EMPLOYMENT TRIBUNALS

Claimant: **Mr R Smith**

Respondent: **Nottinghamshire Golf and Country Club Ltd**

COSTS JUDGMENT OF THE EMPLOYMENT TRIBUNAL
Without a hearing

MADE AT Nottingham **ON** 19 August 2022 **By** Employment Judge Millns

JUDGMENT

1. The Respondent is ordered to pay the Claimant's costs summarily assessed in the sum of **£6,696.00** (inclusive of VAT) pursuant to rule 76 (1) and (2) of the Employment Tribunal Rules 2013.

REASONS

Background to the Claimant's Application for Costs

1. At a hearing on 6 April 2022 the Respondent made an application to set aside the order of Employment Judge Hutchinson dated 11 March 2022 which dismissed the Respondent's Response for its failure to comply with the Unless Order issued on 28 January 2022 sent to the parties on 1 February 2022.

2. In determining that application in the Respondent's favour I was satisfied that in balancing the relevant factors, which included, but was not limited to, the reason for non-compliance, the seriousness of the default, the prejudice to the parties, whether a fair trial was possible and the availability of alternative sanction, that it was in the interests of justice to allow the Respondent relief from sanction. That decision had the effect of setting aside the order of 11 March 2022 in which the

Response was dismissed. The claim was then listed for a final hearing on 18-21 July 2020.

3. At the end of the hearing the Claimant's counsel, Ms Anderson, made an application for the Claimant's costs. I decided that any costs application should be made in writing and should be reserved to me for determination.

The Claimant's costs application

4. By letter dated 9 May 2022 the Claimant's representatives, Ashfords LLP, made an application for costs in writing. At the same time, they asked that the matter be determined on the papers without the need for a hearing.

5. In summary, the Claimant's application seeks a costs order under Rule 76(1) and/or Rule 76(2) based on what are alleged to be serious and repeated failures on behalf of the Respondent and/or the Respondent's representatives to respond to correspondence from the Claimant and the Tribunal and to comply with orders of the Tribunal, including an unless order, concerning the exchange of documents and witness statements.

6. The Claimant alleges that the unreasonable conduct by the Respondent started in November 2021, when it failed to provide witness statements as agreed by 5 November 2021. Thereafter the Claimant submits that Ashfords LLP spent time chasing the Respondent's then solicitors, Cleggs, for a response, which was not forthcoming, culminating in Ashfords LLP making an application for an unless order, which was granted on 28 January 2022. When the Unless Order was not complied with by the Respondent there was a further hearing on 1 March 2022 necessitating further costs by the Claimant.

7. Thereafter a Rule 21 remedy hearing was set down for 6 April 2022. On 25 March 2022 the Respondent made an application under Rule 38(2) to set aside the decision to dismiss the Response. That application was the matter which I determined in the Respondent's favour at the hearing on 6 April 2022.

8. The Claimant's application states that all the above matters have caused the Claimant to incur unnecessary cost and that such has been caused by the Respondent and/or its representative's unreasonable conduct (Rule 76 (1)) and/or their failure to comply with an order (Rule 76 (2)).

9. The Claimant's application for costs attaches a costs schedule. The total claim for costs by the Claimant is £5,544.00 plus VAT in respect of solicitors' fees and £1,500 plus VAT in respect of counsel's fees – therefore, a total of £8,332.80 inclusive of VAT.

The Respondent's response to the Claimant's costs application

10. The Respondent's representatives, Lanshaws Solicitors, responded to the Claimant's costs application by email dated 20 May 2022. They also requested that the Claimant's application be determined on written representations only.

11. The Respondents' submissions on costs start with the following paragraph:

"*It is an inescapable fact that the Claimant sought an unless order which was granted, and that order was not complied with. It is a further inescapable fact that correspondence from the Tribunal in relation to that order was not responded to. The Tribunal has determined that this was as a result of failures by the Respondent's then representative, not by the Respondent itself. Accordingly, the Respondent cannot seriously dispute that there has been unreasonable conduct of the proceedings by its former representatives for the purposes of rule 76(1)(a) or that there has been a breach of an order for the purposes of rule 76(2). The Respondent therefore focuses its response to the application not on the issue of whether the costs threshold had been crosses, but on the second stage in the decision making process as to whether the discretion should be exercised or not, and alternatively the amount of any costs order.*"

12. The Respondent then sets out in detail why it says discretion ought not to be exercised in favour of a costs order. In summary the Respondent invites the Tribunal to make a wasted costs order against its former representatives, Cleggs Solicitors, for two main reasons. Firstly, based on the findings of fact made by the Tribunal about the reason for the Respondent's non-compliance with Tribunal orders. Secondly, because if the Respondent was left to pursue Cleggs Solicitors for any costs ordered against the Respondent, that would involve additional cost and litigation risk to the Respondent. The Respondent also sets out its view as to why it says that the hearings of 1 March 2022 and 6 April 2022 should have been avoided. In that respect it submits that the Claimant's representatives ought to have conceded that a longer time estimate was needed for the final hearing, which it says would have obviated the need for both hearings on 1 March and 6 April 2022 and ensuing costs.

