Neutral Citation Number: [2022] EAT 58

Case No: EA-2019-000842-JOJ]

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 2 December 2021

Before :

THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS

- -

Between :

MISS G FRANCE **Appellant**

- and -

MAHAMMAD ZIAULLAH ZAHI KHAN & OTHERS **Respondents**

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- -

Mr O France for the **Appellant**
Mr J Heard (instructed by DWF Law LLP) for the **Respondents**

Hearing date: 2 December 2021

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

The claimant was unsuccessful in her substantive claims and subsequently a costs order was made against her. She applied for reconsideration of the costs order and in connection with that she sought orders from the Employment Tribunal ("ET") requiring the respondents to provide information in response to questions relating to its conduct of the litigation. She also sought orders for disclosure, inspection and third party disclosure. She said this material was relevant to her grounds for reconsideration as she contended that the respondents' own conduct should have been taken into account in determining the costs issue. Her applications were contained in letters to the ET dated 20 March and 20 June 2018. She sent chasing correspondence in August 2019. This appeal was from the ET's decision contained in a letter dated 20 August 2019 refusing her applications.

The appeal was allowed on the basis that the Employment Judge had failed to take into account relevant considerations, namely the reconsideration application and the two 2018 applications; the available materials indicated these documents were not before her when she made her decision. Secondly, there was a failure to comply with the duty to give reasons; the decision letter was so brief it did not enable the claimant to know whether each of her applications had been considered or the basis upon which they had been refused. The applications were remitted for determination.

THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS:

Introduction

1. I will refer to the parties as they were known below. The claimant appeals the refusal of her applications for provision of information and documentation in advance of a reconsideration hearing concerning a costs order that had been made against her. The decision under appeal was made by Employment Judge Sage ("EJ Sage") and was set out in a letter from the London South Employment Tribunal ("ET") dated 20 August 2019.

2. The claimant's notice of appeal raised a number of grounds. In the event, at the hearing of her application pursuant to rule 3(10) of the **Employment Appeal Tribunal Rules 1993 (SI 1993/2854)** (the "**EAT Rules 1993**"), she was granted permission by HHJ Auerbach to proceed with the appeal in respect of just one ground, which had two parts to it. In his order dated 9 June 2021 HHJ Auerbach identified this ground as follows:

> "**The Employment Judge erred by not giving consideration to the range of grounds on which the Appellant was seeking a reconsideration of the Martin Tribunal's costs decision and whether her applications might, to any extent, be relevant to any of those grounds; and/or the Judge's decision was not Meek compliant in that respect**".

3. The procedural history is complex but an understanding of certain aspects is important for the purposes of this appeal.

The procedural history

4. The claimant brought proceedings for race and sex discrimination and for victimisation. By a judgment sent to the parties on 13 October 2015 the ET (Employment Judge Martin ("EJ Martin") and Members) dismissed the claims. The respondents applied for costs and a hearing to determine this application was listed for 15 March 2016.

5. On 11 January 2016, the claimant made an application to obtain information which she considered to be relevant to resisting the application for costs. Her application comprised a series of questions addressed to the respondents relating to preparation for the hearing. I will give a flavour of the questions asked:

> "**1. Answering "Yes" or "No" please confirm whether the Respondents/those instructed made an application to stay proceedings in October 2014. Should the answer be "No" please state in detailed particularity why you disagree with this assertion and provide supporting evidence.**
> **2. Answering "Yes" or "No" please confirm whether the Respondents/those instructed refused to agree the list of issues stemming from June 2014 prior to the full merits hearing? Should the answer be "No, you did not *refuse* to agree the list of issues, please state in detailed particularity what date prior to the full merits hearing you agreed the list of issues with supporting evidence.**
> **4. Answering "Yes" or "No" please confirm whether the Scott Schedule (proposed by the Respondent or those they instruct) and indeed drafted by them in April 2014, was not completed by the Respondents and/or disclosed to the Claimant until the eve of the full merits hearing? If denied please state when it was provided and provide evidence in support."**

6. Amongst other topics raised, the questions also covered the adequacy of the respondents' disclosure, whether they had disclosed extensive additional materials on the eve of the full merits hearing, whether they had removed certain of the claimant's documents from the hearing bundle and whether they were late in providing copies of the bundle to the ET.

