RM

EMPLOYMENT TRIBUNALS

Claimant: **Phyllis Appiah-Kubi**

Respondent: **Abbeyfield Society t/a Abbeyfield**

Heard at: **East London Hearing Centre (by CVP)**

On: **20 May 2022**

Before: **Employment Judge Housego**
Tribunal Member Forecast
Tribunal Member Lush

Representation

Claimant: Daniel Ibekwe, of PTSC Union

Respondent: Tanya Aynsley, people support services manager of the Respondent

JUDGMENT

1. **The Claimant is ordered to pay to the Respondent costs assessed at £2,000.**

2. **PTSC is ordered to pay to the Respondent wasted costs of (a further) £10,000.**

REASONS

1. A successful Respondent may claim costs. A wasted costs order may be made by a Tribunal against the representative of a party.

The applicable Rules

2. Rule 76 deals with costs orders, Rule 80 deals with wasted costs orders.

3. The two Rules state:

> **When a costs order or a preparation time order may or shall be made**
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> **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—
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> (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
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> (b) any claim or response had no reasonable prospect of success.
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> (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.
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> (3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if—
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> (a)the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and
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> (b)the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment.
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> (4) A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer's contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party.
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> (5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing.
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> **When a wasted costs order may be made**
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> **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—
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> (a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative; or
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> (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.
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> 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.
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> (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.

4. Means may be relevant – Rule 84. The Tribunal may (but is not obliged to) take account of the means of the paying party, or representative.

5. Costs do not follow the event in Employment Tribunals. For a costs order to be made against a party, that party or representative must have behaved

unreasonably (as described in Rule 76(1)(a) or Rule 80(1)(a) (or the case put forward by that party must have had no reasonable prospect of success). The costs application asserts that the claims (other than the small claim about being denied a specific representative) were all bound to fail, and had no basis on which they could succeed.

6. If the Tribunal finds this to be so, the Tribunal must consider whether or not to make a costs order. The Tribunal then has a discretion as to whether to order costs or not. The Tribunal must consider all the circumstances when exercising that discretion.

7. If it decides to order costs it may summarily fix the amount, up to £20,000, or order detailed assessment of costs (Rule 76). There is no power to order detailed assessment in a wasted costs order, as the amount must be specified in the order (Rule 81). There is no cap on a wasted costs order.

8. A costs order against a Respondent and a wasted costs order against a representative can be made in the same case. The only restriction is in Rule 75(3) which says that a costs order and a preparation time order may not both be made in favour of the same party in the same proceedings.

Principles to be applied[1]

9. McPherson v BNP Paribas (London Branch) (1) [2004] EWCA Civ 569 (13 May 2004, paragraphs 39-41:

> 39. Ms Mc Cafferty submitted that her client's liability for the costs was limited, as a matter of the construction of rule 14, by a requirement that the costs in issue were "attributable to" specific instances of unreasonable conduct by him. She argued that the tribunal had misconstrued the rule and wrongly ordered payment of all the costs, irrespective of whether they were "attributable to" the unreasonable conduct in question or not. The costs awarded should be caused by, or at least be proportionate to, the particular conduct which has been identified as unreasonable.
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> 40. In my judgement, rule 14 (1) does not impose any such causal requirement in the exercise of the discretion. The principle of relevance means that the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion, but that is not the same as requiring BNP Paribas to prove that specific unreasonable conduct by Mr McPherson caused particular costs to be incurred. As Mr Tatton-Brown pointed out, there is a significant contrast between the language of rule 14(1), which deals with costs generally, and the language of rule 14(4), which deals with an order in respect of the costs incurred "as a result of the postponement or adjournment." Further, the passages in the cases relied on by Ms McCafferty (**Kovacs v. Queen Mary & Westfield College** [2002] IRLR 414 at para 35 **Lodwick v. London Borough of Southwark** [2004] EWCA Civ 306 (at paras 23-27) and **Health Development Agency v. Parish** EAT/0543/03, BAILII: [2003] UKEAT 0543_03_2410, LA at para 26-27) are not authority for the proposition that rule 14(1) limits the tribunal's discretion to those costs that are caused by or attributable to the unreasonable conduct of the applicant.
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> 41. In a related submission Ms McCafferty argued that the discretion could not be properly exercised to punish Mr McPherson for unreasonable conduct. That is undoubtedly correct, if it means that the indemnity principle must apply to the award of costs. It is not, however, punitive and impermissible for a tribunal to order costs without confining them to the costs attributable to the unreasonable conduct. As I have explained, the unreasonable conduct is a

