Neutral Citation Number: [2024] EAT 68

Case No: EA-2021-001105-RN
EA-2022-000479-RN

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 3 May 2024

Before :

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT

- -

Between :

Mr D Ireland

Appellant

- and -

University College London

Respondent

- -
- -

The Appellant (acting in person) did not attend but relied on written submissions
Ms Marianne Tutin (instructed by Clyde & Co) for the **Respondent**

Hearing date: 25 April 2024

- -

JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives.
The date and time for hand-down is deemed to be 10:30am on 3 May 2024

SUMMARY

Practice and procedure – costs – wasted costs

Having provided the parties with its reasoned decision on liability (dismissing the claimant's claim of direct race discrimination), the Employment Tribunal ("ET") had proceeded to determine the respondent's application for costs, making an award against the claimant in the sum of £14,000. Subsequently, the Employment Judge had rejected the claimant's application for wasted costs against the respondent's representatives. The claimant appealed both decisions.

Held: dismissing the appeals

The ET had not erred in principle, nor failed to take into account all relevant factors, nor reached a perverse decision in proceeding to hear the respondent's application for costs at the end of the liability hearing. It had also not been wrong for the ET to consider the respondent's application whilst not, at the same time, determining the claimant's application for wasted costs; to the extent that the wasted costs application could have any relevance to the question of costs against the claimant, he had been able to raise the points he relied on. The ET had reached permissible conclusions, providing adequate reasons, as to the claimant's conduct of the proceedings; it had not been required to find a precise causal link between that conduct and the costs sought (**McPherson v BNP Paribas (No 1)** [2004] EWCA Civ 569, [2004] ICR 1398 and **Sunuva Ltd v Martin** UKEAT/0174/17 applied). In any event, in circumstances in which the claimant's claim had been dismissed for substantially the same reasons as had earlier been identified in making a deposit order, and when the weakness of his case had been explained by the respondent in a number of letters, warning him of the risk of costs, the ET had been entitled to conclude that an award of costs was warranted by reason of the claimant's unreasonable pursuit of his claim.

The ET had similarly not erred in its determination of the claimant's application for wasted costs. The delay in dealing with that application was not unreasonable and no error had arisen from the fact that it was determined by the Employment Judge alone (**Riley v SoS for Justice and ors** UKEAT/0438/14 considered). The ET had taken into account all relevant matters and had not lost sight of the fact that the claimant was acting in person; it had permissibly concluded that the conduct of the respondent's representatives was not improper, unreasonable or negligent.

The Honourable Mrs Justice Eady DBE, President:

Introduction

1. These appeals raise questions as to the approach an Employment Tribunal ("ET") should adopt when an application for costs is made at the end of a final liability hearing, and when separately determining an application for wasted costs in the same proceedings.

2. In giving this judgment, I refer to the parties as the claimant and respondent as below. This is the full hearing of two appeals brought by the claimant against decisions of the London Central Employment Tribunal (Employment Judge Brown, sitting with Messrs Kendall and Baber), as follows: (1) the decision sent to the parties on 27 June 2021, making a costs award against the claimant in the sum of £14,000 ("the costs decision"); (2) the decision sent to the parties on 28 January 2022, dismissing the claimant's applications for wasted costs against the respondent's representatives ("the wasted costs decision"). The claimant's appeals having initially been considered (on the papers) by His Honour Judge Auerbach to raise no arguable question of law, these matters were permitted to proceed to a full hearing, on amended grounds of appeal, after a hearing under rule 3(10) **Employment Appeal Tribunal Rules 1993** (as amended) by His Honour Judge Shanks.

3. The claimant has represented himself in the appeal proceedings, as he did before the ET, albeit he has chosen not to attend this hearing but to rely on his written submissions; the respondent continues to be represented by Ms Tutin of counsel, as below.

The relevant procedural history pre-dating the ET decisions under challenge

4. On 6 October 2019, the claimant presented a claim of race discrimination to the ET in relation to the respondent's withdrawal of an offer of employment. The claim was resisted by the respondent, which, on 19 November 2019, entered a response in the proceedings providing its (non-discriminatory) explanation for the withdrawal of the job offer (a lack of satisfactory responses to requests for references), and indicating its intention to apply for a strike out or deposit order.

5. On 28 November 2019, the respondent sent the claimant a first "*without prejudice save as to costs*" ("WPSATC") letter.

6. On 6 March 2020, the respondent wrote to the claimant regarding his correspondence relating to the proceedings, which was described as follows:

> "[Your] correspondence has included allegations that our client or this firm has attempted to mislead the Employment Tribunal (see for example your email to Ellie Shepherd of this firm on 16 February 2020) and is engaged in the falsifying of evidence (see for example your email to Ellie Shepherd of 20 February 2020). These allegations have been repeated in correspondence with the Employment Tribunal (see for example your emails of 24 February 2020). Furthermore, on occasion, these allegations have been accompanied by inappropriate comments directed at employees of our client (see for example your email to Mr Peter Warwick, Director of Employee Relations at UCL, on 18 February 2020 in which you suggested that certain members of our client's staff are "lazy", "inept" and "pigheaded") and solicitors of this firm (see for example your email to Rachel Robbins of this firm on 28 November 2019, in which you suggested Ms Robbins "arrogantly" implied she had "superior knowledge of the case")." (see the record at paragraph 17 of the ET costs decision)

7. On 25 March 2020, the claimant sent a number of emails to the respondent's solicitors, recorded by the ET, as follows:

> ""The gang that seeks to profit via bullshit and bullying should learn some ethics."
> "Would you agree that some who see themselves as law professionals in the city are in fact a type of narcissistic parasitical mafia who see themselves as entitled to manipulate and control those they deem as inferior? I think so."
> "I will spend the rest of my life ensuring that the world knows of the incompetent & biased shit that works for your client and the parasites it runs to for help when it fails."
> "Your ET3 is an utter crock of shit and you should know it. I will spend the rest of my life illustrating how disgustingly selfish and parasitical some people can be."
> "How dare you seek to tell me what to do. Unless you're the police and I'm someone subject to a restraining order, you have no right to tell me what to do. Learn your place and learn some respect for your elders. I'll never accept such arrogance."" (paragraph 18, ET costs decision)

8. On 4 June 2020, the respondent applied for a strike out (or costs in the alternative) on the basis of the claimant's scandalous, unreasonable or vexatious conduct of the proceedings in sending such abusive correspondence to the respondent and its representatives. Meanwhile, the claimant had also made applications for the ET to strike out the response.

9. An open preliminary hearing took place on 23 June 2020 before Employment Judge Quill. The applications to strike out the claim and response were dismissed, albeit EJ Quill made the following observations regarding the claimant's conduct:

> "43. I do not propose to go through the Claimant's remarks item by item. Some were certainly rude, and some were seemingly intended to cause offence. The Claimant did not, in fact, deny that they were rude or offensive. During submissions I twice asked the Claimant to specify whether he was arguing that – in fact – nothing he said was unreasonable (because it was a justified response, in his opinion, to the actions of the Respondent and/or its lawyers) or whether he was accepting that his conduct had been inappropriate, but was asking me to take into account – as a reason not to strike out the claim - that he had been (according to him) made ill by things said and done by the other party. The Claimant did not give a clear and unambiguous answer, but his responses to my questions implied that he was arguing the former."

