Appeal No. UKEAT/0184/19/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 14 November 2019

Before

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

(SITTING ALONE)

MR V MIHAILESCU — APPELLANT

BETTER LIVES (UK) LIMITED t/a BLUEBIRD CARE (IPSWICH) — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR V MILHAILESCU (The Appellant in Person) and MS ANA UNTILA (Interpreter)
For the Respondent	No appearance or representation by or on behalf of the Respondent

SUMMARY

PRACTICE AND PROCEDURE - Costs

The Employment Tribunal erred in concluding that the threshold requirement for the exercise of discretion as to costs had been met.

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

1. I shall refer to the parties as they were below. The Claimant appeals against the Judgment of the Bury St Edmunds Employment Tribunal ("The Tribunal") awarding £5,000 of costs against him. The Claimant represents himself and has been assisted this morning by an interpreter. It has, at times, been difficult to ensure that the Claimant's focus remains on the challenge to the Tribunal's Judgment as to costs ("the Costs Judgment") and not its judgment on liability ("the Liability Judgment") about which he is also aggrieved.

2. The Respondent has not appeared at this Hearing. It has confirmed, by way of an email dated 21 October 2019, that it would not be opposing or otherwise taking part in the appeal. This appeal has not, therefore, been fully argued by both sides. This Judgment of the Employment Appeal Tribunal is very much one confined to its own facts and should not be seen as establishing any wider point of principle in relation to costs judgments.

The Factual Background

3. The Claimant was employed by the Respondent as a Care Worker. His employment commenced on 30 April 2015. At that stage, he entered into a written agreement which described him as an employee. The contract was described as a zero-hours contract which stated that there was no guarantee of work or any minimum hours. It appears that the Claimant ceased to be provided with any work as from 9 June 2016.

4. The Claimant issued proceedings before the Tribunal on 24 October 2016. He had brought claims for notice pay, holiday pay, arrears of pay, and other payments. In its response dated 25 November 2016, the Respondent denied that the Claimant was an employee or even that he was a worker of the Respondent. It asserted that the Claimant had, at all times, been

self-employed. On that basis, the Respondent contended that the Tribunal did not have jurisdiction to hear any of the claims being brought by the Claimant, most of which were dependent on him having the status of an employee.

5. A Preliminary Hearing was listed to determine the Claimant's employee status ("the Status Hearing"). The Status Hearing was originally listed to be heard on 16 February 2017. However, the Claimant was unable to attend for medical reasons, and the matter was relisted to be heard on 26 May 2017. On that day, Employment Judge Laidler heard evidence from both the Claimant and the director of the Respondent, Mr Dhir, and considered documentary evidence, including the written terms on which the Claimant was engaged. The Tribunal came to the very clear conclusion that the Claimant was an employee. Indeed, Mr Dhir accepted that the letter issued to the Claimant upon the commencement of the relationship was a contract of employment. The Tribunal emphatically rejected the Respondent's contention that the Claimant was self-employed. The Respondent had even gone as far to suggest that the Claimant was not a worker. As to that contention, the Tribunal found that it was not clear how and why the Respondent sought to maintain that the Claimant was not a worker.

6. The Tribunal, therefore, concluded that the Claimant was an employee working under a contract of employment, and that it did, therefore, have jurisdiction to determine the Claimant's claims, which were based on employee status. The Tribunal also found, in the alternative, that the Claimant would have been found to be a worker and entitled to bring claims under the **Employment Rights Act 1996**. The Tribunal did not have time at that hearing to clarify the issues and a further preliminary hearing was arranged in order to do that. The Tribunal also noted, at paragraph 62 of the Judgment that it had not made any findings in relation to rates of payment or as to how the relationship between the Claimant and the Respondent had ended. Those matters were left to the substantive hearing.

7. The further preliminary hearing took place on 25 August 2017. At that hearing, the Claimant confirmed that he was not pursuing an unfair dismissal claim or a claim that he had been paid in breach of the national minimum wage. The Tribunal explained to the Claimant that the Tribunal did not have jurisdiction to deal with certain matters, and the issues which were identified for consideration were claims for breach of contract arising out of the alleged failure to pay the Claimant his contractual wages and overtime hours, compensation for loss of earnings since 9 June 2016, holiday pay, which, at that stage, was valued by the Claimant at £4,861.85, and failure to provide pay slips.

8. The Liability Hearing took place on 4, 5, and 23 January 2018, also before Employment Judge Laidler. The Claimant was unrepresented, although he was assisted by an interpreter as he was today. The Respondent was represented by Mr Clarke, a solicitor.

9. The Tribunal dismissed all of the Claimant's claims save for the claim in respect of holiday pay. The Tribunal stated that, at the Liability Hearing, the Claimant had tried to resurrect matters which he had previously been told could not be pursued before the Tribunal. As to the holiday pay claim, the Respondent accepted, at the hearing, that the Claimant is entitled to holiday pay, but not for the amounts claimed. The Respondent accepted that the amount due and payable to the Claimant was £2,498.47, gross. It would appear from the terms of paragraph 10 of the Liability Judgment, that the Respondent only accepted liability for any amount of holiday pay at the hearing itself.

10. The Respondent then applied for its costs. It submitted a schedule setting out a total of £22,383.10 plus VAT in respect of those costs. Unfortunately, neither the application nor the schedule of costs are before the Appeal Tribunal today.

11. The application for costs was heard on 29 November 2018, again before Employment Judge Laidler. Once again, the Claimant was acting in person, assisted by the interpreter, and the Respondent was represented by Mr Clarke.

The Costs Judgment

12. The Tribunal reminded itself that the Claimant had previously withdrawn certain of his claims and that he had been told that it did not have jurisdiction to deal with certain other claims. The Tribunal also reminded itself that the Claimant had been told about the Tribunal's power to award costs, as recorded at paragraph 11 of the Liability Judgment. It also referred to the costs warning stated in the Respondent's ET3.

13. At paragraph 7 of the Costs Judgment, the Tribunal referred to paragraphs 5 through to 10 of the Liability Judgment as matters taken into account in the Tribunal's decision on costs. At paragraph 9, the Tribunal noted that it had found the Claimant's evidence to be contradictory and not credible. Having referred to the relevant Rules on costs, the Tribunal went on to set out its conclusions:

> **"12. The Tribunal is satisfied the Claimant has acted unreasonably in the bringing of these proceedings and in the manner in which they have been conducted and that the majority of the claims had no reasonable prospects of success. As such the Tribunal's discretion to award costs arises. The Claimant who at the outset had advice from a Citizens' Advice Bureau chose to pursue claims that were not within the jurisdiction of the Tribunal. This was explained to him at the preliminary hearings, but he still tried to pursue them. It does not appear that the Claimant sought further advice on his position.**
>
> **13. The Claimant is aggrieved that he was working under a zero hours contract and how his pay was calculated, but the Tribunal found at a preliminary hearing that he was employed under a zero hours contract. It had to remind him on numerous occasions that it could not revisit that finding or look into whether or not it was a 'fair' term of the contract.**
>
> **14. The Claimant kept changing the basis of his claims. He came to the full merits hearing claiming over £80,000. This was a significant claim that the respondent had no choice but to incur costs in defending. The Claimant cannot criticise the respondent for so doing.**
>
> **15. Even at this hearing, the Claimant has sought to argue the issues in his claim rather than focus on the issue of costs."**

14. Having concluded that the discretion to awards costs was engaged, the Tribunal went on to consider whether to make such an order and, in doing so, had regard to the Claimant's ability to pay. The Tribunal concluded that the Claimant should not have to pay costs for the Status Hearing on 26 May, when it was found that he was an employee and on 25 August, which was

a standard hearing, to clarify the issues. After referring to a couple of authorities, the Tribunal concluded as follows:

> **"21. Having considered all the circumstances, the Respondent's cost schedule and the bills to the Respondent had accompanied it and giving consideration to the Claimant's ability to pay, the Tribunal has concluded an award of £5,000 inclusive of VAT and disbursements should be made to cover, in effect, some of the costs of the full merits hearing which could have been avoided had the Claimant not acted unreasonably in pursuit of these claims.**
>
> **22. How that sum is to be paid will be a matter for the County Court if the Respondent seeks to enforce the award."**

Legal Framework

15. Rule 76 of **The Employment Tribunal Rules of Procedure 2013** ("the ET Rules") govern the awarding of costs by the Tribunal. Insofar as it is relevant, it provides at Rule 76:

> **"When a costs Order or a preparation time Order may or shall be made**
>
> **76.-(1) A Tribunal may make a costs Order or a preparation time Order, and shall consider whether to do so, where it considers that-**
>
> **(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or**
>
> **(b) any claim or response had no reasonable prospect of success."**

16. Rule 84 of the **ET Rules** deals with the ability to pay. It provides:

> **"Ability to pay**
>
> **84. In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay."**

17. It is well-established that the structure of these provisions dictates a three-stage approach: The Tribunal must first consider the threshold question of whether any of the circumstances identified in Rule 76(1) applies and, if so, it must then consider separately, as a matter of discretion, whether to make an award of costs. If it is decided that an award of costs should be made, the final stage is to decide what amount of costs to award: see **Vaughn v London Borough of Lewisham (No. 2)** [2013] IRLR 713 and **Haydar v Pennine Acute NHS Trust** [2017] UKEAT0141/17/BA at paragraph 25.

18. It is also well-established that as a decision on costs involves the exercise of discretion by the Tribunal, the Employment Appeal Tribunal will rarely interfere with the Tribunal's decision. In **Barnsley Metropolitan Borough Council v Yerrakalva** [2012] ICR 420, Mummery LJ held as follows:

> **"6. The Tribunals below did not agree about the exercise of the discretion. That is not surprising. A familiar feature of all litigation is that experienced Judges may sensibly differ on how, in the particular circumstances of the individual case, a costs discretion should be exercised. Parties and prudent advisers should take account of that factor when considering whether a costs order is worth appealing.**
>
> **7. As costs are in the discretion of the ET, appeals on costs alone rarely succeed in the EAT or in this court. The ET's power to order costs is more sparingly exercised and is more circumscribed by the ET's Rules than that of the ordinary courts. There the general Rule is that costs follow the event and the unsuccessful litigant normally has to foot the legal bill for the litigation. In the ET costs orders are the exception rather than the Rule. In most cases the ET does not make any order for costs. If it does, it must act within Rules that expressly confine the ET's power to specified circumstances, notably unreasonableness in the bringing or conduct of the proceedings. The ET manages, hears and decides the case and is normally the best Judge of how to exercise its discretion.**
>
> **8. There is therefore a strong, soundly based disinclination in the appellate Tribunals and courts to upset any exercise of discretion at first instance. In this court permission is rarely given to appeal against costs orders. I have noticed a recent tendency to seek permission more frequently. That trend is probably a consequence of the comparatively large amounts of legal costs now incurred in the ETs.**
>
> **9. An appeal against a costs order is doomed to failure, unless it is established that the order is vitiated by an error of legal principle, or that the order was not based on the relevant circumstances. An appeal will succeed if the order was obviously wrong. As a general Rule it is recognised that a first instance Decision-maker is better placed than an appellate body to make a balanced assessment of the interaction of the range of factors affecting the court's discretion. This is especially so when the power to order costs is expressly dependent on the unreasonable bringing or conduct of the proceedings. The ET spends more time overseeing the progress of the case through its preparatory stages and trying it than an appellate body will ever spend on an appeal limited to errors of law. The ET is familiar with the unfolding of the case over time. It has good opportunities for gaining insight into how those involved are conducting the proceedings. An appellate body's concern is principally with particular points of legal or procedural error in Tribunal proceedings, which do not require immersion in all the details that may relate to the conduct of the parties."**

The Grounds of Appeal

19. The grounds of appeal, which were drafted by the Claimant, are not entirely clear. However, as I determined on the sift in this matter, the principle contention is that the Tribunal erred in awarding costs in circumstances where the Respondent has consistently resisted all aspects of the claim, including employee status, there had been some findings in the Claimant's favour, and the Claimant had succeeded in part of his claim in relation to holiday pay. In those circumstances, it was said that the Tribunal erred in reaching the conclusion that the Claimant

had acted unreasonably "*in the bringing of these proceedings*". The Claimant further contends that, as he succeeded in part, and he was ultimately awarded some compensation, the pursuit of some unmeritorious claims, where there was no deposit order against him, did not render his conduct unreasonable such as to trigger the costs jurisdiction. It is further argued that the Tribunal erred in assessing the amount of costs awarded and that there was no or no adequate explanation of the basis on which the sum of £5,000 was reached. In particular, it was not clear to what extent the unreasonable conduct extended what was a relatively short hearing and what additional costs would have been incurred by the Respondent as a result.

