Case Number: (2) 3401106/2013
(1) 3400584/2013

EMPLOYMENT TRIBUNALS

Claimant: (2) Mr RF Wallis
(1) Ms C Leadbetter

Respondent: Sywell Aviation Limited

Respondent to Costs Applications: Mr Roger Walker

HEARD AT: BEDFORD ET

ON: 22nd & 23rd February 2017
10th March 2017 (Written submissions)
31st May 2017 (No parties in attendance)

BEFORE: **Employment Judge Ord**

REPRESENTATION

For the Claimants: In person

For the Respondent: Ms Omeri (Counsel)

For the Respondent to the Costs Application: In person

COSTS JUDGMENT

1. No Order is made on the Respondent's application for costs against the Claimants or either of them.

WASTED COSTS ORDER

1. I make no order on the Claimants' application for a wasted costs order against Mr Walker.

2. A Wasted Costs Order is made in favour of the Respondent against Mr Walker in the sum of £11,107.00 payable within 28 days.

Background

3. This matter came before me on the 22 and 23 February 2017 to consider an application for costs made by the Respondent against the Claimants and each of them, further or alternatively an application for wasted costs made by the Respondent against the Claimants' representative Mr Walker and an application for wasted costs made by the Claimants against Mr Walker.

4. The matter had come before me on 12 May 2016 by way of a preliminary hearing for case management purposes in relation to these claims. At that time I reminded the parties of the relevant costs rules which I repeat here for clarity to the extent that they are relevant.

The Tribunal Rules

5. Under Rule 76 of the Employment Tribunal Rules of Procedure 2013; 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) all the way that the proceedings (or part) have been conducted; or

   (b) Any claim or response had no reasonable prospect of success.

6. Under Rule 80 a Tribunal may make a wasted costs order against a representative in favour of any 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 reasonable to expect the receiving party to pay.

7. Under Rule 80(2) "representative" means a party's legal other representative or any employee of such representative, but does not include a representative who is not acting in pursuit of profit with regard to the proceedings. A person acting on a contingency or conditional fee arrangement is considered to be acting in pursuit of profit.

8. Under Rule 81 the wasted costs order may order the representative to pay the whole or part of any wasted costs of the receiving party, or disallow any wasted costs otherwise payable to the representative,

including an order that the representative repay to its client any costs which have already been paid. The amount disallowed or repaid must in each case be specified in the order.

History

9. The history of this case is long, but may be summarised as follows.

10. Both Claimants were employed by the Respondent at Sywell Aerodrome, operated under the trading name “Brooklands Flying Club”.

11. The first Claimant, Ms Leadbetter, instituted proceedings by the presentation of form ET1 on 22 April 2013. She brought a claim for unfair dismissal, constructive unfair dismissal, redundancy pay, holiday pay and arrears of pay for a layoff 21 January to 5 April 2013. She also claimed to have suffered detriment for having made protected disclosures. The second Claimant, Mr Wallis, presented his claim to the Tribunal on 6 July 2013. Notwithstanding the fact that he was still in the employment of the Respondent at the time he brought claims for unfair dismissal holiday pay and arrears of pay (in respect of the same lay-off period as the first Claimant) and claims to have suffered detriment for having made protected disclosures. On each claim form the Claimants said they were represented by Mr Walker. In the case of the first Claimant, Mr Walker described his organisation as "People Agenda". In the case of the second Claimant he described his organisation as "The United and Independent Union".

12. Responses were filed on 21 May and 7 August 2013 to the two claims and on 7 August, the Respondent sought further and better particulars of the Claimants’ claims. On 17 December 2013 further and better particulars were ordered, including the provision of further particulars regarding the alleged protected disclosures and the detriment the Claimants had allegedly been put to for having made such disclosures.

13. At that hearing, Mr Walker appeared on behalf of both Claimants and described himself as a union representative. The Tribunal recorded that one of the issues to be determined at the final hearing would be whether it had any jurisdiction to hear Mr Wallis' claim of unfair dismissal as at the time he presented his claim he was still in employment and was not on notice of termination issued by his employer. The attention of Mr Walker was drawn to the contents of Section 111 (2) and (3) of the Employment Rights Act 1996.

14. On behalf of the two Claimants Mr Walker withdrew the claims for a holiday pay and also withdrew Ms Leadbetter's claim for arrears of pay. Mr Wallis’ claim for arrears of pay continued and the Tribunal pointed out to Mr Walker that it related to the period 23rd January to 4 April 2013, but the claim had not been presented to the Employment Tribunal until 6 July 2013 and therefore there was a question of

whether the claim had been brought in time (as well as any issue on the merits of the claim itself).

15. By this date each Claimant had provided identical schedules setting out issues which they said amounted to protected disclosures, but neither of them had given for many of the alleged disclosures details of how they considered the matter constituted a protected disclosure, to whom it was made and in what circumstances, as well as giving no indication of the detriment which each Claimant said they had been subjected to.

16. Subsequently the Claimants withdrew their remaining claims on 11 February 2014. Judgment was signed dismissing each claim on withdrawal. The Respondent made an application for costs which came before employment judge on the 1 May 2014 and was postponed to be listed before me (on the application of the Respondent which was not opposed by the Claimants).

17. The matter then came before me on 17 July 2014 when it was stayed in the light of a then current criminal investigation taking place into the activities of Mr Wallis.

18. Those investigations were subsequently discontinued. The stay of proceedings was extended during the currency of the investigations. Accordingly, a delay occurred in the hearing of the current applications.

