Appeal No. EA-2019-000145-LA
(previously UKEAT/0166/20/LA)

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 31 March 2021

Before

HIS HONOUR JUDGE JAMES TAYLER

(SITTING ALONE)

MR M IBEZIAKO — APPELLANT

(1) YORK TEACHING HOSPITALS NHS FOUNDATION TRUST
(2) LOCUM PLACEMENT GROUP LTD — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR M IBEZIAKO (The Appellant in Person)
For the First Respondent	MR ANDREW WEBSTER (of Counsel) Instructed by: DAC Beachcroft LLP St Paul's House 23 Park Square South Leeds West Yorkshire LS1 2ND

SUMMARY

PRACTICE AND PROCEDURE

The Tribunal did not err in law in refusing to postpone a costs hearing because the Claimant contended that he was unwell and had not slept the night before the hearing. The Tribunal did not err in law in its consideration of the Claimant's means, and in holding that, although he was unable to pay any award of costs at the time of the hearing, there were reasonable prospects that he would be able to pay an award of costs of £2,000 (10% of sum claimed by the First Respondent) in the future.

Rule 42 of the ET Rules, which requires the Tribunal to consider written representations sent to it and the other parties 7 days before a hearing, does not preclude the employment tribunal allowing a party to submit a skeleton argument at the hearing (or less than 7 days before the hearing), although fairness generally requires that the other party has a reasonable amount of time to read the skeleton before oral submissions.

HIS HONOUR JUDGE JAMES TAYLER

Introduction

1. This is an appeal against the Judgment of the Employment Tribunal sitting in Hull on 29 November 2018, Employment Judge S-J Davies sitting with members, awarding costs against the Claimant in the sum of £2,000. The Judgment was originally sent to the parties on 12 December 2018. A corrected version of the Judgment was sent to the parties on 19 December 2018.

Background

2. In order to understand the appeal it is necessary to consider a little of the background. The Claimant was provided to work for the First Respondent through an employment agency, the Second Respondent. He started working on or about 1 May 2017.

3. On 29 August 2017, the Claimant was referred by his general practitioner to a therapy provider, Let's Talk. In a letter of that date the GP stated that the Claimant had been seen for an assessment and offered face-to-face therapy.

4. The Claimant undertook a number of shifts for the First Respondent at the beginning of September 2017. The Claimant's claim to the Employment Tribunal arose out of what happened when he worked those shifts. The Claimant ceased work for the First Respondent on or about 5 September 2017. A claim form was submitted to the Employment Tribunal on 5 November 2017.

5. On 28 March 2018 the Claimant attended a therapy session as he wished to control his anxiety.

6. On 2 May 2018, in the lead-up to the liability hearing, the Claimant was sent a costs warning letter by the First Respondent.

7. The hearing took place from 21 to 24 May 2018, with 25 May 2018 as a day of deliberations. The claims were dismissed in a Judgment sent to the parties on 8 June 2018.

8. On 27 June 2018 the First Respondent made a written application for costs, setting out in some detail the basis for the application, including the Tribunal's determination that some of the allegations made by the Claimant were false.

9. The Claimant provided the Tribunal with a letter dated 5 September 2018 from his GP:

> **"Please find enclosed copies of letters from the Let's Talk Service regarding this gentleman.**
>
> **Mr Ibeziako states that he has attended this service regarding depression and anxiety. We have no further information regarding this issue.**
>
> **Mr Ibeziako is not currently on any medication."**

10. I was provided with a timesheet that demonstrated that the Claimant had undertaken a night shift on 9 September 2018, provided by a different agency to a new end user. Other timesheets suggested that around this time the Claimant was undertaking some other work though the same agency.

11. On 4 October 2018 the Claimant was sent notice of the costs hearing. The letter was in standard form. It included the wording:

> **"You may submit written representations for consideration at the hearing. If so, they must be sent to the Tribunal and to all the other parties not less than 7 days before the hearing. You will have the chance to put forward oral arguments in any case."**

12. This is a standard paragraph designed to provide for parties who wish to put their submissions in writing, particularly if the party does not intend to attend the hearing, rather than those who provide a skeleton argument to provide structure to oral submissions. I appreciate the wording of the standard letter is slightly unfortunate and does on occasion result in litigants in person being surprised when they are provided with a skeleton argument at, or shortly before, a hearing. Well drafted skeleton arguments are of assistance because they give a brief outline, and some advance notification, of the oral submissions. The provision of a skeleton argument does not disadvantage the party receiving it. The only alternative to accepting a skeleton argument would be to permit only oral submissions that would cover the same ground, without the other party having the benefit of a brief written note of the submissions and, usually, some advance notification. That being said, fairness generally requires that the other party has a reasonable amount of time to read the skeleton argument before oral submissions based on it are made. The time required for reading will be reduced if skeleton arguments are kept rather more skeletal than is now the common practice; many "skeleton" arguments have too much flesh on the bones. A skeleton argument that is no more than bullet point of the submissions designed to give them structure may not require pre-reading.

13. The paragraph in the standard letter derives from rule 42 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 which provides:

> **42. Written representations**
>
> **The Tribunal shall consider any written representations from a party, including a party who does not propose to attend the hearing, if they are delivered to the Tribunal and to all other parties not less than 7 days before the hearing.**

14. This rule requires an employment tribunal to read and consider any written representations sent to the tribunal and other parties 7 days before the hearing, but does not preclude the tribunal considering written documents produced thereafter, subject to ensuring that

there is a fair opportunity for them to be read. For example, at a full hearing a skeleton argument for closing submissions, by its nature, is unlikely to be completed until the evidence has been heard, so could not be sent to the tribunal and other parties 7 days before the hearing. Such a skeleton is, nonetheless, very helpful to the tribunal and often the other party.

15. Rule 42 is particularly designed to allow parties who do not wish, or are unable, to attend a hearing, to submit written representations.

