Case Numbers: 2201364/2019
2201367/2019
2201370/2019

EMPLOYMENT TRIBUNALS

Claimants: **(1) Mr B Churchill**
(2) Mr Z Nuseibeh
(3) Mr O Diallo

Respondent: **Floreat Capital Markets Ltd**

Heard at: **London Central** **On: 6 December 2019**
Before: **Employment Judge Elliott**

Appearances
For the claimants: **Ms R Tuck, counsel**
For the respondent: **Mr P Kirby, one of Her Majesty's counsel**
For Floreat Holding Ltd: **Mr R Bhatt, counsel**

JUDGMENT ON COSTS

The judgment of the tribunal is that the claimant Mr Diallo shall pay the following costs:

1. To the respondent the sum of **£6,000**.
2. To the interested party the sum of **£14,400.**

REASONS

The procedural background

(1) This decision was given orally on 6 December 2019. The claimants requested written reasons.

(2) There are three claims, brought by Mr B Churchill, Mr Z Nuseibeh and Mr O Diallo. Mr Diallo is a co-director of the respondent and a shareholder. The respondent is part of the Floreat Group which is an investment business.

(3) At a preliminary hearing on 15 August 2019 I extended time for the respondent to file the ET3's and also ordered that the holding company, Floreat Holding Ltd

be joined as an interested party under Rule 35 to be present at the preliminary hearing on 15 August 2019, but not to participate and to participate in this costs hearing.

(4) The full merits hearing is listed to take place over six days commencing on Wednesday 29 January 2020.

(5) A further preliminary hearing for case management took place on 12 September 2019 before Employment Judge Snelson. An Order was made that the parties deliver the final agreed list of issues to the tribunal by 16 September 2019. A draft list of issues was made available at the 12 September hearing, as per the Order made on 15 August 2019. The list of issues has been completed and will be included in the trial bundle.

(6) The value of the claims is around £250,000 as the statutory cap applies.

Background

(7) On 1 August 2019 a director of the respondent Mr M Otaibi, wrote to the tribunal saying that without the consent of claimant Mr Diallo, who was also a director, the respondent could not serve any defence or take part in the tribunal proceedings. He said that the "*deadlock*" could not be resolved by the date for filing the ET3s. The ET3 was originally due by 6 August 2019.

(8) On behalf of claimant Mr Diallo it was said that Mr Otaibi was free to conduct any Response by the respondent and that Mr Diallo recognised his conflict of interest and would not be involved in the making of any such Response.

(9) It is this situation that gives rise to the costs applications. The parties are all agreed that only one preliminary hearing was necessitated, whether it took place on 15 August or 12 September and that unnecessary costs were incurred by having to hold two preliminary hearings and then this costs hearing. Had the ET3's been filed on time or before the 15 August preliminary hearing, no further case management hearing would have been necessary.

Documents

(10) I had two bundles from the interested party, one was a bundle for the preliminary hearing on 15 August 2019 and one was a core bundle for the costs hearing plus an authorities bundle. There was a skeleton argument from the claimants and from the interested party. There was a chronology from the respondent.

(11) I had written submissions from the claimant and the interested party to which counsel spoke and oral submissions only from the respondent. All submissions were fully consider together with any authorities referred to whether or not expressly referred to below.

The costs applications

(12) Prior to the hearing on 15 August 2019, solicitors for the holding company wrote to the tribunal stating that their original application for a stay of proceedings was necessitated by claimant Mr Diallo's "*failure*" to make his position clear as to whether he consented to Mr Otaibi filing a Response to the proceedings. They considered Mr Diallo's conduct unreasonable, vexatious and disruptive and they made an application for costs under Rule 76 in the sum of £9,675.18. Further costs had been incurred by the date of this hearing on 6 December 2019.

(13) The claimants opposed the application for costs. They said that the application made by the holding company for a stay of proceedings was made to put pressure on the claimants and to frustrate the claims. They reserved their position on costs.

(14) The claimants and the respondent also made consequential applications for costs.

The issue for this hearing

(15) The issue for this hearing was the determination of the holding company's costs application of 14 August 2019 plus the later applications for costs made by the claimants and the respondent.

