EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: S/4105198/16, S/4105199/16, S/4105200/16
(Multiple Case No 7959}

Held in Glasgow on 22 December 2017
(Expenses Hearing, in chambers)

Employment Judge: Ian McPherson

1. Mr Brian Aitken	**1st Claimant** **Written Representations by:** **Mr Mark Allison - Solicitor**
2. Miss Courtney Aitken	**2nd Claimant** **Written Representations by:** **Mr Mark Allison - Solicitor**
3. Mrs Elizabeth Aitken	**3rd Claimant** **Written Representations by:** **Mr Mark Allison - Solicitor**
Pro Fives Ltd	**Respondents** **Written Representations by:** **Mr Ian S Meth - Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:

(1) Having considered parties' written representations, in chambers, on the claimants' opposed application for Expenses, which failing Wasted Costs, against the respondents, and / or their representative, Mr Meth, in terms of Rules 76 and 80 of the Employment Tribunals Rules of Procedure 2013, the Tribunal refuses the application, and makes no such Order ; and

(2) The claims and response shall proceed to a Final Hearing on a date to be hereinafter fixed by the Tribunal in March, April or May 2018, and the clerk to the Tribunal is instructed to issue fresh date listing stencils to ascertain parties' availability in that revised listing period.

REASONS

Introduction

1. This case called again before me on Friday, 22 December 2017, for an in chambers, Expenses Hearing, conducted by way of considering written representations from parties' representatives.

2. This Hearing had been previously intimated to parties* representatives by the Tribunal by letters dated 6 November, and 1 and 14 December, 2017. Originally listed for 5 December 2017, that listing had to be cancelled, due to me requiring to sit on a 12 day Final Hearing in another case, and re-arranged for this re-scheduled date.

Claimants' Application for Expenses, or Wasted Costs

3. The purpose of this Hearing was for me to consider the claimants' opposed application for Expenses, which failing Wasted Costs, against the respondents, and / or their representative, Mr Meth, in terms of Rules 76 and 80 of the Employment Tribunals Rules of Procedure 2013, as per Mr Allison's application to the Tribunal dated 5 October 2017, submitted by

his secretary, Marion Milligan's e-mail of that date sent at 14:10, and copied to Mr Meth for the respondents.

4. That application followed upon a public Preliminary Hearing held before me, on 8 September 2017, where the respondents' representative, Mr Meth, withdrew his application for Strike Out of the claims, under Rule 37(1)(a> of the Employment Tribunals Rules of Procedure 2013, but he insisted upon his application for Deposit Orders to be made against the 3 claimants, under Rule 39, but, having heard parties' representatives, I refused that application, and ordered that the case be listed for Final Hearing.

5. My written Judgment and Reasons, dated 18 September 2017, was entered in the register and copied to parties by the Tribunal, under cover of a letter to parties' representatives dated 20 September 2017.

6. Objections to the claimants' application were intimated to the Tribunal by Mr Meth, on behalf of the respondents, and copied to Mr Allison for the claimants, as per Mr Meth's e-mail of 11 October 2017 sent at 10:55.

Preliminary Procedure and Parties' Further Representations

7. Having considered the application and objections, I instructed that the correspondence be placed on the casefile, and a letter was sent to parties' representatives by the Tribunal under cover of a letter dated 21 October 2017.

8. In that letter from the Tribunal, parties' representatives were asked to confirm, within 10 days, whether they were content for the opposed application to be determined by me on the papers only, sitting in chambers, or whether any party requested an Expenses Hearing be fixed.

9. In reply, Mr Allison, by e-mail sent on 23 October 2017, at 10:38, confirmed that the claimants were content that I should determine the expenses

application without the need for a Hearing, provided I was satisfied that I had sufficient detail as to the parties' respective positions on the application to allow me to do so. For their part, he stated that the claimants considered that they had set out their position in the detail that they would wish.

10. Further, by e-mail from Mr Meth, the respondents' representative, sent at 12:17 on 23 October 2017, he confirmed that the respondents were content for all outstanding matters to be dealt with by me as Employment Judge sitting alone in chambers. His objections of 11 October 2017 did not request any Hearing.

11. In light of that correspondence from parties' representatives, I directed that the opposed application would be dealt with on the papers only, and that a separate Expenses Hearing, in chambers, would be arranged in due course, and parties advised of that date. Parties' representatives were so advised by the Tribunal, under cover of a letter dated 6 November 2017.

12. Notice of Wasted Costs Hearing was sent to parties' representatives, under cover of a letter dated 6 November 2017, assigning 3 hours for full disposal, to be heard by an Employment Judge in chambers on Tuesday, 5 December 2017 at 10.00am.

13. Following a query from Mr Meth, on 9 November 2017, a further letter was sent to parties' representatives, under cover of a letter dated 10 November 2017, confirming that that Hearing was in chambers, for the Judge alone, and that parties' representatives were not required to attend.

14. In that letter, and on my direction, the clerk to the Tribunal advised parties' representatives that, for the avoidance of any doubt, while the Notice of Hearing referred only to ***"Wasted*** Costs", the Expenses Hearing was listed to consider the claimants' application for Expenses under Rule 76, and for Wasted Costs under Rule 80.

15. Further, that letter of 10 November 2017 also advised parties' representatives that the Expenses Hearing on 5 December 201 7 would be dealt with by the Judge, in chambers, on the basis of parties' application and objections of 5 and 11 October 2017, unless, by no later than 4.00pm on Friday, 24 November 2017, either party's representative advised they wished an oral Hearing, but the Judge's view expressed by me was that matters could best be addressed, to avoid delay and reduce expense, by way of considering the papers to hand, and any further written representations parties' representatives may wish to make, including a note of any case law authorities they wished to refer to, or rely upon, in support of the application and / or objections to it.

16. Similarly, if the respondents, or Mr Meth, sought to provide any information, in terms of Rule 84, for the Tribunal to take into account as regards the potential paying party's ability to pay, if any Expenses or Wasted Costs Order were to be made by the Tribunal, following consideration of the claimants' opposed application, then the Tribunal's letter of 10 November stated that that information, and any appropriate vouching of their assets and means, should be provided to the Tribunal, with a copy sent at the same time to Mr Allison, by no later than 4.00pm on Friday, 24 November 2017.

17. Subsequently, by email sent at 11:31 on 24 November 2017, Mr Meth, the respondents' representative, confirmed that the respondents were in agreement that there is sufficient material before the Judge to make a decision based on the written material before me, and he provided some further written representations. No submissions were intimated in respect of the respondents', or Mr Meth's, ability to pay, if any such Order were to be made by the Tribunal.

18. Further, by email sent at 12:38 on 24 November 2017, Mr Allison, the claimants' representative, replied to Mr Meth's further representations. On my instructions, parties' representatives were advised, under cover of a

letter from the Tribunal dated 1 December 2017, that their correspondence of 24 November 2017 had been referred to me, placed on the casefile, and confirmation given that it would be considered at the Expenses Hearing, then listed for 5 December 2017.

Expenses Hearing before this Tribunal

19. When the case called before me, in chambers, for this Expenses Hearing, I had before me Mr Allison's application of 5 October 2017, Mr Meth's objections of 11 October, and parties' representatives' further written representations sent in on 24 November 2017.

Claimants[1] Application

20. The claimants' application of 5 October 2017 reads as follows:-

This application is made arising from the preliminary hearing on 8 September 2017 ("the hearing"), scheduled for the specific purpose of considering the Respondent's application for a strikeout, which failing application for a Deposit Order. The Tribunal's judgment in relation thereto was issued to parties on 20 September 2017.

