Case No: 2500012/2021

EMPLOYMENT TRIBUNALS

Claimant: Miss G A Cairns

Respondent: Daemma Trading Ltd T/a Cash Converters

Heard at: Newcastle (CVP) **On: 19 July 2022**

Before: Employment Judge A.M.S. Green

Representation

Claimant: Ms N Twine - Counsel
Respondent: Not present or represented

RESERVED JUDGMENT ON COSTS

The application for costs is well-founded and the respondent will pay £4746.24 to the claimant.

REASONS

Introduction

1. For ease of reading, I refer to the claimant as Miss Cairns and the respondent as Cash Converters.

2. Miss Cairns presented her claim form to the Tribunal on 30 December 2020 claiming constructive unfair dismissal, discrimination arising from disability, failure to make reasonable adjustments and holiday pay. She subsequently withdrew her holiday pay claim. In a reserved judgment, which was promulgated on 25 April 2022, the Tribunal upheld the claimant's remaining claims and awarded her compensation in the sum of £49,007.25.

3. On 9 May 2022, Goodharts, solicitors representing Miss Cairns, submitted an application for costs under rule 75 (1) (a) and for wasted costs under rule 80 (1) (the "First Application").

4. On 21 May 2022, Mrs Geraldine Cairns, submitted a further application for costs (the "Second Application"). Mrs Cairns is Miss Cairns' mother. This application is for the entire costs incurred in the proceedings and proceeds under rule 76 (1) (a) & (b) and rule 76 (2).

5. The First and Second Applications were made in time.

6. On 25 May 2022, Holly Blue Employment Law ("Holly Blue") submitted written representations on behalf of Cash Converters opposing the First Application. On 18 July 2022, they submitted further written representations dealing with the First and the Second Applications.

7. Where, after a claim has been heard and determined by a full Tribunal, a costs application is made that relates in large part to the conduct of the substantive hearing, the costs application should be heard by the same full Tribunal and not by the employment judge sitting alone. However in **Riley v Secretary of State for Justice and ors 2016 ICR 172, EAT**, the EAT held that the Rules contain no express or implied power for the Tribunal in such a case to be constituted in any way other than as the full Tribunal that dealt with the substantive hearing. However, the EAT noted that if it were wrong on this point, and the rules do allow the employment judge the discretion to decide on the constitution of the Tribunal for the costs application, then the judge must actively consider how to exercise that discretion. One relevant factor would be whether the costs application related to matters which all three members of the panel had witnessed and upon which each would have had their own individual views. In this case I have actively considered that it would be appropriate to hear the claimant's applications sitting with the full panel or sitting alone. I decided to determine the matter sitting alone as the matters complained of do not in large part relate to behaviour witnessed by the full panel. The applications overwhelmingly relate to pre-hearing behaviour and also involve assessing the reasonable prospects of the response succeeding where the focus is the Response itself.

8. I conducted a CVP remote hearing. Cash Converters were neither present nor represented at the hearing. This was because their representative, Ms Harkins, had another hearing to attend. We worked from a digital bundle. Mrs Cairns adopted her witness statement. Mrs Cairns is Miss Cairns' mother. She was not asked any questions. Ms Twine made oral submissions. In reaching my decision, I have considered the documents contained in the bundle, Ms Twine's oral submissions and the written representations provided by Holly Blue.

9. In this case, I have been asked to determine costs on the "unassessed basis". This term is commonly used to refer to general costs which must not exceed an upper limit of £20,000 that can be awarded by the Tribunal without the need for the precise amount to be determined separately by means of a detailed assessment. The Tribunal must state the following:

    a. On what basis, and in accordance with what establish principles, it is awarding any sum of costs.

    b. On what basis it arrives at that sum.

    c. Why costs are being awarded against the party in question

The First Application

10. The First Application proceeds on the basis Miss Cairns incurred costs as a result of Cash Converters and/or Holly Blue's unreasonable conduct in these proceedings. Alternatively, Holly Blue should be liable wasted costs. The application proceeds under rule 75(1)(a) and rule 80.

11. The First Application refers to Cash Converters' repeated failures to comply with case management orders (disclosure of documents, bundle preparation and exchange of witness statements) which necessitated applications by Miss Cairns' solicitor to force Cash Converters to comply with those orders. Miss Cairns also had to apply to the Tribunal to vary case management orders thereby causing her to incur additional costs. The application is supported by a schedule of costs in the sum of £2946.24. The schedule of costs refers to disbursements relating to Counsel's fees which are not quantified. However, the relevant fee note rendered by Counsel's clerk is for £1800 (£1500 + VAT). Consequently, the total sum claimed is £4746.24.

12. The First Application submits that Cash Converters' failure to engage in the proceedings delayed the progress and Miss Cairns' preparation of her case.

The Second Application

13. In the Second Application, Mrs Cairns explains that she was working on behalf of Miss Cairns notwithstanding that Goodharts were instructed in the litigation. She refers to the fact that a wasted costs order had already been submitted in the First Application and explains that she is working with Goodharts who are currently very busy on a case and other work and permitted her to put in an application for "full costs". She submits that during the proceedings, witnesses appearing for Cash Converters were totally discredited and goes on to say that the "way the respondent and Holly Blue have dealt with this matter has shown the utmost disrespect towards the ET". She submits that Cash Converters misled the Tribunal, delayed the court process causing Miss Cairns to incur further expense. She alleges that Cash Converters did not produce any credible evidence at the hearing and delayed the hearing by not providing evidence required by the Tribunal and tried to submit witness statements at the last minute in breach of case management orders. Invoices were enclosed with the application in the total of £33,917. Ms Twine submitted that the application sought costs to be assessed on the standard assessment capped at £20,000.

Findings of Fact

14. On 14 June 2021, Employment Judge Johnson conducted a private preliminary hearing. The hearing was conducted by telephone. Miss Cairns was represented by Ms Colqhoun, a solicitor. Cash Converters were neither present nor represented. I note in paragraph 4 of the case management summary that the parties were notified of the hearing on 14 April 2021 that there would be a private preliminary hearing on 14 June 2021 at 11:30 AM. It is recorded that the notice of hearing was sent to the parties' representatives at the addresses

which appeared on the claim form and the response form. Nothing was returned to the Tribunal from Cash Converters. Consequently, Employment Judge Johnson was satisfied that Cash Converters was properly served with the notice of hearing. He goes on to record that by 11:40 AM, Ms Julie Barnett of Holly Blue had not joined the call nor had anybody else from Cash Converters. No indication was given to the Tribunal or Ms Colquhoun that Cash Converters' representative would not be attending the hearing. Employment Judge Johnson invited Ms Colquhoun to comment upon whether the hearing should continue in Ms Barnett's absence. Ms Colquhoun was content to continue with the hearing.