[1] All the guidance is taken from LexisNexis PSL, and I acknowledge its derivation. Not all of it is relevant to this case, but it is helpful as it sets out the principles overall, which gives context.

precondition of the existence of the power to order costs and it is also a relevant factor to be taken into account in deciding whether to make an order for costs and the form of the order.

10. For a costs order:

    1. *there is nothing in the wording of the ET Rules to limit the costs that may be awarded by an employment tribunal to those costs incurred at a particular stage of the proceedings or indeed to costs incurred after they have begun*

    2. *the Tribunal's discretion to award costs where a party has conducted the proceedings in an unreasonable way is not limited to those costs that are caused by, or attributable to, the unreasonable conduct of that party*

    3. *the Tribunal is not required to identify the particular costs caused by particular conduct; rather it should look at the whole picture of what happened in the case and the effects of such conduct*

    4. *the conduct of the litigation by the party applying for the costs order can be taken into account*

    5. *the conduct of a claimant in rejecting a 'Calderbank' type offer of settlement can be taken into account, provided the claimant is found to have been unreasonable in rejecting the offer*

    6. *although the CPR[2] do not apply directly to Employment Tribunal proceedings, Tribunals should exercise their powers under the ET Rules in accordance with the same general principles which apply in the civil courts, but they are not obliged to follow the letter of the CPR in all respects.*

11. Costs orders are not to be imposed for punitive reasons, and the Tribunal is entitled, but not obliged, to consider the ability of the paying party's ability to pay. It should give reasons.

12. For wasted costs orders:

The government guidance on employment tribunal powers (derived from the seminal case of Ridehalgh v Horsefield [1994] Ch 205) states that:

1. *'improper' covers but is not confined to conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice and other serious professional penalty*

2. *'unreasonable' describes conduct that is vexatious or designed to harass the other side rather than advance the resolution of the case*

[2] Civil Practice Rules

3. *'negligent' should be understood in a non-technical way to denote failure to act with the competence reasonably expected of ordinary members of the legal profession.*

13. The Tribunal should apply a three-stage test in determining whether to make a wasted costs order:

    13.1. has the representative of whom complaint is made acted improperly, unreasonably or negligently?

    13.2. if so, did such conduct cause the party applying for the order to incur unnecessary costs?

    13.3. if so, is it in all the circumstances just to order the representative to compensate that party for the whole or any part of the relevant costs?

14. The following further guidance summarises the correct approach to wasted costs applications:

    1. *the wasted costs jurisdiction should only be exercised with great caution and as a last resort. Both the aggrieved party and the court or tribunal have other powers to remedy the situation by invoking summary remedies such as striking out. The making of a wasted costs order should not be the primary remedy*

    2. *a wasted costs order should be made only if the court or tribunal is satisfied that the conduct of the representative was improper, unreasonable or negligent*

    3. *a wasted costs order should not be made unless it is supported by evidence. For example, where there has been a failure in disclosure, it cannot simply be assumed that there was either negligence on the part of the representative concerned or that the failure in disclosure amounted to a failure by the representative in his or her duty to the court*

    4. *a representative should not be held to have acted improperly, unreasonably or negligently simply because he acts on behalf of a party who pursues a hopeless case*

    5. *the Tribunal can only make a wasted costs order in such a case if it is shown that:*

        1. *the representative has presented a case which he regards as bound to fail, and*
        2. *in so doing, he has failed in his duty to the court, and the proceedings amount to an abuse of the process*

