EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4100467/2017

Held in Glasgow on 28 July 2017 (Expenses Hearing)

Employment Judge: Ian McPherson (in chambers)

Mr David Gibb	**Claimant** **Written Representations by:** **Mr Iain Burke – Solicitor**
Peter Vardy Limited	**Respondents** **Written Representations by:** **Ms Kirsty Swan – Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the respondents' opposed application for an Expenses Order or Wasted Costs Order against the claimant is refused.

REASONS

Introduction

1. This case called before me, as an Employment Judge sitting alone, at the Glasgow Tribunal office, on Friday, 28 July 2017 at 10.00am, for an Expenses Hearing, as intimated to both parties' representatives under cover of a letter from the Edinburgh Tribunal office dated 17 July 2017, referring to it as a Costs Hearing. As this matter was to be dealt with by way of written submissions, rather than personal attendance by parties' representatives, it was transferred to the Glasgow Tribunal office, and allocated to me, on

account of the lack of judicial resource at the Edinburgh Tribunal on the allocated Hearing date.

Claim and Response

2. By ET1 claim form, presented on the claimant's behalf, on 21 March 2017, by his Solicitor, Mr Iain Burke, from Messrs Bannerman Burke Taits, Solicitors, Selkirk, the claimant complained that he was owed notice pay, holiday pay, and other payment arising from the termination of his employment with the respondents on 4 November 2016.

3. His claim form was presented, following ACAS early conciliation, between 25 January 2017 and 22 February 2017. In his ET1 claim form, the claimant stated that, in the event that his claim was to be successful before the Tribunal, he sought an award of compensation only and he quantified that as a total claim for **£9,945.20**, inclusive of the Tribunal lodging fee of £160.

4. The claimant's ET1 form was accepted by the Employment Tribunal on 23 March 2017, and Notice of Claim and Notice of Final Hearing was served on the respondents, on that date, requiring them to lodge an ET3 response by 20 April 2017 at latest, and advising that a Final Hearing had been set for Wednesday, 31 May, 2017, with a one hour allocation to hear the evidence and decide the claim, including any preliminary issues.

5. On 7 April 2017, the Legal Department at Motor Industry Legal Services, lodged an ET3 response, on behalf of the respondents, defending the claim. It was submitted by Ms Kirsty Swan, Solicitor with MILS Solicitors, trading as Motor Industry Legal Services, London.

6. The claim brought against the respondents was defended, and detailed grounds of resistance were set forth in a separate, three page paper apart, asserting that there had been no unlawful deduction of salary as the respondents were entitled to make a deduction from the claimant's final salary, due to having made a genuine overpayment of salary, which failing, if not correct, then alternatively, or additionally, averring that the respondents had a contractual right to deduct sums from the claimant's final salary.

7. That ET3 response was accepted by the Tribunal on 11 April 2017, and a copy sent to the claimant's solicitor, and to ACAS. On 19 April 2017, Employment Judge Lucy Wiseman, having considered the file, and having not dismissed the claim or the response on initial consideration, ordered that the claim would proceed to the listed Final Hearing on 31 May 2017, as per the Tribunal's previous letter to parties dated 23 March 2017, but enquiring whether the allocated time for that Final Hearing was sufficient time to hear the case. Parties' comments were requested by 26 April 2017.

8. On 25 April 2017, the respondents' representative, MILS Solicitors, replied to the Tribunal, stating that they did believe that further time would be needed, a Final Hearing having been listed for only one hour, to account for evidence being required, and indicating that one day would be sufficient to deal with both liability and, if necessary, remedy.

9. On 27 April 2017, the claimant's solicitor, Mr Burke, advised the Tribunal office that in his view one day would be sufficient to hear the case. Thereafter, that correspondence having been referred to Employment Judge Robert Gall, on 2 May 2017, he directed that the one hour Final Hearing be extended to one day, still on Wednesday, 31 May 2017, and both parties' representatives were so advised by letter from the Tribunal.

10. Formal, amended Notice of Final Hearing, setting aside one day on 31 May 2017 for the case's full disposal, including remedy if appropriate, was issued to both parties' representatives by the Tribunal on 4 May 2017.

Settlement of Claim

11. On 30 May 2017, the Tribunal office was advised by ACAS, Manchester, that settlement had been agreed between the parties and, as a result, by letter to parties' representatives, on 31 May 2017, from the Edinburgh Tribunal office, they were advised that the Tribunal's file had been closed, and the file would be retained until May 2018, when it would be destroyed.

12. No application was made on the respondents' behalf for the Tribunal to consider issuing a **Rule 52** Judgment, in terms of the **Employment**

Tribunals Rules of Procedure 2013, dismissing the claim, following upon its withdrawal by the claimant.

Respondent's application for Wasted Costs

13. On 19 June 2017, the respondents' solicitors at MILS e-mailed to the Glasgow Tribunal office, with copy to the claimant's solicitor, an application for Wasted Costs in accordance with **Rule 76 of the Employment Tribunal Rules of Procedure 2013.** They confirmed that they had copied their application to the claimant's solicitor so that they could raise any comments or objections by return. The respondents' application was made, for Wasted Costs, following the claimant's withdrawal of his Employment Tribunal claim on Tuesday, 30 May 2017.