15. Employment Judge Johnson made several case management orders including the following:

    a. By 30 July 2021, Cash Converters were required to send Miss Cairns copies of all documents relevant to the issues.

    b. By 27 August 2021, Miss Cairns was required to send Cash Converters copies of any other documents relevant to the issues. This included documents relevant to financial losses and injury to feelings.

    c. By 24 September 2021, Miss Cairns and Cash Converters were required to agree which documents were going to be used at the final hearing.

    d. Cash Converters was required to prepare a file of documents to be used at the hearing with an index and page numbers. They had to send a hard copy to Miss Cairns by 24 September 2021.

    e. The parties were required to send each other copies of all of their witness statements by 22 October 2021.

16. Paragraph 28 of the case management orders warned the parties that if any of the orders were not complied with the Tribunal may:

    a. Waive or vary the requirement.

    b. Strike out the claim or the response.

    c. Bar or restrict participation in the proceedings.

    d. Award costs in accordance with the Tribunal rules.

17. The case management orders were dated 17 June 2021 and were sent to the parties on 18 June 2021.

18. On 1 August 2021, Ms Barnett emailed Ms Colquhoun indicating that she was looking to send her the disclosure documents on behalf of Cash Converters "in accordance with CMO". She went on to say that she was currently abroad and was not 100% confident as to how good the Internet would be. She provided 39 Google links to the documents. She indicated that she was still waiting for other documents namely: the absence management policy and grievance policy documents. If there were problems opening the documents, she asked

Ms Colquhoun if she would be willing to wait until 8 August 2021 when she would be returning to the United Kingdom because in her words "as I am afraid I'm not very IT minded". At this stage, Cash Converters had not complied with the case management order requiring it to send Miss Cairns all documents relevant to the issues by 30 July 2021.

19. Ms Colquhoun replied to Ms Barnett on 2 August 2021 notifying her that she had sent an access request from her personal email account to gain access to each of the documents.

20. Ms Colquhoun sent another email to Ms Barnett on 4 August 2021 asking her to accept her access requests so that she could open the documents.

21. On 11 August 2021, Goodharts wrote to the Tribunal to apply for an order that unless Cash Converters provided full disclosure of its documentary evidence within seven days, the response will be struck out. They also applied for their costs in making the application. They referred to the private preliminary hearing on 14 June 2021 and, in particular, the fact that Holly Blue failed to attend and offered no explanation or apologies for their absence at the preliminary hearing. They referred to the order requiring Cash Converters to disclose documents relevant to the issues by 30 July 2021 which had not been complied with. Copies of the correspondence passing between Ms Barnett and Ms Colquhoun was attached to the application.

22. On 31 August 2021, Ms Colquhoun emailed Ms Barnett attaching documents on behalf of Miss Cairns and requested her to send the draft index to the hearing bundle so that it could be agreed. She also referred to the fact that she had not received copies of the documents that Cash Converters had in its possession relevant to the issues to be determined.

23. On 8 September 2021, the Tribunal wrote to Cash Converters asking them to confirm whether disclosure had taken place and if it had not, to explain why. Cash Converters were required to respond to the Tribunal by return.

24. On 14 September 2021, Ms Colquhoun emailed Ms Barnett to express her concern about her failure to correspond with her with the case management order. She referred to her failure to provide Cash Converters' documentary evidence which meant that it would not be possible to agree the contents of the hearing bundle. This was required to be done by 24 September 2021 in accordance with the applicable case management order with Cash Converters to prepare the file of documents with an index and page numbers. Ms Colquhoun also reminded Ms Barnett that witness statements required to be exchanged by 22 October 2021. She went on to say that her failure to comply with the order was unreasonably delaying the progress of the case and continued delay would make it impossible for Miss Cairns to comply with the order. She asked Mis Barnett to confirm that she was still instructed in the litigation.

25. On 22 September 2021, Ms Colquhoun emailed Ms Barnett again to remind her that she had not provided disclosure other than in the form of a difficult to decipher and incomplete list of documents. She accused her of ignoring her correspondence requesting copies of all documents upon which Cash Converters relied and a clear complete list of documents. She referred to Miss Cairns disclosing her documents to Cash Converters.

26. On 22 September 2021, Ms Barnett replied to Ms Colquhoun's email stating that she had not received any email since 1 June 2021, and she apologised if she had missed anything. She asked to resend. She went on to say that she was unaware that she had had difficulties with her disclosure and apologised. She had sent the disclosure while she was abroad and assumed, in the absence of a response from Miss Colquhoun that she had received everything "ok".

27. On 27 September 2021, Ms Barnett emailed Ms Colquhoun to ask if she could advise or resend the emails that she said that she had not referred to and also to confirm if she had received Cash Converters' disclosure as sent to her in July.

28. Ms Colquhoun replied to Ms Barnett on 27 September 2021 to say that the only email that she had received from her was dated 1 August 2021 and she was unable to open any of the document links therein. She forwarded all of her emails to Ms Barnett.

29. Ms Barnett replied to Ms Colquhoun on 28 September 2021 confirming several emails that came through the previous day, but she had not read them because of other hearing commitments. She promised to revert to her the following day.

30. On 11 October 2021, Ms Colquhoun emailed Ms Barnett to express her concern that she had still not received a response. She attached further documents to be included in accordance with Miss Cairn's ongoing duty to disclose relevant evidence. She requested Miss Barnett provide an indexed and paginated bundle as soon as possible to enable her to prepare witness evidence with reference to the bundle, exchange of witness statements being imminent.

31. Ms Barnett emailed Ms Colquhoun on 11 October 2021 resending her original email of 1 August 2021 with the document links.

32. Ms Colquhoun responded on 12 October 2021 reminding her that she had written to her several times in response to the email of 1 August 2021 stating that she was unable to open the attachments.

33. On 26 October 2021, Goodharts wrote to the Tribunal referring to their application dated 11 August 2021 and the Tribunal's correspondence with Cash Converters dated 8 September 2021. It referred to the fact that Cash Converters had failed to comply with Employment Judge Johnson's case management order dated 17 June 2021 by failing to send Miss Cairns copies of all documents relevant to the issues. Cash Converters had failed to agree and provide a hearing bundle. This meant that Miss Cairns was unable properly to prepare witness evidence and had been prevented from complying with the requirement in the case management order to exchange witness statements by 22 October 2021. It went on to say that:

> *The respondent's failure to engage in these proceedings has delayed the progress and preparation of this matter by 3 months. This matter is listed for a final hearing over 4 days starting on the 28 March 2021. If the Tribunal is not minded to strike out the Response, we ask for another case*

management hearing to provide new directions which will not further prejudice the claimant because of the respondent's in action.