Submissions

20. The Claimant, with the assistance of the interpreter, submitted that there had not been any finding that he was on a zero-hours contract at the Status Hearing and that the Judge was wrong to prevent him from raising that issue. He had understood it would be addressed at the Liability Hearing. He said that he did not seek to resurrect certain claims but that the Tribunal had wrongly got that impression from the fact that the Respondent had included in the bundle an old witness statement prepared prior to the Status Hearing, whereas he had wished to rely on a newer statement which contained different matters relevant to his having employee status. The Claimant made various other points relating to the Liability Judgment which are not relevant to this judgment.

Discussion

21. As stated above, the Tribunal is required to consider, first, whether any of the circumstances set out in Rule 76.1 apply so as to confer on the Tribunal the discretion to award costs. The Tribunal relied on two matters:

> **(a) the majority of the claims had no reasonable prospect of success, and**
>
> **(b) he had acted unreasonably in the proceedings and in the manner in which they had been conducted.**

22. As to the first of these matters, the Tribunal did not specify which claims it considered had no reasonable prospect of success. I have considered the ET1 in this matter. I note that it does not include any claims under the **Data Protection Act** or the **Health and Safety at Work Act**. In the Liability Judgment, the Tribunal refers to these claims as having been raised in recent correspondence. There was never any formal attempt, as far as I can see, to amend the Claimant's claim to include such issues, and they were not identified as issues at the Preliminary Hearing in August. To the extent, therefore, that the Tribunal included the **Data Protection Act** and the **Health and Safety at Work Act** claims as ones that had been pursued without reasonable prospect of success, it was wrong to do so. They were not claims at any stage. The fact that a litigant in person might mention such matters in correspondence does not make them claims, still less that they are claims being pursued without reasonable prospects of success.

23. As for the remaining claims, there was a reference to a claim for unfair dismissal. However, although the Claimant appeared in his ET1 to seek compensation and re-engagement, it seems to have been clarified at an early stage that that claim was not one that was being pursued. The Claimant did pursue a claim of wrongful dismissal. That was pursued without objection from the Respondent. It cannot be said to have been unreasonable to do so.

24. That leaves the claims for breach of contract, holiday pay, and failure to provide pay slips. The claim for holiday pay succeeded; the claim for breach of contract did not. However, there was no indication at the Status Hearing that the claim for breach of contract was a wholly unreasonable one to pursue. Indeed, the Tribunal expressly stated that it had not made any findings as to the rates of pay claim and that this would be a matter to be dealt with at the substantive hearing. There was no application for a deposit order in respect of these matters.

A The only consideration given to a deposit order application was in respect of pay since 9 June 2016.

B 25. Whilst the Tribunal did not find in the Claimant's favour in respect of the breach of contract claim, it cannot be said that it had no reasonable prospects of success. The Tribunal considered that claim over several pages in the Liability Judgment and ultimately accepted the Respondent's evidence that the correct amounts were paid. That was a finding that the Tribunal C was entitled to reach on the evidence. It did not necessarily mean that the claim had no reasonable prospects of success.

26. The Tribunal did note that the Claimant's concerns were more about the zero-hours D contract and it may be that that concern, persistently pursued, was what coloured the Tribunal's Judgment. The Tribunal's view, however, was that this was a matter that had already been determined at the Status Hearing and could not be raised again. I have considerable doubts as E to the correctness of that view.

27. The Judgment at the Status Hearing was that the Claimant was an employee and that the Tribunal had jurisdiction to consider the claims. The only reference to zero-hours contract in the entire judgment that I can see is at paragraph 11, where the Tribunal does no more than set F out what the terms of the contract provided in that regard. There is no analysis at all as to whether that term reflected the reality of position. Given that the Claimant had been arguing that the Respondent was not entitled to rely upon the zero-hours provision to simply stop giving G him work, and given that the Tribunal had made no findings as to how the relationship had ended, it is not surprising that the Claimant was left to believe that the zero-hours issue was still one that would be considered at the Full Liability Hearing. Indeed, the Claimant stated, in terms today, that that was what he was told at the Status Hearing. This seems to me something H

that was consistent with the Tribunal's statement that it had not made any findings as to how the relationship had ended.

28. As such, it was not unreasonable for the Claimant to pursue this issue, and nor is it one that could be said to have had no reasonable prospect of success insofar as it related to the issue of termination. A zero-hours contract is not, in and of itself incompatible with there being a termination. The Tribunal rejected the Claimant's wrongful dismissal claim, and it concluded that he was not dismissed because it was a zero-hours contract and no further work was offered. However, as I said, in the absence of any proper analysis, either at the Status Hearing or the Liability Hearing, about the zero-hours element of the contract, and given the implication that it would be dealt with subsequently, it was not unreasonable for the Claimant to continue to pursue that issue.

29. The Tribunal was undoubtedly correct to conclude that some of the Claimant's claims, such as the claim for loss of earnings since 9 June 2016, had no merit. However, I consider that, insofar as it concluded that "the majority" of claims had no prospect of success, it fell into error, and it reached a conclusion that was not supported by the evidence. The jurisdiction to award costs was not engaged by reason of that matter.

30. As to the conclusion that the Claimant had acted unreasonably in bringing and conducting the proceedings, the position, in my view, is that the Tribunal also erred in this regard. The Claimant clearly had a sound complaint that he was an employee. That was the underlying basis for several of his other complaints. It was a claim that was strongly, and, arguably, unreasonably resisted by the Respondent from the outset. Moreover, the Claimant had a valid holiday pay claim which succeeded. Given that background, the fact that some claims are unmeritorious or do not succeed does not mean that the bringing of proceedings was unreasonable. Particular latitude may be afforded to a litigant in person such as the Claimant, who may not have the ability or access to expertise to be able to differentiate clearly between

meritorious and unmeritorious claims. It cannot be said, in the circumstances of this case, that the Claimant had acted unreasonably in bringing the proceedings insofar as that refers to the entirety or even the majority of the proceedings.

31. I turn, then, to the second limb of the Tribunal's finding on unreasonableness, which is in relation to the manner in which the Claimant had conducted proceedings. For the reasons set out above, I do not consider that the Claimant did conduct himself unreasonably in continuing to pursue, for example, the zero-hours claim. As for other aspects of this claim, which the Tribunal considered had been pursued unreasonably, such as the **Data Protection** and **Health and Safety at Work Act** claims, it does not appear that those were, in fact, claims at all: see above. The finding that the Claimant continually sought to resurrect claims that he had been told he could not pursue appears to arise out of his attempts to raise claims in respect of those matters, i.e. Data Protection and Health and Safety at Work. However, some of these had only been raised recently before the Liability Hearing, and it does not appear that there was a repeated attempt to resurrect them. I also take on board what the Claimant says about the incorrect reliance upon the older witness statement which was put in the bundle by the Respondent. As the Respondent has chosen not to appear today to clarify or correct the Claimant, I am prepared to accept what he says as being correct. Taking all of these matters into account, it seems to me that the Tribunal erred in concluding that the Claimant was acting unreasonably in the bringing and conducting of proceedings and that it had jurisdiction to award costs.

32. The next question for the Tribunal was whether, in the exercise of its discretion, costs should be awarded at all. The Tribunal noted that costs do not follow the event and concluded that the Claimant should not have to pay costs for the hearing on 26 May when it was found that he was an employee, and the 26 August, which was a standard hearing to clarify the issues. That was clearly correct.

33. I bear in mind the warning in **Yerrakalva** against interfering with the exercise of discretion. It was said there that an appeal against a costs order is doomed to failure unless it is established that the order is vitiated by an error of legal principle or that the order was not based on the relevant circumstances. It seems to me that, in the circumstances of the present case, the Tribunal did fail to take into account certain significant matters.

34. The first is that the Respondent had unreasonably resisted a claim as to employment status:

> **(a) At the Status Hearing, Mr Dhir for the Respondent had accepted in oral evidence that the letter of 30 April 2015 was a contract of employment, thereby contradicting the case that had been put by the Respondent up to that stage.**
>
> **(b) The letter sent to the Claimant at the time referred to him being an employee throughout.**
>
> **(c) The Tribunal accepted the evidence of the Claimant which it regarded as "entirely convincing".**
>
> **(d) The Respondent sought to embark on various arguments to deny employee status which were unsupported by evidence: see, for example, paragraph 26 of the Status Judgment, in which the Tribunal said there was no evidence that Claimant had ever sent his wife in his place to do work.**
>
> **(e) At paragraph 60 of the Status Judgment, the Tribunal said that, "It did not find that the arguments advanced on behalf of the Respondent to be persuasive in any way whatsoever."**
>
> **(f) It was said in paragraph 62 that the Tribunal had not, at that stage, made any finding with regards to rate of payment or as to how the relationship between the parties had ended. It noted that those matters would be for the substantive hearing. In those circumstances, as I have already said, whilst the position could have been clearer, it cannot be said to be unreasonable for the Claimant to pursue the question of zero-hours contracts following that hearing.**
>
> **(g) At paragraph 66 the Tribunal said, 'It is not clear to this Tribunal how and why the Respondent sought to argue that the Claimant was not a worker.' Moreover, although the Respondent was running the argument that the Claimant was self-employed, the Tribunal noted that, 'It was not even put to the Claimant that he was running his own business.'"**

35. Taking all of those matters into account, it can be seen that, certainly as at the initial stages of the dispute, it was the Respondent who was, arguably, acting unreasonably, in resisting the Claimant's claim as to his employment status. That does not appear to have been taken into account by the Tribunal in the exercise of its discretion to award costs. I note, of course, that the Judge dealing with the Costs Judgment is the very same Judge who dealt with

the Status Hearing, and it could be argued that, in refusing to award costs in respect of the Status Hearing, the Tribunal can be deemed to have taken into account the Respondent's own unreasonable conduct. However, it seems to me that, in the absence of any express reference to this important factor, or any indication that this countervailing consideration was factored into the analysis, it can be said that the Tribunal failed to take account of all the relevant circumstances in coming to its decision.

36. The Costs Judgment also does not refer to the fact that the Claimant was not subject to any deposit orders. This is notwithstanding the fact that the Respondent had expressly considered making an application for a deposit order as referred to at paragraph 4.7 of the Liability Judgment. It also appears from that paragraph that a deposit order had only been considered in relation to the claim for compensation for loss of earnings since 9 June 2016 and not in respect of any other claim. Whilst a deposit order is not, on any view, a pre-requisite to an award of costs against the Claimant, the absence of a deposit order was, in the circumstances of this case, a factor that ought to have been taken into account in the exercise of discretion.

37. The Tribunal commented at paragraph 14 of the Costs Judgment that the Claimant's claim is, "*... a significant claim that the Respondent had no choice but to incur costs in defending*." However, the Respondent had resisted the Claimant's successful claim for holiday pay right up to the hearing. At paragraph 10 of the Liability Judgment, the Tribunal said, "*Following the earlier decision on employment and work status, the Respondent accepted, at this hearing, that the Claimant was entitled to holiday pay, but not for the amount claimed*."

38. It is apparent, therefore, that, although the Status Hearing had concluded in May 2017 with the Judgment being sent to the parties in June 2017, the Respondent did not concede the Claimant's entitlement to holiday pay until almost seven months later at the Liability Hearing itself. In those circumstances, it can be said that it was the Claimant who had little choice but to pursue that claim right up to the hearing.

39. Taking those matters into account, it seems to me that it can be said that the Tribunal failed to have regard to all the relevant circumstances in exercising its discretion. Had it done so, it is possible that the discretion would have been exercised differently. However, given my conclusion that the Tribunal was wrong to find that the costs jurisdiction was engaged at all, I do not need to determine whether the exercise of that discretion was in fact wrong.

40. The next stage of the analysis for the Tribunal was to determine the appropriate amount. The Tribunal has a broad discretion in this regard, although the basis for exercising the discretion to award a particular sum ought to be properly explained. In the present case, the total sum claimed by the Respondent was said to be £22,283.10 plus VAT. The Tribunal's award amounts to just under 25% of that sum. It would not have been appropriate to make the Claimant liable for the whole of the costs of the Liability Hearing. As discussed above, the Claimant had little choice but to take the matter to a full hearing to recover, at least, his holiday pay. The hearing does not appear to have been unduly extended by references to such matters as DPA and HSWA**.** The zero-hours contract issue was a matter that, in my judgment, the Claimant was entitled to pursue. The majority of the Judgment is taken up by dealing with the Claimant's contractual claim, which, as I said above, was not an unreasonable one to pursue. In those circumstances, an award of £5,000, which would appear to represent a substantial proportion of the costs incurred for the Liability Hearing, seems quite high and is certainly not properly explained.

Conclusion

41. For all of these reasons, it is my Judgment that the Tribunal did err in law. This appeal is therefore allowed. I substitute a decision that there was no discretion to award costs and the costs award is set aside.