    6. *behaviour by a representative will amount to an abuse of process if eg:*

1. *he uses litigious procedures for purposes for which they were not intended, such as the knowing pursuit of dishonest cases, or the pursuit of proceedings for reasons unconnected with success in the litigation*

2. *he evades rules intended to safeguard the interests of justice, eg by knowingly conniving at incomplete disclosure of documents*

7. *a representative owes no duty to the opposing party: only failures in duty to the court or tribunal can provide a foundation for wasted costs applications*

8. *the wasted costs jurisdiction should not be applied in such a way as to undermine the willingness of professional advocates to represent litigants, either by creating conflicts of interest or by exposing the advocates to pressures which will tend to deter them from representing certain clients or from doing so effectively. At times, the proper discharge by the advocate of his duties to his client will be liable to bring him into conflict with the court: the advocate acting in good faith in such circumstances is entitled to protection*

9. *it must be shown that the conduct complained of caused the party applying for the wasted costs order to incur unnecessary costs. For example, if a wasted costs order is sought relying on a representative's failure to advise his client during trial that the case has become hopeless, such an application could not succeed if it were established that the litigant would have pursued the trial to the bitter end despite receiving that pessimistic advice*

10. *the court or tribunal must exercise a discretion at two stages:*

    1. *it must first consider whether the application is justified and proportionate, having regard to the merits and circumstances*
    2. *if that first test is passed, the application will proceed to a hearing at which the court or tribunal has to:*

        1. *decide whether the central prerequisites for an order are made out, and*
        2. *if they are made out, exercise its discretion as to whether to make an order or not.*

11. *despite the care with which wasted costs applications need to be approached, tribunals should not be discouraged from making wasted costs orders in an appropriate case. Despite the various cautions and caveats about its use, the weapon of the wasted costs order is a valuable one, which the rule-maker intended should be used in proper cases. The need to observe the essential requirements of a fair procedure and good reasons need not involve undue formality or elaboration and should not operate as a deterrent.*

The application

15. A costs order is sought because the claims that failed are said to have had no prospect of success, for the reasons set out in a costs warning letter sent to the Claimant's representative, dated 28 June 2021, and in an email of 03 September 2021, and in the application made by email dated 08 October 2021.

16. The wasted costs application is on the basis that the Respondent incurred costs as a result of the improper, unreasonable or negligent act on the part of the Claimant's representative, who holds himself out as an expert, but advanced a claim for which there was no sound evidential basis. It was, the Respondent says, impossible for the claim of race discrimination (S26 harassment) to succeed. In the race claim this was not because the Claimant's evidence was not believed, but because no case at all was put as to why any treatment might have any connection with race.

17. The total cost incurred was £20,276.00 plus vat of £5,455.20, a total of £25,731.20. A schedule of costs was annexed to the application.

18. The application points to the costs warning letter of 28 June 2021.

    18.1. It points out [correctly] that *"Employment Judge Burgher pointed out during the preliminary hearing on 4 February 2021 that the Claimant would need an inferential or evidential basis to establish that the disciplinary investigation could be said to relate to the Claimant's race. Indeed he commented that this was something the Claimant's representative should reflect on".*

    18.2. It then sets out an analysis of the case which accurately predicts the course of this Tribunal's decision on the race and trade union claims (but not in the representation claim).

19. The Respondent's solicitor's letter of 21 June 2021 accurately predicts the course of the race discrimination case and set out reasoning which accurately predicted the reasons found by the Tribunal for dismissing that claim. The solicitor sent a further email to Mr Neckles before the hearing, on 03 September 2021 warning as to costs and giving an estimate of costs to be incurred. It is not said that these were not received. The email of 03 September 2021 refers to the letter of 28 June 2021, and (correctly) states that the bundle of documents contains nothing which supports the claims.