We ask the employment Tribunal to strike out the Response and enter judgment in favour of the claimant with damages to be assessed. The claimant applies for its costs of and occasioned by this application.

Such an order would be in accordance with the overriding objective to deal with a case fairly and justly and for the claimant not to be prejudiced by unreasonable delays

34. On 27 October 2021, Goodharts wrote to the Tribunal seeking an order to vary the directions set out in Employment Judge Johnson's case management orders dated 17 June 2021. The letter invited the Tribunal to consider this application together with the earlier application to strike out the Response. The letter goes on to say:

The Claimant has been forced to make this application due to the Respondent's complete inaction and failure to comply with all the case management orders. This has made it impossible for the parties to exchange witness evidence by the 22 October 2021.

The Claimant applied for and Unless Order against the Respondent in September 2021 and recently applied for an order striking out the Response. These applications have not been decided. The Claimant is frustrated by the respondent's inaction. In the event that the Tribunal decides not to strike out the Response, the Claimant applies for the case management order of Employment Judge Johnson to be varied as follows:

- *By 5 November 2021 the respondent must send the claimant copies of all documents relevant to the issues.*
- *By 12 November 2021, the claimant and respondent must agree which documents are going to be used at the hearing.*
- *By 26 November 2021, the respondent must prepare a file of those documents with an index and page numbers. They must send a hard copy to the claimant by the 19th November 2021.*
- *The claimant and the respondent must send each other copies of all their witness statements by 22 January 2022.*

35. On 27 October 2021, Ms Colquhoun wrote to Ms Barnett attaching medical evidence of CBT treatment that Miss Cairns was receiving for her disability and other evidence. She also requested her to send a draft index for the hearing bundle for agreement as soon as possible.

36. On 11 November 2021, Ms Barnett emailed Ms Colquhoun in the following terms:

Anne

I am told that the issue with access is now resolved, please find attached documents and bundle index. I believe the only doucuments [sic] not included are the Claimants contract of employment and the policy documents as I appear to be unable to locate these electronically but will forward them to you once I recieve [sic] further copies from my client.

I noticed only yesterday that a large number of your emails had gone to my junk email, I am uncertain why some would find file here automatically whilst other are received without issue but I do apologise for the frustrations I have likely caused you. Can I ask in the first instance that you confirm your ability to open the files and I will make a deliberate check of my junk folder.

37. On 23 November 2021, Ms Colquhoun emailed Ms Barnett to inform her that she was unable to open the documents and asked her to post hard copies and a draft bundle index as soon as possible. She informed her that Miss Cairns had disclosed documents in support of her disability and a further fitness for work certificate would follow shortly.

38. Ms Colquhoun emailed Ms Barnett on 24 November 2021 in response to her email of 11 November 2021 to confirm that she was unable to open the documents attached to her email but acknowledged receipt of the draft index to the bundle.

39. On 1 December 2021, Ms Colquhoun emailed the Tribunal in respect of the application to vary the case management orders of 17 June 2021. She updated the Tribunal to say that the parties were yet to agree the hearing bundle and to agree a date for the exchange of witness statements. She informed the Tribunal that she had served Miss Cairns' disability impact statement on Cash Converters with supporting medical evidence, but disability remained an issue. Consideration was being given as to whether medical evidence from an expert would be required.

40. On 26 January 2022, Ms Colquhoun emailed Ms Barnett to ask whether she was still instructed in the litigation. If she was, to vary the existing case management orders so that the bundle would be agreed by 28 January 2022 and witness statements would be exchanged by 11 February 2022.

41. Ms Barnett confirmed, in an email to Ms Colquhoun dated 26 January 2022, that she was still instructed and agreed to the to the case management order.

42. On 2 February 2022, Ms Barnett emailed Ms Colquhoun to apologise for having only just realised because she had been "confused with who I am communicating with and on what case, I remain instructed albeit the case will be passed to my colleague as a result of recurring illness on my part, before doing so I would like to pass over the agreed bundle, and I think I have advised you of this previously". She promised to send the final bundle through once it was fully paginated which he believed would be the following day as she was presently in a hearing.

43. On 17 March 2022, Ms Colquhoun emailed a different person at Holly Blue called Sophie Harkins[1] to discuss the hearing bundle. She listed 12 documents missing from the hearing bundle. She listed two documents that were difficult to decipher and requested clearer copies. She requested four documents to be added to the bundle. She noted that Miss Cairns' up-to-date medical records would also need to be included in the bundle which she would send as soon as possible. She suggested witness statements should be exchanged at "12 noon next Monday" (i.e. 21 March 2022).

44. On 21 March 2022, Ms Harkins emailed Ms Colquhoun asking her if she could access the link to the final hearing bundle.

45. On 22 March 2022, Ms Harkins emailed Ms Colquhoun with the witness statements from the Cash Converter witnesses.

46. The final hearing was conducted from 29 to 31 March 2022 (inclusive).

The applicable law

47. Rule 75 (1) (a) gives the Tribunal the power to make a costs order against one party to the proceedings (the "paying party") to pay the costs incurred by another other party (the "receiving party") on several different grounds.

48. Rule 77 provides that a party may apply for either type of costs order at any stage, although no later than 28 days after the date on which the judgment finally determining the proceedings was sent to the parties. No costs or preparation time order may be made unless the proposed paying party has had a reasonable opportunity to make representations, in writing or at a hearing, as the Tribunal may order, in response to the costs application.

49. Rule 76(1) sets out the grounds for making a costs order including:

    a. A party (or that party's representative) has acted vexatiously, abusively, disruptively, or otherwise unreasonably in the bringing or conducting of proceedings (or part thereof).

    b. A claim or response had no reasonable prospect of success.

50. Rule 76(2) provides that a Tribunal may make a costs 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. When costs are awarded under rule 76(2), as distinct from rule 76(1)(a), there is no need to find that a party has acted 'vexatiously, abusively, disruptively or otherwise unreasonably'. It is sufficient that he or she is clearly responsible for the breach.

51. Rule 76(1)(a) imposes a two-stage test. The Tribunal must first ask itself whether a party's conduct falls within rule 75(1)(a). If so, it must ask itself whether it is appropriate to exercise its discretion in favour of awarding costs against that party. If a party's representative has acted vexatiously, abusively, or disruptively or otherwise unreasonably in the bringing or conducting of the

[1] Ms Harkins represented Cash Converters at the final hearing

proceedings the Tribunal may make a costs order against the party in question. The power to award costs is discretionary.

