EMPLOYMENT TRIBUNALS

Claimant: **Mrs G Ingham**

Respondent: **Walton Bannus Estates Ltd**

WASTED COSTS APPLICATION

Heard at: **Leicester** **On:** **Thursday 27 April 2018 and 1 August 2018 (in chambers)**

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

Representation:

For Mr Kalaher/Headleys Solicitors: **Mr T Perry of Counsel**
For the Applicant (Walton Bannus Estates Ltd): **Mr D J Meichen of Counsel**

JUDGMENT

The application for wasted costs against Headleys Solicitors is granted in part. The firm is ordered to pay the Applicant the sum of £695.00.

REASONS

Background

1. This hearing was to consider an application for wasted costs made by the Applicant (Walton Bannus Estates Ltd) against Mr Paul Kalaher of Headleys Solicitors, Lutterworth, the firm which acted for the Claimant in the substantive proceedings. The application was made under Rule 80 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ('the Tribunal Rules') and was supported by a costs schedule. This showed that the costs incurred by the Applicant in defending this matter were nearly £10,000. The claim for wasted costs was for over half that amount, namely £6,000.

2. The history of the matter is that the claimant, Mrs Ingham, presented a number of complaints to the Tribunal against the Applicant (a firm of estate agents) on 8 June 2017. The claim form named Mr Kalaher, acting on behalf of Headleys Solicitors, as the Claimant's representative and he represented her throughout these proceedings. I was told by Mr Perry that Mr Kalaher has been qualified as a Solicitor for some 20 to 30 years and that he is an employee of Headleys.

3. The claim form indicated that the Claimant had been employed by the Applicant from 1 July 2013 until 31 January 2017 and that she was bringing the following claims:-

(i) a claim for a statutory redundancy payment;
(ii) a claim for 'contractual notice period, as yet unpaid' (albeit the box in section 8.1 of the claim form, indicating a notice pay claim, had not been ticked);
(iii) a claim for damages 'in respect of bullying and harassment which caused me illness which is ongoing';
(iv) a claim for failure to pay commission; and
(v) a claim for a 'basic award'. Bearing in mind that the claim form was presented by a firm of Solicitors, the reference to the basic award clearly suggested an unfair dismissal claim, although no particulars of any such claim were included in the claim form.

4. All claims were apparently presented in time due to the 'stop the clock' effect of the ACAS early conciliation procedure.

5. As far as the claim for bullying and harassment was concerned, no further particulars were given beyond those stated in paragraph 3(iii) above. In particular the claim form did not name the alleged perpetrator or give details of the circumstances in which the bullying was alleged to have occurred. Equally there was no indication that the alleged bullying related to a protected characteristic under the Equality Act 2010. The legal basis for this claim was therefore completely unclear.

6. The matter was treated by the Tribunal as a 'short track case' and was set down for a one hour hearing to be held on Friday 11 August 2017.

7. The deadline for the Applicant (i.e. Walter Bannus Estates Ltd) to submit a response to the claim was 17 July 2017. At 13.30 on 17 July 2017 Mr Kalaher sent an email to the Tribunal advising that he had not received a response and applying for a default judgment on liability to be issued. However, at some point on 17 July 2017 the Applicant submitted a timely response to the Tribunal. Accordingly, no default judgment was issued.

8. The response indicated that the Applicant was defending the claim and named Ms Imogen Hamblin of Nelson's Solicitors, Nottingham as its representative. The response also stated that the Claimant had been paid a statutory redundancy payment in the sum of £1583.51 on 31 January 2017 and requested further details of the bullying and harassment claim, complaining that it had not been properly pleaded. In addition, the response contained two paragraphs denying liability for unfair dismissal and arguing, in the alternative, that if the dismissal was procedurally unfair then compensation should be reduced on the grounds of contributory conduct

and/or under the principle in Polkey v AE Dayton Services Ltd [1987] ICR 142 on the basis that the Claimant had allegedly received referral fees directly into her bank account. This was further alleged to have been a 'serious act of misconduct' which would have entitled the Applicant to dismiss her in any event.

9. Mr Kalaher wrote to Ms Hamblin on 27 July 2017, responding to a number of points in the response. His answer to the complaint that the bullying claim had not been pleaded properly was as follows: 'Point taken. We attach a medical report and shall prepare a witness statement to prove causation'. However, Miss Hamblin took the view that the medical report contained nothing to suggest that the Claimant satisfied the definition of disability in the Equality Act 2010. She was therefore still at a loss to understand the basis of the bullying claim and reiterated her request for further and better particulars.

10. Having heard nothing further, on 7 August 2017 Ms Hamblin applied for the final hearing (listed for 11 August 2017) to be converted to a Preliminary Hearing. It is evident from her letter of application that her prime concern was the discrimination claim and the fact that less than a week before the final hearing was due to go ahead the Claimant had still not provided further and better particulars, despite her requests. As a result, the Applicant was simply not in a positon to respond to the allegations. As she put it:

"… the Claimant's representative intends for the Tribunal Judge to determine unknown issues relating to bullying and harassment at the hearing on 11 August… we would respectfully request that this matter is relisted as a directions hearing so that we may address these issues in the proper way, before any further costs are incurred…'

The letter of application also put Mr Kalaher on notice that if the Applicant did not receive full particulars of the allegations of 'bullying and harassment' then the Applicant intended to make an application for wasted costs. The letter also repeated the assertion in the response that a redundancy payment had already been made to the Claimant. In addition, it contained a concession that notice pay was owing and stated that an offer to pay £1300.00 had been made.

