Appeal No. UKEAT/0356/14/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 15 April 2015

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

HAFIZ & HAQUE SOLICITORS — APPELLANT

(1) MR A MULLICK
(2) PAUL UK LTD — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JOSEF DAVID CANNON (of Counsel) Instructed by: Hafiz & Haque Solicitors 18 Cavell Street London E1 2HP
For the First Respondent	MR ASIFUR RAHMAN MULLICK (The First Respondent in Person)
For the Second Respondent	MR JONATHAN COHEN (of Counsel) Instructed by: JD Law LLP 4th Floor Thavies Inn House 3-4 Holborn Circus London EC1N 2HA

SUMMARY

PRACTICE AND PROCEDURE - Costs

Wasted costs

A Schedule of Loss was served which grossly over-inflated the losses claimed. In pre-trial negotiations, the Claimant and Respondents narrowed their differences, but although the Respondents were prepared to pay a sum which appeared to the Employment Tribunal to be overly generous, the Claimant wanted more than double that sum, and thereafter the claim proceeded to a hearing at which the Claimant lost. The Tribunal ordered that he pay a sum by way of costs (just short of £5,000), and then pursued his solicitors for wasted costs for having advanced such a misleading and inflated schedule and for their client's refusal to settle for a reasonable sum. They were constrained by legal professional privilege from revealing their instructions from and advice to the Claimant. The Judge nonetheless determined the case without any sufficient indication that she was applying the principles set out in the leading House of Lords authority of **Medcalf v Weatherill**, as applicable in these circumstances, and speculated impermissibly as to whether the solicitors had given misleading advice to the Claimant when this was not the only realistic possibility, thereby failing to apply the "benefit of doubt" principle appropriately: a Tribunal has to be satisfied not that on balance there is doubt which favours the professional lawyer concerned, but that there is no room at all for doubt.

On the separate question of costs claimed by the successful Appellants under Rule 34A(2A) an award of £400 was made, the further fee of £1,200 payable on permission being granted to proceed to a Full Hearing having been unnecessary: given the position the parties were then taking as to compromise, the appeal should not have proceeded further.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. This appeal raises the question of the proper approach by a Tribunal to an application for wasted costs against professional representatives in a situation in which legal professional privilege precludes their being fulsome about the instructions they received and the advice they gave to their client.

2. It arises out of a claim brought by the Claimant, Mr Mullick, which was heard at London (Central) Employment Tribunal by Employment Judge Goodman, who gave her reasons for dismissing the claims on 1 July 2013. The Claimant asserted that he had been discriminated against on the grounds of his race, that he had been unfairly dismissed and that he had been wrongfully dismissed. The dismissal was said to be constructive. He focussed on having been dismissed at a disciplinary hearing in respect of what were largely performance issues. He complained about procedural defects in the hearing especially the attendance of a Miss Livermore as a note-taker when she had been involved previously in what had taken place.

3. An internal appeal, however, was allowed, but against penalty: a final written warning was substituted. His employer decided that he should be required to work at a different shop within the Paul organisation which could be required of him in accordance with his contract. On 29 September 2012 he did so. However, he spent only one day at the new premises before leaving, claiming to have fallen ill. On 9 October, he submitted a detailed grievance and what he described as a notice of constructive dismissal. In the event, the Tribunal thought that his date of termination of employment was 9 October 2012.

4. The Tribunal rejected his claims: the race claim on the basis that it was ill-conceived since there was nothing in the facts to show any more than a difference in treatment (and even that was not clearly established) and a difference of race, and the unfair dismissal claim since there were no proper grounds for claiming that the employer was, as had been alleged, in breach of its duty of trust and confidence so as to render the resignation actually a constructive dismissal. The employee having left service of his own will, there was no wrongful dismissal and no entitlement to notice pay either.

5. The hearing concluded with an application for costs against the Claimant. The basis for this application was that the Claimant had at the outset, or towards the outset, of his claim submitted a Schedule of Loss. In the view of the Tribunal, this Schedule of Loss was grossly exaggerated. First, it claimed a past loss of earnings from 9 October 2012 to 15 March 2013, the Schedule itself being served on the 14th, without apparent recognition that during that period the Claimant had been off sick and therefore unable to work. That may be because the Claimant was asserting that the reason for his illness was his mistreatment by the Respondent: he did in this respect give express credit for the statutory sick pay and holiday pay which he had received. He claimed non-financial losses in respect of the race award in which the suggested award was £30,000, very nearly, if not at, the top of the top band of the **Vento** guidelines, and added to that a further £3,000 for aggravated damages. The explanation given in the text of the Schedule for claiming aggravated damages was:

> **"The Respondent has trivialised its acts of discrimination, failed to remedy the wrongs the Claimant has suffered and far from apologising for its treatment has put the Claimant to the pressure, stress and cost of tribunal proceedings where, for the first time …"**

And the Schedule then tails off.

