EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110541/2019 (V)

Held remotely on 2 March 2022 (By CVP)

Employment Judge: R Gall

Tribunal Members: Ms K Ramsay
Mr R Henderson

Ms L Milroy	**Claimant** **Represented by** **Ms S Mechan – Solicitor**
Damall Ltd	**First Respondent** **Now dissolved**
Mr R Best	**Represented by** **Mr S Connolly – Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Unanimous Judgment of the Tribunal is that the application for wasted costs made in terms of Rule 80 of the Employment Tribunals (Rules of Constitution & Procedure) 2013 is successful on the basis that the conduct of the claimant's representative was, in some aspects, unreasonable. The claimant's representative will pay to the respondent Mr Best the sum of £1250 (One Thousand Two hundred and Fifty Pounds) by way of wasted costs.

REASONS

1. This hearing in this case took place on 7, 8 and 18 June 2021. After a members' meeting on 3 August the Judgment was issued. It was dated 17 August 2021 and sent to parties on 24 August 2021.

2. The claim was unsuccessful. The respondent has now presented an application in terms of Rule 80 of the Employment Tribunals (Rules of Constitution & Procedure) Regulations 2013, ("the Rules"). He seek wasted costs.

3. At the hearing Ms Mechan represented the claimant. Mr Connolly represented the second respondent. The first respondents were a limited company. They are no longer in existence, having been dissolved. Ms Mechan represented herself in opposing this application. Mr Connolly spoke to the respondent's application.

4. In the period immediately prior to the hearing Ms Mechan had made an application to the Tribunal seeking that Employment Judge Gall recuse himself. That application had been refused, with the reasons for that being set out. At the outset to this hearing the Employment Judge clarified with Ms Mechan that she was aware of the application having been refused. He asked whether that decision was one which had been appealed or which was to be appealed. If it was in either of those categories then the hearing could not proceed until the Employment Appeal Tribunal had made its determination.

5. Ms Mechan confirmed that no appeal had been taken and none was to be taken. This hearing therefore proceeded.

Rules in Relation to Wasted Costs

6. The terms of Rule 80 are 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 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."

7. Rule 84 states:-

"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."

8. Ms Mechan had confirmed that she did not wish to make representations or to lead evidence in relation to ability to pay. There was no argument as to Ms Mechan not being a representative as defined in Rule 80.

9. Written representations were received from both solicitors. Each had the opportunity to respond to the representations of the other.

10. A hearing upon the application was set for 2 March 2022. The Tribunal had had the benefit of reading the submissions and replies from both solicitors in advance. It was not considered necessary in the interests of justice or otherwise for the written submissions simply to be read to the Tribunal. Both Ms Mechan and Mr Connolly were given the opportunity to make any supplementary submissions.

11. Mr Connolly adhered to his written submissions. Ms Mechan added, to some extent, to her written submissions. She maintained the theme and general approach as set out in her written submissions.

General comments - Principles

12. Mr Connolly set out the basis on which he made the claim for wasted costs. He referred to the authorities, citing *Ridehalgh v Horsefiled and another ("Ridehalgh")* 1994 3AER 848, *Medcalf v Weatherill ("Medcalf")* 2002 UKHL 27 and *Mitchells Solicitors v Funkwerk Information Technologies York Ltd ("Mitchells Solicitors")* UKEAT/0541/07. Mr Connolly also referred in relation to the matters mentioned in paragraph 22 (4) below, to the case of *Highvogue Ltd, N Morris v Davies ("Highvogue)* UKEAT/0093/07. That case related to a representative persisting with points when they had not been raised in the written case, documentation, witness statements or cross examination. An award of wasted costs was made.

13. It was recognised by Mr Connolly that Tribunals were urged to approach a decision potentially to award wasted costs with great caution, awarding them as a last resort. To make such an award a Tribunal had to be satisfied that the conduct of the representative involved could properly be categorised as improper, unreasonable or negligent. The test was not met simply as the representative had acted for a party pursuing a hopeless case. An award would only fall to be made in that circumstance if the representative had presented a case which that representative considered was bound to fail and in so doing the representative had failed in their duty to the court, the proceedings amounting to an abuse of process.

14. Further, there may be issues of client privilege/confidentiality which prevent a representative from explaining why a particular approach has been taken in advancing a client's case.

15. The conduct of the representative in question must be shown to have resulted in incursion of unnecessary costs. Any wasted costs awarded are to be awarded on a compensatory basis rather than a punitive one.

