EMPLOYMENT TRIBUNALS

Claimant: **Mr D. Eiugbadebo**

Respondents: **Abellio London Limited**

Heard at : **London South via CVP** **On: 25 April 2022**

Before: **Employment Judge T R Smith**

Members **Mrs H. Carter**
Mr R. Singh

Representation

Claimant: Mr D.Ibdekwe (Trade union member)

Respondent: Ms R.Jones (Counsel)

JUDGMENT

The claimant is ordered to pay the respondent its costs limited to £2000.

Written Reasons Provided Pursuant to Rule 62(3)

The Issues.

1.The issues for the tribunal to determine were firstly whether to make an order for costs against the claimant on the basis that the claimant or his representative had acted vexatiously, abusively, disruptively or otherwise unreasonably in the way the proceedings had been conducted or, secondly in addition or in the alternative, whether to make a wasted costs order against the claimant's representative on the basis the respondent had incurred costs as a result of an improper or unreasonable act or omission.

The evidence.

2.The tribunal had before it an agreed bundle of documents consisting of 67 pages. A number in brackets is a reference to a page number in the bundle.

3.It also had the respondent's cost application, the claimant's opposition to that application and written skeleton arguments from both parties

4.Although the tribunal had granted permission in its case management order of 03 December 2021 for either party to file statements by a specified date, and had expressly reminded the claimant that it might be to his advantage if a costs order was made that the tribunal had details of his financial position before it, neither party relied upon a written statement.

5.However on the morning of the hearing Mr Ibdekwe made an application for leave for the claimant to give oral evidence as to his means. Ms Jones was neutral on the issue, subject to her right to cross examine. For the oral reasons given the tribunal granted the claimant's application.

The background.

6.This judgement should be read in conjunction with that of the tribunal dated 03 December 2021 ("the substantive hearing") as amplified in its written reasons drafted on 29 December 2021 and sent to the parties on 11 January 2022 (55 to 61).

7.It is helpful to briefly summarise some of those findings.

8.The tribunal found the respondent had failed to comply with its legal obligation to permit the claimant to be accompanied to a disciplinary hearing by his chosen companion in breach of section 10 of the Employment Relations Act 1999 and the respondent was ordered to pay the claimant compensation of £2.

9.The background to the claim was that the claimant was employed by the respondent as a bus driver and issued proceedings on 09 April 2020. He made various complaints under the Equality Act 2010, the blacklisting regulations and under sections 10 11 and12 of the Employment Relations Act 1999. The Claimant's representative in the claim form was named as Mr F. Neckles with the address for service being care of the PTSC union (more details of which are set out below).

10.As it transpired Mr J. Neckles represented the claimant throughout, including at the substantive hearing.

11.Following a preliminary hearing on 18 February 2021 the only complaint that was thereafter pursued was under section 11 of the Employment Relations Act 1999.

12.In essence this related to the claimant's complaint that he was refused permission to be accompanied by Mr F. Neckles to a disciplinary hearing on 29 January 2020.

13.Mr F. Neckles and his brother Mr J. Neckles are both senior members of a small trade union, the PTSC.

14.When the claimant attended the disciplinary hearing with Mr F. Neckles he was told that Mr Neckles could not be his representative but another official or fellow worker could. The hearing was adjourned and the claimant was represented by another member of the PTSC. He ultimately received an informal warning.

15.It is important to explain why the respondent had such a ban. Mr F. Neckles had been employed by the respondent but dismissed in 2013 and had issued tribunal proceedings against the respondent. He was represented by Mr J. Neckles in that claim. Those proceedings were struck out by Employment Judge Lamb who found Mr F. Neckles had fraudulently created a falsified witness statement to further his claim against the respondent and Mr F. Neckles had made threats to another employee.

16.Not only were the proceedings dismissed but a costs order was made, ultimately, in the sum of £20,000.

17.The respondent then barred Mr F. Neckles from their premises because the respondents believed he was not be trusted and due to his threats made to another employee. There was also a bar on Mr J. Neckles, but little turns on that point.

Additional findings of fact.