7. By letter dated 27 January 2016 from the ET, the parties were informed that EJ Martin had refused the claimant's application. The reasons given were as follows:

> "**The Respondent's application for costs is clear and no further information is required to enable the Claimant to prepare her submissions. The matters on which the Claimant seeks further information are not relevant to the application for costs made by the Respondent. The Tribunal is not considering the Respondent's action in the preparation for the hearing. The application is brought on the ground that the Claimant's claims were misconceived and/or had no reasonable prospect of success. The question of how the Respondent conducted the litigation is therefore not in issue for the purposes of the costs hearing. The Claimant's application for an order requiring the Respondent to provide the information contained in the Claimant's request dated 11 January 2016 is refused**."

8. By a reserved judgment promulgated on 25 April 2016, the ET ordered the claimant to pay costs to the respondents in a sum to be assessed. Paragraph 8 of the ET's decision summarised the respondents' application, saying that the basis was that the claims had no reasonable prospect of success from the outset and that the claimant had acted otherwise unreasonably and vexatiously in

conducting the proceedings. A series of six sub-paragraphs then set out the way in which counsel for the respondents had supplemented these proposition in his oral submissions. They included allegations that the number of communications from the claimant was excessive and her claim shifted throughout the proceedings requiring many preliminary hearings to determine the claims (para 8.4) and that she had acted unreasonably in the way she had dealt with the bundles for the full merits hearing, producing another set, and also in the number of applications she had made at the outset of that hearing (para 8.5). In other words, the respondents *did* rely upon the claimant's conduct as a ground for making an order for costs against her. It is apparent from para 9 of the decision that the claimant's then representative argued that the respondents' behaviour had to be factored in and that any unreasonable conduct should be reduced by 50% as they were equally to blame.

9. In setting out its reasons for making a costs order, the ET did not deal with the conduct allegations explicitly. The crux of its reasoning was summarised in para 19 where the tribunal said:

> "**Taking all of the above matters into account, we are satisfied that the claim was misconceived and that the Claimant's decision to pursue it to the end amounted to unreasonable conduct. We are therefore satisfied that the threshold for a costs order has been met."**

10. Earlier in para 16 the ET had said:

> "…**What is striking is that the Claimant did not establish the legal basis of her claim prior to issuing it or prior to the hearing. She had not read the relevant statutes or associated case law…She was unaware of the legal tests to be applied. As a solicitor the Claimant should have known the importance of establishing the legal basis of her claim. There is an abundance of information on the internet which the Claimant could have researched. However, she chose to bring serious allegations without checking the legal basis of her claims. This is both unreasonable and vexatious…Given that she had not checked the legal basis of her claims she cannot have had reasonable grounds for believing she was right. The Tribunal finds that her clams were misconceived and following from this it was unreasonable for her to pursue her claims as she did. As a qualified solicitor who holds herself out as being an employment lawyer the Tribunal does not accept that the Claimant can rely on ignorance of the law**."

11. Mr France submitted that the conduct allegations formed part of the reasons for the costs order. I do not accept that proposition. The ET's decision makes clear that it was the pursuit of the misconceived claim that led to the costs award. I asked Mr France to show me where the ET had upheld and relied upon the conduct allegations. He pointed to the phrase "Taking all of the above

matters into account" in paragraph 19. However, the rest of this sentence shows that the ET was referring to the pursuit of the misconceived claim. This is also true of the references to "unreasonable" conduct in paragraphs 16 and 19, which was the only other material that Mr France directed my attention to.

12. By application dated 3 May 2016, the claimant sought a reconsideration of the costs order. She contended that in light of EJ Martin's 27 January 2016 decision she had been ill-prepared for the costs hearing, as she did not expect her conduct to be relied upon by the respondent. She said that if she had appreciated this in advance, she would have wanted to put forward evidence of the respondents' own misconduct in respect of the proceedings. In paragraph 15 of her application she listed the points that she would have put forward. They were: last minute disclosure; non-compliance with ET orders for disclosure in September 2014 and February 2015; a last minute October 2014 request for a stay; refusal to agree the list of issues; refusal to respond to the claimant's Scott Schedule drafted in April 2014; refusal to provide inspection; delaying the exchange of witness statements; covert removal of detriments from the Scott Schedule and key evidence from the bundle; raising an eleventh hour defence that was not in the previous pleadings; and putting forward falsified documents.

