Appeal No. UKEAT/0174/17/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 14 December 2017

Before

THE HONOURABLE MR JUSTICE KERR

(SITTING ALONE)

SUNUVA LIMITED — APPELLANT

MRS C MARTIN — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR PHILIP WARNES (Consultant) Peninsula Business Services Ltd The Peninsula Victoria Place Manchester M4 4FB
For the Respondent	MR MIKE MAGEE (of Counsel) Instructed by: Signet Partners 2-3 Hind Court London EC4A 3DL

SUMMARY

PRACTICE AND PROCEDURE - Costs

The Tribunal had not erred by awarding costs to the Claimant including an award in respect of costs incurred for work done while legally represented before the claim had started. The reasoning of Mummery LJ in **McPherson v BNP Paribas (London Branch)** [2004] ICR 1398 (paragraph 40) remained good law despite the changed wording of what had become Rules 74 to 76 of the **2013 Rules of Procedure**.

THE HONOURABLE MR JUSTICE KERR

1. The only issue in this appeal is whether the Employment Tribunal below wrongly included in an award of costs, in favour of the Claimant below (the Respondent in this appeal), certain costs incurred in respect of work done before receipt of the ET3 from the employer. There were other proposed grounds of challenge to the Decision below but these have been found unarguable, first by Mrs Justice Laing in the sift process, and subsequently at a Rule 3(10) Hearing before Mr Justice Choudhury.

2. I shall refer to the Appellant in this appeal as "the Respondent" as it was before the Tribunal, and to the Respondent in this appeal as "the Claimant" as she was below.

3. The challenge is to a Decision of the Employment Tribunal sitting at London Central (Employment Judge Tayler sitting with Mrs Griffiths and Ms Collins) to award the Claimant costs in the sum of £17,136.90. The Judgment including the award of costs was dated 13 March 2016 (which appears to be an error and I believe should be 13 March *2017*). The Decision was sent to the parties the next day, 14 March 2017.

4. The Respondent contends that the costs award was in part unlawful and seeks a reduction in the amount of costs awarded. The total amount of costs claimed by the Claimant was £25,705.36. The amount awarded was two thirds of that claimed, namely £17,136.90. The amount claimed by the Claimant in respect of costs incurred for work done before receipt of the ET3 was £7,042.50. The amount awarded in respect of that period was thus, £4,695, being two thirds of the amount claimed. It is that latter amount £4,695, which is in issue in this appeal. It

is unnecessary to rehearse in detail the facts found by the Tribunal; the following summary will suffice.

5. The Respondent sells fashion swimwear. The Claimant was its International Sales Manager from September 2012. In January 2016, a restructuring was proposed. The Respondent decided that the Claimant would be made redundant. A document was prepared dated 11 January 2016, specifically stating that the Claimant would be made redundant (see paragraph 42 of the Tribunal's Reasons). The Respondent was then advised that it should undertake a selection process with a pool and selection criteria. The Respondent then devised such a process and it was operated. The Claimant's employment terminated in April 2016, after she had been selected for redundancy and that was followed by an unsuccessful appeal.

6. The Claimant instructed solicitors and began to incur legal costs. On 18 May 2016 (see paragraph 51 of the Reasons), her solicitors wrote a letter before claim asserting unfair dismissal and discrimination on the ground of sex. I have not seen that letter but I am told that it raised the point, among other points, that the redundancy exercise had been a sham.

7. The Claimant brought her claim in August 2016, alleging unfair dismissal, unlawful deduction from wages, sex discrimination, and victimisation. The Respondent filed and served an ET3 on or about 7 October 2016, denying that the dismissal had been unfair and denying that the redundancy procedure was unfair and saying that the relevant witness - Ms Stokes - had decided to compose the pool of four people, subsequently reduced to three. Paragraph 56 of the ET3 grounds of resistance included in effect a denial that there was a "*predetermined outcome*" to the redundancy selection exercise. Looking ahead for a moment, this was the very point subsequently conceded by Ms Stokes later in her oral evidence.