18.Both Mr J and Mr F Neckles have appeared as advocates in a number of reported tribunal cases and the tribunal accepted the submission of Ms Jones that they were frequent attenders at tribunal. They were not inexperienced advocates and Mr J. Neckles had some legal knowledge, evidenced by the fact he held an honours degree in law.

19.Mr F.Neckles did not attend the hearing today having written to the tribunal on 22 April 2022, stating that he was suffering from a medical condition. No doctors note or medical report was before the tribunal.

20.Mr Ibdekekwe indicated on behalf of the claimant that he did not waive litigation privilege.

21.The respondent had made an application to the Regional Employment Judge dated 04 March 2021 (01 to 06) asking for a *"contempt of court referral"* against Mr J.Neckles. The basis of that application appeared to be that there were two sets of multiple cases running simultaneously and Mr J. Neckles had advised Employment Judge Sharma, sitting in London Central on 22 October 2020, that he had no knowledge of duplicate proceedings in London South, which it was alleged was untrue. He had also made a statement to Employment Judge Andrews sitting in London South on 12 January 2021 as regards the subsequent withdrawal of the duplicate proceedings in London Central, which it was said, again, was untrue.

22.That application had not been addressed by the date of the claimant's substantive hearing.

23.On 31 May 2021(09), at the latest, the respondent wrote to the tribunal indicating that it did not dispute the fact that the claimant's chosen representative Mr F.. Neckles's was not permitted to attend the claimant's disciplinary hearing on 29 January 2020. That was copied to Mr Neckles. The respondent, prior to the hearing of the claimant's substantive hearing, agreed a statement of facts which conceded the fact the claimant had been denied his chosen representative.

24.In essence therefore by the substantive hearing, whilst the respondent had not made a formal admission, there was no dispute as to the factual matrix.

25.On 02 June 2021 Mr J. Neckles wrote to the respondent's solicitors by e-mail, marked without prejudice (62) stating *"in the light of the ET judgement discharged* (sic) *in the matter of Jimale -v- Abellio London Ltd today ….the claimant is minded to*

withdraw all his claims on the basis that all applications made within the above stated claims and any for cost (sic) *will not be pursued upon withdrawal".*

26**.Jimale** was a case undertaken by Mr Neckles which again related to a complaint under section 11 of the Employment Relations Act 1999, which the tribunal found proven, but awarded only nominal damages.

27.The respondent replied at 11.53 on the same day indicating that they would accept the offer but the contempt of court referral would still be pursued regardless (62).

28.On 02 June 2021 at 3.06 (64) Mr J.Neckles wrote to the respondent solicitors stating *"as your client is continuing with the contempt of court application, the claimant will be continuing with his claims accordingly…"*

29.The respondent solicitors replied on 03 June 2021 at 3.54 (65) and said *"it appears to us that you are attempting to use the withdrawal of this claimant's case as a tool to pressure the respondent into withdrawing the contempt of court application against you, and we consider this conduct to be highly unethical, not in the best interests of your client and moreover, tantamount to blackmail"*

30.An annual return dated 27 October 2021 for the PTSC union was before the tribunal (10 to 48).

31.It showed Mr F. Neckles was the general secretary with Mr J. Neckles its the legal secretary. It was a small union with approximately 267 members.

32.It had two principal sources of income, the first being described as *"income from court actions"* of £59,251 and then members contributions and subscriptions of £24,903.

33.A letter was sent by the respondent's solicitors on 01 December 2021 (50 to 52) to Mr J. Neckles. It was an open letter. The respondent stated *"we are writing to put you on notice that, should you/your client continue to pursue the above-mentioned claim and subsequently be awarded nominal or no compensation by the tribunal at the hearing on Friday, 3 December 2021, our client will make an application to the tribunal for a costs order to be made against you and your client under rule 76 of the employment tribunal rules of procedure 2013".*

34.The tribunal would interject that the letter made no reference to any claim under rule 80.

35.The letter then set out the respondent's reasoning why it considered such an application was likely to succeed including reference to previous tribunal determinations involving the Neckles brothers in section 11 claims where, although their members had succeeded on similar facts, compensation had been in a nominal sum of £2 and that there was no evidence of any loss to the claimant in this case.

