Appeal No. UKEAT/0503/11/CEA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8JX

At the Tribunal
On 8 March 2012
Judgment handed down on 10 April 2012

Before

THE HONOURABLE MR JUSTICE SUPPERSTONE

BARONESS DRAKE OF SHENE

DR B V FITZGERALD MBE LLD FRSA

PEAT AND OTHERS — APPELLANTS

BIRMINGHAM CITY COUNCIL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants	MR STUART BRITTENDEN (of Counsel) Instructed by: Thompsons Solicitors City Gate East Tollhouse Hill Nottingham NG1 5FS
For the Respondent	MR PAUL EPSTEIN (One of Her Majesty's Counsel) & MS LOUISE CHUDLEIGH (of Counsel) Instructed by: Birmingham City Council Legal Services Ingleby House 11-14 Cannon Street Birmingham B2 5EN

SUMMARY

PRACTICE AND PROCEDURE – Costs

Applications for costs followed the dismissal of complaints of unfair dismissal by ten test Claimants who were employees of R. R sought to implement a Single Status Agreement and invited its employees to accept new terms and conditions of employment. As refused to do so, and were then dismissed but re-engaged on new terms. They were represented throughout by their trade union and there had been extensive collective consultation. The issue at the liability hearing was as to the need for individual consultation. As continued with their claims after receipt of a costs warning letter.

The ET awarded costs against As on two bases: first, that they acted unreasonably in the conduct of the case by pursuing it after receipt of a costs warning letter until the end of the trial; and second, their claims so far as they asserted that events subsequent to the termination of their employment were relevant were misconceived. They were ordered to pay R's costs occasioned by that assertion, so far as such costs were not included in those awarded on the first basis.

Held, dismissing the appeal:

(1) As acted unreasonably by failing to engage with R's costs warning letter, which would have led them to an earlier assessment of the merits of their claims. It was not necessary for R to establish that the claims were misconceived.

(2) The ET did not err in law in concluding that all matters post-dismissal were irrelevant to the issue of fairness. There was no basis on which the ET could depart from the principle established by the House of Lords in **Devis v Atkins** [1977] AC 91 and **West Midlands Co-Operative Society v Tipton** [1986] ICR 192.

THE HONOURABLE MR JUSTICE SUPPERSTONE

Introduction

1. The Appellants appeal against the judgment of the Birmingham Employment Tribunal, chaired by Employment Judge Goodier, promulgated on 20 May 2011 in which it upheld the Respondent's application for costs pursuant to rule 40(3) of the Employment Tribunals (Rules of Procedure).

2. The Tribunal awarded costs against the Appellants on two bases: first, that they acted unreasonably in the conduct of the case by pursuing it from 21 October 2010, after receipt of a costs warning letter, until the end of the trial; and second, their claims so far as they asserted that events subsequent to the termination of their employment were relevant were misconceived. They were ordered to pay the costs of the Respondent occasioned by that assertion, so far as such costs were not included in those awarded on the first basis.

3. Mr Stuart Brittenden appears for the Appellants. Mr Paul Epstein QC and Ms Louise Chudleigh appear for the Respondent. We are grateful to counsel for the assistance they have given us.

4. The applications for costs arose out of a hearing in November 2010 of the claims of ten test claimants who were representative of, by the start of the hearing, some 300 or so claimants. The Claimants were employees of the Respondent. As the Respondent sought to implement the Single Status Agreement of 1997 it invited its employees to accept new terms and conditions of employment. The Claimants refused to do so, and were then dismissed but re-engaged on the new terms. By claims presented from June 2008 to March 2009 they complained of unfair dismissal. They were members of trade unions, and were represented in the proceedings as follows: Unison members by the Nottingham office of Thompsons; GMB and Unite/T&GWU

members by EAD Solicitors; and UCATT members by OH Parsons. There had been other claimants, members of Unite/Amicus, who had been represented by the Birmingham office of Thompsons, but they had withdrawn their claims before the start of the hearing, and there was no costs application against them. The Respondent defended the unfair dismissal claims on the basis that the dismissals were for "some other substantial reason", and were not unfair.

