EMPLOYMENT TRIBUNALS

Claimant: **Ms M Randall**

Respondent: **(1) Miss B Gurney**
(2) Merali's Limited
(3) Fordover Services Limited

Heard at: Watford (CVP) **On: 1 November 2022 & 13 February 2023**

Before: Employment Judge A.M.S. Green

Representation

Claimant: Ms A Beech - Counsel
The Respondents: Ms I Egan - Counsel
Mr M Sprack: Mr H Sheehan - Counsel

RESERVED COSTS JUDGMENT

1. The application for a costs order against the claimant is dismissed.

2. The application for a wasted costs order against Mr Sprack is dismissed.

REASONS

Introduction

1. For ease of reading I have referred to the claimant as Ms Randall, the first respondent as Miss Gurney, the second respondent as Merali and the third respondent as FSL. Mr Sprack is the barrister who represented Ms Randall. Miss Gurney, Merali and FSL have applied for a wasted costs order against him and a costs order against Ms Randall.

2. On 7 & 8 June 2021, I conducted an open preliminary hearing to determine if Ms Randall was an employee of, or a worker of, Miss Gurney, Murali or FSP. I determined that Ms Randall was truly self-employed and held that the

Tribunal did not have jurisdiction to hear the claims. The judgment was sent to the parties on 15 July 2021.

3. On 10 August 2021, solicitors representing Merali and FSO applied for costs to be awarded against Ms Randall and wasted costs to be awarded against Mr Sprack. The solicitors indicated that Miss Gurney would also be applying for costs which they did on 11 August 2021. It was agreed that Ms Egan would represent all three respondents. I have reproduced the relevant sections of the application as follows:

> *As the Tribunal will recall, the Claimant was found to be "truly self-employed" (Paragraphs 43 and 49, pages A12 and A14). Throughout this matter the Respondents representatives have highlighted to the Claimant and her representatives that this matter was misconceived and had no reasonable prospects of success. This has taken place at each stage.*
>
> *The Claimant's Grounds of Claim were professionally drafted by Mr Sprack. The Tribunal are asked to note that he failed to particularise the claim for age discrimination so that it could sensibly be responded to. He also failed to particularise the dates in which holidays were taken in the holiday pay claim. This is symptomatic of his handling of this matter.*
>
> *We ask the Tribunal to note that the Claimant was privy to trade union advice at the outset of this process. The usual process for a trade union is that their Solicitors will make an assessment on the prospects of success in a claim. If that claim does not have reasonable prospects then support to pursue a claim to the Employment Tribunal is not provided by the union, unless there is a specific reason that a claim should be supported, such as the case being of industrial importance, a test case, or perhaps a member has a long history of union membership. Both of the Solicitors acting for the Respondents have extensive experience of having acted for trade unions having worked for Thompsons Solicitors for sustained periods of time. Mr Airey worked for Thompsons for over 10 years. We are therefore able to confirm that this is the usual process.*
>
> *On 22 September 2020, RFB wrote to the Claimant's trade union (pages A31 and A15 to A17). Within this letter RFB set out why this case was misconceived. It was highlighted that by the Claimant's own admission in the claim form that she arranged cover and there was no obligation for personal service or mutuality of obligation. It was confirmed to the union that if there was no withdrawal within 7 days then the defence to the claims would be produced and a claim for costs would be pursued.*
>
> *This letter was not responded to by the trade union. The union failed to engage in this process. The Respondents therefore suspect that the union decided not to support the Claimant's claim as it did not have reasonable prospects of success.*
>
> *Following this RFB attempted to send the letter directly to the Claimant on 29 September 2020. This bounced back and RFB then contacted the Claimant to ask for a correct email address. The Claimant's partner confirmed by phone that all contact should be through Mr Sprack, and the correspondence was therefore directed to Mr Sprack (page A29). On 1*

October 2020 Mr Sprack responded to reject the Respondent's offer (Page A26).

In his email rejecting the offer, Mr Sprack contended that there was a clear significant distinction between 'arranging cover' and 'exercising the right to substitution'. Other than that, he failed to address any of the points raised in the without prejudice letter dated 22 September 2020 and he failed to get to grips with the clear issues with the Claimant's claims.

It was clear from the outset that the Claimant had no prospects if succeeding in an argument that she was an employee, particularly as she could send a substitute of her choice when she went away. Therefore, after this matter was listed for a final hearing the Respondents approached Mr Sprack in order to make a nuisance settlement offer. The extent of this offer and the basis for making it is set out at pages A24 and A25. As the Tribunal will note, this offer of £2500 was more than the £2052.92 which was calculated as the Claimant's losses in the best-case scenario on the basis of the pleaded case.