36.Reference was made to the emails of 02 June 2021 and that the decision of the claimant to not withdraw his claim, having first offered to do so, could have nothing to do with the merits of his claim and it was only because the respondent would not withdraw the contempt of court referral made against Mr J. Neckles personally. The referral had no bearing upon the claimant's claim.

37.The letter also referred to the fact that there was repeated failures to indicate whether the claimant would be giving any witness evidence about his alleged losses.

38.The respondent stated its cost to date were £1500 plus VAT and if the matter proceeded to a full hearing a further £1000 plus VAT would be incurred. However if the claim was withdrawn in full by 12 pm on Thursday 02 December 2021 costs would not be pursued. That offer not accepted

39.The hearing proceeded with the outcome already recorded by the tribunal.

40.The claimant did not file a statement or attend the substantive hearing to give evidence as to any loss.

41.The claimant did not appeal the outcome of the substantive hearing.

42.It now appears that the claimant had been dismissed by the respondent, on or about 06 July 2021, for alleged gross misconduct and that is subject to new separate proceedings under case reference 2305643/2021. The claimant also has a claim pending against the respondents under case reference 2302004/2021 in respect of alleged detriments under section 12 of the Employment Relations Act 1999.

43.The legal work for the respondent for the substantive hearing was undertaken from the respondents' solicitors Clitheroe office in Lancashire and all work was undertaken by a solicitor of 3 years qualification. The respondent had an agreement

with its solicitors that tribunal hearings limited to one day would be remunerated at a rate of £1000 plus vat per day.

44.The respondent is vat registered.

45.The respondent schedule of costs placed before the tribunal today amounted to £4500 plus VAT (53 to 53A). Of that sum £1000 represented the attendance at the substantive hearing, £1000 represented counsel's fee at the hearing today, £1000 represented preparation for the costs hearing and £1500 represented 5 hours work at £300 per hour for work since receipt of the ET1.

46.In oral affirmed evidence the claimant confirmed he had not entered into any fee arrangement and that included a conditional fee agreement with either of the Neckles brothers or the PTSC.

47.The claimant's oral evidence as to his financial position can be summarised as follows.

48.He had the possibility of a financial benefit if his new tribunal claims succeeded.

49.He has worked as a PSV bus driver and as a delivery driver but remains unemployed. Whilst it may well be that the claimant's employment as a bus driver has been hindered by the alleged reluctance of the respondent to release his Licence for London (and this was an allegation that caught Ms Jones by surprise and upon which she was unable to take instructions. the tribunal considered that if the respondent had indeed retained the Licence for London there was no reason why it would not release the same, given it was in the respondent's interests that the claimant was earning if a costs order was made against him. Thus there is a realistic possibility the claimant will obtain alternative employment as a bus driver in the near future.

50.The tribunal (and this was a full panel) considered it was entitled to apply its own industrial knowledge as regards the demand for delivery drivers in London which is high. The claimant drives and can drive delivery vehicles up to 3.5 tons. Again the tribunal considered that there was a reasonable possibility the claimant could obtain alternative employment as a delivery driver in the near future.

51.Whilst the claimant suffers from high blood pressure that was treated by medication and he had been able to work for the respondent driving without any difficulty.

52.The claimant is a married man with three children but now separated from his wife

and pays no maintenance. His wife and children remain in the matrimonial home which was rented.

53.The claimant is currently dependent upon financial support from friends and is squatting at the moment. He has a limitation on his passport which prevents him obtaining state benefit.

54.The claimant has a GTC Vauxhall Astra which he valued at £2000.

55.The claimant had no substantial savings or capital assets. He had no outgoings as everything was paid for by friends.

Submissions.

56.The tribunal had full regard to both the oral and written submissions made by both parties. The mere fact the tribunal has not referred to each and every argument does not mean they were not given due consideration.

The claimant.

57.The principal points advanced on behalf of the claimant were as follows.

58.Firstly it was contended a wasted costs order could not be brought against Mr J Neckles as he did not act for profit.

