Case 106
Kuwait Oil Company

v

Al-Tarkait

[2020] Costs LR 1923

Neutral Citation Number: [2020] EWCA Civ 1752
Court of Appeal (Civil Division)
21 December 2020

Before:
Bean, Simler and Andrews LJJ

Keywords:
employment tribunal costs

Headnote

In an employment tribunal claim in which the former employee had failed in his claim for disability discrimination and wrongful dismissal, but had succeeded in respect of unfair dismissal, the Employment Appeals Tribunal had not erred in upholding the decision of the tribunal placing a cap on the final amount to be paid in costs by him to the respondent. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 at para 78(1)(a) permitted the employment tribunal to order payment of a specific sum up to £20,000, having regard to a paying party's ability to pay, and under reg 78(1)(b), to direct a detailed assessment in respect of higher sums, and to limit the amount payable to no more than the compensation awarded and any costs awarded against the respondent. In that way, the claimant would not be out of pocket, save in so far as his own costs were concerned. Here, there had been an order for detailed assessment of the

respondent's costs under para 78(1)(b) limited to the sum of compensation awarded to the claimant (£79,724.20) when added to the costs awarded to him (£4,900). The amount payable would be determined by the costs assessor at detailed assessment, subject to that cap. Such an order did not oust or usurp the jurisdiction of the costs assessor, but merely established the outer limit within which the costs were to be assessed. Appeal dismissed.

Cases Cited

Jilley v *Birmingham and Solihull Mental Health NHS Trust* [2007] UKEAT/0584/06/DA
Polkey v *AE Dayton Services Ltd* [1987] UKHL 8
Swissport Ltd v *Exley and Others* [2017] UKEAT/0007/16/JOJ

Judgment

Simler LJ:

Introduction

1. This appeal raises a short but important point of construction not previously considered at the level of this court, in relation to the rules relating to awards of costs in employment tribunal proceedings. The essential question is whether an employment tribunal has jurisdiction under the relevant rules to place a cap on the potential award of costs that might be made when it makes an order for costs which are likely to exceed £20,000 and should therefore be sent for detailed assessment. Both the employment tribunal and the Employment Appeal Tribunal said yes but Mr Duggan QC for the appellant contends they erred in law and there is no jurisdiction under the rules to do this. He invites this court (as he unsuccessfully invited the Employment Appeal Tribunal to do) to remove the cap but to leave the order otherwise undisturbed. Dr Al-Tarkait has played no part in the appeal.

2. The question arises in this way. Following lengthy proceedings,

Dr Al-Tarkait's claims for disability discrimination and wrongful dismissal failed, but his unfair dismissal claim succeeded. Following a Remedy Hearing, by a judgment with reasons promulgated on 9 November 2018, the employment tribunal (Employment Judge Tayler, Mrs Cameron and Mr McLaughlin, "the Tayler Tribunal") made reductions to both the compensatory and basic awards to reflect *Polkey* and contributory fault respectively, and then awarded compensation totalling £79,724.20 to Dr Al-Tarkait, with payment stayed because of the costs decisions made at the same time.

3. Each of the parties made a costs application against the other because of the way the proceedings were conducted. Both costs applications succeeded in part. The Tayler Tribunal made a small award of costs of £4,900 in favour of Dr Al-Tarkait (who was the claimant below but is the respondent to this appeal). The order reads as follows:

> "3. The claimant is awarded costs in respect of the respondent's failure to disclose documentation attached to the investigation report until an application was made to the tribunal. Otherwise the claimant's application for costs is dismissed."

There is no appeal from this order.

4. The award of costs in favour of Kuwait Oil Company (the respondent below but the appellant on this appeal) was in terms as follows:

> "4. The respondent is awarded the costs incurred by reason of the claimant raising the matters that were dismissed by consent or by decision of the Auerbach tribunal [which had conducted a substantial case management hearing]. Those costs are limited to a maximum sum of the compensation awarded to the claimant added to the costs awarded to the claimant."

The effect of para 4 of the order was to cap the costs the appellant could recover from Dr Al-Tarkait in an amount that would ensure that Dr Al-Tarkait was not, overall, out of pocket from the proceedings save in respect of his own costs.

5. The Tayler Tribunal directed that should either or both parties require a taxation of the costs award, applications should be made to the tribunal to that effect. Accordingly, no order was made as to who should conduct the detailed assessment of the costs to be paid.

However, at para 5, the Tayler Tribunal urged the parties to consider the additional costs that would be involved in taxation and the proportionality of such a course of action.

