Neutral Citation Number: [2025] EAT 79

Case No: EA-2023-000059-RS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 3 June 2025

Before:

HIS HONOUR JUDGE JAMES TAYLER

- -

Between:

Mr M Willis

Appellant

- and -

1) GWB Harthills LLP
2) Miss Hester Russell
3) Mrs Elizabeth Lord

Respondents

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- -

Mr M Willis, the Appellant in person
Andrew Burns KC (instructed by Pennington Manches Cooper LLP) for the **Respondent**

Hearing date: 15 May 2025

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JUDGMENT

SUMMARY

Practice and Procedure

The Employment Tribunal did not err in law in awarding costs. Ability to pay considered.

HIS HONOUR JUDGE JAMES TAYLER

The Issue

1. When deciding whether to make an award of costs, and if so in what amount, how should an Employment Tribunal exercise its discretion to have regard to "ability to pay"? Obviously, the Employment Tribunal should act justly, weighing the relevant circumstances. This appeal turns on whether the EAT should overturn an exercise of that discretion.

Outline facts

2. The claimant is the former managing partner of the first respondent, a firm of solicitors. In 2018 the claimant was diagnosed with cancer and went off sick. The claimant received payments from a permanent health insurance ("PHI") scheme. A bitter dispute developed including about whether the claimant could receive profit share paid into his pension in addition to the PHI payments. The claimant submitted his first claim to the Employment Tribunal on 16 April 2020. The respondent admitted some elements of the first claim in November 2020. The Employment Tribunal entered a liability judgment by consent on 6 January 2021. The claimant submitted a second claim on 7 June 2021. The second claim was heard from 19 to 26 June 2021. The Employment Tribunal dismissed the complaints in the second claim by a judgment sent to the parties on 3 May 2022. A remedy hearing in the first claim was heard from 3-6 October 2022, with deliberations in chambers on 7 and 10 October and 15 December 2022. The remedy judgment was sent to the parties on 21 December 2022. The Employment Tribunal made no award to the claimant. The Employment Tribunal was highly critical of the claimant. Both parties made applications for costs. By a judgment sent to the parties on 21 December 2022 the Employment Tribunal ordered the claimant to pay the respondents' costs capped at £210,000 with the amount of costs to be determined by way of a detailed assessment on a standard basis by the County Court in accordance with the Civil Procedure Rules 1998.

3. The claimant made three applications for reconsideration relying on new evidence that he has sought to introduce in this appeal asserting that it demonstrated that he had not been dishonest as had been found by the Employment Tribunal. The Employment Tribunal dismissed the applications for

reconsideration in judgments sent to the parties on 4 August 2023, 8 February 2024 and 19 February 2024. Those judgments were not appealed. There is no proper basis for me to reopen the matters the claimant challenged in the reconsideration applications.

Grounds of appeal

4. The claimant appeals the costs judgment. Three grounds of appeal were permitted to proceed (the paragraph numbers in the grounds of appeal are included):

> **Ground 5(b) Failure to properly consider whether to exercise its discretion to award costs:**
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> 15. It was also an **error of law to fail to take into account C's ability to pay when deciding whether or not to exercise its discretion**.
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> **Ground 7: Failing to take into account the effect of the award on C's wife and children:**
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> 17. **The Tribunal ordered an amount of costs (£210,000) which it was materially likely C would be unable to pay without selling the family home. In reaching its decision the Tribunal failed to take into account the impact of the order on C's wife and family.** In particular, it failed to take into account that: C's wife and daughter live in the family home and any sale would force them out of the house; C's elderly mother-in-law was due to move into the home and this would be prevented by a sale of the home; C's wife was joint owner of the home; any forced sale would take place at a time when C's wife was providing caring duties for C in the late stages of Stage 4 bowel cancer; if C were to pass away the effect of the costs order would fall solely on his wife and children.
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> 18. **The Tribunal made a passing comment that C might not need to sell the home because C would be able to effect equity release or a charge over his property (Judgment § 66). This was pure speculation** and should not have been taken into account by the Tribunal where no evidence was heard on that possibility, and C was given no opportunity to make submissions on it. In reality this option was unfeasible because lenders would be deterred by C's poor health prognosis.
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> **Ground 8: Wrongly taking into account £340,000 in the assessment of C's ability to pay**
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> 19. **In considering C's ability to pay, the Tribunal took into account that C was due an estimated profit share payment from R of £340,000 (Judgment § 65). It should not have taken that into account when evaluating C's means, given that C and R had been in acrimonious dispute about the entitlement to profit share** and no distribution has been made to C for over 4 years. The Tribunal took the figure of £340,000 without having heard evidence on the issue from R. In fact, since the Tribunal's costs judgment, R has declared C is not entitled to profit share during the period he was unfit for work and has still paid no sum to him.
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> 20. **In assessing C's ability to pay £210,000, the Tribunal also erred by failing to**

