Neutral Citation Number: [2024] EAT 179

Case No: EA-2021-001425-RN

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 8 October 2024

Before:

CASPAR GLYN KC, DEPUTY JUDGE OF THE HIGH COURT

- -

Between:

MRS K PILGRIM **Appellant**

- and –

JASMINE CARE (HOLDINGS) LTD **Respondent**

- -
- -

The Appellant appeared in Person
MR E McFARLANE (representative, **Peninsula Business Service Ltd**) for the **Respondent**

Hearing date: 8 October 2024

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JUDGMENT

REVISED

SUMMARY

PRACTICE AND PROCEDURE

The Tribunal made no error of law in dismissing the costs' application. Further, the Tribunal had no jurisdiction to make a second costs' award for legal costs when it had already made a preparation time order in favour of the claimant in these proceedings. The definition of the word 'proceedings' encompassed the whole course of a claim from issue to final determination and was not to be interpreted as referring only to a single application in the course of a claim.

CASPAR GLYN KC, DEPUTY JUDGE OF THE HIGH COURT:

1. This is an appeal by Ms Pilgrim against the decision of Employment Judge Vowles and members made after a hearing in chambers dated 21st October 2021. The hearing followed a claim form presented by the claimant on 21st May 2018 and a case management decision that was held on 19th June 2020. A response was filed and, between 6th and 13th January 2020, there was a liability hearing. The Judgment and Written Reasons were sent to the parties on 10th March 2020. The claimant substantively succeeded in her claims.

2. On 4th March 2020 the remedy hearing was delayed by Covid. It was relisted on 19th March 2021. Prior to that, on 19th June 2020, case management orders were issued by the tribunal which I shall deal with later, and were sent to the parties on 22nd July 2020.

3. The Remedy hearing took place on 19th March 2021. The decision was sent to the parties on 7th April 2021. Directions were given at the hearing for the claimant to make a costs application if she so wanted. A detailed costs application was made on 31st March 2021 by the claimant's solicitors. It was said (and summarise): that the claimant had provided all papers as directed by the Tribunal, she complied with the orders of 19th June 2020 by providing the papers required by August 2020. The respondent was ordered to provide documents and counter-schedules in response by 2nd October 2020. However, those were not forthcoming.

4. The claimant's representative wrote on 8th October 2020 to the Employment Tribunal asking for an order debarring the respondents from appearing or making representations at the remedy hearing. The claimant's representative

telephoned the respondent's representative and was told that she was no longer representing the respondent and was told to contact Mr Howson, which the claimant's representative duly did. Mr Howson replied that he would answer and deal with the matter. However, there was further confusion when, on 10th November 2020, another respondent's representative wrote to the tribunal asking for an extension to comply with the orders made by the Tribunal until 9th January 2021. That prompted the claimant's solicitor to write on 11th November 2020 to the tribunal asking for a debarring order to prevent the respondent from making representations at the remedy hearing.

5. Further to that, on 6th December 2020, the Employment Tribunal wrote to the respondents directing a response to the claimant's application by 21st December 2020. By 22nd December 2020 no response had been received, and again the claimant asked for the respondent to be debarred from making representations at the remedy hearing.

6. There were no substantive replies from the respondent or any replies from the respondent. Accordingly, on 25th January 2021 the claimant asked for a default order against the respondent in the sum claimed on the schedule of loss. By this time, Ms Pilgrim had been hospitalised as a result of Covid, and by 26th January was suffering as a result of a coma and was intubated. On 26th January the respondents forwarded a detailed schedule of loss, and on 14th February 2021 the Employment Tribunal emailed the respondent for confirmation that the order would be complied with within 14 days. On 18th March 2021 the claimant side prepared the bundle.

7. Following the remedy hearing, Employment Judge Vowles and his members considered the application and determined it so that no legal costs were awarded to the claimant. On 11th November 2021 the claimant appealed by grounds of appeal which have been amended. On 29th March 2023 Employment Judge Eeley and members made a preparation time order against the respondent (pursuant to rule 76(1)(a) of the Employment Tribunals rules) in respect of the respondent's unreasonable conduct of the litigation between 13th January 2023 and 29th March 2023 and awarded the claimant the sum of £420 to be paid by the respondent.

8. On 2nd June 2023 the case was sifted by Deputy High Court Judge Sheldon KC (as he then was) and a preliminary hearing was held in front of His Honour Judge Taylor in which ELAAS helpfully amended the grounds of appeal which Ms Pilgrim pursues before me now. Those amended grounds of appeal are were sealed 8th February 2024.

