



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Mr V Testa**

**v**

**The Chief Constable of  
Bedfordshire Police**

**Heard at:** Huntingdon/Cambridge

**On:** 21 and 22 August 2017  
25 October 2017 (no parties in attendance)

**Before:** Employment Judge Ord

**Appearances**

**For the Claimant:** Mr H Bahra (McKenzie Friend)

**For the Respondent:** Mr M Ley-Morgan (Barrister)

## JUDGMENT ON COSTS

1. The respondent's claim for costs against the claimant is dismissed on withdrawal.
2. In relation to the respondent's claim for wasted costs against Mr Bahra:-
  - 2.1 Mr Bahra was a representative within the meaning of rule 80.
  - 2.2 No wasted costs order is made against Mr Bahra in favour of the respondent.

## REASONS

1. This claim for costs arises out of proceedings instituted by the claimant by presentation of a claim form on 22 November 2015.
2. The claimant, who remains a serving officer within the Bedfordshire Constabulary, had previously issued a claim against the respondent on

11 July 2013. In part, the claims made in these proceedings were a repetition of that earlier claim. That first claim was dismissed on withdrawal.

3. There were preliminary hearing orders made on 26 May and 3/4 November 2016 to hear the respondent's application to strike out the claimant's claim as having no reasonable prospect of success, alternatively because the claims were res judicata; alternatively for a deposit order on the basis that the claims had little reasonable prospect of success.
4. At those hearings the following order were made:-
  - 4.1 On 26 May, four of the claimant's complaints were struck out as being res judicata, they having been included in the 2013 proceedings which had been dismissed on withdrawal.
  - 4.2 On 3rd/4<sup>th</sup> November five further complaints were struck out as having no reasonable prospect of success and in relation to the single remaining claim a deposit order was made on the basis that that claim had little reasonable prospect of success.
5. On 7 March 2017 the remaining claim was dismissed on withdrawal.
6. Thereafter, the respondent made an application for costs/wasted costs. On 4 May 2017 Mr Bahra was joined as a respondent to the wasted costs application.
7. Mr Bahra claimed that at all times he was acting as a "McKenzie Friend" and was not a representative within the meaning of Rule 80 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. He resisted, in any event, the claim for wasted costs made against him on the merits of the application.
8. Mr Testa resisted the claim for costs on its' merits, said he was at all times guided by advice from Mr Bahra, gave evidence that he did from time to time pay Mr Bahra for advice and/or representation and said that any order for costs should be a wasted costs order against Mr Bahra.

### **The Issues**

9. The issues for determination by the tribunal at the costs hearing were therefore as follows:-
  - 9.1 Are the criteria (or any of them) for the making of a costs order under Rule 76 (1) (a) or (b) met?
  - 9.2 If so, does the tribunal exercise its' discretion to make an order in favour of the respondent?

- 9.3 Was Mr Bahra acting as a representative within the meaning of rule 80(2)?
- 9.4 If so, are any of the criteria of rule 80(1) met?
- 9.5 If so, does the tribunal exercise its' discretion in favour of the respondent to make an order for the payment of wasted costs against Mr Bahra?

### **The Hearing and Findings of Fact**

10. Evidence was given by the claimant and Mr Bahra. The Respondent relied on legal submissions through counsel. There was a bundle of documents provided to the Tribunal and the Tribunal read statements from the claimant and Mr Bahra to which each of them was sworn. The claimant also had provided a written response to Mr Bahra's statement.
11. At the conclusion of the claimant's evidence and cross-examination, the respondent withdrew its' claim for costs against the claimant, proceeding only with the application for wasted costs.
12. The claimant's evidence, in short, was that he relied entirely on Mr Bahra throughout the proceedings. He said that Mr Bahra advised him on the content of his pleadings and how to progress his case. He said that Mr Bahra was first involved in his claim before the presentation of his claim form, when he faced internal disciplinary procedures/ investigations. He knew Mr Bahra had successfully brought proceedings against the Respondent for race discrimination and that he had, after discussions with both, more faith in Mr Bahra's advice and guidance than that of his police federation representative. He therefore chose to follow Mr Bahra's advice.
13. The claimant's unchallenged evidence was that Mr Bahra knew the content of his claim in 2013 and that he had withdrawn those claims; further that Mr Bahra did not advise him that he could not resurrect those claims once they had been dismissed on withdrawal, but rather that they should form part of this second claim as they were part of his "story".
14. The claimant also said on oath that at the time he presented his ET1 to the tribunal he could not "think straight". He said that he did not fully understand the nature of his case. That latter point was challenged by Mr Bahra whose evidence was that he told the claimant to set out the facts as if this was a police investigation, consider the evidence in support of the facts and set out his claims accordingly.
15. I accept Mr Bahra's evidence (not challenged in any meaningful way) that the narrative statement attached to the ET1 as presented in this case was of the claimant's own making. I therefore accept, to the extent that claims are clearly discernible from that pleading, that the claimant had an understanding of the claims he was pursuing in these proceedings.

