Neutral Citation Number: [2023] EAT 110

Case No: EA-2021-000938-NLD

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 4th July 2023

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

THE SPORTS PR COMPANY LIMITED	**Appellant**
- and -	
MS. VALENTINA LONDONO CARDONA	**Respondent**

- -
- -

The Appellant did not attend and was not represented
Helen Moizer (instructed by the **Free Representation Unit)** for the **Respondent**

Hearing Date: 4 July 2023

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JUDGMENT

SUMMARY

Practice and Procedure – Extension of Time

The claimant in the employment tribunal presented a wages claim in respect of her notice period. The ACAS EC Certificate that she obtained before doing so correctly identified her employer by its corporate name. In box 2 of the claim form, however, in the space for the name of the employer, she put the name of a director of the respondent. Elsewhere in the narrative, however, she referred to "the company", and to the name of the company, and to the individual named in box 2 as a director.

A judge rejected the claim under rule 12 because of the discrepancy between the name of the respondent on the ACAS EC Certificate and the name given in box 2, and because she did not consider it not to be in the interests of justice to do so. Following the claimant having confirmed the corporate name of the respondent, the judge treated the claim on reconsideration under rule 13 as validly presented, but, because she considered her original decision to be correct, it was treated as presented only when the error was corrected. As a result it was presented out of time. Neither the rule 12 nor the rule 13 decision was appealed.

At the full merits hearing, the tribunal decided that the error the claimant had made was reasonable, that it was therefore not reasonably practicable for her to have presented her claim in time, and therefore time was extended. That was a finding that the tribunal was entitled to reach. It did not err in doing so. The respondent's appeal on the time point therefore failed. The respondent's appeal in relation to the merits of the tribunal's decision had been rejected at the sift stage, the respondent had not asked for a rule 3(10) hearing in that regard in time, and the Registrar had refused an extension of time in that respect. However, the respondent was permitted to raise one challenge to the calculation of the wages award by amendment, which was upheld. This was that, in calculating the award, the tribunal failed to take account of the three-day waiting period at the start of a period of sickness, before entitlement to SSP arose. The matter was remitted to the tribunal to recalculate its award so as to rectify that error.

HIS HONOUR JUDGE AUERBACH:

1. I will refer to the parties as they were in the employment tribunal, as claimant and respondent. This is the respondent's appeal.

2. The claimant was employed by the respondent, it appears to be common ground, from 30 March 2020 as a press assistant. Following her employment having come to an end on a date which was later disputed, the claimant began ACAS early conciliation on 17 September 2020 and received an ACAS early conciliation certificate correctly naming the respondent on 1 October 2020.

3. On 16 October 2020 the claimant presented a claim form to the tribunal claiming for unpaid wages. She was a litigant in person. Box 2 of the claim form has the heading: "Respondent's details (that is the employer, person or organisation against whom you are making a claim)". Box 2.1 has the rubric: "Give the name of your employer or the person or organisation you are claiming against" and there is a box to complete this. Box 2.2 has the rubric: "Address" and there are a number of labelled boxes for completing the details of an address and then there is a box for the phone number.

4. The claimant completed box 2.1: "Caroline McAteer". The boxes for the address and phone number she completed by giving the address of the respondent with its postcode and its phone number. She gave in box 2.3, as required, the ACAS early conciliation certificate number. In box 5 she gave her dates of employment as 30 March to 6 August 2020.

5. In box 8.2, which is labelled as being for the background and details of the claim, the claimant gave her narrative account of events. This included her account that she had reached a decision at a certain point that it was best for her to "stop being part of the company". She continued: "As per my contract, on the 6th of July, I sent Caroline McAteer, director of The Sports PR Company, a notice period of one month via email". She went on to assert that her notice took

effect on 6 August 2020, and that she had not been paid in respect of the period after 30 June 2020, which, on her case consisted in part of days worked, in part of days of booked holiday and in part of days when she was off sick. She set out her calculation of the overall amount of wages that she claimed for that period.