13. A hearing was listed to consider the reconsideration application, however that did not proceed as EJ Martin determined that the application had no reasonable prospect of success, as set out in a letter from the ET dated 19 October 2016.

14. The claimant appealed that decision and HHJ David Richardson permitted the appeal to proceed to a full hearing on the our grounds that he identified. In the event, it was agreed by the parties that the 19 October 2016 decision should be set aside and the reconsideration application remitted for hearing before a differently constituted ET. This was reflected in the order made by Slade J following a hearing on 13 March 2018. The re-consideration hearing remains outstanding.

15. The claimant applied for a number of steps to take place before the re-consideration hearing was listed. In a document dated 22 March 2018 she applied for: orders that the respondent be compelled to answer her January 2016 request for information; witness orders in respect of two named individuals (who she said could give evidence critical to the respondents' misconduct); and an order that she be permitted inspection of her previous email account, to show that an email relied upon in the proceedings had been falsified.

16. These applications were reiterated in the claimant's further communication to the ET dated 20 June 2018, along with additional requests for an order for third party disclosure from the Metropolitan Police Force, who she said had evidence material to her allegation that the respondents had misled the ET; and an order requiring provision of information relating to the deletion of her email account. She concluded the letter by listing the five orders that she sought.

17. As no substantive response was received from the ET, the claimant sent a further letter. This led to the ET writing to the respondents on 2 July 2019 enclosing the claimant's applications and asking the respondents to confirm whether they were able to deal with any of the matters on a voluntary basis and, if not, to provide reasons. The respondents' reply asked for further time.

18. On 6 August 2019, the claimant wrote to the ET reiterating that her applications remained outstanding and referring to her letters of March and June 2018. At this stage she sought unless orders.

19. The decision under appeal was made in response. A letter from the ET dated 20 August 2019 said that Employment Judge Sage ("EJ Sage") had asked the author to write to the parties as follows:

> "**The claimants letter to the Tribunal has been considered by Employment Judge Martin and the application has been refused. The submissions of the Respondent were also taken into account. The request made for information is not relevant to the issue of reconsideration. No order will be made.**
> **The case will be listed for a 2 day Reconsideration hearing**."

20. By letter dated 2 December 2019, the Employment Appeal Tribunal ("EAT") indicated that Choudhury J (President) had directed that no further action be taken on the appeal, pursuant to rule 3(7) of the **EAT Rules 1993**. The claimant then applied for a rule 3(10) hearing. In the lead up to that hearing, HHJ James Tayler directed that enquiries be made of the ET to ascertain the respective decision making roles of EJ Martin and EJ Sage as there was some ambiguity in the letter setting out the decision under appeal. An emailed response from the ET sent on 23 September 2020 said:

> "**Employment Judge Sage has asked me to write to you as follows:**
> **In answer to Judge Tayler's request, Employment Judge Sage dealt with the case as a very urgent referral when dealing with duty work and the letter that was sent out was in response to a specific question put forward by the Clerk asking her to comment on a previous letter or group of letters or emails on the file from the Claimant dated 7 February and from the Respondents dated 2 August.**
> **This was her only involvement in the matter**."

21. As the claimant informed the EAT that she was not aware of any letter from the respondents dated 2 August 2019, HHJ James Tayler asked the ET to provide copies. He also sought further clarification of the respective roles of EJ Sage and EJ Martin in terms of the 20 August 2019 decision. The ET then replied on 24 September 202 as follows:

> "**I confirm that Employment Judge Sage was referring to the original decision of Employment Judge Martin back in 2016 and the reconsideration of that decision which had already been refused by Employment Judge Martin."**

22. Accordingly, and as HHJ James Tayler noted at paragraph 20 of the reasons accompanying his order sealed on 28 September 2020, it appears that in the 20 August 2019 decision letter EJ Sage had been referring back to a decision or decisions made by EJ Martin in 2016, as part of her reasoning; she was not intending to suggest that EJ Martin had made the instant decision on the claimant's applications in 2019. In his 28 September 2020 order, HHJ James Tayler permitted the claimant to amend her grounds of appeal in light of this new information and requested the ET to provide the letters from the claimant and the respondents referred to in the ET's email of 23 September 2020.

