EMPLOYMENT TRIBUNALS

Claimant: Mr M Masuri
Respondent: Lidl Great Britain Ltd

HELD AT: Liverpool **ON:** 11 May 2021

BEFORE: Employment Judge Shotter

Members: Mr A Clarke
Mr M Stemp

REPRESENTATION:

Claimant: Mr J Halson, solicitor
Respondent: Ms R Kight, counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that;

1. The respondent's application for costs against the claimant is successful and the claimant is ordered to pay to the respondent a contribution towards costs in the sum of £200.00 (two-hundred pounds.)

2. Mark Reynolds Solicitors are ordered to pay costs in the sum of £200.00 to the respondent (two-hundred pounds).

REASONS

1. This has been a remote hearing by video which has been consented to by the parties. The form of remote hearing was Kinley CVP fully remote. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that the Tribunal was referred to are in a main bundle of 248 pages which includes a skeleton argument produced by Ms Kight and the claimant's witness statement, together with the original trial bundle at pages 32 to 34, 73 and 84. The Tribunal has also taken into account the Presidential Guidance, including paragraph 14 to which it was referred by Ms Kight.

2. The claimant's statement of means is unsigned and undated, his bank statement goes back to 03 June 2020, and is clearly out of date for today's hearing. The claimant is currently living in Nigeria and he has not attended the hearing today, despite being aware for some time that it was going ahead, the application made on behalf of the claimant to adjourn having been refused. There is no explanation from the claimant as to his non-attendance; as before the claimant's legal representative is without instructions and he has agreed that if the claimant is in Nigeria it is unlikely he will still be in receipt of the benefits claimed as attached in appendices to the claimant's statement. In short, neither the claimant's legal representative, the respondent or the Tribunal are aware of the claimant's means as at today's hearing. The Tribunal took the view that the respondent had been waiting since 2020 for this cost hearing and as the request for an adjournment had been refused earlier and the claimant had not appeared with no explanation given to his solicitor, the respondent and Tribunal, it was in accordance with the overriding objective to continue hearing the respondent's application.

The costs application

3. The respondent made a costs application on the 20 May 2020 against the claimant and a wasted costs application against the claimant's solicitors that runs to a total of 6-pages which the Tribunal does not intend to repeat in full. The respondent also relies upon a skeleton argument prepared by Ms Kight, which the Tribunal took into account.

The cost application grounds

Ground 1

4. Turning to the respondent's written grounds for making the costs application submitted on behalf of the respondent, the respondent differentiates from a case where the claimant held an honest but mistaken belief and one where the claimant did not have a mistaken or honest belief, it maintains was the case of the claimant. In Ms Kight's Skeleton the Tribunal was referred to Scott v Inland Revenue Commissioners [2004] EWCA Civ 400, Sedley LJ, para 46 that they key question with regard to considering whether to award costs on the ground that a claim had no reasonable prospect of success, the key question in this regard is not whether a [party thought he or she was right, but whether he or she had reasonable grounds for doing so. For the reasons set out below the Tribunal determined the claimant had reasonable grounds for issuing these proceedings, did not accept the claimant's case was based on something the claimant knew not to be true when he issued these proceedings and took the view that there was some room for doubt which could only be resolved when "the dust of the battle had settled." The Tribunal has explored this facet further below.

5. The Tribunal found the claimant was not a credible witness as set out in the judgment and reasons promulgated on the 30 April 2020 ("the Judgment and Reasons"), but it does not necessarily follow that the claimant did not have a honest but mistaken belief that the disciplinary allegations raised against him

which resulted in the final written warning were false at the time when he entered into this litigation, bearing in mind what transpired during the disciplinary investigation relating to the respondent's refusal to provide the CCTV evidence through to the differences in the disciplinary statements made by managers as provided in a comparison schedule prepared by Mr Halson titled "Respondent's Accounts." The differences are marked in the evidence given ranging from Jack Pope's disciplinary statement that the claimant had used his physical presence in an intimidating manner, repeatedly pointing his finger in "my face" and "several times pushed me in the shoulder" when the CCTV report confirmed there was no suggestion of physical aggression. The Tribunal's written reasons at paragraph 44 dealt with this evidence.

