Appeal No. UKEAT/0131/18/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 23 October 2018
Judgment handed down on 16 November 2018

Before

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

(SITTING ALONE)

MR S MONFARED — APPELLANT

SPIRE HEALTH CARE LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR GUS BAKER (of Counsel) Bar Pro Bono Scheme
For the Respondent	MR DECLAN O'DEMPSEY (of Counsel) Instructed by: DAC Beachcroft LLP St Paul's House 23 Park Square South Leeds LS1 2ND

SUMMARY

PRACTICE AND PROCEDURE - Costs

The Employment Appeal Tribunal ("the EAT") dismissed an appeal against a detailed assessment of costs by the Employment Tribunal ("the ET"). The EAT held that, in the light of the express dispute on that assessment, the ET had not erred in law in its approach and had given adequate reasons for its decision. The EAT decided that, having regard to the terms of the **Employment Tribunal Rules of Procedure 2013**, and the order for the detailed assessment made by the ET in an earlier decision in the proceedings, the ET was required, on the detailed assessment, to assess the costs of proceedings including the costs of the detailed assessment, and that the ET had rightly rejected, and had given sufficient reasons for rejecting, the contention of the Claimant in the ET that the ET should have adopted some other approach to the assessment.

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

Introduction

1. This is an appeal from a Judgment of the Employment Tribunal ("the ET") sitting at East London which was sent to the parties on 29 September 2017. The ET consisted of Employment Judge Foxwell ("the EJ"). The ET, after a detailed assessment, decided that, on the standard basis, the Respondent's costs of the claim brought by the Claimant were £85,143.

2. On this appeal, the Claimant has been represented by Mr Baker, and the Respondent by Mr O'Dempsey. Both counsel provided the Employment Appeal Tribunal ("the EAT") with skeleton arguments. I thank them both for their help. Mr O'Dempsey, but not Mr Baker, appeared in the ET. I must record my particular thanks to Mr Baker for arguing this appeal pro bono. The EAT is always very grateful to lawyers who represent Appellants pro bono, and Mr Baker fully deserves that gratitude for his excellent presentation of this appeal.

3. I will refer to the parties as they were below. Paragraph references are to the ET's Costs Judgment, unless I say otherwise.

The Grounds of Appeal

4. On the paper sift, His Honour Peter Clark decided that this appeal raised no arguable point of law. After a hearing under Rule 3(10), at which the Claimant had the advantage of being represented by Mr Adkin, acting under the auspices of the ELAAS Scheme, Simler J ordered that there should be a Full Hearing of the appeal on the grounds of appeal for which she gave leave to amend.

5. There are three such grounds of appeal.

a. The EJ failed to apply a three-staged (or four-staged) assessment to a detailed assessment on the standard basis, in particular in relation to counsel's fees and work done on documents. In relation to each item, the EJ should have:

i. considered whether it was incurred reasonably,

ii. considered whether it was reasonable in amount,

iii. considered whether it was proportionate to the matters in issue and

iv. resolved any doubt in favour of the Claimant.

b. The EJ did not give adequate reasons for his assessment of counsel's fees and of work done on documents; the largest items on the bill. There is no analysis or discussion of counsel's fees at all. The only item of work done on documents on which the EJ comments is the work done on witness statements.

c. The EJ gave inadequate reasons and/or failed to deal with the Claimant's submission that the Respondent had increased the value of the costs schedule.

The ET's Decision after the Substantive Hearing

6. In a Judgment sent to the parties on 9 August 2016, the ET dismissed the Claimant's claims that he had been the subject of detriment for making protected disclosures, and that he had been discriminated against on the grounds of his race or on the grounds of his religion or belief. The ET held that the Claimant had been unfairly dismissed.

7. In paragraph 1 of its Judgment the ET said that it already had a thick file and "a lengthy history to where we have got today". The ET recorded, in paragraph 27.7, when considering the Claimant's application for an adjournment of the hearing, the Respondent's submission that its costs so far included counsel's fees of £12,500 for the Substantive Hearing and that its

solicitors' costs to date were £54,000. In paragraph 41.8, the ET observed that the resources which the ET had devoted to the claim were "exceptionally high". There had been four Preliminary Hearings and, instead of being listed for an hour or two, one had been listed for a day, and one for two days.

The ET's Remedy Judgment

8. In a Judgment sent to the parties on 22 February 2017, the ET refused the Claimant's applications for reinstatement or re-engagement. The Respondent was ordered to pay the Claimant £4,176 compensation for unfair dismissal. The Claimant was ordered to pay the Respondent "one quarter of the costs of the Respondent, to be determined by way of detailed assessment".

9. The ET had given the Claimant time to digest the documents supporting the Respondent's application for costs as the Claimant felt unprepared (paragraph 101). The ET had written and oral submissions from the Respondent. The Respondent relied on a continual pattern of behaviour of not complying with ET Orders for no good reason, the Claimant's repeated and unsuccessful attempts to delay the case for spurious reasons, and the fact that, at the heart of his case, there were deliberate lies which had subjected the Respondent and its witnesses to a very long process of litigation, as allegations such as his could only be dealt with by considering the evidence. The Claimant had brought some of his allegations vexatiously. He had made unfounded allegations against Mr Calver. He had been made a settlement offer of £5,000 in March 2016. He had made no counter-offer. He had acted unreasonably in various ways during the proceedings. He had made baseless allegations that the Respondent had intimidated witnesses. He had failed to comply with many procedural Orders. The Claimant had not provided proper evidence about his means.

10. The test for whether costs should be ordered was the same whether or not a litigant was represented, but in applying the test, the ET should take into account that the Claimant was a litigant in person (paragraph 113).

