EMPLOYMENT TRIBUNALS

Claimant: **Mr P Bruce**

Respondent: **S J McIntosh (Haulage) Limited**

Heard at: **Nottingham**

On: **21 May 2018**

Before: **Employment Judge Faulkner (sitting alone)**

Representation
Claimant: **Mr S Purnell (Counsel)**
Respondent: **Mr P Martin (Counsel)**

JUDGMENT

The Respondent's application for a costs order and its application for a wasted costs order are both refused.

REASONS

1. Judgment and oral reasons were given to the parties at the conclusion of this Hearing. These written reasons are provided at Mr Martin's request, closely reflecting the oral reasons of course, but set out in a slightly different order and incorporating changes in expression and explanation, and some additional details, which the time for preparing written reasons affords.

Issues

2. It was agreed with Counsel at the start of the Hearing that the issues to be decided in respect of the Respondent's costs application were:

2.1. Did the Claimant act vexatiously, abusively, disruptively or otherwise unreasonably in the bringing of the proceedings or in the way that they were conducted (regulation 76(1)(a) of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Regulations"))?

2.2. Did the claim have no reasonable prospect of success (regulation 76(1)(b) of the Regulations)?

2.3. If either of these questions was answered affirmatively, should the Tribunal make a costs order?

2.4. If so, in what amount, and should the Tribunal have regard to the Claimant's ability to pay?

3. It was agreed that the issues to be decided in respect of the Respondent's wasted costs application were:

3.1. Did the Claimant's solicitors act improperly, unreasonably or negligently in writing to the Tribunal regarding the Respondent's unsigned statements as further detailed below (see regulation 80(1)(a) of the Regulations)?

3.2. If so did that result in unnecessary costs for the Respondent?

3.3. If so, is it just to order payment of those costs by the Claimant's solicitors?

3.4. If so, in what amount?

Facts

4. The parties produced just before the Hearing was due to commence an agreed bundle of 165 pages. Page references in these Reasons are references to that bundle. Given the limited time available, the Hearing having been scheduled for 3 hours, I made clear what I had read beforehand, namely: my earlier Judgment and Reasons (pages 74 to 92); correspondence sent or copied to the Tribunal by the parties after the date of the earlier Judgment and Reasons, some of which included related correspondence sent at an earlier date (pages 27 to 29, 72 to 73, 93 to 101); the Claimant's statement regarding his financial means; and Mr Martin's skeleton argument. I made equally clear that it was for the parties to point me to other documents should they deem it necessary for me to consider them, although I did briefly look at the short costs schedules prepared in support of the Respondent's applications (pages 109 to 111). In addition to the documentation just referred to, I heard evidence from the Claimant under affirmation as to his financial means. On the basis of all of the materials and evidence thus considered, I make the following findings of fact.

5. The Claimant's complaints to the Tribunal, essentially of unfair dismissal and breach of contract, were presented on 12 December 2016, having been preceded by a letter of claim dated 18 November 2016 (pages 24 to 26). On 22 December 2016, the Respondent's solicitors wrote to the Claimant's solicitors (see pages 27 to 29), on a "without prejudice save as to costs" basis. They asserted that the account of the relevant events leading to the Claimant's resignation set out in the letter of claim and the Claim Form was not truthful; that the Claimant's behaviour on the date of termination of his employment was reprehensible; that the claim was misconceived because the Claimant had resigned; that even if he was dismissed the effect of Polkey and contributory fault would be that there would be no financial award; and that if the Claimant was not believed by the Tribunal as to the events leading up to termination, it was unlikely he would be believed as to whether he was dismissed. As a result of all of this, it was said that a costs application would be made (rules 76(1)(a) and (b) were cited) if the Claimant continued to pursue his claim and he was invited to withdraw it.

6. That invitation was evidently rejected, such that the Respondent lodged its ET3 Response on 6 January 2017. At paragraph 9 of that Response it stated that "The Claimant has in bringing these proceedings acted vexatiously, abusively, disruptively or otherwise unreasonably and the claim has no reasonable prospect of success".

7. As part of the preparations for the Final Hearing, the parties were of course required to exchange witness statements. This is the context for the Respondent's application for wasted costs. The Respondent had requested an extension of time of 6 weeks for exchange, which was granted by the Tribunal. Exchange eventually took place therefore on 10 April 2017. The Respondent's statements were served on the Claimant's solicitors unsigned and undated, and without a "statement of truth".

