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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE INDUSTRIAL TRIBUNALS

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Between:

CATERPILLAR (NI) LIMITED

Appellant;

and

DEREK MARSHALL

Respondent.

_____

Before: Stephens LJ, Treacy LJ and McCloskey LJ

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COSTS

McCloskey LJ (delivering the judgment of the court)

Introduction

[1] Caterpillar (NI) Limited ("*the employer*") appealed to this court against the decision of the Industrial Tribunal in proceedings in which Derek Marshall ("*the employee*"), succeeded in his case to the following extent (per the decision of the Tribunal):

> "*(1)* [He was] *not medically suspended from work within the meaning of Article 96 of the Employment Rights (NI) Order 1996.*
>
> *(2) The respondent made an unlawful deduction from the wages of Derek Marshall. The respondent is ordered to pay him the sum of £238.*"

There was no appeal by the employee.

[2] By its decision promulgated on 2 October 2019 this court determined the appeal in the employer's favour in the following terms:

> "[23] *It was at all times common case that the sickness absence policy forms part of the Respondent's contract of employment with the Appellant. The Respondent's entitlement to remuneration throughout his period of absence from work was governed by this policy and he was paid in accordance with its provisions. In its decision the Tribunal did not engage with the relevant provisions of the policy and reached a bare, unreasoned conclusion which is unsustainable in law on the grounds elaborated above.*
>
> [24] *The appeal succeeds for the reasons given. That part of the Order of the Tribunal which found that the Appellant made an unlawful deduction from wages for the three "waiting days" is set aside."*

Costs: The Legal Framework

[3] The parties have been unable to agree on the costs of the appeal. There are certain provisions of the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (NI) 2005 (the "Procedural Rules") bearing on the general rule that costs orders are not appropriate inter-partes in employment tribunal proceedings.

Rule 38

> *"General powers to make costs orders*
>
> *(1) Subject to paragraph (2) and in the circumstances listed in rules 39, 40 and 47 a tribunal or chairman may make an order ("a costs order") that –*
>
> *(a) a party ("the paying party") make a payment in respect of the costs incurred by another party ("the receiving party");*
>
> *(b) the paying party pay to the Department, in whole or in part, any allowances paid by the Department to any person for the purposes of, or in connection with, that person's attendance at the tribunal.*
>
> *(2) A costs order may be made under rules 39, 40 and 47 only where the receiving party has been legally represented at the hearing under rule 26 or, in proceedings which are determined without such hearing, if the receiving party is legally represented when the proceedings are*

determined. If the receiving party has not been so legally represented a tribunal or chairman may make a preparation time order (subject to rules 42 to 45). (See rule 46 on the restriction on making a costs order and a preparation time order in the same proceedings.)

(3) For the purposes of these Rules "costs" shall mean fees, charges or disbursements incurred by or on behalf of a party in relation to the proceedings.

(4) A costs order may be made against or in favour of a respondent who has not had a response accepted in the proceedings in relation to the conduct of any part which he has taken in the proceedings.

(5) In these Rules "legally represented" means having the assistance of a person (including where that person is the receiving party's employee) who –

(a) has a general qualification within the meaning of section 71 of the Courts and Legal Services Act 1990;

(b) is an advocate or solicitor in Scotland; or

(c) is a member of the Bar of Northern Ireland or a solicitor of the Supreme Court of Northern Ireland.

(6) Any costs order made under rules 39, 40 or 47 shall be payable by the paying party and not his representative.

(7) A party may apply for a costs order to be made at any time during the proceedings. An application may be made at the end of a hearing, or in writing to the Office of the Tribunals. An application for costs which is received by the Office of the Tribunals later than 28 days from the issuing of the decision determining the claim shall not be accepted or considered by a tribunal or chairman unless it or he considers that it is in the interests of justice to do so.

(8) In paragraph (7), the date of issuing of the decision determining the claim shall be either –

(a) the date of the hearing under rule 26 if the decision was issued orally; or

(b) if the decision was reserved, the date on which the written decision was sent to the parties.

(9) No costs order shall be made unless the Secretary has sent notice to the party against whom the order may be made giving him the opportunity to give reasons why the order should not be made. This paragraph shall not be taken to require the Secretary to send notice to that party if the

party has been given an opportunity to give reasons orally to the chairman or tribunal as to why the order should not be made.

