EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr T Robins **CAB Special Batteries Limited**

RESERVED COSTS JUDGMENT OF THE TRIBUNAL

IN RESPECT OF THE APPLICATION OF THE RESPONDENT DATED 4 DECEMBER 2018 FOR WASTED COSTS AGAINST DAS LAW LIMITED PURSUANT TO RULES 80 – 82 OF SCHEDULE 1 OF THE EMPLOYMENT TRIBUNAL (CONSTITUTION AND RULES OF PROCEDURE) REGULATIONS 2013

Exeter **On** **19 and 20 August 2019**

Before: **Employment Judge Goraj**

Representation.

The claimant –Mr J Bromige of Counsel, (in attendance on 19 August 2019 only)
The respondent – Mr G Probert, Counsel
DAS Law Limited - Mr M Smith, Counsel

The Judgment of the tribunal is that: -

The respondent's application for wasted costs against DAS Law Limited pursuant to Rules 80 - 82 of Schedule 1 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 is dismissed.

INTRODUCTION

1. This judgment determines the application by the respondent dated 4 December 2018 ("the application") for alleged wasted costs against the respondent's

former legal representatives, DAS Law Limited ("DAS Law") pursuant to Rules 80 – 82 of Schedule 1 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ("the Rules"). The application is resisted by DAS Law.

THE APPLICATION

2. The application is contained at paragraph 34-37 of the respondent's consolidated costs application which is to be found at pages 8-9 of the bundle ("the core bundle") which was provided for the purposes of the associated costs application between the parties. The application for wasted costs is set out below

"35. DAS Law Limited were negligent and/or unreasonable in their conduct of the case on behalf of the Respondent in that:

a. DAS Law failed to comply with the Unless Order of the Tribunal dated 28 February 2018 and specifically to disclose to the Claimant and the Tribunal any documentary evidence that the Respondent would wish to rely upon in support of arguments in relations to sections 122-123 of the Employment Rights Act 1996 by 1 March 2018.

b. DAS Law failed to comply with the Unless Order, despite there being a number of significant documents in their control that would have assisted the Respondent and the Tribunal in determining the issues. The result was that the Respondent was debarred from producing such documents at the final hearing.

c. DAS Law failed to instruct the Respondent's then counsel, Mr Tibbitts, about the existence of the Unless Order resulting in Mr Tibbitts becoming professionally embarrassed.

36. As a direct result of the DAS Law's unreasonable and negligent conduct, the Respondent suffered the following wasted costs:

a. Costs relating to the adjournment of the substantive Tribunal hearing on 14 March 2018.

b. From 14 March 2018, the cost of the new professional legal representation (including counsel) for a final substantive hearing that began on 8 October 2018 and continues to date. For the avoidance of doubt, but for DAS Law's negligence, the Tribunal would have been determined by the end of the March 2018 listing. Thus, the further costs incurred by the Respondent in defending the action were unnecessary and ultimately wasted.

c. The respondent's application in July 2018 for relief from sanctions (the barring of the documentary evidence supporting the section 122- 123 ERA issue).

d. the Respondent's attendance at the Case Management Preliminary Hearing on 22 August 2018 and related preparation".

37. It is submitted that it is just and equitable to make the wasted costs order against DAS Law Limited in favour of the Respondent".

DOCUMENTS AND ASSOCIATED MATTERS

3. When determining the application, the Tribunal has had regard in particular, to the following: -

(1) The contents of the application and DAS Law's response.

(2) The agreed bundle of documents which was submitted for the purposes of the application ("the DAS bundle").

(3) The Order dated 16 March 2018 ("the Order dated 16 March 2018") together with the subsequent written reasons which were provided by the Tribunal dated 13 June 2018 ("the Reasons dated 13 June 2018").

(4) The Order dated 28 September 2018 ("the Order dated 28 September 2018") in which the Tribunal refused an application by the respondent for relief from sanctions in respect of the Unless Order dated 27 February 2018 (referred to further below).

(5) The email from the respondent's solicitors to the claimant's solicitors dated 7 October 2018 which is at page 140 of the core bundle (which was prepared for the associated costs application between the parties ("the core bundle")).

(6) The contents of the reserved Judgment (as subsequently corrected) which was originally sent to the parties on 8 November 2018 ("the Judgment") which is at pages 24-70 of the core bundle.

(7) The respondent's updated costs schedule (containing a breakdown of costs claimed including against DAS Law) dated 9 February 2018 ("the respondent's Costs Schedule").

BACKGROUND AND MATTERS WHICH ARE RELEVANT TO THIS COSTS HEARING

4. By a claim form dated 22 May 2017 the claimant in this matter, Mr T Robins, brought various claims against the respondent including for constructive dismissal and breach of contract for notice which were resisted by the respondent.

5. During the course of the substantive Hearing in October 2018, the respondent conceded that the claimant had been constructively and unfairly dismissed by the respondent. The Tribunal however subsequently held in a Judgment which was originally sent to the parties on 8 November 2018 (pages 24- 70 of the core bundle) that any basic or compensatory awards which would otherwise

have been awarded to the claimant in respect of such unfair dismissal were reduced by 100 percent pursuant to sections 122 - 123 of the Employment Rights Act 1996 ("the Act") for reasons relating to the claimant's conduct on 2 August 2016

6. Much of the relevant background in this matter is set out at paragraphs 1 – 27 the Costs Judgment determining the associated application for costs between the claimant and the respondent (" the Costs Judgment ") and such matters are therefore not repeated in this judgment.

