Appeal No. UKEAT/0218/16/DA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 6 October 2017

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

SOLL (VALE) APPELLANT

MR M JAGGERS RESPONDENT

Transcript of Proceedings

JUDGMENT

APPLICATION FOR COSTS

APPEARANCES

For the Appellant	MR DAVID READE (One of Her Majesty's Counsel) Instructed by: Hedges Law 13 Beaumont Street Oxford OX1 2LP
For the Respondent	MR ALEXANDER LINE (of Counsel) Instructed by: Blake Morgan LLP New Kings Court Tollgate Chandler's Ford Eastleigh Hampshire SO53 3LG

SUMMARY

PRACTICE AND PROCEDURE - Costs

Costs - power of EAT to make award of costs in both ET and EAT proceedings

The Respondent had succeeded in its appeal against a finding by the Employment Tribunal that it had unfairly dismissed the Claimant; whilst the question of liability would have needed to be remitted to the ET, the EAT had also substituted a finding that any award made would be nil (applying **Polkey**), given that the Claimant's conduct meant that he would inevitably have been summarily dismissed for the charge relating to his falsification of a contractual document for personal gain. The Respondent applied for its costs both before the ET and EAT.

Held: *dismissing the applications.*

Although the EAT had the power to make an award of costs relating to the ET proceedings and the application had been made in time (time running from the date of the EAT Order, which had finally disposed of the ET proceedings), it was appropriate for the ET to determine the merits of the application and the amount of any award if made.

As for costs before the EAT, it could not be said that the Claimant's defence of the appeal had been misconceived in all respects. Even if it had been unreasonable to defend the appeal in respect of the **Polkey** point, there would still have been a hearing on liability; it was unclear what, if any, additional costs arose from the Claimant's defence of the **Polkey** aspect of the appeal. In the circumstances, it would be inappropriate to make an award of costs in respect of the EAT proceedings.

HER HONOUR JUDGE EADY QC

Introduction

1. This Judgment relates to costs, both on the appeal and in respect of the underlying Employment Tribunal ("ET") proceedings. In it, I refer to the parties as the Claimant and Respondent, as below.

2. After a Full Hearing on 8 February 2017, I allowed the Respondent's appeal and set aside the earlier Judgment of the ET, substituting my finding that there should be a nil award given the application of **Polkey v A E Dayton Services Ltd** [1988] ICR 142 HL (see my Order seal dated 9 February 2017). My reasoned Judgment given orally at the end of that hearing, now available in transcript, should be read as providing the background to the present application and to this Judgment. Subsequent to my Order allowing the appeal, the Respondent made a written application for its costs in the sum of £142,500. As the effect of my Order was to conclude the proceedings before the ET, the Respondent sought its costs both before the EAT and in the ET. The Claimant resisted that application, both in principle and amount. I initially proposed that the application be determined on the papers but the Respondent sought a short oral hearing to resolve the questions raised on this application.

The Application for Costs before the Employment Tribunal

The Respondent's Application and Submissions

3. By its Judgment, the ET found the Claimant had been unfairly dismissed and there was due to be a further hearing to determine remedy. The Respondent submits that the ET's Judgment had thus not fully disposed of the proceedings. The result of the EAT's Judgment on appeal was to vary the findings of the ET so that no further hearing would take place before the

ET; the EAT's Order finally disposed of the proceedings. That being so, any application for costs had to be made within 28 days of the Judgment and Order of the EAT; see Rule 77 of Schedule 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("the ET Rules"). It was wrong to read that Rule (as the Claimant did) as meaning that the Respondent would have had to make its application within 28 days of the ET's Judgment. That had not finally determined the proceedings; the EAT's Judgment had. Moreover, the EAT having exercised the powers of the ET by substituting its Judgment that there should be a nil award on the claim, the costs application should be made to the EAT rather than the ET, the matter having not been remitted to the ET.

4. To the extent it was suggested this part of the application should be more appropriately dealt with by the ET, the Respondent observes that the essential basis for its application is the same in respect of costs both before the ET and the EAT (see further below), and it was preferable that one Tribunal should deal with both, which would also avoid potential inconsistencies in approach. And, although the ET had sat as a three-member panel, there was no jurisdictional requirement for the EAT to do so in order to exercise the powers of the ET.

