Appeal No. UKEAT/0202/18/BA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 4 October 2019

Before

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

(SITTING ALONE)

MS J MOSS — APPELLANT

BUPA INSURANCE SERVICES LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS J MOSS (The Appellant in Person)
For the Respondent	MR ANDREW SUGARMAN (Of Counsel) Instructed by: DAC Beachcroft LLP St Pauls House 23 Park Square South Leeds LS1 2ND

SUMMARY

PRACTICE AND PROCEDURE - Costs

The Claimant contended that the ET's decision on costs was inadequately reasoned as it simply referred to the absence of unreasonable conduct on the part of the Respondent.

Held, dismissing the appeal: that the Claimant's appeal was rendered academic by the fact that the ET had exercised its discretion not to award costs in any event, and that part of the decision was not challenged. In any event, the reasons given, though brief, were adequate in circumstances where it was clear from the terms of the Liability Judgment and other documents presented to the Tribunal that there was no unreasonable conduct on the part of the Respondent.

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

1. This is the Claimant's appeal against a decision of the London Central Employment Tribunal ("the Tribunal") refusing the Claimant's application for a preparation time order. The factual background to this appeal may be stated quite briefly. The Claimant worked for the Respondent as a modelling actuary from 7 October 2013 until 30 September 2014. Following the introduction of a hot-desking system in January 2014, the Claimant raised some concerns which she said amount to public-interest disclosures. These included some health and safety concerns and concerns about the use of confidential information. The Respondent was also subject to a major restructuring exercise in 2014 as a result of which the Claimant's modelling actuary role disappeared. The Respondent proposed to make redundancies and decided to make offers of settlement to affected employees, including the Claimant. The offer comprised a discretionary redundancy payment of £5,727 and three months' notice pay of £18,615.

2. The Claimant was not content with the proposed terms which were, it must be said, offered in a rather peremptory manner. The Claimant was also offered £350 for legal advice. Having rejected the terms, she was escorted off the premises and she soon thereafter lodged proceedings in the ET. At the end of September 2014, the Claimant received her usual pay by bank transfer but she did not receive a pay slip. On 7 November 2014, she received pay in lieu of notice and holiday pay. She also received her September payslip some six weeks late. Her pension contributions were not paid for the months of October to December 2014.

3. The Claimant's claim form before the Tribunal contained many claims. These included claims for direct age discrimination, automatic unfair dismissal on the grounds that she had made protected disclosures, breach of contract in that her employer gave her pay in lieu of notice when

A the contract gave the employer no right to do so, failure to pay pension contributions, failure to pay and provide itemised pay statements. Some of these claims were subsequently withdrawn.

B 4. The Full Hearing came before Employment Judge Gay between 17 and 20 November 2015. The majority of the Claimant's claims, including the claims for age discrimination and automatic unfair dismissal by reason of public-interest disclosures, were dismissed. The Tribunal did accept that the Claimant had made two protected disclosures, but it concluded that she was not dismissed because of them.

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5. The Claimant's claim for breach of contract did succeed. The Claimant also established

D that she had not been provided with an itemised payslip for her pay; however, the payslips were supplied soon afterwards and contained the necessary information. Accordingly, the Tribunal found that it would not be just or equitable to make an award in respect of that breach. In dealing

E with financial remedy, the award by the Tribunal was £1,053.48, which comprised the employer's net pension contributions for the period between October and December 2014.

6. The Tribunal summarised and recorded its Judgment ("the Liability Judgment) on the

F various complaints as follows:

> **"1. It is recorded that the following complaints are dismissed on withdrawal:**
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> **1.1 Breach of contract and/or unauthorised deduction from wages for failure to pay accrued holiday pay, including pay that would have accrued if notice were properly given. Alternatively, if not unconditionally withdrawn, these claims would fail and be dismissed in any event.**

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> **1.2 Breach of contract complaints in respect of:**
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> - **Income protection cover;**
> - **Private medical insurance;**
> - **Fit and Assist cover;**

