EMPLOYMENT TRIBUNALS

Claimant: Mr A

Respondent: Persimmon Group Plc

HELD AT: **Remote Hearing by Skype** **ON:** **21 April 2020**

BEFORE: **Employment Judge JM Wade**

REPRESENTATION:

Claimant: Ms B (lay representative/partner)

Respondent: Mr A Johnston (counsel)

For Irwin Mitchell: Mr A Weiss (counsel)

This hearing was converted to a remote hearing by skype, subject to recording, in accordance with Presidential Guidance following the emergence of Covid 19. The parties said this at the conclusion of the hearing: they were very pleased that the hearing had been able to take place and considered it to have been satisfactory, and would welcome such hearings being more widely available. I reserved judgment, there having been some initial difficulty with the technology, albeit I hoped to provide a written judgment promptly. This is set out below with my reasons.

RESERVED JUDGMENT

1 The respondent's renewed application for a dismissal judgment is dismissed.
2 The respondent's application for costs is dismissed.
3 The claimant's application for a preparation time order is dismissed.
4 Irwin Mitchell acted unreasonably by acting for the respondent in these proceedings, but no wasted costs on the part of the respondent arose.

REASONS

Introduction

1. The claimant, a bricklayer, had an accident at a construction site operated by the respondent in August 2019 and became unable to work shortly thereafter. The issues for determination in this hearing arise in very unusual circumstances which does not bear a short summary. Neither I nor the representatives could find, I understand, authority of direct assistance. The matters for determination today were:

   1.1. The respondent's renewed application for a dismissal judgment after a withdrawal;

   1.2. The respondent's application for costs;

   1.3. My own motion wasted costs consideration – "the conflict issue"; and

   1.4. The claimant's preparation time application.

Documents and evidence for this hearing

2. I had previously given the following directions in preparation for what was expected to be a hearing in person:

   2.1. The respondent's solicitors are entitled to be separately represented on the matter;
   2.2. The respondent is to clarify whether its cost application is of wasted costs against the claimant's representative, or against the claimant himself, and if the former, the claimant's representative is entitled to be separately represented on the matter.
   2.3. Any representatives are to agree a bundle of the relevant documents related to the matters above (including client retainers, SRA guidance and so on) by no later than 19 March 2020.
   2.4. The parties are to exchange witness statements relevant to the issues by no later than 2 April 2020.
   2.5. The hearing shall be listed on the first available date before me after 16 April.
   2.6. By no later than 5 March 2020 the parties shall confirm dates to avoid in the window 16 April 2020 to 11 June 2020.
   2.7. The hearing details to be sent to the respondent, in accordance with Rule 82.

3. On Thursday 16 April when the file was referred to me remotely I gave the following direction:

   In the current Covid 19 circumstances, the hearing is converted to be heard by skype. The latest applications on behalf of the claimant and his representative may be raised at the hearing – they are not capable of being addressed on paper; there is already an extant issue of wasted costs in respect of Irwin Mitchell to be determined. To the extent the claimant and his representative pursue their own wasted time and cost, they must provide to all a schedule of the time and sums sought. The matters set out in the motion to dismiss document are a mix of submission and evidence for the hearing; to the extent Ms [B] wishes to give evidence, she must confirm whether she wishes the motion to dismiss document

to be treated as her evidence. The parties must cooperate to provide a combined electronic bundle and electronic versions of all witness statements to the Tribunal as soon as possible.

4. Yesterday, after further correspondence from Ms B about an inability to agree a bundle, a late statement from Ms Malik, further documents and time being required (which suggested a possible adjournment), and a submission that she would wish to cross examine Ms Malik, I directed:

   "The disclosure of the metadata appears, at this stage, disproportionate and unnecessary to address the issues for determination at tomorrow's hearing. It is very unhelpful for the Employment Judge to have no agreed bundle at this stage. The parties must submit their two separate bundles (if that is the position) by return. Would the parties please confirm who represents Persimmon at tomorrow's hearing as a matter of urgency. The paper file is not available to the Employment Judge and it is not clear from the emails that have been forwarded for her consideration".

5. The parties had not been able to agree a bundle. There was provided to me yesterday afternoon by solicitors acting for IM the following: two statements on behalf of the claimant (Ms B's and his own); two statements on behalf of Irwin Mitchell (Ms Heelam, Client Care and Remedy Manager, and Ms Malik, the solicitor with conduct of the proceedings for the respondent); a respondent's bundle, containing developments and correspondence until 10 March, and a full skeleton from Mr Weiss on the conflict issue, on behalf of IM. That included a helpful summary of the relevant legal principles. It also indicated at paragraph 40 that the respondent did not seek a wasted costs order against Irwin Mitchell, saying this: "Why would they, is the rhetorical question? IM represented them successfully in the proceedings - the Claimant withdrew his claims against Persimmon". Mr Johnston then confirmed that the respondent did not seek a wasted costs order disallowing the legal fees it had incurred in instructing IM in the Tribunal proceedings.
6. After business hours yesterday, IM sent to the Tribunal and the claimant detailed costs breakdowns indicating costs sought in excess of £13,000 including consulting widely internally and externally on the conflict issue. Ms B confirmed today that she had not provided any breakdown of the preparation time sought but believed it would be in the same magnitude of hours as that spent by the respondent.
7. In conducting the hearing by skype today I observed to the parties the following:

   7.1. I had read the extensive materials provided;

   7.2. The late provision, or no provision, of costs breakdowns before a hearing to address the parties costs' applications was unsatisfactory.