The issues for determination

19. Against that background the issues for the Tribunal to determine at the hearing were therefore as follows:-

    1. In what capacity was Mr Walker acting for the Claimants? He maintains that he was acting free of charge for each of them. Each of the Claimants maintained that Mr Walker was in fact entitled to 20% of any recovery which they made during the course of the proceedings. I note that the definition of lay representative in Rule 74 of the Employment Tribunal Rules of Procedure 2013 is someone who is not a legal representative as defined earlier in that section and who charges for representation in the proceedings. Further, that under Rule 80 when considering a wasted costs order against a representative that the meaning of "representative" does not include a person "not acting in pursuit of profit with regard to the proceedings". But a person acting on a contingency or conditional fee arrangement is considered to be acting in pursuit of profit.

    2. Had the Claimants or their representative acted vexatiously, abusively disruptively or otherwise unreasonably in bringing the proceedings (or part) or in the way that the proceedings (or part) had been conducted. Alternatively, did the claim or claims have no reasonable prospect of success?

3. If the answer to number 2 above is that the Claimants or their representative had acted as described or that the claim or claims had no reasonable prospect of success, should a costs order be made in favour of the Respondent, if so in what amount?

4. In the event that Mr Walker was found to be acting in pursuit of profit should a wasted costs order be made against him in favour of either the Claimants or either of them, or the Respondent and if so in what sums?

The Hearing

20. Evidence was heard from Mr Michael Bletsoe-Brown on behalf of the Respondent, from both Ms Leadbetter and Mr Wallis and from Mr Walker. Evidence was also called from Mr Goss, who had been represented by Mr Walker in previous Employment Tribunal proceedings. At the conclusion of the hearing, each party was given the opportunity to make final submissions in writing and if appropriate to make comment on the closing submissions of other parties within timescales laid down at the final hearing.

21. My attention was drawn by the parties to a number of authorities in particular:-

1 Arrowsmith v Nottingham Trent University [2011] EWCA Civ 797,
2 Insteed v Redbridge, London Borough Council UKEAT 442/14,
3 Liddington v 2gether NHS Foundation Trust UKEAT/2/16,
4 Scott v Russell [2014] 1 Costs LO95,
5 Wilsons Solicitors v Johnson UKEAT/515/10,
6 Casquiero v Barclays Bank plc UKEAT/85/12, and
7 Godfrey Morgan Solicitors Ltd v Cobalt Systems Ltd UKEAT/608/10.

Upon which I will comment as appropriate during the remainder of this Judgment.

22. It is appropriate to deal with the issues for determination in the order set out in paragraph 19 above. Accordingly, the first question for the Tribunal to determine is whether Mr Walker was acting for profit when representing the Claimants.

23. If he was not thne no wasted costs order could be made against him in favour of either the Respondent or the two Claimants.

Was Mr Walker acting for profit?

24. Ms Leadbetter's evidence was that following the decision by the Respondent to close down the flying club where she and Mr Wallis worked for a period over the early months of 2013 she sought legal advice. Her only concern at this stage was the lost income she would otherwise have earned during the period of shut down.

25. Whilst she was given confidence on the basis of that advice that she had a sound claim she was unable to instruct Solicitors due to the level of fees. She became aware of the services of Mr Walker and his business "People Agenda".

26. Ms Leadbetter's evidence was that Mr Walker managed her case with little or no involvement from her, acting on a no win no fee basis and said that he would take 20% of any settlement awarded. There was no written agreement in place, but on 22 April 2013, she signed a letter (as did Mr Wallis in exactly the same terms on the same day) stating:-

> *"I give Roger Walker of people agenda full permission to deal with all aspects of my employment with Sywell Aerodrome."*

27. The letter went on to give instruction that all correspondence should be through him, including by telephone and gave Mr Walker's then address and telephone number. There was no mention in the letters of the United and Independent Union. Ms Leadbetter confirmed that she had never been a member of the Trade Union and Mr Walker had never invited her to become a member of that Trade Union. Those matters were agreed by Mr Walker but he maintained that he carried out tribunal work through People Agenda free of charge and was conducting such activities as a marketing tool for the trade union. In his statement, he says, "this free work was on the basis of union PR - we would hope to gain members by such work, and this has worked well in the past". Mr Walker accepted that he did not ask or encourage either of the Claimants to join the relevant union nor could he explain how operating in the Employment Tribunal under the name “People Agenda”, which had no obvious or apparent connection with the United and Independent Union would serve to publicise or encourage individuals to join that union. I accept the evidence of Ms Leadbetter, corroborated by Mr Wallis that neither of them ever had any contact with Mr Walker other than through the business of People Agenda.

28. There remains, however, the dispute as to whether or not Mr Walker was acting for profit. People Agenda, he accepted, was at the time a profit-making business but he says that it made its money through offering human resource advice to businesses and not through tribunal representation which he undertook free of charge.

29. Both Ms Leadbetter and Mr Wallis said that whilst there was nothing in writing the agreement they had with Mr Walker was that he would take

20% plus VAT of any compensation or settlement sum which was secured on their behalf.

30. There is no written evidence before me to confirm that Mr Walker has ever advertised his services on that basis and there is nothing in writing to indicate that was the agreement between him and the two Claimants in this case. There is simply the conflict between the evidence of the Claimants and Mr Walker.