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> - **Eligibility for product discounts;**
> - **Loss of paid time off for training;**
> - **Loss of life insurance cover.**

2. The following complaints fail and are dismissed by the tribunal:

- Dismissal as direct age discrimination;

- Automatic unfair dismissal for public interest disclosure;

- Failure to engage in collective consultation;

- Breach of the obligation to provide written terms and conditions (really a form of remedy);

- Breach of contract claims in respect of: failure to pay the claimant's professional subscription; failure to pay for any continuing professional development courses attended in October to December 2014; failing to refund the value of the claimant's restaurant card

3. The claim for breach of contract by failure to pay a management staff bonus is outside the jurisdiction of the tribunal and is dismissed.

4. The following complaints succeed:

> **It is declared that the respondent breached the claimant's contract of employment by dismissing her without three months' notice (giving pay in lieu of notice instead).**
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> **Further and separately we declare that the respondent breached the contract of employment by failing to pay employer's pension contributions on behalf of the claimant for October-December 2014. £1,053.48 is due and owing to the claimant in respect thereof.**
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> **We declare that there was a failure by the respondent to provide timely itemised pay slips for September and October 2014. No further remedy is awarded under this head".**

7. The Liability Judgment was promulgated on 21 December 2015, and on 18 January 2016, the Claimant wrote to the Tribunal in the following terms: "I am writing within 28 days to ask the Employment Tribunal to make an Order for costs, particularly the reimbursement of the Employment Tribunal fees I had to pay against the Respondent." I pause here to note that the copy of that letter before me today, purportedly sent on 18 January 2016, is in a slightly different form. In particular, it refers to the application for costs as including the reimbursement of fees to be repaid rather than particularly for such fees to be repaid. The significance of that difference, according to the Respondent, is that the Claimant, by changing the wording, is attempting to make it easier for her to argue that her initial application was for a Preparation Time Order and was not focused exclusively on the recovery of fees.

8. I have considered the version of the document before me and the Tribunal's description of the one that it saw. It seems to me that whatever the reasons for the difference between the

two versions, the version which was sent to the Tribunal in January 2016 was, bearing in mind that it was sent by a lay person, sufficiently broadly worded to include an application for a Preparation Time Order. By a letter dated 23 February 2016, the Respondent's solicitor wrote to object to the Claimant's application on the basis that she had failed in the majority of the claim and had been awarded less than she had been offered before the hearing.

9. Employment Judge Gay wrote to the parties on 1 March 2016 to say that the Claimant's costs application would have to be determined by a full Tribunal either on the papers or after a further hearing. She mentioned that the Claimant had unsuccessfully appealed against the Liability Judgment in the meantime.

10. On 26 October 2017, Employment Judge Grewal wrote to the parties (Employment Judge Gay having by then retired) inviting submissions on costs. The parties were informed that the application would be dealt with by Employment Judge Grewal on the papers, unless she considered that a hearing was necessary. The parties made submissions. It was at that stage that the Claimant made clear that her application was for costs by way of a Preparation Time Order, including the recovery of Tribunal fees. On 20 November 2017, Employment Judge Grewal dismissed the application for costs and the recovery of fees. In her Judgment ("the Costs Judgment) sent to the parties on 22 November 2017, the Judge noted that the application for costs was made long after the time limit for applying for costs had expired. She went on to say as follows:

> **"6. The application for the other costs (preparation time and expenses) was made long after the time limit for applying for costs had expired. In any event, I am not satisfied that the Claimant has made out the grounds for applying for those costs. The failure to engage in settlement negotiations is not a ground for making those costs order. I am not satisfied that the Respondent acted unreasonably in conducting the proceedings or that its conduct led to any unnecessary costs being incurred. Even if the Claimant had established unreasonable conduct on the part of the Respondent, in exercising my discretion as to whether to award costs I would have taken into account the following. The Claimant lost the vast majority of claims that she had brought. She succeeded in only a small part of the claim. The Claimant had been offered considerably more than she was awarded before she commenced proceedings".**