And further noted:

> "46. … The Claimant has been made aware that the Respondent might seek costs and that inappropriate words or actions in the future, directed at the Respondent's representatives or (especially) any potential witness might be grounds for a future strike out application."

10. EJ Quill did, however, go on to make a deposit order, having concluded that the claimant's claim had little reasonable prospect of success, reasoning:

> "52. … based on the undisputed facts, there are very plausible reasons that a tribunal might be satisfied that race played no part whatsoever in the decision. The Respondent received one poor reference (Montgomery), one express refusal (Adams) and (unless he can prove otherwise) one non-reply (Groves) from the 3 referees that the Claimant asked them to contact. The Claimant's comments and suggestions about what might have happened had the Respondent made further enquiries of him or his referees are irrelevant unless a tribunal is satisfied that the Respondent would have acted differently if his race had been different."

11. Following the preliminary hearing, on 3 July 2020, the respondent sent the claimant a second WPSATC letter, noting that the deposit order supported its view that his claim was unlikely to succeed. The claimant was again warned that, if he pursued his claim, the respondent reserved its rights to seek its costs in defending the claim.

12. The claimant sought to appeal against the deposit order, but, on 17 February 2021, his appeal to the EAT was rejected on the papers by His Honour Judge Martyn Barklem, who noted:

> "the difficulties which his claims are likely to encounter are self-evident, and the ET did not err in pointing them out."

13. On 17 February 2021, the respondent sent the claimant a third WPSATC letter, noting that the EAT had warned of the fundamental difficulties with his claim and urging him to take heed of those warnings. The claimant's ongoing unreasonable conduct in making persistent and meritless applications was also drawn to his attention. The claimant was again put on notice that the respondent intended to seek its costs in defending the claim if he continued to pursue it. The respondent has said that the claimant's response to this letter was: "*Keep digging :)*".

14. On 19 March 2021, the respondent sent the claimant a fourth WPSATC letter, noting that it intended to apply for a costs order against him following the result of the upcoming liability hearing. It was explained:

> "You should … come to the hearing on 23 March 2021 prepared to deal with the question of your means to pay any costs award made against you, by which we mean you should come prepared to deal with questions on your ability to pay a costs award which are put to you orally, and bring any relevant documentary evidence which supports your position. In the event you do not, we shall ask the Tribunal to infer from

your failure to do so that you have the means to pay any award made against you."

15. During preparations for the ET hearing, the claimant made a number of applications to the ET, including five **Freedom of Information Act** requests, eight disclosure applications (some relating to the same documents), six applications to strike out, together with what the ET described as "*a vast array of correspondence*". On 22 March 2021, the claimant submitted an application for wasted costs against the respondent's representatives on the basis of what was said to be a "*series of improper acts*".

16. The full merits hearing of the claimant's claim took place, via CVP, over three days, from 23 to 25 March 2021. At the outset of the hearing, EJ Brown invited the claimant to list any outstanding applications for case management and he referred to applications for specific disclosure in respect of three categories of documents and witness orders. The ET addressed each of the outstanding applications thus identified. It directed that disclosure be provided in respect of one category of document (records of the race of the other two candidates for the job in question), on the basis that the documents were relevant and it would be quicker and easier to use the relevant records than rely on cross-examination. Otherwise, however, the ET:

> "9. … did not make any order regarding the other documents that the Claimant sought. The Respondent had said that all such documents had already been disclosed. The Tribunal would not make an order where it was futile to do so. If it later appeared that the Respondent had failed to disclose relevant documents that would be a serious matter."

17. The ET heard evidence during the first day of the hearing, with the parties making their submissions on the morning of the second day. Submissions having finished by mid-morning, the ET then began its deliberations in the absence of the parties. Upon the hearing resuming on the third day (25 March 2021), the ET provided the parties with its written judgment and reasons (17 pages). Accepting the respondent's evidence, the ET concluded that it had been decided that the offer of employment made to the claimant was withdrawn *"... because of the lack of satisfactory references. This was nothing to do with race*." (paragraph 130, ET liability decision), and duly dismissed the claimant's claim.

The respondent's application for costs and the ET's decision and reasoning

18. Having provided the parties with its reasoned judgment, the ET adjourned for an hour to enable its decision to be read. After the adjournment, when the parties returned, the respondent indicated that it wished to apply for its costs; the claimant objected to that application being considered at that stage. Having

considered the matter, the ET determined that it would proceed to hear the respondent's application, explaining its reasoning as follows:

> "3. … The Claimant objected to the costs application being heard on 25 March. He said that he was not prepared to deal with a costs hearing, that the Respondent had sent him the costs Bundle on 19 March 2021, very shortly before the liability hearing was due to start, and when the Respondent knew that he would not have time to consider it. The Claimant said that the Respondent had misled the Tribunal regarding disclosure and that he would be making an application for reconsideration. The Claimant said that he had made his own application for wasted costs.
> 4. The Tribunal decided that it would be fair, and in accordance with the overriding objective, to hear the Respondent's costs application. It would save time and costs to do so. The Respondent had written to the Claimant on 28 November 2019, 3 July 2020 (following the making of a deposit order against him), on 17 February 2021 and on 19 March 2021, warning him that it would make an application for costs against him and setting out the basis on which it would do so. The Tribunal had made a decision in the case on the basis of the evidence it had heard. Unless and until that decision was overturned or reconsidered, that decision would stand and the Tribunal would proceed on that basis."

19. Pursuant to the costs regime provided under schedule 1 of the **Employment Tribunal (Constitution an Rules of Procedure) Regulations 2013** ("ET Rules"), the respondent's application was put on two bases: (1) that the claimant had unreasonably pursued a claim with no reasonable prospects of success, and (2) that his conduct of the claim had been unreasonable, in that he had made persistent applications and sent abusive correspondence. Ms Tutin took the ET through the relevant documentation in support of that application, and presented the respondent's schedule of costs, explaining that although the costs had vastly exceeded £20,000, the amount sought was limited to costs incurred since November 2020, and was capped at £14,000.

20. The claimant complained that the respondent had sent "*100s of pages of documents*" in respect of its costs application shortly before the hearing, that it had misrepresented the position, and had selectively quoted from the deposit order. He further complained that the respondent had failed to provide disclosure and said the reason he had submitted lots of applications was because the respondent had failed to respond to his emails. As for the abusive emails that had been referenced, the claimant said these had been discussed at the hearing before EJ Quill, he had been medicated when he had sent them and had had a mental breakdown. Although not wishing to address the ET about his means, the claimant said he was unemployed and was suicidal.

21. Having referred to the relevant rules and case-law, the ET decided that the claimant had acted unreasonably in pursuing his claim. Satisfied that it had rejected the claim for the reasons identified for making the deposit order (and other reasons), the ET concluded that this was a case where rule 39(5) **ET Rules** applied. Even if that had not been the case, however, it was also satisfied that it had been unreasonable for the claimant

to have pursued his claim when it had been repeatedly pointed out to him that it was hopeless

22. The ET also found that the claimant had acted unreasonably in his conduct of the proceedings, by his abusive and intimidating emails of 25 May 2020 and his allegations of falsification of evidence. It further held that the claimant's repeated applications to the ET had been "*wholly disproportionate*", and "u*nreasonable*" in respect of what ought to have been a "*straightforward claim*".

