Appeal No. EA-2020-000280-OO (previously UKEAT/0053/21/OO)

EMPLOYMENT APPEAL TRIBUNAL

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

At telephone hearing before the Tribunal
On 21 July 2021
Judgment handed down on 18 August 2021

Before

CLIVE SHELDON QC (DEPUTY JUDGE OF THE HIGH COURT)

(SITTING ALONE)

MR A FOSTER — APPELLANT

ROWES GARAGE LIMITED — RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	MRS IRINA FOSTER (Representative)
For the Respondent	No appearance or representations by or on behalf of the Respondent

SUMMARY

PRACTICE AND PROCEDURE

Appeal dismissed: the Tribunal had given sufficient reasons for its decision not to make a reduction in the costs award to be paid by the Claimant on the grounds of inability to pay. Further, the decision arrived at by the Tribunal was not perverse.

CLIVE SHELDON QC (DEPUTY JUDGE OF THE HIGH COURT)

Introduction

1. This is an appeal brought by Andrew Foster (who I shall call the Claimant) against the decision of an Employment Tribunal, sitting in Exeter, on February 5th 2020 that he should pay Rowes Garage Limited (the Respondent) the sum of £9,600 in costs.

2. Permission to proceed to a full hearing was granted by Cavanagh J. on March 3rd 2021. Permission was limited to arguing one ground of appeal: that the Employment Tribunal's decision to order the Claimant to pay £9,600 in costs was perverse in light of the Claimant's ability to pay and/or the Employment Tribunal failed to give adequate reasons for its decision not to make a reduction in the costs award on the grounds of his inability to pay.

3. The Claimant's appeal was argued by his wife Irina Foster. Mrs. Foster produced a detailed skeleton argument, and amplified her points in oral argument before me. The Respondent did not attend the hearing, but stated in its response to the Notice of Appeal that it was quite clear that the Employment Tribunal took the Claimant's means into account when making the costs order, and gave sufficient reasons for the decision not to apply a discount based on the Claimant's ability to pay the award of £9,600.

Factual Background

4. In 2016, the Claimant issued proceedings that he had been unfairly dismissed, had been discriminated against because of his disability and had suffered harassment because of his disability. His claims were dismissed following a hearing in July 2017.

5. The Respondent made an application for costs on the basis that the Claimant had acted vexatiously in the bringing and in the conduct of these proceedings, or had otherwise acted unreasonably both in bringing the proceedings and in the way in which they were conducted, and also on the basis that the claims had no reasonable prospects of success. A hearing to consider this application was heard on February 5th 2020.

6. In advance of that hearing, the Claimant sent an email to the Employment Tribunal asking the panel to consider a letter from his GP. This letter reported that the Claimant had been suffering from severe depression for many years, and that the Claimant was "very withdrawn, anxious and has a pervasive low mood". The GP stated that the symptoms were having "a severe impact on his life at the moment", and that these proceedings had caused the Claimant's symptoms "to have actually worsened." In the Employment Tribunal's decision on the costs application, it was noted (at paragraph 3) that the Claimant had confirmed that he did not wish to postpone the hearing, but wanted it to go ahead.

7. At paragraph 4 of its decision, the Employment Tribunal stated that after considering the application and the Claimant's reply:

> "the Tribunal adjourned temporarily to reach its decision. I then gave a summary outline of that decision having confirmed that full written reasons would follow. Towards the end of that process the claimant collapsed. He was immediately assisted by the Tribunal staff and an ambulance was called. The Tribunal . . . confirms that its decision was reached having considered in full the respondent's application and the claimant's response to that application, and before he unfortunately fell ill."

The Tribunal's Decision

8. In its written decision, the Employment Tribunal set out the arguments made by the Respondent and the Claimant with respect to the bringing of and conduct of the proceedings.

It then set out the relevant rules relating to costs, including rule 84 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the 2013 Regulations"):

> "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 wasted costs order is made, the representative's) ability to pay."

9. The Employment Tribunal referred to the case law, and to the relevant legal principles. The Employment Tribunal noted that the correct starting point was that an award of costs is the exception rather than the rule; and that it has a wide discretion where an application for costs is made. There was a two-stage process (per *Monaghan v. Close Thornton* [2002] EAT/0003/01; *Brooks v. Nottingham University Hospitals NHS Trust* UKEAT/0246/18). The questions to be asked were (i) was the conduct of the party against whom costs is sought unreasonable; if so, (ii) ought the Tribunal to exercise its discretion in favour of the receiving party, having regard to all the circumstances.