8. The standard order for exchange of statements, issued with the Notice of Claim some months before on 14 December 2016, did not say that the statements had to be signed or dated. The relevant Presidential Guidance (pages 163 to 165) recommends but does not require (this word is emphasised) a statement of truth, stating that there is no objection to a witness statement that does not include one. As for signing of witness statements, it describes this as "good practice".

9. On 18 April 2017 the Respondent's solicitors wrote to the Tribunal (page 48) explaining the form in which the Respondent's statements had been served and saying that "the minimum standard that is expected of witness statements to render them admissible in proceedings is that they must be verified by a statement of truth and must be signed by the maker of the statement. The statement should also be dated to indicate when the statement was made". The email went on to say that "as matters stand the unverified statements served by the Respondent are invalid and inadmissible in these proceedings". The Claimant's solicitors requested that "in accordance with the Tribunal rules and the Order of 14 December the Tribunal strike out the Respondent's witness statements for non-compliance". Also on 18 April 2017, the Claimant's solicitors wrote to the Respondent's solicitors (pages 51 to 52) on a "without prejudice save as to costs basis", referencing the application to "strike out [the Respondent's] witness evidence" which it said had strong prospects and would lead to only the Claimant's evidence being heard thus increasing his prospects of success. The letter set out a settlement offer. Mr Martin says that the application to the Tribunal was thus made to bolster the Claimant's negotiating position, not to further the requirements of the overriding objective.

10. The Respondent's solicitors replied to the Tribunal on the same date (page 50), opposing the Claimant's solicitors' application, stating that there was no obligation to served signed statements either under the Order of 14 December 2016 or the Presidential Guidance. They went on to say that they would ensure fully signed and dated copies of the statements were available at the Final Hearing and confirmed that the witnesses had agreed their statements and that all of them would be present at the Hearing. The Respondent's solicitors concluded by saying that they "reserved the right to apply for a wasted costs order … on the basis of having to respond to what we contend is … both an improper and unreasonable application".

11. On 26 April 2017 the Tribunal wrote to the parties (page 56) referring to the case management order of 14 December which did not require the statements to be signed and dated. The Tribunal's letter went on to say that the Respondent's statements could "of course be confirmed in terms of authorship and the date thereof at the hearing. It follows that the response will not be struck out".

12. On 5 May 2017 the Respondent's solicitors wrote a further "without prejudice save as to costs letter" (pages 72 to 73) to the Claimant's solicitors, rejecting the Claimant's settlement offer, and characterising the application to have the Respondent's witness evidence struck out as improper and unreasonable. The letter reiterated the invitation to the Claimant to withdraw his claim on the basis set out in previous correspondence, noting the Claimant's written witness evidence that he had followed Ms McCourt to see if she was ok, which it described as "ludicrous". The

letter stated that the Respondent had incurred significant costs in defending the Claim but would forego a costs application if the Claimant withdrew his Claim by 19 May 2017 and paid £1 as a contribution towards the Respondent's costs.

13. In addition to the dispute between the parties and their representatives regarding witness statements, there was also something of a dispute about the provision by the Claimant of full dashcam footage of what took place on 16 September 2016 (see the correspondence at pages 68 to 71). The footage was first requested by the Respondent's solicitors on 5 April 2017 and eventually provided on 22 May 2017. Mr Martin asserts that this was because the Claimant was unwilling to disclose the full footage until he saw the Respondent's witness statements and realised he could no longer contest the Respondent's case as to where his conversation with Ms McCourt took place. The Claimant's case, put forward by his solicitors in the correspondence, is that the footage was held on a PC which had crashed. I found it unnecessary to make any reference to this issue in my earlier decision.

14. The Final Hearing took place on 7 June and 12 September 2017. By a Judgment with Reasons dated 13 October 2017, sent to the parties on 11 November 2017, I dismissed the Claimant's complaints. It is not necessary for me to recite the findings of fact or conclusions set out in my earlier decision in any detail. That decision may be read on its own terms in order to understand the context for the Respondent's applications and my conclusions in respect of them.