5. On 8 October 2010 EAD Solicitors wrote to the Respondent to withdraw the claims of their clients on the basis that "a review of the evidence recently disclosed has been undertaken". On 15 October 2010 OH Parsons wrote to the Respondent to say that "union funding has been withdrawn from this case, and accordingly I am no longer instructed on behalf of any of the UCATT claimants in this matter". At that date OH Parsons withdrew the claims of those of its clients whom it had been able to contact. Some had not then been contacted, but their claims were withdrawn before the start of the hearing.

6. On 18 October 2010 the Respondent wrote to the Appellants' solicitors giving them formal notice that in the event that the Respondents were successful in defending the Appellants' unfair dismissal claims in whole or in part an application for costs would be made. On the following day, 19 October 2010, the Appellants' solicitors replied to the letter.

7. On 15 December 2010 the Tribunal dismissed the claims for unfair dismissal.

8. On 12 January 2011 the Respondent presented an application for costs against the Appellants on the sole basis that the Appellants had acted unreasonably in advancing a case in respect of one issue, namely that events occurring post-termination were relevant to the fairness of the dismissals for the purposes of s.98(4) **ERA 1996** ("the original costs claim").

9. On 18 April 2011 the Respondent applied to amend the scope of the costs application against the Appellants and sought costs on the basis that they had acted unreasonably in not withdrawing from the proceedings at an early stage ("the amended costs claim"). The application was heard by the Tribunal at the start of the hearing on 21 April 2011. The Tribunal allowed the amendment.

10. The Tribunal held that the claimants represented by EAD Solicitors and OH Parsons did not act unreasonably in the conduct of the proceedings, and the applications by the Respondent for costs orders against them failed.

Legal principles

11. Rules 40(2) and (3) of the **Employment Tribunals Rules of Procedure 2004** provides, in so far as is material:

> **"(2) a tribunal… shall consider making a costs order against a paying party where, in the opinion of the tribunal… any of the circumstances in paragraph (3) apply. Having so considered, the tribunal… may make a costs order against the paying party if it… considers it appropriate to do so.**
>
> **(3) The circumstances referred to in paragraph (2) are where the paying party has in bringing the proceedings, or he or his representative has in conducting the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably, or the bringing or conducting of the proceedings by the paying party has been misconceived."**

Regulation 2 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004** defines "misconceived" as including having no reasonable prospect of success.

12. We remind ourselves that employment tribunals have a discretion as regards the award of costs, which discretion should not readily be interfered with. In **Beynon and others v**

Scadden and others [1999] IRLR 700 at paragraph 15 Lindsay J summarised the proper approach:

> **"The proper test for the employment tribunal was not whether its order accorded with this authority or that but, ultimately, to borrow the phrase from Morritt LJ, whether it was just to have exercised as it did the power conferred upon it by the rule. We must remember, too, that the test for us is different to that which was appropriate to the employment tribunal. We must not consider whether we would have ordered as the chairman did but instead ask ourselves whether the employment tribunal took into account matter which it should not have done, or failed to take into account that which it should have done or whether in some other way it came to a conclusion to which no employment tribunal, properly directing itself, could have arrived."**

13. Recently the Court of Appeal in **Barnsley Metropolitan Borough Council v Yerrakalva** [2012] IRLR 78 has given guidance as to the correct approach to be adopted in an appeal against a costs order. Mummery LJ said:

> **"7. As costs are in the discretion of the ET, appeals on costs alone rarely succeed in the EAT or in this court. The ET's power to order costs is more sparingly exercised and is more circumscribed by the ET's rules than that of the ordinary courts. There the general rule that costs follow the event and the unsuccessful litigant normally has to foot the legal bill for the litigation. In the ET costs orders are the exception rather than the rule. In most cases the ET does not make any order for costs. If it does, it must act within rules that expressly confine the ET's power to specified circumstances, notably unreasonableness in the bringing or conduct of the proceedings. The ET manages, hears and decides the case and is normally the best judge of how to exercise its discretion.**
>
> **8. There is therefore a strong, soundly based disinclination in the appellate tribunals and courts to upset any exercise of discretion at first instance. In this court permission is rarely given to appeal against costs orders. I have noticed a recent tendency to seek permission more frequently. That trend is probably a consequence of the comparatively large amounts of legal costs now incurred in the ETs.**
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> **9. An appeal against a costs order is doomed to failure, unless it is established that the order is vitiated by an error of legal principle, or that the order was not based on the relevant circumstances. An appeal will succeed if the order was obviously wrong. As a general rule it is recognised that a first instance decision-maker is better placed than an appellate body to make a balanced assessment of the interaction of the range of factors affecting the court's discretion. This is especially so when the power to order costs is expressly dependent on the unreasonable bringing or conduct of the proceedings. The ET spends more time overseeing the progress of the case through its preparatory stages and trying it than an appellate body will ever spend on an appeal limited to errors of law. The ET is familiar with the unfolding of the case over time. It has good opportunities for gaining insight into how those involved are conducting the proceedings. An appellate body's concern is principally with particular points of legal or procedural error in tribunal proceedings, which do not require immersion in all the details that may relate to the conduct of the parties.**
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> **...**
>
> **41. The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. …**
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> **42. On matters of discretion an earlier case only stands as authority for what are, or what are not, the principles governing the discretion and serving only as a broad steer on the factors**

