CA on appeal from the EAT before Thorpe LJ, Mummery LJ, Mr Justice Bennett. 13th May 2005

JUDGMENT : Lord Justice Mummery :

Introduction

1. This appeal is about an order for costs made by the employment tribunal and affirmed by the employment appeal tribunal, when the appellant, Mr Alasdair McPherson, withdrew his claims for unfair dismissal and breach of contract against his former employer, BNP Paribas, an investment bank. He was employed in the high yield sales team between 15 January 1999 and 29 September 2000 at a basic annual salary of £100,000, plus almost as much again in bonuses and other benefits. Mr McPherson claimed that he was constructively dismissed on 29 September; Paribas alleged that he was dismissed on 11 October for gross misconduct. Not long after his departure from BNP Paribas Mr McPherson obtained employment with another bank, Societe Generale, and he has continued to work for them throughout these proceedings.

2. The costs order is unusual in three respects: first, in the majority of cases employment tribunals do not make costs orders at all (see, for example, the comments in the recent Court of Appeal cases of **Gee v. Shell UK Ltd** [2003] IRLR 82 at paras 22, 35 and **Lodwick v. London Borough of Southwark** [2004] EWCA Civ 306 at paras 23-27); secondly, when a costs order is made by an employment tribunal, it is normally after a full hearing of the case on the merits, whereas the costs order in this case was made against an applicant, who withdrew his application several weeks before the full hearing was due to take place, so that there was never any decision on the substantive merits of his claims; and, thirdly, the amount of costs involved is, for a case that never had a full hearing, very large by tribunal standards, the bill presented by Paribas for detailed assessment totalling £90,747.82.

3. It is in those circumstances that the appeal raises a number of legal and practice points, which have not been considered in the authorities, on the exercise of the employment tribunal's discretion to make a costs order against an applicant who withdraws his claim.

The Employment Tribunal Proceedings

4. As the key question is whether Mr McPherson conducted the proceedings unreasonably, it is necessary to examine in detail the course of the proceedings. Mr McPherson presented his complaint to the employment tribunal on 17 October 2000. It was originally listed for hearing from 24 to 28 September 2001. On 21 August 2001 Mr McPherson's solicitors (Taylor Joynson Garrett,) now Taylor Wessing wrote to the solicitors for BNP Paribas (Clyde & Co) to notify them that their client was receiving specialist medical advice regarding a potentially serious heart complaint and that he had been advised that he might require heart surgery, but they did not intend at that stage to apply for an adjournment. A late application by Mr McPherson to postpone the hearing was in fact made and granted a month later. By an order dated 4 October 2001 the tribunal informed the parties that the case had been re-listed for hearing from 27 to 31 May 2002.

5. Neither the decision of the employment tribunal under appeal nor the other papers before this court reveal much about the conduct of the proceedings by Mr McPherson and his solicitors in the eleven months between their institution and the grant of the adjournment. This is relevant because the costs order ultimately made in favour of BNP Paribas was in respect of the whole of the tribunal proceedings and it was said to be justified by Mr McPherson's unreasonable conduct of them.

6. Mr McPherson's successful application for the adjournment of the hearing fixed for the end of September 2001 was supported by medical opinion contained in two letters dated 21 September, which had the effect of introducing Mr McPherson's state of health as a factor affecting the conduct of the proceedings. The letters were written by Mr McPherson's consultant cardiologist, Dr Laura Corr, to whom he had been referred by his GP, Dr Ruth Marchant, after a period in intensive care in hospital following an alarming cardiac incident earlier in 2001. Dr Corr explained that Mr McPherson was under her care with Wolf-Parkinson White Syndrome, a cardiac condition associated with disturbance of the rhythm of the heart due to a congenital abnormality in the electrical conducting system. His symptoms (chest pain and heart palpitations) had worsened, partly because of the stress of the forthcoming tribunal, but she thought that they would settle if the tribunal could be postponed and time allowed for re-assessment and curative treatment.

7. Dr Corr said that the condition was unlikely to be life-threatening, that the pattern of the recent symptoms strongly suggested that they were significantly affected by stress and would be likely to be brought on during the tribunal; that the condition could be managed relatively easily and simply using a technique called radio frequency ablation, which does not require surgery, and that this would have a greater than 95% chance of success, abolishing his symptoms in the future and allowing him to be symptom-free, despite the stress of a tribunal.