15. As I identified in my earlier decision there were a number of conflicts of evidence between the parties, some of which it was necessary for me to resolve. The most important were first, what passed between the Claimant and Ms McCourt and Ms Turton on 16 September 2016 at the nursery where Ms McCourt had taken her child and where the Claimant had followed her, and secondly what was said between the Claimant and Mr McIntosh of the Respondent later on the same day (paragraph 58 of my decision).

16. I concluded (paragraph 59) that there were some inaccuracies in the evidence given by some of the Respondent's witnesses, which I described as "[overstating] the facts". Regarding the Claimant's evidence, I found (paragraph 62) that it was in part manifestly inaccurate, was subject to material change, was at times selective and was in significant respects unreliable. Paragraph 62 listed the evidence I was referring to, for example the Claimant's omission from his Tribunal Claim Form of what took place at the nursery, which was clearly highly relevant to the case. Another example was his written statement that he followed Ms McCourt to see if she was okay, whereas he agreed in oral evidence that he did not. All the evidence I referred to in paragraph 62 related to the first key conflict of evidence.

17. As to the second key conflict of evidence, I concluded in paragraph 63 that I preferred the Respondent's case as to whether the Claimant spoke the words of resignation I had set out in paragraph 27. The Claimant said he had not done so, Mr McIntosh said he did; on balance I preferred Mr McIntosh's evidence, though as I made clear that was not determinative of how the Claimant's employment had come to an end as the Claimant's case was that he had already been dismissed before those words were spoken. My finding of fact at paragraph 65 was that the conversation went as follows:

> "Mr McIntosh stated, "You do know it's come to the point where JAS will not have you driving for them again". The Claimant then said, "What happens now?", to which Mr McIntosh replied, "What do you expect me to do? There is nowhere else for you to go". The Claimant then stated, "If they don't want me,

> I don't want them, I resign as from today (or as of now)". Mr McIntosh then said, "Ok, I am sorry it's come to this", and informed the Claimant that he would need to collect his personal belongings from his lorry …".

18. I went on to conclude (paragraphs 66 to 69) that as there had been no unambiguous words of dismissal spoken, in order to determine whether the Claimant had been dismissed it was necessary for me to consider objectively what was said, judging the effect of the words used by Mr McIntosh by looking at the words exchanged between him and the Claimant beforehand and afterwards, assessing how those words in that context would be understood by a reasonable listener. Having carried out that analysis, I concluded that what Mr McIntosh said did not amount to words of dismissal and that the Claimant subsequently spoke unambiguous words of resignation. I thus concluded that he had not been dismissed, and of course his complaints failed on that basis.

19. In paragraph 70, I went on to say that had the Claimant been dismissed, for various reasons I would have found the dismissal to be unfair, but would also have found that the Respondent would have fairly dismissed the Claimant within a couple of weeks of the actual date of termination had it followed a fair procedure, and that any remaining compensatory award and all of the basic award would have been extinguished on the grounds of contributory fault as the Claimant was in my judgment wholly to blame for his dismissal. The grounds for that conclusion, which were also dispositive of the breach of contract complaint, were that (paragraph 75) it was clearly blameworthy to follow Ms McCourt to her child's nursery, shout at her and point at her whilst standing close to her and refuse to leave when asked. Objectively assessed I found (paragraph 76) the Claimant's behaviour to be reprehensible, given that he was representing the Respondent to its sole customer and the sole customer to the world.

20. Having received my Judgment and Reasons, the Respondent's solicitors made the costs and wasted costs applications by email to the Tribunal dated 6 December 2017 (pages 95 to 96). This attached a letter sent to the Claimant's solicitors dated 17 November 2017 (pages 93 to 94). It summarised some of the history of the case set out above, in particular referring to the costs warning letters. The Claimant's solicitors replied on 7 December 2017 (pages 98 to 99). They referred to the "clear and demonstrable dispute" as to whether the Claimant had been dismissed, which it said the Claimant was entitled to "ventilate … and … have tried at Tribunal". As to the wasted costs application, the email said that it was the Claimant's solicitors' reasonable view that the Respondent's statements "may not have been compliant" and thus the Claimant's solicitors were entitled to apply to the Tribunal to "clarify their authenticity and admissibility in proceedings". The email added, "It was the Claimant's solicitor's view that it would have been remiss, acting in the best interests of the Claimant, not to request the Tribunal's input on the matter". It is not necessary for me to refer to the further correspondence which led to this Hearing.

