Case Number: 3327267/2017

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss L Dunthorne	**v**	Sarah Heffer Accountancy Limited

Heard at: Norwich **On**: 7 January 2019

Before: Employment Judge Postle

Appearances
For the Claimant: Miss Ismail, Counsel
For the Respondent: Miss Dawson, Solicitor

JUDGMENT ON COSTS

1. The claimant is ordered to pay a contribution towards the Respondent's costs assessed at **£3,000**

2. The tribunal makes a wasted costs order against the Claimant's solicitors and is ordered to pay costs assessed at **£3,050**

REASONS

1. This was a hearing to determine the Respondent's application for a costs order against the Claimant's representative and / or the claimant.
2. I will deal with the Law in connection with wasted costs. That is found in Rule 80 of the Employment Tribunal Rules of Procedure and Regulations 2013 and that says,

   'A Tribunal may make a wasted cost order against a representative in favour of any party or receiving party where that party has incurred costs as a result of any improper, unreasonable or negligent act or omission on the part of the representative or 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 as described as wasted costs.'

3. Rule 80 is based on the wasted costs provisions that apply in the Civil Courts with the above definition of wasted costs being almost identical to

that contained in section 51 of the Supreme Court Act 1981. Useful guidance was set out by the Court of Appeal in Riderhalgh v Horsefield [1994] England 848 in which the Court set out a three stage test that should be followed when a wasted costs order is being considered.

4. First, a court or tribunal should consider whether the representative acted improperly, unreasonably or negligently. If so, the next question is whether the representative's conduct caused the respondent to incur unnecessary costs? And if so, the court or tribunal should ask the third question, namely whether it would be just to order the representative to compensate the respondent for the whole part of the relevant costs?

5. The Court of Appeal in that case also examined the meaning of improper, unreasonable and negligent as follows, albeit whilst focusing on members of the legal profession rather than representatives generally:

   4.1 Improper covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty;

   4.2 Unreasonable describes conduct that is vexatious, designed to harass the other side rather than advance the resolution of the case;

   4.3 Negligent should be understood in its untechnical way to denote failure to act with competence reasonably to be expected from an ordinary member of the profession.

6. The Court of Appeal went on to note that representatives should not be held to have acted improperly or unreasonably or negligently simply because his or her client pursued a claim or defence that was plainly due to fail.

Conclusions

7. We know that Mr Dean, Solicitor, was instructed by the claimant around about the middle of November. There was a hearing on 22 November 2017 and through no fault of either party, that was postponed as a result of a lack of judicial resources. The hearing was relisted for 1 February 2018 and indeed that hearing came before me as a Full Merits hearing.

8. There is no doubt that hearing had to be aborted because of the behaviour of Mr Dean over the question of disclosure. I remind myself of the record of that hearing,

   "Originally today's hearing was a Full Merits hearing. Having spent some time identifying the issues with Mr Dean and establishing what was claimed and what was not claimed and Mr Dean confirming there were no claims for discrimination or human rights claims and matters not within the tribunal's jurisdiction. Mr Dean wanted to pursue an application for a strike

out and produced a letter he had written on 29 January just to the respondent's solicitors requesting 12 further documents that he believed had not been provided. It became clear very quickly, there was a great deal of dispute between the parties and a short adjournment was offered for the parties to speak to each other in an effort to sort out what was contained in the two bundles that had been provided for today's hearing and what was not.

The two bundles being one prepared by the respondent and one prepared by the claimant. Upon the parties returning, Miss Dawson, Solicitor for the respondents, confirmed that the documents listed in the letter of 29 January are all in the claimant's bundles save for document 86 which the claimant would be in possession of, in any event. Document 99 was in relation to witness statements originally the respondents had prepared and they were not disclosed (as they would not be giving evidence) and Miss Dawson had written to the Employment Tribunal to explain why. In relation to document 100, being time sheets from May 2015 to March 2017 in the interests of proportionality the respondents simply provided time sheets for January, February and March 2017, three months prior to the claimant's resignation. Mr Dean responded saying he does not know if all the documents are in his bundle.

Once again, the Judge concerned that it is now 11:30 am and we were not in any position to start the full merits hearing, adjourned once again for the parties to agree clearly what was contained in the bundles from the list and what was not. Precisely what they were asked to do earlier this morning. The parties returned at 11:40 am and quite amazingly Mr Dean now conceded that with the exception of document 99 and 100, all other documents were in the bundle."

That is why, ultimately, the hearing had to be aborted because by now the hearing had lost the best part of two and a half hours and the parties, having confirmed the time they would need to cross examine witnesses, meant that the case could not now be dealt with in the time provided.

The claim was therefore relisted for Monday 23 April and Tuesday 24 April 2018.

9. It is clear by any objective assessment as Miss Ismail hinted in her closing, that the delay on 1 February was down to Mr Dean, or at least three hours. I take the view that his behaviour was not only improper, it was unreasonable and negligent. He clearly had those documents, for whatever reasons best known to himself, Mr Dean was either using delaying tactics because he was not prepared for the hearing and / or, he was negligent in simply not reading the bundle that had been provided and the documents contained in the bundle. Therefore, as a result of that the Full Merits hearing could not proceed and the fault for that lay fairly and squarely on Mr Dean's shoulders.

10. So, I assess, allowing for travelling time and some preparation time, 5 hours at £230 as a contribution towards the respondent's wasted costs in the first instance of £1,150.