Mr Sprack was warned that if this offer was not accepted then an application for costs would be made against the Claimant and him as representative (first paragraph). Despite this Mr Sprack again refused to engage with the issues or the calculations outlined, and on 2 February 2021 he rejected this offer on behalf of the Claimant and made a counteroffer of £16,000 (Pages A23 and A24). There was no rationalisation provided for this offer. The Tribunal is asked to note that at this point Mr Sprack indicated that the Claimant would consider an offer from either Respondent, thus indicating that settlement could be achieved against one Respondent and the other Respondents would still have a claim pursued against them. This is highly underhanded behaviour.

On 3 February 2021 Mr Sprack engaged with the issue of a costs threat being made against him personally and asked that this was withdrawn (Pages A22 and A23). The basis for the application being made against Mr Sprack personally was then set out clearly in an email dated 5 February 2021 (Pages A19 to A21). The Tribunal are asked to note that disclosure had now taken place between the parties. RFB had reviewed this disclosure and highlighted that the extremely limited disclosure provided supported the Respondents' positions that the Claimant was self-employed. In particular the taking of extensive periods of time off work was highlighted and it is asserted that had Mr Sprack engaged with the evidence disclosed at this point, he would have realised that the Claimant was in a very weak position in respect to prospects of success. Rahman Lowe for the First Respondent also emailed in support of RFB's email later that day (Page A18).

Again, Mr Sprack did not respond. He did not explain why the Respondents assertions were incorrect, nor did he show that he had examined the evidence. This resulted in the Respondents needing to produce Witness Statements. Following the exchange of Witness Statements, on 25 May 2021, Rahman Lowe wrote with a further costs threat to state their view that the Claimant's evidence did not support her assertion that she was employed by the First Respondent (Page A34).

Mr Sprack did not write in response to this email until 4 June 2021. He did not respond to the assertions made and stated an offer of settlement of £9,500, again without any explanation of how this was arrived at (Pages A37 and A38). This was rejected on behalf all of the Respondents in correspondence that day (Pages A36 to A37). It is asserted that it was Mr Sprack and the Claimant's intention to attempt to leverage the Respondents into a settlement even though there was nothing to support the Claimant's assertions.

As a result of the Claimant and Mr Sprack's negligent refusal to get to grips with the evidence this matter proceeded to hearing. As outlined above the Claimant was found to be "truly self-employed" (Paragraphs 43 and 49, pages A12 and A14). This is an emphatic finding. It is exactly what the Claimant and Mr Sprack were told would be the finding throughout the without prejudice correspondence.

The Tribunal's finding were also that Merali's had no role to play in the arrangement (Paragraph 1, page A4), and the only contact the Claimant had with Mr Meralli was exchanging pleasantries as she only dealt with the First Respondent (Paragraph 19, page A4). Despite this Mr Sprack and the Claimant did not withdraw the claims against Merali's Limited, the Second Respondent, until paragraph 3 of the Claimant's skeleton submissions. We ask the Tribunal to note that paragraph 35 of Mr Sprack's skeleton submission was also not a completed sentence, which is indicative of his slap-dash approach to the handling of this litigation which proved to be very costly for the Respondents.

The Tribunal also importantly found that the Claimant was not subject to Ms Gurney's control (paragraph 21, pages A4 ad A5) and not only did the Claimant have an unfettered power to provide substitutes, she regularly exercised it (paragraph 22, pages A5 to A7 and paragraph 44, page A12). The Tribunal also found at paragraph 23 (Page A7) that the Claimant was not integrated into the Third Respondent's business and had no dealings with them.

It is the Second and Third Respondents' assertion that these findings show no claim whatsoever should have been brought against them. In respect to the use of substitutes, it is submitted that it is inconceivable that the Claimant was an employee given the extent of the absence periods (this appears to be 8 to 9 weeks at a time on occasion), and yet the Claimant and Mr Sprack pressed ahead with that argument, despite the numerous warnings about the prospects of success on that issue.

As stated throughout, Mr Sprack and the Claimant repeatedly failed to get to grips with the evidence in this matter. This is exemplified by the findings in paragraph 22 of the judgment when the Tribunal found that there was nothing in the Claimant's witness statement which stated that Ms Gurney was required to approve Ms De Sanchez and Carlos before accepting them to provide cover. This was correctly said to be a material averment of fact given in evidence that should have been in the witness statement. The Tribunal also correctly highlighted that the statement was prepared by a lawyer, Mr Sprack, who no doubt advised on the adminicles of evidence that must exist to establish employee or worker status and the relevant averments were conspicuously absent.