52. Rule 76(1)(b) also follows a two-stage test. The Tribunal has a duty to consider making an order where this ground is made out but there is a discretion whether actually to award costs. Whether or not the party has received legal advice or is acting completely alone may be an important consideration when deciding whether or not to make a costs order against him or her. Under rule 76(1)(b), the focus is simply on the claim or response itself.

53. In **Radia v Jefferies International Ltd EAT 0007/18** the EAT dismissed an appeal against an employment Tribunal's decision to award the respondent employer the whole of its costs, potentially amounting to over £500,000, on the basis that the claim had no reasonable prospects of success. In so holding, the EAT gave guidance on how Tribunals should approach costs applications under rule 76(1)(b). It emphasised that the test is whether the claim had no reasonable prospect of success, judged on the basis of the information that was known or reasonably available at the start. Thus, the Tribunal must consider how, at that earlier point, the prospects of success in a trial that was yet to take place would have looked. In doing so, it should take account of any information it has gained, and evidence it has seen, by virtue of having heard the case, that may properly cast light back on that question, but it should not have regard to information or evidence which would not have been available at that earlier time. The EAT went on to clarify that the mere existence of factual disputes in the case, which could only be resolved by hearing evidence and finding facts, does not necessarily mean that the Tribunal cannot properly conclude that the claim had no reasonable prospects from the outset, or that the claimant could or should have appreciated this from the outset. That still depends on what the claimant knew, or ought to have known, were the true facts, and what view the claimant could reasonably have taken of the prospects of the claim in light of those facts. Applying that to the present case, the EAT was satisfied that there was sufficient evidence for the Tribunal's conclusion that the claimant did not believe that there was genuine merit in his claims.

54. In **Scott v Inland Revenue Commissioners 2004 ICR 1410, CA**: Lord Justice Sedley observed that 'misconceived' for the purposes of costs under the Tribunal Rules 2004 included 'having no reasonable prospect of success' and clarified that the key question in this regard is not whether a party thought he or she was in the right, but whether he or she had reasonable grounds for doing so. The Court of Appeal held that the employment Tribunal's decision in this particular case not to award costs against S should be reconsidered, as it was not clear that the Tribunal had directed its attention to the questions of whether S's case was doomed to failure or, if it was, from what point.

55. The Court of Appeal in **Scott v Russell 2013 EWCA Civ 1432, CA** (a case concerning costs awarded by an employment Tribunal), cited with approval the definition of 'vexatious' given by Lord Bingham in **Attorney General v Barker 2000 1 FLR 759, QBD (DivCt)**. According to His Lordship, 'the hallmark of a vexatious proceeding is… that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant, and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the

ordinary and proper use of the court process'. This suggests that where the effect of the conduct falls within Lord Bingham's stringent definition, this can amount to vexatious conduct, irrespective of the motive behind it.

56. Abusive or disruptive conduct was discussed in **Garnes v London Borough of Lambeth and anor EAT 1237/97**, a case which concerned a complaint of race discrimination. The Tribunal office had made four attempts to fix a hearing but had adjourned on the first three occasions at G's request. In addition, G had failed to attend two interlocutory hearings as he objected to their being held. At the fourth hearing, which was fixed for 15 days, G again said he could not proceed. The Tribunal offered to adjourn for five days but G said he would not attend at any time during the 15-day period. The Tribunal then adjourned for an hour to allow G to consider his position. The Tribunal warned G that if he did not attend after the hour the case might be struck out and costs awarded against him. When G did not attend the Tribunal struck out the case and awarded the respondent the costs of attending the Tribunal hearing. The Tribunal held that G had conducted the proceedings 'unreasonably, vexatiously and disruptively' and this was upheld by the EAT on appeal.

57. Turning to the issue of unreasonable conduct 'unreasonable' has its ordinary English meaning and is not to be interpreted as if it means something similar to 'vexatious' (**Dyer v Secretary of State for Employment EAT 183/83**). The Cambridge dictionary definition of unreasonable is "not based on or using good judgment; not fair"[2].

58. In determining whether to make an order under this ground, a Tribunal should take into account the 'nature, gravity and effect' of a party's unreasonable conduct (**McPherson v BNP Paribas (London Branch) 2004 ICR 1398, CA**). However, the Tribunal should not misunderstand this to mean that the circumstances of a case have to be separated into sections such as 'nature', 'gravity' and 'effect', with each section being analysed separately — **Yerrakalva v Barnsley Metropolitan Borough Council and anor 2012 ICR 420, CA**. The Court of Appeal in **Yerrakalva** commented that it was important not to lose sight of the totality of the circumstances. The vital point in exercising the discretion to order costs is to look at the whole picture. The Tribunal has to ask whether there has been unreasonable conduct by the paying party in bringing, defending, or conducting the case and, in doing so, identify the conduct, what was unreasonable about it, and what effect it had.

59. Rule 78 (1) sets out how the amount of costs will be determined. The Rules provide that such an order is in respect of costs incurred by the represented party meaning fees, charges, disbursements, and expenses.

60. It is important to recognise that even if one (or more) of the grounds is made out, the Tribunal is not obliged to make a costs order. Rather, it has a discretion whether or not to do so. As the Court of Appeal reiterated in **Yerrakalva**, costs in the employment Tribunal are still the exception rather than the rule. It commented that the Tribunal's power to order costs is more sparingly exercised and is more circumscribed than that of the ordinary courts, where the general rule is that costs follow the event, and the unsuccessful litigant normally has to foot the legal bill for the litigation. In the employment Tribunal, by contrast, costs orders are the exception rather than the rule. If the Tribunal decides to make a

[2] https://dictionary.cambridge.org/dictionary/english/unreasonable

costs order, it must act within rules that expressly confine its power to specified circumstances, notably unreasonableness in bringing or conduct of the proceedings.

61. In considering whether to make an order for costs, and, if appropriate, the amount to be awarded, the Tribunal may have regard to the paying party's ability to pay. It is not obliged to do so; it is permitted to do so. The Tribunal is not required to limit costs to the amount that the paying party can afford to pay. However, I remind myself that in **Benjamin v Inverlacing Ribbon Ltd EAT 0363/05** it was held that where a Tribunal has been asked to consider a party's means, it should state in its reasons whether it has in fact done so and, if it has, how this has been done. Any assessment of a party's means must be based upon evidence before the Tribunal.

62. Rule 80 provides that a Tribunal may make a wasted costs order against a representative in favour of any party where that party has incurred 'wasted costs'. 'Wasted costs' means costs incurred as a result of any improper, unreasonable, or negligent act or omission on the part of the representative, or which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the party to pay.