14. The specific terms of the respondents' application for Wasted Costs read as follows:-

> "*It is alleged that the Claimant has acted unreasonably in the way the proceedings have been conducted. Specifically here, the matter relates to the timing of the Claimant's withdrawal of his claim. The Tribunal Hearing was listed for 10am on Wednesday 31st May 2017. The claimant's solicitors were aware that the Respondent's solicitor would be travelling to the Tribunal on Tuesday 30 May, as the Respondent's solicitors are based in England. At approximately one hour prior to the Respondent's solicitor boarding her plane (as she travelled from Bristol Airport to Edinburgh Airport) the Claimant's solicitor telephoned to advise that on preparing his legal arguments, he was reconsidering the prospects of his client's claim for an unlawful deduction of wages complaint. He was therefore considering his client's position in respect of seeking to argue a breach of contract instead. Thereafter shortly prior to the Respondent's solicitor boarding her plane, the Claimant's solicitor telephoned to advise that on reflection the Claimant wished to withdraw his claim.*
>
> *Whilst we accept that the Claimant is free to withdraw his claim, our client has suffered unnecessary costs in relation to the timing of the*

same. Had the Claimant's solicitor prepared his legal arguments earlier, it could have avoided the Respondent incurring the travel costs and disbursements associated with the Hearing.

In addition, we put the Claimant's solicitor on notice that his client was potentially pursuing a claim without prospect of success. We wrote to the Claimant's solicitor on 17 February 2017 setting out our client's position to assist the Claimant's solicitor with considering the merits of the claimant's claim. We duly enclose a copy of same at Annex 1. Had the Claimant and his solicitor considered this letter at the time, it is submitted that the Claimant would have withdrawn sooner and therefore, the Respondent would not have incurred any of these costs, as set out in the Schedule of Costs at Annex 2.

We therefore make this application on the basis that the Respondent has incurred unnecessary costs due to the claimant's conduct. These are costs that have all been unnecessarily incurred and could have been avoided entirely had the Claimant considered his position prior to the day before the Hearing. As a result, the Respondent asks for the Wasted Costs relating to the disbursements prepared in the Schedule of Costs."

15. At Annex 1 to the respondents' application for Wasted Costs was a copy of the respondents' solicitor letter, dated 17 February 2017, sent by e-mail to the claimant's solicitor, on that date. It is not necessary, for the purposes of this Judgment, to narrate the full terms of that letter, and it will suffice to note that the respondents' solicitor put the claimant's solicitor on notice that the respondents thoroughly disputed the allegations raised, and the letter concluded by stating that:-

"In the circumstances therefore please note that if any legal action is taken against our client we will rigorously defend the same and we put your client on notice to costs."

16. It is of note that this letter was issued prior to the commencement of the current Tribunal proceedings, and during the course of the ACAS early

conciliation process, ongoing until the ACAS Early Conciliation Certificate was issued on 22 February 2017.

17. Further, Annex 2 to the respondents' application for Wasted Costs was their Schedule of Costs, marked "***Without Prejudice Save as to Costs***", and amounting to a total sum of **£666.46**, made up as follows:-

Disbursements incurred for attendance at the Employment Tribunal on Tuesday 30th May 2017

1.	*Preparation and photocopying of the main bundle and skeleton argument papers (x 3 copies at 25p per page)*	*- £147.95*
2.	*Flight Bristol/Edinburgh*	*- £215.09*
3.	*Cancellation charges for hotel in Edinburgh*	*- £120.00*
4.	*Mileage and car parking (Bristol Airport)*	*- £72.34*
	Sub Total	*£555.38*
	VAT at 20%	*£111.08*
	TOTAL AMOUNT DUE:	***£666.46***

18. While the respondents' Schedule of Costs detailed the disbursements, and the individual amounts, comprising the total amount sought, no vouching documents, or receipts, were produced, in respect of the disbursements described at items, 2, 3 and 4 respectively.

19. I pause to note and record here that in connection with the written representations received from both parties' representatives, there was no call for such vouching by the claimant's solicitor, and no exhibition of any relevant vouching documents by the respondents' solicitor.

Claimant's objections to the Respondent's application for Wasted Costs

20. By e-mail, sent on 22 June 2017, to the respondents' representative, and copied at the same time to the Glasgow Tribunal office, the claimant's solicitor, Mr Burke, replied with commendable brevity, but lack of any meaningful explanation, simply stating "***please note that I object to any award of costs being made against the claimant in this case."*** Mr Burke did, however, ask if the Employment Judge could indicate whether the opposed application for costs should be dealt with by written submission or a Hearing.

21. Following referral to Employment Judge Murdo Macleod, resident Employment Judge in Edinburgh, he directed that the respondents' application for costs, and the claimant's objections, would be dealt with by written submissions, and by e-mail to parties' representatives, from the Edinburgh Tribunal office, on 29 June 2017, they were advised that written submissions should be lodged by 7 July 2017.

22. On 6 July 2017, the respondents' solicitors, the Legal Department at Motor Industry Legal Services, e-mailed the Edinburgh Tribunal office, with copy to the claimant's solicitor, assuming that the deadline provided in the Tribunal's e-mail of 29 June 2017 was for the claimant's solicitor to respond, and advising, however, for the avoidance of doubt, that they wished to confirm that the respondents sought to rely on the contents of their letter dated 19 June 2017, together with enclosures, as the respondents' submissions for the costs application.