Given the fact that Mr Sprack failed to engage with the issues raised with him in without prejudice correspondence and the problems with the Claimant's case throughout, we are actually uncertain if he has been negligent in his preparation of the witness statement by failing to explain what should have been therein.

The only other plausible alternative was whether the evidence was deliberately left out. Neither of these are desirable. This is therefore a matter for the Claimant and Mr Sprack to clarify to the Tribunal and we expect that both parties will need to make submissions on that point separately.

…

It is averred that the Claimant's case had no reasonable prospects of success. When given an offer which was more than the value of the Claimant's claim on the best-case scenario, that should have been accepted. The failure to do so was unreasonable and the failure to engage in any of the correspondence dealing with the issues raised was also unreasonable conduct. This was clearly a vexatious claim and the failure to listen to any warnings was entirely unreasonable.

Under Regulation 78 the Tribunal is permitted to make an order not exceeding £20,000 without carrying out detailed assessment. It is asserted that detailed assessment is not needed in this matter. The Second and Third Respondents billed costs are set out in the attached schedule amount to £9,300 plus VAT. There is currently costs of £1200 plus VAT which are unbilled and will be billed this month (a revised schedule will be provided prior to the hearing). RFB's costs charged to the Second and Third Respondents therefore amount to £10,500 plus VAT (£12,600). Counsel's costs for the hearing were £2,650 plus VAT (£3,180) and her costs for a full day costs hearing of this application will be £1650 plus VAT (£1980) or £1350 plus VAT (£1620) for a half day. Counsel's costs are therefore a maximum of £4300 plus VAT (£5,160). The total costs claimed are therefore £17,760 (£14,800 plus VAT). We apply for an award in this sum.

The Second and Third Respondent also make a wasted costs application against Mr Sprack under Regulation 80. We assert that his handling of this matter was unreasonable and negligent and the Respondents should not be expected to pay given his handling of this matter. The Tribunal are referred to A19 to A21 for the legal arguments which relate to an order against Mr Sprack personally.

4. On 11 August 2021, solicitors representing Miss Gurney applied for a costs order against Ms Randall and a wasted costs order against Mr Sprack. Having narrated the chronology of the proceedings, the letter sets out the basis for the application which are reproduced as follows:

We contend that the claim in this matter had no reasonable prospect of success, that it was pursued vexatiously and/or abusively, disruptively and/or unreasonably for the following reasons:

(1) Right from the outset, the legal test that the Claimant needed to address in order to have any standing to even bring a claim, was detailed in the GoR. Despite receiving this and the numerous costs warnings, the Claimant continued to pursue her claims against R1, whilst at no point ever addressing the legal test to evidence her claim. This, despite a PH being specifically listed to determine the Claimant's employment status. The Claimant ought to have at that stage addressed her mind to the issues, however, once again, she failed to address any of these in her witness statement. This was a point that the Tribunal also noted in its judgment at Para 22 (a) wherein they stated:

> *"Furthermore, her witness statement was prepared with the help of a lawyer who would, no doubt advised on the key adminicles of evidence that must exist for a claimant establish employment or worker status. Such averments are conspicuously absent".*

(2) All the issues which R1 repeatedly raised such as mutuality of obligations, control, and the unfettered right to substitute, were all found to have been absent by the Tribunal in its judgment (see Paras 21, 22, 43 and 44 – 46).

(3) The Claimant was employed by other companies and knew full well what to expect as an employee, something which the Tribunal also noted in its judgment at Para 18. It would therefore have been clear to the Claimant that her engagement with the Respondents was an entirely different arrangement then that of an employee or as a worker.

(4) For the reasons set out above, the Claimant's claim simply did not have reasonable prospects of succeeding. Despite addressing all the relevant issues to her and the legal tests that she needed to evidence, which Mr Sprack, as her representative would have taken her through (as the Tribunal also expected as referred to at Para 22(a) of its judgement), she continued to pursue the claims, which amounts to an abuse of process, vexatious and/or unreasonable conduct. She knew full well that significant costs were being expended and remained completely indifferent to this.

(5) It was also highlighted numerous times that R1 is elderly and suffered from ill health, is of limited means and that the Claimant would be unable to recover anything from R1 even in the event that she succeeded with her claim (which was highly unlikely). Again, we assert that Mr Sprack would have discussed these issues with the Claimant and again, despite this, she continued to pursue her claims.