31. The evidence of Mr Goss was however illuminating. Mr Goss had also been employed by the Respondent, and when his employment came to an end he engaged Mr Walker's services. Those claims were not successful and as a result, the Respondent made an application for costs against Mr Goss. His evidence was that he was only advised of the costs hearing by Mr Walker at 8 P.M. the night before it was due to take place (12 December 2013), but he was told that he should not worry as “costs rarely get awarded”. Because of the lack of notice he was unable to attend the hearing (the Judgment was provided to the Tribunal as part of the costs bundle). Mr Walker was described as a "lay representative" and Mr Walker specifically confirmed under oath that he did not have any contingency or conditional fee arrangement with Mr Goss. As the Respondent could produce no evidence information to support the contention that a conditional or contingency fee arrangement was in place the Respondent was denied the opportunity to cross-examine Mr Walker on that point. A costs order was made against Mr Goss. On 14 January 2014, Mr Goss wrote to the Respondent in reply to their request for payment and expressed surprise at the contents of the Respondent's letter relating to Mr Walker as representing Mr Goss free of charge as, to quote Mr Goss letter "during my first meeting with Mr Walker. He made it quite clear that he would represent me on a "no win no fee basis". When questioned by my wife, who was present at the time, about the actual cost Mr Walker confirmed it would be “20% of any settlement”.

32. I note that that letter was written before any claim for costs was made in these proceedings and that Mr Goss has not sought to appeal or have reconsidered the costs judgment against him. In answer to questions from Mr Walker, Mr Goss confirmed that there was no written statement or agreement to support his contention that he had been acting for Mr Goss on a no win no fee basis. Mr Walker put it to Mr Goss that there was no evidence of that on his people agenda website and Mr Goss said that he had never looked at it. Mr Goss told Mr Walker that whilst he was given his name from a friend. Mr Walker himself was not a friend.

33. One troubling aspect of Mr Goss evidence was that in answer to a question from the Tribunal, he said that he had not been told that the claim for costs in his case was also being made against Mr Walker.

34. Mr Walker's evidence was different. He said that he had told Mr Goss about the costs hearings under some time previously, long time before the night before, and it was Mr Goss's decision himself not to attend. He did not say that he had told Mr Goss that a claim for costs was also being made against him personally, nor how in those circumstances he could deal with the obvious conflict of interest between himself and Mr Goss.

35. I find that evidence difficult to accept and I do not accept it, for this reason. Had Mr Goss been properly advised that there was an application for costs against him and that part of that application included a claim for costs against Mr Walker, but Mr Walker was resisting that part of the claim on the basis that he had been acting as a "friend" and not for profit, it seems beyond the realms of reasonable possibility that Mr Goss would have let matters proceed in his absence. His letter of 14 January 2014, written promptly after the costs hearing and in reply to a letter from the Respondent referring to Mr Walker having represented him free of charge, clearly indicates his surprise and recites the terms upon which he then said Mr Walker had been representing him.

36. It is clear that there is no written agreement between the Claimants in this case and Mr Walker as to fees. However, I am satisfied on the evidence before me that both Claimants were told by Mr Walker that he would act for them on a no win no fee basis on the basis, and that he would take by way of a fee 20% of any recovery which they made. Accordingly, I am satisfied that in this case Mr Walker was a lay representative within the meaning of Rule 74 (3) and was acting on a contingency or conditional fee arrangement and therefore is considered to be acting in pursuit of profit in accordance with Rule 80 (2).

37. The suggestion that Mr Walker was undertaking this work as a means of public relations for a trade union is fanciful and lacks any logic. At no stage did he make any attempt to encourage either of the Claimants to join the union. Nor did he invite them to suggest to others that they might do so. All the correspondence sent by Mr Walker to the Employment Tribunal was from his email address at people agenda which he confirms is a profit-making business. I do not accept Mr Walker's evidence that he was acting as a form of McKenzie friend, or otherwise without charge in these proceedings.

Vexatious, abusive or otherwise unreasonable conduct, or no reasonable prospect of success?

38. The next question to be considered is whether the Claimants or their representative acted vexatiously, abusively, disruptively or otherwise unreasonably in bringing the proceedings (or part) or in the way that the proceedings (or part) had been conducted. Alternatively, did the claim or claims have no reasonable prospect of success?

39. There are two parts to this issue. First I must consider whether in the bringing of the proceedings or the way the proceedings have been conducted there has been conduct as set out in the rule and secondly, whether any claim had no reasonable prospect of success.

40. For the purpose of a costs order a party is considered responsible for the actions of his or her representative. For these purposes, the actions of a representative are attributed to the party against whom an order is sought.

41. In *AGv Barker* the House of Lords identified vexatious proceedings as having *"little or no basis in law (or at least no discernible basis)…its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the Claimant and that it involves……a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process".* This definition was cited with approval in *Scott v Russell*

42. In respect of one element of Mr Wallis claim the matter is straightforward. Mr Wallis brought a claim for unfair dismissal at a time when he was on his own admission, still in the employment of the Respondent and was not under notice from the Respondent of termination of that employment. In those circumstances the Tribunal has no jurisdiction to hear that Claimant all and it had no prospect of success whatsoever. It was this fact which was brought to the attention of Mr Walker at the preliminary hearing on 17 December 2013.

43. The claims for outstanding holiday pay and arrears of pay were withdrawn at the first case management hearing 17 December 2013, although Ms Leadbetter's unchallenged evidence was that she had instructed Mr Walker to withdraw that claim in October 2013. Ignoring the claim for unfair dismissal brought by Mr Wallis that left a claim for unfair dismissal on behalf of Ms Leadbetter and claims by both Claimants that they had suffered detriment because of their having made protected disclosures.

44. As to Ms Leadbetter's claim to have been unfairly dismissed, she readily accepted in evidence before me that she had not been dismissed by the Respondent nor had she resigned. She had, when the temporary closure of the airfield was announced, asked for her P45 but she said she did so to seek other work, and indeed stated at the same time that she hoped to return when the airfield re-opened.

45. Given that evidence, which she gave without hesitation, it is clear that her claim to have been unfairly dismissed had no reasonable prospect of success at all. She had not been dismissed and had not resigned. Even if her request for her P45 was somehow considered to be a resignation, it was not made because of any breach of contract by the

Claimant, but because she wanted to find other work to fill in the gap left by the temporary shut-down of the airfield over the winter period.