7. The Tribunal has not heard any oral evidence in support/defence of the application and has therefore not made any formal findings of fact

8. DAS Law were appointed by the respondent's insurers to act in defence of the Tribunal proceedings pursuant to the terms of a Legal Expenses Insurance Policy. At the time of the events in question, the Tribunal proceedings were being dealt with at DAS Law by an Associate solicitor (pages 20- 21 of the DAS bundle).

9. The instructions of DAS Law in the Tribunal proceedings were formally terminated by an email which was sent at 11:32am on 14 March 2018 by Enigma solicitors on behalf of the respondent. This email (which is at page 49 of the DAS bundle) is set out in full at paragraph 23 below.

The High Court proceedings

10. As stated at paragraph 20 of the Costs Judgment, the claimant and the respondent are also engaged in High Court proceedings which were originally initiated by the respondent in February 2017 for alleged breach of fiduciary duty. As part of the High Court proceedings the respondent made an application for an interim injunction on 12 December 2017 in respect of the respondent's discovery (following the termination of the claimant's employment with the respondent) that the claimant had transferred (without the authorisation of the respondent) copies of the respondent's emails to his personal email address or around 2 August 2016. The claimant and the respondent were both represented by different solicitors in the High Court proceedings. The respondent was represented by Mr Neil Mercer of Enigma solicitors referred to above.

11. The Tribunal was not made aware until 13 March 2018 (on the second day of the original Tribunal Hearing) of the extent of the potential overlap between the High Court proceedings and the Tribunal proceedings in respect of the matters to be considered at a Hearing in the High Court on 17 April 2018 relating to the alleged transfer of emails by the claimant from the respondent on or around 2 August 2016.

The Order dated 27 February 2018 and subsequent events

12. On 27 February 2018, the Tribunal sent 2 orders to DAS Law by email. The first order (at pages 8-9 of the DAS bundle) was an order to provide by 1 March 2018 specific documentation previously requested by the claimant in a letter

dated 16 February 2018. The second order (page 10 of the DAS bundle) was an unless order ("the Unless Order dated 27 February 2018") which stated as follows: -

" On the application of the claimant, Employment Judge Goraj ORDERS that -

The respondent be debarred from relying on any documentary evidence in support of any contention that any compensation awarded to the claimant should be reduced pursuant to sections 122 or 123 of the Employment Rights Act 1996 unless any such documents are served on the claimant by noon on 1 March 2018."

13. It is acknowledged at paragraphs 17 and 23 of the skeleton argument prepared for this costs hearing on behalf of DAS Law ("the skeleton argument of DAS") that (a) DAS Law did not comply with the Unless Order dated 27 February 2018 and (b) the respondent was not informed of the existence of the Unless Order dated 27 February 2018 until the deadline for compliance had passed.

14. It is further stated at paragraph 17 of the skeleton argument of DAS, by way of explanation for the failure of DAS Law to comply with the Unless Order dated 27 February 2018, that :-

" The omission followed an unfortunate misinterpretation by the recipient at DAS Law of the two orders attached to the email of 27 February 2018; the recipient mistakenly believed that the Unless Order related to the Specific Disclosure Order, rather than pertaining to distinctly separate material.

15. It was further stated at paragraph 55 of the skeleton argument of DAS that:- "Whilst it is perhaps understandable how such an error could have been made, given the demands of a busy litigation office and the nature of the two orders been sent together, it is conceded that the nature of the Unless Order ought to have been appreciated at the time".

16. On 8 March 2018 DAS Law (whom it is acknowledged were unaware of the above-mentioned error) emailed the claimant's representative with a request to add further documents to the hearing bundle. These included documents relating to the emails which the respondent alleged that the claimant had sent to his personal email account on 2 August 2016 and upon which the respondent sought to rely to demonstrate that the claimant had committed acts of gross misconduct by taking commercially sensitive information without the knowledge of the respondent and, consequentially, that any compensation awarded to the claimant in respect of his unfair dismissal claim should therefore be reduced pursuant to sections 122 - 123 of the Act.

The relationship between the respondent and DAS Law

17. It appears from the emails with which the Tribunal has been provided for the purposes of the application (pages 95 – 138 of the bundle) that there was a deteriorating relationship between the respondent/ Enigma solicitors (who appear from the emails to have been assisting the respondent in respect of the Tribunal proceedings during this period) and DAS Law from 9 March 2018 onwards. Further, it appears from the available documentary evidence that

although the deteriorating relationship was due in part to the issues arising as a result of the Unless Order dated 27 February 2018, it formed part of wider differences between the parties relating to (a) the High court proceedings including in respect of both the previous provision of information to the Tribunal and the requested further information regarding such proceedings / the potential overlap between the High Court and the Tribunal proceedings and (b) the wider conduct of the Tribunal proceedings by DAS Law.

The events of the substantive hearing on 12 – 14 March 2018

12 March 2018

18. It is accepted by DAS Law (paragraph 23 of the skeleton argument of DAS) that the Counsel for the respondent was unaware of the Unless Order dated 27 February 2018 until he was informed of its existence on the morning of 12 March 2018. At this time, the respondent's Counsel provided the claimant's Counsel with a copy of a document entitled "Traffic and frequency analysis of emails sent by Timothy John Robins on 2 August 2016 ("the Analysis document for 2 August 2016") which had been prepared by the respondent for the purposes of the application for injunctive relief in the High Court proceedings (paragraph 4 of the Judgment) and which listed the alleged sensitive / confidential documentation which it believed that the claimant had taken from the respondent. The respondent's Counsel had received a copy of the Analysis document for 2 August 2016 during the weekend prior to the commencement of the Hearing (paragraph 24 of the skeleton argument of DAS).