11. It is against that Costs Judgment that the Claimant appeals today. The Claimant originally relied upon seven grounds of appeal. Permission to appeal was refused on the sift. However, at a Rule 3(10) Hearing conducted on 25 July 2018, I granted the Claimant permission to proceed on a single ground of appeal, which, following the hearing, was reformulated as follows: "Employment Judge Grewal failed to give any or any adequate reasons for her decision to refuse the Claimant's application for the costs of her preparation time." The appeal is therefore a reasons appeal based on the sole ground that the Tribunal failed to give adequate reasons for its decision and the Costs Judgment was not therefore, **Meek**-compliant (see **Meek v City of Birmingham District Council** [1987] IRLR 250).

Legal Framework

12. Rule 62 of the **ET Rules 2013** provides as follows:

> **"(1). The Tribunal shall give reasons for its decision on any disputed issue, whether substantive or procedural (including any decision on an application for reconsideration or for orders for costs, preparation time and wasted costs).**
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> **…..**
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> **(4) The reasons given for any decision shall be proportionate to the significance of the issue and for decisions other than judgments may be very short."**

13. The obligation to provide reasons in decisions relating to costs were considered by the Employment Appeal Tribunal ("the EAT") in **English v Emery Reimbold & Strick Ltd** [2002] 1 WLR 2049 Court of Appeal:

> **"14. It is an unhappy fact that awards of costs often have greater financial significance for the parties than the decision on the substance of the dispute. Decisions on liability for costs are customarily given in summary form after oral argument at the conclusion of the delivery of the judgment. Often no reasons are given. Such a practice can, we believe, only comply with Article 6 if the reason for the decision in respect of costs is clearly implicit from the circumstances in which the award is made. This was almost always the case before the introduction of the new Civil Procedure Rules, where the usual order was that costs followed the event. The new rules encourage costs orders that more nicely reflect the extent to which each party has acted reasonably in the conduct of the litigation. Where the reason for an order as to costs is not obvious, the Judge should explain why he or she has made the order. The explanation can usually be brief. The manner in which the Strasbourg Court itself deals with applications for costs provides a model of all that is normally required**
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> **….**

> **19. It follows that, if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the Judge reached his decision. This does not mean that every factor which weighed with the Judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the Judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the Judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, in may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon."**

14. It is clear from those provisions that costs Judgments may be very brief indeed. However, so long as it is possible for the parties to understand why an Order was or was not made, there would not be any error of law. In **The Governing Body of St Andrews Catholic Primary School & Ors v Blundell** [2010] UKEAT/0330/09/JOJ, the EAT dealt with a similarly brief decision on costs as follows:

> **"29. The Tribunal's reasons were succinct. It is the brevity of the Tribunal's reasoning which is, to our mind, the main point we will have to consider on this appeal.**
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> **…**
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> **39. Mr Neaman placed weight on what is called Meek compliance. This is a reference to Meek v City of Birmingham District Council [1987] IRLR 250 in which Bingham LJ stated that although the Tribunals are not required to create "an elaborate formalistic product of refined legal draughtsmanship" their Reasons should:**
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> > **"[…] contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the Reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the EAT or, on further appeal, this court to see whether any question of law arises; and it is highly desirable that the decision of an Employment Tribunal should give guidance both to employers and trade unions as to practices which should or should not be adopted."**
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> **40. This formulation, however, plainly applies to a judgment on the issues or some of the issues in the proceedings themselves. If the Tribunal has determined those issues and is then presented with an application for costs neither Meek nor rule 30(6) requires an elaborate rehearsal of all the background which the Tribunal has taken into account in reaching its findings. The parties will already know from the Tribunal's reasons on those issues what the Tribunal's findings were and why they were reached. In our experience, reasons given for decisions on questions of costs are often succinct. It is frequently a short matter of judgment whether conduct relied on is or is not capable of being characterised as unreasonable and then equally a short matter of judgment whether, in all the circumstances, a discretion should be exercised in favour of awarding costs.**
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> **41. At paragraph 14 in English v Emery Reimbold and Strick Ltd [2002] 1 WLR 2409, Lord Phillips, the Master of the Rolls, referred to the fact that decisions relating to costs are customarily given in summary form after all argument at the conclusion of the delivery of a Judgment. He said:**
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> > **"[…] Such a practice can, we believe, only comply with Article 6 if the reason for the decision in respect of costs is clearly implicit from the circumstances in which the award is made. […] Where the reason for an order as to costs is not obvious, the Judge should explain why he or she has made the order. The explanation can usually be brief. The manner in which the Strasbourg Court itself deals with applications for costs provides a model of all that is normally required."**