Appeal No. UKEAT/0184/19/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 14 November 2019

Before

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

(SITTING ALONE)

MR V MIHAILESCU — APPELLANT

BETTER LIVES (UK) LIMITED t/a BLUEBIRD CARE (IPSWICH) — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR V MILHAILESCU (The Appellant in Person) and MS ANA UNTILA (Interpreter)
For the Respondent	No appearance or representation by or on behalf of the Respondent

SUMMARY

PRACTICE AND PROCEDURE - Costs

The Employment Tribunal erred in concluding that the threshold requirement for the exercise of discretion as to costs had been met.

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

1. I shall refer to the parties as they were below. The Claimant appeals against the Judgment of the Bury St Edmunds Employment Tribunal ("The Tribunal") awarding £5,000 of costs against him. The Claimant represents himself and has been assisted this morning by an interpreter. It has, at times, been difficult to ensure that the Claimant's focus remains on the challenge to the Tribunal's Judgment as to costs ("the Costs Judgment") and not its judgment on liability ("the Liability Judgment") about which he is also aggrieved.

2. The Respondent has not appeared at this Hearing. It has confirmed, by way of an email dated 21 October 2019, that it would not be opposing or otherwise taking part in the appeal. This appeal has not, therefore, been fully argued by both sides. This Judgment of the Employment Appeal Tribunal is very much one confined to its own facts and should not be seen as establishing any wider point of principle in relation to costs judgments.

The Factual Background

3. The Claimant was employed by the Respondent as a Care Worker. His employment commenced on 30 April 2015. At that stage, he entered into a written agreement which described him as an employee. The contract was described as a zero-hours contract which stated that there was no guarantee of work or any minimum hours. It appears that the Claimant ceased to be provided with any work as from 9 June 2016.

4. The Claimant issued proceedings before the Tribunal on 24 October 2016. He had brought claims for notice pay, holiday pay, arrears of pay, and other payments. In its response dated 25 November 2016, the Respondent denied that the Claimant was an employee or even that he was a worker of the Respondent. It asserted that the Claimant had, at all times, been

self-employed. On that basis, the Respondent contended that the Tribunal did not have jurisdiction to hear any of the claims being brought by the Claimant, most of which were dependent on him having the status of an employee.

5. A Preliminary Hearing was listed to determine the Claimant's employee status ("the Status Hearing"). The Status Hearing was originally listed to be heard on 16 February 2017. However, the Claimant was unable to attend for medical reasons, and the matter was relisted to be heard on 26 May 2017. On that day, Employment Judge Laidler heard evidence from both the Claimant and the director of the Respondent, Mr Dhir, and considered documentary evidence, including the written terms on which the Claimant was engaged. The Tribunal came to the very clear conclusion that the Claimant was an employee. Indeed, Mr Dhir accepted that the letter issued to the Claimant upon the commencement of the relationship was a contract of employment. The Tribunal emphatically rejected the Respondent's contention that the Claimant was self-employed. The Respondent had even gone as far to suggest that the Claimant was not a worker. As to that contention, the Tribunal found that it was not clear how and why the Respondent sought to maintain that the Claimant was not a worker.

6. The Tribunal, therefore, concluded that the Claimant was an employee working under a contract of employment, and that it did, therefore, have jurisdiction to determine the Claimant's claims, which were based on employee status. The Tribunal also found, in the alternative, that the Claimant would have been found to be a worker and entitled to bring claims under the **Employment Rights Act 1996**. The Tribunal did not have time at that hearing to clarify the issues and a further preliminary hearing was arranged in order to do that. The Tribunal also noted, at paragraph 62 of the Judgment that it had not made any findings in relation to rates of payment or as to how the relationship between the Claimant and the Respondent had ended. Those matters were left to the substantive hearing.

7. The further preliminary hearing took place on 25 August 2017. At that hearing, the Claimant confirmed that he was not pursuing an unfair dismissal claim or a claim that he had been paid in breach of the national minimum wage. The Tribunal explained to the Claimant that the Tribunal did not have jurisdiction to deal with certain matters, and the issues which were identified for consideration were claims for breach of contract arising out of the alleged failure to pay the Claimant his contractual wages and overtime hours, compensation for loss of earnings since 9 June 2016, holiday pay, which, at that stage, was valued by the Claimant at £4,861.85, and failure to provide pay slips.

8. The Liability Hearing took place on 4, 5, and 23 January 2018, also before Employment Judge Laidler. The Claimant was unrepresented, although he was assisted by an interpreter as he was today. The Respondent was represented by Mr Clarke, a solicitor.

9. The Tribunal dismissed all of the Claimant's claims save for the claim in respect of holiday pay. The Tribunal stated that, at the Liability Hearing, the Claimant had tried to resurrect matters which he had previously been told could not be pursued before the Tribunal. As to the holiday pay claim, the Respondent accepted, at the hearing, that the Claimant is entitled to holiday pay, but not for the amounts claimed. The Respondent accepted that the amount due and payable to the Claimant was £2,498.47, gross. It would appear from the terms of paragraph 10 of the Liability Judgment, that the Respondent only accepted liability for any amount of holiday pay at the hearing itself.

10. The Respondent then applied for its costs. It submitted a schedule setting out a total of £22,383.10 plus VAT in respect of those costs. Unfortunately, neither the application nor the schedule of costs are before the Appeal Tribunal today.

11. The application for costs was heard on 29 November 2018, again before Employment Judge Laidler. Once again, the Claimant was acting in person, assisted by the interpreter, and the Respondent was represented by Mr Clarke.

The Costs Judgment

12. The Tribunal reminded itself that the Claimant had previously withdrawn certain of his claims and that he had been told that it did not have jurisdiction to deal with certain other claims. The Tribunal also reminded itself that the Claimant had been told about the Tribunal's power to award costs, as recorded at paragraph 11 of the Liability Judgment. It also referred to the costs warning stated in the Respondent's ET3.

13. At paragraph 7 of the Costs Judgment, the Tribunal referred to paragraphs 5 through to 10 of the Liability Judgment as matters taken into account in the Tribunal's decision on costs. At paragraph 9, the Tribunal noted that it had found the Claimant's evidence to be contradictory and not credible. Having referred to the relevant Rules on costs, the Tribunal went on to set out its conclusions:

> **"12. The Tribunal is satisfied the Claimant has acted unreasonably in the bringing of these proceedings and in the manner in which they have been conducted and that the majority of the claims had no reasonable prospects of success. As such the Tribunal's discretion to award costs arises. The Claimant who at the outset had advice from a Citizens' Advice Bureau chose to pursue claims that were not within the jurisdiction of the Tribunal. This was explained to him at the preliminary hearings, but he still tried to pursue them. It does not appear that the Claimant sought further advice on his position.**
>
> **13. The Claimant is aggrieved that he was working under a zero hours contract and how his pay was calculated, but the Tribunal found at a preliminary hearing that he was employed under a zero hours contract. It had to remind him on numerous occasions that it could not revisit that finding or look into whether or not it was a 'fair' term of the contract.**
>
> **14. The Claimant kept changing the basis of his claims. He came to the full merits hearing claiming over £80,000. This was a significant claim that the respondent had no choice but to incur costs in defending. The Claimant cannot criticise the respondent for so doing.**
>
> **15. Even at this hearing, the Claimant has sought to argue the issues in his claim rather than focus on the issue of costs."**

14. Having concluded that the discretion to awards costs was engaged, the Tribunal went on to consider whether to make such an order and, in doing so, had regard to the Claimant's ability to pay. The Tribunal concluded that the Claimant should not have to pay costs for the Status Hearing on 26 May, when it was found that he was an employee and on 25 August, which was

a standard hearing, to clarify the issues. After referring to a couple of authorities, the Tribunal concluded as follows:

> **"21. Having considered all the circumstances, the Respondent's cost schedule and the bills to the Respondent had accompanied it and giving consideration to the Claimant's ability to pay, the Tribunal has concluded an award of £5,000 inclusive of VAT and disbursements should be made to cover, in effect, some of the costs of the full merits hearing which could have been avoided had the Claimant not acted unreasonably in pursuit of these claims.**
>
> **22. How that sum is to be paid will be a matter for the County Court if the Respondent seeks to enforce the award."**

Legal Framework

15. Rule 76 of **The Employment Tribunal Rules of Procedure 2013** ("the ET Rules") govern the awarding of costs by the Tribunal. Insofar as it is relevant, it provides at Rule 76:

> **"When a costs Order or a preparation time Order may or shall be made**
>
> **76.-(1) A Tribunal may make a costs Order or a preparation time Order, and shall consider whether to do so, where it considers that-**
>
> **(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or**
>
> **(b) any claim or response had no reasonable prospect of success."**

16. Rule 84 of the **ET Rules** deals with the ability to pay. It provides:

> **"Ability to pay**
>
> **84. In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay."**

17. It is well-established that the structure of these provisions dictates a three-stage approach: The Tribunal must first consider the threshold question of whether any of the circumstances identified in Rule 76(1) applies and, if so, it must then consider separately, as a matter of discretion, whether to make an award of costs. If it is decided that an award of costs should be made, the final stage is to decide what amount of costs to award: see **Vaughn v London Borough of Lewisham (No. 2)** [2013] IRLR 713 and **Haydar v Pennine Acute NHS Trust** [2017] UKEAT0141/17/BA at paragraph 25.

18. It is also well-established that as a decision on costs involves the exercise of discretion by the Tribunal, the Employment Appeal Tribunal will rarely interfere with the Tribunal's decision. In **Barnsley Metropolitan Borough Council v Yerrakalva** [2012] ICR 420, Mummery LJ held as follows:

> **"6. The Tribunals below did not agree about the exercise of the discretion. That is not surprising. A familiar feature of all litigation is that experienced Judges may sensibly differ on how, in the particular circumstances of the individual case, a costs discretion should be exercised. Parties and prudent advisers should take account of that factor when considering whether a costs order is worth appealing.**
>
> **7. As costs are in the discretion of the ET, appeals on costs alone rarely succeed in the EAT or in this court. The ET's power to order costs is more sparingly exercised and is more circumscribed by the ET's Rules than that of the ordinary courts. There the general Rule is that costs follow the event and the unsuccessful litigant normally has to foot the legal bill for the litigation. In the ET costs orders are the exception rather than the Rule. In most cases the ET does not make any order for costs. If it does, it must act within Rules that expressly confine the ET's power to specified circumstances, notably unreasonableness in the bringing or conduct of the proceedings. The ET manages, hears and decides the case and is normally the best Judge of how to exercise its discretion.**
>
> **8. There is therefore a strong, soundly based disinclination in the appellate Tribunals and courts to upset any exercise of discretion at first instance. In this court permission is rarely given to appeal against costs orders. I have noticed a recent tendency to seek permission more frequently. That trend is probably a consequence of the comparatively large amounts of legal costs now incurred in the ETs.**
>
> **9. An appeal against a costs order is doomed to failure, unless it is established that the order is vitiated by an error of legal principle, or that the order was not based on the relevant circumstances. An appeal will succeed if the order was obviously wrong. As a general Rule it is recognised that a first instance Decision-maker is better placed than an appellate body to make a balanced assessment of the interaction of the range of factors affecting the court's discretion. This is especially so when the power to order costs is expressly dependent on the unreasonable bringing or conduct of the proceedings. The ET spends more time overseeing the progress of the case through its preparatory stages and trying it than an appellate body will ever spend on an appeal limited to errors of law. The ET is familiar with the unfolding of the case over time. It has good opportunities for gaining insight into how those involved are conducting the proceedings. An appellate body's concern is principally with particular points of legal or procedural error in Tribunal proceedings, which do not require immersion in all the details that may relate to the conduct of the parties."**

The Grounds of Appeal

19. The grounds of appeal, which were drafted by the Claimant, are not entirely clear. However, as I determined on the sift in this matter, the principle contention is that the Tribunal erred in awarding costs in circumstances where the Respondent has consistently resisted all aspects of the claim, including employee status, there had been some findings in the Claimant's favour, and the Claimant had succeeded in part of his claim in relation to holiday pay. In those circumstances, it was said that the Tribunal erred in reaching the conclusion that the Claimant

had acted unreasonably "*in the bringing of these proceedings*". The Claimant further contends that, as he succeeded in part, and he was ultimately awarded some compensation, the pursuit of some unmeritorious claims, where there was no deposit order against him, did not render his conduct unreasonable such as to trigger the costs jurisdiction. It is further argued that the Tribunal erred in assessing the amount of costs awarded and that there was no or no adequate explanation of the basis on which the sum of £5,000 was reached. In particular, it was not clear to what extent the unreasonable conduct extended what was a relatively short hearing and what additional costs would have been incurred by the Respondent as a result.