   7.3. In addition to the matters before me, Ms B had, on behalf of the claimant, made various complaints in relation to these events to IM directly, to the ICO, and to the SRA (the Solicitors' Regulation Authority);

   7.4. I needed to give focus to decide only the issues before me in a proportionate way – I would make those findings and determinations that were necessary bearing in mind other arenas of complaint were in motion;

7.5. The parties had the documents that were before me;

7.6. The relevant chain of events was not in dispute and cross examination was unlikely to be unnecessary –for example the parties had agreed a transcript of the relevant telephone call between the claimant and IM's member of staff;

7.7. The principles of law identified in Mr Weiss' skeleton were helpful and uncontroversial;

7.8. There were omissions from his skeleton of relevant parts of the SRA code as to conflict, including, for example the definition of a client, (which includes a prospective client, where the context permits) and the provisions about when a solicitor shall not act.

8. In response to observation 7.6 Mr Weiss considered that the interpretation of the chain of events was in dispute, with many accusations being levelled by Ms B against IM which were not accepted, but otherwise he agreed with the approach and did not consider cross examination of witnesses was necessary.

9. Ms B's written and oral submissions made clear that she makes wide ranging criticisms of IM throughout their dealings and would have wished a far greater volume of matters to be addressed, and the opportunity to cross examine Ms Malik on meta data, and J, and other IM fee earners/staff. I had expressed my view that metadata would not be proportionate, and I confirmed cross examination was also unnecessary and disproportionate.

10. I then heard oral submissions on the four matters for determination. I did not hear oral evidence or swear in witnesses. The IM statements were signed and contained statements of truth; the claimant statements were not formally signed and I asked Mr A that he confirm he had read the statement and was content it was true, to the best of his knowledge and belief, and that Ms B was also content as to that. They were.

11. After some discussion I decided to reserve my judgment and the hearing came to a close.

12. It subsequently transpired that at 10am (this was not clear during the hearing but was to be expected given the lack of bundle agreement) Ms B had forwarded an index and pdf attachments, in effect the claimant's bundle, of underlying evidence. It included a variety of documents including SRA code matters, but it was also clear that the material had been set out and referenced either in Ms B's statement or in her communications (motions) previously. There was no prejudice to either side in those documents having been submitted separately and late because of a disagreement about whether they were relevant (if that is what had occurred).

<u>The chronology that gave rise to the matters for determination today</u>

<u>The accident</u>

13. On 22 August 2019 the claimant had an accident on scaffolding at the respondent's site (Mr Johnston confirmed today that the respondent has responsibility for the operation of the site in question, irrespective of the claimant's employment status). The injury was reported in the respondent's accident book. The claimant alleged the accident arose through faulty scaffolding.He initially returned to work, then had time off, and when he sought to return he alleges he was told there was no work for him. The site is close to his home and he alleges he could observe work continuing. He subsequently had investigation for musculo skeletal injuries which

he alleges arose in consequence of the accident. The respondent alleges the accident arose through his own negligence.

14. The telephone call to IM on 23 September

15. On 23 September 2019 the claimant telephoned IM. He called as a member of the public seeking advice. A recording of this call was provided to the Tribunal by Ms B, having obtained it through a Subject Access Request. The agreed transcript of that call begins, as one would expect: "Good afternoon Irwin Mitchell, [J], speaking how can I help?".

16. After audio difficulty, the claimant replies "I had a fall at work .. through no fault of my own through scaffolding… which was completely illegal and so I was off work for a while with an injury and now when I'm looking to get back to go to work they're, saying that there, there is no work for me there".

17. There then proceeds an extensive information gathering exercise in which J establishes where the accident happened, when it happened, the likely evidence, in terms of photographs and videos available, potential medical evidence, and why the claimant felt punished for the accident. The claimant's response included why he did not accept that there was a simple downturn in work justifying his being let go.

18. J then advised the claimant of two options: firstly that he might have an employment issue ("recourse under an employment matter") and secondly he had "certainly got a personal injury claim"… "if the scaffolding boards have not been clipped correctly and they've not been set up properly, so I'd certainly look at that as well."

19. The claimant was asked whether he wanted to "go for" the personal injury or the employment matter, in response to which the claimant replied, "well I'm self-employed…and… subcontractor".

20. J's response to that is further advice: "if you're subcontracted to another company to work for them, then you've still got an employment matter because you're actually then employed because you're working for somebody else you're not self-employed any more. You're working for somebody else. From my understanding okay."

21. J then goes on to say "so there's a potential there. Obviously I know you're a self-employed individual so you're a self-employed entity, but what you're then doing is you're contracting yourself out for work to another person, and if somebody else takes your work on and takes you on as a contractor, you're then classed as being employed by that individual that takes your services on…" "I certainly think there's an employment issue. There, because if you've been pushed out of work because of your injury, that's naughty and that shouldn't be happening. Okay, so they shouldn't really be doing that at the end of the day because…"

22. J goes on: "So I can take details in regards to that entirely up to you if you want to do that now. It does take about half an hour to go through the details, so we're going to need that time. If you've got it available… My intention will be is to take all details down in respect of enquiry and then what we will do is we move over to our specialist dedicated teams that deal with these kind of injuries on a daily basis or these kind of claims regularly and what they do then is they look at it in a bit more detail and determine whether or not there is a case to build and if there is we can move it forward and then try get you a good outcome".

23. J goes on to set out the basis on which the personal injury cost regime would work in a no-win no fee environment, and he offers again that it is up to the claimant whether he wishes to go ahead with a personal injury claim or be put over to an employment specialist to see if there is a case there.

24. The claimant indicated that he would like to go with the personal injury claim first. He told J that wife was a lawyer but it would not be her expertise.

