Neutral Citation Number: [2022] EAT 131

Case No: EA-2016-000663-VP

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 9 June 2022

BEFORE :

THE HONOURABLE MRS JUSTICE ELLENBOGEN DBE

(SITTING ALONE)

- -

Between :

J **Appellant**

- v -

(1) K
(2) L

Respondents

- -
- -

J the **Appellant** in person
Paul Smith (instructed by **K & L**) for the **Respondents**

Hearing date: 9 June 2022

- -

APPROVED JUDGMENT

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SUMMARY

Practice and procedure

The appeal from the employment tribunal's order that the appellant pay the respondents' costs was dismissed; the tribunal had identified and applied the correct legal principles and had been entitled to come to the conclusions which it had reached, including its summary assessment of the costs payable.

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THE HONOURABLE MRS JUSTICE ELLENBOGEN DBE:

1. By a judgment sent to the parties on 19 August 2016 ("the Costs Judgment"), the Leeds Employment Tribunal (Employment Judge Jones, Mr R Webb and Mr I W Taylor — "the Jones Tribunal"), concluded that the claimant had acted vexatiously, abusively, disruptively and unreasonably in the way in which he had pursued proceedings and that, in all the circumstances, it was just and equitable that he pay the respondents' costs, summarily assessed in the sum of £20,000. This is the full hearing of the claimant's appeal from that judgment in which I refer to the parties by their respective statuses before the Jones Tribunal.

2. The Costs Judgment had followed a judgment of Employment Judge Jones, sitting alone, sent to the parties on 16 March 2016, by which the claimant's substantive claims had been struck out by reason of his failure to have complied with case management orders made on 30 October 2015 and actively to have pursued his claim ("the Strike Out Judgment"). That judgment was the subject of a separate appeal by the claimant to the EAT, which was rejected by HHJ Peter Clark under rule 3(7ZA) of the **Employment Appeal Tribunal Rules 1993 (as amended)**, as being totally without merit, by order dated 15 July 2016. The claimant's application for a review of that order was refused, by order dated 19 August 2016. Thereafter, the Court of Appeal (Underhill LJ) refused permission to appeal, without an oral hearing, by order dated 7 March 2017, also certifying the application as being totally without merit. The instant appeal is not an appeal from the Strike Out Judgment, on which a collateral attack is not permissible.

The Facts

3. On 18 January 2015, the claimant presented various complaints against the respondents. Case management hearings took place on 11 June and 30 October 2015, at which Employment Judge Cox identified the complaints presented and made orders for disclosure of certain documentation and the exchange of witness statements. On 7 March 2016, the Jones Tribunal convened for the substantive

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hearing, listed for five days, but the case could not proceed by reason of the claimant's ill health. Had he been fit to proceed, it would have been necessary to adjourn the hearing in any event owing to his non-compliance with the tribunal's earlier orders. Accordingly, the Jones Tribunal required the claimant to show cause as to why his claim should not be struck out. On 15 March 2016, Employment Judge Jones, sitting alone, struck out the claims, having considered the claimant's emails in response to the Jones Tribunal's earlier orders, setting out his reasons in the Strike Out Judgment.

4. Thereafter, the respondents made an application for costs, on the basis that the claimant had acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing or conducting of the proceedings. The claimant, accompanied by a friend, represented himself. The respondents were represented by Mrs Oldroyd, solicitor. That application was determined by the Costs Judgment.

5. In summary, the Jones Tribunal found [27] that the case had never come to a hearing because the claimant had not disclosed any evidence in the form of documents or witness statements by the dates specified in earlier case management orders. Although he had asserted that his health had precluded him from responding meaningfully to the show cause order, that assertion had not been supported by medical opinion and had been undermined by the claimant, who had demonstrated his ability to communicate at the time, in a series of emails. The content of those communications had berated the tribunal and the respondents but had provided no answer to the straightforward question as to why the claimant had not complied with the tribunal's orders and how it was that a fair trial was, nevertheless, achievable. At [28] to [30], the Jones Tribunal stated:

> **"28. The Tribunal deals with litigants in person on a daily basis. It is more than familiar with the difficulties they face in preparing their cases. The prospect of putting together a witness statement is daunting and, in the knowledge their opponents have the advantage of experienced lawyers, can become paralysing. Such is compounded if the litigant has to tackle depression and anxiety.**
>
> **29. Contrary to his repeated protestations to the contrary, the claimant is an intelligent and educated person. He was able to address the Tribunal with skill and fluency in respect of the costs regime, the Tribunal rules and the merits of the application. We recognise the frustrations he has had, as with other litigants in person, in conducting his case. Notwithstanding all of that, his case was derailed because not only did he fail to provide his evidence as required, but he evinced an animosity to doing so in the future. A fair trial became unachievable. That was**

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unreasonable conduct of litigation.

