Appeal No. UKEAT/0210/19/00

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 4 December 2019

Before

THE HONOURABLE MR JUSTICE KERR

(SITTING ALONE)

KUWAIT OIL COMPANY (K.S.C) APPELLANT

DR JAMAL AL-TARKAIT RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR MICHAEL DUGGAN (of Counsel) Instructed by: Holman Fenwick Willan LLP Friary Court 65 Crutched Friars London EC3N 2AE
For the Respondent	No appearance or representation by or on behalf of the Respondent

SUMMARY

PRACTICE AND PROCEDURE – Costs

A costs order made by the tribunal under rule 78(1)(b) of the **Employment Tribunal Rules of Procedure 2013** was within its powers, even though it capped the costs in favour of the appellant (the respondent below) in an amount that had not yet been precisely ascertained. The tribunal had been entitled to have regard to the claimant's means and ability to pay, under rule 84; and although the precise amount of the cap was not stated as an exact figure, the costs order was sufficiently certain to comply with the requirement that the order should identify the "specified part" of the costs to which it related.

The cap on the costs recoverable by the appellant did not usurp the jurisdiction of an employment judge or county court costs judge conducting a subsequent detailed assessment. That judge would still have to determine the amount payable under the costs order; the cap imposed by the tribunal did not determine the amount payable, only the maximum amount payable. The appeal therefore failed and the costs order stands. However, it would be better to specify any such cap as an exact sum, rather than as an amount that was only known as an approximation.

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THE HONOURABLE MR JUSTICE KERR

Introduction

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1. Insofar as this appeal has survived the sift and a rule 3(10) hearing, it seeks to overturn an order for costs not made against but in favour of the appellant company (which was the respondent below and to which I shall refer as the respondent). The respondent to the appeal was the claimant below, to whom I shall refer as the claimant.

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2. The surviving complaint is that the order for costs in the respondent's favour capped those costs in an amount that was not fully quantified but was expressed thus:

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> **"The Respondent is awarded its costs incurred by reason of the Claimant raising the matters that were dismissed by consent or by decision of the Auerbach tribunal. Those costs are limited to the maximum sum of the compensation awarded to the Claimant added to the costs awarded to the Claimant." [253]**

3. The background to that costs order was that after lengthy proceedings, the claimant's

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claims for disability discrimination and wrongful dismissal failed, but his unfair dismissal claim succeeded with a substantial **Polkey** reduction and an 80% reduction of his basic award, for contributory fault. He was awarded compensation totalling £79,724.20 with payment stayed.

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4. Because of the way the proceedings were conducted, there were costs applications by both parties. Those costs applications both partially succeeded. No fixed amounts of costs

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were awarded but the parties were given leave to apply for an assessment of costs if one were needed.

5. The award of costs in the claimant's favour was expressed thus:

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> **"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."**

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6. The costs order in favour of the respondent was as quoted above. Its effect was to cap the costs the respondent could recover from the claimant in an amount that would ensure the claimant was not, overall, out of pocket from the proceedings save in respect of his own costs.

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7. The likely practical outcome was that the main financial winners would be the parties' lawyers. In saying that, I am not intending in any way to disparage the parties' lawyers. They will have contributed to the substantive outcome and saved their respective clients from a result

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less favourable to their respective clients.

8. If the order in favour of the respondent stands, the respondent cannot recover more than

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the combined amount of the costs it must pay to the claimant plus £79,724.20. Since the amount of the respondent's costs liability to the claimant is not yet known, the amount of the cap on the respondent's costs entitlement is also not yet known.

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9. The issue in this appeal is whether the costs order in the respondent's favour was lawfully made. The respondent said it was not: it should have been uncapped. The respondent asks me to remove the cap but to leave the order otherwise undisturbed.

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10. The claimant has contended in writing, by means of a respondent's answer from his solicitors dated 12 September 2019, that the appeal should be dismissed and that the claimant

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resists it. The respondent's answer also includes a cross-appeal by the claimant.

11. The cross-appeal merely points out that if the costs order in favour of the respondent is

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to be uncapped, that would cause the claimant financial hardship because of his substantial financial liabilities.

