Appeal No. UKEAT/0184/17/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 17 January 2018

Before

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

(SITTING ALONE)

MR B WENTWORTH-WOOD & OTHERS — APPELLANTS

MARITIME TRANSPORT LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants	MS KATHERINE APPS (of Counsel) Instructed by: OH Parsons LLP Sovereign House 212-224 Shaftesbury Avenue London WC2H 8PR
For the Respondent	No appearance or representation by or on behalf of the Respondent

SUMMARY

PRACTICE AND PROCEDURE - Costs

1. Ordinary and Wasted Costs Orders were made in disregard of the well-established principles that apply to such Orders and without giving adequate reasons. The Judgment was neither accessible nor public in consequence.

2. The Respondent did not resist the appeal. The Employment Appeal Tribunal allowed the appeal and substituted (with the agreement of the parties) an Order dismissing both applications.

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

1. This appeal challenges a Judgment and Order made on 11 January 2016 by Employment Judge Laidler, that the Claimants (as they were below) should be jointly and severally liable to pay the Respondent the sum of £8,195.40 by way of costs, and that OH Parsons LLP (the solicitors acting for the Claimants) should be liable to pay the sum of £600 to the Respondent by way of wasted costs ("the Costs Judgment").

2. The Costs Judgment followed an earlier Judgment of the same Employment Judge striking out the Claimants' claims following a hearing on 26 June 2015 (referred to as "the Strike-out Judgment") which was the subject of a partially successful appeal, **Wentworth-Wood & Others v Maritime Transport Ltd** UKEAT/0316/15/JOJ (referred to as "Wentworth-Wood 1"). In **Wentworth-Wood 1**, the Employment Appeal Tribunal (HHJ Richardson) dealt with an appeal against the Unless Order that preceded the subsequent automatic dismissal of all claims by reason of material non-compliance with the Unless Order. Employment Judge Laidler found that the Claimants who had served schedules setting out amounts claimed had not provided full particulars of the amount of holiday pay claimed, and that mistakes had been made as regards a particular Claimant, which meant that confirmation by the Claimants' solicitors that all Claimants were covered by a collective agreement did not materially comply with the requirement in paragraph 3 of the Unless Order to say which Claimants' contracts of employment were covered by a collective agreement.

3. HHJ Richardson held that on a true construction of the Unless Order, those Claimants who had served schedules had complied with the requirement in paragraph 1 of the Unless Order to provide "*full particulars of the amount of holiday pay claimed*". Further, the

Claimants' solicitors had complied with the requirement in paragraph 3 of the Unless Order, notwithstanding the mistake made in the case of a particular Claimant. Finally, the claims of those Claimants who had complied with all three paragraphs of the Unless Order had therefore not been dismissed automatically for material non-compliance. Those claims were reinstated accordingly.

4. This appeal is pursued by the Claimants and OH Parsons LLP. By letter dated 17 August 2017, the Respondent's company solicitor, Mark Wakelin, expressed the view the Employment Judge was fully justified in making the Costs Order but stated that for reasons of cost it was not viable for the Respondent to defend this appeal. Accordingly, this appeal is not contested. Further, the parties have sensibly corresponded with one another and reached terms of agreement set out in a COT3 form and a draft Consent Order. Confirmation on behalf of the Respondent was provided by email dated 17 January 2018 timed at 10.26 from Prettys Solicitors LLP, stating that the Respondent agrees to the terms of the Consent Order in the form attached to OH Parsons LLP's earlier email of 16 January 2018, timed at 18.25.

5. The draft Consent Order provides that the appeal should be allowed both in respect of costs and wasted costs awarded by the Employment Judge, and that the Employment Appeal Tribunal should substitute an Order that there be no Order for costs or wasted costs on these claims. Notwithstanding that agreement, since the parties invite the Employment Appeal Tribunal to allow the appeal and to substitute its judgment, it seems to me that it is necessary for me to consider and determine whether errors of law are raised by this appeal and if so, what Order should follow.