5. As for the merits of the applications, it was the Respondent's case that the Claimant had acted unreasonably in bringing his claim and in his conduct of the proceedings, alternatively, that his claim had had no reasonable prospect of success; in the appeal proceedings, that his defence had been misconceived, alternatively, he had again acted unreasonably. The underlying basis for these submissions was the Claimant's conduct in fabricating a version of his contract of employment for personal financial gain and giving a dishonest account of his conduct in this respect. That commenced with his denial of the disciplinary charge and

continued in the proceedings before the ET. It was this conduct - pursuant to the ET's findings in this regard - that led the EAT to conclude that the remedies award should be reduced to nil.

6. Accepting that a finding that a party has lied before the ET does not automatically lead to the conclusion that there has been unreasonable conduct justifying a costs award, it was necessary to examine the context and look at the nature, gravity and effect of the lie in determining the reasonableness of the alleged conduct. Where in some cases a central allegation is found to be a lie, that might support an application for costs, but it does not mean that on every occasion that a Claimant fails to establish a central plank of the claim, an award of costs must follow; see per Rimer LJ in **Arrowsmith v Nottingham Trent University** [2012] ICR 159 CA, approving a passage from the judgment of the EAT, Cox J, presiding in **HCA International Ltd v May-Bheemul** UKEAT/0477/10, 23 March 2011 unreported. In the present case, the false document and the Claimant's lies about its falsehood first arose in the context of without prejudice correspondence regarding the termination of his employment in January 2015. It was in the context of the Claimant rejecting the Respondent's proposal (that he be paid £80,000 under a settlement agreement terminating his employment) that he first presented (through his solicitors) the falsified contract. It was this conduct by the Claimant that subsequently led to the additional disciplinary charge and ultimately to the failure of his case in these proceedings. The nature and gravity of the lie were clear: the most senior employee of an organisation had created a fabricated document for financial gain. It was a lie he maintained throughout the disciplinary and appeal processes and he did not retract the document at any stage, even in the proceedings before the ET, instead contending that the Respondent had not been entitled to summarily dismiss him. The ET had found that:

> **"109. … The claimant's evidence on the contract was such that it leads the Tribunal to conclude that the claimant knew that he was presenting a false document to the respondent. We reject as untruthful the claimant's evidence that he presented the contract simply because it was the document he was provided with in November 2014 soon after his suspension. On balance, the Tribunal consider that the evidence shows that the claimant altered the content of the contract in order to use it to his advantage in negotiations with the respondent. …"**

A

7. Had the Claimant accepted his wrongdoing when the matter was raised in the disciplinary process, it was obvious he would have been summarily dismissed and would simply have had no case to pursue before the ET; there would never have been another reason for the Claimant's dismissal and thus no question as to the fairness of the decision based on the other disciplinary charges; the Claimant would never have succeeded on any claim of unfair dismissal and this was not a case akin to **Telephone Information Services Ltd v Wilkinson** [1991] IRLR 148 EAT, where there was an issue of entitlement to a declaration.

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8. Moreover, the disingenuous avoidance of answering a direct question before the ET as to whether he relied on the falsified contract reflected the fact that the Claimant's conduct came perilously close to perverting the course of justice by mounting a claim on a false document.

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9. As to the effect of the lie, it had led to the additional disciplinary charge and his persistence in it had led to his claim before the ET and thus to the appeal, which the Claimant had actively resisted. The Claimant had, of course, known that he had created and presented a false document and thus must have known his claims were misconceived (EAT) or had no reasonable prospect of success (ET).