42. In this case we consider that the parties sufficiently know the reasons why the Tribunal reached the conclusions it did. On the threshold question arising under rule 40(3), it was not alleged in the application for costs that Mrs Blundell or her solicitors were under any legal duty to disclose information about the second year of the MA course. The question for the Tribunal was whether it was unreasonable not to volunteer such information. That was a short question for the Tribunal to decide. The Tribunal decided that it was not. That, in the context of the application and the response from the parties, is, to our mind, clear.

43. The Tribunal said that it had in mind the bitter and long-running nature of the dispute. That is not surprising and it needed no explanation to the parties. This was not litigation according to old-fashioned Rules of chivalry. The Tribunal found the School had sought to reopen the question of Mrs Blundell's capability going behind the findings in the liability Judgment. The Tribunal had made an award of aggravated damages. The papers which we have seen indicate the lengths to which the litigation had gone. There had even been an application for disclosure of photographs of a party, an application by the School given short shrift by the Tribunal. The Tribunal was entitled to take the view, which in our judgment it plainly did, that it was not unreasonable Mrs Blundell, in the absence of any legal duty, to take the stance she did.

44. In any event the Tribunal stated its conclusion that it would not have awarded costs having regard to the overall picture. Contrary to Mr Neaman's submission, we consider that at this second discretionary stage the Tribunal is entitled to look at the overall picture when it decides to make an award of costs. In this case the overall picture was well-known to the parties. It did not require elaboration in great detail by the Tribunal for them to understand the position.

45. Each side had been successful on some aspect of the litigation. But significantly, the School had been found to have victimised the Claimant, accusing her of being a failing teacher, and making the allegations maliciously and persisting in them even at the remedies hearing. We appreciate and accept that the Tribunal's reasoning is succinct. It might have been well advised to have spelt out its reasons in more detail but we are quite satisfied that given the background it was obvious to both parties what matters the Tribunal had in mind. Echoing the words of Mummery LJ in Dean, we do not think we are entitled to interfere merely because we, as an appellate court, might have given Reasons in more detail."

15. It can be seen therefore that where the overall picture is clear from the Judgment and the material before the Tribunal, a Judgment on costs, which involves, as the EAT said in the **Blundell** case, "A short matter of Judgment as to whether conduct relied upon is or is not capable of being characterised as unreasonable and an equally short matter of Judgment, whether in all the circumstances of discretion should be exercised in favour of awarding costs," can be very brief indeed.

Submissions

16. Ms Moss represented herself this morning. She submits that as the reasons point had been allowed to proceed to a Full Hearing, and, as the EAT had at one point considered making a **Burns/Barke** Order for further expansion of the Tribunal's reasons, it was obvious that the reasons were inadequate and that the appeal should be allowed. I pause here to note the fact that although a **Burns/Barke** order was considered, one was not made because of the Claimant's objections to the same.

17. Ms Moss also submitted that Employment Judge Grewal did not hear the case and was not therefore, in a position to assess whether conduct was unreasonable. She said that the matters taken into account by Employment Judge Grewal in the exercise of her discretion were not correct. In particular, it was wrong to attach much weight to the offers made before the hearing because these had "strings attached" in terms of confidentiality and tax indemnities, making them impossible for her to accept. Ms Moss also contends that she was successful on the issues that were important to her such as whether there had been protected disclosures. As for the Respondent's conduct itself, there were problems with the Respondent's disclosure in that the data she had requested were not all provided by the dates set out, that there were delays in providing information, and that although she was supposed to receive a bundle by a particular date, she received the bundle late. All of that, to her mind, amounted to unreasonable conduct.