21. The Claimant said at paragraph 4 of his short statement that his Claim was based on principle and not about money, and that he still believes he was unfairly dismissed.

22. Turning to the figures, the costs application was for a total of £14,295 excluding VAT (the Schedule at pages 109 to 110 was amended by agreement between the parties). The Respondent has recovered the VAT and so did not seek to reclaim it. The Claimant did not contest the amount of the costs being claimed, though did say that his ability to pay means that I should not exercise the discretion to make such an order. The wasted costs application was for £329 (again excluding VAT). The

Claimant's case was that if such an order were granted, at most it should be for the sum of £100 representing around 30 minutes' work, the amount of work set out in the schedule being said to be excessive.

23. As to the Claimant's means, I am satisfied that I had before me everything material to the issue, even though it transpired that the Claimant had not disclosed a bank statement for his ISA account. He says – and I have no reason not to accept – that the amount in the account stands at £19.

24. The Claimant's current income is around £2,093 net per month, depending on the hours he works as a lorry driver, which can be up to 60 per week. His wife has a cleaning job, from which she earns a small income, though the work is not wholly reliable. She receives £140 per month from her son (the Claimant's stepson) for living expenses. The Claimant is quite obviously the main breadwinner.

25. The Claimant and his wife have a 16-year-old daughter living at home, who has 3 more years left at College. The family's expenses are around £2,100 per month. They have a mortgage of £38,000 on a property worth around £179,000, credit card debts (at least in part due to legal fees related to this case) of around £6,000, and also a car finance arrangement with an in-law. The Claimant also has to pay fees for Mr Purnell's attendance at this Hearing, which he will again meet via his credit card.

The law

Costs application

26. The relevant rules of procedure are rules 74 to 78 of Schedule 1 to the Regulations. In respect of this application, the particularly relevant rule is rule 76 which in part reads as follows:

> "(1) A Tribunal may make a costs order …, and shall consider whether to do so, where it considers that –
>
> (a) a party … 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 … had no reasonable prospect of success".

27. Case law provides regular reminders that costs orders remain the exception not the rule in employment tribunal litigation, although that does not mean that exceptional circumstances are required, just that the relevant test is satisfied. In summary, the first step is to consider whether either of rules 76(1)(a) or (b) are satisfied. In relation to rule 76(1)(a), as I will explore further below, the Respondent relies on the Claimant having acted unreasonably in the bringing of (and continuing with) his claim. Whereas vexatious conduct describes actions done out of spite to harass a respondent, unreasonable conduct may be something less than that. If either limb of rule 76(1) is satisfied, the second step is to consider whether to make a costs order; it is not mandatory to do so and tribunals have a wide discretion in that regard. If it is decided that a costs order should be made, the third step is to consider the amount of the costs to be paid pursuant to the order, and in doing so the Tribunal may take the Claimant's financial means into account.

28. In respect of rule 76(1)(a), which in this case is concerned with unreasonable conduct, the Tribunal should consider the nature, gravity and effect of the conduct that is alleged to have been unreasonable, though not as though it were applying a

checklist. In **Barnsley Metropolitan Borough Council v Yerrakalva [2011] EWCA Civ 1255**, the Court of Appeal made clear that it is necessary to look at the whole picture of what happened in the case and ask whether there has been unreasonable conduct by the Claimant in bringing and conducting it. The Tribunal must identify that conduct, what was unreasonable about it and what effects it had. As to this last point, which is concerned with causation, it is not necessary to find a precise link between the unreasonable conduct and the costs incurred but matters of causation must not be ignored altogether.

29. On the question of unreasonable conduct, Mr Purnell referred me to a decision of the Employment Appeal Tribunal in **Telephone Information Services Ltd v Wilkinson 1991 IRLR 148**. In that case the claimant refused a settlement offer of the maximum amount available to him were he to succeed in his claim of unfair dismissal essentially because he wanted a finding, or as it might have been an admission from the respondent, that he had been unfairly dismissed. The respondent applied to have the claim struck out on the ground that for him to persist in his complaint would be frivolous or vexatious. The application was refused, a judgment which the EAT upheld. In its judgment it said that the claimant had a right to have his claim decided by the employment tribunal; his claim was not simply for a monetary award – it was a claim that he was unfairly dismissed, and he was entitled to have a finding on that matter and maintain his claim to the tribunal for that purpose. As the respondent had been unwilling to concede the basis of the claim the claimant could not be criticised for pursuing it and asking the tribunal to decide it. The EAT's decision was referred to by the Court of Appeal, without demur, in **Gibb v Maidstone & Tunbridge Wells NHS Trust 2010 IRLR 786.** It said, "An unfair dismissal claim is not in all respects to be equated with a common law action which a defendant can simply choose to settle by a monetary offer", commenting that the **Wilkinson** decision was instructive in this regard.