25. There then proceeds further detailed further discussion of the height which the alleged accident happened and other relevant details, confirmation of the date and that IM was the first firm that the claimant had contacted. His address and telephone details were taken, together with an email and date of birth and general "know your client" information. The claimant provided the location of the site and that it was operated jointly by Church/Persimmon. There is discussion of PPE, the weather conditions, and that there were other people working with the claimant at the time of the accident and that the accident book was filled out, the nature of the injuries and discussion of the subcontractor, identified only as "Andy", that the claimant was working for, and that he was a subcontractor for Persimmon.

26. J said he would get details from "companies house", and he asked why the claimant believed Persimmon to be responsible. J also explained the need for a statement of truth, and that he would be having the details reviewed by one of his colleagues. He explained the principle of contempt of court for providing information not given with an honest belief (in the context of the statement of truth).

27. The claimant was provided with a reference number, the details of J, and asked to send over further information/photographs to support his claim. The final stages of the call including J asking whether it mattered that he had not immediately sought medical attention; and he was reassured about that with a proviso that all his evidence would be reviewed so that J could get in touch and "give you an update as to where were currently stand for you, alright". The call came to an end. On balance I consider the call lasted over an hour.

<u>The conflict check and further dealings between IM and the claimant</u>

28. Very shortly after the call ended a conflict check was undertaken, but it contained an error in the spelling of "Persimmon" Homes as an adverse party and, it appears, the address (identifying a DN post code) – that was not an address given by the claimant.

29. The conflict check was returned as "conditionally passed open for time and disbursement entries". The conflict check also provided: "If any of the terms are incorrect or appear in the wrong fields please arrange for the file to be updated on your case management system and then request a further conflict search on the correct details". There was a further warning: "conflicts will not be fully cleared for your matter until all parties have been provided and conflict checked."

30. A very small fraction of the information relayed to J by the claimant appeared in a pro forma file note with questions relevant to construction sector accidents (for example about scaffolding), in which J appears to have answered standard issues with "YES" or "NO" answers, and provided summary details. He may have been completing this as the call progressed, but it is possible, and in my judgment likely, that other notes were taken to enable the later completion of that summary form which may not have been retained. I did not have a statement from J.

<u>The claimant's further dealings with IM</u>

31. On 27 September, the claimant chased his matter by telephone, providing his reference number and seeking to understand how best to send the video evidence that he wished to send; it transpired that the video evidence of the scaffolding had not been sent and that was then corrected, on 2 October. In his covering email attaching that evidence, the claimant referred to a "major breach of employers responsibilities under health and safety law".

32. On 11 October 2019, the claimant telephoned IM again and a file note was recorded seeking a call back from J and a promise that J would be in touch with Mr A shortly.

33. In the morning of 24 October, someone (it may have been J) noted on the file that he/she had spoken to A who advised that, "it would be a small claim and we would not be able to assist". A message was then left asking the claimant to call IM back (but not the details).

34. B (a further IM person) noted that when the claimant did call back, the matter was said to be fully dealt with by MCH (again the identity of who that is, is unclear), and a letter had been sent to the claimant.

35. That letter, was, in short, IM's assessment of the merits of his PI claim, which in conjunction with the application of cost rules in short track cases, resulted in the firm declining to act. He was provided with limitation information and that another solicitor may take a different view, with information about how to find that alternative. IM closed its file.

<u>These proceedings</u>

36. After some dealings direct with the respondent, the claimant then commenced claims in this Tribunal in December 2019, identifying his representative as Karolyn B, with an email address at "Blegal1". In correspondence Ms B styled herself as "B Legal", "B B BCL LL.M ADR Prof CIArb-Legal Representative".

37. The Claimant presented two claim forms ticking unfair dismissal and indicating unfair dismissal/whistleblowing and dismissal for having raised health and safety concerns. Claim 1807400 – 2019 was presented against Persimmon Group PLC ("Persimmon") only on 16 December 2019. The details of the claim were in a separate attachment, clearly lay drafted, and referring to "Andy Geldart" as the claimant's boss, and a site manager, and a sub contractor. There was reference to Persimmon HR, and having been told after the accident when seeking to return to work, that there was no more work for him – this was cast as a dismissal.

38. The claim details also included information about alleged breaches of NHBC Regulations (the relevance of which is unclear). Claim number 1807532 - 2019 was presented against Persimmon and A Geldart Brickwork Limited ("A Geldart") on 18 December 2019.

39. On 23 December 2019, the respondent approached IM to act in the employment claims and provided a copy of the ET1s to IM. Those instructions were pursuant to an umbrella retainer beween IM and the respondent for employment litigation.

40. On 30 December 2019 a conflict check was carried out in respect of the employment claims, that too contained an error, but only in respect of Geldert. The claimant was identified on that check - a previous "personal injury enquiry" was the characterisation Ms Heelam gave to the claimant's presence on the respnodent's

system. The decision was taken by IM that there was no conflict and the firm could act for Persimmon.

41. On issue the claimant's claims had been fixed for a case management hearing, as is the ordinary practice in protected disclosure complaints, particularly were the legal complaints may be unclear.

42. IM then confirmed it acted for Persimmon, filing responses to both claims, on 14 January 2020. The response asserted that the claims could not be brought because the claimant was neither employee nor worker of the respondent. Further that the accident had been the result of the claimant's own negligence.

43. The claimant withdrew his claim against A Geldart, and that claim was dismissed. An Employment Judge joined the two Persimmon claims, which were, in effect duplicates, and the case management hearing was due to take place on 14 February 2020.

<u>The emergence of costs and conflict issues and adjournment</u>

44. On 29 January 2020 IM wrote a "Calderbank" letter to the claimant's representative setting out its client's position that for status reasons the claims had no prospects of success, and if pursued, an application for costs against the claimant would follow. If withdrawn by 4 February, there would be no application for costs.