Submissions

20. The Claimant, with the assistance of the interpreter, submitted that there had not been any finding that he was on a zero-hours contract at the Status Hearing and that the Judge was wrong to prevent him from raising that issue. He had understood it would be addressed at the Liability Hearing. He said that he did not seek to resurrect certain claims but that the Tribunal had wrongly got that impression from the fact that the Respondent had included in the bundle an old witness statement prepared prior to the Status Hearing, whereas he had wished to rely on a newer statement which contained different matters relevant to his having employee status. The Claimant made various other points relating to the Liability Judgment which are not relevant to this judgment.

Discussion

21. As stated above, the Tribunal is required to consider, first, whether any of the circumstances set out in Rule 76.1 apply so as to confer on the Tribunal the discretion to award costs. The Tribunal relied on two matters:

> **(a) the majority of the claims had no reasonable prospect of success, and**
>
> **(b) he had acted unreasonably in the proceedings and in the manner in which they had been conducted.**

22. As to the first of these matters, the Tribunal did not specify which claims it considered had no reasonable prospect of success. I have considered the ET1 in this matter. I note that it does not include any claims under the **Data Protection Act** or the **Health and Safety at Work Act**. In the Liability Judgment, the Tribunal refers to these claims as having been raised in recent correspondence. There was never any formal attempt, as far as I can see, to amend the Claimant's claim to include such issues, and they were not identified as issues at the Preliminary Hearing in August. To the extent, therefore, that the Tribunal included the **Data Protection Act** and the **Health and Safety at Work Act** claims as ones that had been pursued without reasonable prospect of success, it was wrong to do so. They were not claims at any stage. The fact that a litigant in person might mention such matters in correspondence does not make them claims, still less that they are claims being pursued without reasonable prospects of success.

23. As for the remaining claims, there was a reference to a claim for unfair dismissal. However, although the Claimant appeared in his ET1 to seek compensation and re-engagement, it seems to have been clarified at an early stage that that claim was not one that was being pursued. The Claimant did pursue a claim of wrongful dismissal. That was pursued without objection from the Respondent. It cannot be said to have been unreasonable to do so.

24. That leaves the claims for breach of contract, holiday pay, and failure to provide pay slips. The claim for holiday pay succeeded; the claim for breach of contract did not. However, there was no indication at the Status Hearing that the claim for breach of contract was a wholly unreasonable one to pursue. Indeed, the Tribunal expressly stated that it had not made any findings as to the rates of pay claim and that this would be a matter to be dealt with at the substantive hearing. There was no application for a deposit order in respect of these matters.

A The only consideration given to a deposit order application was in respect of pay since 9 June 2016.

B 25. Whilst the Tribunal did not find in the Claimant's favour in respect of the breach of contract claim, it cannot be said that it had no reasonable prospects of success. The Tribunal considered that claim over several pages in the Liability Judgment and ultimately accepted the Respondent's evidence that the correct amounts were paid. That was a finding that the Tribunal C was entitled to reach on the evidence. It did not necessarily mean that the claim had no reasonable prospects of success.

26. The Tribunal did note that the Claimant's concerns were more about the zero-hours D contract and it may be that that concern, persistently pursued, was what coloured the Tribunal's Judgment. The Tribunal's view, however, was that this was a matter that had already been determined at the Status Hearing and could not be raised again. I have considerable doubts as E to the correctness of that view.

27. The Judgment at the Status Hearing was that the Claimant was an employee and that the Tribunal had jurisdiction to consider the claims. The only reference to zero-hours contract in the entire judgment that I can see is at paragraph 11, where the Tribunal does no more than set F out what the terms of the contract provided in that regard. There is no analysis at all as to whether that term reflected the reality of position. Given that the Claimant had been arguing that the Respondent was not entitled to rely upon the zero-hours provision to simply stop giving G him work, and given that the Tribunal had made no findings as to how the relationship had ended, it is not surprising that the Claimant was left to believe that the zero-hours issue was still one that would be considered at the Full Liability Hearing. Indeed, the Claimant stated, in terms today, that that was what he was told at the Status Hearing. This seems to me something H

that was consistent with the Tribunal's statement that it had not made any findings as to how the relationship had ended.

28. As such, it was not unreasonable for the Claimant to pursue this issue, and nor is it one that could be said to have had no reasonable prospect of success insofar as it related to the issue of termination. A zero-hours contract is not, in and of itself incompatible with there being a termination. The Tribunal rejected the Claimant's wrongful dismissal claim, and it concluded that he was not dismissed because it was a zero-hours contract and no further work was offered. However, as I said, in the absence of any proper analysis, either at the Status Hearing or the Liability Hearing, about the zero-hours element of the contract, and given the implication that it would be dealt with subsequently, it was not unreasonable for the Claimant to continue to pursue that issue.

29. The Tribunal was undoubtedly correct to conclude that some of the Claimant's claims, such as the claim for loss of earnings since 9 June 2016, had no merit. However, I consider that, insofar as it concluded that "the majority" of claims had no prospect of success, it fell into error, and it reached a conclusion that was not supported by the evidence. The jurisdiction to award costs was not engaged by reason of that matter.

30. As to the conclusion that the Claimant had acted unreasonably in bringing and conducting the proceedings, the position, in my view, is that the Tribunal also erred in this regard. The Claimant clearly had a sound complaint that he was an employee. That was the underlying basis for several of his other complaints. It was a claim that was strongly, and, arguably, unreasonably resisted by the Respondent from the outset. Moreover, the Claimant had a valid holiday pay claim which succeeded. Given that background, the fact that some claims are unmeritorious or do not succeed does not mean that the bringing of proceedings was unreasonable. Particular latitude may be afforded to a litigant in person such as the Claimant, who may not have the ability or access to expertise to be able to differentiate clearly between

meritorious and unmeritorious claims. It cannot be said, in the circumstances of this case, that the Claimant had acted unreasonably in bringing the proceedings insofar as that refers to the entirety or even the majority of the proceedings.

31. I turn, then, to the second limb of the Tribunal's finding on unreasonableness, which is in relation to the manner in which the Claimant had conducted proceedings. For the reasons set out above, I do not consider that the Claimant did conduct himself unreasonably in continuing to pursue, for example, the zero-hours claim. As for other aspects of this claim, which the Tribunal considered had been pursued unreasonably, such as the **Data Protection** and **Health and Safety at Work Act** claims, it does not appear that those were, in fact, claims at all: see above. The finding that the Claimant continually sought to resurrect claims that he had been told he could not pursue appears to arise out of his attempts to raise claims in respect of those matters, i.e. Data Protection and Health and Safety at Work. However, some of these had only been raised recently before the Liability Hearing, and it does not appear that there was a repeated attempt to resurrect them. I also take on board what the Claimant says about the incorrect reliance upon the older witness statement which was put in the bundle by the Respondent. As the Respondent has chosen not to appear today to clarify or correct the Claimant, I am prepared to accept what he says as being correct. Taking all of these matters into account, it seems to me that the Tribunal erred in concluding that the Claimant was acting unreasonably in the bringing and conducting of proceedings and that it had jurisdiction to award costs.

32. The next question for the Tribunal was whether, in the exercise of its discretion, costs should be awarded at all. The Tribunal noted that costs do not follow the event and concluded that the Claimant should not have to pay costs for the hearing on 26 May when it was found that he was an employee, and the 26 August, which was a standard hearing to clarify the issues. That was clearly correct.

33. I bear in mind the warning in **Yerrakalva** against interfering with the exercise of discretion. It was said there that an appeal against a costs order is doomed to failure unless it is established that the order is vitiated by an error of legal principle or that the order was not based on the relevant circumstances. It seems to me that, in the circumstances of the present case, the Tribunal did fail to take into account certain significant matters.

34. The first is that the Respondent had unreasonably resisted a claim as to employment status:

> **(a) At the Status Hearing, Mr Dhir for the Respondent had accepted in oral evidence that the letter of 30 April 2015 was a contract of employment, thereby contradicting the case that had been put by the Respondent up to that stage.**
>
> **(b) The letter sent to the Claimant at the time referred to him being an employee throughout.**
>
> **(c) The Tribunal accepted the evidence of the Claimant which it regarded as "entirely convincing".**
>
> **(d) The Respondent sought to embark on various arguments to deny employee status which were unsupported by evidence: see, for example, paragraph 26 of the Status Judgment, in which the Tribunal said there was no evidence that Claimant had ever sent his wife in his place to do work.**
>
> **(e) At paragraph 60 of the Status Judgment, the Tribunal said that, "It did not find that the arguments advanced on behalf of the Respondent to be persuasive in any way whatsoever."**
>
> **(f) It was said in paragraph 62 that the Tribunal had not, at that stage, made any finding with regards to rate of payment or as to how the relationship between the parties had ended. It noted that those matters would be for the substantive hearing. In those circumstances, as I have already said, whilst the position could have been clearer, it cannot be said to be unreasonable for the Claimant to pursue the question of zero-hours contracts following that hearing.**
>
> **(g) At paragraph 66 the Tribunal said, 'It is not clear to this Tribunal how and why the Respondent sought to argue that the Claimant was not a worker.' Moreover, although the Respondent was running the argument that the Claimant was self-employed, the Tribunal noted that, 'It was not even put to the Claimant that he was running his own business.'"**

35. Taking all of those matters into account, it can be seen that, certainly as at the initial stages of the dispute, it was the Respondent who was, arguably, acting unreasonably, in resisting the Claimant's claim as to his employment status. That does not appear to have been taken into account by the Tribunal in the exercise of its discretion to award costs. I note, of course, that the Judge dealing with the Costs Judgment is the very same Judge who dealt with

the Status Hearing, and it could be argued that, in refusing to award costs in respect of the Status Hearing, the Tribunal can be deemed to have taken into account the Respondent's own unreasonable conduct. However, it seems to me that, in the absence of any express reference to this important factor, or any indication that this countervailing consideration was factored into the analysis, it can be said that the Tribunal failed to take account of all the relevant circumstances in coming to its decision.

36. The Costs Judgment also does not refer to the fact that the Claimant was not subject to any deposit orders. This is notwithstanding the fact that the Respondent had expressly considered making an application for a deposit order as referred to at paragraph 4.7 of the Liability Judgment. It also appears from that paragraph that a deposit order had only been considered in relation to the claim for compensation for loss of earnings since 9 June 2016 and not in respect of any other claim. Whilst a deposit order is not, on any view, a pre-requisite to an award of costs against the Claimant, the absence of a deposit order was, in the circumstances of this case, a factor that ought to have been taken into account in the exercise of discretion.

37. The Tribunal commented at paragraph 14 of the Costs Judgment that the Claimant's claim is, "*... a significant claim that the Respondent had no choice but to incur costs in defending*." However, the Respondent had resisted the Claimant's successful claim for holiday pay right up to the hearing. At paragraph 10 of the Liability Judgment, the Tribunal said, "*Following the earlier decision on employment and work status, the Respondent accepted, at this hearing, that the Claimant was entitled to holiday pay, but not for the amount claimed*."

38. It is apparent, therefore, that, although the Status Hearing had concluded in May 2017 with the Judgment being sent to the parties in June 2017, the Respondent did not concede the Claimant's entitlement to holiday pay until almost seven months later at the Liability Hearing itself. In those circumstances, it can be said that it was the Claimant who had little choice but to pursue that claim right up to the hearing.

39. Taking those matters into account, it seems to me that it can be said that the Tribunal failed to have regard to all the relevant circumstances in exercising its discretion. Had it done so, it is possible that the discretion would have been exercised differently. However, given my conclusion that the Tribunal was wrong to find that the costs jurisdiction was engaged at all, I do not need to determine whether the exercise of that discretion was in fact wrong.

40. The next stage of the analysis for the Tribunal was to determine the appropriate amount. The Tribunal has a broad discretion in this regard, although the basis for exercising the discretion to award a particular sum ought to be properly explained. In the present case, the total sum claimed by the Respondent was said to be £22,283.10 plus VAT. The Tribunal's award amounts to just under 25% of that sum. It would not have been appropriate to make the Claimant liable for the whole of the costs of the Liability Hearing. As discussed above, the Claimant had little choice but to take the matter to a full hearing to recover, at least, his holiday pay. The hearing does not appear to have been unduly extended by references to such matters as DPA and HSWA**.** The zero-hours contract issue was a matter that, in my judgment, the Claimant was entitled to pursue. The majority of the Judgment is taken up by dealing with the Claimant's contractual claim, which, as I said above, was not an unreasonable one to pursue. In those circumstances, an award of £5,000, which would appear to represent a substantial proportion of the costs incurred for the Liability Hearing, seems quite high and is certainly not properly explained.

Conclusion

41. For all of these reasons, it is my Judgment that the Tribunal did err in law. This appeal is therefore allowed. I substitute a decision that there was no discretion to award costs and the costs award is set aside.