6. On 20 November 2020 the employment tribunal wrote to the claimant. The letter was headed: "Rejection of claim" and referred to rule 12(1)(f) of the **Employment Tribunals Rules of Procedure 2013**. The letter informed her that EJ Clark had decided to reject her claim because, although she had given an early conciliation number, the name of the prospective respondent on the certificate – The Sports PR Company Limited – was not the same as the name on the claim form: Caroline McAteer. The letter added: "The judge has considered if the error is minor and has decided that it is not; it would be in the interests of justice to reject the claim". It appears that the letter was accompanied by the usual explanatory notes relating to claim rejection in such a case.

7. As I will describe, in its later decision which is the subject of this appeal, the employment tribunal made a finding that the claimant received that letter on 5 December 2020. It appears that on 8 December 2020 the claimant then emailed the employment tribunal indicating that she wanted to correct the name of the respondent to "The Sports PR Company Limited".

8. It appears that there was then a delay in that email being considered by a judge. However, on 13 May 2021 the tribunal wrote to the claimant stating that after reconsideration by Judge Clark the claim was now accepted. The letter continued: "Because the original decision to reject the claim was correct but the defect which led to the rejection has since been rectified, the claim form is to be treated as having been received on 8 December 2020".

9. The respondent was sent a copy of the claim and that letter on that date, and was then required to enter a response to it. The respondent did enter a response. The contact email address

that it gave was for "Bea" at the respondent, which appears to have been a reference to Ms Bea Kerlin, an Executive Assistant. There was a narrative indicating the basis on which the claim was defended, including a dispute about the termination date, it being asserted that the claimant had first resigned on 1 July 2020 and that she had not worked a period of notice. It was also asserted that, on the basis that the claim was being treated as presented with effect on 8 December 2020, it was out of time.

10. The respondent emailed the employment tribunal on 14 June 2021 indicating that it had entered a response but had also raised a time point and did not understand why the claim had been allowed to proceed when it was out of time. It does not appear to be disputed that the respondent did not receive a response to that email prior to the matter coming to a hearing on 30 June 2021. It appears that, on that same day, the tribunal sent a response indicating that a judge had directed that the time point would be considered at that hearing, but in fact that letter either was only sent, or only received by the respondent, after the hearing that day was over.

11. The hearing on 30 June 2021 was before Employment Judge Burns at London Central conducted by CVP. The claimant was in person. Ms McAteer, a director, appeared for the respondent. The tribunal recorded that it heard evidence from them both and considered various documents. The tribunal's judgment and written reasons were sent to the parties on 30 June 2021.

12. The tribunal decided that, having been treated as presented on 8 December 2020, the claim was out of time, but that it was not reasonably practicable for it to have been presented in time, and that it was also presented within a further reasonable period. The judge also upheld the wages claim on its merits and ordered the respondent to pay the claimant £1482.77 gross of tax and NI contributions.

13. The respondent appealed. The notice of appeal gives Ms Kerlin's email address as the

contact. Beneath the grounds of appeal, the notice of appeal form is signed by Ms McAteer.

14. In the usual way, the grounds of appeal were considered on paper by a judge of the EAT. The grounds challenged the tribunal's decisions on the time point and on the merits. The judge who considered them on paper considered that the challenge on the merits was not arguable. In the usual way the EAT wrote to the respondent on 11 October 2022 informing it of the judge's decision on that aspect of the grounds of appeal and referring it to rule 3(10) of the EAT's rules of procedure, a copy of which was enclosed with the letter. Pursuant to that, the respondent had 28 days in which, if it wished, to seek a rule 3(10) hearing in respect of that aspect of the grounds.

15. In respect of the time point, the EAT judge considered the grounds of appeal to be arguable and directed that there be a full appeal hearing. That hearing has come before me today.

16. Over the course of the past few days, starting on 28 June 2023, there have been a series of communications between Ms Watts, Operations Manager for the respondent, Mr Hallstrom of the Free Representation Unit (FRU), for the claimant, and the EAT, including some communications from the EAT's administration and some written at my direction. I do not need to set out all of the detail, but, in summary, Ms Watts indicated that the respondent wished to seek to withdraw the appeal. Mr. Hallstrom on behalf of the claimant objected, as he indicated that the claimant wished to pursue a costs application and to make submissions at a hearing.