11. The ET took into account the Claimant's limited success in the litigation (paragraph 123). He had a reasonably arguable case that his dismissal was substantively unfair and that his dismissal was an unlawful act of victimisation (paragraphs 124 and 125). The ET took into account that the Claimant was a litigant in person, albeit that these were not his first proceedings (paragraph 126). The ET did not hold him to the same standards as a professional person. The ET took into account that the Respondent had made many unsuccessful applications which extended the time of Preliminary Hearings and the Substantive Hearing (paragraph 127). Part of the Respondent's bill included such costs. The ET referred to the amounts claimed in paragraph 128.

12. The ET did not consider that the Claimant was unreasonable to reject the offer of settlement (paragraph 129). The Claimant was entitled to a Remedy Hearing. He was not unreasonable to seek reinstatement or re-engagement (paragraph 130). Nevertheless, the ET held that the Claimant's conduct of the proceedings was unreasonable (paragraph 132) in the three respects which the ET went on to describe in paragraphs 132 to 143. The ET said, in paragraph 143, that they were an experienced Tribunal, and accustomed to adjudicating factual disputes. "Where the Claimant went beyond what one might reasonably expect in litigation was in the gross exaggerations and making allegations in bad faith or to disrupt investigations of complaints made against him and complaints made by him".

13. It was appropriate to make a Costs Order. The Claimant had acted unreasonably "in an extensive number of respects", as the ET had described. There should be consequences. The Respondent had had to incur "extensive additional costs" (paragraph 146). The ET was not able to give an exact estimate of how much the Respondent's "reasonable legal costs would have been had the Claimant not acted unreasonably in the ways we have described" (paragraph 148). The ET gave examples of how the Respondent's preparations and the length of the hearing would have been shorter if the Claimant had not behaved unreasonably (paragraphs 149 to 151). The ET expressly took into account, in deciding whether the Claimant's conduct was unreasonable, that he was a litigant in person (ibid).

14. In paragraph 157 the ET said that taking all the factors into account, it had considered whether to order the Claimant to pay a "flat sum", or a proportion of the Respondent's costs, to be decided by way of detailed assessment. A fixed sum had some attractions, especially given the length of the proceedings, but it would be difficult to do. The ET had not done a detailed assessment of the Respondent's costs. It seemed unlikely to the ET that costs on a standard basis would amount to the costs claimed by the Respondent, or a figure close to it; but the ET was not in position to make that assessment and had not heard submissions about it. If the Respondent's costs were assessed at £50,000 rather than £90,000, that would produce a very different outcome. The ET therefore decided to award a proportion of the Respondent's costs.

The Respondent's Bill of Costs

15. The Respondent's bill of costs was drawn up by a costs draftsman. It is 24 pages long. It includes the costs of drawing up the bill itself. It consists of a narrative of the proceedings, a list of the rates used for the solicitors involved in the case, and a list of attendances by solicitors on the Respondent, on the Respondent's insurer, on the Claimant and on counsel. It lists

counsel's fees, and attendances on the ET and the EAT, and on the witnesses. Under the heading "Documents" it says, "See Schedule 1" (bundle, page 184). The bill, by way of summary, gives the total times spent by various solicitors on the documents, and the associated costs. Schedule 1 to the bill of costs is 39 pages long. It sets out, in detail, the work done on documents (bundle, pages 188 to 227).

16. When the Respondent made its initial written application for costs on 22 December 2016, it claimed that its total costs were £98,846.50 (ET's Remedy Decision, paragraph 128). This was broken down into solicitors' costs of £67,476.50 and counsel's fees of £31,370. By the time of the costs assessment, that total had increased to £121,120.88 (the Respondent's bill of costs, final page, bundle, page 187). Over £8,000 of that difference was the cost of preparing the detailed bill of costs (ibid). Counsel's fees had increased, modestly, to £33,820 (ibid).

The Claimant's Points of Dispute

17. The Claimant was a litigant in person during the proceedings, but his case was that counsel, whom he named, acting under the Direct Access Scheme, "assisted" him to draft his points of dispute ("PD") (bundle, page 347). The PD referred to the overriding objective. The PD said that, unless otherwise stated, the Claimant disputed the entire application for costs. The Claimant referred to paragraph 6.2 of the **CPR** which (said the Claimant) sets out how costs are to be assessed on the standard basis. In its reply, the Respondent pointed out the basis of a detailed assessment is set out in CPR 44.3. Despite referring to the wrong Rule, however, the PD accurately summarise the tests in CPR 44 (see pages 347 to 348). There was, at least, no dispute between the parties about what that test was.

18. Paragraphs (ii) and (iii) drew attention to the difference between the total figure given in the ET's Remedy Decision and the total now claimed by the Respondent. The Claimant made the point it was unfair to assess a different total of costs from that which the ET had in mind at the remedy stage; had the Respondent put forward a bigger total then, the ET might have ordered a larger percentage discount than it did. Paragraph (iii) made the further point that while the ET could take a broad-brush approach, "Costs should not be awarded in respect of any matters which fall outside … the ET's ruling", such as advice in relation to the Claimant's appeal to the EAT. There must be some link between that assessment of costs and the grounds on which costs had been awarded against the Claimant.

19. In section D, the Claimant set out his understanding of the ET's Remedy Judgment. He made a number of points about costs, which, in his submission, the Respondent should not be awarded (for example, the costs of defending the Claimant's claims which had succeeded, costs of time spent considering settlement, the costs of the various applications it made at Preliminary Hearings, and the costs of the Remedy Hearing). These points are based on a misunderstanding of the effect of the ET's decision on costs, as I think Mr Baker fairly accepted in his oral submissions.