16. I accept the claimant's evidence, however, that he was, throughout the period of these proceedings, relying heavily (and increasingly as the matter progressed) on the assistance he was receiving by Mr Bahra. As the claimant put it (and I accept this evidence), he just "told a story", but did not know if he could make that story into a claim against the respondent. It was Mr Bahra who advised him that he may have claims as a result of the "story" as told by him. Equally, however, it was the claimant who was required to set out the evidential basis for the allegations he made, whilst it was Mr Bahra's role to present that evidence and "story" in the best possible way on the claimant's behalf.
17. I also accept the claimant's evidence, again unchallenged, that Mr Bahra requested the claimant to copy him into and ensure that he had "everything" about the case so that he faced "no surprises".
18. Thus, I accept that the claimant understood the nature of the claims being brought, he relied on the advice and guidance of Mr Bahra who, on the basis of the narrative of events which the claimant set out assisted him to pursue the claims or complaints which the claimant sought to bring in the employment tribunal. Further, that at all times Mr Bahra knew the claims which the claimant had brought in 2013 and that they had been dismissed on withdrawal.
19. Mr Bahra had previously brought a claim himself against the same respondent. He accepted in his evidence before me that other people within the respondent organisation thereafter came to him for advice and assistance with issues which they had with the respondent.
20. Although Mr Bahra claimed in his evidence that he wanted "nothing to do" with, not only this claim brought by Mr Testa but also other matters which people brought to him, he did not indicate that he had taken any steps to dissuade or discourage the claimant from seeking his advice and assistance nor had he (as he legitimately could have done) simply refused to assist this claimant (and/or others).
21. The extent of Mr Bahra's involvement in this claim was a matter of dispute between him and the claimant. The claimant, in essence, stated that he was reliant on Mr Bahra's advice and guidance throughout. Mr Bahra by contrast sought to minimise his involvement in his own evidence. Certain features emerge from his own witness statement, however, which indicate the nature and level of Mr Bahra's involvement.
22. A simple example of this can be found at paragraph 70 of Mr Bahra's statement. Mr Bahra confirmed that prior to the Preliminary Hearing initially listed for 30 June 2016 (postponed to 3 and 4 November) he received from the claimant (who remained on the tribunal record as a litigant in person throughout, it is an uncontroversial fact that Mr Bahra did not go on record as a representative) a hearing bundle and all relevant witness statements. According to Mr Bahra he then "reviewed the material with the claimant" at meetings at both Mr Bahra's home and the claimant's

where Mr Bahra “received [the claimant’s] instructions as to how he wished me to present his case and the questions he wished to put to the witnesses in cross examination”. He goes on to say how he asked the claimant to set out his evidence in a witness statement.

23. The claimant’s evidence was that draft letters would be passed to Mr Bahra for comment or amendment before being sent to the tribunal and Mr Bahra did not deny this but was critical throughout the process of the claimant’s “wordy” style.
24. Mr Bahra appeared on behalf of the claimant at both preliminary hearings.
25. Mr Bahra has accepted that he was paid for work he did in this case. He accepts that he has raised charges against the claimant for work he has done in this matter and that he has been paid in part. He also confirmed his intention to pursue the claimant for further charges raised but not paid and that another individual he had assisted had also been charged for work done and that those unpaid charges were now the subject of court action.
26. He confirmed that this charge was for “representation” at hearings. The claimant stated that in addition Mr Bahra was due to receive a percentage of any award or settlement he received. Mr Bahra denied this.
27. Mr Bahra claimed that he was not acting for profit when he charged the claimant for appearances in hearings, merely covering his costs. He did not, however, justify this by reference to any financial expenses or outgoings, charging as he did a flat rate of £500 per hearing day.
28. I am satisfied in the light of all of the above that:-
  - 28.1 Mr Bahra was, at the time he was appearing in tribunal on behalf of the claimant, acting as a representative within the meaning of rule 80(2).
  - 28.2 Throughout the conduct of this case the claimant was relying upon the advice and guidance he was receiving from Mr Bahra and that such advice and assistance was part of the representation which Mr Bahra was providing to the claimant.
  - 28.3 That accordingly there is no exemption which applies so as to prevent the tribunal from making an order for wasted costs against Mr Bahra.
29. The respondent’s claims for costs are limited to counsel’s fees. They are claimed as follows:-
  - 29.1 £1500.00 for the settling of the response to the claims (20/12/15).
  - 29.2 £1275.00 for an advice in conference (25/02/16).

- 29.3 £130.50 for travelling expenses thereto (25/02/16).
- 29.4 £300.00 for “advising” (11/02/16).
- 29.5 £150.00 for a telephone advice (10/03/16).
- 29.6 £75.00 for a further telephone advice (12/04/16).
- 29.7 £300.00 for drafting a letter to be sent to the tribunal (14/04/16).
- 29.8 £2250.00 being preparation for the adjourned hearing on 30/06/17.

The above all supported by fee notes, and:-

- 29.9 £1650.00 brief on the preliminary hearing (03/11/16).
- 29.10 £850.00 refresher (04/11/16).
- 29.11 £145.15 travel and expenses for that hearing.
- 29.12 £850.00 for the instant hearing.