17. Having been informed erroneously by the EAT's administration, following receipt of Ms Watts' application, that the hearing would be cancelled, the parties were subsequently informed of my decision that, as matters stood, in light of the claimant's application, the hearing would go ahead, although I left the door open to the parties agreeing proposals to deal with the matter in some other way, by consent, or to some further application being made. There was a further application by the respondent for the appeal hearing to be postponed. I refused that application and my order

and reasons for it will be provided separately.

18. In the course of the correspondence, the respondent indicated that it would not be attending this morning's hearing, and indeed it did not, but that it wished all of the matters raised in its various communications and attachments to be taken into account as representations and submissions both on the merits of the appeal, which in light of the hearing going ahead it indicated was maintained, and on the claimant's costs application.

19. I have indeed taken into account all of the matters raised in the various communications and attachments from the respondent up to and including those received this morning prior to the start of the hearing.

20. I turn first to consider the substantive appeal. As I have noted, the original grounds of appeal sought to challenge the tribunal's decision both on its merits and on the time point, but it was considered not arguable by the sift judge in relation to the merits. The respondent did not seek a rule 3(10) hearing within 28 days of being notified of the sift judge's opinion, but in the recent correspondence the respondent has sought to re-visit this aspect and has referred to the fact that, having originally written notifying it of the sift judge's opinion on 11 October 2022, and notwithstanding that no rule 3(10) hearing request had been made then, the EAT then wrote again on 16 December 2022 inviting any rule 3(10) application to be made by 30 December.

21. On 5 January 2023 the respondent then wrote asking for a rule 3(10) hearing. Initially such a hearing was listed. However, on 5 April, the EAT wrote indicating that the 16 December letter had been written in error, because no judge had extended the time for the respondent to seek a rule 3(10) hearing. The respondent was asked whether it wished to apply for an extension and further correspondence was treated as making such an application. The matter was then referred to the Registrar who, by a decision sent on 10 May 2023, refused that application. The matter was not

thereafter further pursued by the respondent until it was raised again in the very recent correspondence to which I have referred. In particular it did not appeal the Registrar's decision to a judge.

22. It appears to me that there is no basis on which I could properly treat the challenge raised in the original grounds of appeal, to the merits of the employment tribunal's decision, as being live before me today. The respondent did not seek a rule 3(10) hearing within the 28 days allowed from when notified of the sift judge's decision. The EAT's subsequent letter of 16 December plainly was sent in error, and in any event, the respondent did not, even after that, ask for a rule 3(10) hearing, within the further period purportedly allowed by that letter.

23. The EAT takes a strict approach to the extension of time for seeking rule 3(10) applications, just as it does to the extension of time for submitting appeals. Even had the Registrar's decision refusing to extend time been the subject of an appeal to a judge, which it was not, I cannot see that it was wrong, or that it would have been disturbed.

24. Subject to one point, what is live before me is therefore solely the appeal in relation to the June 2021 decision to extend the claimant's time in respect of her complaint to the employment tribunal.

25. In a number of its submissions to the EAT, the respondent re-states its case on the merits of the claim, with regard to the date on which notice of termination of the employment was given, or took effect, and as to whether the claimant did or did not properly work out the notice period. However, none of these matters have any bearing on the decision on the time point relating to the presentation of the employment tribunal claim.

26. As to that, I have already described the correspondence notifying Judge Clark's original decision, by the letter of 20 November 2020, to reject the claim under rule 12, and then her

decision to accept the claim on reconsideration, but to treat it as having been presented with effect on 8 December 2020. EJ Burns, on 30 June 2021, accordingly proceeded from the starting point that the claim had been presented on 8 December 2020 and was therefore out of time.

27. In that sense, Judge Burns did not seek to go behind Judge Clark's decision. I am bound to observe that Judge Clark's original decision to reject that claim might arguably have been open to challenge. That is having regard to the fact that, although in box 2 the claimant had put Ms McAteer's name rather than the respondent's name, elsewhere in her claim form she referred to "the company" and she gave its name, albeit omitting the word "Limited", and she referred to Ms McAteer as a "director". However, there was no appeal from, or other challenge to, either Judge Clark's original decision or her reconsideration decision in which she proceeded on the basis that her original decision was correct and hence determined that 8 December was the deemed date of presentation of the claim.