16. On 4 October 2018 the Claimant made an application to postpone the costs hearing. He provided some limited medical evidence. On 19 October 2018 the Claimant submitted a document that was stated to be an application to strike out the costs application, contending that it was not properly made. The Claimant also provided some information in respect of his financial position.

17. On 7 November 2018 the application for a postponement was refused. Employment Judge Davies stated:

> **"1. The Claimant's application to postpone the costs hearing is refused. The Claimant has provided no medical evidence that he will be unfit to attend the hearing on 29 November 2018. The medical evidence provided relates to 2017, except that on 5 September 2018 his GP said that they had no information regarding the Claimant's statement that he had attended with depression and anxiety. The GP said that the Claimant is not currently on any medication."**

18. The letter went on to deal with the Claimant's application that the costs judgment be dealt with by another Employment Judge, holding that it would be determined by the full panel that had heard the liability hearing as is usual. The application to strike out the costs application was refused, although it was noted that the points raised by the Claimant could be advanced at the costs hearing.

19. On 27 November 2018 at 14.30, the Respondent sent by email a brief skeleton argument produced by their counsel for the purposes of the costs hearing. The Claimant did not start working on his response to the skeleton argument until the evening of 28 November 2018. In the skeleton argument he provided in response the Claimant stated that he worked through the night. The Claimant referred to notes from the counselling service he was attending. The counselling session referred to in the notes most proximate to the costs hearing was held on 28 March 2018. There was no reference to any later attendance for counselling.

20. The Claimant attended the costs hearing on 29 November 2018. At the outset he made an application for a postponement. The Tribunal dealt with the application in their Reasons, at paragraphs 1.2 and 1.3:

> **"1.2. At the outset of the hearing, the Claimant renewed a request he had made the previous week for the hearing to be postponed. He referred to my reasons for refusing that postponement and said that the medical evidence he had previously provided referred to an appointment in March 2018. He also explained that the reason his GP reported that he was not on medication was that he had chosen to try a talking therapy first. He said that he had only been sent Mr Webster's skeleton argument yesterday and that he had not slept because he had been working to respond to it. He said that his anxiety levels were high.**
>
> **1.3. The Tribunal decided to go ahead with the hearing. There was no medical evidence that the Claimant is currently unfit to participate. The reference to an appointment on 28 March 2018 did not provide information about his current state of health. We recognised that he had chosen to try a talking therapy rather than medication, but there was still no medical evidence that he is currently unfit (or undertaking any talking therapy). We accepted that his anxiety levels were high and that he had not slept well, but he was able to make a cogent application to postpone the hearing. The Tribunal felt that he was able to participate effectively. No doubt the hearing was contributing to his state of anxiety, but that would remain the case at any postponed hearing. The Tribunal accepted that Mr Webster's skeleton argument had been emailed to him on Tuesday. It was sent, having regard to the Claimant's health, to give him advanced notice of Mr Webster's arguments. Otherwise, Mr Webster would simply have made them orally at the hearing. This was to assist the Claimant. In any event, a detailed application for costs was made in June, so the Claimant knew the arguments and had ample chance to prepare for the costs hearing. In all the circumstances, it was consistent with the overriding objective to go ahead with the hearing."**

21. So far as is relevant to this appeal, the Tribunal considered the relevant legal principles at paragraphs 4.1 and 4.2:

"4.1. Rules 76 and 84 of the Employment Tribunal Rules of Procedure 2013 provide, so far as material, as follows:

76 When a costs order or a preparation time order may or shall be made

(1) A Tribunal may make a costs 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.

…

84 Ability to pay

In deciding whether to make a costs … order, and if so in what amount, the Tribunal may have regard to the paying party's … ability to pay.

4.2. The Tribunal had regard to principles derived from some of the cases, in particular:

4.2.1. Unrepresented parties are not to be judged by the standards of a professional representative - the Tribunal must make an allowance for inexperience and lack of objectivity: see *AQ Limited v Holden* [2012] IRLR 648 EAT.

4.2.2. The Tribunal must identify the unreasonable conduct, say what was unreasonable about it and say what its effect was: see *Yerrakalva v Barnsley MBC* [2012] ICR 420 CA;

4.2.3. The mere fact that a party has lied in the course of its evidence is not necessarily sufficient to found an award of costs. The Tribunal has to have regard to the context, and the nature, gravity and effect of the untruthful evidence in determining the question of unreasonableness: see *Arrowsmith v Nottingham Trent University* [2012] ICR 159 CA."

22. The Tribunal considered the costs application between paragraphs 5.3 and 5.6. The Tribunal considered the Claimant's means at paragraph 5.6:

"5.3. The effect of the unreasonable behaviour was that the First Respondent had to defend this claim in a 4 day Tribunal hearing, bringing ten of its employees to give evidence about the wide-ranging allegations. It also led the First Respondent to incur very significant legal costs. The schedule provided by the First Respondent indicated that its legal costs are more than £20,000. Without carrying out any close scrutiny of the figures, the Tribunal accepted that the legal costs reasonably incurred in preparing for and attending the hearing were likely to be in the region of £15,000 - £20,000.

5.4. The Tribunal therefore considered whether it should make a costs order. We decided that it was appropriate to do so. The First Respondent is a public body spending taxpayers' money. It has reasonably incurred significant legal costs in

defending a claim that was unreasonably brought and pursued. It wrote a costs warning letter to the Claimant after witness statements had been exchanged, setting out in detail why the claim should be withdrawn. The Claimant dismissed that out of hand. The Claimant's financial circumstances can be taken into account in deciding how much to award, but they do not mean that the Tribunal should not make an award at all.

5.5. The Claimant suggested that the First Respondent had failed to comply with the Civil Procedure Rules and that its costs application should be refused on that basis. The Rules to which he referred do not apply in Employment Tribunal cases. He also said that the costs application should be struck out or that summary judgment should be issued. The Tribunal Rules only allow for a party's claim or response to be struck out, not a costs application. They do not allow for summary judgment. The appropriate course of action is to deal with an application for costs on its merits, which the Tribunal has done. The Claimant relied on a number of matters relating to the events that gave rise to his claim. Those matters were decided by the Tribunal at the liability stage. He cannot re-open them in a costs hearing. He pointed out that he has made an appeal to the Employment Appeal Tribunal. That can be dealt with by staying the effect of the costs order (putting it on hold) until the appeal has been finally determined.

