EMPLOYMENT TRIBUNALS

Claimants: (1) Mr MW Kelly
(2) Mrs J Kelly

Respondents: (1) 3L Care Limited
(2) The Executors of the Estate of Peter Stock
(3) Brian Higgins

HELD AT: Manchester **ON:** 28-30 January 2020

BEFORE: Employment Judge Franey
Ms L Atkinson
Ms B Hillon

REPRESENTATION:
Claimants: Mr D Northall (Counsel)
Respondents: Miss K Barry (Counsel)

COSTS JUDGMENT

The unanimous judgment of the Tribunal as to costs is as follows:

1. Pursuant to rule 76(1) the first and second respondents are ordered to pay to the claimants **85%** of the costs incurred by them in these proceedings as assessed by an Employment Judge following a detailed assessment under rule 78(1)(b) (excluding costs as a consequence of the late disclosure of the file of papers before Mr Higgins during the disciplinary proceedings in October 2017, which are the subject of the wasted costs order below). The first and second respondents are jointly and severally liable for this award.

2. No order for costs is made against the third respondent Mr Higgins.

3. Pursuant to rule 80(1) a wasted costs order is made requiring the respondents' solicitors Browne Jacobson LLP to pay to the claimants the sum of £**10,596.92** (of which £1,494.99 represents VAT paid by the claimants) in respect of costs wasted as a consequence of the late disclosure of the file of papers before Mr Higgins during the disciplinary proceedings in October 2017.

REASONS

Introduction

1. On 9 July 2019 the Tribunal promulgated its Reserved Judgment dealing with all matters in relation to liability[1] in these combined cases ("the Liability Judgment"). It followed a 15 day hearing in late April and May 2019, and two further days in chambers at the end of May for deliberations. Both claimants succeeded in their complaints of "ordinary" unfair dismissal and breach of contract in relation to notice pay. Mr Kelly also succeeded in a complaint of unauthorised deductions from his pay relating to repayment of tax incurred on a director's loan. Mrs Kelly also succeeded in a complaint of disability discrimination based on a breach of the duty to make reasonable adjustments concerning the failure to delay investigatory and disciplinary meetings.

2. Both claimants also brought claims which were unsuccessful. Mr Kelly alleged that the reason or principal reason for his dismissal was one or more protected disclosures, which would have rendered dismissal automatically unfair and meant that there was no cap on unfair dismissal compensation. The Tribunal found that he had not made any protected disclosures, although had he done so his case would have succeeded on causation. Mrs Kelly had also brought a protected disclosure complaint but that had been withdrawn prior to the final hearing.

3. Mrs Kelly complained of harassment related to disability and of marital status discrimination in relation to her dismissal. Both of those complaints failed. She also pursued an argument that her employment had not been lawfully terminated because the dismissal letter had not been sent directly to her, but the Tribunal rejected that argument and found that notification to her solicitors was sufficient to terminate her employment.

4. Any reference in square brackets in these Reasons is a reference to paragraph numbers from that Liability Judgment. It will be assumed that the reader of this Judgment has also read the Liability Judgment.

5. The remedy for the successful complaints was determined over two days on 28 and 29 January 2020. That is the subject of a separate Remedy Judgment.

6. On the final day of the three-day remedy/costs hearing we heard and determined costs applications made on behalf of the claimants.

7. In addition to our own Liability Judgment, we had a costs bundle which ran to approximately 350 pages. Any reference to page numbers in these Reasons is a reference to that costs bundle. A small number of emails were added to that bundle during the hearing.

8. The costs applications were made in writing in a four page document accompanied by a two page summary of costs. Some additional details of the costs incurred were provided for the purpose of the wasted costs application. We had oral submissions from Mr Northall as well.

[1] The Liability Judgment used the claimants' former surname of Tarrant.

9. For the respondent Miss Barry relied on oral submissions only. She too referred us to paragraphs in our Liability Judgment and in the costs bundle.

10. Both advocates made reference to authorities to which we will refer below.

Relevant Legal Framework

11. The power to award costs is contained in the 2013 Rules of Procedure. The definition of costs appears in rule 74(1) and includes fees, charges, disbursements or expenses incurred by or on behalf of the receiving party.

12. Rule 75(1) provides that a Costs Order includes an order that a party makes a payment to another party "in respect of the costs that the receiving party has incurred while legally represented".

