

Neutral Citation Number: [2023] EAT 59

Case No: EA-2022-000068-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 5 April 2023

Before :

HIS HONOUR JUDGE JAMES TAYLER

Between :

B.L.I.S.S RESIDENTIAL CARE LTD

Appellant

- and -

TERESA EILEEN FELLOWS

Respondent

Daniel Brown (instructed by Ashfords LLP) for the **Appellant** relied on written submissions
Peter Doughty for the **Respondent** relied on written submissions

Hearing date: In Chambers: 5 April 2023

COSTS JUDGMENT

Practice and Procedure

HIS HONOUR JUDGE JAMES TAYLER:

1. This judgment should be read with the judgment allowing the appeal. I concluded that the employment tribunal erred in law in holding that it had not been reasonably practicable for the claimant to submit her claim within the primary time limit. I allowed the appeal and substituted a judgment dismissing the claim because it was submitted out of time. My judgment was substituted for that of the employment tribunal on the basis that it was the only possible determination. The judgment allowing the appeal should be read with this judgment.

2. The respondent applied for costs. They assert that they should be awarded their costs in both the employment tribunal and the Employment Appeal Tribunal (“EAT”). I allowed the parties to exchange submissions on this issue. I have considered those submissions.

Costs in the employment tribunal

3. This application raises an issue as to the circumstances in which it can be appropriate for the EAT to award costs incurred in the employment tribunal. The employment tribunal held that it was not reasonably practicable for the claimant to submit her claim within the primary time limit. Because the claimant succeeded in the employment tribunal there was no basis for the respondent to apply for costs at that stage. Because the appeal succeeded, and I have substituted a judgment that it was reasonably practicable for the claim to have been submitted within the primary time limit, on the basis that was the only possible answer on this issue, the matter will not be remitted to the employment tribunal to determine whether the claim was submitted in time, which would have provided an opportunity for the respondent to apply for its costs in the employment tribunal. While I am inclined to consider that in such circumstances it would be possible to remit the matter for the purposes of an application for costs only, it was common ground that I have the power to deal with the costs in the employment tribunal as part of the disposal of the appeal. Neither side has suggested that I should remit the costs application for determination in the employment tribunal.

4. Section 35(1)(a) of the **Employment Tribunals Act 1996** provides:

(1) For the purpose of disposing of an appeal, the Tribunal may –

a. Exercise any of the powers of the body or officer from whom the appeal was brought...

5. In the costs judgment in **Sol (Vale) v Jagers** UKEAT/0218/16/DA, HHJ Eady, as she then was, held that where the EAT substitutes a decision for that of the employment tribunal the EAT has power to make an award of costs incurred in the employment tribunal. Time for making the application runs from the date of the EAT judgment.

6. In considering the application I am exercising the powers of the employment tribunal and so apply the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (“**ET Rules**”).

7. Rule 76 **ET Rules** provides:

76.— When a costs order or a preparation time order may or shall be made
(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted;

(b) any claim or response had no reasonable prospect of success ...

8. If one of the thresholds for making a costs order is reached the employment tribunal still has a discretion to exercise in deciding whether to award costs, and if so, in what sum.

9. In considering an application for costs the employment tribunal should bear in mind that it is generally a costs free jurisdiction: **Gee v Shell Limited** [2003] IRLR 82. Where a party considers that a claim or response is misconceived, a costs warning letter may be sent. There is no obligation to do so and a failure to do so does not prevent the employment tribunal making a costs order. However, the failure to do so is a matter that the employment tribunal may take into account in deciding whether to award costs, or in fixing the amount of an award. The respondent did not send

the claimant a costs warning letter in the employment tribunal.

10. Rule 84 **ET Rules** provides:

84. 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.