5.6. The Tribunal therefore considered how much the Claimant should be ordered to pay. We took into account his financial position, in particular that he is not currently in a position to make any payments but that there are reasonable prospects that his health, employment position and financial position will improve in the relatively short term. Given the level of the Claimant's debts, his lack of assets and his potential earning capacity, the Tribunal did not consider that there was any realistic prospect of his ever being able to pay a costs order in the region of £20,000 and we did not consider that it would be in the interests of justice to make such an order. The Tribunal considered it just and proportionate to order the Claimant to pay a sum that he had a realistic prospect of paying, by instalments, within a reasonable timeframe. The Tribunal considered that £2,000 was such a sum."

23. The Judgment was sent to the parties on 12 December 2018. A corrected version was sent on 19 December 2018.

24. The Claimant told me that after he left the hearing he went home and he slept because he was extremely tired because of having to deal with the First Respondent's skeleton argument. After a night's sleep the immediate pressure on him evaporated, as a result, he says, he did not need to attend his general practitioner. There is no medical evidence suggesting an exacerbation of the Claimant's anxiety and depression at the time of the cost hearing.

25. The Claimant applied for a reconsideration of the costs judgment. The application was not supported by medical evidence that demonstrated that he had not been fit to participate in the cost hearing on 29 November 2018. The application for reconsideration was refused.

26. On 2 March 2019 the Claimant submitted his Notice of Appeal to the Employment Appeal Tribunal. Thereafter his health deteriorated. The Claimant attended his general practitioner on 15 March 2019. The Claimant was initially prescribed with 50mg Sertraline tablets on 15 March 2019. The Claimant provided a prescription that demonstrates that the dose was subsequently increased to 100mg.

27. The Claimant has provided a financial statement dated 10 May 2019 showing substantial debts. The Claimant contends in his skeleton argument that he had debts that he was unable to pay at the date of the costs hearing of £11,207. The Claimant provided for the purposes of this appeal a Fit Note, dated 31 October 2019, by which he was signed off as unfit to undertake work.

28. On 9 December 2019 the appeal was considered at the sift stage by Choudhury P who concluded that there were no reasonable grounds for bringing the appeal. The Claimant challenged that decision pursuant to Rule 3(10) of the EAT Rules and submitted a proposed amended Notice of Appeal. At the Rule 3(10) hearing on 18 August 2020, HHJ Auerbach allowed two grounds of appeal to proceed. His reasoning is set out at paragraphs 40 to 48 of the transcript:

> **"40. However, what has given me pause is the Claimant's reliance on Teinaz v London Borough of Wandsworth [2002] ICR 1471 and Iqbal v Metropolitan Police Service & Anor UKEAT/0186/12. These authorities, and in particular the discussion in Iqbal, recognise that when there is an application on the day, as there was here, by a litigant in person, and there is a lack of available medical evidence, the decision that the Tribunal has to take is a very difficult one. It has to decide whether there is a sufficient basis that it ought to adjourn effectively on the litigant's say-so, without having supporting medical evidence to hand.**
>
> **41. The Tribunal did not arguably err by simply regarding this as the same application that the Claimant had made a few weeks earlier. What the Tribunal clearly had in mind was that this was a renewal of the same *type* of application,**

namely an application to postpone on medical grounds. However, it did consider what information it had before it now, and whether there was any update to the medical evidence that had supported the previous application; and it noted that no further medical evidence was presented on the day. However, the Claimant makes the distinct point that, because the premise of his application was that he was labouring under the effects of his anxiety and depression, having had a very bad sleepless night the night before, he had not had the opportunity to marshal any further medical evidence; and, he says, the Tribunal should, therefore, arguably have considered, per the guidance in Iqbal and Teinaz, postponing at least for a short time to enable him to have the opportunity to get that evidence.

42. I have to consider today only whether this is sufficiently arguable to warrant proceeding to a Full Hearing. The Claimant's case is not straightforward, given in particular the limitations of the previous evidence that had been put before the Tribunal on earlier occasions, and the lack of any current evidence before the Tribunal of a medical nature, that he was currently on medication, currently seeing a GP or currently receiving counselling. The Claimant's case is also not assisted by the fact that, although he did apply for a reconsideration in December, an application that was unsuccessful, he did not take the opportunity before applying for that reconsideration, to get any further medical evidence to put before the Tribunal at that point.

43. However, all of that being said, the Tribunal *did* have evidence that the Claimant had in the past seen the GP for anxiety and depression, and had in the past been referred for counselling, which he had received over some months, at least up until March of that year, according to a letter previously shown to it. The Tribunal also did itself, later in its Costs Decision, at paragraph 3.2, say that it accepted that he had suffered mental ill health and had tried CBT. They referred to the explanation he proffered for other treatments that he was trying at that time. I think there is just enough here to get the Claimant over the threshold of it being arguable that the Tribunal, which did not expressly refer to the possibility of a short adjournment, did not sufficiently follow the Teinaz and Iqbal guidance in this case. It is sufficiently arguable for me to allow that aspect of the challenge to the refusal of the postponement to proceed to a Full Hearing.

44. However, I stress that it will be for the EAT at the Full Hearing to finally determine whether that ground, which is limited to the contention that the Tribunal failed to give sufficient consideration to the Iqbal and Teinaz guidance, succeeds or not. It will be important that at the Full Hearing, the EAT has all of the relevant evidence that was available to the ET. That includes the GP's letter of 5 September 2018, which the Claimant described to me today but was not in my bundle, and which was sent to the ET in support of the pre-hearing adjournment application. The EAT will also need to have in its bundle copies precisely of the other medical evidence dating from 2017 that was sent to the ET on that occasion, so that the EAT can see precisely what previous medical evidence would have been available to the ET when considering the application made at the Hearing itself. Therefore, I will allow that ground to proceed on that basis.