13. The circumstances in which a Costs Order may be made are set out in rule 76. The relevant provision here was rule 76(1) which provides as follows:

> **"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 or:**
>
> **(b) any claim or response had no reasonable prospect of success."**

14. The procedure by which the costs application should be considered is set out in rule 77 and the amount which the Tribunal may award is governed by rule 78. In summary rule 78 empowers a Tribunal to make an order in respect of a specified amount not exceeding £20,000, or alternatively to order the paying party to pay the whole or specified part of the costs with the amount to be determined following a detailed assessment.

15. Rule 84 concerns ability to pay and reads as follows:

> **"In deciding whether to make a costs, preparation time or wasted costs order and if so in what amount, the Tribunal may have regard to the paying party's (or where a wasted costs order is made the representative's) ability to pay."**

16. It follows from these rules as to costs that the Tribunal must go through a three stage procedure (see paragraph 25 of **Haydar v Pennine Acute NHS Trust UKEAT 0141/17/BA**). The first stage is to decide whether the power to award costs has arisen, whether by way of unreasonable conduct or otherwise under rule 76; if so, the second stage is to decide whether to make an award, and, if so, the third stage is to decide how much to award. Ability to pay may be taken into account at the second and/or third stage.

17. The case law on the costs powers (and their predecessors in the 2004 Rules of Procedure) include confirmation that the award of costs is the exception rather than the rule in Employment Tribunal proceedings; that was acknowledged in **Gee v Shell UK Limited [2003] IRLR 82**.

18. If there has been unreasonable conduct there is no requirement for the Tribunal to identify a precise causal link between that unreasonable conduct and any specific items of costs which have been incurred: **McPherson v BNP Paribas (London Branch) [2004] ICR 1398**. However there is still the need for some degree of causation to be taken into account as the Court of Appeal pointed out in **Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78**:

> **"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 has been unreasonable conduct by the claimant in bringing and conducting the case, and in doing so to identify the conduct, what was unreasonable about it and what effects it had."**

19. The Court of Appeal considered an application for costs made where the defence of the whole claim was said to be unreasonable in **Scott v Commissioners of the Inland Revenue [2004] EWCA Civ 400**. In paragraph 46 the Court approved a submission by counsel that the question was not whether the respondent thought it was in the right, but whether there were reasonable grounds for so thinking. This illustrates that the power to award costs based on unreasonable defence of the proceedings can be exercised even if the respondent genuinely thinks it has a good defence.

Wasted Costs

20. The power to make an award of wasted costs against a representative arises under rules 80-84. Rule 80(1) provides as follows:

> **"A Tribunal may make a wasted costs order against a representative in favour of any party ('the receiving party') where that party has incurred costs –**
>
> **(a) As a result of any improper, unreasonable or negligent act or omission on the part of the representative; or**
>
> **(b) Which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay.**
>
> **Costs so incurred are described as 'wasted costs'."**

21. Rule 82 prevents a Tribunal making an order unless the representative has had a reasonable opportunity make representations in writing or at a hearing. It also requires the Tribunal to inform the representative's client in writing of any proceedings under this rule and of any order made against the representative.

22. Rule 84, which concerns ability to pay, also applies to wasted costs orders.

23. The leading cases in relation to wasted costs derive from the equivalent jurisdiction in civil proceedings. They include **Ridehalgh v Horsefield [1994] Ch 205**. Their applicability in Employment Tribunal proceedings was confirmed, for example, by the Employment Appeal Tribunal in **Wentworth-Wood and Others v Maritime Transport Ltd UKEAT/0184/17**. In **Ridehalgh** the Court of Appeal set out a three stage approach to determining whether a wasted costs order could be contemplated:

(1) The Tribunal must first decide whether the representative in question has acted improperly, unreasonably or negligently.

(2) If so, the Tribunal must ask whether such conduct caused the receiving party to incur unnecessary costs.

(3) If so, the Tribunal must consider in the circumstances whether (applying the overriding objective in rule 2) it is just to order the legal representative to compensate the receiving party for the whole of any part of the relevant costs.

24. In **Wentworth-Wood** the EAT reminded Employment Tribunals that it should be recognised that wasted costs is an exceptional jurisdiction to be exercised with great care. In particular it requires consideration of what specific conduct is said to be improper, unreasonable or negligent. At the third stage the Tribunal must be alive to the possibility that issues of privilege could prevent a lawyer from mounting a proper defence to an application.