(16) It was confirmed by counsel for the claimants and counsel for the interested party that the costs application was only against claimant Mr Diallo.

(17) There was also a costs application from the respondent against claimant Mr Diallo, dated 29 November 2019 (core bundle page 53).

(18) There was also costs application from all three claimants against the respondent and the interested party dated the day before this hearing, 5 December 2019, core bundle page 79.

The position of the holding company

(19) In deciding to join the holding company as an interested party under Rule 35 on the terms set out above, I decided that it had a legitimate interest as a 50% shareholder in making its application for a stay because of the potential financial implications of the respondent failing to file an ET3 in each case. The stay application was abandoned when Mr Otaibi indicated that he was in a position to deal with the Response to the claim (letter 6 August 2019). I agreed that the holding company had an interest in making that application to protect its position as a substantial shareholder. That gave an interest in a costs application.

The interested party's application

(20) The interested party's position, was that Mr Otaibi was precluded by the respondent's Articles of Association from taking any steps in defending the proceedings without claimant Mr Diallo's consent. The interested party said that Mr Diallo should have given his consent when first requested, but he did not. It

was submitted that he withheld his consent in furtherance of his interests as a claimant.

(21) The interested party said that it was not until the very last minute that Mr Diallo "*relented*" by which time the respondent had incurred significant costs and with the deadline for the ET3 looming, an application for a stay was made.

(22) On 28 November 2019 the interested party made an open offer to settle with Mr Diallo paying its costs in the sum of £8,000 and to avoid the cost of this costs hearing.

(23) On 4 December 2019 the claimants gave notice of intention to make an application for costs against the interested party in respect of this costs hearing (core bundle page 56). They offered a "*drop hands*" approach on the basis that the parties focus on the full merits hearing and drop their claims for costs against one another. Their substantive costs application was made on 5 December and was at page 79 of the bundle.

(24) The interested party accused Mr Diallo of "*game playing*" by obfuscating with the intention of causing "*maximum prejudice*" to the respondent to cause both the respondent and the interested party to incur cost. The interested party said that this was "*proven"* by Mr Diallo's "*volte face"* at the 15 August hearing when he consented to the respondent's application for an extension of time for the filing of the ET3.

The claimant's position (Mr Diallo)

(25) The claimant's position was that Mr Otaibi was always able to defend these proceedings on behalf of the respondent and ought to have presented an ET3 by 6 August 2019 so that the 15 August 2019 preliminary hearing would have been the only one necessary and there would have been no need for the 12 September 2019 preliminary hearing. The claimant accused the respondent of "*game playing*".

The relevant law

(26) Costs do not follow the event in employment tribunal proceedings and an award of costs is the exception and not the rule (Lord Justice Mummery in ***Barnsley Metropolitan Borough Council v Yerrakalva 2012 IRLR 78***).

(27) The power to award costs is contained in Rule 76 of the Employment Tribunal Rules of Procedure 2013 which provides that:

> *1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—*
>
> *(a) 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 that the proceedings (or part) have been conducted;

(28) The Court of Appeal held in ***Yerrakalva*** (above) that the vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there was unreasonable conduct in bringing and conducting the case and in doing so, to identify the conduct, what was unreasonable about it and what effects it had. There does not have to be a precise causal link between the unreasonable conduct in question and the specific costs being claimed.

(29) The term 'vexatious' was described by Lord Bingham in ***Attorney General v Barker 2000 1 FLR 559*** (cited with approval by the CA in ***Scott v Russell 2013 EWCA Civ 1432*** which was a case concerning costs in the Employment Tribunal) at paragraph 19):

"…the hallmark of a vexatious proceeding is…that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant, and it involves an abuse of the process of the court, meaning that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process."

(30) "Unreasonable" has its ordinary English meaning and is not to be interpreted as if it means something similar to vexatious: ***Dyer v Secretary of State for Employment EAT/183/83***.