23. The ET responded by letter dated 19 October 2020. This said: "The referrals to Employment Judge Sage were all the correspondence behind the referrals numbered 427 and 428". This material

was enclosed. The terms of this letter suggested that these documents were the only materials before EJ Sage when she made the decision under appeal. The documents under number 427 were simply concerned with the listing of the hearing and available dates. An issue for me to resolve is whether EJ Sage had the claimant's March and June 2018 applications before her when she made her decision. The contents of 428 indicates that this was not the case. The letter from the claimant dated 6 August 2019, along with several attachments, was part of 428, but not the letters which set out the applications that the claimant was making. This is consistent with the claimant's understanding of the position; Mr France told me that he had checked the draft of the 6 August 2019 letter on his phone and it did not attach the March or June 2018 applications.

24. At a very late stage of the appeal hearing before me, namely at 12:40 hours, after the claimant's reply, and when I had been about to rise to consider my decision, Mr Heard submitted that it was important to try and establish this point more definitively, although his skeleton argument had appeared to accept the proposition I have just set out (at paragraph 23). I gave him 20 minutes to see if he could obtain further clarification on this matter by telephoning his instructing solicitors. At 13:00 hours Mr Heard indicated that he had not been able to progress this. I declined to allow him further time, given that the respondent had received the material supplied by the ET in October 2020 and therefore had already had ample time to clarify this matter, all other submissions had been completed and I had intended to give judgment in the early afternoon. Permitting further time would unduly disrupt this in respect of a matter that could have been explored much earlier.

25. Accordingly, and for the reasons I have indicated, I proceed on the basis that the March and June 2018 applications were not attached with the 6 August 2019 emailed letter, were not part of 428 and were not placed before EJ Sage when she made the decision under appeal. It also follows that EJ Sage did not have the claimant's 2016 reconsideration application which explained why she said that the respondents' conduct was relevant.

26. The documents in 428 did include an email from the respondents to the claimant sent on 22 November 2018. It is necessary to refer to the terms of this email as it may shed light on what was said in the decision under appeal. In respect of the claimant's information request, the email said:

> **"…the same information request was previously refused by EJ Martin on the basis that the information sought was not relevant to the costs hearing to which it related.**
> **To our understanding, there is no reverted costs hearing scheduled to occur…**
> **On the basis that there is no reverted costs hearing, we would submit that the decision communicated by EJ Martin on 27 January 2016 continues to state the position on the relevance of the information requested. Accordingly, it is our view that the information sought is not relevant to the reconsideration application…"**

27. By an order made by HHJ James Tayler on 8 December 2020 the appeal was stayed to enable the claimant to submit an out of time request for a reconsideration of EJ Sage's decision, now that she was in possession of fuller information regarding that decision. She made this application on 18 December 2020.

28. The application was considered by Employment Judge Ferguson ("EJ Ferguson"), whose decision was promulgated on 10 March 2021. It has not been appealed. She pointed out that as the 20 August 2019 letter communicated a case management decision as opposed to a judgment, the correct approach, rather than a reconsideration, was to consider the matter pursuant to rule 29 of the **Employment Tribunal (Consolidation and Rules of Procedure) Regulations 2013** (the "**ET Rules 2013**"), which gave the power to vary, suspend or set aside an earlier case management order where it was necessary to do so in the interests of justice. EJ Ferguson declined to set aside or vary EJ Sage's earlier decision; she made no order in relation to the claimant's requests for information and other applications and she directed that the costs reconsideration hearing should be listed without delay.