28. As there had been no challenge to either of those decisions by Judge Clark, Judge Burns did not err in proceeding from the starting point that the claim was to be treated as having been presented on 8 December 2020 and was out of time. In resisting this appeal, Ms. Moizer, the pupil barrister instructed by the Free Representation Unit who has appeared on the claimant's behalf today, does not seek to go behind that.

29. I turn, then, to the judge's reasons for finding that it was not reasonably practicable for the claim to have been presented in time and that it was presented within a further reasonable period, which are the questions that the judge was required to consider, in order to decide whether to extend time, pursuant to section 23 **Employment Rights Act 1996**.

30. The judge's reasons are expressed in paragraph 3 of his decision, as follows:

> **"I find that the ET1 form at section 2.1 which asks "Give the name of your employer or the person or organisation you are claiming against" is somewhat ambiguous and**

> **confusing especially for litigants-in-person, as is the Claimant in this case. Furthermore, having made a mistake of the type which many such litigants do make, by citing her boss rather than the employing company as "the person she was claiming against" the Claimant was not notified about her mistake by the Tribunal until after the primary limitation period had expired. As soon as she was notified she acted promptly to rectify the mistake. In these circumstances I find that it was not reasonably practicable for the Claimant to claim against the correct Respondent in time and that she claimed within a reasonable time thereafter. Hence her claim is within the Tribunal jurisdiction."**

31. I pause to observe that there is another point which was not taken before the judge or on this appeal, which is that the date on which time began to run was treated as being what the judge found as a fact was the effective date of termination, that is, 6 August 2020. In respect of a wages claim, time begins to run from when the wages are properly payable. Consideration does not appear to have been given to whether, in respect of any part of the wages that the claimant said she should have been paid in respect of the period up to 6 August 2020, any of those wages might have been properly payable on a later date, depending, for example, on whether she was paid weekly or monthly, in advance or in arrears. However, that was a point that has not been taken at any stage by the claimant, either before the tribunal or in defending this appeal, so I take no account of it.

32. The grounds of appeal assert that, whilst it is appreciated that time can be extended where it is found not to be reasonably practicable for the claim to have been presented in time "there were no such circumstances in this case. The claim was initially denied on the basis that the details on the ET1 did not match those of the ACAS certificate (R193882/20/89) assigned to the case as per rule 12(1)(e) of the Employment Tribunals Rules of Procedure 2013." The grounds go on to note that, upon reconsideration, the claim was treated as presented on 8 December 2020 but was then out of time; and they note also that the respondent did not receive notice of the claim until 18 May 2021.

33. The grounds go on to refer to the respondent having attempted to raise the point with the tribunal in its email of 14 June 2021 but not having received a response until 30 June, which was received after the hearing had taken place. They go on to assert that the matter was only addressed

at the hearing when they raised with the judge how it was that the case had been allowed to proceed when it was treated as presented outside of the time limit. The grounds submit that the judge: "seemed to accept the Claimant's excuses for the delay, despite no valid reason being given."

34. Making allowances for the fact that these grounds of appeal were prepared by an individual acting on behalf of the respondent effectively as a litigant in person, and reading them fairly, it seems to me that the following points in substance arise from them.

35. First, the respondent refers to the significant delay before it was notified in May 2021 that the claim was accepted on reconsideration and then required to respond to it. I agree with Ms Moizer that this does not assist the respondent in challenging the employment judge's decision to extend time. It is unfortunate, though perhaps not entirely surprising, given the impact upon the work of employment tribunals of the pandemic, that there was this delay and indeed the judge took it upon himself to apologise for the delay in his decision. However, notwithstanding that administrative delay by the tribunal, it still fell to the judge to consider whether it was not reasonably practicable for the claimant's claim to have been presented in time and whether, if so, it was presented within a further reasonable period. That administrative delay by the tribunal was not a relevant consideration.