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The Claimant's Submissions

10. Rule 77 of the **ET Rules** provides:

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> **"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. …"**

11. "Judgment" is defined by Rule 1(3)(b) of the **ET Rules** as being:

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> **"… a decision, made at any stage of the proceedings … which finally determines -**
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> **(i) a claim, or part of a claim, as regards liability, remedy or costs …"**

12. The reference to judgment finally determining the proceedings must refer to the proceedings to which the **ET Rules** relate, namely those before the ET; see **Afolayan v MRCS Ltd** [2009] EWCA Civ 796 at paragraphs 15 to 18 per Mummery LJ:

> **"15. In my judgment, the "proceedings" referred to in rule 34A(1) are primarily proceedings in the EAT. Although "any proceedings" is very wide, the expression clearly does not cover proceedings in the ordinary courts, such as a county court action for wrongful dismissal, even arising out of the same facts. That jurisdiction is outside the tribunal system, is not subject to appeal to the EAT and is governed by the Civil Procedure Rules, which include their own costs regime. It is clear from other provisions of the EAT Rules that the expression "any proceedings" generally refers to proceedings before the EAT. See, for example, the power of the Appeal Tribunal in rule 24 to give directions to facilitate "the future conduct of any proceedings". See also rule 25 and 26.**
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> **16. As for costs in the ET an appeal lies to the EAT against the actual making of a costs order by the ET and against the ET's refusal to make a costs order, but costs in the ET are not governed by the EAT Rules. There are specific provisions in the Employment Tribunal Regulations 2004, rules 38-41. Rule 40(2) of the ET rules provides that a tribunal or chairman shall consider making a costs order against a paying party where, in the opinion of the tribunal or chairman any of the circumstances appearing in paragraph (3) apply. Having so considered, the tribunal or chairman may make a costs order against the paying party if it or he considers it appropriate to do so.**
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> **17. Paragraph (3) of rule 40 is in these terms:**
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> > **"The circumstances referred to in paragraph (2) are where the paying party has in bringing the proceedings or he or his representative has in conducting the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably, or the bringing or conducting of the proceedings by the paying party has been misconceived."**
>
> **18. The specified circumstances are not exactly the same as those in the EAT Rules and, in my view, the "proceedings" referred to there are proceedings in the ET, not proceedings in the EAT or in the ordinary courts."**

13. The ET's Reserved Judgment had been sent to the parties on 15 April 2016. It was not open to the Respondent to invite the EAT to determine the issue of ET costs in circumstances in which no costs application had been made to the ET in compliance with Rule 77.

14. Even if the application had been made within time, the Claimant contended that - notwithstanding the EAT's ability to exercise the powers of the ET pursuant to section 35(1)(a) of the **Employment Tribunals Act 1996** ("the ETA") - it was desirable for the issue of ET costs to be determined by the same ET that had determined liability in the underlying proceedings (see generally **Barnsley Metropolitan Borough Council v Yerrakalva** [2012] IRLR 78 CA): the ET as arbiter of fact was best placed to determine the implications of its

findings in so far as they related to costs. That was all the more so given the ET had comprised a three-member panel (see **Riley v Secretary of State for Justice** [2016] ICR 172 EAT).

15. As for the merits of the application for costs in respect of the ET proceedings, such an award remained the exception not the norm, and the discretion was to be exercised sparingly (**Yerrakalva**, paragraph 7). Moreover, costs were intended to be compensatory rather than punitive (**Lodwick v London Borough of Southwark** [2004] IRLR 554 CA at paragraph 23). More specifically, the Claimant had not acted unreasonably in bringing or conducting the ET proceedings; in particular, he had been entitled to seek declaratory relief on his unfair dismissal claim, even if he was (as the EAT found) ultimately not awarded any compensation (**Telephone Information Services Ltd v Wilkinson** at paragraphs 21 to 22). Here, the ET had found that the dismissal was orchestrated and predetermined and whilst the contract issue was relevant to the issue of compensation, it was arguably irrelevant to the question of fairness of the dismissal. Whilst the EAT had found the ET's reasoning unclear on this question, it had not conclusively held the dismissal had to be found to be fair. In any event, a lie, even on its own, will not be sufficient to justify an award of costs; see **Arrowsmith v Nottingham Trent**.

