

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

At the Tribunal
On 16 March 2018

Before

THE HONOURABLE MR JUSTICE LAVENDER

(SITTING ALONE)

MR F NECKLES

APPELLANT

ABELLIO LONDON LTD

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MS CHESCA LORD
(of Counsel)
Bar Pro Bono Scheme

For the Respondent

MS ALICE CARSE
(of Counsel)
Instructed by:
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SUMMARY

PRACTICE AND PROCEDURE - Costs

An Employment Judge was not obliged to adjourn a hearing of her own motion. The hearing concerned an application for reconsideration of a Costs Order against the Claimant. The basis of the application was that the Claimant had misled the Tribunal as to his assets when he said that he had transferred his former matrimonial home into his wife's name, since in fact he was still the registered proprietor. There were related County Court proceedings in which it was subsequently decided that he held the property on trust for his wife. The Employment Judge was aware of the County Court proceedings, but decided to proceed with the hearing. In the circumstances, she was entitled to do so.

A THE HONOURABLE MR JUSTICE LAVENDER

B 1. This is an appeal against a Decision of Employment Judge Williams contained in a Judgment which was dated 25 July 2016 and sent to the parties on 27 July 2016, following a hearing on 13 July 2016. I will refer to this as the “Second Costs Judgment”. Employment Judge Williams decided to vary a Judgment of 24 September 2015, sent to the parties on 28 September 2015, which I will refer to as the “First Costs Judgment”, by which she had ordered **C** the Appellant to pay £10,000 in costs, and to order the Appellant to pay costs in the sum of £20,000 to the Respondent.

D 2. There is only one ground of appeal which is pursued at this hearing. Other grounds were advanced, but were found to have no reasonable prospects of success. The remaining ground is set out in paragraph 11 of the Notice of Appeal. It is that Employment Judge **E** Williams made an error of law in not adjourning the hearing on 13 July 2016 to await the outcome of the County Court proceedings to which I will refer. In response to that ground, the Respondent makes two submissions. The first is that the Appellant did not apply for an adjournment on this basis. The second is that the Employment Judge was not obliged to **F** adjourn the hearing, either of her own motion or in response to an application (if any was made).

G 3. A decision to adjourn or not to adjourn a hearing is a case management decision. The Judge has a discretion. It is accepted that this Tribunal should not interfere unless the Judge made an error of law or made a decision which no reasonable Tribunal could have made. I was referred in this respect to Carter v Credit Change Ltd [1979] ICR 908 and X v Z Ltd [1998] **H** ICR 43.

A 4. The background is as follows. The Appellant was employed by the Respondent as a bus driver. He was dismissed on 12 April 2013. He presented two claims to the Employment Tribunal, one shortly before and one after his dismissal.

B 5. Following a hearing on 16 December 2014, which the Appellant did not attend and at which he was not represented, Employment Judge Lamb struck out both of those claims in a Judgment which was dated 6 February 2015 and sent to the parties on 10 February 2015. He did so in consequence of a finding that the Appellant, having been ordered to disclose the metadata of a witness statement, was guilty of misconduct in falsifying the metadata which he disclosed in response to that Order.

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D 6. The Respondent applied for an Order that the Appellant pay its costs, pursuant to Rules 76(1)(a) and/or 76(2) of the **Employment Tribunals Rules of Procedure 2013**. Following a hearing on 15 September 2015, Employment Judge Williams decided in the First Costs Judgment that the Appellant should pay an amount in respect of costs to the Respondent. She decided that, taking account of the Appellant's means, as permitted by Rule 84 of the **ET Rules**, he should not be ordered to pay more than £10,000. She assessed the costs in that amount.

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G 7. In doing so, she took account of what she had been told about the Appellant's means. In particular, the Appellant's brother, who represented him at the hearing on 15 September 2015, said that the Appellant had separated from his wife and would have transferred the family home into her name. The Judge expressed some scepticism about what she was told about the Appellant's means.