46. I turn now to the protected disclosures claims.

47. The history of the prosecution of the claims is illuminating. It was the evidence of both Claimants that they consulted Mr Walker only to seek redress for the financial losses they suffered as a result of the Respondent closing the flying club over the winter months and their having to cancel appointments for flying lessons which had already been made in the period of closure. It is notable that Mr Walker did not challenge that part of the Claimants' evidence at all.

48. Nor did he challenge the evidence of Ms Leadbetter that it was Mr Walker who identified other claims that they may have, nor the evidence of both Claimants that at no stage did he explain to either of them what was meant by a protected disclosure nor the legal tests that they would have to meet to succeed in such claims.

49. Further particulars of the claims for having made protected disclosures were first requested in writing on 7 August 2013. A document setting out the particulars sought was sent by the Respondent's Solicitors to Mr Walker as the Claimant's representative.

50. At a preliminary hearing on 29 August 2013, attended by Mr Walker, an order was made for those particulars to be provided by 12 September 2013. There was some belated attempt at compliance on 13 October 2013, but when the Respondent considered the information provided it advised the Claimants, again through Mr Walker, that the information provided was inadequate and sought the balance of the information requested.

51. Subsequently a further order was issued for the delivery of particulars on 17 December 2013 at another Preliminary Hearing when Mr Walker attended.

52. Mr Walker then ceased to represent the Claimants and they themselves made attempt to comply with the Orders. However there was an absence of information regarding the dates when it was stated that disclosures had been made and a failure to identify the detriment(s) to which each Claimant said they had been put. The Respondent also said that the alleged disclosures could not amount at law to protected disclosures.

53. The Respondent referred me to the decision of the EAT in *Liddington* where a party's failure, after being given a number of chances to particularise claims relating to protected disclosures, although not deliberate, was sufficient to amount to unreasonable conduct. In that case the Claimant was a litigant in person.

54. Ms Leadbetter's evidence, which I accept and which was not seriously challenged, was that she was not aware of the hearing held in August 2013 and did not know of any requirement for further and better particulars until Mr Walker sent an email on 26 September 2013 with a copy of the request for further and better particulars of the claim (attached to an email from the Respondent Solicitors of 9 August 2013) and said this

> *"can you read these and ring me when you have the answers please – am on holiday next week so I really need to get these done sent to the Tribunal by tomorrow at the latest."*

55. Ms Leadbetter replied by email at 7:11 that evening with draft further particulars.

56. Mr Walker did not advise either Claimant that the particulars had been ordered by the court nor that at the time he sent the request for information to the Claimants (with a request that they be dealt with that day) there was already a breach of the order. Mr Walker simply failed to bring this to the attention of those he was representing. Mr Walker did not advise the Tribunal at any stage during the course of the instant hearing what he did with those draft answers. He did not seek to amend or fine-tune them, nor did he send any replies to the Respondent Solicitors. Thus he allowed his clients to continue to be in default of the order.

57. This is compounded by the fact that on the same day as he was asking the Claimants to provide draft answers by return (which they did) the Tribunal sent out (and therefore he would the following day or at the very latest two days thereafter receive) a written warning that the Tribunal was considering striking out the Claimant's claims because of their failure to comply with the orders of the Tribunal in this regard.

58. The Respondent then sought an unless order for the delivery of particulars on 30 January 2014, but all of the remaining claims were withdrawn on 5 February 2014 by the Claimants, following which a judgment dismissing the claims on withdrawal was signed on 11 February 2014.

59. In relation to this aspect of the application, I need go no further.

60. The claims for detriment for having made protected disclosures were conducted unreasonably. The absence of any proper particularisation of them despite the numerous attempts to have them provided (including, on one occasion, the Respondent's Solicitor sending to Mr Walker a partially completed Scott Schedule, completed on the basis of the information provided, with blank columns for completion) appears to me to be on all fours with the position in *Liddington* and was clearly unreasonable conduct.

61. Further I accept Ms Omeri's submission that where a party is unable to properly particularise a claim of this type, despite orders they do so, and where only inadequate and partial particulars are provided, such claims have no reasonable prospect of success.

62. Both Claimants also initially brought claims for outstanding holiday pay.

63. Ms Leadbetter's claim was for 16.8 days of holiday pay. She issued that claim when her ET1 was presented on 22 Aril 2013, but accepted in evidence before me that she had been paid 16 days of holiday pay on or about 28 December 2012. Mr Walker had not, before presenting her claim, queried with the Claimant the amount of holiday pay (if any) which was outstanding to her. The pleaded claim was that she "had worked Bank Holidays and not received [her] Holiday Pay" which was, on her own evidence, manifestly false. At best on her own evidence she had a claim for one part of one day (perhaps, on rounding, one full day). The claim was abandoned on 17 December 2013 at the Preliminary Hearing.

64. Mr Wallis claim for outstanding holiday pay was made on presentation of his ET1 on 6 July 2013. There was no particularisation of the amounts being sought other than to say he should be paid £116.54 per day for holiday pay. The claim was withdrawn on 17 December 2013 without any further particularisation in the meantime.

65. During the hearing Mr Walker's evidence was that he had asked Ms Leadbetter to confirm her holiday "entitlement". He did not suggest that he had questioned how much (if any) of that "entitlement" had been used nor how much if any had been paid to her. He further accepted that there was no basis of fact, based on the information given by Mr Wallis, to sustain a claim for outstanding holiday pay at all.