8. In a letter enclosing a copy of Dr Corr's letter Taylor Joynson Garrett wrote *"…we would hope that the case would be re-listed to be heard for a later[date] after our client has the operation that is necessary to remedy his condition."*

9. Clyde & Co strongly opposed the adjournment, pointing out that the application was made at a very late stage on the basis of a medical condition that was not life-threatening, that the postponement would prejudice their client and that there was no mention in Dr Corr's letter of the need for an operation. In another letter they made it clear that, if the hearing was postponed, they would make an application for costs, due to the considerable prejudice incurred by BNP Paribas. For example, six witness orders had been issued by the tribunal at Mr McPherson's request on 12 September 2001 in relation to the forthcoming hearing.

10. In commenting on the objections to the postponement, Taylor Joynson Garrett again mentioned the question of treatment, saying the refusal of BNP Paribas to accede to the postponement of the hearing was an attempt to force him to withdraw his claim at a late stage and that that *"was wholly unnecessary as our client's condition is curable and our client will be fit and able to attend an Employment Tribunal hearing once he has received the necessary treatment."*

11. That exchange of letters is important, as, when Taylor Joynson Garrett gave notice to the employment tribunal on 9 May 2002 of the withdrawal of his claims, the only reason given for his decision to withdraw was the effect of the stress of the litigation on his health. There was no evidence that between September 2001 and May 2002 he had undergone any operation or received any of the curative treatment foreshadowed in the solicitor's letters and Dr Corr's reports of September 2001.

12. After the adjournment was granted there was correspondence between the solicitors about requests for more information concerning his state of health, his claims and the disclosure of documents. Orders for disclosure were made, but not all of them were complied with. Issues were raised by BNP Paribas about Mr McPherson's health difficulties and their impact on the level of compensation which might be awarded, if his claim were successful.

13. Unknown to BNP Paribas and to the tribunal until the production of a letter from Dr Ruth Marchant dated 23 May 2002 for the purposes of the costs hearing on 27 May, Mr McPherson saw Dr Marchant in December 2001, as he was experiencing more symptoms from the syndrome, which were directly related to *"instances around the case."* At the consultation there was discussion about the option of withdrawing from the case, as his health was being severely affected by cardiac problems caused by stress.

14. There was a directions hearing before the tribunal chairman on 31 January 2002. It was agreed and ordered, with reference to an earlier order of 1 November 2001 for the disclosure of details of remuneration with his new employer, that Mr McPherson must disclose details of all past, current and future entitlements. Mr McPherson never complied with that order, despite a further directions order on 15 February 2002 and subsequent reminders from Clyde & Co (letters of 15 March and 4 April 2002). As regards further requests for particulars and information, the chairman stated that he expected the parties to deal with them reasonably and promptly in the spirit of co-operation. He reminded the parties of their duty to assist in the furtherance of the overriding objective to deal with cases justly, as set out in regulation 10 of the 2001 Regulations (which imposes a duty on the parties to assist the tribunal to further that objective) and reminded them of the costs consequences that could follow from a refusal to act in accordance with the overriding objective. A notice relating to non-compliance with tribunal orders was attached to the order of 31 January 2002.

15. As regards the medical information, which Mr McPherson had not supplied in response to the request in Clyde & Co's letter of 11 October 2001 arising from reports obtained from Dr Corr to obtain the

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postponement of the September hearing, the chairman declined to make an order. He considered that, should an application be made for the costs thrown away, there would be adequate information available to the tribunal, upon which such an application could be determined. He did, however, make an order that Mr *McPherson "should confirm to BNP Paribas and the tribunal 14 days before the full merits hearing that there is at that time no medical reason why he will be unable to attend the hearing."* The chairman confirmed that the six witness orders were still effective in relation to the hearing fixed for the end of May.

