EMPLOYMENT TRIBUNALS

Claimant: Mr S Rice

Respondent: North West Ambulance Service

HELD AT: Manchester **ON:** 20 December 2017
In Chambers 27 March 2020

BEFORE: Employment Judge Holmes

REPRESENTATION:

Claimant: Mr R Carter, Counsel
Respondent: Mr P Spencer, Solicitor

RESERVED JUDGMENT ON COSTS ASSESSMENT

It is the judgment of the Tribunal that the claimant's solicitors Messrs Simpsons are ordered to pay the respondent's wasted costs assessed in the sum of **£3,790.20**

REASONS

1. On 20 December 2017 the claimant has made an application to postpone the substantive hearing of his claims which were listed for 3 and 4 January 2018 on the grounds that he is unavailable, as he will be out of the country on a pre-booked holiday. The respondent objected to that application, and consequently the Tribunal heard submissions , and rejected the application.

2. A preliminary hearing was held on 7 July 2017, at which the claimant was granted permission to amend his claims, but the Tribunal made a wasted costs order pursuant to rule 80 of the 2013 rules of procedure, against the claimant's solicitors, Messrs. Simpsons. The parties were then to seek to agree those costs, or inform the Tribunal whether a hearing was required.

3. The Tribunal wrote to the parties enquiring of the position. Consequently a reply was received from the claimant's solicitors on 27 September 2017, in relation to the position as to costs and confirming that a costs hearing would be required. The

assessment of costs was thus carried out at the hearing on 20 December 2017, and judgment reserved.

4. The Tribunal file was, unfortunately, not then re – referred back to the Employment Judge after the judgment in relation to the postponement application was promulgated. A final hearing (Employment Judge Feeney and Members) was held on 4 January 2018, and judgment sent to the parties on 16 February 2018. The respondent appealed to the EAT, and the remedy hearing was postponed.

5. On 4 July 2018 the respondent's solicitor sent an email to the Tribunal chasing up the costs assessment that had been carried out on 20 December 2017. That does not appear to have been referred to Employment Judge Holmes.

6. The appeal proceeded, and was successful, with the matter being remitted to a different Tribunal, by a judgment dated 4 February 2019.

7. A preliminary hearing was held for the remitted hearing on 8 April 2019. No mention appears to have been made of the outstanding costs assessment, and the file again was not re-referred to Employment Judge Holmes. The remitted hearing was to be held on 4 to 6 December 2019.

8. On 24 May 2019 the respondent sent a further email to the Tribunal chasing the costs assessment, and referring to the email sent the previous July. In July 2019 the file was sought, but not referred back to Employment Judge Holmes.

9. The Tribunal was subsequently , on 3 September 2019 informed that the case had settled. This was taken at the time to include the costs issue, and the file was not then re – referred to the Employment Judge.

10. In due course, on 5 September 2019 the respondent informed the Tribunal that the settlement did not include settlement of the costs assessment, and accordingly the Tribunal's judgment was still required. There was then some confusion as to whether the costs assessment was to be held on one of the days listed for the final hearing in December 2019, it not being appreciated that it had been carried out in December 2017.

11. There then ensued some delay in locating the file, and bundles that were believed (it turns out erroneously) to be relevant to the costs assessment.

12. Thereafter, further delay has been occasioned by the effects of the Covid – 19 pandemic, and the restrictions that then arose upon access to judicial premises and resources. The Employment Judge apologises to the parties for this delay.

The respondent's application.

13. The respondent provided a Costs Schedule in which a total of £2,166.00 plus VAT was sought in relation to solicitors' costs, and Counsel's fees of £1,1718.00, plus VAT, were also claimed.