45. On 31 January Ms B wrote to IM pointing out the claimant's position on conflict, including the nature of the call he had had in September, and the information provided and advice received. She said that there would be complaint to the SRA and others including the press, and requesting that IM "recuse itself" by 4 February and "make reparation". That matter was passed to the client experience team within IM, who acknowledged the correspondence separately to the proceedings.

46. By email of 5 January 2020 Ms B made an "application to withdraw counsel" to the Tribunal, seeking an order removing IM's representation of Persimmon in the proceedings, due to an alleged conflict of interest on the part of IM. On the same day IM applied for the claim to be struck out and/or a deposit ordered. There was some time before these applications were referred to an Employment Judge.

47. In the meantime, IM provided its agenda for the case management hearing to Ms B with no reference to the conflict issue; and by email of 11 January 2020 Ms B made an application for an adjournment of the preliminary hearing listed for 14 February 2020 "In order for the Claimant to assess his position with the SRA and the court rule on a withdrawal of counsel". Ms B asserted IM had a conflict of interest.

48. By email of 12 February 2020 IM on behalf of Persimmon, opposed the application of an adjournment on the basis that IM did not believe there was a conflict of interest: "We have carried out internal investigations into this matter and concluded that there is no conflict of interest…The personal injury department has responded to the Claimant's compliant [sic] and informed him: There was no solicitor client relationship and no terms of business had been agreed, although it is accepted that he had provided information for the purposes of a potential personal injury claim only; and that they do not hold any confidential information that is materially relevant to this claim."

49. By later email of 12 February 2020 timed at 15.46, Ms B renewed the request for an adjournment and 'withdrawal of Counsel'. She stated that, inter alia, the

Claimant had discussed a possible employment claim against Persimmon in his initial telephone call with IM. On or before that time IM has acknowledged some fault in its dealings with the claimant (but not conflict) and had offered a small gesture of goodwill (£200 openly, which I was told today remains open for acceptance).

50. The next morning Ms B made a subject access request to IM in relation to the data held about the claimant. By email of later that day Ms B asked for the preliminary hearing the next day to be held in public. IM did not object.

51. By an order dated 13 February 2020, the Tribunal directed, having considered the emails from the Persimmon requesting a strike out or deposit order and the Claimant's application to withdraw counsel and the adjournment request, that the case would remain listed and the applications would be dealt with at the hearing the next day on 14 February 2020. There was no express communication that the hearing would be in public.

52. By email early on 14 February 2020, Ms B said this:

We represent the Claimant in respect of the above matter.

We are writing to advise the Employment Tribunal that with reference to s2(a) Overriding objective, we consider the ongoing issues with counsel, to defeat the objective to ensure all parties are on an equal footing. Under rule 6.2 of the SRA Code, (a law firm must not act for two or more clients in relation to a <u>related</u> matter. My client does not wish to proceed in a Tribunal, when there are serious factors to be investigated and where it is held in private.

Irwin Mitchell have stated they have conducted their own investigations and contested our request for withdrawal of their representation. Nevertheless, we deem this to be subjective and, prior to continuing any further employment litigation, my client requires clarification from the regulator, the SRA, on whether Irwin Mitchell can continue to act for Persimmon Group Plc, under this matter.

We do not wish to imposition the court or take up its valuable time regarding matters of counsel and alleged conflicts of interest. Therefore, we have initiated this complaint to the Solicitors Regulation Authority, upon a conclusive investigation they will be able to determine and enforce withdrawal, if required, my client can then make an informed decision.

Pursuant to rule 52(a)-(b) we are withdrawing the claim against the respondent, we expressly request the Tribunal to allow us to reserve our right to bring a further claim upon the SRA findings.

53. In response by email of 14 February 2020 timed at 10.08, Irwin Mitchell stated that if the Claimant withdrew his claim, it should be a full withdrawal with no right to bring a further claim. Ms B emailed again to say: "As per the letter we have sent to the Tribunal this morning, my client wishes to withdraw on the pleas illustrated. My client will not be in attendance at the Tribunal, having withdrawn his claim in the interim, until the Tribunal have ruled."

54. By order dated 14 February 2020 I directed that: "*On the parties' correspondence yesterday and today:*

1 The claimant withdraws his claims and today's combined preliminary hearing is vacated.
2 The proceedings are at an end pursuant to Rule 51.
3 The files shall be closed.
4 There shall be no judgment dismissing the claims: I am satisfied it is not in the interests of justice to do so at this time."

55. The respondent then applied for a dismissal judgment, and made an application for costs or wasted costs against the claimant and his lay representative; I decided of my own motion that there would be a hearing to address the respondent's two applications and: "*whether to make a wasted costs order against the respondent's representative (including disallowing its own client costs) within Rules 80 to 82 on the basis that in acting for the respondent in this matter it has acted improperly, or unreasonably, or negligently ("the conflict issue").*"

56. The claimant then, on 10 March, sought the striking out of the respondent's applications. I directed those matters must be aired at this hearing. On 9 April the claimant wrote again resisting the respondent's applications, seeking further witnesses be directed to attend, and, in a one line heading, that preparation time costs be awarded to Ms B/the claimant. The further directions, orders and latter stages of the chronology in preparation for this hearing appear above.

The relevant law and submissions

57. I start with the dismissal judgment issue. Mr Johnston properly referred me to Rules 51 and 52 and the fact that they differ from the previous provisions on which much of the case law developed:

51 End of claim

Where a claimant informs the Tribunal, either in writing or in the course of a hearing, that a claim, or part of it, is withdrawn, the claim, or part, comes to an end, subject to any application that the respondent may make for a costs, preparation time or wasted costs order.