23. Thereafter, by e-mail to the Glasgow Tribunal office, on 10 July 2017, copied to the respondents' solicitor, the claimant's solicitor, Mr Burke, without proffering any explanation for the 3 day delay in replying, by the deadline of 7 July 2017, assigned by Employment Judge Macleod, replied as follows:-

> *"We refer to the above. The applicant objects to the costs application. He does not accept that he acted unreasonably as alleged by the respondent's agent.*
>
> *His position is that he pursued the claim to the best of his ability but on final consideration accepted advice tendered and withdrew the claim.*

He does not accept it was a claim that had no prospects of success. He balanced the potential costs to him for his own legal representation against the merits of the case and took the view that he wanted to withdraw. This was communicated immediately and agents were able to prevent the respondent's agent from having to travel."

24. Parties' representatives having been advised, by the Edinburgh Tribunal office, on 17 July 2017, that this matter would be dealt with by way of written submissions at this Hearing, when it called before me, there were no further written submission, or representations, received from either party. Accordingly, in chambers, I considered the opposed Wasted Costs application, on the basis of the papers to hand.

Relevant Law

25. The relevant statutory provisions, relating to Costs / Expenses Orders, are as set forth in the **Employment Tribunals Rules of Procedure 2013**, **Rules 74 to 84**, and while Ms Swan's application for "***Wasted Costs***" referred to it being made in accordance with **Rule 76 of the Employment Tribunals Rules of Procedure 2013**, about which I will say more later, neither party's representative made any further reference to the relevant statutory provisions, nor to any applicable case law authorities, that might have been of assistance to me at this in chambers Expenses Hearing.

26. Accordingly, I think it is helpful if, at this stage, I set out in full the relevant statutory provisions, and note that, so far as relevant for present purposes, the **Employment Tribunals Rules of Procedure 2013,** provide as follows:-

"**INTRODUCTORY AND GENERAL**

Overriding objective

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

COSTS ORDERS, PREPARATION TIME ORDERS AND WASTED COSTS ORDERS

Definitions

74. *(1) "Costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing). In Scotland all references to costs (except when used in the expression "wasted costs") shall be read as references to expenses.*

(2) "Legally represented" means having the assistance of a person (including where that person is the receiving party's employee) who –

(a) has a right of audience in relation to any class of proceedings in any part of the Senior Courts of England and Wales, or all proceedings in county courts or magistrates' courts;

(b) is an advocate or solicitor in Scotland; or

(c) is a member of the Bar of Northern Ireland or a solicitor of the Court of Judicature of Northern Ireland.

Costs orders and preparation time orders

75*(1) A costs order is an order that a party ("the paying party") make a payment to –*

(a) another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative;

(b) the receiving party in respect of a Tribunal fee paid by the receiving party; or

(c) another party or a witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual's attendance as a witness at the Tribunal.

When a costs order or a preparation time order may or shall be made

***76**(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that –*

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

(b) any claim or response had no reasonable prospect of success, or

(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.

(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

Procedure

***77.** A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.*

The amount of a costs order

***78**(1) A costs order may –*

(a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;

(b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles; or, in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993, or by an Employment Judge applying the same principles;

(c) order the paying party to pay the receiving party a specified amount as reimbursement of all or part of a Tribunal fee paid by the receiving party;

(d) order the paying party to pay another party or a witness, as appropriate, a specified amount in respect of necessary and reasonably incurred expenses (of the kind described in rule 75(1)(c)); or

(e) if the paying party and the receiving party agree as to the amount payable, be made in that amount.

(2) Where the costs order includes an amount in respect of fees charged by a lay representative, for the purposes of the calculation of the order, the hourly rate applicable for the fees of the lay representative shall be no higher than the rate under rule 79(2).

(3) For the avoidance of doubt, the amount of a costs order under sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000.

When a wasted costs order may be made

***80.**—(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".

(2) "Representative" means a party's legal or other representative or any employee of such representative, but it 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.

(3) A wasted costs order may be made in favour of a party whether or not that party is legally represented and may also be made in favour of a representative's own client. A wasted costs order may not be made against a representative where that representative is representing a party in his or her capacity as an employee of that party.

Effect of a wasted costs order

81. *A 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 to be paid, disallowed or repaid must in each case be specified in the order.*

Procedure

82. *A wasted costs order may be made by the Tribunal on its own initiative or on the application of any party. A party may apply for a wasted costs order at any stage up to 28 days after the date on which the judgment finally determining the proceedings as against that party was sent to the parties. No such order shall be made unless the representative has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application or proposal. The Tribunal shall inform the representative's client in writing of any proceedings under this rule and of any order made against the representative.*

Ability to pay

84. *In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay."*

Discussion and Deliberation

27. While Ms Swan's application dated 19 June 2017, as reproduced above at paragraphs 13 and 14 of these Reasons, refers to it being an "***application for Wasted Costs, in accordance with Rule 76***", the first point to note is

that she has confused the two quite separate type of Orders, an Expenses Order under **Rule 76** being a quite separate category from a Wasted Costs Order under **Rules 80 to 82**.

