Appeal No. UKEAT/0043/18/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 1 May 2018

Before

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

(SITTING ALONE)

KL LAW LTD — APPELLANT

(1) WINCANTON GROUP LTD
(2) MS J MARZEC — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR MARCIN KOZIK (Representative) KL Law Ltd Censeo House 6 St Peters Street St Albans Hertfordshire AL1 3LF
For the First Respondent	No appearance or representation by or on behalf the First Respondent
For the Second Respondent	Second Respondent debarred from taking part in this appeal

SUMMARY

PRACTICE AND PROCEDURE - Costs

1. Following withdrawal of the Claimant's claims part way through a substantive hearing, the Employment Tribunal dealt with a wasted costs application made against her legal representative by the Respondent. There was no adjournment to enable evidence to be prepared and the Employment Tribunal heard no evidence from the legal representative. The Employment Tribunal made a wasted costs order finding that the legal representative was negligent in relation to the Claimant's disclosure obligations; this caused unnecessary costs; and it was just to make the order.

2. The appeal was allowed and the order set aside. The Employment Tribunal's finding of negligence was in error in circumstances where privilege was not waived and it had no means of establishing what advice was given to the Claimant about disclosure. Further, the necessary element of breach of duty to the court was not considered by the Employment Tribunal. Finally, the causation finding was flawed by a failure to address the question whether the Claimant would have continued with the claim irrespective of any negative advice she received.

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

1. This is an appeal against the judgment of the Sheffield Employment Tribunal (comprised of Employment Judge Little, Ms Hodgkinson and Mr Smith) which made an award for wasted costs against a firm of claims managers who provided legal advice and representation to the Claimant, KL Law Ltd (the Appellant). There were two individuals advising the Claimant within the firm: Mr Kozik (who represents the Appellant) and Ms Lappa (who was also engaged in representing the Claimant's partner, Mr Tatinger, who also pursued proceedings against the Respondent, Wincanton Group Ltd).

2. The basis for the wasted costs order made by the Tribunal was that there was a negligent failure to comply with disclosure obligations causing unnecessary costs to be incurred by the Respondent in the substantive proceedings, and it was therefore just to make such an order in the circumstances. The Appellant challenges the award of wasted costs on a number of grounds.

3. Two points should be made clear at the outset. First, the result of this appeal, whichever way it goes, cannot affect the Claimant's position. Although the Respondent sought a costs order against her in addition to the order sought against the Appellant, it failed to obtain an order against the Claimant because of her limited means. That decision has not been challenged. If the wasted costs order is now set aside, the Respondent cannot revive its application for costs against the Claimant, and she has not therefore had any reason to be involved in this appeal.

4. Secondly, by letter dated 21 March 2018, the Respondent indicated that they would not be resisting this appeal but would leave the matter in the hands of the EAT. I have not, therefore, heard from the Respondent at this hearing. Nonetheless, I have explored, during the course of oral argument, points that might have been put by the Respondent. I am grateful to Mr Kozik for dealing with my questions and for his clear, focused submissions.

The Factual Background

5. The background can be summarised shortly. The Claimant pursued claims of unlawful direct race and sex discrimination (together with claims of indirect disability discrimination which were, in the event, withdrawn on day one of the hearing) and a claim for constructive unfair dismissal. The claims were all resisted.

6. A substantive hearing listed for four days started on 6 March 2017. On day three, following cross-examination, the Claimant was questioned by the Employment Judge. As a result, it was discovered that she had a diary entry recorded in relation to an important conversation with her manager said to have taken place on 25 May 2016. Pages from a diary were produced immediately, translated and, in significant respects, the entry did not tally with what the Claimant said about the meeting in her witness statement. The Claimant was asked whether she had notes or diary entries in relation to other meetings that were important to her claims, namely meetings on 15 May and 6 June 2016, both of which were described in her witness statement. The Claimant said she did have notes recorded in the diary but these had not been disclosed. Concern was understandably raised by the Respondent's counsel, Ms Moss, who expressed concern to the Tribunal that there might be other diary entries which should have been disclosed.