11. On 8 August 2017 Mr Kalaher wrote to Ms Hamblin providing further details of the commission claim. Amongst other things the letter made reference to unpaid commission for Solicitor referrals.

12. The application to convert the hearing was granted and accordingly a telephone Preliminary Hearing went ahead at 3pm on 11 August 2017, conducted by Employment Judge Ahmed. Shortly before the hearing was due to start Mr Kalaher sent a flurry of documents to Miss Hamblin. The first was a schedule of loss sent at about 11am that morning, which stated that the total value of the claim was some £56,160. This figure included a basic award, suggesting that the Claimant was still pursuing a claim for unfair dismissal. It also contained a claim for £20,000 by way of injury to feelings for discrimination, together with a claim for over £37,000 for loss of wages/future loss, indicating that the Applicant was facing a substantial discrimination claim.

13. The schedule was followed at 12.23pm by the Claimant's agenda for the Preliminary Hearing. This contained a concession that a redundancy payment had been made to the Claimant. In addition, it listed the remaining complaints as being "contractual notice pay, unpaid wages by way of commission and bullying and harassment'. There was no mention of unfair dismissal.

14. The Claimant also sent the Applicant a number of emails before the Preliminary Hearing. One, sent at 12.43pm, informed the Applicant that the Claimant would be applying to join a director of the Applicant, Mr McDonagh, as an individual party to the bullying and harassment claim. No further particulars were given save for an allegation that Mr McDonagh had 'caused the ill-health of the Claimant'. Another, sent at 12.59pm, referred to the Applicant acting 'aggressively' but also asked whether Mr McDonagh wished to settle the matter.

15. At the preliminary hearing the Claimant was represented by Mr Kalaher and the Applicant by Ms Hamblin. The minutes of that hearing record that:

15.1 Judge Ahmed explained that the Tribunal has no jurisdiction to hear a stand-alone complaint of bullying and harassment unless it arises in relation to one of the protected characteristics set out in the Equality Act 2010. Accordingly, Mr Kalaher accepted the Claimant could not proceed with this claim and did not pursue the application to join Mr McDonagh;

15.2 it was agreed that the Applicant would pay the sum of £1300.00 to the Claimant 'representing the contractual/statutory notice pay which the Claimant was entitled to upon termination of employment' (I understand that this sum was paid to the claimant a few days later);

15.3 it was further agreed that a redundancy payment had been made in the correct amount, with the result that that claim was satisfied.

15.4 it was agreed that there was only one outstanding claim, relating to the alleged failure to pay commission. (The claim for unfair dismissal was not referred to expressly in Judge Ahmed's summary of the discussion, but it is clear that no such claim was pursued after this hearing).

15.5 Judge Ahmed noted that 'it was not clear…whether the outstanding commission is pleaded as a breach of contract claim or as a claim for unlawful deduction of wages'. He therefore ordered the Claimant to provide further particulars of that claim (including both the legal and factual basis of the claim) by 25 August 2017. In addition, the parties were ordered to provide mutual disclosure of documents by 6 September 2017 and the matter was set down for a final hearing on 25 October 2017.

16. The Claimant provided further particulars in relation to the claim for commission on 29 August 2017 (some four days late). These stated that the Claimant's entitlement was derived from 'terms of the employment to which the Respondent acquiesced by reason of trade custom and practice and conduct throughout the Claimant's period of employment'. Mr Kalaher also sent Ms Hamblin a detailed schedule of loss, claiming £1592 by way of compensation.

17. Having reviewed the Claimant's documentation, the Applicant informed Mr Kalaher on 5 September 2017 that it accepted that £203.18 was owed to the Claimant in commission payments, a sum that was later paid to the Claimant.

However, the Claimant continued to maintain that a further £1388.71 was outstanding.

18. The Applicant provided disclosure of a number of documents on 5 September 2017. However, the Claimant disputed that full disclosure had been made and on 8 September 2017 Mr Kalaher applied to the Tribunal for an order that the Applicant disclose further documents, including certain sales invoices and cash receipts. The Applicant maintained that full disclosure of relevant documents in its possession or control had been given, alleging that the Claimant had destroyed information on the Applicant's database before leaving the organisation with the result that no further documentation could be provided. There then followed a number of email exchanges between the parties on this issue, the Claimant maintaining that it was impossible to delete some of the relevant documents from the Respondent's data base. During this exchange Mr Kalaher stated that he believed that Nelsons Solicitors had seen relevant documents 'some time ago', which Miss Hamblin took as an attack on her professional integrity. Employment Judge Britton dealt with the matter on 25 September 2015 and ordered the Applicant to provide discovery of all the documents requested by the Claimant, on the basis that 'all the discovery requested… by the Claimant's representative is relevant'. Disclosure of some further documents (bank statements) was made by the Applicant on 9 October 2017, but it continued to maintain that any further documents had been destroyed by the Claimant and so were no longer in its possession or control.