30. Mr Martin referred to the judgment of the EAT in **Kopel v Safeway Stores Plc [2003] IRLR 753.** In that case, what the EAT described as a generous settlement offer was rejected "out of hand", the claimant refusing to engage in any meaningful negotiations. Citing earlier similar cases where generous offers had been made, the EAT held that it was permissible for the tribunal to have found that rejecting the offer was unreasonable conduct which merited a costs award against the claimant.

31. As to the amount of any costs order, this Hearing was concerned with a summary assessment of the Respondent's costs. As I have already noted, there was no dispute between the parties as to the amount claimed. As also already noted, the Tribunal may take the paying party's ability to pay into account in deciding the amount of any costs order. This includes capital assets and savings and may also involve an assessment of the party's future ability to pay, even if it appears he could not pay the full amount ordered now. Mr Martin rightly referred to the Court of Appeal's decision in **Arrowsmith v Nottingham Trent University [2012] ICR 159** in which it was held that the fact that a party's ability to pay was limited did not require a tribunal to order payment of a sum confined to what she could in fact pay.

Wasted costs application

32. The relevant rules related to wasted costs applications are those set out at rules 80 to 82 of Schedule 1 to the Regulations. Rule 80 in particular states in part as follows:

> "(1) A Tribunal may make a wasted costs order against a representative in favour of any party ("the receiving party") where that party has incurred costs –

(a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative …".

33. The leading authority in respect of wasted costs applications is **Ridehalgh v Horsefield [1994] 3 AER 848**. The essential questions to be asked are threefold. The first is whether the representative acted improperly (this includes but is not limited to conduct which would lead to professional sanctions) or unreasonably (for example actions which harass the other party rather than progressing the case) or negligently (in other words, a failure to act with the competence which could reasonably be expected of him or her). If the representative did act in one of these ways, the second question is whether that resulted in unnecessary costs being incurred. Thirdly, if it did, it must be asked whether it is just to order payment of those costs in whole or in part.

34. The Employment Appeal Tribunal considered **Ridehalgh** and other authorities in a case referred to by Mr Purnell, **Mitchells Solicitors v Funkwerk Information Technologies York Ltd [2008] UKEAT/0541/07.** The EAT said that the wasted costs jurisdiction should be exercised with great caution and as a last resort; confirmed that a wasted costs order should only be made if the tribunal is satisfied that the conduct of the impugned representative was properly to be characterised as improper, unreasonable or negligent; and went on to say that the tribunal can only make such an order in such a case (it was particularly concerned with situations in which a representative acts on behalf of a party who pursues a hopeless case) if it is shown that the representative has presented a case which he regards as bound to fail and in doing so has failed in his duty to the court such that the proceedings amount to an abuse of process.

35. Quoting from **Ridehalgh,** examples of this sort of conduct include pursuing proceedings for reasons unconnected with success in the litigation, pursuing a case known to be dishonest and evading rules intended to safeguard the interests of justice such as knowingly conniving in incomplete disclosure. It is the duty to the court that is emphasised; there is no duty to one's opponent. The requirement for there to be an abuse of process was confirmed by the EAT in **Ratcliffe Duce and Gammer v Binns [2008] UKEAT 0100/08** in which it was said, "The distinction therefore is between conduct which is an abuse of process and conduct falling short of that". **In Wentworth-Wood and others v Maritime Transport Ltd UKEAT/0184/17**, the EAT criticised the judgment of the tribunal below as having "made no attempt whatever to identify the breach of duty owed by [the firm of solicitors in that case] that was relied on as akin to an abuse of process", going on to conclude that there was no conduct akin to an abuse of process that justified an award of wasted costs.