45. I turn to the second matter which has given me pause. This concerns the Claimant's challenge to the amount awarded based on a challenge to the Tribunal's assessment of his prospective ability to pay. As I say, I do not think it is arguable that the Tribunal failed in a general sense to take account of his current means. However, it decided to make a limited award on the basis the prospect of his being able to pay such an award by instalments in the future. It was not wrong as such for the Tribunal to make an award against someone who did not have current ability to pay on the basis of its assessment of future prospects: Vaughan v London Borough of Lewisham & Ors [2013] IRLR 713. However, I think that the Claimant has an arguable case that the Tribunal did not sufficiently explain how it had assessed and come to the view that there were

reasonable prospects that his health, employment and financial position would improve in the relatively short-term, such that a figure of £2,000 was one that he had reasonable prospects of being able to pay by instalments.

46. The Claimant again has informed me today that the Tribunal did not just have evidence of his current payslips, but also other evidence of difficulties he had faced in terms of unsuccessful applications for employment. The ET does not say anything except for a fairly broad statement in its Decision as to how it came to its view, and a statement about the market generally in terms of jobs, and that his prospects in terms of what he could generate by way of work income would improve. I think there is room to argue at least that the Decision is not Meek-compliant in that regard and/or that there was not a sufficient evidential basis for it.

47. Again, I have only decided that this limited ground related to the Tribunal's assessment of his future ability to pay should be permitted to proceed, as it is arguable. That does not necessarily mean that it will succeed at the full appeal hearing. Once again, it is important that the EAT at the Full Hearing has in its bundle copies of all the material relating to the Claimant's work, applications for work and so forth that were in front of the ET that made the Costs Decision.

48. Therefore, there are two limited grounds that I have allowed to proceed to a Full Hearing. Firstly, a challenge to the Tribunal's Decision not to postpone, the ground being that the Tribunal failed sufficiently to consider or apply the guidance in Teinaz and Iqbal, in particular having regard to evidence relating to his history of mental health difficulties, and failed to consider the option of a short adjournment to enable him to obtain further available evidence. The second matter is a challenge to the assessment of his prospective ability to meet that award of £2,000, on the basis that there was a failure to explain sufficiently how it came that view and/or that there was insufficient evidence to support that view. None of the other grounds is arguable and none of them will be permitted to proceed to a Full Hearing."

29. In summary the grounds that were permitted to proceed were: first, whether the Employment Tribunal had failed to consider the guidance provided in **Teinaz v London Borough of Wandsworth** [2002] ICR 1471 and **Iqbal v Metropolitan Police Service and Anor** UKEAT/0186/12/ZT, particularly whether consideration had, or should have been, given to an adjournment to allow the Claimant to provide further medical evidence; and secondly, whether sufficient reasons had been given, so as to comply with **Meek v City of Birmingham District Council** [1987] IRLR 250, for the decision that despite the Claimant's lack of means there was a possibility of his situation improving in the foreseeable future that made it appropriate to make an award of costs against him of £2,000.

30. After the Rule 3(10) hearing the Claimant made a subject access request to the Employment Tribunal on 9 December 2020 seeking the bundle of documents that was provided to the Employment Tribunal on 17 December 2020. The Claimant was informed that that bundle had been destroyed. The Claimant expresses considerable dissatisfaction that the bundle had been destroyed in circumstances in which there was an ongoing appeal. The Claimant should have kept his own copy of the bundle or been able to obtain duplicates of most financial or medical documents. The Claimant has adduced some documentation that he contends is of the type that he provided to the Tribunal. He has not provided documentation that demonstrates that he was undertaking counselling beyond 28 March 2018. That is the date referred to in the reasoning of the Tribunal and in the Claimant's skeleton argument. I have no reason to believe that the Claimant was receiving counselling beyond that point.

The Law

31. The law relevant to late applications for adjournment was recently considered by Lavender J in **Mukoro v Independent Workers' Union of Great Britain and Others** UKEAT/0128/19/BA:

> **"34. Applications for adjournments fall within the Employment Tribunal's powers to make general case management orders under Rule 29 and, under Rule 30, they may be made at a hearing or in writing. They are governed specifically by Rule 30A, which provides (so far as is relevant) as follows:**
>
> > **"(1) An application by a party for the postponement of a hearing shall be presented to the Tribunal and communicated to the other parties as soon as possible after the need for a postponement becomes known.**
> >
> > **(2) Where a party makes an application for a postponement of a hearing less than 7 days before the date on which the hearing begins, the Tribunal may only order the postponement where -**
> >
> > **…**
> >
> > **(c) there are exceptional circumstances.**
> >
> > **…**
> >
> > **(4) For the purposes of this rule -**

(a) references to postponement of a hearing include any adjournment which causes the hearing to be held or continued on a later date;

(b) "exceptional circumstances" may include ill health relating to an existing longterm health condition or disability."

35. The Presidential Guidance on Postponements provides (at paragraph 1.1) that applications should ordinarily be made in writing, but recognises that this may not always be possible. In such cases, it provides at paragraph 4 that the application 'will not ordinarily be considered unless there are exceptional circumstances', adding that an explanation should be given as to what the exceptional circumstances are and why they have prevented the applicant from complying.

36. The Guidance further offers examples of exceptional circumstances, including (at paragraph 1, under 'Examples') the following:

"When a party or witness is unable for medical reasons to attend a hearing. All medical certificates and supporting medical evidence should be provided in addition to an explanation of the nature of the health condition concerned. Where medical evidence is supplied it should include a statement from the medical practitioner that in their opinion the applicant is unfit to attend the hearing, the prognosis of the condition and an indication of when that state of affairs may cease."

37. It then describes how an Employment Judge should respond to an application:

"1. Where the appropriate information has been supplied then the Employment Judge will deal with the matter as soon as applicable. If the information has not been supplied any application may become the subject of further enquiry from the Employment Judge for relevant information which will have the effect of delaying the consideration of the application.