16. When an application for wasted costs is made, the Tribunal which then has to deal with that must exercise its discretion in considering whether the application is justified and proportionate in the circumstances of the case. It must then exercise its discretion in deciding whether or not to make such an order and, if it does, as to the amount of wasted costs found to be due in terms of that order.

17. It is for the party making the application to discharge the burden of proof in persuading the Tribunal that the tests are met, resulting in an order being made.

18. These principles were not challenged by Ms Mechan as representing the considerations to be kept in mind by a Tribunal faced with an application for wasted costs.

19. The Tribunal accepted that these cases were the relevant ones for it to consider when it considered whether there was to be a wasted costs order made in terms of the governing provisions, the Rules.

20. Mr Connolly also referred to the Law Society Rules 6, 8 and 12. Those rules are in the following terms:-

- Rule 6:-

  "Competence, diligence and appropriate skills

  Solicitors must have the relevant legal knowledge and skill to provide a competent and professional service. They must be thorough and prepared in all their work and should only agree to work for a client

when they can do this adequately and completely within a reasonable period of time."

- Rule 8:-

"Relations between solicitors

Much of the work of solicitors involves other solicitors.

Solicitors must treat each other with mutual respect and trust. This respect and trust includes not communicating directly with each other's clients.

- Rule 12:-

Relations with the courts

Solicitors must behave with respect towards the court and must state the law and the facts honestly and accurately.

Solicitors have a duty to the court to help ensure that those who give evidence only give truthful and honest statements which they can accurately remember.

Solicitors will treat those who give evidence with appropriate respect and courtesy. When solicitors have to question a person in court who does not have a solicitor and is representing him or herself, they must co-operate with the court in allowing that person to state their case."

Submissions

Submissions for the respondent

21. Mr Connolly set out his submissions detailing 6 specific areas in respect of which he said Ms Mechan's conduct was such that a wasted costs order was appropriately made by the Tribunal. He provided details of costs he said should be awarded. He did not add to those submissions at the hearing. This was on the basis that he had set out his submissions in writing and had

responded to Ms Mechan's submissions when each party was given the opportunity to reply to the submissions of the other.

22. The elements set out by Mr Connolly were as follows:-

(1) Events and circumstances in connection with documents for the hearing and interaction between representatives in the lead up to the hearing. He regarded the conduct of Ms Mechan as having been unnecessary in challenging the content of what had been proposed as the joint bundle and in then producing her own supplementary bundle.

(2) In February 2020 the respondents had submitted answers to the claimant's further and better particulars of claim. Those answers had never officially been incorporated in the response however. Mr Connolly had on 26 May 2021 drawn this to the Tribunal's attention. He intimated that he would raise this at the outset of the hearing in June 2021, so that it could be addressed. Ms Mechan had responded saying that she would oppose the application on the basis that it came too late. This was, Mr Connolly said, in spite of the fact it had been made in February 2020 in response to the claimant's additional particulars. At the commencement of the hearing when the point arose, Ms Mechan then confirmed that there was no opposition to the application. Unnecessary expense had been incurred preparing for an anticipated opposed application.

(3) Despite the allegations of discrimination having been set out in form ET1 and having been subject of apparent agreement in correspondence between Mr Connolly and Ms Mechan, Ms Mechan sought to add allegations of discrimination on the first day of hearing before evidence commenced. This element was commented upon in paragraphs 158 to 172 of the Judgment of the Tribunal. The allegations were therefore sought to be introduced at the last minute and without any prior notice of this position. Ms Mechan had confirmed, however, that she did not seek to amend to introduce

these elements. In fact, after discussion and debate which had lasted for some time, Ms Mechan stated that she would not pursue these points in this case.

(4) The claimant had given evidence by the end of cross examination stating that she had not been paid for the week ending 10 May 2019. Payment for that week had however been made, she confirmed, in July 2019, a COT3 being entered into at that time. The claimant herself had prepared a schedule of payments showing when payments were due and when payment of wages had been made to her. In cross examination she was taken through her bank statements and the bank statements of Damall Ltd. Those company bank statements were subject of evidence from the claimant in relation to payments made to her and to her colleague Ms Kennedy. The claimant confirmed that she had been paid on time between 17 May and 5 July 2019. She had confirmed she made no claim in relation to that period. Ms Kennedy had not given evidence upon that matter.

(5) Despite that, cross examination of Mr Best involved repeated and persistent attempts to put to him the position that the claimant had not been paid on time between 10 May and 28 July 2019.