28. However, taking account of the opening two sentences of her application, as set forth at paragraph 14 of these Reasons, it is clear to me that although she refers at several points in her application to "***Wasted Costs***", she is, in fact, meaning an ordinary application for an Expenses Order, under **Rule 76**, which she specifically flags as the statutory basis of her application, and where she refers in her grounds of application to : **"*It is alleged that the Claimant has acted unreasonably in the way the proceedings have been conducted. Specifically here, the matter relates to the timing of the Claimant's withdrawal of his claim."***

29. Lest I am wrong in that view, which I do not believe that I am, I have, however, also considered her application against the relevant tests for the Tribunal making a Wasted Costs Order, where I am reminded of the opening words of His Honour Judge David Richardson, EAT Judge, in **Single Homeless Project Ltd v Abu & others [2013] UKEAT/0519/12**, at paragraph 1, where the learned EAT Judge stated that applications for Wasted Costs " ***tend to generate more heat than light and to cause more trouble and expense than they are worth…They raise troublesome issues and require careful handling."***

30. As HHJ Richardson also pointed out, at paragraph 2, in **Single Homeless Project Ltd**, for Employment Tribunals and Employment Judges faced with applications for Wasted Costs, which are not everyday fare, there is the valuable guidance in the Judgment of Mr Justice Underhill, as he then was, then President of the EAT, in **Godfrey Morgan Solicitors v Cobalt Systems Ltd [2012] ICR 305**, especially at paragraphs 35(1)-(5), which sets out the essentials.

31. In the circumstances of the present case, having regard to the grounds of application advanced by Ms Swan, on behalf of the respondents, as set forth above at paragraph 14 of these Reasons, while she has made reference to her dealings with Mr Burke, as the claimant's solicitor, the basis of her

application for costs is that, as she highlights in the closing sentences of her application, that: "… ***the Respondent has incurred unnecessary costs due to the claimant's conduct. These are costs that have all been unnecessarily incurred and could have been avoided entirely had the Claimant considered his position prior to the day before the Hearing."***

32. From my reading of the respondents' application in the present case, although labelled as "***Wasted Costs***" it is, on its facts as relied upon by Ms Swan, an application for expenses based on the claimant's unreasonable conduct of the Tribunal proceedings, rather than the bringing of the claim against the respondents, and, specifically, the timing of the claimant's withdrawal of his claim. It is not pled that Mr Burke's role, as the claimant's solicitor, in the bringing and / or conducting of the claim, has been unreasonable.

33. Wasted Costs applications are where an applicant for such an Order from the Tribunal seeks to argue that there has been unjustifiable conduct of the proceedings against them by the other side's lawyer, and where criticisms of the respondent representative's competence or conduct may have serious professional repercussions for that lawyer.

34. There is nothing in Ms Swan's application here, in the present case, that categorises Mr Burke's conduct of the claimant's Tribunal claim against the respondents as improper, unreasonable or negligent, by act or omission, such as would fall within the definition set forth at **Rule 80(1).** On that basis, even if there was a Wasted Costs Order application before me, seeking such an Order against him as the claimant's legal representative, I would not have regarded it as well-founded, and I would have refused it on that basis.

35. Further, while I was not referred to any relevant case-law authorities, by either party's solicitor in the present case, in considering an Expenses Order against the claimant, I have required to give myself a self-direction as to the relevant law.

36. Helpfully, the relevant law has recently been referred to in judgments from the Employment Appeals Tribunal, and I have referred myself specifically to the

helpful judicial guidance provided by the Honourable Mr Justice Singh, EAT judge, in **Abaya v Leeds Teaching Hospital NHS Trust [2017] UKEAT 0258/16** (01 March 2017), and its cross reference to, amongst others, **Ayoola v St Christopher's Fellowship [2014] UKEAT/0508/13, [2014] ICR D37,** a judgment by Her Honour Judge Eady QC on 6 June 2014.

37. In **Abaya**, Mr Justice Singh, at paragraph 13, notes the relevant legal principles as being common ground between the parties, and then, at paragraph 14, he notes that it was also common ground before him that there are, in essence, three stages in the exercise that are involved when an Employment Tribunal decides a Costs application.

38. Further, at paragraphs 14 to 16, Mr Justice Singh then helpfully notes those three stages, so far as material for present purposes, as follows:-

> *"14 ….. The first stage is to ask whether the precondition for making a Costs Order has been established. For example, in the present case, whether the claim or part of the claim had no reasonable prospect of success. However, that precondition is merely a necessary condition; it is not a sufficient condition for an award of costs. This is because the second stage of the exercise that has to be performed is that the Tribunal must consider whether to exercise its discretion to make an award of costs.*
>
> *15. The position was summarised by HHJ Eady QC in the **Ayoola** case at paragraphs 17 and 18. As she said at paragraph 17, at the second stage of the exercise:*
>
> > ***"17. … The Tribunal must then specifically address the question as to whether it is appropriate to exercise its discretion to award costs. Simply because the Tribunal's costs jurisdiction is engaged, costs will not automatically follow the event. The Employment Tribunal would still have to be satisfied that it would be appropriate to make such an order …"***

16. The third stage of the exercise only arises if the Tribunal decides that it is appropriate to make an award of costs. The third stage is to assess the quantum of that award of costs…."