covered by the paramount principle of relevance. A costs decision in one case will not in most cases pre-determine the outcome of a costs application in another case: the facts of the cases will be different, as will be the interaction of the relevant factors with one another and the varying weight to be attached to them."

The Respondent's Costs Warning Letter and the Appellants' Solicitors Response

14. In the costs warning letter of 18 October 2010 the Respondent wrote:

"You have received under separate cover the Respondent's Bundle of Witness Statements, served in compliance with the Order of the Employment Tribunal of 14 September 2010.

…

The City Council does not consider the claims brought by the Claimants have prospects of success. It notes that all parties to the litigation have accepted that there was meaningful collective consultation. It further contends that it is the view of the Respondent that these claims are misconceived and that it is unreasonable for them to have been brought or for them to be persisted in.

The position is as follows:

- **The reason for the dismissals was obviously a potentially fair one – the Respondent had to remove ongoing pay inequality, in order to promote equality and also to seek to cap liabilities to a large class of actual and potential equal pay claimants for very significant sums of compensation;**
- **In the absence of agreement to contractual changes by your clients, this necessitated dismissal and re-engagement;**
- **The witness evidence and documents amply demonstrate that there was provision of considerable information over the changes proposed, and extensive consultation with the unions, and such consultation lasted a considerable period, and the Respondent sought to reach agreement with the unions;**
- **No party contends that there was any failure of collective consultation; and indeed, the unions at almost the final hour withdrew their protective award Tribunal claims without providing any reason for doing so, although the reason must be that they were of the view that there were no reasonable prospects of success;**
- **The collective consultation will in a situation such as the present, even absent individual consultation, be more than sufficient to secure a finding of fairness;**
- **In many cases there was individual consultation over the proposals and the Tribunal will find the dismissals to be fair;**
- **Finally, even if the Tribunal were of the view that in an ordinary dismissal and re-engagement case further consultation might be expected, in the present case, where ongoing inequality had to be ended, and there had been extensive consultation, further consultation was pointless and would have made no difference to the fact of the dismissals. Therefore, the Claimants have suffered no loss, and that the present extensive hearing is an expensive exercise in futility. It warned and consulted with employees.**

…

You will be aware that UCATT have withdrawn funding and that OH Parsons are in the process of withdrawing claims from all the clients they represent. In addition EAD Solicitors have also withdrawn all but one Claimant's claim and are not taking part in the hearing in November. In each case the Council has reserved its position with regard to costs.

Considerable costs have already been incurred by the City Council in preparation for the hearing. In order to avoid the additional and considerable costs of attending the trial in this matter you are invited to consider your position as a matter of urgency."

15. On the following day, 19 October 2010, the Appellants' solicitors responded as follows:

"I write further to your letter of 18th October 2010. I am extremely surprised to have received a letter from you threatening costs (for the first time) in such close proximity to the hearing. If you genuinely believe that the test claims pursued by Thompsons Nottingham were misconceived, one would have reasonably anticipated that this point would have been raised far earlier in the proceedings.

In any event, we fundamentally disagree with your assessment of the merits of our test Claimants, or that it was somehow '*unreasonable for them to have been brought or for them to be persisted in*'. This is also at odds with the second paragraph of your letter which suggests that the Respondent will pursue an application for costs if it is successful '*in whole or in part…*'. This of course reflects the reality, namely that you acknowledge that our claims are not misconceived (in the sense of having no reasonable prospect of success).

We do not propose to respond in detail to your points at this juncture, save to note that you appear to place significant emphasis upon the fact that the parties have now accepted that there was sufficient collective consultation. This is something that we are of course aware of.