Whether any costs order would attract VAT

13. When making submissions about the amount of costs the Respondent submitted that VAT should not be added to any sums ordered to be paid to the Claimant because "the Claimant's insurers will be the receiving party, and can no doubt reclaim the VAT." The Respondent cited **Raggett v John Lewis plc [2012] IRLR 906 (EAT).**

14. The Claimant's representatives were asked by me to provide written comments on the Respondent's VAT submission, and did so by email dated 8 August 2022.

15. The Claimant's representatives submitted that VAT should be payable by the Respondent because, unlike the recipient of costs in **Raggett**, the Claimant was not registered for VAT. They also submit that the fact the Claimant's claim is backed by insurers should not change that position because HMRC's view is that legal services in relation to an insurance claim are supplied to the policy holder, being the Claimant, not the insurance company. Therefore, the insurer cannot

reclaim the VAT incurred in the supply of legal services and this is the position even when payment is made directly to the supplier of the services by the insurer.

Determination on paper

16. Having considered the correspondence from both parties and taking account of the Overriding Objective, it is proportionate and in the interests of justice to provide my decision without the need for a hearing.

Relevant Law

17. The tribunal's power to award costs is set out in rules 74 to 84 of the 2013 Employment Tribunal Rules. I set out some of those rules below:

When a costs order or a preparation time order may or shall be made

76.- (1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that –

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or others unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

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

(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.

(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been adjourned or postponed on the application of a party.

The amount of a costs order

78.- (1) A costs order may –

(a) order the paying party to pay the receiving 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 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, or by an Employment Judge applying the same principles; or, in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993, or by an Employment Judge applying the same principles;

(c) order the paying party to pay the receiving party a specified amount as reimbursement of all or part of the Tribunal fees paid by the receiving party;

(d) order the paying party to pay another party or a witness, as appropriate, a specified amount in respect of necessary and reasonably incurred expenses (of the kind described in rule 75(1)(c)); or
(e) if the paying party and receiving party agree as to the amount payable, be made in that amount.

(2) Where the costs order includes an amount in respect of fees charged by a lay representative, for the purposes of the calculation of the order, the hourly rate applicable for the fees of the lay representative shall be no higher than the rate under rule 79(2).

(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.

When a wasted costs order may be made

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

(a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative; or
(b) which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay.

Costs so incurred are described as "wasted costs".

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

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

Effect of a wasted costs order

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

Procedure

82. 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 27 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

18. Milan v Capsticks Solicitors LLP & Others UKEAT/0093/14/RN sets out that a structured approach should be taken in relation to an application for costs where the then President of the EAT, Langstaff J, described the exercise to be undertaken by the Tribunal as a 3-stage exercise at paragraphs 52:

"*There are thus three stages to the process of determining upon a costs order in a particular amount. First, the tribunal must be of the opinion that the paying party has behaved in a manner referred to in [Rule 76]; but if of that opinion, does not have to make a costs order. It has still to decide whether, as a second stage, it is "appropriate" to do so. In reaching that decision it may take account of the ability of the paying party to pay. Having decided that there should be a costs order in some amount, the third stage is to determine what that amount should be. Here, covered by Rule [78], the tribunal has the option of ordering the paying party to pay an amount to be determined by way of detailed assessment in a county court."*

19. As the Court of Appeal reiterated in Yerrakalva v Barnsley Metropolitan Borough Council and nor 2012 ICR 420, CA, costs in the employment tribunal are still the exception rather than the rule. Given that costs are compensatory, and not punitive (Lodwick v Southwark London Borough Council 2004 ICR 884, CA) it is necessary to examine what loss has been caused to the receiving party. In this regard the Court of Appeal in Yerrakalva held that costs should be limited to those 'reasonably and necessarily incurred' and also made clear that whilst there is no requirement for the Tribunal to determine whether there is a precise causal link between the unreasonable conduct in question and the specific costs being claimed, that does not mean that causation is irrelevant.