Analysis

Costs application

36. I deal first with the application under rule 76(1)(b), namely that the Claim had no reasonable prospect of success. Mr Martin relied on essentially two arguments. One was that the Claimant knew that he had resigned, and thus there was no reasonable prospect of him establishing that he had been dismissed in order to found complaints of unfair or wrongful dismissal. Secondly and alternatively, Mr Martin submitted that even if the Claimant had been able to establish that he was dismissed, and even if that dismissal was unfair, it was plain that he would not receive any compensation because of his conduct (this was essentially a submission that there was no

reasonable prospect of the Claimant being awarded compensation for any unfair dismissal) and equally plain that the breach of contract complaint would fail on this basis also.

37. Responding to the first of those points, Mr Purnell said that the key issue in the case was the question of whether the Claimant was dismissed. This was not the only important issue, but it is plainly right that it was a crucial issue that fell to be determined before anything else. Mr Purnell's submission was that there was a core dispute of fact on which this crucial aspect of the case turned, and that to find that it had no reasonable prospect of success would amount to saying that no reasonable Tribunal could have found that the Claimant was dismissed. He argued that the evidence in the case, and the analysis I carried out of this core issue in reaching my earlier decision, makes clear that this was plainly not the case. He argued by analogy that had the Respondent sought to strike out the complaints at a preliminary stage on the basis of their having no reasonable prospect of success, any such application would have been doomed to fail.

38. I conclude that it cannot be said that there was no reasonable prospect of the Claimant establishing that he had been dismissed. This is in no way to renege from my findings of fact as to what was said by the Claimant and Mr McIntosh as set out above, nor from my analysis of the implications of those words, which as I have said was that Mr McIntosh did not dismiss the Claimant, who then resigned. Nevertheless, as my earlier decision makes clear, in analysing this question it was necessary for me to determine the import of the words spoken from the surrounding circumstances, including, as the case law permits, what took place before and after the crucial conversation. The words spoken did not themselves entirely resolve the issue.

39. I acknowledge my finding that the Claimant's post-termination conduct was consistent with his having resigned, but even if the Claimant only realised the possibility of establishing dismissal (based on his recollection of the conversation) once he took legal advice, given the potential ambiguity of what happened on the date of termination that does not mean that there was no reasonable prospect of establishing a claim on that basis nor, I should add, that the Claimant acted unreasonably in pursuing his complaints accordingly. I note also that the Claimant disputed having used words related to resignation and that I resolved that issue against him, but I made (and make) no finding of dishonesty in relation to his evidence in that respect. In any event, as I have already said, my earlier decision shows that it was not unambiguously clear that the Claimant had not already been dismissed by the time words of resignation were spoken.

40. Further, as Mr Purnell pointed out, if the Claimant had succeeded in establishing that he had been dismissed – which it is clear from my earlier decision took some care to analyse – I found that any such dismissal would have been unfair on a number of grounds. Given the shortcomings in how the Respondent handled its consideration of the Claimant's misconduct, it is perhaps not surprising that at least in a layman's sense the Claimant felt the Respondent had acted unfairly and concluded that he was entitled to pursue his complaints on that basis.

41. I therefore reject Mr Martin's case that there was no reasonable prospect of the Claimant establishing that he was dismissed, and unfairly so, for the reasons I have given. As to there being no reasonable prospect of obtaining compensation, this seems to me more appropriately dealt with under the rule 76(1)(a) part of the Respondent's application in relation to which the Respondent says it was unreasonable to pursue a claim knowing the Tribunal would find against the Claimant

on the question of what took place between him and Ms McCourt. As far as rule 76(1)(b) is concerned, no reasonable prospect of obtaining compensation, if such it was, is plainly not the same as the complaint having no reasonable prospect of success.

42. I turn next to the application for costs under rule 76(1)(a). It is plain from the correspondence prepared by the Respondent's solicitors and from Mr Martin's skeleton argument that the alleged unreasonable conduct is first of all that the Claimant continued with his case knowing that it would not succeed or at least that he would not obtain any, or any material, compensation. This is the force of some of the bullet points at paragraph 4 of Mr Martin's skeleton argument, namely the costs warnings I have mentioned above, the risk of the Claimant getting no compensation because of his "reprehensible" conduct and his refusal to accept a settlement offer. Mr Purnell relies on the decision in **Wilkinson** in this respect and submits that the Claimant was entitled to seek a finding of unfair dismissal. In response to that, Mr Martin says that the Claimant never made clear that he wanted a finding of unfair dismissal and therefore effectively seeks to distinguish this case from **Wilkinson** saying that it is necessary to look at all of the circumstances of the case.