6. The Tribunal took the view that had the respondent disclosed the CCTV evidence, which it should have done, the differences between Jack Pope, Melanie Roberts and Paul Landanowski's statement are so marked that they could have assisted the claimant remember what had actually taken place on the day in question as opposed to what he could recall after the passage of time which invariably results in a shifting perception. It is entirely possible that the claimant could have held a belief that the managers were not telling the truth and exaggerating the incident.

7. As submitted by Mr Halson, the claimant had been spoken to by the respondent before about his intimidating tone and body language, which reflects a lack of self-awareness on his part._The Tribunal was referred to page 73 of the original trial bundle Paul Landanowski who stated in his witness statement given during the disciplinary investigation "I have previously had to speak to Mo regarding his tone of his voice and his body language and explained to him that it can come across intimidating and aggressive." The fact is the claimant had been spoke to previously about his attitude, and yet the CCTV confirmed he was not aggressive and intimidating in the incident which resulted in the claimant being issued with a final written warning.

Claimant's conduct of this litigation

8. There were a number of instances when the claimant should have been in touch with his solicitor and he was not, as indeed was the case at today's hearing. It is clear the claimant's solicitors were without instructions for lengthy periods of time through no fault of his legal representative, who had to make the best of the situation without his client losing face in this litigation.

9. It is noted on the 20 May 2019 case management orders were agreed and a final hearing listed for 9-11 October 2019.

10. On the 19 August 2019 the respondent made an application to strike out the claimant's claim supported by a one-and-a-half-page letter setting out the claimant's "repeated" failure to comply with case management orders.

11. The Tribunal wrote to the claimant's representative on the 21 September 2019 threatening strike out the claims, and in an email sent on 30 September 2019 to the Tribunal and copied to the respondent, Mr Halson explained he had not heard from the claimant since April 2018 until the claimant telephoned him on

the 30 September 2019 from Liverpool prison. This history was supported by Mr Halson's submissions today; he explained the claimant's ex-wife had been in contact on the 23 August 2019 to inform his firm the claimant was in prison and Mr Halson properly took the view that until he had instructions to divulge this information to the Tribunal and respondent (which he did not) he was unable to communicate this fact. Mr Halson submitted that in hindsight perhaps he should have confirmed he was unable to obtain instructions from the claimant to the respondent and Tribunal; however, this would not have any difference to an outcome as the trial was listed for the next month. The Tribunal agreed.

12. The Tribunal took the view that the claimant's solicitors could not be blamed for the fact their client did not provide instructions going as far back as April 2019. The claimant was in prison from 9 May 2019 until the 8 November 2019, the day of the claimant's trial, but does not excuse the claimant failure to any provide instructions during this period. In his witness statement the claimant makes references to attempts to contact his solicitor during his period in custody and there is no suggestion he was struggling to make calls. It was incomprehensible that the claimant was unable to contact his solicitors over a period of 6-months by some form of communication, even taking into account that the criminal proceedings understandably took precedence over the Employment Tribunal litigation. The deadline date for strike out was 30 September 2019, and it is notable that this was the date the claimant conveniently contacted his solicitors last minute so an explanation could be given to the Tribunal as to why the case management orders had not been complied with. The Tribunal did not accept that the claimant has provided a reasonable explanation for his non-compliance during this period. This view is supported by events which follow when the strike out threat and the prospect of an imminent trial made no difference to the claimant's lack of communication.

13. The claimant was released from prison on the 8 November 2019, the case was re-listed on the 12 December 2019 and case management orders were still outstanding as the claimant had not provided a schedule of loss or a list of documents.

14. On the 31 January 2020 the claimant's legal advisors agreed a revised time table at the respondent's solicitor's suggestion and the claimant still failed to produce his list of documents and schedule of loss by 5 February 2020 with the trial imminent on 18 to 20 March 2020. The claimant's legal advisor, who was trying his best in difficult circumstances, was overworked and as a direct result failed to comply with case management orders previously agreed by him.

