

JERSEY / JUDGMENT

States Employment Board v Erika Francioso

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Employment - appeal on costs [2026]JRC234 Royal Court (Samedi) 10 September 2026 Before : M. H. Temple, Esq., Deputy Bailiff Between States Employment Board Appellant And Erika Francioso Respondent Advocate J. P. Rondel for the Appellant. Advocate S. B. Wauchope for the Respondent.

judgment

the deputy bailiff:

Introduction

1. On 20 August 2026 I allowed the Appellant’s appeal against the decision of the Employment and Discrimination Tribunal (the “Tribunal”) to refuse to allow its application for costs (the “Costs Appeal”) and now give reasons for my decision. 2. At the hearing, following a short adjournment, it transpired that the parties had agreed a settlement of the Respondent’s, Ms Francioso, appeal against the Tribunal’s decisions in relation to her unfair dismissal and discrimination claims as set out in the Tribunal’s judgment dated 19 December 2025 under the reference Erika Franciso v States Employment Board

[2024] TRE 127. The settlement included a compromise of the Costs Appeal as against Ms Francioso but without prejudice to the States Employment Board (“SEB”) pursuing the Costs Appeal as a pure point of law. The Appellant, as the largest employer in Jersey, wished to proceed with the Costs Appeal as a pure point of law due its general importance. I approved a Consent Order recording the settlement reached between the parties and then allowed the SEB’s Costs Appeal on the papers which included detailed written submissions from Advocate Rondel and Advocate Wauchope. Appeal on a Point of Law 3. Article 94(1) of the Employment (Jersey) Law 2003 (the “Employment Law”) provides: - “A person aggrieved by a decision or order of the Tribunal may, on a question of law only, appeal to the Royal Court by applying to the Tribunal for leave to appeal”. 4. In *Voisin (trading as Voisins Department Store) v Brown* [2007] JLR 141, Birt, then Deputy Bailiff, held that the correct test to apply in relation to Article 94 of the Employment Law was as follows: - “The wording of art. 94 mirrors that of the equivalent English legislation, which confers a right of appeal on a question of law from an employment tribunal to the employment appeal tribunal. Mr Preston accepted that *Harvey on Industrial Relations &*

Employment Law set out the position accurately at Division T, para. 1630: ‘An appeal for an employment tribunal lies only on a “question of law” (ETA S21(1)). Accordingly, the ETA will have no plan to interfere with a tribunal’s decision unless it can be shown: (a) that the tribunal misdirected itself in law or misunderstood the law or misapplied the law; or (b) that there was no evidence to support a particular conclusion or finding of fact; or (c) that the decision was either perverse in that it was one which no reasonable tribunal, directing itself properly on the law, could have reached, or alternatively, was one which was obviously wrong...’ 5. Subsequent clarification in relation to ground (c) was provided in *Luxicabs Limited v Baal* [2011] JLR 208 at paragraph 18(2) which was confirmed by the Jersey Court of Appeal in *JT (Jersey) Limited v Wood* [2016] JCA 183 at paragraph 22. In summary, ground

- (c) was only a valid ground of appeal where the Tribunal’s decision could be shown to be so unreasonable that no reasonable tribunal could have made it. 6. In this case the SEB’s Costs Appeal was brought pursuant to limb (a) of *Voisin* i.e. “that the tribunal misdirected itself in law or misunderstood the law or misapplied the law” on two grounds as set out below. Costs Regime of the Tribunal 7. On 25 July 2025, the Employment & Discrimination Tribunal (Procedure)(Jersey) Amendment Order 2025 came into force and amended the Employment & Discrimination Tribunal (Procedure)(Jersey) Order 2016 (the “Procedure Order”). Article 40A was inserted into the Procedure Order as follows:- “(1) The Tribunal may make an order for costs incurred by a party in proceedings, on its own initiative or on the application of a party, only if it is satisfied that a party (or their representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably either in the bringing of proceedings or in the conduct of proceedings.
- (2) An application for an order for costs must be made to the Tribunal at the conclusion of proceedings (either orally or in writing) or in writing within 21 days after that conclusion.
- (3) If the Tribunal has indicated that it might make an order for costs, or if an application for costs has been made under paragraph (2), the party against whom the order might be made may make representations to the Tribunal on the question of the order within 14 days of the date of the Tribunal's indication or the application, as appropriate.
- (4) The costs are to be awarded on an indemnity basis but must not exceed £10,000.
- (5) But in deciding whether to make an order for costs and, if so, the amount of the order (subject to the maximum in paragraph (4)), the Tribunal must have regard to the ability of the party concerned to pay.
- (6) If the order is made in favour of a respondent, it may be enforced as a civil debt in the same manner as costs awarded under Article 4 of the Civil Proceedings (Jersey) Law 1956.
- (7) In this Article, "indemnity basis" has the same meaning as in Rule 12/5 of the Royal Court Rules 2004” 8. Royal Court Rule 12/5 provides as follows: “12/5 The indemnity basis On a taxation of costs on the indemnity basis all costs shall be allowed except insofar as they are