The Claimants hereby apply for:

a. A Cost Order in terms of rule 76 (1) (a), in relation to the costs associated with the preparation for and conduct of the hearing, on the grounds that, in insisting upon said hearing, the Respondent (or in the alternative the Respondent's representative) acted unreasonably; or

b. In the alternative, a Wasted Cost Order against the Respondent's representative in relation to the proportion of the said costs attributable to the strikeout application only, on the grounds that in insisting upon that application - and in allowing a hearing to be concluded which predominantly

focused upon that and thereafter withdrawing the application approximately two and a half hours after the hearing had commenced - the Respondent's representative (a) acted unreasonably [in terms of rule 80 (1) (a) [or (b) in any event, it would be unreasonable for the Claimants to require to bear those costs as a consequence of the decision by the Respondent's representative to abandon the strikeout application.

Cost Application - Rule 76

The principal application is in relation to the whole of the costs occasioned by the preparation for and conduct of the hearing, as detailed in the undernoted schedule.

Such an application is governed by Rule 76. In the Claimant's submission, the correct approach is as follows:

1. *The Tribunal must be satisfied that the Respondents (or the Respondent's representative) have acted (in this case) unreasonably.*
2. *That unreasonable conduct must relate to the way in which proceedings (or part) have been conducted.*
3. *In those circumstances the Tribunal shall consider making an application [i.e the consideration of same is mandatory].*
4. *The Tribunal may make the Cost Order in those circumstances [i.e the rule is permissive, and it is a matter for the exercise of the Tribunals discretion even if satisfied on the foregoing principles].*
5. *The Tribunal shall determine the amount of the costs award, but broadly speaking it should be based upon the costs actually incurred as a consequence of the actively conducted referred to above.*

In the Claimant's submission, the bringing of both of the applications and the insisting on a preliminary hearing for the discrete purpose of dealing with those applications was wholly unreasonable. The Respondent's

representative recognised that it was not reasonable or appropriate to seek a strikeout at an earlier preliminary hearing in this case in May 2017. The basis of this volte face was a single sentence in the letter from James Steven, Liquidator to Ian Meth dated 8 June 2017 [produced as production 11 within the Claimant's bundle of documents for the hearing] in which he said "the Respondent did not acquire any business, physical assets or goodwill from Aitken Multipurpose Arenas Ltd".

This was a case where a Merits Hearing had already been allowed. Parties had already agreed that a minimum of five (and likely more) days were required to determine the substance of this case. It was (or reasonably ought to have been) obvious to the Respondents and/or their representative that the factual matrix is in this case was complex, involved, and based upon numerous adminicles of evidence from multiple sources, including hundreds of sheets of documents produced before the tribunal already in response to Case Management Order applications.

It was obvious that evidence was required to determine the merits of this case. It, therefore, ought to have been obvious to the Respondents and/or their representative that the Tribunal would not be in a position to grant either Order in the absence of hearing evidence, and the Respondents/their representatives knew that they did not intend to lead any evidence at the preliminary hearing.

The application itself was made on 8 September 2017 in complete ignorance of the fact that there was not an agreed factual metric in this case, and by contrast there was substantial dispute in fact. That should have been known to the Respondents and/or their representative at the commencement of the hearing (no Joint Minute or statement of agreed facts having been agreed, no requests having been made for same, and the ET1 and ET3 setting our polarised factual accounts. It became obvious as the Respondents made their application that the applicant was bound to fail in the absence of an agreed factual matrix, quite apart from anything else. It

was *obvious that in the absence of such an agreed factual matrix, the Tribunal could not determine whether the claim is brought by the Claimant had no reasonable prospects or had little reasonable prospects of success. No reasonable party/agent would have brought an application in this way, in those circumstances.*

Moreover, the unreasonableness of the Respondent/Respondent's representative's conduct is compounded by the way in which the preliminary hearing itself was conducted. It is tolerable clear from the nature of the submissions - and from the correspondence that had proceeded the application - that the principal application was the strikeout. The majority of submissions made by both parties on the day related to the strikeout application, and all of the case law referred to related to strikeout applications. At approximately 12.30pm - following the hearing the Claimants agent's submissions - the Respondent withdrew their strikeout application, and accepted that it would be "draconian" to grant a strikeout. In effect, it was accepted that the Tribunal was not in a position to determine that the case had no reasonable prospects at this stage. That was an appropriate concession, but was one that ought to have come before - and not to have prevented the application being made in the first place. There was nothing said or produced by the Claimant's representative that ought to have come as a surprise to the Respondents, or that otherwise was out with their knowledge. All of the documents produced by the Claimant's representative within the Claimant's bundle were documents available to both parties. All of the submissions made were based upon the existing ET1 and those documents. The Respondent's representative asserted that he was "familiar with the strikeout case law authorities cited" [paragraph 23 of the judgment]. In those circumstances, the Respondent/Respondent's representative knew or ought to have known that the applications - or at least the application for strikeout - was bound to fail, and that there was no purpose to insisting upon such an application.

Put bluntly, the hearing in question would not have occurred had the Respondent not made and thereafter insisted upon these applications. The Respondent had the benefit of the Claimant's position prior to the hearing. The Respondent had the benefit of the Claimants submissions in relation to the purpose and utility of such preliminary hearing as far back as July 2017. Further, the Respondent had the benefit of a costs warning made by the Claimant on or around 6 September 2017, warning that this application would be made in the event that they insisted upon proceeding with their application. They chose to do so.

In those circumstances, objectively, the Respondents conduct is and should be classified as unreasonable and in those circumstances it is appropriate to make a cost award on the principle that the Claimant should not require to bear the additional, unnecessary costs occasioned as a result of (and only as a result of) the foregoing application.

Wasted Cost Order (Rule 80)

This application is made in the alternative, and would arise only if (a) the Tribunal concludes that the unreasonable act is one for which the Respondent's representative (rather than the Respondent) must bear responsibility. In those circumstances, that could only relate to the strikeout application for the reasons set out above. The Claimants care content to leave that as a matter for the judgment of the Tribunal and/or the Respondent (if the Tribunal is minded to grant one or other application) as the Claimants cannot comment upon the extent to which the bringing of the applications and conduct of a preliminary hearing arose based upon informed instructions or not.

Insofar as such an application is concerned, however, the Tribunal requires to be satisfied as to the following:

1. That the Claimants have incurred costs;

2. That the costs are as a consequence of the unreasonable (in this case) act on the part of the Respondent's representative;
3. In the alternative, even if not directly occasioned by same, that in light of the act or omission it is unreasonable to expect the Claimants to pay those costs;
4. That the Tribunal may make a wasted costs award [the rule being permissive];
5. That the wasted Costs Order may relate to the whole or part of any wasted costs of the receiving party;
6. That the amount to be paid shall be specified in the Order.

This application rests on the combination of the insistence on the preliminary hearing proceedings and the subsequent abandonment of the strikeout application. Reference is made to the foregoing submissions. Even if the Tribunal considers that it was not unreasonable for the Respondent's representative to insist upon the preliminary hearing proceeding in relation to the Deposit Order application, it is respectfully submitted that - on any objective analysis - it was unreasonable to insist upon a strikeout application (and thereby bring about (a) extensive preparation in relation hereto and (b) extensive advocacy in relation thereto) only to then abandon same following proper consideration of the circumstances, in real time, at the hearing considering that application. As has been indicated above, there was nothing new which arose which the Respondent's representatives would not have been aware of at the time he considered it appropriate to bring the application, or certainly at the time he considered it appropriate to insist upon the application going ahead notwithstanding a cost warning. At best, the situation appears to suggest that the Respondent's representative had not properly applied his mind to the papers available, the circumstances of the case, and the relevant case law. The Employment Judge himself expressed his surprise at the way in which the application was abandoned, describing it as "very much like a bolt out of the blue" [paragraph 52 of judgment].

Had the strikeout application not been insisted upon, it is clear from the terms of the submissions made in the judgment that the hearing would have been far more brief, if it was still required. In those circumstances, the costs incurred are self-evident and wasted costs.

