EMPLOYMENT TRIBUNALS

Claimant: **Mr. Adrian Finn**

Respondent: **Community Inclusive Trust**

Heard at: **Nottingham (In Chambers)**

On: **24th May 2022**

Before: **Employment Judge Heap**

Representation
Claimant: **Written representations**
Bird & Co: **Written representations**
Respondent: **Written representations**

JUDGMENT AT A COSTS HEARING CONDUCTED ON THE PAPERS

1. The Respondents application for costs against the Claimant is refused.

2. The Respondents application for wasted costs against Bird & Co is refused.

REASONS

BACKGROUND & THE ISSUES

1. This hearing followed on from a Reserved Judgment ("The Judgment") in which I dismissed all of the complaints which the Claimant had brought against the Respondent. Those were complaints of automatically unfair dismissal under Section 103A Employment Rights Act 1996; wrongful dismissal and a breach of contract in respect of outstanding expenses which the Claimant alleged were owed to him.

2. Following promulgation of the Judgment the Respondent made an application for costs and also for wasted costs against the Claimant's solicitors, Bird & Co. I do not repeat the whole of the application here but in short it is predicated on the Respondent's contention that the claim had no reasonable prospect of success and/or that the Claimant or his representative acted unreasonably in the conducting of the proceedings. It was confirmed at an earlier Preliminary hearing

that there are five bases upon which the application is made which are as follows:

a. That time was wasted with having to deal with incorrect or incomplete hearing bundles and witness statements (paragraph 3 and 13 of the application);
b. That the claim had no reasonable prospects of success (paragraph 5 and 10 of the application);
c. That there had been a failure to obtain adequate instructions and this this caused delay in the hearing as a consequence (paragraph 6 and 7 of the application);
d. That the evidence and presentation of the Claimant had been evasive and unsatisfactory and that it is also alleged that the Claimant's evidence had been untruthful (paragraphs 8, 9, 10 and 15 of the application); and
e. The way in which the Claimant's case had been presented was unreasonable (paragraph 11, 12 and 14 of the application).

3. The Respondent previously confirmed at a Preliminary hearing last December that no legal costs were sought by the Respondent in connection with representation by Croner because those were covered under the terms of an insurance policy. The basis of the application is that the Respondent seeks reimbursement of expenses incurred in respect of witnesses who attended the hearing for the duration that they were present.

THE HEARING

4. The parties were agreed at a Preliminary hearing to make Orders for the disposal of the costs applications that they should be determined on the papers. I have taken into account all representations made by all parties before determining the applications.

THE LAW

Applications for costs

5. Rules 74 to 84 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("The Regulations") deal with the question of whether an Employment Tribunal should make an Order for costs.

6. Rule 76 sets out the relevant circumstances in which an Employment Judge or Tribunal can exercise their discretion to make an Order for costs and the relevant parts of that Rule provide as follows:

> **"*When a costs order or a preparation time order may or shall be made***
>
> ***76.—*** *(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—*
>
> *(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or*

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

7. In short, therefore, there is discretion to make an Order for costs where a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing or conducting of the proceedings. Equally, the discretion is engaged where a party pursues either a claim or defence which has no reasonable prospect of succeeding or, to put it as it was termed previously, where a claim or defence is being pursued which is "misconceived". That latter issue is the only one that I am considering for the purposes of this Judgment.

8. It should be noted that merely because a party has been found to have acted vexatiously, abusively, disruptively or unreasonably or where a claim or response has no reasonable prospect of succeeding, it does not automatically follow that an Order for costs should be made. Once such conduct or issue has been found, a Tribunal must then go on to consider whether an Order should be made and, particularly, whether it is appropriate to make one. When deciding whether an Order should be made at all and, if so, in what terms, a Tribunal is required to take all relevant mitigating factors into account.

Applications for wasted costs

9. Rules 80 to 82 of the Regulations deal with wasted costs. Rules 80 and 81 provide as follows:

"When a wasted costs order may be made

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

(a)as a result of any improper, unreasonable or negligent act or omission on the part of the representative; or

(b)which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay.

Costs so incurred are described as "wasted costs".

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

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

Effect of a wasted costs order

81. *A wasted costs order may order the representative to pay the whole or part of any wasted costs of the receiving party, or disallow any wasted costs otherwise payable to the representative, including an order that the representative repay to its client any costs which have already been paid. The amount to be paid, disallowed or repaid must in each case be specified in the order".*

10. The decision in **Ridehalgh v Horsefield 1994 Ch 205** endorses the adoption of a three stage test when a wasted costs application is made: (i) Has the legal representative of whom complaint is made acted improperly, unreasonably or negligently? (ii) If so, did such conduct cause the applicant to incur unnecessary costs? (iii) If so, is it in all the circumstances of the case just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs?