66. On that basis, neither of those claims for outstanding holiday pay had any reasonable prospect of success.

67. The Claimants both brought claims for "arrears of pay". Mr Wallis referred to not being paid for "extra hours to complete vital CAA documentation" for which he sought payment without stating any sums due. Ms Leadbetter sought payment for 43 hours of cancelled flight lessons (which had been apparently booked in for the period of closure) and £35 for "desk retainer discrepancy".

68. At no stage did either Claimant suggest that they were entitled to be paid under their contracts for work not done and nor did they challenge the Respondent's right to (nor the decision to) close the airfield during winter months. Neither Claimant could explain the basis for this claim further.

69. Ms Leadbetter's claim for arrears of pay was withdrawn on 17 December 2013. Mr Wallis' claim was subject to an order for

particularisation, set out in the orders from that day. Such particularisation had not been forthcoming prior to the claim being withdrawn.

70. In those circumstances I am satisfied that neither Claimant's claim for arrears of pay had any realistic prospect of success. They could not point to any part of their contract which gave them a right to be paid in the circumstances which pertained at the time and neither was Mr Wallis able to offer any particulars of his claim for expenses and fees attending the course referred to.

Breach of Tribunal Orders

71. The Claimants were both in breach of the Tribunal's Orders of 29 August 2013 when they were ordered to provide proper particulars of their "whistleblowing" claims and of the order of 17 December 2013 when the requirements for particularisation were set out with precision.

72. The first response received was sent by Mr Walker on behalf of the Claimants and was instantly identified as inadequate by the Respondent's Solicitors. No further information having been forthcoming particulars were again ordered on 17 December and the information thereafter provided by the Claimants was also inadequate.

73. Clearly those orders had not been complied with and Rule 76 (2) is therefore engaged.

Unreasonable conduct of settlement negotiations

74. The Respondent says that the Claimants acted unreasonably in relation to the conduct of settlement negotiations which failed.

75. They in particular refer to the proposal by Mr Barden (who briefly assisted the Claimants after Mr Walker's withdrawal from the case) that a settlement agreement should be on the basis of no further claims being made by either party against the other, but this was at a time when the Respondent believed there had been fraud by Mr Wallis. Mr Wallis in his evidence before me denied that there was any desire to prevent such a claim if it was legitimate, but that is not in accordance with Mr Barden's proposal (presumably made on instructions).

76. What the remainder of the correspondence shows, however, is that both Mr Barden and Mr Wallis were anxious to avoid him being unable to fully resist any such claim. That was the basis, it was said, of Mr Barden's redraft of the proposed agreement.

77. It is not clear to me why, in those circumstances, a simple agreement withdrawing the claims before the Tribunal with no order as to costs would not have achieved all parties' aims, nor was it explained to me why those negotiations collapsed.

78. I can, however, well understand that Mr Wallis was anxious to be able to fully and freely respond to the allegations which it was suggested may be raised against him and it was not unreasonable of him to seek to do so at that time. In fact I am told that no civil suit has ever been launched against Mr Wallis and the criminal investigation into his conduct which was instigated, presumably, on the basis of information from the Respondent, did not proceed.

79. I am not satisfied that the conduct of those negotiations was unreasonable. Equally, I do not find, as Ms Omeri submitted, that Mr Wallis or Mr Barden were seeking to "prevent the reporting of a crime". There was no clear evidence of that before me.

Summary

80. Accordingly I am satisfied that none of the claims brought by the first and second Claimants had any reasonable prospect of success. I am further satisfied that the Claimants and each of them were in breach of the Orders of the Tribunal dated 29 August 2013 and 17 December 2013.

81. The terms of Rule 76(1) have been met and I must consider whether it is appropriate to make a costs order against the Claimants and each of them, and if so in what amount.

Wasted costs

82. An application is made by the Respondent for a wasted costs order against Mr Walker, and also by the Claimants against him.

83. Under Rule 80 such an order may be made when a party has incurred costs due to the improper, unreasonable or negligent act or omission on the part of a representative , or which in the light of any such act or omission occurring after such costs were incurred the Tribunal considers it unreasonable to expect the receiving party to pay.

84. I have already found that Mr Walker was acting for profit in this matter and thus that he is a representative within the meaning of Rule 80.

85. Both Claimants told me during this hearing that they were concerned and only concerned, when they sought advice, to seek payment or recompense for work they were due to carry out prior to the decision to close the airfield operated by the Respondent for the early months of 2013.

86. This was not challenged by Mr Walker, and is corroborated by Ms Leadbetter's own contemporaneous email to the Respondent. She wrote on 23 January 2013 that she had

> *"just received [the] letter regarding my being laid off. I am writing to ask you to please send my P45 to me in the post as soon as possible so that I have some chance of finding other means of employment between now and April. Hopefully I will be invited back to the school to instruct in April – I have very much enjoyed my time at Brooklands*"

87. However, once Mr Walker had been consulted the clams made by both Claimants grew out of all recognition. The merits of those claims I have already dealt with above.

88. It is insufficient for the making of a wasted costs order, however, for a representative to have pursued cases on his client's behalf which are plainly doomed to fail (see, as an example, *Mitchells Solicitors v Funkwerk Information Technologies York Ltd. UKEAT 541/07).*

89. The requirement is that there must be improper unreasonable or negligent conduct which thereby assisted proceedings amounting to an abuse of process (thus breaching the representative's duty to the court) and which caused costs to be wasted (see *Ratcliffe, Duce and Gammar v L Binns EAT 0100/08).*

90. Those cases, and the remainder of the cases which have been drawn to my attention on this point, deal with cases where a representative has pursued cases at his client's behest. This case, however, is different. On the evidence of the Claimants, which I accept (it being unchallenged), the idea of pursuing claims for unfair dismissal, Holiday Pay, arrears of pay and for detriment following the making of protected disclosures were not theirs but Mr Walkers. In relation to those claims the following matters are highly relevant.