30. From April 2015 up until the day before this hearing the claimant sent numerous emails, the content of which were offensive and abusive. They were replete with rude and disobliging comment and opinion which was of no relevance to the progress of the case. Composing such lengthy discursive communications must have been time consuming. Regrettably, such time was not invested in an attempt to produce a witness statement."

6. Having set out examples of emails which the claimant had sent ([31] and [32]), the Jones Tribunal went on to state:

> **"33. These extracts are a small fraction of the voluminous levels of correspondence, often several emails per day, being sent both to the respondents and the Tribunal. To have conducted this litigation by sending such material was unreasonable and abusive. Such is self evident from the content of these documents. Allegations are made of corruption without a scintilla of evidence to support them. Widespread accusations are a deflection to the respondents' representatives, who have to consider and address them. The claimant stated that the pursuit of the litigation had ceased to be his objective, in his email sent to the Tribunal of 7 March 2016: "*This case long since stopped being about [L] and [K].*" That conduct is both disruptive and vexatious."**

7. The Jones Tribunal stated that it had considered the claimant's argument to the effect that the respondents themselves had been culpable of unreasonable behaviour, observing that the allegation of unreasonable conduct against Mrs Oldroyd had become a discrete complaint in the litigation upon which no adjudication had been made by virtue of the claimant's conduct which had brought the proceedings to an end. Accordingly, it concluded that it was not reasonable for the claimant to pray that in aid, having been responsible for the lack of determination of its merits, thereby depriving those whom he had accused of a determination which might have been made in their favour.

8. At [35] of its judgment, the Jones Tribunal stated:

> **"Supplying the claimant with a copy of a legal authority on the morning of the hearing is an accepted practice. The claimant himself submitted documents during his submissions including a helpful summary of cases in respect of employment tribunal costs. The Tribunal allowed the claimant time to read the case provided to him by Mrs Oldroyd as well as refresh his memory of the email extracts which were, after all, his own compositions. The disclosure of personal data, by reason of the delivery of a bundle to the claimant's former address, was not an issue which was explored in detail before us, but we are not satisfied this criticism defuses the many serious transgressions of the claimant's conduct which fall foul of rule 76(1)(a)."**

9. Having found that the threshold under rule 76(1)(a) of the **Employment Tribunal Rules of Procedure** ("the Rules") had been met, the Jones Tribunal went on to address all factors which it

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considered to be relevant to its determination of whether a costs order was appropriate, *"not least the nature, gravity and effect of the conduct"* [37], concluding:

> **"38. As to its nature and gravity, it was sustained, serious and fatal to the proper determination of the issues raised. Service of evidence in written form is essential in a complex case of this type, to enable the parties to address and respond to the other party's case. The fact that the majority of reported cases involve withdrawal of claims, the refusal of reasonable settlement offers or circumstances in which parties have lied, is not definitive of the cases in which it is appropriate to make costs orders. The claimant argued that he had sincerely wished to expose the dishonesty of the senior teachers at K in cross-examination and had been denied that by the order of the Tribunal striking out his case. The Tribunal pointed out that it was his action which precluded him from that opportunity. It also deprived the respondents and their witnesses from the opportunity to answer serious accusations which had been made.**
>
> **39. What were the effects of this conduct? We are not able to evaluate the prospects of this action succeeding, given the circumstances in which it came to an end. The argument of the claimant that there is no causal connection between the costs the respondents have incurred and his conduct stumbles at the first hurdle, because the reason for the strikeout was not his ill health or his criticisms of the judiciary, as he repeatedly contended, but the indisputable fact he failed to serve his written evidence. For the claimant to cease to cooperate in orders to bring the matter to a hearing but to pour his energies into an epic assault on the integrity of senior employees of the respondents, and the Tribunal service, was to cause avoidable expense to be incurred and the work that had been undertaken in preparation for the hearing wasted. It is not true, as the claimant argued, that his objectionable emails post-dated the work which led to the costs being incurred. There has been a course of conduct commencing from at least April 2015 in which the claimant has acted in the way complained of. It was this continuous conduct which led the Tribunal to conclude on 15 March 2016 that a fair trial was simply impossible. At paragraph 7 of the reasons the Employment Judge expressed his opinion that the claimant's hostility in correspondence betrayed an attitude of noncompliance which was irretrievable.**
>
> **40. With regard to his ability to pay, we recognise that the claimant does not presently have an income from which he could defray any costs order. Moreover, given that he has been assigned to the support group of ESA claimants it is unlikely, in the foreseeable future, he will have any other income from which to pay costs.**
>
> **41. The claimant has capital assets in the form of his home to the value of £95,000. If the Local Authority obtained a charging order upon that property and sought to enforce it, as contemplated by the claimant, he would have to sell it. We recognise that is a dire situation for anyone to be placed in. Nevertheless the claimant has knowingly embarked upon a course of conduct which has led to the funds of the Local Authority being diverted to defend litigation rather than to be spent on the education of children in the district. Having regard to the nature and gravity of the claimant's conduct we are satisfied that it is appropriate that an order for costs is made, notwithstanding the claimant's financial circumstances. In respect of the amount claimed, we do not consider the claimant's means influence that, given they can only realistically be recouped out of the capital in his property, which is sufficient to cover the full sum claimed.**
>
> **42. We do not award the full sum claimed of £23,278 and order a detailed assessment. That would involve further delay and expense, the filing of a bill of costs, a response**

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> **and further adjudication.**
>
> **43. The claim was not considered on its merits and a small discount is appropriate to recognise that. The early preparation and conduct of the response would have involved expenditure, which would not normally be recoverable in the ordinary course of events in this jurisdiction. Those observations should not detract from our conclusion that, having had regard to the totality of the circumstances, the vast majority of the costs incurred were wasted by a course of unreasonable and disruptive conduct which commenced at an early stage of this case.**
>
> **44. Having considered the statement of costs, upon a summary assessment, we find they were necessarily and reasonably incurred.**
>
> **45. Taking all these factors into account, we make an order for costs to be paid to the respondents of £20,000."**

The Appeal

10. At a preliminary hearing before the EAT on 18 September 2019, the claimant had the benefit of assistance, through ELAAS, from Mr Deshpal Panesar (then junior counsel). The grounds of appeal which have been permitted to proceed are as amended by him and approved by the claimant on that date. There are four grounds, by each of which it is contended that the Jones Tribunal erred in law in the exercise of its discretion as to costs:

a. Ground 1:

i) It erroneously concluded that the claimant's assertion of ill health had been unsupported by medical opinion, when, as had been recorded in the Strike Out Judgment, the tribunal had received an email on that day from the claimant's GP stating that the claimant was in poor mental health, that his condition might deteriorate and that that state of affairs would be likely to persist between 4 and 18 March 2016. That encompassed the entirety of the period within which the claimant had been ordered to show cause as to why his claim should not be stuck out; and

ii) It failed to have any, or any sufficient, regard to the medical opinion received, or the claimant's state of mental health and its contribution to his

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failure to have shown cause;

b. Ground 2: at [42] and [43] of its judgment, it failed to apply any, or any sufficient, analysis to, or scrutiny of, the makeup of the costs which it had awarded against the claimant, in particular:

i) as to the level of the award, having regard to the reasons for the strike out and the medical evidence to which reference was made in ground 1, above, and the potential for at least some of the costs claimed to have been incurred legitimately from the issue of proceedings; and

ii) awarding costs in the absence of a detailed assessment, but, nevertheless, awarding the maximum sum without any, or any sufficient, analysis of the appropriateness of that sum, or regard to the particular litigation history and reasons for the strike out, as set out above;

c. Ground 3: it went beyond a compensatory award of costs, into an award which was punitive. In so doing, *"notwithstanding ostensibly awarding costs on the basis of failing to show cause, the ET in fact awarded costs in whole or in part on a punitive basis in response to emails it regarded as pejorative and abusive from the claimant"*; and

d. Ground 4: it failed to apply the overriding objective, in particular:

i) in ensuring a level playing field for the claimant, a litigant in person

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with mental health issues;

ii) in failing to have sufficient regard to the Equal Treatment Bench Book ("the ETBB") and, in particular, with regard to ensuring the provision of authority in sufficient time for the claimant to assimilate it; and

iii) in failing to have any, or any sufficient, regard to the history of this litigation and the claimant's perception of the same.