(6) The Respondents were put to the task of incurring significant costs despite highlighting to the Claimant at each stage when responding to the ET1, following disclosure and exchange of witness statements, that the claim lacked any substance with details setting out why. We would expect Mr Sprack to have advised the Claimant as to the consequences in relation to costs in the event that her claims were dismissed. The Claimant failed to even respond to any of R1's WPSTAC correspondence, which further highlights the cavalier approach she took to the claim.

5. Regarding the application for the wasted costs order, having recited the relevant rule and applicable case law, the letter goes on to say:

> *The Claimant was professionally represented throughout her claim by Mr Sprack, who is an experienced Counsel (Call 2014).*
>
> *If the Claimant was pursuing the claim based on the advice of Mr Sprack, then we contend that such advice was negligent in view of the matters set out above, in the pleadings and the various WPSATC correspondence.*
>
> *Mr Sprack is requested to make clear how the claim was being funded, was he being paid by the Claimant or was he acting under the terms of a damages-based agreement/no win no fee agreement? If it's the latter, it is contended that there was an improper motive in seeking to recover funds from the Respondents for a financial benefit. In addition, if Mr Sprack was acting under a no win no fee agreement, the terms of the agreement were likely to state that if he considered the claim to unlikely have reasonable prospects of success, he would cease to continue acting for her under the terms of the agreement. That would lend weight to the contention that the Claimant was pursuing the claims based on the negligent advice of Mr Sprack. Mr Sprack is therefore requested to disclose a copy of any such agreement.*
>
> *We assert that if any competent legal representative in similar circumstances to Mr Sprack, and who were representing the Claimant took time to go through her responses to the legal test in evidencing employment or worker status as the Respondent's representatives had done, and indeed as the Tribunal had done, we submit that they would have arrived at the conclusion that it was inconceivable that the Claimant could have been an employee or worker of R1 and would have advised their client accordingly. From what is apparent, Mr Sprack failed to take his client through the necessary questions as these are not dealt with in the PoC or the witness statement, both of which he drafted. He would have known what the test was and what his client needed to establish. We refer once again to Para 22(a) of the judgment noted above. This*

6. On 1 November 2022, I conducted a remote CVP costs hearing. Mr Sprack was present on screen but was in Germany. He no longer represented Ms Randall who had waived legal professional privilege and confidentiality in respect of the costs and wasted costs application. For obvious reasons, Ms Randall and Mr Sprack were separately represented. Mr Sprack had prepared a witness statement but was unable to give oral evidence and be cross examined because he was in Germany. Ms Randall adopted her witness statement and gave oral evidence. Ms Beech made oral submissions. Unfortunately, we ran out of time, and it was agreed to continue the hearing to enable the other representatives to make their closing submissions.

7. A date was fixed for 9 November 2022 to complete the hearing. However, after the hearing on 1 November 2022, Mr Sprack indicated that he would now be available to give evidence in the jurisdiction and I determined that it would be in the interests of justice and proportionate to enable him to do so given the potentially serious professional consequences for him if I was minded making a wasted costs order. In this regard I reminded myself that in

Godfrey Morgan Solicitors Ltd v Cobalt Systems Ltd UKEAT/0608/10, Underhill J said that:

> *it is standard practice in the context of other kinds of issue for one party to be able to comment on the other party's submissions, and I do not see what is different about a wasted costs application* (para 26).

As to cross-examination of the representative, he stated that:

> *no doubt in most circumstances this will be inappropriate and/or unnecessary and/or disproportionate. But in a case like the present, where the representative is no longer acting for the party, where privilege has already been waived, where an oral hearing has been fixed and where the party and the representative have given different accounts of facts which may be central to the issue before the tribunal, cross-examination would seem a fair and proportionate way of helping it to get to the right result* (para 26).

Further, in **Single Homeless Project Ltd v Abu UKEAT/0519/12** (27 August 2013, unreported), the EAT (Judge Richardson presiding) was in no doubt that the respondent, who had applied for a wasted costs order against the claimant's legal representative and a costs order against the claimant, should have been afforded an opportunity to see and comment upon the large amount of written evidence and written submissions which had been supplied to the tribunal by both the claimant and the representative. Most of the material related to ability to pay and the EAT took the view that it was 'incumbent upon the tribunal to ensure that it heard what both sides had to say on the subject'.

8. The hearing fixed for 9 November 2022 was vacated and relisted for 13 February 2023. At that hearing, Mr Sprack adopted two witness statements and gave oral evidence. I heard submissions from all of the representatives.

9. In reaching my decision, I have considered the oral and documentary evidence and the written and oral submissions. The fact that I have not referred to every document produced should not be taken to mean that I have not considered it.