…

5. Once all the relevant information is available to the Employment Judge he/she will take into account all matters and information now available to them and consider whether to grant or refuse the postponement. The decision however remains in the discretion of the Employment Judge concerned.'

38. In *Teinaz* […] Peter Gibson LJ said as follows (in paragraphs 20 to 22 of his judgment):

"20. Before I consider these points in turn, I would make some general observations on adjournments. Every tribunal or court has a discretion to grant an adjournment, and the exercise of such a discretion, going as it does to the management of a case, is one with which an appellate body is slow to interfere and can only interfere on limited grounds, as has repeatedly been recognised. But one recognised ground for interference is where the tribunal or court exercising the discretion takes into account some matter which it ought not to have taken into account: see, for example, *Bastick v James Lane Ltd* [1979] ICR 778 at 782 in the judgment of Arnold J giving the judgment of the EAT (approved as it was in *Carter v Credit Change Ltd* [1980] 1 All ER 252 and page 257 per Stephenson LJ, with whom Cumming-Bruce and Bridge LJJ agreed). The appellate body, in concluding whether the exercise of discretion is thus vitiated, inevitably has to make a judgment on whether that matter should have been taken into account. That is not to usurp the function of the lower tribunal or court: that is a necessary part of the function of the reviewing body. Were it otherwise, no appellate body could find that a

discretion was wrongly exercised through the tribunal or court taking into account a consideration which it should not have taken into account or, by the like token, through failing to take into account a matter which it should have taken into account. Although an adjournment is a discretionary matter, some adjournments must be granted if not to do so amounts to a denial of justice. Where the consequences of the refusal of an adjournment are severe, such as where it will lead to the dismissal of the proceedings, the tribunal or court must be particularly careful not to cause an injustice to the litigant seeking an adjournment. As was said by Atkin LJ in *Maxwell v Keun* [1928] 1 KB 645 at page 653 on adjournments in ordinary civil actions:

> **"I quite agree the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned judge on such a question as an adjournment of a trial, and it very seldom does do so; but, on the other hand, if it appears that the result of the order made below is to defeat the rights of the parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the Court has power to review such an order, and it is, to my mind, its duty to do so."**

21. A litigant whose presence is needed for the fair trial of a case, but who is unable to be present through no fault of his own, will usually have to be granted an adjournment, however inconvenient it may be to the tribunal or court and to the other parties. That litigant's right to a fair trial under Article 6 of the European Convention on Human Rights demands nothing less. But the tribunal or court is entitled to be satisfied that the inability of the litigant to be present is genuine, and the onus is on the applicant for an adjournment to prove the need for such an adjournment.

22. If there is some evidence that a litigant is unfit to attend, in particular if there is evidence that on medical grounds the litigant has been advised by a qualified person not to attend, but the tribunal or court has doubts as to whether the evidence is genuine or sufficient, the tribunal or court has a discretion whether or not to give a direction such as would enable the doubts to be resolved. Thus, one possibility is to direct that further evidence be provided promptly. Another is that the party seeking the adjournment should be invited to authorise the legal representatives for the other side to have access to the doctor giving the advice in question. The advocates on both sides can do their part in assisting the tribunal faced with such a problem to achieve a just result. I do not say that a tribunal or court necessarily takes any error of law in not taking such steps. All must depend on the particular circumstances of the case. I make these comments in recognition of the fact that applications for an adjournment on the basis of a medical certificate may present difficult problems requiring practical solutions if justice is to be achieved."

39. Arden LJ said as follows in paragraph 43 of her judgment:

> **"43. I agree with Peter Gibson LJ that applications for adjournment may raise difficult problems requiring practical solution. While any tribunal will naturally want to be satisfied as to the basis of any last minute application for an adjournment and will be anxious not to waste costs and scarce tribunal time or to cause inconvenience to the parties and their witnesses, it may be that in future cases like this a tribunal or advocates for either party could suggest the making of further inquiries and a very short adjournment for this purpose. I am not, of course, saying that that course would necessarily have assisted in this case, but it may be helpful to advocates and tribunals to bear this point in mind in a future case."**

> **40. A decision by an Employment Tribunal on an application for the adjournment of a hearing is a case management decision, as to which the Employment Tribunal has a discretion. This Tribunal will not interfere with such a decision unless it is shown that the Employment Tribunal took account of an irrelevant factor, failed to take account of a relevant factor or reached a conclusion which no reasonable Employment Tribunal would reach: see *Andreou v Lord Chancellor's Department* [2002] IRLR, at paragraphs 33 and 35.**
>
> **41. Mr Grant [counsel for the Appellant] submitted, relying on paragraph 45 of this Tribunal's judgment in *Shui v Manchester University* [2018] ICR 77, that our task was to make up our own mind about the fairness of the proceedings before the Employment Tribunal, rather than reviewing the decision of the Employment Tribunal. However, that submission is contrary to the outcome of the careful analysis of the authorities by this Tribunal in *Leeks v Norfolk & Norwich University Hospital NHS Foundation Trust* [2018] ICR 1257 (although we note that *Shui* was not cited in argument or referred to in the judgment in *Leeks*)."**

32. Within his analysis of the law Lavender J sets out the relevant passages from the key decision of the Court of Appeal in **Teinaz**; so, they need not be repeated again here. **Teinaz** and **Mukoro** concern the position of a claimant who as a result of a medical emergency contends that she or he is unable to attend a hearing at the last minute, and the approach that the Tribunal should adopt in considering whether further medical evidence should be obtained, particularly if there is some evidence to suggest that medical advice has been given that the party should not attend the hearing. That is a different situation to this case, although the general principles are of assistance.

