THE EMPLOYMENT TRIBUNALS

Claimant: **Mrs L Herring**

Respondent: **J Lovric Limited**

Heard at: **East London Hearing Centre**

Before: **Employment Judge Gardiner**

Members: **Ms A Berry**
Mr K Rose

Representation

Claimant: Mr R Taylor, solicitor

Respondent: Mr S Hoyle, consultant

COSTS DECISION

The Respondent's application for a wasted costs order is refused.

REASONS

1. The Claimant has succeeded in her discrimination claim against her former employer, J Lovric Limited. The Judgment of the Tribunal, sent to the parties on 30 April 2020, was that she had suffered direct discrimination on grounds of pregnancy and that her dismissal was automatically unfair.

2. Following a Remedy Hearing, the Claimant was awarded the total sum of £19,974.67. This was announced orally. Following a request for written reasons, the Remedy Judgment and Reasons was sent to the parties on 10 February 2021.

3. At the Remedy Hearing, Mr Hoyle, the Respondent's representative, indicated he intended to pursue an application for wasted costs against the Claimant's representative, Mr Taylor, under Section 80 Employment Tribunal Rules 2013. The Tribunal directed that any such costs application should be made in writing within 14 days. The costs application relied upon by the Respondent was

submitted on 26 October 2020, together with a bundle totalling 130 pages. The sum claimed was a total of £3102.40. Mr Taylor put in a detailed statement in response, running to 47 paragraphs. No further submissions were made.

4. Initially, it was envisaged that the costs application would be dealt with at a further hearing. Subsequently both parties agreed that the matter could be decided on the papers.

5. The basis of the Respondent's application is twofold. Firstly, that the Claimant ran a case for direct sex discrimination in two respects which were "doomed to fail". The Tribunal dealt with this matter at paragraphs 91-94 of its Liability Judgment. The basis for this submission is that the Claimant's representative knew that the acts complained about fell outside the protected period. This, it is argued, rendered the hearing on 2 August 2020 "a waste of time" in respect of attendance and travelling. Secondly, Mr Hoyle argues that the conduct of Mr Taylor in his correspondence with him has been "continuously abusive, vexatious and scandalous".

6. Rule 80 is titled "When a wasted costs order made be made", and is worded as follows:

(1) A Tribunal may make a wasted costs order against a representative in favour of any party ("the receiving party") where that party has incurred costs-

a. As a result of any improper, unreasonable or negligent act or omission on the part of the representative; or
b. Which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers unreasonable to expect the receiving party to pay.

7. Mr Hoyle has referred to the following cases:

a. *Rondel v Worsely* [1967] 2 All ER at 1029;

b. *Ridehalgh v Horsefield* [1994] 3 All ER 848;

c. *Wilsons Solicitors (in a matter of wasted costs) v Johnson* UKEAT/0515/10/DA;

d. *Mardner v Gardner & Ors* UKEAT/0483/13/DA

8. *Rondel v Worsely* is authority for the proposition that barristers and solicitors have immunity from an action for negligence in relation to the presentation of a case in court, but not in relation to matters unconnected with cases in court – though the generality of this proposition was modified by certain sections of the Courts and Legal Services Act 1990 as held in *Ridehalgh v Horsefield. Ridehalgh* establishes that the words "improper, unreasonable or negligent" are

to be given their established meaning. An advocate's conduct is not to be described as such for pursuing a hopeless case. The court or tribunal should adopt a three stage approach when deciding whether a wasted costs order should be made, namely whether the legal representative had acted "improperly, unreasonably or negligently, whether if so, the conduct caused the applicant to incur unnecessary costs, and whether in all the circumstances it was just to order the legal representative to compensate the applicant for the relevant part of the costs in whole or in part. The other two cases are specific applications of costs principles to their particular facts.

9. We have carefully considered the bundle of documents which has been submitted by the Respondent with the application. We do not consider that there is any merit whatsoever in either of the arguments advanced by Mr Hoyle. The threshold of "improper, unreasonable or negligent" conduct has not been crossed.

