THE EMPLOYMENT TRIBUNALS

Between:

Claimant:	**Mrs G Dimayuga**
Respondent to claim:	**Epsom & St Helier University Hospitals NHS Trust**
Respondent to costs application:	**Sterling Lawyers Limited**

Hearing at London South on 22 March 2019 before Employment Judge Baron

Appearances

For Claimant:	**Tomos Rees - FRU**
For Respondent to claim:	**Conor Kennedy - Counsel**
For Respondent to costs application:	**Kuldeep Clair - Solicitor**

JUDGMENT ON APPLICATIONS FOR COSTS

It is the judgment of the Tribunal as follows:

1 The application by the Respondent for an order for costs against the Claimant be dismissed having been withdrawn by the Respondent;

2 That Sterling Lawyers Limited do pay wasted costs to the Respondent in the sum of £960.

REASONS

1 I will refer to the NHS Trust as 'the Respondent', and Sterling Lawyers Limited as 'SLL'. SLL presented a claim to the Tribunal on 15 January 2018 on behalf of the Claimant in which the principal claim was that of unfair dismissal following alleged misconduct. There were ancillary money claims. It is not necessary to go into any detail. The matter was listed for hearing on Monday 18 June 2018 before me sitting alone with one day allocated.

2 At 21:58 hrs on Sunday 17 June 2018 an email was sent to the Tribunal by Mr Clair of SLL stating as follows:

> We have been instructed by our client that she does not have sufficient funds at this time to continue with our representation at the hearing, and regret to have to notify the tribunal that we feel that we have no alternative but to withdraw at this point. We do not feel that our instructions go as far as enabling us to completely actually withdraw the case itself.

3 At the time fixed for the hearing the Claimant was not present nor represented. The Respondent was represented by Hollie Patterson, in-

house counsel then with the Respondent's solicitors. There had not been any contact made with the Tribunal by the Claimant to explain her absence. A clerk attempted to contact her using the mobile telephone number on the claim form ET1 but that was unobtainable. I dismissed the claim in accordance with rule 47 of the Employment Tribunals Rules of Procedure 2013. No application has been made for a reconsideration of the judgment, nor has there been any appeal to the Employment Appeal Tribunal.

4 A copy of the judgment was sent to the parties on 16 July 2018. On 13 August 2018 the Respondent made an application for costs against the Claimant, and also an application for wasted costs against SLL. At the outset of this hearing Mr Kennedy withdrew the application as against the Claimant, but said that he wished to proceed with the application for wasted costs against SLL. The original costs application included a schedule of costs totalling nearly £11,000 excusive of VAT. Mr Kennedy told me that it had been decided not to proceed with the application against the Claimant having seen the written submissions she had made with the assistance of the CAB, and the emails to which I refer below.

5 Rules 80 and 81 of the 2013 Rules are as follows:

> **When a wasted costs order may be made**
> **80.**—(1) A Tribunal may make a wasted costs order against a representative in favour of any party ("the receiving party") where that party has incurred costs—
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> (a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative; or
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> (b) which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay.
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> Costs so incurred are described as "wasted costs".
> (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.
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> **Effect of a wasted costs order**
> **81.** 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 which have already been paid. The amount to be paid, disallowed or repaid must in each case be specified in the order.

6 Thus there must have been some improper, unreasonable or negligent act or omission which has resulted in costs being incurred. If that is found to have been the case then the Tribunal has a discretion as to whether to make an order. The principles to be applied are not the same as the principles applicable to an application for costs against a party to the litigation.

7 Mr Kennedy made the application on behalf of the Respondent but did not call any evidence. I heard evidence from Mr Clair, who was cross-examined by Mr Kennedy. As mentioned above, the Claimant had provided

submissions in opposition to the application against her, and brief reference was made to those submissions. The Claimant was present at the hearing but neither Mr Kennedy nor Mr Clair invited her to give evidence.

8 Mr Clair criticised the manner in which the Respondent's solicitors had dealt with various pre-hearing procedural matters. I note the criticisms but make no findings on them as I do not consider them relevant to the decisions I have to make on this application.