11. The employment tribunal is empowered to consider the paying party's ability to pay, but is not required to do so. If the employment tribunal exercises the discretion to disregard the paying party's ability to pay it should generally give reasons: **Jilley v Birmingham and Solihull Mental Health NHS Trust and others** UKEAT/0584/06 at paragraph 44. In considering ability to pay the employment tribunal is entitled to have regard to the likelihood that a person's financial circumstances may improve in the future: **Chadburn v Doncaster & Bassetlaw Hospital NHS Foundation Trust** UKEAT/0259/14/LA. This can include the possibility that money will be received from a third party.

Costs in the EAT

12. The circumstances in which costs may be awarded in the EAT is governed by rule 34A the **Employment Appeal Tribunal Rules 1993** (as amended) ("**EAT Rules**")

34A (1) Where it appears to the Appeal Tribunal that any proceedings brought by the paying party were unnecessary, improper, vexatious or misconceived or that there has been unreasonable delay or other unreasonable conduct in the bringing or conducting of proceedings by the paying party, the Appeal Tribunal may make a costs order against the paying party.

13. The EAT is also permitted to have regard to the ability of the by Rule 34B(2) **EAT Rules**.

(2) The Appeal Tribunal may have regard to the paying party's ability to pay when considering the amount of a costs order.

14. Similar principles apply to considering applications for costs in the EAT to those in the employment tribunal. The respondent did send a costs warning letter to the claimant in respect of the appeal, contending that resistance of the appeal was misconceived. I have taken the sending of that letter into account.

Analysis

15. It would be difficult not to have sympathy for the claimant in respect of the position in which she finds herself. She had a claim of unfair dismissal that she wished to bring in the employment tribunal (it appears there were some other money claims that have not been referred to in the appeal). Through no fault of her own the claim was submitted out of time. It is not particularly surprising that an attempt was made to extend time once the issue was raised, or that an attempt was made to uphold the decision of the employment tribunal when time had been extended. The respondent has been put to cost in the employment tribunal and EAT, but has not had to defend the claim on its merits in the employment tribunal, a generally costs free venue. However, I cannot determine the application based on sympathy for either party, but must consider the objective question of whether the attempt to seek an extension of the primary time limit, on the basis that it was not reasonably practicable to submit the claim form within the primary time limit, was misconceived. I have concluded that on that key question there was only one possible answer. The claim was not submitted within the primary time limit because of the error of a solicitor. The original attempt to extend time in the employment tribunal was, on a proper application of the law, misconceived, in the sense of having no reasonable prospects of success. Similarly, the resistance of the appeal was also misconceived. It was doomed to failure. Accordingly, a threshold for awarding cost has been passed both in the employment tribunal and the EAT.

16. I have considered the claimant's statement of means. She is 62 and has cancer. She is in receipt of benefits. Her monthly income is just under £1,000. The monthly costs she lists are in the region of £770. However, she also states that her daughter has currently taken on her "household costs, mortgage, community charge, utilities etc" which do not show up in the outgoings on the statement of means. The claimant also has outstanding debts. I accept that the claimant currently is impecunious.

17. The respondent contends that I should take into account the possibility of the claimant succeeding in a claim against her former solicitors. I accept that is a matter that I am entitled to take

into account. However, I do not consider it can be taken as a given the claimant will be in a position to bring proceedings against her former solicitors. If she is, she may be able to recover in respect of the chance that she would have succeeded in her claim against the respondent, but it does not follow that she will be able to recover the costs incurred in contending that it was not reasonably practicable to submit her claim in time in the employment tribunal and in seeking to uphold the judgment of the employment tribunal in the EAT, in circumstances in which I have accepted the respondent's contention that asserting that it was not reasonably practicable to submit the claim within the primary time limit and the defence of the appeal were misconceived. I accept there is a possibility of the claimant recovering some monies from her former solicitors but consider it is more than somewhat speculative.

18. In all the circumstances, I consider it is appropriate that there be a modest award of costs against the claimant having regard to all the circumstances of this matter, particularly her current impecuniosity and the speculative nature of her financial situation improving as a result of a claim against her previous solicitors. I award the respondent the sum of £1,000.