

18. At paragraph 143, basing itself on the findings of Employment Judge Ross, the Tribunal concluded that the Claimant had acted vexatiously and unreasonably. At paragraph 144, although the Tribunal recognised that the strike out application failed and that it was accordingly inappropriate to order the Claimant to pay the whole of the costs of the strike out application, the Employment Tribunal considered that it was appropriate to make an order for the Claimant to pay "*something following his behaviour which resulted in the application being made. We conclude that he should pay 80% of the costs incurred by the respondent in connection with its Rule 37 application with such costs being determined by way of detailed assessment …*".

19. As far as the remaining costs are concerned, given that the Claimant had succeeded in his unfair dismissal claim, the Employment Tribunal took the view that it would not be appropriate to order him to pay the whole of the Respondent's costs of the proceedings, or any part of the remedy proceedings. There were competing submissions on what proportion of the total hearing was taken up with issues relating to unfair dismissal, and what proportion related to the other claims held (at paragraphs 145 to 162) to have had no reasonable prospect of success or to have been unreasonably pursued. At paragraph 147, the Tribunal held that it was not possible to make a precise assessment of those competing submissions, but was satisfied that had the claim been limited to the unfair dismissal claim, the witness evidence would have been much shorter and might reasonably have taken two weeks rather than six weeks.

20. At paragraphs 163 to 165 the Tribunal reached the following conclusions in relation to the substantive hearing costs claimed by the Respondent:

> **"163. Having found that the claimant brought a number of claims which had no reasonable prospect of success and that one was brought unreasonably we consider it appropriate to make a costs order against him.**
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> **164. We have concluded above that the hearing of the claimant's successful unfair dismissal claim might reasonably have taken place over 10 days whereas the full hearing lasted for 30 days. We have found that the harassment claim was not brought without any reasonable prospect of success. The claimant estimates that this took 5% of the hearing which is equivalent to 1.5 days. It is difficult to be precise about this estimate of time but we shall accept it for the purposes of this judgment. The claims which we have found were made with no reasonable prospect of success therefore took 18.5 of the 30 days of hearing.**
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> **165. Taking a view of the proceedings overall it is our judgment that the claimant should pay 60% of the respondent's costs in relation to the substantive liability hearing only with the amount to be determined by way of detailed assessment carried out by an Employment Judge applying the same principles as are to be found in the Civil Procedure Rules 1998."**

The Material Legislation

21. The regime on costs in the Employment Tribunal is governed by provisions in the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**, Schedule 1. The particular Rules are Rules 74 to 78. The Tribunal set those Rules out in full.

22. Rule 76 is critical. As far as material, it provides that,:

> **"(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; …"**

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

24. Rule 84 relates to ability to pay and provides:

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

25. The words of the Rules are clear, and require no gloss as the Court of Appeal has emphasised. They make clear (as is common ground) that there is, in effect, a three-stage process to awarding costs. The first stage - stage one - is to ask whether the trigger for making a costs order has been established either because a party or his representative has behaved unreasonably, abusively, disruptively or vexatiously in bringing or conducting the proceedings or part of them, or because the claim had no reasonable prospects of success. The trigger, if it is satisfied, is a necessary but not sufficient condition for an award of costs. Simply because the costs jurisdiction is engaged, does not mean that costs will automatically follow. This is because, at the second stage - stage two - the tribunal must consider whether to exercise its discretion to make an award of costs. The discretion is broad and unfettered. The third stage - stage three - only arises if the tribunal decides to exercise its discretion to make an award of costs, and involves assessing the amount of costs to be ordered in accordance with Rule 78. Ability to pay may be considered, both at the stage two exercise of discretion and at stage three when determining the amount of costs that should be paid.