Your witness evidence, and the documents which you have disclosed, deal with the issue of consultation with the relevant Trade Unions. I am pursuing unfair dismissal claims on behalf of individuals. That of course does not address the Respondent's responsibilities in respect of providing adequate information to the test Claimants, and to engage in meaningful individual consultation in respect of the same. There is ample case law in support of the need for an employer to engage properly with staff on an individual basis in respect of business reorganisations.

For the reasons set out in the evidence of our test Claimants, we therefore do not accept that absent individual consultation, the Tribunal will inevitably find … the dismissals to have been fair (as you now suggest for the first time). We also note your suggestion that '*failure to consult does not automatically make a dismissal unfair*'. With respect, the converse also applies – consultation with the Trade Union does not automatically make the dismissal of an individual fair. This is a question which has to be considered within the scope of section 98(4).

…

We also do not accept that consultation would have been '*futile*' as suggested in your letter. Further, we also note that you have not responded to the matters raised by individuals in their statements, which self-evidently advance compelling arguments as to why their dismissals were unfair.

You advise me that UCATT have withdrawn funding and that OH Parsons are in the process of withdrawing claims. Further, that EAD Solicitors have withdrawn in all but one Claimant's claim and are not taking part in the hearing in November. The issues pursued on behalf of my Claimants are, of course, vastly different to those pursued by the Claimants represented by the Solicitors you refer to and whose cases have been withdrawn or are in the process of being withdrawn.

Can I put the Council on notice that I have spent a considerable amount of time considering the documentation in this case and the analysis that I have referred to in open correspondence holds good. The Council is engaged in an exercise of providing a bundle containing excessive documentation, which is not relevant to any of the issues in these proceedings, is duplicated in many places, and worse still, documents to which the Council has made no attempt to even refer to or rely upon in the witness statements disclosed. Further that the vast majority of the witness statements disclosed by the Council concentrate on collective consultation, which is not an issue for the forthcoming hearing. Those statements in fact appear to have been drafted for the purposes of the litigation which ended in 2009.

If you wish to engage in realistic discussions with a genuine desire to resolve matters in advance of the hearing, then we will of course give due consideration to the same."

The parties' submissions

16. Mr Brittenden submits (1) in relation to the amended costs claim, that the Tribunal erred and misdirected itself in law in deciding that the Appellants had acted unreasonably in the conduct of the case by pursuing it from 21 October 2010 until the end of trial; alternatively, that such a conclusion was perverse; and (2) in respect of the original costs claim, (a) the Tribunal erred in law in concluding that all matters post-31 March 2008 were irrelevant to the issue of fairness; and (b) even if the Appellants are wrong in that respect, it was not misconceived to advance the point.

17. Mr Epstein submits (1) in relation to the amended costs claim, the conduct of the Appellants was unreasonable. The Appellants' case that it was not unreasonable is based on the absence of a finding by the Tribunal that the claims were misconceived and/or on the basis that the claims were not misconceived. However the issue that the Tribunal was considering was not whether the claims were misconceived but whether the Appellants acted unreasonably by failing to engage with the Respondent's costs warning letter, which would have led them to an earlier assessment of the merits of their claims; (2) in respect of the original costs claim, there was no basis on which the Tribunal could depart from the principle established by the House of Lords in **Devis v Atkins** [1977] AC 91 and **West Midlands Co-Operative Society v Tipton** [1986] ICR 192. The Respondent's case, Mr Epstein submits, is that the Tribunal's exercise of discretion on this issue is unassailable.

Discussion

(1) The amended costs claim: unreasonable conduct

18. Mr Brittenden submits that the Tribunal erred in failing to direct itself in accordance with the principles enunciated by Sedley LJ in **Scott v Commissioners of Inland Revenue**

[2004] IRLR 713 where the Court of Appeal confirmed that a tribunal should ask the following question, namely whether the losing party had reasonable grounds for thinking that their assessment was right (para 46); further it was incumbent upon the tribunal to "direct its attention to the question whether the [Appellants'] case was doomed to failure, and if so, from what point" (para 49). Mr Brittenden contends that the Tribunal rejected the assertion that the Appellants were aware that the claims had no reasonable prospects of success and it was therefore not a case that the Appellants knew was doomed to failure. He suggests that the Tribunal did not give any consideration as to whether or not the Appellants had reasonable grounds for believing that they had a winnable case.

