Case No's:
1600693/2018
1601041/2018
1601042/2018

EMPLOYMENT TRIBUNALS

Claimants: **Mr Stewart Brooker**
Mr Michael Davies
Mr Larry Ford

Respondent: **R & M Williams Limited**

COSTS JUDGMENT

1. The application of the Respondent for a Costs Order is refused.
2. The application of the Respondent for a Wasted Costs Order is refused.

REASONS

Preliminary

1. On 1 March 2022 an application was made by the Respondent for a Costs Order and a Wasted Costs Order following the conclusion of the remedies hearing on 15 February 2022. My reserved remedies judgment is dated 9 March 2022 and was sent to the parties on 22 March 2022.

2. I have determined the application of the Respondent on an administrative basis, having been provided with, and having considered, the following documents:

   (1) Written submissions prepared by counsel for the Respondent, Mr Paur, dated 1 March 2022;
   (2) Written submissions prepared by O H Parsons LLP, on behalf of the Claimants, dated 25 March 2022;
   (3) Correspondence between the parties/ the Tribunal.

The issues

3. Ordinarily, a costs application would require the determination of two key issues:

   (1) How should the Tribunal exercise its discretion in deciding whether to make a costs order?
   (2) If the Tribunal decides to make a costs order, how much should the party against whom an order is made, be directed to pay?

4. Due to the manner in which this application has been made by the Respondent, only the principle of costs can be determined (ie, issue (1) above). I have not been provided with any detail of the costs sought by the Respondent, or any explanation of why such amounts are said to have been and reasonably and necessarily incurred as a consequence of the stated unreasonable behaviour/ breach of Tribunal orders on the part of the Claimants and/or their legal representatives.

The legal framework

5. I have reminded myself of Rules 74-84 of the Employment Tribunal Rules of Procedure 2013, and have carefully considered, in particular, the Rules relied upon by the Respondent.

6. Firstly, the Respondent relies on Rule 76, which (with my emphasis), provides that:

   *'(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

   (2) A 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.'

7. Secondly, the Respondent relies on Rule 80(1) which (again with my emphasis), provides that:

   *'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".'

8. Costs Orders in the Employment Tribunal are the exception rather than the rule (*Barnsley Metropolitan Borough Council v Yerrakalva* [2011] EWCA Civ 1255, §7, Mummery LJ), and are rarely awarded (*Lodwick v Southwark London Borough Council* [2004] EWCA Civ 306, §23, Pill LJ).

9. Rule 76 uses the word '*may*' when talking about the circumstances which may lead to the making of such an order, and I have a wide discretion. The Court of Appeal in *Yerrakalva* (supra) cautioned against the citation and value of authorities on costs questions and about the dangers of adopting an over-analytical approach to the exercise of a broad discretion (§39, Mummery LJ).

10. 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 (*Yerrakalva*, §41, Mummery LJ).

11. The purpose of costs orders is to compensate the receiving party; punishment of the paying party is not a relevant factor (*Lodwick,* §23, Pill LJ). This means consideration of the loss caused to the receiving party as a result of the identified basis of any costs order is required. Costs should be limited to those '*reasonably and necessarily incurred*' (*Yerrakalva*, §54, Mummery LJ).

How should I exercise my discretion?

12. Having carefully considered the submissions of the parties, I have determined that I should not exercise my wide discretion in favour of making a Costs Order or a Wasted Costs Order.

13. Looking at the *whole picture* of what has happened in this case, I do not consider that it can be said that there has been unreasonable conduct or a breach of Tribunal Orders by the Claimants/ their legal representatives, to the extent that there can realistically be said to be a loss to the Respondent arising from it.

14. There is no specificity within the submissions of the Respondent to particularise *how* the identified issues negatively impacted its case such that I should exercise my discretion and unusually award costs – particularly in a situation where the Claimants were largely successful in their individual claims against

the Respondent. Addressing the main points relied upon by the Respondent in turn:

(1) **Mr Brooker**: the Respondent states (at §10 of the submissions) that Mr Brooker confirmed in oral evidence that he had a letter to confirm that there had been a Tupe transfer from Roalco Limited to Ian Williams Limited and that he had payslips in his possession. Where does that take the Respondent in a costs argument?

