Costly developments in the tribunal

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Although the number of costs awards in tribunals remains low, the possibility of a costs order can be an important negotiating tool. A handful of recent cases highlight some practical points to bear in mind.

Tribunal statistics: increase in costs awards

According to ET and EAT statistics for 2011-12, the total number of costs awards (excluding wasted costs and preparation time orders) increased by almost 25% from 487 to 612 (discounting a single case where £5 awards were made against 800 claimants). The number for the previous year was 412. Despite the year-on-year increase, the ratio of costs awards to hearings remains low at 1:100 and is actually lower than 10 years ago. This could be seen as evidence either that there are not quite as many unmeritorious cases reaching the tribunal as some suggest, or that the judiciary needs further encouragement to make awards in appropriate cases.

Of course, the potential for costs orders is not restricted to misconceived claims: some respondents also act unreasonably (for example, contesting that a particular claimant is disabled when this is clear cut).

Practical tips when seeking a costs order

First, consider whether a costs warning and subsequent application is appropriate. Dishonesty is relevant but not determinative of whether a costs order is appropriate. In *Topic*, the EAT upheld the ET's costs award in favour of the respondent despite the ET's finding that the claimant had not deliberately lied (instead ruling that her perception of reality was damaged and unreliable). Consider whether your own client's conduct has in any way led to the outcome giving rise to the application – this was relevant to the EAT's refusal of the respondent's application in *Rogers*.

Second, where appropriate, issue a written costs warning as early as possible, setting out reasons, so the other party is put on clear notice that you intend to pursue this course of action if the case proceeds in a certain way. In *Rogers*, the EAT emphasised the importance of this. It refused the respondent's application despite ruling that the claimant's appeal was misconceived (as the tribunal had no jurisdiction to consider the claim), partly on the basis that the respondent had not warned the claimant at the start of the appeal process (or at all) that if he proceeded, it intended to apply for costs.

Third, ensure the costs warning letter is worded moderately and that communications regarding any costs threat are appropriate. Consider suggesting to unrepresented claimants where they might go for legal advice. Aggravated damages can be awarded for oppressive conduct in defending discrimination claims (as confirmed by the EAT in *Zaiwalla*), which could include oppressive costs warning letters. This was part of the reason for aggravated damages in *Allison*.

Fourth, make the application for costs in advance of the hearing, complying with ET Regulations rule 11(4) by informing the other party of the reasons for your application and that it has the right to object. In *Rogers*, the EAT refused the respondent's appeal against costs partly on the basis that no notice of the application for costs had been given prior to the EAT hearing.

Fifth, provide the other party with a schedule of your costs before the hearing, so it has the opportunity to dispute the amount. The importance of this was set out in *Rogers*.

Costs in excess of £20,000 are currently determined by way of detailed assessment in a county court, in accordance with part 47 of the CPR. The receiving party sets out a bill of costs to which the paying party responds by serving points of dispute. The receiving party may then file a reply before applying to the court for a hearing. Some practical tips are as follows:

- the tribunal normally orders that the county court assess costs on the standard basis, so costs must usually be proportionate and reasonably incurred. Keeping a file of

'a refusal to engage with a costs warning letter can amount to unreasonable conduct'

all costs incurred with detailed records of time spent by fee earners is therefore important;
- the receiving party must be ready to justify why senior team members acted on tasks since common challenges to bills of costs include high hourly rates, too many fee earners and unnecessary use of counsel;
- it is worth trying to settle costs proceedings. Making an offer to settle can avoid further costs being incurred in a hearing, and CPR 47.19 provides that the costs judge may take into account written offers to settle when deciding which party should pay the costs of the hearing.

Practical tips when threatened with a costs order

First, ensure you engage with the costs warning letter. In *Peat*, the EAT held that a party's refusal to engage with a costs warning letter can amount to unreasonable conduct. The tribunal awarded costs against the claimants for the unreasonable pursuit of their case following a costs warning letter, finding that their solicitors had failed to engage with the material points of the letter. The EAT dismissed the claimants' appeal, noting that engaging properly with the letter 'would have led them to an earlier assessment of the merits of their claims'. It also held that the respondents did not need to establish that the claims were misconceived.

Second, consider the paying party's ability to pay. ET Regulations rule 41(2) states that, in deciding whether to award costs or how much to award, a tribunal 'may have regard to the paying party's ability to pay'. In *Doyle*, the EAT held that it will sometimes be for the tribunal to raise the issue of the potential paying party's ability to pay costs, and that it should give reasons if it decides not to have regard to ability to pay. The EAT held that, particularly in the face of a substantial award (approximately £100,000) and the fact that there was nothing to clearly suggest that the claimant would be able to pay, the tribunal's failure to raise the issue of costs was 'an error of law which may have led to a substantial injustice to the appellant'.