36. As to the further delay in the respondent receiving a reply to its email of 14 June 2021, again, I do not think that assists it in challenging this decision. This was a wages claim and it appears that in the usual way it was listed for a full hearing without any case management hearing or other preliminary hearing being directed. Judge Clark was only concerned with the question of when, or whether, the claim had been properly instituted under the relevant rules regarding presentation of claims. The effect of her two decisions was that there was then a further point arising, given that the claim was to be treated as having been presented out of time, as to whether time should be extended. However, that required a judicial decision to be separately taken at a

hearing. Because no preliminary hearing to determine that question had been directed, it fell to be considered at the full merits hearing, being the hearing listed for 30 June 2021.

37. That was how matters stood prior to the respondent writing its email of 14 June 2021. Whether, in light of it, to direct that the time point should be considered separately and first at a preliminary hearing, convened for that purpose to take place on an earlier date than the full merits hearing, was a matter for case management discretion. It is apparent that when the respondent's application, after some delay, one infers, was referred to a judge, the view of the judge was that the point should not be considered at a preliminary hearing, but should remain to be considered at the forthcoming full merits hearing. I say forthcoming, because I infer from the wording of the 30 June letter, that the judge did consider the matter, and gave a direction to that effect, in advance of the date of the full merits hearing, but that it was, unfortunately, not processed until the letter of 30 June was sent on the very day.

38. In any event, the respondent did, as envisaged, have the opportunity, as well as the claimant, to address this point at that hearing, as is apparent from the decision arising from that hearing, and I cannot see that the respondent was materially disadvantaged by not having received a reply to its 14 June letter sooner. Prior to the date of the hearing, the respondent was plainly alive to the time point, having indeed raised it in its original grounds of resistance to the claim as well as in its 14 June letter. It is not suggested, for example, that there is any evidence that the respondent itself could or would have presented on this point at the hearing, had it received a response to its 14 June letter sooner.

39. I turn then to the challenge to the substantive merits of the judge's decision on the time point. Ms Moizer submits, in summary, that it is well established that decisions on whether it was not reasonably practicable for a claim to have been presented in time and/or whether it has been presented within a further reasonable time period, are essentially matters for the appreciation of the

tribunal, making findings of fact. She refers also to authority which establishes that the concept of it not being reasonably practicable to have presented a claim in time embraces not only cases in which the tribunal finds as a fact that there was some physical impediment to the claim being presented in time, but also cases in which the tribunal finds that the claimant has made a mistake or acted on a belief, but her mistake or mistaken belief was reasonable. She referred in particular to **Adams v British Telecommunications plc** [2017] ICR 382, a decision of the then President of the EAT, Simler J.

40. Ms Moizer submitted that the present tribunal had properly found as a fact that the claimant had made a reasonable mistake, indeed one very commonly made by claimants acting as litigants in person. That decision could only, if at all, be challenged on perversity grounds or if it was not "*Meek*-compliant" (that is, did not contain sufficient reasons). She said that on a fair reading the grounds of appeal did not in fact advance either such challenge, and, had there been a challenge alleging perversity, that would have required further particulars in accordance with the EAT's Practice Direction. Although the respondent is a litigant in person, it is, she submitted, a well-resourced company and could and should have done this if it wanted to pursue a challenge on this basis.

41. I agree with Ms Moizer, subject to one potential point to which I am going to come, that this decision cannot be said to be, in the legal sense, perverse. The tribunal was entitled, having heard from the claimant, to take a view that her mistake was a reasonable one and so rendered it not reasonably practicable for her to have presented her claim in time. Nor are the reasons inadequate. The tribunal gave sufficient reasons in paragraph 3 so that both she and the respondent understood why it had reached that decision.

42. However, one point which has given me pause, and which appears to me to arise on a fair reading of the grounds of appeal, and of what amounts to the respondent's belated skeleton

argument, in an email it sent to the EAT on 30 June 2023, is the following. The respondent appears to me, as part of its challenge, to be questioning whether it can be right that Judge Burns came to the view that it was not reasonably practicable for the claim to have been presented in time – that is to say, for the claimant to have put the correct name of the respondent into the first line of box 2 when she originally presented her claim form – when Judge Clark had previously come to the view that she had made an error in that regard which, for rule 12 purposes, was not a minor error and was not of such a nature that it would not be in the interests of justice to reject the claim on that account.

