

Procedural Control Mechanisms – Strike Out, Deposits, Stays and Costs

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Introduction

1. The Employment Tribunal system is under attack! It is regularly exposed to criticism as being inefficient, costing those who participate in it too much money and amounting to a disproportionate burden on business. Such criticism has been made all the more fiercely of late both because of the economic climate and also because the Government has been reviewing the Employment Tribunal system with the express aim of reducing the burden placed on business by it.
2. Recently in ***Gayle v. Sandwell & West Birmingham Hospitals NHS Trust*** [2011] EWCA Civ 924 Mummery LJ set out a staunch defence of the Employment Tribunal system (see paragraphs 11 to 22). He stated at paragraphs 11 to 12 of his judgment:

“The ETs are under enormous pressure in these difficult economic times. Their caseload has increased by over 50% in one year, which comes as no surprise at a time of high unemployment. The cases have become more complex with the legislative expansion of employment protection since the tribunal system was first established. They take longer to process. It is not proper for me to comment on proposed reforms of substantive employment law. That is a controversial policy area for public debate and Parliamentary action. Procedural efficiency and justice are, however, of direct concern to the judiciary: the courts and the tribunals are equipped with wide discretionary powers to ensure that cases are dealt with justly.”

“One area of debate is about cases of little or no merit, but considerable nuisance value. All are agreed that they should be cleared out of the system as soon as possible. They should not be allowed to take up a disproportionate amount of time in the ET or cause the other party to incur irrecoverable legal costs and loss of valuable working time.”

3. The purpose of this lecture is to review the discretionary procedural control mechanisms which are available to an Employment Tribunal and which are referred to by Mummery LJ above; to consider the principles which govern their discretionary use by Employment Tribunals; and to consider the current practice of Employment Tribunals in exercising those discretionary powers.
4. The lecture will focus on the power to strike out claims, to make deposit orders, to stay Employment Tribunal proceedings and to order costs.

Strike Out

5. The power of the Employment Tribunal to strike out claims is found in Rule 18(7) of the Employment Tribunals Rules 2004 (as set out at Schedule 1 to the Employment Tribunals

(Constitution and Rules of Procedure) Regulations 2004). An Employment Tribunal may make a strike out order where:

- (a) a claim or response is scandalous, vexatious or has no reasonable prospect of success (see Rule 18(7) (b));
- (b) the manner in which proceedings have been conducted by or on behalf of one of the parties has been scandalous, unreasonable or vexatious (see Rule 18(7)(c));
- (c) the claim has not been actively pursued (see Rule 18(7)(d));
- (d) there has been non-compliance with an order or practice direction (see Rule 18(7)(e));
- (e) it is no longer possible to have a fair hearing (see Rule 18(7)(f)).

6. The scenarios in which an order for strike out may be successful, therefore, fall into two broad categories:

- (a) an order for strike out which arises out of the merits of a claim;
- (b) an order for strike out which arises out of the behaviour of a party or its representative before the Employment Tribunal.

Merits based Strike Out Orders

7. That 'merits based strike out orders' are rarely made, is self evident. Employment Tribunals prefer to determine employment disputes, which are often fact sensitive, on their facts having heard evidence (and, most importantly, the cross-examination of witnesses).

8. Employment Tribunals have been encouraged to adopt such a restrictive approach in relation to merits based strike out orders by the appellate courts, particularly in the context of discrimination cases and whistle blowing cases. For example, in ***Anyanwu v. South Bank Students' Union*** [2001] UKHL 14, [2001] IRLR 305 Lord Steyn stated:

"For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of process except in the most obvious and plainest cases. Discrimination cases are generally fact sensitive and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of the claim being examined on the merits or de-merits of its particular facts is a matter of high public interest."

Similarly, Lord Hope of Craighead stated:

"I would have been reluctant to strike out these claims on the view that discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often fact sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence."