91. First, neither claim for unfair dismissal had the remotest prospect of success. Ms Leadbetter accepted that she had not been dismissed and that she was not pursuing a claim for constructive dismissal. Mr Wallis remained in employment. Neither Claimant had identified these possible claims or facts which could lead anyone to believe they might have such a claim.

92. Second, there was no basis for either Claimant's holiday pay claim. Ms Leadbetter had been paid her holiday pay, but a claim was advanced for her "entitlements" without any enquiry as to whether any holiday had been taken or paid for. Mr Wallis has not at any stage identified that he believed he was due any holiday pay yet that claim was advanced in his ET1.

93. No particulars of any sort have been provided to establish a claim for arrears of pay for either Claimant.

94. Finally, the claims for suffering detriment following the making of protected disclosure were as I have found, wholly without merit and never properly particularised.

95. On the basis of the evidence which I have heard, these claims were the creation and idea of Mr Walker. He it was who identified these "claims" and drafted unparticularised ET1s seeking remedy for these matters on behalf of the Claimants. Their evidence was that they were in his hands and that they trusted him to identify matters for which they could seek remedy.

96. That of itself would, I find, be sufficient to constitute conduct which was improper unreasonable or negligent conduct which thereby assisted proceedings amounting to an abuse of process. In short, what was pursued was not the Claimant's claims but claims of Mr Walker's invention. In *Liddington v 2Gether NHS Foundation Trust* it was held that a failure to identify particulars in relation to alleged protected disclosure was sufficient to amount to unreasonable conduct and further in *Wilsons Solicitors v Johnson* that improper, unreasonable or negligent conduct may be found where a claimant's representative fails to produce coherent particulars of his or her claim, which in relation to the alleged protected disclosures claim was certainly the case here.

97. However evidence during the course of the hearing and consideration of the bundles of documents submitted to the Tribunal have served to corroborate and reinforce that finding. In particular:-

97.1 On more than one occasion, Mr Walker advanced a version of events or of the cases presented which was at odds with the truth. As an example he put it to Mr Bletsoe-Brown that flying logs and files were lost and were "stuffed into rooms". This was denied and Mr Walker said that the Claimants said that that was the case. I pointed out to him that nowhere in any particulars nor in any witness statement did they do so. His reply was to withdraw that remark.

97.2 He then put it to Mr Bletsoe-Brown that Operations manuals were not readily available (contrary to Civil Aviation requirements) and Mr Bletsoe-Brown replied that the obligation was they should be safe and access to them can be provided if necessary. Mr Walker then stated that the Claimants asked for the files and were denied them. Again this had not been alleged by either Claimant and Mr Walker's reply when this was pointed out to him was that he was "sure they would have done in their witness statements" (although this was not referred to in the draft statement the Claimants themselves had prepared).

97.3 On 3 September 2013 Mr Walker alleged to the Respondent's Solicitor that his client (in particular Mr Bletsoe-Brown) had banned the Claimants (described as his "colleagues") from the

airfield and hotel. The Claimants accepted in cross examination that they had not been banned and denied ever suggesting they had been.

97.4 On 13 September 2013 he wrote to the Respondent's Solicitor regarding what he described as the Respondent's sullying the reputation of the Claimants (by Mr Bletsoe-Brown), describing him as a "sad man" and "looking forward to seeing him in front of the judge". He further stated that "he is paying your fees so at least he is suffering financially". That is not a valid reason for the pursuit of litigation.

97.5 Mr Walker agreed, in cross examination, that he was taking part in what could be called a "community crusade" against Mr Bletsoe-Brown. It was said that the airfield was causing environmental and noise pollution. This is again indicative of the tribunal proceedings being used for different and unrelated purposes which is an abuse of process.

97.6 Further, my concern over the motivation behind Mr Walkers conduct of these proceedings and the way he had pursued them is corroborated by the Costs judgment in Mr Scott's case where at Paragraph 10 Employment Judge James had to admonish the Claimant in that case (who was not present) through Mr Walker (who was, and who was putting forward the relevant allegations) over an attempt to adduce evidence which Employment Judge James described as being of "a personal and potentially defamatory nature" regarding Mr Bletsoe-Brown.

97.7 Mr Walker claimed on more than one occasion to have taken instructions from the Claimants in meetings, but could produce no notes or other record of such meetings, the nature and fact of which were denied by the Claimants. I had severe doubts about that evidence which appeared to me to be belated as self serving, and which could not be corroborated by even a single diary entry, meeting note or email.

97.8 In addition, my concern over the veracity of Mr Walker's evidence was corroborated by two matters which post-dated the applications for costs.

97.9 First, it was only after the current applications were made and came to his notice that Mr Walker suggested for the first time that he had ceased to act for the Claimants because Mr Wallis had confessed to both him and to Councillor Jim Bass (from whom no evidence was proffered) to taking cash from the Respondent. If such confession had been made, neither Mr Walker nor Mr Bass offered this evidence to the police when they were investigating potential charges of fraud against Mr Wallis. Remarkably, having represented him up to the end of

December 2013, what Mr Walker later did was offer to assist Mr Bletsoe-Brown in a civil suit against Mr Wallis.