19. In the meantime, on 22 September 2017, the Applicant applied for the commission claim to be struck out under Rule 37 of the Tribunal Rules on the basis it had no reasonable prospect of success and/or that the manner in which the proceedings had been conducted had been scandalous, unreasonable or vexatious. It also applied for a wasted costs order against Mr Kalaher under Rule 80(1) on the basis that the proceedings had been conducted in an 'irregular manner'. The application listed various alleged defects in the way the claim had been pursued by Mr Kalaher.

20. On 13 October 2017, before that application could be dealt with, the case settled via ACAS. Subsequently, on 24 October 2017 and then again on 28 December 2017, the Applicant's Solicitors confirmed that the Applicant intended to pursue the application for wasted costs and a hearing in this matter was ultimately held before me on 27 April 2017. Unfortunately, due to the number of hearings in the list that day, there was not time to give judgment, which was reserved.

The relevant law

(i) The Tribunal Rules

21. The powers of an Employment Tribunal in relation to wasted costs applications are set out in rules 80 to 84 of the Tribunal Rules. Under Rule 80(1) of the Tribunal Rules '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 light of any such act or omission occurring after they were

> incurred, the Tribunal considers it unreasonable to expect the receiving party to pay.'

It is clear that under Rule 80(1)(a) there must be a direct causal link between any impugned behaviour and the costs in question. Demonstration of such a link is therefore essential if a wasted costs application is to succeed.

22. Rule 81 details the extent of the wasted costs jurisidiction:-

'a wasted costs order may order the representative to pay the whole or part of any wasted costs of the receiving party, or disallow any wasted costs otherwise payable to the representative, including an order that the representative repay to its client any costs that have already been paid.'

There is no limit on the amount of wasted costs that can be awarded by the Tribunal.

23. Rule 82 then sets out the procedure that has to be followed in such cases, stating that:-

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

Rule 84 also provides that when considering whether to make an order, or the amount of the order, the Tribunal may have regard to the representative's ability to pay.

24. In this case the Applicant had clearly made a timely application and the Judge was satisfied that the Claimant had been informed of the application in accordance with Rule 82. As far as procedure at the hearing was concerned I heard submissions from both Mr Meichen (for the Applicant) and Mr Perry (for Mr Kalaher) which, in Mr Perry's case, were supplemented by a written skeleton argument. Although invited to do so, Mr Perry made no representations about ability to pay. Nor did he take issue with any of the figures set out in the Applicant's schedule of loss. Neither Mr Kalaher nor the Claimant attended the hearing and Mr Kalaher did not provide a witness statement.

(ii) Relevant case-law

25. The Tribunal Rules dealing with wasted costs are based on the regime in the civil courts. Indeed, the definition of wasted costs set out in Rule 80 is identical to that in section 51(7) of the Senior Courts Act 1981. As a result, authorities dealing with wasted costs in the High Court (in particular the guidance given by the Court of Appeal in Ridehalgh v Horsefield [1994] 3 All ER 848 CA and the House of Lords' decision in Medcalf v Mardell and ors [2002] 3 All ER 72) are relevant when a Tribunal is considering this issue: see Ratcliffe Duce and Gammer v Binns

UKEAT/1900/08. The principles in those cases establish that the wasted costs jurisdiction should be exercised 'with great caution and as a last resort'. They also establish the following three-stage test:-

a) has the legal representative of whom complaint is made acted improperly, unreasonably or negligently?

b) if so, did such conduct cause the applicant to incur unnecessary costs?

c) if so is it, in all the circumstances, just to order the legal representative to compensate the applicant for the whole or part of the relevant costs?

26. The Court of Appeal considered the meaning of 'improper, unreasonable and negligent' conduct in the Ridehalgh case. According to the Court, 'unreasonable' describes conduct that is vexatious and designed to harass the other side rather than advance the resolution of the case and it makes no difference that the conduct is the product of excessive zeal rather than an improper motive. The acid test is whether the conduct permits of a reasonable explanation. By contrast 'negligent' should be understood in a non-technical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession. This is no less a standard than would have to be proved in an action for negligence. Those definitions were subsequently approved by the House of Lords in Medcalf.

27. It is clear from cases such as Ridehalgh that a legal representative who pursues a hopeless claim that is plainly 'doomed to fail' should not, on that basis alone, be held to have acted improperly, unreasonably or negligently. After all, clients often insist that a case be pursued, even though their lawyer advises against such a course of action. It is only if there has been conduct on the representative's part that amounts to an abuse of process that the first part of the three-stage test set out above will be satisfied.