<u>Second strike-out application</u>

15. On the 12 February 2020 the respondent made a second application to strike out.

16. On the 26 February 2020, three weeks before the re-listed final hearing, the claimant's legal advisor provided the claimant's schedule of loss and list of

documents. In the email sent on 26 February the claimant's legal advisor fell on his sword apologising "to both respondent and the Tribunal for our failure to respond to their correspondence and delay in dealing with case management orders. **This was unfortunately due to pressure at work on part of the claimant's solicitor and not through any fault of the claimant**" [the Tribunal's emphasis].

17. In the body of the 26 February 2020 letter the claimant's legal advisor suggested exchange of witness statements on 6 March and explained "that is 12-days prior to the hearing date and we suggest that this would give both parties sufficient time to prepare for the hearing of this matter. The delay on our part was due to pressure of work. We realise this failure on our part is not one we can excuse…there is still time for the matter to be properly prepared…no party suffers any undue prejudice."

18. The hearing took place and no party suffered any prejudice by the delay. It took the respondent a threat of two strike out applications for the claimant and the claimant's legal advisor to comply with case management orders for the trial to take place, when this should have been the case especially given the fact the claimant's legal advisor had agreed case management orders he then failed to comply with because of overwork.

<u>The claimant's conduct at the final hearing</u>

19. The respondent relies on the claimant's conduct at the final hearing, particularly during cross-examination, describing it as "unreasonable" with the claimant blaming the claimant's legal advisor for his own shortcomings when the claimant failed to produce documentation, as noted by the Tribunal in the Reasons.

20. The respondent referred the Tribunal to paragraphs 75 and 96 maintaining what could have been relatively straight forward and speedy was slow and protracted during a time when COVID-19 posed a risk. The Tribunal took the view COVID-19 Pandemic was not relevant to its consideration as to whether or not to award costs. The hearing took place in the allotted time and no prejudice was suffered by the respondent as a result of any delays, with the exception of the cost of preparing two strike-out applications. The Tribunal does not accept the time it took to hear this case could have been shortened, even taking into account the claimant's difficulties in answering questions put to him on cross-examination as found by the Tribunal in the Judgment and Reasons. The Tribunal took the view that it is not unusual for witnesses to have difficulties answering questions on cross-examination, and being inaccurate historians when giving evidence. The point is that the claimant's case was heard in good time and completed in the estimated length of hearing. There is no basis to award costs in favour of the respondent as a result of the manner in which the claimant gave evidence, which resulted in his claim being dismissed in any event as the Tribunal did find his evidence credible.

21. Looking at the situation as a whole the Tribunal accepts that the claimant's conduct from April 2019 and that of the claimant's legal advisor from 5

February 2020 until the case managed orders were complied with on 26 February 2020, resulted in delay and extra costs.

22. The respondent's second strike out application was directly attributable to the claimant's legal advisor failure and not the claimant, and the earlier strike out application was solely attributable to the claimant's unreasonable behaviour when he failed to communicate with his solicitors and provide instructions until it because clear that his claims were about to be struck out.

Law

23. The relevant Employment Tribunal Regulation is 74-76. Rule 76(1)(a) provides that: "A Tribunal must consider whether to make a costs order against a party where he or she has acted unreasonably in the bringing or conducting of proceedings".

24. Rule 76 of the Tribunal Rules 2013 imposes a two-stage exercise for a Tribunal in determining whether to award costs. First, the Tribunal must decide whether the paying party (and not the party who is seeking a costs order) has acted unreasonably, such that it has jurisdiction to make a costs order. If satisfied that there has been unreasonable conduct, the Tribunal is required to consider making a costs order and has discretion whether or not to do so. Fees for this purpose means fees, charges, disbursements or expenses incurred – rule 74(1) Tribunal Rules 2013.

25. It is common ground that the Tribunal has the discretionary power to make a costs order under the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013. Rule 74 defines costs and rule 76 sets out when a costs order may or shall be made.

26. Rule 76(1)(A) provides that: "A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—a party (or that party's representative) has acted vexatious, 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 any claim or response had no reasonable prospect of success.