6. Interest on past losses was claimed. It is said that the first date of the discriminatory conduct was 22 October 2002. Interest calculated as from that date, being principally interest on the injury to feelings award, came in total to just short of £18,500. In a fourth head, "Future losses", there was a claim for 52 weeks at the weekly rate of pay which the Claimant had been receiving when he had been in employment with Paul's. What was not said, though this document said it was composed on 14 March, was that on 4 March, as it later appeared, the Claimant had actually started a new job in which he was paid slightly more annually than he had been whilst in the service of Paul's.

7. In total, the unfair dismissal claim including the basic award for loss of earnings and loss of statutory rights, uplifted for a failure to follow procedures, was claimed at just short of £9,000, which when added to the balance which essentially related to the discrimination claim, amounted to a total net claim just short of £85,000. Part of that required to be grossed up, and although the grossing up calculation was in my view, in any event, in error, this all came to a total of just over £89,000. One can see why, in the context of this case, the Tribunal thought the Schedule had been grossly exaggerated.

8. The Tribunal thought there had been no explanation of why aggravated damages were claimed. It was wrong in that. There had been (see paragraph 5 above), although the explanation is barely if at all adequate. As Mr Cohen pointed out in argument, such an explanation might apply to almost any claim for discrimination and would not normally be thought to justify a claim for aggravated damages.

9. The claim for costs was resolved on the basis that the claim had been overinflated. When the Respondents had, on repeated occasions, pointed this out to the Claimant, he had

persisted in refusing to settle even though the sums offered to him rose from just over £2,000 to just over £9,000, which was on the Respondent's case itself a gross overvaluation. Nonetheless he did not settle though it would have been reasonable to do so, and the Respondents thereby incurred the costs of a hearing which at the latest should have proved unnecessary before any costs related to the eve-of-hearing preparation had been incurred. These costs would not have been incurred if the Claimant had acted reasonably, if he had not submitted an unreasonably inflated Schedule of Loss and taken an unreasonable approach to the conduct of negotiations. Taking into account the Claimant's means, the Judge ordered the Claimant to contribute £4,900 towards the Respondent's costs. That sum having been paid, the Respondent then pursued the Claimant's solicitors for a wasted costs order in addition. It is this that gives rise to the current appeal.

10. On 28 November 2013, Employment Judge Goodman made a wasted costs order against the Claimant's solicitors and on 7 February 2014, by Reasons given on that date, refused their application that she should reconsider.

The Law

11. The **Employment Tribunal Rules 2013**, in the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013** Schedule 1, provide by Rule 80 for the circumstances when a wasted costs order may be made. The Rule reads as follows:

> **"(1) A Tribunal may make a wasted costs order against a representative in favour of any party ("the receiving party") where that party has incurred costs -**
>
> > **(a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative; or**
> >
> > **(b) which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay.**
>
> **Costs so incurred are described as "wasted costs".**"

Paragraphs (2) and (3) to Rule 80 do not materially feature in the present case.

12. To apply this rule requires a two-stage process. First, the Tribunal must be satisfied, the burden of proof being on the person alleging it, that the representative has been guilty of an "improper, unreasonable or negligent act or omission". I shall describe that as "the conduct criterion". Secondly, insofar as an application under Rule 80(1)(a) is concerned, there must have been costs incurred "as a result of" any improper, unreasonable or negligent act or omission etc. This I shall term "the causation question".

13. It should be noted that this imposes a requirement of causation which is not so clearly identified, if it is present at all, in the Rules of the Tribunal which relate to the payment of costs by a party. In Rule 76 no clear causative link is required between the conduct falling foul of the Rule and the expenditure by way of costs, or (in Scotland) of expenses.