59.Secondly that costs could not be pursued when a claim has been found to have merit, even though the compensation was nominal. Even at its highest the claimant could only have recovered two weeks' pay so little weight should be given to the fact there had been a nominal award. The award was within the range of awards the tribunal could have made. An award of costs should have been made against the respondent. (The tribunal noted that no such application had been made by the claimant).

60.Thirdly it was only at the substantive hearing that the respondents conceded a breach of section 10 Employment Relations Act 1999.

61.Fourthly the respondent's application was frivolous or vexatious and an abuse of process.

62.Fifthly there were previous tribunal awards in the range of £2 to £950 for similar matters so it was not unreasonable to pursue the matter. The fact there had been

similar cases was irrelevant as the tribunal had said in its substantive judgement it did not consider itself bound by them.

63.Sixthly the tribunal, at no stage indicated it was only minded to make a nominal award of damages.

64.Seventhly in seeking to pursue costs, the respondent was breaching the claimant's right under article 6 of the European Convention on Human Rights. A litigant would be dissuaded from pursuing their legal rights if they faced an award of costs if they did not consider they would receive more than nominal damages and a costs order would be contrary to the decision in **Shah and Shah [2021] EWHC 1668 QB**

The respondent.

65.Ms Jones submitted there had been unreasonable and/or abusive conduct by Mr J. Neckles and relied upon the same factual matrix for both the rule 76 and rule 80 application.

66.The respondent has admitted a breach of section 10 at the substantive hearing.

67.Mr J. Neckles had been involved in at least three similar cases where only a nominal award of £2 was made. The claimant's representative must have known that the claimant had suffered no loss particularly as he was accompanied at the adjourned disciplinary hearing by another member of the PTSC union and Mr Neckles knew he had no direct evidence from the claimant to adduce at the substantive hearing as to any loss.

68.Mr J. Neckles had indicated in an email of 02 June 2021 that the claimant was minded to withdraw and therefore knew at that stage the claim had no value but that stance only changed when the respondent indicated it will continue with its contempt of court referral. The fact there was mention of "without prejudice" in the correspondence did not prevent the documents being examined for the purposes of costs and in any event looked at in totality Mr J. Neckles was using that label to perpetrate an unambiguous impropriety.

69.On the assumption Mr J. Neckles was acting on instructions then whilst he had been willing to withdraw his claim the only reason it was then pursued was for Mr J. Neckles benefit and that was not reasonable conduct of the litigation.

70.The claimant had proceeded having been given a costs warning on 01 December 2021.

71.Even if the claimant was unemployed that was no reason not to make a substantial cost order, **Vaughan -v- Lewisham Borough Council [2013] IRLR 720.**

72.Turning to the rule 80 application Ms Jones made reference to the principles in **Ridehaugh -v- Horsefield 1994 CH 205**. She said that had Mr J. Neckles been a qualified solicitor or barrister his conduct would have been likely to have led to disciplinary proceedings.

73.Given that almost £60,000 of the PTSC's income was from *"income from court actions "* the tribunal should infer he was acting for profit.

74.Mr Neckles had not produced any evidence he was not acting for profit. She referred to a first instance decision of the tribunal in **Henry -v- London General Transport Service Ltd ET2301782/2015** (but did not produce a transcript). She fairly said that the case involved a determination as to whether Mr Neckles was acting for profit and the tribunal found in his favour, but that case was distinguishable given the information to be found in the annual return of the PTSC. She also referred to the decision of the EAT in **PTSC Union -v- JB Global limited (in administration) UKEAT/0212/2020** which she said was authority for the proposition that Mr J. Neckles and/or the PTSC had to make *"a good positive case"* that he/they were not acting for profit.

The law

75.The tribunal applied the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013.

76.The starting point is rule 76 which states: –

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…"

77.The next relevant provision is rule 80 which states: –

80.(1) A Tribunal may make a wasted costs order against a representative in favour of any party ("the receiving party") where the 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.

(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.

78.Finally the tribunal noted rule 84 which states: –

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.

79.From the voluminous case law the tribunal considered a number of fundamental principles could be gleaned.