Appeal No. UKEAT/0184/19/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 14 November 2019

Before

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

(SITTING ALONE)

MR V MIHAILESCU — APPELLANT

BETTER LIVES (UK) LIMITED t/a BLUEBIRD CARE (IPSWICH) — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR V MILHAILESCU (The Appellant in Person) and MS ANA UNTILA (Interpreter)
For the Respondent	No appearance or representation by or on behalf of the Respondent

SUMMARY

PRACTICE AND PROCEDURE - Costs

The Employment Tribunal erred in concluding that the threshold requirement for the exercise of discretion as to costs had been met.

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

1. I shall refer to the parties as they were below. The Claimant appeals against the Judgment of the Bury St Edmunds Employment Tribunal ("The Tribunal") awarding £5,000 of costs against him. The Claimant represents himself and has been assisted this morning by an interpreter. It has, at times, been difficult to ensure that the Claimant's focus remains on the challenge to the Tribunal's Judgment as to costs ("the Costs Judgment") and not its judgment on liability ("the Liability Judgment") about which he is also aggrieved.

2. The Respondent has not appeared at this Hearing. It has confirmed, by way of an email dated 21 October 2019, that it would not be opposing or otherwise taking part in the appeal. This appeal has not, therefore, been fully argued by both sides. This Judgment of the Employment Appeal Tribunal is very much one confined to its own facts and should not be seen as establishing any wider point of principle in relation to costs judgments.

The Factual Background

3. The Claimant was employed by the Respondent as a Care Worker. His employment commenced on 30 April 2015. At that stage, he entered into a written agreement which described him as an employee. The contract was described as a zero-hours contract which stated that there was no guarantee of work or any minimum hours. It appears that the Claimant ceased to be provided with any work as from 9 June 2016.

4. The Claimant issued proceedings before the Tribunal on 24 October 2016. He had brought claims for notice pay, holiday pay, arrears of pay, and other payments. In its response dated 25 November 2016, the Respondent denied that the Claimant was an employee or even that he was a worker of the Respondent. It asserted that the Claimant had, at all times, been

self-employed. On that basis, the Respondent contended that the Tribunal did not have jurisdiction to hear any of the claims being brought by the Claimant, most of which were dependent on him having the status of an employee.

5. A Preliminary Hearing was listed to determine the Claimant's employee status ("the Status Hearing"). The Status Hearing was originally listed to be heard on 16 February 2017. However, the Claimant was unable to attend for medical reasons, and the matter was relisted to be heard on 26 May 2017. On that day, Employment Judge Laidler heard evidence from both the Claimant and the director of the Respondent, Mr Dhir, and considered documentary evidence, including the written terms on which the Claimant was engaged. The Tribunal came to the very clear conclusion that the Claimant was an employee. Indeed, Mr Dhir accepted that the letter issued to the Claimant upon the commencement of the relationship was a contract of employment. The Tribunal emphatically rejected the Respondent's contention that the Claimant was self-employed. The Respondent had even gone as far to suggest that the Claimant was not a worker. As to that contention, the Tribunal found that it was not clear how and why the Respondent sought to maintain that the Claimant was not a worker.

6. The Tribunal, therefore, concluded that the Claimant was an employee working under a contract of employment, and that it did, therefore, have jurisdiction to determine the Claimant's claims, which were based on employee status. The Tribunal also found, in the alternative, that the Claimant would have been found to be a worker and entitled to bring claims under the **Employment Rights Act 1996**. The Tribunal did not have time at that hearing to clarify the issues and a further preliminary hearing was arranged in order to do that. The Tribunal also noted, at paragraph 62 of the Judgment that it had not made any findings in relation to rates of payment or as to how the relationship between the Claimant and the Respondent had ended. Those matters were left to the substantive hearing.

7. The further preliminary hearing took place on 25 August 2017. At that hearing, the Claimant confirmed that he was not pursuing an unfair dismissal claim or a claim that he had been paid in breach of the national minimum wage. The Tribunal explained to the Claimant that the Tribunal did not have jurisdiction to deal with certain matters, and the issues which were identified for consideration were claims for breach of contract arising out of the alleged failure to pay the Claimant his contractual wages and overtime hours, compensation for loss of earnings since 9 June 2016, holiday pay, which, at that stage, was valued by the Claimant at £4,861.85, and failure to provide pay slips.

8. The Liability Hearing took place on 4, 5, and 23 January 2018, also before Employment Judge Laidler. The Claimant was unrepresented, although he was assisted by an interpreter as he was today. The Respondent was represented by Mr Clarke, a solicitor.

9. The Tribunal dismissed all of the Claimant's claims save for the claim in respect of holiday pay. The Tribunal stated that, at the Liability Hearing, the Claimant had tried to resurrect matters which he had previously been told could not be pursued before the Tribunal. As to the holiday pay claim, the Respondent accepted, at the hearing, that the Claimant is entitled to holiday pay, but not for the amounts claimed. The Respondent accepted that the amount due and payable to the Claimant was £2,498.47, gross. It would appear from the terms of paragraph 10 of the Liability Judgment, that the Respondent only accepted liability for any amount of holiday pay at the hearing itself.

10. The Respondent then applied for its costs. It submitted a schedule setting out a total of £22,383.10 plus VAT in respect of those costs. Unfortunately, neither the application nor the schedule of costs are before the Appeal Tribunal today.

11. The application for costs was heard on 29 November 2018, again before Employment Judge Laidler. Once again, the Claimant was acting in person, assisted by the interpreter, and the Respondent was represented by Mr Clarke.

The Costs Judgment

12. The Tribunal reminded itself that the Claimant had previously withdrawn certain of his claims and that he had been told that it did not have jurisdiction to deal with certain other claims. The Tribunal also reminded itself that the Claimant had been told about the Tribunal's power to award costs, as recorded at paragraph 11 of the Liability Judgment. It also referred to the costs warning stated in the Respondent's ET3.

13. At paragraph 7 of the Costs Judgment, the Tribunal referred to paragraphs 5 through to 10 of the Liability Judgment as matters taken into account in the Tribunal's decision on costs. At paragraph 9, the Tribunal noted that it had found the Claimant's evidence to be contradictory and not credible. Having referred to the relevant Rules on costs, the Tribunal went on to set out its conclusions:

> **"12. The Tribunal is satisfied the Claimant has acted unreasonably in the bringing of these proceedings and in the manner in which they have been conducted and that the majority of the claims had no reasonable prospects of success. As such the Tribunal's discretion to award costs arises. The Claimant who at the outset had advice from a Citizens' Advice Bureau chose to pursue claims that were not within the jurisdiction of the Tribunal. This was explained to him at the preliminary hearings, but he still tried to pursue them. It does not appear that the Claimant sought further advice on his position.**
>
> **13. The Claimant is aggrieved that he was working under a zero hours contract and how his pay was calculated, but the Tribunal found at a preliminary hearing that he was employed under a zero hours contract. It had to remind him on numerous occasions that it could not revisit that finding or look into whether or not it was a 'fair' term of the contract.**
>
> **14. The Claimant kept changing the basis of his claims. He came to the full merits hearing claiming over £80,000. This was a significant claim that the respondent had no choice but to incur costs in defending. The Claimant cannot criticise the respondent for so doing.**
>
> **15. Even at this hearing, the Claimant has sought to argue the issues in his claim rather than focus on the issue of costs."**

14. Having concluded that the discretion to awards costs was engaged, the Tribunal went on to consider whether to make such an order and, in doing so, had regard to the Claimant's ability to pay. The Tribunal concluded that the Claimant should not have to pay costs for the Status Hearing on 26 May, when it was found that he was an employee and on 25 August, which was

a standard hearing, to clarify the issues. After referring to a couple of authorities, the Tribunal concluded as follows:

> **"21. Having considered all the circumstances, the Respondent's cost schedule and the bills to the Respondent had accompanied it and giving consideration to the Claimant's ability to pay, the Tribunal has concluded an award of £5,000 inclusive of VAT and disbursements should be made to cover, in effect, some of the costs of the full merits hearing which could have been avoided had the Claimant not acted unreasonably in pursuit of these claims.**
>
> **22. How that sum is to be paid will be a matter for the County Court if the Respondent seeks to enforce the award."**

Legal Framework

15. Rule 76 of **The Employment Tribunal Rules of Procedure 2013** ("the ET Rules") govern the awarding of costs by the Tribunal. Insofar as it is relevant, it provides at Rule 76:

> **"When a costs Order or a preparation time Order may or shall be made**
>
> **76.-(1) A Tribunal may make a costs Order or a preparation time Order, and shall consider whether to do so, where it considers that-**
>
> **(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or**
>
> **(b) any claim or response had no reasonable prospect of success."**

16. Rule 84 of the **ET Rules** deals with the ability to pay. It provides:

> **"Ability to pay**
>
> **84. In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay."**

17. It is well-established that the structure of these provisions dictates a three-stage approach: The Tribunal must first consider the threshold question of whether any of the circumstances identified in Rule 76(1) applies and, if so, it must then consider separately, as a matter of discretion, whether to make an award of costs. If it is decided that an award of costs should be made, the final stage is to decide what amount of costs to award: see **Vaughn v London Borough of Lewisham (No. 2)** [2013] IRLR 713 and **Haydar v Pennine Acute NHS Trust** [2017] UKEAT0141/17/BA at paragraph 25.

18. It is also well-established that as a decision on costs involves the exercise of discretion by the Tribunal, the Employment Appeal Tribunal will rarely interfere with the Tribunal's decision. In **Barnsley Metropolitan Borough Council v Yerrakalva** [2012] ICR 420, Mummery LJ held as follows:

> **"6. The Tribunals below did not agree about the exercise of the discretion. That is not surprising. A familiar feature of all litigation is that experienced Judges may sensibly differ on how, in the particular circumstances of the individual case, a costs discretion should be exercised. Parties and prudent advisers should take account of that factor when considering whether a costs order is worth appealing.**
>
> **7. As costs are in the discretion of the ET, appeals on costs alone rarely succeed in the EAT or in this court. The ET's power to order costs is more sparingly exercised and is more circumscribed by the ET's Rules than that of the ordinary courts. There the general Rule is that costs follow the event and the unsuccessful litigant normally has to foot the legal bill for the litigation. In the ET costs orders are the exception rather than the Rule. In most cases the ET does not make any order for costs. If it does, it must act within Rules that expressly confine the ET's power to specified circumstances, notably unreasonableness in the bringing or conduct of the proceedings. The ET manages, hears and decides the case and is normally the best Judge of how to exercise its discretion.**
>
> **8. There is therefore a strong, soundly based disinclination in the appellate Tribunals and courts to upset any exercise of discretion at first instance. In this court permission is rarely given to appeal against costs orders. I have noticed a recent tendency to seek permission more frequently. That trend is probably a consequence of the comparatively large amounts of legal costs now incurred in the ETs.**
>
> **9. An appeal against a costs order is doomed to failure, unless it is established that the order is vitiated by an error of legal principle, or that the order was not based on the relevant circumstances. An appeal will succeed if the order was obviously wrong. As a general Rule it is recognised that a first instance Decision-maker is better placed than an appellate body to make a balanced assessment of the interaction of the range of factors affecting the court's discretion. This is especially so when the power to order costs is expressly dependent on the unreasonable bringing or conduct of the proceedings. The ET spends more time overseeing the progress of the case through its preparatory stages and trying it than an appellate body will ever spend on an appeal limited to errors of law. The ET is familiar with the unfolding of the case over time. It has good opportunities for gaining insight into how those involved are conducting the proceedings. An appellate body's concern is principally with particular points of legal or procedural error in Tribunal proceedings, which do not require immersion in all the details that may relate to the conduct of the parties."**

The Grounds of Appeal

19. The grounds of appeal, which were drafted by the Claimant, are not entirely clear. However, as I determined on the sift in this matter, the principle contention is that the Tribunal erred in awarding costs in circumstances where the Respondent has consistently resisted all aspects of the claim, including employee status, there had been some findings in the Claimant's favour, and the Claimant had succeeded in part of his claim in relation to holiday pay. In those circumstances, it was said that the Tribunal erred in reaching the conclusion that the Claimant

had acted unreasonably "*in the bringing of these proceedings*". The Claimant further contends that, as he succeeded in part, and he was ultimately awarded some compensation, the pursuit of some unmeritorious claims, where there was no deposit order against him, did not render his conduct unreasonable such as to trigger the costs jurisdiction. It is further argued that the Tribunal erred in assessing the amount of costs awarded and that there was no or no adequate explanation of the basis on which the sum of £5,000 was reached. In particular, it was not clear to what extent the unreasonable conduct extended what was a relatively short hearing and what additional costs would have been incurred by the Respondent as a result.