14. In **Salinas v Bear Stearns International Holdings Inc and Anr** [2005] ICR 1117 the predecessor to the ordinary costs rule (if I may call it that), was considered by the Appeal Tribunal presided over by Burton J, President. He drew attention to the decision of the Court of Appeal in **McPherson v BNP Paribas (London Branch**) [2004] ICR 1398. In that case Mummery LJ referred to an earlier dictum which had been taken to require that the costs to be ordered would have to be shown to be attributable to the particular vexatious, abusive, disruptive or unreasonable conduct which had led to the Tribunal deciding to make such an order. Though his words are, as Mr Cannon for the Appellant pointed out to me, not *ratio*, nonetheless they are clearly of the greatest authority. At paragraph 40 of Mummery LJ's Judgment, he said:

> **"In my judgment, rule 14(1) does not impose any such causal requirement in the exercise of the discretion. The principle of relevance means that the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the**

> **discretion, but that is not the same as requiring BNP Paribas to prove that specific unreasonable conduct by [Mr McPherson] caused particular costs to be incurred. As [counsel for the Respondent] pointed out, there is a significant contrast between the language of rule 14(1), which deals with costs generally, and the language of rule 14(4), which deals with an order in respect of the costs incurred "as a result of the postponement or adjournment". …"**

He went on in paragraph 41 to observe that unreasonable conduct was a precondition of the power to order costs and was also a relevant factor to be taken into account in deciding whether to make an order for costs.

15. Mr Cohen argues that it would be unfortunate if, in applying the wording of Rule 80, I were to conclude that there was a causative requirement to be met when this would not be the case in the general costs rule. I cannot accept that submission. The Rule says what it states. It is a different rule from the general costs rule. It clearly requires that the costs which are to be indemnified were incurred as a result of the conduct complained of. The conduct itself need not, it seems to be, be identified with such specificity that it can be said that this particular aspect of improper conduct caused this particular loss. To that extent, I adopt the general approach in respect of what is another rule from another set of rules considered by the Court of Appeal in **McPherson v BNP Paribas**, but it seems to me it is not for me to ignore the precise wording which is used, which is in contradistinction to the absence of any such wording in Rule 76.

16. I turn then to the further issues which arise where, in establishing either conduct or causation or both, the professional representative in the firing line cannot (because he is professionally obliged not to do so) reveal any privileged discussions which the client had with him, or he with the client.

17. In the seminal case of **Ridehalgh v Horsfield & Anr** [1994] EWCA Civ 40, the Court of Appeal considered extensively the nature of the conduct referred to by the Rule. Though the Rule there considered was that contained in section 51(7) of the **Senior Courts Act 1981**, the expression is no different in the **Tribunal Rules** and I conclude I should interpret it in the same way. Under the heading "Improper, unreasonable or negligent" Lord Bingham MR set out the meaning to be attributed to those three phrases. He pointed out that the acid test of "unreasonable" behaviour is whether the conduct permitted of a reasonable explanation. So far as negligence was concerned, he did not invoke technical concepts of the law of negligence, but he firmly discountenanced any suggestion that an applicant for a wasted costs order need prove anything less than he would have to prove in an action for negligence. It would have to be an error "which no member of the profession who was reasonably well- informed and competent would have given or done or omitted to do" or "such as no reasonably well-informed and competent member of that profession could have made" (expressions adopted from **Saif Ali v Sydney Mitchell & Co** [1980] AC 198). He noted that there could be overlap between the three and they were not to be viewed as self-contained expressions.

18. In dealing with the effect on determining whether there had been conduct which might trigger the right to claim wasted costs where there had been no waiver or privilege by the lay client, Lord Bingham said this ([1994] Ch 205 at 237):

> **"Where an applicant seeks a wasted costs order against the lawyers on the other side, legal professional privilege may be relevant both as between the applicant and his lawyers and as between the respondent lawyers and their client. In either case it is the client's privilege, which he alone can waive.**
>
> **The first of these situations can cause little difficulty. If the applicant's privileged communications are germane to an issue in the application, to show what he would or would not have done had the other side not acted in the manner complained of, he can waive his privilege; if he declines to do so adverse inferences can be drawn.**
>
> **The respondent lawyers are in a different position. The privilege is not theirs to waive. In the usual case where a waiver would not benefit their client they will be slow to advise the client to waive his privilege, and they may well feel bound to advise that the client should take independent advice before doing so. The client may be unwilling to do that, and may be unwilling to waive if he does. So the respondent lawyers may find themselves at a grave disadvantage in defending their conduct of proceedings, unable to reveal what advice and**

> **warnings they gave, what instructions they received. In some cases this potential source of injustice may be mitigated by reference to the taxing master, where different rules apply, but only in a small minority of cases can this procedure be appropriate. Judges who are invited to make or contemplate making a wasted costs order must make full allowance for the inability of respondent lawyers to tell the whole story. Where there is room for doubt, the respondent lawyers are entitled to the benefit of it. It is again only when, with all allowances made, a lawyer's conduct of proceedings is quite plainly unjustifiable that it can be appropriate to make a wasted costs order."**

