



## Sharing administrative costs in the employment tribunal

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*Preparing tribunal bundle copies can be time-consuming and expensive. To equalise the cost and avoid disputes, tribunals have ordered preparation costs to be shared between the parties. But the Court of Appeal in the tax case of Eclipse has set an unhelpful precedent for sharing costs.*

*Eclipse* concerned some 700 lever arch files, most of which contained documents on which HM Revenue & Customs relied. The Revenue's contribution to costs as originally ordered was £108,395.48. The applicable rules equate to Rules 74-77 of Schedule 1 to the *ET (Constitution and Procedure) Regulations 2013* (both sets of rules made under s.29 of the Tribunals Courts and Enforcement Act 2007).

### **The Court of Appeal decision**

The court focused on a rule, the relevant parts of which are stated in identical terms to Schedule 1 Rule 76(1), which gives an explicit power for the tribunal to order costs '(a) where the paying party, or their representative, has acted vexatiously, abusively, disruptively or otherwise unreasonably in either bringing either the bringing of 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.' The court rejected the argument that the tribunal had the power, under its general case management powers (which also echo those of the tribunal), to make an order for shared costs.

The court accepted that the tribunal does have the power to order parties to produce the bundles. Incurring the cost of producing bundles is intrinsic to the action of producing them; thus *Eclipse* argued that there is an implicit power to order that the costs of that production be shared. However, in both the tax and the employment tribunal rules, the explicit costs award powers are stated in terms only suitable for application at the conclusion of the case, or in the event of 'unreasonable behaviour'.

There is no authority that failing to share the cost of production of bundles is unreasonable behaviour for the purpose of those rules. Generally, unreasonable behaviour

would not be considered for costs purposes until the conclusion of the case. Accordingly, the court found that it had no jurisdiction under the Tribunal Procedure (First-Tier Tribunal) (Tax Chamber) Rules 2009 to make an order apportioning financial responsibility for the production of the bundles.

Some tribunals seek to achieve a sharing of costs, without making an explicit costs order, by ordering that one party produce two and the other produce three sets of bundles. Another alternative is to leave the parties to agree the split of costs, and seek an order based on the 'unreasonable behaviour' of a party which refuses to bear its share of the costs. Both approaches entail additional costs in the *inter-partes* negotiations and risk wasting further tribunal time if agreement is not reached.

### **Conclusion**

The court's suggestion is risky in the absence of precedent or Presidential Guidance. Permission to appeal has been sought in this case, but it is also an issue on which the President might consider issuing new guidance to help save time and money in future.

#### **KEY:**

*Eclipse*

*Eclipse Film Partners No.35 LLP v the Commissioners for HMRC* [2014] EWCA Civ 184