Submissions

20. The Claimant, with the assistance of the interpreter, submitted that there had not been any finding that he was on a zero-hours contract at the Status Hearing and that the Judge was wrong to prevent him from raising that issue. He had understood it would be addressed at the Liability Hearing. He said that he did not seek to resurrect certain claims but that the Tribunal had wrongly got that impression from the fact that the Respondent had included in the bundle an old witness statement prepared prior to the Status Hearing, whereas he had wished to rely on a newer statement which contained different matters relevant to his having employee status. The Claimant made various other points relating to the Liability Judgment which are not relevant to this judgment.

Discussion

21. As stated above, the Tribunal is required to consider, first, whether any of the circumstances set out in Rule 76.1 apply so as to confer on the Tribunal the discretion to award costs. The Tribunal relied on two matters:

> **(a) the majority of the claims had no reasonable prospect of success, and**
>
> **(b) he had acted unreasonably in the proceedings and in the manner in which they had been conducted.**

22. As to the first of these matters, the Tribunal did not specify which claims it considered had no reasonable prospect of success. I have considered the ET1 in this matter. I note that it does not include any claims under the **Data Protection Act** or the **Health and Safety at Work Act**. In the Liability Judgment, the Tribunal refers to these claims as having been raised in recent correspondence. There was never any formal attempt, as far as I can see, to amend the Claimant's claim to include such issues, and they were not identified as issues at the Preliminary Hearing in August. To the extent, therefore, that the Tribunal included the **Data Protection Act** and the **Health and Safety at Work Act** claims as ones that had been pursued without reasonable prospect of success, it was wrong to do so. They were not claims at any stage. The fact that a litigant in person might mention such matters in correspondence does not make them claims, still less that they are claims being pursued without reasonable prospects of success.

23. As for the remaining claims, there was a reference to a claim for unfair dismissal. However, although the Claimant appeared in his ET1 to seek compensation and re-engagement, it seems to have been clarified at an early stage that that claim was not one that was being pursued. The Claimant did pursue a claim of wrongful dismissal. That was pursued without objection from the Respondent. It cannot be said to have been unreasonable to do so.

24. That leaves the claims for breach of contract, holiday pay, and failure to provide pay slips. The claim for holiday pay succeeded; the claim for breach of contract did not. However, there was no indication at the Status Hearing that the claim for breach of contract was a wholly unreasonable one to pursue. Indeed, the Tribunal expressly stated that it had not made any findings as to the rates of pay claim and that this would be a matter to be dealt with at the substantive hearing. There was no application for a deposit order in respect of these matters.

A The only consideration given to a deposit order application was in respect of pay since 9 June 2016.

B 25. Whilst the Tribunal did not find in the Claimant's favour in respect of the breach of contract claim, it cannot be said that it had no reasonable prospects of success. The Tribunal considered that claim over several pages in the Liability Judgment and ultimately accepted the Respondent's evidence that the correct amounts were paid. That was a finding that the Tribunal C was entitled to reach on the evidence. It did not necessarily mean that the claim had no reasonable prospects of success.

26. The Tribunal did note that the Claimant's concerns were more about the zero-hours D contract and it may be that that concern, persistently pursued, was what coloured the Tribunal's Judgment. The Tribunal's view, however, was that this was a matter that had already been determined at the Status Hearing and could not be raised again. I have considerable doubts as E to the correctness of that view.

27. The Judgment at the Status Hearing was that the Claimant was an employee and that the Tribunal had jurisdiction to consider the claims. The only reference to zero-hours contract in the entire judgment that I can see is at paragraph 11, where the Tribunal does no more than set F out what the terms of the contract provided in that regard. There is no analysis at all as to whether that term reflected the reality of position. Given that the Claimant had been arguing that the Respondent was not entitled to rely upon the zero-hours provision to simply stop giving G him work, and given that the Tribunal had made no findings as to how the relationship had ended, it is not surprising that the Claimant was left to believe that the zero-hours issue was still one that would be considered at the Full Liability Hearing. Indeed, the Claimant stated, in terms today, that that was what he was told at the Status Hearing. This seems to me something H

that was consistent with the Tribunal's statement that it had not made any findings as to how the relationship had ended.

28. As such, it was not unreasonable for the Claimant to pursue this issue, and nor is it one that could be said to have had no reasonable prospect of success insofar as it related to the issue of termination. A zero-hours contract is not, in and of itself incompatible with there being a termination. The Tribunal rejected the Claimant's wrongful dismissal claim, and it concluded that he was not dismissed because it was a zero-hours contract and no further work was offered. However, as I said, in the absence of any proper analysis, either at the Status Hearing or the Liability Hearing, about the zero-hours element of the contract, and given the implication that it would be dealt with subsequently, it was not unreasonable for the Claimant to continue to pursue that issue.

29. The Tribunal was undoubtedly correct to conclude that some of the Claimant's claims, such as the claim for loss of earnings since 9 June 2016, had no merit. However, I consider that, insofar as it concluded that "the majority" of claims had no prospect of success, it fell into error, and it reached a conclusion that was not supported by the evidence. The jurisdiction to award costs was not engaged by reason of that matter.

30. As to the conclusion that the Claimant had acted unreasonably in bringing and conducting the proceedings, the position, in my view, is that the Tribunal also erred in this regard. The Claimant clearly had a sound complaint that he was an employee. That was the underlying basis for several of his other complaints. It was a claim that was strongly, and, arguably, unreasonably resisted by the Respondent from the outset. Moreover, the Claimant had a valid holiday pay claim which succeeded. Given that background, the fact that some claims are unmeritorious or do not succeed does not mean that the bringing of proceedings was unreasonable. Particular latitude may be afforded to a litigant in person such as the Claimant, who may not have the ability or access to expertise to be able to differentiate clearly between

meritorious and unmeritorious claims. It cannot be said, in the circumstances of this case, that the Claimant had acted unreasonably in bringing the proceedings insofar as that refers to the entirety or even the majority of the proceedings.

31. I turn, then, to the second limb of the Tribunal's finding on unreasonableness, which is in relation to the manner in which the Claimant had conducted proceedings. For the reasons set out above, I do not consider that the Claimant did conduct himself unreasonably in continuing to pursue, for example, the zero-hours claim. As for other aspects of this claim, which the Tribunal considered had been pursued unreasonably, such as the **Data Protection** and **Health and Safety at Work Act** claims, it does not appear that those were, in fact, claims at all: see above. The finding that the Claimant continually sought to resurrect claims that he had been told he could not pursue appears to arise out of his attempts to raise claims in respect of those matters, i.e. Data Protection and Health and Safety at Work. However, some of these had only been raised recently before the Liability Hearing, and it does not appear that there was a repeated attempt to resurrect them. I also take on board what the Claimant says about the incorrect reliance upon the older witness statement which was put in the bundle by the Respondent. As the Respondent has chosen not to appear today to clarify or correct the Claimant, I am prepared to accept what he says as being correct. Taking all of these matters into account, it seems to me that the Tribunal erred in concluding that the Claimant was acting unreasonably in the bringing and conducting of proceedings and that it had jurisdiction to award costs.

32. The next question for the Tribunal was whether, in the exercise of its discretion, costs should be awarded at all. The Tribunal noted that costs do not follow the event and concluded that the Claimant should not have to pay costs for the hearing on 26 May when it was found that he was an employee, and the 26 August, which was a standard hearing to clarify the issues. That was clearly correct.

33. I bear in mind the warning in **Yerrakalva** against interfering with the exercise of discretion. It was said there that an appeal against a costs order is doomed to failure unless it is established that the order is vitiated by an error of legal principle or that the order was not based on the relevant circumstances. It seems to me that, in the circumstances of the present case, the Tribunal did fail to take into account certain significant matters.

34. The first is that the Respondent had unreasonably resisted a claim as to employment status:

> **(a) At the Status Hearing, Mr Dhir for the Respondent had accepted in oral evidence that the letter of 30 April 2015 was a contract of employment, thereby contradicting the case that had been put by the Respondent up to that stage.**
>
> **(b) The letter sent to the Claimant at the time referred to him being an employee throughout.**
>
> **(c) The Tribunal accepted the evidence of the Claimant which it regarded as "entirely convincing".**
>
> **(d) The Respondent sought to embark on various arguments to deny employee status which were unsupported by evidence: see, for example, paragraph 26 of the Status Judgment, in which the Tribunal said there was no evidence that Claimant had ever sent his wife in his place to do work.**
>
> **(e) At paragraph 60 of the Status Judgment, the Tribunal said that, "It did not find that the arguments advanced on behalf of the Respondent to be persuasive in any way whatsoever."**
>
> **(f) It was said in paragraph 62 that the Tribunal had not, at that stage, made any finding with regards to rate of payment or as to how the relationship between the parties had ended. It noted that those matters would be for the substantive hearing. In those circumstances, as I have already said, whilst the position could have been clearer, it cannot be said to be unreasonable for the Claimant to pursue the question of zero-hours contracts following that hearing.**
>
> **(g) At paragraph 66 the Tribunal said, 'It is not clear to this Tribunal how and why the Respondent sought to argue that the Claimant was not a worker.' Moreover, although the Respondent was running the argument that the Claimant was self-employed, the Tribunal noted that, 'It was not even put to the Claimant that he was running his own business.'"**

35. Taking all of those matters into account, it can be seen that, certainly as at the initial stages of the dispute, it was the Respondent who was, arguably, acting unreasonably, in resisting the Claimant's claim as to his employment status. That does not appear to have been taken into account by the Tribunal in the exercise of its discretion to award costs. I note, of course, that the Judge dealing with the Costs Judgment is the very same Judge who dealt with

the Status Hearing, and it could be argued that, in refusing to award costs in respect of the Status Hearing, the Tribunal can be deemed to have taken into account the Respondent's own unreasonable conduct. However, it seems to me that, in the absence of any express reference to this important factor, or any indication that this countervailing consideration was factored into the analysis, it can be said that the Tribunal failed to take account of all the relevant circumstances in coming to its decision.

36. The Costs Judgment also does not refer to the fact that the Claimant was not subject to any deposit orders. This is notwithstanding the fact that the Respondent had expressly considered making an application for a deposit order as referred to at paragraph 4.7 of the Liability Judgment. It also appears from that paragraph that a deposit order had only been considered in relation to the claim for compensation for loss of earnings since 9 June 2016 and not in respect of any other claim. Whilst a deposit order is not, on any view, a pre-requisite to an award of costs against the Claimant, the absence of a deposit order was, in the circumstances of this case, a factor that ought to have been taken into account in the exercise of discretion.

37. The Tribunal commented at paragraph 14 of the Costs Judgment that the Claimant's claim is, "*... a significant claim that the Respondent had no choice but to incur costs in defending*." However, the Respondent had resisted the Claimant's successful claim for holiday pay right up to the hearing. At paragraph 10 of the Liability Judgment, the Tribunal said, "*Following the earlier decision on employment and work status, the Respondent accepted, at this hearing, that the Claimant was entitled to holiday pay, but not for the amount claimed*."

38. It is apparent, therefore, that, although the Status Hearing had concluded in May 2017 with the Judgment being sent to the parties in June 2017, the Respondent did not concede the Claimant's entitlement to holiday pay until almost seven months later at the Liability Hearing itself. In those circumstances, it can be said that it was the Claimant who had little choice but to pursue that claim right up to the hearing.

39. Taking those matters into account, it seems to me that it can be said that the Tribunal failed to have regard to all the relevant circumstances in exercising its discretion. Had it done so, it is possible that the discretion would have been exercised differently. However, given my conclusion that the Tribunal was wrong to find that the costs jurisdiction was engaged at all, I do not need to determine whether the exercise of that discretion was in fact wrong.

40. The next stage of the analysis for the Tribunal was to determine the appropriate amount. The Tribunal has a broad discretion in this regard, although the basis for exercising the discretion to award a particular sum ought to be properly explained. In the present case, the total sum claimed by the Respondent was said to be £22,283.10 plus VAT. The Tribunal's award amounts to just under 25% of that sum. It would not have been appropriate to make the Claimant liable for the whole of the costs of the Liability Hearing. As discussed above, the Claimant had little choice but to take the matter to a full hearing to recover, at least, his holiday pay. The hearing does not appear to have been unduly extended by references to such matters as DPA and HSWA**.** The zero-hours contract issue was a matter that, in my judgment, the Claimant was entitled to pursue. The majority of the Judgment is taken up by dealing with the Claimant's contractual claim, which, as I said above, was not an unreasonable one to pursue. In those circumstances, an award of £5,000, which would appear to represent a substantial proportion of the costs incurred for the Liability Hearing, seems quite high and is certainly not properly explained.

Conclusion

41. For all of these reasons, it is my Judgment that the Tribunal did err in law. This appeal is therefore allowed. I substitute a decision that there was no discretion to award costs and the costs award is set aside.