19. As subsequently recorded at paragraph 12 of the Order dated 28 September 2018 and at paragraph 4 of the Judgment, a number of matters were agreed between the parties on the morning of 12 March 2018 including that the Analysis document for 2 August 2016 would be admitted into the Hearing bundle. Following such agreement, no application was made by the respondent's Counsel (a) for relief from sanctions in respect of the Unless Order dated 27 February 2018 (paragraph 14 of the skeleton argument of DAS and paragraph 12 of the Reasons dated 28 September 2018).

13 March 2018

20. The claimant commenced his oral evidence on the morning of 13 March 2018 (at which time it was agreed between the parties that the Hearing was likely to be concluded within the 5 day time allocation).

21. As recorded at paragraph 12 (c) of the Reasons dated 28 September 2018, the claimant gave evidence regarding the Analysis document for 2 August 2016 on 13 March 2018 during which he accepted that some of the information which he had forwarded to his personal email address that day would have been useful to a competitor.

22. On 13 March 2018 an issue arose regarding the nature of the Hearing in the High Court on 17 April 2018 including the extent to which there was an overlap between the issues to be determined in High Court and in the Tribunal proceedings following which (a) the Tribunal requested further information form the solicitors dealing with the High Court proceedings on behalf of the parties (Kitsons and Enigma) regarding any potential overlap (a previous

request for information having been made to them by the Tribunal on 26 January 2018) and (b) the respondent subsequently made an application to postpone and stay the Tribunal proceedings pending, at least , the outcome of the Hearing in the High Court on 17 April 2018 which application was resisted by the claimant. The Tribunal declined to determine this application pending the provision by Messrs Kitsons and Enigma of further information regarding the High Court proceedings which they were required to bring to the Tribunal the following day.

14 March 2018

23. As stated above, the retainer of DAS Law was formally terminated by Enigma, solicitors on behalf of the Respondent by an email to DAS Law sent on the morning of 14 March 2018 (page 49 of the DAS bundle). The email is set out below.

"This email is sent with the approval of Stuart Robertson.

Your firm's retainer is terminated on the grounds that the Claimant has indicated today (counsel to counsel) an intention to seek wasted costs against both DAS and CAB.

A conflict of interest therefore now exists between us because you say that CAB is liable to pay costs Orders and CAB thinks that your firm should pay in the light inter alia ;

1. Inadequate trial preparation,

2. Failure to produce the List of Issues in time,

3. The making of an Unless Order and failure to comply with it leading to the debarring of further relevant evidence,

4. A failure to inform the tribunal that injunctive relief proceedings are extant despite being explicitly informed on at least 10 January 2018 and earlier,

5. Failure to ensure that the witness statements reflected the correct issues, and

6. Failure to pass key documents to counsel and Ignoring client instructions to read such documents.

Further, your client and customer service has fallen below the standard of a competent solicitors firm.

I will now instruct new solicitors to mitigate my losses in these proceedings . I will then instruct litigation solicitors to recover any losses and costs.

Please treat this email as a formal complaint and escalate it.

Yours faithfully

Enigma""

24. The Tribunal has noted that Enigma, solicitors state on behalf of the respondent that there was a conflict of interest between DAS Law and the respondent because of a dispute concerning costs and lists 6 reasons why the respondent considered that DAS Law should be responsible for any costs orders.

25. Following the termination of DAS Law's retainer the respondent's then Counsel withdrew from the case.

The adjournment on 14 March 2018

26. The Hearing was subsequently adjourned on 14 March 2018 upon the application of Mr Robertson of the respondent. The grounds for such application are set out at paragraphs 3 and 5 of the Written reasons dated 13 June 2018. In summary, Mr Robertson contended that the respondent would be prejudiced if it was required to proceed without an alternative barrister including as the case was complex and of high value and that he would not be in a position to take over the cross examination of the claimant which had hitherto been conducted by the respondent's Counsel. Mr Robertson did not rely in his application for an adjournment upon the Unless Order dated 27 February 2018 or upon any conflict of interest between the respondent and DAS Law.

27. The application was opposed by the claimant but was granted by the Tribunal on (a) the basis set out in the Order dated 16 March 2018 and (b) on the grounds set out in the Reasons dated 13 June 2018 (paragraph 10 thereof).

28. In the light of the above, it was not necessary for the Tribunal to determine the respondent's disputed extant application for an adjournment/ stay of the Tribunal proceedings pending the outcome of the High proceedings. The Tribunal however explained in its conclusions (paragraph 10(6) of the reasons dated 13 June 2018) that when deciding to grant the respondent's application to adjourn the Tribunal proceedings, the Employment Judge had taken into account that the Tribunal may, in any event, have decided to stay the Tribunal proceedings pending the outcome of the hearing in the High Court in April 2018 in the light of the further information regarding such proceedings which had come to light during the course of the Tribunal hearing.

Preliminary Notice pursuant to the Professional Negligence Pre – action Protocol

29. On 26 March 2018 Enigma solicitors sent to DAS Law on behalf of the respondent (at pages 56-59 of the DAS bundle) a Preliminary Notice pursuant to Part 5 of the Professional Negligence Pre- Action Protocol. In this letter the respondent's solicitors identified a number of alleged breaches of contract/ negligence by DAS Law including with regard to the failure to comply with the Unless Order dated 27 February 2018 and associated matters. It was confirmed at the Costs Hearing that (a) the respondent had not, to date, taken

any further action against DAS Law in respect of such letter and (b) any further claim against DAS Law was likely to be a High Court action for professional negligence and (c) any such claim would be with regard to broader allegations of professional negligence.

The claimant's costs

30. By a letter dated 9 April 2018, the claimant applied for costs against the respondent or, in the alternative against DAS Law (page 60 onwards of the DAS bundle) in respect of three distinct areas relating to the claimant's alleged wasted costs including the respondent's alleged violation of the Unless Order dated 27 February 2018 on 8 March 2018 and the respondent's successful application to adjourn the hearing on 14 March 2018. The claimant's application for costs was settled by DAS Law on the terms contained in a consent order dated 14 June 2018 (pages 79-80 of the DAS bundle). No contribution to the settlement was sought from the respondent by DAS Law.

The Case Management Preliminary Hearing on 22 August 2018

31. The Tribunal conducted a Case Management Preliminary Hearing ("CMPH") on 22 August 2018 . The associated order dated 29 August 2018 is at pages 20-23 of the core bundle. The stated purpose of the CMPH was to consider the respondent's application dated 21 July 2018 for specific disclosure of documents namely, 2 emails which the respondent contended that the claimant had sent from his work email account to his personal email account on 2 August 2016. It is further recorded that the respondent acknowledged that it had copies of the relevant emails in its possession but, in summary, took issue with the fact that the claimant had failed to return or to admit taking the emails or their attachments. The application was resisted by the claimant. The application by the respondent was refused (for the reasons set out at page 21 of the core bundle) save that the claimant was ordered to swear a further affidavit confirming his position with regard to his possession / control of such documents as directed by the Tribunal including to return them forthwith if they subsequently came to light. The Tribunal also dealt during the CMPH on 22 August 2018 with other matters as set out at page 22 of the core bundle

The application for relief from sanctions dated 25 August 2018

32. On 25 August 2018, the respondent made an application for relief from sanctions in respect of the Unless Order dated 27 February 2018. This application was refused by the Tribunal for the reasons set out at paragraphs 33 of the order dated 28 September 2018 including (a) as the claimant had given evidence at the hearing in March 2018 in respect of the Analysis document for 2 August 2016 which had been admitted by agreement between the parties in the agreed bundle of hearing documents and (b) although the respondent had stated in its application dated 25 August 2018 that it wished to adduce important documentary evidence in support of its contentions pursuant to sections 122 - 123 of the Act, it had not given any details of the nature, date or volume of any further documentation upon which it sought to rely.

The respondent's solicitors' email dated 7 October 2018

33. As stated at paragraph 22 of the Costs Judgment, the respondent's solicitors wrote to the claimant's solicitors on 7 October 2018 (page 140 of the core bundle) regarding the inclusion of the Analysis document for 2 August 2016 in the hearing bundle on 12 March 2018. The respondent's solicitors expressed their professional view that the inclusion of such document was likely to damage the claimant's interests and credibility / lower the claimant's prospects of success in the Tribunal proceedings and made associated allegations regarding the claimant's Counsel and solicitor in relation to such matters.

The Judgment

34. The Judgment is at pages 24 – 70 of the core bundle. The Judgment included a finding (issue 3a of the Amended List of issues) that any basic or compensatory awards should be reduced by 100 percent pursuant to sections 122 (2) and 123 (1) of the Act for reasons relating to the claimant's conduct on 2 August 2016.

35. The Tribunal's factual findings regarding the events of 2 August 2016 (in respect of the transfer by the claimant of emails from the respondent to his personal account) and associated matters are at paragraphs 38-56 of the Judgment (pages 32-36 of the core bundle). Further, the Tribunal's conclusions regarding Issue 3 a of the Amended List of Issues are at paragraphs 114 – 120 of the Judgment (pages 57 – 60 of the core bundle).

The respondent's Costs Schedule

36. The respondent's Costs Schedule states that it was prepared by a costs lawyer/ assistant. The Costs Schedule is divided into 2 parts namely, (a) Part 1 – Costs which the Respondent considers the Claimant is liable to pay and (b) Costs which the Respondent considers that DAS Law is liable to pay . The Tribunal has noted in particular that (a) The respondent's Costs Schedule states that some of the alleged wasted costs claimed had been apportioned on a 50/ 50 basis between the claimant and DAS Law (b) that the respondent did not claim any costs against DAS Law for any period prior to 16 April 2018 and (c) that the respondent did not claim any costs against DAS Law in respect of the restored hearing in October 2018.

37. During the course of the Hearing it became apparent that the respondent's position regarding the wasted costs sought by the respondent against DAS Law had changed including, in particular that (a) the respondent was no longer seeking wasted costs against DAS Law in respect of the adjournment of the Hearing on 14 March 2018 (Limb a of paragraph 36 of the application) and (b) the respondent was seeking wasted costs against DAS Law in respect of the adjourned hearing in October 2018 (Limb b of paragraph 36 of the application) although no costs had been claimed in the respondent 's Cost Schedule against DAS Law in respect of the relisted hearing (the costs being claimed instead against the claimant – at pages 5 -10 of the respondent's Costs Schedule).

38. The respondent was afforded two opportunities during the hearing to clarify its position with regard to the costs sought. The respondent initially confirmed that it was seeking wasted costs against the respondent for costs of (a) the hearing on 14 March 2018 (b) 3 days of hearing in October 2018 (c) the application for relief for sanctions (which it dated as July 2018) and (d) the CMPH on 22 August 2018.

39. After further consideration, the respondent confirmed that it was pursuing wasted costs in respect of the items from the respondent 's Costs Schedule as identified in the attached sheet. The Tribunal noted in particular that (a) the respondent confirmed that it no longer seeks wasted costs in respect of the Hearing on 14 March 2018 (Limb a of the respondent's costs application (b) that the respondent confirmed that it does now seek costs against DAS Law in respect of the Hearing in October 2018 and (c) the respondent was unable to identify any specific costs in respect of the application for relief for sanctions (which it identifies in the respondent's application as having been made in July 2018).

The submissions of the parties and legal authorities

40. The Tribunal has given careful consideration to the written and oral submissions of the parties and to the authorities upon which they rely including in particular as follows: -

Re A Barrister (Wasted Costs Order (no 1 of 1991 [1993] QB.
Ridehalgh v Horsefield [1994] Ch 205 CA.
Tolstoy- Miloslavsky v Aldington [1996] l WLR 736 CA.
Turner Page Music v Torres Design Associates Limited [1998] Times, 3 August CA.
Medcalf v Weatherill [2002] UKHL 27 HOL.
Brown v Bennett (Wasted Costs) (No 1) [2002] l WLR 713 HC.
Ratcliffe Duce and Gammer v Binns UKEAT/0100/08 (23 April 2008) EAT.
Hedrich v Standard Bank London Limited [2009] P.N.L.R CA.
Wentworth – Wood v Maritime Transport Limited UK EAT/ 0184/17 (17 January 2018) EAT.

THE LAW

41. The Tribunal's jurisdiction to make a wasted costs order is set out at Rules 80 – 82 of the Rules. A wasted costs order may order the representative (in this case DAS Law) to pay the whole or part of any wasted costs of the receiving party (the respondent).

42. Having regard to the above Rules and authorities (including in particular, the leading authorities of **Ridehalgh** and **Medcalf**) the Tribunal has reminded itself that it has to have regard in particular to the matters referred to below.

43. The Tribunal is required to apply a three stage namely:-

(1) has DAS Law acted improperly, unreasonably or negligently,
(2) if so, did such conduct cause the respondent to incur unnecessary costs

(3) if so, is it, in all the circumstances, just to order DAS Law to compensate the respondent for the whole or part of the relevant costs.

Unreasonable or negligent conduct

44. Unreasonable or negligent conduct is defined, in summary in **Ridehalgh** as follows: -

(1) Unreasonable conduct - describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case. It makes no difference that the conduct is the product of excessive zeal and not improper motive. The acid test is whether the conduct permits of a reasonable explanation.

(2) Negligent conduct - should be understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession. However, the adoption of an untechnical approach does not mean that the respondent is required to prove anything less than it would have to prove in an action for negligence.

Causation

45. The Tribunal has jurisdiction to make a wasted costs order only where the improper, unreasonable or negligent conduct complained of has caused a waste of costs and only to the extent of such wasted costs. The demonstration of a causal link is therefore essential. Where the conduct is proved but no waste of costs is shown to have resulted it is not appropriate for the exercise of the wasted costs jurisdiction (**Re A Barrister** and **Ratcliffe**).

46. The jurisdiction to make a wasted costs order must be exercised with care and only in a clear case (**Tolstoy – Miloslavsky).**

47. The Tribunal is required to consider, whether on the balance of probabilities, the respondent would have incurred the costs which it is claiming from DAS Law if they had not acted or advised as they did **(Brown)**.

48. An application for wasted costs is inappropriate in cases requiring a detailed investigation into the facts as the procedure is a summary one which is to be applied in uninvolved and clear cases where unnecessary costs are incurred **(Turner Page Music** and **Hedrich**).

THE CONCLUSIONS OF THE TRIBUNAL

Was DAS Law's failure to comply with the Unless Order dated 27 February negligent or unreasonable conduct.

49. The Tribunal has considered first whether DAS Law's admitted failure to comply with the Unless Order dated 27 February 2018 constituted unreasonable or negligent conduct for the purposes of Rule 80 (1) of the Rules.

50. The respondent contended that it was plain that DAS Law had acted negligently in respect of such failure including, having regard in particular, to (a) the clear wording of the Unless Order dated 27 February 2018 which contained a clear warning that if the respondent failed to comply with its terms it would be

debarred from relying on any documentary evidence in support of its contentions pursuant to sections 122 -123 of the Act (b) DAS Law had in fact appreciated the seriousness of the unless provisions (the email dated 28 February 2018 at pages 20-21 of the DAS bundle) (c) the comments of the claimant in the letter to DAS Law dated 9 March 2018 (page 24 of the DAS bundle) and (d) any contention by DAS Law that the conduct was not negligent was doomed to failure.

51. DAS Law did not concede the alleged negligent conduct however, it made the acknowledgements and concessions identified in paragraph 13-15 above including that the nature of the Unless Order dated 27 February 2018 ought to have been appreciated by DAS Law at the time.

The conclusions of the Tribunal

52. Having given the matter careful consideration, the Tribunal is satisfied that the failure of DAS Law to comply with the terms of the Unless Order dated 27 February 2018 (paragraph 35 a of the respondent's application) constituted negligent conduct (as defined in **Ridehalgh**) for the purposes of Rule 80 (1) of the Rules. When reaching such conclusion the Tribunal has taken into account in particular, the following matters :- (1) the conduct of the matter was being dealt with by an Associate solicitor who acknowledged the importance of dealing with an unless order and the consequences of failing to do so (pages 20- 21 of the DAS bundle) (2) DAS Law have not offered any proper explanation for the failure to comply with the Unless Order dated 27 February 2018 and further, have made the concessions referred to at paragraph 13 – 15 and 51 above including that the nature of the Unless Order dated 27 February 2018 should have been appreciated at the time.

53. As a result of such negligence the respondent was debarred from relying on any documentary evidence in support of its contentions pursuant to sections 122 - 123 of the Act (save to the extent subsequently agreed on 12 March 2018).

Was DAS Law's failure to instruct the respondent's Counsel about the existence of the Unless Order dated 27 February 2018 negligent or unreasonable conduct?

54. DAS Law acknowledges that the respondent's Counsel did not become aware of the existence of the Unless Order dated 27 February 2018 (and therefore DAS Law's failure to comply with it) until he was informed of its existence on the morning of 12 March 2018 (paragraph 18 above). DAS Law's failure to do so was a direct consequence of its earlier failure to recognise the terms of the Unless Order dated 27 February 2018 and the Tribunal is therefore satisfied that this further failure on the part of DAS Law also constitutes negligent conduct for the purposes of Rule 80 (1) of the Rules.

Did such conduct cause the respondent to incur unnecessary costs?

55. The Tribunal has therefore gone on to consider the question of causation namely, whether the negligent conduct of DAS Law identified above (in respect

of both the failure of DAS Law to comply with the Unless Order dated 27 February 2018 and to inform Counsel thereof) caused the respondent to incur unnecessary costs (including as contended at paragraph 35 c of the application whether such alleged conduct resulted in the respondent's Counsel becoming professionally embarrassed).

The respondent's submissions

56. The respondent contends that DAS Law's negligence in dealing with the Unless Order dated 27 February 2018 directly caused a breakdown and eventual conflict in the relationship between the respondent and DAS Law resulting in (a) DAS Law being dis- instructed partway through the Hearing in March 2018 (b) the respondent having to request an adjournment and (c) the matter being relisted for hearing in October 2018.

57. The respondent relies in support of its contentions in particular, on the following :- (a) that the respondent's confidence in DAS Law was clearly shaken by the end of 12 March 2018 as a result of DAS Law's negligence coming to light and the events of the day (b) the inability of the respondent to challenge the claimant's oral evidence on 13 March 2018 (during which he denied transferring items 15-19 of the Analysis document for 2 August 2016) in the absence of the relevant emails (c) by the evening of 13 March 2018 the relationship between the respondent and DAS Law was at breaking point (d) DAS Law acknowledged in an email on the morning of 14 March 2018 that it understood that the respondent had no confidence in DAS Law and that DAS Law did not believe that it could continue to act for the respondent in such circumstances and (e) Enigma solicitors subsequently wrote to DAS Law on behalf of the respondent on 14 March 2018 (page 49 of the DAS bundle) to dis – instruct DAS, the final nail in the coffin being the Claimant's indication that it would seek a wasted costs order against both DAS Law and the respondent – the clear conflict being caused by DAS Law's negligence in dealing with the Unless Order dated 27 February 2018 (f) DAS Law accepted its liability for wasted costs by a subsequent consent order in favour of the claimant (page 79 of the DAS bundle) and (g) the potential overlap with the High court proceedings was not the reason for the adjournment which was allowed because of the lack of legal representation which was caused by DAS Law's negligence and the resulting conflict of interest between DAS Law and the respondent.

The submissions of DAS Law

58. DAS Law denied that its failure to comply with the Unless Order dated 27 February 2018 had caused the respondent to incur any wasted costs. The respondent contended, as a general point, that this case was not appropriate for consideration pursuant to Rule 80 of the Rules as the summary nature of the wasted costs procedure was emphasised in the authorities which make it clear that the jurisdiction must only be exercised in a clear case (which did not apply in this matter).

59. In summary, DAS Law also contended as follows :- (a) the Unless Order dated 27 February 2018 related to documentary evidence in support of the respondent's contention that any compensation awarded to the claimant should be reduced pursuant to sections 122 - 123 of the Act by reason of the

claimant's conduct on 2 August 2016 in emailing commercially sensitive and confidential documents to his personal email address (b) the Tribunal found as a fact that the claimant did act as alleged and reduced the claimant's compensation accordingly (c) matters relating to the documents covered by the Unless Order dated 27 February 2018 were resolved by around midday on 12 March 2018 on the basis of the agreed submission of the Analysis document for 2 August 2016. There was therefore no need for the respondent to rely on the documentation covered by the Unless Order dated 27 February 2018 and no application for relief from sanctions was accordingly required/made (d) the respondent did not terminate the retainer with DAS Law on 12 March 2018 despite knowing by that stage that the claimant was seeking costs in respect of the breach of the Unless Order dated 27 February 2018 (e) On 13 March 2018 (and after the claimant had commenced his evidence) concerns emerged regarding the potential conflict between the Tribunal and High Court proceedings and in the light of which the respondent instructed its Counsel to seek a postponement of the Tribunal proceedings (f) in response to such an application the Tribunal sought further information which gave rise to a difficult exchange of correspondence between DAS Law and Enigma solicitors (g) the respondent terminated its retainer with DAS Law by an email on 14 March 2018 which raised a number of complaints only one of which referred to the Unless Order dated 27 February 2018. It was the respondent's decision to terminate the retainer with DAS Law notwithstanding that there was no question of any conflict of interest between them as there was never any suggestion by DAS Law that the respondent would be responsible for the failure to comply with the Unless Order dated 27 February 2018 (h) it is factually incorrect to suggest that Counsel for the respondent had become professionally embarrassed as a result of not been informed about the Unless Order dated 27 February 2018 as he was fully aware of it by the morning of 12 March 2018 and moreover, resolved the issues relating thereto as indicated previously above. Once DAS Law ceased to act for the respondent Counsel was without instructions and that is why he ceased to act and (i) it is likely that the hearing in March 2018 would have been adjourned in any event in the light of the potential overlap with the High Court proceedings.

60. DAS Law further contended in closing submissions that the respondent's difficulties in clarifying during the Hearing the actual costs allegedly flowing from the negligence of DAS Law (including its attempt to recover for the first time significant additional costs in respect of the hearing in October 2018 which had not previously been identified in the respondent's Costs Schedule as wasted costs) clearly demonstrated that the matter was not suitable for the summary jurisdiction of wasted costs.

The conclusions of the Tribunal

61. Having given the matter careful consideration, the Tribunal is not satisfied that the respondent has established, on the balance of probabilities, that DAS Law's failure to (a) comply with the Unless Order dated 27 February 2018 or (b) its subsequent failure to instruct the respondent's Counsel about the existence of the Unless Order dated 27 February 2018 caused the respondent to incur the alleged unnecessary costs (including that it caused the respondent's Counsel to be professionally embarrassed). When reaching its conclusions, the Tribunal has had regard to (a) the general considerations referred to below and has then

gone on further to consider (b) the position with regard to the alleged wasted costs identified in respect of limbs a – d at paragraph 36 of the application as amended during the course of the Hearing (as set out in the attached sheet).

62. When reaching the above conclusions the Tribunal has taken into account in particular the following matters:-

(1) The wasted costs procedure pursuant to Rule 80 (1) of the Rules is a summary jurisdiction which must be exercised with care and only in a clear case. The application is however predicated on the basis of a chain of events namely, that the negligence, " directly caused a breakdown and eventual conflict in the relationship between the Respondent and DAS, resulting in DAS being dis – instructed half way through the full hearing at the Employment Tribunal. The Respondent had to request an adjournment and a new final hearing was listed" (paragraph 3 of the respondent's skeleton argument). Moreover, there is a dispute between the parties as to whether (a) there was any conflict of interest between the parties arising from the negligent conduct of DAS Law in respect of the Unless Order (including regarding any responsibility for costs) and (b) the reasons for any breakdown in the relationship

(2) It is essential to demonstrate a causal link in claims for wasted costs including that the identification of the actual loss flowing from the negligence must be identified.

(3) It is however clear from the available evidence that the failure by DAS Law to comply with the Unless Order dated 27 February 2018 was fully appreciated by the morning of 12 March 2018 (including by the respondent's Counsel).

(4) Further, It was subsequently agreed between the parties on 12 March 2018 that the Analysis document for 2 August 2016 would be admitted into the hearing bundle.

(5) In the light of the above (and the other associated matters of agreement) :- (a) the hearing was able to continue (b) no application was made for relief from sanctions (c) the claimant commenced his oral evidence on the morning of 13 March 2018 and (d) it was agreed between the parties that the Hearing was likely to be concluded within the original 5 day time allocation (paragraphs 19- 21 above).

(6) The issues relating to DAS Law's failure to comply with the Unless Order dated 27 February 2018 were therefore resolved for the purposes of the conduct of the Hearing by 13 March 2018.

(7) During his evidence on 13 March 2018 the claimant made admissions regarding the Analysis document for 2 August 2016 including that he had forwarded the emails belonging to the respondent to his personal email address and that some of the information which he had

transferred would have been useful to a competitor (paragraph 21 above).

(8) By 13 March 2018, a new issue had arisen namely, the Tribunal's concern regarding the potential overlap between the Tribunal proceedings and the proceedings in the High Court in relation to the events of 2 August 2016 and in the light of which the respondent's Counsel was instructed by the respondent to make an application to stay the Tribunal proceedings pending the outcome of the High Court proceedings on 17 April 2018. Further, although this application was not ultimately determined by the Tribunal, in the light of the decision of the Tribunal to accede to the respondent's application on 14 March 2018 to adjourn the Hearing, it was :- (a) factor which the Tribunal took into account when deciding to accede to the respondent's application and (b) the Tribunal stated that it might, in any event, have decided to stay the Tribunal proceedings pending the outcome of the hearing in the High Court in the light of the further information which had come to light during the course of the Tribunal hearing (paragraph 9 (6) of the Reasons dated 13 June 2018).

(9) It is apparent from the documents (pages 95- 138 of the DAS bundle) that there was a deteriorating relationship between the respondent/ Enigma solicitors and DAS Law from 9 March 2018 which appears to be for number reasons including not only because of the Unless Order dated 27 February 2018/ the claimant's intimated claim for wasted costs against DAS Law/ the respondent but also because of wider issues including matters related to the High Court proceedings (paragraph 17 above).

(10) The position is reflected in the email which was sent to DAS by Enigma solicitors on behalf of the respondent on the morning of 14 March 2018 terminating the retainer of DAS Law which cites a number of reasons why the respondent believed that DAS Law should be responsible for wasted costs (page 49 of the DAS bundle and paragraphs 23 – 24 above).

(11) Mr Robertson of the respondent did not seek to rely on the Unless Order dated 27 February 2018 or any alleged conflict of interest between the respondent and DAS Law in his application to postpone the hearing on 14 March 2018 (paragraphs 3- 5 of the Written Reasons dated 13 June 2018).

(12) The respondent's solicitors subsequently contended in the email to the claimant's solicitor dated 7 October 2018 (page 140 of the core bundle) that the admission of the Analysis of document of 2 August 2016 was likely to damage the claimant's interests and lower his prospects of success in the Tribunal proceedings (paragraph 33 above).