97.10 Secondly, on 11 May 2016 Mr Walker wrote to the Tribunal as part of his defence to the current applications and stated that he would not be able to meet any claim for costs. He sent two emails the first at 0954 that day stated that:-

> *"please note I am now retired and all my capital is contractually bound into a house extension programme. If costs are raised against me I will be unable to pay"*

The second, longer email at 1306 whilst repeating those above added words to the effect that Mr Goss was lying and that Mr Wallis would seek to mislead the Tribunal regarding taking cash for lessons (which he claimed Mr Wallis had confessed to saying

> *"he admitted as much to me".*

97.11 The important points which emerged during examination of Mr Walker's evidence were these. First, there was and is no house extension built or being built at his current home; second there was a house extension built at his previous home but he had not lived there for (as I understood his somewhat confused evidence) over 2 years and thirdly he owns his house, mortgage free (valued by him at £230,000) and co-owns (although, bizarrely, he could not say in what proportion) two other houses which are rented out from which he receives £200 per month. They are also mortgage free and worth (on his evidence) £165,000 and £130,000 respectively. He has a pension income of £19,742 per annum.

97.12 Accordingly, I am driven to the conclusion that Mr Walker was seeking to do no more nor less than mislead the Tribunal when he claimed he had no capital other than that which was committed to a non-existent house extension. Those emails could serve only to mislead and were, I find, written solely to seek to dissuade the Respondent and perhaps the Claimants from seeking cots against him as they would (on the basis of that wholly false information) perhaps be unable to make recovery.

In addition, the unreasonable conduct of the Claimants as set out in the earlier part of this judgment, and their pursuit of claims which had no reasonable prospect of success was procured by Mr Walker for what I find to have been ulterior motives arising out of a dislike for Mr Bletsoe-Brown and as part of what he himself said could be described as a "community crusade" against the operation of the airfield.

The means of the Claimants and Mr Walker

98. Under Rule 84 when deciding whether or not to make a costs or wasted costs order, and if so in what amount I may have regard to the paying party's (or the representatives, in the case of a wasted costs order) ability to pay.

99. I have already set out the information regarding Mr Walker's means above. He has substantial unencumbered assets and an income of over £19,500 per annum.

100. In relation to Ms Leadbetter she has an income of approximately £8000 per annum, has no other source of income and has savings of approximately £2,000. She has no investments. As regards Mr Wallis he now works as a self-employed gardener earning between £7,000 and £8,000 per annum. He previously had a share in a farming business, the value of which was exhausted in his defence of the criminal charges brought against him. He had no other assets other than approximately £180 in shares in an energy company and no savings.

CONCLUSIONS

101. It is clear from what I have said above that whilst the Claimants are liable for the conduct of their representative insofar as an order under Rule 76 and 78 is concerned, they were in the main innocent of the matters which have caused concern in this case.

102. Their unchallenged evidence was that they sought advice only as to whether they had any claim for lost income following the decision to close the airfield where they worked and provided flying lessons for the period January to March 2013, particularly as they had lessons booked in for that period.

103. What then happened was that Mr Walker, without any or any proper instruction, analysis of the position and without even any consideration of the Claimants' contracts of employment encouraged and advised the Claimants to pursue claims which were wholly without merit, without factual substance and without legal basis.

104. The Claimants claims for holiday pay had no merit. They were, in the case of Ms Leadbetter, simply a statement of her annual entitlement for the year to date at the time of her lay off. She had already been paid the sums due but Mr Walker did not enquire. In Mr Wallis' case there was no factual basis whatsoever for a claim for outstanding holiday pay. The pleading lacked any particularisation other than the claimed daily rate.

105. The claims for unfair dismissal were doomed to failure. Ms Leadbetter admitted she had neither resigned nor been sacked but her evidence was that Mr Walker said she had a good claim for constructive dismissal. The legalities were, she said "lost on her". She relied on Mr Walker's judgment. Mr Wallis' claim for unfair dismissal was made at a time when he was still, on his own case, employed by the Respondent and had been given no notice of termination. In those circumstances, his claim was one over which the Tribunal had no jurisdiction.

106. The claims for arrears of pay were equally without merit. There was no basis for payment to the Claimants other than for flying lessons they had carried out. Mr Walker advised the Claimants of the strong merits of their claims without even looking at the Claimant's contracts of employment to ascertain if there was any basis in contract for those claims.

107. The claims for suffering detriment having made protected disclosures were again without merit. They lacked any legal foundation, were, on the Claimants' evidence, the idea and solely the idea of Mr Walker and were made only on his advice and at his instigation. Yet he did not deem it necessary to analyse precisely what it was alleged that the Claimants had said or done which could amount to a protected disclosure nor seek to identify and detriment to which either of them had been put as a consequence. Thus the Claimants were left floundering by the request for particularisation of claims they did not themselves understand, a position made worse by Mr Walker's failure to advise them honestly about the orders for particulars which had been made. He also failed to honestly advise them of the position in relation to Mr Wallis' unfair dismissal claim even after it had been clearly spelled out to him at the Preliminary Hearing on 17 December 2013.

108. All of that amounts to improper, unreasonable and negligent acts or omissions by Mr Walker.

109. Mr Walker's email correspondence, his personalisation of the dispute onto Mr Bletsoe-Brown, his conducting, on his own admission, a form of crusade against that individual and the very presence of the airfield as identified in this judgment further demonstrate that he has conducted these proceedings in a way which were (and for a purpose which was) an abuse of the process. He has, throughout the case and throughout the hearing before me, shown scant regard for the interests of his clients, even offering to act against Mr Wallis interests in support of the Respondent when he realised he was facing a potential order for costs.

110. Accordingly, I find that the Claimants themselves were not properly responsible for the fact that wholly unmeritorious claims were advanced and certainly not the way the claims were conducted.

111. For that reason, had I been minded to make a costs order against the Claimants I would have made a wasted costs order against Mr Walker in favour of the Claimants in the same amount as the costs would have been incurred as a result of improper, unreasonable and/or negligent acts of Mr Walker.

112. However, in the light of that fact, the fact that they have identified no costs (other than any awarded in these proceedings) to which they have been put and in the light of each of the Claimants' limited means I make no order for costs against them as I am entitled in the exercise of my discretion so to do.