The Factual Background

6. The Claimants are LGV drivers originally employed by Roadways Container Logistics Limited. There is no dispute that their employment transferred to the Respondent under the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("TUPE") in September 2014, and from December 2014, assisted by their union, they instructed OH Parsons LLP and brought claims against the Respondent in the Employment Tribunal as follows:

(i) for arrears of holiday pay following **Bear Scotland Ltd & Others v Fulton & Others** UKEATS/0047/13;

(ii) for awards in respect of unlawful inducements relating to collective bargaining under section 145B of the **Trade Union and Labour Relations (Consolidation) Act 1992**.

7. Three claim forms were lodged with the Employment Tribunal covering three groups of Claimants. This appeal relates to all three claim forms. The first is referred to as the "Wentworth-Wood Claimants". Their claims were struck out by the Employment Tribunal on 26 June 2015. Some of those who no longer pursued holiday pay claims did not have either of their claims reinstated following the appeal in **Wentworth-Wood 1**. The second group is referred to as the "All Day Claimants" whose claims were also struck out by the Tribunal, but in respect of whom only Mr Robinson pursued his appeal. The third group is the "Adams Claimants" who are also Wentworth-Wood Claimants, and issued duplicate claims relating to the period of holiday pay which had accrued since their initial claims. Those were dismissed as duplicate claims and not by reference to the Unless Order. There was no appeal by the Adams Claimants against the dismissal of their claim. The wasted costs application related only to the Adams Claimants.

8. Legislation and jurisprudence on which the three claim forms were based was relatively new at the time they were issued. This meant that there was a degree of uncertainty as to the basis on which sums for holiday pay recoverable under EU law should be calculated, and whether such claims could be pursued against private employers. Some of that uncertainty was resolved in the Claimants' favour in principle by subsequent decisions of the Court of Appeal in **Lock v British Gas Trading Ltd** [2017] ICR 1, and by the Employment Appeal Tribunal in **Dudley Metropolitan Borough Council v Willetts** [2017] IRLR 870, although uncertainty about limitation periods remains. As far as liability under section 145B is concerned, there were conflicting first instance judgments in cases raising issues under section 145B, and those have only recently been clarified at the level of the Employment Appeal Tribunal in **Kostal UK Ltd v Dunkley & Others** UKEAT/0108/17.

9. The application for costs was made by the Respondent by letter dated 7 August 2015 following their successful strike-out application, pursuant to Rules 75(1)(a) and 76(1)(a) of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**. All Claimants and OH Parsons LLP were said to have acted unreasonably in the conduct of the proceedings. Further, in relation to the Adams Claimants, a Wasted Costs Order was sought on the basis of alleged negligence in bringing and/or conducting the proceedings. The letter is a lengthy one, extending over eight full pages.

10. In response, by letter dated 15 September 2017, OH Parsons LLP candidly accepted that the manner in which the litigation was conducted in the six months between issue and strike-out was not ideal. It was accepted that Orders were missed and calculation schedules were not initially provided in a timely manner; and there had been some clerical errors and some duplication. However, as the Employment Appeal Tribunal accepted in **Wentworth-Wood 1**,

A contrary to the view adopted by the Employment Tribunal on the strike-out application, there had in fact been substantial compliance with the Unless Order in relation to many of the Claimants. In particular, 22 schedules were provided in compliance with the Unless Order. Twenty-four Claimants had provided dates of their employment and answers were given in relation to the coverage of a collective agreement.

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11. By the Costs Judgment (promulgated following a hearing notwithstanding the Respondent's own request for a postponement of the hearing of its costs application while the Claimants pursued a review of the Strike-out Order, and before determination of the appeal lodged by the Claimants against the Strike-out Order) the Employment Judge set out the relevant Rules and summarised the principles of law she derived from **Ridehalgh v Horsefield** [1994] Ch 205. As far as wasted costs are concerned, she referred to **Yerrakalva v Barnsley Metropolitan Borough Council** [2012] ICR 420 in relation to costs awarded on the basis of unreasonable conduct.