9 The history of the matter is very largely set out in emails in respect of which clearly privilege had been waived.

9.1 14.05.18 at 12:05. Mr Clair invited the Respondent's solicitors to make a sensible offer of settlement.

9.2 11.06.18 at 11.04. The Claimant wrote as follows having received the final draft of her witness statement:

> Just wanted to let you know that the reason for not being able to go through the witness statement was because I have run out of money to pay the fees. In view of this I will not continue to the tribunal hearing representation.

9.3 11.06.18 at 11:35. Mr Clair replied saying that he was shocked. He said that if the Claimant were minded to drop the claim then he could continue to seek to negotiate a settlement on a conditional fee basis for the next few days. He added:

> If it appears during this week that they are not likely to make an offer, we would have to withdraw, at our discretion. Nothing would then be payable by you.

Mr Clair said that the word 'withdraw' in that context meant SLL ceasing to act for the Claimant. I accept that that was his intention.

9.4 11.06.18 at 12:47. Mr Clair sent a further email making reference to witness statements. He then referred back to the email at 11:35 and said:

> If I do not hear from you, I will soon have to tell them that you want to withdraw.

I interpret that as being clearly a reference to a withdrawal of the claim under rule 51.

9.5 11.06.18 at 12:49. The Claimant replied to the email of 11:35. She said in the first line that she was not going to continue. The final paragraph is as follows:

> I just need to say thank you for your concern. And you said also that I can stop anytime if I want to. Here we come I ran out of money now. Hopefully this clarifies things now.

9.6 11.06.18 at 19:00. It is not entirely clear to which email(s) the Claimant is replying because she says: 'Yes thank you it went well'. That does not obviously follow on from anything. She then said:

> Yeah I will take your offer based on what is stated in your email earlier.

It appears to be agreed that that referred back to the conditional fee arrangement suggested in the email at 11:35, and that was confirmed by Mr Clair in an email on 12.06.18 at 11:54.

9.7 13.06.18 at 13:35. Mr Clair suggested to the Claimant that if no settlement offer were received he would represent her at the hearing on the basis of a mixture of a fixed fee and the conditional fee arrangement already made. Mr Clair accepted in cross-examination that that offer had not been accepted by the Claimant. Indeed in the next email her position was made clear.

9.8 13:06.18 at 14:20. The Claimant replied as follows:

> My emotions dictate I cannot face anymore as I am too tired and stressed on this now. Lets hope it can settle by Friday, otherwise I really can't attend. Hope you understand. I have already given myself a rest about it as I'm just exhausted now plus money ran out.

Mr Clair did not reply to that email.

9.9 15:06:18 at 10:00. This email was from Mr Clair to the Respondent's solicitors and in the email Mr Clair suggested a settlement at a specified figure. There was no response to that email.

10 There the emails cease apart from the email to the Tribunal of 17 June 2018 in which Mr Clair stated that he had ceased to represent the Claimant. There was no email from Mr Clair to the Claimant seeking clear final instructions as to whether he was to attend the Tribunal to represent her on the proposed basis, or whether she was to attend alone, or whether she wished to withdraw the claim. In the Claimant's written submissions in respect of the application against her she stated that she had assumed that as there was no settlement forthcoming then Mr Clair would have withdrawn the case as agreed on 11 June. That I find to be wholly understandable.

11 There was no evidence of any negotiations having taken place concerning settlement other than that of Mr Clair having suggested various figures to the Respondent's solicitors without any response. Mr Clair accepted in cross-examination that the Respondent, being a public body, required Treasury approval before being able to effect a settlement, and that it was necessary for a claimant's chances of success to have been assessed at greater than 50%. I note that in paragraph 11 of his own witness statement he said that he had assessed the Claimant's chances of success as being 30% to 50%. It is therefore apparent that Treasury approval was not likely to be granted.

12 Mr Kennedy submitted that the instructions to Mr Clair were clear. He had instructions to seek to effect a negotiated settlement based on the email from the Claimant on 11 June at 19:00 hrs, but he had also been told categorically that the Claimant was not going to attend any hearing. That was set out in the email of 13 June at 14:20 hrs. The consequence, said Mr Kennedy, was that when by midday on Friday 15 June a settlement had not been effected then steps should have been taken by Mr Clair to notify the Tribunal that the claim was withdrawn.