(10) Where a tribunal or chairman makes a costs order it or he shall provide written reasons for doing so if a request for written reasons is made within 14 days of the date of the costs order. The Secretary shall send a copy of the written reasons to all parties to the proceedings."

Rule 39

"When a costs order must be made

(1) Subject to rule 38(2), a tribunal or chairman must make a costs order against a respondent where in proceedings for unfair dismissal a hearing under rule 26 has been postponed or adjourned and –

(a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before that hearing was due to take place; and

(b) the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed, or of comparable or suitable employment.

(2) A costs order made under paragraph (1) shall relate to any costs incurred as a result of the postponement or adjournment of the hearing under rule 26."

Rule 40

"When a costs order may be made

(1) A tribunal or chairman may make a costs order when on the application of a party it or he has postponed the day or time fixed for or adjourned a hearing under rule 26 or pre-hearing review. The costs order may be against or, as the case may require, in favour of that party as respects any costs incurred or any allowances paid as a result of the postponement or adjournment.

(2) A tribunal or chairman shall consider making a costs order against a paying party where, in the opinion of the tribunal or chairman (as the case may be), any of the circumstances in paragraph (3) apply. Having so considered, the tribunal or chairman may make a costs

order against the paying party if it or he 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.

(4) A tribunal or chairman may make a costs order against a party who has not complied with an order or practice direction."

[4] An appeal from decisions of Industrial Tribunals to the Northern Ireland Court of Appeal lies on a question of law by virtue of Article 22 of the Industrial Tribunals (NI) Order 1996. Appeals of this kind engage section 59 of the Judicature (NI) Act 1978 (the "*1978 Act*") which, in subsection (1) provides:

"*Subject to the provisions of this Act and to rules of court and to the express provisions of any other statutory provision, the costs of and incidental to all proceedings in the High Court and the Court of Appeal, including the administration of estates and trusts, shall be in the discretion of the court and the court shall have power to determine by whom and to what extent the costs are to be paid.*"

The next point of reference is Order 62, Rule 3 of the Rules of the Court of Judicature of Northern Ireland. This provides:

"*(1) This rule shall have effect subject only to the following provisions of this Order.*

(2) No party to any proceedings shall be entitled to recover any of the costs of those proceedings from any other party to those proceedings except under an order of the court.

(3) If the court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the court shall order the costs to follow the event except when it appears to the court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."

The starting point, therefore, is that the costs of all proceedings in the High Court and the Court of Appeal lie within the discretion of the court, by section 59(1) of the 1978 Act. This general rule, however, is expressly stated to be "*subject to*" rules of

court. The effect of Order 62, Rule 3(3) is to establish a general rule that costs follow the event. This general rule is expressly subject to the exception that the court may order otherwise where it considers that "*in the circumstances of the case*" it should do so.

The Competing Submissions

[5] On behalf of the employee Mr Michael Potter (of counsel) informed the court that this case has had trade union support from its inception. He developed an argument with the following main interlinked strands. Employment tribunals have always operated on the basis that each party bears its respective costs; in England and Wales this also applies to proceedings in the appellate tribunal, the Employment Appeal Tribunal ("EAT"), in England and Wales and in Scotland, which has no parallel in the jurisdiction of Northern Ireland; thus in those jurisdictions appeals from first instance decisions do not give rise to a significant costs deterrent; as a result neither an employee's right of access to the court nor the principle of equality of arms is infringed.

[6] Mr Potter further submitted that aberrant tribunal decisions may go unchallenged by reason of the costs risk to the unsuccessful party; injustices may therefore be left uncured; the availability of an appeal is ineffective in consequence; there may be a significant imbalance between appeal costs and the amount at stake; a chilling effect may deter important test case appeals; and, by virtue of economic realities, inequality is more likely to be suffered by employees than employers.

[7] Elaborating, Mr Potter highlighted the basic ethos of the employment tribunal system namely one which provides employees with access to a specialist judicialised tribunal without deterrent costs. He submitted that it is unfair and unreasonable that an employee who succeeds at first instance should be exposed to the risk of appeal costs in cases where the tribunal's decision has been found to be erroneous in law. He suggested that the appeal arrangements in this jurisdiction are anomalous. He raised the possibility of an "*apparent breach*" of Article 6(1) ECHR, in tandem with Article 14 (contrary to section 6 of the Human Rights Act 1998).