29. I will summarise EJ Ferguson's reasoning. She concluded that the costs order had been made on the basis that the claimant had pursued misconceived claims, rather than because of her conduct (paragraph 14). She pointed out that the claimant was wrong to say that the costs order had been set

aside by the EAT because she was denied the opportunity to adduce evidence of the respondents' misconduct at the costs hearing (paragraph 17). At paragraph 15 EJ Ferguson said that in order for the costs reconsideration application to succeed, the claimant would need to persuade the ET that: (i) the respondents' alleged malfeasance was relevant to the costs order; (ii) she was denied the opportunity to adduce evidence or make submissions about the respondents' conduct because of EJ Martin's 27 January 2016 decision; and (iii) the submissions and evidence which she now sought to rely upon would have led to a different result. EJ Ferguson said it was "by no means certain" that the claimant would overcome the first two hurdles. At paragraphs 18 and 19 she concluded:

> "**The Claimant's applications for information and witness orders, etc, are only arguably required if she gets to stage (iii) above. In those circumstances it seems to me that it would be premature to make any order on the Claimant's applications. The most sensible way forward, bearing in mind the overriding objective and the wide-ranging nature of the Claimant's requests, is for the reconsideration hearing to proceed without further order at this stage. If the Claimant succeeds on steps (i) and (ii) above, then the Tribunal can then consider her applications for information etc. If necessary the hearing can be adjourned to allow time for the information to be provided.**
>
> **For those reasons the decision to refuse the Claimant's applications was correct albeit EJ Sage appears not to have had access to all of the information as to the background. It is not necessary in the interests of justice to vary, suspend or set aside EJ Sage's decision."**

The parties' submissions

30. The claimant submits that EJ Sage's decision was wrongly based upon or over-reliant on EJ Martin's 27 January 2016 decision refusing the original request for information, when much had happened in the interim, not least that the respondent had (contrary to EJ Martin's expectations) relied upon her conduct at the costs hearing; and her application for reconsideration of the costs order relied on the respondents' own misconduct. She says that EJ Sage did not have regard to these matters or to the relevant documents, since the March and June 2018 applications were not before her.

31. She also contends that the reasons given were not *Meek* compliant. The decision did not address her applications beyond the request for information and she is unable to understand from this short letter why she was unsuccessful.

32. The claimant maintains that the respondents' conduct is relevant as her own conduct of the

proceedings should not be considered in isolation from this. She says that granting her applications will enable her to show that the respondents were responsible for serious misconduct, and that her applications, read with her costs reconsideration application, plainly showed why the material she sought was relevant.

33. At the hearing Mr France submitted that I should not only set aside the 20 August 2019 decision but should myself grant the five applications contained in the March and June 2018 letters and then direct that the case be remitted to a different hearing centre. Alternatively, if the case was remitted to the London South ET, it should not be considered by any judge who had been involved in costs decisions made in the proceedings. In response to my questions, Mr France said that the approach identified by EJ Ferguson did not provide an appropriate way forward as it would in fact increase costs by introducing an additional stage and, potentially an additional hearing, after the ET had considered the points she identified at (i) and (ii) of her decision.

34. Mr Heard resisted the appeal on behalf of the respondents. He submitted that the ET's decision was *Meek* compliant; it was proportionate to the issues being addressed and it was sufficient for the parties to understand why the applications had been refused.

35. Mr Heard also submitted that the reference in EJ Sage's reasons to the claimant's letter having been considered by EJ Martin and her application refused, was not a reference to her 27 January 2016 decision rejecting the claimant's original application for information (prior to the costs hearing), but a reference to her rejection of the costs reconsideration application in the letter dated 19 October 2016 (prior to the successful appeal to the EAT). The twofold significance of this, said Mr Heard, was, firstly, it showed that EJ Sage's reasoning was not based on the pre-costs hearing January 2016 decision and, secondly, that EJ Sage must have seen the claimant's costs reconsideration application when making her decision and thus was in a position to evaluate the relevance or otherwise of the

claimant's requests.

36. Mr Heard submitted in the alternative, that even if the reference was in fact to EJ Martin's decision of 27 January 2016, it did not follow that EJ Sage failed to consider the matter afresh, taking into account the relevant factors. Furthermore, EJ Martin's 27 January 2016 decision remained relevant as the 2018 applications were made on a similar basis and whilst there had been intervening events, there had been no material change of circumstances and accordingly, there was no basis for varying or setting aside EJ Martin's decision.