of an unreasonable amount or have been unreasonably incurred and any doubts which the Greffier may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the receiving party.” 9. The effect of Article 40A of the Procedure Order was therefore to provide the Tribunal with a new power to award costs. Whilst the power to award costs was introduced by Ministerial Order, it was part of a package of changes initiated by a report from the Jersey Employment Forum which had also resulted in amendments to the Employment Law and the Discrimination (Jersey) Law 2013 approved by the States Assembly in April 2025. Amongst other things, those amendments increased the financial limits to the Tribunal to award compensation for unfair dismissal and for discrimination claims. Costs Decision of the Tribunal

10. The SEB and Ms Francioso both applied for their costs following the Tribunal’s substantive decision pursuant to Article 40A of the Procedure Order. The Tribunal refused both parties’ applications for costs in its judgment dated 11 February 2026 (under Reference [2024] TRE 127B). As regards the SEB’s application at paragraph 9 of its judgment the Tribunal stated as follows: - “Article 40A introduces a very limited costs regime. There is no scope for what in the Royal Court would be standard costs. If the threshold of behaviour set out in Article 40A(1) has been met the Tribunal may award a party up to £10,000 in costs. The reference to the indemnity principle contained in RCR Rule 12/5 means that if there is a doubt about whether the costs are reasonable or have been reasonably incurred the Tribunal must resolve that doubt in favour of the receiving party. It does not mean that the receiving party can claim costs that have not been incurred. The costs regime under Article 40A is therefore compensatory and not punitive and the party seeking costs must demonstrate that wasted costs have been incurred.”
11. The SEB had filed a schedule of costs in support of its application. Paragraphs 17, 18, 19 and 25 of the Tribunal’s cost’s judgment declined to make an award of costs in relation to detailed items of costs sought by the SEB on the grounds that the SEB had not identified or quantified “any wasted costs” or for the reason that it was not for the Tribunal “to go through the Respondent’s schedule of costs and identify the relevant entries”.
12. The SEB submitted that the Tribunal’s costs judgment of 11 February 2026 disclosed two errors of law as regards both of which the Tribunal gave leave to appeal to the Royal Court on the papers on 17 March 2026. The first error of law alleged by the SEB was the statement in paragraph 9 of the Tribunal’s costs judgment that the costs regime under Article 40A of the Procedure Order is “compensatory and not punitive” (“Ground 1”). The second error of law alleged by the SEB was in relation to the statement in paragraph 9 that: “The party seeking costs must demonstrate that wasted costs had been incurred” (“Ground 2”).
Submissions of the Parties
13. The submissions of the parties in relation to Grounds 1 and 2 can be summarised as follows.

14. As regards Ground 1 Advocate Rondel submitted that it was clear from the wording of Article 40A(1) of the Procedure Order that the purpose of the costs regime was punitive not compensatory. Whilst costs must have been incurred by the party in whose favour a costs order is sought, the jurisdiction to award costs by the Tribunal was where a party or their representative “has acted vexatiously, abusively, disruptively or otherwise unreasonably either in the bringing of proceedings or in the conduct of proceedings”. Article 40A(7) of the Procedure Order expressly referred to RCR 12/5 in relation to indemnity costs, the purpose of which was to punish unreasonable behaviour. Article 40(A)(1) of the Procedure Order made no reference to a costs award being recoverable by a successful party only. If the purpose of the costs regime is compensatory and not punitive, then the Tribunal’s interpretation could not be reconciled against the possible recovery of costs by a party (on the indemnity basis) who is ultimately unsuccessful in its prosecution or defence of a claim.
15. Advocate Rondel further submitted that as a matter of statutory construction Article 40A was clearly punitive rather than compensatory on the natural and ordinary meaning of the words used. However, if there was any doubt as to construction, then he submitted that the following three documents should be admitted as aids to construction or interpretive tools to show that the purpose of the new Article 40A of the Procedure Order was punitive and not compensatory.
16. Firstly, the Report and Recommendations of the Jersey Employment Forum dated June 2024 stated (at page 23) that: “In cases where a party - either claimant or respondent - has acted unreasonably or vexatiously, the Forum supports the introduction of a costs jurisdiction in the Tribunal. The Forum recommends that a limited costs regime should be introduced to sanction or deter vexatious claims and conduct. The Forum emphasises that the regime should be strictly limited to what the Tribunal deems to be vexatious claims or in circumstances where a respondent's conduct, in the view of the Tribunal, requires a sanction.” (Emphasis added)
17. Secondly, the Report and Proposition P.78/2024 concerning the Draft Employment and Discrimination (Jersey) Amendment Law 202- (the “Amendment Law”) had stated (at page 4 of the Report) that: - “The Employment Forum also made several separate recommendations relating specifically to the processes and procedural rules of the Employment and Discrimination Tribunal. These include the anonymising of Tribunal judgments; the introduction of a limited costs regime for vexatious conduct on the part of an employee or employer; and the extension of the time permitted for an employer to file a response to a claim. The Minister has accepted each of these recommendations as well. They will be progressed as part of a wider review of the Tribunal's rules and regulations which will take place in 2025.” (Emphasis added)
18. Thirdly, the Hansard Report of the debate in the States Assembly concerning P78/2024 recorded that the Minister for Social Security’s speech in support of the Proposition concerning the Amendment Law on 22 April 2025 had included the following comment in respect of the new Article 40A to be inserted into the Procedure Order: - “I am also pleased