19. **Ridehalgh** was not the last word. In **Medcalf v Weatherill & Anr** [2002] UKHL 27, the Court of Appeal had decided by a majority that a wasted costs order should be made against two barristers. On further appeal to the House of Lords that decision was overturned. In the course of his speech Lord Bingham of Cornhill at paragraph 23 quoted the passage I have just cited above from **Ridehalgh** and said this:

> **"… Read literally and applied with extreme care, it ought to offer appropriate protection to a practitioner against whom a wasted costs order is sought in these circumstances. But with the benefit of experience over the intervening years it seems clear that the passage should be strengthened by emphasising two matters in particular. First, in a situation in which the practitioner is of necessity precluded (in the absence of a waiver by the client) from giving his account of the instructions he received and the material before him at the time of settling the impugned document, the court must be very slow to conclude that a practitioner could have had no sufficient material. Speculation is one thing, the drawing of inferences sufficiently strong to support orders potentially very damaging to the practitioner concerned is another. …"**

He then referred to a decision by Mr George Laurence, sitting as a Deputy High Court Judge in **Drums and Packaging Ltd v Freeman** (unreported, 6 August 1999) where he had mused on whether, had privilege not been waived, he would have come to the conclusion that he felt able to do and then said:

> **"Only rarely will the court be able to make "full allowance" for the inability of the practitioner to tell the whole story or to conclude that there is no room for doubt in a situation in which, of necessity, the court is deprived of access to the full facts on which, in the ordinary way, any sound judicial decision must be based. The second qualification is no less important. The court should not make an order against a practitioner precluded by legal professional privilege from advancing his full answer to the complaint made against him without satisfying itself that it is in all the circumstances fair to do so. This reflects the old rule, applicable in civil and criminal proceedings alike, that a party should not be condemned without an adequate opportunity to be heard. Even if the court were able properly to be sure that the practitioner could have no answer to the substantive complaint, it could not fairly make an order unless satisfied that nothing could be said to influence the exercise of its discretion. Only exceptionally could these exacting conditions be satisfied. Where a wasted costs order is sought against a practitioner precluded by legal professional privilege from giving his full answer to the application, the court should not make an order unless, proceeding with extreme care, it is (a) satisfied that there is nothing the practitioner could say, if unconstrained, to resist the order and (b) that it is in all the circumstances fair to make the order."**

20. Accordingly, in my view, the law relevant to the case which Employment Judge Goodman heard is this: first, she had to be satisfied that there was conduct which came within the description of improper, unreasonable or negligent act or omission. Secondly, that the costs said to be wasted were incurred as a result of that conduct. Thirdly, in this case, that it was one of those cases, in practice rare, in which it could be said with confidence that there was no room for doubt. A court must be slow, indeed very slow, to conclude a practitioner could have had no sufficient material where that practitioner is precluded by privilege from setting the material out. Finally, the court should separately consider whether, in the circumstances, it is fair to make the order asked.

The Judgment

21. The Judge acquitted the solicitors of the relevant conduct insofar as the race claim was concerned. Though the Tribunal had found it to be misconceived, and there is no appeal against that decision by the Claimant, it said:

> **"13. … with no more than inference that the solicitors encouraged the claimant, and knowing that claimants, who may well have suffered real discrimination in other areas of life, do sometimes genuinely believe discrimination has occurred, without much evidence, the solicitors are probably entitled to the benefit of doubt and it is no grounds of itself for an order. In any case it is unlikely significantly to have increased costs."**

22. When turning to the Schedule of Loss, the Judge summarised the errors. There was a mistake in her stating that the claim was for £33,000 aggravated damages when it was for £3,000. That is, I think, an error of transcription. The solicitors had said to her that they could not reveal the instructions which led it to prepare such a Schedule, but they did go so far as to say that they had mistakenly and wrongly used a template from an earlier case, which had the result of overvaluing the race discrimination claim. That was by mistake.

23. In this appeal Mr Cannon accepts that the Schedule of Loss was negligently prepared. The conduct criterion, therefore, was satisfied so far as that was concerned.