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12. The cross-appeal is, effectively, not pursued since the claimant's solicitors subsequently wrote to the appeal tribunal attaching a notice of appearance stating that the claimant did not intend to be present at today's hearing. For the avoidance of doubt, the cross-appeal raises no arguable point of law and I dismiss it and turn to consider the appeal.

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Background Facts

13. The claimant started working for a predecessor of the respondent in September 2003, based in London. After certain "**TUPE**" transfers, he became a medical specialist for the respondent. He has a muscle disorder and used crutches and subsequently a wheelchair. After disagreements with the respondent, he was dismissed summarily in March 2016 for gross misconduct. He was highly paid when dismissed, citing net annual pay as at dismissal of nearly £35,000 per month and other valuable benefits.

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The Proceedings

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14. In June 2016, he brought a claim for disability discrimination, unfair dismissal and notice pay based on wrongful dismissal. The respondent accepted that the claimant was under a disability but denied liability on all counts, saying it had not discriminated against him and had, fairly and in accordance with its contractual rights, dismissed him for gross misconduct.

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15. The pleadings quickly became extensive and were initially exchanged up to September 2016. The matter was set down for a 10 day full merits hearing to start on 9 January 2017. But during the first few days of that hearing, it became apparent that the matter was not ready for trial.

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16. First, the respondent successfully excluded certain evidential matters from the scope of the issues. The claimant then informed that he had begun to use a wheelchair in May 2013, not May 2014 as had been pleaded. That led to further amendments to the claimant's pleaded case. The respondent then successfully applied for an adjournment, to have time to meet claimant's modified case.

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17. The Employment tribunal (EJ Auerbach, as he then was, sitting with lay members) then gave case management orders, on the fourth day. The matter was refixed for 11 to 27 September 2017. The case management orders dealt with preparations for that trial.

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18. Each side also made a costs application against the other. Those applications were deferred to the conclusion of the trial. Directions were included to enable them to be determined at the end of the trial. Schedules of costs were to be provided, with approximate amounts of costs claimed, broken down into different types of costs. The claimant had to deal with the issue of his means. The parties were required to exchange written submissions on costs.

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19. In a written submission dated 20 January 2017, the claimant claimed costs estimated at about £57,900, of which an estimated £4,900 related to the respondent's "unreasonable conduct in failing to disclose relevant documents in breach of orders." The rest of his costs claim related, in one way or another, to the adjournment.

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20. The respondent's written application for costs, also dated 20 January 2017, sought unquantified costs (to be quantified later); first, occasioned by the successful exclusion of

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"various claims and evidential matters", and, second, occasioned by the adjournment of the trial.

21. The pleadings were then further amended and the matter proceeded towards the revised trial dates in September 2017.

22. Further written submissions on costs were made towards the end of the trial. The claimant noted that the respondent's costs schedule had stated that its costs amounted to £233,492.51. The claimant complained that the amount was grossly excessive. The respondent expanded its costs application to add a claim for the costs of the trial because of "the way in which the case has been conducted by the claimant." The respondent asked for its costs to be subject to detailed assessment if not agreed.

The Decisions of the Employment Tribunal

23. The tribunal comprised Employment Judge James Tayler sitting with Mrs Cameron and Mr McLaughlin. The tribunal gave a written judgment dated 27 September 2017 and sent to the parties on 29 September 2017.

24. The claims for disability discrimination were dismissed. So was the wrongful dismissal claim. The unfair dismissal claim succeeded but the tribunal found that "[h]ad a fair procedure been applied the Claimant would inevitably have been dismissed three months after the date of his dismissal." His basic award was reduced by 80 per cent for contributory conduct.

25. The tribunal gave detailed reasons for those findings, which is unnecessary to relate here. They did not deal with remedies. They dealt with compensation and costs issues at a later

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reconvened hearing on 20 and 21 August 2018. The claimant did not attend, that hearing, not then being represented.

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26. The solicitors who had been acting for the claimant informed the tribunal that they had ceased to act and that the claimant was seeking an adjournment. The tribunal refused the adjournment and proceeded to consider the issues of compensation and costs. They gave their decision and reasons in a written judgment dated 7 November 2018 and sent to the parties two

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days later.

