EMPLOYMENT TRIBUNALS

Claimants: Mr R Kiseliov, Mr E Kurktus and Mr J Iljin

Respondent: Alpha Vehicles Limited

RECORD OF A PRELIMINARY HEARING

Date: 8 July 2022

Before: Employment Judge James (sitting alone)

At: Leeds (by CVP)

Appearances

For the claimant: Ms A Hashmi, counsel

For the respondent: Mr J Ratledge, counsel

Interpreter: Ms I Kambarovaite (Lithuanian interpreter)

JUDGMENT

(1) The application to set aside the dismissal of the claims and the response to counterclaim (Rule 38(2) Employment Tribunal Rules of Procedure 2013) is refused.

(2) The application for costs against the claimants (Rules 76(1)(a) and (b) and 76(2) Employment Tribunal Rules of Procedure 2013) is refused.

(3) The application for wasted costs against Ms Hashmi succeeds, in the sum of £4,500.

REASONS

The issues for the hearing

1. This preliminary hearing was listed on 6 May 2022, to consider three issues. First, the claimants' application to set aside the dismissal of the claims and the response to counterclaim (Rule 38 (2)); second, an application for costs against the claimants (Rules 76(1)(a) and (b) and 76(2)); third, an application for wasted costs against Ms Hashmi (Rule 80).
2. A Lithuanian interpreter had been booked, in the expectation that the claimants would be present at the hearing. This was because the order dated 11 May 2022, following the hearing on 6 May 2022, confirmed that this hearing would consider, amongst other things, an application for costs against the claimants. On Ms Hashmi confirming that nevertheless, the claimant's were not going to attend, the interpreter was released.
3. Orders were made to ensure that the applications could be dealt with on this occasion. They included the following:

> ***3. By 4pm on 13 May 2022*** *the claimants shall add any further documents they or their counsel would like to rely on at the next hearing, to the end of the 199 page bundle prepared by the respondent for today's hearing, and email a copy of the amended bundle to the respondent's solicitors. The bundle shall include any documents from the claimants to Ms Hashmi asking her to represent them at the hearing today and any response. Such documents may be suitably redacted to the extent that they contain any legal advice, or any request for advice.*
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> ***4. By 4pm on 13 May 2022****, the claimant's counsel shall send to the respondent's solicitors copies of the documents provided to the tribunal by email this morning supporting her application for her to join the hearing by video link. Those documents are not to be forwarded to the respondent and should only be included in the bundle for the next hearing if they are relevant to any arguments to be put forward then.*
>
> *5. The bundle is to be finalised* ***by the respondent on 4pm on 17 June 2022 and emailed to the claimants and Ms Hashmi.*** *A copy should also be emailed to the tribunal in line with the order below. The bundle should include a note of the costs claimed by the respondent and any related invoices. No further documents will be considered at the hearing that have not been included in the bundle, without the leave of the Judge.*
>
> ### *Application for wasted costs*
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> *6. Mr Ratledge indicated that his client was considering making an application for wasted costs against Ms Hashmi as a result of the hearing not being able to proceed today. If any such application is to be made, it must be sent to Ms Hashmi and to the tribunal* ***by 4pm on 27 May 2022.***

7. Ms Hashmi must send any response to the application, if made, together with any supporting evidence, to the respondent and to the tribunal, ***by 4pm on 10 June 2022.***

Preliminary matters

4. The respondents had prepared a bundle, which had substantially increased in length, following the previous hearing. The bundle for the previous hearing was 199 pages. The bundle for this hearing was 1037 pages. The tribunal also received a written skeleton argument from Mr Ratledge, a chronology, and two legal authorities, which shall be referred to in due course.

5. At the outset of the hearing, Ms Hashmi argued that certain documents were missing from the amended bundle. She stated that a 346-page bundle had been sent to the tribunal on 14 May 2022, although that was wrongly marked for the attention of Employment Judge Wade. That bundle has not been printed off by the Tribunal. It is not the job of the Tribunal to do so. To the contrary, the directions quoted above were made to ensure that an agreed bundle of documents was provided to the Tribunal in time for this hearing. Ms Hashmi re-sent a Dropbox link to the bundle, at 11:40 am on the day of the hearing, having sent an email at 10:39 without the link attached. An application was made to admit those documents in evidence. The application was refused for the following reasons.

6. As already noted, orders were made in the order dated 11 May, following the previous hearing. Those orders should have been complied with. No satisfactory explanation has been provided to the Tribunal why they were not.

7. As noted above, Ms Hashmi did not send a link to the 346 page bundle to the tribunal until 11:40 am; and the link provided was a DropBox link. Mr Ratledge had commenced his submissions on the substantive applications at 11.23 am, before that was even received. It is not the job of the Tribunal to download or print bundles from DropBox.