19. Further Mr Brittenden suggests that the Tribunal misdirected itself as to the correct test to be applied when considering unreasonable conduct. The union in **Beynon** had been put on clear notice that a disposition by way of a share transfer was not covered by TUPE. Despite its inescapable flaw being pointed out more than once in correspondence well before the hearing the union had persisted in an argument that was held to be without foundation and was manifestly so. That, submits Mr Brittenden, is not the present case.

20. As for the costs warning letter dated 18 October 2010 Mr Brittenden had a number of criticisms. However his central point is that the letter and the witness statements of the Respondent referred to failed to address the Appellants' case that the Respondent had failed to engage in sufficient individual consultation and the Respondent had not complied with its own published policies and procedures for informing and consulting staff. It could not be said that these claims were misconceived when these were arguable points for the Appellants to raise. In support of this submission Mr Brittenden relies upon the Tribunal's analysis at paragraph 20.3.1.9(a) of its decision on liability as confirming that it was not unreasonable to pursue a

claim that the Respondent had breached its own policy, practice or procedure as regards the provision of individual information and consultation.

21. The Tribunal's judgment on liability is very lengthy and deals with a number of points, as the Tribunal acknowledged at paragraph 41 of its costs judgment. However the central point was as to the lack of need for individual consultation. Mr Epstein's summary of the position which he said the Claimants were in at the date of the costs warning letter is set out at paragraph 35 of the Tribunal's decision on costs:

> **"the unions themselves engaged in the collective consultation and knew, or should have known, what the Tribunal found to be the case: 'by any sensible measure, the degree and extent of collective consultation undertaken by BCC was extraordinary. It lasted over many years, and ranged over many subjects.' The Claimants and the Unions all knew the reason for the dismissals, and that it was a potentially fair one. This was not a redundancy case. These were technical dismissals only. Continuity of employment was preserved. No-one lost his job as a result of the dismissal; all were re-engaged. It was, or should have been, evident that the dismissals all had to take place by a defined point in time, and that individual consultation on the issue of dismissal could not have made any difference to the outcome. While in the case of the EAD and OH Parsons claimants he complained that they came late to a realisation of their position, 'sanity never dawned for the Thompsons Nottingham claimants'. In their response to the costs warning letter… they describe their position as being 'vastly different' from that of the EAD and OH Parsons claimants, yet in truth they were the same. The same letter shows that the claimants simply failed to understand the significance of the collective consultation…"**

22. Mr Epstein repeats this submission before this Tribunal. As the Employment Tribunal noted the costs warning letter predicted the outcome on the central point in some detail and on a reasoned basis. The Respondent had no option but to dismiss and re-engage so as to implement Single Status in the absence of consent to the proposed changes. In those circumstances the only possible variable in the process was the grading of jobs following job evaluation. Each employee was entitled to appeal against his or her job evaluation score which was subject to a separate appeals process. There was no right of appeal against dismissal because there was no option for the Council but to dismiss. It could not have been acceptable for the Respondent to have some employees on new terms and conditions and some on old terms and conditions as the whole purpose of the exercise was the harmonisation of terms.

23. Mr Epstein referred us to the sections in the Tribunal's decision on liability where the Tribunal considered the detail and extent of the consultation process that took place. It is not necessary, we think, for us to repeat it in this Decision. However we note in particular the agreed facts at paragraph 6 and the "further findings of fact on generic issues" at paragraph 8. Paragraph 8.7 ("Communication by Unison with its members") includes at paragraph 8.7.1 the following:

> **"As was to be expected (since this was the purpose of collective consultation with appointed representatives), and as is confirmed by Mr Gillespie, Unison cascaded information that it had received from management to its members. Mr Gillespie described the different ways in which that was done."**

Mr Gillespie was one of the test claimants and also a branch communication officer of Unison.

24. Paragraph 8.8 is headed "Consultation with individual employees". At the end of paragraph 8 is a "General conclusion".