> **make findings of fact, and failing to take into account, almost £200,000 of debt, and in relation to the risk of Aviva recouping in excess of £200,000 of income protection payments.** [emphasis added]

The legal principles

5. The relevant rules when the costs application was decided were Rules 76 and 84 **Employment Tribunal Rules 2013** (now Rule 74 and 82 **Employment Tribunal Rules 2024**) which provided, so far as is relevant:

> When a costs order or a preparation time order may or shall be made
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> 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—
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> > (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 …
>
> Ability to pay
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> 84. In **deciding whether to make a costs**, preparation time, or wasted costs **order**, and **if so in what amount**, the Tribunal **may have regard to the paying party's** (or, where a wasted costs order is made, the representative's) **ability to pay**. [emphasis added]

6. The application of these rules can be split into three stages:

> Stage 1: is there conduct that could warrant making a costs order ("threshold conduct")
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> Stage 2: if so, should an award of costs be made ("the discretionary decision") – the Employment Tribunal may have regard to ability to pay at this stage
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> Stage 3: if so, what amount of costs should be awarded ("the quantum decision") – the Employment Tribunal may also have regard to ability to pay at this stage

7. At stage 2 a wide range of factors can be relevant, such as the party's subjective belief in the merits of a complaint or defence, the type of complaint and whether the party had the benefit of legal advice. Rule 84 gives the Employment Tribunal the power to have regard to the paying party's ability to pay as part of the Stage 2 discretionary decision. An Employment Tribunal might conclude where a party is guilty of threshold conduct, and there are no other factors pointing against making a costs order, that a party's total inability to pay is such that no costs order should be made. In other cases, the Employment Tribunal might decide it is appropriate to make a costs order but take account of the party's ability to pay in limiting the award when making the Stage 3 quantum decision.

8. There is no requirement to identify these stages in the analysis of an application for costs, although they may provide a useful framework to ensure a necessary component is not missed. But if, for example, an Employment Tribunal decides it will have regard to a party's ability to pay and concludes it is such that the party can meet the full award of costs sought when making the Stage 3 quantum decision, it goes without saying that the Employment Tribunal concluded that the party's ability to pay was not so limited that it should not make an award of costs at all when considering the Stage 2 discretionary decision. In such circumstances, there would be no requirement for the Employment Tribunal to refer specifically to ability to pay at stage 2, where it has done so at stage 3.

9. Reading Rule 84 and the relevant authorities, and applying a little common sense, establishes several principles that will often be of assistance. Rule 84 provides a discretion to have regard to ability to pay but there is no requirement to do so. If an Employment Tribunal decides not to have regard to ability to pay generally it should succinctly explain why: **Jilley v Birmingham and Solihull Mental Health NHS Trust** UKEAT/0584/06. In many cases it is desirable to have regard to ability to pay: **Jilley**. Factors that might lead an Employment Tribunal not to have regard to ability to pay include where a party has failed to attend or take the opportunity to provide evidence about ability to pay or where an Employment Tribunal considers that such evidence that has been provided is so unreliable as to be worthless: **Jilley**. Where an Employment Tribunal does have regard to ability to pay it should give a brief explanation of how it has done so that is **Meek** compliant in that the parties can understand in broad terms how ability to pay has been taken into account: **Jilley**. This may require some analysis of income and outgoings and of any assets or debts. Capital assets may be an important aspect of a party's ability to pay even if not immediately or easily realisable: **Shields Automotive Ltd v Greig UKEATS/0024/10**. Where assets are jointly owned, such as a family home, it may be relevant to consider the share held by the party against whom the costs application is made: **Howman v The Queen Elizabeth Hospital Kings Lynn** UKEAT/0509/12/JOJ; including the effect of the sale on the other person who jointly owns the asset.

10. The fact that a party's ability to pay is limited does not require an Employment Tribunal to

either make no award of costs or to assess a sum confined to an amount that the party could actually pay: **Arrowsmith v Nottingham Trent University** [2012] ICR 159.