28. One practical difficulty in this area arises from the principle of legal professional privilege. This rule of evidence ensures that, as a general rule, evidence of communications between a lawyer and his client are not admissible in evidence before the Tribunal. The privilege is that of the client rather than the lawyer. This means that, unless the client waives privilege (which did not happen in this case), it may be impossible for the representative to give the Tribunal all relevant background information. As a result, when the Tribunal is assessing whether there has been 'improper, unreasonable or negligent' conduct on the part of a representative, it must make full allowance for the fact the representative may not be able to tell the full story and should therefore give the representative the benefit of the doubt. As the Court of Appeal put it in Ridehalgh, it is 'only when, with all allowances made, a lawyer's conduct of proceedings is quite plainly unjustifiable that it can be appropriate to make a wasted costs order.' The same point was made in Medcalf by Lord Bingham. He stated that:-

‘… only rarely will the court be able to make full allowance for the inability of the practitioner to tell the whole story or to conclude that there is no room for doubt in a

situation which, of necessity, the court is deprived of access to the full facts on which, in the ordinary way, any sound judicial decision must be based'.

He therefore stressed that the effects of legal professional privilege make it very difficult to find the third test in Ridehalgh satisfied (that it is just in all the circumstances to make an award) because there may often be some relevant fact that the practitioner is restrained from mentioning due to privilege.

The Applicant's submissions

29. As Mr Meichen explained at the hearing, the Applicant was not basing its application on the ground that the claim had been hopeless or doomed to fail (indeed it would have been very difficult to do so given that the Applicant had conceded the notice pay claim and at least some liability in respect of commission payments). Instead it was the Applicant's case that Mr Kalaher had acted unreasonably and/or negligently in the preparation and conduct of the case, thereby causing the Applicant to incur wholly unnecessary costs, and in such circumstances it was just to make an award.

30. In this regard Mr Meichen stressed that Mr Kalaher had, from the outset, failed to analyse and formulate the claim properly, giving the Applicant to understand that it was facing a substantial discrimination claim (and possibly an unfair dismissal claim as well). Yet in essence this was simply a claim for notice pay and commission. The failure to make that clear from the outset resulted in the litigation being far more protracted than it need have been, which substantially increased the Respondent's costs.

31. Mr Meichen placed considerable reliance on the case of Wilson's Solicitors v Craig Johnson and ors UKEAT/0515/10. The claim form in that case was described by Underhill J in the following terms:-

> 'Although [the] broad outline is clear enough, there are a number of obscurities about precisely how the claim is put and very little detail of any kind is pleaded. As for the claims of discrimination, these are frankly obscure...'

A case management discussion ("CMD") was held. However, according to the Employment Judge who presided at that discussion, Mr Wilson (Solicitor for the claimants) was still 'unable... to provide any further details or clarity'. As she explained:-

> 'Mr Wilson failed to prepare himself adequately for the Case Management Discussion...He was not in a position to discuss precisely what was being claimed or define what the factual and legal issues were, and the proposed amended particulars of claim did not assist but rather created further confusion.'

32. As a result, the CMD had to be abandoned and the Judge subsequently ordered the claimants' representative to pay the respondents wasted costs of some £1063 in relation to the CMD. She also ordered the claimants' representative to repay the costs incurred by the claimants in relation to the CMD. On appeal, the

EAT upheld those awards, holding that the Judge had been entitled to lay the blame for the failings at the CMD at the representative's door. Noting that the claimants in the case had not waived legal professional privilege, Mr Justice Underhill stated:-

'The question remains whether ... the Judge was entitled to assume that the defects in the presentation of the case were Mr Wilson's fault rather than his clients. That might be a fair point in a case where criticism of the representative was that he or she had been pursuing a hopeless case: in such a case it will generally be unfair to make any assumptions about responsibility. But this was a case of a different kind. The Judge's criticism... was of defects in the pleadings and Mr Wilson's inability at the CMD to rectify those defects by clarifying the nature of his clients' case. No doubt in principle such failings could still be the fault of the client; but more typically they are the fault of the lawyer and result from failure to put the necessary work or thought into the preparation of the case. A judge will normally be well-placed to recognise failings of the latter kind... The defects in the pleadings – both in their original and amended form - were not of a kind which would typically flow from failures by the client: they were failures of analysis and accurate information. Mr Wilson, as we have said, raised no question about his responsibility for the defects: rather he denied they existed. In those circumstances the Judge was in our view entitled to treat them as resulting from his negligence.'

33. According to Mr Meichen, the conduct of Mr Kalahar was on a par with that in the Wilson case. The allegation was that Mr Kalahar had not put in the necessary work or thought in preparing the case, with the result that the claim form was ‘incoherent’. It was further argued that he subsequently failed to clarify the nature of his client’s case in timely fashion. These were failures of 'analysis and accurate formulation' which had led directly to his client to incurring unnecessary costs and it was therefore just that an order for wasted costs be made. In pursuit of this argument Mr Meichen identified a number of 'key defects' in the presentation of the Claimant's case, which largely mirror those set out in Miss Hamblin’s letter of application of 22 September 2017. These are dealt with in detail below.