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12. Having set out those principles, she reached conclusions at paragraphs 9 to 14 as follows:

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> **"9. The tribunal is satisfied that both in relation to wasted costs and costs generally the relevant thresholds have been met for the reasons set out below and that the applications should be granted. However, the costs claimed are far from reasonable and are not proportionate and much lower sums have been assessed as payable by the Claimants in this matter. It was for the Claimants to provide particulars in support of their case. Orders were made which they failed to comply with. It was neither reasonable or proportionate for the Respondents to incur significant legal costs when that information was not being provided.**
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> ***Claim numbers 3400585/15 to 3400608/15 (Adams & others)***
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> **10. For the reasons advanced the Respondents in their application the Tribunal accepts that the Claimants and/or their representatives acted unreasonably in the way in which the proceedings in cases 3400585/2015 through to 3400608/2015 (the 'Adams cases') have been conducted, which were dismissed as duplicates. The Respondents' submissions are again accepted and the Tribunal is satisfied that there should be a wasted costs order against the Claimants' representative on the ground that they acted negligently in bringing those proceedings and subsequently failing to withdraw them. Indeed in relation to both of the above, and having regard to the reasons already given on the last occasion, it would be difficult to see how the Tribunal could not find unreasonable and/or negligent conduct and therefore fail to exercise its discretion to award costs.**

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Costs generally

11. The Tribunal does not accept the argument advanced that the discretion should not be exercised in this case as the Claimants have already suffered the hardship of their cases being struck out. If that was a valid argument then whenever there was a failure a comply with an Unless Order and the Claimants were consequently struck out that would be a defence to any costs application brought.

12. As identified on the last occasion, the Claimants' solicitors failed to particularise the claims in the ET1; respond to the Tribunal's initial and additional Orders; and when schedules of loss were eventually prepared they were not complete and the Respondents were still left not knowing the case it had to meet. It is no answer to say that a lot of work must have gone into those schedules if the work done did not address the key issues that the Tribunal and the Respondents needed to have clarified.

13. The Claimants' solicitors in their responses to the costs application accepted on numerous occasions failures on their part and indeed apologised. They also accepted, and have again today, that they could have made their difficulties clear earlier but failed to do so. Those failures by them have led to costs being incurred by the Respondents for which the Claimants (and in relation to the wasted costs, the solicitors) should be responsible.

14. It has been suggested that there was a "reasonably comprehensive" response in the solicitors' letter of 5th March 2015. When that letter is, however, considered it is primarily a request to postpone the hearing listed for 7th April and associated concerns with regard to the need to pay the hearing fee which, of course, the Judge was not concerned with. It is correct that this Employment Judge did postpone the hearing but the Claimants' request for a stay was not granted, on the contrary the Claimants were given a further opportunity to provide particularisation by 1st April, which they again failed to do. Where the Tribunal does have some sympathy with the Claimants' submissions, is that this is not a case where it has been found that the claims were misconceived and/or had no reasonable prospects. They have been struck out for the failure to particularise the details of the claims. The merits have not been tried. The Tribunal cannot therefore accept the Respondents' contentions that all of these costs should be borne by the Claimants."

13. Accordingly, she was satisfied in relation to both Costs Orders sought that the relevant thresholds for awarding costs were met. She made reference to reasons for reaching those conclusions, but rather than setting them out she expressed herself satisfied that the Respondent's submissions should be accepted. The remainder of the Costs Judgment was given over to addressing the quantum of costs to be awarded.

14. When he granted permission on the papers for this appeal to go forward to a Full Hearing, Langstaff J said:

"Quite apart from the substance of the appeal, for a Judge to make serious findings of unreasonable vexatious behaviour against the litigants and a finding of conduct, at least akin to professional negligence against their representative by reference to what is said in a letter the substance of which is not unintelligibly reprised in the Judgment is questionable.

It is doubtful if it meets usual requirements for a Judgment to be accessible and public.

For this reason alone I would have granted permission so that if appropriate the Employment Appeal Tribunal can give guidance, but it seems from such material as I can glean from the Judgment that the appeal is in any event arguable."

As will appear from what I say below, I respectfully agree with and endorse those observations.