In respect of items 29.9 to 29.11 no fee notes were produced. The figures do not include VAT, the respondent being VAT registered.

- 30. I do not make any order in relation to costs incurred prior to the hearing on 26 May 2016. The claimant had drafted and presented his claim to the tribunal without Mr Bahra’s direct involvement and no possible order can be made against Mr Bahra for the period prior to or required as a consequence of the presentation of the claim. The respondent has obtained no fewer than four advises from counsel in the early part of these proceedings. Even if I was minded to make an order for costs in relation to this period of activity (and I am not because they seem to me to flow from the presentation of the claim, the response thereto and the steps to be taken by the respondent as a consequence of the claim as pleaded) I would have found such costs to be disproportionate. I consider that the relevant costs are those incurred at the hearings on 26 May and 3/4 November 2016 and steps taken in preparation therefore.
- 31. It is clear from the findings of the tribunal on 26 May 2016 and 3/4 November 2016 that the claimant’s claims were all, bar one, unsustainable. That remaining claim was identified as having little reasonable prospect of success and was subsequently abandoned. In part, the pleaded claims were clearly a repetition of claims made and abandoned in the 2013 proceedings. In part, they had no reasonable prospect of success. Those findings were neither the subject of any application for reconsideration or appeal.

32. The fact that the matters struck out on 26 May 2016 were repeats of earlier claims which had been withdrawn by the claimant and then dismissed by the tribunal ought to have been obvious to the claimant and to Mr Bahra. Equally, the lack of any reasonable prospect of success in relation to those remaining claims which were struck out on 3 and 4 November ought to have been clear. There was, of course, one claim which survived but which was later abandoned by the claimant. Had the respondent pursued a claim for costs against the claimant in relation to the hearing on 26 May 2016, that would have found favour with me because the claims struck out on that day were clearly *res judicata*. I would not have been so minded in relation to the hearing on 3 and 4 November 2016, however, first because one of the claims survived that hearing and second because the matter was not so glaringly obvious that the claimant could be legitimately criticised for not abandoning, prior to the preliminary hearing, the claims that were struck out.
33. No such application in relation to the 26 May hearing was, however, maintained. It is clear from my findings at paragraph 22 above that Mr Bahra, in relation to that hearing (and, I find, in relation to the claim generally) was acting primarily as an advocate. He sought the claimant's instructions on how the claimant wanted the claim to be put; he discussed the matters the claimant wanted to raise through cross-examination of the respondent's witnesses and – in effect – sought to present the claimant's case in the best possible light and in the way the claimant wished it to be presented.
34. I find that to have been the case in relation to the hearing on 26 May and in relation to the hearing on 3 and 4 November.
35. That is not enough to found an order for wasted costs against a representative. In Mitchells Solicitors v Funkwerk EAT 541/07 it was confirmed that a representative does not behave improperly, unreasonably or negligently simply by acting for a party who pursues a claim or defence which is plainly doomed to fail. Further, that even if conduct of that nature was established it is essential for the making of a wasted costs order that the representative has, by his or her conduct, assisted proceedings amounting to an abuse of the court's process and that his/her conduct caused costs to be wasted.
36. Thus an advocate does not act unreasonably, improperly or negligently simply by presenting their client's best case, however hopeless. Even if Mr Bahra should have appreciated that those parts of the claim which were either *res judicata* or which were found to have no reasonable prospects of success were doomed to failure it is not clear to me that he could have persuaded (even if he was obliged to) the claimant to abandon or withdraw those proceedings. In this application, the respondent is effectively asking me to find not only that Mr Bahra was in some way the controlling mind behind these proceedings (he clearly was not; the original claim form was completed and presented by the claimant himself and Mr Bahra did not have input into that document) but also that they were

being pursued for an improper motive (it was suggested that this was part of Mr Bahra's own continuing dispute with the respondent, but I do not make that finding and there was no evidence to support the same) and that the proceedings were therefore an abuse of the court's process. I make no such finding.

37. The evidence before me points to Mr Bahra acting as requested by the claimant to put his case forward as best as he was able and in the best possible light, based on instructions given to him by the claimant himself. Whilst the claimant was relying on Mr Bahra's experience (in his own case) as opposed, in truth, to his expertise, Mr Bahra was relying on the claimant to provide the evidence necessary to conduct the case. More than once in evidence Mr Bahra referred to telling the claimant to treat his case like he would a police investigation and to collect and set out all the evidence he had to justify the allegations being made. That the claimant was unwilling or unable to do so is not Mr Bahra's fault and he was simply trying to present the claimant's case – such as it was – in the best possible way.
38. In all the circumstances of this case, therefore. I do not find that Mr Bahra has acted negligently, unreasonably or improperly in the way he represented the claimant; further that in any event there was no abuse of process. For those reasons I do not make any order for wasted costs against Mr Bahra.

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Employment Judge Ord

Date: 30 November 2017

Sent to the parties on: 30/11/2017

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For the Tribunal Office