Evidence

11. At 2.38, yesterday afternoon, the EAT received an email having the subject, "witness testimony" from an email address "d.dawson…". It contained an account, from Mr Dawson's perspective, of various hearings in these proceedings, since October 2015, concluding with a statement of truth, albeit not in standard form. No application to admit that evidence has been made by the claimant. Mr Dawson was not present and able to be cross-examined. Nevertheless, I considered the content of his statement *de bene esse*. The majority of the material provided did not relate to any of the grounds of appeal which have been permitted to proceed. The only part of potential relevance (to ground 4 of this appeal) is set out below:

> "In August, the following year, I attended the tribunal in Leeds again for the costs hearing.
>
> [The claimant] was handed a really long and complicated printout of an important Court of Appeal judgment at the beginning of the hearing. The chairman ... told us he'd give us 45 minutes (from memory) to read the document.
> ...
>
> We went to the waiting room, where there were other parties with their solicitors chatting away about their own cases. It was not a quiet setting for [the claimant] to concentrate on reading the document.
>
> [The claimant] struggled to get through the document and in what felt like a very short time we were invited back into the tribunal."

Directions

12. On 3 February 2022, the EAT listed this hearing. It directed the parties to lodge and exchange

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skeleton arguments and a chronology by 4.00 pm on 26 May 2022. The claimant did not do so and, when chased, engaged in inappropriate and vituperative correspondence with the staff of the EAT, to which it is unnecessary to give the oxygen of publicity. Suffice it to note that it was of a character similar to that to which the Jones Tribunal had referred. Counsel for the respondents lodged his skeleton argument just under seven hours after the deadline. His instructing solicitor sent a copy to the claimant three hours later.

13. This morning, the claimant sent an email to the EAT stating that it was his intention to rely upon the skeleton argument lodged with his notice of appeal. That document, running to 24 pages of text, pre-dated the amended grounds of appeal and, accordingly, was not directed at them. Nevertheless, I have considered it with care. Only paragraphs 97 to 102 and 111 relate to the costs hearing and the Costs Judgment. None of them is material to this appeal. I have also had regard to the claimant's email and attachments sent to the EAT at 10.23 am this morning, in so far as they advance substantive argument, and to the claimant's oral submissions before me today. I have considered the respondent's written and oral submissions, advanced by Mr Paul Smith of counsel.

The Parties' Submissions

The Claimant's Submissions

14. The claimant addressed me over a period of approximately two and a half hours, including in reply. Much of that time was devoted to the expression of his view that judges support other judges; that Employment Judge Jones and other employment judges behaved inappropriately, both generally and towards him in this litigation; and that those judges had formed, and been motivated in their decisions by, homophobic and otherwise inappropriate beliefs about him. Other submissions were directed towards proposed grounds of appeal which had not been permitted to proceed to a full hearing. As I informed the claimant in the course of the hearing, those submissions did not assist me in my consideration of the four grounds of appeal which he had been given permission to advance,

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on which he needed to focus. I am satisfied that he understood that need.