> **"By any sensible measure, the degree and extent of collective consultation undertaken by BCC was extraordinary. It lasted over many years, and ranged over many subjects, increasing in intensity in 2007. Towards the end of 2007 there were sometimes meetings between BCC and the unions every day, and sometimes meetings took place more than once per day."**

25. In its conclusion on the first issue as to whether there was a requirement of individual consultation the Tribunal said at paragraph 20.3.1.9 that:

> **"(a) … The context of the various communications identified by Mr Brittenden was not one in which there were to be any job losses. BCC was engaged not in managing the relatively simple exercise of selecting for redundancy, but the much less straight-forward one of implementing the Single Status agreement in the face of stiff resistance from the trade unions…**
>
> **(b) As to the need for sufficient information for employees to make an informed decision, the cascading of information specific to the employee, and for an individual meeting, in any ordinary case of redundancy a tribunal is likely to find that if a subsequent dismissal is to be fair, the selection procedure, the criteria and the application of them to the employee must be explained, and there must be an individual meeting between employee and manager at which these matters, and especially the personal position of the employee, may be debated. That, of course, is because whatever collective consultation has gone before, there comes a point at**

> **which each individual must be considered separately for the purpose of a decision. In the present case, however, after long and exhaustive collective consultation which had resulted in a large measure of agreement, the role of individual discussion and debate had been limited to the JE process, including that of appeal… Even where an employee complained quite correctly that his post had been matched inappropriately a JE appeal was the sole remedy provided for him.**
>
> **…**
>
> **(d) As to meetings between the receipt of the employee pack and the date of termination of employment, the tribunal notes that Mr Albon and Mr Innis regarded such meetings as desirable. However, given the procedure which BCC had adopted, they could at most have provided pastoral support. Nothing said by either party at such a meeting could affect the JE process (except to the extent if any that it then came to be included in a JE appeal), or (unless it caused the employee to change his mind about rejection of the new terms) the sending out of termination letters. …"**

26. At paragraph 42 of its costs decision the Tribunal reminded itself of the warning in **Scott** that the Tribunal jurisdiction generally is and should remain a cost-free one. The Tribunal continued:

> **"Certainly, we should not wish to give the impression that a costs warning letter should always or generally have the effect of putting a party at risk as to costs. This was, however, a highly unusual case. It was by way of being a test case. The Claimants were at the opposite end of the spectrum from those unsophisticated and unrepresented parties who are involved in many tribunal cases: they were represented by solicitors and counsel who are both well respected specialists in employment law. They faced a trial which was bound to be lengthy and costly. They had the full evidential package for the trial, and were given what we have found to be an 'apparent conclusive opposition' to their cases. In the face of that, they went on and lost, and they did so on substantially the grounds that had been identified in the warning letter. We have concluded that in so doing they acted unreasonably."**

27. The Tribunal then reminded itself that it had a discretion whether to make a costs order and concluded essentially for the reasons that it summarised in this paragraph, that it should do so. With regard to the withdrawal by the EAD and OH Parsons claimants the Tribunal stated at paragraph 39 of its decision:

> **"we do not infer from this that they therefore concluded that their cases were hopeless, still less that because they withdrew other claimants who did not withdraw acted unreasonably. We do, however, infer that they considered that they had sufficient material before them to enable them to make an informed pre-trial assessment of their cases. The Thompsons claimants [i.e. the Appellants] had the same material, and were in a position to undertake a similar assessment."**

28. We accept Mr Epstein's submission that the Appellants' solicitors in their letter of 19 October 2010 failed to engage with the point made in the costs warning letter about the extent

of the collective consultation. The letter complains that the Respondent "has engaged in an exercise of providing a bundle containing excessive documentation" and that the Council concentrate "on collective consultation" which they say "is not an issue for the forthcoming hearing". What the Appellants' solicitors appear not to have appreciated is that the nature, extent and content of the collective consultation was very much an issue at the forthcoming hearing. It was because of that consultation that in the circumstances of the case individual consultation was not needed. Quite simply the Appellants' solicitors appear to have failed to address their mind to the nature and extent of the collective consultation. We think that if they had engaged with that issue the Appellants, even if they considered they had a reasonable prospect of success, would have been likely to have appreciated that it was so thin, that it was not worth going on with the hearing.

29. Mr Epstein contends that the Appellants had no reasonable prospect of success on the issue as to the need for individual consultation. However we agree with his submission that in order to succeed on unreasonable conduct it was not necessary for the Respondent to satisfy the Tribunal that the Appellants had no reasonable prospect of success. The Respondent's argument does not depend on establishing that their claim is doomed to failure and it matters not what the Appellants or their solicitors thought about their prospects of success.