24. In dealing with the effect of the Schedule, the Judge focussed, as it seems to me, upon what led the Claimant not to settle the case once what it considered to be advantageous terms had been offered. Thus, from paragraph 17 through to paragraph 24, it analysed as best it could, in the absence of any clear and direct evidence, covered as it was by privilege, what the Claimant thought. This passage began, paragraph 17, by asking:

> **"The question is not so much whether the respondent was or was not misled, but whether the claimant was. …"**

At paragraph 18 the Judge thought it important to assess when, if at all, the Claimant's solicitors realised the Schedule was erroneous, observing that the fact it was never revised would suggest that they did not recognise this at all. She postulated three possibilities: that the solicitors never realised *their* mistake; that they realised their mistake but decided to leave it untouched in the hope of negotiating a better settlement, if they had recognised it all; and thirdly that there remained an outside chance that they did tell the Claimant it needed to be revised but the Claimant refused permission to amend it. The Judge immediately linked that with why the Claimant might do so and said:

> **"… the claimant had been led to believe his claim had a far higher value, and was now reluctant to accept that it did not. …"**

25. At paragraph 19 the Judge began by observing that another point arose from the erroneous Schedule. Then there followed a series of "ifs". She suggested that privilege had little relevance, for instance:

> **"… if any unreasonable instructions or settlement offers were unreasonable because the claimant's solicitors had not recognized their error and advised him of it. …"**

26. At paragraph 20 she then returned to the theme that the Claimant had been led to believe that his claim was worth more by the way in which it was set out by the solicitors to begin with. This was to suggest that the Schedule reflected the solicitors' view of the case independent of the Claimant and not the Claimant's view of the case as communicated to and expressed by the solicitors. She said, for instance:

> **"… It is hard to see how he can have believed his claim was worth £48,000 [this was by reference to a reduced offer of settlement. It was the second reduced offer of settlement to which reference has been made in correspondence] unless he had been advised by solicitors who had negligently not recognized the errors in the schedule, or had been so instructed by the claimant, who had been led to believe his claim was worth more by the way it was set out to begin with."**

27. The concept that the Claimant had been led to believe that he had an entitlement greater than it was, was expressed again at paragraph 21. Then at paragraph 23 the Judge turned to the causation question. She said:

> **"Did the conduct cause costs to be incurred unnecessarily? Had the claimant had a proper schedule of loss he would have had a different expectation of settlement. The respondents were very keen to settle, recognising the amount of costs to be incurred, likely to be unrecovered. They made a number of offers. They wrote detailed letters to explain the calculation of value. They offered more than on their valuation it was worth, all to no avail. Had the claimant not been misled as to its value (assuming of course that he was told at some stage that the schedule was inflated and unlikely to be recovered) he would have settled and the hearing costs been avoided."**

She turned to look, then, to see what costs had resulted and, in the final four lines, at paragraph 24 said this in respect of the final offer made by the Respondents, one of £9,700:

> **"… An offer of £9700 was very attractive. It is not known whether the claimants' solicitors recommended this offer. If they did not, it is hard to see how that was good advice. If they did, and the claimant still rejected it, that it [sic - probably 'is'] likely to be because he had been misled into thinking his claim was worth much more."**

28. Thus the reasoning that the Judge was adopting was that the negligent or unreasonable or improper conduct was the raising of expectations to the extent that they misled the Claimant so that he did not settle when any reasonable Claimant would have done so.

29. In turning to the award, the Judge separately addressed the question of justice. She chose a date of 20 June 2013. That is because there was an offer of £9,500 made on 18 June, communicated by email on the 19th to the Claimant, and an email was sent in response on the 19th, declining the offer and confirming a counter-offer of £20,000. That being the gap between the parties, the case did not then settle. I have little doubt that that is why the Judge chose the date of 20 June. But the terms on which she did so are of importance to the argument which Mr Cannon makes. She said this:

> **"Is it just to award costs from 20 June? Arguably it would be just to award costs from an earlier date, but making allowance for the solicitors' difficulties when privilege is not waived, from that date it is hard to see why the effects of errors on the schedule (if they were errors, and it was not deliberate overstatement) could have gone unrecognized. From this date there can be no room for doubt." (paragraph 26)**

The Appeal

30. There are three grounds of appeal which HHJ Clark permitted to be advanced following an oral renewal application under Rule 3(10). The first is that the proper test arising out of the **Medcalf v Weatherill**'s further elaboration of the test set out in **Ridehalgh** was not applied. The Tribunal did not mention **Medcalf**, nor did it set out sufficient of its effect for a court on appeal to be satisfied that it had the principles in mind. In particular there was no reference to the two-limb test set out at paragraph 23 of the Judgment in that case, asking whether the Tribunal could be satisfied that there was nothing the practitioner , if unconstrained, could say to resist the order and whether, secondly, it was fair then to make it.

