Neutral Citation Number: [2026] EAT 4

Case Nos: EA-2023-000557-LA
EA-2023-000558-LA
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EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 12 January 2026

BEFORE:

HIS HONOUR JUDGE JAMES TAYLER

- -

BETWEEN:

Miss B Gurney

Appellant

and

(1) Ms M Randall
(2) Merali's Limited
(3) Fordover Services Limited
(4) Mr M Sprack

Respondents

Merali's Limited

Appellant

and

(1) Ms M Randall
(2) Miss B Gurney
(3) Fordover Services Limited
(4) Mr M Sprack

Respondents

Fordover Services Limited

Appellant

and

(1) Ms M Randall
(2) Miss B Gurney
(3) Merali's Limited
(4) Mr M Sprack

Respondents

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Imogen Egan (instructed by Rahman Lowe Solicitors and Kilgannon and Partners) for the **Appellants**
Harry Sheehan (instructed by Womble Bond Dickinson (UK) LLP) for **Mr Sprack**

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COSTS JUDGMENT

HIS HONOUR JUDGE JAMES TAYLER

1. The fourth respondent (who I will refer to as the respondent) has applied for costs after the dismissal of an appeal against a judgment of Employment Judge A.M.S. Green refusing an application for wasted costs. The Employment Tribunal judgment was sent to the parties on 1 March 2023.

2. The appeal was heard on 7 October 2025. The judgment dismissing the appeal was sealed and handed down on 23 October 2025.

3. The application for costs was made on 4 November 2025. The appellants responded on 14 November 2025 and the respondent provided a brief reply on 17 November 2025.

4. The appeal judgment sealed on 23 October 2025 should be read together with this judgment.

5. The Employment Appeal Tribunal has the power to make an order for costs pursuant to rule 34A of the **Employment Appeal Tribunal Rules 1993 (as amended)**:

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

6. Like in the Employment Tribunal, costs do not follow the event, and the EAT is generally a costs free jurisdiction. If one of the threshold conditions is met, the EAT still has a discretion to exercise before making an award of costs. As in the Employment Tribunal, it is a two step process; (1) has threshold conduct occurred (2) should the discretion to award costs be exercised; see in the Employment Tribunal context: **Madu v Loughborough College** [2025] EAT 52, [2025] ICR 1126.

7. Does the fact that an appeal has passed the sift, or been put through to a full hearing at a Rule 3(10) Hearing or a Preliminary Hearing, protect an appellant from an award of costs? A previous suggestion to that effect was firmly rejected by Burton J in **Iron and Steel Trades Confederation v ASW Ltd (in liq)** [2004] IRLR 926:

> 3 We are unanimously of the view that this application was one which, objectively speaking, was without reasonable prospect of success. The fact that our judgment was relatively long, and hence took some time in court to deliver, was in deference to the lengthy argument of an experienced and senior Queen's Counsel, and, as is so often said,

simply because a matter has been argued for some time, it does not mean that it was arguable. We are satisfied that in the event the appeal was unarguable. But we do not conclude that in the circumstances the appellant was acting unreasonably in bringing forward this appeal and pursuing it to the hearing, within the confines of **what is still an exceptional jurisdiction so far as the award of costs is concerned.**

4 Mr Hochhauser has shown us a statement made by Judge Clark, with which we were all of us previously unfamiliar, in an unreported decision called *Coots v John Lewis plc* 27 February 2001, which says that it is generally not the practice of the Employment Appeal Tribunal to award costs in circumstances where the appeal has survived effectively a preliminary stage. If that was the practice of the Employment Appeal Tribunal on 27 February 2001, which I am sure the long experience of Judge Clark entitled him to say, it is no longer the practice, and indeed it may well be that that would be an impermissible trammel of the power of the Employment Appeal Tribunal to award costs under rule 34.

5 Inevitably there has been some kind of preliminary process at the Employment Appeal Tribunal. It used to be a preliminary hearing, with the very occasional sift, such as is described in that case. Now every appeal that comes forward is sifted by a judge in accordance with the new Practice Direction, which has been in force since December 2002, at paragraph 9. Some cases go straight through to a full hearing and some are the subject-matter of a preliminary hearing.