8. Returning to grounds of resistance attached to the ET3, at paragraph 64 it alleged that "*the method of selection was fair with an appropriate mix of objective and subjective criteria*". Again, it was being suggested that the process was genuine when manifestly it was not. Finally, at paragraph 71, there was an express denial that the process was "*a sham or predetermined in any way*".

9. The hearing took place from 9 to 13 February 2017. According to paragraph 44 of the Tribunal's Reasons it was on 12 January 2017 (which is probably an error for 12 *February* 2017) that the Respondent conceded at the hearing that the dismissal was unfair. What happened on the fourth day of the hearing was, I understand, as follows. The relevant witness for the Respondent was Ms Stokes and she was giving oral evidence. In the course of questions asked of her during that evidence she accepted that despite the creation of a pool and the trappings of a fair procedure there was, as the Tribunal put it at paragraph 42 of its Reasons, "*never any prospect of anyone other than the Claimant being selected for dismissal. It had been decided at the outset that she would be dismissed*". The Tribunal recorded the concession that the dismissal was unfair and went onto adjudicate the other claims. Only the claim for deduction from wages met with any success. Compensation was subsequently agreed.

10. A costs application was made by the Claimant at the end of the hearing. The result had been announced orally but the Written Reasons had not then yet been prepared. The Claimant's solicitors produced a Schedule, which I have seen. The costs application was argued. Mrs Montaz, an advocate from Peninsula then appearing for the Respondent, did not argue that costs should be limited to the costs of work done for the Claimant after the date of receipt by her solicitors of the ET3. The costs application was dealt with by the Tribunal thus at paragraph 78 of the Decision:

> **"78. At the conclusion of the hearing the Claimant applied for costs. A cost schedule that was provided showing costs of £25,705 36 [sic], with solicitor's costs limited to the applicable County Court rate for Chelmsford. The application was limited by not pursuing issues about costs wasted by reason of problems in producing the bundle. The application was put on the basis that the defence to the claim of unfair dismissal had no reasonable prospects of success. In submissions the Respondent's representative accepted that that was the case, as she had no real choice but to do, as it is clear from the business case created in January 2016 that a decision was taken to dismiss the Claimant following which that sham process was put in place. From the outset, the Respondent should have admitted liability. In circumstances in which it is accepted that the claim of unfair dismissal never had any reasonable prospect of success the threshold for making an award of costs has been passed. The real question is what was the consequence of the Respondent not having admitted the unfair dismissal at the outset. There were in addition claims of sex discrimination and of victimisation. Any discrimination award was only likely to add injury to feeling as the other losses were within the unfair dismissal limit. With an admission of liability there is a possibility of the discrimination claim continuing, but we consider that the greater likelihood is that there would have either been no hearing with only limited costs incurred by the Claimant, or there would have been a much shorter hearing. There is a small possibility that there was still would have been [sic] a full hearing on the discrimination complaints, but we consider that that is unlikely. We consider the best way to deal with those possibilities is to make an overall deduction from costs and we award the Claimant two thirds of the sums that she has requested, £17,136.90, and those of the costs that we order the Respondent to pay the Claimant. We consider that costs are justified in a case in which a false reason for dismissal was put forward by the Respondent which they persisted in maintaining until the last but one day of the hearing. The Respondent that [sic] the Claimant should be awarded the issue and hearing fee."**

11. For the Respondent, Mr Warnes referred me to **Davidson v John Calder (Publishers) Ltd & Anr** [1985] IRLR 97. He drew from that authority in particular the proposition that an award of costs ought not to be punitive in nature; it must be compensatory and should not be awarded by way of punishing the paying party. That proposition is uncontroversial and not disputed by the Claimant.