Schedule of Costs (Costs Application under Rule 76)

Preparation for hearing - three hours x £150 per hour = £450

Advocacy - three hours x £150 per hour - £450

Correspondence in considering strikeout application, replying to same, exchanging documents for hearing, and issuing cost warning - one hour x £150 per hour = £150

Total costs £1050 plus VAT £1260

Schedule of costs (wasted costs application)

Proportion of preparation attributable to strikeout application two hours x £150 per hour = £300

Proportion of advocacy attributable to strikeout - two and a half hours x £150 per hour £375

one half of time attributable to correspondence - £75

Total wasted cost = *£750 plus VAT*

£900

This application has been intimated to the Respondent's representative in terms of Rules 77 and 92 and 82 and 92 (in relation to the latter application). It is recognised that the Respondent's representative is presently on annual leave and the Claimants are content that a fair period of time is allowed for his return and thereafter for him consider the application.

Respondents' Objections

21. Mr Meth's objections of 11 October 2017 read as follows:-

The respondent objects to the application for costs and/or wasted costs under Rule 76 and Rule 80.

In the circumstances, we do not propose to respond at length. The employment judge is more than aware of the issues that were before the employment tribunal and has notes of the claimants submission and has himself produced a judgement extending to some 41 pages.

Whilst we note the claimant's comments, we can only reiterate this remains a claim pleaded under regulation 3 (1) (a) of the Transfer Regulations. Once again, to cover issues raised at the hearing, the entire application is predicated on the assumption that the intention was to dispose of AMP A Ltd as a going concern. That would naturally mean the transfer of physical and intangible assets.

AS EJ McPherson alludes to in his judgment, had the claim been fully pleaded at the onset many of the preliminary issues that have arisen would have been obviated.

It was our belief that Mr Steven's assertions were critical as they go directly to the case that is pleaded, namely that there was a transfer of a going concern which there clearly was not.

Mr Allison is of course right to point out that the case was already listed for hearing and there are a plethora of documents that will require to be put before the tribunal. However we do not accept that this inevitably leads to a conclusion that a merits was necessary, particularly given the important disclosures made by Mr Steven and presumably the evidence he will then give before the employment tribunal.

Although there were previous discussions in respect of strikeout which are quoted at length in EJ McPherson's judgement of the preliminary hearing, we are of the view that had the employment judge considered that our application for a preliminary hearing in respect of strikeout/de posit order was unreasonable or in itself had no reasonable prospects of success, then he would not have granted it. Again that does not suggest that we acted in any way unreasonably.

In his consideration of the deposit order part of the respondent's application, EJ McPherson states at paragraph 88: -

"After careful consideration, I have decided that is not it appropriate for me to do so, and I have refused Mr Meth's application ..."

It is of course well-known an employment tribunal's that awards of costs/expenses do not follow from a judgement against one party or another. Mr Allison properly refers to rule 76. However, given the foregoing, the respondent simply submits that if an employment judge determines a matter only having required to give it "careful consideration" and only having reached that conclusion at page 37 of the judgement, how it can be said that the respondent's representative acted unreasonably in making the application.

Against the fear of repetition, that whilst the factual matrix may not be agreed, some of the facts at the claimants have to date relied on our wholly undermined by a critical witness (who has been named as a witness for the claimants) and again, the level of that undermining may reasonably have led the employment judge to determine that the cases did not have any if not no reasonable prospects of success.

Once again, we cannot see how in raising that matter we have acted unreasonably.

We *do not accept Mr Allison's assertion that there was no prospect of our application for a strikeout being granted.* **We** *do however concede that, contrary to the view expressed during the hearing, that was less likely to succeed than the application for a deposit order. Notwithstanding this, rather than suggesting the acted unreasonably, we believe that the withdrawal of that aspect of the application on the day was an entirely appropriate way to proceed. It was only after hearing the oral arguments of Mr Allison, that we were able using our experience of this matter to determine from yourselves that that part of the application should not succeed and therefore it was appropriate to take this matter out of the judge's hands. Once again, if, as Mr Allison states it was a "appropriate concession" then again we do not believe we can be held to have acted unreasonably in making that concession. So the reasons narrated above, we do not accept that the application should not be brought in the first place.*

Mr Allison states that the claimants of incurred costs. It is not immediately apparent what costs they have incurred, given Mr Allison's averments at the preliminary hearing that the claimants are all legally aided.

Accordingly, the Claimants have not incurred costs. In fact, the legal aid board have incurred further unnecessary costs in the preparation of this

application. If a further hearing is granted then further costs will be incurred by both parties.

The likelihood then is that the merits hearing will require to be delayed further. We accept Mr Allison's position that these claim now require to go to a merits hearing.

If the tribunal is minded to have a further preliminary hearing in this matter, then we believe it appropriate rather than the employment judge making a decision on the further outstanding matters on the material before him, it would be appropriate that these also be addressed at this hearing.

For the record we make no objection to the application to amend. We are aware that Mr Allison plans to argue this point. We do not see this as making any material difference to the Claimants' cases before the tribunal

Respondents' Further Representations

22. Further, in his further representations of 24 November 2017, Mr Meth states that:-

We refer to the Employment Tribunal's communication of 10 November and write as follows

We are in agreement that there is sufficient material before the EJ to make a decision based on the written material before him.

We have spent some time re looking as Messrs. Harvey volume 4 section P1 paragraphs 1044- 1120. In that section they deal extensively with both costs applications under Rule 76 and wasted costs and Rule 80. We note that Mr Allison makes no reference to case law. We believe he is right not to do so. There is no case law we can find that supports his contention that the

way we have conducted this aspect of the case comes close to the conduct required by the employment tribunal Judge to make such a finding.

In addition, as we read Mr Allison's application, he recites the appropriate rules yet fails to identify specific conduct which would give credence to his application. As we have already stated in our earlier response, Mr Allison getting the better of those particular exchanges or me taking a decision during the hearing that I no longer believed I could win on strike out but could win on the issue of the deposit order is not conduct I respectfully submitted is conduct entitling an EJ to award expenses and/or make a preparation time order. Indeed to find otherwise would lead to the absurd proposition that a party continuing with an argument it no longer believes is sustainable is better off pursuing that argument rather than conceding the point it believes is no longer sustainable

As stated, I believe relevant case law is somewhat thin on the ground here. I again respectfully submit this is because all of the cases reported and identified in the relevant section in Harvey bear no resemblance to the facts in this case. In effect Mr Allison is asking you to hold that an award of expenses/preparation time is axiomatic following your refusal to strike out or make a deposit order.

However, in Barnsley Metropolitan Borough Council v Yerrakalva 2012 IRLR 78 Mummery LJ stated at paragraph 41:

"The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had."

The point as we see it in relation to this is that even if you believe I was wrong to bring the application that is not enough. The applications by both

myself and Mr Allison need to be looked at in the whole context of the case not just in isolation.

Indeed we continue to maintain that the case has been brought under a factual matrix which is now demonstrably unsupportable. However to elaborate on that now is potentially prejudicial to any further submission or observations we make now that the case is proceeding to a merits hearing. Sufficient, I believe to say, at this stage, when looking at my application against the dicta of Mummery LJ, to look at the whole context and background of the case. In that proposition we do not wish to say more as these arguments will require to be aired at the merits hearing. The claim is pleaded under Regulation 3 (1) (a) and we believe the evidence, including Mr Stephen's letter, continues to indicate that the factual matrix which underpins the claims is not, nor has ever been sustainable. In looking at the case as a whole, again we cannot see how the requesting of and proceeding with the Preliminary hearing comes close to demonstrating the sort of conduct by a representative that would warrant an order as My Allison requests..