11. The Court of Appeal in **Ridehalgh** (as subsequently approved by the House of Lords in **Medcalf v Mardell & Ors 2002 All ER 721, HL**) examined the meaning of 'improper', 'unreasonable' and 'negligent' as follows:

> *"'improper' covers, but is not confined to, conduct that would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty;*
>
> *'unreasonable' describes conduct that is vexatious, designed to harass the other side rather than advance the resolution of the case; and*
>
> *'negligent' should be understood in a non-technical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession".*

CONCLUSIONS

12. I begin with the question of whether an Order for costs should be made against the Claimant. The first stage of that test is whether the claim had no reasonable prospect of success. I cannot in the circumstances agree with the Respondent that the case was hopeless and that the Claimant and/or his solicitor should have been aware of that from the get go. It was clear after the dust had settled that it was a weak claim in light of all of the evidence - and particularly the witness evidence - but there were clear triable issues. The Claimant was entitled to have those matters ventilated and tested with a view to the Tribunal determining if he had been unfairly dismissed. I therefore reject the assertion that the claim was misconceived or had no reasonable prospect of success so as for the costs discretion to become engaged.

13. I turn then to the second limb of the application against the Claimant which was that he had lied. If a party has lied then, depending on the surrounding circumstances and the effect that it had, that can amount to unreasonable conduct. However, I did not at any point find that the Claimant had lied during

the course of his evidence. It is correct to say that I made a number of observations about the credibility of his evidence. That is not unusual when witnesses have diametrically opposed accounts. However, I made no finding that the Claimant had lied and whilst the Respondent might seek to infer that from my observations on credibility, the two are not the same thing.

14. It follows that I do not find that the claim either had no reasonable prospect of success or that it was pursued or conducted unreasonably on the above grounds and on that basis the costs application against the Claimant fails.

15. I turn then to the application for wasted costs against Bird & Co. Such applications are often difficult to defend and to deal with given that the representatives are constrained by legal professional privilege. However, Mr. Hamilton does not rely on any issue of privilege nor insofar as the position on delay is concerned if that something which needs to concern me given that the situation relates to matters of preparedness for which blame could not lay with the Claimant.

16. I need to consider the three stage test in **Ridehalgh** to determine this part of the application. The first question is whether Bird & Co acted improperly, unreasonably or negligently in these proceedings. There is not in my view any question, given the meaning of those terms in the context of an application for wasted costs, that any conduct was improper or unreasonable. The real question is whether there was negligent conduct. I remind myself that in this context that refers to a failure to act with the competence reasonably to be expected of ordinary members of the profession.

17. It is fair to observe that this was probably one of the most shambolically prepared cases that I have seen. That is not a remark that I make lightly and it is not directed solely at the Claimants side. As I set out in the Judgment the Respondent had been in breach of Orders and had not turned their minds properly to disclosure such that additional documents had to be disclosed and admitted into evidence on more than one occasion.

18. However, as set out in the costs application a great deal of time was wasted having to deal with incorrect or incomplete hearing bundles and witness statements and that fault did lie with Bird & Co. In this regard, whilst I was reading into the papers and the witness statements it became clear that the hearing bundles which had been provided by the Claimant's solicitors did not contain a number of the documents listed on the bundle index nor did a number of page references in the Claimant's witness statement appear either in the index or otherwise the bundles themselves. There were no less than 20 issues identified with the bundle in this regard. Whilst Mr. Hamilton referenced issues with the Covid-19 pandemic as being the likely cause of that state of affairs, the case should in fact have been trial ready in March 2020 and was only postponed because he was shielding and as such it is difficult to see how the pandemic could be the cause of deficiencies in the hearing bundles and the numbering referred to in the Claimant's witness statement.

19. Moreover, for reasons which I was ultimately unable to get to the bottom of it transpired on two separate occasions that Mr. Hamilton and the Claimant were working from different copies of the witness statements for the Respondent. Further time was therefore lost seeking to rectify those matters. It was of course

for Mr. Hamilton to ensure that he had the correct witness statements and that those were the ones that he had supplied to his client for use at the hearing.

20. More importantly than that, however, is the fact that nowhere in the Claimant's witness statement did it set out what he had actually said or done that was said to have amounted to the making of protected disclosures.

21. It was not even said whether the disclosures relied on were made orally or in writing and, in the case of the former, what exactly the information was that the Claimant was said to have actually disclosed. None of that was in the Claimant's otherwise very lengthy witness statement (which ran to some 40 pages) either at all or in sufficient detail to allow cross examination to be effective and findings of fact to be made.

22. Of the sole (later identified) protected disclosures relied upon that was actually in writing, that document was omitted from the hearing bundle prepared by Mr. Hamilton and had to be located and inserted. Another alleged disclosure was identified that was not pleaded at all and although it was said by Mr. Hamilton that there was to be an application to amend the claim that in fact never materialised.

