‘Unreasonableness’: costs applications in the Small Claims Court and the Employment Tribunal

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Overview

Last month in *Dammermann v Lanyon Bowdler LLP* the Court of Appeal provided guidance on the meaning of ‘unreasonableness’ in relation to costs applications in the Small Claims Court. Although primarily providing guidance for parties operating under the CPR, the CoA’s consideration of whether a party has behaved unreasonably is also useful for parties in the employment tribunal because of the similar language used in the two tests.

In this article, Joe England analyses the case and highlights what lessons can be learned for both commercial and employment practitioners.

The CPR compared to the ET Rules

CPR rule 27.14(2)(g), applicable in the small claims track, provides:

‘The court may not order a party to pay a sum to another party in respect of that other party's costs, fees and expenses, including those relating to an appeal, except...such further costs as the court may assess by the summary procedure and ordered to be paid by a party who has behaved unreasonably.’

ET rule 76(1)(a) and (b) provide:

‘A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—
(a) a party (or that party’s representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
(b) any claim or response had no reasonable prospect of success.’

In *Harris v Academies Enterprise Trust*, when considering an argument that the approach to relief from sanctions under the CPR following *Mitchell v News Group Newspapers Ltd* should be applied by ETs to strike out applications, Langstaff J highlighted the relevance of the CPR to the ET Rules. Whilst stating that the rules are different, he nevertheless acknowledged the relevance of the CPR and its case law:

‘Though, it seems to me, there is much of principle that applies to both, it would be a mistake to suggest that the CPR applied in the tribunals in the same way as they apply in the civil

courts. Regard must be had, I have no doubt, to the insight given by cases such as *Mitchell* into that which constitutes justice' (para. 33)

Given the similarities in wording between the two tests above, whilst the CoA's analysis in *Dammermann* of what is 'unreasonable' under the *CPR* does not create a precedent, it could provide a persuasive argument in an ET, particularly with a move towards a unified court system on the horizon.

Unreasonableness in Dammermann

Mr Dammermann had lost a small claims hearing against the Defendant firm of solicitors and then lost an appeal before a Circuit Judge (CJ), at which stage costs were ordered against him on the basis of unreasonable behaviour. His claim failed because the solicitors were not agents of his mortgagee. The appeal to the CoA against the costs award was brought by Mr Dammermann on three points:

- the CJ that ordered costs was the same CJ who had granted him permission to appeal
- the point of law on which he lost the case was obscure
- the CJ was wrong to take into account his rejection of a £1,000 offer to settle

The CoA stated that the first two had 'considerable force' (para. 12) and allowed the appeal. For the first point, the CoA held very simply that the CJ had failed to consider its relevance.

For the second, the CoA held that the case involved 'a somewhat intricate point' based on an 'artificial' deed (para. 26). They considered the CJ's findings that 'the primary case presented by Mr Dammermann is simply not right' and of a skeleton served at least six weeks previously, 'it is obvious from that skeleton argument that he was barking up the wrong tree', but rejected the Respondent's submission that the CJ had found that the appeal was totally without merit.

In an ET case, the analysis is likely to be relevant because many litigants in person (and lawyers) feel no doubt the cases turn on intricate and obscure points of law, and the response to their complexity could be considered under the general test of unreasonableness at ET rule 76(1)(a) as well as more specifically whether a claim had 'no reasonable prospect of success' under ET rule 76(1)(b).

The consideration of the third point is also of interest in both small claims and ETs because it is common in both for a party to make a commercial offer to settle on the basis that such an offer is cheaper than shelling out for costs that are unlikely to be recovered. Such an offer could be made as a Calderbank offer, for example, and there is support from the CoA that the making and rejection of such offers is a relevant consideration to unreasonableness. The CoA stated that if this were the only point of appeal it would not have succeeded, the CJ was entitled to take the rejection into account and 'the fact that Mr Dammermann was prepared to settle for a substantially higher figure is, obviously, irrelevant to this consideration' (para. 28).

Slight caution is needed in a comparison between the CPR and ET Rules here because, as the CoA highlighted, there is express provision to consider the rejection of an offer per CPR 27.14(3):

'A party's rejection of an offer in settlement will not of itself constitute unreasonable behaviour under paragraph 2(g) but the court may take it into consideration when it is applying the unreasonableness test.'

Although there is no such express provision in the ET Rules, the EAT in *Kopel v Safeway Stores plc* nevertheless highlighted that the rejection of an offer to settle can result in a costs order if the conduct in rejecting the offer was unreasonable. Further, in *Vaughan v London Borough of Lewisham* the EAT held that the making of an offer, even a substantial one, will not normally make it unjust to make a costs order in favour of the respondent if they later argue that the claim was in any event misconceived.

Guidance

At the end of their judgment the CoA accepted an invitation to provide general guidance on when a party has behaved unreasonably. Unsurprisingly, the CoA emphasised a limitation because 'all such cases must be highly fact-sensitive' (para. 30) but relied on *Ridehalgh v Horsefield* to provide guidance that could be read across from wasted costs applications:

> 'conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting in a practitioner's judgment, but it is not unreasonable'

The CoA continued:

'the meaning of "unreasonably" cannot be different when applied to litigants in person in Small Claims cases. Litigants in person should not be in a better position than legal representatives but neither should they be in any worse position than such representatives' (para. 31)

Here, there is a conflict with the approach suggested by the EAT, as articulated in *AQ Ltd v Holden* and endorsed in *Vaughan*, that 'a tribunal cannot and should not judge a litigant in person by the standards of a professional representative' (para. 32). An ET may therefore feel that taking this approach, the arguments against awarding costs in *Dammermann* have even more force with a litigant in person in an ET than under the CPR.

The CoA ended their judgment with a statement that is unlikely to provide encouragement for those in both systems who feel unjustifiably the target of litigation and who would want to therefore seek their costs:

'it would be unfortunate if litigants were too easily deterred from using the Small Claims Track by the risk of being held to have behaved unreasonably and thus rendering themselves liable for costs' (para. 32).

Given the contrast of the two systems that is highlighted by *Holden*, it is arguable that this comment should carry even more weight in an ET than in the small claims court.

Conclusion

Dammermann provides guidance on the meaning of unreasonableness from the CoA. This provides important analysis from a level of court that does not often consider claims under the small claims court. Although there is a limit on how far the *CPR* can be read across to an ET, the analysis of what is 'unreasonable' presents a relevant insight to the ET Rules, both through the parallels and contrasts between the two systems. The CoA has reaffirmed the principle that costs in both should be the exception and not the norm.

Authorities

CPR = Civil Procedure Rules 1998
ET Rules = ETs (Constitution and Rules of Procedure) Regulations 2013, Schedule 1
Dammermann v Lanyon Bowdler LLP [2017] EWCA Civ 269
(http://www.bailii.org/ew/cases/EWCA/Civ/2017/269.html)
Harris v Academies Enterprise Trust and others [2015] IRLR 208
Mitchell v News Group Newspapers Ltd [2014] 1 WLR 795
Kopel v Safeway Stores plc [2003] IRLR 753
Vaughan v London Borough of Lewisham [2013] IRLR 713
Ridehalgh v Horsefield [1994] Ch 205
AQ Ltd v Holden [2012] IRLR 648

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