33. **Iqbal** has more in common with this case. The claimant, acting in person, contended that he did not feel able to continue with a hearing. An occupational health report had been provided that indicated significant depressive illness. The claimant sought a postponement and, when his application was refused, withdrew the entire claim. The discussion and conclusions of HHJ Richardson are set out at paragraphs 15 to 23:

> **"15. Applications during a hearing by a party representing himself or herself for an adjournment on the grounds of ill-health are among the most difficult interim applications Employment Tribunals are called on to deal with, especially where the application is on the grounds of stress or depression. Such applications arise at short notice; often the evidence is unsatisfactory. The natural instinct of a Tribunal, applying the overriding objective, will be to proceed with the hearing. Representing oneself before a Tribunal is inherently likely to be a stressful experience. It is hardly surprising if a litigant representing himself feels very**

nervous and inadequate, particularly at the start of the hearing. However, Tribunals are used to making allowances for such matters. The hearing process is methodical and structured, and experience shows that after initial stage-fright many litigants find that their nerves subside and that they cope with the inevitably challenging task of representing themselves. It would not be in their own interests if Tribunals were too ready to grant adjournments; sooner or later, if they are to represent themselves, they will have to cope with the challenge.

16. Sometimes initial discussion with a litigant, giving reassurance and encouragement of the kind that we have mentioned, establishes agreement that the best course is to proceed; but if the application is persisted in, the Tribunal must address it. At this point the guidance in Teinaz and Andreou is of great value. We agree with Ms White [counsel for the Respondents] that it is not an error of law in itself for the Tribunal to fail to refer to these cases in its reasons, although we must say that in our experience most Tribunals do make express reference. The key question is whether the Tribunal has approached the question with the correct principles in mind. In this case it is sufficient to quote two passages from Teinaz. In paragraphs 21-22 Peter Gibson LJ said:

> **"21. A litigant whose presence is needed for the fair trial of a case, but who is unable to be present through no fault of his own, will usually have to be granted an adjournment, however inconvenient it may be to the tribunal or court and to the other parties. That litigant's right to a fair trial under Article 6 of the European Convention on Human Rights demands nothing less. But the tribunal or court is entitled to be satisfied that the inability of the litigant to be present is genuine, and the onus is on the applicant for an adjournment to prove the need for such an adjournment.**
>
> **22. If there is some evidence that a litigant is unfit to attend, in particular if there is evidence that on medical grounds the litigant has been advised by a qualified person not to attend, but the tribunal or court has doubts as to whether the evidence is genuine or sufficient, the tribunal or court has a discretion whether or not to give a direction such as would enable the doubts to be resolved. Thus, one possibility is to direct that further evidence be provided promptly. Another is that the party seeking the adjournment should be invited to authorise the legal representatives for the other side to have access to the doctor giving the advice in question. The advocates on both sides can do their part in assisting the tribunal faced with such a problem to achieve a just result. I do not say that a tribunal or court necessarily makes any error of law in not taking such steps. All must depend on the particular circumstances of the case. I make these comments in recognition of the fact that applications for an adjournment on the basis of a medical certificate may present difficult problems requiring practical solutions if justice is to be achieved."**

17. Moreover, Arden LJ said:

> **"39. I agree with Peter Gibson LJ that applications for adjournment may raise difficult problems requiring practical solution. While any tribunal will naturally want to be satisfied as to the basis of any last minute application for an adjournment and will be anxious not to waste costs and scarce tribunal time or to cause inconvenience to the parties and their witnesses, it may be that in future cases like this a tribunal or advocates for either party could suggest the making of further enquiries and a very short adjournment for this purpose. I am not, of course, saying that that course would necessarily have assisted in this case, but it may be helpf"ul to advocates and tribunals to bear this point in mind in a future case.**

18. As Teinaz shows, if there is medical evidence that the party is not fit to participate in the hearing, an adjournment will generally have to be granted

whatever the inconvenience to other parties. Often, however, there is no direct evidence that the party is not fit to participate in the hearing; it will be his or her say-so. The Tribunal will then have a difficult decision to make: is it right to allow a short adjournment of the kind that is suggested in Teinaz for medical evidence to be obtained?

19. When a Tribunal makes that decision it is highly material to bring into account any information there is concerning the health of the person in question. If the person says that he is stressed but there is no significant history of depression or stress or treatment for it, the Tribunal may more easily reach the conclusion that fairness does not require any investigation of the medical position.

20. If, however, there is a significant history of depression or stress requiring medical treatment, the Tribunal will be more circumspect. A general practitioner with notes available to him may be well placed to give a view on the litigant's ability to cope. It will often be appropriate to apply the guidance in Teinaz by adjourning the case to enable the Claimant to make an urgent appointment to see the practice that is treating him. The Tribunal is entitled to ask the litigant to take with him a short letter drafted by the Tribunal explaining the assistance that the Tribunal can give to litigants in person and explaining what assistance and opinion it is that is required from the medical practitioner. Of course, time is limited, and the medical practitioner's opinion will inevitably be a short one, but in a case such as this it may be of critical importance to the fairness of a decision that the Tribunal makes.

21. In this case it is a striking feature of the Tribunal's reasons in paragraph 6 that it did not refer to the evidence in the occupational health report confirming that the Claimant was suffering from depression, being treated by antidepressants and had ongoing psychological problems. It is impossible to see from paragraph 6 of the Tribunal's reasons how it evaluated what the Claimant said to it. The Claimant may have been regarded by the Tribunal as genuine, or it may have discounted, wholly or in part, what he said; it is impossible to be sure.

22. It is also a striking feature of paragraph 6 that the Tribunal makes no reference to the possibility of a short adjournment for obtaining medical opinion of some kind. This is a key feature of the Teinaz guidance. The Tribunal was not required to refer to Teinaz, but in our judgment it was required to consider the possibility of a short adjournment. Indeed, in this case, if the Tribunal had appreciated and fully taken into account that the Claimant was being treated by his general practitioner, prescribed antidepressants and had been given counselling, we think it was bound to conclude that a short adjournment was required in the interests of fairness. We think it was an error of law and unfair to proceed with the hearing without it.

