

Appeal No. UKEAT/0104/17/JOJ
UKEAT/0199/17/JOJ

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

At the Tribunal
On 13 March 2018

Before

THE HONOURABLE MRS JUSTICE SLADE DBE
(SITTING ALONE)

MS G FRANCE

APPELLANT

MR M Z KHAN & OTHERS

RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MR ANDREW OTCHIE
(of Counsel)
Direct Public Access

For the Respondents

MS SHEILA ALY
(of Counsel)
Direct Public Access

SUMMARY

PRACTICE AND PROCEDURE - Costs

The Respondents acted unreasonably on the day before the hearing of one appeal in seeking to resile from an agreement that reconsideration of the making of a costs order be remitted to a differently constituted Employment Tribunal. Further the Respondents acted unreasonably in withholding consent to the adjournment of a second appeal against the amount of costs the Claimant had been ordered to pay. If the costs order were varied on reconsideration the amount of costs would be affected. The Claimant too was at fault in failing to take steps to relist the matter before the Employment Tribunal for reconsideration. The Respondents were ordered to pay three quarters of the summarily assessed costs of the hearing before the EAT on 13 March 2018.

A THE HONOURABLE MRS JUSTICE SLADE DBE

B 1. At the conclusion of the hearing today, which has resulted sensibly in a consent order to be made, the Claimant's counsel, Mr Otchie, has applied for the costs of the hearing today. The basis of that application is that the conduct of the Respondents, in failing to agree to the vacation of today's hearing, has been vexatious and unreasonable causing an unnecessary hearing and accordingly costs are sought under Rule 34A(1).

C 2. There are two appeals listed for today. The first appeal is under UKEAT/0104/17. It is an appeal against the refusal of a reconsideration application of a costs decision made by an Employment Tribunal ("ET") following the dismissal of all the Claimant's claims.

D 3. The parties had agreed in September 2017 as to the disposal of that appeal. The appeal had originally been listed for October 2017. On the basis that agreement had been reached between the parties as to the disposal of that appeal, the appeal was adjourned. The agreement between the parties was that the reconsideration application be remitted for hearing before a differently constituted ET. Notwithstanding that agreement, no relisting of that application has taken place, although counsel for the Claimant, Mr Otchie, has said on instructions that the Claimant did ask for the matter to be relisted but there is no evidence that that occurred.

E 4. The second appeal under UKEAT/0199/17 is from the decision of the ET on detailed assessment of costs. That assessment was made in the sum of £40,000 and £3,000 of the costs of the assessment hearing. The grounds of appeal against that assessment are very limited indeed. It is apparent that any assessment of costs would depend upon, first of all, a costs order being made by an ET, and secondly, on the basis upon which that costs order was made as to

A whether it was period of time order or proportion order, or any variety of order which would be available to an ET to make. It is somewhat curious that the assessment of costs proceeded when it was known that there was a current appeal against the making of the costs order in the first place. However, it is also plain that the assessment of the amount of costs ordered, or **B** whether they are ordered at all depends upon the outcome of the reconsideration decision of an ET looking at the original costs order made.

C 5. Against that background, both appeals having been adjourned from October 2017 were relisted for today. The Claimant made an application to postpone the hearings of today on 1 February 2018. It appears that the Claimant wrote in her application, “*The Appellant has written to the Respondents on two occasions now, requesting their consent to a postponement of the above but is yet to receive any response*”, and she therefore makes the application. The point made in the application is that the appeal against the assessment of costs under **D** UKEAT/0199/17 is intrinsically linked to the appeal in UKEAT/0104/17, by which the costs order is to be remitted back to the ET. **E**

F 6. Those points are plainly correct. The determination of the assessment of amount of costs does depend upon what answer an ET gives as to whether the original costs order is to be reconsidered, and either set aside in its entirety or varied or some other order made in respect of it. However, the Respondents did not agree to the postponement of today’s hearings and the application for an adjournment of today’s hearings was refused by the Registrar on 21 **G** February. Accordingly, these two appeals have remained in the list.

H 7. Before the hearing today, the Claimant indicated that she was going to withdraw her appeal UKEAT/0199/17. The proper procedure for that withdrawal was not followed and the

A appeal has not been withdrawn. The Respondents yesterday withdrew or sought to withdraw
from the consent order which they had entered into in September 2017 in respect of appeal
B UKEAT/0104/17, the appeal from the refusal to reconsider the original costs order. The
position today has been that eventually the parties have agreed that the terms of the original
consent order, which the Respondents indicated that they were going to resile from, remains in
place and that the reconsideration application goes back to a differently constituted ET.

C 8. As far as the appeal from the assessment of the costs decision is concerned, it is plainly
right that that appeal is dependent upon and follows after the outcome of any appeal against the
making of a costs order in the first place and the type of order, which may or may not remain in
D place after a reconsideration. There could be said to be blame on both sides. The Claimant, for
her part, has not shown any evidence that she made an application for the listing of the
reconsideration of the costs decision, which was the subject of the consent order and the basis
E upon which the appeals were adjourned in October 2017. Both parties are responsible for
ensuring that the proceedings proceed in an orderly manner, but the primary responsibility for
the carriage of the relisting must be that of the Claimant, who asked for the matter to be
F reconsidered. It is unfortunate, to put it at its lowest, that a lawyer, as the Claimant is, has not
been able to show any steps that she has taken to relist these proceedings before the ET.
However, there is fault on the Respondents' side for seeking to resile, at four o'clock on the day
before the hearing of the appeal from an agreement reached in September 2017 as to the
G disposal of the first appeal. Very sensibly, the Respondents have thought better of that position
during the course of today's hearing and also thought better of their position on to whom the
matter is to be remitted.

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A 9. As far as the appeal against the assessment of costs is concerned, it is plain and apparent
that that matter follows on after any decision on reconsideration by the Employment Tribunal of
the costs themselves. The refusal of the Respondents to consent to an adjournment of today's
B hearings for that reason is, in my judgment, unreasonable. There is unreasonableness on both
sides. It is quite right, as Ms Aly has said on more than one occasion, that these proceedings
have dragged on for far too long. There must be some finality in this litigation between these
parties.

C

10. However, in pursuing resistance to the appeals and maintaining this hearing today, the
weight of blame lies with the Respondents. In my judgment, there was unreasonable conduct in
D the Respondents resiling from their treatment of the first appeal and more importantly in
withholding their consent, which was sought on 1 February or before, to the adjournment of
both appeals today because it was perfectly apparent that the appeal from the assessment of
costs matter had to follow on from the reconsideration matter, which at that point had been
E agreed to be returned to the ET. Accordingly failing to consent to the adjournment which was
sought by the Claimant on 1 February 2018 which resulted in its refusal, in my judgment, was
unreasonable conduct.

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11. As to the order to be made, I do consider that the conduct of the Respondents has
crossed the threshold which warrants the making of an order under Rule 34A. However, blame
G does not lie exclusively with the Respondents and bearing that in mind, I order that the
Respondents pay to the Claimant three quarters of the costs of today summarily assessed.

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