11. There may be circumstances where there is an obligation on the Employment Tribunal to raise the question of ability to pay when considering making a costs order even if that question has not been raised by the potential paying party, **Doyle v North West London Hospitals NHS Trust** UKEAT/0271/11.

12. In considering ability to pay an Employment Tribunal is not limited to considering the current state of affairs but may consider what a party could realistically pay over a reasonable period, which is often something of an open-ended question: **Vaughan v London Borough of Lewisham (No 2)** [2013] IRLR 713. It is open to the Employment Tribunal to adopt a reasonably optimistic view as to future ability to pay, particularly where costs are sent for assessment in the County Court where means may be considered again.

The decision of the Employment Tribunal

13. The Employment Tribunal carefully summarised the relevant law and its prior findings that the claimant had given untruthful evidence. The Employment Tribunal rejected the claimant's assertion that this resulted from mental ill health. The Employment Tribunal summarised its conclusions:

> 60. With those findings of fact in mind we considered the context, nature gravity and effect of the claimant's conduct to decide if it was unreasonable. **The nature and extent and scale of the claimant's deception was extreme because he was attempting to mislead the tribunal to obtain relief knowing he was not entitled to it because he was not telling the truth.** We agreed that misleading a court or tribunal is **one of the most serious findings of unreasonable conduct** by a party and **particularly egregious for a party who is a solicitor**.
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> 61. **We do not find the unsatisfactory nature of the claimant's testimony is explained by the claimant's diagnosed mental health conditions**. We do not accept the evidence in the claimant's costs witness statement which is in our view an undisguised attempt to challenge the findings properly made by the tribunal. In so far as it is relied upon to place a different 'complexion' on the findings of fact we prefer the certainty of the findings of fact made after careful examination of the evidence.
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> 62. We are satisfied that the respondents have shown the claimant's conduct in bringing and conducting these proceedings was unreasonable conduct crossing the threshold of unreasonable conduct required to make a costs order. We have not gone on to consider

> the alternative ground of 76(1) (b) that the claim had no reasonable prospects of success because it was not necessary to. [emphasis added]

14. While I appreciate that the claimant still disputes these conclusions, they are not subject to challenge in the grounds of appeal that have been permitted to proceed. There is no proper basis to admit new evidence that was the subject of unsuccessful applications for reconsideration that have not been appealed.

15. The findings against the claimant were extremely serious and go to his honesty and the reliability of his evidence. Notwithstanding these coruscating findings the Employment Tribunal did consider the claimant's ability to pay. The Employment Tribunal explained how it exercised the discretion:

> 63. **As to whether we should exercise our discretion to make a costs order** having found unreasonable conduct by the claimant we are not persuaded that the fact that the claimant is a disabled person by reason of his cancer and by reason of depression is a reason for not making a costs order which is otherwise just. We are not persuaded that because a strike out or deposit order was not applied for a costs order should not be made. It is difficult to see how the Tribunal could have ordered a strike out or deposit order if the respondents had raised an allegation that the claimant was telling lies without examining the evidence and there were disputes of fact. Having seen the without prejudice save as to costs correspondence it was unlikely the claimant would have taken any costs warning letter seriously however well drafted and would most likely have complained that the respondents' solicitors were sending aggressive correspondence questioning his honesty and integrity.
>
> **Ability to pay.**
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> 64. **The claimant's evidence that the value of his house has not risen substantially for 20 years was implausible.** The claimant had purchased his for £850,000 20 years ago and is suggesting a realistic value for the property if sold is £950,000 giving him a share of £475,000. The valuation he has provided shows the property has increased by £100,000 in 20 years. **The claimant could not explain how that valuation could be correct and we do not accept it is realistic or reliable.** We preferred Mr Burns more realistic estimate based on Zoopla valuation showing a value of £1.47 million - £2.2 million based on the House Price Index which does factor increases over time in a more realistic way. **This was another blatant attempt by the claimant to 'hoodwink' the tribunal about the true value of <u>his half share</u> of the capital asset** to try to avoid a costs order. His conduct in attempting to rely on an estimate he knows is not truly representative of the value goes against the claimant and in favour of the making a costs order.
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> 65.**The capital value of the home and <u>the claimant's half share</u> provides him with sufficient means to pay a costs award. The claimant is not intending to sell his home to repay <u>his other debts of loans from family and friends</u>** where there is no time scale for repayment or his outstanding legal costs of £50,000 which he will have to