The Appeal

26. Against that background, I turn to consider the principal ground of appeal which challenges the award of costs, both in respect of the strike out hearing and the substantive hearing in this case. Miss Pennycook contends that the Employment Tribunal failed to adopt a two-stage process before determining at the third stage the amount of costs to be paid. Instead, she submits that, having concluded that the Claimant had triggered the costs jurisdiction, the Tribunal moved straight to consider the percentage of costs that should be paid without any

reference to the discretion available at stage two and without considering stage two at all. That erroneous approach was compounded by the Employment Tribunal's error in relation to the burden of proof at paragraph 137 where the Tribunal said: "*The claimant has not satisfied us that this is a case where there should not be an order for costs if the respondent is able to satisfy us as to the matters set out in Rule 76*". If this is a reference to stage two, contrary to her primary submission, Miss Pennycook submits that there are two errors here. First, the Tribunal wrongly reversed the order of the two stages and secondly, the Tribunal wrongly put the burden on the Claimant to show that costs should not be awarded.

27. Since the application for costs was made by the Respondent, the burden was, she submits, on the Respondent to satisfy the Tribunal that it had jurisdiction to make a costs award, and if it did have that jurisdiction it was then for the Tribunal to satisfy itself that it was right and proper to exercise the discretion to award costs in all the circumstances of this case. Miss Pennycook submits that the Tribunal's approach reflects an error. This is not to adopt linguistic perfection, but given the absence of any neutral consideration of the wide discretion available to the Tribunal, it cannot confidently be assumed that the outcome would have been the same had the Tribunal adopted the correct approach.

28. Miss Pennycook submits that there are a number of factors that the Tribunal would have considered had it recognised the two-stage approach and adopted that approach correctly. These include the fact that the Claimant did not have legal experience of whistleblowing and although he had experience of another case in the Employment Tribunal it was different and had reached a different stage. Secondly, that the Respondent's refusal to consider alternative resolution was a factor. Thirdly, that the Respondent had itself behaved in ways that were capable of criticism (for example, central witnesses were not called by the Respondent whereas

irrelevant witnesses were called) and that had the effect of prolonging the proceedings ought to have been considered. Fourthly, the Claimant was not represented at any stage and had no legal advice, making it more difficult for him to assess the prospects of success of these claims. Finally, the Claimant received no costs warnings over a lengthy period and no correspondence from the Respondent indicating its view that he was pursuing claims that had no prospect of success. Had all of those matters been considered properly, she submits that the result might have been different.

29. Against that, Miss Wedderspoon submits on behalf of the Respondent that the Judgment must be read fairly and as a whole. She reminds me that the Tribunal expressly referred to the relevant provisions in the Rules to be applied and accepted the legal principles as submitted by the Respondent. The Tribunal must have been aware of the need to decide whether a costs order is appropriate and that there was no burden on the Claimant in this regard. She submits that although there is a burden on the Respondent at stage one to establish unreasonable conduct of one kind or another, there is a neutral burden at the discretion stage, but that was or must have been recognised by the Tribunal.

30. Although she accepts that the Tribunal's wording at paragraph 137 may be a little clumsy, it was simply a means of expressing that the Tribunal had looked at the whole picture of what happened, and found the Claimant's explanations for the Respondent's description of his unreasonable conduct of the proceedings unsatisfactory. Miss Wedderspoon submits that the Tribunal's wording does not undermine its reasoning or indicate any error of law because it is clear from paragraphs 144 (in relation to the strike out costs) and 163 (in relation to the substantive hearing costs) that the Tribunal did in fact exercise its discretion when it decided that it was appropriate to award costs.

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31. I accept Miss Wedderspoon's submission that it is important to consider paragraph 137 in its proper context. It appears under the heading, "*Conclusions*", in a section containing a series of disparate conclusions, at paragraph 123 (the conclusion that the Respondent was legally represented and had incurred costs), at paragraph 124 (that the costs applications were in time), at paragraphs 125 to 127 (in relation to the Claimant's ability to pay), at paragraph 128 (that the Respondent's submissions summarised at paragraphs 41 to 45 should be accepted), then, having accepted the Respondent's submissions, there is a broad correlation between the points made by the Employment Tribunal at paragraphs 129 to 136 with those made by the Respondent at paragraphs 42 and 43. Thus, paragraph 42 refers to the relevance of professional representation when judging a complainant's conduct in bringing proceedings, and this is dealt with at paragraphs 129 and 130; and paragraph 43 deals with a case where a clear-cut finding is made that the central allegation of racial abuse was a lie, and the Tribunal concluded that this was inapplicable here (paragraph 134).