The Relevant Costs Rules

6. The power to make a costs order derives from the Employment Tribunal Rules of Procedure, contained in Schedule 1 to the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, rules 74 to 84 ("the Rules"). Rule 76 provides the power to make a costs or preparation time order. It provides:

> "76
>
> (1) A tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that –
>
> (a) 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; or
>
> (b) any claim or response had no reasonable prospect of success; …"

7. Once the power to award costs has been exercised, rule 78 deals with the methods of determining the amount of costs to be paid, and is the rule on which this appeal is focused. It provides a number of different ways in which the amount of costs can be determined. So far as material it provides:

> "78
>
> (1) A costs order may –
>
> (a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;
>
> (b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles; …

(3) For the avoidance of doubt, the amount of a costs order under sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000."

8. Rule 79 deals with the amount of a preparation time order, rules 80 to 82 deal with wasted costs orders, and rule 83 deals with allowances. These rules do not concern us.

9. Finally so far as this statutory costs scheme is concerned, rule 84 is headed "Ability to pay". It applies to costs, preparation time and wasted costs orders. It gives employment tribunals discretion to take the paying party's ability to pay into account at two stages of any costs exercise: first, when deciding whether to make an order, and secondly, if an order is made, when deciding what amount should be awarded by way of costs. It states:

"84. In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay."

The Tayler Tribunal judgment

10. It is unnecessary to describe the course of the proceedings in any detail or to refer to the liability judgment in this case (dated 27 September 2017 and sent to the parties on 29 September 2017). For our purposes, we need only consider the costs award made by the Tayler Tribunal in favour of the appellant.

11. Although the appellant claimed costs under a number of different heads, the only head of costs awarded to it was in respect of its application for costs thrown away as a result of having had to deal with historic matters that were either withdrawn by consent or struck out by an earlier tribunal. In relation to those matters Dr Al-Tarkait was found to have acted unreasonably and his conduct was found to have put the appellant to significant expense, justifying an order for costs. The Tayler Tribunal accepted that costs were incurred in seeking the exclusion of historic material and that it was reasonable to expend some costs on considering rebuttal evidence but expressed itself to be "askance at the costs incurred in dealing with this matter" (para 31). It noted that, excluding sums claimed solely in respect of the postponement of the full merits hearing, the amount claimed by the appellant was £228,500 and said, "We do not accept that it was

reasonable for the respondent to incur anything like that level of costs in dealing with those historical allegations."

12. At para 32 the Tayler Tribunal addressed Dr Al-Tarkait's means as follows:

> "32. We also have had regard to the claimant's third statement in which he deals with his means. A number of the contentions he makes in respect of sums that have been lent to him by family members and in respect of matters such as a loan from his pension fund were not supported by documentation. This was despite a request from the respondent. We also note that we do not have a signed statement. However, we consider it is likely that the claimant has very limited financial resources. The most significant addition to his resources would be the payment of the compensation he is entitled to, by reason of his dismissal being unfair and the limited amount of costs we have awarded in respect of the respondent's failure to provide supporting documentation to the investigation report."

At paras 33 to 35 the Tayler Tribunal explained the basis for making the impugned capped award of costs in favour of the appellant as follows:

> "33. Pursuant to rule 78 we can award costs in a sum not exceeding £20,000 or to order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party. We consider that provision is drawn widely enough that we may apply a costs limit even if the costs are above the £20,000 limit so would require taxation. Should the parties apply costs will be subject to taxation. However, we urge them to consider the additional cost that would be involved in taxation and the proportionality of such a course of action.
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> 34. We limit the costs awarded to the respondent to the sum of the compensation awarded to the claimant and the costs awarded to the claimant. We do this on two grounds. The most important reason we make this decision, irrespective of our second ground, is because we do not see how the respondent should acting reasonably have incurred any costs in excess of that sum in dealing with the additional allegations. While we accept that they were entitled to take steps to have the background allegations removed and to carry out some reasonable investigation into rebuttal evidence they at most were background allegations. We consider that the amount of costs incurred in dealing

> with this matter was way out of proportion. While we accept those costs were incurred we consider that the costs awarded should be limited to that amount as a reasonable estimate of costs that could reasonably be incurred in dealing with this issue.
>
> 35. In addition, taking account of the claimant's financial resources, as we are entitled to pursuant to rule 84 of the Employment Tribunal Rules 2013, we consider that is a reasonable level which to set costs."