20. In Ridehalgh v Horsefield and another [1994] Ch 205 the Court of Appeal set out a three-stage test that should be followed when a wasted costs order is being considered:
    20.1 Did the representative act improperly, unreasonably or negligently?
    20.2 If so, did that conduct result in the party incurring unnecessary costs?
    20.3 If so, is it just to order the representative to compensate the party for the whole or part of those costs?

21. Ridehalgh gave further general guidance on the use of wasted costs orders including that the wasted costs jurisdiction should be exercised with great caution

and as a last resort. Further, that wasted costs orders should only be made if the court or tribunal is satisfied that the conduct of the impugned representative can properly be characterised as improper, unreasonable, or negligent.

22. At Medcalf v Weatherill [2002] UKHL 27 the House of Lords made it clear that the making of a wasted costs order should be regarded as a last resort and should be confined to a small number of specific instances. Lord Bingham commenting:
"*Save in the clearest case, applications against the lawyers acting for an opposing party are unlikely to be apt for summary determination, since any hearing to investigate the conduct of a complex action is itself likely to be expensive and time-consuming."* (Paragraph 24.)

Conclusions

23. Following the 3-stage test, I have considered the following matters:

    23.1 Has the Respondent behaved in a manner proscribed by the Rules?

    23.2 If so, should I exercise discretion to make a costs order in the Claimant's favour?

    23.3 If I exercise discretion in favour of a costs order, what amount should be paid?

24. I note that the Respondent accepts that there has been unreasonable conduct of the proceedings (by its former representatives) for the purposes of rule 76(1)(a) or that there has been a breach of an order for the purposes of rule 76(2). The Respondent failed to comply with the requirement to exchange witness statements and then failed to comply with the Unless Order which followed. The first part of the 3-stage test has clearly been satisfied.

25. I must then consider whether to exercise discretion in favour of a costs order. I do not accept the Respondent's submissions that I should not exercise my discretion because I attributed fault for non-compliance with the Unless Order to its former representatives and instead make a wasted costs against its former representatives.

26. I do not think that the extent of the evidence that I heard at the last hearing was sufficient for me to consider that a wasted costs order might be or is appropriate. In any event, before making such an order, the former representatives of the Respondent would need the opportunity to make representations to the Tribunal. That would likely necessitate a further hearing which would require additional evidence to be given, causing delay and additional costs and expense. In my view such an approach would not be in accordance with the overriding objective as it would not be proportionate or in the interests of justice.

27. I have carefully considered the Respondent's remaining three submissions as to why it says discretion should not be exercised in favour of awarding costs. Those matters do not persuade me that I should not exercise my discretion in favour of awarding costs. I do not agree that criticism should be levelled at the Claimant's representatives for not agreeing with the Respondent's representative's suggestion that the final hearing ought to be adjourned due to insufficient listing time. At that stage the Claimant's representatives did not have copies of the Respondents' witness statements (these were not served until just before the hearing on 6 April 2022) and acting in the best interests of the Claimant it was understandable that they pursued strike out of the Respondent's response rather than engage in discussions about the length of the final hearing.

28. In all the circumstances I exercise my discretion to award costs under rule 76(1)(a) and 76(2) for the Respondent's failure to comply with case management directions regarding the exchange of witness statement and its failure to comply with the terms of the Unless Order.

29. Turning to the amount of costs, I agree with the Respondent's submissions that some time has been spent chasing the Tribunal which was not reasonably and necessarily incurred. I also agree that time spent preparing the schedule of loss, remedy witness statement and witness guide will not be thrown away, albeit some updating may need to be done to some of those documents if the claim is successful. Overall, I reduce time spent from 46.2 hours to 34 hours because this is a more proportionate figure in all the circumstances. This allows a total of £4,080.00 for solicitor costs and I allow counsel's fee of £1500.00 in full.

30. I determine the disputed position in VAT in favour of the Claimant – i.e. VAT will be payable by the Respondent. Whilst I note the case of **Raggett** held that VAT should not be included in costs ordered to be paid if the receiving party is able to reclaim VAT as input tax, I accept the Claimant's submission that, unlike the recipient of costs in **Raggett**, the Claimant is not registered for VAT. I also accept the submission that as legal services are provided to the Claimant, not his insurance company, the insurer cannot reclaim the VAT incurred in the supply of legal services. Therefore, the total sum payable, inclusive of VAT, is **£6,696.00**.

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Employment Judge Millns

Date: 19 August 2022

Sent to the parties on:

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For the Tribunal:

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Notes:

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