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A 8. The Judge explained the relevance of the Appellant's means by saying that it would not
be in the interests of justice for her to make an oppressively large Costs Order that the
B Appellant would have no realistic prospect of paying, even over a substantial timescale. The
Judge did not, however, make a factual finding as to the amount of the Appellant's means or the
extent of his ability to pay a Costs Order. This is not surprising, given her scepticism as to
some of what she was told.

C 9. On 9 October 2015 the Respondent applied for the reconsideration of the First Costs
Judgment. The basis of this reconsideration application was that the Appellant was, in fact, still
registered with his ex-wife as one of the proprietors of his former matrimonial home ("the
D property"). The Respondent contended that the Appellant had misled the Tribunal at the
hearing on 15 September 2015.

E 10. Employment Judge Williams decided to hold a hearing to determine the reconsideration
application. The Notice of this decision was dated 8 February 2016. The Appellant did not file
any witness statements from himself or anyone else in response to this application,
notwithstanding the allegation that he had misled the Tribunal. Between 9 October 2015, when
F the reconsideration application was made, and 13 July 2016, when it was heard, a number of
steps were taken in relation to the property:

G (1) On 24 December 2015 a firm of solicitors applied to the Land Registry for the
registration of a restriction against the title to the property, enclosing a copy of a
purported Trust Deed dated 28 February 2009, by which the Appellant and Mrs
Neckles declared that they held the property on trust for Mrs Neckles absolutely.

H (2) On 29 December 2015 the Land Registry entered a restriction against the title to the
property.

A (3) On 14 January 2016 the Respondent applied to the County Court at Huddersfield for an Interim Charging Order over the property. This was granted by District Judge Heels on 2 February 2016.

B (4) On 13 April 2016 the Appellant applied for the discharge of the Interim Charging Order.

(5) On 7 June 2016 Mrs Neckles applied to be joined as a party to the County Court proceedings, alleging that she was the sole beneficial owner of the property.

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11. Employment Judge Williams recorded in the Second Costs Judgment (in paragraph 25) that she was informed that the next hearing in the County Court proceedings would be on 25 July 2016 and that this would be a directions hearing only. She also noted in paragraph 27 of the Second Costs Judgment that:

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(1) The Appellant had made an application for a postponement of the hearing on 13 July 2016. I have not been provided with a copy of this application. It is not suggested that it was an application for an adjournment to await the outcome of the County Court proceedings.

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(2) That application was refused on 12 July 2016 by Employment Judge Baron.

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(3) The application was not renewed at the hearing, on the basis that she was asked to and did permit the Appellant's representative - i.e. his brother - an additional hour to read and consider the documentation.

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12. In paragraphs 30 to 47 of the Second Costs Judgment Employment Judge Williams also identified and dealt with a number of preliminary matters which were raised on the Appellant's behalf. These include invitations to Employment Judge Williams to recuse herself and to make

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A a reference to the Court of Justice of the European Union. They did not include an application for an adjournment to await the outcome of the County Court proceedings.

B 13. In paragraph 38 of the Second Costs Judgment Employment Judge Williams set out in some detail what happened at the hearing on 13 July 2016 in connection with the possibility of the Appellant giving evidence. The Appellant was given the opportunity to give evidence. The position which he adopted was that he would not give evidence unless a Witness Order was applied for by the Respondent and made by the Tribunal. The Respondent did not apply for a C Witness Order and the Appellant did not give evidence, nor did he call anyone else to give evidence.

D 14. A submission was made on the Appellant's behalf in relation to the County Court proceedings. In paragraphs 56 and 57 of the Second Costs Judgment, Employment Judge Williams said as follows:

E “56. Mr John Neckles also submitted that I had no jurisdiction to consider the validity of the trust deed as that issue was now before the Huddersfield County Court in relation to the costs order enforcement proceedings and the Employment Tribunal's jurisdiction was limited to the matters conferred on it by statute. He said I was obliged to accept the document as valid.