63. Rule 81 provides that a wasted costs order may require the representative to pay the whole or part of any wasted costs of the relevant party. It may also disallow any wasted costs otherwise payable to the representative and order the representative to repay his or her client any costs that have already been paid. The amount to be paid, disallowed, or repaid must in each case be specified in the order.

64. Wasted costs orders can only be made against a 'representative'. This is defined by Rule 80(2) as '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'. So the term 'representative' is not limited to legally qualified representatives.

65. The Court of Appeal in **Ridehalgh v Horsefield and other cases 1994 3 All ER 848, CA** emphasised that a legal representative should not be held to have acted improperly, unreasonably, or negligently simply because he or she acts on behalf of a party whose claim or defence is doomed to fail. Similarly, in **Medcalf v Mardell and ors [2002] UKHL 27** the House of Lords commented that it is the duty of the advocate to present his or her client's case even though he or she may think that it is hopeless and even though he or she may have advised the client that it is. The willingness of professional advocates to represent litigants should not be undermined either by creating conflicts of interest or by exposing the advocates to pressures that will deter them from representing certain clients or from doing so effectively.

66. In **Ratcliffe Duce and Gammer v Binns (t/a Parc Ferme) EAT 0100/08** the EAT observed that the Court of Appeal in **Ridehalgh**, had advocated a three-stage test for courts (and, by extension, employment Tribunals) to adopt in respect of wasted costs orders:

    a. first, has the legal representative acted improperly, unreasonably, or negligently?

b. secondly, if so, did such conduct cause the applicant to incur unnecessary costs?

c. thirdly, if so, is it in the circumstances just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs?

67. The Court of Appeal in **Ridehalgh** emphasised that even where a court and, by extension, the Tribunal, is satisfied that the first two stages of the test are satisfied (i.e. conduct and causation) it must nevertheless consider again whether to exercise the discretion to make the order and to what extent. It still has a discretion at stage 3 to dismiss an application for wasted costs where it considers it appropriate to do so, for example, if the costs of the applicant would be disproportionate to the amount to be recovered, issues would need to be re litigated or questions of privilege would arise.

68. In **Ridehalgh**, the Court of Appeal examined the meaning of 'improper', 'unreasonable' and 'negligent' — subsequently approved by the House of Lords in **Medcalf** as follows:

a. '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;

b. 'unreasonable' describes conduct that is vexatious, designed to harass the other side rather than advance the resolution of the case;

c. '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.

69. In **Ratcliffe** Mr Justice Elias (as he then was) stated that the notion that a wasted costs order can be made against a lawyer simply because his client is pursuing a hopeless case is entirely erroneous. Such conduct does not of itself demonstrate that their representative has acted improperly or unreasonably. Clients frequently insist on pursuing a case against the best advice of their lawyers.

70. Similarly, other aspects of litigation that lead to unnecessary costs should not readily be blamed on the representatives. In **Hafiz and Haque Solicitors v Mullick and anor 2015 ICR 1085, EAT**, the claimants' solicitors had produced an exaggerated schedule of loss and the claimant rejected several generous offers of settlement. An employment judge awarded wasted costs against the solicitors, finding that the schedule had been negligently prepared and that this raised the claimants' expectations, with the result that he did not settle when any reasonable claimant would have done. The EAT overturned the award on appeal. Mr Justice Langstaff, then President of the EAT, observed that there might well have been some proper explanation for the exaggerated schedule if only the solicitors had been freed from the shackles placed on them by professional privilege. The Tribunal had wrongly inferred that the claimant must have been misled by the solicitors when it was just as likely that it was the claimant who had attributed an unrealistic value to the claim.

71. In **Mitchells Solicitors v Funkwerk Information Technologies York Ltd EAT 0541/07** the EAT considered that it was clear from the civil law authorities, in particular **Ridehalgh** and **Medcalf,** that a legal representative does not behave improperly, unreasonably, or negligently simply by acting for a party who pursues a claim or defence which is plainly doomed to fail. Furthermore, even if a legal representative can be shown to have acted improperly, unreasonably, or negligently in presenting a hopeless case, it remains vital to establish that the representative thereby assisted proceedings amounting to an abuse of the courts process (thus breaching his or her duty to the court) and that his or her conduct actually caused costs to be wasted. It therefore overturned a wasted costs order made against the claimants' solicitors, which had been based upon the employment Tribunals finding that any competent adviser would have told the claimant that her claim was highly unlikely to succeed.

72. Mr Justice Elias (as he then was) confirmed these principles in **Ratcliffe**, in which judgment was handed down shortly after that in **Mitchells Solicitors**. He observed that, where a wasted costs order is concerned, the question is not whether the party has acted unreasonably. The test is a more rigorous one, as the leading authorities make plain. They demonstrate that a wasted costs order should not be made merely because a claimant pursues a hopeless case and his or her representative does not dissuade him or her from so doing. The distinction therefore is between conduct that is an abuse of process and conduct falling short of that. In this particular case there had been no attempt by the employment Tribunal to determine whether there was an abuse of process, and there was no basis for supposing that there was. It had not been suggested that the case was being pursued for any improper purpose or anything of that nature. This was a case where the representative did not prevent a party pursuing what turned out to be a hopeless case. Even if it was fair to infer that the solicitor should have appreciated that it was hopeless — and it had to be remembered that the claimant was maintaining that he had relevant evidence to support his case until the last minute — it did not follow that the representative could have influenced his client to drop the case in any event. Since there was no evidence that the claimant would have withdrawn even if advised to do so, there was no basis for inferring that any costs had been incurred as a consequence of any misconduct. Elias J therefore set aside the Tribunals wasted costs order.

73. These cases now establish that a wasted costs order requires a high standard of misconduct on a representative's part. Accordingly, acting on a clients' instructions, even in a hopeless case, will not incur liability for costs in the absence of an abuse of process. These rulings confirm that it will be very difficult to succeed in a wasted costs application against a representative as a number of stringent conditions must be satisfied, including showing an abuse of the court. An abuse of the court includes such matters as issuing or pursuing proceedings for reasons unconnected with success in the litigation; pursuing a case known to be dishonest; and knowingly making incomplete disclosure of documents.

74. Rule 31 gives an employment Tribunal a specific power to order 'any person in Great Britain to disclose documents or information to a party (by providing copies or otherwise) or to allow a party to inspect such material as might be ordered by a county court or, in Scotland, by a sheriff'. Once an order for disclosure has been made, it imposes an obligation that remains continuous throughout the proceedings (**Scott)**. Therefore, if further documents come to

light, or come into existence, during the course of the proceedings, they should be disclosed if they are relevant to any information already disclosed or fall within the terms of an order for disclosure.