7. The Tribunal proposed an adjournment so that Ms Moss and the Claimant's representative Mr Kozik, could go through the pages that the Claimant had by way of extracts from the diary in question. However, on putting that proposal to the parties, Mr Kozik said the Claimant wished to withdraw her claim. There was a short adjournment during which Mr Kozik was permitted to take instructions from the Claimant, and, following that, he gave confirmation that the Claimant did wish to withdraw her claims. The claims were accordingly dismissed on withdrawal with a judgment to that effect sent to the parties on 20 March 2017.

8. Following the withdrawal, the Respondent applied for costs against the Claimant on grounds of unreasonable conduct in bringing and conducting the proceedings and because they were said to have been misconceived; and against the Appellant on grounds that the claim was both misconceived and because "*disclosure must have been handled negligently*" (paragraph 17).

9. Representations were made to the Tribunal by Mr Kozik at that stage seeking an adjournment of the application to prepare for and obtain evidence to oppose it. The Employment Judge rejected the application to adjourn, concluding that it would not be within the overriding objective to require the parties to return for a costs hearing sometime in the future, not least because, as the Tribunal recorded at paragraph 13, they were told that the Claimant was intending to return to Poland permanently, and there remained only two days hearing time within which to deal with the matter. The result was that the costs hearing proceeded the following day and, as I understand from Mr Kozik, the Tribunal made clear that it would not hear evidence on the application but would proceed on the basis of submissions alone.

10. The Tribunal recorded the essential submissions made by the Respondent in relation to the two applications it pursued. It summarised what Mr Kozik said in relation to the Claimant's position at paragraphs 19 and 20; and what he said on behalf of the Appellant at paragraph 21. The Tribunal set out the terms of Rule 80 of the **Employment Tribunal Rules of Procedure** relating to wasted costs and also referred to the three stage test set out in of **Ridehalgh v Horsefield** [1994] 3 All ER 848, stating that a Tribunal dealing with a wasted costs application should consider:

> **"26. …**
>
> **First, had the representative acted improperly, unreasonably, or negligently? Second, if so did that conduct cause the party applying for costs to incur unnecessary costs? Finally, would it be, in the circumstances, just to order the representative to compensate the other party for the whole or part of the relevant costs.**
>
> **…"**

There was no further amplification or consideration of the general approach to wasted costs orders by the Tribunal.

11. The Tribunal found that there was conduct in relation to the duty of disclosure which did not meet the standard of competence reasonably to be expected of an ordinary member of the claims management fraternity, particularly one with a solid legal background. The Tribunal regarded it as commonplace for employees to keep diaries or other contemporaneous records and concluded the missing documents could not be regarded as obscure or unusual. Moreover, the failure amounting to negligence was aggravated in this case, the Tribunal held, by reason of the fact that the Claimant did in fact provide some diary entries which would have put any reasonably competent representative on enquiry that there might be other relevant entries.

12. Having reached those conclusions, the Tribunal held at paragraphs 27, 28 and 29 as follows:

> **"27. We therefore find that there was negligent conduct.**
>
> **28. We find that that conduct did cause the respondent to incur unnecessary costs. If the representative had sought and obtained from the claimant the missing diary entries it is likely, in our judgment, that by the standard of a reasonably competent representative the claimant would have been advised to either not pursue the claim or, if commenced abandon it or at the very least to severely limit its scope. Moreover if there had been full disclosure to the respondent it would have been in a position to exert legitimate pressure on the claimant to withdraw by pointing out what may well have been serious discrepancies between her pleaded case and her own contemporaneous documentation.**
>
> **29. The final consideration is whether it would in the circumstances be just to make a wasted costs order. We accept that there must be some speculation as to the likely result of there being full disclosure by the claimant to her representative and then full disclosure by the representative to the respondent. However, we believe that the consequences are sufficiently probable in the way we have described them above to make an order which in the first place only addresses a part of the respondent's actual costs and secondly which represents two thirds only of the amount actually being sought by the respondent.**
>
> **We should add that although Rule 84 permits us to have regard to a paying party's means in the context of a wasted costs order we have not been invited to take into account those means. However, clearly the representative is a Limited company, no doubt with assets. We were told that the claimant on behalf of herself and Mr Tatinger's claim had paid some £13,000 to K L Law Limited in respect of Mr Tatinger's costs and her own."**

