Case No: A2/2012/0598

Neutral Citation Number: [2012] EWCA Civ 1148
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
(MR JUSTICE SUPPERSTONE)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday 17th July 2012

Before:

LORD JUSTICE RICHARDS
and
LORD JUSTICE ELIAS

- -

Between:

UNISON	**Respondent**
- and -	
GLEN KELLY & ORS	**Appellants**

- -

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Mr Nicholas de Marco (instructed by Bindmans LLP) appeared on behalf of the **Appellants**.

Mr Anthony White QC (instructed by the Bar Pro Bono Unit) represented the **Respondent**.

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Judgment

(As Approved by the Court)

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Lord Justice Elias:

1. This is an application by the respondents to this appeal for an order under CPR Part 52.9(1)(c) that the court should order that the appellant should only be allowed to continue an appeal which they have already been granted permission to pursue on the basis that they will not seek any of their costs against the respondents if that appeal is successful.

2. The background to the application is this. The respondents were all disciplined by their trade union, UNISON, in March 2009. They were all active members of the union and elected officials. They were suspended following this disciplinary action from holding any office within UNISON for periods between two and three years. A few of the respondents are no longer members but the others remain members.

3. The respondents claimed that they were being disciplined because they had criticised the union's standing orders committee at a conference in which a number of resolutions were banned by the standing orders committee. They successfully contended that the discipline was in breach of Section 65 of the Trade Union and Labour Relations Consolidation Act. That section, amongst other matters, prohibits disciplining a trade union member for alleging that the union or one of its officers has breached the trade union rules and/or the law.

4. The unjustified discipline action succeeded before the London Central Employment Tribunal. There was an appeal to the Employment Appeal Tribunal by the union but that failed.

5. The further appeal to this court was based on four grounds. I in fact granted permission to appeal. The most important ground is a contention by the union which is of some more general interest and does not simply affect the parties in this case, that Section 55 is incompatible with the freedom of association rights conferred by Article 11 of the Convention. The Employment Appeal Tribunal found against the union on that point, but in granting permission I indicated it was a point of some importance, particularly to the trade union movement generally, and that it should go to the Court for a hearing. I also indicated that there was an arguable point on an estoppel and I permitted the appeal to go forward on two other grounds which seemed to me to be weak, but which I allowed the appellants to pursue because they should not take any significant time and the appeal was progressing in any event.

6. The problem facing the respondents is that they are individuals who cannot afford to defend this litigation. There is a witness statement produced by their solicitor from Bindmans which indicates that they are earning between £22,000 and £41,000 a year. They are concerned that if the appeal succeeds and they are liable in costs then they be made bankrupt. Accordingly, they have made it clear that unless they have some protection from a potential order for costs against them they will not be able to play any part in the proceedings.

7. The basis of the application is CPR 52.9(1) which provides that a court may impose conditions upon which an appeal may be brought but only where there

is a compelling reason to do so. The contention here is that there is such a compelling reason in the circumstances of this case.

8. Mr de Marco, counsel for the respondents, has advanced a series of reasons why he submits that the condition would be appropriate in the circumstances of this case. Firstly, as I have indicated, the principal issue in that case is the Article 11 point, which is one of general public interest and of general interest to the union movement as a whole. It is important that the court should hear full argument on that point, but if the respondents are not protected from the risk of costs then they will not be able to appear before the court, and there is a real risk that the court will have to determine that matter with only one side of the argument. The alternative would be to appoint an amicus, but either way, the appellants would not in practice be likely to recover their costs of taking the appeal.

9. Secondly - and in my view this is an important point - the respondents, if the condition were imposed, would be represented by counsel acting pro bono. Counsel has indicated in court today that in those circumstances they would undertake not to seek costs against the appellant if the appeal were to be unsuccessful.

10. Thirdly, this is not a case of an applicant or appellant who is seeking protection from the risk of costs in order to be able to pursue a claim against a defendant, nor indeed is it a private party seeking to pursue litigation on a point of allegedly wider public interest, such as in the Eweida v British Airways Plc [2009] EWCA Civ 1025, a case which is heavily relied on by Mr White QC for the union. In this case the respondents are simply before the court because they are defending their position and seeking to resist the appeal.

11. Fourthly, the appeal is from the cost-free jurisdiction, at least in a typical case. Claims before the employment tribunal and the Employment Appeal Tribunal can be taken without risk of costs at least provided the claimants are acting reasonably. Mr de Marco submits that Parliament here recognises the importance of enabling employees and other workers to pursue their claims without the risk of having to face a heavy cost burden if they reasonably pursue a claim which fails. That objective, he submits, would be wholly undermined if, as a result of succeeding before the employment tribunal and the Employment Appeal Tribunal, as in this case, the individual should be faced with potentially high costs at the level of the Court of Appeal.

12. Mr White QC, counsel for the union, resists this application. He made his submissions in a typically succinct and attractive way. He contended that in essence this is an application for a protected costs order (PCO) and he submitted that the court simply has no jurisdiction to make a PCO in this case because this is private litigation. He referred to the judgment of Lloyd LJ in the Eweida case at paragraph 38, to the effect that a PCO should not be awarded in private law litigation.