[8] With specific reference to the present appeal Mr Potter submitted that an issue of "*wider importance*" was at stake, transcending the small monetary sum involved (£238); this was a "*test case*" with "*ramifications … potentially significant for* (Union) *members and workers*"; for this reason it was supported and financed by the employee's trade union (as at first instance) and the absence of union support would have resulted in inequality of arms for the employee and unilateral argument only.

[9] On behalf of the employer, Mr Martin Wolfe QC submitted that the general rule that costs follow the event should apply given that this is an appeal from the Industrial Tribunal involving two well-resourced parties; there has been no obstacle in the way of the employee defending the appeal; he has had the benefit of free legal representation at both levels; he and his trade union were under no obligation to

contest the appeal, but chose to do so; and they exposed themselves to a well settled cost risk in consequence.

Consideration and Conclusions

[10] The potency of the general rule has long been recognised. It was emphasised by this court in *Re Kavanagh's Application* [1997] NI 368. There Carswell LCJ drew attention to the statement of Atkin LJ in *Ritter v Godfrey* [1920] 1 KB 47 at 60:

> "*In the case of a wholly successful Defendant, in my opinion the judge must give the Defendant his costs unless there is evidence that the Defendant (1) brought about the litigation or (2) has done something connected with the institution or the conduct of the suit calculated to occasion unnecessary litigation and expense or (3) has done some wrongful act in the course of the transaction of which the Plaintiff complains.*"

The Lord Chief Justice stated at 382a:

> "*The award of costs is in the discretion of a trial judge, but the discretion should be exercised along well settled lines.*"

While acknowledging "*the respect which has to be shown by an appellate court to the exercise of a judge's discretion in the award of costs*", the Court of Appeal concluded (at 383a) that:

> "*… there was no sufficient reason to refuse costs to the successful respondent, still less to order costs against him.*"

[11] In *McAteer v Fox and Others* [2016] NICA 46 this court cited with approval the following passage in Valentine, Civil Proceedings: The Supreme Court at 17.05:

> "*Foolishness or exaggeration, reliance on unappealing grounds are not grounds for withholding costs from the winner and misfortune, poverty or sympathy of a court are not grounds for waiving costs against the loser. The judge must decide judicially and cannot delegate the discretion.*"

Gillen LJ then identified certain governing principles at [27], including these:

> *(i)* "*The purpose of the rule is to avoid expense, delay and aggravation involving protracted litigation arising out of taxation. Such an aim would be achieved especially, though not exclusively, in complex cases.*

(ii) *The discretion vested in the judge is not subject to any formal restriction.*

(iii) *The order does not envisage any process similar to that involving taxation. The approach should be a broad one ….*

(iv) *Although the discretion is unlimited, it must be exercised in a judicial manner. An example of acting in an unjudicial manner would include for example clutching a figure out of the air without any indication as to the estimated costs*".

[12] In *R (ex parte Child Poverty Action Group) v Lord Chancellor* [1999] 1 WLR 347 Dyson J highlighted that the general rule that costs follow the event has the important function of encouraging parties to act sensibly in a context of increasingly expensive litigation. It promotes discipline within the litigation system, obliging the parties to assess carefully for themselves the strength of any claim. The general rule further ensures that the assets of the successful party are not depleted by reason of having to go to court. To like effect is the decision of Gillen J in *Re Moore (Costs)* [2007] NIQB 23. The strength of the general rule is reflected in another decision of this court holding that where a judge orders that costs follow the event, there is no requirement to state reasons: *Ewing v Times Newspapers* [2013] NICA 74.

[13] Two further decisions in this jurisdiction may be noted. In *Doyle v Doyle* [2012] NICh 18 the fact that the unsuccessful party was an impecunious unrepresented litigant was considered to afford no reason for departing from the general rule. In *Ballinamallard Developments v Ormeau Gas Works* [2008] NIQB 114 it was held that the court may permissibly examine the benefits which either or both parties have achieved from the litigation, together with their conduct in both the pre-litigation events and the litigation itself, reviewing the evidence and the outcome of the proceedings broadly.