Submissions on behalf of Mr Kalaher

34. For his part Mr Perry, on behalf of Mr Kalaher, made a number of general points about the application. Firstly, he suggested that the costs incurred by Nelsons on behalf of the Applicant were unfeasibly high and that this application was no more than a ‘blatant attempt’ to recover a large proportion of these costs (bearing in mind that the substantive claim was ultimately a meritorious claim which the Applicant had settled, acknowledging liability for notice pay and, at least in part, for commission).

35. Secondly, he stressed that it was necessary to view the matter in context. The claim form was presented on 8 June 2017. There was then a Preliminary Hearing on 11 August 2017. This, he claimed, was effective in narrowing the issues between the parties, as a result of which it was agreed that there was only one outstanding claim. Further particulars of the commission claim were provided by Mr Kalaher on 29 August 2017. This was slightly out of time but in all, the circumstances the delay was *de minimis*. A dispute over disclosure then followed. This took nearly three weeks to resolve and was finally determined by Judge Britton

on 25 September 2017. The matter settled shortly afterwards on 13 October 2017, just four months after the claim began. In Mr Perry's submission, to the extent there was any delay in resolving the matter, this resulted from the dispute over disclosure rather than any conduct on Mr Kahaler's part. Certainly, given that dispute, it was difficult to see how the matter could possibly have been resolved by 11 August 2017, as Mr Meichen suggested.

36. Thirdly he stressed that the doctrine of legal professional privilege prevented the Tribunal from having a full understanding of the nature of the instructions given to Mr Kalaher and the reasons why he acted as he did. He therefore submitted it could not be shown that Mr Kalaher had acted either unreasonably or negligently and in any event the Applicant had failed to show that any such conduct had caused unnecessary costs.

37. Finally, in his submission the application arose as a result of a rather fractious dispute over disclosure. In these circumstances it would not be just to make a wasted costs award.

Applying the law to this case

38. In coming to my decision, I applied the three stage test in Ridehalgh.

(1) Had Mr Kalaher acted unreasonably or negligently?

39. As noted above, Mr Meichen highlighted a number of 'key defects' in Mr Kalaher's presentation and conduct of the case which he argued amounted to unreasonable and/or negligent acts. I will deal with each in turn.

The poor drafting of the claim form which meant the Applicant could not be sure of the case it had to meet.

40. Mr Meichen pointed to a number of alleged defects in the claim form, which he maintained amounted to unreasonable or negligent conduct on Mr Kalaher's part. These were (i) the wrongful inclusion of a claim for redundancy pay, (ii) the confusing and contradictory statements in relation to notice pay, (iii) the reference to a claim for a basic award despite the fact that the box indicating an unfair dismissal claim had not been ticked and (iv) the fact that the claim for commission did not make it clear that referral fees were included in the claim. (Mr Meichen also drew attention to the failure to particularise the claim for bullying and harassment and the misleading reference to the unfair dismissal basic award but I deal with those issues separately at paragraphs 46 to 51 below.) Mr Perry accepted that the claim form was 'muddled' but that this was nothing more than the 'very common, slightly confused progress of a claim' and certainly did not justify a wasted costs award.

41. In my view, the claim form was certainly poorly pleaded. However, so far as the inclusion of the redundancy pay claim is concerned, the effect of legal professional privilege is such that it is not possible to lay the blame for the inclusion of this claim at Mr Kalaher's door. It is entirely possible that he included the redundancy claim in good faith, on the basis of the instructions given to him by his client. As far as the notice pay claim is concerned, the particulars of claim clearly

refer to ‘the contractual notice period, as yet unpaid’. In those circumstances the fact that the box indicating a notice pay claim is not ticked is, in reality, unlikely to have caused any real confusion, particularly as the Applicant acknowledged in its grounds of resistance that the Claimant was given 4 weeks’ notice ending on 31 January 2017 (para 5) but only received her salary to 31 December 2016 (para 7).

42. Similarly, I do not find the failure to particularise the commission claim at this early stage to be either unreasonable or negligent. It is common for such a claim to be pleaded in general terms in the claim form and for further and better particulars to be provided or ordered in due course (as happened later in this case). The important point is that the Applicant had been put on notice that it was facing such a claim. The fact that further details were not provided at this early stage cannot justify a wasted costs award.

The failure to withdraw the redundancy pay claim until the Preliminary Hearing on 11 August 2017

43. Mr Meichen pointed out that the response, which was served on the Claimant's representatives on 18 July 2017, clearly stated that a redundancy payment had been paid into the Claimant’s bank account on 31 January 2017. In Mr Meichen’s submission this information should have prompted the Claimant to withdraw the claim for redundancy pay promptly, yet it was not until the Preliminary Hearing some three and a half weeks later that this occurred.

44. In my view this does not justify a finding of unreasonable or negligent behaviour on Mr Kalaher’s part. Whilst three and a half weeks does, on the face of it, seem a long time to clarify whether payment had been made, the doctrine of legal privilege prevents disclosure of the full picture. At the very least, Mr Kalaher would have had to take further instructions from his client and it is always possible that Mrs Ingham took her time in reporting back to him. In any event I am not persuaded that the delay in withdrawing the claim caused any wasted costs – certainly Mr Meichen did not point to anything in particular.