80.Firstly costs are the exception rather than the rule and that costs do not necessarily follow the event – **Gee –v- Shell (UK) Limited [2003] IRLR 82** at paragraph 22.

81.Secondly just because costs are the exception rather than the rule does not mean that the case itself has to be exceptional in order for a tribunal to make an order – **Power –v- Panasonic (UK) Limited EAT 0431/04**.

82.Thirdly costs are compensatory and not punitive – **Lodwick –v- Southwark London Borough Council [2004] IRLR 544.**

83.Fourthly the tribunal must assume Mr J. Neckles was at all times acting on instructions. The tribunal noted that the claimant did not at any stage suggest he was not acting on his instructions. The conduct of the claimant's representative can provide the basis for award for costs as the claimant is fixed with the consequences of his choice of representative see **Taiwo -v- Olaigbe [2013] ICR 770.**

84.There was one preliminary matter referred to in the papers, although not argued by Mr Ibdekwe, which the tribunal should briefly deal with, which relates to the without prejudice documentation and whether the tribunal was permitted to have sight of the same. The tribunal preferred the argument of Ms Jones on this point that once a substantive hearing had concluded the tribunal was entitled to look at what took place by way of settlement discussions when examining the rule 76 threshold. If however the tribunal was wrong on that point it considered it could do so because the claimant's representative was utilising the *"without prejudice"* label to affect an unambiguous impropriety. In reaching this conclusion the tribunal has reminded itself that the bar is high. The claimant's representative was seeking to prevent allegations of serious misconduct, allegedly lying to two tribunals, from being examined and was utilising the claimant's claim as a vehicle to place pressure upon the respondent. Put succinctly Mr J.Neckles was saying that the respondents would face the burden and cost of defending the claimant's claim unless they desisted in their own allegations against him as to his alleged misconduct, which had nothing to do with the litigation. That threat was unambiguously improper. It is for those reasons the tribunal considered it could look at the correspondence. The tribunal should emphasise it makes no finding whatsoever as regards the truth or falsity of the respondents' allegations against Mr J. Neckles.

Discussion.

Rule 76.

85.There are three elements to a costs award. Firstly has the threshold criteria under rule 76 been surmounted, secondly, if so, should the tribunal decide to exercise its discretion to make an award and thirdly, if so, what should be the magnitude of any award.

86.In rule 76, unreasonableness has its ordinary meaning and is not the same as vexatious, see **Dyer –v- Secretary of State for Employment UKEAT/183/83.** This therefore implies that the threshold for vicariousness is higher. For vexatious conduct it must be established that the paying party knew there were no reasonable prospects of success whereas knowledge is not required simply for a finding of unreasonable conduct.

87.The key question is whether the claimant or MrJ. Neckles behaved unreasonably

and the tribunal reminded itself it is not for it to substitute its own view but it had to review the decision taken by the claimant or his representative.

88.Here it is appropriate to deal with the submissions made by both parties.

89.Mr Ibdekwe's best point was the claimant had succeeded. The tribunal did not accept, however, that merely because a claimant had succeeded that in itself was a bar to an order for costs being made; an example can be found in the decision in **Nicholson Highland Ware Limited –v- Nicholson [2010] IRLR 859.** Mrs Justice Smith (as she then was) said in the EAT:-

"The question to be addressed under [what is now Rule 76] *is not whether or not the paying party succeeded in any part of his claim. Such success would not, of itself, mean that he had not acted unreasonably. A party could have acted unreasonably and an award of expenses be justified, even if there had been partial (or whole) success. It will all depend on the circumstances of the individual case".*

90.The tribunal considered that there could be cases where it would be perfectly reasonable for a claimant to continue to pursue their claim even if there was little or no financial benefit. For example a care worker dismissed for gross misconduct may decide to pursue a tribunal claim even though they have been offered a basic and a full compensatory award. They may pursue the claim to obtain a declaration that they have been unfairly dismissed as such a judgement could be material to their professional registration and obtaining further work in the care sector.