Response

20. Mr Neckles responded to the application by email dated 18 October 2021. He wrote:

    20.1. There was nothing vexatious or unreasonable in the manner in which the proceedings were brought or conducted.

    20.2. The trade union claim was lost but no claim is brought about the costs of defending that action.

20.3. The claim under S26 was arguable and the fact that she was not successful does not mean that costs should be awarded against her.

20.4. If the Respondent had genuinely thought the claims weak they should have applied for a deposit order.

20.5. "…the costs warning they issued … was on the basis of strategic ambiguity in order to legitimise a cost application … at a later date if the Claimant were not successful…"

20.6. The application was *"predicated on revenge due to the claims that her trade union and Tribunal Representative brought against it."*

20.7. Mr Neckles had not acted for profit in the case and so there was no jurisdiction to make an order against him personally.

20.8. The Respondent has no costs as they insure against the expense of such claims.

20.9. On oral hearing was sought.

21. Further written representations were made by Mr Ibekwe on the day of this hearing. Those submissions add that Mr Neckles was not acting for profit, and nor was the PTSC Union, and so Rule 80(2) meant that there could be no wasted costs order made.

22. The Tribunal enquired of Mr Ibekwe whether the conflict of interest implicit in the application had been addressed (the representative was on notice that it was said that they had behaved unreasonably, and that there was an order for costs sought against the Claimant as a result). Mr Ibekwe said that it was accepted that this was a potential conflict of interest, but that the Tribunal could deal with it. I pointed out that it was not possible for the Tribunal to do so, and that this was a matter for him. He elected to proceed.

23. The oral submissions of Ms Aynsley were short. The judgment spoke for itself. The application had been set out in written form. Abbeyfield is a charity and so the further expense of representation had not been incurred. They had incurred the costs: there was no insurance policy or other way of defraying the expense. Abbeyfield prided itself on its ethical practices, and it had to defend the race discrimination claim fully. As the Tribunal had noted, in the circumstances the person said to have harassed Ms Appiah-Kubi had no choice other than to refer the matter to a disciplinary hearing. There was, even now, no basis put forward on which, let alone evidence to support, an assertion that this was racial harassment.

24. Mr Ibekwe said that a different Tribunal could, on the same evidence, have come to a different conclusion. The Tribunal had not permitted it to be advanced that there had been previous matters of harassment in disciplinary affairs, which was the backdrop to the claim. There had been no submission of no case to answer. That the claim did not succeed did not mean it had no reasonable prospect of success. The person taking the disciplinary case found that there was no case to answer, which was supportive of the Claimant's case. While the Tribunal had found that the

Claimant had not proved facts from which discrimination could be inferred, it had gone on to say that if it was wrong about that, the burden of proving it was not was met, so that it took account of the fact that it might be wrong, so that there was not no reasonable prospect of success.

25. Ms Aynsley responded that the only previous matters that had been referred to by Ms Appiah-Kubi were dealt with by the Tribunal in its judgment. The Tribunal had recorded that they arose from complaints received by the manager, who was obliged to investigate them, and having done so took no disciplinary action. That was evidence against, not for, the Claimant. It was not right that the person taking the disciplinary hearing found there was no case to answer. There was: it was her decision not to impose a disciplinary sanction, which was not the same thing at all.

26. The Tribunal enquired about the position so far as the union was concerned. Mr Ibekwe said he was unaware of any case where a union had been subjected to a wasted costs order. His union had been ordered to pay costs in the past, but only as a party.

27. Ms Appiah-Kubi gave evidence as to her means. She lives with her husband, a bus driver, gross income £1,900 a month. A couple of months ago she had commenced work, though an agency, as a self-employed live in carer, and earned £700 a week. She worked 2 or 3 weeks a month, and so her income was between £1,400 and £2,100 a month, gross. They rented their flat at £1,250 a month. No-one else lived with them.