14. The hourly rates charged for the two fee earners who carried out the work were £170 for a partner, and £65.00 for a trainee solicitor. There was no challenge to the rates charged. The respondent also provided a print out of the time recorded

15. In terms of the work done, most of it was by the partner, as follows:

Correspondence :

With claimant's representative	12 mins
With Client	1 hour 6 minutes
With Counsel	54 minutes
With Tribunal	18 minutes
Telephone attendance:	
With Tribunal	12 minutes
With claimant's representative	6 minutes
With Counsel	12 minutes
Preparation	2 hour 30 minutes
Drafting	1 hour 42 minutes
Meeting with client prior to hearing	30 minutes
Attendance at hearing	3 hours 30 minutes
Travel to hearing	36 minutes

16. Additionally, further work done by the Trainee is claimed, as follows:

Correspondence:

With claimant's representative	6 minutes
With Counsel	6 minutes
Preparation	42 minutes
Drafting	1 hour 12 minutes

14. Going through these , Mr Carter for the claimant challenged the reasonableness of some of these items. In relation to the work done by the Partner, he submitted that the work need not have been carried out at partner level, and that the respondent was claiming for either a partner or trainee. A junior solicitor could have done some of the work. He questioned the amount of correspondence claimed for, and what work of drafting still needed to be done on 4 July 2017.

15. In relation to Counsel's fees, he submitted that at £1718.00 plus VAT they were on the high side.

16. In reply, Mr Spencer for the respondent submitted firstly that as costs were being awarded under rule 80, they should be assessed on an indemnity basis.

17. In relation to the attendance of the Partner on 7 July 2017, whilst the Trainee also did attend, and no claim was made for that, this was only their second day in post, and it would not have been feasible to have sent the Trainee alone.

18. The case was very significant to the client, and merited Counsel and the file handler being in attendance. The claimant was a regional officer of a trade union, which had a strong presence in the respondent. It was vital to the respondent to maintain good industrial relations.

19. The application was to deliver a knock out blow at the preliminary hearing which, had it not been a last minute amendment, would have led to the claim being struck out. The deduction from wages claim was unpleaded prior to then.

20. There had been very little engagement with the claimant's solicitors prior to the hearing, and it was unclear how the claimant would deal with the application.

21. The respondent had a witness present, Mr Forrest, and one of the matters discussed with Counsel was the documentation. In the end he was not required, but it was important to him, and hence the Partner, there.

22. An application was made in the middle of the hearing, which could be and was then dealt with, without the need for instructions to be taken remotely.

23. He took the Tribunal through the print out, explaining what work was done. He contended that it was reasonable, in terms particularly, of the preparation for the hearing.

24. Turning to Counsel's fees, he contended that there was an element of travel expense claimed, as Counsel was from Leeds Chambers. The brief fee of £1500.00 was reasonable for the seniority of Mr Sweeney.

25. Finally, he took the Tribunal through the items of drafting claimed, and the chronology that had been prepared.

26. In reply , Mr Carter firstly queried how Counsel could incur £218 in travel expenses from Leeds.

27. Moving on to the claim made by Mr Spencer that costs should be awarded on an indemnity basis , he accepted that this can be so, but the Tribunal was still entitled to consider whether the costs claimed were proportionate. The respondent had not cleared that hurdle. The Tribunal should look at the reasonableness of the costs claimed in totality.

Discussion and assessment.

28. The starting point for this assessment is the basis upon which the Tribunal should carry it out. Mr Spencer for the respondent invites it to make the assessment on an indemnity basis, contending that a wasted costs order under rule 80 entitles the Tribunal to make the assessment on that basis.

29. The Tribunal made its costs order on … 2017. It was expressed to be a wasted costs order, but was silent upon the basis for assessment. No application was made at the time for an order on the basis of indemnity costs, and the Tribunal is now being asked to consider assessment on that basis.