91.This however was not such a case. The claimant did not attach any weight at all to obtaining a declaration, evidenced by the fact that he indicated in June 2020 that he was prepared to drop his claim provided the respondent did not pursue costs.

92.Allied to this point the submission of behalf of the claimant that the respondent only admitted liability at the substantive hearing loses considerable weight because, for the reasons already outlined, a declaration had no value to the claimant.

93.An order for costs would not deprive a party of a right to a fair hearing. Article 6 is concerned with access to justice and the claimant has had his right to a fair trial. The State is entitled to stipulate in what circumstances a costs order may be made and as the tribunal has already observed costs are very much the exception and not the rule. It is the claimant or the behaviour of Mr Neckles acting on his instructions which has triggered the application for costs. Just because a party may obtain only nominal

compensation does not mean that costs will automatically be awarded against that party. There has been no infringement of the claimant's rights under The Human Rights Act 1998.

94.The tribunal did not consider the case of **Shah -v- Shah** mentioned in the claimant's skeleton argument, although not referred to, at all, in oral submissions, assisted the claimant. **Shah** was a civil case subject to a completely different cost regime under the CPR where costs usually follow the event. That is to be contrasted with the employment tribunal where no such rule exists. More significantly in **Shah** there was a part 36 offer and much turned on the specific wording of that rule and whether the rejection by the appellant in that case defeated the potentially draconian cost consequences that followed . The respondent had made a part 36 offer where it indicated it would offer £1 and the claimants proceeded and recovered nominal damages of £10 but an award of costs was still made against them.

95.The tribunal does not consider that anything turned upon the fact that prior to judgement there was no indication given by the tribunal that a nominal award would be made. It would be rare, and potentially dangerous, for a tribunal to express a view, even provisional, until all the evidence and submissions had been heard. In any event the claimant knew there was a risk of a nominal order given he and Mr Neckless were aware of the first instance decision in **Jimale.** Mr Neckless would also have been aware of the first instance decisions in **Gnahoua -v- Abellio London Ltd 2303661/2025**, and **Batchelor -v- Abellio London Ltd 2301635/2015** where in each case a nominal award of £2 was made. In each case Mr Neckles must have known that it was likely that any damages would be nominal firstly because of the awards made in the above cases which while not binding on this tribunal indicated how tribunal' had approached similar cases, and secondly because he had no direct evidence from the claimant of any loss.

96.The tribunal is satisfied that the claimant or his representative behaved unreasonably and vexatiously .

97.It reached this conclusion for the following reasons.

98.The claimant had indicated in correspondence that he would withdraw his claim if there was no application for costs. That was accepted by the respondent. However the claimant also wanted the separate referral to the Regional Employment Judge to

be withdrawn. That had nothing whatsoever to do with the claimants claim against the respondent. It had no benefit to the claimant w, only to Mr J. Neckles.

99.The fact the claimant then decided to pursue matters having first decided that his claim was not worth pursuing was both unreasonable and vexatious . In effect the respondent was being put to the costs of continued proceedings when the claimant considered they had no value because the respondent would not withdraw their referral against Mr Neckles.

100.The conduct of the claimant was further unreasonable when on 01 December 2021 the respondent offered, even at that late stage to allow the claimant to withdraw with no claim for costs but specifically warned the claimant that if matters were pursued he was at risk of costs and in the tribunal's judgement fairly set out why there was such a risk. It was unreasonable in the circumstances of the claimant then still proceed..

101.The tribunal does not accept the submission of Ms Jones that the conduct in the claimant withdrawing his discrimination and blacklisting allegations at the preliminary hearing on 18 February 2021 showed that the claimant and Mr J. Neckless had acted unreasonably from the inception of proceedings. The mere withdrawal of weak claims at a relatively early stage, does not necessary amount to unreasonable conduct. Indeed there is a public interest in encouraging parties to withdraw weak claims well before trial given the saving in tribunal time and also costs. The tribunal also noted that at no stage when the claimant withdrew was any threat then made as regards costs.

102.Having determined that the threshold criteria were satisfied the tribunal then had to decide whether or not to exercise its discretion, which is a separate and discrete question.