9. Ground 1 asserts that the Employment Tribunal did not properly consider the prejudice suffered by the claimant in respect of the further costs to which Ms Pilgrim was put as a result of the respondent failing to comply with paragraphs 5, 8 or 9 of the Case Management Order. Ground 2 argues that, if the tribunal had properly considered that prejudice, then they would have been bound to exercise their discretion in favour of Ms Pilgrim.

10. Turning to the decision of the Employment Tribunal under appeal, the Employment Tribunal directed itself as to the law at paragraphs 8 – 10. In particular the Tribunal considered :

> "8. *Yerrakalva v Barnsley Metropolitan Borough Council* [2012] ICR 420.
>
> The Court of Appeal confirmed that a Tribunal's power to order costs is more sparingly exercised and is more circumscribed than that of the courts where the general rule is that costs follow the event. In Tribunals, costs orders are the exception rather than the rule. In most cases the Tribunal does not make any order for costs and if it does, it must act within the rules that confine its powers to specified circumstances. The vital point in exercising the discretion to order costs is to look at the whole picture. The Tribunal has to ask whether there has been unreasonable conduct by the paying party in bringing, defending or conducting the case, and, in doing so, identify the conduct, what was unreasonable about it, and what effect it had.
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> 9. *McPherson v BNP Paribas* [2004] ICR 1398.
>
> In determining whether to make an order under the ground of unreasonable conduct, a Tribunal should take into account the 'nature, gravity and effect' of a party's unreasonable conduct.
>
> 10. *Osannaya v Queen Mary University* [2011] EAT 0225/11.
>
> The use of the word 'unreasonable' requires a high threshold to be passed when a costs order is made."

11. Further, the tribunal gave what amounted to its reasons in its decision between paragraph 13 and paragraph 16, and they read as follows:

> "13. Having considered the Claimant's application for a Costs Order, and the Respondent's response to the application, the Tribunal found that looking at the whole picture, the Respondent had not acted unreasonably in failing to comply with the Tribunal's orders or in the conduct of the proceedings. Nor could it find any vexatious, abusive or disruptive conduct.
>
> 14. It is clear from the detailed account given in the application that the Respondent's representative has been tardy in complying [with] the Tribunal's orders and has failed to respond on several occasions to correspondence from the Claimant's representative and from the Tribunal. That, however, falls short of the high threshold of unreasonable conduct, particularly in view of the fact that the Respondent did in fact comply with the case management orders, albeit after the due date, some 2 months before the remedy hearing when it appears all preparation had been completed. The listed remedy hearing was not delayed and there was no apparent prejudice to the Claimant in respect of the remedy hearing.

> 15. The Claimant acknowledged in the Costs application that it had received the counter schedule of loss on 26 January 2021.
>
> 16. The Respondent's counter schedule of loss was detailed and disclosed the Respondent's factual and legal arguments it would advance at the remedy hearing. Both parties were legally represented at the hearing."

The Tribunal concluded this reasoning at paragraph 17 by refusing to make a Costs Order.

The Law

12. There is a measure of agreement between the parties as to the law. Ms Pilgrim has adopted some parts of the respondent's skeleton argument, but, as well as adopting those parts, has adopted parts that could be seen as concessions by her. I fully recognise they are not concessions by her, and she has actively pursued her appeal in front of me today.

13. The Employment Tribunal Procedure Rules provide, under the 2013 Regulations, as follows:

> "74(1) 'Costs' means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing). ...
>
> 75(1) A costs order is an order that a party ('the paying party') make a payment to —
>
> (a) another party ('the receiving party') in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative; ...
>
> (2) A preparation time order is an order that a party ('the paying party') make a payment to another party ('the receiving party') in respect of the receiving party's preparation time while not legally represented. 'Preparation time' means time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at any final hearing.

> (3) A costs order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings. A Tribunal may, if it wishes, decide in the course of the proceedings that a party is entitled to one order or the other but defer until a later stage in the proceedings deciding which kind of order to make.
>
> 76(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; or
>
> (b) any claim or response had no reasonable prospect of success".

14. I also note from the rules of procedure that regulation 3 (interpretation) provides as follows: "'National security proceedings' means proceedings in relation to which a direction is given, or an order is made, under rule 94 of Schedule 1"; and "'Tribunal' means an employment tribunal established in accordance with regulation 4 and, in relation to any proceedings, means the Tribunal responsible for the proceedings in question, whether performing administrative or judicial functions".

15. Regulation 7(1):

> "7(1) The President shall, in relation to the area for which the President is responsible, use the resources available to —
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> (a) secure, so far as practicable, the speedy and efficient disposal of proceedings;
>
> (b) determine the allocation of proceedings between Tribunals; and
>
> (c) determine where and when Tribunals shall sit."