13. He also emphasises that there is a significant private interest in this case. The respondents may be awarded not insignificant damages if the appeal is unsuccessful. He emphasises the fact that in general in a PCO litigation the fact that a private interest is engaged is a significant factor to take into consideration when determining whether such an order is appropriate. As Mr de Marco has pointed out and made clear in his submissions, and as indeed Mr White I think accepts, it would be stating the principle too high to say that a PCO cannot be awarded in circumstances where private interests are engaged; the jurisdiction is a flexible one and there is no absolute bar but it is right to say that where private interests are engaged that is a significant factor which will bear on the question whether a PCO should be granted or not.

14. Mr White submits that this is not a case where, to use the language of 52.9(1)(c), there is a compelling reason for the order to be made. He accepts, notwithstanding that a PCO itself cannot be made in private litigation, that nevertheless it is in principle open to the court to make it a condition of pursuing an appeal that the appellant will not seek or enforce any order for costs against the respondent. He prays the jurisprudence of the PCO because it is in many respects analogous.

15. He was right, however, to concede that a costs condition can be imposed as a condition of permission. That much is made clear in the judgment of this court in the case of Weaver v London Quadrant Housing Trust [2009] EWCA Civ 235, which was a case where, as in this case, it was a respondent seeking costs protection; in that case the respondent sought a protected costs order, which was granted, but in the course of the judgment I gave in that case I noted at paragraph 5 that there is a power under the rules for a grant of permission to appeal to be made conditional on costs not being pursued, Indeed there is an example in the White Book of a case called Morris v Wrexham CBC [2001] EWHC Admin 697 where leave to appeal was granted on condition that the appellant pay the respondent's costs in the appeal; that of course has not been sought here.

16. Mr White also submitted that one of the union's principal concerns was that if an order of this kind were made, making it conditional that they should have to bear their own costs even if they were successful in the appeal, that might promote a flurry of litigation against the union which would be highly undesirable. I do not accept that submission. We must bear in mind here that, as I have emphasised, the respondents have successfully won before the employment tribunal and the Employment Appeal Tribunal; they are not, as in the Eweida case for example, seeking to pursue an appeal, with the consequence that the other party will necessarily incur costs which they will not be able to recover. This is the choice of the union to pursue this appeal and to bring the respondents before the court. It would be a relatively rare case where the respondents to an appeal in this court will have won twice below and where they will have the benefit of pro bono representation and will not be seeking to enforce their costs against the appellant.

17. I am satisfied in these circumstances that the order should be made essentially for the reasons advanced by Mr de Marco. In particular I place considerable

weight on the four factors I have outlined above. To recapitulate: firstly, that the appeal raises this point of wider public interest. It also involves, as Mr White emphasises, an estoppel argument, but nonetheless the principal ground of appeal is that engaging the Article 11 question. Secondly, the jurisdiction is essentially a cost-free one at the lower levels of the hierarchy and I accept that there is an important public policy objective which is in issue here: where a party has succeeded twice below there is a risk that if it is liable for costs before the Court of Appeal that might undermine that important policy objective. That at least seems to me to be a relevant factor which ought to weigh in the balance.

18. Thirdly -- and it is a related point and I have emphasised it already -- the parties here seeking the order are respondents to the appeal; they are not seeking to be funded or protected in order to advance their claims merely to defend their position. Finally and very importantly, as I have indicated they are willing to undertake that they will not seek costs against the appellant. There is an obvious equity in imposing a condition that the appellants, if successful, will not seek costs against them.

19. It would be deeply unattractive for an important point of this kind to be argued before the court with only one side represented. This is not strictly a protected costs order application. As I have indicated, it is a case where what is sought is a condition on the granting of permission to appeal. Mr White accepts that that condition would be imposed, the only question is whether there are proper reasons to lead the court to say that in the circumstances the reason is sufficiently compelling to allow the condition to be imposed, and for the reasons that I have given I consider that it is.

20. Accordingly I would make an order that on the undertaking of the respondent not to pursue the application for costs against the appellant if the appellants are unsuccessful, the order for permission to appeal will be modified so as to impose a condition upon the appellant that it will not, if successful, seek any order for costs against the respondents or any of them

Lord Justice Richards :

21. I agree. It seems to me that one way in which the application was put was as an application for a PCO. But for the decision in Eweida that a PCO cannot be made in private litigation, I would have been minded to make a PCO in this case. It may be that notwithstanding Eweida the wide discretion of the court in matters relating to costs would admit of the possibility of a freestanding order analogous to a PCO, even in private litigation. But it is not necessary for us to go that far. In this case it is open to us to vary the grant of permission to appeal in the way indicated by Elias LJ so as to impose a condition that the appellant, if successful, will not seek costs against the respondents. It might not be just to impose such a condition in the absence of a corresponding restriction on the ability of the respondents, if successful, to seek costs against the appellants, but that obstacle has been removed by the respondents undertaking through counsel not to seek their costs if they do succeed in resisting the appeal. In those circumstances I am satisfied that the order

proposed by Elias LJ is the right one and the one best calculated to promote the overriding objective.

Order: Application granted