37. The respondents' position was that if the appeal succeeded, I should do no more than set aside EJ Sage's decision and remit the case. In these circumstances EJ Ferguson's decision would stand.

The legal framework

38. Appeals to the EAT only lie on a point of law. It is trite law that where the appeal is from the exercise of a case management decision, the appeal will only succeed if the decision maker below erred in law, rather than because the appellate judge would have arrived at a different conclusion. Errors of law for these purposes include failing to take into account a factor that demonstrably should have been considered.

Duty to give reasons

39. In terms of the ET's duty to give reasons, rule 62 of the **ET Rules 2013** provides as relevant:

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

40. In **Neary v Governing Body of St Albans Girls School** [2010] ICR 473 Janet Smith LJ

considered the extent of the Tribunal's duty to give reasons in the context of an application for relief from sanctions. However, her identification of the essential requirements is of wider application. She said:

> "**52 …Litigants are entitled to know why they have won or lost and appellate courts must be able to see whether or not the judge has erred. In a case of this kind, it seems to me that the basic requirements are that the judge must make clear the facts that he has regarded as relevant. He must say enough for the reasons for his decision to be understood by a person who knows the background…**"

41. Accordingly, I must consider whether EJ Sage's reasons said enough for the decision to be understood by someone who knows the background. I must also bear in the mind the question of proportionality.

42. The claimant relies upon the classic statement of Bingham LJ (as he then was) as to a Tribunal's duty to give reasons in **Meek v City of Birmingham DC** [1987] IRLR 250. He held that although the Tribunal's reasons are not required to be an elaborate or formalistic product of refined legal draftsmanship, they must nevertheless contain: (i) an outline of the facts of the case that give rise to the complaint; (ii) a summary of the Tribunal's basic factual conclusions; and (iii) a statement of the reasons which led it to make its conclusions on the facts found. However, this statement does not apply in full to a case management order where the ET has not been engaged in the process of finding facts and it may be unnecessary to refer to the detail of the substantive claim (depending upon the nature of the application under consideration). This distinction is reflected in rule 62 of the **ET Rules 2013**; rule 62(5) specifies more detailed requirements in the case of a judgment, which reflect Bingham LJ's approach.

Power to set aside, suspend or vary an earlier order

43. Rule 29 of the **ET Rules 2013** provides (as relevant):

> "**The Tribunal may at any stage of the proceedings, on its own initiative, or on application, make a case management order…A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice, and in particular where**

> **a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made**."

44. In **Serco Ltd v Wells** [2016] ICR 768 Judge Hand QC interpreted the rule 29 power to vary, suspend or set aside an earlier order as exercisable where there had been a material change of circumstances since the order was made, or that the order was based on a material omission or misstatement, or that there was some other substantial reason necessitating the interference: paragraph 43(b) and (d).

Costs

45. In **Barnsley MBC v Yerrakalva** [2012] ICR 420, the Court of Appeal considered an appeal from a costs order made on the basis that the claimant had been untruthful about aspects of her case. The Tribunal had also voiced "significant criticisms" of the respondents' conduct of the litigation and had referred to the impact on the costs it had incurred and now sought from the claimant. The Court held that in these circumstances the Tribunal had erred in the exercise of its discretion in ordering the claimant to pay 100% of the respondents' costs. The appeal was allowed and an order that the claimant pay 50% of the respondent's costs was substituted. Lord Justice Mummery observed at paragraph 52:

> "**If, as should have been done, the criticisms of the Council's litigation conduct had been factored into the picture as a whole, the ET would have seen that the claimant's unreasonable conduct was not the only relevant factor in the exercise of the discretion. The claimant's conduct and its effect on the costs should not be considered in isolation from the rest of the case, including the Council's conduct and its likely effect on the length and costs of the Pre-Hearing Review.**"

46. The claimant relies upon this case as showing, as a matter of principle, that the conduct of the party making the costs application also needs to be taken into account when the application is considered. I do not consider that the decision goes that far. In this particular case the Tribunal was satisfied that the respondent had behaved in a way that had increased the costs of the litigation and the Court of Appeal decided the Tribunal erred in failing to take this finding into account when it came to exercising its discretion in relation to costs. It does not follow from this than an investigation

into the conduct of the party applying for costs is required in every case. It will depend upon the circumstances.