The Application for Costs before the EAT

The Respondent's Application and Submissions

16. The application was made under the **EAT Rules 1993** Rule 34A(1), which provides that the EAT may make an award of costs against the party where it appears to the EAT 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 …"**

17. Here "misconceived" meant no more than unreasonable. As for the merits of the application, these were largely as for the application for costs before the ET (indeed, that was in

large part why it was appropriate for the EAT to determine both applications for costs both before the ET and in the appeal proceedings).

The Claimant's Submissions

18. Accepting that the EAT was entitled to exercise its discretion to award costs in cases to which Rule 34A(1) applied, the Claimant contended that (1) misconceived suggested a higher test than unreasonable, and (2) there was no strong basis for an award of costs in this case.

19. The Respondent had chosen to appeal and it was the EAT's Judgment that the ET had fallen into error. The Claimant had no control over these matters. No costs warning had been given in respect of the EAT proceedings, so the Claimant had no pre-warning that the Respondent would seek its costs if he defended the appeal. He was entitled to seek to uphold the ET's Judgment and a party would generally not be acting unreasonably in doing so (**Afolayan** at paragraph 32). More generally, see the submissions already made as to the merits of the application in respect of the ET proceedings.

Means

20. The Claimant had provided evidence in a witness statement form regarding his means relevant to this application. As the Respondent has observed, I may take into account a party's means. I am not obliged to do so. Accepting that to be the case, the Claimant urges it would be a very rare case in which regard was not had to a paying party's means. It was the Respondent's case on the other hand that I should not have regard to means in this case, given the nature of the Claimant's underlying wrongdoing. If I did think it appropriate to do so, however, the Respondent submitted this was not a case where the Claimant was impecunious. Specifically, he was in employment and had the ability to re-mortgage the property in which he

shared an interest and there was no reason to think he could not meet the repayments that would entail. He was still in employment, notwithstanding the EAT's Judgment having been in the public domain from February-March 2017.

21. For the Claimant, it is suggested that this would simply be a disproportionate outcome. Moreover there was little in the way of his expenditure that could reasonably be reduced and there was no real certainty in his current employment position.

Discussion and Conclusions

Costs before the ET

22. The first question raised relates to the application for costs before the ET, that is: whether the Respondent is able to make an application for its costs in the ET proceedings given that this was made outside the 28-day time limit as calculated from the last ET Judgment.

23. Accepting that "proceedings" in Rule 77 of the **ET Rules** refer to proceedings in the ET and not the EAT, in setting aside the ET's Judgment and substituting my own finding that there should be a nil award in this case, I was exercising the power conferred on the EAT by section 35(1) of the **ETA** and thus exercising the powers of the ET; it was my Judgment that finally determined the ET proceedings for the purposes of Rule 77. The Respondent has made its application for costs in those proceedings - made both to the EAT and the ET - within the required 28-day time period.

24. In reaching this view, I consider it is supported, not undermined, by the definition of "judgment" at Rule 1(3) of the **ET Rules**. That definition clearly distinguishes between proceedings and the individual Judgments that might be given in those proceedings, which

might be on liability, remedy or costs, or a combination of any of those. In the present case, the ET's Judgment had not determined the proceedings before it because it was still due to hold a Remedy Hearing. It was my Order which disposed of any need for a Remedy Hearing and thus, absent any appeal to the Court of Appeal, finally determined the proceedings.

25. Having found that the Respondent has made an in-time application for its costs before the ET, the next question is whether the EAT has jurisdiction to determine that application. On this point, it is common ground that it has. That falls within the general power afforded by section 35 of the **ETA**. The exercise of that power must (again, it is common ground) be a matter of judicial discretion. The next question for me is, therefore, whether it is appropriate that I determine the application in respect of the ET costs.

26. Whilst I see it might be said that there is some attraction to consistency on the costs applications before the ET and the EAT, I consider this is a case where it is appropriate for the ET to consider the application made in relation to its own proceedings. That is not just because, in general terms, costs are "*pre-eminently in the discretion of the court or tribunal hearing and deciding the case*" - see per Mummery LJ at paragraph 1 of **Afolayan** and more generally in **Yerrakalva** - but I consider this is also the appropriate course dictated by the particular circumstances of this case.