27. A Tribunal must consider whether to make a costs order against a party where he or she has acted unreasonably in the bringing or conducting of proceedings". Rule 76 of the Tribunal Rules 2013 imposes a two-stage exercise for a Tribunal in determining whether to award costs. First, the Tribunal must decide whether the paying party (and not the party who is seeking a costs order) has acted unreasonably, such that it has jurisdiction to make a costs order. If satisfied that there has been unreasonable conduct, the Tribunal is required to consider making a costs order and has discretion whether or not to do so. Fees for this purpose means fees, charges, disbursements or expenses incurred – rule 74(1) Tribunal Rules 2013. In Employment Tribunal proceedings costs do not ordinarily follow the event, unlike County Court and High Court actions.

Wasted costs

28. The Tribunal Rules 2013, rule 80 provides a tribunal may make a wasted costs order against a representative in favour of any party where that party has incurred 'wasted costs'. Wasted costs means costs incurred as a result of any improper, unreasonable or negligent act or omission on the part of the representative, or which, in the light of any such act or omission occurring after they were incurred, the employment tribunal considers it unreasonable to expect the party to pay — rule 80(1).

29. Rule 80 is based on the wasted costs provisions that apply in the civil courts, with the definition of 'wasted costs' is identical to that contained in S.51(7) of the Senior Courts Act 1981. Accordingly, the authorities applicable to wasted costs in the civil law generally are equally applicable in the employment tribunals — *Cliffhanger Duce and Hammer v Inns (t/a PARC Fermi) and anor EAT 0100/08* and *Mitchell Solicitors v Funkiness Information Technologies York Ltd EAT 0541/07*. Two leading authorities analysing the scope of Section 51 and the circumstances in which such orders can be made are *Rider's v Horse field and other cases 1994 3 All ER 848, CA*, and *Medical v Marvell and ors 2002 3 All ER 721, HL*. In the *Mitchell Solicitors* case, the EAT confirmed that these cases are 'sources of essential assistance' for employment tribunals in the matter of wasted costs.

30. In *Rider's v Horse field and other cases 1994 3 All ER 848, CA* the Court of Appeal examined the meaning of 'improper', 'unreasonable' and 'negligent' — subsequently approved by the House of Lords in *Medical v Marvell and ors 2002 3 All ER 721, HL* — as follows:

• 'improper' covers, but is not confined to, conduct that would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty

• 'unreasonable' describes conduct that is vexatious, designed to harass the other side rather than advance the resolution of the case

• 'negligent' should be understood in a non-technical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession.

31. The Court of Appeal in *Ridehalgh v Horsefield and other cases 1994 3 All ER 848, CA* held a legal representative should not be held to have acted improperly, unreasonably or negligently simply because he or she acts on behalf of a party whose claim or defence is doomed to fail.

32. The question as to whether a legal representative was negligent may turn on what instructions were provided by the client and what advice was given by the representative, both of which are matters covered by legal professional privilege that can only be waived by the client. In cases where privilege is not waived, a representative may be prevented from advancing a full answer to the complaint made against him. In the *Ridehalgh* case (above) the Court of Appeal provided some useful guidance in this regard. It recognised the difficulties that privilege might cause lawyers in these circumstances, and stated that judges who are invited to make a wasted costs order must make

full allowance for the fact that legal representatives may be prevented from telling the full story. Where there is room for doubt in these circumstances, the lawyers are entitled to the benefit of that doubt, and it is 'only when, with all allowances made, a lawyer's conduct of proceedings is quite plainly unjustifiable that it can be appropriate to make a wasted costs order'.

33. *Ridehalgh* was cited by Mr Justice Elias (as he then was) when President of the EAT in *Ratcliffe Duce and Gammer v Binns (t/a Parc Ferme) and anor EAT 0100/08*. He observed that where the privilege of the client is not waived, it will be a very exceptional case indeed where a court will be entitled to infer that a party is abusing the process of the court by pursuing a hopeless case.