30. When a court is to assess the amount of costs under the CPR, it must do so on either the 'standard' or 'indemnity' basis (CPR 44.3(1)). CPR 44.3(4) provides that where an order for costs to be assessed is silent then the costs will be assessed on the standard basis. As a result of this most orders are actually silent on the basis, which means standard basis assessment. Both bases will not allow costs unreasonably incurred and of an unreasonable amount. Prior to the CPR the only difference between the two bases was in respect of the burden of proof of reasonableness. On the standard basis any doubt as to reasonableness is to be resolved in favour of the paying party, while on the indemnity basis any doubt is to be resolved in favour of the receiving party (see Cook on Costs)

32. In terms of when indemnity costs are appropriate, the following extract from Cook on Costs is helpful.

"The discretion to make such an order is wide, indeed so wide that the Court of Appeal has shied away from setting a prescriptive list of circumstances where such an order would be appropriate. In Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hamer Aspden & Johnston (Costs) [2002] EWCA Civ 879 Lord Woolf explained why guidance was of limited assistance:

"Ín my judgment it is dangerous for the court to try and add to the requirements of the CPR which are not spelt out in the relevant parts of the CPR. This court can do no more than draw attention to the width of the discretion of the trial judge and re-emphasise the point that has already been made that, before an indemnity order can be made, there must be some conduct or some circumstance which takes the case out of the norm."

This approach has recently been affirmed by the Court of Appeal in Blueco LTD v BWAT Retail Nominee [2014] EWCA Civ 154, where the first instance decision that allegations of dishonesty took the case 'out of the ordinary', justified an award of indemnity costs. While the Excelsior comments were adopted by Coulson J in Noorani v Calver [2009] EWHC 592 (QB), he went a stage further extracting from the authorities to summarise the position as follows:

"Indemnity costs are no longer limited to cases where the court wishes to express disapproval of the way in which litigation has been conducted. An order for indemnity costs can be made even when the conduct could not properly be regarded as lacking in moral probity or deserving of moral condemnation. However, such conduct must be unreasonable "to a high degree". "Unreasonable" in this context does not mean merely wrong or misguided in hindsight."

Coulson J then confirmed why specific guidance in this area is so difficult, saying:

"In any dispute about the appropriate basis for the assessment of costs, the court must consider each case on its own facts …"

The reference to unreasonableness is important. The Court of Appeal returned to this theme in Whaleys (Bradford) Ltd v Bennett [2017] EWCA Civ 2143. Whilst reaffirming the Excelsior approach and with Richards LJ cautioning against the use of 'exceptionality' as an articulation of the test (as it suggests a stricter test and is too reliant on context), the Court of Appeal stated that 'the norm' is not intended to be a question of the frequency with which something occurs, but, instead, is a reference to whether something is outside the ordinary and reasonable conduct of proceedings.

However, it should be remembered that in Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hamer Aspden & Johnson (see above), Lord Woolf was at pains to stress that 'an indemnity costs order may be justified not only because of the conduct of the parties, but also because of other particular circumstances of the litigation'. This followed on the heels of the case of Reid Minty (a firm) v Taylor [2001] EWCA Civ 1723, in which the Court of Appeal determined that a party can be ordered to pay costs on the indemnity basis under CPR 44.2 even though there has been no moral lack of probity or conduct deserving of moral condemnation on its part. The provision specifically included a discretion to decide whether some or all of the costs awarded should be on the standard or indemnity basis. If costs were awarded on the indemnity basis, in many cases there would be some implicit expression of disapproval of the way in which the litigation had been conducted, but that would not necessarily be so in every case.

What does seem clear is that where the court has made an award of indemnity costs the cases in which it has done so can be divided between those where there has or has not been culpability and abuse of process.