(6) At the request of the Tribunal, representatives had sought to prepare a schedule showing when the claimant received her pay. Ms Mechan had adhered to her position during the attempts to prepare such a schedule, despite this not being in line with the evidence from the claimant. She maintained that the claimant had not been paid at all for the pay date of 19 April, had been paid early for the pay date of 10 May and had been paid later than Ms Kennedy for pay dates 17 May to 21 June, 12 and 19 July and 2 August. That simply did not reflect the evidence and there was no basis for that approach by Ms Mechan, Mr Connolly said.

(7) Time was taken dealing with all these matters at the hearing and between representatives. A wasted costs application in relation to that time was warranted and should be granted, Mr Connolly argued. The Tribunal in its Judgment at paragraphs 104 to 111 had rejected the submissions made that there was evidence to support this line which Ms Mechan had sought to advance.

(8) This aspect saw Ms Mechan behaving unreasonably, improperly and, with what he said was a degree of hesitation in relation to it being advanced, negligently, Mr Connolly submitted. The submissions she had made were in direct contradiction with the evidence of her own client, the claimant.

(9) This was also an instance where a hopeless case had been pursued in that there was no evidence to support this line of questioning of Mr Best. That should have been realised by Ms Mechan, leading her to refrain from advancing this argument by attempted cross examination. Reference was made by Mr Connolly to *Highvogue*.

(10) Ms Mechan had sought to introduce an argument that the claimant had never been paid for the sum due on pay date 19 April. This was not an allegation made in the claim form or in the claimant's evidence. The claimant's evidence was not consistent with it. This attempt by her had meant time was taken, leading to costs being incurred, in circumstances where the line was not something open to the claimant given her own evidence.

(11) There had been no evidence led by the claimant from which discrimination could be inferred. Nothing had been presented beyond the events and the allegation of discrimination. There was a failure to advance any "more, sufficient material" as required in *Madarassy v Nomura International plc ("Madarassy"*) 2007 ICR 867. Ms Mechan would have known the evidence of the claimant and must have known that the claim could not succeed. There had been no prospect of the claimant being able to prove that the way she had

been treated was because she had been on maternity leave. Mr Connolly went through the allegations of discrimination advanced and the evidence presented in relation to them. This supported his proposition and meant an award of wasted costs should be made, he said. The Tribunal had looked at the events individually and in the round. It had not found facts such that the burden of proof had transferred to the respondents.

23. In addition to the elements of conduct of the case upon which Mr Connolly relied, he also sought wasted costs in respect of the making of the application for wasted costs itself. He mentioned the position of the respondent as a private individual meeting costs on that basis and having suffered the stress of the Tribunal claim.

Submissions of Ms Mechan

24. Ms Mechan lodged written submissions. She had not replied in writing to Mr Connolly's submissions. At the hearing she said she wished to reply to those, as she said to "put forward the correct factual point of view".

25. At this hearing Ms Mechan made submissions as to evidence which she said she now had which, in her view, established that the evidence given by Mr Best had been unreliable. It was highlighted to Ms Mechan that this was not a hearing in relation to reconsideration, but a wasted costs application based on grounds which had been detailed.

26. Ms Mechan referred to the case brought by Ms Kennedy against Damall Limited. That had not been defended and had resulted in a Rule 21 Judgment. She also referred to the case brought by the claimant against Cowden Limited and Damall Limited, which had also not been defended by Damall Limited. Her position was that facts found in those cases contradicted the evidence given by Mr Best at the hearing in this case. In those cases, however, no evidence had been given by Mr Best. There had been no evidence in the case brought by Ms Kennedy given that it was undefended. The evidence given in the Cowden case had not been challenged by any contrary evidence. More

significantly, they had not been matters relevantly raised in the hearing in this case.

27. The Tribunal found it hard to see the relevance of these elements of Ms Mechan's submissions to this hearing. Also, it could not see the relevance to this hearing of her reference to a letter from HMRC received by the claimant on 20 January 2022. It appeared to be Ms Mechan's position that this all cast doubt on the credibility of Mr Best. This hearing was however concerned with the conduct of the case on behalf of the claimant and the allegation made that there was a basis on which wasted costs were properly awarded. It was not a re-hearing of the merits.

28. The Tribunal did not see that the submissions made at this hearing added anything to the submissions Ms Mechan made in writing. They were not viewed as covering matters relevant to this hearing. They were, it seemed to the Tribunal, an attempt to reopen and revisit matters aired at the hearing and dealt with in the Judgment. The Tribunal had no doubt that Ms Mechan felt strongly about the matters she raised and continued to be of the view that the Tribunal had come to the wrong conclusion. That, however, was not a matter for debate or consideration at this hearing.