This was a remedies hearing. The issue of whether there had been a Tupe transfer on 1 January 2018 was determined by the EAT. The issue of Mr Brooker's gross weekly pay was ultimately agreed by counsel for the Respondent (at the hearing) as £523.77 which was the identified figure in a spreadsheet like document prepared by the Respondent. It was a document that it had itself created/ had knowledge of, and which could (therefore) have been the subject of negotiation pre final hearing.

(2) **Mr Davies:** the Respondent relies (at §11 of the submissions) on the fact that Mr Davies stated in evidence that he had provided payslips (from his new employment, which commenced with LCB Construction on 23 January 2018) to his legal advisors. A live issue at the hearing was whether a future loss of earnings of 12 months was just and equitable in all the circumstances. I dealt with this in some detail in the remedies judgment at §28-29. In particular, I emphasised that there was:

'*no good reason why this has not been provided. Mr Davies has had the benefit of legal representation who would have been aware of the need to provide this. It is also of concern that in oral evidence, Mr Davies was unable to say what his rate of pay actually was, and was unable to confirm that the stated (written) amount of £326 per week was accurate'*

I accepted the secondary submission of counsel for the Respondent that an award limited to one month would be reasonable, and only a modest award was made. Although the failure to produce wage slips at an earlier date was unfortunate, there were a number of other issues in Mr Davies' claim that remained in dispute, namely (i) what his gross weekly pay was and (ii) whether a loss of statutory rights should be included and if so, how much. A remedies hearing would still have been required irrespective of the future loss of earnings part of Mr Davies' claim.

(3) **Mr Ford**: the Respondent states (at §15 of its submissions) that it was significantly prejudiced by the late service of Mr Ford's statement in making its own investigations. The issue which this relates to (although not explicit in the submissions of the Respondent) is whether a future loss of earnings

of 12 months was just and equitable in all the circumstances. Issues of mitigation are matters of fact and the burden of proof is on the Respondent. Mr Ford did not have to prove he had mitigated his loss, but did provide evidence which was attached to his Schedule of Loss that was in the bundle which the Respondent had prepared [pg 130-133]. This confirmed a number of steps Mr Ford had taken to secure alternative employment. This would have been information known to the Respondent before the final hearing.

15. The Tribunal Orders of EJ Havard (21 August 2020) and EJ Brace (20 July 2021) should have been fully complied with. Dates set out therein were not aspirations, but mandatory directions to ensure that the claims were case managed effectively. It is highly regrettable that certain information came to light at a very late stage in proceedings, however I do not consider that the information which emerged had such a bearing on each of the three cases that would justify a Costs Order or a Wasted Costs Order being made.

16. Having regard to the wider canvas of this case, I also note that there may have been some confusion as ACAS appeared to have been contacting the Claimants directly when solicitors were instructed (see letter dated 13 November 2020 from the Respondents solicitor to the Claimants solicitor), and I also note the concerns raised by the Claimants in their written submissions regarding alleged unreasonable conduct by the Respondent in this litigation (§19 onwards). I have (for example) seen the email from the Claimants solicitor to the Tribunal dated 12 November 2020 stating (inter alia) that:

'Unfortunately the 2nd Respondent has not disclosed any documents or provided a remedy bundle which has hampered the production of witness statements.

We are awaiting the 2nd Respondents response to a request for the bundle before witness statements can be finalised and exchanged.

We have today asked the 2nd Respondent to contact us to try and agree a list of issues and agreed facts. We hope the 2nd Respondent will respond after which we shall be able to progress the matter'

17. It is not necessary or appropriate for me to make findings of who breached what Orders and when, or try and determine why (primarily from the order of EJ Harward on 25 August 2020 onwards) as I am very clear on the particular facts of these three cases, for the reasons set out above, that I should not exercise my discretion and make the rare and exceptional orders sought by the Respondent.

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Employment Judge E Sutton

Date: 11 May 2022

RESERVED JUDGMENT & REASONS SENT TO
THE PARTIES ON 19 May 2022

FOR EMPLOYMENT TRIBUNALS Mr N Roche