23. It was plain that Mr. Hamilton could not have taken proper instructions from the Claimant about the alleged disclosures because if he had he would not have needed an adjournment in order to take further instructions and would have been able to set those out when asked about them. Without having those instructions it is difficult if not impossible to comprehend how advice could have been given to the Claimant as to whether what he had alleged that he had said could amount to a protected disclosure and whether he had been dismissed because he had made them. In fact, very little thought appeared to have been given to the issue of protected disclosures and the burden of proof. Mr. Hamilton spent very little time in otherwise lengthy cross examination dealing with them and had to be prompted to do so. He also appeared largely uninterested in them at the point of his final submissions and the focus appeared to concentrate on issues more akin to an "ordinary" unfair dismissal claim which the Claimant did not have the standing to bring because of his length of service.

24. In my view, the catalogue of failures on the part of Bird & Co, but particularly the failure to have properly taken instructions on the very foundation of the claim before the hearing, represented a failure to act with the competence reasonably to be expected of ordinary members of the profession and therefore they did act negligently in these proceedings.

25. However, if Mr. Hamilton had taken instructions about those matters well before the hearing (as he should clearly have done) he would no doubt have received the same answers from the Claimant. Whilst time would not have been wasted at the hearing itself there is nothing at all to suggest that the Claimant would not have proceeded and the hearing would have been avoided altogether.

26. Therefore, the full costs which are claimed by the Respondent of attendance by witnesses on all days of the hearing that they were present do not arise. The question is whether the Respondent should have an Order for costs made in their favour in respect of the time that was occasioned in resolving the issues with the

hearing bundle, witness statements and to take instructions in respect of the disclosures which were alleged.

27. The next question to turn to when considering the wasted costs application is whether that conduct negligent caused the Respondent to incur unnecessary costs. Mr. Hamilton submits that the Respondent's witnesses were at work and presumably getting paid and so they have not incurred any expenses and as such there is nothing to claim. However, as observed at the last Preliminary hearing the basis of the Respondent's application is that it has had to pay the witnesses during the course of their evidence/attendance when they would otherwise have been undertaking their normal duties. The loss is therefore said to be the sums which the Respondent has paid to their witnesses for time that they were not working. Rule 75(1)(c) provides that a costs Order can include a payment made by a party to "*another party* (my emphasis) *or a witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual's attendance as a witness at the Tribunal".* I am therefore satisfied that there is a basis upon which the costs claimed could be Ordered to be paid.

28. That brings me back to the question of whether the negligent conduct has caused the Respondent a loss. I am not convinced that it has. In this regard, given that the Respondent was represented, the witnesses were only required to be in attendance for the time that they were giving evidence rather than attending the hearing throughout.

29. It was, in my view, a personal choice for the witnesses to be present at other times than when they were required to give evidence. During periods of delay for instructions to be taken, issues with the witness statements to be resolved and for the problems with the hearing bundle to be remedied they could have continued to undertake their normal duties.

30. The position might possibly have been different if this was a hearing which had been conducted in person, but it was not. It was a remote hearing conducted by CVP. There was no need for witnesses to be present throughout and, particularly, not during times that there were delays taking instructions. It would not have been difficult for Mr. Hoyle to have remained in contact with the witnesses and let them know when they would be required to log in to give their evidence.

31. Moreover, I had invited submissions from the Respondent, which do not appear to have been forthcoming, as to how it is said that the claim for costs of the sort claimed in this regard could be Ordered given the provisions of Rule 75(1)(c) Employment Tribunals (Constitution & Rules of Procedure) Regulations. That again relates to attendance as a witness. At the times when there was delay (and at all times when their evidence was not being given) the individuals who did give evidence for the Respondent were in effect observers.

32. For all of those reasons I do not accept that during the periods of delay the Respondent did incur any costs as a result of the negligent conduct of Bird & Co because it was their personal choice to remain logged into the hearing for the full duration or more of it than was necessary to give their evidence.

33. However, even if I had found that the Respondent had suffered a loss, I would not at the third stage of the **Ridehalgh** test have determined that it was just to

Order Bird & Co to compensate the Respondent for the relevant costs. That is for the same reasons as I have already given in that it was the personal choice of those witnesses for the Respondent to choose to remain for longer periods than they had to do so and not just whilst they were giving their evidence. I do not consider in such circumstances that it would be just to visit the costs of that choice on the Claimants solicitors.

34. Finally, I feel obligated once again to pay reference to the way in which both sides in this unfortunate dispute have conducted themselves. It is plain that neither has heeded what I said about those matters in the Judgment following the liability hearing and continue to be unable to conduct themselves with the professional courtesy that they should towards the other. Whilst I do not doubt that they are committed to their respective clients, conducting litigation in a combatative and points scoring manner rarely serves to further the interests of either party and they have done themselves no credit. There is perhaps an irony to part of the Respondent's submissions as to personal attacks by Mr. Hamilton upon Mr. Hoyle who represented the Respondent. It was a feature of a most memorable hearing for all the wrong reasons that this manifested itself on both sides with time wasted by both as a result. It is sincerely hoped that the representatives will do their utmost in the future to avoid any repletion of such matters.

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Employment Judge Heap

Date: 26th May 2022

Note:

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