27. On compensation, the calculation was straightforward: the claimant was entitled to the

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statutory maximum, less 80% of his basic award. The resulting figure was, as already mentioned, £79,724.20. The **Polkey** reduction part of the decision did not have any purchase on the outcome. The Respondent did not dispute the Employment tribunal's calculation of the claimant's compensation.

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28. The ET then went on to consider the rival costs applications. They reviewed the applicable law and the procedural history. In the claimant's favour, they accepted that the

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respondent had been remiss by not disclosing documents relevant to an investigation which took place between November 2015 and February 2016, leading to a decision to suspend the claimant.

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29. Those documents were plainly relevant and should have been disclosed earlier than they were. The tribunal agreed with another employment judge, Employment Judge Grewal, who had earlier opined as much. That was the reasoning supporting the costs order in favour of the

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claimant. It appears that this corresponds to that part of the claim made in January 2017 by the

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claimant which, the claimant then estimated, had resulted in a relatively small amount of costs, about £4,900, being incurred.

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30. The tribunal then considered the three heads of costs sought by the respondent. They rejected the contention that the whole claim was misconceived and that the respondent should therefore be awarded the costs of the entire proceedings, which, I am told, ran to more than £1,000,000, or of the disability discrimination component, which had failed. They reasoned that losing did not mean the whole claim had been misconceived or unreasonably conducted.

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31. They rejected, too, the respondent's application for costs thrown away as a result of the first trial having had to be adjourned. At the same time, they considered the claimant's application for costs in respect of the same matter, the adjournment. They concluded that the adjournment should not lead to an award of costs in favour of either party, though both had, to an extent, acted unreasonably.

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32. Finally, they considered (at paragraph 30 of the written judgment) the respondent's application for costs thrown away as a result of, "the historic matters that were either removed by consent or by order of the Auerbach tribunal," i.e. at the hearing in January 2017. They decided that the claimant had acted unreasonably by adducing "such substantial historical material, both in his answer to the request for further particulars, and in his witness statement."

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33. That, the tribunal said, had put the respondent to significant expense and should be visited with an order for costs. Costs were unnecessarily incurred by the respondent in seeking the exclusion of that material and it was reasonable also to incur some costs "in considering rebuttal evidence" (paragraph 31). The tribunal noted that, excluding sums claimed solely in

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respect of the postponement of the trial, the amount claimed by the respondent was £228,500. That, the tribunal said, went far beyond what it was reasonable to expend.

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34. The tribunal went on, at paragraph 32, to consider a statement from the claimant about his means. Although it found his evidence on that point not altogether satisfactory, it accepted that it was "likely that the claimant has very limited financial resources"; the most significant addition to which would be "payment of the compensation…and the limited amount of costs we have awarded [him]."

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35. The tribunal went on to explain their reasons for making the capped award of costs in favour of the respondent, which is challenged in what is left of this appeal. At paragraphs 33 to 35 at the end of the judgment, they said this:

> **"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.**

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> **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."**

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The Appeal

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36. His Honour Judge Barklem at a rule 3(10) hearing allowed only one point of appeal to proceed to a full hearing. The remaining ground of appeal is as follows:

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"6.4. Having considered and made costs orders, the tribunal erred in the orders that it made in limiting the costs that the Appellant could recover.

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6.6. The tribunal limited the Respondent's costs to "the sum of compensation awarded to the Claimant and costs awarded to the Claimant". It then stated that it did not see how the Appellant should have incurred costs in excess of this sum in dealing with "the additional allegations".

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6.6 1. [The tribunal erred in that] …in placing such a ceiling on costs in relation to the "additional allegations" the tribunal, in effect, assessed costs whereas the jurisdiction for assessment is the costs judge. The tribunal suborned the jurisdiction of the assessment since an assessment could be that the Appellant did incur costs that were reasonable above the ceiling wrongly placed on costs by the tribunal."

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The Relevant Costs Provisions

37. The current rules on costs are in rules 74 to 84 of the **Employment Tribunals Rules of Procedure,** in Schedule 1 to the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**. Certain changes were made to the old rules dated form 2004. In particular, the tribunal was given power to award a fixed sum of up to £20,000 rather than, as previously, £10,000; and was given a new power to carry out an assessment of the amount of costs payable, in addition to the option of the assessment being done by a costs judge in the county court.

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38. Rule 78 provides, so far as material, under the heading "[t]he amount of a costs order", as follows:

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"(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; …

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(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."

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39. Rule 84 of the current Rules provides under the heading "[a]bility to pay" as follows:

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> **"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 Submissions in Support of the Appeal

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40. Mr Duggan QC, for the respondent, submitted in his skeleton argument that the tribunal wrongly assumed the jurisdiction that would be exercised on a detailed assessment, whether by an employment judge or by a county court costs judge. He submitted that there was no provision for the tribunal to place a ceiling on costs awarded. The tribunal, he argued, usurped the costs assessment jurisdiction by doing so.

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41. Specifically, he submitted that 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.

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42. He made some further more detailed submissions in oral argument. He accepted that if a detailed assessment were done by an employment judge, there was nothing to prevent the judge from placing a cap on the paying party's costs liability, based on considerations of ability to pay, applying rule 84.

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43. But, he submitted, if the detailed assessment were done by a costs judge in the county court, rule 84 had no application because it referred only to "the Tribunal" having regard to the paying party's ability to pay.

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44. Instead, he submitted, if the assessment is done in the county court, the resulting order is an "order…made by a county court under which a sum of money…is payable" (section 71(1) of

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the **County Courts Act 1984**). The county court then has power to stay or delay payment based on ability to pay: see section 71(2) of that Act; but has no power to cap the amount of costs payable.

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45. Mr Duggan accepted that it is a bit odd that the amount payable on the assessment may vary according to who is doing the assessing - the employment judge or the county court costs judge; but he said that was the consequence of the wording of rules 78(1)(b) and 84 of the Rules. Only if an employment judge performs the costs assessment, he said, can a cap on costs liability be imposed applying rule 84.

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46. Mr Duggan further submitted that where "a specified part of the costs of the receiving party" is ordered to be paid under rule 78(1)(b), there was no room for the employment tribunal making that order to consider the paying party's ability to pay, applying rule 84. That rule, he said, could only be operated at all if the order made was one for a fixed sum of £20,000 or less, ordered to be paid under rule 78(1)(a).

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47. Yesterday, I drew the parties' attention to two cases not cited by Mr Duggan, though with respect, they should have been. The first is **Jilley v Birmingham and Solihull Mental Health NHS Trust** [2007] UKEAT/0584/06/DA. That case was decided in 2007, under the old **2004 Rules**. The EAT decided that a tribunal had failed to give adequate reasons on the issue of ability to pay and whether it had taken that matter into account. At [46], His Honour David Richardson said this:

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> **"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)."**

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48. Mr Duggan submitted that the EAT was wrong in that paragraph. The then rule 41(1)(c) provided that the tribunal "may order the paying party to pay the receiving party the whole or a specified part of costs of the receiving party" with the amount to be paid being determined in accordance with the **Civil Procedure Rules 1998**. The wording was not materially different from what is now rule 78(1)(b) except that an employment judge then had no power to conduct the assessment himself or herself.

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49. I also drew Mr Duggan's attention to Slade J's decision in **Swissport Ltd v Exley & Ors** [2017] UKEAT/0007/16/JOJ. That case was decided under the current **2013 Rules**. There, as the judge recorded at [34], an employment tribunal had made a costs order in the following terms:

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> **"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."**

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There had been no detailed assessment of costs when the matter came before this appeal tribunal.

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50. The ceiling of 10 per cent of compensation was there imposed because the receiving parties were obliged under a "Damages Based Agreement" to pay to their solicitors 10 per cent of any compensation received, as remuneration for the solicitors' services, irrespective of the amount of work done by the solicitors.

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51. Slade J upheld the order. The argument was about whether there should have been an element of "prorating" given that the order related to costs incurred over a specific limited

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period, while the obligation to pay 10 per cent of compensation received did not bear any relationship to the amount of work done during that or any other period.

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52. It was not argued in the **Swissport** case that the cap was objectionable in principle, no doubt because without it the "indemnity principle" (that you cannot receive more costs than you are liable to pay your lawyers) would be in danger of being breached. As Mr Duggan pointed out, the cap imposed here related to ability to pay, not to observance of the indemnity principle.

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Reasoning and Conclusions

53. I reject Mr Duggan's interpretation of the current rules. In my judgment, 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).

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54. I see 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. It is all the more important if (which I need not decide) Mr Duggan is right to submit 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.

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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

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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.

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58. I am therefore in agreement with His Honour Judge Richardson's observation in the **Jilley** case at [46], that "[e]ven 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." Provided the costs order made under rule 78(1)(b) meets the requirement that the order is to pay "a specified part" of the receiving party's costs, the order is within the power of the tribunal and is not (see rule 78(3)) limited to £20,000.

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59. I should add that the altered wording of what used to be rule 41(1)(c) in the old **2004 Rules** and the current wording of what is now rule 78(1)(b) in the current **Rules** does not in any way invalidate or alter the cogency of what His Honour Judge Richardson said in **Jilley**.

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60. In the **Swissport** case, a cap on costs imposed at the pre-assessment stage was not considered objectionable by anyone involved. That was because the cap was needed to avoid any risk of breach of the indemnity principle. That issue does not arise here.

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61. But if a cap can be imposed for that purpose, I do not see why it should not be imposed for other purposes such as those cited by the tribunal here: to reflect its assessment of the maximum reasonable level of costs incurred and the paying party's ability to pay them.

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62. I do not accept Mr Duggan's submission that a rule 78(1)(b) order which sets a cap on the amount of costs recoverable necessarily usurps the jurisdiction of the judge conducting a

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later detailed assessment. That judge still has the function of determining "the amount to be paid," in the language of rule 78(1)(b). The cap does not determine the actual amount payable, only the maximum amount.

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63. The costs award in the respondent's favour in this case, therefore, is not bad in law by reason of setting a cap on the amount recoverable. However, it still remains to consider whether, being capped by reference to an unascertained figure, it fails to measure up to the

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requirement that it must adequately identify the "specified part" of the receiving party's costs.

64. Here, the cap was set by reference to two components. The quantum of one was known

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but of the other was not. The part of the cap fixed by reference to this claimant's compensation was £79,724.20, the amount awarded. The other part of the cap added to that sum was an unknown figure, yet to be assessed, representing the costs awarded to the claimant.

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65. Although the amount would not be known until any detailed assessment, the employment tribunal knew that the amount claimed by the claimant under that head of his costs application was estimated at £4,900. Since parties rarely underestimate their claimed costs, it was therefore very unlikely that the assessed amount would exceed £4,900; though it might well be less than that figure.

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66. It can therefore be deduced that the amount of the cap, though not precisely known, is approximately known; it is approximately the sum of those two figures, which would be about £84,624.20 or less, but not so much less as to fall below £79,724.20. For practical purposes, the amount of the cap is known to lie in a range from £79,724.20 to £84,624.20.

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67. To pinpoint the precise amount of the cap, a limited assessment would be needed of the costs recoverable by the claimant, but not of the respondent's costs of dealing with the excluded matters.

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68. On balance, I have concluded that the order made was sufficiently clear to meet the requirement that it must specify the part of the respondent's costs payable by the claimant. It was not too uncertain to meet that requirement.

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69. However, I would add that orders such as this one are not to be encouraged. A cap consisting of an exact amount is much better. An exact amount could easily have been stated here. The obvious cap figure would be £84,624.20, for reasons already explained.

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70. For completeness, I would add this. If I had accepted that the order was unlawfully made, I would not have acceded to the invitation to remove the cap. I would have set aside the

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costs order in favour of the respondent and remitted that part of the respondent's costs application to the same employment tribunal for reconsideration. I would have left intact the costs order in the claimant's favour. It is unlikely that the outcome of that exercise would have been very different.

71. It remains open to either party to seek an assessment which can be done either by an employment judge or a costs judge of the county court. Like the tribunal below, I hope the parties will consider carefully whether that would be a cost effective move for either of them.

72. For those reasons, the appeal fails. I uphold the employment tribunal's costs order.