The issue of the conduct of representatives is dealt with at paragraphs 1075 and 1076 of Harvey referred to above. It is sufficient for me to say I believe that there is nothing in those paragraphs to suggest that my conduct was disruptive, vexatious abusively disruptively or unreasonable in any respect. In respect of the application for wasted costs, we simply reiterate that we cannot see how any conduct on our part can be deemed to be improper, unreasonable or negligent by any interpretation of the English language.

Even pursuing a hopeless case (which this application manifestly wasn't) is not grounds for an award of wasted costs against a solicitor. Mitchells Solicitors v Funkwerk Information Technologies 2008 AII ER (D) 99 at paragraph 30; paragraph 1111 ibid.

Claimants' Further Representations

23. Finally, in his further representations of 24 November 2017, Mr Allison responds, stating that:-

I refer to the Tribunal's previous correspondence, and to the representations by Mr Meth on behalf of the Respondent.

It is quite correct that my application did not make specific reference to case law. The rules and guidance on expenses and wasted costs applications are trite. The rules are perfectly clear in their scope and breadth and each case will turn upon its own facts and circumstances.

It is important to note that this application proceeds upon two alternatives: an expenses/costs application against the Respondent or, in the alternative, a wasted costs application against the Respondent's representative. They are not to be conflated, and much of the argument made by Mr Meth relates only to the latter and is of no relevance to the former.

As we have made clear, each application is founded upon "unreasonable conduct" only. There is no need for the Tribunal to trouble itself with the other issues and the grounds for expenses and wasted costs applications are self-evidently alternatives. Thus, the fact that the Respondent's or Mr Meth's conduct is not vexatious, abusive or disruptive is irrelevant to the question of whether it is or has been unreasonable.

It is also quite wrong to say that we have not identified conduct. The basis of the application is clear, and can be summarised as thus: The Respondent and Mr Meth knew or ought reasonably to have known that a strike out could not succeed where there were material maters of fact to be adjudicated upon. The Respondent and Mr Meth knew that they had no intention of leading evidence. They had in their possession and would have been familiar with all of the documents. Crucially, there was nothing said during the hearing and no document referred to which was not already within the knowledge of the Respondent and Mr Meth. As such, if at the end

of the hearing it was so glaringly obviously that a strike out could not succeed (and it was) then it was just as obvious (or would have been with the diligent preparation and objective consideration that one would expect from a party and/or representative) before the hearing commenced. The concession could and should have been made before, and as such the Claimants have incurred unnecessary expense as a result.

In terms of the deposit order, for the same reasons it was obvious that all of the evidence in this case would need to be heard and that - absent any intention to seek to lead evidence or agree a factual matrix before the hearing- it was impossible for the Tribunal to form a considered view on the merits of the cases.

The foregoing two paragraphs clearly encapsulate unreasonable conduct that could and should have been avoided, either by the Respondent taking a reasonable approach or by Mr Meth giving the considered advice that one would expect from the informed representative.

The question as to who should bear the costs is a matter for the Tribunal. No issue is taken with the notion that there is a somewhat higher threshold to find a representative (rather than a party) liable, albeit that the additional threshold - the need to conclude that there has been an abuse of process (per Mitchells) is met. In this case, the insistence that a hearing takes place without having properly thought through the purpose of or requirements to succeed at that hearing is clearly an abuse of process. Abuse of process does not mean or require to be taken as mean vexatious conduct. The new rules (enacted since Mitchells) make it clear that unreasonable conduct is itself a separate and sufficient basis for an award. As such, we would suggest that the proper construction of "abuse of process" in terms of the new rules is an act or omission that plainly should not occur. That is exactly where we are at in this case.

The Tribunal is also entitled to take into account the state of knowledge of Mr Meth in insisting that the hearing takes place: I remind the Tribunal that Mr Meth announced at this hearing for the first time that his clients "had stopped trading" and "would not have the means to pay any award". Whilst that was to do with the merits, it denotes a carefree attitude that readily fits with the assessment of unreasonable conduct set out above. In those circumstances, the Tribunal can readily conclude an abuse of process.

If the tribunal is not satisfied on that aspect, then the tribunal is still entitled to make an award against the Respondents. There is no additional threshold for a costs/expenses award and all that is required is conduct that is objectively unreasonable.

Relevant Law

24. Other than Mr Allison's reference to the legal basis for his applications, under Rules 76 and 80 of the Employment Tribunals Rules of Procedure 2013, neither party's representative cited any relevant case law authorities for my attention in considering this matter at this Expenses Hearing, in either the original application, or objections, until, on 10 November 2017, I queried whether or not they were going to do so.

25. In his reply of 24 November 2017, Mr Meth, the respondents' representative, referred to two reported cases, being Barnsley Metropolitan Borough Council v Yerrakalva 2012 IRLR 78 and Mitchells Solicitors v Funkwerk Information Technologies 2008 All ER (D) 99.

26. Further, in his reply of 24 November 2017, Mr Allison, the claimants' solicitor, stated that:-

> "/t *is quite correct that my application did not make specific reference to case law. The rules and guidance on expenses and wasted costs applications are trite. The rules are perfectly clear*

in their scope and breadth and each case will turn upon its own facts and circumstances."

27. Mr Allison's reply, as above, has reminded me of the Court of Appeal's judgment in *Bamsfey Metropolitan Borough Council y Yerrakalva [20111 EWCA Civ 1255* reported at [2012] IRLR 78, where Lord Justice Mummery, former President of the Employment Appeal Tribunal, at paragraph 39 of his judgment, stated as follows:-

7 begin with some words of caution, first about citation and value of authorities on costs questions and, secondly, about the dangers of adopting an over-analytical approach to the exercise of a broad discretion."

28. As regards my powers as Employment Judge, I have had regard to the Employment Tribunals Rules of Procedure 2013, and, in particular, Rule 2 (Overriding objective), as follows:-

Overriding objective

2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable —

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

29. The relevant statutory provisions, relating to Costs / Expenses Orders, are as set forth in the Employment Tribunals Rules of Procedure 2013, at Rules 74 to 84, and I think it is helpful if, at this stage, I set out in full the relevant statutory provisions, and note that, so far as relevant for present purposes, it is provided as follows:-

COSTS ORDERS, PREPARATION TIME ORDERS AND WASTED COSTS ORDERS

Definitions

74.(1) "Costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing). In Scotland all references to costs (except when used in the expression "wasted costs') shall be read as references to expenses.

(2) "Legally represented" means having the assistance of a person (including where that person is the receiving party's employee) who –

(a) has a right of audience in relation to any class of proceedings in any part of the Senior Courts of England and Wales, or all proceedings in county courts or magistrates' courts;

(b) is an advocate or solicitor in Scotland; or

(c) is a member of the Bar of Northern Ireland or a solicitor of the Court of Judicature of Northern Ireland.

Costs orders and preparation time orders

75(1) A costs order is an order that a party ("the paying party") make a payment to -

(a) another party ("the receiving part/') in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative;

(b) the receiving party in respect of a Tribunal fee paid by the receiving party; or

(c) another party or a witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual's attendance as a witness at the Tribunal.

When a costs order or a preparation time order may or shall be made

76(1) -A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that-

(a) a party (or that party's representative) has acted vexatiously, 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

(b) any claim or response had no reasonable prospect of success, or

(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.

(2) JX Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

Procedure

77. /X party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.

The amount of a costs order

78(1) >4costs order may -

(a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;

(b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving

party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles; or, in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment and Further Provisions) 1993, or by an Employment Judge applying the same principles;

(c) order the paying party to pay the receiving party a specified amount as reimbursement of all or part of a Tribunal fee paid by the receiving party;

(d) order the paying party to pay another party or a witness, as appropriate, a specified amount in respect of necessary and reasonably incurred expenses (of the kind described in rule 75(1)(c)); or

(e) if the paying party and the receiving party agree as to the amount payable, be made in that amount.

(2) Where the costs order includes an amount in respect of fees charged by a lay representative, for the purposes of the calculation of the order, the hourly rate applicable for the fees of the lay representative shall be no higher than the rate under rule 79(2).

(3) For the avoidance of doubt, the amount of a costs order under sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000.

When a wasted costs order may be made

80.—(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 it unreasonable to expect the receiving party to pay.

Costs so Incurred are described as "wasted costs".

(2) "Representative" means a party's legal or other representative or any employee of such representative, but it does not include a representative who is not acting in pursuit of profit with regard to the proceedings. A person acting on a contingency or conditional fee arrangement is considered to be acting in pursuit of profit.

(3) A wasted costs order may be made in favour of a party whether or not that party is legally represented and may also be made in favour of a representative's own client. A wasted costs order may not be made against a representative where that representative is representing a party in his or her capacity as an employee of that party.

Effect of a wasted costs order

81. A wasted costs order may order the representative to pay the whole or part of any wasted costs of the receiving party, or disallow any

wasted costs otherwise payable to the representative, including an order that the representative repay to its client any costs which have already been paid. The amount to be paid, disallowed or repaid must in each case be specified in the order.

Procedure

82. A wasted costs order may be made by the Tribunal on its own initiative or on the application of any party. A party may apply for a wasted costs order at any stage up to 28 days after the date on which the judgment finally determining the proceedings as against that party was sent to the parties. No such order shall be made unless the representative has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application or proposal. The Tribunal shall inform the representative's client in writing of any proceedings under this rule and of any order made against the representative.

Ability to pay

84. In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay."

30. Helpfully, the relevant law has recently been referred to in judgments from the Employment Appeals Tribunal, and I have referred myself specifically to the judicial guidance provided by the Honourable Mr Justice Singh, EAT judge, in Abaya v Leeds Teaching Hospital NHS Trust [2017] UKEAT 0258/16 (01 March 2017), and its cross reference to, amongst others, Ayoola v St Christophers Fellowship [2014] UKEAT/0508/13, [2014] ICR D37, a judgment by Her Honour Judge EadyQC on 6 June 2014.

31. In Abaya, Mr Justice Singh, at paragraph 13, notes the relevant legal principles as being common ground between the parties, and then, at paragraph 14, he notes that it was also common ground before him that there are, in essence, three stages in the exercise that are involved when an Employment Tribunal decides a Costs application.

32. Further, at paragraphs 14 to 16 in Abaya, Mr Justice Singh then helpfully notes those three stages, so far as material for present purposes, as follows:-

> *"14 ..... The first stage is to ask whether the precondition for making a Costs Order has been established. For example, in the present case, whether the claim or part of the claim had no reasonable prospect of success. However, that precondition is merely a necessary condition; it is not a sufficient condition for an award of costs. This is because the second stage of the exercise that has to be performed is that the Tribunal must consider whether to exercise its discretion to make an award of costs.*
>
> *15. The position was summarised by HHJ Eady QC in the Ayoola case at paragraphs 17 and 18. As she said at paragraph 17, at the second stage of the exercise:*
>
> > *"17. ... The Tribunal must then specifically address the question as to whether it is appropriate to exercise its discretion to award costs. Simply because the Tribunal's costs Jurisdiction is engaged, costs will not automatically follow the event. The Employment Tribunal would still have to be satisfied that it would be appropriate to make such an order ..."*
>
> *16. The third stage of the exercise only arises if the Tribunal decides that it is appropriate to make an award of costs. The third stage is to assess the quantum of that award of costs ..."*

33. Further, at paragraphs 17 to 20, in Ayoola, Her Honour Judge Eady QC states, as follows:-

> *"17. As for the principles that apply to an award of costs in the Employment Tribunal under the 2004 Rules, the first principle, which is always worth restating, is that costs in the Employment Tribunal are still the exception rather than the rule, see Gee v Shell UK Ltd [2002] IRLR 82 at page 85, Lodwick v London Borough of Southwark [2004] ICR 884 at page 890, Yerrekalva v Barnsley MBC [2012] ICR 420 at paragraph 7. Second, it is not simply enough for an Employment Tribunal to find unreasonable conduct or that a claim was misconceived. The Tribunal must then specifically address the question as to whether it is appropriate to exercise its discretion to award costs. Simply because the Tribunal's costs jurisdiction is engaged, costs will not automatically follow the event. The Employment Tribunal would still have to be satisfied that it would be appropriate to make such an order, see Robinson and Another v Hall Gregory Recruitment Ltd UKEA T/0425/13 at paragraph 15.*
>
> *18. On this point, albeit addressing the previous costs jurisdiction under the 2001 Employment Tribunal Rules, the EAT (HHJ Peter Clark) in Criddle v Epcot Leisure Ltd [2005] EAT/0275/05 identified that an award of costs involves a two-stage process: (1) a finding of unreasonable conduct; and, separately, (2) the exercise of discretion in making an order for costs. In Criddle there was no indication in the Tribunal's Reasons that the Tribunal Chairman had carried the second stage of the requisite exercise and the EAT was not satisfied, in the absence of such indication, that the Chairman had in fact done so. The appeal was thus allowed against the costs order.*

19. The extension of the Tribunal's costs Jurisdiction to cases where the bringing of the claim was misconceived has been seen as a lowering of the threshold for making costs awards, see Gee v Shell UK Ltd per Scott Baker LJ. In such cases the question is not simply whether the paying party themselves realised that the claim was misconceived but whether they might reasonably have been expected to have realised that it was and, if so, at what point they should have so realised see Scottv Inland Revenue Commissioners [2004] ICR 1410 CA per Sedley LJ at paragraphs 46 and 49. Equally, in the making of a costs order on the basis of unreasonable conduct, the Tribunal has to identify the conduct, stating what was unreasonable about it and what effect it had, see Barnsley MBC v Yerrekalva per Mummery LJ at paragraph 41.

20. That said, an appeal against a costs order will be doomed to failure unless it is established that the order is vitiated by an error of legal principle or was not based on the relevant circumstances; the original decision taker being better placed than the appellate body to make a balanced assessment as to the interaction of the range of factors affecting the court's discretion. Again, see Yerrekalva per Mummery LJ at paragraph 9, and note also the observation at paragraph 49 that

> *`...as orders for costs are based on and reflect broad brush first instance assessments, it is not the function of an appeal court to tinker with them. Legal microscopes and forensic toothpicks are not always the right tools for appellate judging'. "*

34. In his Judgment in Abaya, at paragraph 20, Mr Justice Singh places specific reliance on the reasoning of HHJ Eady QC in the Ayoola case, at her paragraphs 50 to 53, and it is helpful, in that regard, to note here what,

so far as relevant for present purposes, HHJ Eady QC said there, as follows:-

"50. Against that background, the question for me is whether the Employment Judge erred in granting costs at £10,000 or in failing to provide adequate reasons for granting that sum.

51. Although no particular procedure is laid down in the Tribunal Rules for a summary assessment of costs, the discretion as to the amount of an award must still be exercised Judicially. One can take it a bit further. Although not bound by the same rules as the civil courts and although the discretion under the 2004 Tribunal Rules is very broad, the costs awarded should not breach the indemnity principle and must compensate and not penalise; there must, further, be some indication that the Tribunal has adopted an approach which enables it to explain how the amount is calculated for the purpose of Rule 30(6)(f).

52. The Claimant, rightly, does not suggest that the question of procedural Justice on a costs application requires the prior service of a Schedule of Costs or any particular process. Nor is he saying here that there is insufficient reasoning in terms of the calculation of costs such as to amount to a breach of Rule 30. He does contend, however, that this is a surprising sum given how little had transpired by this stage.

53. That is not an entirely fair picture. The case had previously been listed for hearing in July and apparently aborted late in the day. There had had to be various procedural steps taken as a result of the lack of clarity on the Claimant's case. More generally, Tribunal litigation costs tend, as with most civil cases, to be front-loaded. That said, it is fair to observe that £10,000 is a high award and the overall sum said to have been incurred, over £15,000,

might seem surprising. I reach no final view on that. My concern is that there is no written explanation by the Employment Judge of her scrutiny of the figures sought by the Respondent. Although she has set out, as the Respondent no doubt did in submissions, some detail as to the amount the Respondent was seeking, what she does not do is indicate that she has conducted any independent scrutiny of those sums herself or set out the reasons for her conclusion that it was appropriate to award £10,000. That may be an error of approach in terms of the lack of scrutiny of the sum claimed or it may simply be an error in terms of adequacy of reasoning. I cannot be sure as to which ….. "

35. Finally, in his own judgment, in Abaya, Mr Justice Singh says, at paragraph 20, that all cases are fact-sensitive, and everything depends on the particular circumstances of each case, and in quoting from HHJ Eady QC, in Ayoola, at paragraph 51, he states that: *"the discretion under the 2004 Tribunal Rules is very broad [and I would say the same of the 2013 Rules]".*

Discussion and Deliberation

36. As this opposed application arose from the respondents' representative's conduct of the Preliminary Hearing held before me on 8 September 2017, it is appropriate that the circumstances surrounding the fixing of that Preliminary Hearing are borne in mind.

37. On 18 July 2017, following my consideration of correspondence sent between 30 June and 13 July 2017 by parties' representatives, a Final Hearing listed for 4 to 8 September 2017 (as per Notice of Final Hearing issued on 23 May 2017) was postponed, and I directed that a 3 hour Preliminary Hearing be set to consider the respondents' application for Strike Out of the claims under Rule 37, and for Deposit Orders under Rule 39, as per Mr Meth's application of 13 July 2017. Notice of Preliminary

Hearing was issued, under cover of letter from the Tribunal dated 25 July 2017, assigning 11 September 2017 forthat Preliminary Hearing.

38. In his e-mail of 25 July 2017, sent at 19:25, the claimants' solicitor, Mr Allison, submitted that I should reconsider my decision to fix that Preliminary Hearing, and, in particular, he stated that :

> *"The Claimants object to the listing of the case for a preliminary hearing. There has been no change in circumstances since the last preliminary hearing, at which Mr Meth himself described there as being "no prospect" of the case being struck out. The application appears to entirely rest on a comment made by a third party (James Stephen, the liquidator of AMPA) in correspondence to the tribunal. The factual situation has in no way changed. The question of whether Mr Stephen thinks there has been a TUPE transfer is, with due respect to him, neither here nor there. That is a matter for the Tribunal to determine, and will be a question of inference based on a consideration of numerous adminicles of evidence. Mr Stephen is not privy to the basis in fact or law of this case (he has not seen the pleadings), nor is he qualified to form a view on the questions to be determined by the Tribunal...*
>
> *... In my submission, the tribunal is only going to be able to determine whether there is merit in the case following hearing all of the evidence. The case is involved, with extensive documentation, and a multiplicity of parties. It is inconceivable that an informed view could be formed on the merits of the case in a 3 hour hearing. Both parties are already preparing themselves for full hearing, and as such I would suggest that there is no benefit to listing the case for a PH at the same time, in close proximity to a full hearing."*

39. On 4 August 2017, under cover of a letter from the Tribunal sent to parties' representatives, on my instructions, they were advised that, further to correspondence from them between 19 and 31 July 2017, I had agreed with Mr Allison's statement, in his e-mail of 31 July 2017, that this case should not become *"litigation by correspondence",* which is why I fixed the Preliminary Hearing on Strike Out and Deposit Order. The Preliminary Hearing, arranged for 11 September 2017, was postponed, by agreement of parties' representatives, and relisted for 8 September 2017, as per amended Notice of Preliminary Hearing issued to parties' representatives, under cover of a letter from the Tribunal dated 16 August 2017.

40. For the sake of brevity, I refer to my written Judgment and Reasons dated 18 September 2017, as entered in the register and copied to parties by the Tribunal under cover of a letter to parties' representatives dated 20 September 2017.

41. I turn now to address each of Mr Allison's applications, firstly for Expenses, and then for Wasted Costs.

Application for Expenses

42 If the application for an Expenses Order were to be granted in the present case, I am satisfied, under Rule 75(1) of the Employment Tribunals Rules of Procedure 2013, that the claimants, as *"receiving party",* are entitled to an order against the respondents, as *"paying party".* The claimants have been legally represented in pursuit of their claims against the respondents in these Tribunal proceedings, and Mr Allison has acted, throughout these proceedings before the Employment Tribunal, as solicitor for the claimants.

43. In Mr Allison's application for expenses against the respondents, under Rule 76 of the Employment Tribunals Rules of Procedure 2013, he has applied on the basis that the respondents and / or their representative, Mr

Meth, have acted unreasonably in the way the proceedings have been conducted, specifically, in relation to insisting upon the Preliminary Hearing on Strike Out held on 8 September 2017.

44. It is therefore a fairly narrowly drafted application, as against the width of applications envisaged by Rule 76(1), and it does not include a complaint that the respondents or their representative, Mr Meth, have acted vexatiously, abusively, or disruptively, in the defending of the proceedings or in the way they have conducted their defence to these Tribunal proceedings, or that the ET3 response to the claims has no reasonable prospects of success.

45. While, in his application, Mr Allison refers to "abuse *of process",* I am not satisfied that Mr Meth's conduct falls into that category. It is generally recognised by Tribunals that for conduct to be regarded as "vexatfous", there must be evidence of some spite or desire to harass the other side, or the existence of some other improper motive ; as per the National Industrial Relations Court in its well-known, and oft cited, judgment in ET Marler v Robertson [1974] ICR 72. Simply being misguided is not sufficient to establish vexatious conduct, per the Employment Appeal Tribunal in AQ Ltd y Holden [2012] IRLR 648.

46. The Court of Appeal, in Scott v Russell [2013] EWCA Civ. 1432, cited with approval, the definition of vexatious given by Lord Bingham in Attorney General v Barker [2000] 1 FLR 759, that the hallmark of a vexatious proceeding is that it has little or no basis in law (or at least no discernible basis), and that whatever the intention of the proceedings may be, its effect is to subject the other side to inconvenience, harassment and expense out of all proportion to any gain likely to accrue, and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process.

47. Mr Allison has made his application, on behalf of the claimants, timeously, as while there has been no Judgment finally determining the proceedings, he made application within 28 days of the Preliminary Hearing Judgment issued on 20 September 201 7, and in accordance with Rule 77, the respondents, through their representative, Mr Meth, have had a reasonable opportunity to make representations in writing in response to the application, and the respondents, through Mr Meth, have not requested an Expenses Hearing.

48. I have considered the opposed application on the basis of parties' representative's written representations made to the Tribunal, as detailed earlier in these Reasons, being Mr Allison's application of 5 October 2017, and Mr Meth's objections of 11 October 2017, and their further written representations of 24 November 2017. I am satisfied that all parties have, through their respective representative's correspondence with the Tribunal, had more than ample opportunity to make whatever written comments, objections or representations that they might have felt appropriate.