11. The Tribunal then have to consider again whether there was improper, unreasonable and negligent behaviour by Mr Dean in informing Watford Employment Tribunal that the case was withdrawn at 15:36 hrs on Friday 20 April 2018 without informing the respondent's solicitors of their intention and instructions, to abandon the claim, notwithstanding the claimant's threat to withdraw was conditional on the respondents not pursuing costs against the claimant. If they were, then the claimant would continue the claim as confirmed by Mr Dean's email to Miss Dawson at page 183, which was dated 13 April. It clearly says,

"In the event that the respondent still makes an application after withdrawal the claimant wishes to reserve the right to recommence the claim should the tribunal be satisfied that there is a legitimate reason to do so."

12. Miss Dawson, on behalf of the respondents, responds on 18 April and says,

"We will still be pursuing a costs order for the wasted costs attributed to our client by you and / or your client… Unless your client can confirm that she pay the costs as previously served upon her in November 2017 then attendance will still be required at the Tribunal. For her to defend the costs application or indeed proceed with her claim. Please confirm to us which one it will be."

13. The Watford Employment Tribunal were notified again by Mr Dean's firm of Solicitors that the hearing listed for Monday 23 and 24 April will not be going ahead, at page 187, that is not copied to the respondents in any shape or form. So not surprisingly, the Respondents and Miss Dawson turn up to what they believed was a hearing on 23 April to be told eventually by the staff at the Tribunal after having enquiries made at the Watford Employment Tribunal, that the claimant had withdrawn the claim by email at 15:36 hrs on the Friday before and therefore the case had been removed from the list.

14. The above behaviour was improper, negligent and unreasonable and the claimant's Solicitor should have at the very least, to avoid unnecessary expenses and costs being incurred, notified the respondents of their position. Again, I assess the wasted costs at 5 hours, which makes £1,150.

15. I now turn to the unfortunate and intemperate language being used by Mr Dean. Having been in practice myself some years ago, I would have expected serious repercussions from letters passing between solicitors which suggest at 194, amongst other things, *'compared to Godfrey you are like a flea on a rat'*, a letter written by Mr Dean to Miss Dawson. That is

totally improper behaviour designed to harass and make the respondent's solicitors back off and to that I make an award of £750 costs.

16. That is a total of £3,050 wasted costs that Mr Dean's firm will pay to the respondents.

17. Turning to the claim for costs against the claimant, the law is set out in Rule 76, again of the Employment Tribunal Rules of Procedure 2013,

'A Tribunal may make a cost order or a preparation time order and shall consider whether to do so where it considers that a party or that party's representative has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings or part, or the way the proceedings or part, have been conducted or any claim or response had no reasonable prospect of success'.

18. It is a two stage process, I remind myself, firstly I have to consider whether any of the factors under 76(1)(a) or (b) or both have arisen and then I have to decide whether to exercise my discretion. The rules go on to say that in deciding whether to make a costs order I may have regard to the paying parties' means. Of course, in this case we have heard evidence from the claimant as to her means and her available income after her expenses have been paid in, which she tells me is approximately £500 per month. She says she has no savings but she has a freehold property with a mortgage with equity in it and also a BMW motor vehicle which is free of any loan. Apart from a small debt to a credit card, she has no other debts.

19. Looking at the background to this case, she was employed as a trainee accountant. Throughout her employment there appears to have been no problems. There appears to have been no grievances and no problems arising between her and her employers whilst she was employed at all. In fact, when she resigned on 22 March, her letter, at page 92, is a friendly letter suggesting not one hint that there had been problems or that she had been treated badly and I quote,

"May I take this opportunity to thank you most graciously for the help and opportunities I have been provided with in the four years I have been with the company."

I repeat, no hint of any problems or subsequent allegations.

20. The reason the claimant left the employment of the respondents we know, was because she had found a better paid job and there is no criticism for that, no doubt she thought her prospects were better served elsewhere. The resignation letter was dated 22 March and she was going to leave on Friday 21 April to start her new job on 24 April.

21. At some stage during the claimant's employment with the respondents, they had funded a training course costing £750 and there had been some informal agreement that if she left, at some stage, she would pay a portion

of that back. Originally, on resigning, it had been agreed that she would now pay it back. When the Respondent deducted it from her last pay slip it appears that, is when the claimant became malicious and vexatious. Her claim on 17 August gives a whole host of what can best be described as outrageous, vexatious and vindictive claims which, amongst other things, talk about intellectual property rights, data protection law in the use of her photograph on the company website, and further she was effectively used as a modern day slave and that the respondents should be refrained from employing apprentices. That seems at odds with the claimant's employment throughout and her resignation letter.

22. As we know, there was a hearing to take place on 22 November, again through no fault of either party that was postponed. There was a hearing on 1 February, that was aborted and relisted for 23 and 24 April.

23. The claimant, as we know, has had legal advice from solicitors since mid November. She had been warned that her claim was, in a nut shell, malicious and vindictive and that costs would be pursued. Then at the very, very last moment on the Friday before the hearing was due to take place in April (and she must have given instructions as late as that), she withdrew her claim. The reason she withdrew her claim is because she never had any intention of pursuing it, it was clearly malicious, vexatious and I also take the view that Rule 76(1)(a) has come into play and further the claim had no reasonable prospect of success. The claimant knew it was doomed to fail from the outset and therefore the reason for her withdrawing it at the last moment was she had hoped she would obtain some form of settlement before any hearing took place.

24. As a result of the above, I do exercise my discretion, I have had regard to the claimant's means and I order her to make a contribution towards the respondent's costs in the sum of £3,000

25. That is a total of £6,050 between the wasted costs of Mr Dean and the claimant.

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Employment Judge Postle

Date: 7 / 3 / 2019

Sent to the parties on: 8 / 3 / 2019

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For the Tribunal Office