8. Mr Ratledge informed the Tribunal that the bundle had been sent to Ms Hashmi as well as to the claimant's representative on 17 June as ordered. A read receipt had not been delivered until today, at 9.39 am. Ms Hashmi did not demur from that suggestion. It appears therefore that preparation for this hearing was not begun in good time by Ms Hashmi.

9. Further, paragraph 3 of the order of 11 May 2022, quoted above, confirmed that the documents were to be added to the 199 page bundle from the previous hearing. At that hearing, Ms Hashmi agreed to assist the claimants to do so. Had the direction been complied with and had Ms Hashmi taken the action she had agreed to take, the 346 pages could have been added to the previous bundle. It would then have been a simple job to forward that to the solicitors for the respondent.

10. Yet further, in preparing for the hearing, it should have become apparent to Ms Hashmi, prior to 9.39am on the day of the hearing itself, that some relevant documents were missing. A request could have been made even at that late stage to the respondent's solicitors to include those in the bundle. Alternatively, a short supplementary bundle could have been prepared and sent to the Employment Tribunal, attaching those documents which it was said were missing from the bundle prepared and sent in line with the directions of 11 May 2022.

11. In all of these circumstances, the Tribunal determined that it would not be just or fair to allow a further substantial bundle of documents to be put before the Employment Tribunal, at such a late stage, in breach of the orders that were made at the previous hearing.

12. Following the ruling, Mr Ratledge made oral submissions in relation to the applications made by the respondent. Following Mr Ratledge's oral submissions, Ms Hashmi responded. A brief right of reply was given to Mr Ratledge; followed by a further very brief right of reply to Ms Hashmi. Judgment was reserved.

13. The three applications before the hearing are dealt with in turn below. In relation to each of the applications, the relevant legal principles are set out first; these are followed by findings of fact relevant to those principles; finally, the Tribunal's conclusions on the application are set out.

I. Application to set aside the dismissal of the claims

Legal principles

14. Rule 38(2) Employment Tribunal Rules of Procedure 2013 provides:

> *(2) A party whose claim or response has been dismissed, in whole or in part, as a result of such an order may apply to the Tribunal in writing, within 14 days of the date that the notice was sent, to have the order set aside on the basis that it is in the interests of justice to do so. Unless the application includes a request for a hearing, the Tribunal may determine it on the basis of written representations.*

15. There is some guidance on the test in Rule 38(2) in *Wentworth-Wood v Maritime Transport Limited UKEAT/0316/15/JOJ* at paragraph 7 which reads as follows:

> *Thirdly, if the party concerned applies under Rule 38(2), the ET will decide whether it is in the interests of justice to set the Order aside. This is not the same as asking whether it was in the interests of justice to make the Order in the first place. It is the stage of the procedure at which the ET considers relief against sanction, and it can take into account a wide range of factors, including the extent of non-compliance and the proportionality of imposing the sanction; see Neary v Governing Body of St Albans Girls' School [2010] ICR 473 CA at paras 48-53.*

16. Reference is made in *Neary* to the factors set out at CPR 3.9(1) of the CPR. Not all of those factors need to be considered in an application under Rule 38(2). For the sake of completeness, the CPR 3.9(1) factors are:

> *(a) the interests of the administration of justice;*
>
> *(b) whether the application for relief has been made promptly;*
>
> *(c) whether the failure to comply was intentional;*
>
> *(d) whether there is a good explanation for the failure;*
>
> *(e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol;*
>
> *(f) whether the failure to comply was caused by the party or his legal representative;*
>
> *(g) whether the trial date or the likely date can still be met if relief is granted;*
>
> *(h) the effect which the failure to comply had on each party; and*

(i) the effect which the granting of relief would have on each party.

17. At paragraph 60 of *Neary* the court said:

> *Given that this was a deliberate and persistent failure to provide the particulars, it seems to me difficult to criticise the EJ's conclusion. One of the conditions set out by Sedley LJ in* Blockbuster *had been complied with. It is well established that a party guilty of deliberate and persistent failure to comply with a court order should expect no mercy. It seems to me that the EJ was entirely justified in taking the view that a review of the automatic strike out had no reasonable prospect of success. It would have been better if he had said so in terms. However, he did say that the circumstances justified the strike-out and it seems to me that that must have meant that he considered it to be just.*

Relevant facts

18. The Claim forms were submitted on 19 September 2020. Claims were made for notice pay, holiday pay and arrears of pay. The claimants claimed that they were not paid the National Minimum Wage during their employment. They asserted that they had resigned as they were not being paid properly. Further, they had not taken any annual leave during their employment.