13 Mr Clair said in cross-examination that the reason he had withdrawn from representing the Claimant, and not withdrawn the claim, was in order to protect her so that she could attend the hearing if she had wished, for which

she could have sought free representation. Mr Clair said in his witness statement that the Claimant 'was permanently led by her emotions rather than any sense of reason or logic.'

14 Mr Clair accepted that he had not told the Claimant that she was able to attend the hearing herself. When it was put to Mr Clair that the Claimant had justifiably assumed that he had withdrawn the claim because no settlement had been reached he replied that she could have enquired of him. I found his evidence and reasoning to be very unconvincing, particularly in this respect.

15 Mr Clair suggested that it was only at close of business on Friday 15 June 2018 that it was apparent that no settlement was possible, and he sought to make much of cases where there is a settlement at the door of the court. My understanding of the point is that any liability for costs should start later than that suggested by Mr Kennedy.

16 The application was put forward by Mr Kennedy on the basis that Mr Clair had been negligent within rule 80. My interpretation of the emails is as follows. The emails of 11 June at 11:04 and 12:49 do have at least some limited potential for ambiguity in that the Claimant refers to financial constraints in both emails and 'tribunal hearing representation' in the earlier one. The Claimant was not unequivocally saying that she wished to withdraw the claim, although she was clearly saying that she could not afford to be represented. There was then some discussion in emails about seeking a settlement. Then on 13 June at 14:20 hrs the Claimant unequivocally stated that she could not face the hearing. There was no further communication between the Claimant and Mr Clair after that.

17 In my judgement Mr Clair should have acted differently. It was obvious from the email of 13 June 2018 at 14:40 that the Claimant was not going to attend the hearing. She stated as much. I consider Mr Clair's excuse (for that is what I consider it to be, rather than a reason) for not withdrawing the claim, being that the Claimant was emotional and kept changing her mind to be of no substance. If that was his view of the Claimant's personality then there was all the more reason for Mr Clair to have contacted the Claimant on Friday 15 June to spell out the options open to her, and to ask for specific instructions as to whether he should give notice under rule 51 to withdraw the claim. He did not do so.

18 The issue then before me is whether rule 80 applies and whether I should exercise the resulting discretion. I am aware of the exhortations that wasted costs orders should not be made lightly. However in my judgement Mr Clair was under an obligation to each of the Claimant, the Respondent and the Tribunal by about midday on 15 June 2018 to have notified the Tribunal that the claim was being withdrawn, possibly first having ascertained finally from the Claimant that that was her desire. I refer to midday as being the appropriate time because the Respondent and the Tribunal could then have been notified in sufficient time to prevent witnesses and counsel attending, and to assist the Tribunal in the listing of cases for the following hearing day. To me, the contents of the Claimant's email of 13 June 2018 at 14:40 are absolutely clear. She was not going to

attend the hearing. I therefore hold that Mr Clair was negligent for the purposes of rule 80.

19 The second element is whether costs have been incurred unnecessarily. I am satisfied that that is the case. I was not provided with detailed records as to the times during the day when Miss Patterson made preparations for the hearing, and she did not give evidence. I do not consider that I need it. I am prepared to assume that final preparation for the hearing is likely to have taken place during the afternoon of the preceding working day. I allow three hours. Miss Patterson also attended at the Tribunal on 18 June 2018. On a conservative estimate I assess the travelling time from her office in Wimbledon and for attending at the Tribunal at two hours. Miss Patterson's modest charge-out rate was £160 per hour making a total of £800. To that must be added VAT as it is not recoverable by the Respondent, making a total of £960.

20 Finally I must decide whether to exercise the discretion to make an order. I see no reason not to do so. I was concerned about the proportionality of the Respondent pursuing the single application as eventually made but the hearing was held and I have to make a decision. The Respondent is a public body and although the costs of today's hearing may have exceeded the costs to be awarded I see no reason not to make an award.

Employment Judge Baron

Dated 22 March 2019