28. The Tribunal, in retirement to consider, noted the case of PTSC Union v JB Global Ltd (In Administration) UKEAT/0212/20/VP. In that case, PTSC Union unsuccessfully appealed a wasted costs order made against it when it (again in the person of John Neckles) represented a Claimant. It was disingenuous of Mr Ibekwe to say he knew of no case about wasted costs involving a union, when (he accepted when asked) he knew of this case, basing that answer on the statement that the union had been a party to the case. The Tribunal noted that in paragraph 12 of that judgment paragraph 9 of the decision under appeal was cited. It applies here. It also refers to another first instance case, Henry -v- London General Transport Services Ltd 2301782/2015, where the issue of whether Mr Neckles was acting in pursuit of profit was dealt with. In both cases this was not a bar to a wasted costs order being made. Mr Ibekwe said that members pay subscriptions, and in return the union represents them and so this was not acting for profit. He who asserts must prove, and Mr Ibekwe has not shown that an order cannot be made on that basis. Mr Ibekwe did not submit that the application was made against Mr Neckles personally, and so an order could not be made against the union.

29. The Tribunal emailed the case to both parties, inviting submissions in writing upon it and affording half an hour to do so. Neither party made any submission about it, and nor was there a request for more time to do so.

The Tribunal's liability judgment

30. The judgment said at paragraph 37:

"There is nothing in the facts narrated above from which any Tribunal might think an inference could be drawn that the race of the Claimant was of any relevance to Barbara Jones. There was a real issue to be dealt with."

31. At paragraph 39:

"The matter of fire safety, effective fire drills (the whole point of which is to make sure there is an effective system, and to deal with any issue) and full reporting in line with proper policies is self-evidently a matter where an issue like the one arising needs to be addressed formally."

32. At paragraph 42:

"The entire disciplinary process was conducted professionally. There was no delay. The Claimant was not entitled to be represented at the investigation stage. She chose not to be represented at the hearing. Boulla Gregoriades is senior to Barbara Cutts and a proper person to take the hearing. She made a fair decision."

33. At paragraph 43:

"…the referral was unwanted conduct which was unrelated to the Claimant's race. It did not have the purpose or effect of violating Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for Claimant. Any disciplinary process is stressful. There was nothing about this process that was any more than the usual stress for the Claimant."

Decision in principle

34. The Tribunal notes that costs can be claimed for expense incurred before issue of a claim, and *MacPherson* remains good law, even after changes in the Rules[3].

35. The costs and wasted costs orders do not have to be directly attributable to specific items of costs incurred[4].

36. The race discrimination claim had no prospect of success.

    36.1. No reason is advanced in the claim forms as to why anything that happened had any connection with race, other than a generalised and unsubstantiated claim that race discrimination was endemic in the care industry.

    36.2. The Claimant's witness statement makes allegations that Mr Neckles' exclusion from the process was race discrimination (paragraph 11), but the only basis for saying that her own treatment was race discrimination is in paragraph 19, where she says it related to historical grievances set out on 22 October 2020. That was dealt with in the Tribunal's findings at paragraph 20:

[3] Sunuva Ltd v Martin [2017] UKEAT 0174_17_1412 (14 December 2017)
[4] Paragraphs 39-41 of *McPherson*.

"The Claimant had worked at the home since 2011. Barbara Jones had been her manager (intermittently) for several years. There had been two previous complaints made by residents about the Claimant. In none of the three complaints did Barbara Jones refer the Claimant for disciplinary action. There was no disciplinary sanction on the Claimant at any time in her employment with the Respondent (which continues)."

36.3. When expressly invited by me during submissions to set out why anything that happened had any connection with race Mr Neckles did not do so, as set out below.

37. The question as to what link there was between what happened, and race, was raised by me towards the end of Mr Neckles' submissions. My record of proceedings:

"j - if all so - why race?