Discussion and conclusions

The First Application

75. In Ms Twine's submission most of the focus of the application related to disclosure of documents. She submitted that Cash Converters had persistently failed to provide disclosure of documents in accordance with the case management order made at the preliminary hearing on 14 June 2021. Furthermore, Holly Blue had failed to attend that hearing and had not provided any explanation for their absence.

76. Employment Judge Johnson had ordered disclosure to take place by 30 July 2021. Ms Twine acknowledged that certain documents had been emailed to Ms Colquhoun with embedded Google links on 1 August 2021. Ms Barnett had sent the email whilst abroad two days after the deadline prescribed in the case management order. She admitted that she was not sending all of the documents. Further documents were set to follow on 8 August 2021. This did not happen which triggered the application to the Tribunal on 11 August 2021 to issue an Unless Order.

77. Ms Twine referred to the Tribunal's letter of 8 September 2021 chasing Cash Converters to confirm whether disclosure had taken place. Ms Colquhoun had then written to Ms Barnett on 14 September 2021 expressing her concern over the failure to disclose documents and the delay this was having on the timetable to take the matter to the final hearing. She quite correctly expressed concern that in the absence of documents, the parties could not agree the contents of the hearing bundle before the deadline of 24 September 2021. Her concern was sufficient for her to question whether Holly Blue was still instructed to represent Cash Converters. There was no immediate response to that email which prompted Ms Colquhoun to send a follow-up email. This did yield a response to the effect that Ms Barnett had not seen any correspondence from Ms Colquhoun since 1 June 2021. In Ms Twine's submission, this seemed strange because there had been no change of email address and all correspondence had been sent to the same address throughout the conduct of the litigation.

78. Ms Twine then referred to Ms Barnett's email of 27 September 2021 requesting Ms Colquhoun to resend the emails. I was then referred to Ms Colquhoun's email of 11 October 2021 further requesting disclosure of the documents. This triggered the application on 26 October to the Tribunal to strike out the response. Ms Twine acknowledged that there was no evidence in the bundle to cast light on whether the Tribunal took any action in response to that application. However, at that juncture, Cash Converters were three months late in making disclosure pursuant to the original case management order. The following day, Miss Cairns applied to the Tribunal for a variation of the case management orders.

79. Ms Twine then referred me to the email that Ms Barnett sent on 11 November 2021 where she explained that the missing emails from Ms Colquhoun had been located in her junk folder and that she now believed that the matter had

been resolved. This was not in fact the case as Ms Colquhoun emailed Ms Barnett on 23 November 2021 to explain that she was still unable to open the documents via the links. This triggered a request for hard copies of the draft index to be sent. At this juncture, Cash Converters were nearly 4 months late in disclosing the documents as per the case management order.

80. Ms Twine submitted that the consequence of this was that the bundle was not agreed until 21 March 2022. Witness statements were not exchanged as per the original order and were eventually exchanged on 22 March 2022. This was one week before the final hearing. This was a direct consequence of Cash Converter's delay in making disclosure. I was taken to Holly Blue's letter of 25 May 2022 responding to the application where it is claimed that Miss Cairns was also guilty of late disclosure. In response to this, Ms Twine said that the parties had a duty of continuing disclosure and accepted that some further documents were disclosed but these did not have an impact on the timetable or prejudice the case in any way. The documents that were disclosed were updated medical records and fit notes. Furthermore, other documents were noted to be missing from the bundle and not because they had failed to be disclosed.

81. In Ms Twine's submission, Cash Converters' conduct in delaying with disclosure in breach of the case management order was unreasonable and the threshold required by rule 76 (1) (a) had been met. The costs associated with the first application were set out in the schedule of costs to be updated with Counsel's disbursements of £1500 plus VAT. Ms Twine submitted that the Tribunal had discretion on the sum to be awarded. The costs claimed related to the extra work that was required to deal with Cash Converters' delay.

82. I was also invited to consider making a wasted costs order against Holly Blue. This proceeded on the premise that Holly Blue failed to provide disclosure and to adhere to the case management timetable and their behaviour was unreasonable. They did not engage in correspondence over a sustained period of time and allowed the breach of the case management order to continue. As a consequence of this, Miss Cairns incurred additional costs. It was in the discretion of the Tribunal to order Holly Blue to compensate Miss Cairns in accordance with the overriding objective. Holly Blue were at fault.

83. In their written submissions responding to the application, Holly Blue state that initial disclosure was made on 1 August 2021. They acknowledge that this was two days late in terms of the case management order. They explain that there were perceived issues with the Internet connection because Ms Barnett was abroad. As a matter of fact, I do not accept that initial disclosure was made on 1 August 2021 for the simple reason that Ms Colquhoun was unable to open any of the documents embedded in the Google links in the email. Disclosure had not occurred by 30 July 2021 as ordered. Cash Converters were in breach of the case management order.

84. Holly Blue suggest that there were other ways in which Ms Colquhoun could have contacted Ms Barnett such as using the telephone. Whilst that might be correct, I do not see that it absolves Holly Blue of their failure to disclose the documents as ordered. They were under an obligation to do so and given that the parties had been corresponding by email using the same addresses, it was reasonable for Ms Colquhoun to continue to use that method of communicating.

85. Holly Blue submits that Ms Barnett was unaware of the emails that Ms Colquhoun had sent to her and referred to the email of 22 September 2021. It is also submitted that the problem lay with the fact that Ms Colquhoun's email found their way into Ms Barnett's junk folder and lay their undiscovered. Whilst it is possible that this happened, I believe that it was incumbent upon Ms Barnett regularly to check her junk folder particularly given the timetable that had been set out by Employment Judge Johnson. She could not assume that everything was okay because she had not heard from Ms Colquhoun to the contrary. A prudent step would have been to check the junk folder regularly.

86. Holly Blue also take issue with the fact that further evidence was disclosed by Miss Cairns' partner, Mr MacKay on 14 March 2022 which was sent on 17 March 2022. Reference is also made to updated and completed medical records that were sent on 21 March 2022. It is alleged that the combined effect of this late disclosure was to cause particular difficulty for Cash Converters' witnesses because they had to amend their witness statements shortly before the final hearing. It is further submitted that Cash Converters acted in good faith in accepting the inclusion of further documentation because the Tribunal would be better served at the final hearing of all the available evidence. It is accepted that some of the documents were missing from the bundle, which was an oversight on the part of Holly Blue, but Miss Cairns had access to all of the documents forming part of her claim which would not prevent her from completing her witness evidence. It is further submitted that the issue with documents missing from the bundle was dealt with immediately and the issuing of the full bundle was delayed by Miss Cairns' failure to provide her full medical evidence until 21 March 2022.