(31) The claimant cited two case law examples of vexatious conduct, noting correctly that such a finding is fairly rare in the Employment Tribunal:

Keskar v Governors of All Saints Church of England School [1991] ICR 493, *EAT, where costs were awarded against a claimant in a discrimination case on the basis that he was 'motivated by resentment and spite in bringing the proceedings', and that there was 'virtually nothing to support his allegations of race discrimination'. The ground on which the award was made was unreasonable conduct but it could as easily have been vexatious conduct.*

Beynon v Scadden [1999] IRLR 700, EAT, an employment tribunal categorised a union's behaviour as vexatious and unreasonable on the ground that its pursuit of a case on behalf of the claimants was both without merit and done with the collateral purpose of achieving union recognition from the respondent, and awarded costs against the claimants. The EAT upheld the award and the grounds on which it was made even though it would itself have categorised the conduct as simply unreasonable rather than vexatious.

(32) The EAT in ***Raggett v John Lewis plc 2012 IRLR 906*** said that where a party is registered for VAT and able to recover VAT on its counsel's fees and solicitors' costs as input tax, to award costs including VAT would represent a bonus to that party compensating over and above the costs incurred and would represent a penalty to the paying party. I was informed that the interested party and the respondent were not VAT registered.

(33) On the issue of hourly rate is the interested party through to the tribunal's attempt a recent decision from the High Court in the case of ***Ohpen Operations UK Ltd v Invesco Fund Managers Ltd HT-2019-000137*** (O'Farrell J) commenting on the Solicitors Hourly Guideline Rates 2010 and stating in the judgment at paragraph 14 that the guideline rates were unsatisfactory and not helpful in determining reasonable rates in 2019 and that guideline rates are significantly lower than the current hourly rates in many London City solicitors' firms. I took this into account on the question of hourly rates, City firms being instructed by all parties.

(34) Section 175 of the Companies Act 2006 sets out the duty to avoid conflicts of interest. In relation to that duty, the House of Lords in ***Boardman v Phipps, [1967] 2 AC 46*** said that a fiduciary (of which a director is one) "*must not make a profit out of his trust which is part of the wider rule that a trustee must not place himself in a position where his duty and his interest may conflict*".

(35) A director would not be in breach of the no conflict and no profit principles if the company gave its informed consent to the director being in such conflict - see ***Bristol & West v Mothew 1998 Ch 1****.*

(36) The decision as to whether or not a company defends proceedings is one for the directors: ***Abdelmamoud v The Egyptian Association in Great Britain Ltd 2018 Bus LR 1354****.*

Submissions from the interested party

(37) The interested party said that the costs application by the claimant was made at 7pm the night before this hearing and they have had since 15 August 2019 to make their application and have known about this hearing since 14 November 2019. On 28 November 2019 the interested party made their open offer to settle in the sum of £8,000 seeking a reply by 4pm on Monday 2 December 2019. They received a reply on 4 December with the drop hands suggestion.

(38) The interested party said that Mr Diallo ought to have given Mr Otaibi his express consent, first requested on 2 May 2019 repeated on 17 July 2019 and again on 1 August 2019. They said express consent was only given on 6 August 2019 in a letter of that date at pages 27-28 when he gave express consent. He said in that letter that Mr Otaibi "*has been and is free to conduct any response by the respondent…".*

(39) It was submitted that in the claimant's solicitors' letter of 3 May 2019 (page 14) by just accepting that Mr Diallo was in a conflict situation, this was not giving his express consent.

(40) On 9 August 2019 the interested party wrote to the claimant's solicitors, asking for an extension of time for the ET3 and gave a costs warning if this was not given. Consent was given at the hearing on 15 August 2019. The interested party said had this consent been given prior to 15 August, they would not have

made this costs application.

(41) The point about Article 11 of the Articles of Association was raised for the first time on 4 December 2019, the interested party did not agree with what was said, but submitted that the point could have been raised earlier.

(42) The interested party said that if I made findings as above, then Mr Diallo must have been unreasonable and vexatious and costs should be awarded.

(43) For the interested party, they said that had Mr Diallo consented earlier, they would not have been here today and would not have incurred the costs.

(44) The Articles of Association ("AA") were at tab 35 of the bundle for the 15 August 2019 hearing. Article 11 was raised by the claimant on 4 December 2019. It was submitted that by raising this point on 4 December, it flew in the face of Mr Diallo giving his consent on 6 August 2019. It was said to be an "ex post facto" attempt to justify his actions.

(45) Article 5 provides that the directors are to take decisions collectively as a majority and it is not in dispute that there were only 2 directors, Mr Otaibi and Mr Diallo.