52 Dismissal following withdrawal

Where a claim, or part of it, has been withdrawn under rule 51, the Tribunal shall issue a judgment dismissing it (which means that the claimant may not commence a further claim against the respondent raising the same, or substantially the same, complaint) unless—

(a) the claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there would be legitimate reason for doing so; or

(b) the Tribunal believes that to issue such a judgment would not be in the interests of justice.

58. He took matters helpfully further: it was not enough for the claimant to reserve a right to bring a further claim, but I must be satisfied that there was legitimate reason to do so – that to do so would not be an abuse. He referred me to Verdin v Harrods Ltd [2006] IRLR 339.

59. He said it was an abuse to withdraw and reserve, and then commence the same claim against the respondent, as an alternative to seeking a stay or adjournment or consideration of the conflict issue, at the hearing scheduled on 14 February. The matter could, and should, have been dealt with. As to whether "a claim" could mean the personal injury proceedings, and the risk that issue estoppel could have some impact on the employment status in proceedings in the county court in that respect (which was a question I asked him if we were in 52(b) territory, his response was that the respondent had responsibility for the site irrespective of employment or contractor or worker status: the claimant would not be prejudiced by a dismissal judgment on that basis.

60. He accepted that my previous decision was expressed on the basis that it was not in the interests of justice to do so – but he said that in this case we were in Rule 52(a) territory and clarified that the employment claim was still being considered.

61. Ms B refuted that the conduct was abusive. The claimant still relies on being a worker or employee, as a labour only contractor. She referred to Autoclenz indicating there may be suggestion of a sham in the contractual arrangements set out in the respondent's response. She also said that "they had not wanted to waste the court's time" being without the evidence on 14 February. It was not clear whether this was evidence as to conflict, or status. She submitted that the claimant had not wanted a private hearing, and was concerned in the light of the conflict issue he could not be on an equal footing.

Costs applications

62. The relevant provisions are in Rules 74 to 84. They do not need to be repeated here. The issues have considerably narrowed.

63. As to a wasted costs order against Ms B, pursued by IM on behalf of the respondent, it is clear she has some legal knowledge and research skills and operates through a trading name, "B Legal", but she is not a qualified solicitor, barrister, or ILEX. Before today I had sought clarity about whether she acted for profit in this matter, and it was confirmed, and again in her statement, that she acts as the claimant's partner only. That is supported by the claimant's assertion to IM in the September call that this was not her expertise. She is not a representative against whom a wasted costs order can be made, and Mr Johnston accepted that as a matter of principle. And as a matter of evidence, there was no evidential basis to suggest that she acted on a retainer for profit.

64. Equally, there is no provision in the Tribunal's rules for a preparation time order to be made against a representative. The claimant's preparation time order was a one line heading only; it did not articulate the basis of the application, and it can only reasonably be understood, in context, to based on a criticism of IM's conduct, rather than, in this context, the respondent's.

65. Those two applications then, must be dismissed.

66. That leaves Persimmon's applications for costs against the claimant, advanced by Mr Johnston on two bases: that the claim was, as set out in the calderbank letter, misconceived and with no prospects of success from the outset, for status reasons. Secondly, if I was against him on that, the claimant had engaged in Rule 76(a) conduct on 14 February in withdrawing at the last moment, which had resulted in wasted and costs in preparation for the respondent, and subsequently, as set out in the schedules.

67. Again, in her oral submission Ms B was clear that the SAR request had only just been made on 13 February, and without the underlying information, she considered the best course was to withdraw and reserve rather than waste the Tribunal's time. She also considered that "they" were not on an equal footing in attending such a hearing.

The conflict issue - submissions

68. As I indicated to the parties I would, I simply adopt Mr Weiss' helpful setting out of the principles, many of which were reflected in the the orders made for the consideration of this issue. As to the application of the principles, Mr Weiss adopted IM's position that there was no conflict, and advanced that there was no merit in any other allegations of improper conduct.

69. Ms B's submissions were diametrically opposite to those of Mr Weiss. She considered there was a conflict and there had been highly improper conduct by IM, her belief evidenced by the breadth of her complaints.

The principles

70. In Godfrey Morgan Solicitors Ltd v Cobalt Systems Ltd [2012] ICR 305, the EAT (Mr Justice Underhill) provided detailed guidance on the Tribunal's wasted costs regime. Whilst the case was decided under the 2004 rules, the relevant provisions are the same in the 2013 Rules. Per Mr Justice Underhill (¶35):

71. Save in the most straightforward case, it will always be wise for the tribunal in its consideration of a wasted costs order to be reminded of the guidance given by the Court of appeal at pp.226-239 of the judgment in Ridehalgh v Horsefield [1994] Ch 205 (copy attached).

72. It is always good practice for the Tribunal to follow the three-stage test in Ridehalgh: (1) Has the legal representative of whom complaint is made acted improperly, unreasonably or negligent? (2) If so, did such conduct cause the applicant to incur unnecessary costs? (3) If so, is it in all the circumstances just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs?

73. The procedure for determining claims for wasted costs will depend on all the circumstances of the case. The procedure must be as simple and summary as possible, but only so far as fairness permits. In Godfrey Morgan Solicitors, Mr Justice Underhill observed that "as for cross-examination of the representative against whom costs are sought, no doubt in most circumstances this will be inappropriate and/or unnecessary and/or disproportionate".

74. The following aspects of the guidance in Ridehalgh are particularly relevant:

75. The meaning of improper: ""Improper"means what it has been understood to mean in this context for at least half a century. The adjective covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct. But it is not in our judgment limited to that. Conduct which would be regarded as improper according to the consensus of professional (including judicial) opinion can be fairly stigmatised as such whether or not it violates the letter of a professional code."