30. We obtain no assistance from the decisions in **Scott v Commissioners of Inland Revenue** [2004] IRLR 713, **Npower Yorkshire Ltd v Daly** UKEAT/0842/04/ILB and **Lake v Arco Grating (UK) Ltd** UKEAT/0511/04/RN to which Mr Brittenden referred. Those cases were decided on their individual facts and they do not bear on the issue of the unreasonable conduct with which we are concerned in the present case. (See observations at para 42 in **Yerrakalva** set out at para 10 above).

31. Having reached its decision on the basis of unreasonable conduct, the Tribunal considered it was not necessary to deal with the alternative basis of the application, that the claims were misconceived. In our view the Tribunal was perfectly entitled to adopt this approach.

32. By reason of the matters we have referred to, we also reject the Appellants' contention that the Tribunal's conclusion that the Appellants had acted unreasonably in the conduct of the case was perverse.

(2) The original costs claim: post-termination events

33. Turning to the Appellants' second ground of appeal, namely the relevance of post termination events, the Tribunal concluded that it could not take into account any matter post-dating 31 March 2008 (the date on which the dismissals took place) in considering the issue of fairness and that it was bound to reach this conclusion by reference to the House of Lords ruling in **Tipton**.

34. At paragraph 20.4.4 of its decision on liability the Tribunal said:

> **"The tribunal does not believe that it is right to assimilate an appeal against JE grading to an appeal against dismissal. The two types of appeal have quite different purposes and characteristics. In this case a deliberate decision was taken, after very lengthy consultation with the unions, that there should be no appeal against dismissal. There was to be no appeal because of the imperative of implementing Single Status. The dismissals were, in the sense we have defined…, technical ones only: no-one stood to lose his or her job. A person appealing against the JE score or grade was not necessarily a 'red circle' or a person who had declined to accept the new contract: one could accept the contract yet still pursue a JE appeal. Moreover, even a 'red circle' who had rejected the new contract, and whose JE appeal was eventually unsuccessful, did not, unlike a person who unsuccessfully appeals against a redundancy dismissal, cease to be employed. Though Mr Brittenden put the argument for the Test Claimants on this point as persuasively as any advocate could, we cannot accept it. The exceptions to the *Devis v Atkins* principle are now well-known and based, so far as appeals are concerned, upon another judgment of the House of Lords, that [is] *West Midlands Co-Operative Society Limited v Tipton*. We do not accept that such nexus, if any, as existed between the dismissal and the JE appeal was such as to make the JE appeal part of the dismissal process, and therefore to bring it within the *Tipton* exception. The distinction is far from being either artificial or meaningless; it is a reflection of the reality of the situation of the parties. We consider that Mr Brittenden was inviting us to create a new exception, and in doing so to depart from clear authority at the highest level, and the tribunal cannot do so. We**

conclude that in judging the fairness of the dismissals we can only take account of evidence of events up to the date of termination of employment."

35. The Appellants' case on this appeal is two-fold. First, that the Tribunal erred in law in concluding that all matters post 31 March 2008 were irrelevant to the issue of fairness; second, even if the Appellants are wrong in that respect, it was not misconceived to advance the point.

36. Mr Brittenden relies on the judgment in the Court of Appeal in **Tipton** [1985] IRLR 116, in particular the observations of Ackner LJ at paragraph 10 and Slade LJ at paragraph 20 that post termination matters were relevant if they could be said to be relevant to the fairness of the decision to dismiss as at the effective date of termination. That general caveat, he submits, was not overruled by the House of Lords.

37. From this authority Mr Brittenden submits that it is clearly relevant to the issue of fairness if staff were dismissed for refusing to accept, even conditionally, an incorrect grade which they had not been consulted about. It follows that, not only the fact of an appeal, but the outcome of the appeal is potentially relevant.

38. In our view Mr Epstein is correct in submitting that the grounds of appeal (paragraphs 34-36 of the Notice of Appeal) which allege that the Tribunal erred in law in finding that events post-termination were irrelevant missed the point. The argument that the Tribunal was considering at the costs hearing was whether it was misconceived for the Claimants to have run their case at the liability hearing in the way in which it was run, namely on the basis that post-dismissal events were relevant as coming within a recognised exception to the approach in **Devis v Atkins**.