Appeal No. UKEAT/0184/19/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 14 November 2019

Before

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

(SITTING ALONE)

MR V MIHAILESCU — APPELLANT

BETTER LIVES (UK) LIMITED t/a BLUEBIRD CARE (IPSWICH) — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR V MILHAILESCU (The Appellant in Person) and MS ANA UNTILA (Interpreter)
For the Respondent	No appearance or representation by or on behalf of the Respondent

SUMMARY

PRACTICE AND PROCEDURE - Costs

The Employment Tribunal erred in concluding that the threshold requirement for the exercise of discretion as to costs had been met.

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

1. I shall refer to the parties as they were below. The Claimant appeals against the Judgment of the Bury St Edmunds Employment Tribunal ("The Tribunal") awarding £5,000 of costs against him. The Claimant represents himself and has been assisted this morning by an interpreter. It has, at times, been difficult to ensure that the Claimant's focus remains on the challenge to the Tribunal's Judgment as to costs ("the Costs Judgment") and not its judgment on liability ("the Liability Judgment") about which he is also aggrieved.

2. The Respondent has not appeared at this Hearing. It has confirmed, by way of an email dated 21 October 2019, that it would not be opposing or otherwise taking part in the appeal. This appeal has not, therefore, been fully argued by both sides. This Judgment of the Employment Appeal Tribunal is very much one confined to its own facts and should not be seen as establishing any wider point of principle in relation to costs judgments.

The Factual Background

3. The Claimant was employed by the Respondent as a Care Worker. His employment commenced on 30 April 2015. At that stage, he entered into a written agreement which described him as an employee. The contract was described as a zero-hours contract which stated that there was no guarantee of work or any minimum hours. It appears that the Claimant ceased to be provided with any work as from 9 June 2016.

4. The Claimant issued proceedings before the Tribunal on 24 October 2016. He had brought claims for notice pay, holiday pay, arrears of pay, and other payments. In its response dated 25 November 2016, the Respondent denied that the Claimant was an employee or even that he was a worker of the Respondent. It asserted that the Claimant had, at all times, been

self-employed. On that basis, the Respondent contended that the Tribunal did not have jurisdiction to hear any of the claims being brought by the Claimant, most of which were dependent on him having the status of an employee.

5. A Preliminary Hearing was listed to determine the Claimant's employee status ("the Status Hearing"). The Status Hearing was originally listed to be heard on 16 February 2017. However, the Claimant was unable to attend for medical reasons, and the matter was relisted to be heard on 26 May 2017. On that day, Employment Judge Laidler heard evidence from both the Claimant and the director of the Respondent, Mr Dhir, and considered documentary evidence, including the written terms on which the Claimant was engaged. The Tribunal came to the very clear conclusion that the Claimant was an employee. Indeed, Mr Dhir accepted that the letter issued to the Claimant upon the commencement of the relationship was a contract of employment. The Tribunal emphatically rejected the Respondent's contention that the Claimant was self-employed. The Respondent had even gone as far to suggest that the Claimant was not a worker. As to that contention, the Tribunal found that it was not clear how and why the Respondent sought to maintain that the Claimant was not a worker.

6. The Tribunal, therefore, concluded that the Claimant was an employee working under a contract of employment, and that it did, therefore, have jurisdiction to determine the Claimant's claims, which were based on employee status. The Tribunal also found, in the alternative, that the Claimant would have been found to be a worker and entitled to bring claims under the **Employment Rights Act 1996**. The Tribunal did not have time at that hearing to clarify the issues and a further preliminary hearing was arranged in order to do that. The Tribunal also noted, at paragraph 62 of the Judgment that it had not made any findings in relation to rates of payment or as to how the relationship between the Claimant and the Respondent had ended. Those matters were left to the substantive hearing.

7. The further preliminary hearing took place on 25 August 2017. At that hearing, the Claimant confirmed that he was not pursuing an unfair dismissal claim or a claim that he had been paid in breach of the national minimum wage. The Tribunal explained to the Claimant that the Tribunal did not have jurisdiction to deal with certain matters, and the issues which were identified for consideration were claims for breach of contract arising out of the alleged failure to pay the Claimant his contractual wages and overtime hours, compensation for loss of earnings since 9 June 2016, holiday pay, which, at that stage, was valued by the Claimant at £4,861.85, and failure to provide pay slips.

8. The Liability Hearing took place on 4, 5, and 23 January 2018, also before Employment Judge Laidler. The Claimant was unrepresented, although he was assisted by an interpreter as he was today. The Respondent was represented by Mr Clarke, a solicitor.

9. The Tribunal dismissed all of the Claimant's claims save for the claim in respect of holiday pay. The Tribunal stated that, at the Liability Hearing, the Claimant had tried to resurrect matters which he had previously been told could not be pursued before the Tribunal. As to the holiday pay claim, the Respondent accepted, at the hearing, that the Claimant is entitled to holiday pay, but not for the amounts claimed. The Respondent accepted that the amount due and payable to the Claimant was £2,498.47, gross. It would appear from the terms of paragraph 10 of the Liability Judgment, that the Respondent only accepted liability for any amount of holiday pay at the hearing itself.

10. The Respondent then applied for its costs. It submitted a schedule setting out a total of £22,383.10 plus VAT in respect of those costs. Unfortunately, neither the application nor the schedule of costs are before the Appeal Tribunal today.

11. The application for costs was heard on 29 November 2018, again before Employment Judge Laidler. Once again, the Claimant was acting in person, assisted by the interpreter, and the Respondent was represented by Mr Clarke.

The Costs Judgment

12. The Tribunal reminded itself that the Claimant had previously withdrawn certain of his claims and that he had been told that it did not have jurisdiction to deal with certain other claims. The Tribunal also reminded itself that the Claimant had been told about the Tribunal's power to award costs, as recorded at paragraph 11 of the Liability Judgment. It also referred to the costs warning stated in the Respondent's ET3.

13. At paragraph 7 of the Costs Judgment, the Tribunal referred to paragraphs 5 through to 10 of the Liability Judgment as matters taken into account in the Tribunal's decision on costs. At paragraph 9, the Tribunal noted that it had found the Claimant's evidence to be contradictory and not credible. Having referred to the relevant Rules on costs, the Tribunal went on to set out its conclusions:

> **"12. The Tribunal is satisfied the Claimant has acted unreasonably in the bringing of these proceedings and in the manner in which they have been conducted and that the majority of the claims had no reasonable prospects of success. As such the Tribunal's discretion to award costs arises. The Claimant who at the outset had advice from a Citizens' Advice Bureau chose to pursue claims that were not within the jurisdiction of the Tribunal. This was explained to him at the preliminary hearings, but he still tried to pursue them. It does not appear that the Claimant sought further advice on his position.**
>
> **13. The Claimant is aggrieved that he was working under a zero hours contract and how his pay was calculated, but the Tribunal found at a preliminary hearing that he was employed under a zero hours contract. It had to remind him on numerous occasions that it could not revisit that finding or look into whether or not it was a 'fair' term of the contract.**
>
> **14. The Claimant kept changing the basis of his claims. He came to the full merits hearing claiming over £80,000. This was a significant claim that the respondent had no choice but to incur costs in defending. The Claimant cannot criticise the respondent for so doing.**
>
> **15. Even at this hearing, the Claimant has sought to argue the issues in his claim rather than focus on the issue of costs."**

14. Having concluded that the discretion to awards costs was engaged, the Tribunal went on to consider whether to make such an order and, in doing so, had regard to the Claimant's ability to pay. The Tribunal concluded that the Claimant should not have to pay costs for the Status Hearing on 26 May, when it was found that he was an employee and on 25 August, which was

a standard hearing, to clarify the issues. After referring to a couple of authorities, the Tribunal concluded as follows:

> **"21. Having considered all the circumstances, the Respondent's cost schedule and the bills to the Respondent had accompanied it and giving consideration to the Claimant's ability to pay, the Tribunal has concluded an award of £5,000 inclusive of VAT and disbursements should be made to cover, in effect, some of the costs of the full merits hearing which could have been avoided had the Claimant not acted unreasonably in pursuit of these claims.**
>
> **22. How that sum is to be paid will be a matter for the County Court if the Respondent seeks to enforce the award."**

Legal Framework

15. Rule 76 of **The Employment Tribunal Rules of Procedure 2013** ("the ET Rules") govern the awarding of costs by the Tribunal. Insofar as it is relevant, it provides at Rule 76:

> **"When a costs Order or a preparation time Order may or shall be made**
>
> **76.-(1) A Tribunal may make a costs Order or a preparation time Order, and shall consider whether to do so, where it considers that-**
>
> **(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or**
>
> **(b) any claim or response had no reasonable prospect of success."**

16. Rule 84 of the **ET Rules** deals with the ability to pay. It provides:

> **"Ability to pay**
>
> **84. In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay."**

17. It is well-established that the structure of these provisions dictates a three-stage approach: The Tribunal must first consider the threshold question of whether any of the circumstances identified in Rule 76(1) applies and, if so, it must then consider separately, as a matter of discretion, whether to make an award of costs. If it is decided that an award of costs should be made, the final stage is to decide what amount of costs to award: see **Vaughn v London Borough of Lewisham (No. 2)** [2013] IRLR 713 and **Haydar v Pennine Acute NHS Trust** [2017] UKEAT0141/17/BA at paragraph 25.

18. It is also well-established that as a decision on costs involves the exercise of discretion by the Tribunal, the Employment Appeal Tribunal will rarely interfere with the Tribunal's decision. In **Barnsley Metropolitan Borough Council v Yerrakalva** [2012] ICR 420, Mummery LJ held as follows:

> **"6. The Tribunals below did not agree about the exercise of the discretion. That is not surprising. A familiar feature of all litigation is that experienced Judges may sensibly differ on how, in the particular circumstances of the individual case, a costs discretion should be exercised. Parties and prudent advisers should take account of that factor when considering whether a costs order is worth appealing.**
>
> **7. As costs are in the discretion of the ET, appeals on costs alone rarely succeed in the EAT or in this court. The ET's power to order costs is more sparingly exercised and is more circumscribed by the ET's Rules than that of the ordinary courts. There the general Rule is that costs follow the event and the unsuccessful litigant normally has to foot the legal bill for the litigation. In the ET costs orders are the exception rather than the Rule. In most cases the ET does not make any order for costs. If it does, it must act within Rules that expressly confine the ET's power to specified circumstances, notably unreasonableness in the bringing or conduct of the proceedings. The ET manages, hears and decides the case and is normally the best Judge of how to exercise its discretion.**
>
> **8. There is therefore a strong, soundly based disinclination in the appellate Tribunals and courts to upset any exercise of discretion at first instance. In this court permission is rarely given to appeal against costs orders. I have noticed a recent tendency to seek permission more frequently. That trend is probably a consequence of the comparatively large amounts of legal costs now incurred in the ETs.**
>
> **9. An appeal against a costs order is doomed to failure, unless it is established that the order is vitiated by an error of legal principle, or that the order was not based on the relevant circumstances. An appeal will succeed if the order was obviously wrong. As a general Rule it is recognised that a first instance Decision-maker is better placed than an appellate body to make a balanced assessment of the interaction of the range of factors affecting the court's discretion. This is especially so when the power to order costs is expressly dependent on the unreasonable bringing or conduct of the proceedings. The ET spends more time overseeing the progress of the case through its preparatory stages and trying it than an appellate body will ever spend on an appeal limited to errors of law. The ET is familiar with the unfolding of the case over time. It has good opportunities for gaining insight into how those involved are conducting the proceedings. An appellate body's concern is principally with particular points of legal or procedural error in Tribunal proceedings, which do not require immersion in all the details that may relate to the conduct of the parties."**

The Grounds of Appeal

19. The grounds of appeal, which were drafted by the Claimant, are not entirely clear. However, as I determined on the sift in this matter, the principle contention is that the Tribunal erred in awarding costs in circumstances where the Respondent has consistently resisted all aspects of the claim, including employee status, there had been some findings in the Claimant's favour, and the Claimant had succeeded in part of his claim in relation to holiday pay. In those circumstances, it was said that the Tribunal erred in reaching the conclusion that the Claimant

had acted unreasonably "*in the bringing of these proceedings*". The Claimant further contends that, as he succeeded in part, and he was ultimately awarded some compensation, the pursuit of some unmeritorious claims, where there was no deposit order against him, did not render his conduct unreasonable such as to trigger the costs jurisdiction. It is further argued that the Tribunal erred in assessing the amount of costs awarded and that there was no or no adequate explanation of the basis on which the sum of £5,000 was reached. In particular, it was not clear to what extent the unreasonable conduct extended what was a relatively short hearing and what additional costs would have been incurred by the Respondent as a result.