76. *The meaning of unreasonable: ""Unreasonable also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But such conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable".*

77. *The meaning of negligent: "The term "negligent" was the most controversial of the three. It was argued that the Act of 1990, in this context as in others, used "negligent" as a term of art involving the well known ingredients of duty, breach, causation and damage. Therefore, it was said, conduct cannot be regarded as negligent unless it involves an actionable breach of the legal representative's duty to his own client, to whom alone a duty is owed. We reject this approach…since the applicant's right to a wasted costs order against a legal representative depends on showing that the latter is in breach of his duty to the court it makes no sense to superimpose a requirement under this head (but not in the case of impropriety and unreasonableness) that he is also in breach of his duty to his client. We cannot regarded this as, in practical terms, a very live issue, since it requires some ingenuity to postulate a situation in which a legal representative causes the other side to incur unnecessary costs without at the same time running up unnecessary costs for his own side and so breaching the ordinary duty owed by a legal representative to his client. But for whatever importance it may have, we are clear that "negligent" should be understood in an untechnical way to denote a failure to act with the competence reasonably to be expected of ordinary members of the profession. In adopting an untechnical approach to the meaning of negligence in this context, we would however wish firmly to discountenance any suggestion that an applicant for a wasted costs order under this head need prove anything less than he would have to prove in an action for negligence: "advice, acts or omissions in the course of their professional work which no member of the profession who was reasonable well-informed and competent would have given or omitted to do"; an error "such as no reasonably well-informed and competent member of that profession could have made"".*

78. *Causation. "The court 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. Demonstration of a causal link is essential."*

79. *Should the court initiate the inquiry? "save in the most obvious cases, the court should in our view be slow to initiate the inquiry. If they do so in cases where the inquiry becomes complex and time -consuming, difficult and embarrassing issues on costs can arise: if a wasted costs order is not made, the costs of the inquiry will have to be borne by someone and it will not be the court; even if an order is made, the costs ordered to be paid may be small compared with the costs of the inquiry."*

80. *The appropriate procedure: "The overriding requirements are that any procedure must be fair and that it must be as simple and summary as fairness permits. Fairness requires that any respondent lawyer should be very clearly told what he is said to have done wrong and what is claimed. But the requirement of simplicity*

and summariness means that elaborate pleadings should in general be avoided. No formal process of discovery will be appropriate. We cannot imagine circumstances in which the applicant should be permitted to interrogate the respondent lawyer, or vice versa. Hearings should be measured in hours, and not in days or weeks. Judges must not reject a weapon which Parliament has intended to be used for the protection of those injured by the unjustifiable conduct of the other side's layers, but they must be astute to control what threatens to become a new and costly form of satellite litigation."

The SRA Code of Conduct for Solicitors ("the Code")

81. The Code glossary defines relevant terms as follows: "client ***means the person for whom you act and, where the context permits, includes prospective and former clients".***

82. *"Conflict of interest: means a situation where your separate duties to act in the best interests of two or more clients in relation to the same or a related matters [sic]conflict"*

83. Principle 6.2 provides: You do not act in relation to a matter or particular aspect of it if you have a *conflict of interest* or a significant risk of such a conflict in relation to that matter or aspect of it, unless: [it was agreed that the exceptions were not engaged here] .

84. Principle 6.3 provides: You keep the affairs of current and former *clients* confidential unless disclosure is required or permitted by law or the *client* consents.

85. Principle 6.4 provides: Where you are acting for a *client* on a matter, you make the *client* aware of all information material to the matter of which you have knowledge, except when:

a) the disclosure of the information is prohibited by legal restrictions imposed in the interests of national security or the prevention of crime;

b) your *client* gives informed consent, given or evidenced in writing, to the information not being disclosed to them;

c) you have reason to believe that serious physical or mental injury will be caused to your *client* or another if the information is disclosed; or

d) the information is contained in a privileged document that you have knowledge of only because it has been mistakenly disclosed.

86. Principle 6.5 provides: You do not act for a *client* in a matter where that *client* has an interest adverse to the interest of another current or former *client* of you or your business or employer, for whom you or your business or employer holds confidential information which is material to that matter, unless:

a) effective measures have been taken which result in there being no real risk of disclosure of the confidential information; or
b) the current or former *client* whose information you or your business or employer holds has given informed consent, given or evidenced in writing, to you acting, including to any measures taken to protect their information.

Discussion and Decisions

Did the claimant's Tribunal claims have no reasonable prospect of success for reasons of lack of status?

87. The difficulty with this question is that, perhaps because there was no case management hearing, the Employment Rights Act ("ERA") complaint being brought is unclear: worker detriment (which can include disengagement), or employee dismissal, or both: certainly the respondent had identified the prospect of either in its response. The complexities of status are well trodden territory in this Tribunal. Indeed J, in his advice to the claimant, identified how confused and difficult the territory can be. It is the rare case where it can be said that to advance a worker or employee position, even against documents suggesting self employment, is without reasonable prospect of success. Some parts of the factual matrix (comprising the necessary multi factoral approach) were likely to be greatly in dispute in these proceedings. I cannot say that the lay pleading in this case, when read against the response, was in the rare, clear, self employed category. There was no suggestion that I should hear evidence or make findings, pertinent to status. I cannot conclude that the claimant's claims had no reasonable prospect of success, but status would properly have been a preliminary issue to be determined on evidence.

Was the claimant's late withdrawal and reservation vexatious, abusive, disruptive, or otherwise unreasonable conduct?