9. The factual scenario in **Anyanwu** was that two students had been expelled from South Bank University after serious allegations had been made against them relating to their conduct. As a result they were not permitted to enter the student union building where they had worked as salaried officers of the South Bank University Students' Union. The students alleged race discrimination. It is noteworthy that on a full examination of the facts, the claims failed: see **Anyanwu v. South Bank Students' Union** [2003] All ER (D) 285.
10. The *dicta* of the House of Lords in **Anyanwu** were referred to and adopted by the Court of Appeal in **North Glamorgan NHS Trust v. Ezsias** [2007] EWCA Civ 330, [2007] IRLR 603 in the context of a whistle blowing dispute. In that case the case for the employer was that Mr. Ezsias had been dismissed as a result of a breakdown in trust between himself and other members of the department in which he worked. Indeed, nine members of Mr. Ezsias' department had signed a document which referred to "*a complete lack of confidence in and a total breakdown of the relationships between this consultant and the senior staff within the department.*" Mr. Ezsias claimed, on the contrary that the principal reason for his dismissal was that he had made protected disclosures.
11. In the Court of Appeal, Maurice Kay LJ made the following points:
 - (a) the test under Rule 18(7) was a similar test to that applied by the Courts in the context of summary judgment applications pursuant to CPR 24. The question is whether there is a realistic chance of success as opposed to a fanciful prospect;
 - (b) it was necessary for the Employment Tribunal to analyse the particular nature and scope of the factual dispute in question and it would only be in exceptional cases which involved disputes of fact that a strike out order could properly be made;
 - (c) there were, however, cases in which an order for strike out could be made, notwithstanding a factual dispute: "*An example might be where the facts sought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation.*"
 - (d) "*Whistle blowing cases have much in common with discrimination cases, involving as they do an investigation into why an employer took a particular step, in this case dismissal.*" It followed that the NHS Trust would come up against the same difficulties in this case as the Students Union in the **Anyanwu** decision.
12. The Court of Appeal found that Mr. Ezsias' claim should not have been struck out by the Employment Tribunal and remitted the matter to the Tribunal. Mr. Ezsias' claim subsequently

failed on the merits and the decision of the Employment Tribunal was upheld by the EAT: see [2011] IRLR 550.

13. It follows that where a strike out order is sought by a litigant in a discrimination case, or whistle blowing case (or indeed in any other case where the facts are in dispute) an Employment Tribunal will be cautious about making such an order. That said, there are a number of judgments at EAT level where strike out orders have been made by the Employment Tribunal or the EAT in discrimination cases:

(a) in ***ABN Amro Management Services Limited v. Hogben*** UKEAT/0266/09/DM the EAT made the following orders:

- i. that a claim that Mr. Hogben had not been appointed, in the context of a redundancy exercise, to a suitable alternative position because of his age, should have been struck out and the Employment Judge was wrong not to do so. Underhill P stated at paragraph 15 of his judgment that it was:

“... prima facie implausible to the point of absurdity that an age difference of nine months could make any difference to the question whether the Claimant or Mr. Kellett obtained the UK role, and only marginally less implausible that, in the case of the global role, Mr. Pettit would be influenced by the fact that the Claimant was 41 or 42 and Mr. Pereira 47 or 48...”

Further, at paragraph 15 of his judgment Underhill P stated that the claim should not proceed to trial simply to enable the employee to cross-examine a decision maker where there was no basis for assuming that cross-examination might advance the employee’s case any further;

- ii. that a claim that Mr. Hogben had not been awarded a *pro rata* bonus was discriminatory should have been struck out by the Employment Judge. The employee’s case was that the employer had decided to cease to pay *pro rata* bonuses to redundant employees part way through a redundancy exercise. The effect of that was that employees who had been made redundant before 2008 were advantaged as compared to those made redundant after 2008 (when the change was effected). It was said that the same was indirect age discrimination because those employees who had been made redundant before 2008 were more senior and therefore older employees. The Employment Judge had found the claim to be arguable and had refused to strike it out. Underhill P disagreed finding that:

1. there could be no PCP applied neutrally to the two groups of employees. On the contrary, the employer had applied one policy to one group of employees (those

redundant before 2008) and another policy to another group of employees (those redundant after 2008);

2. even if there were a PCP, it was highly likely that the PCP would be justified.

Further, in his judgment, Underhill P stated, having referred to **Anyanwu**:

“... it is fair to note that the force of those observations will inevitably vary depending on the nature of the particular issues; and Lord Hope in the same case made clear that in an appropriate case a claim for discrimination can and should still be struck out if the tribunal can be satisfied that it has no reasonable prospect of success...”