The premature application for a default judgment

45. I accept that Mr Kalaher had ‘jumped the gun’ in applying for a default judgment in this case and so may be accused of being over zealous, but I do not accept that this action was either unreasonable or negligent. In any event, as Mr Meichen accepted, it did not cause any wasted costs.

The confusion engendered by the claims for unfair dismissal and for bullying and harassment.

46. As noted above, the claim form referred to a claim for ‘damages in respect of bullying and harassment’ which had resulted in ‘ongoing illness’. Unsurprisingly in those circumstances the response contained a request for further and better particulars of the bullying and harassment claim.

47. The Applicant argues that the request was simply ignored. However, as noted above, there is an email to Ms Hamblin of 27 July 2017 (which the Applicant

may have overlooked) in which Mr Kalaher directly addresses this point, attaching a medical report by way of further information and stating that he would be preparing a witness statement to prove causation. It is therefore not the case that Mr Kalaher ignored the request. However, as noted above, his response did not prove to be particularly helpful. The medical report failed to advance matters or identify a justiciable complaint and Miss Hamblin therefore remained at a loss to understand the basis of the claim. This was the main reason for her application that the hearing on 11 August 2017 be converted to a Preliminary Hearing, as her letter of application demonstrates. She was very concerned that the Applicant would not be in a position to respond to the bullying claim if the final hearing went ahead as planned.

48. Her application having been granted, the matter was discussed at the Preliminary Hearing on 11 August 2017. It appears from Judge Ahmed's summary of the discussion that the confusion over the bullying claim arose because Mr Kalaher was unaware that it is impossible to bring a personal injury claim in the Tribunal. Judge Ahmed's summary states as follows:-

"I explained to Mr Kalaher for the Claimant that the Tribunal has no jurisdiction to hear a standalone complaint of bullying and harassment, other than in relation to a protected characteristic under the Equality Act 2010 ("EA 2010'). It is confirmed that there is no complaint in relation to any protected characteristic under the Equality Act 2010. Therefore, the complaint cannot be pursued in the Employment Tribunal… Any such claim must be pursued in the ordinary courts.'

49. This then is not a case where it is impossible to obtain the full picture because of legal professional privilege. On the contrary the evidence before me is that there was a clear failure of understanding on Mr Kalaher's part (a failure that was further manifested in the schedule of loss sent to the Applicant on the morning of the preliminary hearing which included a claim for £20,000 by way of compensation for discrimination). This case is therefore similar to the Wilson case in that this defect in the pleadings does not flow from a possible failure on the part of the client. On the contrary it was a failure of analysis by Mr Kalaher. I therefore conclude that in bringing the bullying claim against the Applicant Mr Kalaher had failed to act with the competence reasonably to be expected of ordinary members of the solicitors' profession. He was holding himself out as being competent to conduct proceedings in the Employment Tribunal and in those circumstances could be expected to be aware of this basic point. In my view he was clearly negligent in this regard. (I deal below with the question whether this act of negligence caused any costs to be incurred and whether it would be just to make any award.)

50. I have considered whether the reference to a 'basic award' in the claim form also constituted negligence. This clearly (and understandably) created confusion by suggesting there was an unfair dismissal claim, even though no such claim was particularised and there was no tick in the box indicating that the claimant was bringing such a claim. As noted above, the Applicant therefore included two paragraphs in the response denying liability for such a claim. Mr Kalaher subsequently wrote to Miss Hamblin on 27 July 2017 responding to the Applicant's grounds of resistance. However, he failed to clarify the position in relation to the unfair dismissal claim. Confusion was further increased by the schedule of loss which Mr Kalaher sent to Miss Hamblin shortly before the Preliminary Hearing. Like

the claim form, this suggested that there was an unfair dismissal claim - yet only an hour and a half later Mr Kalaher sent Miss Hamblin an agenda which confirmed the Claimant was not, after all, pursuing such a claim.

51. All this was highly unsatisfactory from the Applicant's point of view. However, bearing in mind the caution that has to be exercised in light of legal professional privilege, I do not feel there is sufficient evidence to find that Mr Kalaher acted unreasonably or was negligent in this regard. Bearing in mind that the Claimant had sufficient continuous employment to bring an unfair dismissal claim, I simply do not know what Mr Kalaher's instructions were and how much of the blame for this state of affairs can be laid at his door. There is clearly a danger that I do not have all the relevant facts and so, bearing in mind Lord Bingham's comments in Medcalf, I have to give Mr Kalaher the benefit of the doubt. As a result, I do not find that he was negligent or acted unreasonably in this regard.

Inadequacies in the Claimant's agenda for the Preliminary Hearing

52. Mr Meichen argued that there were a number of failings in the Claimant's agenda which was sent to the Applicant shortly before the Preliminary Hearing on 11 August 2017. For example, Mr Kalaher requested disclosure 'of all documentation concerning the Respondent's business and the Claimant's employment' – which in Mr Meichen's submission was clearly a 'fishing expedition'. Mr Meichen also alleged that Mr Kalaher defined the issues in the case in hopelessly wide terms, namely whether there were 'sums due to the Claimant in respect of her employment and whether or not the Claimant is entitled to further relief arising from bullying and harassment'.