> settle soon. **He will use his unpaid profit share to settle his own legal costs.** The value of his unpaid profit share is yet to be agreed. **In March 2021 the respondents had estimated the value based on the LLP's projected profits at just under £340,000.** We were **satisfied the claimant has the means in his capital asset (1/2 share of home) and unpaid profit costs to pay a costs award.**
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> 66. **In deciding the amount of costs**, we know the claimant has paid his own costs of £195,000 which he has agreed are reasonable and proportionate in relation to the first claim which settled before a liability hearing. Mr Cordrey invited the tribunal to cap any costs awarded at the amount awarded to the claimant in respect of his costs application in relation to Claim 1 but as that application has failed the cap must be set in a different way. **Mr Burns suggests a cap of £210,000 even though the actual costs incurred by the respondents exceed £277,000.** We have decided **a reasonable and proportionate sum to cap the respondents' costs is £210,000. The costs should be assessed on the standard basis by way of a detailed assessment in the County Court**. The costs are **not immediately payable as there may be some delay while the unpaid profit costs value is decided, and we suggest no earlier than March 2023 which will hopefully give enough time after the LLP accounts for 2020/2021 to be approved in January 2023**. **The claimant also has alternative means that will not involve the sale of his home given his equity share in his home** whether he does so by way of **equity release or a charge on the property**.

Analysis of the grounds of appeal

Ground 5(b) Failure to properly consider whether to exercise its discretion to award costs:

16. It is asserted that the Employment Tribunal failed to have any regard to the claimant's ability to pay at all when making the Stage 2 discretionary decision. This ground is based on a misreading of the judgment. Paragraphs 63 to 65 all deal with the Stage 2 discretionary decision. The Employment Tribunal considered discretionary factors other than ability to pay at paragraph 63 and ability to pay as an aspect of the Stage 2 discretionary decision at paragraphs 64 and 65 before considering ability to pay as a part of the Stage 3 quantum decision at paragraph 66. This ground of appeal fails.

Ground 7: Failing to take into account the effect of the award on C's wife and children

Ground 8: Wrongly taking into account £340,000 in the assessment of C's ability to pay

17. These grounds are best considered together as they challenge the manner in which the Employment Tribunal assessed the claimant's ability to pay. The Employment Tribunal painted a picture of the claimant's means with a broad brush. The claimant had provided some detail of his

income and outgoings and his assets and debts. The Employment Tribunal was clearly highly sceptical of his evidence because of its earlier findings about his honesty and the fact that he suggested such a modest increase in the value of his family home over the last 20 years. The claimant sought to introduce new evidence that supported the valuation he advanced in the Employment Tribunal, but I do not accept there is any proper basis for that evidence to be introduced as it could and should have been obtained for the purposes of the costs hearing. Because the Employment Tribunal was so sceptical of the claimant's evidence it might have chosen to disregard the claimant's ability to pay. When it chose to have regard to the claimant's ability to pay the Employment Tribunal was entitled to adopt a reasonably rosy assessment of the claimant's likely future circumstances.

18. While it is correct that the Employment Tribunal did not expressly weigh up the current income and outgoings of the claimant, it did not assess his ability to pay based on his current income, but on the basis of his share in the family home and likely future profit share. The Employment Tribunal concluded that the claimant was likely to be able to pay the costs award having regard to his half-share in the family home and his likely profit share not withstanding his other debts (briefly referred to at paragraph 65). The Employment Tribunal repeatedly noted that the claimant had a half-share in the family home. While it did not specifically refer to the consequences that a sale of the house would have on his wife and children, I do not consider it was required to do so, particularly because on any valuation this was a very substantial capital asset. In taking a realistic view of the claimant's future ability to pay I do not consider that the Employment Tribunal erred in law in considering the possibility of some form of equity release, even if it was not specifically canvassed in argument. It is obvious that where such a valuable asset is held there are options to release some of the value. The Employment Tribunal might equally have referred to the possibility of the claimant and his wife selling the property and moving into less valuable accommodation. I do not consider that there was any error of law in the Employment Tribunal taking the claimant's likely profit share into account. While it did not refer to the possibility of the PHI payments being recouped or to the amount of his other debts it clearly had his debts in mind at paragraph 65. The specific grounds are not made

out. Further, the broad-brush assessment of ability to pay was justified by the specific circumstances of this case.

19. Accordingly, the appeal is dismissed.

20. The respondent has explained that the costs award has now been recouped from the claimant's profit share. While I did not take that into account in considering the appeal as it was not information available to the Employment Tribunal it may be of some comfort to the claimant in considering the practical consequences of this appeal being unsuccessful.