13. Accordingly, there were two freestanding grounds identified by the Tayler Tribunal for limiting the costs capable of being awarded in favour of the appellant under rule 78(1)(b). The first flowed from the conclusion that the respondent had not acted reasonably in incurring costs in excess of £84,000 in dealing with the historic allegations. The second reason related to the claimant's ability to pay. Pursuant to rule 84, the tribunal took this into account in setting a cap on the costs that could be awarded. Although the appellant is dissatisfied with the conclusion reached by the Tayler Tribunal that the total of costs incurred in defending the historic allegations was not reasonably incurred, Mr Duggan accepts that he cannot challenge that conclusion on this appeal having failed to obtain permission to do so. The appeal is limited to the question whether the tribunal had jurisdiction to set the cap it did under rule 78(1)(b).

The Employment Appeal Tribunal Judgment

14. The appellant's appeal to the Employment Appeal Tribunal failed and was dismissed. The Employment Appeal Tribunal (Kerr J) rejected Mr Duggan's submissions that the Tayler Tribunal had wrongly assumed the jurisdiction that would be exercised on a detailed assessment, whether by an employment judge or by a county court costs judge, and usurped the costs assessment jurisdiction by placing a ceiling on costs awarded when there was no power to do so in the rules and in particular under rule 78(1)(b). Kerr J held that an employment tribunal may have regard to ability to pay under rule 84 when making a non-fixed sum award under rule 78(1)(b), as well as when making a fixed sum award of £20,000 or less under rule 78(1)(a). In his view, there was nothing in the wording of rule 78(1)(b) to compel the contrary conclusion, which would be very undesirable since ability to pay may be important in either case, and perhaps even more important if Mr Duggan was correct (a point the Employment Appeal Tribunal

did not need to decide) that a costs judge in the county court is not allowed to step into the shoes of an employment judge and apply rule 84 when conducting a detailed assessment. The Employment Appeal Tribunal continued:

> "55. I see no reason why an employment tribunal should not take account of a paying party's ability to pay in a case where, for example, a very large amount of costs – far exceeding £20,000 – are incurred in relation to a discrete issue forming the subject matter of a 78(1)(b) order that the paying party pay the costs in respect of that issue as a 'specified part' of the receiving party's costs. Indeed, ability to pay is more important in cases where the award is likely to exceed the limit of £20,000 in rule 78(1)(a), than in cases where the award is fixed at £20,000 or less.
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> 56. In my judgment, the employment tribunal's power to take account of ability to pay is untrammelled; the tribunal may have regard to it in deciding both whether to make a costs order and 'if so in what amount'.
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> 57. It is true that rule 78(1)(b) uses the phrase 'whole or specified part of the costs', whereas 78(1)(a) uses the phrase 'a specified amount, not exceeding £20,000'. But a tribunal may have to decide whether to make an issue based costs order or a 'period' based costs order and ability to pay may be relevant to whether it should do so and in what terms. It would be unreal, in my judgment, for a tribunal in such a case to have to blind itself to the paying party's means."

The Employment Appeal Tribunal referred to two cases. First, *Jilley* v *Birmingham and Solihull Mental Health NHS Trust* [2007] UKEAT/0584/06/DA, which was decided under the 2004 Rules but rule 41(1)(c) (the predecessor to rule 78(1)(b)) was in materially identical terms. At [46]–[47] HHJ David Richardson said the following:

> "46. It occurred to this Appeal Tribunal, in the course of argument, that the tribunal might have taken the view that, if costs were to be the subject of detailed assessment, it was solely for the county court to take account of ability to pay. If the tribunal took that view it was in our judgment wrong. Even if a tribunal orders detailed assessment it is entitled, in the exercise of its discretion, to make an order for costs which takes account of ability to pay. It can, for example, order that only a specified part of the costs should be payable: see rule 41(1)(c).

> 47. Moreover rules 41(1) and (2) taken together are wide enough, in our judgment, to allow a tribunal to take account of ability to pay by placing a cap on an award of costs even where it orders a detailed assessment. Particularly if a tribunal is satisfied that a paying party has been frank as to his means, it may be positively desirable to do so. It may, for example, render it unnecessary to go through the expense of a detailed assessment, or assist parties to reach terms of payment."

This was said by Mr Duggan to be incorrect, and he maintained before us in any event, that this observation was not the subject of argument and was not necessary to the decision.