Traditionally costs on the indemnity basis have only been awarded where there has been some culpability or abuse of process such as:

- *deceit or underhandedness by a party;*
- *abuse of the court's procedure;*
- *failure to come to court with open hands;*
- *the making of tenuous and hopeless claims;*
- *reliance on utterly unjustified defences;*
- *the introduction and reliance upon voluminous and unnecessary evidence;*
- *extraneous motives for the litigation (an example of which is the use of litigation for an ulterior commercial purpose – see Amoco (UK) Exploration v British American Offshore Ltd [2002] BLR 135 below); or*
- *discontinuance without explanation where allegations of serious dishonesty and fraud have been made.*

What seems clear is the exercise of the discretion by the court is best considered by reference to specific examples of where the court has made indemnity costs orders. It is one of those instances where it is hard to pinpoint specific conduct, but one knows it when one sees it!"

33. Further, when considering the relevance of unreasonableness, the editor of Cook says this:

"National Westminster Bank plc v Rabobank Nederland [*2007] EWHC 1742 (Comm)* *found that the minimum nature of the conduct required to justify an order for costs on the indemnity basis was, except in very rare cases, that there had been a significant level of unreasonableness or otherwise inappropriate conduct in its widest sense. This could be pre-litigation conduct or in relation to the commencement or conduct of the litigation itself (mirroring the conduct provisions of CPR 44.2(5)(a)). The conduct must be looked at in the context of the entire litigation and a view taken as to whether the level of unreasonableness or inappropriateness is, in all the circumstances, high enough to engage such an order."*

34. In terms of whether there would be any difference in applying the standard or the indemnity basis, in respect of those costs governed by the post-March 2013 provisions the difference between standard and indemnity basis is more pronounced. CPR 44.3(2)(a) provides that where the amount of costs is to assessed on the standard basis, the court will –

(a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred …"

In contrast there is no test of proportionality on the indemnity basis. The test applied on both the standard and the indemnity basis of costs is a test of reasonableness, but on the standard basis the additional test of proportionality applies.

35. The Tribunal does not consider it should make an assessment on the indemnity basis. Whilst there was unreasonable behaviour to justify a wasted costs order under rule 80, that is all there was. Unreasonableness is identified as a minimum requirement for an assessment on an indemnity basis, but that is far from saying that unreasonableness will justify the indemnity basis. Applying the test from ***National Westminster Bank plc v Rabobank Nederland [2007] EWHC 1742 (Comm)*** above the Tribunal does not consider that the conduct , taken in the context of the entire litigation, was such that the level of unreasonableness or inappropriateness was, in all the circumstances, high enough to engage such an order

36. Further, as submitted by Mr Carter, and is clear from the observations above, the assessment of costs on either the standard or indemnity basis still requires the Tribunal to consider what costs are reasonable.

37. The Tribunal accordingly will assess the costs on the standard basis, and will consider what costs were reasonably incurred, and whether the amounts claimed are reasonable amounts.

38. In relation to the items claimed, the most contentious are attendance of the Partner at the hearing, and the travel claim associated with it, and the Preparation and Drafting items , which total some 4 hours 12 minutes, and in respect of the latter, there is a further claim for 1 hour 12 minutes of Drafting by the Trainee.

39. The Tribunal notes a number of matters.

The next item that the Tribunal will examine is the Preparation time of 2 hours 30 minutes claimed in relation to work done by the Partner. That, from the print out comprises of:

Partner:
15 June 2017
Reviewing and collating existing documents
and identifying those required 36 minutes

20 June 2017
double checking time limits – see note
– still look out of time 36 minutes

4 July 2017
Reviewing submissions of counsel;
sending email of requested information;
Comments on the submissions;preparing
Bundle;email to client re witnesses 1 hour 18 minutes

In total those items account for the 2 hours 30 minutes preparation time claimed for the work done by the Partner.

40. Amongst the items of preparation, 36 minutes are claimed on 20 June 2017 for *"double checking time limits – see note – still look out of time".* Counsel was , of course, instructed on the application, and had been for some time. Whilst the Partner's diligence in what is admittedly "double checking" a point is commendable, it was not really necessary, and cannot be considered as reasonable. This item is disallowed.