19. The responses were filed on 3 November 2020. They included a counterclaim against Mr Kiseliov. The claim for Mr Kiseliov is for about £18,000 plus notice pay and holiday; for Mr Kirktus, about £1,300 plus notice and holidays; and for Mr Iljin, £23,000 plus notice pay and holidays. The counterclaim is for over £146,000. Both the claims and the counterclaim are thus for significant amounts.

20. A response to the counterclaim was be provided by 27 November 2020. A response was not provided in time.

21. At a preliminary hearing by CVP on 21 December 2020, EJ Shepherd listed the claims for a for preliminary hearing on 8 and 9 April 2021, in person, to determine whether the response should be struck out due to alleged death threats against the claimants; and whether Acas Early Conciliation had been complied with by Mr Kiseliov. Related orders were made regarding the provision of further particulars, and the exchange of documents and statements etc.

22. By 18 January 2021 further particulars were to be provided, together with updated schedules of loss. An application for strike out was made by the respondent on 20 January 2021 since those were not provided.

23. By 8 February 2021, the claimant's were to provide full written details of the proposed application to strike out the respondent's response. That order was not complied with.

24. A strike out warning was issued on 9 February 2021 due to the failure to comply with ET orders/the claim not being actively pursued. Objections were to be provided by 23 February 2021. That order was not complied with.

25. Applications were made to postpone the preliminary hearing, because of the claimant's alleged persistent non-compliance with orders. On 1 April 2021 the tribunal postpone the preliminary hearing to 25 and 26 May 2021.

26. On 25 and 26 May 2021, a preliminary hearing took place before Employment Judge Buckley. The final hearing was listed between 21 to 25 March and 28 to 30 March 2022 inclusive. The issues were identified. Witness statements were ordered to be

exchanged on 17 February 2022 for the final hearing. The respondent's application for an unless order was refused but EJ Buckley stressed the need for the claimants to comply with the orders made. Mr Kiseliov was given leave to provide a late response to the counterclaim on 26 May 2021.

27. A case management preliminary hearing took place on 13 October 2021, when further orders were made. On 1 November and 3 November 2021, applications were made by the respondent for strike out/unless orders. A strike out warning was issued, following which the claimants substantively complied with the orders, so that was not pursued further. The final hearing remained listed on 21 March 2022, for 8 days.

28. On 1 December 2021, further orders were made by Employment Judge Lancaster which included the following:

> *4. For the avoidance of doubt the date for sending copies of documents […] is extended to 15th December 2021. If there are in fact no further documents to be disclosed the parties must by the same date confirm to the other side that this is in fact the position.*
>
> *6. The date for the parties to try to agree a list of issues for the final hearing is also extended to 20th January 2022.*
>
> *7. The date for sending of witness statements is confirmed to be that in EJ Buckley's original order, 17th February 2022.*

29. A further application for strike out and unless orders was made by the respondent on 25 February 2022 due to continuing non-compliance with tribunal orders. An Unless Order was made on 9 March 2022, no response having been received to the application from the Claimants. The final hearing remained listed. The deadline for compliance with the orders was 15 March 2022. The orders made were as follows:

> *Unless by the 12pm 15th March 2022 the claimants comply with all outstanding directions to send a list and copy of documents (due on 15th December 2021), confirm or submit a proposed variation to the list of issues (due on 20th January 2022) and send to the Respondent a copy of their witness statements (due on 17th February 2020 but put back, without formal extension, by the Respondent to 24th February), and confirm in writing to the Tribunal that they have done so the claims and the response to the employer's contract claim will stand dismissed without further order.*

30. At 11.59 am on 15 March 2022, an email was sent by the claimants to the tribunal with a copy to the respondent's solicitors which stated:

> *This is the 4th time we have written to the Tribunal. All of our information was already provided to the Respondent's legal representative and the Tribunal at the hearing on 26.5.21 by our representative. We have attached proof those emails sent to Judge Buckley at the hearing on 26.5.21 to this email.*
>
> *The only documentation that has been sent after this is the translations dated 19.10.21.*
>
> *We do not therefore understand why we have been provided with an unless order especially given the fact that the Respondent has been able to prepare a bundle which contains the documents that we have been provided them with. We attach a copy of this bundle.*

In fact it was the Respondent who wrote to us …. to request additional time for the exchange of witness statements however these were already provided to the Respondent on 26.5.21 as can be seen from the attached emails.

It is in the public interest for this claim to be heard Claimant because this claim deals with fraud and abuse of the government furlough scheme by the Respondent.

At present we do not have a legal representative and we have already told the Respondent that we agreed to the draft list of issues subject to any legal advice that we will be given prior to the hearing.