23. Observing that the claimant had declined to give any evidence as to his means and had provided no medical evidence to explain or excuse his unreasonable conduct, and taking into account the clear warnings given by the respondent, the ET was satisfied that it was appropriate to make an award of costs in the sum of £14,000. Although the ET reserved its decision on costs, it is apparent that it reached its judgment on 25 March 2021, albeit the reasoned decision was only sent to the parties on 27 June 2021.

Applications after 25 March 2021

24. On 7 April 2021, the claimant made an application for reconsideration of the ET's liability and costs decisions; he also made a recusal application. On 10 July 2021, the claimant made a written wasted costs application against the respondent's representatives in respect of his "*preparation of Rule 71 costs Judgment reconsideration application*". On 20 July 2021, the respondent submitted its objection to that application. On 24 July 2021, the claimant made a further application for wasted costs.

25. It appears that the claimant's reconsideration application was not forwarded to EJ Brown until 28 July 2021. EJ Brown refused both the application for reconsideration and recusal.

26. Subsequently, in further correspondence from the claimant to the ET, it was understood that he was asking that a different ET reconsider the liability and costs judgments. On 9 September 2021, EJ Brown wrote to the parties confirming that any application for reconsideration would be addressed by the judge who had made the original decision; she further stated that, other than the claimant's wasted costs application, it was considered that all other applications had been addressed. In relation to the outstanding wasted costs applications, the parties were asked if they wished this to be determined at a hearing or on the papers. The respondent replied the same day, stating that it was content for the application to be dealt with on the papers. Further correspondence followed from the claimant in which he made clear his position that EJ Brown should be recused from dealing with the proceedings and, by a letter of 13 September 2021, sent the ET the wasted

costs application he had made on 22 March 2021.

27. By a judgment sent to the parties on 2 November 2021, EJ Brown addressed the claimant's applications of 10 and 24 July 2021; both applications were dismissed. In the final paragraph of that judgment, EJ Brown referred to the claimant's outstanding application for wasted costs of 22 March 2021, confirming that that would be dealt with separately.

The 22 March 2021 application for wasted costs and the ET's decision and reasoning

28. The claimant's wasted costs application of 22 March 2021 was pursued on the basis of what was said to be a "*series of improper acts*" relating to: (i) his applications for disclosure, specifically: (a) the respondent's response of 11 November 2020 to an application made on 8 November, (b) the response of 21 December 2020 to an application made the same day, and (c) the response of 2 February 2021 in respect of an application of 31 January 2021; (ii) applications for two witness orders, made on 3 February 2021, in respect of which, on 19 February 2021, the respondent objected to there being a preliminary hearing; (iii) a decision notice from the Information Commissioner, received on 11 March 2021, and the respondent's representation of that to the ET on 16 March 2021; and (iv) his 15 March 2021 application for a postponement of the liability hearing/recusal, resisted by the respondent on 16 March 2021, which characterised the claimant's application as "*baseless*". On 22 April 2021, the claimant emailed the ET, setting out the costs he claimed in relation to each of the matters he relied on in his application.

29. I have set out above how the ET addressed various applications made by the claimant subsequent to the liability and costs decisions made on 25 March 2021. In then dealing with the outstanding application for wasted costs from 22 March 2021, the opportunity was given for the respondent to provide a written response, which it did on 25 January 2022. In the meantime, by email of 6 January 2022, the claimant had made a further application for EJ Brown to be recused from dealing with his case.

30. By a further decision, sent to the parties on 28 January 2022, addressing the 22 March 2021 wasted costs application, EJ Brown first considered whether she was the appropriate judge to consider the application, holding:

> "8. I decided that it was fair and proportionate for the Claimant's 22 March 2021 application for wasted costs orders to be dealt with on the papers by me, EJ Brown. The Respondent's solicitors, who were the target of the wasted costs applications, had agreed to them being dealt with on the papers.

> 9. I was familiar with the case. I was the judge who conducted the Final Hearing. I had been provided with a Costs Bundle and Bundle of Recent Correspondence at that time, containing the parties' voluminous correspondence about procedure, disclosure and costs. I was able to refer to these documents in making this judgment."

31. As for the merits of the application, EJ Brown rejected the claimant's contention that the respondent's representatives had acted improperly, holding that:

(i) In relation to the applications for disclosure: (a) the respondent's response to the 8 November application, had been reasonable: the application related to travel expenses but that was not an issue in the proceedings and, while EJ Quill had said a decision on the application could be made in due course, it was arguably correct to say that he had declined to make a more wide-ranging order; (b) and (c) the respondent had given reasoned responses to the applications of 21 December 2020 and 31 January 2021, and the fact that the ET had disagreed with the respondent about one document did not mean the respondent's representative had acted improperly.

(ii) As for the applications for witness orders, made on 3 February 2021, the ET had not considered it necessary to hear from those employees, and the respondent's representatives acted reasonably in declining to call witnesses who were unnecessary to advance the respondent's case.

(iii) The respondent's representation of 16 March 2021 in respect of the decision notice from the Information Commissioner was correct: FOI requests are separate from ET proceedings, and the respondent's response was reasonable.

(iv) The ET had agreed with the respondent in respect of the claimant's 15 March 2021 application for a postponement of the liability hearing/recusal: there could be no basis for seeking recusal until the relevant judge had made the relevant decision and given reasons for doing so; the respondent's representative had acted entirely properly in pointing this out.

32. In the circumstances, the 22 March 2021 application for wasted costs was dismissed.

The grounds of appeal and the claimant's submissions in support

The costs decision appeal

33. By his first ground of appeal in this regard, the claimant contends that:

> "The ET unfairly allowed C only a few minutes to digest its 17 page liability judgment on day 3 of the 3 day 'liability only' hearing before holding a costs hearing that was unexpected and unprepared for by C, and failed to take into account the factual matrix

> assertions within C's written costs cross application regarding R's contributory conduct when drawing its discretionary conclusion that there was little reason not to make a costs order in favour of R"

34. In support of that ground, the claimant emphasises that he was acting in person, with no prior experience of ET proceedings, and objects that the ET: (i) relied on a liability judgment promulgated "*minutes beforehand*"; (ii) ignored that the earlier case management orders (that is, the orders given at case management preliminary hearings giving directions for the future conduct of the hearing and the listing of the full hearing) had expressly stated that the full hearing would deal with "*liability only*", and (iii) admitted a bundle that breached the deadline provided in the earlier case management order and was compiled by only one party. In determining to proceed to determine the respondent's application for costs, the claimant says the ET failed to properly balance the comparative prejudice to the parties. He further submits that, having decided to proceed to determine the respondent's application, it was then incumbent upon the ET to take into account his 22 March 2021 application for wasted costs, which made competing contentions regarding costs.

35. The second of the grounds of appeal against the costs decision (originally ground 4) provides:

> "The ET failed to set out any effects of C's 'unreasonable' conduct of May 2020, which it was obliged to do, and took an irrelevant matter into account by failing to set out any reasoning on why this conduct and explanatory medical evidence was relevant to R's costs claim when it did not occur in the time period of Nov 2020 to Feb 2021 that R claimed its costs for."

36. Observing that costs in the ET are compensatory rather than punitive, the claimant submits that the ET erred in failing to decide what, specifically, was unreasonable about his emails of 25 May 2020, or to analyse the effect/s of those emails to demonstrate relevance to an award of costs (**Yerrakalva v Barnsley** [2011] EWCA Civ 1255; [2012] ICR 420).