27. Whilst it is correct that my Order on the appeal brought the proceedings to an end and that I substituted my Judgment for that of the ET on the **Polkey** issue, my ruling was still dependent upon the particular findings of fact made by the ET. Moreover, whilst I was critical of the clarity of reasoning on the liability finding, I did not find there could only be one outcome on that issue.

28. I can see that there is also some attraction to the Respondent's submission that, had the Claimant admitted the disciplinary charge regarding the falsification of the contract, it seems likely that he would have been immediately summarily dismissed and the Respondent would have had no need to rely on the other charges, which complicated the position before the ET. That, however, requires me to second-guess what would have happened and I am conscious that the ET, which had the benefit of hearing the evidence of the relevant witnesses, had concluded that there was a predetermined view that the Claimant should be dismissed from an early stage. It is also fair to observe that, notwithstanding the Respondent's conclusion that the Claimant was guilty of the additional charge regarding the falsification of the contract, it did not dismiss solely for that reason but also relied on the other charges in reaching its decision and in defending the proceedings before the ET.

29. Accepting, as I do, that there can be value in a declaration of unfair dismissal, I consider the ET is best placed to determine the reasonableness of the Claimant's pursuit and conduct of the proceedings before it in all these respects. That is all the more so given that the ET's findings on the falsified contract underpinned my conclusion on the **Polkey** issue. It is best placed to determine the nature and gravity and, importantly, the effect of the Claimant's dishonesty in the context of the proceedings before it, there being no general rule that a lie will not result in an award of costs (**Arrowsmith**).

30. Finally, I also consider there is force in the Claimant's observation that the original ET sat as a three-member panel, whilst I have sat alone. This is not a jurisdictional point (unlike **Riley**) but a matter that goes to my discretion in determining what is the appropriate course to adopt in the interests of justice in this matter.

Costs before the EAT

31. As for the Respondent's application for costs before the EAT, the first question under this head is whether I am satisfied that my costs jurisdiction is engaged under Rule 34A(1) of the **EAT Rules**: was the Claimant's defence of the appeal misconceived or was there other unreasonable conduct in his bringing or conducting the proceedings? For these purposes, I do not see there is to be a distinction of substance between that which is misconceived and that which is unreasonable. If I conclude that my costs jurisdiction is engaged, then the next question for me is whether it is appropriate to make an Order of costs in this matter.

32. On the question whether my costs jurisdiction is engaged, it seems to me that the real issue relates to the Claimant's conduct relevant to the ET proceedings. In my judgment, that - as I have ruled - is a matter for the ET. There is a further question, however, as to whether the Claimant's active defence of the appeal was misconceived given the ET's finding on the contract and the underlying dishonesty on which that finding was based. I do not consider that this is a point that can be fairly made against the Claimant in respect of the ET's finding of unfair dismissal: although I allowed the Respondent's appeal in that regard, my reasoning on that issue would have warranted a remission to the ET and I did not consider it so clear that only one outcome was possible. In those circumstances, I do not consider I can find that the Claimant's defence of the ET's decision in his favour was misconceived on that point. Should he, however, have recognised the futility of seeking to maintain that defence in the **Polkey** point? That is a difficult judgment to make. Given that I found that the ET's decision on this issue was perverse, on one view it was unreasonable for the Claimant to seek to uphold that aspect of the ET's Judgment. Even if that meant that an aspect of his defence of the appeal was misconceived or conducted unreasonably, however, it would apply only to a part of the EAT proceedings; there would have been a hearing of some kind in any event.

33. In those circumstances, even if my costs jurisdiction is engaged in part, I would not consider it appropriate to make an award of costs and therefore refuse the Respondent's application in this regard.

Means

34. In these circumstances, I do not need to address the issues regarding means: this will be a matter for the ET to consider should the Respondent pursue its costs application (which I have found to have been made in time). By way of observation, however, I would not agree with the Claimant that it would necessarily be disproportionate for a costs award to be made in a matter where a senior employee pursued a claim, apparently in part based on a falsified document, about which he then continued to lie. As to the particular level of any award if it is made, that is for the ET.