13. Accordingly, the Tribunal concluded that a wasted costs order should be made so as to reimburse the Respondent in the sum of £6,300 by way of contribution to its total costs of approximately £16,000.

The Grounds of Appeal

14. The Appellant advances a number of grounds on which it is said the Employment Tribunal erred in law in making the wasted costs order. With respect to Mr Kozik, the Notice of Appeal is diffuse, and I do not propose to set out the grounds identified by it in any detail. It is sufficient to refer to the reasons given by Soole J when he permitted this appeal to proceed to a Full Hearing. He summarised the grounds as raising the following points of challenge:

> **"(1) Procedure: the application being presented to the appellant on the morning of the costs hearing against his client (which was the day after she abandoned her claim); and then dealt with in one immediate stage**
>
> **(2) The necessary element of breach of duty to the court (see e.g. *Persaud v Persaud*): this appears not to have been considered**
>
> **(3) Negligence**
>
> **…**
>
> **(5) Causation: e.g. whether earlier advice to abandon would have been accepted."**

15. The grounds were developed by Mr Kozik. He contends that whilst, ordinarily, a failure by a legal representative to comply with his or her disclosure obligations amounts to a breach of the duty owed to the court or tribunal, in this case the Tribunal did not consider this question at all, and, in circumstances where privilege was not waived by the Claimant, Mr Kozik was hampered in addressing this point appropriately. Secondly, in the absence of evidence about the advice offered to the Claimant about her disclosure obligations and what she needed to do and when, and any particular advice given when the second tranche of disclosure was made by her on 28 February, he submits there was no evidential basis for the Tribunal to conclude that the Appellant's conduct amounted to negligent conduct. Finally, so far as causation is concerned, Mr Kozik submits that even assuming there was negligent conduct, the Tribunal made no finding that the Claimant would have acted on advice not to pursue a claim, and there was no evidential basis for that finding. Mr Kozik submits that if any of those errors of law is made out, each is sufficient to vitiate this decision, and it is unnecessary, therefore, to address the procedural and perversity grounds he relies on (as dealt with in writing).

16. Before setting out the legal principles that apply, it is necessary to deal in a little more detail with the chronology in relation to disclosure. As I have indicated earlier, the Appellant accepted instructions from the Claimant and her partner, Mr Tatinger, in relation to unlawful discrimination claims they wished to pursue against the Respondent. There was a hearing of Mr Tatinger's claim in January 2017. The hearing took place in Sheffield but was adjourned. It reconvened in February 2017. The reason for the adjournment was a need to return to Poland to care for a sick relative, and, as I understand the position, both the Claimant and Mr Tatinger travelled to Poland and remained there until the resumed hearing in Sheffield in February 2017. The hearing resumed on 20 February 2017 and, at that point, the Claimant, Mr Tatinger, Ms Lappa and Mr Kozik were all in Sheffield at the same time.

17. There were after-court conferences each evening that involved the Claimant, Mr Tatinger, Ms Lappa and Mr Kozik. During the course of that hearing period, Ms Lappa spent a considerable amount of time with the Claimant taking her witness statement, and there was discussion about documents disclosed by the Respondent and documents that had by that stage been disclosed by the Claimant (who had sent extracted pages from a diary to the Appellant in accordance with her disclosure obligations).