39. Further, at paragraphs 17 to 20, in **Ayoola**, Her Honour Judge Eady QC states, as follows:-

"*17. As for the principles that apply to an award of costs in the Employment Tribunal under the 2004 Rules, the first principle, which is always worth restating, is that costs in the Employment Tribunal are still the exception rather than the rule, see* ***Gee v Shell UK Ltd*** *[2002] IRLR 82 at page 85,* ***Lodwick v London Borough of Southwark*** *[2004] ICR 884 at page 890,* ***Yerrekalva v Barnsley MBC*** *[2012] ICR 420 at paragraph 7. Second, it is not simply enough for an Employment Tribunal to find unreasonable conduct or that a claim was misconceived. The Tribunal must then specifically address the question as to whether it is appropriate to exercise its discretion to award costs. Simply because the Tribunal's costs jurisdiction is engaged, costs will not automatically follow the event. The Employment Tribunal would still have to be satisfied that it would be appropriate to make such an order, see* ***Robinson and Another v Hall Gregory Recruitment Ltd UKEAT/0425/13*** *at paragraph 15.*

18. On this point, albeit addressing the previous costs jurisdiction under the 2001 Employment Tribunal Rules, the EAT (HHJ Peter Clark) in ***Criddle v Epcot Leisure Ltd*** *[2005] EAT/0275/05 identified that an award of costs involves a two-stage process: (1) a finding of unreasonable conduct; and, separately, (2) the exercise of discretion in making an order for costs. In* ***Criddle*** *there was no indication in the Tribunal's Reasons that the Tribunal Chairman had carried the second stage of the requisite exercise and the EAT was not satisfied, in the absence of such indication, that the Chairman*

had in fact done so. The appeal was thus allowed against the costs order.

19. The extension of the Tribunal's costs jurisdiction to cases where the bringing of the claim was misconceived has been seen as a lowering of the threshold for making costs awards, see ***Gee v Shell UK Ltd*** *per Scott Baker LJ. In such cases the question is not simply whether the paying party themselves realised that the claim was misconceived but whether they might reasonably have been expected to have realised that it was and, if so, at what point they should have so realised see* ***Scott v Inland*** **Revenue Commissioners** ***[2004] ICR 1410*** *CA per Sedley LJ at paragraphs 46 and 49. Equally, in the making of a costs order on the basis of unreasonable conduct, the Tribunal has to identify the conduct, stating what was unreasonable about it and what effect it had, see* ***Barnsley MBC v Yerrekalva*** *per Mummery LJ at paragraph 41.*

20. That said, an appeal against a costs order will be doomed to failure unless it is established that the order is vitiated by an error of legal principle or was not based on the relevant circumstances; the original decision taker being better placed than the appellate body to make a balanced assessment as to the interaction of the range of factors affecting the court's discretion. Again, see ***Yerrekalva*** *per Mummery LJ at paragraph 9, and note also the observation at paragraph 49 that*

> ***`...as orders for costs are based on and reflect broad brush first instance assessments, it is not the function of an appeal court to tinker with them. Legal microscopes and forensic toothpicks are not always the right tools for appellate judging`."***

40. In his Judgment in **Abaya**, Mr Justice Singh places specific reliance on the reasoning of HHJ Eady QC in the **Ayoola** case, at her paragraphs 50 to 53,

and it is helpful, in that regard, to note here what, so far as relevant for present purposes, HHJ Eady QC said there, as follows:-

"50. Against that background, the question for me is whether the Employment Judge erred in granting costs at £10,000 or in failing to provide adequate reasons for granting that sum.

51. Although no particular procedure is laid down in the Tribunal Rules for a summary assessment of costs, the discretion as to the amount of an award must still be exercised judicially. One can take it a bit further. Although not bound by the same rules as the civil courts and although the discretion under the 2004 Tribunal Rules is very broad, the costs awarded should not breach the indemnity principle and must compensate and not penalise; there must, further, be some indication that the Tribunal has adopted an approach which enables it to explain how the amount is calculated for the purpose of Rule 30(6)(f).

52. The Claimant, rightly, does not suggest that the question of procedural justice on a costs application requires the prior service of a Schedule of Costs or any particular process. Nor is he saying here that there is insufficient reasoning in terms of the calculation of costs such as to amount to a breach of Rule 30. He does contend, however, that this is a surprising sum given how little had transpired by this stage.

53. That is not an entirely fair picture. The case had previously been listed for hearing in July and apparently aborted late in the day. There had had to be various procedural steps taken as a result of the lack of clarity on the Claimant's case. More generally, Tribunal litigation costs tend, as with most civil cases, to be front-loaded. That said, it is fair to observe that £10,000 is a high award and the overall sum said to have been incurred, over £15,000, might seem surprising. I reach no final view on that. My concern is that there is

no written explanation by the Employment Judge of her scrutiny of the figures sought by the Respondent. Although she has set out, as the Respondent no doubt did in submissions, some detail as to the amount the Respondent was seeking, what she does not do is indicate that she has conducted any independent scrutiny of those sums herself or set out the reasons for her conclusion that it was appropriate to award £10,000. That may be an error of approach in terms of the lack of scrutiny of the sum claimed or it may simply be an error in terms of adequacy of reasoning. I cannot be sure as to which….. "

41. Finally, in his own judgment, in **Abaya**, Mr Justice Singh says, at paragraph 20, that all cases are fact-sensitive, and everything depends on the particular circumstances of each case, and in quoting from HHJ Eady QC, in **Ayoola,** he states that: "***the discretion under the 2004 Tribunal Rules is very broad [and I would say the same of the 2013 Rules]".***

42. If the application for an Expenses Order were to be granted in the present case, I am satisfied, under **Rule 75(1) of the Employment Tribunals Rules of Procedure 2013**, that the respondents, as "***receiving party***", are entitled to an order against the claimant as "***paying party***". The respondents have been legally represented in pursuit of their resistance to the claim brought against them by the claimant in these Tribunal proceedings, and MILS have acted, throughout these proceedings before the Employment Tribunal, as solicitors for the respondents.