15. There are three grounds of appeal set out in a Notice of Appeal prepared by Ms Apps of counsel, who appears on the Claimants' and on OH Parsons LLP's behalf. By the first ground of appeal they submit that the Tribunal's Costs Judgment cannot stand in light of the analysis of the EAT in **Wentworth-Wood 1**. By the second ground of appeal they contend that the Costs Judgment does not comply with the reasons test set out in **Meek v City of Birmingham District Council** [1987] IRLR 250. Finally, by the third ground, OH Parsons LLP contend that the Tribunal's approach to wasted costs being ordered was flawed and in error of law. I address those grounds in turn.

Ground 1: *Wentworth-Wood 1*

16. The Employment Judge held, in effect that all Claimants had failed to comply with the Unless Order and all schedules provided were incomplete in relation to all Claimants. The reasoning she provided is minimal. She simply stated that the relevant thresholds were met and "*It was for the Claimants to provide particulars in support of their case. Orders were made which they failed to comply with*". That is inadequate. It fails to identify which Claimants breached which aspect of the Unless Order and fails to particularise each finding of defect. Even reading the Costs Judgment generously, and as incorporating by reference the reasons given in the earlier Strike-out Judgment there is no attempt to identify in relation to each Claimant which part of the Unless (or other) Order had not been complied with.

17. The Employment Appeal Tribunal has already held in **Wentworth-Wood 1** that the Tribunal's Strike-out Judgment was in error of law because:

(i) 22 schedules were provided, including the sum claimed.

(ii) 24 Claimants had provided dates of employment.

(iii) Every Claimant had confirmed that he or she was covered by a collective agreement; albeit there was an error in relation to a particular Claimant, Mr Beddoes.

(iv) A breach of the Unless Order by one Claimant could not result in another Claimant's claim being struck out, but this possibility was a linchpin of the Respondent's submissions before the Employment Tribunal and implicitly accepted by the Employment Tribunal in simply accepting wholesale the Respondent's submissions.

(v) The Tribunal had not properly construed the Unless Order. The Order did not require further particulars of holiday pay claimed than simply the figure claimed. It did not require every aspect of the legal and factual case to be particularised and did not require the Claimants to identify the contractual terms relied on or the statutory method for calculating sums due.

(vi) The Employment Tribunal wrongly accepted the Respondent's submissions as to the adequacy of the schedules provided. Compliance with the Unless Order required the amount to be stated, not that those sums should be either factually correct or legally sustainable as the Respondent sought to argue.

(vii) The Tribunal had been wrong to accept the Respondent's submission that the Claimants' responses to the second paragraph needed to be factually accurate. The fact that there was a mistake in respect of one Claimant did not mean that there was non-compliance with the Unless Order.

(viii) Finally, the Tribunal gave the Unless Order a meaning it simply did not bear.

18. The Employment Appeal Tribunal in **Wentworth-Wood 1** subsequently found that because only 11 Claimants had pursued appeals in relation to their holiday pay claims, only 11 claims would be reinstated before the Employment Tribunal. That conclusion, however, is not to be understood, as Ms Apps submits, as a finding that those not included within the 11 were in substantial breach of the Unless Order. It is clear from the Employment Appeal Tribunal's Judgment that the reason further relief was not ordered was because those individuals were regarded as having abandoned their entire appeal by virtue of not pursuing an appeal in respect of the holiday pay claim aspect of the strike-out decision. I accept that submission.

19. In those circumstances, I agree with Ms Apps that the Tribunal's broad, generalised finding at paragraph 9 cannot stand in light of the Judgment in **Wentworth-Wood 1**. I add, as Ms Apps submits, that this ground has even stronger relevance to the Adams Claimants. The Unless Order did not even apply to them. The Tribunal had no rational basis, accordingly, for concluding that they were in breach of an Unless Order which did not apply to them.

20. The failure to identify each Claimant and his or her deficient conduct and the error in treating them all together as a single unit led to a conclusion that was plainly erroneous. The error at paragraph 9 is compounded at paragraphs 12 to 14 set out above, where the Tribunal again made reference to the Unless Order as having been breached and the fact that the claims had been struck out for failure to particularise the details of the claims. That too was an error and, accordingly, this ground of appeal succeeds.