31. The second ground was that the Tribunal had impermissibly speculated as to the possible explanations for the conduct which it saw. Mr Cannon argues that it is only where such speculation results in a finding there is no possible explanation which could exonerate the representatives that the Tribunal could accede to an application for wasted costs and, in the circumstances of the present case, at least having regard to the period of time after 20 June

2013, the facts did permit an explanation which would exonerate Hafiz & Haque. Thirdly, that there was here unfairness. Hafiz & Haque had not had a proper opportunity of meeting the case against them, one which was equivalent to professional misconduct or negligence.

32. Mr Cohen, in a highly skilful argument, urged that I was being asked to sanction misconduct before a Tribunal. What had happened here was something which he described as toxic to the system. The vice upon which he centrally focussed was the fact that the Claimant had begun a new job on what was probably 4 March, a matter of ten days before the Schedule was submitted by Hafiz & Haque to the solicitors acting for Paul's, yet the Schedule made no mention at all of the fact of this employment. That was misleading. It had the potential ultimately to mislead the Tribunal. It is important as a principle that parties should conduct themselves honestly and frankly, if that process is to have any value at all. No less is to be expected of professional representatives.

33. There were in reality only two possibilities: first that, as the Judge said, either the solicitors never realised that the Schedule was erroneous or that they did but had either drafted it with the intention of misleading their opponents or continued with it with that intention. There was no third possibility. That being so, he argued that this behaviour was properly and rightly condemned by the Employment Judge. The Judge had not simply limited her decision to the question of whether the solicitors had been negligent. Throughout her Judgment she had referred on occasions to possible impropriety. Thus, in paragraph 21, she used the phrase "negligently, if not abusively". (I accept, so far as it goes, that the Judge did not limit her description of the conduct to negligence but envisaged that it might well be worse than that.) He argued that there had been no ground of appeal which challenged the causation of the wasted costs since he characterised the argument, advanced may I say with equal skill and

elegance by Mr Cannon as his own had been, as focussing upon the causation of the loss complained of. He argued, as I have noted, that the effect of **Salinas** was that the causative link, in any event, should be viewed broadly and not in the terms apparently indicated by Rule 80 and as I have held it to be.

34. He argued that the Judge had applied the approach set out in **Ridehalgh** to which she referred and had sufficiently dealt with the principles which derived from **Medcalf**. Thus, in paragraph 13, she had used the expression "the solicitors are probably entitled to the benefit of the doubt", showing that she had that phrase well in mind. It has a resonance with **Ridehalgh**. The Judge had asked whether it was just to award the costs from 20 June, thereby showing that she applied a test of justice. Given that the solicitors here had taken no steps to show that they were aware at any stage of the errors in the Schedule, the Judge's findings were entirely appropriate.

Discussion

35. The argument of Mr Cannon begins by recognising, as in my view is appropriate, that the decision actually made in respect of costs related to the period from 20 June onward. She did not award the costs for any prior period. The loss to be compensated was thus the expenditure of legal costs after that date. The conduct which caused this loss was thus the unbridgeable disparity between the offer made by the Respondents of just under £10,000 on 19 June and the counter-offer of £20,000 made by the Claimant.

36. In giving Reasons, the Tribunal Judge is obliged to set out the law which is to be applied. Here, the only authority to which reference was specifically made was that of **Ridehalgh v Horsefield**. There was no separate reference to **Medcalf**. I have looked carefully

at the Judgment to see whether there is a sign within the Judgment that the principles in **Medcalf** were applied, bearing in mind that the House of Lords plainly thought it of importance that the further qualifications to the **Ridehalgh** principles should be made in a case such as this where legal professional privilege is involved.

37. Though there is reference to the benefit of doubt in paragraph 13, that is more likely to derive from the expression to that effect in **Ridehalgh**, and in any event the way in which the Judge there applied it, balancing no more than inference against other matters, and deciding that the solicitor was probably entitled to the benefit of the doubt, suggests to me that the Judge was not applying a sufficiently rigorous test. The test is more analagous to that of the balance of probabilities than the "no room for doubt approach", which both counsel adopted in their skeleton arguments. I can see no clear trace that the Tribunal asked whether there was nothing that the practitioner could say if unconstrained to resist the order, at least so far as the period after 20 June is concerned. In his reply, Mr Cannon emphasised that his case was not that there had been no negligence; there had been, in the initial preparation of the Schedule. His case, however, was that there were explanations which might very well have been advanced had it not been for professional privilege which would cover the case, at least around and after 20 June.