43. As to that, stepping back from the legal language of the rule 12 test on the one hand and the section 23 test on the other hand, it might be said that the practical effect of Judge Burns' decision was to reverse the effect of Judge Clark's decision, because a claim that, in light of Judge Clark's decision, fell to be treated as out of time, then, in light of Judge Burns' decision, fell to be treated effectively as if it had been presented in time.

44. In fairness to both sides, I put this point to Ms Moizer for her submission. Having considered her submission, I have come to the conclusion that this point does not indicate an error of law in Judge Burns' decision. As Ms Moizer correctly submitted, the tribunal was concerned with applying two different tests in different contexts and on different occasions. Judge Clark considered on paper, first the provisions rule 12, and then those same provisions in her reconsideration decision, subject to rule 13. There has been no challenge by either side to her decisions in that regard.

45. Judge Burns was considering the application of a different legal test, being the two-stage "not reasonably practicable" and "further reasonable period" test, set out in section 23 of the **1996 Act**. I would add that he was doing so in a different context, namely not on paper but at a hearing in which he heard from the claimant and as a result of which he made findings of fact. I do not think that he, therefore, erred by coming to the decision that he did, by virtue merely of the fact that

Judge Clark had previously come to the decision that she did, applying a different legal test in a different context. Indeed, it would have been open to Parliament, had it so wished, to provide that if the effect of decisions under rule 12 and rule 13 was in a given case that a claim was treated as presented out of time, then there could then be no further consideration of an extension of time under the different substantive provisions of the **1996 Act** relying on the same facts. However, it did not so provide.

46. Accordingly, for all of these reasons I conclude that there was no error of law of any kind in Judge Burns' decision on the time point, and the appeal on that point is therefore dismissed.

47. However, there is one other matter that was raised in the course of the respondent's recent communications with the EAT. This is that the tribunal's calculation of the amount of wages that it awarded reflected an element for statutory sick pay in respect of the whole of that part of the notice period during which the claimant was in fact off sick. But, says the respondent, this was an error in respect of the first three days, which are the SSP waiting period, during which the claimant would not have been entitled to SSP. It has therefore submitted that the amount awarded by the tribunal should be recalculated and reduced to take account of that error.

48. Ms Moizer submits that this point was not raised in the original grounds of appeal and amounts, at best for the respondent, to a very late application to amend its appeal. She says there is no good reason or excuse for that application having been made so very late, and so it should be refused. I asked her whether she had any submission to make as to the merits of the point and she indicated that she had none.

49. It does appear to me that the point is unanswerable, and there was simply an error by the tribunal when calculating the element of the award relating to the sickness period. I note that the respondent in its submission also says that the point was raised by it during the course of the

tribunal hearing. Albeit it is indeed a very late application to amend, it appears to me it would do an injustice to the respondent not to allow the amendment and then partly allow the appeal on this specific point. It does not do any injustice to the claimant to do so, since the effect is simply to deprive her of what would otherwise amount to a windfall.

50. I will therefore allow the amendment and partially allow the appeal on this point only.

51. I turn to the claimant's costs application. This was foreshadowed in Ms Moizer's skeleton argument served on 20 June 2023. Then, following the respondent's email of 28 June indicating that it was seeking to withdraw the appeal, there was a further email from Mr Hallstrom of FRU indicating that the claimant wished to pursue the costs application. The application was then formally made on 30 June 2023.

52. In the course of the application, reference was made to the claimant representative having written a costs warning letter on 28 June 2023. In the course of submissions this morning, Ms Moizer clarified that that letter was written in point of time *after* the respondent's email applying to withdraw the appeal. She also indicated that it was written "without prejudice save as to costs" and she therefore agreed that it was not appropriate for its contents to be referred to, or considered by, the EAT prior to a decision on the merits of the appeal, that appeal, after all, having been maintained. In further discussions she indicated that, on reflection, the respondent did not propose to share the contents of the email with the EAT or to seek to rely upon it, even after the decision on the substantive appeal had been given, and therefore was content for me to proceed to give a decision on the substantive appeal and then the costs application, in one go, as I am now doing.