(46) Article 11 dealt with the situation where a director is in conflict with the company, specifically under section 175 of the Companies Act and to give or regulate the situation where a director requires authorisation from the company to carry on in conflict. Article 11 addresses section 175 of the Companies Act 2006, that a fiduciary, a director, must not make a profit out of his trust.

(47) Article 11 said:

> ***Directors' conflicts of interests***
> *11.1 For the purposes of this Article 11, a conflict of interest includes a conflict of interest and duty and a conflict of duties, and interest includes both direct and indirect interests.*
> *11.2 The directors may, in accordance with the requirements set out in this Article 11, authorise any matter proposed to them by any director which would, if not authorised, involved director in breaching his duty under section 175 of the Companies Act 2006 to avoid conflicts of interest….*
> *11.4 Any authorisation under this Article 11 will be effective only if:*
> *11.4.1 the matter in question shall have been proposed by any director for consideration at a meeting of directors in the same way that any other matter may be proposed to the directors under the provisions of these articles or in such other manner as the directors may determine;*

(48) The interested party submitted that Article 11 of the AA did not apply because it related to a business transaction which this situation was not. Article 11 existed to authorise a conflict and the only way it could apply, was if Mr Diallo said he had brought a case against the respondent, I am in conflict with you, but I would like to conduct a defence. As he would not wish to conduct a defence against his own claim, the interested party said it could not apply.

(49) The more common conflict situation would be where the director in question was seeking to form a contract where he also had an interest. The conflict should be disclosed so that any authority could be given. The interested party said it did not apply to filing a defence within proceedings. The interested party said that it was not about authorising conflicts. All that was needed was for Mr Diallo to authorise the filing of the ET3.

(50) Two directors are necessary for a quorum. There were only 2 directors Mr Diallo and Mr Otaibi. When the company invokes Article 11 to authorise a conflict, the proposing director does not count for the purposes of quorum (Mr Diallo) nor can he. Mr Bhatt said that this did not apply to this situation of filing a defence to Employment Tribunal proceedings.

(51) It was submitted that when the respondent asked for consent, Article 11 could have been raised and was not.

(52) It was pointed out that in a letter dated 20 December 2018, solicitors for the claimant said that Mr Diallo did not accept that Mr Otaibi had any right to act on behalf of the company without board approval (bundle page 3). This was in the context of a Companies Court application. It was repeated on 12 April 2019 (bundle page 7).

(53) On 2 May 2019 when the ET proceedings had been issued but not served, solicitors for the interested party requested a copy of the ET1 which was not provided. A request was made for Mr Diallo to consent to Mr Otaibi having full control of the litigation. A reply was given on 3 May, page 14, which was submitted acknowledged the conflict but did not give consent.

(54) On 17 July (page 15) consent was sought. It expressly said: "*If Mr Diallo does not consent to my proposal, an application to stay the ET proceedings in order to allow the parties to resolve the deadlock will be made*". Mr Diallo's solicitors said in an email of 24 July 2019 that Mr Diallo's position had been made clear on 3 May 2019, but it did not answer the express question.

(55) Express consent was not given until 6 August 2019 at 18:40 hours.

(56) In relation to the application for an extension of time, consent was not given until the 15 August 2019 hearing itself.

Submissions from the respondent

(57) The respondent made four points (i) context, (ii) authorisation, (iii) the correspondence and (iv) tactics. The respondent endorsed and repeated the submissions made by the interested party.

(58) In terms of context this is not the only dispute between the parties, for example there are Companies Court proceedings, there are threatened High Court proceedings. It was submitted that this was not an isolated unfair dismissal claim.

It was said to indicate why the claimants may seek to behave unreasonably. Conduct could be fed into other proceedings. A straight answer to a straight question asked three times would have removed any ambiguity. A "Delphic" response left open the possibility of Mr Diallo arguing that Mr Otaibi had acted without proper authorisation.

(59) On authorisation, the point was raised on 4 December 2019 and Article 11 concerned a situation where a director asks the company for authorisation on a particular conflict. It was not about a conflict whereby Mr Diallo was asking for authorisation of a conflict he was in. He did not need authorisation to bring his proceedings.