103.There is no need to establish a precise causal relationship between the conduct and the costs claimed but a tribunal should have regard to the nature, gravity and effect of the unreasonable conduct and its effect on costs, see **McPherson –v- BNP Parabis 2004 IRLR 558.**The tribunal had to ask itself whether there was unreasonable conduct by the paying party in bringing, defending or conducting the case and if so, identify the conduct, what was unreasonable about it and what effect it had.

104.As the tribunal have already identified the unreasonable conduct was the

correspondence of June, the failure to withdraw following the costs warning in December and proceeding to trial knowing that the respondent's prediction that any damages would be nominal was bound to be correct given the claimant was not giving any evidence as to his losses.

105.Although the tribunal has found that the rejection of the offer in December was unreasonable it does not follow that the tribunal must automatically exercise its discretion make an award for costs. The tribunal is conscious that the principal in matrimonial law of **Calderbank –v- Calderbank** (i.e. without prejudice as to costs offers) does not directly apply in relation to costs in the tribunal, see **Kopel –v- Safeway Stores PLC 2003 IRLR753**.

106.However, **Kopel** does not say that **Calderbank** letters are irrelevant. In **Kopel**, Mr Justice Mitting stated that the Employment Tribunal *"must first conclude that the conduct of an appellant in rejecting the offer was unreasonable before the rejection becomes a relevant factor in exercising its discretion…."*.

107.The rejection of the offer was unreasonable because the claimant and Mr J. Neckles were only pursuing matters because of the contempt of court referral and without any genuine desire to obtain a declaration, and they knew that they would recover nothing or only a nominal sum as no evidence was placed before the tribunal as to proof of loss.

108.The effect of the claimant's conduct or that of Mr Neckles was such that the respondents were put to expense, certainly from June onwards.

109.The effect therefore was that the respondent incurred additional costs and that was causally linked to the unreasonable behaviour set out above.

110.The tribunal therefore concluded that it would exercise its discretion to make an award of costs.

111.The tribunal then turned to the magnitude of those costs. The tribunal had evidence from the claimant as to his financial position and considered they were a relevant factor to be taken into consideration both at the discretion and at the disposal stage.

112.The tribunal considered that it could carry out a summary assessment given the sum claimed was well within the tribunal's jurisdiction. In looking at the summary

assessment the tribunal has had regard to the published hourly rates for solicitors in the respondent's solicitor's locality and the time claimed.

113.The respondent was seeking costs of £4500 plus vat for work undertaken in respect of the case from its inception. The respondent cannot recover vat as it is vat registered.

114.The tribunal considered that at the earliest the unreasonable behaviour commenced was in June 2020 and not prior to that date for the reasons already stated.

115.The tribunal considered all the work undertaken in respect of the substantial hearing of £1000 was reasonable having regard to the fact it included an element of preparation. Similarly counsel's fee in respect of the costs hearing was also reasonable, again bearing in mind it include element of preparation.

116.The tribunal did not accept that there was a further £1000 worth of work properly recoverable against the claimant between the substantive hearing and the cost hearing. In any event the appropriate charging rate was not £300 but on £177 having regard to the location of the respondents' solicitors office and the grade of fee earner. The tribunal allowed two hours making a total of £354.

117.Although the tribunal would have been prepared to make an order for some costs from June the respondent has simply claimed a global sum of five hours at £300 per hour from inception and the tribunal could not discern what was pre-and what was post June and in the circumstances considered that the ambiguity should be decided in favour of the claimant.

118.The tribunal therefore assessed costs at £2354 in total.

119.The tribunal then factored in the claimant's ability to pay. Whilst the claimant is unemployed it accepted the submission of Ms Jones that, that does not mean there should only be a nominal order. The tribunal has already recorded why the claimant has reasonable prospects of obtaining other employment.

120.The claimant also has the possibility of compensation from the respondent if he succeeds in his two outstanding tribunal claims.

121.Pulling all these factors together the tribunal considered £2000 would be appropriate. That equates the value the claimant placed upon his car which he said

he was not using. That could therefore be sold to realise a sum to discharge the respondents' costs.