6 When there is a preliminary hearing, there is sometimes, depending upon the precise order made, an obligation on the respondent to put in submissions setting out concisely why the appeal should not go forward, but more usually simply an opportunity for the respondent to do so; but at least on a preliminary hearing there is now the opportunity for consideration and for knocking out an appeal with the benefit of the respondents having put forward a case. Of course, respondents do not have, in most cases, the right to appear, but they do have the right of putting in written submissions. It is sometimes the case that a fresh adviser to the appellant on the day of the appeal goes beyond the previous notice of appeal, perhaps obtaining leave to amend, and in certain circumstances, therefore, the respondent will not have had the opportunity of making submissions, so that the basis on which the appeal goes forward is a surprise to the respondent.

7 But, save in those circumstances, at least the appeal will have been tested on a preliminary hearing. Where, however, a case goes straight through to a full hearing on a sift, which is a very substantial number of cases now, then there will have been no opportunity for the respondent to have made any such input; and we do not believe there ought to be any practice which says that where a case has gone through the sift, or indeed for that matter gone through an ex parte preliminary hearing, there should be any practice that costs would only in exceptional circumstances, or extraordinary circumstances, or in circumstances in which the court has been misled, be awarded.

8 **However, it must be a factor, and it always will be a factor, that the case has been sifted through, or perhaps considered on a preliminary hearing**, in the consideration as to whether the appeal was unreasonably brought, not least of course because there is the power at the sift stage for a Registrar at the moment, and under proposed new rules a Judge, effectively to strike out an appeal under rule 3 of the Employment Appeal Tribunal Rules if it appears that the Employment Appeal Tribunal has no jurisdiction to hear it;

> and indeed under proposed new rules if the appeal has no reasonable prospect of success, though that is not the test at the moment.
>
> 9 In those circumstances, we are satisfied that the question of the case being sifted through, as it was here, to a full hearing, is a factor in our consideration. Also a factor in our consideration is the fact that under the present Rules there is, unlike the Employment Tribunal Rules, no provision whereby costs can be awarded if proceedings are misconceived – misconceived being defined in the Employment Tribunal Rules as being proceedings having no reasonable prospect of success. That is a specific head in the Employment Tribunal Rules, which would enable a decision by an employment tribunal on an objective basis, that costs ought to be awarded because the proceedings had no reasonable prospect of success. The test in the Employment Appeal Tribunal Rules remains however whether the proceedings have been brought or conducted unreasonably. [emphasis added]

8. When **Iron and Steel Trades Confederation** was determined there was no specific power in the **EAT Rules** to award costs where an appeal or response was misconceived, in the sense of having no reasonable prospect of success. The **EAT Rules** have been amended to add that power. However, I do not consider that amendment alters the analysis that the fact that an appeal has passed the sift is a factor that can be taken into account when deciding whether to exercise the discretion to award costs even where an appeal is misconceived, particularly were an appellant is a litigant in person, which was not the case in this appeal.

9. One of the reasons why only limited comfort can be taken from the fact that an appeal has passed the sift is that the prospects of the appeal succeeding may appear very different once the respondent has had the opportunity to respond, or other steps have been taken in preparing the appeal that have altered the landscape. In **Takavarasha v London Borough of Newham** UKEAT/0077/12 His Honour Judge Peter Clark stated:

> [15] Taking all of those matters into account, we are satisfied that this is a proper case for costs in the appeal. The picture following a full hearing is very different from that which presented itself to the division that heard the preliminary hearing on an Appellant-only basis.

10. In **London Fire Commissioner v Hurle** [2022] EAT 55, I suggested:

> However, the fact that grounds were considered to be arguable on the sift by a judge of the EAT should give some pause for thought.

11. The application for costs is made on the basis that the appeals were unnecessary and/or misconceived. I do not consider that in the context of this application the term unnecessary adds anything to misconceived. It is asserted that the appeal was misconceived from the outset because there were no reasonable prospects of success. It is asserted that this was clearly set out in the response to the appeal and the skeleton argument produced by the respondent for the full hearing.