31. At 16.20 on 15 March 2022, an email was sent to the tribunal, cc the respondent's solicitors, attaching an email with a pdf with four witness statements attached. The covering email stated:

The witness statements of all 4 Claimants were sent by the Claimants themselves to the Court before the case on 25.5.21 when the hearing in front of EJ Buckley took place. This is why the Claimants were able to give evidence at the Court at the hearing on 25.5.21 and 26.5.21. We have also attached these emails to the Tribunal separately as well.

32. The statements attached run to four pages each and are broadly the same. No reference is made in them to any of the pages in the final hearing bundle, since they are statements made in relation to the issues before the tribunal on 25 and 26 May 2021.

33. This email was not included in the bundle prepared by the respondent's solicitors for the preliminary hearing on 6 May 2022 and nor was it included in the 1037 page bundle prepared for this hearing. That is a notable and inexplicable omission. The Tribunal is only aware of the contents of that email and the attachments because it was sent by Ms Hashmi on 6 May 2022.

34. The respondent applied for confirmation that the claims had been dismissed on 15 March 2022. Their letter stated:

In relation to the first and second Orders above, we wish to bring the Tribunal's attention to the fact that the Claimants have still not provided a list and copies of documents that they wish to refer to at the final hearing, nor have they confirmed that there are no further documents to be disclosed.

We also wish to highlight that, in their correspondence of today's date, the Claimants have referred to the bundle that we provided to them on 28 January 2022. This bundle was prepared only with the documentation that the Claimants had provided in anticipation of the preliminary hearing and was prepared on the basis that the Claimants had nothing further to add at that stage. We have previously written to the Claimants in order to obtain agreement to the contents of the draft joint hearing bundle for trial, however they have not provided confirmation of such. They have been silent on the issue.

In relation to third Order above, we wish to clarify our understanding of the purpose of the witness statements that the Claimants have provided and referred to in today's emails.

The Claimants have indicated that they have complied with the Order by providing us and the Tribunal with copies of witness statements made by the First Claimant, Mr Viktor Kiseliov, and Mr Daumantas Malinauskas on 25 May 2021.

It is abundantly clear that these witness statements were prepared in anticipation of the preliminary hearing which took place on 25 and 26 May 2021. The primary purpose of the preliminary hearing was to give Mr Viktor Kiseliov the opportunity to respond to the Respondent's counterclaim and to explore Mr Daumantas Malinauskas' employment status (this claim has since been struck out).

Following the preliminary hearing, the above Case Management Order was made which imposed a further obligation on the Claimants to provide full and complete witness statements in preparation for the final hearing (which is listed for 21 March 2022).

Even if the Claimants are seeking to rely on the existing witness statements, which in our view (and, we submit, in the view of the Tribunal, hence its Order that further statements be provided) are wholly inadequate for the purposes of the final hearing, they have still failed to comply with the Order in its entirety given that the Second and Third Claimants (Mr Kurtkus and Mr Iljin) are yet to supply any statements.

35. Confirmation that the claims were dismissed was issued by the tribunal on 16 March 2022. An application to set aside the dismissal was made on 16 March 2022 by email, sent on the claimant's behalf at 13:43. On 24 March 2022 an application for costs was made by the respondent.

Decision on the Rule 38(2) application

36. The decision on this application to set aside the dismissal of the claims has not been an easy one. The issues are finely balanced. Following careful consideration however, it is the judgment of the Tribunal that the dismissal order should not be set aside. The following factors in particular have been taken into account in arriving at this decision.

37. It is noted and accepted that the application for relief from sanction was made promptly. Further, in the judgment of the Tribunal, the failure to comply was not intentional but due to language difficulties and because the claimants were representing themselves in between hearings. There is a therefore a partial explanation for non-compliance, in that the claimant's are foreign nationals who speak Lithuanian, not English. Some allowance is to be made for that. However, there comes a point at which the tribunal must draw a line, especially where the continuing failure to comply with tribunal deadlines and orders has interfered with the proper administration of justice. Hearings have had to be adjourned on three occasions now, taking into account the last hearing on 6 May 2022 which could not proceed at that time for reasons which will be considered in due course.

38. One of the concerning issues in relation to this matter, is that the respondent's application for dismissal of the claims was not entirely accurate. Whilst the Tribunal is not suggesting that was deliberate, it is incumbent on professional legal representatives to put a full and accurate picture before the Tribunal, in relation to any application made. The contents of the email sent at 11:59 on 15 March 2022 can reasonably be read as confirming that the claimants did not have any additional documents to provide, and therefore that the bundle was in effect agreed; and did not have anything to add to the list of issues.