Rule 80.

122.It was submitted that a wasted costs order should be against Mr Nicholls and/or the union. The tribunal did not accept that in this particular case an order could properly be pursued against the union. On the claimant's claim form the representative was given as Mr F. Neckles and while the union's address appears, that was an address for service on Mr Neckles. The tribunal is satisfied that this was not a claim that was brought by the union but a claim brought by the claimant with his representative being Mr Neckles.

123.They may be cases where an order can be made against a union, for example where it brings a collective redundancy claim but this was not one of them.

124.It is a precondition to a successful application under rule 80 that the representative is acting for profit.

125.The key issue for the tribunal was determined whether Mr J. Neckles was acting in for profit.

126.The tribunal noted that case law pointed against trade union officials acting for profit.

127.Whilst another employment tribunal in **Henry -v- London General Transport Service Ltd ET2301782/2015** had apparently investigated whether Mr Neckles acted for profit and had found in his favour this tribunal cannot attach great weight to that judgement, firstly because it is only persuasive and not binding but more significantly because a full transcript was not before the tribunal so it could understand the reasoning. However the tribunal cannot completely overlook that another tribunal has found that in the past Mr Neckles was not acting for profit

128.Significantly in this case the tribunal had the evidence of the claimant who was emphatic that he paid no sums to either the union or Mr Neckles or entered into any contingency or conditional fee agreement and the tribunal found the claimant to be a broadly reliable witness.

129.Ms Jones invited the tribunal to infer that Mr Neckles would not have acted for the claimant had it not been for profit. The tribunal rejected that submission. Firstly as the

claimant was a member of the trade union one of the benefits a union member would normally expect would be free representation. Mr J. Neckles actions were consistent with him acting on behalf of his member as a trade union official. Further the tribunal considered that given the very lengthy litigation history between Mr J.Neckles and the respondent, and the level of animosity that existed Mr J.Neckles would have litigated in any event because of his dislike for the respondent, without the need for any form of monetary recompense.

130.The Tribunal did not accept Ms Jones's submission that the decision of the EAT in **PTSC Union -v- JB Global Ltd (in administration) UKAEAT/0212/2020** established the point she contended namely the burden of proof was upon Mr Neckles and/or the union to show he or they was not acting for profit. In the tribunal's judgement the EAT was not looking at whether there was a burden of proof on a person/union to show they were not acting for profit. The case concerned solely the issue of vat on costs. At paragraph 41 HHJ Auerbach noted that the union had not challenged the finding at first instance that there burden of proof was upon them to show they were not acting for profit and declined to deal with the point stating *"this is not being challenged on appeal, and therefore I do not in any event need to decide whether that is the correct approach to the burden of proof on this issue"*

131.At its highest all Ms Jones can point to is that in **PTSC** is at the first instance an Employment Judge considered there was a burden on the union to show it had not acted for profit, because if not, it will be difficult for the other party to show that it was.

132.The tribunal did not have a copy of the first instance decision and therefore is unaware of the full reasoning utilised by the learned Employment Judge. This tribunal concluded that with respect to the learned Employment Judge a respondent could obtain evidence, for example by means of an application for specific disclosure. The tribunal therefore declined to follow the first instance decision for the above reasons.

133.In any event, in this particular case, if the tribunal was wrong on the above points, it was distinguishable because the tribunal had the credible, direct evidence of the claimant.

134.The tribunal concluded that the evidence before the tribunal pointed away from, in this particular case, Mr Neckles, acting for profit. This however is a finding on these particular facts. Another tribunal, on different facts may very reasonably reach a

different conclusion

135.It follows therefore that the wasted costs order must be dismissed as the tribunal does not have jurisdiction.

136.The tribunal has not lost sight of the fact that the rule 76 unreasonable/vexatious behaviour may have been by Mr J. Neckles but the wording of section 76 is such that liability is still fixed on the claimant because the rule encompasses the acts or omissions of a representative. The tribunal noted at no stage did the claimant in evidence blame Mr Neckles or suggest he was acting contrary to his instructions.

04 May 2022
Employment Judge Smith