18. Following the conclusion of the hearing in February 2017, Ms Lappa and Mr Kozik returned to St Albans (where they are based) and the Claimant and Mr Tatinger remained in Sheffield. Given budgetary constraints, neither travelled to the other again, but there was a case-conference using Skype on 28 February 2017. In the course of that, further diary notes were referred to by the Claimant and by email, dated 28 February at 9.53pm, the Claimant sent Ms Lappa a series of documents including, as is clear from their description, a number of extracted pages from a diary. Those additional documents, disclosed very close to the date of the substantive hearing in the Claimant's case, were sent immediately by Ms Lappa to the Respondent, as evidenced by email dated 1 March 2017 timed at 4.09pm from Ms Lappa to the Respondent's solicitors, Clarks Legal LLP.

19. Mr Kozik tells me that privilege has not, at any stage, been waived by the Claimant in relation to legal advice given by him on her claim and in relation to the case. Moreover, while not revealing the nature of the legal advice he gave, he submits that the events support a submission that he gave proper advice on disclosure in circumstances where the Claimant provided copies of documents in January 2017 to the Appellant, which were then disclosed to the Respondent in accordance with standard disclosure obligations and produced additional documents on 28 February. Although before the Employment Tribunal on the wasted costs

application there was some reference to privilege, there was no detailed discussion about it and Mr Kozik was afforded no opportunity to give evidence. He says he told the Employment Tribunal that he was hampered in his dealings with the Claimant by the distance between them and budgetary constraints so that Skype was a convenient way of taking instructions and giving advice.

20. Moreover, the Claimant produced the second tranche of documents very late in the day, and, although he was hampered in what he could say to the Employment Tribunal about the advice he had given in relation to disclosure, including after the second tranche of disclosure, he says he told the Employment Judge that he was not at fault and any fault lay with the Claimant. That is, to some extent, reflected in the summary given by the Employment Judge at paragraph 21 of the submissions made by Mr Kozik on the wasted costs application as follows:

> **"21. … Essentially Mr Kozik blamed his client for not telling him that there were more diary entries than had been provided to him. He explained that because the claimant lived in Doncaster and he was based in St Albans the claimant had never visited his office and that communications between them had been via Skype. It appeared that Mr Kozik would not have met the claimant until the recent hearing of Mr Tatinger's claim in which Ms Marzec was a witness. He contended that his organisation had asked the claimant whether there were any other diary entries but suggested that perhaps the claimant had not understood that request because of her alleged mental state. Mr Kozik pointed out that the respondents had never queried whether there were any other diary entries than those that had been disclosed to them. Mr Kozik said that when he had worked for various solicitors' firms in London it had been common practice not to meet the client but to deal via Skype."**

The Applicable Legal Principles

21. The jurisdiction to make a wasted costs order derives, as the Tribunal recognised, from Rule 80 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**, which provides 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; or**
> >
> > **(b) which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay.**
>
> **Costs so incurred are described as "wasted costs".**

> **(2) "Representative" means a party's legal or other representative or any employee of such representative, but it does not include a representative who is not acting in pursuit of profit with regard to the proceedings. A person acting on a contingency or conditional fee arrangement is considered to be acting in pursuit of profit.**
>
> **(3) A wasted costs order may be made in favour of a party whether or not that party is legally represented and may also be made in favour of a representative's own client. A wasted costs order may not be made against a representative where that representative is representing a party in his or her capacity as an employee of that party."**

22. As Elias P (as he then was) held in **Ratcliffe Duce and Gammer v Binns** UKEAT/0100/08, Rule 80(1) of the **2013 Rules** (or rather its predecessor, Rule 48(3) under the earlier Rules**)** precisely mirrors the definition of wasted costs given in section 51 of the **Supreme Court Act 1981**. Accordingly, the authorities applicable to wasted costs in civil cases generally, are equally applicable in an employment context. The two leading authorities analysing the scope of section 51 and the circumstances in which wasted costs orders can be made are **Ridehalgh** and **Medcalf v Weatherill & Another** [2002] UKHL 27.