15. The claimant contended that it was not possible fairly to determine the amended grounds of appeal without having regard to the full background to the litigation, stating that he was not seeking to go behind the Strike Out judgment. Generally, he submitted, it ought to have been recognised by the Jones Tribunal, amongst others, that it was unsurprising that a person having his *"mental health issues"* would react angrily, if provoked. As to grounds 1 and 2(a), the Jones Tribunal had adopted an excessively narrow view of the medical evidence which had been before it. More generally, in relation to grounds 2 and 3, it was said that the Jones Tribunal had failed to have regard to the particular litigation history, including by its failure to have accepted the claimant's account of events the subject of the litigation, and to have conducted a suitably granular analysis of the costs schedule provided by the respondents before identifying the sum payable, itself serving to demonstrate that its award had been punitive rather than compensatory. He acknowledged that he had not sought to challenge particular entries on the costs schedule at the costs hearing, as indicated by [20] of the Costs Judgment[1], but submitted that the Jones Tribunal had not afforded him an opportunity to address it on the link between the conduct criticised and the costs claimed and that no consideration had been given to the likelihood that he would never work again. In any event, he submitted, the quantum of the sum claimed ought to have inclined the Jones Tribunal to order a detailed assessment, both as a requirement of rules 78(1)(a) and (b) of the Rules and as a matter of principle. Indeed, having formed an adverse view of him when striking out the claim, Employment Judge Jones should not have determined the costs application at all. Regarding ground 4, here, too, the Jones Tribunal ought to have had regard to the history of the litigation, as explained in relation to ground 2(b). Furthermore, in allowing the respondents to rely upon an authority produced on the morning of the hearing, it had set the scene for the hearing as a whole.

[1] **"20. In respect of the sums claimed, were the Tribunal to make a summary assessment, he submitted that he had no observations to make because he was not in a position to pay without selling his home whether it be a payment of £2,000 or £20,000."**

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The Respondents' Submissions

16. The respondents' overarching submission was that the Jones Tribunal had considered and applied the relevant legal principles and reached permissible conclusions; all grounds of appeal ought to be dismissed. As to the individual grounds:

Ground 1

a. Amongst the relevant circumstances which the Jones Tribunal had been obliged to take into account had been the background to the claimant's failure to have complied with case management orders and actively to have pursued his claim, being the reasons why the latter had been struck out in March 2016. The Jones Tribunal had done so (Costs Judgment, [27]) and had been entitled to have regard to the reasons for the claimant's failings, as set out in the Strike Out Judgment. Having done so, it had been entitled to find that medical opinion did not support the claimant's suggestion that he had been precluded from showing cause by reason of ill health; [5] and [6] of the Strike Out Judgment referred. Ground 1 constituted an impermissible collateral attack on the findings made in the Strike Out Judgment, the claimant's appeal from which had been dismissed. The Jones Tribunal had properly directed itself as to, and applied, the relevant legal principles at the discretionary stage.

Ground 2

b. The first limb of ground 2 should fail for the reasons advanced in relation to ground 1 and because the Jones Tribunal had made an appropriate deduction from the costs sought by reference to the considerations identified at [43] of the Costs Judgment. The second limb of ground 2 should fail because the Jones Tribunal had considered itself able to make a summary assessment of the respondents' costs and been satisfied that

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an order would compensate them for the attributable costs ([43] and [44] of the Costs Judgment referred). Its decision had been compliant with the principles set out in **Kovacs v Queen Mary and Westfield College** [2002] IRLR 414, CA. The Jones Tribunal had had regard to the overall bill of costs and made discounts in respect of particular items included within the respondents' schedule, including counsel's fees, yet to be incurred, VAT and the matters set out at [43] of the Costs Judgment. Overall, a discount of approximately one-third had been made, on the application of a sound methodology. The fact that the sum awarded happened to coincide with the cap imposed by rule 78(1)(a) of the Rules had been coincidental.

Ground 3

c. The Costs Judgment made clear that costs had been awarded on the basis that the claimant had acted vexatiously, abusively, disruptively and unreasonably in the way in which he had pursued the proceedings. Costs had not been awarded simply because the claim had been struck out or by reason of the claimant's lack of compliance with case management orders, as was suggested by ground 3. At [43], the Jones Tribunal had found that the "vast majority" of the costs incurred had been caused by the claimant's "unreasonable and disruptive conduct", on which findings its order had been based. That conclusion had been unsurprising given that the claim had been struck out for failures to have complied with case management orders and actively to have pursued the claim. Properly, the Jones Tribunal had cited a representative sample of the claimant's correspondence and noted its overall quantity ([30] to [33]). Those had been relevant considerations when assessing the quantum of the award and its assessment was unassailable. It was clear, from [8], [42] and [43] of the Costs Judgment, that the Jones Tribunal had had the compensatory principle in mind. A

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summary assessment did not require the granular approach for which the claimant contended, which would be characteristic of a detailed assessment. Nothing in the Costs Judgment indicated that the Jones Tribunal had adopted a punitive approach.