(b) in **Iteshi v. London Borough of Hammersmith and Fulham** [2011] UKEAT 0491_10_1703 the EAT upheld the decision of an Employment Judge to strike out a claim for race discrimination. In that case a job applicant had not been appointed to a position because he was over-qualified (as being a qualified barrister who had completed the Bar Vocational Course but not pupillage). The employer did not wish to appoint qualified lawyers to its litigation assistant positions because it was concerned that such individuals would seek alternative employment and leave once the market had ‘picked up’. The applicant alleged race discrimination (both direct and indirect, the indirect discrimination argument being that there were more qualified lawyers who were Black African than there were qualified lawyers who were Black Caribbean) but refused to turn up to a Pre-Hearing Review set down to determine whether such complaints had reasonable prospects of success on the basis that it was a “*dodgy PHR*”. HHJ Peter Clark considered that:

- i. the Employment Judge had been entitled to strike out the claim for discrimination because of the claimant’s failure to turn up to the PHR alone;
- ii. in any event, as to the claim for direct discrimination, the claimant’s comparators were not proper comparators in law since they had materially different qualifications to the claimant;
- iii. the claim for indirect discrimination would inevitably fail on the question of justification.

At paragraph 25 of his judgment, HHJ Peter Clark stated:

*“The extent of an Employment Judge’s power to strike out, particularly an unlawful discrimination claim, has been considered at the highest level; see **Anyanwu v South Bank Students Union** [2001] ICR 391 (HL); applied in **Ezias v N Glamorgan NHS Trust** [2007] ICR 1126 (CA). I have been referred to the approach of Underhill P to this question in **ABN Amro Management v Hogben** (UKEAT/0266/09, 20 November 2009, BAILII: [2009] UKEAT 0266_09_0111) at para. 7. I gratefully adopt that approach; plainly a case may be struck out in appropriate circumstances, else there is no purpose in rule 18(7)(b).” (emphasis added)*

14. Drawing on some of the above and the current practice of Employment Tribunals the following thoughts are offered:

(1) the cases in which strike out applications are most likely to be sought by respondents before the Employment Tribunal are long running discrimination and whistle blowing cases where a full merits hearing is likely to be most expensive because of the extensive factual investigation which will be required to determine those cases;

(2) those cases, unfortunately, are the sort of cases where strike out applications are least likely to be successful, precisely because of the disputed facts inherent in such complaints;

(3) that said, the guidance of the Court of Appeal and House of Lords only partially reflects the 'every day' application of Rule 18(7) by Employment Tribunals who appear to be ready to make strike out orders in appropriate cases. Further, the EAT has shown itself prepared to uphold strike out orders in appropriate cases and even, in the **ABN Amro** case, to make such an order in place of the Employment Tribunal's refusal to do so;

(4) strike out orders, however, remain the exception rather than the rule and applications should only be made in very weak cases otherwise a respondent before the Employment Tribunal could put themselves at risk of costs: see **Verma v. Harrogate NHS Trust** [2009] UKEAT 0155;

(5) the application for a Pre-Hearing Review ("PHR") to determine a strike out application should be particularised and should include:

- i. a summary of the arguments as to why the claim will not succeed;
- ii. an explanation as to why the holding of such a PHR is proportionate and is in accordance with the overriding objective. It might, for example, reduce the length of the main hearing and/or the costs to the parties in preparing for a main hearing;

(6) a difficult tactical question is whether or not to lead evidence (by way of witness statement) at a PHR at which a strike out order is sought. Often, in discrimination cases, respondents will want to lead evidence to suggest non-discriminatory explanations for the treatment of the claimant. However, leading evidence might (a) suggest that there are factual disputes which can only be resolved at trial; or (b) result in a witness having to be tendered for cross-examination. In the **ABN Amro** case, the employer produced a short witness statement but did not tender the witness for cross-examination in order to 'square the circle'. Underhill P commented that: "*the statement by itself would have little weight on a strike-out application of this kind*".