53. On the other hand, viewing the Claimant's agenda as a whole, I noted that it contained a concession that a redundancy payment had been made to the Claimant, confirmed that there was no unfair dismissal claim, set out a suggested timetable for the preparation of the case for a final hearing and stated that the Claimant was interested in judicial mediation. Overall it therefore advanced matters and so I do not accept that the preparation of this document amounted to unreasonable or negligent conduct on Mr Kalaher's part. In any event there was no evidence that the contents of the agenda had resulted in any costs being wasted, a point conceded by Mr Meichen when I put it to him.

The application to join Mr McDonagh as an individual respondent

54. Mr Meichen argued that notice of the application to join Mr McDonagh as an individual respondent in the main proceedings, which was made shortly before the Preliminary Hearing, was wholly inappropriate given that there was no basis for the bullying and harassment claim. It was therefore a clear example of unreasonable and/or negligent conduct by Mr Kalaher. For his part Mr Perry made the point that it was not unusual for individual respondents to be added to claims. He also stressed that the application to join Mr McDonagh was not pursued once Judge Ahmed had explained that the bullying claim could not be heard in the Tribunal. In Mr Perry's submission in those circumstances it could not amount to either unreasonable or negligent conduct.

55. Having considered the matter I am of the view that Mr Kalaher's action in applying to join Mr McDonagh was part and parcel of the futile attempt to bring a free-standing bullying and harassment claim and therefore did constitute a negligent act on Mr Kalaher's part.

56. I also find that Mr Kalaher's conduct in this regard constituted unreasonable conduct. It has to be remembered that Mr Kalaher is a Solicitor. As a result, if he gives the other party notice that such an application is to be pursued, then the other party can be expected to take the matter seriously. Whatever the motive for his actions may have been (whether it was excessive zeal or the product of an improper motive) this conduct inevitably increased the pressure on the Applicant, particularly as it occurred in the context of ongoing requests for settlement. Yet there was no valid bullying or harassment claim and so absolutely no justification for Mr Kalaher's conduct. In those circumstances there was, in my view, no reasonable explanation for his behaviour. It is therefore my finding that his conduct clearly satisfied the Ridehalgh definition of an unreasonable act, namely a vexatious act, designed to harass the other side – and it makes no difference that ultimately the application to join Mr McDonagh was never pursued.

The reference to the 'aggressive' action of the Respondent

57. According to Mr Meichen, the reference in Mr Kalaher's email of 11 August 2017 to the 'aggressive' action of the Respondent was indicative of the Claimant's unreasonable approach to the litigation and was part of a tactic to try and force a settlement. However, I was not persuaded by this argument. The comment was made as part of the normal cut and thrust of litigation and in those circumstances did not cross the threshold of unreasonable behaviour.

Late service of the Further and Better Particulars

58. Mr Perry acknowledged that the further and better particulars of the commission claim were provided four days after the date required by Judge Ahmed's order (25 August 2015). However, I note that the compliance date (25 August 2015) fell on the Friday before the August bank holiday weekend, so that when Mr Kalaher sent the particulars to Miss Hamblin on Tuesday 29 August 2017 he did so on the first working day after the holiday weekend. In those circumstances his delayed compliance was not of a magnitude to constitute unreasonable or negligent conduct.

Defects in the further and better particulars of the commission claim.

59. Mr Meichen made two points about the substance of the particulars of the commission claim. Firstly, whilst the particulars set out in some detail the amounts being claimed by way of commission, he argued that they failed to comply with Judge Ahmed's orders because they did not set out the legal basis of the claim and specify whether the claim was brought in contract or as an unauthorised deduction from wages.

60. However, I was not persuaded by this argument. Judge Ahmed's order simply stated that the Claimant should set out the legal basis of the claim. On a careful reading of the particulars it is apparent that this was done. The particulars

made reference to the terms of the Claimant's employment and specifically to a custom and practice term dealing with commission. It was therefore clear that the claim was grounded in contract. Moreover, the Applicant accepted some liability for commission payments a few days later and so I do not, in any event, accept that this aspect of the particulars caused any particular confusion or delay.

61. Mr Meichen's second point was that the issue of referral fees had not been mentioned prior to the 29 August 2017 and that this failure delayed settlement of the claim. However, again, I am not persuaded that this was in fact the case. Referral fees were mentioned in Mr Kalaher's email of 27 July 2017 and then again in his email of 8 August 2017, where he refers to 'unpaid commissions for Solicitor referrals and rental applications of £275'. It was therefore apparent from an early stage of the proceedings that referral fees constituted part of the claim and I therefore do not consider that Mr Kalaher's conduct was unreasonable or negligent in this regard.

Mr Kalaher's conduct in relation to disclosure.