to report that in respect of one aspect of the Tribunal's procedural rules, work is further advanced. I will shortly sign a Ministerial Order which will give the Tribunal the power to award costs against a person whose behaviour in respect of a claim is unreasonable or vexatious.” (Emphasis added)

19. As regards Ground 2 Advocate Rondel submitted on behalf of the SEB that there was no requirement in Article 40A of the Procedure Order for a party seeking costs to demonstrate that wasted costs had been incurred. The Tribunal had applied a test which did not appear on the wording of Article 40A. Further, one of the powers available for the Tribunal, is for it to make an award for costs of its own initiative (per Article 40A(1)) where a party has acted vexatiously, abusively, disruptively or otherwise unreasonably. If it was firstly necessary to establish that costs have been 'wasted' by the other party, then how in practice could the Tribunal ever make an order of its own initiative.
20. Advocate Wauchope submitted that Grounds 1 and 2 were not true errors of law and that the Royal Court as an appellate Court should be slow to interfere with a specialist Tribunal's interpretation and application of a provision that fell squarely within its statutory jurisdiction and institutional expertise. The Tribunal had interpreted Article 40A of the Procedure Order in accordance with the natural and ordinary meaning of the words used. He submitted that the “indemnity principle” meant that a party could never recover costs that had not been incurred and that the £10,000 cap in Article 40A(4) was consistent with a compensatory regime and inconsistent with a punitive regime.
21. Advocate Wauchope relied on the contents of a Guidance Note issued by the Tribunal prior to the costs regime in Article 40A of the Procedure Order coming into force (the “Guidance Note”). The Guidance Note described the factors the Tribunal may consider, including the progress of the proceedings, failure to attend, pursuit of hopeless arguments, failure to accept settlement offers "more than or close to" a Tribunal award, abusive correspondence, and "The ability of the party to pay any costs order". He submitted that the language of the Guidance Note is the language of reimbursement and proportionality, not penalisation.
22. Advocate Wauchope also relied on the previous decision of the Tribunal in *Page v JEV Company Limited* [2025] TRE 54B, where (at paragraph 7) the Tribunal had held that: "The costs regime deters unreasonable conduct, encourages settlement and compensates a party affected by unreasonable behaviour for wasted costs. The regime is compensatory in nature and does not allow the Tribunal to penalise a party for unreasonable behaviour where there are no associated wasted costs."
23. Advocate Wauchope also submitted that the three extrinsic documents relied on by Advocate Rondel (referred to at paragraphs 16
- 18 above) did not assist the construction contended for by the SEB. The word “sanction” used in the Employment Forum report denoted the consequence of a costs order - that is, the award of costs against a party who has behaved unreasonably - not a free-standing penal jurisdiction divorced from costs. None of the extrinsic documents relied on by the SEB

suggested that the Tribunal was to be empowered to impose a fine, or a sum payable in the absence of costs actually incurred. The deterrent and sanctioning functions described by the Employment Forum and the Minister were not inconsistent with a compensatory regime. A compensatory order for costs could plainly deter without thereby ceasing to be compensatory.