Behaviour Based Strike Out Orders

15. Behaviour based strike out orders might be made in a number of scenarios. However, it is unlikely that a strike out order would be made as a sanction for behaviour unless a fair trial was no longer possible. In **Bolch v. Chipman** [2004] IRLR 140 the EAT considered that the following stages of analysis were necessary before a strike out order was made by reason of '*scandalous, unreasonable, or vexatious conduct*':
- (a) there must be a conclusion that proceedings have been conducted unreasonably (or scandalously, or vexatiously) on behalf of a person;
 - (b) the Employment Tribunal must consider that a fair trial is no longer possible;
 - (c) even where a fair trial is no longer possible, a strike out order must be considered proportionate.
16. Similarly, where a strike out application is made for want of prosecution, the primary consideration will be whether or not a fair trial is possible: see **Peixoto v. British Telecommunications plc** UKEAT 0222/07. Plainly, where there are less draconian sanctions for delay, these are likely to be adopted by an Employment Tribunal before striking out a claim.
17. Although strike out orders are unlikely to be made for a mere failure to comply with an order of the Employment Tribunal, where the effect of non-compliance renders a fair trial impossible, strike out will be an appropriate sanction: see **Bennett v. London Probation Service** UKEAT 0194/09. In that case, the claimant refused to disclose medical records in a disability discrimination claim and stated that she would never disclose them. Her claim was struck out.
18. Unless orders are a useful tool to deploy in relation to a litigant who persistently refuses to comply with orders of the Employment Tribunal. These are orders which apply a sanction (such as strike out) on a failure to comply with the unless order. Where an unless order takes effect, the party whose claim is struck out may apply for the order to be revoked or reviewed. On such an application the Employment Tribunal should take all relevant matters into account. The factors set out in **CPR 3.7** (relating to applications for relief from sanctions in the civil courts) are likely to be relevant, but the Employment Tribunal is not bound to consider each and every factor: see **Governing Body of St Albans Girls' School v. Neary** [2010] IRLR 124.

Deposit Orders

19. Where a 'merits based strike out order' is sought it will usually be the case that a deposit order will be sought in the alternative. The Tribunal has jurisdiction to order the Claimant to pay a deposit pursuant to Rule 20(1) of the Employment Tribunal Rules 2004:

"20 Requirement to pay a deposit in order to continue with proceedings

(1) At a pre-hearing review if a chairman considers that the contentions put forward by any party in relation to the matter required to be determined by a tribunal have little reasonable prospect of success, the chairman may make an order against that party requiring the party to pay a deposit of an amount not exceeding £500 as a condition of being permitted to continue to take part in the proceedings relating to that matter." (emphasis added)

20. The test then is similar to the test of 'no reasonable prospect of success' (required for a strike out) but the language suggests a 'wider jurisdiction'. Quite where the boundary line as between "no reasonable prospect of success" and "little reasonable prospect of success" is drawn, however, is difficult to articulate.

21. Further, there is surprisingly little appellate jurisprudence dealing with deposit orders. Rule 20 was considered by the EAT (Elias P presiding) in ***Jansen van Rensburg v. The Royal Borough of Kingston upon Thames and others*** [2007] All ER (D) 187. In that case a deposit order had been made by the Employment Judge who reasoned:

"The Respondent submitted that the claims are weak and unclear. The Claimant demonstrated her difficulty in articulating them at the hearing. The equal pay claims were hopeless and her allegations of sex and race discrimination were not made during the course of her employment. The Claimant is seeking re-engagement which undermines her claim of constructive dismissal. The Claimant herself put forward the first Respondent for a diversity award on the ground that it was a leader in this field."

22. The EAT upheld the Employment Judge's decision observing that:

- (a) even in the context of strike out applications, ***Ezsias*** showed that a provisional assessment of credibility was permitted in an appropriate case;
- (b) it would be very surprising, therefore, if a similar assessment were not permitted in relation to the making of a deposit order;
- (c) since the test in Rule 20 is less rigorous than the test in Rule 18(7): *"It follows that a tribunal has greater leeway when considering whether or not to order a deposit. Needless to say, it must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response."*

23. Deposit orders, limited as they are to £500 (and even then being means based: see Rule 20(2) of the Employment Tribunal Rules 2004), are unlikely for financial reasons alone, to prevent a litigant from pursuing a claim or a defence. However, the following should be noted:

- (a) where a deposit order is made, the grounds upon which it is considered that the paying party has little reasonable prospect of success in a claim will be recorded in a document and sent to that party: see Rule 20(3) of the Employment Tribunal Rules 2004;
- (b) that document will also set out that if the contention which has been adjudged to have little reasonable prospect of success is persisted in, then an order for costs could be made: see Rule 20(3) of the Employment Tribunal Rules 2004;
- (c) a costs order can be made pursuant to Rule 47 of the Employment Tribunal Rules 2004 where a litigant has pursued a claim in the face of a deposit order and where that claim has failed on grounds that “*were substantially the same as the grounds recorded in that document for considering that the contentions of the party had little reasonable prospect of success*”.