29. Turning to the submissions Ms Mechan made in writing, she replied, in summary, as follows to the 6 grounds referred to above in paragraph 22, adopting the same numbering:-

    (1) Ms Mechan narrated the circumstances in which issues about documentation for the hearing had come about. She referred to them as "petty housekeeping details". The inclusion of documents in the joint bundle had not been as it should have been. Some documents were difficult to read. The supplementary bundle she had produced was appropriate in the circumstances. There had been nothing improper, unreasonable or negligent in her actions.

    (2) In relation to the application to amend, Ms Mechan said that she had a duty to her client and would not be rushed into a decision. She

had stated that neither party should be amending at the late stage involved. She had then considered the position. Although there had been a letter threatening the seeking of costs, it was appropriate for her to consider the position and to seek instructions. She had not been unreasonable and had not acted improperly or in a negligent manner.

(3) What Mr Connolly had referred to as additional allegations of discrimination were said by Ms Mechan to be instances of evidence in respect of the claim. That evidence ought to have been permitted in the claim.

(4) In reply to the position advanced by Mr Connolly that she had pursued questions in cross examination for which there was no evidential basis, Ms Mechan set out what she regarded as the facts as she saw them and which supported the questions which were asked or sought to be asked. She referred to the payments made and what was to be taken from them She analysed the payments, including the position in respect of Ms Davidson.

(5) In relation to the argument advanced by Mr Connolly that there was no basis in evidence for cross examination as to there never being any payment to the claimant of the sum due on 19 April, Ms Mechan referred to elements which she said supported that as being the factual position. She again analysed the payments made and detailed the basis for her position as was put, or attempted to be put, to Mr Best in cross examination.

(6) Mr Connolly had alleged that there was no basis for a case of discrimination. In her submission, Ms Mechan advanced an argument as to the claimant having experiences said to have been discriminatory. Ms Mechan put forward the position that this was due to being physically absent from the premises as she was on maternity leave. This, it was submitted, was an explanation for the later payment of the claimant on some occasions and for her being

barred from the bar. It was not however an argument advanced at the hearing. Ms Mechan made submissions at this hearing as to the TUPE transfer and farewell do. Those were not however allegations of discrimination before this Tribunal. Ms Mechan went on to refer to what she said was new evidence in relation to the claimant's interaction with HMRC regarding maternity leave. She set out further matters which, she said, contradicted the evidence the second respondent had given in the main hearing as to the reasons for him giving up trading at the bar in question. Ms Mechan commented unfavourably on the credibility of the second respondent due to that information and due to what she alleged had been said by some other witnesses in a different claim, in which the second respondent had not been a witness or party. She referred to a different case in which a different employee of the first respondents had obtained judgment, that case being undefended. The changing landscape of a TUPE transfer was mentioned as well as these other cases. It was, Ms Mechan submitted, difficult "to ring fence precisely the matters relating to each individual case across three evidential hearings during which the full complement of respondents were never simultaneously present and giving evidence".

Ms Mechan denied that there had been any improper, unreasonable or negligent acts on her behalf.

Brief Reply from Respondent

30. In a brief written reply to Ms Mechan's written submissions, Mr Connolly said that the second claim which the claimant had brought was of no relevance to this case. It was a later claim and involved different issues. The second respondent in this case was not a party to, or a witness in that other case.

31. Mr Connolly queried the factual position advanced by Ms Mechan in relation to events and background relative to the amendment from the respondents.

32. He reiterated that it had been unreasonable to attempt at the outset of the merits hearing to introduce allegations of discrimination which were not part of the claim as originally presented and not subject of any amendment application..

33. In general terms, he said, the submissions from Ms Mechan did not detail matters or arguments which addressed the test the Tribunal required to apply in relation to a wasted costs application. New matters and points which contradicted the findings of the Tribunal had been detailed by her. Some of those matters would have or could have been known by the claimant at time of the merits hearing and ought to have been part of that hearing if appropriate. The attack on Mr Best's credibility was unfounded and baseless and contained a false statement. He referred once more to Rule 12 of the Law Society's standard of conduct. There was, he said, no pertinent information in Ms Mechan's submissions which assisted the Tribunal in answering the questions laid down in *Ridehalgh.*

Applicable Law

34. The terms of Rule 80 are key in detailing what the Tribunal has to do. Those terms are set out above. The cases referred to above, *Ridehalgh, Medcalf, Mitchells Solicitors and Highvogue* are ones which set out the relevant points for consideration by the Tribunal as it considers application of Rule 80.

The Issue

35. The issue for the Tribunal was whether an order for wasted costs was to be made and, if it was, how much was to be ordered by the Tribunal as being payable by way of wasted costs.