43. In Ms Swan's application for expenses against the claimant, under **Rule 76 of the Employment Tribunals Rules of Procedure 2013,** she has applied on the basis that the claimant has acted unreasonably in the way the proceedings have been conducted, specifically, in relation to the timing of the claimant's withdrawal of his claim. It is therefore a fairly narrowly drafted application, as against the width of applications envisaged by **Rule 76(1),** and it does not include a complaint that the claimant or his representative have acted vexatiously, abusively, disruptively or otherwise unreasonably in

the bringing of the proceedings or in the way they have conducted these Tribunal proceedings, or that the claim had no reasonable prospects of success.

44. Ms Swan has made her application, on behalf of the respondents, timeously, as while there has been no Judgment finally determining the proceedings, she made application within 28 days of the settlement of the claim, and its withdrawal, on 30 May 2017, and in accordance with **Rule 77**, the claimant, through his solicitor, Mr Burke, has had a reasonable opportunity to make representations in writing in response to the application, and he has not requested a Hearing.

45. I have considered the opposed application on the basis of both parties' representative's written representations made to the Tribunal, as detailed earlier in these Reasons, being Ms Swan's application of 19 June 2017, and Mr Burke's initial, briefly stated objection of 22 June 2017, and his more detailed grounds of objection intimated on 10 July 2017. I am satisfied that both parties have, through their respective solicitor's correspondence with the Tribunal, had more than ample opportunity to make whatever written comments, objections or representations that they might have felt appropriate.

46. The next issue which arises for the Tribunal is whether or not any of the circumstances set forth in **Rule 76(1)** apply. I am aware that the approach to expenses to be applied by the Employment Tribunal has a three stage exercise:-

> ***(1) Has the paying party acted in a way that an expenses order, etc, may or shall be made by the Tribunal?***
>
> ***(2) if so, the Tribunal must ask itself whether to exercise its discretion in favour of awarding expenses, etc, against that party; and***

> ***(3) if the Tribunal decides that it is appropriate to make an award of expenses, it must assess the quantum of that award.***

47. While the Tribunal was not referred to any case-law authorities, by either of the parties' representatives involved in the present application, I have reminded myself of the Court of Appeal's judgment in ***Barnsley Metropolitan Borough Council v Yerrakalva [2011] EWCA Civ 1255*** **(03 November 2011),** reported at **[2012] IRLR 78,** where Lord Justice Mummery, former President of the Employment Appeal Tribunal, at paragraph 39 of his judgment, stated as follows:-

> "***I begin with some words of caution, first about citation and value of authorities on costs questions and, secondly, about the dangers of adopting an over-analytical approach to the exercise of a broad discretion."***

48. **Yerrakalva** considered the former **Rule 40** within the **Employment Tribunals Rules of Procedure 2004**. Notwithstanding the **Employment Tribunals Rules of Procedure 2013,** in force since 29 July 2013, the old case law still holds good given the similarity in wording between the old and new Rules.

49. While taking note of Lord Justice Mummery's words of caution in ***Yerrakalva*** about citation and value of authorities on costs questions, I do think it is still appropriate to take account of certain other often cited Judgments of the Court of Appeal in ***Gee v Shell UK Ltd*** **[2003] IRLR 82, *Lodwick v London Borough of Southwark*** **[2004] IRLR 554**, and ***McPherson v BNP Paribas*** **[2004] IRLR 558**, recognising that expenses orders in the Employment Tribunal remain the exception and not the rule, and that in the majority of Employment Tribunal cases, the unsuccessful party will not be ordered to pay the successful party's costs, and that costs are compensatory, and not punitive.

50. I recognise, of course, that expenses cases are very much fact dependent, and I refer in that regard to Lady Smith's Judgment in the Employment Appeal Tribunal on 8 July 2009 in ***Dunedin Canmore Housing Association Limited v Donaldson*** **[2009] UKEATS/0014/09,** which is consistent with the more recent view of the Court of Appeal, in ***Arrowsmith v Nottingham Trent University*** ***[2011] ICR 159***, at paragraph 33, that it is a fact-sensitive exercise.

51. In the present case, after carefully considering the matter, I am not satisfied that it can be said that, by withdrawing his claim, on 30 May 2017, on the eve of the Final Hearing assigned for 31 May 2017, the claimant was acting unreasonably.

52. The Court of Appeal, in **McPherson v BNP Paribas (London Branch) [2004] EWCA Civ 569, ICR 1398 and IRLR 558 (CA),** held that it is not unreasonable conduct, *per se*, for a claimant to withdraw a claim, and the Court observed (per Lord Justice Mummery, at paragraph 28) that it would be unfortunate if claimants were deterred from dropping claims by the prospect of an order for costs on withdrawal in circumstances where such an order might well not be made against them if they fought on to a full Hearing and failed. The Court further commented that withdrawal could lead to a saving in costs, and that Tribunals should not adopt a practice on costs that would deter claimants from making "***sensible litigation decisions***". Further, as Lord Justice Thorpe observed during argument in that case notice of withdrawal might "***in some cases be the dawn of sanity***."