20. At paragraph (vi) the Claimant acknowledged that the Respondent was entitled to costs in relation to the matters referred to at paragraph 132 of the Remedy Judgment. The ET would have to make a judgment about the extent to which the hearing was extended as a result. The Claimant acknowledged that "a proportion of Counsel's fees may be recoverable" and a proportion of solicitor's fees of attendance. The Claimant said it was not helpful that the ET had not identified the extent to which hearings had been lengthened by his conduct (paragraphs (vi) and (vii)). He criticised the Respondent in paragraph (vii) for failing to identify the costs

attributable to his disruptive behaviour. He made related points in paragraphs (ix) to (xiv). In paragraph (xv) the Claimant said that paragraph 131 of the ET's Judgment was "somewhat ambiguous" but that the ET had acknowledged that any award should be reduced so as to take into account the fact that he was a litigant in person and not familiar with ET Rules and procedures.

21. In section E of the PD, the Claimant made some specific points on the Respondent's costs schedule and schedule of work done. He attached a schedule with his specific comments. This schedule was missing from the EAT bundle, but it was handed to me during the hearing. The costs he highlighted in pink, in his submission, fell outside the scope of the Costs Judgment. He highlighted others in orange. The position about them was, he submitted, unclear. He accepted that he was liable for at least part of the costs he highlighted in yellow or left blank. There were doubts whether the amounts claimed were reasonable and proportionate. I have considered the highlighted schedule briefly (I bear in mind that this is an appeal). My impression is that very little is highlighted in yellow. Relatively few items are left blank, many are highlighted in pink, and fewer are highlighted in orange.

22. His specific points included a complaint that the costs claimed had not been related to the ET's conclusions in the Remedy Judgment. He accepted, at paragraph (iv), that a proportion of counsel's costs for attending the Liability Hearing were recoverable. He did not accept that the full fees were recoverable, but did not explain why, other than to say that they included the costs of earlier advice, including dates to avoid and attending various Preliminary Hearings and the Remedy Hearing. I cannot see that counsel has charged a fee for giving dates to avoid, and Mr Baker was not able to help with this point.

23. In section F, headed "Conclusion", the Claimant repeated his point that costs should be limited to costs incurred as a result of the hearing being extended. He put the Respondent to "strict proof" of other matters. He disputed the Respondent's repeated attempts to strike out his claim.

24. The references to counsel's fees in the PD (at paragraphs D(iv), E(iv), (ix), F (first paragraph), bundle, page 353) reflect the misconceived attack which is mounted against the bill of costs in the PD. That attack is based principally on the views that (1) the Claimant should not have to pay any costs in respect of hearings which he won and (2) should only have to pay costs to the extent that it could be shown that they were incurred as a result of the prolonging of the proceedings by the Claimant's unreasonable conduct. No reasoned case is made in the PD that (a) it was unreasonable to instruct counsel for any item of work, (b) counsel's fees for any item were unreasonable in amount, or (c) counsel's fees were disproportionate to the issues at stake etc.

The Respondent's Response

25. The Respondent contended that the Claimant's PD did not comply with CPR PD 47 and should be struck out. The Respondent contended that in assessing whether the costs were reasonable and proportionate, the ET should take into account the complexity of the claim and the Claimant's conduct. It was the Respondent's case that the Claimant's conduct had increased the costs of the claim.

26. At point C(i), the Respondent contended that the schedule of costs had been prepared "at the time in support of" the Respondent's costs application. Those costs were not summarily assessed on the day; and the Respondent's costs had been allowed at 25%, subject to detailed

assessment. The costs claimed in a bill of costs will always be higher given that it also incorporates additional work following the ET's Judgment of 22 February 2017, and given that the costs are subject to a detailed assessment, the Respondent is entitled to recover the costs of preparing a detailed bill of costs.

27. The Respondent expanded on this point in its response to point C(iii). The costs referred to in the ET's Remedy Judgment represented the Respondent's costs up to and including 19 December 2016, the date when the Respondent made its application for costs. The schedule makes clear that those only include the solicitors' costs and counsel's fees. The later, bigger figure, includes costs incurred between December 2016 and 22 May 2017, including all disbursements incurred on the case, all counsel's fees and the preparation of the bill of costs. The detailed bill of costs is an essential precondition of the detailed assessment which the ET ordered. It was mere speculation to assert that if the Respondent had put forward a bigger figure at the Remedy Hearing, the ET would have ordered the Claimant to pay a smaller proportion of that figure than 25%.

28. The Respondent conceded part of point C(iii) by accepting that the Claimant was not liable to pay any part of the costs of the 2015 and 2017 appeals to the EAT (just over £2,800). The Respondent did not concede that the Claimant was not liable for the costs of a later appeal to the EAT, as it was directly relevant to the ET proceedings.

29. The Respondent argued that the Respondent was entitled to the costs of the Remedy Hearing, since the Respondent had been awarded a proportion of the costs of the entire proceedings (point D(iv)). The Respondent contended that all the costs of disclosure (22 hours) were recoverable; the bundle for the Substantive Hearing was 2,000 pages long (point D(viii)).

30. In section E, the Respondent set out its responses to the detailed criticisms of the bill of costs. The Respondent confined itself to points of principle and concessions. The Respondent contended that the Claimant's PD should be disallowed outright because the Claimant had made no "real objections". The Claimant had simply asked the ET to go through the bill and "pick out any issues". It was for the Claimant to identify the issues. The Claimant had not made any alternative proposals. The items should be allowed in full.

31. The Respondent said that there had been a high number of Preliminary Hearings because the Claimant kept failing to comply with directions and/or to clarify the nature of his claims. Counsel was instructed as this was "the most cost-effective option when compared to the acting solicitor travelling and attending those hearings. Continuity was also paramount given the complexities and developments in the claim, such that the same counsel was utilised" (point E(iv)). In the light of the long history of the claim and its complexity, it was necessary for an associate solicitor to attend the Substantive Hearing because of the Claimant's many complaints about the preparation of the case for the Substantive Hearing. An associate did not attend the Preliminary Hearings. The Respondent disputed that the suggestion that a disproportionate number of lawyers had been involved. The case had lasted 2.5 years. Extra lawyers were used to cover periods of leave and absences. Junior lawyers were used wherever appropriate to keep costs low.

The ET's Detailed Assessment

32. The ET decided that the Respondent's costs of the proceedings were £85,143, having assessed them on the standard basis. He ordered the Claimant to pay a contribution of £21,285.75 to those costs.

33. The ET summarised the history of the proceedings in paragraphs 2 to 4.

34. The EJ said that costs are assessed in the ET in accordance with "the same principles and process as the Civil Courts" (paragraph 5). He referred to CPR Part 44. Where the basis of assessment is not specified in the Costs Order, costs are to be assessed on the standard basis. This requires the court to allow costs which are proportionate to the matters in issue only. Costs which are disproportionate in amount can be disallowed or reduced even if reasonably incurred. In such an assessment, the ET must resolve any doubt whether costs have been reasonably and proportionately incurred, or were reasonable and proportionate in amount in favour of the paying party.

35. The EJ described the written materials he had considered. He had taken into account the Claimant's PD, even though "they do not follow the normal process of setting out detailed but brief points of dispute in respect of all or certain of the amounts claimed". The Claimant had asked him, in essence, to scrutinise the Respondent's bill of costs with care. The EJ said that it became clear during the hearing that the Claimant wanted to challenge aspects of the Costs Order itself. For example, he wanted the EJ to disallow the costs of the unfair dismissal claim. The EJ explained to the Claimant that his job was to give effect to the Costs Order which had already been made: "this requires me to assess the Respondent's costs and then calculate what 25% of this amount is. It is not for me to go behind the Order, although I recognise that the Claimant has been disappointed by the outcome of this litigation" (paragraph 6).

36. The EJ recorded the Respondent's partial concession about the costs of the appeals. The EJ decided to disallow all those costs, because there is a similar costs jurisdiction in the EAT (paragraphs 7 and 8). The EJ listed in paragraph 9 some points which he had asked the

Respondent to clarify. The rates charged for solicitors were below the guideline rates in the **CPR** for solicitors practising in the centre of Leeds (where the Respondent's solicitors were based), with one exception. The rate for a grade A solicitor exceeded the guideline rate by an amount which was de minimis. He accepted the rates claimed as the other lower rates were significantly below the guideline rates. The EJ had regard to the fact that this was "hard-fought litigation with a history stretching back some years" (paragraph 10). The ET's file showed that the Claimant at times sent letters which were wide-ranging and unfocussed, so that it would be unjust if the EJ took too narrow a view of the costs which had been incurred by the Respondent.

37. In paragraph 11 the EJ noted that the total claimed was £121,210.80. He described the broad headings in the bill. He then examined each element in turn. He allowed the costs which he considered were proportionate and reasonably incurred. He disallowed those which he considered were excessive or disproportionate. Having done that, he looked at the overall total, and discounted it further, having regard to proportionality (see, e.g., his approach in paragraphs 13 to 14, 16, 17 to 19, 24 to 25). In some cases, the EJ reduced the claim significantly; for example, the Respondent claimed £47,946 for work done on documents. The EJ reduced this to £32,200. He reduced the amount claimed for solicitors' attendance on counsel for six days of the Liability and Remedy Hearings (paragraph 26).

38. He allowed counsel's fees of £32,820 as claimed (paragraph 20). As the Respondent points out, in paragraph 17, the EJ specifically found, when considering the costs of attendances on counsel, that those were disproportionate "to the issues in hand and the other work Counsel has done on the case as reflected in the brief and fees paid to him for advice".

39. At paragraph 28, he considered the costs of preparing the bill of costs. He found that the claim was disproportionate, as effectively, more than a full working week had been spent preparing the bill. He allowed 20 hours instead.

The Law

The Relevant Provisions on Costs

*The **Employment Tribunal Rules of Procedure 2013** ("the Rules")*

40. Rule 2 of the **Employment Tribunal Rules of Procedure 2013** ("the Rules") enacts the overriding objective, which is that ETs should deal with cases fairly and justly. Dealing with cases in that way includes, so far as practicable, dealing with cases in a way which is proportionate to the complexity and importance of the issues, avoiding unnecessary formality and seeking flexibility, avoiding delay, and saving expense. An ET must seek to give effect to the overriding objective in interpreting, and in giving exercising, any power conferred by the **Rules**. The parties are to help the ET to further that objective and must co-operate generally with each other and with the ET.

41. Rule 74(1) of the **Rules** defines costs as "fees, charges, disbursements or expenses incurred by or on behalf of the receiving party …". A Costs Order, among other things, is an Order that the paying party makes a payment to the receiving party "in respect of the costs that the receiving party has incurred while legally represented" (Rule 75(1)(a)). "Legally represented" means having the assistance (in short) of a person who has a right of audience in various types of proceedings (i.e., a solicitor or a barrister) (Rule 74(2)). Rule 76(1), (2) and (3) gives an ET power to make a Costs Order in certain circumstances. Rule 77 prescribes the procedure for making a Costs Order. A party may apply for a Costs Order at any stage up to 28 days after the date on which the Judgment finally determining the proceedings in respect of that

party was sent to the parties. An Order cannot be made unless the paying party has had a reasonable opportunity to make representations.

42. Rule 78 is headed "The amount of a costs order". Such an Order may require the paying party to pay a specified amount in respect of the costs of the receiving party (Rule 78(1)(a)), or "the whole or a specified part of the costs of the receiving party, with the amount to be paid" being decided "either by a county court in accordance with the **Civil Procedure Rules 1998**, or by an Employment Judge applying the same principles" (Rule 78(1)(b)). If the first route is used, the amount cannot exceed £20,000. If the second is, it can.

43. Mr Baker draws attention to the terms of CPR 44.3 and submits that four principles apply when a court is assessing costs on the standard basis:

i. The court must not allow costs which have been unreasonably incurred or are unreasonable in amount (paragraph 44.3(1)).

ii. The court should only allow costs which are proportionate to the matters in issue; costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably and necessarily incurred (paragraph 44.3(2)(a)).

iii. The court must resolve any doubt about whether costs have been reasonably and necessarily incurred in favour of the paying party (paragraph 44.3(2)(b)).

iv. The court must take into account all the circumstances, including, for example, the conduct of the parties at all stages, any efforts to resolve the dispute, the amount of any property involved, the importance of the matter to the parties, the complexity of the matter, the skills of those involved, and the time spent on the case.

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44. The Respondent draws attention to CPR PD 47.8.2. Points of dispute are to be short and to the point. They must identify any general points or matters of principle which need to be decided before individual items in the bill are addressed, and "identify specific points, stating the nature and grounds of the dispute". The Respondent submits that the Claimant failed to do this in his PD. By CPR 47(1)(6) only those points raised in the PD may be relied on at the hearing unless the court gives permission.

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45. The Claimant also draws attention to the nature of the ET's duty to give reasons. Rule 62(1) of the **Rules** requires the ET to give reasons for a decision on any disputed issue, including any decision on an application for reconsideration or for Orders for costs. By Rule 62(4), the reasons given for any decision must be proportionate to the significance of the issue. For decisions other than Judgments, they may be "very short". Counsel agree that the decision on the costs assessment was a Judgment for this purpose (see the definition of "judgment" in Rule 1(2)(b) of the **Rules**). Rule 62(5) requires an ET to identify the issues it has decided, to state its findings of fact in relation to those issues, concisely identify the relevant law, and state how the law has been applied to the findings in order to decide the issues. Where the Judgment includes a financial award, the reasons "shall identify, by means of a table or otherwise, how the amount to be paid has been calculated".

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46. The relevant authorities are well known. An ET cannot just set out its basic factual conclusions. It must also state the reasons which led it to reach the conclusion it reached on the basic facts. An ET complies with Rule 62 if what Rule 62 requires can "reasonably be spelt out from the determination of the ET" (per Buxton LJ in paragraph 25 of **Balfour Beatty Power Networks Ltd v Wilcox** [2007] IRLR 63). As HHJ Hand QC said in **Greenwood v NWF**

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Retail Limited [2011] ICR 896 at paragraph 56, explaining a statement by Buxton LJ that the predecessor of Rule 62 was a guide and not a straitjacket:

> **"56. We take him to mean that a judgment will not be erroneous in law simply because the structure of the rule is not visible on the surface of the decision so long as its constituent parts can be unearthed from the material beneath. On the other hand, the constituent parts will need to be more than a formal statement paying lip service to the sub-paragraphs of the rule; the judgment must demonstrate substantial compliance. As in *Balfour Beatty* itself, the controversy will usually be as to rule 30(6)(c) and (e) and it will not be enough to set out the terms of the rule if there cannot be found in the rest of the judgment material that demonstrates substantial compliance with the terms of the rule."**

The Written Submissions

(1) The Claimant's Written Submissions

47. The Claimant draws attention to the statement in the Claimant's PD that "Unless otherwise indicated, I dispute the Respondent's entire application for costs".

48. The Claimant submits that the EJ failed to apply the tests in CPR 44.3 to counsel's fees and £33,200 of the work done on documents. It is submitted that "it must have been apparent that the Claimant disputed these claims for costs".

49. The Claimant draws attention to paragraph 20 of the Costs Order: "I allow Counsel's fees of £33,820 as claimed". The Claimant complains that the EJ did not ask himself whether the fees were reasonably incurred or reasonable in amount, or consider the factors in CPR 44.3(5) or in CPR 44.4(3) in deciding whether the fees were proportionately and reasonably incurred. The Claimant draws attention to the fact that the Claimant's pay before tax was £2,700 per month so that this was not likely to be a high-value case. The Claimant suggests that the Respondent could have used a less senior barrister, and paid a smaller brief fee and daily refreshers.

50. The Claimant makes similar points in relation to work done on documents. The EJ does not seem to have addressed his mind to the questions whether the total was either reasonably incurred or reasonable in amount. Such an analysis was done in relation to the work done on witness statements, the Claimant accepts. The ET did not consider the factors in CPR 44.3(5) or CPR 44.4(3) in deciding whether these costs were proportionately and reasonably incurred. Almost all the work was done by Rita Streets, a Grade B associate, charging £180 per hour, whereas the partners charged only £45 more per hour. There was very little use of junior members of staff. It was difficult to see how she could reasonably and proportionately have spent 203 hours working on documents. Much of the work consists of emails to her client, to the Claimant, to counsel and to the insurer. This is "confusing" as the EJ found that the routine letters to the client were "wholly disproportionate" and the attendances on counsel "unnecessary". Despite finding that, the EJ seems to have allowed all the costs of working on these emails. Many of these costs are arguably unreasonably incurred or unreasonable in amount. Overall the amount spent on documents was disproportionate to the modest value of the claim and having regard to the factors in CPR 44.4.

51. In support of the second ground of appeal, the Claimant argues that the ET failed to give adequate reasons for the amounts of costs he awarded. The Claimant acted in person at the assessment. The EJ noted that the Claimant had asked him to scrutinise the bill with care. There is no reasoning to support the award of all of counsel's fees or in support of the conclusion, if it was reached, that the amounts spent on documents were reasonably incurred and reasonable in amount. There is no reasoning which explains why the Claimant lost on these issues.

52. The Claimant submits that the amount of costs claimed at the time of the Remedy Hearing was some £99,000. He refers to the view, expressed by the ET in paragraph 157 of the Remedy Judgment, that it was unlikely that costs assessed on the standard basis would amount to the sum claimed by the Respondent or a figure close to that. Having expressed that view, the ET decided to award the Claimant a proportion of the total costs, assessed on the standard basis. By the time of the assessment, the bill had gone up to some £121,000. The Claimant objected to this in his PD. It is suggested that the ET only sent for assessment the costs claimed by the Respondent as at December 2016, not the costs of the entire proceedings. That is how the decision of the ET in the Remedy Judgment should be understood. After all, the ET did not find that the Claimant had behaved unreasonably after the Remedy Hearing.

The Claimant's Oral Submissions

53. In his oral submissions for the Claimant, after some hesitation, Mr Baker did not press the contention that the Claimant's invitation to scrutinise the Respondent's bill with care required the EJ to go through every line of the bill of costs and schedule, either in his head, or in the course of the hearing. He submitted, instead, that the EJ was required expressly to apply a three-stage test to each the disputed heads of costs, including counsel's fees and work done on documents. He was required expressly to ask, in relation to each head, whether the costs were reasonably incurred, reasonable in amount, and proportionate overall. Express findings of fact that costs under each head met all three tests were a legal precondition of any decision that the Respondent was entitled to those costs on the standard basis.

54. He was constrained to accept that the PD did not expressly make the point, either, that any the costs under those two heads were not reasonably incurred, were reasonable in amount and proportionate, or make any reasoned case why not. He submitted that the Claimant's

general statement that the whole costs application was disputed was enough to require the ET to adopt the approach he described (see the previous paragraph).

55. He accepted that the EJ's reasons were adequate in those parts of the Decision which the Claimant did not challenge, and that those parts of the Judgment disclosed no error of law, despite the fact that the EJ had not, in those parts of the Decision, gone through the bill of costs line-by-line. He accepted that, on the appeal, I was entitled to assume that the EJ had read the whole bill of costs. What the EJ had to do, he submitted, in relation to each head of costs, was to read the entire bill of costs, and form a view whether, taken as a whole, the heads passed the tests in CPR 44. He then had to record and express his views.

56. I asked him what function the PD should play. He said that they might play a role in focussing the dispute where the parties are professionally represented. Here, however, he submitted, although the PD asserted that counsel had assisted in their preparation, it must have been obvious to the EJ that the PD did not comply with the requirements of CPR 47 and that, in that situation, the EJ should give that assertion "very little weight". The PD, he suggested, did "not conform to any professional standards". "Assisted" could mean anything. He accepted that the PD were misconceived, but submitted that the EJ should have read them as putting in issue all of counsel's fees and all the work done on documents. The EJ should expressly have adopted the three-stage approach to counsel's fees, even though there was no express challenge to them. Had the EJ done so, the first ground of appeal would have failed.

57. Mr Baker accepted that the effect of the authorities about Rule 30 (the predecessor to Rule 62) is that Rule 30 imposed a requirement to give reasons which complied in substance with what is now Rule 62(5), but did not prescribe a specific template for an ET's reasons. The

sums of costs at issue were large for the Claimant. He was facing a five-figure costs bill. The reasons, in so far as they concerned work done on documents and counsel's fees, did not comply with Rule 62.

58. While accepting that the PD was misconceived in many respects, Mr Baker submitted that it did clearly raise an issue that it was "inequitable" to assess costs on a different basis from that recorded in the ET's Judgment on remedy. He did not emphasise the ET's guess about costs in paragraph 157 of the Remedy Judgment. He submitted that the Order made by the ET in its Remedy Judgment had to be read with Rule 78. He submitted, I think, that the Order after the Remedy Hearing was ambiguous because it was not clear whether the costs it ordered to be assessed were the costs incurred down to the date of the Remedy Hearing, or the costs incurred down to the date of the detailed assessment. If the effect of the Remedy Judgment was that the ET had adopted the former course, the ET on the detailed assessment would only have had power to order the Claimant to pay the costs of the detailed assessment if it had also found that the Claimant had behaved unreasonably in relation to the detailed assessment. He accepted that, if his submission was right, then, on one reading of the Remedy Judgment, the Respondent would be deprived of the costs of the detailed assessment which the ET had ordered, even though the ET had ordered that detailed assessment for the sole purpose of giving effect to its decision that the Claimant should pay part of the costs of the proceedings. That was so even though it would follow naturally in the civil courts that the Respondent would get the costs of the detailed assessment (a concession Mr Baker then immediately withdrew).

59. His position was that if the Respondent wanted the costs of a detailed assessment, the Respondent should have asked for those at the Remedy Hearing. If, having failed to ask for those costs at the Remedy Hearing, the Respondent wanted the EJ to make such an Order at the

hearing of the detailed assessment, the Respondent would have had to ask for those costs at that stage, and have persuaded the EJ that the Claimant had acted unreasonably in the course of the detailed assessment. He submitted that paragraph (ii) of section C of the PD was a submission that the Costs Order made after the Remedy Hearing was a "past-facing" Order, and not a "future-facing" Order. The EJ erred in law in not dealing with that submission expressly.

60. The Claimant asked for permission to add to Mr Baker's oral submissions. Mr O'Dempsey did not object to that application, so long as the Claimant's oral submissions were time-limited. I explained to the Claimant that Mr Baker had made very comprehensive written and oral submissions, but that, in the light of Mr O'Dempsey's expressed position, I would allow him to address me for ten minutes. With commendable economy, he finished what he wished to say in about eight minutes.

(2) The Respondent's Written Submissions

61. The Respondent summarises its submissions in five propositions:

i. The Judge had regard to the correct materials.

ii. The Judge applied the relevant principles correctly and proportionately in relation to the issues raised by the Claimant was sufficient specificity.

iii. It is not necessary for a Judge to repeat clearly stated principles each time a head of costs is discussed when the context makes clear that they are being applied throughout the Judgment.

iv. The Claimant understood (or ought to have understood) in relation to most of the heads of costs that the correct principles had been applied.

v. The decision is sufficiently reasoned to show why in each instance the Claimant's submissions did not succeed.