Ground 4

d. Whilst the ways in which the Jones Tribunal had failed to ensure compliance with the overriding objective in ensuring a level playing field had not been identified in the grounds of appeal, it had been clear, from [28], that the Jones Tribunal had been aware of its obligations and had had regard to appropriate considerations. It had also had in mind the requirements of the ETBB, affording the claimant 45 minutes in which to consider and process authority provided by the respondents' solicitor, a matter to which the judicial member had made reference at paragraph [ii] of his judgment on reconsideration, sent to the parties on 27 September 2016, following the claimant's unsuccessful application of 2 September 2016:

> **"[ii] The claimant was given all reasonable opportunity to address the issues. At the commencement of the hearing a period of 45 minutes was provided for the claimant to consider the authority on costs and the summary of extract from his emails produced by the respondents' representative. The claimant declined the offer of two further breaks during the hearing. He was invited to ask any questions about, or seek any explanation of, any matter he felt needed clarification."**

It was a matter for the claimant where he had chosen to sit when reading that authority, a question not engaged by this ground of appeal.

e. The third limb of ground 4 was unparticularised, but it was plain that the Jones Tribunal had had the history of the litigation at the forefront of its thinking when considering whether it had jurisdiction to make an order for costs and, if so, in what sum. It could not have been expected to accept the substantive merit in a claim which

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had not been determined because it had been struck out.

Discussion and Conclusions

17. I am satisfied that it is appropriate that the respondents be permitted to attend and respond to this appeal, notwithstanding the late submission of their skeleton argument. That document was submitted just under seven hours late to the Employment Appeal Tribunal and was copied to the claimant just under ten hours late, two weeks before the hearing of this appeal. I am satisfied that the claimant had sufficient time in which to process its content (had he chosen to do so), which, in any event, closely followed that of the Respondents' Answer, and that he has properly understood the bases upon which the respondents resist this appeal and been given and taken an opportunity to address them.

18. Rule 76(1)(a) of the Rules confers on a tribunal the power to make a costs order where "a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted". There are three stages to be considered. At stage one, the tribunal must decide whether the party in question has acted as set out in rule 76(1)(a). If so, the tribunal must consider whether it should exercise its discretion to make a costs order: **Robinson v Hall Gregory Recruitment Ltd** [2014] IRLR 761, EAT (stage two). Its discretion is broad, but is to be exercised having regard to all the circumstances: **AQ Ltd v Holden** [2012] IRLR 648, EAT. In cases in which reliance is placed upon unreasonable conduct, "…the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion, but that is not the same as requiring the receiving party to prove that specific unreasonable conduct by the paying party caused particular costs to be incurred": **McPherson v BNP Paribas (London Branch)** [2004] ICR 1398, CA [40], per Mummery LJ. In **Yerrakalva v Barnsley MBC** [2012] IRLR 78, CA [41], Mummery LJ said:

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> **"The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. The main thrust of the passages cited above from my judgment in McPherson was to reject as erroneous the submissions to the court that, in deciding whether to make a costs order, the ET had to determine whether or not there was a precise causal link between the unreasonable conduct and the specific costs being claimed. In rejecting that submission, I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances."**

Should the tribunal decide to exercise its discretion, the final stage is to consider the sum which the paying party ought to be ordered to pay. That, too, is a discretionary exercise. Per rule 84 of the Rules, the tribunal may have regard to that party's ability to pay. Costs orders are compensatory and must not be punitive: **Lodwick v Southwark London Borough Council** [2004] IRLR 554, CA [23]. A summary assessment of costs is appropriate where the tribunal both considers itself able to make such an assessment and is satisfied that it would compensate the receiving party for the costs attributable to the vexatious, abusive, disruptive or unreasonable conduct which has led to the decision to make a costs order: **Kovacs**.