53. On the other hand, per Lord Justice Mummery, at paragraph 29, in **McPherson**, the Court of Appeal was also clear that Tribunals should not follow a practice on costs that might encourage speculative claims, allowing claimants to start cases and to pursue them down to the last week or two before the Hearing in the hope of receiving an offer to settle, and then, failing an offer, dropping the case without any risk of a costs sanction. Further, at paragraph 30, Lord Justice Mummery stated that the critical question in this regard was whether the claimant withdrawing the claim has

conducted the proceedings unreasonably, not whether the withdrawal of the claim is in itself unreasonable.

54. The reasons for the withdrawal of the claim, on 30 May 2017, are set forth by the claimant's solicitor, Mr Burke, in his detailed grounds of objection to the respondents' application, and I refer back to paragraph 23 of these Reasons for the full terms of those objections. Meantime, it will suffice to refer back to one specific section of those objections, reading:

> ***"His position is that he pursued the claim to the best of his ability but on final consideration accepted advice tendered and withdrew the claim. He does not accept it was a claim that had no prospects of success. He balanced the potential costs to him for his own legal representation against the merits of the case and took the view that he wanted to withdraw. This was communicated immediately and agents were able to prevent the respondent's agent from having to travel."***

55. On the basis of this information from the claimant's solicitor, I am satisfied that, to use Lord Justice Mummery's phrase in **McPherson**, the claimant made a "***sensible litigation decision***." Further, the fact that Ms Swan was not required to travel to Edinburgh, for the Final Hearing fixed for 31 May 2017, was a saving in her time and thus cost to her clients. Against this background, I cannot categorise the claimant's decision to withdraw the claim on 30 May 2017 as being unreasonable, especially where late minute settlements / withdrawals of Tribunal claims are still very much a regular feature of litigation before the Employment Tribunals.

56. In an ideal world, it may be that matters could have been addressed before 30 May 2017. As recently as 27 April 2017, the claimant's solicitor, Mr Burke, in writing to the Tribunal, envisaged a one day Final Hearing. It is not clear when Ms Swan made her travel arrangements, and bookings. The absence of any vouching documentation means that that information is not available to me.

57. What is clear is that the claimant, acting with the benefit of legal advice from Mr Burke, brought his ET1 claim form, notwithstanding that, during the ACAS early conciliation period, Ms Swan issued a Costs Warning letter on 17 February 2017. Her costs application before this Tribunal refers only to that one Costs Warning, prior to the presentation of the ET1, and, by there being no reference to any further Costs Warning, after issue of the ET1, I take it as read that there was none.

58. Further, while Ms Swan's application refers to that Costs Warning as having put the claimant's solicitor on notice that his client was potentially pursuing a claim without prospect of success, that view was not revisited by the respondents' solicitors after presentation of the ET1 claim form, served on the respondents on 23 March 2017, and the ET3 response, presented on 7 April 2017, did not seek a Strike Out of the claim, under **Rule 37 of the Employment Tribunals Rules of Procedure 2013**.

59. Further, Employment Judge Wiseman having considered the file, at Initial Consideration on 19 April 2017, did not dismiss the claim or response, but she ordered the case proceed to the listed Final Hearing. Also, I remind myself of the Court of Session judgment that, as a general principle, cases should not be struck out on the ground of no reasonable prospects of success when the central facts are in dispute (***Tayside Public Transport Co Ltd (t/a Travel Dundee) –v- Reilly [2012] CSIH 46***).

60. In such circumstances, I do not consider that it is not appropriate for the respondents to suggest now, as their application has done, that the claim had no reasonable prospects of success. If that was their view, or if their view was that it had little reasonable prospect of success, they could have applied for Strike Out, which failing a Deposit Order under **Rule 39**, but they did neither. They cannot now argue, with the benefit of hindsight, that the case had no prospects of success, where it has been settled between the parties, through ACAS, and withdrawn, and the Tribunal has accordingly

heard no evidence and so made no findings, nor any final Judgment on the merits of the claim

61. As the Court of Appeal commented in its judgment in ***Yerrakalva***, it is important not to lose sight of the totality of the circumstances. The vital point for any Tribunal in exercising the discretion whether or not to order costs / expenses is to look at the whole picture, and ask whether there has been unreasonable conduct by the potential paying party in bringing, defending or conducting the case and, in so doing, identify the conduct, what was unreasonable about it, and what effect it had.

62. Reasonableness is a matter of fact for the Employment Tribunal to decide upon, and in considering my decision in this matter, I have been conscious of the fact that Tribunals must be careful not to penalise parties unnecessarily by labelling conduct as unreasonable when it may, in fact, be perfectly legitimate in the circumstances. As the Court of Appeal reiterated in ***Yerrakalva***, costs / expenses in the Employment Tribunal are still the exception rather than the rule.

63. Having decided that the claimant and / or his representative did not act unreasonably by withdrawing the claim, I have not required going on and ask myself whether I should exercise my discretion in favour of the respondents and make an Expenses Order against the claimant. Even if I had done so, I would then have had to decide what is an appropriate sum to award against the claimant.

64. Under **Rule 84**, I am aware that the Tribunal is permitted (but not obliged) to take into account the paying party's ability to pay, when considering whether or not to make an Order or how much that Order should be for. The claimant's solicitor, in his objections, did not submit for my consideration anything at all about the claimant's means and his ability to pay in the event that I did not uphold his objections.