38. By that stage it must be remembered that these matters had happened. First, the Schedule, with its gross exaggerations, had been served on 14 March. But on 25 April the Respondents, in a three-page letter, said:

> **"In terms of the remaining compensation that has been claimed under the Schedule of Loss, we note that your client has now commenced alternative full time employment with Dyno-Plumbing as a Payroll/HR Administrator/Fleet Administrator with effect from 4 March 2013 at a salary of £20,000 per annum. In light of this, our comments are as follows:**
>
> **…"**

And it set out calculations of loss which came to a sum of £2,209.51 which was then advanced.

39. As from that date, whatever the original intention of the future loss claim may have been and whether it was the failure of the Claimant to tell his solicitors that he had got a new job, their failure to ask, or their failure to record on the Schedule that he had told them of his new employment, the solicitors acting for the Respondent appeared to be fully aware of his employment position. Indeed there is no suggestion from the Tribunal's Decision that, by the time the matter came before the Tribunal, there was any attempt to say otherwise by the Claimant. In those circumstances, Mr Cannon argues that the complaint here is really that the solicitors failed to submit a revised Schedule to their opponents, once they had actual knowledge that the Claimant had a new job at a higher rate of pay than the one he had previously enjoyed. In effect, the solicitors were being condemned in wasted costs for a failure to put in an amended document recording that of which the parties were well aware.

40. The reason why such a document was not supplied is unavailable. Focussing upon the context, as I accept the Judge should have done, of 20 June and thereafter, albeit set against the history of that which had taken place earlier, any reasonable Tribunal would be bound to accept that there might be some explanation if only the solicitors had been freed from the shackles which their observation of professional privilege placed upon them.

41. Next, I think that in the reasoning, when the Judge repeatedly focussed upon whether the Claimant was misled or not, arguing that he must have been misled by the solicitors and that that was the probable reason for his rejection of the offers, the Judge was ignoring the guidance otherwise given by **Medcalf** to the effect that there was plainly here room for doubt as to precisely what was happening.

42. I acknowledge that the solicitors here did not cover themselves in glory, to say the least. But to say that they should have been subject to a wasted costs order seems to me to pay insufficient regard to the strictness of the test, after **Medcalf**, to which the Judge did not give any specific attention and of which I cannot infer from her Judgment that she actually was aware.

43. In her Reconsideration Decision, at paragraph 13, the Judge said this:

> **"The thrust of the application [that is the application by the solicitors for a reconsideration of her order] is that in the absence of information, where privilege is not waived, the tribunal must never speculate as to that advice. This is a matter of law for which an appeal, rather than reconsideration, is apt."**

She did not say whether she accepted the principle generally or not. There is some hint, but perhaps it should be stated no higher than that, that by saying that, in her Reconsideration Decision, she was indicating that she had not taken such a strict approach when earlier reviewing the evidence as to what had happened in order to decide whether the conduct criterion had been satisfied.

44. Returning then to the Notice of Appeal, ground A, the proper test, seems to me to have been made out. I cannot be satisfied that the proper test was applied. Ground B, as to impermissible speculation, it seems to me is made out. There seems to me, for instance, to be no particular reason given at paragraph 20 why the solicitors should have been any more likely than the Claimant to have attributed an unrealistic value to the claim. A client who regards his claim as being very substantial when an experienced lawyer would not is a figure well known in legal circles. It is not inconceivable that the Claimant might be such a case. The Judge's conclusion that the Claimant was misled into thinking his claim was worth more than it was is one which simply cannot be sustained without there being speculation. It can be founded on no

documented evidence, for privilege precluded it. He may well have been advised and ignored the advice.

45. I would, however, acquit the Judge of failing to have regard to fairness. She specifically did. Whether she recognised it as part of the qualification to the **Ridehalgh** test or was posing the question in a more general sense, she nonetheless applied this part of the test. She did make, what she described as, allowance for the solicitors' difficulties and therefore showed a degree of complicity with the **Ridehalgh** approach. I do not regard that ground of appeal as having been sustained.

46. Accordingly, in my view, the Tribunal did not apply a sufficiently rigorous test and found itself speculating to an extent which, on appeal, the court must regard as impermissible.

Consequence

47. Privilege has not been waived. Before me Mr Mullick himself appeared unrepresented. In correspondence which I had seen prior to the hearing, he had expressed the hope that the Free Representation Unit might be able to give him some advice and assistance. In the event, he has been here listening to the appeal. I invited him to say whatever he may have wished to say. The points he made were essentially points of fact, explaining his own position and his lack of awareness as to the importance or effect of waiver of privilege.

48. I have to deal with the appeal on the basis upon which it was put before the Judge and on the material which was available to her. I have dealt with this case on that basis and it is on that basis that I have concluded that the appeal should be allowed.