39. The House of Lords decision in **Tipton** does not assist the Appellants. Lord Bridge at page 201 summarised the three questions which must be answered under section 57 of the **Employment Protection (Consolidation) Act 1978** in determining whether a dismissal was fair or unfair: "(1) What was the reason (or principal reason) for the dismissal? (2) Was *that* reason falling within section 57(2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held? (3) Did the employer act reasonably or unreasonably in treating *that* reason as a sufficient reason for dismissing the employee?" Lord Bridge continued:

> **"The reason shown by the employer in answer to question (1) may, therefore, be aptly termed the real reason. Once the real reason is established the answer to question (2) will depend on the application of the statutory criteria to that reason. Then comes the crucial question (3): did the employer act reasonably or unreasonably in treating the real reason as a sufficient reason for dismissing the employee? Conduct of the employee unrelated to the real reason for dismissal obvious cannot affect the answer to this question. This, and no more than this, is what the *Devis* case decided. But I can see nothing in the language of the statute to exclude from consideration in answering question (3) 'in accordance with equity and the substantial merits of the case' evidence relevant to show the strength or weakness of the real reason for dismissal which the employer had the opportunity to consider in the course of an appeal heard pursuant to a disciplinary procedure which complies with the statutory Code of Practice."**

40. On the findings of fact made by the Tribunal, (see para 34 above), which have not been appealed, **Tipton** does not apply.

41. At the costs hearing Mr Brittenden sought to rely on the decision in **Bampouras v Edge Hill University** UKEAT/0179/09 which he confirmed was not cited to the Tribunal at the liability hearing. It supports the proposition that post-dismissal events are at least potentially relevant. However as the Tribunal observed at paragraph 38 of its costs decision:

> **"…the simple fact is that the Claimants' case was run at trial on the basis that later events were relevant only if and so far as they were in the nature of an appeal, and on that basis within one of the well-known exceptions to the *Devis* principle. It was open to the Claimants, on their discovery of *Bampouras* to appeal against the judgment of the Tribunal, yet there had been no appeal. However, lest the Tribunal is wrong on this point, we have reconsidered our judgment in the light of *Bampouras*, and concluded that had we been invited to consider it at trial we should not have thought that in the circumstances we should take post-termination events into account."**

42. We agree with Mr Epstein that on the basis that the Appellants did not appeal any element of the liability judgment, the Tribunal was right to decline to accede to a submission on **Bampouras** to the effect that it made an error of law on this issue. On the facts in **Bampouras** it was possible to take into account certain post-termination events. We think the decision in **Bampouras** falls within the "**Tipton** exception".

43. Mr Brittenden submits that as a unilateral and substantial change to terms and conditions operates as a dismissal (**Hogg v Dover College** [1990] ICR 39 EAT), it was not misconceived to assert that an appeal against grading was in essence, an appeal against dismissal. We reject this submission. There was no right of appeal against dismissal, only a right of appeal against job evaluation. Further **Hogg v Dover College** concerned a demotion; it was a constructive dismissal case; it did not concern a direct dismissal, as in the present case.

44. Finally we reject Mr Brittenden's submission that the Tribunal's exercise of discretion to award costs in respect of the post-termination points was perverse and/or insufficiently reasoned. It is said that the post-termination points were not mentioned anywhere in the Respondent's costs warning letter of 18 October 2010 and the Respondent never asserted that the post-termination matters were misconceived or otherwise irrelevant prior to the commencement of the hearing itself.

45. These points were made to the Tribunal at the costs hearing and at paragraphs 46-47 of their decision the Tribunal refer to Mr Brittenden's skeleton argument and submissions. The Tribunal rejected those submissions as they were entitled to do. At paragraph 47 the Tribunal said: "In the exercise of that discretion, it reminds itself again of the warning in **Scott v CIR**. It takes into account the unusual character of the litigation and the fact that the Claimants had throughout access to highly skilled and specialist legal advice. It has concluded on balance that

it should make an order, and does so in terms which are intended to avoid any duplication with the order made under paragraph 43 above".

46. In our view on the facts of the present case all matters post 31 March 2008 were irrelevant to the issue of fairness and it was misconceived to advance the point.

Conclusion

47. We are satisfied that the Tribunal did not err in law in making the costs order it did. In our view there are no grounds for interfering with the Tribunal's exercise of discretion. For the reasons we have given this appeal is dismissed.