12. Mr Warnes went on to refer me to **Health Development Agency v Parish** [2004] IRLR 550, a decision of His Honour Judge Richardson in this Appeal Tribunal. Mr Warnes submitted that paragraph 21 of Judge Richardson's judgment demonstrated that there has to be a causal relationship between the conduct of a party in bringing or conducting proceedings and the costs which are awarded against that party. In consequence of that conduct, that case was decided under the then Rule 14(1) of the Rules in the Schedule to the then **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001**, which at the material time provided that "*Where, in the opinion of the tribunal, a party has in bringing the proceedings, or a party or a party's representative has in conducting the proceedings, acted vexatiously,*

abusively, disruptively or otherwise unreasonably, or the bringing or the conducting of the proceedings by a party has been misconceived, the tribunal shall consider making" an order in respect of costs incurred by another party. Such was the wording of the test as it then stood.

13. In oral argument Mr Warnes added that until an employer sees the case pleaded against it in the ET1, the employer does not know what case it has to answer and that accordingly, it is in the nature of a punishment of an employer Respondent to award costs against it in respect of a time before it could reasonably know the case it has to meet. As I understood his argument, Mr Warnes submitted that the reasoning in paragraph 21 of the **Parish** case is still good law and that he added that costs incurred in consequence of an employer's conduct cannot as a matter of logic predate that conduct and that means in practice, at least in the vast majority of cases, cannot predate the ET1. He was prepared to accept by way of small qualification to that proposition that in an extreme case where the basis of a proposed claim is made very clear to an employer before the filing of an ET1, it might be lawful in rare circumstances to award costs against a subsequent Respondent incurred in respect of work carried out before the claim was brought, but he stressed that such cases would be wholly exceptional in his submission.

14. For the Claimant (now the Respondent in the appeal) Mr Magee made contrary submissions with regard to the **Parish** case and in particular paragraph 21 of Judge Richardson's judgment. That paragraph states:

> **"21. The employment tribunal's power in rule 14 is founded upon a finding as to the way a party has brought or conducted proceedings. In our judgment the conduct of a party prior to proceedings or unrelated to proceedings cannot found an award of costs. In our judgment it is necessary for there to be a causal relationship between the conduct of a party in bringing or conducting proceedings and the costs which are awarded under rule 14."**

15. Mr Magee submitted first that the penultimate sentence of that paragraph refers only to the "trigger" for an award of costs; that is to say the conduct of a party - at the time, as I have

said, the test was as set out in Rule 14(1) of the **2001 Rules**. The Tribunal had to form the opinion that a party had in bringing the proceedings (which could only refer to a Claimant) or in conducting them (which could refer to either party) acted vexatiously, abusively, disruptively or otherwise unreasonably. Mr Magee further submitted that the last sentence of paragraph 21 of Judge Richardson's judgment in **Parish** is not good law as it cannot stand with the subsequent decision of the Court of Appeal in **McPherson v BNP Paribas (London Branch)** [2004] ICR 1398.

16. In that appeal the Court of Appeal modified and reduced the substantial order for costs made against a Claimant made by an Employment Tribunal. At paragraph 40 of his judgment, Mummery LJ rejected a submission from counsel set out at paragraph 39, namely the submission that a persons' liability for costs was "*limited, as a matter of the construction of rule 14, by a requirement that the costs in issue were "attributable to" specific instances of unreasonable conduct by him*". Rejecting that submission, Mummery LJ (in paragraph 40) said that Rule 14 "*does not impose any such causal requirement in the exercise of the discretion*". He went on in the same paragraph to add:

> **"40. … The principle of relevance means that the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion, but that is not the same as requiring BNP Paribas to prove that specific unreasonable conduct by [Mr McPherson] caused particular costs to be incurred. … Further, the passages in the cases relied on by Miss McCafferty [counsel for the paying party] … are not authority for the proposition that rule 14(1) limits the tribunal's discretion to those costs that are caused by or attributable to the unreasonable conduct of the applicant."**

The cases that the Lord Justice referred to included **Health Development Agency v Parish**, to which I have already referred.