Staying Proceedings

- 24. One way of reducing the (irrecoverable) cost burden of Employment Tribunal litigation is, in cases where there is a cross-over of issues as between the Employment Tribunal and the High Court / county courts, to force the matter into the costs jurisdiction by seeking a stay of tribunal proceedings.
- 25. The Employment Tribunal can stay its proceedings pursuant to Rule 10(2)(h) of the 2004 Rules. The decision is a discretionary case management decision which should be exercised in accordance with the overriding objective and which will only be interfered with by an appellate tribunal (where the Employment Tribunal has applied the correct test and taken all relevant matters into account) in cases of perversity: see ***Bastick v. James Lane (Turf Accountants) Limited*** [1979] ICR 778.
- 26. In ***First Castle Electronics Ltd. v. West*** [1989] ICR 72 the EAT identified a number of issues which ought to be considered by employment tribunals when exercising their discretion to stay proceedings pending determination of other proceedings. In that case, the company secretary of the respondent company was alleged to have made a number of errors in documents which were prepared in relation to the proposed take-over of the company. The company secretary was dismissed and brought unfair dismissal proceedings in the employment tribunal in addition to wrongful dismissal proceedings in the High Court. At first instance, the employment tribunal refused to order a stay of proceedings. An appeal was granted by the EAT (Ward J presiding). The following factors were identified as being significant:
 - (a) the degree of overlap between the issues in the different jurisdictions;
 - (b) the complexity of the issues and the evidence;

- (c) the amounts at stake in the respective proceedings;
- (d) the risk of there being findings of fact by an Employment Tribunal which could embarrass the High Court and on the contrary, the possibility of findings made by the High Court being helpful to an Employment Tribunal;
- (e) the procedural complexity of the case;
- (f) the rules of evidence (which may in the High Court be more suitable for the determination of particular issues);
- (g) any prejudice which will be caused by the delay of a stay.

27. It follows that where there is a dispute of any complexity, or where there is a substantial overlap of factual or legal issues for determination, that the Employment Tribunal will probably grant a stay of proceedings and permit matters to be determined in the civil courts. Indeed, in ***Mindimaxnox LLP v. Gover*** UKEAT/0225/10/DA the EAT allowed an appeal against the refusal of an employment judge to order a stay of proceedings pending the determination of High Court proceedings on the basis that:

- (a) the factors mentioned in ***First Castle Electronics v. West*** will be highly relevant in determining whether or not to stay proceedings in the Employment Tribunal;
- (b) it is generally desirable to dispose of proceedings in the High Court first where the sets of proceedings are substantially similar: see also ***GFI Holdings Limited v. Camm*** UKEAT 0321/08;
- (c) proceedings should not, generally, be permitted to continue concurrently. That is so, particularly where there are unfair dismissal proceedings in the employment tribunal and other causes of action relating to aspects of the dismissal in the High Court because the factual issues raised will be the same. It is not in accordance with the overriding objective to have concurrent proceedings dealing with the same factual issues: see paragraph 45 of the judgment.

28. More recently, in ***Paymentshield Group Holdings Limited v. Halstead*** UKEAT/0470/11DM the EAT has granted a stay of Employment Tribunal proceedings even though no concurrent High Court proceedings had been issued by the employee. The position was that:

- (a) the claimant had been dismissed and had issued a claim for unfair dismissal in the Employment Tribunal;
- (b) the claimant has also sent a letter before action in relation to a contract claim in the High Court in which wrongful dismissal was alleged as was breach of contract. There was, therefore an overlap of factual and legal issues as between the Employment Tribunal claim and the claim which had been intimated in the High Court;

- (c) initially the parties agreed to a stay of the Employment Tribunal proceedings, pending the completion of proceedings in the High Court and consequently a stay was ordered by consent;
- (d) the claimant then asked for the stay to be lifted so that he could proceed first with the Employment Tribunal proceedings and then continue with High Court proceedings on the completion of the Employment Tribunal proceedings, when he would be in a position to make use of his 'winnings' from the Employment Tribunal to fund his High Court claim;
- (e) the stay was lifted and (presumably on an application to have the order lifting the stay revoked) an Employment Judge declined to revoke the order and to re-impose the stay.

29. HHJ McMullen QC found that the Employment Judge erred in law and stated at paragraph 36 of his judgment:

*"It seems to me on this novel point that there is no difference in the principle to be applied when High Court proceedings have been issued, and been the subject of a pre-action conduct letter and a draft particulars of claim. This is not a case where there just may be a glint in the Claimant's eye that he may seek in another forum from the Employment Tribunal to recover substantial amounts, say, for a bonus; that issue is not before me. But it seems unlikely that a Respondent would succeed in keeping the Claimant out of the Employment Tribunal just because for six years he might possibly issue proceedings. The principle applies where there has been issue and service of proceedings; see *Mindimaxnox*. In my judgment it is correct to extend it on the facts of this case, where there has been a solicitor's letter in accordance with the CPR which, in practice, claimants have to issue lest there be consequences at some stage in costs. It is certainly regarded as an important part of the procedures. It is intended to get the parties to see what a case is and possibly avoid going to court, but it is an important and established part of the court's practice in Section C of the Civil Procedure. It involved legal costs in its preparation and service and legal costs for the Respondent in providing a response and substantive reply. Here it was accompanied by draft particulars of claim so that the Respondent saw exactly what it is that is going to be claimed, and it had the effect of drawing from the Claimant a ready acceptance that his claim in the Tribunal must be stayed pending the outcome of this matter. What was right for him on advice to do in December 2010 is unchanged by the change of heart he has had in wishing to go first in the Tribunal. He did not have to utter the letter before action; he could have gone ahead with his Employment Tribunal case and the issues as to concurrence, and embarrassment of the High Court Judge, would not in my view have arisen, because it would simply be hypothetical. However, we have to deal with the facts as they are, and this is a clear intention by the Claimant to claim the remedies and relief above. The claim in the Employment Tribunal is now worth about £400,000 I am told."*

30. The reasoning is rather difficult and the decision is under appeal to the Court of Appeal (where permission has apparently been granted). The difficulty with the reasoning is that the rules set out in ***First Castle*** and in ***Mindimaxnox*** were determined in the context of deciding in which forum proceedings should take place where there are two extant sets of proceedings and a possible overlap of issues. In those circumstances one set of proceedings or the other plainly has to be heard first because it would be unacceptable to have conflicting findings of fact in different jurisdictions. When deciding which, of two extant sets of proceedings should be heard first, it is easy to see that the factors referred to in ***First Castle*** and in ***Mindimaxnox*** will be highly relevant. However, where proceedings are yet to be issued in the High Court and will not

be issued until the conclusion of proceedings in the Employment Tribunal, then the problem would not seem to arise at all and there would appear to be no basis for a stay.

31. The present position is that claimants should be careful in threatening High Court proceedings because they may unwittingly be taken into the costs jurisdiction prior to the determination of their Employment Tribunal claim. Even if the Court of Appeal corrects the decision in ***Paymentshield*** the claimant who intimates High Court proceedings but does not issue them, may find that they face an application for a stay in Employment Tribunal proceedings. The employer may, as did the employer in ***GFI Holdings v. Camm***, issue a claim in the High Court seeking negative declaratory relief (for example, as to the entitlement of a party to a contract) and then seek a stay of Employment Tribunal proceedings.

Costs Orders

32. Costs orders are one of the most effective and often used procedural control mechanisms exercised by the Employment Tribunal. The jurisdiction of the Employment Tribunal to award costs is well known and includes:

- (a) vexatious, abusive, disruptive or unreasonable conduct in the bringing or conducting of proceedings: see Rule 40(3) of the Employment Tribunal Rules 2004;
- (b) the bringing or conducting of proceedings which are misconceived: see Rule 40(3) of the Employment Tribunal Rules 2004;
- (c) the failure to comply with a rule or a practice direction: see Rule 40(4) of the Employment Tribunal Rules 2004;
- (d) where proceedings have been continued and failed after the award of a deposit order: see Rule 47 of the Employment Tribunal Rules 2004.