39. Of more significance, is the failure to inform the tribunal that the email sent at 16:20 on 15 March 2022 contained four witness statements, not two (although it is accepted that in any event, all four witness statements were written for the purposes

of the preliminary hearing in May 2021, and not for the final hearing). It also concerns the Tribunal that the email sent at 16:20 on 15 March 2022 was not only absent from the bundle of documents prepared for the preliminary hearing on 6 May 2022, at which the application to set aside was first considered; it has also been omitted from the much larger bundle prepared for the purposes of this hearing. That is an important document and it should have been included in the bundle.

40. Whilst these matters are of some concern, ultimately they do not persuade the Tribunal that it would be in the interests of justice to set aside the dismissal of the claims. The tribunal is reminded that this judgment is not concerned with whether or not the unless order, and subsequently the dismissal order should have been made in the first place; but with whether it is in the interests of justice to set the latter order aside. It remains the case that full and sufficiently detailed witness statements were not provided in time for the final hearing. If indeed it was the case that the claimants did not intend to provide any further witness evidence to the final hearing, other than that presented to the preliminary hearing in May 2021, that could and should have been stated at a much earlier stage. At the preliminary hearings in May and October 2021, at which relevant orders were made, the claimants were represented by Ms Hashmi. If the claimants did not intend to give any further evidence about their claims, that could and should have been made clear on one of those occasions.

41. Further, the witness statements that have been provided are brief, running to only four pages each, part of which relates to the issue as to whether or not the claimant's were subjected to threats. That was a matter to be considered at the May 2021 preliminary hearing, and which was no longer relevant to the remaining issues in the case. The statements do not refer to page numbers in the final hearing bundle, and nor do they, in the case of Mr Kiseliov, make any reference to the counterclaim. Further, none of the statements have a statement of truth from a person who confirms that they have read the contents of the statements to each of the claimants. Finally, and in any event, the email containing those four brief witness statements was not sent until 16:20, over four hours after the deadline for complying with the unless order had passed. Whilst relatively short in itself, that specific non-compliance stands to be judged in the context of the numerous instances of non-compliance set out in detail in the facts section above. Non-compliance which has continued in relation to this hearing, as noted below.

42. Had the claims not been dismissed when they were, it was highly likely that the hearing listed for eight days from 22 March 2022 would have had to have been adjourned. Were the claims to be allowed back in at this stage, it would be 6 to 9 months before they could be re-listed for hearing.

43. Bearing all of the above in mind, it is the Tribunal's judgment that the dismissal of the claims should not be set aside since it would not be in the interests of justice to do so. If judgment were set aside and the claim re-listed for hearing, further directions would need to be made to enable that to happen. The Tribunal remains unconvinced, on the basis of the history of these proceedings to date, and the numerous instances of non-compliance, that those orders would be properly complied with in a timely fashion. The application is therefore refused.

II. Application for costs

Relevant legal principles

44. Rule 76 of the Employment Tribunal Rules of Procedure 2013 ("the 2013 Rules"), provides, in so far as relevant here:

> *(1) A Tribunal may make a costs order … and shall consider whether to do so, where it considers that—*
>
> > *(a) a party … 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;*
> >
> > *(b) any claim or response had no reasonable prospects of success*
>
> *(2) A Tribunal may also make such an order where a party has been in breach of any order …*

45. Rule 76 requires the Tribunal to adopt a two-stage approach:

> *the tribunal must first consider the threshold question of whether any of the circumstances identified in [what is now Rule 76] applies, and, if so, must then consider separately as a matter of discretion whether to make an award and in what amount."* (*Vaughan v London Borough of Lewisham (No. 2) [2013] IRLR 713* at [5])

46. In *Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78* it was stated:

> *The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had." (Paragraph 41)*

47. It remains a fundamental principle that the purpose of an award of costs is to compensate the receiving party, not to punish the paying party (*Lodwick v London Borough of Southwark [2004] IRLR 554 CA*).

48. If the Tribunal is satisfied that the claimant acted vexatiously or unreasonably, it must then consider separately whether to make an award and, if so, in what amount. At this stage:

> *the Tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of its discretion …*

although the respondent is not required:

> *to prove that specific unreasonable conduct by the [claimant] caused particular costs to be incurred*". (Kapoor at #15)

49. Rule 78 provides, in so far as relevant here:

> *(1) A costs order may—*
>
> > *(a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;*
> >
> > *(b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed*

assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998 ["the CPR"], or by an Employment Judge applying the same principles…

(3) For the avoidance of doubt, the amount of a costs order under sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000.

50. The relevant parts of Rule 84 provide:

In deciding whether to make a costs … order, and if so in what amount, the Tribunal may have regard to the paying party's … ability to pay.