(60) On the correspondence, the respondent agreed with the submissions of the interested party. On 2 May 2019 solicitors for the holding company asked for consent to conduct the defence (page 12) including as to privilege as to having sight of particular documents. The question was not answered. It was accepted for Mr Diallo that there was a conflict (page 14). On 17 July 2019 Mr Otaibi proposed to defend the proceedings and engage a legal team and sought consent and dealt with the issue of privilege. The response was on 24 July, saying refer to our previous letter "*which makes Mr Diallo's position clear".* The respondent was not clear as to his position.

(61) By 1 August 2019, Mr Otaibi did not understand himself to be in possession of consent. He wrote to the tribunal, copied to the claimants' solicitors, referring to the deadlock and seeking a stay. He said if he had authorisation he would file the ET3s. He said that Mr Diallo seemed to be intent on prejudicing the respondent (page 19). He said it was open to Mr Diallo to authorise the respondent to defend itself.

(62) The response came at 18:40 on 6 August 2019, the day the ET3's were due to be filed.

(63) It was submitted that this was tactical manoeuvring with the claimants using sophisticated lawyers seeking to obtain a potential tactical advantage. It was submitted that they did not answer straightforward questions and only did so when the matter had been referred to the tribunal and responded after business hours on the day the ET3s were due to be filed. They did not agree to an extension of time for the ET3s until the parties were in the tribunal. The respondent needed separate representation and it was too complex for a mere holding defence. The respondent said that the claimants pursued an unreasonable tactical campaign which caused unnecessary costs.

Submissions for the claimant Mr Diallo

(64) The claimant agreed with Mr Kirby QC for the respondent that context was important. There was correspondence, starting in the core bundle on 20 December 2018 (page 1). In that letter it was not accepted that Mr Otaibi had the right to act without board approval. This was about the signing off of accounts

and was referred to in paragraph 15 of Mr Diallo's ET1. In January 2019 proceedings were issued in the Companies Court seeking an order that the claimant sign off the 2017 accounts of the respondent on a going concern basis. Mr Diallo's position was that the company was insolvent and not a going concern. According to the ET1, the Judge in the Companies Court said that Mr Diallo was right not to sign off the accounts on a going concern basis.

(65) Paragraph 17 of the ET3 said that the loan that the interested party (holding company) had extended to the respondent was outstanding at £1.75m.

(66) EC Certificates were issued on 25 March 2019 and on 26 March, the claimants' solicitors enclosed the EC Certificates and said there would be unfair dismissal claims. There was reference to the Companies Court proceedings. In March and early April 2019 there was also correspondence about potential breach of post termination restrictions.

(67) The ET1's were presented on 12 April 2019. The tribunal served it on 10 July 2019. The claimant's counsel could not say whether a copy of the ET1 was sent to the respondent. The respondent and the holding company said it was not and I find that it was not. Correspondence came from the solicitors for the holding company which was not the respondent.

(68) The solicitors for the holding company asked whether Mr Diallo was going to resign his directorship (page 11 dated 2 May 2019) and went on to ask if he would irrevocably consent to Mr Otaibi having full claims control on behalf of the respondent. It was submitted that this was not a straightforward question in relation to the ET claim but was a broad question about irrevocable claims control by the respondent. There was also a request that advice in the legal proceedings would be privileged so that Mr Diallo could not access it. Mr Diallo was not prepared to resign his directorship pending other litigation issues. Mr Diallo accepted that there was a position of conflict.

(69) The claimant accepted that the letter of 3 May 2019 did not give consent to the filing of an ET3 but said that this was not the question asked, it was a request for full irrevocable claims control.

(70) The ET1 was not served by the tribunal until 10 July 2019. On 17 July 2019 Mr Otaibi expressly asked for consent to full claims control of the ET proceedings (page 15). The response was to refer to the 3 May 2019 letter saying it made "*Mr Diallo's position clear*".

(71) The claimant submitted that by 17 July Mr Otaibi could start gathering information to go into the ET3.

(72) The claimant said that there was no explanation as to why after the 6 August 2019 the ET3 could not have been filed or a draft presented on 15 August 2019.