16. I am grateful to the parties for their submissions and pay testament to Ms Pilgrim who appears before me as a litigant in person. The parties are largely agreed on the principles applying to costs' orders:

i) Costs do not follow the event in the ET.

ii) *Osannaya v Queen Mary University London* UKEAT/0225/11/SM in which the following principles emerge:

a) A costs order is exceptional in an ET.

b) It is unusual but not exceptional where an adjournment has been granted.

c) The use of the word "unreasonable" requires a high threshold to be passed when a costs order is made.

d) Employment Judges have a wide discretion and it is against that wide discretion which this appeal must be judged.

iii) *Yerrakalva v Barnsley Metropolitan Borough Council & Ors* [2011] ICR 420:

a) Costs are in the discretion of the Employment Tribunal, appeals on costs alone rarely succeed in the Employment Appeal Tribunal;

b) Paragraph 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."

(Pausing there, obviously in this case it is the conduct of the respondent on which I am focused.)

iv) Paragraphs 48 – 52: When approaching the amount of any costs, then the criticism of the paying party's litigation conduct should be factored into the picture as a whole, including but not limited to the conduct of the receiving party. In this case I am satisfied that Ms Pilgrim's conduct was blameless.

v) *Abaya v. Leeds Teaching Hospital NHS Trust* UKEAT/0258/16/BA.

There are three stages in the exercise that are involved when an Employment Tribunal decides a costs application such as this one:

i) To ask whether the precondition for making a costs order has been established. That is merely a necessary and not a sufficient condition.

ii) The tribunal must consider whether to exercise its discretion to make an award of costs.

iii) And the third stage only arises if appropriate and assessment of quantum of costs are applied.

17. All cases are fact-sensitive. Elaborate and extensive reasoning is not necessary but the Employment Tribunal must set out adequate reasoning so that the parties know why the tribunal has decided as it has. I refer to the well-known principles in *Meek v. City of Birmingham District Council* [1987] IRLR 250 and *DPP Law Ltd v. Greenberg* [2021] EWCA Civ 672. An appeal tribunal should read the whole decision and not hypercritically. Further, I refer to the Senior President of Tribunals: Reasons for decisions guidance and Practice Direction to the First-tier Tribunals. This Practice Direction does not apply directly to the Employment Tribunal, but it sets out the well known principles and is a useful summary of them, and I read it as follows:

> "5. Where reasons are given, they must always be adequate, clear, appropriately concise, and focused upon the principal controversial issues on which the outcome of the case has turned. To be adequate, the reasons for a judicial decision must explain to the parties why they have won and lost. The reasons must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the main issues in dispute. They must always enable an appellate body to understand why the decision was reached, so that it is able to assess whether the decision involved the making of an error on a point of law. These fundamental principles apply to the tribunals as well as to the courts.
>
> 6. Providing adequate reasons does not usually require the First-tier Tribunal to identify all of the evidence relied upon in reaching its findings of fact, to elaborate at length its conclusions on any issue of law, or to express every step of its reasoning. The reasons provided for any decision should be proportionate, not only to the resources of the Tribunal, but to the significance and complexity of the issues that have to be decided. Reasons need refer only to the main issues and evidence in dispute, and explain how those issues essential to the Tribunal's conclusion have been resolved.
>
> 7. Stating reasons at any greater length than is necessary in the particular case is not in the interests of justice. To do so is an inefficient use of judicial time, does not assist either the parties or an appellate court or tribunal, and is therefore inconsistent with the overriding objective. Providing concise reasons is to be

> encouraged. Adequate reasons for a substantive decision may often be short. In some cases a few succinct paragraphs will suffice. For a procedural decision the reasons required will usually be shorter.
>
> 8. Judges and members in the First-tier Tribunal should expect that the Upper Tribunal will approach its own decisions on appeal in accordance with the well settled principle that appellate tribunals exercise appropriate restraint when considering a challenge to a decision based on the adequacy of reasons. As the Court of Appeal has emphasised, a realistic and reasonably benevolent approach will be taken such that decisions under appeal will be read fairly and not hypercritically."

The Claimant's Submissions

18. In her persuasive submissions, Ms Pilgrim accepted the clear and succinct direction of law at paragraphs 8 – 10. However, it was her case that the Employment Tribunal had failed to look at the whole picture. Her submission was that, from the start of the case, the respondents had not been helpful. They did not respond to any of the tribunal's directions. They did not respond to her solicitor's correspondence time and time again.