Relevant facts

51. Reference is made to the facts set out above in relation to the application under Rule 38(2). Those facts are also relevant to the application for costs. Mr Ratledge also relies on the limited and sporadic emails from the person relied on by the claimant's to write to the tribunal and the respondent's solicitors ('Adil').

52. Further, the hearing could not proceed on 6 May because relevant documents were not provided beforehand. At 10.09 Ms Hashmi sent an email to the tribunal with attachments. Further emails were sent at 10.45, 11.39, 12.01, and 12.29, after the hearing had started. The tribunal adjourned at 12.35 to check its Inbox. Those inquiries showed that an email was received by the tribunal at 12 noon on 15 March but that it did not contain the pdf bundle of statements which were put before us by Ms Hashmi today. It is now apparent that they were received at 16:20 hours. The continued drip feed of emails on the day of the hearing shows disrespect for the work of the Tribunal and the efficient administration of justice.

53. The Orders made on 6 May have also not been complied with, resulting in issues over the bundle for this hearing. Those other instances of non-compliance are dealt with in relation to the wasted costs application below and are not repeated here.

Decision on the costs application against the claimants

54. The respondent relies on three bases for the costs application - unreasonable conduct of the proceedings; that the claims had no reasonable prospect of success; and non-compliance with orders. In effect, these are all inter-related. The unreasonable conduct of the proceedings is the continued failure to comply with orders. Mr Ratledge argued that because of the failure to comply with such orders, there was no reasonable prospect of the proceedings succeeding. Self-evidently, orders have not been complied with. In considering the application for costs, the Tribunal notes that whilst there are three potential bases for the costs application, the underlying reason is the same in each case.

55. No specific evidence was provided to the tribunal about the claimant's means. It is however apparent that whilst they are in employment, they are engaged in low-waged work and of limited means.

56. The tribunal is satisfied that a threshold condition for the making of a costs order has been met – namely, unreasonable conduct of the proceedings, as a result of continued non-compliance with orders, leading to hearings having to be adjourned.

57. In considering whether or not to exercise the discretion to award costs however, the tribunal notes that as a result of that non-compliance, the claims have been dismissed. The claimants have therefore been denied the chance to put their claims before a tribunal and have the dispute heard. The respondent has been saved the

costs which would have been occasioned by an 8-day hearing. Whilst that does not automatically mean that a costs order should not be made, the tribunal is satisfied that in the circumstances of this case, and bearing in mind also the claimant's limited means, that the discretion to award costs should not be exercised in this case against the claimants.

III. Application for wasted costs

Relevant legal principles

58. Rule 80 of the Employment Tribunal Rules of Procedure 2013 provides:

> *(1) A Tribunal may make a wasted costs order against a representative in favour of any party ('the receiving party') where that party has incurred costs—*
>
> > *(a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative; or*
> >
> > *(b) which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay.*
>
> *Costs so incurred are described as 'wasted costs'.*
>
> *(2) 'Representative' means a party's legal or other representative or any employee of such representative, but it does not include a representative who is not acting in pursuit of profit with regard to the proceedings. A person acting on a contingency or conditional fee arrangement is considered to be acting in pursuit of profit.*
>
> *(3) A wasted costs order may be made in favour of a party whether or not that party is legally represented and may also be made in favour of a representative's own client. A wasted costs order may not be made against a representative where that representative is representing a party in his or her capacity as an employee of that party.*

59. Rule 81 (Effect of a wasted costs order) provides:

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

60. Rule 82 (Procedure) provides:

> *A wasted costs order may be made by the Tribunal on its own initiative or on the application of any party. A party may apply for a wasted costs order at any stage up to 28 days after the date on which the judgment finally determining the proceedings as against that party was sent to the parties. No such order shall be made unless the representative has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application or proposal. The Tribunal shall inform the representative's client in writing of any proceedings under this rule and of any order made against the representative.*

61. Rule 84 (Ability to pay) provides:

> *In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.*

62. The leading general guidance is contained in the judgment of the Court of Appeal in *Ridehalgh v Horsefield* [1994] Ch 205, [1994] 3 All ER 848 (approved by the House of Lords in *Medcalf v Mardell* [2002] UKHL 27, [2003] 1 AC 120, [2002] 3 All ER 721), from which the general principles set out below are extracted. Although the Court was there concerned solely with legal representatives, the principles may be adapted so as to apply to any representatives falling within Rule 80. The principles are as follows:

> *(a) When considering whether to make a wasted costs order, a* three-stage test *should be applied:*
>
> > *(i) Has the legal representative of whom complaint was made acted improperly, unreasonably or negligently?*
> >
> > *(ii) If so, did such conduct cause the applicant to incur unnecessary costs?*
> >
> > *(iii) If so, is it, in all the circumstances, just to order the legal representative to compensate the applicant for the whole or part of the relevant costs?*
>
> *(b)* 'Improper' *covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. Conduct which would be regarded as improper according to the consensus of professional (including judicial) opinion can be fairly stigmatised as such, whether or not it violates the letter of a professional code.*
>
> *(c)* 'Unreasonable' *aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. The acid test is whether the conduct permits of a reasonable explanation.*
>
> *(d)* 'Negligent' *should be understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession. In adopting an untechnical approach to the meaning of negligence in this context, the Court firmly discountenanced any suggestion that an applicant for a wasted costs order under this head need prove anything less than he would have to prove in an action for negligence.*
>
> *(e) A legal representative is not to be held to have acted improperly, unreasonably or negligently simply because he acts for a party who* pursues a claim or defence which is plainly doomed to fail*. It is rarely if ever safe for a court to assume that a hopeless case is being litigated on the advice of the lawyers involved. They are there to present the case; it is for the judge and not the lawyers to judge it. On the other hand, a legal representative must not lend his assistance to proceedings which are an abuse of the process of the court. It not entirely easy to distinguish between the hopeless case and the case which amounts to an abuse of process, but in practice it is not hard to say which is*

which, and if there is doubt, the legal representative is entitled to the benefit of it.

(f) If an advocate's conduct in court *is improper, unreasonable or negligent, he is liable to a wasted costs order. But a judge must make full allowance for the fact that an advocate in court often has to make decisions quickly and under pressure. Mistakes will inevitably be made and things done which the outcome shows to have been unwise. Advocacy is more an art than a science and cannot be conducted according to formulae. Individuals differ in their style and approach. It is only when, with all allowances made, an advocate's conduct of proceedings is quite plainly unjustifiable that it can be appropriate to make a wasted costs order against him.*

(g) Where an applicant seeks a wasted costs order against the lawyers on the other side, legal professional privilege *may be relevant both as between the applicant and his lawyers and as between the respondent lawyers and their client. If the applicant's privileged communications are germane to an issue in the application, he can waive his privilege, and if he declines, adverse inferences can be drawn. The respondent's lawyers are in a different position, as the privilege is not theirs to waive. Judges who are invited to make or contemplate making a wasted costs order must make full allowance for the inability of respondent lawyers to tell the whole story. Where there is room for doubt, the respondent lawyers are entitled to the benefit of it. It is again only when, with all allowances made, a lawyer's conduct of proceedings is quite plainly unjustifiable that it can be appropriate to make a wasted costs order.*

(h) The court has jurisdiction to make a wasted costs order only where the improper, unreasonable or negligent conduct complained of has caused a waste of costs *and only to the extent of such wasted costs. Demonstration of a causal link is essential.*

(i) As to the timing of an application *for wasted costs, such an application is generally best left until after the end of the trial.*

(j) As to the appropriate applicant*, the court itself may initiate the enquiry whether a wasted costs order should be made. In straightforward cases (such as failure to appear, lateness, negligence leading to an otherwise avoidable adjournment, gross repetition or extreme slowness) there is no reason why it should not do so. But save in the most obvious case, courts should be slow to initiate the enquiry, and will usually be well advised to leave an aggrieved party to make the application if so advised.*

Relevant facts

63. The hearing was listed for 6 May 2022 to consider the claimant's application to set aside the dismissal of the claim dated 16 March 2022 and the respondent's application for costs. The claimants were asked by the respondent's solicitors to let them have any further documents they wanted to rely on at that hearing. No documents were received.

64. Ms Hashmi applied at 8.12 am on 6 May 2022 for permission to attend the hearing by video link due to ongoing medical issues. The Tribunal takes no issues with the substance of that request, which was granted. Costs schedules were received at 9.32am from the respondent's solicitors. At 10.09 Ms Hashmi sent an email to the

tribunal with attachments. Further emails were sent at 10.45, 11.39, 12.01, and 12.29, after the hearing had started.

65. The tribunal adjourned at 12.35 so the tribunal could check its Inbox. Those inquiries showed that an email was received by the tribunal at 12 noon but that it did not contain the pdf bundle of statements which were put before us by Ms Hashmi. That was contrary to what Ms Hashmi asserted at the outset of her application to set aside the dismissal. It is now apparent that the email containing those statements was received at 16.20 hours on 15 March 2022, over four hours after the deadline for compliance set out in the Unless Order. Some of the orders made by the tribunal were missing from the 6 May bundle although the most material of the missing documents were those sent on 15 March 2022 by the claimants to the Tribunal, and copied to the respondent.