Ground 2: The Adequacy of the Reasons

21. The minimum requirements of a reasoned judgment are well established. By way of reminder, Bingham LJ (as he then was) held in **Meek**:

> **"8. … the decision of an Industrial Tribunal is not required to be an elaborate formalistic product of refined legal draftsmanship, but it must contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the EAT or, on further appeal, this court to see whether any question of law arises …"**

22. The approach to the question whether costs should be awarded against a party to a claim based on unreasonable conduct is also well established. In **Yerrakalva v Barnsley Metropolitan Borough Council** [2012] ICR 420, the Court of Appeal held at paragraph 41 (Mummery LJ):

> **"41. The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. The main thrust of the passages cited above from my judgment in *McPherson* … was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the employment tribunal had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances."**

23. As already indicated, the Employment Tribunal's Costs Judgment, at paragraphs 9 to 14, fails to state which Claimants were in breach of which Orders and on which dates. There is no identification of the ways in which OH Parsons LLP acted that amounted to behaviour that no solicitor who was reasonably informed and competent would have behaved. The Costs Judgment does not set out which costs of the Respondent were said to have been caused by which conduct or breach of acceptable standards of behaviour. Nowhere is there set out the reasons why the Employment Judge rejected the submissions made in the Claimants' solicitors' letter of 15 September 2015, addressing the wasted costs and ordinary costs application and stating why those costs should not be ordered.

24. Although the Employment Tribunal made reference to **Yerrakalva** the Costs Judgment discloses a failure to apply the approach identified in **Yerrakalva** to the facts, or to explain to the reader why the Respondent was successful in this application and why the Claimants and OH Parsons LLP lost. There is no outline of the factual background or the factual conclusions reached, and the particular matters I have referred to above do not appear anywhere. In those circumstances, I regret to conclude that the Employment Tribunal's Costs Judgment fell far below the standard required by **Meek**.

25. Moreover, to produce a Judgment that adopts wholesale the reasons advanced by the successful party, without identifying those reasons and explaining, even briefly what those reasons are or why they have been accepted, simply does not satisfy the minimum requirements for a reasoned Judgment that is both accessible and public. It does not enable a reader of the Judgment to understand in an intelligible way, why the unsuccessful party lost the case. I regret that the Costs Judgment, which created a significant costs liability for Claimants with, I suspect, limited means, fails to meet the dual requirement of being accessible and public in consequence. It cannot stand.

Ground 3: Wasted Costs

26. Rule 80(1) of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** provides:

> **"(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 -**
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> > **(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.**
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> **Costs so incurred are described as "wasted costs".**

27. Rule 82 of the **Rules** provides that a Wasted Costs Order may be made by a tribunal but "*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*".

28. The powers in the **2013 Rules** mirror the powers available to award costs against a legal representative in civil proceedings under section 51 of the **Senior Courts Act 1981**. The leading cases in relation to section 51 are **Ridehalgh v Horsefield** and **Medcalf v Mardell, Weatherill & Another** [2002] UKHL 27.

29. In **Ridehalgh**, the Court of Appeal set out a three-stage approach to determining whether a Wasted Costs Order can be contemplated:

(1) Has the legal representative of whom complaint is made acted improperly, unreasonably or negligently?

(2) If so, did such conduct cause the receiving party to incur unnecessary costs?

(3) If so, is it, in the circumstances, just to order the legal representative to compensate the receiving party for the whole or any part of the relevant costs?