62. According to Mr Meichen, the accusation by Mr Kalaher that the Applicant had not provided full disclosure was unfounded and caused the Applicant to waste time dealing with requests for documents which they simply did not have. However, Mr Kalaher's position (namely that that the information on the Applicant's database could only be archived rather than deleted) was at least plausible and because of legal professional privilege it is impossible to know whether he was acting on instructions in putting this aspect of the case. In addition, Judge Britton decided that all the documents he had requested by way of disclosure were relevant. In those circumstances Mr Kalaher's conduct of this aspect of the proceedings cannot be characterised as unreasonable or negligent.

(2) Did the failings in respect of the bullying and harassment claim cause the Applicant to incur unnecessary costs?

63. As noted above, demonstration of a direct causal link between the impugned conduct and the wasted costs in question is essential if an order is to be made. In this case the only conduct of Mr Kalaher's which I have found to be negligent is the inclusion of the bullying and harassment claim in the claim form and the pursuit of that claim in the early stages of the proceedings (including the application to join Mr McDonagh as an individual Respondent which I found to be both a negligent and an unreasonable act.) However, in my view the wasted costs flowing from this conduct were limited, and nowhere near the figure of £6,000 claimed by the Applicant. For example, I am not persuaded that the inclusion of a claim for £20,000 by way of injury to feelings for discrimination caused any additional costs to be incurred, particularly as the costs schedule makes no reference to this matter.

64. However, some costs did flow directly from Mr Kalaher's conduct. So, for example, it was necessary to include a short paragraph requesting further particulars of the bullying claim in the response. According to the costs schedule, Miss Hamblin also spent time discussing the bullying claim with Mr Kalaher by telephone on 1 August 2017. In addition, it was necessary for her to peruse the

medical report sent to her by Mr Kalaher on 27 July 2017 and then – because the basis for the bullying and harassment claim was still wholly unclear - to spend time drafting the application for a Preliminary Hearing. In my view that application and the subsequent Preliminary Hearing itself would have been completely unnecessary had Mr Kalaher analysed the claim correctly at the outset of the case and omitted any reference to the bullying and harassment claim. (It is certainly very unusual for a straightforward money claim – or even a claim for unfair dismissal – to be listed for a Preliminary Hearing.) As it was Ms Hamblin had no option but to apply for a Preliminary Hearing if her client's interests were to be properly protected.

65. Having considered the schedule of loss I calculate that these wasted costs amount to £695.00 in total. This figure comprises:-

(i) £19.50 to cover the short reference to the bullying claim in the response;
(ii) £12.50 to cover the telephone call on 1 August 2017 with Mr Kalaher (I have not awarded for the whole of the conversation as it appears from the costs schedule that other topics were discussed);
(iii) £19.50 for perusing the medical report;
(iv) £117.00 for the work involved in drafting the application for a Preliminary Hearing to the Tribunal;
(v) £19.50 for sending the application letter to the Tribunal
(vi) £19.50 for responding by email to the application to join Mr McDonagh;
(vii) £136.50 for preparation for the Preliminary Hearing;
(viii) £117.00 for preparing submissions for the Preliminary Hearing; and
(ix) £234.00 for the time spent attending the Preliminary Hearing.

(3) <u>Would it be just in all the circumstances to order payment of such costs?</u>

66. I see no reason why these costs should not be awarded. The claim for bullying and harassment was, as Mr Meichen put it, a complete 'red herring' which clearly increased the Applicant's costs in the early stages of this litigation. In particular I do not accept Mr Perry's argument that the application for wasted costs was motivated by the dispute about discovery, with the result that it would be unjust to make an award. In fact, the record shows that Miss Hamblin warned the Claimant as early as 7 August 2017 that the Applicant would be making a wasted costs application if full particulars of the bullying claim were not provided. That was some weeks before the dispute about discovery reared its head.

67. I should add that Mr Meichen argued for a wasted costs award of a much greater figure. He suggested that, had it not been for Mr Kalaher's alleged negligence and unreasonable conduct, the application for a Preliminary Hearing would have been unnecessary and the claim could have been determined once and for all on 11 August 2017. Instead, he argued, the matter became unduly protracted, settlement was delayed and the Applicant incurred substantial wasted costs as a result.

68. I am not persuaded by those arguments. In my view there was no basis on which wasted costs could be awarded in relation to events after the Preliminary

Hearing, when the claim for bullying was withdrawn. After this, the principle reason matters took time to resolve was the dispute over discovery in relation to the commission claim. This had nothing to do with the bullying and harassment claim and, given the fractious nature of the exchanges between the parties on this issue, would in my judgment always have taken some weeks to resolve. It was therefore highly unlikely that the matter could have been concluded on 11 August 2017 and it would therefore be quite unjust to lay responsibility for any further wasted costs at Mr Kalaher's door.

69. Finally, I note that the costs schedule includes costs incurred in connection with the wasted costs application itself. Bearing in mind that this application has only succeeded to a limited degree, I do not think that it would be just to add these costs to my award.

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Employment Judge Milgate

Date 16 August 2018

REASONS SENT TO THE PARTIES ON

18 August 2018

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FOR THE TRIBUNAL OFFICE