37. Thirdly, (by what was formerly ground 5), the claimant contends that:

> "The ET failed to set out any reasoning on why the quantity of C's case management applications was deemed disproportionate by not taking into account whether the grounds and basis of the majority of these applications was itself unreasonable"

38. Allowing that the number of applications made by the claimant could be a relevant factor, it is objected that the ET provided no reasoning to explain how it determined that this had been unreasonable and disproportionate in this case. There were good reasons for making so many applications (made during a period when the ET office was closed and it was not responding to emails), in particular given the respondent's responses (a point that was also made in ground 4 of the wasted costs appeal); in this regard, the claimant

specifically relies on the fact that, at the liability hearing, the ET had ordered disclosure of a document that the respondent had sought to withhold.

39. By the fourth ground of appeal (originally ground 6), the claimant further objects that:

> "The ET misdirected itself by accepting that C had failed to address his mind to R's costs warning letter when, as stated by C, its own deposit order reconsideration judgment and liability judgment findings proved that the basis of R's costs warning letter relied on misrepresentation of the basis of C's case and was thus unmeritorious"

40. In support of this ground, the claimant says that, in making the deposit order, his case had been "*fatally neutered*", with emphasis being placed on an irrelevant email. The respondent's subsequent WPSATC letters had relied on this misstatement of the dispute and, in consequence, the claimant "*did not capitulate*" to the threat of costs. The ET had erred in thus failing to recognise that the claimant *had* addressed his mind to the WPSATC letters, but had concluded they were misconceived.

41. For completeness, the claimant has explained that, although the deposit order was under appeal at the time of the ET liability hearing, he later withdrew that appeal so as to focus on lodging an in-time appeal against the costs decision. In any event, he contends the ET wrongly applied rule 39(5) **ET Rules**, failing to appreciate that (i) the email cited within the deposit order was not mentioned within the liability judgment, and (ii) the deposit order had stated that he was relying on "*an inference that the panel was selected to be biased against him*" whereas the inference he was seeking was as set out in the liability judgment, namely that the recruiting manager had a propensity for bias, as demonstrated during her selection of the panel members.

The wasted costs appeal

42. By the first ground of challenge in respect of this appeal, the claimant contends:

> "The Tribunal erred by delaying judgment on my 22 March 2021 wasted costs application for ten months instead of determining it in chambers on 25 March 2021 at the same time it determined the respondent's competing costs application of 19 March 2021"

43. As the claimant observes, this ground overlaps with the first ground of challenge in respect of the costs decision appeal. In his written submissions (although not in the amended grounds permitted to proceed to a full hearing), the claimant has further argued that EJ Brown erred in determining his application for wasted costs absent the two ET lay members who had been part of the ET panel for the costs decision (see **Riley v Secretary of State for Justice and ors** UKEAT/0438/14).

44. The second ground (originally ground 3) sets out the claimant's objection that:

> "The ET misdirected itself by finding that travel expenses were 'not an issue' requiring disclosure despite having relied on circumstantial evidence on this matter in thirteen liability judgment paragraphs and EJ Quill having expressly stated in the preliminary stages that a decision on a further disclosure order on this matter could be made in due course"

45. In his submissions, the claimant says this ground "*highlights the procedurally unfair approach of the ET*", contending that the ET erred by "*unfairly/perversely conflating EJ Quill's postponement of making a decision on further disclosure with him refusing it*"; he says this "*can best be described as perverse judicial entrapment*".

46. Thirdly (originally ground 4), the claimant contends that:

> "The ET failed to properly take into account R's conduct re disclosure as a represented party facing a litigant in person, and failed to ensure that R met its disclosure obligations prior to and at the liability hearing"

47. In this regard, the claimant again relies on the respondent's refusal to disclose a document that the ET subsequently ordered it to provide at the outset of the liability hearing. Withholding relevant documents was unreasonable conduct and EJ Brown's rejection of the wasted costs application in this regard demonstrated substantive unfairness towards the claimant. Citing the EAT's decision in **AQ Ltd v Holden** [2012] IRLR 648 - to the effect that an ET should not judge a litigant in person by the same standards as a professional representative with regard to costs – the claimant contends that was a relevant factor that EJ Brown had failed to take into account.

The case for the respondent

The costs decision appeal

48. In respect of the first ground, the respondent observes that there is no minimum notice requirement for a costs application, albeit the paying party has to have had a "*reasonable opportunity*" to make written or oral representations (rule 77 **ET Rules**). The ET made a permissible case management decision to consider the application at the end of the liability hearing (see paragraph 8 Guidance Note 7, **Presidential Guidance – General Case Management**): the claimant had a reasonable opportunity to consider the costs sought, prepare a response to the application, and produce evidence of means; given (i) the WPSATC costs warnings of 28 November 2019, 3 July 2020, 17 February 2021 and 19 March 2021, (ii) the application for costs in the

alternative to a strike out, and (iii) the explanation provided by EJ Quill upon the making of the deposit order, he knew, or ought reasonably to have known, that the respondent would apply for its costs once judgment was promulgated. Moreover, the claimant had sufficient time to consider the 17-page liability decision and did not ask for longer to read/understand it when the hearing reconvened. As for the wasted costs application, that related to the alleged conduct of the respondent's representatives: (i) it was not material to an assessment of the claimant's conduct; and (ii) the ET had already had regard to the substance of the claimant's complaints in (a) determining his disclosure applications, and (b) deciding on the merits of the claim. In any event, any alleged error was immaterial to the outcome: (i) the claimant failed to identify what submissions he would have made had he been given additional time, or whether/why this would have made a difference to the outcome; (ii) the claimant's wasted costs application was later rejected on the basis that the respondent's representatives did not act improperly.

49. Turning to the second ground of challenge on this appeal (originally ground 4), the respondent points out that the ET made reference to the content of the claimant's emails of 25 May 2020, the unreasonable nature of which was self-evident, and permissibly concluded these were abusive and intimidating and (taken with the claimant's allegations of fraud) amounted to unreasonable conduct of the proceedings; the ET had thus set out the effects of such conduct and its reasoning was adequate in the circumstances. Moreover, the claimant's conduct in such correspondence was not an irrelevant factor; there does not need to be a precise causal link between the unreasonable conduct and the specific costs being claimed (**McPherson v BNP Paribas (London Branch) (No 1)** [2004] ICR 1398, per Mummery LJ at paragraph 40; **Sunuva Ltd v Martin** UKEAT/0174/17, per Kerr J at paragraph 22); the ET was required to (and did) "*look at the whole picture of what happened in the case*" (**Yerrakalva v Barnsley**, per Mummery LJ at paragraph 41. It was thus permissible for the respondent to rely on this conduct, even if it took the pragmatic and proportionate decision to limit the costs sought to a small proportion of those incurred in preparing for the final hearing. In any event, any alleged error of law would be immaterial to the outcome, given that the costs award was also made on the basis that the claimant had acted unreasonably in pursuing the claim in light of the deposit order and/or in circumstances where the respondent had repeatedly pointed out to him that his claim was unmeritorious.

50. As for the third ground of challenge (originally ground 5), the respondent says that, although not referring to the specific grounds of the claimant's applications, it undoubtedly had these in mind, given that it:

(i) had already considered a number of the applications for disclosure and witness orders during the final hearing; (ii) was aware the claimant had applied repeatedly for the same documents and so must have been aware of the grounds of such requests; and (iii) had read the reasons for making a deposit order, which also dealt with at least some of the claimant's strike out applications. In any event, it was the making of persistent and meritless applications (in respect of the same documents) which was disruptive and time-consuming, resulting in significant and unnecessary costs being incurred by the respondent. Yet further, any alleged error would be immaterial to the outcome: the costs award was also made on the basis that the claimant had acted unreasonably in pursuing the claim, which was a sufficient ground by itself to justify the costs order.

51. In response to the fourth ground (originally ground 6), the respondent submits that this is an attempt to challenge a finding of fact, that the claimant had failed to address his mind to WPSATC letters, and did not meet the high test required to demonstrate that the conclusion was perverse (**Yeboah v Crofton** [2002] EWCA Civ 794, [2002] IRLR 634, per Mummery LJ at paragraph 93).

The wasted costs appeal

52. Addressing the first ground under this appeal, the respondent makes the point that delay does not necessarily give rise to a question of law; on order to succeed on such a challenge, the claimant would need to show that any unreasonable delay led to a perverse decision or, in exceptional circumstances, that he was deprived of his right to a fair trial, such that it would not be fair or just for the decision to stand (**Bangs v Connex South Eastern Ltd** [2005] EWCA Civ 14, [2005] ICR 763, per Mummery LJ at paragraph 43). In the present case, there was no unreasonable delay: the claimant had not sought to pursue his wasted costs application at the end of the liability hearing and, thereafter, the ET was dealing with a high volume of correspondence and applications from him, which explained the time taken. In any event, the claimant has not identified any way in which it might properly be said that the wasted costs decision was perverse or explained how any allegedly unreasonable delay resulted in a deprivation of his right to a fair trial.

53. As for the second ground of challenge (originally ground 3), the respondent submits that this is really a perversity challenge to the ET's conclusion that it had acted reasonably in respect of the disclosure of documents relating to travel expenses; the appeal did not pass the high threshold required.

54. Turning to the third objection raised (originally ground 4), the respondent contends that this is really

a poorly disguised attempt to challenge the ET's determinations of the claimant's applications for disclosure (not the subject of these appeals). Insofar as the claimant was seeking to challenge the ET's conclusion that the respondent's conduct in relation to disclosure was reasonable, he again failed to pass the high threshold required to establish perversity.

The legal framework

55. In considering the decisions under challenge in these appeals, the starting point is provided by the **ET Rules**, as set out within schedule 1 of the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013**. In interpreting or exercising any power provided by the **ET Rules**, an ET is required to seek to give effect to the overriding objective, as explained by rule 2:

> "The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable— (a) ensuring that the parties are on an equal footing; (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues; (c) avoiding unnecessary formality and seeking flexibility in the proceedings; (d) avoiding delay, so far as compatible with proper consideration of the issues; and (e) saving expense."

56. As well as specific powers relating, for example, to disclosure or witness orders, the ET is given broad powers to case mange the proceedings before it (see rule 29 **ET Rules**); where the decision under challenge involves an exercise of the ET's case management discretion, it will only be open to the EAT to intervene where the ET:

> "… has taken some matter which it was improper to take into account or has failed to take into account some matter which it was necessary to take into account in order that discretion might be properly exercised; or, alternatively …, that the discretion which was made by the tribunal, or [the judge], in the exercise of its discretion was so far beyond what any reasonable tribunal or [judge] could have decided that [the EAT is] entitled to reject it as perverse." see **Bastick v James Lane (Turf Accountants) Ltd** [1979 ICR 778 EAT (approved by the Court of Appeal in **Carter v Credit Change Ltd** [1979] ICR 980, [1979] IRLR 361 CA.

57. A perversity challenge before the EAT will only succeed where an "*overwhelming case*" is made out that no reasonable ET, on a proper appreciation of the evidence and the law, could have reached the decision in issue; see **Yeboah v Crofton** [2002] EWCA Civ 794, [2002] IRLR 634, per Mummery LJ at paragraph 93.

58. As one of the tools available to the ET to better enable it to justly case manage proceedings, rule 39 **ET Rules** provides that, where it is considered that any specific allegation or argument in a claim or response

has little reasonable prospect of success, a deposit order may be made requiring the party in question to pay a specified sum (not exceeding £1,000) as a condition of continuing to advance that allegation or argument. Not only is that party thus required to make such a payment as a condition of pursuing the allegation or argument in question, however, by rule 39(5) it is further provided:

> "If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order— (a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and (b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders), otherwise the deposit shall be refunded."

As Simler J (as she then was) explained in **Hemdan v Ishmail** [2017] IRLR 228 EAT:

> "10.…if the money is paid and the claim pursued, it operates as a warning, rather like a sword of Damocles hanging over the paying party, that costs might be ordered against that paying party (with a presumption in particular circumstances that costs will be ordered) where the allegation is pursued and the party loses. There can accordingly be little doubt in our collective minds that the purpose of a deposit order is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails. That, in our judgment, is legitimate, because claims or defences with little prospect cause costs to be incurred and time to be spent by the opposing party which is unlikely to be necessary. They are likely to cause both wasted time and resource, and unnecessary anxiety. They also occupy the limited time and resources of courts and tribunals that would otherwise be available to other litigants and do so for limited purpose or benefit."

59. Save in the circumstances provided by rule 39(5) **ET Rules**, in proceedings before the ET, costs do not simply follow the event and awards of costs are the exception, not the rule. That said, by rules 74-84 of the **ET Rules**, the power to make awards of costs is afforded to the ET in specified circumstances. By rule 76 it is provided (relevantly):

> "(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; …"

60. A costs order may be made on the ET's own initiative or on the application of a party; the procedural requirements are set out at rule 77 **ET Rules**, as follows:

> "A party may apply for a costs order … at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application."

61. In guidance provided by the President of Employment Tribunals, it is advised that:

> "8. … If judgment on the claims is given at a hearing, it will usually be sensible to make any application for costs …then, in order to avoid delay and the additional cost of getting everyone back for another hearing." see paragraph 8 **Guidance Note 7**, **Presidential Guidance – General Case Management**.

62. Determining an application for costs at the liability hearing should also avoid the difficulty identified in **Riley v Secretary of State for Justice and ors** UKEAT/0438/14, where, in a case that had been determined by a panel of three, the Employment Judge then sat alone to determine an application for costs related to the conduct of the losing claimant. In allowing the claimant's appeal, the EAT (Langstaff P presiding) rule that the Employment Judge had been wrong to do so:

> "28. … where, at any rate, a concluded decision as to liability is reached by a panel of three and thereafter a costs application is made which relates, in sufficient part at any rate, to the conduct of that hearing, there is no jurisdiction for that application to be considered other than by a panel of three, that being the panel so far as it may be assembled as heard the substantive question. And, if that were wrong, then in any event the Judge would, under the applicable statutory provisions, have a discretion which he should, in these circumstances, have exercised. There is no material to show that he turned his mind to it. The inference in the present circumstances is that he did not. …"

63. In determining whether to make an award of costs, the ET must be satisfied that the relevant threshold test is satisfied for the purposes of rule 76 **ET Rules** but, if so, then has a discretion as to whether it should nevertheless make such an award, and, if so, as to how much the award should be. Although the threshold tests do not distinguish between those who are professionally represented and those who act in person, that is likely to be a relevant consideration when applying those tests to determine whether a non-professionally represented party has behaved in one of the specified ways; it is also likely to be a relevant matter in determining whether it is appropriate to make an award of costs. As the EAT (His Honour Judge Richardson presiding) observed in **AQ Ltd v Holden** [2012] IRLR 648:

> "32. The threshold tests in rule 40(3) are the same whether a litigant is or is not professionally represented. The application of those tests should, however, take into account whether a litigant is professionally represented. A tribunal cannot and should not judge a litigant in person by the standards of a professional representative. Lay people are entitled to represent themselves in tribunals; and, since legal aid is not available and they will not usually recover costs if they are successful, it is inevitable that many lay people will represent themselves. Justice requires that tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life. … [L]ay people are likely to lack the objectivity and knowledge of law and practice brought by a professional legal adviser. Tribunals must bear this in mind when assessing the threshold tests in rule 40(3). Further, even if the threshold tests for an order for costs are met, the Tribunal has discretion whether

> to make an order. This discretion will be exercised having regard to all the circumstances. It is not irrelevant that a lay person may have brought proceedings with little or no access to specialist help and advice."

64. The ET also has a specific power to make a wasted costs order against a representative; thus, by rule 80 **ET Rules**, it is provided:

> "(1) A Tribunal may make a wasted costs order against a representative in favour of any party ('the receiving party') where that party has incurred costs— (a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative; or (b) which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay."

65. In considering whether to make an award of costs (or wasted costs), and the amount of any such award, the ET has a broad discretion. The purpose of a costs order is, however, purely compensatory: questions of punishment are irrelevant both to the exercise of the discretion whether to award costs under and to the nature of the order that is made (**Beynon and ors v Scadden and ors** [1999] IRLR 700 EAT, paragraph 31). That said, when making a costs order on the ground of unreasonable conduct, the ET's discretion is not fettered by the requirement to precisely link the award to specific costs incurred as a result of that particular conduct (**McPherson v BNP Paribas (London Branch) (No 1)** [2004] EWCA Civ 569, [2004] ICR 1398, per Mummery LJ at paragraph 40; **Sunuva Ltd v Martin** UKEAT/0174/17, per Kerr J at paragraph 22), although that is not to say that questions of causation are to be disregarded; as Mummery LJ stated in **Barnsley Metropolitan Borough Council v Yerrakalva** [2011] EWCA Civ 1255, [2012] ICR 420:

> "41. The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. …"

66. In considering appeals from decisions of the ET, the jurisdiction of the EAT is limited to questions of law (section 21 **Employment Tribunals Act 1996**). As for the approach to be taken on appeals against costs awards made in the ET, as Mummery LJ observed in **Yerrakalva**:

> "7. As costs are in the discretion of the ET, appeals on costs alone rarely succeed in the EAT or in this court. The ET's power to order costs is more sparingly exercised and is more circumscribed by the ET's rules than that of the ordinary courts. There the general rule is that costs follow the event and the unsuccessful litigant normally has to foot the legal bill for the litigation. In the ET costs orders are the exception rather than the rule. In most cases the ET does not make any order for costs. If it does, it must act within rules that expressly confine the ET's power to specified circumstances, notably unreasonableness in the bringing or conduct of the proceedings. The ET manages, hears and decides the case and is normally the best judge of how to exercise its discretion.

> 8. There is therefore a strong, soundly based disinclination in the appellate tribunals and courts to upset any exercise of discretion at first instance. In this court permission is rarely given to appeal against costs orders. …
> 9. An appeal against a costs order is doomed to failure, unless it is established that the order is vitiated by an error of legal principle, or that the order was not based on the relevant circumstances. An appeal will succeed if the order was obviously wrong. As a general rule it is recognised that a first instance decision-maker is better placed than an appellate body to make a balanced assessment of the interaction of the range of factors affecting the court's discretion. This is especially so when the power to order costs is expressly dependent on the unreasonable bringing or conduct of the proceedings. The ET spends more time overseeing the progress of the case through its preparatory stages and trying it than an appellate body will ever spend on an appeal limited to errors of law. The ET is familiar with the unfolding of the case over time. It has good opportunities for gaining insight into how those involved are conducting the proceedings. An appellate body's concern is principally with particular points of legal or procedural error in tribunal proceedings, which do not require immersion in all the details that may relate to the conduct of the parties."

67. More generally, in considering the reasoning of the ET, I am bound to remind myself of the guidance provided by Popplewell LJ in **DPP Law Ltd v Greenberg** [2021] EWCA Civ 672, [2021 IRLR 1016 at paragraphs 57-58. Furthermore, although not a point pursued in the claimant's written submissions, I bear in mind that delay on the part of the ET will not necessarily give rise to a question of law such as to engage the jurisdiction of the EAT. As the Court of Appeal made clear in **Bangs v Connex South Eastern Ltd** [2005] EWCA Civ 14, [2005] ICR 763, even if the delay is unreasonable, that will not give rise to an independent ground of appeal unless it leads to a perverse decision, or , exceptionally, is to be treated as a serious procedural error or material irregularity, such as would risk the deprivation of the right to a fair hearing under article 6 **European Convention on Human Rights** ("ECHR"); see per Mummery LJ at paragraph 43 **Bangs v Connex**.

Analysis and conclusions

68. In considering the questions raised by these appeals, it is helpful to start with the points raised in respect of the wasted costs decision: it is the claimant's case that his application for wasted costs raised matters relevant to the ET's decision on the respondent's application for costs, and ought properly to have been taken into account at that stage.

69. Although not a point emphasised in the claimant's written submissions, by the first ground of appeal in respect of the wasted costs decision it is contended that the ET erred in delaying its determination of the claimant's application of 22 March 2021. In the submissions for the hearing of the appeal, however, the focus is rather more on what is said to have been the ET's error in failing to address that application – or at least take

it into account – when determining the respondent's application for costs. This latter point is also part of the first ground of challenge under the appeal against the costs decision itself.

70. Of itself, the delay in the determination of the claimant's 22 March 2021 application for wasted costs is simply a question of fact, it does not give rise to any question of law (see **Bangs v Connex**). Given the procedural history, I do not consider it can fairly be said that the delay was unreasonable: the ET was dealing with a number of applications made by the claimant after the liability hearing, including applications for EJ Brown to be recused from any further dealings in the proceedings; the delay might be regrettable but it is explicable and not unreasonable. In any event, this is not a case where any prejudice has been identified arising from the mere fact of that delay. The matters raised by the claimant were largely matters of record, of which EJ Brown was already aware (as the Employment Judge who has presided over the liability hearing) or which would be apparent from the ET file. There can be no suggestion that the delay deprived the claimant of his article 6 **ECHR** rights in respect of the wasted costs application itself.

71. As the claimant's written submissions make clear, in relation to the timing of the ET's determination of the wasted costs application, the real objection taken is to the fact that this was not addressed alongside the respondent's application for costs. In its answer, the respondent has suggested that the claimant had in fact made it clear to the ET that he did not wish for his application to be dealt with at the end of the liability hearing; the claimant does not accept that characterisation of events, although the ET's record would certainly suggest it did not understand that the claimant had wished to pursue his application for wasted costs at that stage: it was something he referred to (paragraph 3, ET costs decision) but there is nothing to indicate that he sought to advance the application at that hearing. In any event, I cannot see that any material error arises from the ET's failure to consider both applications at the same time.

72. First, the costs application required the ET to consider the conduct of the claimant (i) in bringing or pursuing the proceedings; and/or (ii) in his conduct of those proceedings; determining those questions was not dependent upon the ET's assessment of the conduct of the respondent's representatives. If the claimant had acted unreasonably in pursuing a weak claim, the matters raised in his application for wasted costs would not serve to mitigate his own unreasonable behaviour. Similarly, if the ET's costs jurisdiction was engaged by the claimant's unreasonable conduct of the proceedings, as demonstrated by (for example) the content of the emails cited in the costs decision, there was no suggestion that this was a direct result of the conduct of the

respondent's representatives as alleged in the application for wasted costs.

73. Second, and in any event, to the extent that the claimant sought to rely on the matters he had raised against the respondent's representatives in his wasted costs application, it had been open to him to do so when responding to the respondent's costs application on 25 March 2021. Indeed, the claimant made the submission that the respondent had misled the ET regarding disclosure and – by referring to his own application – made it clear that he considered that to be improper conduct. He further argued that the respondent had misrepresented the position in relation to the deposit order and in respect of his conduct, that it had failed to provide disclosure, and that he had had to make such a large number of applications because the respondent had failed to respond to him. To the extent that the claimant considered the respondent's behaviour to provide relevant context when assessing his own conduct, the substance of his case was thus before the ET when it was making its decision on costs.

74. Third, even assuming that the matters raised in the wasted costs application might have been relevant to the determination of the respondent's costs application against the claimant, the allegations of improper conduct were all ultimately found to be without foundation. This is a point that I consider further below, when addressing the other grounds of appeal against the wasted costs decision, but, in the circumstances, it is hard to see what possible difference it would have made to the ET's costs decision if it had proceeded to consider the application for wasted costs at the same time.

75. An additional point raised under this ground of appeal in the claimant's written submissions (albeit that it does not feature in the amended grounds of appeal permitted to proceed to the full hearing), is that EJ Brown erred in proceeding to consider the application for wasted costs without the other two members of the ET panel, with whom she had sat when determining liability and costs. As the EAT made clear in **Riley**, this potentially gives rise to a jurisdictional question, as to whether the application ought properly to have been considered by the ET that had determined liability and costs (EJ Brown, sitting with Messrs Kendall and Baber), rather than a differently composed ET (EJ Brown sitting alone). Although not a matter raised before the ET (the claimant's objection at that stage was to EJ Brown' further involvement in the case, not to the fact that the lay members were no longer involved) or at an earlier stage in the appeal, Ms Tutin did not seek to suggest that I should not address this point, recognising that it was a question that could be answered without needing to revert to the ET (see the guidance provided at paragraph 50 **Secretary of State for Health v Rance**

[2007] IRLR 664 EAT).

76. Although EJ Brown considered whether it was appropriate for her to consider the claimant's application for wasted costs, I accept that she was thereby focused on the question whether there was any basis for her to be recused (this being the claimant's argument at that stage); her reasoning does not suggest that she turned her mind to whether she ought properly to determine the application as one member of a panel of three. I am, however, satisfied that, in the circumstances of the application for wasted costs, EJ Brown did not thereby err. The application, dated 22 March 2021, related to what was said to have been the conduct of the respondent's representatives *prior* to the liability hearing. This was not a case where the application in question arose during the course of a hearing before a panel of three; it was made before that panel became seized of the case and it related to conduct that similarly pre-dated its involvement. There was no jurisdictional bar to EJ Brown's determination of the application, and no reason in principle why all three members of the earlier panel should be involved given that it did not relate to the conduct of the hearing over which they had presided.

77. Turning then to the substance of the wasted costs decision and the second and third grounds of challenge raised in this respect, it is the claimant's case that EJ Brown (i) misinterpreted what had earlier been directed by EJ Quill on the claimant's application for disclosure (he had postponed making a decision; he had not refused the application), and (ii) adopted an unfairly favourable approach towards the conduct of the respondent's representatives, failing to take into account the position of the claimant as a litigant in person. The authority relied on by the claimant in respect of his position as a litigant in person (**AQ Ltd v Holden**) relates to how such a party is to be treated when assessing *their* conduct for costs purposes (rather than the conduct of legal representatives for the purposes of a wasted costs award), but his point can be understood as more generally saying that, when determining whether a representative has acted improperly, it can be relevant to take into account whether the party on the receiving end of the conduct in question is acting in person.

78. Adopting that approach, I am, however, unable to see any error on the part of EJ Brown. In considering whether the response to the application of 8 November 2020 (for documents relating to a refusal to pay travel expenses) was improper, unreasonable or negligent (*per* rule 80 **ET Rules**), EJ Brown set out in full the relevant part of the correspondence from EJ Quill, including the reference to the earlier order for disclosure of documents that would show "*any decision to (potentially) withhold payment of the Claimant's expenses was because of the Claimant's race*". EJ Quill had then gone on to record the respondent's position that it had no

such documents and had declined to consider making any further orders until after the claimant had complied with the deposit order. Similarly, EJ Brown fully set out the respondent's response to the claimant's renewed request for this disclosure of 11 November 2020; including the statement that the ET had refused to make any wider order. It is clear that there was no misunderstanding on the part of EJ Brown as to what had been said by EJ Quill and as to how that had been represented by the respondent's representatives. Expressly recording the fact that EJ Quill had allowed that a further decision might be made in due course, EJ Brown permissibly found that the respondent had fairly referenced the limitation of the earlier order.

79. EJ Brown adopted a similarly thorough approach to each of the other allegations made in the claimant's application in respect of the responses to his requests for disclosure. Specifically, in relation to the application for documents recording the race of the other candidates, EJ Brown took into account the fact that the ET had ultimately granted this application notwithstanding the respondent's argument that the point could be dealt with in oral evidence, but permissibly found that such a disagreement with the respondent's position did not demonstrate that the response had amounted to improper conduct.

80. In her careful consideration of each of the complaints made by the claimant in support of the application for wasted costs, EJ Brown neither misinterpreted the record of earlier ET decisions nor adopted an unfairly favourable approach to the conduct of the respondent or its representatives. She was plainly well aware of the fact that the claimant was acting in person and there is nothing in the reasoning provided that would suggest that she lost sight of that fact at any stage of her consideration. Ultimately the claimant's appeal against the wasted costs decision in these respects amounts to a perversity challenge and does not meet the high threshold required (**Yeboah v Crofton**).

81. For the reasons explained, the wasted costs appeal fails.

82. I turn then to the claimant's appeal against the ET's decision on costs. To the extent that the first ground of challenge on this appeal overlaps with the first ground under the wasted costs appeal, it fails for the reasons I have already provided (see paragraphs 71-74 above). More generally, the first ground of appeal in relation to the ET's determination of the respondent's costs application is essentially a challenge to the case management decision to proceed to deal with that application at the end of the liability hearing; as such, it would only be open to the EAT to interfere if the ET erred in principle, failed to have regard to that which was relevant or took into account some improper matter, or reached a decision that is properly to be characterised

as perverse (**Bastick v James**; **Carter v Credit Change**).

83. It is the claimant's contention that the ET erred in principle by proceeding to determine the question of costs when that had not been a matter identified in the earlier case management order setting his case down for a final merits hearing on liability (the ET's order of 26 June 2020 having directed that the final hearing would determine "*All issues in the case relating to liability (but not remedy)*"). Relatedly, he submits that the ET further erred in permitting the respondent to rely on a costs bundle that had not been agreed beforehand (and to which he had not had the opportunity to contribute) and had been sent after the date ordered for the provision of any bundle for the liability hearing.