88. It is apparent from the claimant's communication of withdrawal and reservation that Ms B did not understand or appreciate that the hearing on 14 February, would be conducted in public – she had seen the IM did not object – but there was no express notice to this effect (or at least there was none in my papers). It is easy from a position of knowledge, which is IM's position, to understand that a hearing which may result in the claim being dismissed, would have to be conducted in public pursuant to our rules, and that the public nature of the hearing would have been confirmed and discussed at the outset. But I accept that was not the claimant's state of knowledge and there was real concern about a private hearing.

89. Further, on behalf of the respondent and again from a state of deep knowledge, Mr Johnston can say the reasonable course would have been to attend, and air the complaints and issues. But these were not circumstances where the claimant and Ms B could reasonably perceive that they and the respondent, represented by a large firm, both on the conflict and the substantive issues, were on an equal footing. The claimant and Ms B knew that there was a very real dispute of fact between them about the nature of the engagement between the claimant and IM in September and October, in respect of which the claimant had very little corroborative evidence. As often happens before a hearing, the parties' engagement had escalated and tension appeared to be running high.

90. My assessment against this background is that the claimant's conduct in withdrawing that morning did not cross the 76(1)(a) threshold, even though it was very late in the day. This was not a withdrawal for no reason, or for an inherent weakness of case, or as an attempt to put the respondent to the greatest possible cost and walk away from the proceedings, as on occasion, is seen. This was withdrawal with reservation – discontinuance – for real concern about conflict in the advisers and the consequent potential prejudice to the claimant. That arose in

circumstances where the claimant was actively seeking to pursue a personal injury claim.

91. If I am wrong in my assessment of the claimant's conduct, the next question would be whether I should exercise my discretion to make a costs order against him. In all the circumstances of this case, I would not do so. The claimant had arguable claims in two jurisdictions which he wished to bring. He has not been served well. It is not in the interests of justice for him to face costs in a jurisdiction which is typically one of reasonable parties bearing their own costs. The respondent's costs application against the claimant is also dismissed

Would the bringing of fresh proceedings be an abuse of process?

92. For the same reasons, commencing fresh proceedings against the respondent on the same basis, would, in my judgment, not be an abuse as articulated by Mr Johnston – that the claims could and should have been pursued from 14 February – because I take into account the knowledge, reasoning and reservation of Ms B or the claimant, as above. However, I consider, on current law such a fresh claim of employee dismissal or worker disengagement (detriment) pursuant to the Employment Rights Act ("ERA") would be doomed to failure, and therefore unreasonable and an abuse. The claimant would be in, it seems to me, unsurmountable limitation difficulties. How could it be said that it was not reasonably practicable for him to present within three months (plus ACAS conciliation), when he had done so in these proceedings, and then discontinued. In the Tribunal jurisdiction only, discontinuance, is of little practical use because of the very short and strict limitation periods (particularly in ERA claims).

93. That being so, the other reservation issue relates to the claimant's pursuit in a different jurisdiction of a further claim – in this case the personal injury proceedings. The respondent asserted in its ET response that the claimant's accident occurred through his own negligence. It asserted he was a self employed contractor with whom it had limited direct dealings. It seems to me, and despite Mr Johnston's assurances on the status issue, these matters (cause of injury/status) have been raised in this Tribunal and will be raised in the county court: they are common matters. From an abundance of caution, I consider that the claimant's reservation is valid in that respect, and a Judgment in this Tribunal is not to be given when, albeit a different and further cause of action is to be pursued, issues may overlap.

94. If I am wrong on the application of Rule 52(a), and I come to exercise discretion under 52(b), I take into account Mr Johnston's submission that the respondent should not have to face the costs of defending the same claim in the ET again; but that prejudice is unlikely to arise given my comments above. On balance, and given the way matters have evolved since 14 February, I continue to consider it is not in the interests of justice to give Judgment following withdrawal in this case.

In acting for the respondent in this matter did IM act improperly, or unreasonably, or negligently

95. I had no evidence of whose decision cleared the potential conflict identified on the respondent's system in late December, or early January, but that decision is adopted, in effect, by the statement of Ms Heelam,

96. I do not know if the detailed observations she provides now, were the considerations at the time, but in summary they are: the firm did not agree to act for the claimant in the personal injury matter - there was no retainer, communicated

to him on 24 October; nor did the firm act for him in the employment matter; there was no record of the employment related discussions on the file; there was no confidential information provided to the firm in respect of which it would be under an obligation to impart to Persimmon, either (1) because of the relationship; and/or (2) because it was not acting in the PI claim for Persimmon; and/or (3) because there was more information in the ET1 than the claimant had provided to J, such that anything said to J was no longer confidential. Mr Weiss adopted the firm's analysis that there was no conflict.

97. I take note of the general principles of conflict and potential conflict, enshrined in the code, and for which lawyers and judges have a general appreciation. I was not helped by any up to date decisions of the SRA, or others' thoughts on such matters in context, but had only the opposing positions of the claimant, and IM.

98. I did not need to address whether the conduct is properly to be considered improper, or negligent conduct, bearing in mind these matters may be subject to consideration again, and/or in a different forum. In my judgment, acting for the respondent following the call that took place between J and the claimant was unreasonable conduct. I say that for the following reasons.

99. As part of the background to this issue, the lack of an accurate note of the claimant's call with J, combined with the pro forma file note information, gave a wholly wrong impression of the extent of the telephone engagement to those investigating the matter at IM. IM's assessment consequently did not appear to take into account: a) the amount of advice J gave, both in relation to the "employment" matter, and the personal injury case; b) the extent of the information provided by the claimant; c) the beginning of the call: there was no caution that IM may not be able to act if there was a conflict (nor any discussion of the prospect or meaning of potential conflict at all); nor was the caller, a member of the public, informed they may wish to be circumspect because it could arise that IM acted for an adverse party; nor was there any discussion of the precautions in place to address that issue.