87. I do not accept this submission. Miss Cairns was complying with her duty of continuing disclosure when she provided updated and completed medical records to Holly Blue on 21 March 2022. I do not believe that she can be criticised for that. Indeed, if she had withheld that information, she would have been in breach of her duty of continuing disclosure.

88. It cannot be said by any measure that Ms Barnett acted in a vexatious or abusive way in the conduct of the litigation. There is no evidence to support that proposition.

89. However, I do believe that Ms Barnett acted unreasonably. She failed to attend the preliminary hearing and offered no explanation for her absence. That was unprofessional and discourteous to the Tribunal and to Ms Colquhoun. Ms Barnett did not exercise sound judgment in the way she chose to disclose documents to Ms Colquhoun (i.e. electronically and whilst abroad). On her own admission, she was not good with IT and was unsure about whether the Internet would be 100% reliable when she was abroad. Choosing to disclose documents electronically in these circumstances was unwise and not without risk. Furthermore, this was at a time when Cash Converters were already in breach of the case management rule. The attempted disclosure on 1 August 2021 failed. It has to be remembered that case management orders list dates by which things are supposed to happen. It is not good practice by those who are responsible for the conduct of litigation to leave things to the very last moment and then to attempt to take steps such as disclose documents whilst they are abroad, using unreliable means to do so. Good practice is based on sound judgment which requires keeping a diary to ensure that deadlines are

met. The fact that the documents were disclosed late suggests poor diary management.

90. I also think it did not amount to sound judgment to assume that the documents had been received. It was poor judgment on Ms Barnett's part not to regularly check her spam or junk folder in her email. It was also unreasonable for her to expect Ms Colquhoun to telephone her as an alternative means of communication thereby absolving Ms Barnett from her own failure to comply with the case management order regarding disclosure.

91. I am also concerned that, on one occasion, Ms Barnett was confused about who she was corresponding with when in her email on 2 February 2022, she apologised to Ms Colquhoun for having only just realised because she had been "confused with who I am communicating with and on what case". This paints a picture of a disorganized state of affairs and confusion. Perhaps it can be explained by her ill health. It may also suggest an under resourced organisation and/or incompetence.

92. The effect of the delay in disclosure meant that Miss Cairns incurred unnecessary additional costs in instructing her solicitor to pursue the matter. The bundle could not be agreed until the documents had been disclosed. Witness statements could not be completed without an agreed bundle. This no doubt needlessly added to Miss Cairns' stress which could have been avoided had the case management order been complied with.

93. Given what I have said above, I find that the threshold in rule 76(1)(a) has been met. Whilst an award of costs is an exceptional thing to do in the Tribunal, I am satisfied that it would be warranted in this case. Professional representatives should know better.

94. Furthermore, an award of costs would also be merited under rule 76 (2). As I have indicated above, there is no need to find that a party has acted 'vexatiously, abusively, disruptively or otherwise unreasonably'. There has been a breach of a case management order. It is sufficient that he or she or it is clearly responsible for the breach. That is the case here.

95. I am also invited to make a wasted costs order. It cannot be said on the evidence that Ms Barnett behaved improperly. Such conduct would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. I accept that she is not a solicitor, but had she been, her conduct was not so serious as to amount to the sanctions adumbrated above.

96. The definition of unreasonable is not the same as for rule 76(1)(a). In the context of a wasted costs order 'unreasonable' describes conduct that is vexatious, designed to harass the other side rather than advance the resolution of the case. The evidence in this case does not support such a conclusion.

97. This leaves negligence. Did Ms Barnett act negligently? I remind myself from the case law that '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. The profession in this case is employment advisers. I also remind myself that a wasted costs order is a serious sanction for a legal or quasi professional (such as Ms Barnett). I accept that findings of

negligent conduct are serious findings to make and making a wasted costs order is an exceptional step to make but I believe that Ms Barnett acted with degree of incompetence and poor judgment in the way in which she failed to attend the hearing and handled disclosure of documents for the reasons that I have given above that to amount to negligence. She had the conduct of the litigation. I believe that her behaviour failed to meet the standard expected of ordinary members of the profession. This involves adhering to a Tribunal imposed timetable, attending hearings or explaining one's absence, timely correspondence with one's opponent and knowing with whom one is corresponding. Regrettably this was not the case here. However, because I do not know what the "back story" (if any) there is between Holly Blue and their client, Cash Converters, I am not minded making a wasted costs order. There could be more than meets the eye in terms of that relationship.

98. I have decided to make a costs order of £4746.24 against Cash Converters on the standard assessment basis for the reasons given above. The sum is calculated by reference to the schedule of costs as updated with details of Ms Twine's fee for the additional work. Although I have decided not to make a wasted costs order against Holly Blue, given that I believe that they acted negligently in the conduct of the litigation on behalf of Cash Converters, they may need to notify their professional indemnity insurers, if they have not already done so, as Cash Converters may seek an indemnity from Holly Blue in respect of their liability.

The second application

99. In her submissions, Ms Twine referred to Mrs Cairns' witness statement, where she provides further information in support of her application. She relies upon the following:

    a. Cash Converters acted badly because they lied or misled the Tribunal.

    b. Cash Converters had no defence to the claims.

    c. Cash Converters behaved unreasonably by not disclosing documents.

    d. Cash converters did not comply with other directions from the Tribunal.

100. I have already dealt with items (c) and (d) and have made a costs order in respect of the additional costs incurred by Miss Cairns because of those failings. I do not propose to say any more on those matters.

101. Mrs Cairns says in paragraph 3 of her statement that whilst giving evidence, Mr Lowes denied that Miss Cairns told him she was going off sick with "work-related stress" on the telephone on 9 September 2019 to advise that she was off sick. He said that Miss Cairns had advised him she would be off sick for a week but did not say why. Mrs Cairns then refers to a subsequent email which Mr Lowes sent to Miss Cairns referencing the fact that she was off sick with work-related stress. She then refers to my asking Mr Lowes how he knew that Miss Cairns was off with work-related stress if she had not told him during the telephone call on 9 September 2019. She states that Mr Lowes could not give

a reasonable explanation and that in Mrs Cairns, opinion, he was lying and trying to mislead the Tribunal. I disagree. The Tribunal did not reach the conclusion that Mr Lowes had lied.

102. Mrs Cairns refers to Mr Pilgrim failing to disclose his handwritten notes. This prompted an adjournment to enable a search for those notes.