[14] Article 6 ECHR decisions of the ECtHR, given effect by the Human Rights Act 1998, arises only if the substantive decision of this court entailed a judicial determination of a civil right or obligation as between the two parties. In the extensive written submissions which the court has received neither party addresses this fundamental issue. In these circumstances the court considers that it would be antithetical to the overriding objective to embark upon its own independent examination and resolution of this issue of law.

[15] Subject to the foregoing, having had its attention drawn to Article 6 ECHR, the court is reminded that in certain circumstances a person's right of access to a court for independent and impartial judicial adjudication of a legal dispute could, in principle, be impaired by the factor of prohibitive cost. This is illustrated in an

admissibility decision of the ECtHR, *Handolsdalen v Sweden* [2009] 49 EHRR SE 15 which involved a private law litigation dispute between certain landowners and the inhabitants of four Swedish Sami villages relating to reindeer grazing rights. In proceedings which had a total duration of some 12 years, at both first instance and on appeal, the villagers were unsuccessful and were ordered to pay the landowner's appeal costs of some €270,000. The proceedings continued for a further two years, culminating in the Supreme Court refusing leave to appeal. In the ensuing Strasbourg proceedings the applicants complained of a series of breaches of Convention rights. One of their discrete complaints was that by reason of the high level costs involved, they were denied effective access to a court in contravention of Article 6 ECHR. They contended that on account of their limited resources they had been obliged to have resort to a legal representative lacking expertise and experience, state funded legal aid was not available, there was inequality of arms vis-à-vis the landowner litigants and the legal costs were prohibitive. The ECtHR ruled that their complaint was admissible.

[16] In both *Stankov v Bulgaria* [2009] EHRR 7 and *Klauz v Croatia* [Application No 28963/10], the ECtHR gave consideration to costs rules in the relevant domestic legal system whereby (a) the "loser pays" principle applied and (b) the successful party may have to pay the other party's costs in proportion to the percentage of the disallowed claim. The successful party's costs risk arose also where the court awarded him damages but considered that the claim had been inflated, giving rise to the possibility of having to pay costs to the unsuccessful defendant exceeding the damages awarded to the plaintiff. Given that these costs rules could operate as a deterrent to a party's right of access to the court, the ECtHR applied the familiar test of whether the restriction pursued a legitimate aim and was proportionate in determining an asserted infringement of Article 6(1) ECHR.

[17] While holding that the impugned costs rules pursued the legitimate aim of discouraging ill-founded litigation and inflated costs, thereby promoting the proper administration of justice and protecting the rights of others, the court concluded that an infringement of Article 6(1) had been established on the particular facts of the case. In the relevant passages in the *Klauz* judgment, the text is replete with references to the individual case which the court was deciding, the phrase "*the present case*" appearing repeatedly. In short, the finding of a breach of Article 6(1) in the form of a restriction which "*… impaired the very essence of the applicant's right of access to court*" (see [97]) was inextricably wedded to the litigation specific context under consideration.

[18] Other decided cases featured in Mr Potter's submissions. One of these is *Coventry v Lawrence* [2015] UKSC 50 where a losing party unsuccessfully challenged the statutory arrangements for conditional fee agreements, specifically those aspects whereby they were required to pay a success fee to the successful party's lawyers and an after the event insurance premium on the basis of asserted incompatibility of the statutory regime with Article 6(1) ECHR. The Supreme Court rejected this challenge, holding that the scheme had the legitimate aim of promoting the widest

public access to legal services for civil litigation funded by the private sector and struck a proportionate balance between the rights of different types of litigant *inter alia* because the recoverable costs themselves had to be proportionate to the matters in issue.

[19] We have also given consideration to *UNISON v Lord Chancellor* [2017] UKSC 51 which entailed a successful challenge to a measure of subordinate legislation requiring the payment of fees for claims in employment tribunals and appeals to the EAT which was held to be unlawful under both the common law and EU law as (regarding the former) it was in contravention of the citizen's constitutional right of access to the courts and (regarding the latter) it infringed the general EU law principles of effectiveness and effective judicial protection.