34. In *KL Law Ltd v Wincanton Group Ltd and anor EAT 0043/18* Mrs Justice Simler (President of the EAT) held that an employment tribunal had erred by making a wasted costs order against KLL Ltd who had represented the claimant in pursuance of claims for race, sex and disability discrimination and constructive dismissal against WG Ltd. The EAT overturned the costs order, holding that the tribunal's finding that KLL Ltd had been negligent was erroneous in circumstances where the claimant had not waived legal privilege. The tribunal had heard no evidence from the legal representative and had no means of establishing what advice had been given about disclosure. Simler P observed that, where there has been a failure in respect of disclosure, a tribunal cannot simply assume that there was either negligence on the part of the legal representative concerned or that it is a failure by the legal representative regarding his or her duty to the court. **Simler P emphasised that 'a wasted costs order is an order that should be made only after careful consideration and any decision to proceed to determine whether costs should be awarded on this basis should be dealt with very carefully. A wasted costs order is a serious sanction for a legal professional. Findings of negligent conduct are serious findings to make.** Furthermore, even a modest costs order can represent a significant financial obligation for a small firm. **Tribunals should proceed with care in this area'** [the Tribunal's emphasis].

35. In *Cliffhanger Duce and Hammer v Inns (t/a PARC Fermi) and nor EAT 0100/08* the EAT observed that the Court of Appeal in *Rider's v Horse field and other cases 1994 3 All ER 848, CA*, had advocated a three-stage test for courts (and, by extension, employment tribunals) to adopt in respect of wasted costs orders:

    1. first, has the legal representative acted improperly, unreasonably, or negligently?

    2. secondly, if so, did such conduct cause the applicant to incur unnecessary costs?

    3. thirdly, if so, is it in the circumstances just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs?

36. The Court of Appeal in *Rider's* emphasised that even where a court — and,

by extension, an employment tribunal — is satisfied that the first two stages of the test are satisfied (i.e. conduct and causation) it must nevertheless consider again whether to exercise the discretion to make the order and to what extent. It still has a discretion at stage 3 to dismiss an application for wasted costs where it considers it appropriate to do so — for example, if the costs of the applicant would be disproportionate to the amount to be recovered, issues would need to be re-litigated or questions of privilege would arise.

Conclusion

37. The Tribunal is mindful that it is "rare" for costs orders to be appropriate in Employment Tribunal proceedings; they do not follow the event as in the ordinary course of litigation.

38. The Tribunal was not persuaded that it was unreasonable for the claimant to have brought the claim as submitted by Ms Kight, and there was a triable issue concerning the lack of CCTV evidence disclosed, the contradictions in the respondent's evidence for the reason why the CCTV evidence was not disclosed, and the claimant's belief that false allegations had been made as a result of the conflicting reports given by managers against a background of a refusal to disclose CCTV evidence which confirmed the claimant had not acted aggressively. A report of what the CCTV evidence shows is a different matter to viewing the actual contemporaneous CCTV footage, and the Tribunal was concerned at the final hearing as to whether the refusal to disclose the CCTV footage gave rise to adverse inferences from which unlawful race discrimination could be inferred before deciding on balance in favour of the respondent. It was only "after the dust of battle had settled" was the Tribunal able to make sense of the evidence, including the discrepancies on the part of the respondent. Mr Halson's submission that had the respondent retained and produced the CCTV evidence that would have enabled all parties to see more clearly whose version of events was accurate, had considerable force. It is conceivable the CCTV evidence may have jogged the claimant's recollection (and those of the other witnesses) as to what had taken place as opposed to subjective inaccurate recollections of the incident when people often remember what they think happened as opposed to the reality.

39. Mr Halson submitted with some justification that had the claimant thought he was not telling the truth and had something to hide he would not have made such an issue of being provided with the CCTV footage, and the Tribunal accepts that the actions of the claimant in this regard points strongly to the claimant having an honest belief that he had not acted in a threatening manner. The fact the Tribunal found in favour of the respondent does not undermine this, as it had to undertake a difficult balancing exercise in order to ascertain which version of events were credible on the balance of probabilities, finding in favour of the respondent having concluded the claimant's evidence was not credible and inaccurate.

The claimant's unreasonable conduct

40. The Tribunal took the view that the claimant's unreasonable conduct lay with the manner in which he conducted this litigation over many months, and the respondent chasing completion of case management orders which culminated in a strike out warning that need not have been made had the claimant been in contact with his solicitor and explained the fact that he was in prison unable to progress the litigation. Had the claimant taken this step it is likely the case management orders would have been amended or at the very least the date for compliance extended, and possibly, the trial date adjourned until later.

41. There is no reason to doubt Mr Halson's submission that the initial failure to comply with case management orders. The claimant's instructing solicitors were unaware the claimant had been detained in custody as from 9 May, and it was not unreasonable for the fee earner to take a view that the case management orders as agreed would be complied with and he cannot be criticised for this.

42. The respondent is claiming costs in the sum of £16,167.60 excluding VAT against the claimant and his solicitors. The strike out application has been costed out at £1,131.50 comprising of just under six hours work for all preparation and follow up activity 4-hours of which were undertaken by a fee earner a 9-year PQE associate charging £185.00 per hour, 1.5 hours by a 5-year PQE charged out at £185 and 0.4 hours by a partner 30 years PQE charged out at £285. The fee earners are both highly experienced and the Tribunal questioned why a partner would need to review the strike out application given the relatively straight-forward issue at stake, namely, case management orders had not been complied with. The Tribunal established from the correspondence on the Tribunal file that the application was not overly-complex and would not have taken just under 6-hours fee earning time.

43. The Tribunal concluded that the claimant's lack of activity and failure to provide instructions between April 2019 through to just before the second strike out application issued directly as a result of the claimant's legal advisor non-compliance, as concede in the email, was unreasonable. His unreasonable conduct resulted in additional costs being incurred by the respondent that would not have been otherwise, as the claimant failed to instruct his solicitors for a substantial period of time in this litigation.

44. With a view to compensation the respondent and not punish the claimant the Tribunal has used its discretion in favour of the respondent: Lodwick V Southwark London Borough Council [2004] ICR 884 CA. Lodwick is particularly relevant in this case given the non-appearance of the claimant and the attendance of Mr Halson whose solicitor's firm is yet again, without instructions from the claimant and the Tribunal kept in its mind the fact that the costs order and amount were not designed to punish.

45. The Tribunal is unable to take into account any up-to-date information on the claimant's means as it does not exist. It was expecting the claimant to have given evidence under oath today and as indicated above, the claimant has given no reason for failing to appear. The claimant's statement reveals he had little income (Income Support), no savings, no property and no investments,

and after his release from prison lived at the address of a friend as a temporary arrangement. The claimant is now in Nigeria, Mr Halson expects him to return to the UK in June/July 2021 and there is no evidence that should the claimant return to the UK and the respondent take steps to enforce the costs order, what his financial position will be the claimant having presumably worked in Nigeria. Ms Knight referred the Tribunal to Arrowsmith v Nottingham Trent University [2021] ICR 159, CA submitting the Tribunal was not required to limit costs to the amount that the paying party can afford to pay, and the Tribunal has taken this into account when deciding the amount, the claimant is ordered to pay.

46. Taking into account what little information the Tribunal has on the claimant's means, and the personal responsibility he had for the unreasonable behaviour in this litigation, the Tribunal using its discretion orders the claimant to contribute towards costs in the sum of £200.00 (two-hundred pounds).

47. The Tribunal finds the respondent's costs excessive, and takes the view that a more reasonable estimate would be 2 hours preparation not involving senior partner, and one hour correspondence with client and Tribunal, totalling 3 hours at £185.00 which equates to £555.00 with the claimant making a contribution of £200 taking into account the possibility that his financial position may be considerably different from the snapshot given for 2020 bearing in mind the claimant was aware of this cost hearing today and the need to provide a statement dealing with his means as provided in the case management orders sent to the parties on 11 June 2020.

48. The wasted costs order required careful thought as it is a draconian step to award costs against a firm of solicitors in which is essentially a cost-free jurisdiction. Mr Halson can be commended for the open and honest way he dealt with the delay in his firm progressing this litigation and failing to comply with agreed case management orders that resulted in the second strike out application. It is unfortunate the claimant's legal advisor was so overworked that he overlooked the deadline date so close to the trial with the result that the final hearing could be prejudiced and the respondent had no option but to incur the extra costs of a strike out application.

49. It is uncontroversial that the second strike out application is directly attributable to the claimant's solicitors as admitted by Mr Halson in the email sent on 26 February 2020 having let an agreed deadline past (14 February 2020), and lack of any objection with regards the respondent's application to strike out the claims with a final hearing listed commencing 13 March 2020. The Tribunal has considerable sympathy for the claimant's legal advisor who was for a lengthy period of time during this litigation was put in a difficult position by the claimant, a claimant who was prepared at a final hearing to make unsubstantiated criticisms against his solicitor and failed to provided instructions for months on end including at this costs hearing.

50. Turning to the three-stage test set out by the Court of Appeal and approved by the House of Lords in Rider's v Horse Field above, the Tribunal concluded the claimant's legal representative's actions were not improper or unreasonable in any way whatsoever, rather they were negligent in the non-

technical sense of the word denoting failure to act with the competence reasonably to be expected of ordinary members of the profession.

51. Complying with long-standing agreed case management orders only after a strike out application three-weeks before a final hearing, which included discovery and resulted in a late trial bundle and exchange of witness statements as a result of being overworked, fell into the category of a failure to act with the competence reasonably to be expected of ordinary members of the legal profession. The fact that the claimant's solicitor was so overworked may not be attributable to him personally, and the costs order is rightly made against the practice in which a solicitor is so overworked that he is unable to comply with orders. The Tribunal is mindful of the fact that being overworked can be a state of being practicing solicitors and the wider legal profession are under regularly, and it notable that following compliance the legal representatives acting in this case turned around the case management orders expeditiously with the result that the trial took place without any prejudice to either party. For this outcome, the legal representatives preparing this case can be commended.

52. In light of the fact that there is no issue of legal privilege being waived, the Tribunal decided to order wasted costs solely on the admission of the claimant's solicitor, taking into account guidance highlighted by Mrs Justice Simler in KL Law Ltd v Wincanton Group Ltd and anor EAT 0043/18 who emphasised that 'a wasted costs order is an order that should be made only after careful consideration and any decision to proceed to determine whether costs should be awarded on this basis should be dealt with very carefully. A wasted costs order is a serious sanction for a legal professional. Findings of negligent conduct are serious findings to make. Furthermore, even a modest costs order can represent a significant financial obligation for a small firm. Tribunals should proceed with care in this area,' the Tribunal concluded the high hurdle for a wasted costs order has been met.

53. With reference to the second part of the three-stage test set out in Rider's v Horse Field above, namely, did such conduct cause the applicant to incur unnecessary costs the Tribunal found the respondent incurred the unnecessary costs of issuing a strike out warning as recorded above.

54. Finally, with reference to the third part of the tests, namely, 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, the Tribunal found that it was on balance. The respondent incurred 2 extra hours preparing the second application for a strike out. The work was carried out by a newly qualified solicitor of PQE 1 at £150 per hour, and a 6-minute review by a partner. The Tribunal took the view that the costs were nevertheless excessive, given one strike application had already been made and it was not a complex matter that would take a great deal of time.

55. Taking into account the Tribunal's discretion to award costs, it does not accept the costs claimed at £328.50 plus VAT were reasonable in circumstances. A contribution towards costs in the sum of £200 inclusive of VAT was just and equitable taking into account the fact that the application

was straightforward and should not have taken any longer than one-hour to be drafted and checked, which includes reading correspondence from the last strike out. Accordingly, it is order that the costs in favour of the respondent in the sum of £200 wasted costs should be met by Mark Reynolds Solicitors and not the claimant.

56. In conclusion, the respondent's application for costs against the claimant is successful and the claimant is ordered to pay to the respondent a contribution towards costs in the sum of £200. Mark Reynolds Solicitors are ordered to pay costs in the sum of £200 to the respondent.

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24.5.2021

Employment Judge Shotter

JUDGMENT AND REASONS SENT TO THE PARTIES ON

26 May 2021

FOR THE TRIBUNAL OFFICE

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