As far as the third stage is concerned, Sir Thomas Bingham MR (as he then was) explained at pages 233F-234F:

> **"A legal representative is not to be held to have acted improperly, unreasonably or negligently simply because he acts for a party who pursues a claim or a defence which is plainly doomed to fail. As Lord Pearce observed in Rondel v Worsley [1969] 1 AC 191, 275:**
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> > **"It is easier, pleasanter and more advantageous professionally for barristers to advise, represent or defend those who are decent and reasonable and likely to succeed in their action or their defence than those who are unpleasant, disreputable, and have an apparently hopeless case. Yet it would be tragic if our legal system came to provide no reputable defenders, representatives or advisers for the latter."**
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> **As is well known, barristers in independent practice are not permitted to pick and choose their clients. Paragraph 209 of their Code of Conduct provides:**

> **"A barrister in independent practice must comply with the 'Cab-rank rule' and accordingly except only as otherwise provided in paragraphs 501 502 and 503 he must in any field in which he professes to practise in relation to work appropriate to his experience and seniority and irrespective of whether his client is paying privately or is legally aided or otherwise publicly funded: (a) accept any brief to appear before a court in which he professes to practise; (b) accept any instructions; (c) act for any person on whose behalf he is briefed or instructed; and do so irrespective of (i) the party on whose behalf he is briefed or instructed (ii) the nature of the case and (iii) any belief or opinion which he may have formed as to the character reputation cause conduct guilt or innocence of that person."**
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> **As is also well known, solicitors are not subject to an equivalent cab-rank rule, but many solicitors would and do respect the public policy underlying it by affording representation to the unpopular and the unmeritorious. Legal representatives will, of course, whether barristers or solicitors, advise clients of the perceived weakness of their case and of the risk of failure. But clients are free to reject advice and insist that cases be litigated. It is rarely if ever safe for a court to assume that a hopeless case is being litigated on the advice of the lawyers involved. They are there to present the case; it is (as Samuel Johnson unforgettably pointed out) for the judge and not the lawyers to judge it.**
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> **It is, however, one thing for a legal representative to present, on instructions, a case which he regards as bound to fail; it is quite another to lend his assistance to proceedings which are an abuse of the process of the court. Whether instructed or not, a legal representative is not entitled to use litigious procedures for purposes for which they were not intended, as by issuing or pursuing proceedings for reasons unconnected with success in the litigation or pursuing a case known to be dishonest, nor is he entitled to evade rules intended to safeguard the interests of justice, as by knowingly failing to make full disclosure on ex parte application or knowingly conniving at incomplete disclosure of documents. It is not entirely easy to distinguish by definition between the hopeless case and the case which amounts to an abuse of the process, but in practice it is not hard to say which is which and if there is doubt the legal representative is entitled to the benefit of it."**

30. Lord Bingham's speech in the subsequent case of **Medcalf** emphasised the need for real care before even embarking on consideration of a wasted costs application. In the same case, Lord Hobhouse discussed this jurisdiction holding at paragraph 56:

> **"56. In my judgment, the jurisdiction must be approached with considerable caution and the relevant provisions of section 51 construed and applied so as not to impinge upon the constitutional position of the advocate and the contribution he is required to make on behalf of his client in the administration of civil justice. The judgment in *Ridehalgh v Horsefield* [1994] Ch 205 referred to most of the relevant points. …"**

Lord Hobhouse explained that involved recognising that from the point of view of the lawyer, the jurisdiction is penal and involves making a finding of fault against the lawyer and visiting a financial sanction upon him. Further, he explained that the fault must relate clearly to a fault in relation to the lawyer's duty to the court and not in relation to the opposing party to whom he owes no duty. That meant a restrictive application of the jurisdiction was called for,

recognising that wasted costs cannot be awarded against a lawyer simply because his client is pursuing a hopeless case. As Lord Hobhouse explained:

> **"56. … it is the duty of the advocate to present his client's case even though he may think that it is hopeless and even though he may have advised his client that it is: *Ridehalgh* … 233-234. So it is not enough that the court considers that the advocate has been arguing a hopeless case. The litigant is entitled to be heard; to penalise the advocate for presenting his client's case to the court would be contrary to the constitutional principles to which I have referred. The position is different if the court concludes that there has been improper time-wasting by the advocate or the advocate has knowingly lent himself to an abuse of process. However it is relevant to bear in mind that, if a party is raising issues or is taking steps which have no reasonable prospect of success or are scandalous or an abuse of process, both the aggrieved party and the court have powers to remedy the situation by invoking summary remedies - striking out - summary judgment - peremptory orders etc. The making of a wasted costs order should not be the primary remedy; by definition it only arises once the damage has been done. It is a last resort."**

31. In **Ratcliffe Duce and Gammer v Binns (t/a Parc Ferme) & McDonald** UKEAT/0100/08, Elias P (as he then was) held that tribunals should apply the three-stage **Ridehalgh** test when determining whether a Wasted Costs Order should be contemplated and made (see paragraph 18).