10. At paragraph 31 of its decision, the Employment Tribunal stated as follows:

> "With regard to the paying party's ability to pay, Rule 84 allows the tribunal to have regard to the paying party's ability to pay, but it does not have to, see *Jilley* . . . and *Single Homeless Project v Abu*. The fact that a party's ability to pay is limited, does not, however, require the tribunal to assess a sum that is confined to an amount that he or she could pay see *Arrowsmith v Nottingham Trent University* which upheld a costs order against a claimant of very limited means and per Rimer LJ "her circumstances may well improve and no doubt she hopes that they will." One reason for not taking means into account is the failure of the paying party to provide sufficient and/or credible evidence of his or her means. The authorities also make it clear that the amount which the paying party might be ordered to pay after assessment does not need to be a sum which he or she could pay outright from savings or current earnings. In *Vaughan v LB Lewisham*[1] the paying party was out of work and had no liquid or capital assets and a costs order was made which was more than twice

[1] The Employment Tribunal misidentified the respondent in that case as London Borough of Newham. The case is reported at [2013] IRLR 713.

> her gross earnings at the date of dismissal. Underhill P declined to overturn that order on appeal because despite her limited financial circumstances, there was evidence that she would be successful in obtaining some further employment. Per Underhill P: "the question of affordability does not have to be decided once and for all by reference to the party's means at the moment the order falls to be made" and the questions of what a party could realistically pay over a reasonable period "are very open-ended, and we see nothing wrong in principle in the tribunal setting the cap at a level which gives the respondents the benefit of any doubt, even to generous extent. It must be recalled that affordability is not, as such, the sole criterion for the exercise of the discretion: accordingly, a nice estimate of what can be afforded is not essential."

11. At paragraph 32, the Employment Tribunal stated as follows:

> "Insofar as it does have regard to the paying party's ability to pay, the tribunal should have regard to the whole means of that party's ability to pay, see *Shield Automotive Ltd v Greig* (per Lady Smith obiter). This includes considering capital within a person's means, which will often be represented by property or other investments which are not as flexible as cash, but which should not be ignored."

12. Under the heading, the Claimant's Means, the Employment Tribunal stated at paragraph 37 that:

> "The claimant chose to give some limited information as to his means. He explained that his wife is now disabled and he is her main carer. He himself suffers from mental health issues as noted above. He has no savings. However, he is in regular employment, and does own his own home, subject to a mortgage, which he is able to pay from his salary."

13. In its conclusion, the Employment Tribunal explained that the cost threshold was triggered because the conduct of the Claimant in continuing with his proceedings had been unreasonable. At paragraph 42, the Employment Tribunal stated that it had decided to make a costs award against the Claimant, exercising its discretion having regard to all the circumstances. The reasonable sum for the work undertaken by the Respondent in defending the proceedings, following the service of witness statements, was calculated by the Employment Tribunal as £9,600.

14. At paragraph 45, the Employment Tribunal concluded that:

> "However, again we are not unanimous in making the award. We have carefully considered the information which the claimant has given us with regard to his means. Mr Knox, who is again in the minority, is of the view that the claimant cannot afford any award over the sum of £500, and his decision is to limit the award of costs payable by the claimant in favour of the respondent to the sum of £500. The majority (being the Employment Judge and Mr Slater) do not agree. We have carefully considered the guidance above with regard to the claimant's potential ability to pay, and the majority decision of this Tribunal is that the claimant is ordered to pay the respondent's costs limited to £9,600."

The Appeal

15. At a Rule 3(10) hearing, Cavanagh J. permitted an appeal on one ground only: namely whether the Employment Tribunal's reasoning was perverse and/or the Employment Tribunal failed to give adequate reasons for its decision not to make a reduction in the costs award on the ground of inability to pay.

16. A number of authorities are cited in a skeleton argument prepared by Mrs Foster: *Abaya v Leeds Teaching Hospital NHS Trust* (UKEAT/0258/16/BA); *Ayoola v. St Christopher's Fellowship* (UKEAT/0508/13/BA); *Barnsley MBC v. Yerrakalva* ([2011] EWCA Civ 1255); *Haydar v. Pennine Acute NHS Trust* (UKEAT/0141/17/BA); *Hammond v. Secretary of State for Work and Pensions* (UKEAT/0216/13/SM); and *Jilley v. Birmingham and Solihull Mental Health Trust* (UKEAT/0584/06/DA). I have read each of these authorities in considering this appeal.