65. In my view, that was very much a ***lacuna*** in his approach. While the ET1, at section 6, disclosed the claimant's monthly earnings when employed by the respondents, it gave no information at all, at section 7, as to whether or not, post termination of employment with the respondents, the claimant had or had not secured a new job and, if so, what he is now earning. Agents acting for a potential paying party should, in my view, seek to be open and transparent with the Tribunal about their client's whole means and assets, and their ability to pay, if an Expenses Order is to be made by a Tribunal.

66. Had I found the respondents' Costs application well-founded, there would then have been no information before me as regards the claimant's ability to pay, and, in those circumstances, I would have been perfectly entitled to have taken the view that the claimant could have afforded to pay the whole sum of £666.46, as sought by Ms Swan, on behalf of the respondents, in respect of the 4 listed types of disbursements narrated in her Schedule of Costs, because there would have been nothing before me to suggest otherwise.

67. While **Rule 84** provides that in deciding to make an Expenses Order and, if so, in what amount, the Tribunal may have regard to the paying party's ability to pay, the use of the word ***"may***" shows that that is a discretionary power, and not mandatory. I had no documentary, vouching information available to me, from the claimant's solicitor, as to the state of the claimant's financial affairs, as at the date of this Expenses Hearing.

68. Had I decided to make an Expenses Order against the claimant, I would have had to consider assessing the appropriate sum to be awarded, and I was aware that I would have had to consider the options under **Rule 78**. The Tribunal may specify the sum sought by the respondents, provided that sum does not exceed £20,000, per **Rule 78(1)(a).** That is the situation here – the sum sought was quantified by Ms Swan at **£666.46** for disbursements only. As parties had not agreed a specific sum, so I could not have ordered that under **Rule 78 (1)(e).**

69. While, under **Rule 78(1)(b),** I might have considered ordering expenses "***as taxed"*** according to the Sheriff Court Table of Fees, I wish to record here that I did not have before me any judicial account of expenses by a solicitor charging a client for legal expenses, as Ms Swan's application was in respect of disbursements only, and even if I had had a solicitor's account, I would not have considered it appropriate to remit to the local Sheriff Court Auditor of Court for taxation. Indeed, with the respondents instructing English solicitors, I am not sure how they would have prepared a judicial account in Scottish form.

70. As such, had I made any award of expenses, a summary assessment by me as the presiding Employment Judge would have seemed not only appropriate under **Rule 78(1)(a),** but also proportionate, because, as previously stated by the Employment Appeal Tribunal that it is preferable for a Tribunal, when making an award of expenses, to award a fixed sum. I refer, in this respect, to ***Lothian Health Board v Johnstone*** **[1981] IRLR 321**.

71. The practical difficulty, in the present case, is that while the respondents had quantified their claim for disbursements at **£666.46**, they produced no vouching documentation. Equally, of course, I recognise that the claimant's solicitor, while objecting to the respondents' application, requested no vouching, so, on one view, it can be inferred that there was no objection to the amounts as claimed.

72. While, under **Rule 74(1),** "***costs***" includes disbursements or expenses incurred by or on behalf of the receiving party, I am not, in any event, satisfied that the total sum of **£666.46** is merited, as no good cause has been shown by Ms Swan why it was necessary for the respondents, being based in Scotland, to instruct English solicitors, to defend them in proceedings before the Employment Tribunal in Scotland, when it is within my judicial knowledge and experience that English solicitors routinely instruct Scottish correspondents, both Scottish solicitors and Counsel, to appear on their behalf where a Hearing before the Tribunal requires personal attendance.

73. By instructing MILS, and Ms Swan in particular, the respondents have made a business decision to be represented by English solicitors which, of necessity, meant Ms Swan had to book travel from her office in Devon, by flight from Bristol to Edinburgh, and so incur additional travelling and accommodation expenses, that would not have been charged by Scottish solicitors or Counsel, who could fairly easily have been instructed by Ms Swan to have appeared for the respondents at the Edinburgh Tribunal

74. While I do not seek to interfere in the respondents' choice of solicitor, I do not regard it as appropriate, as a matter of general principle, that another party should ordinarily be compelled to meet additional travel and accommodation expenses caused by reason of the respondents' choice of solicitors practising ordinarily furth of Scotland.

75. Had I awarded anything to the respondents, my award would have been restricted to only item 1 (preparation and skeleton argument papers, at £147.95, plus VAT @ 20%)

76. Having regard to the Tribunal's overriding objective under **Rule 2**, to deal with the case fairly and justly, including the saving of expense, I consider that it is incumbent on a potential receiving party's agent to provide the Tribunal with relevant vouching documentation in respect of any application for costs / expenses.

77. The Tribunal is obliged to seek to give effect to the overriding objective in exercising any power given to it by the Rules of Procedure, and that includes determining applications for costs / expenses, and equally parties and their representatives are under a statutory duty to assist the Tribunal to further the overriding objective, and in particular to co-operate generally with each other and with the Tribunal.

78. While I have refused the respondents' opposed application for an Expenses Order or Wasted Costs Order against the claimant, in light of my discussion and deliberation, as above, I am sure that both Ms Swan and Mr Burke will

have identified learning points should, in any future case either of them may be involved in, they have cause to apply for, or object to, an application for costs / expenses.

Employment Judge: Mr Ian McPherson
Date of Judgment: 14 August 2017
Entered in register: 14 August 2017
and copied to parties