84. Accepting that the ET had earlier directed that the hearing in March 2021 should determine all issues relating to liability, that plainly did not mean that it would then be precluded from dealing with other applications that might arise in relation to the proceedings at that hearing. Thus, without having expressly raised the point in setting the case down for a full merits hearing, the ET permissibly addressed the claimant's outstanding disclosure applications at the outset of that hearing. Similarly, it fell comfortably within the ET's case management discretion to decide that it should consider the respondent's application for costs at the end of the hearing; the earlier directions relating to how the ET would proceed to determine issues of liability did not, as a matter of principle, restrict its ability to case manage the proceedings (including any applications arising in those proceedings) more generally and the course that it adopted was (i) not precluded by rule 77 **ET Rules**, and (ii) expressly envisaged within the **ET Presidential Guidance**.

85. The real issue raised by this ground relates to the question whether the ET's determination of the costs application at the end of the final merits hearing gave rise to an unfairness for the claimant: did the ET lose sight of this relevant consideration and/or, having regard to the position of the claimant, was it perverse for it to decide to proceed to determine the application at that stage?

86. In seeking to answer these questions, I bear in mind the considerations identified by the overriding objective, to which the ET was required to have regard in reaching its decision. As the **ET Presidential Guidance** recognises, when judgment is given at the end of the full merit hearing, going on to deal with any issues relating to costs at the same hearing will generally be the course that best achieves the aims identified at rule 2: that will usually be the more proportionate course and will avoid delay and save expense. Moreover, in the present case it is inaccurate to suggest that the ET only allowed the claimant "*a few minutes to digest*"

its liability decision: the ET adjourned for an hour to provide the parties with the opportunity to consider its decision, which ultimately rested on its finding that the respondent had decided to withdraw the offer it had made to the claimant because there was a lack of satisfactory references. Given the very focused nature of the case – and, therefore, the ET's decision – it is unsurprising that the claimant did not ask for further time at the hearing to digest the ET's reasoning (and I understand that there was no particular pressure of time on 25 March 2021: the hearing was completed by lunchtime). Indeed, the substantive points taken by the claimant on this appeal are essentially the same as those he raised below: having now had a far longer period to consider the ET's reasons, the claimant has identified nothing that he might have wished to raise on 25 March 2021 but was (unfairly) unable to do so given pressure of time at that stage.

87. In deciding to proceed to determine the respondent's application, it is apparent that the ET considered it relevant that the claimant had been forewarned of its intention to apply for costs once the decision on his claim was known. Having regard to each of the four WPSATC letters that the respondent had sent to the claimant (the last being on 19 March 2021, in which it was expressly advised that the claimant should attend the hearing prepared to deal with the issue of costs), the ET permissibly concluded that the claimant knew, or reasonably ought to have known, of the likelihood of such an application. That was all the more so given the fact that a deposit order had been made at an earlier stage, which expressly warned the claimant of the risk of costs being awarded against him if he proceeded in his claim. Thus having regard to the relevant circumstances, the ET's case management decision to hear the respondent's application was one that it was entitled to reach. This ground of appeal must fail.

88. The next two points of challenge in respect of the costs appeal both raise questions as to the relevance of the claimant's conduct – in his correspondence and/or in his persistent and repetitive applications – to the award of costs relating to the period from November 2020. The claimant says that the ET made no findings as to the effect of the abusive and intimidatory emails, failed to take into account the relevant context when considering the applications he had made (focusing only on the number of applications, not the reason for them), and carried out no analysis to determine whether there was any causal relationship between that correspondence and/or those applications and the costs claimed.

89. Although there need not be a precise causal link between the unreasonable conduct and the specific costs claimed (**McPherson v BNP Paribus**; **Sunuva**), it is right to say that any award of costs must not be

punitive in nature, and must thus be limited to that which is compensatory. In the present case, the specific correspondence cited in the ET's decision pre-dated the period for which the respondent sought its costs, although that did not mean that the ET was not entitled to have regard to the claimant's conduct as part of the background context to its decision. It is, further, wrong to say that the ET made no finding as to the effect of that correspondence: the passages quoted largely speak for themselves, but the ET plainly concluded that the language used was abusive and intimidating; it was entitled to do so. As for the applications made by the claimant, these continued into the period relevant to the costs application and the ET permissibly found this conduct to have been "*unreasonable and disproportionate*". Although not central to the determination of the application for costs, I do not consider the ET erred in having regard to these matters as supporting its decision.

90. Rather more fundamentally, however, the ET found that the claimant had acted unreasonably in pursuing his claim given: (i) the deposit order; and (ii) the clear warnings given by the respondent in the WPSATC correspondence; of itself, this finding would justify the ET's award of costs. This point is addressed to some degree in the claimant's final ground of appeal against the costs decision. In this regard, he argues that the deposit order had been made on the basis of a misinterpretation of his case on the relevant documents, and there was a mismatch in the reasoning provided in making that order and the reasons ultimately given for dismissing his case at the final hearing. It is the claimant's case that the respondent's WPSATC correspondence relied on the same error as had been made in the deposit order reasoning and that, appreciating this point, this was why he had – entirely reasonably – refused to capitulate to the costs threats made.

91. As rule 39(5) **ET Rules** makes plain, the finding ultimately made on a particular allegation or argument need only be "*for substantially the reasons given in the deposit order*" (emphasis added) to result in the party in question being deemed to have acted unreasonably. In considering the claimant's appeal at the rule 3(10) stage, HHJ Shanks was clear that the ET had been:

> "21. … entitled to conclude that [he] had behaved unreasonably in proceeding with the case in the face of that deposit order. … the point he makes about that … is not a viable ground of appeal."

92. As for the rather more subtle point the claimant seeks to make at this stage, as the respondent observes, this is really an attempt to challenge the ET's conclusion that it had been unreasonable for him to have continued to pursue his claim when the respondent's letters had repeatedly explained why it was hopeless. To the extent that the claimant says that he considered the respondent's warnings made the same error of nuance

as had been made in the deposit order reasoning, that would simply demonstrate that he had failed to properly engage with the warning provided by rule 39(5). As a matter of substance, the reason why the claimant lost his case at the final hearing was because it was accepted that the offer of employment was withdrawn because of the lack of satisfactory references. That was substantially the same reason as had been identified at the deposit order stage, where the ET had expressed the view:

> "52. … based on the undisputed facts, there are very plausible reasons that a tribunal might be satisfied that race played no part whatsoever in the decision. The Respondent received one poor reference …, one express refusal … and (unless he can prove otherwise) one non-reply … from the 3 referees that the Claimant had asked them to contact. The Claimant's comments and suggestions about what might have happened had the Respondent made further enquiries of him or his referees are irrelevant unless a tribunal is satisfied that the Respondent would have acted differently if his race had been different."

The respondent's WPSATC letters essentially made the same point. The ET was entitled to conclude that the claimant had failed to properly engage with the substance of the explanations he had thus been given for why his claim was likely to fail.

93. As made clear in **Yerrakalva**, costs are in the discretion of the ET and an appeal against a costs order is doomed to fail unless vitiated by error of legal principle, not based on relevant circumstances, or perverse. The claimant's challenge to the order made in these proceedings does not meet any of the threshold requirements and there is no proper basis on which the EAT could interfere with the decision made.

Decision and disposal

94. For all the reasons provided, the claimant's various grounds of challenge fail and both appeals are duly dismissed.