Relevant Findings of Facts

25. It was not necessary for the Tribunal to make any primary findings of fact in order to determine the costs applications. The relevant facts were either already before the Tribunal through our Liability Judgment and Remedy Judgment, or were matters which were agreed. We did have sight of some emails between the representatives during the litigation which we had not previously seen, but those can be addressed in our discussion and conclusions section below.

The Applications

26. The costs applications made by the claimants can be categorised under three heads.

27. Firstly, the claimants submitted that the defence to the claims had no reasonable prospect of success, or in the alternative that the defence of the claims was pursued unreasonably. That formed the basis for a claim for the whole costs of the proceedings, or in the alternative for costs dating from the presentation of the claim forms, or in the alternative for costs dating from a costs warning letter sent by the claimants' solicitors ("HRC") on 25 July 2018.

28. Secondly, if that application were to be unsuccessful the claimants sought part of the costs incurred as a consequence of what was said to have been an unreasonable approach to disclosure of documents.

29. Thirdly, the claimants made a separate application for a wasted costs order against Brown Jacobson LLP ("BJ"), the respondents' solicitor during the proceedings, in relation to the late disclosure of the disciplinary file before Mr Higgins which had caused some time to be lost during the liability hearing.

30. We will address each application in turn, summarising the competing positions and explaining our decision.

1. Response No Reasonable Prospect of Success/Unreasonably Pursued

Claimants' Application

31. The submission for the claimants was that an order could be made against all three respondents under the costs rules even though no claim succeeded against Mr Stock personally, particularly because of the Tribunal's finding that Mr Stock was the controlling mind of the company when it came to dismissal and what ensued. However, Mr Northall made clear that there was no award sought against Mr Higgins in relation to costs save in relation to costs arising out of the reasonable adjustments complaint. That complaint was one of the matters that we concluded had been reasonably defended by the respondents and therefore we made no costs order against Mr Higgins.

32. More broadly, Mr Northall submitted that the whole defence of the proceedings was based on a fiction as to the reason for dismissal: the true reason was the decision taken by Mr Stock because of conflicts with the claimants about the cashflow issue and the way the business was being run and the disciplinary process was a means to get rid of the claimants. He therefore submitted that we should conclude the respondents cannot reasonably have believed that their defence would succeed, and he took us to certain paragraphs in our Liability Judgment, particularly paragraphs 418 and 419, which supported that proposition. Accordingly he submitted the unfair dismissal and breach of contract should never have been defended and they accounted for the vast majority of the costs.

33. As for the claims which were reasonably defended (the whistle-blowing complaint which failed, the marital status discrimination and disability harassment complaints which failed, and the issue in relation to the termination of Mrs Kelly's employment) he submitted that their impact upon the costs should effectively be ignored. It should not prevent the Tribunal from ordering recovery of the whole amount of the costs. Failing that, he suggested they accounted for 10% of the costs at the very most.

34. If we were against him on the whole costs of the case then in the alternative he invited us to make an order running from the date of the costs warning letter on 25 July 2018 which accurately predicted the outcome of the case on the fairness of the dismissals.

Respondents' Reply

35. In contrast for the respondents Miss Barry submitted that the Tribunal had not made a finding that there was no belief the claimants were guilty of misconduct even though the true reason was a different one. She suggested that in paragraphs 430-437 of the Liability Judgment we had been primarily concerned with procedural failings in the process had misconduct been the predominant reason, and she submitted that the claims which were reasonably defended, whether they succeeded or not, accounted for a significant proportionate of the overall costs.

36. Miss Barry also emphasised that looked at overall the whistle-blowing and marital status complaints had a particular significance because they were the route for the claimants to an uncapped award of compensation for financial losses flowing from the dismissals.

37. In summary she submitted that despite the Tribunal's findings on the unfair dismissal and breach of contract complaints, which of course she recognised were very critical of the respondents, it had still been reasonable for the proceedings to be defended and the defence overall had had a reasonable prospect of success.

38. If we were against her on that and we were looking at apportioning the cost between the claims reasonable defended and those which we found were not then she submitted that only 30% of the costs incurred should be awarded.