17. The key proposition for the purposes of the appeal are set out in *Jilley*, where Richardson HHJ, stated at [44] that rule 41(2) of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (the predecessor to rule 84 of Schedule 1 to the 2013 Regulations):

> "gives to the Tribunal a discretion whether to take into account the paying party's ability to pay. If a Tribunal decides not to do so, it should say why. If it decides to take into account ability to pay, it should set out its findings about ability to pay, say what impact this had on its decision whether to award costs or on the amount of costs, and explain why. Lengthy reasons are not required. A succinct statement of how the Tribunal has dealt with the matter and why it has done so is generally essential."

18. This point was echoed by Eady HHJ in *Hammond* where she stated at [23-24] that:

> "the means of the paying party still do amount to a potentially relevant matter. The difficulty in this case is in not knowing whether the Employment Judge turned his mind to the question of means – a relevant consideration – or not. If he did, but decided that the likely inability of the Claimant to immediately pay the award would not dissuade him from making it in this case, he did not explain that, as he might have been expected to do. As HHJ Richardson observed in *Jilley*, this is not a particularly onerous requirement, simply to state why in a particular case the Judge did not consider it to be a relevant matter.
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> . . . The Claimant's means were a potentially relevant matter. On the facts before the Employment Judge a question naturally arose as to whether the Claimant could begin to meet the award of costs that the Respondent was seeking. I cannot tell from the reasons given as to whether this potentially relevant matter was taken into account and, in my judgment (and in this regard I follow HHJ Richardson in *Jilley*), that amounts to an error of law on the part of the Employment Judge."

19. Further, a "perversity" challenge should only succeed where "an overwhelming case is made out that the employment tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached": see *Yeboah v. Crofton* [2002] IRLR 634 at [93].

20. The Claimant contends that, in this case, contrary to the exhortation in *Jilley*, the Employment Tribunal did not give a succinct statement that took into account all of the relevant circumstances of the case and his ability to pay. The Claimant says that it is not clear from paragraphs 37 and 45 of the judgment whether the Employment Tribunal decided

not to take the Claimant's means into account, and, if so, why not, or, alternatively, whether the Employment Tribunal decided to take the Claimant's means into account but decided to make no discount as a result of his means.

21. The Claimant notes that whereas the Employment Tribunal stated that he was able to pay his mortgage from his salary, it did not explain if it took into account other relevant factors, such as that the Claimant was the sole provider to his disabled wife, who could no longer go to work because of her physical disabilities; and that, apart from paying the mortgage, the Claimant also had to pay from his salary council tax, gas and electricity bills, prescription medicines, food and so forth. The Claimant also referred to the fact that at the time of this appeal the Claimant had not been working for over a year, so debts have been accumulating.

22. The Claimant also argued that the sum of £9,600, which the Employment Tribunal ordered him to pay, was a lot of money for many people in our society, and the Employment Tribunal did not explain why the majority thought it was affordable to the Claimant.

23. Other matters were also argued by the Claimant: that he had suffered depression for years and so the costs hearing should have been postponed, the Employment Tribunal failed to take into account whether the Claimant's mental capacity to undertake some of the procedural activities required for the substantive hearing was compromised by his depression, that the Claimant was unrepresented and could not possibly predict that his claim would no longer have a reasonable prospect of success, without cost warnings he was unaware that he was at risk of an award of costs being made, the Claimant only proceeded with his case because his previous legal team told him he had a good chance of being

successful, and an unrepresented mentally ill person is no match for a professional legal team. I do not consider that any of these points are relevant to the ground of appeal which was permitted to proceed, and so I do not take these into account in reaching my decision.

Discussion

24. Ultimately, this appeal turns on a narrow point. Did the Employment Tribunal adequately explain its reasons for deciding (by a majority) that the sum of £9,600 in costs should be paid by the Claimant in light of his financial means; and, if so, was this decision "perverse". This turns on a close analysis of what the Employment Tribunal set out at paragraph 45 of its judgment. (The Employment Tribunal's decisions that (i) the cost threshold was triggered, because the conduct of the Claimant was unreasonable; and (ii) a costs award should be made against the Claimant are not challenged on this appeal).