23. It follows from what we have said that, in our judgment, this appeal must be allowed."

34. Rule 84 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** provides that the Employment Tribunal may have regard to the paying party's ability to pay:

> **"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."**

35. The circumstances and extent to which the means of a party should be taken into account in determining an application for costs was considered by Rimer LJ in **Arrowsmith v Nottingham Trent University** [2012] ICR 159:

> **"37. There remains the subsidiary question as to the quantum of the award it made, which was £3,000. In arriving at that figure, the ET had regard to Ms Arrowsmith's means, although under rule 41(2) it was not in fact obliged to do so. Its consideration of those means revealed that Ms Arrowsmith's ability to pay was apparently extremely limited, as the ET explained, and the ET had regard to that by making an order for the payment of a sum that, in comparison with the likely amount of Nottingham's costs that it would recover on an assessment, was probably little more than a token contribution, albeit that Ms Arrowsmith may not see it like that. The fact that her ability to pay was so limited did not, however, require the ET to assess a sum that was confined to an amount that she could pay. Her circumstances may well improve and no doubt she hopes that they will.**
>
> **38. In my judgment, there is no basis for any challenge to the amount of the costs that the ET ordered her to pay. It took account of her means; and it reflected those means in its assessment of what sum it should order her to pay. In my judgment that decision was one that was properly within its discretion. I would accordingly dismiss Ms Arrowsmith's appeal."**

36. In **Vaughan v London Borough of Lewisham and Others** [2013] IRLR 713 Underhill J held:

> **"28. The starting-point is that even though the Tribunal thought it right to "have regard to" the Appellant's means that did not require it to make a firm finding as to the maximum that it believed she could pay, either forthwith or within some specified timescale, and to limit the award to that amount. That is not what the rule says (and it would be particularly surprising if it were the case, given that there is no absolute obligation to have regard to means at all). If there was a realistic prospect that the Appellant might at some point in the future be able to afford to pay a substantial amount it was legitimate to make a costs order in that amount so that the Respondents would be able to make some recovery when and if that occurred. That seems to us right in principle: there is no reason why the question of affordability has to be decided once and for all by reference to the party's means as at the moment the order falls to be made. And it is in any event the basis on which the Court of Appeal proceeded in Arrowsmith, albeit that the relevant reasoning is extremely shortly expressed. It is necessary to remember that whatever order was made would have to be enforced through the County Court, which would itself take into account the Appellant's means from time to time in deciding whether to require payment by instalments, and if so in what amount.**

> **29. On that basis the question for the Tribunal - given, we repeat, that it thought it right to have regard to the Appellant's means - was essentially whether there was indeed a reasonable prospect of her being able in due course to return to well-paid employment and thus to be in a position to make a payment of costs; and, if so, what limit ought nevertheless be placed on her liability to take account of her means in that scenario and, more generally, to take account of proportionality. As to the former question, views might legitimately differ as to the probabilities, but the Tribunal was well-placed - better than we are - to form a view that there was indeed a realistic prospect, and we see no basis on which that judgment can be said to be perverse. As to the latter, we see the force of the argument that it would be pointless, and therefore not a proper exercise of discretion, to require the Appellant to pay more, even in the optimistic scenario envisaged, than she could realistically pay over a reasonable period; and we have been concerned whether the cap was simply set too high. But those questions of what is realistic or reasonable 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 a 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. Approached in that way, we cannot in the end say that the limit of one-third of the Respondents' costs - whether that comes to £60,000 or some other figure in the range - was perverse. It was of course rough-and-ready, but there is in truth no means of arriving at a more precise figure. We cannot conscientiously say that a proportion of, say, a quarter would have been right while a third was wrong. The Respondents are the injured parties, and even if the order does indeed turn out to be recoverable in full at some point in the future, they will be out-of-pocket to the tune of two-thirds of their assessed costs: it is difficult to say in those circumstances that the award is disproportionate. It is also worth bearing in mind that until the introduction of the current Rules in 2004 tribunals were positively prohibited from taking into account the means of the paying party (as is the case in ordinary civil litigation) - see Kovacs v Queen Mary & Westfield College [2002] ICR 919, esp. *per* Simon Brown LJ at para. 16; so there is nothing axiomatically unjust in such a state of affairs. (We have considered whether it might not have been preferable for the Tribunal to express its cap as a specific sum rather than as a proportion of the costs, but the point was not argued before us; and we can in any event see nothing wrong in principle in the Tribunal taking the course it did even if the alternative of identifying a specific sum might have had advantages.)"**

37. Bingham LJ held in **Meek** that the Employment Tribunal should give sufficient reasons for a party to know why they won or lost:

> **"8. It has on a number of occasions been made plain that the decision of an Industrial Tribunal is not required to be an elaborate formalistic product of refined legal draftsmanship, but it must contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the EAT or, on further appeal, this court to see whether any question of law arises; and it is highly desirable that the decision of an Industrial Tribunal should give guidance both to employers and trade unions as to practices which should or should not be adopted."**

38. In setting out the history of events I have referred to some documents that postdate the decision of the Tribunal. I consider it is necessary to do so to set out the sequence of events. However, the Claimant seeks to rely on them for more than that, he contends that the documents constitute new evidence that should be considered by the Employment Appeal Tribunal in considering whether the Employment Tribunal erred in law. The approach to the admission of new evidence is dealt with at paragraph 9 of the EAT Practice Direction that adopts the approach at paragraph 9.3 the approach in **Ladd v Marshall** [1954] 1 W.L.R. 1489. Consideration has to be given as to whether the evidence could have been obtained with reasonable diligence to be used at the Employment Tribunal hearing, whether it is apparently credible and whether it is relevant and probably would have had an important influence on the hearing.

Analysis

39. The Claimant contends that the Employment Tribunal failed to sufficiently consider and apply the guidance in **Teinaz** and **Iqbal** and properly consider the medial and other available evidence when considering the Claimant's application for postponement, including the option of a short postponement to enable the Claimant to obtain further medical evidence. The Employment Tribunal had regard to the fact that there had been a previous application for postponement. That application had been refused, in part because of the lack of medical evidence. The only further medical evidence provided by the Claimant for the costs hearing was in respect his having attended a session of speaking therapy in March 2018, in addition to those attended in 2017. The Claimant explained that he had chosen talking therapy rather than medication. This was not a case like **Teinaz** in which the Claimant could not attend the hearing and where there was at least some evidence to suggest that the non-attendance was on medical advice. It a situation more akin to **Iqbal**.

