

Employment Law Cases Update and Newsletter

March 2012

This is the third issue of Frederick Place Chambers newsletter. The first two issues were generally well-received and we aim to continue in the same vein.

This issue concentrates on the issue of costs in the employment tribunal. The days are long gone when costs were not an issue in employment tribunal proceedings.

The concept of “costs”, by definition exclusively concerned with money – is a highly sophisticated and complex area of law in its own right. Developed largely in the civil courts, the tentacles of costs law now reach out to the employment tribunal.

The very word “costs” can be seen to sum up the central feature of the English legal system – money. How many claims have been abandoned, and justice violated, because of fear of costs?

R. H. Spicer

Head of Chambers

Newsletter Contents

Welcome.....	p.1
Coping with.....	p.1
Case 1.....	p.2
Case 2.....	p.2
Case 3.....	p.3
Case 4.....	p.3
Opinion.....	p.4
News.....	p.5
Dates for your Diary.....	p.5

Coping with....Funding Employment Law Matters

It is a truth universally acknowledged that one of the first questions asked by almost all clients is “how much will this cost?”

And with good reason too. While we are not, yet, at the stage of charging for the submission of the Employment Tribunal claim form, there is a clear line of authority relating to the level of costs that can be incurred; not just your own lawyers’ fees but if you lose, but also possibly the fees of the other side. These fees can be exorbitant (see *Barnsley MBC v Yerrakalva*).

The problem is that most clients with serious legal employment problems don’t have the access to the sort of money that could be incurred; they have, after all, probably lost their job which is why they are consulting lawyers. While clients’ worries may be soothed to some extent, the uncertainty puts a lot of clients off enforcing their legal rights.

A lot of clients don’t realise, however, that there are alternatives. Firstly, advisers don’t need to cost the earth. Solicitors will try and work with their clients in order to come up with creative solutions and there other affordable alternatives out there. Secondly, clients may not realise that they have legal expenses insurance. The problem for us lawyers is that they have a “preferred panel” that they refer a lot of their work. However, there have recently been a number of cases enforcing the right to elect your own solicitor. If you do have this insurance, and have found a lawyer that you would like

Employment Law Cases

Wasted Costs in Employment Tribunals

Godfrey Morgan Solicitors Ltd v Cobalt Systems Ltd [2012] ICR 305, EAT

Facts A claimant entered into a contingency fee agreement with solicitors for claims against his employer. The claimant was liable for disbursements, which included the fee for a barrister if the matter went to a hearing. Proceedings were started and the matter could not be settled. The claimant was unable to pay the solicitor, who did not tell the other side that the claim would be withdrawn until a few days before the hearing. The employer's solicitor applied for a wasted costs order. At an oral hearing, the employment judge refused permission to the claimant's solicitor to introduce various attendance notes and letters. An order was made for costs wasted from the date when it became clear that the matter would not settle. The claimant's solicitor appealed to the EAT.

Decision

1. The appeal would be dismissed.
2. The decision of the employment judge not to allow the admission of documents so late in the day was within his discretion, given that an order for disclosure had been made three months previously.
3. The conduct found by the employment judge amounted to a breach of duty to the tribunal. It was plainly an abuse of process for a claim to be proceeded with which the claimant no longer wished to pursue.
4. On the findings made by the judge, who had preferred the claimant's evidence concerning the advice and instructions, it was the solicitor's fault that it had occurred.

Costs in Employment Tribunals – Unreasonable Conduct

Barnsley MBC v Yerrakalva [2012] IRLR 78, CA

Facts Y complained of disability discrimination. The employment tribunal ordered her to pay B's costs after she withdrew her claim. The basis for this was that at a pre-hearing claim, Y had been untruthful in statements about her health and her means. The tribunal commented that B had incurred costs which were quite disproportionate to the issues at stake. Y appealed successfully to the EAT. B then appealed to the Court of Appeal.

Decision

1. The appeal would be allowed in part.
2. There was solid evidence that Y had been untruthful. The tribunal had jurisdiction to award costs.
3. The tribunal had failed to factor into the exercise of its discretion the criticisms of the conduct of B. The costs order would be varied so that Y would pay 50 per cent of B's costs reasonably and necessarily incurred in relation to the pre-hearing review.
4. The vital point in exercising the discretion to order costs was to look at the whole picture of what had happened in the case and to ask whether there had been unreasonable conduct by the claimant in bringing and conducting it. If there had been such conduct, the tribunal should identify it, what was unreasonable about it and what effects it had

Employment Law Cases cont.

Costs - Means of claimant

Arrowsmith v Nottingham Trent University [2012] ICR 159, CA

Facts A was employed by N as a temporary agency worker. She applied, unsuccessfully, for a permanent position. She complained of sex discrimination, alleging that she had been refused the position because she was pregnant. N denied having knowledge of A's pregnancy until after completion of the selection process. The employment tribunal accepted this. N applied for a costs order against A on the basis that she had acted unreasonably in starting proceedings based on a series of untruths. The tribunal ordered A to pay £3000 towards N's costs, despite the fact that she was unemployed and no longer receiving maternity benefit. A appealed unsuccessfully to the EAT. She then appealed further to the Court of Appeal.