19. Further, she advances the argument in Ground 1 of her appeal that the tribunal did not properly consider the reason for the prejudice that she suffered in respect of her costs, having to pay for her solicitors to chase the respondents. In effect, she submits that the tribunal failed to consider the whole picture by not looking at the unnecessary delay and prejudice that the respondents caused; the fact that there were delays, there were no replies and there were scarce communications requiring her solicitor repeatedly to write to the other side. The respondent also did not follow the Employment Tribunal's case management orders and ignored correspondence. That caused further chasing. The respondent only responded

to the claimant's letters when it made it existential as to whether the respondent would be allowed to defend the proceedings.

20. The claimant was ill and was hospitalised at a time when the respondent eventually complied with the directions. That was, she argued, extremely prejudicial to her. As Ms Pilgrim said to me today, it was not just once or twice: it was again and again, and that should raise this conduct to the high threshold that is required.

21. In respect of Ground 2, Ms Pilgrim submitted to me that, if the tribunal had considered properly the conduct in Ground 1, then it would have been bound to have found that the required threshold was met, and the tribunal would have been bound to exercise its discretion in her favour on an award of costs. Indeed, it must have been unreasonable, looking at the facts, to wait six months and to have to wait again and again for the schedule of loss and only to receive that on 26th January. There was continual delay. Further, she submitted to me in respect of the preparation time order that it was made in separate proceedings. Her submission was that the preparation time order matters were separate proceedings from the costs pursued in this case.

The Respondent's Submissions

22. The respondent's submissions started on the basis that "proceedings", if one construed regulation 75(3), must mean the whole proceedings, which is why at rule 75(3) a tribunal can make one of two orders in proceedings – either a costs order or a preparation time order. Further, the respondent submitted that there is a wide discretion on the tribunal; that it directed itself in accordance with the

law at paragraphs 8 – 10; and, although its reasons were short, the reasons were adequate.

Discussion and Conclusion

23. The tribunal's directions of law between paragraphs 8 and 10 were the model of an appropriate direction. It directed itself in terms to look at the whole picture and it directed itself as to the high threshold necessary for a costs' award. If I look at paragraph 14 of the tribunal's reasons, it is clear that what the tribunal does is it, first, consider that the respondent was tardy in complying with the tribunal's orders. Second, it sets out in terms that the respondent failed to respond on several occasions to correspondence from the claimant's representative and from the tribunal. However, once it had taken those factors into account, the tribunal considered that the conduct fell short of the high threshold of conduct required for costs, particularly as the respondent did, albeit late and after the due date, comply with the appropriate orders two months before the remedy hearing. Further, the response from the respondent was detailed. The remedy hearing was not delayed and therefore the tribunal took the view that the high threshold of costs had not been reached.

24. In my view, the tribunal reached a permissible decision, and it addressed the very complaints that the claimant made, albeit in summary terms. It is true that some judges may have reached the opposite conclusion, but that does not exhibit an error of law. I am satisfied that the reasons, although short, are such that the claimant can understand why she did not succeed on her costs' application, although of course she disagrees with the decision that was made. It stands that

Ground 2 falls away on that basis and therefore there is no criticism that can be made of the reasoning of the tribunal.

25. I turn then to rule 75(3). I am satisfied that a tribunal can only make a preparation time order or a costs order for legal representatives in proceedings. As to the definition of "proceedings", I note in regulation 3, under the interpretation part of the rules, "national security proceedings" is described as the proceedings in relation to which a direction is given for national security, and that must mean the whole proceedings. Second, when the interpretation section addresses the question of "tribunal", the definition is that a tribunal "means the tribunal responsible for the proceedings in question". Again, I am satisfied that the language is such that it refers to the issuing of the claim form or the presentation of the ET1 and the grounds of complaint until the conclusion of the claim. Regulation 7 further persuades me, if one looks at "use the resources [so that the President can] secure, so far as practicable, the speedy and efficient disposal of proceedings", again, I am satisfied that this is a reference to the whole proceedings; that is, from the start to the finish.

26. However, I am further made sure that "proceedings" is a reference to the full set of proceedings before the tribunal – i.e. from start to finish – in that regulation 75(3) provides in terms for a tribunal to make one order or the other, but that it can defer to a later stage in the proceedings deciding which kind of order to make. To me, that is clear that what is being suggested is "later in the proceedings" does not refer to simply a single costs application but to the whole proceedings from the start to its final determination.

27. Accordingly, I am not satisfied that the claimant has identified any error of law on the part of the tribunal and, in any event, if I had been wrong about that, I find that the tribunal would have had no jurisdiction, having made a preparation time order, to make a costs order against the respondent. Accordingly, the appeal is dismissed.