103. Ms Twine submitted that Cash Converters had behaved unreasonably in failing to concede that Miss Cairns was disabled at the material time. She submitted that there was ample evidence to support the fact that Miss Cairns was disabled from the point of time when she had emailed her medical report to Holly Blue on 25 January 2019. She submitted that Cash Converters knew that they had a disabled employee suffering from depression and stress at work and the fact that this was not conceded amounted to unreasonable behaviour. I was also referred to the fact that on numerous occasions various witnesses appearing for Cash Converters attempted to absolve themselves of responsibility in the decision-making relating to Miss Cairns by referring back to the role that Holly Blue played. I was also referred to the Tribunal's findings in paragraph 176 (a) of the reserved judgment relating to Mr Lowes. I was referred to paragraph 89 of the reserved judgment where the Tribunal found that Mr Harrison had given a disingenuous answer relating to the letter of concern as another example of unreasonable behaviour. In her submission, Ms Twine said that this met the threshold under rule 76 (1) (a) and costs should be awarded.

104. Ms Twine addressed me on the scope of rule 76 (1) (b) in that costs should be awarded on the basis that the response had no prospect of success. She referred to paragraphs 4 to 6 of Mrs Cairns' witness statement. In summary, it is submitted that all the witnesses appearing for Cash Converters admitted that they had not followed the company handbook relating to disciplinary matters which was relevant to the claims for unfair dismissal and disability discrimination (especially the failure to make reasonable adjustments claim). In her submission, when an employer fails to follow their own handbook, this generally equates to liability, and this should have been considered by Cash Converters when assessing its prospects of success from the outset. Thereafter, it ought to have been apparent on the documents and on the witness statements that they had no reasonable prospects of success.

105. Ms Twine also submitted that Cash Converters denied that they had breached the implied contractual term of mutual trust and confidence in circumstances when there could not have been a starker case of such a breach. In support of this, she referred to the following paragraphs in the reserved judgment:

a. Mr Lowes' evidence on the letter of concern which he effectively sought to play down and his correspondence with Miss Cairns, which was accusatory and harsh (paragraph 176 (a).

b. Mr Pilgrim's evidence and the failure of Cash Converters to contact Miss Cairns between 16 January 2020 and 11 May 2020 when she was off sick and when she eventually enquired about any entitlement that she might have to be put on furlough. This was a period of nearly 5 months. This aspect was addressed in paragraph 64. There were

also findings that Mr Pilgrim failed to conduct a fair and transparent grievance process (paragraphs 71-76 and 176 (b)).

c. Cash Converter's failure to conduct a fair appeal in that Mr Harrison did not give credence to the substance of complaints against and was not influenced by the number of complaints regarding Ms Lynn (paragraph 88).

d. Cash Converter's failure reasonably to manage Miss Cairns' long-term sickness absence in circumstances where it was unsupportive and uncommunicative which was relevant to the claims for unfair dismissal and discrimination arising from disability (paragraphs 99 and 178).

e. The threatening tone of Cash Converters' communications with Miss Cairns (paragraph 177).

f. Cash Converters' denial of the disability discrimination claims in circumstances where there was no reasonable prospect of defending them. Their defence of the claim of discrimination arising from disability proceeded on the basis of objective justification (i.e. a proportionate means of achieving a legitimate aim). However, the Tribunal had found that no alternatives to an SOSR meeting were considered such as a phased return to work or a referral to occupational health which would have been less discriminatory (paragraph 187). Ms Twine submitted that Cash Converters ought to have known this when it looked to defend the claim, they could not simply say that the discrimination was justified.

g. Regarding the claim for failure to make reasonable adjustments, t there was overwhelming evidence that the PCPs put Miss Cairns to a substantial disadvantage and Cash Converters ought to have known that no steps had been taken notwithstanding the existence of the sickness policy and Holly Blue's involvement in providing advice at the time (paragraph 191).

106. Ms Twine conceded that no costs warning letter had been sent but there had been an early offer to settle which Cash Converters had not responded to. She further submitted that had Cash Converters properly assessed their case from the outset they ought to have realised that they had no reasonable prospects of success. Consequently, the threshold in rule 76 (1) (b) was made.

107. In their written representations, Holly Blue respond to the application on the premise that it was for Miss Cairns to bring her case and the manner in which it was funded is irrelevant to any decision on costs.

108. Regarding the allegation that Mr Lowes lied to the Tribunal, I have already decided for the reasons set out above that the Tribunal did not find that Mr Lowes had lied in this respect. I do not need to consider this aspect of Holly Blue's representations.

109. Regarding the submission that the response had no prospect of success, it is submitted that all of the defences had a reasonable prospect of success. Reference is made to the test to be applied when considering a strike out

application. If a party wishes to strike out claims on the basis of no reasonable prospect of success, the burden upon that party is high and it is necessary to go further than simply showing that the case is weak or unlikely to succeed. In relation to a discrimination claim applications should only be made in the most obvious and plain cases where there is no factual dispute and where the applicant can clearly show reasonable prospects of success. Applications should not be made in any case that involves prolonged or extensive study of documents and the assessment of disputed evidence that may depend upon the credibility of witnesses. The Tribunal is invited that even if it was found that the response had little prospect of success after hearing all of the evidence that would be insufficient to consider the claim as having no reasonable prospect of success. The latter requires a higher threshold to be met.

110. Reference is also made to the decision in **Radia** and was applicable to this case in that the majority of the factual circumstances of the case were disputed by both sides which required the Tribunal to undertake an exercise to consider the credibility of the witnesses and to undertake a prolonged study of the documents. Furthermore, no costs warning was issued by Miss Cairns which is relevant when considering the application. It was also submitted that the parties assumed that the case would go to a final hearing. From this I infer that if a preliminary issue such as a strike out or deposit application was contemplated by Miss Cairns she would have applied for a public preliminary hearing.

111. It was accepted that Mr Pilgrim hadn't disclosed his handwritten notes which was a mistake. He thought they would not be relevant as they were cursory or "scribbles". Furthermore, reasonable attempts had been made during the course of the final hearing to find those notes.

112. Having considered the evidence and submissions, I am not satisfied that the threshold under rule 176 (b) has been made out. From the outset of the case, it is clear when one reads the 62 paragraph grounds of resistance, that this was a case which was justiciable. A fulsome and a colorable defence was presented. Significant facts were in dispute which required to be tested at a final hearing of the evidence. It is noteworthy that the hearing bundle has 548 digital pages. The Tribunal heard evidence from six witnesses during a hearing that lasted for several days. The volume of evidence was such that it yielded a 73-page reserved judgment. It cannot be said by any measure that the response had no reasonable prospect of success from the outset. Consequently, a costs order under rule 76 (1) (b) cannot and should not be made in respect of this application.

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Employment Judge Green

Date 20 July 2022