32. Accordingly, the approach to be adopted by Employment Tribunals is:

(i) to recognise that wasted costs is an exceptional jurisdiction to be exercised with great care adopting a staged approach, and requiring consideration of what specific conduct is said to be improper, unreasonable or negligent;

(ii) to consider whether the particular conduct caused the opposing party unnecessary costs;

(iii) to consider whether in all the circumstances it is just to order the legal representative to compensate the receiving party for the whole or any part of those costs.

33. The third stage requires consideration of the constitutional position of the lawyer and the fact that from his point of view the jurisdiction is penal. It is possible that issues of

privilege might prevent the lawyer from mounting a proper defence and it may be necessary therefore to give the benefit of any doubt to the lawyer. Equally, consideration must be given in an appropriate case to the obligation on a lawyer to argue a case even if it is considered by the lawyer to be hopeless, if those are the client's instructions. There is a distinction between this and a lawyer lending his assistance to proceedings which are an abuse of the process.

34. In the present case, although the Employment Judge referred to **Ridehalgh v Horsefield**, her self-direction was limited as follows:

> **"6. In relation to the wasted costs application the authorities make it clear that negligence should be understood in a non-technical way to denote a failure to act with the competence reasonably to be expected of ordinary members of the profession (*Ridehalgh v Horsefield and another* [1994] Ch 205, 233 paragraph C). That case also makes clear that there must be demonstrated a causal link and that that is essential (p.237 paragraph E)."**

35. She did not identify or adopt the three-stage approach, nor did she state anything to indicate that she recognised or gave consideration to the constitutional position of OH Parsons LLP as the Claimants' solicitors. She did not identify a high degree of impropriety beyond mere negligence and did not reflect the fact that the making of a Wasted Costs Order is a last resort. Rather at paragraph 10 the Employment Judge simply equated unreasonable conduct with negligent conduct and concluded that the bringing of the "Adams" claim and the failure to withdraw it before 26 June 2015 was negligent. That was inadequate. Her statement that it would be difficult to see how the Tribunal could fail to exercise its discretion to award costs is unexplained and difficult to understand in the circumstances.

36. At paragraphs 12 to 14 the Employment Tribunal simply made no attempt whatever to identify the breach of duty owed by OH Parsons LLP to the Tribunal that was relied on as akin to an abuse of process. Instead, the Employment Tribunal appears to have proceeded on the basis that mere negligence was sufficient. The Tribunal failed to consider what costs had been

caused to the Respondent by what particular breach of duty and there was, as I have indicated at the third stage, a failure to conduct any adequate consideration of the justice of ordering OH Parsons LLP to pay wasted costs in the particular circumstances of this case.

37. I have already indicated the lack of clarity in the state of the law in relation both to the holiday pay claims and the inducement claims and to my mind there was simply no basis at all for concluding that there was conduct akin to an abuse of process that justified an award of wasted costs in this case. It seems to me, for all those reasons, that the Employment Judge misdirected herself in law, failing to adopt and apply the staged approach to wasted costs orders to which I have referred. The Wasted Costs Order is set aside accordingly.

Conclusion

38. In light of the agreement of the parties that this Employment Appeal Tribunal should substitute an Order that there should be no Order for ordinary or wasted costs in this case, and in circumstances where, in my judgment, had the right principles been applied there would have been no basis for either Order here, I allow this appeal, set aside the Orders for costs made below, and dismiss both applications by the Respondent for costs.

39. Finally, I am grateful to Ms Apps for her measured and helpful presentation of this appeal.