24. As regards Ground 2 Advocate Wauchope submitted that the wasted costs requirement followed from the compensatory construction of Article 40A of the Procedure Order. He relied on the English case of *Ridehalgh v Horsefield* [1994] Ch 205 and submitted that the requirement to identify wasted costs was a central feature of the wasted costs regime.
Decision
25. I agreed with the submissions of Advocate Rondel in relation to both Grounds 1 and 2. As regards Ground 1, in my judgment as a matter of construction Article 40A of the Procedure Order denotes a jurisdiction that is punitive and not compensatory in that the power to award costs only arises in circumstances where a party has conducted itself vexatiously, abusively, disruptively or otherwise unreasonably. The purpose of the power is to deter and sanction such conduct. There is no jurisdiction for the Tribunal to award costs on the standard basis to compensate a winning party for its costs unlike in ordinary civil litigation in the Royal Court. The Tribunal's power to award costs can be made against a winning party if that party had acted vexatiously, abusively, disruptively or otherwise unreasonably to sanction that party for its behaviour, rather than to compensate the winning party for its costs.
26. Nevertheless, costs still had to have been incurred by a party in proceedings. Costs could not be ordered that had not been incurred and to that extent an award is compensatory. The jurisdiction to order costs is limited to the £10,000 cap for policy reasons, and the Tribunal had to consider the ability of the party concerned to have to pay, including any amounts ordered to be paid by the Tribunal in relation to unfair dismissal and/or discrimination claims. However, none of these matters are inconsistent with the overall purpose of the jurisdiction being punitive to sanction and deter the types of unreasonable conduct specified in Article 40A(1) of the Procedure Order. The fact that there is no power of the Tribunal to fine, as might arise for example in cases of contempt of Court, is irrelevant. Similarly, the previous decision of the Tribunal in *Page* makes no difference as in my judgment it repeats the same error of law.
27. The Tribunal's jurisdiction to award costs being punitive is clear on the natural and ordinary meaning of the words used. There is no need to refer to extrinsic documents as aids to construction of Article 40A of the Procedure Order. Nevertheless, if there is any doubt concerning its construction, then the three documents referred to at paragraphs 16-18 above remove it. They confirm that the power to award costs is to sanction and deter the types of conduct referred to in Article 40A(1) of the Procedure Order.

28. As regards Ground 2, in my judgment the Tribunal's reference to wasted costs also reveals an error of law. The jurisdiction to award wasted costs is one that is exercised against legal representatives in certain circumstances, but it is not one that is conferred by Article 40A of the Procedure Order. There would need to be an express power to award wasted costs against legal representatives, as there is for example in Article 109 of the Criminal Procedure (Jersey) Law 2018.
29. Ridehalgh v Horsefield is a case concerning wasted costs orders against legal representatives under section 51 of the Supreme Court Act 1981. Guidance from the Court of Appeal of England & Wales in In re A. Barrister (Wasted Costs Order) (No 1 of 1991) [1993] Q.B.293 includes reference to a clear need for any judge or court intending to exercise the wasted costs jurisdiction to formulate carefully and concisely the complaint and grounds upon which such an order may be sought. The measures are described as "draconian" and that there is a need for the grounds to be clear and particular. In such cases therefore it is perhaps understandable that specific wasted costs should be identified.
30. However, the jurisdiction of the Tribunal to make an indemnity costs order is different. An indemnity costs order pursuant to RCR12/5 allows all costs to be payable except insofar as they are of an unreasonable amount or have been unreasonably incurred. The Tribunal should therefore take a broader view of the costs incurred by a party where the other party has conducted itself in the ways specified in Article 40A of the Procedure Order. The Tribunal should reach a decision concerning the amount of costs to order to be paid which takes account of the seriousness of the conduct to be deterred, subject to the statutory cap of £10,000 and the ability of the party to pay. In reaching its decision, the Tribunal will itself have to scrutinise any schedule of costs provided in determining whether such costs are payable on the indemnity basis as set out in RCR 12/5, although it may require parties to provide further explanations.

Conclusion

31. I therefore allowed the Costs Appeal on both Grounds 1 and 2. However, the question of the costs claimed by the SEB will not need to be remitted to the Tribunal for reconsideration as the parties have compromised the Costs Appeal in this case. Authorities Erika Franciso v States Employment Board [2024] TRE 127 Employment (Jersey) Law 2003. Voisin (trading as Voisins Department Store) v Brown [2007] JLR 141. Luxicabs Limited v Baal [2011] JLR 208. JT (Jersey) Limited v Wood [2016] JCA 183. Employment & Discrimination Tribunal (Procedure)(Jersey) Amendment Order 2025. Employment & Discrimination Tribunal (Procedure)(Jersey) Order 2016. Discrimination (Jersey) Law 2013. Erika Franciso v States Employment Board [2024] TRE 127B Draft Employment and Discrimination (Jersey) Amendment Law 202. Page v JEV Company Limited [2025] TRE 54B. Ridehalgh v Horsefield [1994] Ch 205. Criminal Procedure (Jersey) Law 2018 In re A. Barrister (Wasted Costs Order) (No 1 of 1991) [1993] Q.B.293

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