Submissions

20. The Claimant, with the assistance of the interpreter, submitted that there had not been any finding that he was on a zero-hours contract at the Status Hearing and that the Judge was wrong to prevent him from raising that issue. He had understood it would be addressed at the Liability Hearing. He said that he did not seek to resurrect certain claims but that the Tribunal had wrongly got that impression from the fact that the Respondent had included in the bundle an old witness statement prepared prior to the Status Hearing, whereas he had wished to rely on a newer statement which contained different matters relevant to his having employee status. The Claimant made various other points relating to the Liability Judgment which are not relevant to this judgment.

Discussion

21. As stated above, the Tribunal is required to consider, first, whether any of the circumstances set out in Rule 76.1 apply so as to confer on the Tribunal the discretion to award costs. The Tribunal relied on two matters:

> **(a) the majority of the claims had no reasonable prospect of success, and**
>
> **(b) he had acted unreasonably in the proceedings and in the manner in which they had been conducted.**

22. As to the first of these matters, the Tribunal did not specify which claims it considered had no reasonable prospect of success. I have considered the ET1 in this matter. I note that it does not include any claims under the **Data Protection Act** or the **Health and Safety at Work Act**. In the Liability Judgment, the Tribunal refers to these claims as having been raised in recent correspondence. There was never any formal attempt, as far as I can see, to amend the Claimant's claim to include such issues, and they were not identified as issues at the Preliminary Hearing in August. To the extent, therefore, that the Tribunal included the **Data Protection Act** and the **Health and Safety at Work Act** claims as ones that had been pursued without reasonable prospect of success, it was wrong to do so. They were not claims at any stage. The fact that a litigant in person might mention such matters in correspondence does not make them claims, still less that they are claims being pursued without reasonable prospects of success.

23. As for the remaining claims, there was a reference to a claim for unfair dismissal. However, although the Claimant appeared in his ET1 to seek compensation and re-engagement, it seems to have been clarified at an early stage that that claim was not one that was being pursued. The Claimant did pursue a claim of wrongful dismissal. That was pursued without objection from the Respondent. It cannot be said to have been unreasonable to do so.

24. That leaves the claims for breach of contract, holiday pay, and failure to provide pay slips. The claim for holiday pay succeeded; the claim for breach of contract did not. However, there was no indication at the Status Hearing that the claim for breach of contract was a wholly unreasonable one to pursue. Indeed, the Tribunal expressly stated that it had not made any findings as to the rates of pay claim and that this would be a matter to be dealt with at the substantive hearing. There was no application for a deposit order in respect of these matters.

A The only consideration given to a deposit order application was in respect of pay since 9 June 2016.

B 25. Whilst the Tribunal did not find in the Claimant's favour in respect of the breach of contract claim, it cannot be said that it had no reasonable prospects of success. The Tribunal considered that claim over several pages in the Liability Judgment and ultimately accepted the Respondent's evidence that the correct amounts were paid. That was a finding that the Tribunal C was entitled to reach on the evidence. It did not necessarily mean that the claim had no reasonable prospects of success.

26. The Tribunal did note that the Claimant's concerns were more about the zero-hours D contract and it may be that that concern, persistently pursued, was what coloured the Tribunal's Judgment. The Tribunal's view, however, was that this was a matter that had already been determined at the Status Hearing and could not be raised again. I have considerable doubts as E to the correctness of that view.

27. The Judgment at the Status Hearing was that the Claimant was an employee and that the Tribunal had jurisdiction to consider the claims. The only reference to zero-hours contract in the entire judgment that I can see is at paragraph 11, where the Tribunal does no more than set F out what the terms of the contract provided in that regard. There is no analysis at all as to whether that term reflected the reality of position. Given that the Claimant had been arguing that the Respondent was not entitled to rely upon the zero-hours provision to simply stop giving G him work, and given that the Tribunal had made no findings as to how the relationship had ended, it is not surprising that the Claimant was left to believe that the zero-hours issue was still one that would be considered at the Full Liability Hearing. Indeed, the Claimant stated, in terms today, that that was what he was told at the Status Hearing. This seems to me something H

that was consistent with the Tribunal's statement that it had not made any findings as to how the relationship had ended.

28. As such, it was not unreasonable for the Claimant to pursue this issue, and nor is it one that could be said to have had no reasonable prospect of success insofar as it related to the issue of termination. A zero-hours contract is not, in and of itself incompatible with there being a termination. The Tribunal rejected the Claimant's wrongful dismissal claim, and it concluded that he was not dismissed because it was a zero-hours contract and no further work was offered. However, as I said, in the absence of any proper analysis, either at the Status Hearing or the Liability Hearing, about the zero-hours element of the contract, and given the implication that it would be dealt with subsequently, it was not unreasonable for the Claimant to continue to pursue that issue.

29. The Tribunal was undoubtedly correct to conclude that some of the Claimant's claims, such as the claim for loss of earnings since 9 June 2016, had no merit. However, I consider that, insofar as it concluded that "the majority" of claims had no prospect of success, it fell into error, and it reached a conclusion that was not supported by the evidence. The jurisdiction to award costs was not engaged by reason of that matter.

30. As to the conclusion that the Claimant had acted unreasonably in bringing and conducting the proceedings, the position, in my view, is that the Tribunal also erred in this regard. The Claimant clearly had a sound complaint that he was an employee. That was the underlying basis for several of his other complaints. It was a claim that was strongly, and, arguably, unreasonably resisted by the Respondent from the outset. Moreover, the Claimant had a valid holiday pay claim which succeeded. Given that background, the fact that some claims are unmeritorious or do not succeed does not mean that the bringing of proceedings was unreasonable. Particular latitude may be afforded to a litigant in person such as the Claimant, who may not have the ability or access to expertise to be able to differentiate clearly between

meritorious and unmeritorious claims. It cannot be said, in the circumstances of this case, that the Claimant had acted unreasonably in bringing the proceedings insofar as that refers to the entirety or even the majority of the proceedings.

31. I turn, then, to the second limb of the Tribunal's finding on unreasonableness, which is in relation to the manner in which the Claimant had conducted proceedings. For the reasons set out above, I do not consider that the Claimant did conduct himself unreasonably in continuing to pursue, for example, the zero-hours claim. As for other aspects of this claim, which the Tribunal considered had been pursued unreasonably, such as the **Data Protection** and **Health and Safety at Work Act** claims, it does not appear that those were, in fact, claims at all: see above. The finding that the Claimant continually sought to resurrect claims that he had been told he could not pursue appears to arise out of his attempts to raise claims in respect of those matters, i.e. Data Protection and Health and Safety at Work. However, some of these had only been raised recently before the Liability Hearing, and it does not appear that there was a repeated attempt to resurrect them. I also take on board what the Claimant says about the incorrect reliance upon the older witness statement which was put in the bundle by the Respondent. As the Respondent has chosen not to appear today to clarify or correct the Claimant, I am prepared to accept what he says as being correct. Taking all of these matters into account, it seems to me that the Tribunal erred in concluding that the Claimant was acting unreasonably in the bringing and conducting of proceedings and that it had jurisdiction to award costs.

32. The next question for the Tribunal was whether, in the exercise of its discretion, costs should be awarded at all. The Tribunal noted that costs do not follow the event and concluded that the Claimant should not have to pay costs for the hearing on 26 May when it was found that he was an employee, and the 26 August, which was a standard hearing to clarify the issues. That was clearly correct.

33. I bear in mind the warning in **Yerrakalva** against interfering with the exercise of discretion. It was said there that an appeal against a costs order is doomed to failure unless it is established that the order is vitiated by an error of legal principle or that the order was not based on the relevant circumstances. It seems to me that, in the circumstances of the present case, the Tribunal did fail to take into account certain significant matters.

34. The first is that the Respondent had unreasonably resisted a claim as to employment status:

> **(a) At the Status Hearing, Mr Dhir for the Respondent had accepted in oral evidence that the letter of 30 April 2015 was a contract of employment, thereby contradicting the case that had been put by the Respondent up to that stage.**
>
> **(b) The letter sent to the Claimant at the time referred to him being an employee throughout.**
>
> **(c) The Tribunal accepted the evidence of the Claimant which it regarded as "entirely convincing".**
>
> **(d) The Respondent sought to embark on various arguments to deny employee status which were unsupported by evidence: see, for example, paragraph 26 of the Status Judgment, in which the Tribunal said there was no evidence that Claimant had ever sent his wife in his place to do work.**
>
> **(e) At paragraph 60 of the Status Judgment, the Tribunal said that, "It did not find that the arguments advanced on behalf of the Respondent to be persuasive in any way whatsoever."**
>
> **(f) It was said in paragraph 62 that the Tribunal had not, at that stage, made any finding with regards to rate of payment or as to how the relationship between the parties had ended. It noted that those matters would be for the substantive hearing. In those circumstances, as I have already said, whilst the position could have been clearer, it cannot be said to be unreasonable for the Claimant to pursue the question of zero-hours contracts following that hearing.**
>
> **(g) At paragraph 66 the Tribunal said, 'It is not clear to this Tribunal how and why the Respondent sought to argue that the Claimant was not a worker.' Moreover, although the Respondent was running the argument that the Claimant was self-employed, the Tribunal noted that, 'It was not even put to the Claimant that he was running his own business.'"**

35. Taking all of those matters into account, it can be seen that, certainly as at the initial stages of the dispute, it was the Respondent who was, arguably, acting unreasonably, in resisting the Claimant's claim as to his employment status. That does not appear to have been taken into account by the Tribunal in the exercise of its discretion to award costs. I note, of course, that the Judge dealing with the Costs Judgment is the very same Judge who dealt with

the Status Hearing, and it could be argued that, in refusing to award costs in respect of the Status Hearing, the Tribunal can be deemed to have taken into account the Respondent's own unreasonable conduct. However, it seems to me that, in the absence of any express reference to this important factor, or any indication that this countervailing consideration was factored into the analysis, it can be said that the Tribunal failed to take account of all the relevant circumstances in coming to its decision.

36. The Costs Judgment also does not refer to the fact that the Claimant was not subject to any deposit orders. This is notwithstanding the fact that the Respondent had expressly considered making an application for a deposit order as referred to at paragraph 4.7 of the Liability Judgment. It also appears from that paragraph that a deposit order had only been considered in relation to the claim for compensation for loss of earnings since 9 June 2016 and not in respect of any other claim. Whilst a deposit order is not, on any view, a pre-requisite to an award of costs against the Claimant, the absence of a deposit order was, in the circumstances of this case, a factor that ought to have been taken into account in the exercise of discretion.

37. The Tribunal commented at paragraph 14 of the Costs Judgment that the Claimant's claim is, "*... a significant claim that the Respondent had no choice but to incur costs in defending*." However, the Respondent had resisted the Claimant's successful claim for holiday pay right up to the hearing. At paragraph 10 of the Liability Judgment, the Tribunal said, "*Following the earlier decision on employment and work status, the Respondent accepted, at this hearing, that the Claimant was entitled to holiday pay, but not for the amount claimed*."

38. It is apparent, therefore, that, although the Status Hearing had concluded in May 2017 with the Judgment being sent to the parties in June 2017, the Respondent did not concede the Claimant's entitlement to holiday pay until almost seven months later at the Liability Hearing itself. In those circumstances, it can be said that it was the Claimant who had little choice but to pursue that claim right up to the hearing.

39. Taking those matters into account, it seems to me that it can be said that the Tribunal failed to have regard to all the relevant circumstances in exercising its discretion. Had it done so, it is possible that the discretion would have been exercised differently. However, given my conclusion that the Tribunal was wrong to find that the costs jurisdiction was engaged at all, I do not need to determine whether the exercise of that discretion was in fact wrong.

40. The next stage of the analysis for the Tribunal was to determine the appropriate amount. The Tribunal has a broad discretion in this regard, although the basis for exercising the discretion to award a particular sum ought to be properly explained. In the present case, the total sum claimed by the Respondent was said to be £22,283.10 plus VAT. The Tribunal's award amounts to just under 25% of that sum. It would not have been appropriate to make the Claimant liable for the whole of the costs of the Liability Hearing. As discussed above, the Claimant had little choice but to take the matter to a full hearing to recover, at least, his holiday pay. The hearing does not appear to have been unduly extended by references to such matters as DPA and HSWA**.** The zero-hours contract issue was a matter that, in my judgment, the Claimant was entitled to pursue. The majority of the Judgment is taken up by dealing with the Claimant's contractual claim, which, as I said above, was not an unreasonable one to pursue. In those circumstances, an award of £5,000, which would appear to represent a substantial proportion of the costs incurred for the Liability Hearing, seems quite high and is certainly not properly explained.

Conclusion

41. For all of these reasons, it is my Judgment that the Tribunal did err in law. This appeal is therefore allowed. I substitute a decision that there was no discretion to award costs and the costs award is set aside.