Decision

39. Having considered those submissions and having reviewed the relevant passages of our Liability Judgment and the other material to which we were taken today, we concluded that the heart of these proceedings were the unfair dismissal and breach of contract claims arising out of the dismissals. We were satisfied the first and second respondents acted unreasonably in defending that part of these proceedings. Mr Stock was the guiding mind of the company by the middle of 2017; he initiated and influenced the investigation and the disciplinary procedures which resulted in dismissal; he sat on the appeals himself and he effectively procured the dismissal of the claimants by Mr Higgins knowing full well that the reason he wanted them out was the dispute over the cashflow issue and how the business should be run. The respondents, if acting reasonably, cannot have thought that that was a potentially fair reason and we were satisfied that in these proceedings the respondents sought to put forward a defence which materially misrepresented the true position.

40. We did not accept Miss Barry's interpretation of our Liability Judgment that we thought that dismissal, had the reason been a genuine belief in misconduct, would have been unfair only on procedural grounds. Although that was the focus of the paragraphs that she highlighted, it is clear from the **Polkey** section of our Liability Judgment that we were satisfied that had there been a proper impartial investigation there would not have been any reasonable grounds for dismissal.

41. It followed that from the very start of this litigation the defence of the "ordinary" unfair dismissal and breach of contract complaints had no reasonable prospect of success and was unreasonably pursued.

42. We were satisfied that the power to make a costs award against the first respondent and the late Mr Stock had arisen. We accepted Mr Northall's argument that the costs rules did not prevent an order being made against Mr Stock even though no claims had bene pursued against him personally, and that it was in accordance with the overriding objective to make his estate jointly liable for any costs award given that he had been the guiding mind of the company at the relevant time and the architect of the dismissals.

43. Pursuant to **Haydar**, the next stages to be considered were whether to exercise our discretion to make an award and if so, how much to award. That raised the question of the significance of the claims which were reasonably defended, including those that were unsuccessful and Mrs Kelly's disability discrimination complaint.

44. Miss Barry did not offer us any information as to the ability of the respondents to pay any award, so we did not take that into account.

45. The claimants' position was that we should effectively ignore those claims and focus solely on those which were unreasonably defended and therefore order the two respondents to be jointly and severally liable for the whole of the claimants' costs. In contrast Miss Barry submitted that there should be apportionment and that only 30% of the costs should be awarded.

46. Having reviewed our Liability Judgment and reflected upon the liability hearing it was clear to us that the vast majority of the preparation and hearing time was referable to claims which were unreasonably defended (the unfair dismissal and the notice pay claims). The additional costs generated by the claims reasonably defended were relatively limited.

47. We were satisfied that the dispute over the marital status complaint and over the termination date for Mrs Kelly did not occupy any significant cost in relation to preparation or hearing time. They did not require any additional evidence but were addressed in submissions (with limited additional cost to the parties) and in our deliberations (at no additional cost to the parties).

48. That was not quite the same for the disability and protected disclosure complaints. The question of whether Mrs Kelly was a disabled person did occupy oral evidence during the hearing.

49. As for the protected disclosure complaint pursued by Mr Kelly, we did spend some time going through the alleged protected disclosures in detail and the analysis formed a significant passage of the concluding part of our Judgment.

50. However, those emails were relevant in any event to the question of the reason for dismissal, (the Tribunal found that the dispute embodied in those emails was the real reason for the dismissal of Mr Kelly), and consideration of those emails would still have been required even had the respondents at the outset conceded the ordinary unfairness and breach of contract complaints.

51. Putting those matters together we were unanimously satisfied that 85% of the total costs of litigation arose out of the claims which were unreasonably defended by the first and second respondents, and therefore the Tribunal unanimously ordered the first and second respondents to pay to the claimants 85% of their costs of the litigation once subjected to a detailed assessment.

52. The assessment of those costs should exclude costs incurred as a consequence of the late disclosure of Mr Higgins' disciplinary file which are subject to the order for wasted costs.

53. No costs order was made against Mr Higgins. He was not responsible for the unreasonable defence of the proceedings.

2. Costs of Late Disclosure of Documents

54. Costs incurred by the claimants arising out of what they contended was an inappropriate approach by the respondents to disclosure are subsumed in the general costs order. No separate order was made.

3. Wasted Costs

55. There were three initial points to be made.

56. Firstly, we were satisfied that BJ did have an opportunity to make representations at this hearing, having been represented by Miss Barry for those purposes, and we knew from emails we have seen that they were put on notice of the wasted costs application in advance of this hearing even though it was not specifically addressed in Mr Northall's written submission.

57. Secondly, rule 82 requires the Tribunal to notify the representative's clients if there is an application for wasted costs but very helpfully through Miss Barry those clients waived that right and therefore we dispensed with that requirement under Rule 6 with the consent of the respondents.