18. Mr Sugarman, who appears for the Respondent but did not appear below, submits that although the reasons for the decision on costs are brief, they must be read in the context of the Liability Judgment and the way in which the parties' cases were put. Viewed in that way, he submits that it is clear that the decision is adequate and leaves the parties in no doubt as to why the decision on costs was as it was. He points out that the Tribunal was correct to find that the

Claimant was out of time, and that was a further reason why the reasons were as brief as they were. He highlights, in particular, the fact that the Tribunal dismissed nearly all of the substantive complaints that the Claimant had pursued at the hearing. In his skeleton argument, he said that only one page out of the 31-page Liability Judgment deals with the Claimant's successful claims.

19. Furthermore, he submits that the Tribunal had regard to the fact that the Claimant had been offered considerably more by way of compensation by the Respondent at the time of her termination than she had recovered through her claim and to the fact that she had withdrawn many of her complaints at the Preliminary Hearing. These are matters which, in the context of this claim, adequately explain the refusal to award costs.

20. That context also included the fact, submits Mr Sugarman, that the claim was badly pleaded, described by Employment Judge Gay as being "discursive" requiring much clarification, that she had lost most of the claim and that none of the Respondent's conduct was unreasonable in any event. As to that conduct, Mr Sugarman submits that the Claimant's complaints focused largely on criticisms about disclosure in relation to age and nationality statistics. He points out that the claims to which the statistics related were either withdrawn or dismissed by the Tribunal. A further order was made in respect of disclosure by Employment Judge Nelson at a Preliminary Hearing on 22 October 2015. That related to a different set of information than that which was originally requested following the first Preliminary Hearing. There was nothing unreasonable or even worthy of criticism submits Mr Sugarman, in the Respondent's approach to disclosure.

21. In any event, he submitted that even if the EAT did not accept those arguments, this was a case where the Tribunal refused to award costs in the exercise of its discretion, and the Claimant's challenge to the assessment of conduct is thereby rendered academic. The

Respondent's skeleton argument reminds me of the principles established in the cases of **Barnsley Metropolitan Borough Council v Yerrakalva** [2012] IRLR 78 and **Dean and Dean Solicitors (A Firm) v Dionissiou-Moussaoui** [2011] EWCA Civ 1331 at paragraph 26, which state that there is very limited scope for an appellate court to interfere with the Tribunal's exercise of discretion in relation to costs.

Discussion

22. The application made by the Claimant for costs was on the grounds that there had been unreasonable conduct on the part of the Respondent. In dealing with such an application, the Tribunal is required to deal with the matter in three stages: the first is to determine whether there was unreasonable conduct such as would open the door to the exercise of discretion; the second is to consider whether costs should be awarded in the exercise of that discretion; the third and final stage is, if the applicant succeeds in the first two stages, to assess what those costs would actually be.

23. In the present case, the Tribunal's clear conclusion was that even if the Respondent had been found to have acted unreasonably, it would not have exercised its discretion to award costs. There is no appeal against that part of the Costs Judgment. In any event, any such challenge would be very likely to fail given the broad discretion afforded to Tribunals in such matters – see **Yerrakalva**. Moreover, it is clear, in my judgment, that the matters upon which the Tribunal relied in the exercise of its discretion not to award costs were sound. The Tribunal took into account three matters, the first of which was that the Claimant lost the vast majority of the claims that she had brought. This was a highly relevant factor, as the numerous claims brought by the Claimant clearly resulted in substantial time being spent on claims which, in the event, did not succeed.

24. The second factor relied upon was that she had succeeded in winning only a small part of her claim. That was correct and it was a factor properly taken into account. The Claimant's primary complaints were ones that were bound to take up the most time. The Respondent cannot be said to have acted unreasonably in responding to those claims. As for the offer, which is the third factor that the Tribunal took into account, that too was a legitimate matter for the Tribunal to consider. Although the Claimant complained that the offer had strings attached, those conditions appear to me to be relatively standard, and it was right for the Tribunal to note that the amount offered was considerably greater than the amount eventually recovered.