49. However there is one postscript, which I sadly am obliged to record. In a chronology prepared for the purposes of appeal, or for both reconsideration and appeal, the solicitors did make reference to some of the communications between themselves and their client in a way which arguably they should not have done if they were properly observing privilege.

50. The details of this are extensively referred to in his skeleton argument by Mr Cohen. This is not a first instance case, when the issues would arise whether as a result privilege had been waived. However, it was being asserted at one and the same time that privilege had not been waived, and yet the privilege may have been broken by the solicitors' conduct. I shall consider what, if any, further steps I may take in respect of this. I record it here for completeness. The matter has had and can have no impact upon my decision, which is purely one of seeing whether the Judge below made an error of law in her determination on the facts and matters available to her, which did not include those possible breaches of professional conduct.

51. It follows, I think, that for the reasons I have given, the appeal is allowed.

52. I am faced with an application for costs under Rule 34 of the **Employment Appeal Tribunal Rules 1993**. This proceeds on the basis that the proceedings have been unnecessary, improper, vexatious or misconceived or there has been unreasonable conduct by the paying party. The conduct on which the Appellant relies is that the Respondents to the appeal were given every opportunity in correspondence to withdraw their opposition to the appeal and failed to do so, such that the costs of the hearing were payable and should be paid by them. In correspondence which is relevant not just to this application but to a further application in respect of the payment of fees, I have been directed to a letter of 2 September 2014. This was

at a stage after the appeal had been lodged but before the matter had been considered by Judge Clark at the Rule 3(10) Hearing. In that, the Appellants offered to withdraw or discontinue the appeal provided that the Respondents agreed to waive their entitlement to the wasted costs sum of £2,500. There would be then no further payment of costs.

53. There was no response by the date until which that offer was said to be open - 19 September 2014. On 4 November 2014, the Respondents' solicitors wrote, in effect offering that which had been suggested by the Claimant. They would not pursue the wasted costs order. There would be an agreement to withdraw the appeal, and each party would bear its own costs. Since this was now after the Rule 3(10) Hearing and Judge Clark had the view that there were reasonable grounds to argue the appeal, the Appellants rejected that and suggested that they would seek the costs of the appeal. They would only be minded to settle it upon the agreement of the Respondent to pay for all the costs of the appeal. The Respondents rejected that, although recorded that they had been instructed to write to the Appeal Tribunal to advise that the company did not intend to pursue the wasted costs order. That repeated offer was rejected.

54. I do not see, in that behaviour, anything which I would class as unreasonable behaviour by the Respondents within the terms of Rule 34A. It has certainly not been unnecessary, improper, vexatious or misconceived. The general rule in this Tribunal is that costs are not payable as between the parties on an appeal unless the Rule 34A grounds are clearly made out. In any event, if I had thought that a ground had been made out, I would have a discretion whether I should order costs or not and in this case I would not have done so since it seems to me that, given the offer which had been made originally on 2 September and the counter-offer on 4 November 2014, this matter should really have been withdrawn at that stage. It should not have been pursued further. What was offered on 4 November would appear to meet the

objectives of the solicitors. However much I can see that solicitors may in many cases have very good professional reasons for not wishing to have a wasted costs order outstanding against them, and the only way of relieving themselves of it is for a successful appeal, given the opening shot they fired on 2 September that does not appear to be the case here.

55. On that basis, I reject the application for costs. As to fees, the regime is different. Under Rule 34A(2A) where the Appeal Tribunal allows an appeal, it may make a costs order against the Respondent, specifying that the Respondent pay to the Appellant an amount no greater than any fee paid by the Appellant under a notice issued by the Lord Chancellor. Here it is relevant to ask how the costs might have been avoided. It seems to me that the initial costs of the appeal were inevitable once the decision had been made to appeal the case. The offer made by the Respondents did not come in advance of there being an appeal to this Tribunal. The solicitors were therefore acting entirely reasonably, it seems to me, in seeking to appeal the order and they should be paid the costs at least of £400 as the fee necessary to lodge the Notice of appeal in the first place.

56. However, I do think that different considerations apply here in respect of the £1,200. Given the correspondence, given what had taken place, there was room, it seems to me, for the solicitors to have spoken to the Respondents at or immediately after the hearing before Judge Clark and before the £1,200 came to be paid. If they had done so, I doubt it would ever have been necessary to pay the further sum. That is not a conclusion I am at all unhappy to reach in this particular case, given aspects of the background which it is unnecessary for me to refer to further.

57. The order therefore is that £400 costs be payable to the Claimant's solicitors by the unsuccessful Second Respondent.