43. It follows from the comments I have already made in relation to the application under rule 76(1)(b) that in my judgment it was not unreasonable of the Claimant to continue with his Claim in order to try to establish his principal complaint that he had been dismissed, and that unfairly. It also follows from what I have already said that it is not unreasonable to pursue a complaint just because one knows that the prospects of obtaining much, if any, compensation are not great. I make no criticism of the Respondent in this regard, but this is perhaps particularly the case in circumstances where (unlike in **Wilkinson**) no offer of settlement was made to the Claimant except the invitation to walk away by payment to the Respondent of £1 towards its costs. That puts this case in quite a different category to **Kopel**. Moreover, the Claimant's compensation was never going to be especially substantial if he succeeded in his complaints because he obtained a job with a similar income fairly quickly, which to some extent supports his contention that the claims were about the principle and not compensation. Claims are regularly held to be well-founded with little or no compensation resulting from them; it does not follow that it is unreasonable to pursue them. I note for completeness, again with no criticism of the Respondent, that there was no offer to concede that the Claimant had been unfairly dismissed either.

44. In his skeleton argument Mr Martin otherwise characterised the Claimant's alleged unreasonable conduct as "deliberately [trying] to conceal the events at the nursery in his letter before action … then in his ET1 and then by failing repeatedly to disclose the dashcam footage in an unedited format until threatened with an application". In his oral submissions, this developed into an argument that it was unreasonable of the Claimant to pursue his claim to a final hearing, in a case where the material facts were at all times within his own knowledge, knowing that he was going to materially alter his evidence – that is how Mr Martin summarised the unreasonable conduct application. Consistent with his skeleton argument, Mr Martin specifically referred in submissions to the changes in the Respondent's account of the incident with Ms McCourt, namely where he spoke to her and his motivation for doing so, in addition to the delay in disclosing the dashcam footage.

45. Dealing briefly first with the delay in disclosing the dashcam footage, my recollection of the evidence at the Final Hearing is as summarised by Mr Purnell in his submissions, namely that the Claimant's evidence that the delay was because he had difficulty with his computer was essentially unchallenged. Moreover, even if the delay in disclosing the footage had been unreasonable conduct, it is difficult to see

what costs the Respondent incurred (other than perhaps limited costs requesting it) that it would not otherwise have incurred as a result of the delay in the footage being revealed.

46. I understand of course that the Respondent's main point in this regard is that it shows that the Claimant knew his case was unreliable because he was changing his story as time went on. The essence of this argument remains therefore that it was unreasonable of the Claimant to continue with his claim, knowing that it would not succeed or would attract no or next to no compensation. I have already found against the Respondent in that regard and that seems to me to deal with this way of putting its case as well. I will nevertheless, as I did when giving oral reasons, go on to consider the changes in the Claimant's account, even though on reflection it does not seem to me strictly necessary to do so in order to address the Respondent's argument.

47. It is clear that there were changes in the Claimant's account, as I have explained. As Mr Purnell submitted, there was no conclusion in my earlier decision that the Claimant had been dishonest, and I accept his additional point that recollections are rarely perfect and indeed often flawed without malign reason. As already noted however, I did find that the Claimant's evidence was subject to material change. The question is whether the Claimant acted unreasonably (or indeed vexatiously, abusively or disruptively) in bringing and continuing to pursue his case in a way which changed as it progressed.

48. The changes in the Claimant's evidence certainly counted against him in my findings of fact, and it must also be noted that the absence of a finding of dishonesty is not determinative of there having been no unreasonable conduct within rule 76(1)(a). Nevertheless, judging the matter overall, noting that there were also some overstatements in the Respondent's evidence – which the Claimant clearly recognised given how his case was pursued by Mr Purnell at the Final Hearing – and particularly given my conclusion that this was not a case, even at the Final Hearing, that could be said to have no reasonable prospect of success, I find that the Claimant did not cross the threshold of unreasonable conduct. Moreover, it was not suggested by the Respondent that the costs it incurred would have been reduced had the Claimant's story been consistent throughout on the question of his dealings with Ms McCourt. In other words, for the reasons explored in dealing with the application under rule 76(1)(b), the Claimant's evidence on this subject, whilst of course important in its own right, was not germane to the central issue in the case, namely whether he was dismissed. That turned on the correct analysis of his conversation with Mr McIntosh which, had it been resolved in his favour, would have resulted in a conclusion that he was unfairly dismissed. Accordingly, even if the threshold of unreasonableness had been crossed by the Claimant's changing of his evidence, I would not have exercised my discretion to make a costs order in the Respondent's favour.