[20] Mr Potter further drew attention to *Bank of Credit and Commerce International SA v Ali No 4* [unreported, Lexis Citation 3668 and WL 1953270] where, following a trial of some nine weeks duration (see [1999] 4 ALL ER 83) the court decided that while the claimants had established that the defendant bank had breached the term of trust and confidence in their contracts of employment they had failed to demonstrate any ensuing loss and their claims were dismissed in consequence. In this first instance litigation the court recognised that in the exercise of its discretion in relation to costs, it was appropriate to take into account the test case nature of the proceedings: out of a total of 364 claims brought by former employees of the defendant bank pursuing damages for stigma in the labour market arising from the alleged breach of the implied term of trust and confidence, five claims were identified and litigated as test cases. Both sides incurred costs well in excess of £1 million. Lightman J, observing that "*honours were even",* forming "*a realistic view of the outcome of the litigation*" and referring to "*the balance of justice",* determined to make no order as to costs *inter–partes.*

[21] The costs issue laid before this court has two elements. The first entails the contention that in this case this court should exercise its discretion in relation to costs by declining to give effect to the general "loser pays" rule. Giving effect to the potency of this general rule and the other related principles identified above, we are unable to discern any basis for acceding to this application. The employee – more accurately his trade union – was in a position to make a considered and informed assessment of the costs risk, with the assistance of lawyers, at all times. Having made this assessment at first instance, the employee secured a modest financial victory without incurring legal costs. The employer appealed. It is clear that the employee would not have participated in the appeal in the absence of trade union support. The union, once again, made a presumptively considered and informed assessment of whether to fund the defence of the appeal. In the absence of any obligation or compulsion of any kind it opted to do so. In thus deciding it exposed itself to the standard costs risk. This risk having materialised, the union now suggests that the employer, who come what may will not recover any of his legal costs at first instance, should also bear his costs of the appeal.

[22] Thus far in the analysis the characterisation of the tribunal claim of the employee and the ensuing appeal to this court as both ordinary and unremarkable seems irresistible. Counsel's recourse to the principles of effective access to justice and inequality of arms occurs in an unmistakable vacuum. These principles have been fully accomplished in the case of this employee.

[23] The trade union, with the availability of legal advice, made an essentially commercial decision in determining to finance the defence of the appeal. Such decisions are the stuff of the activities of every trade union. In a context of finite financial resources some members' claims, in whatever litigation context, are supported while others are not. The only factor of any possible merit is the suggestion that (per Mr Potter's skeleton argument) this was "*… a test case and the ramifications were potentially significant for members and workers*". "*Test case*" is a term of art, susceptible to no precise definition. It is an appellation which will normally be appropriate in a context where a single case or small group of cases has real potential to resolve, or significantly influence, the outcome of other cases, whether extant or reasonably anticipated. We remind ourselves of what this court decided, as summarised in [23] of its principal judgment. This was in substance and reality a routine case involving the ascertainment, construction and application of one discrete facet of the employee's contract of employment with the employer. In simple terms the tribunal erred in law on this point and this court corrected the error. The issues were neither complicated nor sophisticated and such guidance as may be desirable for future cases is now available. Both parties have advanced to this court the bare assertion that this appeal had the trappings of a test case. The court disagrees, emphatically so.

[24] The second dimension of the costs issue calling for judicial adjudication stems from Mr Potter's submission that this court should (per counsel's skeleton argument) provide "*…. guidance in relation to how the issue of costs should justly be addressed in employment appeals* [generally] …." We unhesitatingly decline this invitation. The courts to which section 59 of the 1978 Act is directed are invested with a discretion. This must be exercised judicially. The discretion falls to be exercised in each individual case. The exercise of the discretion will, self-evidently, be shaped and driven by the fact specific and legally sensitive context of the particular case. This analysis flows inexorably from section 59(1). If reinforcement is required this is found in Order 62, Rule 3 with its emphasis on "*the circumstances of the case*". Furthermore this is the recurring and unifying theme of all the decided cases considered above. The factual and legal features and circumstances of every case vary enormously. Given these considerations, the promulgation of general guidance would in our view be manifestly inappropriate.

Final order

[25] This will have two central components:

[i] The appeal succeeds to the extent that the part of the Order of the Industrial Tribunal which found that the Appellant made an unlawful deduction from wages for the three "*waiting days*" in question is set aside.

[ii] The Respondent will pay the Appellant's costs of the appeal, to be taxed in default of agreement.