100. Compounding those matters, the opposite was the case: the claimant was given the impression that the information he provided could be a formal part of his personal injury claim, by the discussion of the statement of truth, and he was encouraged to engage in a full information gathering exercise. That was done before any conflict check.

101. Further aggravating conduct was that IM's investigation did not consider the detail of the call (and in particular whether it addressed employment matters). IM was alerted to the claimant's assertion that an employment issue had been discussed on 31 January in Ms B's letter. It did not seek to confirm this (it seems) with J, or by seeking permission (or not, if not required) to listen to the call. Nor did it consider giving the claimant the benefit of the doubt. That remained the case when Ms B wrote further in her applications days later to the Tribunal, to the effect that IM was wrong about the content of the call.

102. In my judgment, with full sight of the call between the claimant and J, the claimant is entitled to be considered by IM as a "prospective client", such that he was within the definition of client to which the Code provisions apply. He could have a reasonable expectation following that call that the firm would not act in either of the related matters discussed (employment or personal injury) for the adverse party, in this case, the respondent. That expectation derives, to some extent from

common sense and fair dealing, but is consistent with the code provisions. If one substitutes "prospective client" or "the claimant" into the code provisions, the extent of the difficulties become apparent.

103. A practical demonstration was IM's advice given to the claimant, having regard to his interests, that he may very well have an employment claim, and could be considered employed, whereas the respondent's pleaded case was, again advised by IM, that he certainly did not.

104. As to information given by the claimant, there are other examples but even the fact of the claimant's consultation with IM, his intent, or wish, to bring a personal injury claim against the respondent, evidenced by him appearing on IM's system, was confidential information held, which, had IM had an eye only to the best interests of the respondent, should properly have been disclosed to the respondent. There was no evidence before me of the systems in place to ensure there was no real risk of that, or that there was an agreement in place with the respondent in advance to provide for that situation.

105. That being my decision, that in the round there was unreasonable conduct in acting, it is unnecessary for me to consider the further hyperbolic allegations that are made by Ms B, both of conspiracy theory between IM and the respondent, and of conduct by IM in putting before the Tribunal various documents. There are of course difficulties in privilege and other matters which arise in the personal injury proceedings, but it is unnecessary for me to address them to dispose of these matters. I do address one troubling submission of Ms B, in the interests of the overriding objective.

106. She considers that the respondent having early sight of the fact of a video recording of the scaffolding made by the claimant, because of the bundle in these proceedings, is prejudicial. She says she and the claimant did not want that disclosing at this stage. That is a misconceived approach to litigation. Early and frank disclosure of the evidential basis for a claim is consistent with the overriding objective, whatever the jurisdiction, but particularly in those managed through the pre action protocols.

<u>Should a wasted costs order be made disallowing the respondent/IM costs</u>

107. During this hearing, we discussed what could have happened, with hindsight, if IM had taken a different decision when the claimant was flagged as a "previous enquiry", and declined the instructions? Equally, what if the claimant and Ms B had attended the hearing on 14 February – would the Employment Judge have considered a stay for the SRA proceedings, or a possible determination on evidence of the conflict issue, or might they given some kind of helpful indication. We cannot know the answers to these questions.

108. Today Mr Johnston has confirmed the point reflected in Mr Weiss' skeleton and included above: his client, the respondent, seeks no disallowance of its solicitor/client costs – why would they – the claimant had withdrawn his claim. In those circumstances, and bearing in mind that the respondent would have had defence costs from another firm (presumably), if IM had not acted, it cannot be said that in acting, IM has caused the respondent wasted costs in relation to defending the claim to the point of the withdrawal. Mr Weiss submitted that it would be an impermissible exercise of discretion, such as to amount to penalising IM, to do so. I accept that submission and make no wasted costs order.

109. However, it is also clear from the schedules provided that IM has recorded on the respondent/claimant file, it appears, a good deal of cost arising from internal and external consultation about the conflict issue, from a very early stage, between 2 January and 13 February, and beyond that from 14 February until today, including consulting different third party solicitors in each period. Those conflict related costs may or may not be costs properly to be passed to the respondent depending on instructions. I have disregarded those schedules and simply take Mr Johnston's confirmation at face value.

110. Finally, it is inevitably the case that with the lens of hindsight, a different judicial decision could have been taken about adjournment before 14 February, or on the matters for determination arising from the respondent's application for costs/wasted costs/dismissal.

111. Wasted costs in the Tribunal are often raised by the Tribunal of its own motion, and the same is anticipated in the drafting of the Tribunal rules, including disallowance of own client costs. Typically, the "most obvious cases" in *Ridehalgh,* include where a representative's conduct has caused all parties to have thrown away costs – the classic case is negligent failure to comply with orders resulting in an adjournment. The circumstances of conflict, described by the claimant, in my judgment fell into that obvious category. Whether he or Ms B were right or wrong about that, or at the very least, whether he and Ms B were reasonable in considering that conflict justified discontinuance, were matters that needed to be tested in all the circumstances of this case.

112. The conflict issue cannot, proportionately, be given the forensic and lengthy consideration that it might be given in other fora (not least because analogous decisions were not put before me), but it is an important matter going to the interests of justice generally, and the regard in which members of the public generally hold solicitors as a whole. It properly required hearing and determination.

113. It also follows that if I am wrong about the conflict issue, I consider it was a reasonable position for the claimant and Ms B to take, applying the provisions of the code of conduct, and general principles of fair dealing between solicitors and the public. That conclusion inherently informs my assessment of their conduct, which also goes to the matters of dismissal, and costs, above.

114. I have sought to give the parties a swift judgment, as I indicated I would, but I apologise in advance if the proofing process has produced any avoidable errors.

Employment Judge Wade

23 April 2020