25. I fully acknowledge that paragraph 45 of the Employment Tribunal's judgment (see paragraph 14 above) is concise. Nevertheless, in my judgment, a number of propositions can be identified from paragraph 45, and this must be read in the context of other paragraphs of the Employment Tribunal's decision. It seems to me that the Employment Tribunal:

(i) said that it had carefully considered the information which the Claimant gave as to his means (this is a reference back to the factual matters set out at paragraph 37 of its judgment);

(ii) set out the view of the minority that the Claimant cannot afford any award over the sum of £500, and that his decision was to award a sum of £500, to which it said that the majority "do not agree";

(iii) said that the majority had carefully considered the guidance with regard to the Claimant's potential ability to pay (this is a reference back to the authorities

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referred to at paragraphs 31 and 32): those authorities refer to all of the party's means, including their capital (such as property), and can include a party's prospects of being able to make payments based on future employment opportunities; and

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(iv) stated its conclusion that the Claimant was ordered to pay costs limited to £9,600.

26. My understanding of these propositions is as follows: when the majority said that they "do not agree" with the minority position, they were stating that they did not agree that the Claimant could not afford any award over the sum of £500. In other words, the Employment Tribunal was saying that the majority considered that the Claimant could afford to pay more than £500.

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27. As for how much more, my reading of the decision is that the majority of the Employment Tribunal was saying that in their view the Claimant had the "potential ability to pay" £9,600, and by implication they did not need to apply a discount to the Claimant on the basis that he could not pay that amount. This was reflected in the Employment Tribunal's statement that it had "carefully considered the guidance above with regard to the claimant's potential ability to pay", and its earlier statement that it had "carefully considered the information which the claimant has given us with regard to his means". This latter statement was referring to the factual matters set out at paragraph 37 of the Employment Tribunal's decision: that is, on the one hand, the Claimant's status as a carer for his disabled wife, his own mental health, his lack of any savings; and on the other hand, that he was in regular employment, owned his own home and was able to pay his mortgage from his salary.

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28. In my judgment, therefore, the Employment Tribunal did provide a succinct statement of the sort called for by HHJ Richardson in *Jilley* and HHJ Eady in *Hammond*. I consider that paragraph 45 of the Employment Tribunal's judgment does allow the Claimant to understand why he has been ordered to pay the amount of £9,600: even though the Claimant was caring for his disabled wife, had his own mental health issues, and lacked any savings, the majority of the Employment Tribunal assessed that he had the potential to pay the sum of £9,600 as he was in regular employment, owned his home and was able to pay the mortgage from his salary.

29. I do not consider that this reasoning is "perverse". The Claimant was, according to the evidence given by him at the hearing, in regular work, owned his own home, and was able to pay the mortgage from his salary. There is nothing to suggest that the Claimant informed the Employment Tribunal that whilst he paid the mortgage, he was unable to afford other expenses such as food, medical, or utility bills. The fact that (as explained in the Claimant's skeleton argument for this appeal) the Claimant's employment circumstances have changed since the date of the hearing, and in particular that he is no longer in regular employment, is not a reason to find that the Employment Tribunal's decision was perverse.

30. Furthermore, although I note that the Employment Tribunal was aware at the date of the hearing that the Claimant had been suffering from severe depression, and that this was "having a severe impact on his life at the moment" (see the letter to the Employment Tribunal from the Claimant's GP at paragraph 6 above), the Employment Tribunal was not provided with any evidence that the Claimant's mental health was impacting on his future ability to work and earn an income. There was no evidence before the Employment

A Tribunal, therefore, from which it should have formed the view that the Claimant's potential to pay was affected by his mental health condition.

B 31. In addition, the fact that the Claimant owned his own home means that the Employment Tribunal was entitled to consider that the Claimant had capital from which he could potentially pay the Respondent's costs of £9,600. Making a costs payment out of capital (including one's property) was contemplated by Lady Smith in *Shields Automotive Ltd. v. Greig* (as referred to by the Employment Tribunal at paragraph 32 of the judgment). In *Shields*, Lady Smith observed at [47] that "no case was made to the Tribunal that the Claimant would have difficulty in realising his interest in the house or using its value in some other way so as to meet his liability for expenses". Similarly, in the instant case, there was no evidence given to the Employment Tribunal that the Claimant could not pay the Respondent's costs out of the capital in his home.

E 32. Accordingly, although I have great sympathy for the Claimant given his own mental health issues, and have real respect for the way in which Irina Foster has argued this appeal, I dismiss the appeal.

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