15. The Employment Appeal Tribunal also referred to *Swissport Ltd* v *Exley and Others* [2017] UKEAT/0007/16/JOJ, which was decided under the present Rules. The tribunal's costs order in that case was set out by the Employment Appeal Tribunal in that case as follows:

> "34. In the exercise of our discretion, we consider that the second respondent should pay to these claimants the entirety of their costs between the date of receipt of the response document and the conclusion of the Polkey hearing. That order is, of course, subject to a limitation if it is shown that the costs so calculated (see below) exceed 10% of the amounts awarded to each individual claimant."

The ceiling of 10% of compensation awarded to the claimants was imposed because of a "Damages Based Agreement" obliging the parties to pay their solicitors 10% of any compensation received, irrespective of the work done. The order was upheld. The Employment Appeal Tribunal (Slade J) noted that it was not argued in *Swissport* that the cap was objectionable in principle; without it, the indemnity principle would have been in danger of being breached.

16. Both before us and before the Employment Appeal Tribunal, Mr Duggan sought to distinguish the facts of *Swissport* from this case. He emphasised that the cap imposed in *Swissport* was made for very different reasons and irrespective of the Rules, because of the indemnity principle. In that sense it was not a "cap" that was being imposed as such, but merely an order that meant the indemnity principle was not breached. He submitted that a percentage ceiling on an award of costs could not have been made pursuant to rules 78(1)(b) and 84 because of a paying party's limited means.

The Appeal

17. The single ground of appeal is that both tribunals below erred in law in limiting the costs to be awarded under rule 78(1)(b) to the appellant, to a maximum of the total sum of compensation and costs awarded to Dr Al-Tarkait. As he did before the Employment Appeal Tribunal, Mr Duggan submitted the tribunal wrongly assumed the jurisdiction that would be exercised on a detailed assessment. Where an order is made under rule 78(1)(b) for the whole or a specified part of the receiving party's costs to be paid by a paying party, the amount payable can only be determined on a detailed assessment; it cannot be determined in advance of such an assessment by the tribunal applying a cap on the amount of costs recoverable.

18. He accepted that this submission creates an oddity in that if a detailed assessment is done by an employment judge, there is nothing to prevent the judge at the detailed assessment stage (but not before) from placing a cap on the paying party's costs liability, based on considerations that may include ability to pay applying rule 84. However if the detailed assessment is done by a costs judge in the county court, rule 84 has no application because the detailed assessment is conducted by reference to CPR 44. CPR 44.4 sets out the factors to be taken into account in deciding the amount of costs to be awarded and these do not include ability (or inability) to pay.

19. The consequence of Mr Duggan's construction of the Rules is that a tribunal can assess costs up to £20,000 and (pursuant to rule 84) take account of the paying party's ability to pay in fixing the amount payable (and form a view about the reasonableness of the costs claimed by the receiving party). However, where a costs order will exceed £20,000, a tribunal is in effect barred from forming a view of the reasonableness of the costs sought and significantly, from taking into account the question of ability to pay.

20. That, Mr Duggan submitted, follows from a proper construction of the Rules, and if there is a lacuna that does not justify a construction not warranted by a plain reading of the Rules. Moreover, while under rule 84, a tribunal is able to take account of ability to pay in deciding what amount of costs to award if and when it does so, that cannot trump rule 78(1)(b) which provides that the amount of costs is not to be determined by the tribunal but instead is to be determined by the assessor so that these factors cannot be taken into account accordingly, and rule 84 has no application.

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21. Although in the course of argument, Mr Duggan accepted that the words "specified part of the costs" in rule 78(1)(b) are wide enough to permit a tribunal to specify an award of say, 50% of the total costs incurred and send the award for detailed assessment on that basis, he argues that in fixing that amount the tribunal cannot take ability to pay into account.

Analysis and Conclusions

22. Like Kerr J in the Employment Appeal Tribunal, I reject Mr Duggan's construction of rule 78(1)(b). My reasons are the same as those given by the Employment Appeal Tribunal.

23. Rule 78(1)(b) is part of a scheme of rules dealing with costs, and must be read in that way. I consider that rules 78(1)(b) and 84 read together, enable a tribunal to have regard to ability to pay as a reason for ordering a "specified part of the costs" to be limited to a maximum fixed sum and for directing that the part of the costs so specified should be determined on detailed assessment subject to that maximum limit. There is no reason on the face of this costs scheme, to read rule 84 in the restricted way contended for by Mr Duggan; or to read rule 78(1)(b) as excluding consideration of ability to pay when deciding what the maximum amount of the specified part of the costs should be paid. There is nothing in the express wording of these rules requiring such an approach, and no purpose would be served by it. Nor did Mr Duggan suggest any.