62. The EJ recorded the Claimant's admonition to scrutinise the bill with care because that was what the Claimant's PD said. But the PD did not set out the Claimant's points of dispute in enough detail as to enable the EJ to know what items were disputed, or why.

63. The Respondent submitted, in relation to ground 1 and counsel's fees, that the EJ must have applied the principles he stated a few paragraphs earlier, and which he applied to other heads of claim, to this heading. It was "fanciful to suppose that an Employment Judge would simply have forgotten the same principles, which are patently being applied, simply by moving from one head to another". The Respondent refers to the Respondent's justification for counsel's fees (bundle, page 360). The Claimant has never explained why he considered that counsel's fees should not be recovered in full, in the context of "hard-fought litigation".

64. The Respondent submitted that the EJ's approach was proportionate to the way in which the case was put by the Claimant in his PD. The Claimant did not take issue with the approach in paragraphs 17 to 19 of the EJ's Decision, in which it is plain that the EJ was applying the right principles, even though he did not expressly state the test. It made no sense to submit that the EJ suddenly forgot those principles when he reached paragraph 20. The EJ is to be taken to have concluded that all of the costs under this head were appropriate, other than those he specifically reduced. The EJ made an express reduction for overall proportionality.

65. The Respondent submitted that the EJ gave adequate reasons. The parties would have understood that the EJ had decided that the costs under both heads were reasonably incurred, reasonable in amount and proportionate to the matters in issue. It could be understood that the EJ did not consider that there was any relevant doubt to be resolved in the Claimant's favour.

66. Read as a whole, the EJ's Decision satisfied the requirements of Rule 62. Given the lack of specificity in the Claimant's PD, no greater detail was necessary.

67. The Respondent submitted, in relation to ground 3, that the Remedy Judgment did not restrict the detailed assessment in any way. The Remedy Judgment provided for the Respondent's costs to be assessed on a standard basis and for the Claimant to pay 25% of the Respondent's costs as so assessed. The EJ had to consider the bill of costs which the Respondent presented for assessment. The ET at the Remedy Hearing made clear that it had not assessed the Respondent's costs and not heard argument about them. The views it expressed about the likely outcome of the detailed assessment could not, as a matter of law, bind the EJ who did the detailed assessment. The Respondent's costs were what the evidence, in the shape of the detailed assessment, showed them to be. At the stage when the Respondent applied for its costs, they had not been the subject of a detailed bill.

Mr O'Dempsey's Oral Submissions

68. Mr O'Dempsey did not supplement his written submissions at any length. It was clear from the structure of the Judgment, read as a whole, he submitted, that the EJ had understood and correctly applied the law. It was clear that he had considered the detailed bill of costs. It was fanciful to suggest that the EJ should have given very little weight to the statement in the PD that they had been prepared with the assistance of counsel.

69. The PD did not, other than in the broadest terms, take sensible issue with the bill of costs. The colour coding of items in the bill of costs did nothing more than to take general issue with those items, without explaining why. The colours did not enable the EJ to understand what the nature of the challenge was. The Respondent submitted that I should consider how the

Claimant put his case when examining whether the EJ said enough to show that he had applied the right tests, and whether his reasons were adequate. Given the broad nature of the Claimant's challenge, the reasons given in relation to counsel's fees were adequate. The same applied to the reasons about work on documents.

70. The natural reading of paragraph 6 of the Judgment was that the EJ appreciated that he was, as per the Order on the Remedy Hearing, doing a detailed assessment of "one quarter of the costs of the Respondent". When construed against the terms of the provisions on the **Rules** about costs, that could only mean "the costs of the Respondent while it was legally represented". That, in turn, must mean the costs of the entire proceedings, including the costs of the detailed assessment. The EJ was required to, and did, assess the costs which had been incurred by the time that the amount which was to be paid was decided. The Claimant's construction should be rejected because the principles in the **CPR** included (CPR 47.20) that the receiving party was entitled to the costs of the detailed assessment and, in any event, because it penalised the receiving party if the ET decided to order a detailed assessment. Simplicity was the best guide to right construction of the **Rules** and of the ET's Decisions.

Discussion

71. I have summarised the factual and legal materials, and the parties' submissions, at some length. I can therefore consider the issues relatively briefly.

Grounds 1 and 2

72. As Counsel acknowledged, grounds 1 and 2 overlap significantly, and it is convenient to consider them together. There are five questions:

i. Did the EJ identify the issues he decided?

ii. Did the EJ concisely identify the relevant law?

iii. Did he make the findings of fact which he was required to make?

iv. Did he apply the law to the facts he found?

v. Did he sufficiently identify how the payment of costs had been calculated?

73. The EJ was not helped to identify what the issues were. As Mr Baker conceded, the PD made challenges to the bill of costs which were based on a misunderstanding of the Costs Order made at the Remedy Hearing. The purpose of the Order at the Remedy Hearing was to avoid the types of argument raised in the PD by awarding the Respondent a proportion of the total costs, a proportion which was designed to reflect such factors as the Claimant's partial success, and the reasonable arguability of parts of his case. The PD does not identify any distinct, reasoned challenge to the bill of costs made in accordance with the criteria set out in CPR 44. No reasoned challenge is made to counsel's fees, for example.

74. In that situation, the EJ had to do his best. What he seems to have done is, of his own motion, to have considered the bill of costs and to have isolated, and disallowed, or reduced, those parts of the heads of costs which, in his judgment, did not meet the criteria in CPR 44. It is clear that he did this carefully, and in some detail, for example, by reference to numbers of phone calls made. In other words, he gathered only from the PD that the Claimant wanted to pay as little as he could, and, with that in mind, the EJ "scrutinise[d] the bill of costs with care". He got no more help than that from the PD. In my judgment, the EJ was entitled to read the PD as giving him no specific steer about the items which the Claimant challenged on admissible grounds. In my judgment the EJ did sufficiently identify the issues he decided (see paragraph 6 of the Judgment).