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32. In these paragraphs, the Tribunal also addressed a number of points made by the Claimant in his submissions, though not all of them, including at paragraph 131 a reference to his criticisms of the Respondent's conduct, concluding that those were irrelevant when considering the Respondent's costs applications; a reference at paragraph 132 that though the Claimant had a genuine belief in his own case, that did not preclude costs; and at paragraph 135 a reference to the fact that Employment Tribunals are not a cost-free zone.

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33. Having addressed the points raised by the Respondent and a small number of points raised by the Claimant, without further explanation the Tribunal simply stated that the Claimant had not satisfied the Tribunal that this was a case where there should not be an order for costs if the jurisdiction to order costs was established.

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34. The Tribunal then addressed, as I have already indicated, at paragraphs 138 to 144, the question whether there was unreasonable conduct in relation to the strike out application, concluding that there was and (at paragraph 144) that it was appropriate to make an order for the Claimant to pay something following his behaviour, which resulted in the strike out application.

35. Having considered paragraph 137 in its proper context, I do not accept Miss Wedderspoon's submission that it reflects the exercise of discretion at the second stage. Rather, the Tribunal's conclusion that it was appropriate to make an order for the Claimant to pay some costs was reached at paragraph 137, in the context of its earlier conclusion, that given the strike out application was unsuccessful it was not appropriate to order the Claimant to pay the whole of the costs. It is apparent, accordingly, that the Tribunal had already reached a conclusion on stage two, and did that at paragraph 137, before determining the question it had to address at stage one.

36. As far as the costs of the substantive hearing are concerned, the question on unreasonable conduct in relation to the substantive claims is dealt with, as I have already indicated, at paragraphs 145 to 162 and the Tribunal reached the conclusions to which I have already referred. It is clear from the terms of paragraph 163 (set out above) that there was no standing back at that stage and looking at the whole picture to determine whether a costs order was appropriate in all the circumstances, having found unreasonable conduct. Rather, to the extent that it dealt with the exercise of discretion at stage two, it did that earlier at paragraph 137 and simply concluded that it was appropriate to make a costs order against the Claimant.

37. In those circumstances and reading the Judgment as a whole and as generously as I am able to, it seems to me that paragraph 137 reflects an error of approach by this Employment Tribunal. On the face of its reasons, the Tribunal concluded that if the relevant threshold in Rule 76 was made out, it was for the Claimant to satisfy it that there should not be an order for costs as Miss Pennycook submits. The burden of proof ought not to play a significant part in the decision whether or not to order costs but on any view, it was not for the Claimant to satisfy the Tribunal that no costs should be ordered. Rather, as both parties agree, once the Respondent had satisfied the Tribunal that there was jurisdiction to award costs, it was for the Tribunal to satisfy itself, in light of its conclusion that unreasonable conduct of some kind had been established, whether a costs order was appropriate in all the circumstances having regard to any factors relevant to the exercise of that discretion. That was not the Employment Tribunal's approach here.

38. Moreover, it is apparent on the face of paragraph 137, contrary to Miss Wedderspoon's submission, that the Tribunal dealt with stage two before addressing stage one, and that too was an error. Although Miss Wedderspoon submits that to reverse the two stages in this case, if that is what occurred, made no difference, I do not share her confidence. The proper approach when exercising the discretion to order costs is to look at the whole picture of what happened. That necessarily involves first determining whether there has been unreasonable conduct and its nature and gravity, and then considering the effect of that conduct on the proceedings and the incurring of costs. I cannot be confident that the Employment Tribunal would have reached the same conclusion had it recognised that there was no burden on the Claimant to persuade the Tribunal that costs should not be awarded, and had it adopted the correctly ordered approach. As both sides agree, stage two involves a broad, unfettered discretion when making an award of

costs. However, wide though the discretion is, it must be exercised judicially and reasons ought to be given.

