Employment

Recovery position

Chris Bryden & Michael Salter consider tactics for the recovery of costs in employment cases

IN BRIEF

- Recovery of costs is very much the exception in the tribunal.
- All such applications are fact-specific & precedent is of limited application.
- However, guidance can be gleaned from appellate decisions.

The award of costs is governed by r 40 of the Employment Tribunals Rules of Procedure, which provide a discretion to award costs where "the paying party has in bringing the proceedings, or he or his representative has in conducting the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably, or the bringing or conducting of the proceedings by the paying party has been misconceived". The rule is widely drawn and, since its amendment on 6 April 2012, allows a tribunal to award up to £20,000 of costs, to award such sum as the parties agree, or to send the costs to the county court to be assessed if the likely sum is higher than the upper limit it is allowed to award. By r 41(2), the tribunal may (but does not have to) have regard to the paying party's "ability to pay", both in determining the principle, and the quantum of a costs award. According to the Ministry of Justice's statistics for the year April 2010-March 2011 (published in September 2011), 487 costs awards (out of a total of 218,000 claims) were made, with an approximate percentage split between claimants and respondents of 25:75. Recovery of costs by a successful party in the employment tribunal clearly remains very much the exception rather than the rule.

However, in recent weeks, a number of decisions relating to costs have been promulgated by the Employment Appeal Tribunal (EAT), which provide further guidance as to circumstances in which it may, or may not be, appropriate for the tribunal to exercise its discretion to award costs. Whether this is part of a move towards tacit endorsement by the EAT of more costs awards being made, or simply a flurry of appeals that have led to clarification, is not known. However, the three cases discussed below are worthy of note by employment law practitioners when considering the tactical approach to seeking to recover costs.

> "Recovery of costs by a successful party in the employment tribunal clearly remains very much the exception rather than the rule"

Peat

In *Peat & Ors v Birmingham City Council (Practice and Procedure: Costs)* [2012] UKEAT 0503/11/1004, the EAT considered an appeal against an award of costs against ten sample claimants. The respondent had on 18 October 2010 sent to the claimants' solicitors a letter setting out the basis upon which it considered that the claimants had no reasonable prospects of success and putting them on notice of an application for costs (a "costs warning"). The claimants having been unsuccessful at the hearing, the employment tribunal awarded costs from 21 October 2010 on the basis that the claimants had acted unreasonably by pursuing the case after receipt of the costs warning letter, and also because part of their assertions were misconceived. The claimants appealed.

In considering the appeal, the EAT reminded itself that the discretion to award costs should not readily be interfered with by an appellate court, and noted the correct approach was not to consider what the EAT would have done, but whether the employment tribunal took into account matters it ought not to have done, failed to take into account what it should have done, or came to a conclusion no tribunal properly directed could have done (*Beynon and others v Scadden and others* [1999] IRLR 700). The EAT also referred to the dictum of Mummery LJ in *Barnsley Metropolitan Borough Council v Yerrakalva* [2011] EWCA Civ 1255, in which he reiterated the disinclination of appellate courts to interfere with the limited discretion of tribunals to award costs, and noting that precedent was of limited assistance, save as to the application of principles. The facts of each case would likely determine the outcome.

The EAT in *Peat* upheld the decision of the tribunal below. It was noted that the costs warning letter predicted, in a reasoned manner, the outcome of the central point in the case, and it was unreasonable for the claimants not to have engaged with the point made therein. The EAT determined that, had the claimants' solicitors properly engaged with the point, they would have concluded that it was not worth going on with the case, and this amounted to unreasonable conduct. It was not necessary also to show that there were not reasonable prospects of success.

It is important to note that *Peat* does not, as has been suggested elsewhere, establish a principle that the dispatch of a costs warning letter, followed by success, means that an application for costs will necessarily succeed. The tribunal was careful to steer away from any such suggestion, stating: "Certainly, we should not wish to give the impression that a costs warning letter should always or generally have the effect of putting a party at risk as to costs. This was, however, a highly unusual case. It was by way of being a test case. The claimants were at the opposite end of the spectrum from those unsophisticated and unrepresented parties who are involved in many tribunal cases: they were represented by solicitors and counsel who are both well respected specialists in employment

law. They faced a trial which was bound to be lengthy and costly. They had the full evidential package for the trial, and were given what we have found to be an 'apparent conclusive opposition' to their cases. In the face of that, they went on and lost, and they did so on substantially the grounds that had been identified in the warning letter. We have concluded that in so doing they acted unreasonably." Thus, the point made in *Yerrakalva* must at all times be borne in mind.

Rogers

However, while a costs warning letter will not, of itself, have the general effect of putting a party at risk as to costs, it may be that the failure to issue a costs warning will make it harder to recover costs. In *Rogers v Dorothy Barley School* [2012] UKEAT 0013/12/1403, Mr Rogers appealed from a clearly correct determination that the employment tribunal did not have jurisdiction to hear his breach of contract claim in circumstances where he was still employed. However, an application for costs of the misconceived appeal was refused. Mr Recorder Luba QC applied his discretion and gave four reasons for the refusal. The first was that, despite the employer knowing that Rogers was in person and did not grasp the jurisdictional point, no costs warning letter had been sent; second, no notice of the application for costs was given; third, no indication of the quantum of costs had been given; and, finally, there was an element that the respondent had brought the proceedings upon itself. This appears to be a pragmatic exercise of discretion. While *Yerrakalva* should again be borne in mind, a submission based on *Rogers* against an ambush costs application may have significant force.

Doyle

Finally, in *Doyle v North West London Hospitals NHS Trust (Practice and Procedure: Costs)* [2012] UKEAT 0271/11/0404, a costs award for the full amount of costs, to be subject to assessment was made. The costs were likely to be significant (up to £95,000, with the estimate at trial having been £60,000). While criticism was made of the decision to award the whole sum of costs, the appeal was not upheld on this ground. However, it was common ground that no consideration as to the means of the appellant to pay had been given. The issue had not been raised, and, it was submitted, therefore there was no obligation to consider means. The EAT considered that the failure to consider means was nevertheless an error of law, whether procedural irregularity, a failure to deal with the case justly, or *Wednesbury* unreasonableness. While the EAT went to some lengths to stress that they were not seeking to lay down a point of principle in this regard, it is clear that the decision was at least tinged with sympathy for the appellant. Practitioners would be wise to ensure where large costs awards are being sought, that means are at least considered even if to be dismissed, to avoid the risk of appeal. This is to include their capital assets (see *Shields Automotive v Greig* UKEATS 0024/10/BI).

Costs decisions will always turn on the facts of the individual cases; however, the purpose of highlighting the decisions above is to demonstrate examples of judicial thinking which, it appears, are intended to produce a fair result, rather than rigidly to apply principle. NLJ

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