33. Where the Tribunal finds such conduct, it then has:

- (a) a discretion as to whether to award costs at all: see ***McPherson v. BNP Paribas*** [2004] IRLR 558; and
- (b) a discretion as to the amount of any costs order (provided that the same does not exceed £10,000).

34. It used to be said by practitioners of employment law that awards of costs were exceptional and were therefore unlikely to be made. However, as was noted by Burton J in ***Salinas v. Bear Stearns Holdings Inc*** [2005] ICR 1117, the fact that it is exceptional for an Employment Tribunal to award costs (when the statistics across the Employment Tribunal system are considered as a

whole) is of little assistance in assessing whether or not an award of costs ought to be made. Exceptionality refers to outcomes and is not a test in itself.

35. Indeed, costs awards are made more and more frequently by Employment Tribunals, particularly where findings as to unreasonable conduct are made. Examples of where costs awards might be made include:

(a) situations in which litigants are found to have lied. In ***Daleside Nursing Home Limited v. Mathew*** UKEAT/0519/08 a race discrimination claim was pursued based on an allegation of racial abuse. The Employment Tribunal found that the allegation of racial abuse was based on a lie and had not, in fact, occurred. An application for costs was made but the Employment Tribunal declined to award. The EAT overturned the decision of the Employment Tribunal, Wilkie J stating:

“In our judgment, in a case such as this, where there is such a clear-cut finding that the central allegation of racial abuse was a lie, it is perverse for the tribunal to fail to conclude that the making of such a false allegation at the heart of the claim does not constitute a person acting unreasonably. Whatever may be their genuine feelings about the other matters of which a complaint is made, on the particular facts of this case it was the fact that the lie was explicit and so much at the heart of the case that, in our judgment, it is appropriate for us to conclude that this was an overwhelming case where the tribunal has failed properly to address the point, and as a result has come to a perverse conclusion.”

Awards of costs have been made on a similar basis in:

- (i) ***Dunedin Canmore Housing Association v. Donaldson*** UKEATS/0014/09. In that case the claimant had sought damages for breach of a compromise agreement in that the employer had failed to make payment of sums due under that agreement. The employer said it had not paid the sums to the claimant because she had breached the confidentiality clause by disclosing the terms of the agreement to other employees of the employer. The claimant denied that she had done so, but the Employment Tribunal disagreed. It found she had breached the confidentiality clause and that her proceedings were therefore brought dishonestly. The EAT found that it was perverse for the Employment Tribunal not to have made an order for costs in this situation;
- (ii) ***Barnsley Metropolitan Borough Council v. Yerrakalva*** [2011] EWCA Civ 1255. In that case the Employment Tribunal had found that the claimant had exaggerated her symptoms of disability and had lied both to the Employment Tribunal and in an application for disability allowance. The Employment Tribunal ordered that the claimant pay the Council's costs of the proceedings on the withdrawal of her complaint. The EAT discharged the costs order, but it was re-imposed by the Court of Appeal, subject to a variation, that the Claimant was to pay 50% of the Council's costs of preparing for a PHR at which the issue of disability was considered;

(b) situations in which litigants are found to have refused reasonable offers of settlement. Although the **Calderbank** doctrine does not apply in the Employment Tribunal and there is no equivalent of Part 36, the EAT has upheld costs awards in circumstances where it has considered that litigants have unreasonably refused to accept sensible offers of settlement.

Examples include:

- i. **Kopel v. Safeway Stores plc** [2003] IRLR 753. In that case, the claimant had persisted in allegations of discrimination and “slavery” which were described as “frankly ludicrous” and “seriously misconceived” by the Employment Tribunal. An offer of £5,700 which had been made on a **Calderbank** basis was turned down. The Employment Tribunal found that the claimant had continued with a claim unreasonably in the face of the employer’s offer. The EAT agreed and upheld an award of costs in the sum of £5,000;
- ii. **Power v. Panasonic** EAT/439/04. In that case the claimant had brought proceedings for unfair dismissal, disability discrimination and breach of contract. She had sought substantial damages of up to £185,000. Although she had succeeded on the majority of these claims, she was awarded the sum of £5,855.11 and had been made and refused a **Calderbank** offer in the sum of £10,000. The employer sought a contribution to its costs in the sum of £10,000 and that was ordered by the Employment Tribunal. The EAT upheld the costs order.

It may be possible to defend an application for costs in a discrimination case, where a **Calderbank** offer has been refused, by reference to the employee’s right to seek a declaration of discrimination: see **Telephone Information Services Limited v. Wilkinson** [1991] IRLR 148. In **Power v. Panasonic** the EAT indicated that this would have been a good point which would have suggested that an award of costs would have been inappropriate had the claimant attempted to negotiate as to an admission of discriminatory treatment. The point is less persuasive in cases of unfair dismissal where the Employment Tribunal has no power to make a declaration of unfair dismissal: see **Nicolson Highlandwear Limited v. Nicolson** UKEATS/0058/09;

(c) situations in which litigants have engaged in outrageous pre-hearing publicity which go beyond the issues at stake in the claims themselves. In **Iteshi v. OFWAT** UKEAT/0178/11/DM the claimant wrote a letter to his MP which was copied to the EAT in relation to which HHJ McMullen QC stated:

“I bear in mind that the Claimant is highly experienced in employment tribunal proceedings albeit for the most part in his own cause. That he should make with no evidence at all allegations of fraud, conspiracy with the Government between the judges and so on, is disgraceful. The fact that he is writing to his MP is one thing, he is entitled to say what he likes to his MP, but that document was sent to the open mailbox of the EAT. It has been

shown to me today, and to Lady Smith who is also cited in it and is hearing his next appeal tomorrow. It is quite wrong for this material to be adduced, no evidence is brought to support it, it is part of a campaign to expose and discredit the Employment Tribunals and the EAT. It is pre-determined in the Claimant's eyes that he will get no justice. I pointed out in the last case how wrong he is about that."

Further, HHJ McMullen QC stated (at paragraph 7 of his judgment): "*He is seeking to wage a campaign beyond the narrow remit of the claim and appeal which he made against this Respondent. It is in my judgment vexatious.*" In addition, the claimant's claim and appeal was found to be misconceived. Consequently, a costs order of £750 was made in relation to the appeal by the EAT.

36. Where the 'gateway' to costs is satisfied by a finding of, for example, unreasonable conduct, the Employment Tribunal still has a discretion as to whether or not to award costs and in what amount (subject to the £10,000 limit). That discretion will be likely to be exercised having regard to:

- (a) the effect of any unreasonable behaviour. Although the strict rules of causation do not apply to costs orders (and this is a difference between costs orders and wasted costs orders) in **McPherson v. BNP Paribas** [2004] IRLR 558 Mummery LJ opined that Employment Tribunals should consider the "*nature, gravity and effect*" of any unreasonableness. In **Barnsley Metropolitan Borough Council v. Yerrakalva** [2011] EWCA Civ 1255 Mummery LJ has taken a step back from that approach suggesting that it is an unnecessary 'gloss' on the legislation and has led Employment Tribunals into error. However, what is apparent from these decisions is that the discretion to order an amount of costs should be exercised judiciously and therefore should have some relation to the costs occasioned by any unreasonable conduct;
- (b) the means of the paying party.

37. In conclusion, the following practical points are made in relation to costs awards:

- (1) if you don't ask, you don't get! Employment Tribunals are increasingly prepared to make costs orders where applications are made. As such, where a weak claim has been successfully defended or a weak defence has been successfully overcome, or where a party has behaved unreasonably in proceedings, it is always worth making a costs application;
- (2) do everything possible to 'set up' the application. Plainly a party will be in a stronger position in a costs application where it has pointed out the lack of merit in the other side's position and/or the unreasonable conduct in open correspondence. As set out above, **Calderbank** letters are a useful tool in 'setting up' a costs application, as are deposit orders. The exchanging of a costs schedule or putting of the other side on notice as to a cost estimation may also be helpful in 'setting up' the application;

(3)don't burn cost to recover costs! Although costs orders are made more frequently by Employment Tribunals, the average award is still low and therefore, other than in cases where the costs expended are such that detailed assessment (or something close to detailed assessment) is sought, it may be wise not to seek a separate costs hearing. If the matter can be dealt with at the substantive hearing, it should be.

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