10. So far as Mr Hoyle's first argument is concerned, it is true that the Claimant did not succeed on every argument advanced in her claim. However, the Claimant succeeded both in her claim for direct pregnancy discrimination and for automatically unfair dismissal. Those successful claims were strongly resisted by Mr Hoyle on behalf of the Respondents. The fact that the Claimant did not succeed on every claim advanced is not a basis for making a costs order in favour of the losing Respondent, as Mr Hoyle maintains. We do not conclude that it was unreasonable, improper or negligent for the Claimant to advance the claims on which she did not succeed. The law in this area is complex, as was its application to the facts of this case. We do not accept it was doomed to fail. The discrimination claim relating to the persistent requests for access to the Claimant's highly sensitive medical records was a claim she was properly entitled to advance – albeit it did not succeed on the facts. In the same way, it was reasonable for the Claimant to characterise her dismissal as an act of sex discrimination. She was successful in showing that the dismissal was automatically unfair for reasons relating to pregnancy.

11. There is a further basis on which we reject the Respondent's first argument in support of its wasted costs application. There is no evidential basis shown that it was Mr Taylor, rather than the Claimant herself, who had decided to continue with these sex discrimination claims. The ordinary assumption is that claims brought by a party are advanced at the request of, and on the instructions of, that party, not at the insistence of their representative. There is nothing to displace that assumption here. As held in *Ridehalgh*, even if the claims had been "doomed to failure", acting for a claimant bringing such claims does not make her representative's conduct "improper, unreasonable or negligent".

12. Further, we have carefully considered Mr Hoyle's second argument that Mr Taylor's correspondence was inappropriate as he alleges. Far from finding that the tone or conduct of the correspondence was inappropriate, we consider that Mr Taylor's stance, and that of his client, was appropriate in the circumstances.

In correspondence with the Tribunal on 5 August 2019, Mr Taylor raised Mr Hoyle's conduct at the end of the Preliminary Hearing before Employment Judge Prichard the previous Friday. Based on what he had been told by his client, he considered that Mr Hoyle had behaved unprofessionally in speaking directly to his client in the Tribunal building without him being present. It was in that context and given existing tensions between the representatives, that Mr Taylor described Mr Hoyle as "vile and indeed the vilest opponent [he] had come across in 35 years of practice". With hindsight, Mr Taylor's choice of words was perhaps unwise. However, it reflected the outrage he felt on behalf of his vulnerable client at how Mr Hoyle had apparently treated her. Mr Hoyle himself accepts in his costs application that his conduct in approaching Mrs Herring in the way he did might have been ill-judged. This language here, or other language used by Mr Taylor elsewhere does not amount to "improper, unreasonable or negligent" conduct.

13. We have considered each of the page references in the costs bundle made by Mr Hoyle at paragraph 14 of his written submissions, which are said to support his stance that Mr Taylor's conduct was "improper, unreasonable or negligent". None of these references indicate that Mr Taylor has behaved inappropriately. Most concern an earlier solicitor's disciplinary matter involving Mr Taylor which is wholly irrelevant to how Mr Taylor has conducted these proceedings.

14. Finally, Mr Hoyle suggests that the stance adopted by Mr Taylor precluded meaningful settlement discussions. We disagree, based on what we have been shown in the bundle of documents. We note that on 2 July 2020, the Claimant offered to accept £20,000 by way of remedy, well in advance of the scheduled date of the remedy hearing. The Tribunal's award was almost exactly what the Claimant had agreed to accept in settlement. There is no indication there was any counteroffer from the Respondent at any point up until the Remedy Hearing despite a finding of liability in the Claimant's favour. Had the Claimant's offer been accepted, the Remedy Hearing would have been vacated, saving the costs of the parties' attendance at the Remedy Hearing.

15. Mr Taylor wrote a letter to Croner on the day after the Remedy Hearing, which is further relied upon by Mr Hoyle in support of his costs application. We disagree that this letter supports Mr Hoyle's position. It emphasises that it is Mr Taylor who has attempted to conclude a financial settlement by making an offer which was very close in value to the amount that was awarded. Its tone is conciliatory, ending with the following comment "My view is just it is simply time to draw a line with myself and Mr Hoyle simply to move on with our own lives". This was by way of explanation as to why Mr Taylor would not be pursuing a costs application himself, and why he wanted Mr Hoyle's organisation, Croner, to reconsider whether to pursue a costs application on behalf of the Respondent.

16. We note that Mr Hoyle seeks to refer to other proceedings involving Mr Taylor, at paragraph 10 and in the documents there referred to, which are not related to the present case. It would be wholly wrong for us to have regard to such matters

in assessing Mr Taylor's conduct in this claim. We strongly disapprove of Mr Hoyle's attempt to tarnish Mr Taylor's reputation and character in this way.

Employment Judge Gardiner
Date: 1 November 2021