Discussion and Decision

36. It is relatively unusual for there to be a wasted costs order application. It is never a happy situation when such an application is made. The possibility exists, however, of such an order being sought and indeed granted. As is

confirmed in *Mitchells Solicitors,* it is a jurisdiction which requires to be exercised with great caution and as a last resort.

37. There was, for clarity, in this case no wish on the part of Ms Mechan to provide any evidence as to ability to pay. Also, there was no issue as Ms Mechan not being a "*representative"* against whom a wasted costs order might be made in terms of the Rules.

38. Stating the obvious, litigation is a disputed process. Opposing positions will be adopted by respective parties. Often robust argument is involved. Heated exchanges can occur. Parties may instruct that positions are adopted and arguments advanced which the representative may think (and may have advised) have a relatively low likelihood of being successful. Nevertheless, those positions and arguments may be stateable and a party and representative may legitimately put them forward. The position of that party may ultimately not be successful. In that scenario, providing there has not been in the view of the Tribunal unreasonable, vexatious, abuse or disruptive acting in bringing of the proceedings or their conduct and providing that the claim or response did not have no reasonable prospect of success, expenses are not likely to be something considered or awarded by the Tribunal.

39. Wasted costs takes this a degree further. Expenses are sought from the representative. The basis for any such award requires to be the conclusion of the Tribunal that expenses have been incurred by a party "*as a result of any improper, unreasonable or negligent act or omission on the part of the representative"*. Another situation where wasted costs may be awarded is if the expenses are ones *"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".*

40. The Tribunal was not faced with an argument on the part of Ms Mechan that she was acting specifically upon client instructions having tendered certain advice to her client. There was not said to be any issue of potential client confidentiality therefore with which the Tribunal required to wrestle.

41. The Tribunal was conscious in its assessment that Ms Mechan was clearly of the view that the decision reached by the Tribunal was wrong. She had sought that it be reconsidered. That application was refused. The Judgment of the Tribunal had not been subject of any appeal. It therefore stood.

42. The Tribunal also recognised the complexities involved in this situation where there had been other litigation, albeit Damall Limited and Mr Best had not participated in any fashion in that other litigation. The other litigation had related to the claimant's employment. Ms Mechan had acted in those other matters and clearly had her own view of the situation and of how she saw the claimant as having been treated.

43. These matters are mentioned as the Tribunal had concerns as to the submissions, both in written and verbal form, made by Ms Mechan in response to the application.

44. The Tribunal was of the view that those submissions, in large measure, did not address the application. Rather they looked to re-argue points from the case or to refer to what was said to be new evidence. That new evidence related however to the merits of the case. The case had been determined. What the Tribunal required to consider in this application were specific areas and aspects of the conduct of the case by Ms Mechan on behalf of the claimant.

45. The net result of the approach taken by Ms Mechan was that the Tribunal did not have the benefit of a focussed response and counter argument to the application in many areas.

46. As detailed above, 6 aspects were advanced by Mr Connolly in support of his application. The Tribunal considered the application, the response as relevant, the Rules applicable, the case law relating to those application of those Rules together with its recollection of the hearing and its conduct. The Tribunal also considered the conduct of Ms Mechan in relation to the wasted costs application given that this was also a ground on which Mr Connolly made his application for wasted costs.

47. The Tribunal did not find the elements of the Law Society Rules referred to by Mr Connolly to be of particular relevance in its deliberations. It focussed upon the terms of Rule 80 and the associated case law as mentioned above.

Grounds 1 and 2

48. The first two grounds on which the application was made were not seen by the Tribunal as involving improper, unreasonable or negligent conduct by Ms Mechan. The issues over documents and over opposition or not to the amendment of the response were not particularly unusual in course of a case running. It is certainly true that there were better ways of handling these matters and more timeous communication of the position on withdrawal of opposition to the proposed amendment would have been desirable. These involved matters happening in direct communication between the respective solicitors in large measure. Bearing in mind the high bar in the test under Rule 80, and on the information the Tribunal had as to events, it was not persuaded that Ms Mechan's conduct as the claimant's representative was improper, unreasonable or negligent.

Ground 3

49. There was more concern in the Tribunal's mind as to the events at the outset of the hearing when possible additional grounds of claim were aired

50. Ms Mechan, it seemed to the Tribunal, took the view that she could lead evidence about the matters in question although they were not set out as grounds of claim and despite having, it appeared, agreed the list of issues. That list did not include those events. She seemed to be arguing at the outset of the merits hearing, that as the alleged events had happened during the protected period in relation to the claimant's pregnancy, they could be aired in that hearing. As the discussion unfolded, Ms Mechan was asked by the Tribunal if she wished to amend. She said that she did not. She confirmed she would not go into the TUPE transfer matter. After further discussion Ms Mechan, unexpectedly, said that she would leave the matters which had been debated and deal with them in the other case.

