Appeal No. UKEAT/0072/18/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 18 June 2018

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

MS N LEEKS — APPELLANT

(1) ST GEORGE'S UNIVERSITY HOSPITALS NHS FOUNDATION TRUST
(2) MISS C MUSTO
(3) MRS A MORRIS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	No appearance or representation by or on behalf of the Appellant
For the Respondents	No appearance or representation by or on behalf of the Respondents

SUMMARY

PRACTICE AND PROCEDURE - Costs

Employment Tribunal Procedure - Costs - Reconsideration

An application by the Claimant for an adjournment made at 9.31am on the day of the hearing of the appeal was refused.

The Claimant's appeal was dismissed. The Employment Tribunal did not err in law in making a global award of £7,500 in respect of all three Respondents; and in any event the Employment Judge did not err in law in refusing the Claimant's application for reconsideration.

HIS HONOUR JUDGE DAVID RICHARDSON

Adjournment Application

1. This is an appeal brought by Ms Nkechi Leeks ("the Claimant"). I must first deal with an application by the Claimant for an adjournment made this morning, by email, at 9.31am.

2. The background to this application is as follows. On 29 May 2018 the Claimant applied for an adjournment on the basis that she had an appointment at 1.45pm at St George's rheumatology department. The appeal had originally been listed for two hours; it is, in truth, a very straightforward case. On 30 May the Registrar refused that application for adjournment, but she moved the time forward for the hearing to 10 o'clock this morning. That would have allowed ample time for this matter to be heard and for the Claimant to have attended her appointment later in the day. The Registrar noted that the medical evidence before her, whilst certainly indicating that the Claimant had a constellation of symptoms, did not indicate that she was unfit to attend the hearing.

3. Subsequently the Claimant applied for an extension of time for lodging her core bundle. That application was granted on 5 June. There was no further application for an adjournment. Subsequently, again, there was an application for a further extension of time for lodging the core bundle. The Employment Appeal Tribunal did not grant that application but prepared a core bundle on her behalf and sent it to her.

4. There the matter lay until this morning. At 9.31am the Claimant sent a lengthy email which indicates that she intends to attend the St George's appointment today and is not prepared to come to the Employment Appeal Tribunal first. She says that there has been a

deterioration of her health; her symptoms have not abated; and she should "set off to the hospital for medical treatment as a matter of priority as that environment is best suited to support me in my current state of health crisis". She sets out the symptoms that she has, which appear to result principally from fibromyalgia or chronic fatigue, and she says that she is worried about being distracted from a specialist health appointment. She says she might be unable to rearrange the appointment, and she asks the EAT Judge to "temper justice with mercy"; show consideration for her predicament; and postpone the current hearing to a new date.

5. The Claimant attaches to her email some guidance for persons with disability and some medical evidence. Most of the medical evidence is old; indeed, some dates from times when she was engaging in Employment Tribunal proceedings. There is one up-to-date letter dated 13 June 2018 from her General Practitioner. I will read it. There are apparent gaps in it; I will put "…" where there is a blank in the letter. It is addressed "To Whom It May Concern". It reads as follows:

> **"This letter is to confirm that I recently saw this … year old woman, who is a patient of ours at this GP surgery. I understand that she has a tribunal date set for the 18th June 2018. However, she reports that she is unable to attend this as she has a rheumatology appointment at … hospital, this is verified to be on 18th June 2018 at 13:45. She has been diagnosed with Fibromyalgia as far back as Sept 2014 and with that she experiences chronic generalised fatigue, muscle aches, poor sleep and anxiety. She has also reported urinary and faecal incontinence since as early as May 2017 and is seeing the urogynaecology clinic. As a result of these issues and impending rheumatology appointment (which is in her best interest to attend), she may not be fit to attend the tribunal at this time. I understand that she is hoping to change the date of her tribunal so that she can attend the clinical appointment above, which I support."**

6. The letter does not appear to take account of the length of the hearing at the Employment Appeal Tribunal or the fact that (as I have explained) the Employment Appeal Tribunal moved its hearing earlier to ensure that she could attend the hospital appointment.

7. The conclusions I draw for the purposes of today's hearing are as follows.

8. I accept that the Claimant has relevant medical conditions including fibromyalgia with chronic generalised fatigue, muscle aches, poor sleep and anxiety. These are significant issues for her but they do not prevent her conducting Employment Tribunal litigation in general. They would not prevent her from attending a hearing here. The problem is that she wishes to give priority to her appointment at 1.45pm. If she had attended this morning, as she was required to do, I have absolutely no doubt that she would have met that appointment at 1.45pm without the slightest difficulty. I would have ensured that she was on her way in ample time; and she had no reason to suppose that there would be any practical difficulty in keeping her appointment. I cannot help noting that she has not complied with other Orders that the Tribunal has made.