66. As a direct result of the above conduct, it was not possible to deal with the applications on 6 May. Hence the listing of a further hearing, and the making of relevant orders to ensure this hearing could proceed smoothly. A number of those orders were not complied with. Whilst those have not prevented this hearing going ahead, they demonstrate a continuing failure to comply with, and apparent disrespect for, Employment Tribunal orders. For example, Ms Hashmi was ordered to send the medical information she had forwarded to the Tribunal on 6 May, to the respondent's solicitors, on condition that they did not forward it to their client. Without seeking any variation to that order, Ms Hashmi sent that information to the respondent's counsel Mr Ratledge, with a request that he did not forward it to his instructing solicitors. Ms Hashmi was ordered to properly comply with the order by 20 May 2022 but that still was not complied with. It was only complied with by default, in that Mr Ratledge understandably forwarded the email from Ms Hashmi to his instructing solicitors.

67. Further, Ms Hashmi failed to provide the respondent's solicitors by 13 May as ordered, any documents confirming when she received instructions to represent the claimants at the hearing on 6 May. The order was varied, for such documents to be provided by 5pm on Friday, 20 May 2022. It was later confirmed by Ms Hashmi by email that no written instructions were received, but that a telephone call had been made on 27 April 2022 confirming the instructions to represent on 6 May.

68. There has also been non-compliance with the order in relation to the preparation of an agreed bundle of documents for this hearing, as set out above, resulting in an application to introduce a further 346 pages, via a Drop Box link. The link itself was not received until 1 hour 40 minutes after the hearing started. It is also apparent that Ms Hashmi did not start to read the bundle until 9.39 am on the morning of the hearing.

Decision on the wasted costs application

69. The first question to be considered is whether Ms Hashmi, as the legal representative, acted improperly, unreasonably or negligently. The tribunal concludes that Ms Hashmi did act improperly and unreasonably; and, in the non-technical sense of the word, negligently. Despite receiving instructions to represent the claimant's on 27 April, Ms Hashmi did not begin to send relevant documents to the tribunal until after 10am on the day of the hearing. Nor was the basis for the application set out, prior to the hearing. Having accepted the brief, it was incumbent on Ms Hashmi to take all necessary steps to ensure that the hearing could proceed smoothly on 6 May. In the Tribunal's judgment, Ms Hashmi failed to do so. Instead, there was a constant drip, drip of emails throughout the hearing. Further, having

asserted that witness statements were provided by the deadline of noon on 15 March 2022, Ms Hashmi later resiled from that position when it became clear that the statements were not in fact attached to the 11:59 email, but to a later one.

70. Whilst Ms Hashmi's ongoing medical issues justified the application to attend the hearing by video link, (although it would have been helpful for that to be made earlier), they do not provide an explanation for the above conduct.

71. The second question to be considered is whether that conduct caused the respondent to incur unnecessary costs. The Tribunal concludes that it was that conduct which led to the adjournment of the hearing, and the further hearing having to take place today. Had the improper conduct not occurred, the tribunal is satisfied that the hearing could have proceeded on 6 May. Whilst it may have been necessary to reserve judgment, this further hearing day would not have been required.

72. The further costs incurred by the respondent as a result, are the costs occasioned by today's hearing and the extra preparation leading up to it. Whilst the respondent's solicitors did not include all relevant documentation in the bundle, it was incumbent on Ms Hashmi, having accepted the brief, to ensure that all material relevant to her clients' application was put before the tribunal. It was Ms Hashmi who knew the basis of the claimant's application, and the potential relevance of the emails sent on 15 March 2022 to the Tribunal on the claimants' behalf. It was therefore Ms Hashmi's primary responsibility to bring that to the respondent's attention, so that those documents could be included in the bundle of documents produced by the respondent for the hearing on 6 May.

73. The third question is whether it is just in all the circumstances to order Ms Hashmi to compensate the respondent for the whole or part of the additional costs incurred. The Tribunal concludes that it would be just in all the circumstances to do so. Ms Hashmi's conduct leading up to and at the hearing on 6 May is sufficient to justify that conclusion. Her continuing non-compliance with orders made following the hearing on 6 May further justifies the making of such an order.

74. The further costs claimed by the respondent are solicitors costs of £3,290 plus VAT and counsel's brief fee of £2,500 plus VAT. Assuming the receiving party is registered for VAT, VAT is not payable by Ms Hashmi. No information has been provided to the tribunal about Ms Hashmi's means. In such circumstances, the Tribunal does not take into account her means, under Rule 84. In relation to the solicitors costs, there appears to be some element of duplication. Applying a broad brush approach, the Tribunal allows £2,000 in total for solicitors costs, plus counsel's fees in full. The total costs to be paid by Ms Hashmi therefore amount to £4,500.

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Employment Judge James

22 July 2022