51. These preliminary matters took approximately 75 minutes, to include the discussion of the amendment by the respondents (very limited time on the day) and the issue of documents, again the time relative to that element was limited.

52. The Tribunal found it difficult to understand the basis for the position Ms Mechan adopted at the merits hearing and to follow her reasoning in this area. It was surprised when Ms Mechan did not seek to amend at that time, given her apparent wish to air the matters to which she referred. Whether an amendment would have been permitted is a separate matter. The Tribunal was also surprised when Ms Mechan dropped the attempt to persuade the Tribunal that these matters were properly before it at the main hearing, not because of any view that there appeared to be merit in her position but rather as the rather sudden abandonment of her position was not anticipated.

53. In examining this area, the Tribunal concluded that the standard of improper, unreasonable or negligent actions on the part of Ms Mechan had not been met. It was the view of the Tribunal that a degree of time had been taken up prior to the case commencing and that there did not appear ultimately to be merit in the position Ms Mechan detailed. It was difficult to see a valid basis for the position adopted for the claimant in this discussion at the outset of the merits hearing. Tested however against the standard required before Rule 80 is triggered, the Tribunal concluded that the behaviour involved fell short of that. It was not ideal behaviour and the position adopted was not well founded. It was not viewed by the Tribunal as being unreasonable, improper or negligent.

Grounds 4 and 5

54. Turning to grounds 4 and 5, those are treated together as they involve essentially the same point, although in relation to slightly different points of potential cross examination.

55. What Mr Connolly said was that the line of questioning which Ms Mechan sought to pursue, and had to a degree pursued, in cross examination was not

one open to her. This was as it was predicated on a position which differed from, and was indeed contradictory to, the evidence given by her own client and the position of the claimant in her written case. She had persisted with these lines and time had been taken dealing with this situation.

56. The claimant had accepted in cross examination that when paid on 23 April that payment was the one due on 19 April. It could not be made on 19 April due to lack of funds, a robbery having happened in the pub, resulting in cash being taken. The claimant also said that she had not been paid on the due date of May 10 and had required to speak with ACAS in that regard. Agreement had been achieved and she had received payment in July for the sum properly due to her on 10 May. She confirmed that she was paid on time between 10 May and 28 July. The claimant agreed this and that it was in accordance with the schedule she herself had prepared, the schedule then being added to by Ms Mechan in respect of a different period.

57. That evidence had been obtained from the claimant in cross examination. As mentioned in the Judgment, cross examination was conducted perfectly courteously and without any aggression at all. Time had been given for answers. The claimant was certainly not “brow beaten”.

58. Notwithstanding the evidence from her client as mentioned, and the claimant’s case on paper, Ms Mechan then sought to cross examine Mr Best on the basis that the payments of wages to the claimant were not as he had described and were not as the claimant had said in evidence. She sought to cross examine Mr Best on the basis that the payment for 19 April had never been paid, contrary therefore to the evidence from her client. These are matters commented upon in the Tribunal Judgment at paragraphs 104-111.

59. As mentioned, there was a reasonably complex factual background to the case, particularly given the other cases. There was much emotion involved. That said, the Tribunal was of the view that an experienced solicitor ought to have known and appreciated that adopting a line in cross examination which is contrary to the evidence and case on paper of one’s own client is not an appropriate or sustainable position.

60. The Tribunal looked to understand the basis of resistance of the application for wasted costs as detailed by Ms Mechan.

61. In relation to ground 4 it reviewed the submissions made. It did not regard the position as being addressed to any extent by Ms Mechan. What Ms Mechan set out in her submission was unfortunately not reflective of the evidence led at Tribunal. It appeared to the Tribunal to be her interpretation of events in the work relationship and not in line with the evidence the Tribunal heard and in particular the facts as the Tribunal found them. It did not, in the view of the Tribunal, specifically address the points made by Mr Connolly as to the evidence given by the claimant and the line adopted in cross examination, that being inconsistent with the claimant's position in the claim and als her evidence.

62. Turning to ground 5, it seemed to the Tribunal that once more Ms Mechan was putting forward arguments supporting her position as being a stateable one looking to documents, events and interpretation of those. She did not address the essential point made by Mr Connolly, which was that there was no foundation for this line of cross examination. Her submission in this application did not, in some instances, reflect the claimant's evidence. She repeated the position she had taken in submission at Tribunal that the claimant "had been told" things by Mr Connolly when being cross examined and had agreed with them. This had been dealt with in the Judgment, the Tribunal being of the clear view that there had been no inappropriate questioning, tone or pressure from Mr Connolly, with the claimant giving her answers clearly. In addition these matters had not been the subject of any re-examination at the hearing.