Jn - subject to disciplinary investigation on frivolous matters previously and now she brought this herself not in compliance with procedure - BJ wanted to get rid of her

She thinks so as a fair-minded investigation office would not refer to disciplinary but deal informally and rebuttals about fire procedure taken into account would not be referred as…

j - you have not made submission about causative link

jn - previous matters investigation

j that not set out in list if issues - not pleaded and only tangentially in witness statement

Jn (moved on to inducement to join a union)"

38. The whole tenor of the proceedings is to put the claims about Mr Neckles first and the race discrimination (harassment) claim afterwards. The claim form and the documentation set out, as the Tribunal noted in paragraph 62 of its decision that:

"It is plain that much of the Claimant's witness statement, and her communications were authored by Mr Neckles. Its language and content are such that the Claimant could not have authored it. Much of it is a pæon of praise for Mr Neckles, his ability experience and knowledge…"

39. Mr Neckles holds himself out as expert, and there can be no excuse of ignorance in this case.

40. Dealing with Mr Neckles' points:

40.1. The application is not made on the basis that the claim was vexatious or unreasonably conducted, but on the basis that it had no reasonable prospect of success.

40.2. No claim for costs was brought in respect of the trade union claim. That is irrelevant to the claim for costs in defending the race discrimination claim. The point is relevant for the assessment of the amount of a costs award.

40.3. While Mr Neckles correctly states that the fact that the claim lost does not mean a costs order follows he did not provide any support to back up the assertion that the claim under S26 Equality Act 2010 was arguable. Even in his written opposition to the costs application Mr Neckles was unable to suggest why there was said to be any link between the Claimant's race and anything which occurred.

40.4. It is not incumbent on a Respondent to apply for a deposit order. EJ Burgher gave a clear steer that there was a real difficulty with the race discrimination claim in his case management order, and the Claimant's solicitor set matters out with clarity in her letter of 28 June 2021.

40.5. The assertion that the letter was *"a strategic ambiguity"* is incomprehensible. It was indeed to support a costs application later. That is the point of such a letter.

40.6. The motive of the application is not relevant, and even if it were as Mr Neckles says (and the Tribunal makes no such finding) the assessment of the costs application is solely limited to whether it has merit, or not. It has merit.

40.7. The points made by Mr Ibekwe are not sound. The Tribunal does not accept that another Tribunal might have come to the reverse conclusion. This was always a claim where there was no credible basis for suggesting this was harassment on racial grounds, and no evidence to support the assertion. The "*belt and braces"* statement that if the burden of proof had shifted it would have been met is not any indication that the Tribunal had any doubt about the matter. It is highly unusual for a half time submission of no case to answer to be made in discrimination cases, and they are seldom allowed. That the case was not dismissed at the end of the Claimant's case is not grounds for saying that it cannot be said to have had no reasonable prospect of success.

40.8. A wasted costs order is made against a representative in appropriate cases. It is not required to show that the representative was acting for profit, and he has to show that he was not, and has not done so.

40.9. The costs are incurred by the Respondent. Plainly they cannot make a profit by having the costs paid by an insurer and by the Claimant or her representative, but it is not the case that insured parties cannot claim costs. They simply have to pay the costs recovered to their insurer. The point may be relevant to the respective means of the parties, but here the cost falls on the Respondent.

40.10. For the reasons set out in the judgment, and above, there was never any arguable basis for saying that referring the Claimant to a disciplinary hearing was racially motivated. There was no dispute about the facts. In a fire drill, one resident had not left her room, and the Claimant had gone to fetch her, and had then filled in a form to say that everyone had vacated properly. The purpose of a fire drill is to see whether everyone can exit swiftly and unaided. It is of critical importance to know this, in case there is a fire. If people cannot leave unaided in a fire drill there has to be a plan to evacuate them if there is a fire. The Claimant's report was inaccurate. This was drawn to her manager's attention by another resident. Of course this had to be referred to a disciplinary hearing. That was the case whatever the race of the Claimant. The person taking the disciplinary hearing was sympathetic to the Claimant: that does not mean that it was wrong to have such a hearing. Nothing was suggested about the way this was done such that it could be harassment. Even had the manager harassed the Claimant before (and that was not the finding of the Tribunal, as Ms Aynsley correctly pointed out) this referral would still have been inevitable. Race has nothing to do with it, and no cogent reason for thinking that it could have been has ever been advanced.