39. In determining whether costs should be awarded, it may be relevant, depending on the circumstances, to consider whether there have been any costs warnings and the absence of such warnings might also be relevant in deciding not to award costs, again, depending on the circumstances. A costs warning, however, is not a precondition to the award of costs. Tribunals may also consider as relevant the nature of the particular claim when exercising their discretion. In doing so they should bear in mind the very real difficulties which face a claimant in an unlawful discrimination or whistleblowing claim. It is rare for there to be overt evidence of discrimination and this may make it difficult for a claimant, especially where unrepresented, to make a realistic assessment of the real prospects of success until the explanation for the employer's conduct, which is the subject of complaint, has been proffered and tested in evidence. Unrepresented litigants may lack the objectivity and experience brought to bear by a professional adviser, and this too many be relevant to a tribunal's considerations even in a case where the threshold of unreasonable conduct has been crossed, when deciding in light of all the circumstances whether to make a costs order and if so, in what amount.

40. In this case, as Miss Wedderspoon concedes, in relation to the strike out application, the only factor considered at stage two was whether the Respondent was itself justified in making the application to strike out the claim. Further, Miss Wedderspoon submits that the factors to which the Tribunal had regard at stage two in relation to the substantive hearing costs were the fact that the Claimant is an intelligent man with significant litigation experience, and that the hearing would have been shorter had the claims with no reasonable prospect of success not been pursued.

41. The broader factors relied on by Miss Pennycook were, even on Miss Wedderspoon's case, not considered. I have summarised them already. They include the fact that the Respondent had refused to consider alternative resolution of this dispute; the fact that there were criticisms made by the Claimant of the Respondent's conduct that reflected on the length of the hearing, and should have been put into the balance when considering the whole picture; the fact that no cost warnings were given over a lengthy period, nor was any warning given to the Claimant that the Respondent considered his claims to have no prospects of success or to justify an award of costs; the fact that he had not had any professional legal representation or advice at any stage; and finally the difficulty to which I have already adverted of assessing in an accurate way the prospects of success of an unlawful discrimination or whistleblowing claim, made all the harder where a litigant is unrepresented. I accept Miss Pennycook's submission that the two errors she has identified in relation to paragraph 137 mean that this Appeal Tribunal cannot be confident that the Employment Tribunal would have reached the same conclusions absent the errors identified. The decision in respect of both the strike out costs and the substantive hearing costs cannot stand.

42. In light of that conclusion, it is unnecessary to address ground two which is limited to a challenge to the strike out costs. That decision cannot stand in light of my conclusions on ground one. However, it does seem to me that, although the Tribunal was amply entitled to conclude that there was unreasonable and vexatious conduct by the Claimant in relation to the correspondence he engaged in (both with employees of the Respondent and the Respondent's solicitor, Mr Hatfield, that were found to have been a misuse of the legal process by Employment Judge Ross) the Employment Tribunal did not explain the basis for concluding that 80% of the costs of the strike out should be awarded. The Claimant ceased writing letters to the Respondent's employees after April 2013, and the letters substantially complained about

in respect of Mr Hatfield were in July 2013. True it is that there was an email referred to in December 2013, but to a large extent the behaviour had ceased. Moreover, the strike out application was pursued on the basis that a fair trial could not take place in light of that correspondence, but failed. Failure of the strike out application plainly justified the Tribunal's decision not to make an order for the whole of the Respondent's costs of the strike out application, but there is no explanation why the Claimant should bear 80% of the costs of that failed application in circumstances where the Employment Tribunal considered that a fair trial could take place and that there were adjustments that could be made, albeit these were ultimately not regarded as necessary.

43. The parties are agreed that this matter must be remitted if the costs applications are pursued. The issues are fact-sensitive and do not admit of only one answer. The proportionate course is for the matter to be remitted to the same Employment Tribunal for it to re-consider the question of costs in accordance with the three stage approach. Stage one has been dealt with and need not be re-addressed. The question for the Tribunal on remission will be whether at stage two the wide discretion ought to be exercised in favour of an award of costs and if so in what amount. The Tribunal should have regard to all the circumstances and the factors it considers relevant to the exercise of that discretion. It should not place any burden on the Claimant to satisfy it either way.