63. It also appeared from her written submission for this hearing that an application might be being made by Ms Mechan for payslip documents. This was not an application spoken to at this diet. It was not seen as a matter relevant to this hearing, again being of potential relevance only in relation to the merits of the claim.

64. There were therefore many matters set out in Ms Mechan's submissions, both verbal and written, which the Tribunal struggled to see as in any way relevant to resistance of the application before it.

65. There were, as examples, references to interaction with HMRC, to other cases, to events around the TUPE transfer and regarding the farewell do. Those were not, however, matters about which the claimant gave evidence or about which there had been competent cross examination of Mr Best. They were not matters advanced at the main hearing of the case.

66. In relation to these grounds, grounds 4 and 5, the Tribunal concluded that it was unreasonable on the part of Ms Mechan to have taken the course she initially did and to pursue it in face of challenge. The principle involved of making the challenge in cross examination based on the position of one's own client and evidence given by him or her, seemed a fundamental one and one of which Ms Mechan was bound to be aware and one with which she was bound to be familiar.

67. It might have been that Ms Mechan anticipated that the claimant would have given evidence to "set up" the cross examination questions she attempted to ask. It might be that those questions were predicated on what Ms Mechan herself thought had happened, the facts as she saw them. Either way, they were not based on the case as set out and as spoken to by her client, the claimant.

68. Rule 80 stipulates that wasted costs may be ordered by the Tribunal in the scenario of unreasonable behaviour by a representative.. There is therefore a discretion given to the Tribunal.

69. The Tribunal concluded that Ms Mechan's actions involved as detailed in discussion of grounds 4 and 5, specifically those of looking to ask questions of Mr Best in cross examination in relation to a different view of the payment due on May 10 and the payment due on April 19, were unreasonable. As a result, costs had been incurred by the other party.

70. The Tribunal kept in mind the responsibilities of a solicitor to his or her client and the need for a solicitor to represent the position of their client, sometimes in robust terms. The issue in this case was not with the claimant's position being advanced. Rather, it was with the position being advanced in cross examination of the respondents being contradictory to that of the claimant.

71. The Tribunal gave considerable consideration to the application and response. It undertook much deliberation. That was appropriate given the seriousness of the decision to be made and the guidance from case law as to the power in question requiring great caution in its exercise. It is a power to be exercised only as a last resort. Ultimately, the Tribunal unanimously concluded that its discretion should be exercised by the making of an award in respect of costs incurred as a result of the unreasonable behaviour involved.

Ground 6

72. Ground 6 proceeded on the basis that Ms Mechan ought to have known that there was nothing in the claim beyond the treatment complained of and the fact of the claimant's maternity leave. There was nothing more, that being something which was required, as confirmed in *Madarassy*.

73. It had been anticipated that there might be an aspect of the answer by Ms Mechan to this element of the application where client confidentiality might be said to be of relevance. That however was not a position put forward.

74. The Tribunal gave careful consideration to this ground of claim. It concluded that there was enough in the position as set out and in the evidence potentially led for it not to have been unreasonable, improper or negligent on the part of Ms Mechan to have acted for her client in its pursuit. The claim was stateable. Other than in conduct during the hearing in relation to points 4 and 5 above, Ms Mechan's actings in advancing the claims were not unreasonable in the Tribunal's view. The fact that the claim did not succeed and that the evidence accepted was not viewed as sufficient to transfer the burden of proof did not

mean that proceeding with the claim had been an unreasonable, improper or negligent act on the part of Ms Mechan.

75. Looking at the claim advanced, there were certainly times when the claimant was paid after her colleague Ms Kennedy. That was factually correct and was the information known to the claimant and upon which the core element of the claim was based. There were however times when, on the evidence accepted, Ms Kennedy was paid after the claimant. That certainly became clearer during the hearing given the bank statements produced for Damall Limited showing the payments made to Ms Kennedy in particular. The claimant had been unaware of there being such occasions. From the evidence, Ms Kennedy was not particularly on top of the dates when she had received payments. Production of the bank statements and analysis of those in the hearing saw the position become clearer.