40. In dealing with the Claimant's application for a postponement the Employment Tribunal had a wide discretion. The Claimant contends that the Tribunal failed to take account of relevant factors. He contends that the Tribunal failed to take account of the fact that he suffered mental ill-health and had tried CBT. In his oral submissions he referred to the Tribunal failing to take account of his being a disabled person and the effect that depression had because of his inability to sleep the night before the hearing. It is clear from the reasons that the Tribunal understood the Claimant's contention that he was in a high state of anxiety as a result of receiving the Respondent's skeleton argument "late" and contended that he not been able to sleep as a result. The Tribunal did take those factors into account. However, they weighed them against the fact that the Claimant made a cogent application to postpone the hearing and had demonstrated that he was able to participate effectively in the hearing, so as to have a fair hearing. That was a determination that was open to the Employment Tribunal.

41. The Claimant contends that counselling he undertook after 23 March 2018 was not taken into account. As I have set out above, I do not accept that there was evidence of such counselling before the Tribunal.

42. The Claimant contends that there was a failure to take account of the overriding objective. I do not accept that is the case. At the end of paragraph 1.2 the Tribunal specifically concluded that it was consistent with the overriding objective to proceed with the hearing. While the Tribunal did not refer specifically to the disadvantages that would be caused by a postponement they were self-evident: there would obviously be additional cost to the First Respondent, waste of Tribunal time and considerable delay, particularly in circumstances in which the panel that sat at the liability hearing had been brought back together again to hear the costs application. In circumstances in which there was no evidence to suggest that a medical professional considered

that the Claimant was unfit to participate in the proceedings, and in which the Tribunal concluded that from his cogent application to postpone he was able to participate, I do not consider that there was any error in law in the Tribunal deciding not to grant a short postponement for further medical evidence to be obtained. What is more, when the application for reconsideration was subsequently made it was not supported by medical evidence that established that the Claimant had been unfit to participate in the cost hearing.

43. The Claimant points to the fact that there was no previous history of adjournments. That was not a matter specifically referred to in the Tribunal decision, although there is nothing to suggest it was raised by the Claimant. In any event, I do not consider it was a factor that could weigh against the interests of bringing the matter to a conclusion in circumstances in which the Tribunal concluded that the Claimant was able to participate properly in the cost hearing.

44. While the Tribunal did not refer to the decisions in **Teinaz** or **Iqbal**, as **Iqbal** itself makes clear, a mere failure to refer to relevant authorities is not, of itself, an error of law. I do not consider that the decision of the Tribunal was inconsistent with the guidance in those authorities.

45. In the circumstances, I do not consider that the Claimant has established that there was a failure to take account of any relevant circumstances or that the Tribunal reached a decision that was perverse. The Tribunal permissibly concluded that in the absence of supporting medical evidence, after a previous application for postponement had been refused through lack of medical evidence, and in circumstances in which the Claimant had attended and made a cogent application for a postponement, it was inconsistent with the overriding objective to grant a postponement and it was appropriate to go ahead and deal with the cost application.

46. In relation to the application to admit further evidence, while I consider it has been of some assistance in setting out the chronology leading up to the appeal, and while I accept that the evidence could not have been obtained prior to the hearing, because it relates to matters after the hearing, and is apparently credible, the key point is that the Tribunal had to determine the matter as it was at the time that the application was made. It appears that after the hearing the Claimant's medical position has worsened and the Tribunal's view that he might within a reasonable period have got back into employment and be in a position to pay the costs ordered against him has not turned out to be correct. However, that is not material that leads to a conclusion that the decision made by the Employment Tribunal was incorrect. The Tribunal had to make the decision on the basis of the evidence before them.

47. In respect of the means of the Claimant, I consider that on a fair reading of the Judgment the Tribunal did consider the material they had with care, although without setting out in great detail the precise figures. The important point was that the Tribunal noted that given the level of the Claimant's debts, his lack of assets and his potential earning capacity there was no realistic prospect of him ever being able to pay a costs order in the region of £20,000. The Tribunal also accepted that the Claimant was not at the time of the hearing in a position to make any payment. However, they considered that the situation as likely to improve. The Tribunal concluded that notwithstanding the Claimant's current financial position, there were reasonable prospects of them improving, and it was just and proportionate to order the Claimant to pay a sum that represented 10% of the sum claimed by the First Respondent , the Tribunal having accepted that reasonable costs must be in the order of at least £15,000 to £20,000.

48. The Tribunal had no medical evidence to suggest that the Claimant would be prevented from working for a lengthy period of time. In the absence of such evidence it was entitled to

conclude that his position might well improve in the relatively short term. The Tribunal did not have to form a judgement of exactly when the Claimant's financial position would improve or exactly what he would be able to pay. The Tribunal had a discretion to take account of the Claimant's means. The Tribunal had relatively limited information upon which to consider the possibility that the Claimant might be able to pay an award of costs at some stage in the future. While I consider the reasoning is brief, I do not consider it fails to comply with **Meek**. It is clear that the Tribunal concluded that there was a likelihood that the Claimant's condition would improve over time and, if that were the case, he would be in a position to pay some limited amount of costs, notwithstanding his substantial debts and lack of assets. I consider there was sufficient reasoning for that determination and that it was a decision that was open to the Employment Tribunal in the circumstances of this case.

49. Accordingly, both grounds of appeal fail and the appeal is dismissed.

50. I apologise for the considerable delay in these reasons being sent out. A transcript was not requested when I gave my oral judgement. I was not aware that a request for a transcript was made thereafter until I received a draft in early August 2021. There was a considerable delay in transcription for administrative reasons. I approved the transcript within a week of receiving it. Unfortunately, there has been further administrative delay in sending out the judgment after I approved the transcript.