(73) The claimant's counsel did not have instructions as to whether a copy of the ET1 was sent to the respondent prior to it being served on 10 July 2019. The claimant

relied upon the request coming from the holding company and there being no evidence that the respondent asked for it.

(74) The claimant said that the respondent had the ET1 from 10 July and consent from 18:40 on 6 August, so the claimant queries what was holding them up from 6 August to 15 August. The position of the claimants is that it was always open to the respondent to deal with the ET3 and they did not need a tick box of needing consent. The claimant submitted that it was always the position that they could have done so. The claimant accepted that he could have been clearer. It was asked rhetorically: Was it vexatious not to spell it out in words of one syllable? The claimant submitted not.

(75) The claimant also said that when the respondent asked for consent to an extension of time in a letter dated 9 August 2019, the unreasonable conduct relied upon was the claimant not saying "yes" immediately. The claimant said that they did not ask until 9 August, so that when the claimant's responded on 13 August this would not have done away with the need for the case management hearing on 15 August. The claimants accept that they did not consent to an extension of time.

(76) The claimant said it was sensible for them to suggest on 4 December 2019 that the parties drop their costs applications and focus on the substantive proceedings and that proceeding today was "*game playing".*

(77) The claimant did not make any submissions on the Article 11 point but it was not formally abandoned.

Decision on costs application

(78) My conclusion is that this was not at the time about the scope of Article 11 of the AA. It was about the defence of these proceedings. This was not about authorising a transaction, for example, in which Mr Diallo could profit. It was not about seeking authorisation to deal with a conflict, because the conflict was set to continue within the litigation. Mr Diallo did not need authorisation to continue with his claim. The company could not restrict him from bringing or conducting the litigation. Article 11 was never raised at the time. There were no submissions today from the claimant on the Article 11 point, although it was not formally abandoned. I find that it was a point considered at the last minute by the claimants' solicitors and I accept Mr Bhatt's submission that it was done after the event to seek to justify Mr Diallo's actions.

(79) Decisions are taken by a majority under Article 5 of the AA so Mr Otaibi could not defend the claim singlehandedly. He was bound by the AA. If he over reached his powers he would be acting outside his authority and potentially open to liability for any loss.

(80) On the question of this consent Mr Diallo's solicitors said in an email of 24 July 2019 that Mr Diallo's position had been made clear on 3 May 2019, but it did not answer the express question. It was a very easy matter to say, "*yes we confirm*

Mr Diallo gives his consent to Mr Otaibi conducting the defence of the tribunal proceedings". He did not do this. This would have resolved the problem, instead it was made obtuse. It was a straightforward question needing a straightforward answer.

(81) On 1 August 2019, Mr Otaibi wrote to the tribunal explaining his and the respondent's position. The letter was copied to the claimant's solicitors (page 25). What Mr Otaibi needed was express consent, it could easily have been given by Mr Diallo, via his solicitors, by return on 2 August in a short sentence.

(82) The claimant made the point that full claims authority had been requested for Mr Otaibi. I find that it would still have been simple to say, he had that authority for the Employment Tribunal proceedings, but not at present for anything else. The heading of the letter asking the question was clearly marked "*Employment Tribunal Proceedings*".

(83) It was plainly obvious that the respondent would need to file ET3s to the three claims and there was a conflict. It was the easiest step in the world to say – I give you have consent to file the ET3s and conduct the defence of the tribunal proceedings. The response was to refer to the 3 May 2019 letter saying it made "*Mr Diallo's position clear*". It would have been simple to say: "*which for the avoidance of any doubt is yes, I give that consent*". The claimant accepted that it could have been clearer. I agree and find that there was no satisfactory explanation as to why such a clear answer could not have been given. It was unreasonable not to make this plain in one sentence, rather than referring back to previous correspondence which had not given the respondent the clarity it needed.

(84) It is the straightforwardness of the issue, that Mr Otaibi needed consent to defend the tribunal proceedings and the lack of clear and unequivocal reply that I find was unreasonable conduct.

(85) Moving on to consent to the extension of time for the ET3s. It was such a simple exercise for the claimants to agree. The claimant accepts that if there had been agreement between the parties the tribunal was most likely to have granted it. I find that if the respondent had told the tribunal on or before 13 August that there had been agreement to an extension of time and there was a case management hearing taking place on 15 August with a request for a postponement until the ET3's were filed, this was highly likely to have been granted. Had I been the Judge called upon to decide that, I would have granted it.