Conclusions

The grounds of appeal

47. I will firstly address which of EJ Martin's earlier decisions was being referred to by EJ Sage in the 20 August 2019 letter. I conclude that her reference was to the decision of 27 January 2016 refusing the claimant's original request for further information, rather than to the October 2016 decision refusing the costs reconsideration application. I arrive at this conclusion because:

i) The effect of Mr Heard's suggested construction is that the letter would not make sense. The reference to "the application has been refused" must be to the original, pre-costs hearing application, as it would be illogical to say that the costs reconsideration application had been refused and then in the next sentence speak of an outstanding reconsideration issue and whether the information sought was relevant to it;

ii) Given that the EAT had set aside the October 2016 refusal of the reconsideration application it would make no sense for EJ Sage to refer to that decision as an answer to the claimant's applications;

iii) I have already mentioned that EJ Sage was provided with the respondents' email of 22 November 2018 as part of the 428 documents. There are apparent parallels between the content of that email and this decision letter. I have set out the email earlier; it refers in terms to EJ Martin's 27 January 2016 decision.

48. Mr Heard pointed out that the communication from the ET to the EAT on 24 September 2020, which I have also set out earlier, referred to both EJ Martin's original decision and to her refusal of the reconsideration application. However, I do not consider that this one after the event communication outweighs the clear inference to be drawn from the terms of the decision letter itself.

In fairness when I put these various points to Mr Heard during his oral submissions, he did not argue strongly for his alternative construction.

49. Accordingly, I approach matters on the basis that the EJ Sage's reasons for declining to make the orders sought by the claimant, included the proposition that her application had been considered and refused by EJ Martin in her 27 January 2016 decision.

Failure to take relevant considerations into account

50. I conclude that this part of the ground of appeal is made out. There was a failure to take relevant considerations into account. As I have already set out, it is apparent that when making her decision EJ Sage did not have the claimant's costs reconsideration application or her applications contained in the March and June 2018 letters before her. Whilst the 6 August 2019 letter referred to these earlier matters, they were not set out in full. Absent sight of this material, I do not see how the Employment Judge was in a position to fairly determine the five applications which had been made. By way of example, she was not in a position to decide if the information sought was relevant to the costs reconsideration application, when she did not have sight of that application and nor was she able to see whether there had been a material change of circumstances since the 27 January 2016 decision. In short, in order to consider and decide the applications, it was necessary for her to see them.

51. Additionally, the 20 August 2019 decision letter only referred to the claimant's request for information; there is no reference to or engagement with the other four applications which the claimant had made.

52. I am not persuaded by Mr Heard's reliance on the terms of rule 29. The claimant was not seeking a variation of the 27 January 2016 order, she was making fresh applications related to her

costs reconsideration application. As I have explained earlier, the costs decision was promulgated in April 2016 and the reconsideration application made in May 2016. The costs decision and the reconsideration application did not exist when the 27 January 2016 decision was made. Furthermore, four out of the claimant's five applications were only made in 2018, thus they were not before EJ Martin in January 2016 and she did not make a decision in respect of them. Finally, the 27 January 2016 decision was made on the basis that the respondents were not relying upon the claimant's conduct in support of their costs application; an expectation which had turned out to be erroneous.

Duty to give reasons

53. I make all due allowance for the fact that reasons for case management orders may be brief. However, they must enable the parties to understand the outcome. That objective can only be achieved if the reasons engage with the applications that have been made. I agree that there was a breach of the duty to give reasons on this occasion.

54. Firstly, referring to EJ Martin's decision of 27 January 2016 was not an answer to the current applications, given that decision had been made prior to the costs hearing, it was based on an expectation as to the nature of the application which proved to be erroneous and four of the claimant's five applications were not before EJ Martin at that stage.