12. The appeal failed, and pretty comprehensively. Does that mean that it was misconceived?

13. In the Employment Tribunal the parties agreed that the key authority on wasted costs is **Ridehalgh v Horsefield and Another** [1994] Ch. 205. The first step of the analysis is whether the legal representative acted improperly, unreasonably or negligently. In considering asserted negligent conduct by a representative in **Persaud v Persaud and Others** [2003] EWCA Civ 394 the Court of Appeal held that "there must be something more than negligence for the wasted costs jurisdiction to arise: there must be something akin to an abuse of process if the conduct of the legal representative is to make him liable to a wasted costs order." The appellants suggested that the requirement for something "akin to an abuse of process" only applies where negligence is asserted. I concluded that on a proper analysis of the authorities something "akin to an abuse of process" is required whether it is asserted that the representative has acted improperly, unreasonably or negligently. I found support for this proposition in the judgment of Simler J (P), as she then was, in **KL Law Ltd v Wincanton Group Ltd and Another** [2018] 5 Costs LO 639. However, **Persaud v Persaud** is not very clear on this point and **KL Law** was a case in which the impugned actions of the representative were alleged to be negligent. While I came to a clear conclusion on the point I do not consider that the counter argument was so poor as to be unarguable.

14. The first ground of appeal asserted that the Employment Tribunal misdirected itself as to the correct test for "unreasonable" or "improper" conduct required for the award of wasted costs. I held that the application for costs advanced before the Employment Tribunal focussed almost entirely on alleged negligence, and so it was not surprising that the Employment Tribunal dealt with the other

alternatives briefly. I stated that the only reference to unreasonable conduct in the skeleton argument for the costs hearing produced by Ms Egan was to the unparticularised age discrimination complaint. However, that was a significant feature that the appellants were entitled to rely on and it did come close to being akin to an abuse of process. Any pleading should only put forward arguable complaints. A complaint is not arguable if it is not particularised at all. I concluded that the Employment Tribunal accepted that Mr Sprack did have instructions to put forward an age discrimination complaint and that the claimant suggested that she had been replaced by a younger employee, and that Mr Sprack was awaiting further instructions. However, the appeal on this basis was not unarguable.

15. The second ground of appeal asserted that the decision that Mr Sprack did not act improperly, unreasonably, or negligently was perverse. I concluded that the high threshold for establishing perversity was not met, but again the point was not unarguable. The appellants built on the allegations against Mr Sprack asserting that his conduct "would be regarded as improper according to the consensus of professional opinion" and that there were breaches of the Bar Council Code of Conduct. I did not permit these arguments to be adduced because they were not specifically advanced in the Employment Tribunal, but it was just about arguable that they amounted to greater particularity of the broader criticisms that were made in the Employment Tribunal.

16. The third ground of appeal asserted that the Employment Tribunal made a perverse finding that Mr Sprack should not be held to have acted improperly, unreasonably, or negligently simply because the claim was doomed to fail. I dismissed this argument on the basis that where a representative has acted unreasonably or negligently by failing to advise their client that the case has no reasonable prospects of success it remains necessary for there to have been some conduct that is akin to an abuse of process. The Employment Tribunal had found as a fact that there was no such conduct and I did not consider that determination could be said to be perverse. However, in circumstances in which I have concluded that the approach the appellants adopted to the law was not unarguable and the bringing of a wholly unparticularised claim of age discrimination came close to being akin to an abuse of process,

I do not consider this ground was misconceived.

17. Accordingly I have concluded that the threshold relied upon by the respondent for making an award of costs has not been surpassed and so reject the application for costs. If I had concluded that the appeal was misconceived it would have only just surpassed the threshold and I would have refused the application. When permitting the appeal to proceed John Bowers KC sitting as a Deputy Judge of the High Court stated:

> I believe there is a reasonably arguable case that the tribunal (although directing itself at length on the law) did not appreciate the width of the wasted costs jurisdiction. I think that Grounds 2 & 3 follow closely on from the alleged misdirection in Ground 1 so am prepared to allow all three grounds to proceed, although I regard Ground 1 as by far the most important.

18. I was a little perplexed by the reference to the "width of the wasted costs jurisdiction" but assume it is a reference to the broad terms in which Rule 80 **Employment Tribunal Rules 2013** (now Rule 78 **Employment Tribunal Rules 2024**) is drafted. It requires a little analysis of the case law to appreciate that the wasted costs jurisdiction is, in reality, narrow not wide. The decision at the sift stage is necessarily relatively broad-brush. While this was not an appeal brought by a litigant in person I can see why those who represented the appellants took considerable comfort from so eminent an employment lawyer being of the opinion that the appeal was arguable. This is not a case in which the circumstances have substantially changed since the sift decision. The sift opinion is a factor that I am entitled to take into account and had I concluded that the appeal just met the misconceived threshold it would have led me to conclude that costs should not be awarded in the exercise of my discretion.