19. This appeal fails for the following reasons.

20. The Jones Tribunal recited rule 76(1)(a) and 84 of the Rules at [22] and [23] of the Costs Judgment. It cited the relevant passages from **McPherson** and **Yerrakalva** at [25] and [26]. It found that proceedings had been derailed by the claimant's failure to provide his evidence as required, coupled with his evinced animosity to doing so in the future, constituting unreasonable conduct of litigation [29]. Having then set out examples of the claimant's correspondence, dating from 16 April 2015 to 28 July 2016, at [31] and [32] and noted that they represented a small fraction of the voluminous correspondence which he had sent and that the sending of such material, self-evidently, constituted unreasonable and abusive conduct of litigation [33], it held that the threshold requirement imposed by rule 76(1)(a) of the Rules had been met (stage one). It went on to record its obligation (as

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noted in **Robinson**), when considering whether to make an order for costs (stage two), to consider all relevant factors, their nature, gravity and effect [37]. That reflected the approach set out in **Holden** and in **McPherson**.

21. The Jones Tribunal noted that the conduct in question had been sustained, serious and fatal to the proper determination of the issues raised in a case of a type in which service of evidence in written form had been essential [38]. It found that [39]:

> **"For the claimant to cease to cooperate in orders to bring the matter to a hearing but to pour his energies into an epic assault on the integrity of senior employees of the respondents and the Tribunal service, was to cause avoidable expense to be incurred and the work that had been undertaken in preparation for the hearing wasted."**

That finding had regard to causation (see **Yerrakalva**), albeit that it was not necessary for the receiving party to prove that specific unreasonable conduct by the paying party had caused particular costs to be incurred (see **McPherson** and **Yerrakalva**).

22. Finally, the Jones Tribunal moved to stage three. In accordance with rule 84 of the Rules, it considered the claimant's ability to pay ([40] and [41]), concluding that:

> **"Having regard to the nature and gravity of the claimant's conduct, we are satisfied that it is appropriate that an order for costs is made, notwithstanding the claimant's financial circumstances. In respect of the amount claimed, we do not consider the claimant's means influence that, given they can only realistically be recouped out of the capital in his property, which is sufficient to cover the full sum claimed."**

From [43], it is apparent that the Jones Tribunal bore in mind the **Lodwick** principle, making deductions from the sum claimed accordingly. It is of note that, at [8], when citing the respondents' submissions, the Jones Tribunal recorded:

> **"[Mrs Oldroyd] amended the schedule to reduce the claim to £23,278, that being to reflect a reduction in counsel's fee (the case not running the full five days) and accepting the Tribunal's proposition that VAT paid by the respondents could be offset as an output in its returns, so was not a loss which could be recovered from the claimant."**

It is plain, from both paragraphs, that, in accordance with **Kovacs**, it considered itself able to make a summary assessment, applied its mind to the sums properly recoverable and considered that the sum awarded would reflect proper compensation for the conduct which it had identified. In short, all three

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stages of the exercise were properly considered and applied by the Jones Tribunal. Addressing the specific grounds of appeal:

Ground 1

a. Both limbs of ground 1 fail. The Jones Tribunal properly had regard to all relevant circumstances, including those which had led to the claimant's failure to comply with earlier case management orders. At [27], it cross-referred to its earlier conclusions as to the effect of the medical evidence and the claimant's own demonstration of his ability to communicate over the relevant period, which had been set out at [4] to [6] of the Strike Out Judgment:

> **"4. In none of the correspondence does the claimant address the reasons for his failure to comply with the case management orders. He makes it clear that he believes he should not be required to give any such explanation at the moment. He states in two of the emails that he cannot be put under pressure for at least two weeks and that he had a sicknote which informed the tribunal of that, and that he cannot understand how the tribunal can overrule his GP, in recommending that he avoids all tribunal related stress for two weeks. That is not an accurate account of what the medical evidence states. The fit to work note refers to the claimant being in no mental state to attend the Tribunal. The earlier order imposed no such requirement. Mr Hutchinson specifically introduces his opinion of the claimant's "suitability to attend any Employment Tribunal at the present time [emphasis added]".**
>
> **5. In none of the medical opinion submitted is it suggested that the claimant cannot provide a response in writing to the information sought by the Tribunal; namely why he did not provide his documentation to the respondent by 21 January 2016 or why he did not provide a witness statement to the respondent by 18 February 2016. As explained above, it is not correct that his GP recommended that he avoids all Tribunal stress for two weeks; nor does his psychotherapist provide evidence of that type.**
>
> **6. The Tribunal did not require the claimant to provide a witness statement or serve his documentation by 14 March 2016 coupled with an unless order whereby the claims would be struck out in the event of non-compliance. Rather it only required the claimant to provide an explanation why he had not complied with the orders to do so and how, in those circumstances, a fair trial was nevertheless possible. As indicated in the reasons to the previous Order, the claimant has demonstrated an ability to write to the Tribunal during the last week to express his views in clear, if not florid, terms. It is more than apparent from his correspondence that he was capable of providing the information requested."**