113. The conduct of Mr Walker in this case, however, is utterly reprehensible. He was acting on a no-win-no-fee basis, under which he was to recover 20% of any award made in favour of the Claimant or any settlement sum as his reward.

114. He therefore:-

114.1 Advanced claims which were without merit, which were (the unfair dismissal claims) outside the jurisdiction of the Tribunal and which lacked any legal or factual basis. He failed to consider the terms of the Claimants' contracts of employment before advising them of their claims under those contracts, he failed to make any proper investigation or enquiry into what the purported protected disclosures were (having himself identified such a potential claim it was not in the mind of either Claimant) nor what detriment it was said each Claimant had suffered as a result of having made them;

114.2 Did so, it is clear form my findings above, not to assist the Claimants to gain proper restitution for any wrongs they had suffered (none whatsoever being identified) but – in his words – as part of what "could be described as a community crusade" against Mr Betsoe-Brown in particular and the Respondent generally. This is, quite simply, a total abuse of process. It is not the purpose of the Employment Tribunal;

114.3 Did so whilst making unsustainable and wild accusations (for example that the Claimants had been "banned" from premises when no such thing was alleged by the Claimants or either of them, and further during this costs hearing, made allegations that matters were advanced by the Claimants as part of their case which had never been so advanced. This corroborates the Claimants' position that it was he, and not they, who had determined the claims to be brought, lacking in merit and any evidential basis as they were.

114.4 Further the intemperate tone of his emails and his statement in an email that Mr Bletsoe-Brown would be "suffering" as a result of having to pay costs did nothing to assist the cause of his clients. They were inappropriate and an abuse of the tribunal process.

115. In the circumstances, I am satisfied that (following the three stage test laid down in *Insteed v Redbridge LBC [2017] ICR Digest D1)*:-

115.1 Mr Walker, as the Claimants' representative acted improperly, unreasonably and negligently. He pursued claims without regard for their merits, claims which he instigated and which were not made on instructions (other than on receipt of his advice that they were meritorious). He did so not in his clients' best interests nor to advance their position but to pursue his "crusade" against the Respondent, Mr Bletsoe-Brown and the airfield the Respondent operate. That is an abuse of the process.

115.2 That conduct has caused the Respondent unnecessary costs. I am satisfied that had any proper analysis or consideration of the Claimant's claims been made by their representative, the claims would have been abandoned at n early stage; if not before then certainly on receipt of the responses to the claims and the request for further particulars which ought to have clearly demonstrated the lack of merit in all the clams being advanced.

115.3 I am satisfied that it is just to make a wasted costs order to require to representative to compensate the Respondent for the whole or part of those unnecessary costs.

The Amount of a Wasted Costs Order

116. The Respondent has provided a detailed schedule of costs. It has not been challenged by either of the Claimants nor by Mr Walker. In total the costs incurred in defending these claims amount to £26,179.50.

117. I am invited to summarily assess those costs.

118. I have already indicated that I do not consider it appropriate to make a costs order against the Claimants themselves for reasons which I have given.

119. I am satisfied that these claims should certainly have been abandoned once a proper analysis of the Respondent's responses, and the contemporaneous request for further particulars had taken place. At that stage the inability of the Claimants to properly state any protected disclosures or any detriment arising in consequence thereof (claims which the Claimants themselves had not sought to pursue until advised to do so by Mr Walker) should have been obvious; the lack of

jurisdiction in relation to the unfair dismissal claims and the lack of any legal or factual basis for the other claims should have been clear.

120. The Respondent's costs thereafter fall to be considered as wasted costs.

121. The responses were submitted to the Tribunal on 21 May 2013 (Ms Leadbetter) and 7 August 2013 (Mr Wallis) on which latter date requests for particulars were also submitted in respect of both claims.

122. Allowing a reasonable time for the taking of instructions on those documents of, say, 21 days, takes the matter up to 28 August 2013. I am satisfied that thereafter the costs incurred by the Respondent are properly considered to be wasted costs and it is right that an order for repayment should be made against Mr Walker, up to (but not beyond) the hearing on 17 December 2013 (but allowing time spent reporting on the outcome of that hearing) whereafter the parties engaged in (sadly, fruitless) settlement negotiations and which included discussions with ACAS and the drafting of settlement agreements.

123. I do not make any order for the costs of the instant application. I am not minded to do so as the matters which have fallen for consideration have been many and complex.

124. The costs which had been incurred up to and including 17 December 2013, but after 28 August 2013 amounted on the Respondent's schedule to £11,107.00.

125. I am satisfied that it is just and appropriate to make a wasted costs order in that sum, in favour of the Respondent, against Mr Walker and do so.

126. Mr Walker indicated that he should not be liable for any costs because he had negotiated a withdrawal from the claims without costs. However, that proposed settlement was not satisfactory (for the reasons I have already discussed) and was presented to the Claimants without any or any proper explanation as to why the claims he had previously persuaded them to pursue, and which he considered to be meritorious, should now be abandoned. In those circumstances the Claimants properly sought advice on the terms of the agreement and properly sought to protect (in particular) Mr Wallis' ability to resist any claims brought by the Respondent against him. Mr Walker was at that stage, simply 'abandoning ship' but did not properly explain to the Claimants why the ship (to continue the analogy) was, and always had been, doomed to sink.

SUMMARY

127. On the Respondent's application for costs against the Claimants I make no order.

128. On the Claimant's applications for wasted costs order against Mr Walker I make no order.

129. On the Respondent's application for a wasted costs order against Mr Walker I make such an order in the sum of £11,107.00 payable within 28 days of the date hereof.

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Employment Judge Ord, Bedford.
Date:7 June 2017

JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS