Appeal No. UKEAT/0212/20/VP

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON EC4A 1NL

At the Tribunal
On 8 June 2021

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

PTSC UNION — APPELLANT

JB GLOBAL LIMITED (IN ADMINISTRATION) — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JOHN NECKLES (Representative) Relying on written submissions
For the Respondent	No appearance or representations by or on behalf of the Respondent

SUMMARY

PRACTICE AND PROCEDURE – Costs

The Employment Tribunal erred by including VAT in a wasted costs award, as it appeared that the party benefiting from it would have been able to recover the VAT element of the costs that it had incurred. **Raggett v John Lewis PLC** [2012] IRLR 906 applied.

A late application to amend the notice of appeal to introduce a new ground, that the Tribunal had erred in making a wasted costs award at all, by failing to conclude that the representative was not acting in pursuit of profit with regard to the proceedings, was refused; and the proposed new ground would, in any event, have failed on its merits.

HIS HONOUR JUDGE AUERBACH

1. This is the full hearing of an appeal from a wasted costs order made by the Employment Tribunal (the "Tribunal") sitting at Ashford, Employment Judge Corrigan, in which the judge ordered the representative of the claimant in the Tribunal, PTSC Union, to pay the respondent's wasted costs of £3297.00 plus VAT, being £3956.40 in total. As I will describe, that decision followed the claimant's claim having earlier been struck out, following an extended period of non-communication and repeated non-compliance with Tribunal orders by his representative, Mr J Neckles of PTSC Union.

2. I should also start by saying that on 6 June, two days ago, Mr Neckles emailed the Employment Appeal Tribunal ("EAT") a document described as "Appellant's Legal Submissions - Full Appeal Hearing Proceedings". This followed an email that he had sent on 4 June, described as a "Formal application for an Amendment to the Notice of Appeal", and which attached highlighted proposed amendments to the existing grounds of appeal.

3. I will come to all of that presently, but I mention it at the start, because, in the "Legal Submissions" document Mr Neckles indicated that he was asking for the matter to be dealt with on paper due to a medical incapacity, namely, that he was suffering from a condition of nerve palsy which affected both his eyes and meant that he was prevented from being able to read documents and take part orally. As that came to my attention at a relatively late stage, and although there was no application to postpone (nor, indeed, any medical evidence attached), and although Mr Neckles had indicated that he wished the EAT to proceed in his absence, I took the precaution of asking my Associate at the start of the hearing to see if she could contact him by telephone to confirm the position. She spoke to Mr Neckles and he confirmed that he did not wish to participate and that he wished the EAT to proceed and produce a decision on paper.

4. I am giving my decision in open court, but will direct that a transcript be produced. I should also note at the outset that, as I will describe, there has been no participation today from the respondent, which is in administration, and indeed its Answer indicated that it relied upon the reasons given by the Tribunal, but would not be further participating in this appeal.

5. I need to give the background of the history of the litigation in the Tribunal and then in the EAT. In 2018 the claimant, Mr Neves, presented a claim against the respondent indicating that he was employed by it as a sales adviser and that he wished to claim race discrimination. A claim of detriment for taking leave for dependant's care was also advanced, as well as other matters being raised. The claim form identified that his representative was Mr Neckles of PTSC Union. It is not necessary for the purposes of what I have to decide to say anything more about the substance of the claims, but I note that the respondent put in a response in which it set out its account of relevant matters, and that it defended the claims on their merits, as well as raising time points.

6. A preliminary hearing was listed to take place on 27 September 2018. In the run-up to that hearing, an application by Mr Neckles for it to be postponed was refused. At that preliminary hearing, in which Mr Neckles did participate, as did a solicitor for the respondent, EJ Corrigan identified the complaints and the issues and made a number of directions, in particular, for preparations for a further preliminary hearing that was to take place in relation to time-limit issues on a date to be fixed. These included directions for the claimant to provide a schedule of loss, for disclosure and inspection of documents and, in due course, for preparation of a trial bundle and exchange of witness statements.

7. The initial date set for compliance with the judge's orders in relation to the schedule of loss and disclosure was 18 October 2018, but the claimant's representative did not comply by then, and that led to an application by the respondent for the claim to be struck out or an unless

order made. The claimant's representative did not respond to that application, but the judge decided to allow more time; and, as the minute of the 27 September hearing had yet to be sent out, the date for compliance of 18 October was then replaced with 19 November 2018. The minute in that form was then sent to the parties on 5 November 2018. At that point, the claimant's schedule of loss and disclosure were therefore required by 19 November 2018.

8. In its decision which is the subject of the present appeal, being the costs decision to which I will come, the Tribunal describes how, by 4 December 2018, there had still been no compliance with the orders by Mr Neckles, nor explanation or response. On that date, the parties were also informed that the further preliminary hearing (that had been directed by EJ Corrigan at the hearing in September) had now been listed to take place on 19 February 2019.

9. In its costs decision the Tribunal continued that, on 11 December 2018, the respondent's representative wrote again complaining that there had still been no compliance with orders by the claimant, despite a further warning from the respondent's representative. The position remained that there had still been no compliance as of 21 December, and the respondent's representative then wrote to the Tribunal applying for the claim to be struck out and for costs.

10. It appears that no representations were made in response to the strike-out application or seeking a hearing in relation to it. Judgment striking out the claim was signed on 31 January 2019 and sent to the parties on 11 February 2019. That Judgment recited all of the history of the litigation and included the conclusion that the claimant was not actively pursuing the claim.

11. The costs application was then considered at a hearing on 11 November 2019 before Judge Corrigan sitting in Ashford. In her reasons, the judge recited the history and noted that, as of the date of that hearing, the amount of the costs claimed stood at £6101.25 plus VAT,

A including a revised counsel's fee of £1350.00. At that hearing, the respondent was indeed represented by counsel.

12. In her reasons, the judge noted that the Tribunal had written to the parties setting out B why a costs hearing was necessary, which were: that there was insufficient information in relation to the basis on which the claimant's representative was acting for the claimant and because it was appropriate to have regard to ability to pay. The judge went on to set out C relevant provisions of Rules 76, 80 and 84 and she then continued as follows:

> **"7. There is some discussion in Henry v London General Transport Services Limited 2301782/2015 (a case involving a wasted costs application against Mr John Neckles) as to who bears the burden of proving that a representative is not acting in pursuit of profit. In my view rule 80 is a general rule enabling costs to be ordered against someone representing another, on the basis of the way they conduct that representation. Rule 80 (2) provides the exception for** D **those acting not for profit. That is something that is potentially only known by the representative and the person they represent. It seems to me that it must therefore be for the representative to show that they fall within the exception. It cannot be for the Respondent to prove that the Claimant's representative was acting for profit.**
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> **8. The Claimant's representative attended London South not Ashford. The Claimant did not attend. The Notice of Hearing was clear that the matter was** E **listed in Ashford. No explanation was offered as to why the Claimant's representative, an experienced representative, attended the wrong venue. He was nevertheless given the opportunity to come to Ashford today but declined. His paperwork was scanned by London South Employment Tribunal and emailed to Ashford and considered by the Employment Judge. This consisted of a 5 page witness statement for Mr John Neckles and 19 pages of documents (pages 1-18 and 6A). No statement was provided for the Claimant. Otherwise, Mr Neckles' application to postpone (made orally to the clerk) was refused. No** F **good reason was offered for his failure to attend the correct venue today and it would have been disproportionate to postpone the hearing and incur more costs and a further wasted costs application in respect of today.**
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> **9. The Claimant is represented by PTSC Union of which he is a Member. Mr Neckles describes PTSC Union as his employer and himself as the only Trade Union Official with litigation and legal experience. Nevertheless, the Claimant's representative has not suggested in his statement that a costs order cannot be** G **made against him in principle. He has not suggested that he is a representative who is not acting in pursuit of profit with regard to the proceedings within the meaning of rule 80(2). The Respondent's representative submits, and I accept, that the Claimant's representative would have been aware that rule 80(2) and the issue in respect of pursuit of profit was what was being referred to in the Tribunal's email of 11 February 2019 stating that the hearing was to address the basis on which he represented the Claimant, as he has been the subject of wasted costs applications before. I was referred to the case of Henry v London** H **General Transport Services Limited 2301782/2015 where the issue of whether Mr Neckles was acting in pursuit of profit was examined in some detail. Nevertheless this issue has not been addressed in Mr Neckles' statement which**

proceeds to deal with whether his conduct justifies making a wasted costs order."

13. The judge went on to note that, in a statement from Mr Neckles, he accepted that he should have complied with the order of 5 November 2018, but did not do so. He stated that this was his omission, not the claimant's, and was unavoidably due to his health problems, including a heart condition and diabetes, which impaired his ability to perform litigation services on behalf of the claimant and others. The judge noted that there was evidence that Mr Neckles was in intensive care from 20 to 30 June 2018, followed by time on sick leave from 4 July to 1 October 2018, after which he returned to work, although he continued to experience symptoms of fatigue. He had also been taking medication which he said affected his memory. His health was said to be now much improved, following surgery on 31 July 2019.

14. The judge continued as follows:

"11. The Claimant's representative despite his health conditions attended and participated in the telephone Preliminary Hearing on 27 September 2018 (during the period covered by his sick certificate) which led to the Orders made. He had wanted 28 days to comply with the Orders but the date ordered for compliance was 18 October 2018. He did not raise that he would need additional time to comply due to the health issues. There is no suggestion that he was signed off sick for the period after 1 October 2018. He communicated with the Tribunal to give dates to avoid on 4 October 2018 but at no stage said that he needed additional time to comply with the Orders or raised his health issues.

12. The various Orders made at the preliminary hearing were in respect of the Claimant's schedule of loss, further and better particulars and disclosure in respect of time limits. As said above, the date for compliance was 18 October 2018. The issue of time limits was to be considered at a preliminary hearing to be listed after 1 January 2019. The Claimant's representative did not comply by 18 October 2019. The Respondent's representative sent a chasing email on 22 October 2019 stating if the Claimant's representative did not comply by 26 October 2019 the Respondent would apply for a strike out or unless order.

13. There was no response at all by the Claimant or his representative and so the Respondent made the application on 31 October 2019. The Tribunal Order was then signed on 5 November 2019 in which time for compliance was extended for a further 14 days beyond that to 19 November 2019, due to the delay providing the written order. Unfortunately this was not sent to the parties until 4 December 2019. When it was sent it was accompanied by a cover email which responded to the Respondent's application confirming that the Claimant should have been complying with the orders whilst awaiting the written order but that the Claimant should ensure compliance with the new dates and that

the Respondent's Representative should alert the Tribunal in the event of non compliance.

14. By 4 December 2019 there had still been no compliance with the Orders from Mr Neckles, nor an explanation or response. By this time 14 weeks had passed and he had not done what he had initially been ordered to do in 3 weeks. On 4 December the parties were also informed the Preliminary Hearing had been listed for 19 February 2019.

15. On 11 December 2019 the Respondent's representative wrote again to the Claimant's representative requesting an update as there had still been no compliance. The Claimant's representative was warned that if the Respondent's representative did not hear from him by 14 December 2019 they would inform the Tribunal of his failure to comply. The Claimant's representative still had not complied with the orders by 21 December 2019. The Respondent's representative therefore wrote to the Tribunal requesting the claim be struck out and applying for costs of £745.50 plus VAT. Judgment striking out the claim was signed on 31 January 2019 and sent to the parties on 11 February 2019. There had still been no compliance by the Claimant or his representative. By this time, due to the proximity of the Preliminary hearing the Respondent had commenced preparation for the Preliminary Hearing. I agree with the Respondent that by this time there had been a repeated failure to comply with the Orders and silence for a number of months. There was no attempt to reply to the Respondent's representative's correspondence. Indeed the first communication from the Claimant's representative has been today. I agree that this amounts to improper, unreasonable and negligent conduct."

15. The judge went on to consider the medical evidence. She noted that no sick note had been presented to cover the time from 2 October 2019 to the date of the strike-out, and that the Respondent had presented information that suggested that Mr Neckles had continued to be actively involved in this case, including the claimant having applied for the postponement of a disciplinary hearing due to take place on 1 November, which he had said Mr Neckles could not attend; but he then gave other available dates for Mr Neckles during November. There was also reference to another employee represented by Mr Neckles who had applied to postpone an appeal hearing due to take place on 18 December, saying that Mr Neckles was unable to attend due to sudden illness, but providing a list of dates to avoid for him, without any suggestion that he would be unable to attend in the near future. There was also a letter from Mr Neckles to the Respondent on 27 January on behalf of yet another employee, asking for an appeal hearing date to be changed, but with no suggestion that he was not fit to represent.

16. The judge stated:

> **"19. I agree with the Respondent that for the Claimant's representative's ill health to be a satisfactory excuse he would have needed to be too ill to comply or make any contact with the Respondent's representative or Tribunal, and he would have needed to be too ill to arrange for an alternative colleague or the Claimant himself to tell the Tribunal he was incapacitated. I agree that this is inconsistent with the documents."**

17. The judge noted that no evidence had been provided in respect of either the claimant's or the representative's ability to meet an order for costs, despite this being an express purpose of the hearing, as notified in an email from the Tribunal. The judge continued that she considered it appropriate to order wasted costs against the representative due to "improper, unreasonable and negligent conduct" in failing to comply with the orders or engage at all with the respondent from 4 October until the matter was struck out.

18. The judge then continued that it was appropriate to make the order against PTSC Union, and not Mr Neckles personally, as both were named on the form as the claimant's representative. The judge continued:

> **"23. I considered whether I should limit the costs to those incurred after the date for compliance given in the written Order, but was persuaded that the improper, unreasonable and negligent conduct dated back to the original date ordered for for compliance at the hearing on 27 September 2018, namely 18 October 2018. I also considered whether costs should be limited to those incurred up to the strike out of the Claim but I was persuaded by the Respondent's representative that the Respondent was entitled to pursue the wasted costs as a matter of principle, given that they have other cases in which Mr Neckles represents employees and the seriousness of the failure to comply. I accept that as a result the wasted costs have increased.**
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> **24. I considered it appropriate to award the sum above as being the necessary basic costs incurred as a result of the Claimant's representative's failure to comply with the Order and pursuing the wasted costs against him. I considered that to be the £745.50 plus VAT incurred between 22 October 2018 and 18 December 2018 minus £90 which was incurred writing or contacting the Tribunal for updates. This gave a sum of £655.50 plus VAT. I also included the cost of preparing the bundle for this hearing (£551.25 plus VAT), instructions to Counsel and finalising the bundle (£367.50 plus VAT), a telephone call with Counsel (£110.25 plus VAT) and research by the Respondent's solicitor (which the Respondent's representative indicated was in respect of researching the case of Henry which I have been referred to) (£262.50 plus VAT), and Counsel's fee of £1350 plus VAT. This gave a total of £3,297 and adding VAT at 20% gave £3956.40. For clarity in particular I did not consider it appropriate to order costs of preparing for the Preliminary Hearing prior to the Tribunal striking out the claim or chasing the Tribunal."**

19. A notice of appeal in the name of the claimant was presented by Mr Neckles, dated 29 February 2020. In the grounds of appeal, the following matters were raised.

20. Firstly, it was said that the Tribunal was wrong to have failed to take into account that there was evidence that Mr Neckles had material, serious health issues during the relevant periods covered by the "alleged misconduct", as he put it, which gave rise to the making of the costs award. He gave more details there of what he said was the credible evidence of that, and it was asserted that the materials put forward by the respondent about his involvement in other employees' matters during the same time, were purely hearsay without corroboration.

21. Secondly, it was said that the Tribunal had erred by failing to consider the specific question of the causal link between the conduct and the wasted costs, having regard to the fact that the representative was ill during much of the relevant time covered by the award. Developing this point, this ground referred to **Casqueiro v Barclays Bank PLC**, UKEAT/0085/12, and submitted that, if the ill-health of the representative in question played an essential role in the conduct in question, then a causal link could not be credibly established.

22. Next it was asserted that it was wrong to include VAT in the costs award.

23. Next, at para. 11, it was asserted that it was wrong to include an element for the costs of the claimant's lawyers researching into and reading the Employment Tribunal decision in **Henry v London General Transport Services Limited**, which was said to be unnecessary. In developing this ground, it was asserted that the judge had clearly identified:

> **"that the burden falls squarely on the appellant's representative to show the basis on which they are acting, either for profit or otherwise, and not upon the receiving party, respondent and their representatives"**

Yet, it was said, the judge proceeded to make an award for carrying out research which was unnecessary, having regard to the burden of proof. In the alternative, the judge wholly failed to

A have regard to the fact that PTSC Union was credibly on record as representing and, therefore, it was remiss for the respondent and its representatives to embark on what was, on its face, a contrived investigation to prove the contrary. Accordingly, it was said that it was an error of law for wasted costs for expenses for research which was clearly uncalled for to be carried out.

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24. That notice of appeal was considered in the usual way on paper, on this occasion by Lavender J. For reasons he set out, he considered that the grounds raising the causation issue and the matter of the evidence of Mr Neckles' indisposition owing to ill-health were not reasonably arguable. He also considered that the ground concerning the amount awarded for the respondent's solicitor reading the **Henry** case was not challengeable, as it was a potentially relevant decision and appropriate for the Respondent's lawyers to look into it. However, he considered that the ground relating to the inclusion of VAT in the costs order *was* arguable and should proceed to a full hearing, citing **Raggett v John Lewis PLC** [2012] IRLR 906.

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25. The claimant's representative and the respondent were duly notified of Lavender J's opinion and decision in the usual way, and of the claimant's right to seek a rule 3(10) hearing in respect of the grounds that Lavender J did not consider to be arguable. The respondent was, by this time, in administration, and the administrator submitted an Answer that it intended to resist the appeal, relying on the grounds given by the Tribunal, but did not propose to be represented or take an active part in the proceedings. No rule 3(10) hearing was sought.

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26. I note that, in the usual way, the EAT wrote to the claimant's representative regarding the listing of the matter, with further directions for preparations for the hearing of the appeal and with a notice of hearing. The EAT administration had to chase more than once non-compliance with the direction for preparation and submission of a hearing bundle. There was then a reply from Mr Neckles indicating that he had medical conditions that were continuing,

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A and asking for copies of previous orders that he said had been mislaid, and which were then provided. A hearing bundle was subsequently submitted.

27. Then, as I have already mentioned, on 4 June Mr Neckles emailed that he was applying to amend and attached draft amended grounds of appeal which included the following proposed additional grounds:

> **"12 That the Employment Tribunal erred in law or legal principle, in making a wasted costs award against the Appellant's Trade union PTSC and its officer specified on record Mr John Neckles. In that:**
>
> **12.1 The Tribunal failed to consider that the Claimant's representative Trade union PTSC and its specified Union officer Mr john Neckles, does not come or fall under the category of either a Legal representative or a Lay representative, against which / whom costs are awardable;**
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> **12.2 Accordingly, it is or constitutes an error for such costs award to be considered and made against the PTSC Trade union and its Union officer Mr John Neckles."**

28. Then, as I have described, the legal submissions document was sent in on 6 June. Although there was a reference in para. 1.1 to this being a skeleton argument prepared for the purposes of a rule 3(10) hearing to consider whether or not the notice of appeal showed or disclosed an arguable point of law, the submission itself was correctly headed "Appellant's Legal Submissions – Full Appeal Hearing Proceedings" and there is really no reason to doubt (and I have reviewed the EAT's file on this point) that Mr Neckles *did* have clear notice of the rule 3(7) opinion of Mr Justice Lavender; *did not* seek a rule 3(10) hearing; and *was* on notice of the listing of this hearing as the full appeal hearing. The reference to a rule 3(10) hearing in para. 1.1 of his skeleton argument appears to me simply to be an error.

29. Mr Neckles, however, goes on to refer to Lavender J's opinion, and then also to a number of authorities; and he submitted copies of two of those authorities. He goes on to submit that it was wrong for the Tribunal to have awarded VAT in the wasted costs award, citing **Raggett v John Lewis**. He also refers to authorities on wasted costs, that indicate that

A the Tribunal should consider first whether the representative has acted improperly, unreasonably or negligently; secondly, if so, whether such conduct caused the applicant to incur unnecessary costs; and thirdly, if so, whether it is just to order the representative to compensate the applicant for the whole, or any part, of the relevant costs.

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30. Referring to the proposed amended grounds, Mr Neckles submitted that it was wrong for the Tribunal to have made an award against PTSC or Mr Neckles, as neither of them was acting for profit in the particular proceedings in question and, to the contrary, they were acting as volunteers on behalf of their union member. He referred to **Isteed v London borough of Redbridge** UKEAT/0442/14/DA. He therefore invited the EAT to admit the new grounds by way of amendment and to allow the appeal and overturn the wasted costs award.

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31. Finally, there was, as I have already noted, a request for the matter to be considered on paper in view of Mr Neckles' indisposition.

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32. I turn first to the live point about VAT. It is well-established, at least since **Raggett v John Lewis**, that where a party has incurred costs which they are seeking to recover by way of a costs order, and has had to pay VAT in respect of those costs, the Tribunal should *not* include VAT in its costs award, if the party making the costs claim is itself registered for VAT and, therefore, able to recover the VAT element as an input.

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33. In this case, I note that it is not asserted in terms or expressly that the respondent was registered for VAT, but nor does the Answer make any particular assertion about that. It simply relies upon the Tribunal's reasons. Looking at what I can glean about the respondent from the pleadings, I note that the response form confirms that the respondent was the legal entity behind the Oak Furnitureland brand, a UK retailer specialising in solid, hardwood furniture; and it stated that, at the time, it had 97 stores and approximately 1,300 employees.

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34. In the absence of any material suggesting the contrary, I think it is fair to infer that such a business was of a size and nature as to be registered for VAT, and that this is implicitly, if not explicitly, the basis for this ground of appeal. It does appear that this simply was not considered when the judge made her award inclusive of VAT and that it was an error to do so. I will therefore allow this ground, so that, if the award otherwise stands, I will substitute a decision awarding the VAT-*exclusive* amount for the VAT-*inclusive* amount. There can only be one correct way to deal with this, and no need to remit this aspect to the Tribunal.

35. Insofar as the skeleton argument raises the causation issue, I reject this for the following reasons. Firstly, this point was raised in the original notice of appeal, by reference to what was said to be the sickness of Mr Neckles throughout the relevant time having caused the defaults that had led to the costs award. That ground was, however, rejected by Lavender J as not arguable, and no rule 3(10) hearing was sought. I do not see any good reason why I should permit that ground to be re-opened today.

36. In any event, it seems to me that the judge *did* properly address that question. She addressed the evidence relating to sickness and came to a proper conclusion about whether it satisfactorily explained the various defaults. She carefully analysed which costs were being claimed, and in relation to which timeframe, and, ultimately, made an award which was less than the full amount that the respondent was seeking at the time of the hearing before her.

37. That leaves the point that Mr Neckles seeks to raise by amendment today, relating to whether the judge erred on the basis that she should have concluded that PTSC Union was, in the words of rule 80(2) of the **2013 Rules of Procedure**, "not acting in pursuit of profit with regard to the proceedings", and therefore could not be the subject of a wasted costs award.

38. As to whether I should permit this amendment, I note that Mr Neckles seeks to rely upon the fact that PTSC Union is a trade union; and he asserts that it and he were acting, at all times, voluntarily for the member concerned and without payment. If that had been asserted before the Tribunal, and found by it to be correct, then it would have followed that the Tribunal should not make an award against the respondent. It appears to me also to be implicit in Mr Neckles' application, that he would argue that the fact that the representative is a trade union should be regarded as sufficient *alone*, in the absence of evidence to the contrary, to support the conclusion that it was acting not for profit in the proceedings. Though, as a decision of an Employment Tribunal it is not binding on me, I have also taken note that in **Henry**, which concerned someone who was also represented by Mr Neckles, costs were sought against him *personally*, but the Tribunal was not persuaded that he was acting for profit on that occasion, and declined to make such an award.

39. However, in all the particular circumstances of this case, I have decided not to grant the application to amend, and, had I allowed it, I would not in any event have allowed this proposed ground of appeal. My reasons are as follows.

40. First, the judge, in her decision, was alive to this issue and did give active consideration to it. She noted, indeed, that one of the reasons the hearing before her had been convened was because of an issue as to the basis on which PTSC Union or Mr Neckles had been representing. She noted that, despite this, no particular submission had been received on that point; and she went on to say that, in her view, following the approach of the judge in the **Henry** case, the onus was on the representative to show that it was not acting in pursuit of profit in the particular proceedings. She considered that a fair opportunity had been given for him to make submissions or present evidence about that; but he had not raised any arguments or presented

any evidence to support such a case. This is not a case, therefore, in which it can be argued that the judge did not give any consideration to this point at all.

41. Secondly, the notice of appeal, as originally presented, did not seek to challenge this aspect of the decision. As I have described, the challenges it made were to the approach to the evidence regarding Mr Neckles' ill-health, and associated with that to the causal link point, to the inclusion of VAT in the award, and to the decision to award an element of costs for the respondent carrying out research into this point and the **Henry** case. But it did not advance any case that the judge erred by not concluding that PTSC Union could not be the subject of a wasted costs award at all, on the basis that it should have been inferred that it was not acting for profit. The relevant ground in fact appears to accept without question the judge's approach, that the burden fell on PTSC Union to make good a positive case that it was not acting in pursuit of profit. That has not been challenged on appeal, and therefore I do not, in any event, need to decide whether that is the correct approach to the burden of proof on this issue.