As the claimant acknowledges, those conclusions stand and cannot be attacked in this

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appeal. They demonstrate that, when striking out his claim, the Jones Tribunal had full regard to the available medical evidence and what it served to indicate, in all the circumstances. Ground 1 is misconceived.

Ground 2

b. This ground is similarly misconceived. In so far as it arises from the flawed premise of ground 1, it necessarily fails. Further, it is clear from [8] and [43] that the Jones Tribunal had well in mind the need to exclude costs “legitimately incurred from the issue of proceedings” and discounted the sum awarded to reflect them. In so doing, it had regard to the sum which it was appropriate to award, having referred to the relevant history, including the matters which had led to the striking out of the claim. It would not have been appropriate for the Jones Tribunal to have informed its approach by accepting as fact that which had not been and would not be determined because the claim had been struck out. Paragraph 16 of the Costs Judgment records the claimant's submissions as to the need for a causal link between the conduct impugned and the costs awarded. I accept Mr Smith's submission that, in the context of this case, the Jones Tribunal is not to be criticised for conducting a summary assessment of the costs incurred. Further, the granular analysis which the claimant contends ought to have been conducted in this case was not required of such an assessment and the claimant declined to make any submissions as to the sum which ought to payable [20]. The claimant's submission, advanced for the first time in reply, that rules 78(1)(a) and (b) of the Rules precluded a summary assessment is not encompassed by this ground of appeal, nor is the broader submission, also advanced for the first time in reply, that the Jones Tribunal, or any member of it, ought not to have determined the costs application at all.

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Ground 3

c. The bases upon which the Jones Tribunal considered that the costs order which it made was appropriate are set out clearly in the Costs Judgment. The claimant's sending of the correspondence to which it referred was expressly found to have constituted the relevant unreasonable, abusive, disruptive and vexatious conduct [33] for the purposes of rule 76(1)(a) of the Rules. It was that conduct which was found to have caused avoidable expense and the wasted costs of the work undertaken in preparation for the hearing [39], the vast majority of which said to have resulted from a course of unreasonable and disruptive conduct which had commenced at an early stage of the case [43]. There is nothing to indicate that the Jones Tribunal adopted a punitive approach, which is contraindicated by [8] and [43] of the Costs Judgment. The premise of ground 3 is flawed and the ground, generally, misconceived.

Ground 4

d. This ground is similarly misconceived. The overriding objective of the Rules is to enable employment tribunals to deal with cases fairly and justly, including in the ways specified by paragraphs (a) to (e) of rule 2. The asserted failures to have ensured that there was a level playing field (adopting the wording of rule 2(a), *"that the parties are on an equal footing"*), or to have regard to the considerations set out in the ETBB are not made out, having regard, in particular, to [27] to [29] and [35] of the Costs Judgment; to paragraph [ii] of the reconsideration judgment; and to the detailed submissions which the claimant made before the Jones Tribunal, encompassing submissions on the law (including by reference to the authority with which he had been provided on the morning of the hearing [16] as well as to authority other than that on which the respondents had relied), as recorded at [9] to [20] of the Costs

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Judgment. That also addresses the matter raised by Mr Dawson, set out at paragraph 11, above. That the history of the litigation and the claimant's perception of it (as set out in the Jones Tribunal's summary of his submissions) had been in mind is amply apparent from the Costs Judgment. In any event, the claimant's perception could not be determinative and fell to be considered in the context of the Jones Tribunal's findings at [27] and [29], its earlier analysis of that which the medical evidence did and did not serve to indicate, and the way in which the claimant had presented before it.

Disposal

23. It follows that all grounds of appeal are dismissed; the costs order made by the Jones Tribunal stands.

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