55. Secondly, as I have already noted, the letter setting out the decision made no reference to the four applications that were additional to the claimant's request for information.

56. Thirdly, it was said that the request for information was "not relevant" to the reconsideration issues, but no explanation was given for this stated conclusion. It may well be that a sufficient explanation could have been provided in a couple of sentences, but the letter gives no indication as to the Employment Judge's reasoning in this regard. In so far as it is suggested that the letter indicated

her reasons were as per EJ Martin's 27 January 2016 decision, I have already explained why reliance on that earlier decision was inadequate.

57. Fourthly, the lack of clarity is underscored by the fact that the EAT had to make two attempts to clarify the reasoning in this letter with the ET, as I have described earlier; and the fact that at the hearing before me, the parties disagreed as to which decision of EJ Martin was being referred to in the 20 August 2019 letter.

58. Accordingly, the appeal succeeds.

Disposal

59. As I explained during the appeal hearing, the EAT only has the power to substitute its own decision, rather than remitting the issue, if the ET's conclusion was unarguably right or if there is only one other conclusion that the ET could lawfully have come to: **O'Kelly v Trusthouse Forte plc** [1983] ICR 728 CA and **Dobie v Burns International Security Services (UK) Ltd** [194] ICR 812 CA.

60. Mr France argued that I should grant all five of the applications as this was the only lawful conclusion that the ET could have reached. That is plainly not the case. It would not be appropriate for me to say too much about the merits of the applications, since I will not be deciding them; it will suffice for present purposes to note that they are unusual applications and ones made in circumstances where, as I have indicated, the ET's decision to award costs against the claimant did not in fact turn on her conduct of the litigation. This is far from a situation where I could conclude that all or any of the applications could only be decided in the claimant's favour.

61. Mr Heard did not argue that I could only decide the applications in the respondents' favour,

rather he submitted that as there had been no appeal against EJ Ferguson's decision rejecting the application to reconsider EJ Sage's decision, EJ Ferguson's decision still stood, so that, in effect the applications had been determined already. I do not accept this submission. Whilst the claimant has not appealed EJ Ferguson's decision, it was, as I have indicated, a decision made pursuant to rule 29, considering whether the interests of justice required EJ Sage's decision to be varied or set aside. I have now set aside that decision, so, inevitably, the foundation upon which EJ Ferguson's order was made no longer exists. The claimant's five applications remain outstanding and, in the circumstances, will need to be remitted to the ET for their resolution.

62. I am, of course, concerned by the time that these proceedings are taking and by the undesirability of matters stretching out further. However, I see no realistic alternative in the circumstances. A misconceived attempted short-cut in deciding the claimant's applications has, ironically, led to the substantial prolongation of matters. As I indicated during the hearing, I see potential merit in the staged approach that EJ Ferguson identified in her decision. It would be open to the Employment Judge determining the remitted applications to adopt that approach. I record for completeness that Mr France was not in favour of this as a way forward. I have already referred to his submission that to take that course would add to the costs of the proceedings. However, in my view it would plainly save costs, in the event that the claimant was unable to surmount hurdles (i) and (ii) identified by EJ Ferguson. When the remitted applications are considered, the parties should have the opportunity to make submissions as to whether or not this approach should be adopted.

63. Accordingly, in addition to allowing the appeal, I will remit for determination by the ET the claimant's applications dated 22 March and 20 June 2018.

64. I do not consider that any basis has been shown for Mr France's proposal that the case be remitted to a different hearing centre. Whilst he relied upon the history of these proceedings, I do not

consider that the matters he points too are close to sufficient. This appeal has succeeded and the earlier appeal succeeded by consent, as I described. However, there was no appeal from the substantive decision reached at the full merits hearing. I was told that an appeal has been lodged in respect of the determination of the amount of costs that the claimant is to pay, but, as yet there has been no decision as to the merits or otherwise of that appeal. I accept, given the history of the matter, that the remitted applications should not be determined by EJ Sage or EJ Martin, but I am not going to impose any wider restriction upon who they are heard by, as there is no justification for doing so. I also note that doing so would be likely to cause further delay in the resolution of these long-standing issues.