17. At paragraph 41, Mummery LJ accepted as undoubtedly correct the proposition that the discretion to award costs could not properly be exercised to punish a party for unreasonable conduct but added:

> **"41. … It is not, however, punitive and impermissible for a tribunal to order costs without confining them to the costs attributable to the unreasonable conduct. As I have explained, the unreasonable conduct is a precondition of the existence of the power to order costs and it is also a relevant factor to be taken into account in deciding whether to make an order for costs and the form of the order."**

18. Mr Magee submitted that that last sentence had the effect that once the precondition for a costs order was met, an award of costs becomes "at large," as he put it, without any necessary requirement of a causal link between the conduct in question and the incurring of the costs awarded. Further, he submitted that the costs jurisdiction now is broader than it was then. It now extends to the claims for Tribunal fees. It also exists in the context of the new features found in the **2013 Rules**: namely early conciliation and the overriding objective. An employer, he argued, should not have an incentive to behave unreasonably knowing it is protected until issue of proceedings or service of the ET3.

19. I come to my reasoning and conclusions. The current Rules are now contained in Rules 74 to 76 in the relevant Schedule to the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**. The first point is that the current definition of "costs", which may be the subject of an order set out in Rule 74(1), is not on its face limited to costs incurred for work done before receipt of the ET3. The definition of costs is "*fees, charges, disbursements or expenses incurred by on or behalf of the receiving party*". Rule 75(1)(a) says what a "costs order" is. The limit on a costs order stated in Rule 75(1)(a) is that it must be an order in respect of costs incurred "*while legally represented*"; you cannot get a costs order in respect of costs incurred while not "*legally represented*." Again, there is nothing in the

wording to limit the costs that may be awarded to costs incurred at a particular stage of the proceedings or indeed to costs incurred after they have begun.

20. Next, what if a party is not legally represented? He or she can get a "preparation time order" under Rule 75(2) while not legally represented. The order must be in respect of preparation time at a time when the receiving party was not legally represented. "Preparation time" means time spent by the receiving party and any employees or advisors of that party in working on the case. On the face of it that could include preparing the ET1. For some reason you cannot get both a costs order and a preparation time order covering different stages of the proceedings where a party becomes represented or ceases to be so part way through the case; it must be one or the other, not both (see Rule 75(3)).

21. Under Rule 76(1) the power to award a costs or preparation time order arises where a party or 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*". That wording overlaps with, but is not the same as, the wording of the old Rule 14(1) test in the **2001 Rules**. Rule 76(1)(b) is material in the present case. It provides that a Tribunal may make a costs order or a preparation time order where it considers that "*any claim or response had no reasonable prospect of success*". Such then are the current Rules.

22. In my judgment, it is unnecessary to go through the authorities at length. As regards the causation aspect the law remains, in my judgment, as stated in the **McPherson** case by Mummery LJ in the last sentence at paragraph 40 of his judgment. The reasoning there set out holds good when applied in the context of the new wording in the **2013 Rules** as it did in the

context of the old **2001 Rules**. I also accept Mr Magee's submission that the last sentence of paragraph 21 of Judge Richardson's judgment in the **Parish** case cannot stand with the reasoning of Mummery LJ in **McPherson**.

23. There is some force in his further points concerning the new features in the regime governed by the **2013 Rules**, namely in particular the overriding objective and the requirement to undertake early conciliation. Those new features do, as he points out, provide an enhanced focus on the pre-claim stage of the process but I do not think the advent of those new features is necessary to my conclusion. It flows from the wording of the **2013 Rules** and the reasoning in the **McPherson** case, which is not altered or invalidated by the changes made when the **2013 Rules** came into effect.

24. The Respondent is, in my judgment, with respect, wrong to submit that the Tribunal was bound by the **Parish** case or by any other authority or principle of law to confine its costs order to costs in respect of work done before receipt of the ET3. There is, in my judgment, nothing wrong or unlawful about the Tribunal's decision on costs, which must stand. The appeal therefore fails.