23. In **Ridehalgh**, the Court emphasised that the courts should apply a three-stage test when determining whether a wasted costs order should be made. The following three questions should be asked:

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

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

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

However, it is clear from both **Ridehalgh** and **Medcalf**, as applied in an employment context by Elias P in **Ratcliffe**, that it is not enough simply to establish negligent or other impugned conduct alone. It is also necessary for a duty to the court (or tribunal) to be shown to have been breached by the legal representative if he or she is to be made liable for wasted costs: see the

judgment of Sir Thomas Bingham MR in **Ridehalgh**, and **Medcalf** where Lord Hobhouse referred to those observations with approval. In **Persaud v Persaud** [2003] EWCA Civ 394, the Court of Appeal described this requirement as a need to establish something akin to an abuse of the process of the Court.

24. These cases emphasise the importance of not undermining or putting obstacles in the way of a legal representative fulfilling his or her duty to present the lay client's case in the best way possible, even if it is thought hopeless and even if advice has been given that the case is unlikely to succeed. A wasted costs application inevitably gives rise to the potential for a conflict of interest between a legal representative and the lay client, and legal representatives ought not to be penalised for presenting their client's case when instructed to do so.

25. Moreover, if the wasted costs application is disputed, save in the most obvious case, whether conduct is unreasonable, improper or negligent is likely to turn on what instructions the client gave and what advice the representative provided. Both are covered by legal professional privilege that can only be waived by the client. Where it is not waived, privilege may make it difficult or impossible for a legal representative to provide a full answer to the complaint made against him or her. Where there is doubt in such cases, the legal representative is entitled to the benefit of that doubt (see **Ridehalgh**).

The Appeal

26. Mr Kozik submits that there was no attempt whatever by the Employment Tribunal to determine whether there was a breach of duty or something akin to an abuse of process by Mr Kozik in the failure to disclose the diary entries on the basis for example, that he knowingly made incomplete disclosure of documents or lent his assistance to the Claimant in knowingly

avoiding her disclosure obligations. Rather, the Employment Tribunal held that there was negligent conduct and simply moved to the question of causation.

27. Legal representatives undoubtedly owe duties to the court or tribunal in relation to disclosure obligations, but it cannot simply be assumed where there has been a failure in disclosure, that there was either negligence on the part of the legal representative concerned or that the failure in disclosure was a failure by the legal representative in his or her duty to the court. I agree with Mr Kozik that the failure to address these issues was an error of law sufficient to vitiate this judgment.

28. A particular difficulty in dealing with this application is that the question whether or not Mr Kozik was negligent turned on what instructions were provided by the Claimant and what advice he gave. In a case where privilege is not waived, the difficulty for the legal representative is in providing a full answer to the complaint made against him. This was recognised in **Ridehalgh** where the Master of the Rolls held it will be a very exceptional case where a court will be entitled to infer that a legal representative is abusing the process of the court by pursuing a hopeless case; and where there is room for doubt, legal representatives are entitled to the benefit of that doubt. Here, privilege was not waived.

29. At paragraph 23 the Employment Tribunal made findings about failure to give full disclosure on the part of the Claimant, holding as follows:

> **"23. …**
>
> **We were however much more concerned about the clear failure to make full disclosure of relevant documents. Whilst we considered that the greater fault lay with the claimant's representative, the failure as alleged by her representative of the claimant to provide all the documentation to the representative had contributed to the ultimate failure to discharge the duty of disclosure. In this regard, whilst we accept that the claimant is a lay person we have also been told that she is someway through a five year masters degree in Law in Poland. As an obviously intelligent person with some legal background we fail to see how she could have considered diary entries about meetings or events where she profoundly disagreed with the respondent's documentation as anything other than highly relevant documents."**

Further, as indicated, at paragraph 21 the Tribunal recorded the fact that Mr Kozik blamed his client for the failure and also referred to the fact that he was hampered by logistical difficulties in communications. It is also clear from paragraph 21 that Mr Kozik's position was that proper advice was given about disclosure and the importance of providing relevant documents.