16. Preparations for the hearing continued. On 6 and 20 February 2002 Clyde & Co repeated their request for information about Mr McPherson's illness, including information about medication and whether he had received surgery on his heart. They reserved the right to make an application for costs due to the postponement of the hearing and for that purpose wished to clarify the issues concerning his health. None of the information requested was supplied, Taylor Joynson Garrett taking the position that, in view of the order made at the directions hearing, it was unnecessary to respond to the questions on his medical condition.

17. On 6 March 2002 Clyde & Co notified the tribunal and Mr McPherson's solicitors that they wished to make an application for costs under rule 14(1) and (4) of the 2001 Rules, as a result of the postponement of the September hearing. They alleged unreasonable conduct by Mr McPherson with regard to the medical condition and making misleading statements to the tribunal and to them in regard to the application for postponement i.e. on the question of surgery and treatment for the condition. On 27 March the tribunal chairman directed that the application be made to the tribunal dealing with the full merits hearing at the end of May.

18. On 3 May 2002 Taylor Joynson Garrett wrote to Clyde & Co referring to their client's primary wish to clear his name, to his health problems and to the legal costs. They suggested that it would make sense for both parties to attempt mediation. They even suggested the name of a mediator. BNP Paribas disagreed with the merits of the suggestion.

19. On 9 May 2002 Taylor Joynson Garrett wrote to the tribunal giving notice of their client's decision reluctantly to withdraw his claims on medical grounds. Reference was made to his medical condition being exacerbated by stress, to the deterioration of his health in recent weeks, to the fact that he did not feel that he could face the inevitable pressures of the hearing and to the refusal of BNP Paribas to consider mediation as a less stressful and acrimonious forum. A later letter made it clear that his withdrawal was not an admission that his purported dismissal was fair.

20. The reaction of Clyde & Co was that their client now wished to make a costs application for the whole claim, not just for the postponement of the hearing, on the grounds of unreasonable conduct of the originating application in general, including misleading the tribunal and themselves. They suggested that one day's hearing was appropriate later than 27 May 2002, after evidence had been obtained of Mr McPherson's actual state of health and the stress suffered by him.

21. On 23 May 2002 the tribunal made an order dismissing the application on withdrawal. The hearing of the costs application went ahead on 27 May. No application was made by either side for an adjournment, though, with the benefit of hindsight, it would probably have been better all round if the hearing had taken place at a later date and more time had been allowed for preparation. Mr McPherson did not attend the hearing, but he gave evidence in a signed witness statement dated 24 May 2002. He explained his wish to clear his name of allegations made by BNP Paribas, the stressful effect of the proceedings, the medical reasons for his decision to withdraw the claims, family pressures, his decision not to have surgery and his various criticisms of Paribas as employer and as litigant. He also produced the letter from Dr Marchant dated 23 May 2002 mentioned earlier.

The Costs Order

22. The tribunal gave extended reasons on 15 July 2002 for making its order that Mr McPherson pay BNP Paribas's costs of the proceedings (including the costs hearing) on the standard basis to be assessed by way of detailed assessment, if not agreed.

23. Mr McPherson appealed. The employment appeal tribunal dismissed the appeal on 22 July 2003. Keene LJ refused permission to appeal on the ground that there was no error of law in the tribunal's exercise of its discretion, but Latham LJ granted permission on the hearing of the renewed application.

The Law

24. An employment tribunal has power to order an applicant to pay the costs of proceedings under rule 14 of the Rules of Procedure 2001.

"(1) Where, in the opinion of the tribunal, a party has in bringing the proceedings, or a party's representative has in conducting the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably, or the bringing or conducting of the proceedings by a party has been misconceived, the tribunal shall consider making, and if it so decides, may make-

(a) an order containing an award against that party in respect of the costs incurred by another party;

(b) [not applicable]

(3) An order containing an award against a party ("the first party") in respect of the costs incurred by another party ("the second party") shall be-

(a) [not applicable]

(b) [not applicable]

(c) in any other case, an order that the first party pay to the second party the whole or a specified part of the costs incurred by the second party as assessed by way of detailed assessment (if not otherwise agreed).

(4) Where the tribunal has on the application of a party postponed the day or time fixed for or adjourned the hearing, the tribunal may make orders of the kinds mentioned in paragraphs (1)(a) and (1)(b) against or, as the case may require, in favour of that party as respects any costs incurred or any allowances paid as a result of the postponement or adjournment."