49. The next issue which arises for the Tribunal is whether or not any of the circumstances set forth in Rule 76(1) apply. I am aware that the approach to expenses to be applied by the Employment Tribunal has a three stage exercise:-

(1) *Has the paying patty acted in a way that an expenses order, etc, may orshail be made by the Tribunal?*

(2) *If so, the Tribunal must ask itself whether to exercise its discretion in favour of awarding expenses, etc, against that party; and*

(3) *If the Tribunal decides that it is appropriate to make an award of expenses, it must assess the quantum of that award.*

50. While taking note of Lord Justice Mummery's words of caution in Yerrakalva , which I have recited earlier at paragraph 27 of these Reasons, about citation and value of authorities on costs questions, I do think it is still appropriate to take account of certain other often cited Judgments of the Court of Appeal in Gee v Shell UK Ltd [2003] IRLR 82, Lodwick v London Borough of Southwark [2004] IRLR 554, and McPherson v BNP Paribas f2004] IRLR 558, recognising that expenses orders tn the Employment Tribunal remain the exception and not the rule, and that in the majority of Employment Tribunal cases, the unsuccessful party will not be ordered to pay the successful party's costs, and that costs are compensatory, and not punitive.

51. Yerrakalva considered the former Rule 40 within the Employment Tribunals Rules of Procedure 2004. Notwithstanding the Employment Tribunals Rules of Procedure 2013, in force since 29 July 2013, the old case law still holds good given the similarity in wording between the former and current Rules.

52. I recognise, of course, that expenses cases are very much fact dependent, and I refer in that regard to Lady Smith's Judgment in the Employment Appeal Tribunal on 8 July 2009 in Dunedin Canmore Housing Association Limited v Donaldson [2009] UKEATS/0014/09, which is consistent with the more recent view of the Court of Appeal, in Arrowsmith v Nottingham Trent University [2011] ICR 159, at paragraph 33, that it is a fact-sensitive exercise.

53. In the present case, after carefully considering the matter, I am not satisfied that it can be said that, by withdrawing the respondents' application for Strike Out of the claims, during the course of the Preliminary Hearing held on 8 September 2017, the respondents or their representative, Mr Meth, were acting unreasonably.

54. The Court of Appeal, in McPherson v BNP Paribas (London Branch) [2004] EWCA Civ 569, ICR 1398 and IRLR 558 (CA), held that it is not unreasonable conduct, *per se,* for a claimant to withdraw a claim, and the Court observed (per Lord Justice Mummery, at paragraph 28) that it would be unfortunate if claimants were deterred from dropping claims by the prospect of an order for costs on withdrawal in circumstances where such an order might well not be made against them if they fought on to a full Hearing and failed. The Court further commented that withdrawal could lead to a saving in costs, and that Tribunals should not adopt a practice on costs that would deter claimants from making *"sensible litigation decisions".* Further, as Lord Justice Thorpe observed during argument in that case notice of withdrawal might *"in some cases be the dawn of sanity"*

55. On the other hand, per Lord Justice Mummery, at paragraph 29, in McPherson, the Court of Appeal was also clear that Tribunals should not follow a practice on costs that might encourage speculative claims, allowing claimants to start cases and to pursue them down to the last week or two before the Hearing in the hope of receiving an offer to settle, and then, failing an offer, dropping the case without any risk of a costs sanction. Further, at paragraph 30, Lord Justice Mummery stated that the critical question in this regard was whether the claimant withdrawing the claim has conducted the proceedings unreasonably, not whether the withdrawal of the claim is in itself unreasonable.

56. In my view, while McPherson is a case to do with costs following the withdrawal of a claim, I consider that similar type considerations apply in the present case. I am satisfied that, to use Lord Justice Mummery's phrase in McPherson, the respondents, through their representative, Mr Meth, made a *"sensible litigation decision"* Having heard Mr Allison's oral arguments, at the Preliminary Hearing, in support of the claimants' objections to the respondents' application for Strike Out, Mr Meth withdrew his application for Strike Out, but he insisted upon his application for Deposit Orders to be made by the Tribunal.

57. Whilst I refused to make Deposit Orders, as per my Judgment of 18 September 2017, 1cannot categorise Mr Meth's decision to withdraw the application for Strike Out on 8 September 2017 as being unreasonable, especially where last minute settlements / withdrawals of Tribunal claims are still very much a regular feature of litigation before the Employment Tribunals.

58. In an ideal world, it may be that matters could have been addressed before 8 September 2017. In his application to the Tribunal, Mr Allison refers to the respondents having *"had the benefit of a costs warning made by the ciaimant on or around 6 September 2017, warning that this application wouid be made in the event that they insisted upon proceeding with their appiication. They chose to do so."*

59. No copy of whatever costs warning may have been sent, presumably by Mr Allison direct to Mr Meth, was produced to the Tribunal. In any event, in considering the various factors that are relevant to a Tribunal's discretion to award expenses, the fact that a costs warning may have been given is but one of several factors for the Tribunal to consider. It is also recognised that while the absence of a costs warning may be a relevant factor in deciding that costs should not be awarded, equally it is also recognised by Tribunals that a costs warning is not a precondition to the making of a costs order by a Tribunal.

60. As the Court of Appeal commented in its judgment in Yerrakalva, it is important not to lose sight of the totality of the circumstances. The vital point for any Tribunal in exercising the discretion whether or not to order costs / expenses is to look at the whole picture, and ask whether there has been unreasonable conduct by the potential paying party in bringing, defending or conducting the case and, in so doing, identify the conduct, what was unreasonable about it, and what effect it had.

61. Reasonableness is a matter of fact for the Employment Tribunal to decide upon, and in considering my decision in this matter, I have been conscious of the fact that Tribunals must be careful not to penalise parties unnecessarily by labelling conduct as unreasonable when it may, in fact, be perfectly legitimate in the circumstances. As the Court of Appeal reiterated in Yerrakalva, costs / expenses in the Employment Tribunal are still the exception rather than the rule.

62. Having decided that the respondents, through Mr Meth, did not act unreasonably by withdrawing the application for Strike Out of the claims, I have not required going on and ask myself whether I should exercise my discretion in favour of the claimants and make an Expenses Order against the respondents, or Mr Meth. Even if I had done so, I would then have had to decide what an appropriate sum to award against the respondents is.

63. Under Rule 84, I am aware that the Tribunal is permitted (but not obliged) to take into account the paying party's ability to pay, when considering whether or not to make an Order or how much that Order should be for. Mr Meth, the respondents' representative, in his objections, and in his further written representations, did not submit for my consideration anything at all about his or the respondents' means and ability to pay in the event that I did not uphold his objections.

64. In my view, that was very much a *lacuna* in his approach. Representatives acting for a potential paying party should, in my view, always seek to be open and transparent with the Tribunal about their client's whole means and assets, and their ability to pay, if an Expenses Order is to be made by a Tribunal.

65. Had I found the claimant's Expenses application well-founded, there would then have been no information before me as regards the respondents' and / or Mr Meth's, ability to pay, and, in those circumstances, I would have been perfectly entitled to have taken the view that the respondents and / or

Mr Meth could have afforded to pay the whole sum of £1,050, plus VAT, as sought by Mr Allison, on behalf of the claimants, because there would have been nothing before me to suggest otherwise.

66. While Rule 84 provides that in deciding to make an Expenses Order and, if so, in what amount, the Tribunal may have regard to the paying party's ability to pay, the use of the word "may" shows that that is a discretionary power, and not mandatory. I had no documentary, vouching information available to me, from Mr Meth, as to the state of the respondents' financial affairs, or his own at the Xact Group, as at the date of this Expenses Hearing.

67. Had I decided to make an Expenses Order against the respondents, or Mr Meth, I would have had to consider assessing the appropriate sum to be awarded, and I was aware that I would have had to consider the options under Rule 78. The Tribunal may specify the sum sought by the claimants' solicitor, provided that sum does not exceed £20,000, per Rule 78(1) (a). That is the situation here - the sum sought was quantified by Mr Allison at £1,050, plus VAT. As parties had not agreed a specific sum, so I could not have ordered that under Rule 78 (1) (e).