25. On that basis, it seems to me that there is force in Mr Sugarman's arguments that the decision on the discretion stage of the analysis was such as to render the main challenge brought by the Claimant academic in any event. However, notwithstanding that conclusion, I go on to consider the substantive ground of appeal, namely the inadequacy of reasons.

26. It is clear from the authorities considered above that the reasons for a decision on costs can be relatively brief so long as it is clear from the context what the basis for the decision was. Here, the Tribunal said that it was not satisfied that the Respondent acted unreasonably in conducting the proceedings or that its conduct had led to any unnecessary costs being incurred. That conclusion was perfectly easy to understand, notwithstanding the fact that it was not further expanded upon, if one considers the Liability Judgment and the further documentation to which the Tribunal referred.

27. As to the Liability Judgment, the claim form was referred to as being "discursive", reference is made to the fact that three Preliminary Hearings were necessitated in an attempt to sort out the complaints made and the details of those together with necessary disclosure. There

is no explicit or, indeed, implicit criticism of the Respondent in any part of the Liability Judgment. We can construe from that that the Tribunal considered the Respondent's responses to the claims brought by the Claimant as being reasonable.

28. As to the particular complaints of unreasonable conduct relied upon by the Claimant, the first broad ground is that the Respondent had disobeyed the Tribunal's orders, some repeatedly, in the run-up to the hearing. It is understandable from the perspective of a litigant-in-person why it might be thought that some of the conduct on behalf of the Respondent was unreasonable. However, if one looks at it objectively, it is clear that none of the conduct gets anywhere close to the high threshold of unreasonableness. The Respondent was, in broad terms, compliant with the various orders. It may not have complied to the complete satisfaction of the Claimant at this stage, and it may have required some further toing and froing before the matter was fully disposed of, but that is not unusual in litigation of this nature, and it is clear from the various Preliminary Hearing Judgments that none of the three Judges dealing with the preliminaries considered that the Respondent had acted unreasonably in any way in addressing the complex and detailed claims being put forward by the Claimant.

29. Whilst I have some sympathy for the Claimant's position, and indeed that of any litigant-in-person where a party with professional assistance provides disclosure in what appears to be 'dribs and drabs', or provides a bundle slightly late or in a format that is not quite what is expected, the question is not whether the conduct of litigation is unsatisfactory as far as the Claimant is concerned but whether it is unreasonable. For reasons already stated, there is nothing here to suggest that it was.

30. The Claimant also says that an unnecessary extra hearing was required because of the Respondent's conduct. It does not appear to me that that is the case. As stated already, the third Preliminary Hearing ordered further disclosure following the Claimant's age discrimination complaint and required the Respondent to provide material that had not been identified at the first Preliminary Hearing. That seems to be a typical clarification exercise which the Tribunal would be expected to undertake prior to a Full Hearing and it does not indicate that the Respondent's behaviour was unreasonable.

31. The Claimant also contends that the offer made by the Respondent itself amounted to unreasonable conduct. As I have already said, the offer was made with conditions attached that do not appear at all unusual in this sort of litigation. In any event, there is nothing in that conduct which could conceivably be described as unreasonable.

32. These matters were set out in the Claimant's submissions and these were referred to by the Tribunal in Costs Judgment. Having regard to these matters and those set out in the Liability Judgment, it is my view that the Tribunal has adequately explained why it considered that the Respondent had not acted unreasonably in conducting the proceedings or that the Respondent had not acted in any way that led to unnecessary costs.

33. Although it would have been preferable for the Tribunal to have set out its Reasons more fully, I do not consider it to be an error of law for it not to have done so. It is clear from the authorities to which I have referred that the fact that this appeal tribunal might have expressed the reasons more fully does not provide an appropriate or adequate basis for interfering with the Tribunal's decision on costs.

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34. For all of these reasons, and notwithstanding Ms Moss' courteous and helpful submissions this morning, this appeal is dismissed.

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