F 57. As regards this latter point, it will be recalled that it was the Claimant who asked me to take his means into account when making an order for costs. It is clear that if the Tribunal decides to take a party's means into account, then consideration should be given to the party's capital and his savings as well as to his income: *Shields Automotive Ltd v Greig* EATS 0024/10. Accordingly, it was right for me to consider the extent to which the Claimant had an interest in any property and in turn, right for me to assess the information that was provided on his behalf and submissions made by the Respondent as to its adequacy. If the Claimant's position were correct, the effect would be that the Tribunal would be obliged to take at face value what it was told about the extent of a party's interests in property, which is plainly neither a sensible nor just position. Whilst I do not have jurisdiction to determine claims relating to deeds of trust in the way that the County Court does, this does not preclude me from forming a view as to the reliability and/or honesty of the information that I am provided with as to the extent of the Claimant's means.”

G 15. It seems to me clear from this and the remainder of the Second Costs Judgment that H Employment Judge Williams was not expressly asked to adjourn the hearing to await the outcome of the County Court proceedings. On the contrary, the application which was made by

A reference to the County Court proceedings was that she was obliged to accept the Trust Deed as
valid. That submission was rightly rejected. However, the implications of the County Court
proceedings for the hearing before her were raised. I note that, on the Appellant's case, the
B Employment Judge was wrong to say that she was not precluded from forming a view as to the
reliability and/or honesty of the information provided about the Appellant's means, since the
Appellant's case is that the Employment Judge was obliged to adjourn so as to await the
outcome of the County Court proceedings.

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16. Employment Judge Williams went on to conclude that the Appellant had misled the
Tribunal on 15 September 2015. In doing so, she said that she did not consider the Trust Deed
D to be a genuine document and she found that the Appellant had not divested himself of his share
in the property. On that basis, Employment Judge Williams allowed the reconsideration
application and increased the amount of the costs payable by the Claimant to £20,000.
E Employment Judge Williams knew when she did so that the validity of the Trust Deed was an
issue in the County Court proceedings and that Mrs Neckles had applied to be joined as a party
to those proceedings. Employment Judge Williams could not know which way the issue as to
the validity of the Trust Deed would be determined in the County Court proceedings.

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17. In the event, that issue was not resolved until 20 February 2017, in a Judgment given by
District Judge Barraclough following a hearing in which he heard evidence from Mrs Neckles
G and her sister and received witness statements from the Appellant and one of the witnesses to
the Trust Deed. District Judge Barraclough said as follows in paragraph 13 of the Judgment:

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"13. I will say at the outset this. If the matter before me today was simply that Mr Neckles
claimed that he did not have a beneficial interest and there was no claim or evidence from Mrs
Neckles, I would have little difficulty dealing with this application. On the basis of the
evidence before the Court, the evidence of the findings of the Tribunal and the fact that Mr
Neckles did not give evidence, I would have had no hesitation in finding that he retained with a
beneficial interest in the property. ..."

A 18. In short, District Judge Barraclough would have reached the same decision as
Employment Judge Williams if he had only heard the same evidence as Employment Judge
B Williams. However, District Judge Barraclough also heard evidence from Mrs Neckles. The
crucial question for him, as he saw it, was whether he believed her evidence. He decided that
he did believe her, and that was the basis on which he found that the Trust Deed was valid.
Consequently, he discharged the Interim Charging Order.

C 19. Having set out the background, I can deal very shortly with the Respondent's first point.
I accept that no application was made to Employment Judge Williams for an adjournment of the
hearing specifically for the purpose of awaiting the outcome of the County Court proceedings.
D I note also that, although no application was made for an adjournment on this basis, the
implications of the County Court proceedings for the hearing on 13 July 2016 were raised as an
issue and the Judge decided to go ahead and deal with the factual issue as to the validity of the
E Trust Deed. No doubt the Judge would have dealt expressly with the possibility of an
adjournment as an appropriate response to the County Court proceedings if that had been
raised, but it was not. The Judge, having considered the implications of the County Court
proceedings, decided to go ahead with the hearing.

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20. Given that no application was made for an adjournment to await the outcome of the
County Court proceedings, it follows that the Appellant's case has to be that the Employment
G Judge was obliged to make an order for such an adjournment of her own motion. While it
would have been open to her to adopt that course, it is a strong thing to say that she was obliged
to do so of her own motion, especially having regard to a number of factors:

H (1) As is clear from the Second Costs Judgment, the Appellant had made a number of
applications and submissions to Employment Judge Williams, including a

A submission as to what Employment Judge Williams should do in the light of the County Court proceedings. However, they did not include an application for adjournment to await the outcome of the County Court proceedings.