68. While, under Rule 78(1) (b), I might have considered ordering expenses "as taxed" according to the Sheriff Court Table of Fees, I wish to record here that I did not have before me any judicial account of expenses by a solicitor charging a client for legal expenses, as Mr Allison's application was in respect of a "Schedule of Costs". In any event, I would not have considered it appropriate to remit to the local Sheriff Court Auditor of Court for taxation.

69. As such, had I made any award of expenses, a summary assessment by me as the presiding Employment Judge would have seemed not only appropriate under Rule 78(1) (a), but also proportionate, because, as previously stated by the Employment Appeal Tribunal that it is preferable for a Tribunal, when making an award of expenses, to award a

fixed sum. I refer, in this respect, to Lothian Health Board v Johnstone [1981] IRLR 321.

70. The practical difficulty, in the present case, is that while the claimants' solicitor, Mr Allison, has quantified the sum sought at £1,050, plus VAT, he has produced no vouching documentation. Equally, of course, I recognise that Mr Meth, the respondents' representative, while objecting to the claimants* application, requested no vouching, so, on one view, it can perhaps be inferred that there was no objection to the amounts as claimed.

71. Having regard to the Tribunal's overriding objective under Rule 2, to deal with the case fairly and justly, including the saving of expense, I consider that it is incumbent on a potential receiving party's agent to provide the Tribunal with relevant vouching documentation in respect of any application for costs / expenses.

72. The Tribunal is obliged to seek to give effect to the overriding objective in exercising any power given to it by the Rules of Procedure, and that includes determining applications for costs / expenses, and equally parties and their representatives are under a statutory duty to assist the Tribunal to further the overriding objective, and in particular to co-operate generally with each other and with the Tribunal.

73. There is, I consider, merit in Mr Meth's objection stating that, as Mr Allison advised me at the Preliminary Hearing on 8 September 2017, that his three clients were all in receipt of Legal Aid, the claimants have not actually incurred any legal expenses payable to Mr Allison. He will, presumably, seek to recover any legal costs, incurred on their behalf, in due course, from the Scottish Legal Aid Board.

74. Further, as the Preliminary Hearing on 8 September 2017 dealt with more than just the Strike Out and Deposit Order applications, but it also dealt with other case management issues, relating to parties' non-compliance with

previous Orders of the Tribunal, and matters relevant to seeking to list the case for Final Hearing, I would not have been considering making a full award in the amount sought by Mr Allison, as part of that Preliminary Hearing was spent addressing other necessary and appropriate case management issues, in discussion with both Mr Allison and Mr Meth.

Wasted Costs Application

75. Having refused Mr Allison's principal application for Expenses, I then considered his alternative application for a Wasted Costs Order. I am reminded of the opening words of His Honour Judge David Richardson, EAT Judge, in Single Homeless Project Ltd v Abu & others [2013] UKEAT/0519/12, at paragraph 1, where the learned EAT Judge stated that applications for Wasted Costs "tend to *generate more heat than light and to cause more trouble and expense than they are worth. ..They raise troublesome issues and require careful handling."*

76. As HHJ Richardson also pointed out, at paragraph 2, in Single Homeless Project Ltd, for Employment Tribunals and Employment Judges faced with applications for Wasted Costs, which are not everyday fare, there is the valuable guidance in the Judgment of Mr Justice Underhill, as he then was, then President of the EAT, in Godfrey Morgan Solicitors v Cobalt Systems Ltd [2012] ICR 305, especially at paragraph 36(1)-(5), which sets out the essentials, about (1) reference to authority ; (2) three-stage test and guidance in Ridehalgh; (3) procedure ; (4) privilege; and (5) reasons.

77. Here, Mr Allison's application for Wasted Costs is made under Rule 80, and Employment Tribunals have the power to make a Wasted Costs Order against a representative in favour of a party, and Rule 80 is based on provisions that apply in the civil courts in England and Wales, and case law authorities from that jurisdiction are thus equally applicable in the Tribunals.

78. While neither party's representative referred me to the relevant case law on Wasted Costs, although Mr Meth did refer me to Mitchells

Solicitors v Funkwerk Information Technologies 2008 All ER (D) 99, I am aware, from judicial experience of such applications in other cases heard before me in the past, that the two leading cases on Wasted Costs are generally recognised as being the Court of Appeal's judgment in Ridehalgh v Horsefield 1994 3 All ER 848, and the House of Lords' judgment in Medcalf v Mardell and others 2002 3 All ER 721, and the judgments in these two cases are recognised as sources of essential assistance for Employment Tribunals when considering any application for Wasted Costs.

79. The Court of Appeal in Ridehalgh advocated a three-stage test to be adopted, being (1) has the legal representative acted improperly, unreasonably, or negligently; (2) if so, did such conduct cause the applicant for Wasted Costs to incur unnecessary costs?; and (3) 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.

80. Further, the Court of Appeal in Ridehalgh examined the meaning of improper, unreasonable, and negligent, and held that *"improper"* 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, whereas *"unreasonable"* describes conduct that is vexatious, designed to harass the other side rather than advance resolution of the case; and *"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.

81. As is patent from those definitions in Ridehalgh, they proceed against a background where a legal professional is the subject of a Wasted Costs application. In the present case, of course, the respondents' representative, Mr Meth, is not a legal representative, but he is a lay representative, and Rule 80 applies to representatives of both descriptions. Mr Meth has advised the Tribunal that he is not a solicitor, and he appears in these proceedings designed as a consultant with Xact Group. In his

objections, he has not suggested that he is, in any way, exempt from Rule 80, on the basis that he does not charge his clients for representation, or that he is not acting in pursuit of profit.

82. In the absence of any indication to the contrary, I am satisfied that Mr Meth can therefore be made the subject of a Wasted Costs Order, if this Tribunal so decides that the making of such an Order is merited in the circumstances of this case.

83. After carefully reflecting on Mr Allison's application for a Wasted Costs Order, I have decided that it is not appropriate to grant it either. Mr Meth's conduct of the Preliminary Hearing on 8 September 20127 cannot, in my view, be regarded as any of improper, unreasonable (in the sense of vexatious), or negligent, as he took the proper step, at that stage, of having considered Mr Allison's objections, and then withdrawing the respondents' application for Strike Out of the claims.

84. In my view, in doing so, i borrow the phraseology used by Lord Justice Thorpe in McPherson that Mr Meth's decision to withdraw was *"the dawn of sanity',* and, as per Lord Justice Mummery, "a *sensible litigation decision."* At worst, it was an error of judgment on Mr Meth's part, not to withdraw that part of his application earlier than he did, but as I have already commented earlier in these Reasons, at paragraph 57 above, last minute withdrawals are still very much a regular feature of litigation before the Employment Tribunals.

Further Procedure

85. In closing, I turn to consider further procedure. The claims and response shall proceed to a Final Hearing on a date to be hereinafter fixed by the Tribunal. Despite date listing letters being issued to both parties' representatives, under cover of letters from the Tribunal dated 24 October 2017, for return by 3 November 2017, for the proposed listing period of

December 2017, and January and February 2018, to date the case has still not been relisted.

86. Mr Allison, the claimants' solicitor, has duly replied to the Tribunal, as regards relisting, providing details of witnesses to be called, likely duration of their evidence, and dates of unavailability. The delay in relisting has been occasioned by an apparent failure of Mr Meth, as the respondents' representative, to reply to correspondence from the Tribunal. In consequence, the proposed listing period is now unavailable, and it will be necessary to relist for as Final Hearing sometime in March, April or May 2018. I have instructed the clerk to the Tribunal to issue fresh date listing stencils to ascertain parties' availability in that revised listing period.

Employment Judge: **I McPherson**
Date of Judgment: **04 January 2018**
Entered in register: **08 January 2018**
and copied to parties