9. Against this background I am not satisfied that it is in the interests of justice to adjourn this hearing. The appeal is concerned with a very short point. By the time this application was made I had read the papers carefully and was ready to proceed with the case. I think justice strongly points to continuing with the appeal today and providing the Claimant with a written Judgment so that she can understand the very limited point with which the appeal is concerned. If she wishes, having done that, to apply for a review, I will consider the application. However, I would suggest that she would be wise, if she does so, to provide some compelling medical evidence about the hearing this morning and to engage with the Reasons which I give in the Judgment which will follow. It follows that the application for an adjournment is refused.

The Employment Tribunal Proceedings

10. The Claimant was employed by St George's Healthcare NHS Trust as a biomedical scientist from 11 April 2005 until June 2011. In March 2011 she brought proceedings alleging unlawful race discrimination relating to the provision of training. These proceedings were directed not only to the Trust ("the First Respondent"), but also to two members of

management, Miss Charlotte Musto ("the Second Respondent") and Mrs Anne Morris ("the Third Respondent"). A Deposit Order was made and paid by the Claimant. The proceedings were heard in April 2014. By a Judgment dated 20 May 2014, the Employment Tribunal dismissed the complaints and listed the matter to consider the question of costs.

11. The question of costs was heard by the Employment Tribunal (composed of Employment Judge Baron, Ms Donaldson and Ms Stansfield) on 9 January 2015. It ordered that the Claimant pay costs "to the Respondents" in the sum of £7,500 and that the Claimant's deposit to be paid out to the Trust. The written Order is dated 14 January 2015. Written Reasons were given; they are dated 21 January 2015.

12. It is not necessary for the purposes of this appeal to explain the reasons of the Employment Tribunal in any detail. The key paragraphs were paragraphs 12 and 13 which read as follows:

> **"12. In summary we agreed entirely with EJ Zuke's grounds for the making of the deposit order. The conduct of the Claimant was therefore unreasonable and the Tribunal has the jurisdiction to make an order for costs. The next question is whether we should do so, and if so, for what amount. In this case we have no hesitation in making an order. The issues as to reasons for lack of training had been aired before a Tribunal in the context of disability. The claim failed. The same issues were now being aired in the context of race. EJ Zuke had said that he thought it extremely unlikely that race had any relevance, and so we have found. The Claimant should have abandoned this claim after the deposit order had been made. That order acted as a warning to her that she was at risk as to costs.**
>
> **13. The next question is the amount to be ordered. The Respondent had submitted a schedule totalling in excess of £27,000. To that sum VAT ought to be added. Counsel's fees were £10,500 exclusive of VAT. We consider that amount to be excessive for the nature of the claim and the length of the hearing. More junior counsel could properly have been instructed. It is normal that not all costs are recoverable when an assessment is made, either summary or detailed. We would therefore reduce the amount somewhat from the total claimed if we were to order costs before making any reduction taking into account the Claimant's means."**

13. Earlier in the Reasons the Employment Tribunal had dealt with a particular question the Claimant had raised relating to the Order being made in favour of all the Respondents. The Employment Tribunal said the following:

> **"4. The Claimant has requested reason why the costs order was made in favour of ALL the Respondents. There were effectively three respondents to these proceedings, being the NHS Trust and two individuals. The Claimant had also named 'HR Security and Estate Department' but it is apparent that that is no different from the NHS Trust. The reason that the order was made in favour of the Respondents in the plural is simply that all the Respondents defended the claims being made and incurred the costs of so doing."**

14. On 28 January 2015 the Claimant applied for the Order to be rescinded or for there to be a significant downward review. The Employment Judge correctly treated this application as an application for reconsideration. By a Judgment dated 13 February 2015 he refused this application.

The Appeal

15. By Notice of Appeal lodged on 27 March 2015 the Claimant sought to appeal against both the Order dated 14 January 2015 and the Judgment dated 13 February 2015. The appeal against the Order dated 14 January 2015 was out of time. An extension of time was refused by the Registrar by Order dated 18 August 2015.