76. It again was only apparent when evidence was given that there was little, if anything, to support the position that the date of payment had changed for the claimant but not for Ms Kennedy. Ms Kennedy said that she did not get a text confirming the change whilst the claimant had received such a text. Payments made to Ms Kennedy however did not continue to be paid on Wednesdays. As the evidence emerged, there was nothing to connect the payment date for the claimant having been changed from Wednesdays to Fridays to her being on maternity leave. Again, however, the position was such that it was not, in the view of the Tribunal, unreasonable, improper or negligent to proceed with this element as part of the discrimination claim, albeit it was not accepted by the Tribunal that there was any discriminatory action by the respondents in changing the day of the week on which payment was made to the claimant.

77. A further allegation was that the claimant was barred from the pub, this being said to have been a discriminatory act based on her being on maternity leave. The Tribunal found that the act did not constitute discrimination by way of victimisation as no protected act had occurred. It did not however regard Ms Mechan having acted for the claimant in pursuit of the claim as meeting the test for there to be a wasted costs order made.

78. It was difficult to see a basis on which it was argued that there was discriminatory conduct involved when Mr Best had told the claimant in February 2019 that there were no wages. She had just started maternity leave. Nothing was said which provided the link between that and the comment made. The claimant was paid later in the day. Given the other allegations, this one might have been seen in a different context as the evidence unfolded. Ms Mechan had not, in the view of the Tribunal, acted improperly, unreasonably or negligently in being the agent of the claimant in advancing the proposition of discrimination on her behalf.

Conclusion and Amount of Wasted Costs

79. It is always difficult to pin down expenses in such a matter in a precise fashion. The Tribunal therefore took a broad based approach to this. It was conscious that expenses are to be awarded on a compensatory rather than punitive basis. It was aware from the expenses information produced of the hourly charging rate applicable. That rate was well within commercial charging rates from the knowledge and experience of the Tribunal.

80. Mr Connolly submitted that Mr Best was an individual who required to fund his defence to the claim himself. He therefore personally had greater expense due to the action of the claimant's agent. That, Mr Connolly said, was something to which the Tribunal could and should have regard in exercising its discretion in terms of Rule 80.

81. The Tribunal viewed the test as involving determination of its view of categorisation of the acts or omissions of Ms Mechan. Having determined that, in respect of the elements mentioned of grounds 4 and 5, those actings were unreasonable, the Tribunal revisited Rule 80. In applying the terms of that Rule, it did not regard there as being any particular significance in Mr Best being an individual respondent. It had no information as to Mr Best's financial position, albeit there had been an element of information in the context of Damall Limited and the running of the Crown Bar in Paisley.

82. The decision of the Tribunal therefore did not have factored into it any weighting one way or the other due to Mr Best's position as an individual or due to his possible financial position.

83. The Tribunal regarded elements of the conduct of the case by Ms Mechan to have been unreasonable. Specifically, the attempts made by her to cross examine Mr Best on the basis of the COT3 agreement relating to payment other than that due on 10 May and the attempt made to cross examine him on the basis that payment due on 19 April had never been paid, were considered by the Tribunal to have been unreasonable on her part. This was as the evidence from her client, her written position and the payment schedule prepared by her client and spoken to by her had not been to that effect. That evidence had been quite clearly contradictory of those positions which were looked to be put in cross examination.

84. Ms Mechan then persisted with those positions in preparation of the schedule mid-hearing and in submission. She also continued to advance points in submission on the wasted costs hearing which comprised attempts to lead new evidence or to argue that the Tribunal "got it wrong" in its decision. She alleged at one point that Mr Connolly (as well as his client) had "*contrived"* evidence. There was no basis for that. She seemed unable, or at the very least unwilling, to accept that the Tribunal had made findings in fact which were not the subject of challenge in a wasted costs application. She did not appear the appreciate that in this application she required to depart from these positions.

85. The Tribunal considered that in proceeding with and persisting in those attempts to relitigate matters, Ms Mechan was also acting unreasonably, with consequences detailed in Rule 80.

86. As a result of these unreasonable actings expenses were incurred by Mr Best to Mr Connolly. An award by way of expenses, on a compensatory basis, is therefore appropriate. It is considered by the Tribunal to be justified and proportionate in the circumstances.

87. It is difficult to be absolutely precise in determining the exact amount so incurred. Looking broadly at the time and work involved due to those aspects, grounds 4 and 5, which the Tribunal considered "met the Rule 80 threshold" and expenses consequently incurred, the Tribunal unanimously concluded that it was fair in exercise of its discretion to make an award of £1,250 payable by Ms Mechan as wasted costs. That sum is considered to reflect the compensatory amount and is reflected in the Judgment above.

Employment Judge: Robert Gall
Date of Judgment: 14 March 2022
Entered in register: 15 March 2022
and copied to parties