(86) The claimant argues that the ET3s could have been filed between effectively 7 and 14 August 2019 and the hearing on 15 August could have gone ahead without the need for the hearing on 12 September. It is technically possible but the background is such that the respondent could have been given the time it needed, 28 days is allowed, by granting the consent and volunteering at an early stage, a copy of the ET1 rather than hiding behind the fact that the request came from the holding company. It is obvious to parties represented by reputable City firms what needs to happen and how this can be facilitated or obstructed

(87) I find that Mr Diallo acted unreasonably in failing to clearly and unequivocally give his consent to Mr Otaibi defending the ET proceedings and in failing to agree to an extension of time so that a postponement application could have been made and only one case management hearing would have been required. There was no obligation on the respondent or the interested party to agree to the drop hands proposal made by the claimants when they wished to pursue their costs which they considered had been incurred as a result of unreasonable conduct of the claimant.

(88) I therefore award the costs of one preliminary hearing and this costs hearing.

Quantum

(89) For the respondent the matter was dealt with by direct access and the only matter was counsel's fees. The award for one preliminary hearing was made at £2,000 without objection from the claimant. The amount claimed for this hearing was £3,000. No opposing submissions were made about that amount. It is plus VAT because the respondent is not VAT registered. This is a total of £5,000 + VAT of £1,000 making a total award to the respondent of £6,000.

(90) For the interested party, the point was made that the claimants' costs were put at £8,690 for this hearing with counsel's fees of £4,000 plus £1,750 for the case management hearing and £3,091 for preparation. Taking the sums of £8,690 + £3,091 + £4,000 = £15,781. By contrast he interested party claimed £14,408.24 + VAT.

(91) The interested party said that the holding company's costs were reasonable compared with the claimants' costs. The holding company prepared the bundle, there was more correspondence on their side and the holding company as a shareholder needed to take legal advice so this was not just costs of the hearing but costs which flowed from Mr Diallo's unreasonable conduct.

(92) An offer of £8,000 was made which was rejected and the holding company said in the light of the decision made, it ought to have been accepted.

(93) As to counsel's fees: Both sides claimed £4,000 + VAT. Ms Tuck is more experienced that Mr Bhatt who is a 2014 call but his fees include fees for his leader, Mr David Lewis QC, who assisted in the preparation for this hearing, with the skeleton argument so that was submitted to be reasonable and proportionate.

(94) The claimant said it was excessive, not just in relation to hourly rates, with the Guideline rate saying that the highest rate should be £296 rather than £375. It was clarified that the hourly rate claimed were lower as a discount had been applied.

(95) In addition to taking issue with the rates, the claimant said that the involvement began on 23 July 2019 and in relation to 1 August 2019, the cost of the 4 page letter was for five hours with counsel, leading counsel and the solicitor at around

£1,300.

(96) The claimant submitted that the £4,000 for today must have included duplication for the last hearing, so the claimant said a grand total of £5,000 was proportionate because this is what the respondent had been awarded.

(97) Mr Bhatt said that £5,000 was too low. The letters were complicated and a great deal of thought had to go into it. The claim was for £14,408.24 + VAT. The offer was for £8,000 which was rejected and that should be the base line, plus the cost of today which would give a figure of £12,000.

(98) I accepted that more work was involved on the part of the holding company as outlined above. I took account the offer of £8,000 and the cost of Mr Bhatt's attendance today at £4,000. I agreed that 5 hours for one letter and 3 hours for a second letter was extremely high and included leading counsel's fees. The claimants' costs were claimed at £15,781 + VAT for this hearing and the 15 August hearing and for just this hearing it was £12,690 + VAT.

(99) I agreed with Mr Bhatt that on a summary assessment that using the comparison with the claimants' costs, the fact that more work was needed on behalf of his client and the case law relied upon in relation to hourly rates, that £12,000 was a proportionate and reasonable figure and this was awarded + VAT making a total of £14,400 to the interested party.

Employment Judge Elliott

6 December 2019

Sent to the parties on:

09/12/2019

For the Tribunal:

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