25. Although employment tribunals are under a duty to consider making an order for costs in the circumstances specified in rule 14(1), in practice they do not normally make orders for costs against unsuccessful applicants. Their power to make costs orders is not only more restricted than the power of the ordinary courts under the Civil Procedure Rules; it has also for long been generally accepted that the costs regime in ordinary litigation does not fit the particular function and special procedures of employment tribunals. It is, therefore, not surprising that the Employment Tribunal Rules of Procedure do not replicate the general rule laid down in CPR Part 38.6(1) that a claimant who discontinues proceedings is liable for the costs which a defendant has incurred before notice of discontinuance was served on him. By discontinuing the claimant is treated by the CPR as conceding defeat or likely defeat. The tribunal rules of procedure make provision for the withdrawal of claims in Rule 15(2)(a), but the costs consequences are governed by the general power in rule 14.

26. When a costs order made by an employment tribunal is appealed to the employment appeal tribunal or to this court the prospects of success are substantially reduced by the restriction of the right of appeal to questions of law and by the respect properly paid by appellate courts to the exercise of discretion by lower courts and tribunals in accordance with legal principle and relevant considerations. Unless the discretion has been exercised contrary to principle, in disregard of the principle of relevance or is just plainly wrong, an appeal against a tribunal's costs order will fail. If, however, the appeal succeeds, the appellate body may substitute a different order or, if it is necessary to find further facts, the matter may be remitted to the tribunal for a fresh hearing of the costs application.

A. Unreasonable Conduct of Proceedings

27. The tribunal correctly directed itself that the first question was whether, in all the circumstances, Mr McPherson had conducted the proceedings unreasonably (paras 6 and 7 of the extended reasons). The tribunal appreciated that the issue was not whether the action of withdrawing the complaint was itself unreasonable. As it observed, *"There are many genuine issues and matters which might lead an applicant to that course."*

28. In my view, it would be legally erroneous if, acting on a misconceived analogy with the CPR, tribunals took the line that it was unreasonable conduct for employment tribunal claimants to withdraw claims and that they should accordingly be made liable to pay all the costs of the proceedings. It would be unfortunate if claimants were deterred from dropping claims by the prospect of an order for costs on

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withdrawal, which might well not be made against them if they fought on to a full hearing and failed. As Miss McCafferty, appearing for Mr McPherson, pointed out, withdrawal could lead to a saving of costs. Also, as Thorpe LJ observed during argument, notice of withdrawal might in some cases be the dawn of sanity and the tribunal should not adopt a practice on costs, which would deter applicants from making sensible litigation decisions.

29. On the other side, I agree with Mr Tatton-Brown, appearing for BNP Paribas, that tribunals should not follow a practice on costs, which might encourage speculative claims, by allowing applicants to start cases and to pursue them down to the last week or two before the hearing in the hope of receiving an offer to settle, and then, failing an offer, dropping the case without any risk of a costs sanction.

30. The solution lies in the proper construction and sensible application of rule 14. The crucial question is whether, in all the circumstances of the case, the claimant withdrawing the claim has conducted the proceedings unreasonably. It is not whether the withdrawal of the claim is in itself unreasonable, as appeared to be suggested at some points in argument and as might be thought was the approach of the tribunal from reading some passages of the extended reasons out of context (see the opening of para 6: "We turn next to consider whether withdrawing one's complaint in these circumstances is unreasonable.") When read as a whole it is clear from the extended reasons that the tribunal adopted the correct approach to determining whether Mr Mc Pherson had conducted the proceedings unreasonably. The tribunal considered all the circumstances relevant to his conduct. The question was not, as was submitted by Ms McCafferty, whether BNP Paribas had proved that his conduct was so unreasonable that no reasonable applicant could reasonably decide to withdraw the proceedings in the circumstances.