41. In terms of the partner attending the hearing with Counsel, and remaining throughout, the Tribunal considers this questionable. Whilst the case was of some importance to the respondent, involving as it did a union branch secretary, and there was some procedural history to it, the Tribunal does not consider that it was reasonable for a Partner also to attend with Counsel. There is, and never has been in the Tribunals, any requirement for Counsel to be instructed a solicitor or a representative of his solicitors at a hearing, and it is indeed one of the cost saving advantages of that regime that in most cases, Counsel appears without any representative of his instructing solicitors being present.

42. The respondent's solicitors may well have wanted to provide a "Rolls Royce" service to what is doubtless an important public sector client, but that does not make the attendance of a Partner, reasonable, particularly for the duration of the hearing. Initial attendance, for a conference and to ensure that the hearing was set up, and

Counsel had everything that he may require , may have been reasonable, but not the whole of the hearing.

43. Further, given the seniority of Counsel instructed, and the apparently complete instructions that were provided, and indeed discussed before the hearing (note the claim for "Preparation" for 1 hour 18 minutes on 4 July 2017, when the Partner reviewed Counsel's submissions, commented upon them and prepared a bundle) , it is hard to see why the Partner needed to attend the hearing at all

44. This is rather reinforced by the fact that a Trainee did in fact also attend with him. No claim is made for that, or for other work that this Trainee (a different Trainee from that for whose work costs are claimed) did. It does rather highlight, however, how, if any representative of the respondent's solicitors was to attend at all, it could and should have been a Trainee, and not a Partner.

45. Thus, if any attendance at the hearing (and associated travel) is to be allowed, it will be at the Trainee , and not the Partner rate. But should even that be allowed ?

46. The respondent's argument for allowing any costs of attendance at the hearing by a solicitor's representative is the importance grid

47. The Tribunal's view is that attendance of a representative with Counsel was reasonable, but attendance of the Partner was not. Counsel , senior Counsel at that, was instructed, which was arguably all that was reasonably required. Attendance by a representative of the solicitors would be reasonable, but the mere fact that the Trainee in question who did attend was only in their second day in post is, with respect, not relevant. A solicitor's firm cannot claim a higher rate for sending a more senior fee earner, simply because it lacks a suitably experienced more junior fee earner. The Tribunal will allow the cost of attendance , but at the Trainee rate of £65 per hour.

48. In relation to the other items claimed, and all those claimed in respect of the work done by the (previous) Trainee, the Tribunal is satisfied that the work was reasonably done, and that the sums claimed for that work are reasonable.

49. Finally, the Tribunal considers Counsel's fees. These are claimed in the sum of £1,718.00 plus VAT, a total f £2,061.60. This is an odd amount, and at variance with the quoted Brief Fee (see entry of 8 May 2017) of £1,500.00 plus VAT. No fee note was before the Tribunal. It is unclear whether Counsel has added some form of disbursement , such as travel, but given that the Brief Fee was £1,500, and this would be that most that the Tribunal would consider reasonable for such a hearing, this will be the sum allowed.

50. Of the items claimed, therefore , the Tribunal allows all except the following, which are either disallowed, or allowed in a reduced amount:

Item	Reduction applied
Partner:	
Drafting – 36 mins	£102.00

Attendance at hearing 3 hours 36 mins

Allowed at Trainee rate : £595.00 - £227.50 £376.50

Travel – allowed at Trainee rate : ££102.00 - £39.00 £ 63.00

Total reduction: <u>£532.50</u>

Accordingly, from the Costs Schedule, the following deductions need to be made:

Solicitors' costs:

£2166.00 - £532.50

Allowed : £1,633.50 plus VAT £326.70 £1,990.20

Counsel's Fees:

£1718.00 - £218.00 = £1500

Allowed : £1500.00 plus VAT £300.00 £1,800.00

Total costs as assessed: <u>£3,790.20</u>

Employment Judge Holmes

Dated: 6 July 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

9 July 2020

FOR THE TRIBUNAL OFFICE