41. For these reasons the Tribunal considers that the race discrimination claim had no reasonable prospect of success, so that it is obliged to consider making a costs order (Rule 76(1)).

42. The Tribunal further considers that the provisions of Rule 80 concerning wasted costs orders are met: the Respondent had incurred costs which it is unreasonable to expect them to pay by reason of the unreasonable improper or negligent act of putting forward a claim with no reasonable prospect of success. This was not a case of a claim which lost on the merits. There was nothing put forward which could have led to an inference of race discrimination in this case. It was plainly fair to consider disciplinary action arising from an inaccurate report of what was an incorrect outcome to a fire drill. The Respondent's representative took no disciplinary action about it. The only suggestion was that the Claimant's line manager had tried before to get her disciplined, but with no evidence or concrete assertion, and without merit, as she dealt with complaints *without* referring the Claimant to disciplinary action.

43. Mr Neckles is not a solicitor, but he holds himself out as highly expert in the field of employment law, and he cannot claim lack of expertise when the Tribunal assesses his negligence, or unreasonableness, or improper behaviour in putting forward a claim with no prospect of success. This was improper. It was a claim used to assist Mr Neckles in putting forward the claims he wanted to make about his own interaction with the Respondent.

44. In the second claim form the race discrimination claim came after the claims involving Mr Neckles. The Claimant's witness statement dwells much on Mr Neckles and is very light on the race discrimination claim.

45. The claim form gives Mr Neckles as the named representative and the PTSC Union as the organisation he represents.

46. The Tribunal noted that while the PTSC is very much Mr Neckles' organisation, it has a separate identity, and he is an officer of it. The proper subject of the wasted costs order is the PTSC (as it was in the EAT case cited above).

47. On behalf of the PTSC Mr Neckles put forward for its member, Ms Appiah-Kubi, a claim which was unarguable. A representative may of course put forward a case which loses. But it is improper, unreasonable or negligent to put forward a case which (someone professing to be highly expert should, or does, know) has no arguable basis. That is what Mr Neckles did. The way he pleaded the case is very much matters to do with him first and matters to do with Ms Appiah-Kubi second. For the Respondent, the defence of a claim of race discrimination is of huge reputational importance. It makes it the worse to put forward such a claim when it is unarguable: and that does not reduce the imperative on the Respondent to defend fully.

48. No point other than that the Union was not operating to make a profit was made about the principle of a wasted costs order against the PTSC. This statement was not argued or evidenced. It was not said that there was no application against the PTSC, and only one against Mr Neckles. The PTSC is not taken by surprise (Mr Ibekwe did not say so) and nor should it be given the case cited. They have been in this position before. The Tribunal decided that a wasted costs order against PTSC Union was warranted.

Amounts

49. The costs schedule was for £25,731.20. There would have been a hearing in any event over the trade union and representative claims. There would have been large reputational damage for Abbeyfield if it had lost a race discrimination claim. It is entirely reasonable for them to make every effort in defending it. The hearing of the remaining claims could have been accomplished in a day's hearing. Much of the preparation work would not have been needed.

50. Overall, the Tribunal decided that the costs attributable to the race discrimination claim are over half of the total costs incurred.

51. Neither Mr Neckles (in writing) or Mr Ibekwe made any representation about the amount. The costs schedule appears reasonable to the Tribunal. The Tribunal therefore decided that the Respondent had incurred unnecessary costs of over £12,000.

52. In considering the size of those orders the Tribunal had no information about the means of the Union, as none was given. The Tribunal knows about the Claimant's means from her oral evidence (which was not backed by any documentary evidence, but which evidence the Tribunal accepted).

53. The Tribunal assesses costs and exercises discretion rather than applying an arithmetic approach. Bearing in mind all the circumstances the Tribunal orders the Claimant to pay £2,000 costs and PTSC Union to pay (a further) £10,000 wasted costs to the Respondent.

Employment Judge Housego

Dated: 26 May 2022