Decision

1. The appeal would be dismissed.
2. The question for consideration by an employment tribunal, in deciding whether an order for costs was justified under rule 40(2) of Schedule 1 to the 2004 Regulations was whether any of the circumstances referred to under rule 40(3) applied.
3. Such consideration was a fact-sensitive exercise. A lie on its own would not necessarily be enough to found an award of costs; it was for the tribunal to examine the context and the nature, gravity and effect of the lie in determining the unreasonableness of the alleged conduct.
4. In the present case, the tribunal had assessed A's conduct to be unreasonable based on its finding that she had made a case which was materially dependent on untrue assertions.
5. The tribunal had not been obliged to have regard to A's means. The fact that her ability to pay was limited did not require the tribunal to assess a sum confined to the amount that she could pay.

Costs – Conduct Before Proceedings Commenced

Agbodo v Hertfordshire County Council [2010] UKEAT/0243/09/JOJ

Facts A was employed by the respondent local authority as a social worker. He raised an internal complaint of bullying and harassment against his line manager, on the basis of race discrimination. This complaint was dismissed. A applied to the tribunal on the grounds of direct discrimination. The tribunal found the claim wholly unmeritorious and with no possible chance of success. The tribunal also concluded that A did not believe in the truth of his allegations, ought to have accepted an apology and behaved inappropriately with the respondent's solicitor during correspondence. A was ordered to pay the respondent's costs. A appealed to the EAT.

Decision

1. The appeal would be dismissed.
2. The tribunal had been entitled to award costs against a claimant who should have dropped his claim of race discrimination prior to bringing proceedings.
3. Conduct before proceedings is a relevant factor in concluding that there is no sincere belief in his claim's truth.
4. The tribunal reiterated that costs in the employment tribunal were to be exceptional. The key finding that triggered the costs award was that the case had no reasonable prospect of success.

Opinion

We are acutely aware of the crucial significance of costs in the present economic climate. We face a significant erosion of legal aid funding and a general reluctance and inability of clients to fund cases privately. The funding of cases can be highly problematic. One of our aims at Frederick Place Chambers is to deal with funding issues in a realistic and achievable way.

Most of our work is undertaken on a public access basis. Our overheads are low and our expenses are rigorously monitored. This means that we can adjust our fees to the means of the client wherever possible. In relation to matters where we are instructed by solicitors, we aim to apply the same broad principles. It is fair to say that we have never been criticised for charging excessive fees.

It's not just us trying to find creative ways in difficult and uncertain times; the wider legal profession is also changing. The typical roles and relationships are being eroded to leave solicitors with rights of audience and barristers able to conduct litigation. On top of this we have management committees running Chambers instead of traditional heads of chambers, and the new alternative business structures and legal disciplinary partnerships that are seeking to revolutionise the provision of legal services to provide a "one stop shop" for clients. However, despite these changes to our working relationships, clients are still missing out on affordable access to justice. The legal aid cuts will impact upon those in lower incomes. This impact will be made worse as it is those on lower incomes who traditionally have more problems with the legal issues that publically funded work covers, e.g. employment problems.

Justice Secretary Mr Clarke announced earlier this month that; "we're not taking legal aid from women and children, we're taking legal aid from lawyers." Surely Mr Clarke can see that taking legal aid from lawyers will impact on men, women and children, as solicitors and barristers become even more conscious of costs and thus are more unwilling to take on the risky or complicated or costly cases. The prospect of lawyers earning a living seems dirty somehow.

The problem is the legal profession's public image. We are split, into the stereotypical lawyer who earns a healthy wage working on complicated contractual disputes and who is given the same derision as bankers. The other side of the profession, who are usually found to be working in publicly funded work are given the label of being a corporate lawyer, but in reality are completely different.

While the political backdrop makes it challenging, lawyers must still endeavour to provide access to justice for all. In these current straitened economic times, the legal profession as a whole has a moral duty to make every effort to enable impecunious clients to obtain justice. Frederick Place Chambers takes this duty seriously and will continue to strive to seek justice for those clients who face funding difficulties.



9 Frederick Place
Clifton
Bristol
BS8 1AS

Tel : 0117 9467059
E-mail : Rsp4593558@aol.com
www.frederickchambers.co.uk

Chambers Update

This month, has seen a rapid influx of clients travelling to us from both Bristol and further afield. We unfortunately expect to see a rise in redundancy advice, as the austerity measures really squeeze the public sector, alongside the retail sector which is also falling fast. We have noticed a number of unscrupulous employers using the current downturn as an excuse for redundancy, and would advise anyone who thinks that they are at risk of redundancy and it is not a genuine redundancy situation to get in touch.

You may have seen a few more bits and pieces of Chambers' promotional material popping up as we continue to promote our services in and around Bristol.

This month sees the start of pupillage season kicking off. On the 28th March, Polly went to Matrix Chambers in London to spend the afternoon with them ahead of application season.

Also, don't forget to catch Wasted Costs fronted by our very own Head of Chambers playing in a venue near you soon.

Bristol Update

With all the doom and gloom surrounding the UK at the minute, it's nice to have a little chance to blow one own trumpet, and all us Bristol residents can give ours a hearty toot for being named Europe's Best Small City of the Future based on business friendliness and strength of its economy. With the launch of the Bristol Pound just around the corner, hopefully our economy will get an even bigger boost.

Dates for your Diary

Chambers will be closed on Good Friday and Easter Monday apart from emergencies.

April 6 th 2012	Increase in unfair dismissal qualifying period.
April 25 th 2012	Seminar on Recent Redundancy Developments All welcome. Please confirm by calling or emailing Chambers.

For weekly updates, follow our blog on www.frederickchambers.co.uk
Don't forget to like us on Facebook!