42. I have reflected on the fact that it is said in the course of this ground that the judge failed to have regard to the fact that PTSC Union was "credibly on record as representing"; and it is asserted that the respondent's investigation into this aspect was "contrived". Could it be said that it was implicitly being contended within the original ground, that the judge should have concluded that the fact that PTSC Union is a trade union was enough by itself to point to the conclusion that it was not acting in the proceedings in pursuit of profit?

43. As to that, I do not think this original ground put the issue properly into play. That is, firstly, because it did not specifically assert that the fact of being a trade union alone should lead to the conclusion that PTSC Union was not acting in pursuit of profit. Secondly, that reading does not sit with the fact that the ground accepted that the judge took the approach that the burden of proof on this point lay on PTSC Union. Indeed it relied upon it. Thirdly, that

reading does not sit with the fact that the ground challenges only one particular element of the award. Further, this ground was among those that Lavender J considered not to be arguable; and, to repeat, no rule 3(10) hearing was sought in relation to it. Finally, it may be inferred that Mr Neckles did not himself consider the rule 80(2) point already to be live, given that he made it the subject of his application to amend, presented for my consideration today.

44. I have considered whether I should, nevertheless, grant that application. However, I do not think it would be appropriate to do so for the following reasons. Firstly, no good explanation has been put forward for why this matter was not raised in the notice of appeal at the outset; nor as to why an application to amend was not made sooner; nor, if it was (contrary to what appears to me) thought that the original ground should have been construed as embracing the point, as to why a rule 3(10) hearing was not sought. I should add that no argument has been advanced in the materials before me (nor do I have any evidence to show me that it was obviously the case) that the failure to take any such steps until now was specifically because of any disposition or ill-health on the part of Mr Neckles.

45. I have reflected also, although, again, Mr Neckles has not made this submission, as to whether I should allow this ground to be introduced in circumstances in which, in any event, the respondent is not participating in this appeal, and treat this hearing, effectively, as a rule 3(10) hearing in respect of it. But I do not think that course is appropriate either. That is for two reasons. Firstly, although the respondent is in administration and is not participating, I cannot entirely rule out that it might have taken a different approach, had it been aware that the actual or potential grounds of appeal to be further considered by the EAT extended beyond the VAT point. A company in administration still has an interest in recovering (including by defending a previous award) sums considered to be properly owed to it for the benefit of its creditors.

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46. Secondly, the EAT has properly allowed a fair opportunity for a rule 3(10) hearing to be sought, and properly listed and notified this hearing as being the full hearing of the surviving element of the appeal. If I were now to convert this hearing into a rule 3(10) hearing on this point, that might, potentially, lead to the proceedings in the EAT continuing after today, and, possibly, if I thought the point were arguable, holding another hearing on another day. That would not be a proper use of the EAT's resources, when there has been a fair opportunity for these matters to be raised in the proper way before now.

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47. Finally, had I allowed it to proceed by way of amendment, I would not have granted this proposed ground on the information available to me. Whilst the argument about the possible implications of PTSC Union's status as a trade union, for whether it was acting in pursuit of profit, has given me some pause, Mr Neckles' submission does not engage with the Tribunal's actual decision on this point, *nor* does it do more than assert that this is the position.

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48. The reference to **Isteed** does not assist. That was a case in which the Tribunal had evidence before it on the question of whether the representative was acting in pursuit of profit, and made a finding of fact about that which was held, on appeal, not to have been perverse. In the present case, despite it having been flagged up that one reason why the Tribunal decided to hold a hearing in relation to the wasted costs application was because "there was insufficient information in relation to the basis on which the Claimant's representative was acting", the Tribunal fairly noted that Mr Neckles "has not suggested in his statement that a costs order cannot be made against him in principle." Neither the proposed amended ground of appeal, nor the skeleton argument tabled for today, engage with that part of the Tribunal's decision as such.

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49. For all of those reasons I refuse the application to amend the notice of appeal. I allow the appeal on the one ground which is live before me, which is that the Tribunal erred in including VAT in the amount of its wasted costs award; and I substitute for the Tribunal's

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judgment ordering PTSC Union to pay wasted costs in the inclusive sum of £3956.40, a judgment ordering it to pay the respondent's wasted costs in the sum of £3297.00.