49. For the reasons set out above, the Respondent's application for a costs order is refused.

Wasted costs application

50. I can deal with this application much more briefly, focused as it is on one particular action by the Claimant's solicitors.

51. Mr Martin submitted that the basis for the Claimant's solicitors' application to strike out the Respondent's evidence was wholly flawed. He pointed out that the

application referred to no rule of procedure or relevant guidance in support, and as already noted was in his submission an attempt to strong-arm the Respondent into settlement rather than being designed to further the overriding objective of dealing with cases fairly and justly.

52. Mr Purnell's argument was that the application may not have raised a very good point or even have particularly advanced the Claimant's interests, but it did not cross the threshold of being improper, unreasonable, or negligent. The application achieved something, he said, namely confirmation of the Respondent's witnesses' affirmation of their statements and their intention to attend the Final Hearing. He also submitted that the sum claimed is fanciful, as the amount of work required in order to respond to the application should have been much less than it was.

53. It is clear from the case law that one must be very cautious about making a wasted costs order – it is a last resort. It is equally clear in my judgment that the actions of the Claimant's solicitors in this case were not negligent on any understanding of that word. As Mr Purnell rightly pointed out, the Respondent's application was not put on this basis initially, in my view understandably so. Whilst this was not the best point the solicitors could have made – it appears that they may only have properly considered the Presidential Guidance some time later, and they would plainly have been better off seeking to deal with this issue directly with the Respondent, or at most by asking the Tribunal to require the Respondent to clarify the position – that does not mean that they failed to act with the competence reasonably to be expected of them. Admittedly, the wording used in the application was not helpful in that it incorrectly referred to a failure to comply with the Tribunal Rules (the Regulations), but it would be wrong in my view to visit upon the solicitors as a result a finding that they acted negligently. I say this not least because witness statements would usually or often be signed and dated on exchange, and indeed routinely contain a statement of truth. Indeed the Presidential Guidance describes signing of statements as good practice. Further, as Mr Purnell also said, solicitors make all sorts of interlocutory applications to employment tribunals that are refused, many in more peremptory terms than in this case; that does not make those who prepare those applications negligent.

54. If the application was not negligent, was it unreasonable or improper? Was it to harass the Respondent rather than further the overriding objective and advance the case? Again, I accept that it was not a well- made application, but especially when taking the cautious approach enjoined upon me by the case law, I do not find that it was improper or unreasonable even though it coincided with a settlement offer made on the same date. Parties often seek to obtain tactical advantages from what they perceive as errors or weaknesses in their opponent's position; it would be entirely wrong in my view to find it was unreasonable to do so in this case. Further, as Mr Purnell said, it did at least produce clarity as to the finality of the Respondent's statements and who would be attending the Hearing.

55. Further, as set out above, what the case law makes clear is that a wasted costs order must be founded on there having been an abuse of process. Somewhat misguided as the Claimant's solicitors were, there was no abuse of process in this case. For the reasons I have set out, the Respondent's application for a wasted costs order is therefore refused. For the record, had it been granted, I would not have found that the full costs claimed were properly recoverable for the reasons Mr Purnell gave. It should have been possible to deal with the application in no more than 30 minutes, which according to the schedule at page 111 would have resulted in costs of £117.50.

56. As I said when giving oral judgment, I am sure that the outcome of this Hearing is disappointing to the Respondent. I am conscious that its costs represent a significant outlay for a small business, without in any sense whatsoever calling into question that those costs were properly incurred by its advisers, including Mr Martin. Applying the appropriate tests however, I find that its applications are not made out.

Employment Judge Faulkner

Date: 14 June 2018
JUDGMENT SENT TO THE PARTIES ON

18 June 2018

FOR THE TRIBUNAL OFFICE