58. Thirdly, we were not given any information about the ability of BJ to meet a costs order and did not take that into account.

59. The authorities demonstrate that there are three stages to be addressed in a wasted costs application.

60. Firstly, was there conduct by BJ which was negligent? To his credit Mr Deakin in a very candid witness statement submitted during the hearing explained how it came to be that the disciplinary file before Mr Higgins was not in the hearing bundle and had not been previously disclosed. It had been removed by him from the draft bundle of documents for disclosure under the misapprehension that it was simply a duplicate of material which appeared elsewhere. As he accepted in his witness statement, that was an error on his part and he should have checked to make sure that everything being removed was a duplicate, and therefore that material should have appeared in the hearing bundle and been disclosed much earlier to the claimants. It was a consequence of that error that the material only became apparent on the eve of day four of the final hearing when Mr Higgins alerted BJ and Mr Gardiner of counsel to the fact that it was not in the bundle. We found that it was negligent for that material to have been wrongly removed from the disclosed documents.

61. Secondly, did that cause the claimants to incur any additional cost? We accepted to some degree Miss Barry's argument that some of the work would have had to have been done earlier on had the material been disclosed at the proper time. However, that is not the same as having to take instructions and process that material in the midst of a final hearing. In addition, some hearing time was lost as a consequence of that later disclosure, a matter to which we referred in our Liability Judgment. We were satisfied that the negligence did result in additional cost.

62. Thirdly, is it just to order wasted costs to be paid? This was not one of those cases that raises a concern about the effect of privilege as Mr Deakin had been able

to give us a clear and frank account of how the matter arose. That explanation did not impugn his clients at all. Applying the overriding objective we were unanimously satisfied that it is just for BJ to bear some proportion of the additional costs which have been incurred by the claimants as a consequence of that error.

63. To that end we undertook a summary assessment. The amount claimed for solicitors' costs for preparation is £2,474.40 plus VAT. Some of the work would have been done earlier on had the material been disclosed but we recognised that it is quite different having to do it in the course of a final hearing. We were satisfied that that figure should be reduced to £2,000 plus VAT to reflect the additional work caused by the lateness of the disclosure.

64. There was no challenge to counsel's fees which we awarded at £3,700 plus VAT.

65. In relation to the figure claimed for attendance by solicitors at the hearing for an extra 1.5 days, we were satisfied that the attendance of the claimants' solicitor was reasonable. This was one of those cases where to leave counsel to plough on alone would not have been appropriate. However, there may have been a misunderstanding about what we said in our Liability Judgment about those 1.5 days. That represented the delay in the oral evidence: we had hoped to start on the morning of the Friday but in fact we started it on Monday afternoon. The hearing on the Friday involving the parties was for only 30 minutes. We anticipated that some of the work in discussing the late disclosure with the clients and considering the documents would have been done in the course of that day. On the Monday, however, there was half a day spent in the claimants' successful application based on the disclosure of some privileged material. That was additional hearing time involving the parties. Putting that together we reduced the figure claimed for that by broadly two thirds and awarded £725 plus VAT for that element.

66. That left the expenses claimed by Mr and Mrs Kelly because they had arrangements which they cancelled to ensure that the Tribunal could sit again on the resumed dates in mid May 2019. We noted that although a sailing course had been paid for by Mr Kelly's father-in-law that was not recovered when that course was cancelled, and the course had to be paid for by Mr Kelly himself when it was re-booked. In effect he lost the value of that free course. For her part Mrs Kelly had cancelled a flight for which she had already paid.

67. We were satisfied, as Mr Northall submitted, that it was reasonable of the claimants to cancel those arrangements to ensure that the Tribunal could make up lost time and conclude the case in May 2019 rather than coming back weeks or months later. Those expenses were reasonably incurred and formed part of the wasted costs order.

68. In summary the wasted costs order was for the following figure:

Solicitors' costs	£2,000.00
Counsel's fees	£3,700.00
Additional attendance at the hearing for solicitors	£725.00

Expenses which are subject to VAT (sailing course)	£1,049.96
	£7,474.96
Plus: VAT at 20%	£1,494.99
Flight costs of Mrs Kelly	£65.99
Total amount of wasted costs order	**£10,596.92**

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Employment Judge Franey

14 February 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON
21 February 2020

FOR THE TRIBUNAL OFFICE