16. This leaves only the appeal against the Judgment dated 13 February 2015. This appeal was struck out in 2015 for non-payment of the relevant fee but it was revived following the judgment of the Supreme Court in 2017 which held that the fees legislation was unlawful.

17. At a Rule 3(10) Hearing earlier this year, where the Claimant had the benefit of an ELAAS representative, the matter was allowed to proceed to a Full Hearing on amended grounds. The amended grounds read as follows:

> **"Following the rule 3(10) hearing on 14 March 2018, and pursuant to permission granted by HHJ Tucker, the Appellant appeals on the ground that the Employment Tribunal erred in that:**
>
> > **1. It ordered that the Appellant pay costs to the Respondents in the sum of £7,500, in circumstances where there was no evidence that the Second or Third Respondents had incurred costs.**
> >
> > **2. Accordingly, the Second and Third Respondents were not "receiving parties" as defined by rule 75(1)(a) of the Employment Tribunal Rules of Procedure 2013, and**

> **the Employment Tribunal had no jurisdiction to make a costs order in their favour.**
>
> **3. The Appellant understood that the Employment Tribunal assessed the costs to be paid on the basis that she should pay £2,500 to each Respondent and, in the premises, an order should be substituted that she pay £2,500 to the First Respondent only."**

18. The EAT Judge, HHJ Tucker, explained the reasons for allowing the appeal to proceed in a form dated 14 March 2018. In part these reasons related to the provisions of Rules 74 and 75 of the **Employment Tribunal Rules of Procedure 2013**. In part they related from the Claimant's belief that the Employment Tribunal said she was to pay £2,500 to each Respondent.

19. The EAT made a **Burns/Barke** Order, sealed on 28 March 2018, asking the Employment Judge the following questions:

> **"(i) Did he state, orally or in writing, that the Appellant (Claimant below) was to pay each Respondent £2,500? And**
>
> **(ii) Can he set out specific costs incurred by the 2nd and 3rd respondents and where the information of those costs incurred was to be found?**

20. The Employment Judge replied on 8 May 2018. He says that there is no indication in his notes or in the transcript of his *ex tempore* Judgment of any division between the three Respondents of the total amount of costs being claimed. He continues:

> **"4. I am confident that the issue of a division of the costs did not arise and that there was no discussion of the point for the following reasons:**
>
> > **1. The submissions of 2 September 2014 made in support of the costs application refer throughout to the First Respondent.**
> >
> > **2. There was no mention in those submissions of the costs of the Second Respondent or the Third Respondent.**
> >
> > **3. If there had been any discussion of the point, either during submissions or during the Tribunal's deliberations, then I would have made a note of it, and it would have been mentioned in the judgment.**
>
> **5. The answer to the first question is therefore that I did not state in writing that there should be any division of the costs awarded, and on a strong balance of probabilities that I did not state so orally.**
>
> **6. The answer to the second question really follows on. The submissions of 2 September 2014 only refer to the costs of the First Respondent. There is no evidence on the Tribunal**

file of there having been any costs incurred separately by either the Second Respondent or the Third Respondent."

21. An answer has now been filed on behalf of the Respondents. It confirms that the First Respondent instructed solicitors, Capsticks, to act on behalf of all three Respondents. It says that "The First Respondent incurred legal costs in this matter but all legal costs were incurred on behalf of all three Respondents" (paragraph 9.1). It argues that all three Respondents were receiving parties (see Rule 75) and it denies that the Employment Tribunal said anything about a part payment of £2,500 to each party. The Respondents have relied upon their answer; they have not appeared at this hearing.

The Relevant Rules

22. Rule 74 of the **Employment Tribunal Rules of Procedure 2013** provides a definition of "costs" and "legally represented":

> **"(1) "Costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing). In Scotland all references to costs (except when used in the expression "wasted costs") shall be read as references to expenses.**
>
> **(2) "Legally represented" means having the assistance of a person (including where that person is the receiving party's employee) who -**
>
> > **(a) has a right of audience in relation to any class of proceedings in any part of the Senior Courts of England and Wales, or all proceedings in county courts or magistrates' courts;**
> >
> > **(b) is an advocate or solicitor in Scotland; or**
> >
> > **(c) is a member of the Bar of Northern Ireland or a solicitor of the Court of Judicature of Northern Ireland."**

23. Rule 75(1) defines what a "Costs Order" is. It provides:

> **"(1) A costs order is an order that a party ("the paying party") make a payment to -**
>
> > **(a) another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative;**
> >
> > **(b) the receiving party in respect of a Tribunal fee paid by the receiving party; or**

(c) another party or a witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual's attendance as a witness at the Tribunal."