B (2) The reconsideration application had been made over nine months before the hearing on 13 July 2016. The decision to hold a hearing had been communicated over five months before the hearing. The Appellant had had ample time in which to serve witness statements in support of his factual case. He had not done so.

C (3) Nor had the Appellant chosen to give evidence himself or to call any other witness to give evidence at the hearing on 13 July 2016.

D 21. Against that are the following factors:

E (1) It is well recognised that it is desirable to avoid the risk of inconsistent judgments on the same issue by different Courts or Tribunals. For example, that is a factor, albeit not necessarily a decisive factor, in cases concerning the doctrine of *forum non conveniens*. It is also relevant in cases, such as **Mindimaxnox LLP v Gover & Another** UKEAT/0225/10, where a party seeks to pursue concurrent proceedings for the same relief in both the Employment Tribunal and the High Court.

F (2) The Judge knew that Mrs Neckles had applied to join the County Court proceedings, whereas she was not a party to the proceedings before him. She was a potentially important witness.

G (3) The basis for the Judge's decision to increase the costs payable from £10,000 to £20,000 was that the Appellant had an interest in the property, but the County Court has now held that he does not and that the Respondent cannot obtain enforcement of the Costs Order by means of a Charging Order over the property.

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A 22. For the Appellant, Ms Lord relied on the decision of the Employment Appeal Tribunal in Mindimaxnox. However, that was a rather different case:

(1) In Mindimaxnox there was an application for a stay. In this case, there was no application for an adjournment.

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(2) In Mindimaxnox the application was made at an early stage in the proceedings. In this case, we are concerned with a hearing about costs and the question of whether, on the day of the hearing, the hearing should be adjourned.

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(3) In Mindimaxnox the Tribunal faced the prospect of two overlapping sets of proceedings seeking the same relief and being run from beginning to end. In this case, the Tribunal proceedings had already been concluded and the issue as to the validity of the Trust Deed, which had arisen in the context of costs, had already reached the day fixed for hearing.

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23. The Judge had a discretion whether or not to proceed with, or to adjourn, the hearing on 13 July 2016. In exercising that discretion, the Judge was required to have regard to the overriding objective set out in Rule 2 of the **Employment Tribunals (Constitution and Rules of Procedure) 2013**. This provides as follows:

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“The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with the case fairly and justly includes, so far as practicable -

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

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(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.”

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24. Applying these considerations to the hearing on 13 July 2016, no issue arose as to factor (a) or factor (c). As to factors (d) and (e), proceeding with the hearing avoided delay and also

A saved the additional expense which would necessarily have been incurred if the hearing had
been adjourned. Against that, it is submitted that: the County Court proceedings would have
B led to some delay in seeking to enforce a Costs Order anyway; a decision in the County Court
proceedings would have reduced the further costs payable in the Tribunal proceedings, since it
would have determined the issue as to the validity of the Trust Deed; and there would have
been no great prejudice to the Respondent if the reconsideration application had been adjourned
until, say, March 2017. As to factor (b), the parties were ready to deal with an issue which was
C not particularly complex. It was proportionate to deal with it at the hearing.

D 25. Looking at the matter overall, the case could be dealt with fairly and justly if the hearing
went ahead. The Appellant had had ample opportunity to present his case, including any
supporting evidence, on the factual issue which arose for determination. The fact that it was
possible that the County Court might decide that issue differently on a subsequent occasion, on
the basis of different evidence, did not make the hearing on 13 July 2016 unfair or unjust.
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F 26. For all of these reasons, I do not consider that the Judge was required to adjourn the
hearing of her own motion in order to await the outcome of the County Court proceedings.
This is a case management decision which she could have made in the exercise of her
discretion, but it is not a case management decision which she was obliged to make.
Consequently, I dismiss this appeal.
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