30. In these circumstances it seems to me that there was not only no evidential basis for an inference that the failure in disclosure was a breach of duty or an abuse of process by the Appellant, but it is difficult to see how the Tribunal could conclude that there was negligent conduct on Mr Kozik's part in relation to disclosure. For all the Tribunal knew, Mr Kozik gave full and clear advice about disclosure and the importance of providing all relevant documents. For all the Tribunal knew, when the second tranche of disclosure was provided on 28 February, further clear advice was given about the need to go back and check that there were no other diary entries relevant to the case that had not been disclosed; and for all the Tribunal knew, in those circumstances, Mr Kozik fully discharged his own duty to the Tribunal and was not a knowing or reckless participant in the disclosure failings.

31. In addition, as Mr Kozik submits, since the Employment Tribunal made no finding that the Claimant would have withdrawn whatever advice she received, and since there was no evidence that the Claimant would have withdrawn even if advised to do so, there was no basis for inferring that costs had been unnecessarily incurred by the Respondent as a consequence of the negligent conduct. It is as likely as not that the Claimant would have proceeded, notwithstanding negative advice about her prospects, and that even if disclosure had been given at an earlier stage, the Respondent would have been put to the cost and expense of defending these proceedings in any event.

32. Unlike the position where an ordinary costs order is made, where there is no need to fix the amount by reference to the additional costs actually resulting from unreasonable conduct, where a wasted costs order is made, the actual loss flowing from the impugned conduct should as far as possible be calculated. Here, the Tribunal could not have known whether Mr Kozik gave advice that the Claimant had a poor or hopeless case and could not have known whether such advice was ignored. In the circumstances, if the Claimant might have continued the action in any event and there was no evidence to the contrary, no costs could have been wasted. Mr Kozik says he was hampered in what he could say in this regard too, because he could not reveal to the Tribunal what advice on prospects or merits was given to the Claimant. Accordingly, so far as causation is concerned, here too there was an error of law.

33. In light of those conclusions, it seems to me that it is unnecessary to deal with the remaining grounds of appeal (including the ground relying on unfair procedure). I make this observation, however. A wasted costs order is an order that should be made only after careful consideration and any decision to proceed to determine whether costs should be awarded on this basis should be dealt with very carefully. A wasted costs order is a serious sanction for a legal professional. Findings of negligent conduct are serious findings to make. Furthermore, even a modest costs order can represent a significant financial obligation for a small firm. Tribunals should proceed with care in this area.

34. Although I can understand this Tribunal's desire to avoid an adjournment or hold a future hearing in circumstances where it was possible or even certain that the Claimant would be returning to Poland, it seems to me the interests of justice mean it would have been preferable to allow an adjournment here. This would have enabled the Appellant to prepare to

A resist the application, produce evidence and consider its position, together with any potential conflict it had so far as the Claimant was concerned.

B 35. It follows, in my view, that the appeal should be allowed because the Employment Tribunal failed to apply the correct legal principles in determining that wasted costs should be awarded, by failing to consider the question of breach of duty to the Tribunal altogether. The evidence did not and could not support a conclusion in these circumstances that the Appellant C was in breach of duty or that the conduct was negligent in any event. Further, and separately the Tribunal failed to deal properly with the question of causation. These errors mean the wasted costs order cannot stand and must be set aside. Even if the correct principles were D applied, it seems to me that the application could not have succeeded in the circumstances I have described, because there was no basis for making a wasted costs order here, and there is therefore nothing to remit to the Employment Tribunal for re-hearing.

E 36. For all those reasons, accordingly the appeal is allowed and the wasted costs application pursued by the Respondent against the Appellant is dismissed.

F

G

H