31. In my judgment the tribunal was entitled to conclude that there was unreasonable conduct of the proceedings on the part of Mr McPherson. Indeed, Ms McCafferty accepted that that was a correct description of some aspects of her client's conduct of the proceedings: he had not, for example, complied with orders of the tribunal. There were other circumstances, which were properly regarded by the tribunal as unreasonable conduct of the proceedings: Mr McPherson had been asked for documentation which he was obviously loathe to supply; and he had given the impression right up to 9 May 2002 that he was pursuing the complaint and allowed BNP Paribas to incur considerable expense in preparing the case on that basis, while, on his own evidence and unknown to the tribunal and BNP Paribas, he had been seriously considering with his GP in December 2001 the question of abandoning the proceedings on health grounds. There was no hint to the tribunal or BNP Paribas of this possibility before notice of withdrawal was given on 9 May 2002.

32. Ms McCafferty concentrated her attack on the tribunal's finding, which was relied on as unreasonable conduct, that the reason advanced by Mr McPherson for withdrawing the application was not the sole reason for withdrawal. She agreed that the reason for withdrawal was a relevant circumstance in deciding whether there had been unreasonable conduct of the proceedings, but she contended that the tribunal erred in law in rejecting the reason given by Mr McPherson and submitted that it was not for the tribunal to adjudicate on the desirability of medical treatment of a competent individual, such as Mr McPherson. He relied on his health as the sole reason for his decision to withdraw. While the tribunal did not doubt that he suffers from Wolf-Parkinson White Syndrome, it was not satisfied on the evidence that the condition was sufficiently serious to prevent him from attending the tribunal and conducting his case. The tribunal concluded (para5*): " It is the Applicant's claim that his health was the sole reason for withdrawing his complaint. We have found that this claim is not justified. It follows that there must be some other reason for his withdrawing his proceedings which was unconnected with his health."*

33. The tribunal was particularly critical of the lack of up-to-date medical evidence that he would be unfit to attend a hearing of the case. He was not certified as unfit to attend or to conduct the proceedings. There was no medical evidence that he had been advised to withdraw the proceedings in May 2002.

34. The tribunal went on (para 8) to express *" concern as to his probity in relation to the whole of the proceedings"* and to express the view that *" he has been prolonging this case in the hope of obtaining an offer, which never in fact came….The Applicant's sudden withdrawal of these proceedings without good reason is part and parcel of that same conduct."*

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35. Ms McCafferty criticised the reference to concern about Mr McPherson's probity, the rejection of health as the sole reason for withdrawal and the finding of a hope that there would be an offer, as being extravagant inferences unsupported by necessary findings of primary fact which were therefore legally erroneous. She contended that the tribunal's criticisms of the lack of medical evidence were misplaced, as it was not his case that he would be unfit to attend, but that the stress of the ongoing proceedings was damaging to his health.

36. In my judgment, there is force in some of Ms McCafferty's criticisms. In particular, the mention of "concern as to his probity" went considerably further than the tribunal's rejection of health as the sole reason for withdrawal and further than was justified by the evidence of his conduct. It was not, I think, a finding of fact at all and it should not have been expressed as a passing comment. Although there were grounds for criticising Mr McPherson for lack of co-operation with the tribunal and with BNP Paribas on the health issue, the tribunal was probably too critical about the shortcomings of the medical evidence. That said, however, I am aware that an appeal court should read the reasoning of the tribunal as a whole and not scrutinise it for error line by line. On that approach I am satisfied that the tribunal was entitled to infer that Mr McPherson's health was not the sole reason for leaving the decision to withdraw so close to the date when the full hearing was due to take place and without any earlier warning of that possibility, which had been considered by him with his GP over five months previously.

37. I am left in no real doubt that there was ample evidence to justify the tribunal's overall conclusion that there was unreasonable conduct by Mr McPherson in the proceedings and that the tribunal's ruling that it had jurisdiction to make a costs order against Mr McPherson was not perverse or otherwise wrong in law.

B. Exercise of Discretion

38. As to the exercise of the discretion, most of the argument naturally focused on the issue whether, on the basis of the unreasonable conduct found, the tribunal properly exercised its discretion in ordering Mr McPherson to pay the costs of the whole of the proceedings, having regard to the inaccuracy of statements about his medical condition, to concerns about his probity in relation to the whole of the proceedings, to his real reason for withdrawing the claims and to the history of procrastination, delay and non-compliance with orders of the tribunal.