75. I also consider that the EJ concisely, accurately and sufficiently identified the relevant law. He referred in paragraph 5 to CPR 44 and adequately summarised its effect. It is true that the summary in paragraph 5 is condensed. But all four steps identified by Mr Baker are implied in paragraph 5, even if they are not expressed in paragraph 5 in the Order, or in the precise words, of CPR 44. For example, the premise of the passage in CPR 44 which requires doubt to be resolved in favour of the paying party is that costs must be reasonably incurred and reasonable in amount. Moreover, all four steps are described on the second page of the PD, which, it is clear, the ET read.

76. Mr Baker submitted that, in relation to each item which the EJ allowed, the EJ was required to find expressly that the sum was reasonably incurred, reasonable in amount and proportionate, and that he had resolved any doubt in favour of the Claimant. I reject that submission. I do not consider that the Claimant had specifically put any of those points in issue in relation to the work on documents or counsel's fees. What the EJ did was to examine each of the broad heads in the bill with a critical eye, unassisted by any focussed submission from the Claimant, and decide whether or not he should disallow any items, by reference to the tests in CPR 44. To the extent that the EJ's Judgment is silent on the **CPR** criteria, the fair inference, from reading his Judgment as a whole, is that he was satisfied that the tests in CPR 44 were met. Similarly, he was only required to state that he had resolved a doubt in the Claimant's favour if he had a doubt. The fact that he mentions no doubts must mean, given his correct self-direction in paragraph 5, that he had none. The EJ did not adopt a mechanistic approach to the items he disallowed, and Mr Baker accepts that there is no error of law in those parts of the Judgment. In my judgment, if the EJ's Judgment is read as a whole, he made the findings of fact which he was required to make.

77. It is also clear in my judgment, from the passages of the Judgment in which the EJ disallowed items, that he did, in practice, apply the law he stated to the facts which he found, in relation to those items. It is particularly notable, in relation to the work on documents, that, not only did the EJ disallow specific items, he also reduced the overall total on grounds of proportionality. The only fair inference to be drawn from his silence on the other items of the work on documents was that he considered that they met the tests in CPR 44.

78. I also consider that the EJ sufficiently showed how he had calculated the total costs which he ordered the Claimant to pay.

79. For those reasons, I dismiss the first and second grounds of appeal.

Ground 3

80. I consider that the third ground of appeal raises four issues.

81. The first issue is what was meant by the terms of the Judgment on costs given by the ET after the Remedy Hearing, that is, that the Claimant pay "one quarter of the costs of the Respondent, to be determined by way of detailed assessment". I consider that the Order is to be construed by reference to the **Rules**, and that the **Rules**, in turn, are to be construed by reference to the overriding objective. I accept Mr O'Dempsey's submission, that, against that background, the simple construction is the best construction.

82. All the linguistic clues in the **Rules** point in favour of "costs" meaning "the costs of the proceedings". So, if the ET has made a Costs Order requiring the costs of the proceedings to be the subject of a detailed assessment, then the costs of the proceedings must include the costs of

the detailed assessment. Otherwise, a party who, the ET has found, is entitled to costs, must suffer the arbitrary penalty of having to pay extra in order to get the costs to which the ET has decided that it is entitled, if the ET also decides that the just course, rather than summarily to assess the costs, is to order that they be the subject of a detailed assessment. Mr Baker's construction (the premise of which was that the ET could order the costs down to the Remedy Hearing, or the costs up to the detailed assessment) also has the consequence that, if the ET makes an Order of the first type, the receiving party then has to satisfy the ET on the detailed assessment that the paying party has behaved unreasonably in relation to the detailed assessment. I do not consider that that is a just, or a sensible construction of the **Rules**.

83. The second issue raised by this ground of appeal is whether there was any question about the scope of the detailed assessment which the ET was required to decide. There was. In his PD, the Claimant, as the EJ recognised in paragraph 6 of the Costs Judgment, challenged aspects of the Costs Order itself. The Claimant argued, among other points, that it was "inequitable" for costs to be assessed "on a different basis from that recorded in the ET judgment" having regard to paragraphs 152 to 157 of the Judgment. In paragraphs 152 to 156, the ET considered the Claimant's ability to pay. I have summarised paragraph 157 at paragraph 14 above. In short, the ET expressed its view that it was unlikely that, on an assessment, on the standard basis the Respondent would get the sums the Respondent claimed, or anything close to it, but "we are not in a position to make that assessment and have heard no submissions on it". The ET then speculated about the possible outcome of a detailed assessment and decided to order one.

84. The Claimant's argument in paragraph (ii) of the PD was an argument that it was unfair, given the ET's speculative views about the outcome of a detailed assessment, to assess costs on

the basis of the bill of costs, because, he, in turn, speculated, had the ET known that the bill would disclose a greater sum, the ET might have ordered him to pay a smaller proportion of that bill. In other words, it was an argument that the EJ conducting the assessment should go behind the Costs Order, properly construed, and somehow use the figure in the application for costs as a starting point. It was another example of the Claimant's challenges to "the Costs Order itself".

85. The third issue is whether the EJ decided that issue. I consider that he did. He rightly rejected that challenge, with the other similar challenges, one example of which the EJ gave in paragraph 6 of the Costs Judgment.

86. The fourth issue is whether the EJ gave adequate reasons. I consider that he did. I do not consider that Rule 62 required the EJ, in paragraph 6 of the Costs Judgment, to itemise each of the misconceived challenges to the Costs Order which the Claimant made in his PD. It was sufficient for him to say, as he did, that the Remedy Judgment required him to assess the Respondent's costs and then to calculate what 25% of that amount was.

87. I therefore dismiss the third ground of appeal.

Conclusion

88. For those reasons, I dismiss this appeal.