(13) The Analysis document for 2 August 2016 subsequently played an important in the findings of fact contained in the Judgment

regarding the events of 2 August 2016 and the Tribunal's consequential determination that any basic or compensatory awards which would otherwise have been awarded to the claimant in respect of his successful unfair dismissal claim should be reduced by 100% (paragraphs 34 – 35 above).

63. , The Tribunal is further satisfied that the respondent's failure to establish, on the balance of probabilities, for the purposes of this summary procedure, a clear causal connection between the negligence of DAS Law and any wasted costs is demonstrated by the difficulty which the respondent experienced at the costs hearing in seeking to identify the costs which allegedly flowed from the negligence of DAS Law (paragraphs 36 -39 above) including (a) the withdrawal during the costs hearing of its claim for wasted costs in respect of the adjournment of the Hearing on 14 March 2018 (paragraph 36 a of the respondent's application) in the absence of any supporting claim for wasted costs against DAS Law prior to 16 April 2018 in the Costs Schedule and (b) seeking to add (albeit still imprecise) a claim for wasted costs in respect of the Hearing in October 2018 notwithstanding that such claim was brought against the respondent rather than DAS Law in the Costs Schedule and (d) the failure to provide any details of the claim for costs in respect of the respondent's application for relief from sanctions dated 25 August 2018(which is erroneously dated by the respondent as July 2018).

The Tribunal's conclusions regarding the heads of wasted costs claimed at Paragraph 36 of the application

Paragraph 36 a of the application

64. As stated above the Claimant withdrew, during the course of the costs hearing, his claim for wasted costs in respect of the hearing on 14 March 2018. The Claimant sought instead to pursue a claim for the costs identified in respect of paragraph 36 a of the application as identified on the attached sheet.

65. The Tribunal is not however satisfied that the respondent has established, on the balance of probabilities the necessary causal connection between DAS Law's negligence in respect of the Unless Order dated 27 February 2018 and the wasted costs claimed on the attached sheet in respect of paragraph 36 a of the application. When reaching this conclusion the Tribunal has taken into account in particular (a) the reasons set out at paragraph 62 above and (b) such costs were not originally claimed as part of paragraph 36 a of the application and further (c) the respondent has failed to provide any proper explanation of the basis upon which it now contends that such costs are recoverable.

Paragraph 36 b of the application

66. The Tribunal is not satisfied that the respondent has established, on the balance of probabilities, the necessary causal connection between DAS Law's negligence in respect of the Unless Order dated 27 February 2018 and the wasted costs identified on the attached sheet in respect of paragraph 36 b of the application (the bulk of which relate to the preparation for and attendance at the restored hearing in October 2018).

67. When reaching this conclusion the Tribunal has taken into account in particular :- (a) that the costs claimed in respect of paragraph 36 b of the application include the bulk of costs of the restored hearing in October 2018 notwithstanding, as explained at paragraph 39 above, such costs were not originally claimed in the Costs Schedule. Further the respondent was still unclear as to the number of days claimed in respect of the Hearing in October 2018 (leaving that to be determined by the Tribunal) (b) the reasons at paragraph 62 above including that the issues relating to the respondent's failure to comply with the Unless Order dated 27 February 2018 including the associated issues relating to admission of documentation concerning the claimant's conduct on 2 August 2016 were resolved by the agreed admission of the Analysis document for 2 August 2016 in the hearing bundle on 12 March 2018.

Paragraph 36 c of the application - the application for relief from sanctions

68. The Tribunal is not satisfied that the respondent has established, on the balance of probabilities, the necessary causal connection between DAS Law's negligence in respect of the Unless Order dated 27 February 2018 and the alleged wasted costs in respect of paragraph 36 c of the application. When reaching this conclusion the Tribunal has taken into account in particular :- (a) as stated at paragraph 39 above the respondent was unable to identify any specific costs in respect for the application for relief from sanctions dated 25 August 2018 (erroneously described as dated July 2018) (b) the reasons at paragraph 62 above (c) the application for relief from sanctions was unsuccessful (for the reasons given at paragraph 33 of the Order dated 28 September 2018 including in the light of the admission of the Analysis document for 2 August 2016 in the agreed hearing bundle and further, notwithstanding that the respondent stated in support of its application that it wished to adduce important further evidence in support of its case pursuant to sections 122 - 123 of the Act it did not provide any details or copies of such documentation in support of its application and (d) the application for relief from sanctions was, in any event, unnecessary in the light of the resolution of the issue on 12 March 2018 and the subsequent admissions by the claimant in evidence on 13 March 2018 regarding his actions on 2 August 2016 (paragraph 19 – 21 above).

Paragraph 36 d of the application – the respondent's preparation for and attendance at the CMPH on 22 August 2018

69. The Tribunal is not satisfied that the respondent has established, on the balance of probabilities, the necessary causal connection between DAS Law's negligence in respect of the Unless Order dated 27 February 2018 and the CMPH on 22 August 2018 (the associated Order dated 29 August 2018 is at pages 20 -23 of the core bundle) . When reaching this conclusion the Tribunal has taken into account in particular the contents of the Order dated 29 August 2018 which (a) records that the CMPH listed to deal with a discrete application by the respondent for specific disclosure of documents and (b) also dealt with the wider issues also referred to in the Order dated 29 August 2018 (which were unrelated to the Unless Order dated 27 February 2018) .

FINAL CONCLUSION

70. In all the circumstances, the Tribunal is not satisfied that the respondent has established any entitlement to wasted costs pursuant to Rule 80 – 82 of the Rules and the respondent's application against DAS Law is therefore dismissed.

Employmet Judge Goraj

Date: 15 October 2019

Judgment sent to parties: 16 October 2019

FOR THE OFFICE OF THE TRIBUNALS

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