In *Oni*, the EAT indicated that tribunals should encourage parties to use the county court form EX140 (record of examination of an individual debtor, setting out their financial position) for this purpose. This form is already used to assess means in cases referred to the county court for detailed assessment. You should also prepare a cost bundle containing evidence regarding your client's ability to pay.

Third, review the costs schedule carefully. There does not need to be a direct causal link between conduct and costs, but a broad approach to causation should be taken, according to the EAT in *Yerrakalva* (reported in *ELA Briefing,* page 6, March 2012).

If a costs application proceeds to county court assessment, the paying party should take care when drafting the points of dispute in response to the bill of costs since the costs judge is likely to focus on the points of dispute.

Appeals

If a costs award is made by a tribunal, note that appeals on costs alone rarely succeed. In *Yerrakalva*, Mummery LJ commented: 'The ET's power to order costs is more sparingly exercised and is more circumscribed by the ET's rules than that of the ordinary courts … An appeal

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'costs orders likely to be in excess of £20,000 will no longer have to be referred to the county court'

against a costs order is doomed to failure, unless it is established that the order is vitiated by an error of legal principle, or that the order was not based on the relevant circumstances.'

The future

Following Mr Justice Underhill's review of employment tribunal practice and procedure, new draft rules were attached to the review summary dated 29 June 2012. These were subject to consultation until 23 November 2012. The Government published its response on 14 March 2013 and announced that a revised draft of the new rules would be published and laid before Parliament in May 2013 and come into force in summer 2013.

Underhill J's review summary stated: 'We have seen no case for changing the substantive criteria for the award of costs.' The new rules on costs have been redrafted; however, the primary aim appears to have been to simplify them. The key substantive change proposed is that costs orders likely to be in excess of £20,000 will no longer have to be referred to the county court for detailed assessment but may instead be assessed by employment judges. Although this may speed up the process, they may have little experience of dealing with detailed costs applications, so it is hoped that appropriate training and guidance will be given. Some 53% of respondents to the Government's consultation were not sure that assessment by employment judges was a good idea. However, the Government does not propose to change this provision in the interests of simplification of the rules and on the basis that employment judges will be able to refer the matter to a county court if they wish. Where the award sought is high, it may be preferable for practitioners to seek that the cost assessment is referred to an experienced costs judge in the county court.

This area may be subject to further change since Underhill J noted that the Minister for Employment Relations and Consumer Affairs had 'expressed some concern about the apparently small number of cases in which costs orders are made, which seems unlikely to reflect the real incidence of conduct satisfying the criteria for the award of costs'. Moreover, paragraph 55 of the BIS Consultation Paper states: 'Anecdotal evidence from the judiciary suggests that there may be more cases than this where a cost award might be warranted by an individual's behaviour at tribunal, but judges are not making orders.'

The Government's response to Underhill J's review states that the presidents are encouraged to address costs in their guidance: 'Government was struck by the number of responses, from differing sides, who asked for presidential guidance to address the costs regime in more detail … Responses suggest that there are concerns from both sides: that a threat of potential costs orders being made is used by some legal representatives to push parties into settling, and that parties are not aware of when the opposing party's behaviour might warrant them requesting that the judge make a costs order. It would seem that further guidance would be welcome from both these standpoints.'

Whether the number of costs orders is set to increase further is likely to depend on any such guidance.

KEY:

Rogers	*Rogers v Dorothy Barley School* UKEAT/0013/12/LA
Peat	*Peat & ors v Birmingham City Council* UKEAT/0503/11/CEA
Oni	*Oni v NHS Leicester City (formerly Leicester City PCT)* UKEAT/0144/12
ET Regulations	Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004
Doyle	*Doyle v NW London Hospitals NHS Trust* UKEAT/0271/11/RN
Zaiwalla	*Zaiwalla & Co & anor v Walia* UKEAT/451/00 and UKEAT/827/00
Allison	*Allison v Nationwide Security & Harewood (Watford)* (Case No 3301874/07) (5 December 2008, unreported)
CPR	Civil Procedure Rules 1998
Topic	*Topic v Hollyland Pitta Bakery* UKEAT/0523/11/MAA
Yerrakalva	*Barnsley MBC v Yerrakalva* [2010] UKEAT/0231/10, [2012] IRLR 78, CoA