24. As a matter of the plain meaning of the words used, there was and can be no dispute that the words "specified part of the costs" enable a tribunal to order that a fixed percentage of the total costs incurred (once assessed) should be paid and to direct detailed assessment of the costs on that basis; alternatively it can make an award that is issue specific or relates to a particular part of the proceedings only. In each case, although the costs are to be subject to detailed assessment, a limit is placed on the maximum that can be awarded. In the same way, I can see nothing in the words of rule 78(1)(b) that precludes a tribunal from making an order that the losing party should pay the costs incurred in dealing with, here, the part of the proceedings concerned with the historic allegations, subject to a maximum specified limit, with a detailed assessment to be conducted on that basis.

25. That does not involve a tribunal impermissibly usurping the

function of the detailed assessor in a case where costs exceed £20,000. There is no power under rule 78(1)(b) to assess costs in a specific amount. But a power to cap costs is not precluded because that is not what a cap on costs does. A cap sets a ceiling on the amount to be awarded by reference to what a tribunal considers reasonable for the losing party to pay, but does not determine a specific amount to be paid. That is for the assessor to do in a different and separate exercise that requires detailed scrutiny of the actual costs incurred by reference to a range of factors set out in the Civil Procedure Rules, which are well known but do not include ability to pay. Moreover, this approach has the advantage that, having dealt with the substantive issues in the case, the costs order under rule 78(1)(b) is made by the tribunal itself, which, having lived with the case is likely to be in the best position to assess what is reasonable in the circumstances.

26. Nor do I accept Mr Duggan's contention that the costs assessor's jurisdiction is ousted or usurped where a ceiling or cap on the specified part of the costs is imposed. A cap establishes the outer limit within which costs are to be assessed, but ultimately the amount to be awarded is determined by the assessor subject to that limit. While the limit acts as a constraint set by the tribunal, it does not determine the actual amount payable. The assessor has the function of and remains empowered to determine "the amount to be paid".

27. Moreover, this construction of the rule 78(1)(b) gives proper effect to the discretion available pursuant to rule 84. This is particularly important in the "no costs jurisdiction" represented by the employment tribunal system, where impecunious claimants come before tribunals seeking to vindicate their rights, but having in most cases, lost their employment and therefore their main source of income. As Mr Duggan acknowledged in his acceptance that his construction brought with it odd results, there is no good reason why an employment tribunal should be able to take account of a paying party's ability to pay in a case where costs do not exceed £20,000 but is unable to do so in a case where substantially larger sums than that are awarded and ability to pay is likely to be even more important. The position is even more stark on Mr Duggan's construction, in cases where detailed assessment is conducted by a county court costs judge (rather than an employment judge) who cannot have regard to ability to pay at all.

28. In light of these conclusions, I see no error in the approach of

the Employment Appeal Tribunal in either *Jilley* or *Swissport*. These decisions provide further persuasive support for the conclusion I have reached that rules 78(1)(b) and 84 are wide enough to permit a tribunal to order a detailed assessment of costs exceeding £20,000 while at the same time restricting the maximum sum of any such award by placing a cap on the final award by reference to the paying party's ability to pay. Further, as Kerr J observed, in *Swissport* a cap on costs imposed at the pre-assessment stage was not considered objectionable by anyone involved because the cap was necessary to avoid any risk of breach of the indemnity principle. If a cap can be imposed for that purpose, there is no sensible reason why it should not be imposed for other purposes including those relied on by the Tayler Tribunal in this case, namely to reflect the Tayler Tribunal's assessment of the maximum reasonable level of costs incurred and the paying party's ability to pay them.

29. For completeness, and again in agreement with Kerr J, I would add that even if the court had accepted that the costs order was unlawfully made, I would not have acceded to Mr Duggan's suggestion that this court simply remove the cap leaving the order otherwise intact. The correct approach would have been to set aside the costs order in favour of the appellant and remit that part of the costs application to the same employment tribunal for reconsideration.

30. However, for the reasons I have given, subject to the views of the other members of the court, I would uphold the Tayler Tribunal's costs order and dismiss the appeal.

31. **Andrews LJ:** I agree.

32. **Bean LJ:** I also agree.

Michael Duggan QC (instructed by Hfw Llp Solicitors) appeared for the appellant.

No attendance for the respondent.