Discussion and Conclusions

24. I will begin with ground 3 of the amended grounds.

25. It is very likely that the Claimant raised a question at the Costs Hearing about the making of an Order in relation to all three Respondents. This is supported by paragraph 4 of the Employment Tribunal's Reasons which I have quoted already. But it is very unlikely that the Employment Judge made any comment of the kind which the Claimant suggests may have been made. Quite apart from the fact that the Employment Judge and the Respondent's solicitors do not have a note or recollection of any such comment, it is unlikely, given the terms of paragraphs 4, 12 and 13 themselves. The Employment Tribunal was plainly not intending to make an Order dividing up costs. The costs had been incurred by a single firm of solicitors acting for all three Respondents. It is plain from these paragraphs that it was intending to order a contribution to the global amount of costs incurred.

26. I turn then to the question whether there was jurisdiction to make the Order in favour of the three Respondents. It is convenient to begin with the definition of "costs" in Rule 74(1). The definition includes not only costs incurred by a receiving party, but also costs incurred on behalf of a receiving party. The background to this definition, which was widened in 2004, was explained in **Taiwo v Olaigbe** [2013] ICR 770 at paragraphs 58 to 69. The legislature deliberately introduced a definition which includes the words "or on behalf of", so as to enable a Claimant or Respondent to make a claim for costs which had not been incurred by them personally but which had been incurred in support of their claim or response.

27. In my judgment Rule 75 must be read in the light of the definition in Rule 74(1); the legislature did not intend to cut down that definition. For the purposes of Rule 75(1), a party has incurred costs if they are incurred by that party personally or by his representative in the course of supporting that party's case. This way of reading the legislation is helpful to both Claimants and Respondents. There are many Claimants and Respondents whose costs are paid by someone else: a legal centre, or an insurance company, or a charity, or an employer. It is in the interests of Claimants and Respondents alike that Rule 75 is construed in this way.

28. It follows that the Employment Tribunal had jurisdiction to make an Order in favour of all three Respondents, for it is plain that some costs will have been incurred in respect of each of them individually and many in respect of more than one Respondent. Given the Employment Tribunal's reasons for making the Order, it was not necessary to make some separate assessment of the costs of each Respondent; it was entirely sensible to make a global Order in favour of the three Respondents. I would add, if it is some comfort to the Claimant, that such Orders are, in my experience, frequently made.

29. The Claimant, however, faces an even more fundamental problem. I have dealt with the points in the amended Notice of Appeal because leave was given to amend the Notice to take them; but the appeal with which I am dealing is concerned with the Judgment dated 13 February 2015 refusing an application for reconsideration. That application did not take the point that is now taken. The Employment Judge could not, in any event, be faulted for failing to consider the point now taken or directing a reconsideration about it. In truth, the Claimant's complaint is about the underlying Judgment, not the refusal of reconsideration; but that appeal against the underlying Judgment was found in 2015 to be out of time.

30. It follows that the appeal must be dismissed. Bringing the Claimant, who undoubtedly is suffering from fibromyalgia and finds these proceedings to cause her anxiety, to another hearing only to explain to her why, in my judgment, her appeal cannot be allowed would have been an unhelpful and unsatisfactory course to take. Much better that she should have, as a result of this hearing, a Judgment.

31. I point out that if the Claimant has some compelling medical evidence beyond what I have seen and some real reason for challenging the law as I have explained it, then of course she is entitled to put it forward in an application for review so long of course as she complies with the relevant time limit. I should not be taken either to encourage or discourage such an application - simply to point out the Claimant's right to make it.

Postscript. I record, at the time of approving this Judgment in August, that the Claimant sent a further lengthy email at 11.44 complaining about the bundle prepared by the Associate on her behalf and arguing her case further. I received this email some time after giving judgment. I would comment as follows about it. Firstly, prior to the hearing I had obtained from the EAT's files the Order and Reasons given in January 2015: that is how I quoted from them in this Judgment. Secondly, the email itself shows that the Claimant was perfectly capable of preparing a bundle; if she could write at this level of detail about her case, she was quite capable of preparing a bundle for the hearing, and there is no unfairness to her in proceeding on the basis of a bundle prepared by an Associate when she failed to do so. Thirdly, I have not treated the email as an application for a review. As I explained in the Judgment, if the Claimant wishes to apply for a review she is entitled to do so, but she would be well advised to address the matters which I have highlighted.