53. The original basis of the costs application, foreshadowed in the skeleton argument, was that the appeal was from the outset misconceived, because it was, at best for the respondent, an unarguable perversity or *Meek* (inadequate reasons) challenge. The costs application as presented

on 30 June 2023 added a further or alternative strand that there had been unreasonable conduct of the litigation by the respondent. Ms Moizer is giving her services free of charge on instruction from the Free Representation Unit and therefore the application is more precisely for a *pro bono* costs award under the provisions of section 194A **Legal Services Act 2007**.

54. I am satisfied that the various conditions set out in that section in principle would enable me to make such an award, in particular, Ms Moizer being someone who has been called to the Bar and is entitled to appear before me on this appeal. Those provisions enable me to make such an order if I would have made a costs order, had her client been paying for representation by her, and in the same amount as I would in that case have awarded.

55. The original costs application was for an award of £1500, being time spent preparing the bundle, speaking to the FRU, reading the papers, researching and drafting the skeleton argument and finalising this as well as the authorities bundle. The amount sought was increased to £2250 in the costs application covering letter, although that figure was not broken down in that letter. Ms Moizer said that in addition she seeks a further amount, at the same hourly rate, of £125, reflecting the time she has spent at today's hearing.

56. As I have said, the original basis for the foreshadowed application was that the appeal was from the outset misconceived, that is, that it had no reasonable prospect of success. Ms Moizer says that it is no barrier to the making of an order that the judge who considered the notice of appeal on paper, considered the appeal on the time point to be arguable and directed it to proceed to a full appeal hearing. See: **JO Sims Limited v McKee**, UKEAT 05/1805.

57. As to that, Ms Moizer is right, as such, that the fact that the sift judge considered the point to be arguable is not an automatic barrier to a costs application, but nor, in this case, do I necessarily regard it as an irrelevant circumstance. Every case turns on its own facts. There may be cases, for

example, where the appellant, who is likely to be in possession of more information than is available to the sift judge considering the matter on paper, should know that they should not draw false comfort from the fact that their grounds have been permitted to proceed to a full appeal hearing. I accept that there may also be cases where an appellant, who has access to legal advice or who is put on notice, once they have the respondent's Answer, to the points being made in defence of their appeal, ought reasonably to reflect on their position. However, every case, as I say, turns on its own facts.

58. In this case, whilst the appeal has ultimately not succeeded, save on the late-raised point about the first three days' statutory sick pay, it does not automatically follow from that, that *therefore* it was unarguable. As I have said, the point about the relationship or not between the rule 12 decision and the section 23 decision gave me some initial pause, although ultimately I concluded that it was not well-founded. However, bearing that in mind, I do not think it can be said that this appeal was so plainly and obviously hopeless that there should be an award of *pro bono* costs against the respondent on the basis that it should have appreciated that it was misconceived from the outset.

59. The second basis on which the *pro bono* costs award is sought is unreasonable conduct of the litigation. Ms Moizer points to the fact that, as the deadline for filing a bundle approached, the FRU emailed the claimant about preparing the bundle, but received no response, and then put together the bundle itself. She refers also to the fact that the claimant failed to serve a skeleton argument and failed to respond to emails about the contents of the authorities bundle.

60. I agree up to a point that it appears from the correspondence I have seen, or been told about, that there was a failure by the claimant to engage with these matters pursuant to the directions of the judge who considered the appeal initially, and to more recent correspondence from the EAT reminding it of the timetable. However, ultimately, preparation of the bundle was not a complex

task, and was something for which there was a shared responsibility, although formally the duty was on the claimant to file it. I do not think the claimant has been put to extra material cost by the respondent not putting in a skeleton argument; and the claimant assembled and submitted to the EAT in any event the authorities on which her counsel wished to rely. I do not think it would be appropriate for these defaults alone, regrettable though they are, to sound in an award of costs.

61. The FRU and Ms Moizer, who has appeared *pro bono* and clearly put many hours into her preparatory work, are to be commended for the valuable contributions and *pro bono* support they have provided to their client. However, in principle, when approaching an application for *pro bono* costs, the EAT's approach must be exactly the same as it would be were this an application for actual costs by a paid representative; and it cannot, on account of the fact that the representatives have acted *pro bono*, be any more generous to the costs applicant than it otherwise would be.

62. For all of these reasons, the *pro bono* costs application is refused.