39. Ms Mc Cafferty submitted that her client's liability for the costs was limited, as a matter of the construction of rule 14, by a requirement that the costs in issue were "attributable to" specific instances of unreasonable conduct by him. She argued that the tribunal had misconstrued the rule and wrongly ordered payment of all the costs, irrespective of whether they were "attributable to" the unreasonable conduct in question or not. The costs awarded should be caused by, or at least be proportionate to, the particular conduct which has been identified as unreasonable.

40. In my judgement, rule 14 (1) does not impose any such causal requirement in the exercise of the discretion. The principle of relevance means that 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 BNP Paribas to prove that specific unreasonable conduct by Mr McPherson caused particular costs to be incurred. As Mr Tatton-Brown pointed out, there is a significant contrast between the language of rule 14(1), which deals with costs generally, and the language of rule 14(4), which deals with an order in respect of the costs incurred "as a result of the postponement or adjournment." Further, the passages in the cases relied on by Ms McCafferty (**Kovacs v. Queen Mary & Westfield College** [2002] IRLR 414 at para 35 **Lodwick v. London Borough of Southwark** [2004] EWCA Civ 306 (at paras 23-27) and **Health Development Agency v. Parish** EAT/0543/03 LA at para 26-27) are not authority for the proposition that rule 14(1) limits the tribunal's discretion to those costs that are caused by or attributable to the unreasonable conduct of the applicant.

41. In a related submission Ms McCafferty argued that the discretion could not be properly exercised to punish Mr McPherson for unreasonable conduct. That is undoubtedly correct, if it means that the indemnity principle must apply to the award of costs. It is not, however, punitive and impermissible for a tribunal to order costs without confining them to the costs attributable to the unreasonable conduct. As I have explained, the unreasonable conduct is a precondition of the existence of the power to order costs

and it is also a relevant factor to be taken in to account in deciding whether to make an order for costs and the form of the order.

42. I am, however, persuaded that there was an error of law by the tribunal in ordering Mr McPherson to pay the costs of the whole of the proceedings. As I mentioned earlier, there is no evidence that there was any unreasonable conduct on the part of Mr McPherson before his health was introduced as an issue affecting the conduct of the proceedings. The error was in the tribunal's conclusion (in para 8) that *"…the conduct by the Applicant of the whole of this case has been unreasonable and [that] the Respondents are accordingly entitled to their costs of the whole of the proceedings."*

43. There was no evidence of unreasonable conduct of the proceedings before the health issue was first raised with the tribunal in August 2001. No reasonable tribunal, properly directing itself under rule 14, would have ordered Mr McPherson to pay the costs of the whole of these proceedings without some evidence of the unreasonable conduct of them during the first eleven months that the proceedings had been in existence. The unreasonable conduct by Mr McPherson only began, on the findings of the employment tribunal, with the application for an adjournment in September 2001 on medical grounds, which did not justify the request for an adjournment, and continued as a history of procrastination, delay and lack of co-operation down to the notice of withdrawal.

Conclusion

44. I would allow the appeal to the extent of varying the costs order so that Mr Mc Pherson is liable to pay the costs of the proceedings incurred after the date of the application to the tribunal to adjourn, on medical grounds, the hearing fixed for 24 September 2001.

Mr Justice Bennett:

45. I agree with the judgment of Mummery LJ.

Lord Justice Thorpe:

46. I have had the advantage of reading in draft the judgment of my Lord, Mummery LJ and, save on a point of detail, gratefully adopt his conclusion and reasoning. For my part I would fix the commencement of Mr McPherson's liability to pay the costs of the proceedings to the date of the bank's application for information as to the terms of his subsequent employment. In my opinion Mr McPherson's failure to provide this information marks the commencement of his unreasonable conduct. I would not censure him for the application to adjourn the hearing of 24th September 2001 on medical grounds since, although the letters from his solicitors of 23rd and 28th September were plainly misleading, the first at least enclosed the report from Dr Corr upon which the adjournment application rested. In my judgment the enclosure rescues the misleading solicitors letters from the effects and consequences for which Mr Tatton-Brown contended.

MS JANE McCAFFERTY (instructed by Taylor Wessing) for the Appellant

MR DANIEL TATTON-BROWN (instructed by Clyde & Co) for the Respondent