Findings of fact relating to the conduct of the litigation

10. In her witness statement, Ms Randall states that after her working relationship came to an end, she was very distressed and contacted United Voices of the World (“UVW”), her trade union, for assistance. They sent some emails on her behalf. Thereafter, UVW referred her to Mr Sprack for legal advice and assistance in bringing proceedings against the parties that she believed were her employers. From this, it is reasonable to infer that at this stage, UVW believed that the case merited further investigation and advice from a legally qualified person.

11. Mr Sprack is a barrister and was called to the Bar in 2014. He offers direct access to clients. Ms Randall directly retained Mr Sprack rather than going through a solicitor. The retainer was governed by Mr Sprack’s letter of engagement [325]. For present purposes, the following are relevant:

What you told me ('Your Instructions')

In around 1990 you met Betty Gurney: she was waiting for a bus and you told her there was a bus strike. She went on to offer you work as a cleaner, which you agreed to do. You worked for 2 hours on weekday evenings from 1990 until April 2020, for which you were paid £55 weekly, until 2010 when it was increased to £57.50. You took unpaid holiday and arranged cover for yourself. Your work was cleaning the offices of Merali's Limited, an accountants' firm, at Scottish Provident House.

My preliminary advice

I cannot make any promises, or even firm advice, at this stage. In very rough outline I advise you, based on your instructions, that you have reasonable prospects of success in 6 claims against Betty Gurney, Merali's Limited and/or Fordover Services ('the Respondents'):

1. National Minimum Wage Act : the maximum recoverable would be £9,264 (£1,544 yearly, going back 6 years).

2. Holiday pay : the maximum recoverable would be £9,800 (based on £87.50 weekly x 5.6 weeks x 20 years)

3. Notice pay : the maximum recoverable would be £1,046.40 (for 12 weeks at £87.20
weekly).

4. Redundancy payment : the maximum recoverable would be £2,625 (based on £87.50 x 1.5 x 20)

5. Failure to provide itemised payslips : maximum £386 (£29.70 x 13 weeks)

6. Compensation for unfair dismissal : future lost earnings to be quantified

It is important to emphasise that these would be the sums sought, not necessarily the sums which you will recover. I cannot at this stage assess with any precision your prospects of success, beyond saying that they appear reasonable. This assessment will be reviewed throughout your claims, in particular on consideration of the arguments and evidence advanced by the Respondents.

…

The work I will carry out

The work you are instructing me to carry out is :

1. To draft and help you to lodge the claims referred to above in the Employment Tribunal, by 4pm on 10 July 2020, and County Court by 4pm on 24 July 2020.

2. To seek to negotiate an acceptable settlement with the Respondents.

3. To advise you as your claims progress.

4. To do on your behalf any drafting required, and advise you as to work other than drafting that is required of you.

5. To represent you in any hearings in the Employment Tribunal or County Courts.

6. To advise you on enforcement and appeal.

If subsequent work is needed on this matter, there will be another letter of agreement between us. Because I carry out all my work personally and cannot predict what other professional responsibilities I may have in the future, I cannot at this stage confirm that I will be able to accept instructions for all subsequent work that may be required for your case.

My fees for this work

I will send over shortly a separate damages based agreement which sets out my fees for this work. In summary I will be paid 15% of any money recovered from the Respondents. I will not be paid unless and until you are paid by the Respondents, either by way of settlement agreement or agreements or payment or enforcement on a judgment or judgments. By agreeing to instruct me, you are agreeing to pursue your claims reasonably, after proper consideration of my advice, and to allow for 15% of any judgment or settlement to be paid directly by the Respondents to me.

12. Mr Sprack's retainer letter is written in clear and readily intelligible English. It sets out the potential claims that Ms Randall could make. It does not mention age discrimination. At this stage, it is clear that Mr Sprack believed that Ms Randall had reasonable prospects of success on what he had been told by her. This was understandably subject to the caveat that he could not say more about the prospects of success with any precision. Solicitors and barristers who are asked to give advice must obviously have competence in the area of law relevant to the advice that they give, and it should also not be forgotten that their advice is dependent upon the information and evidence provided to them by their clients. This was the only time that Mr Sprack gave Ms Randall written advice on the prospects of her claim succeeding. The retainer letter did not warn Ms Randall that she could be at risk of a costs award should her claim be unsuccessful. I find that surprising because clients need to be aware of that risk (however remote) as part of making an informed choice in making a claim.

13. Mr Sprack and Ms Randall entered into a Damages Based Agreement, a copy of which was produced [339].

14. Mr Sprack helped Ms Randall to prepare the ET 1 and he sent the draft particulars of claim for her to approve. On 14 July 2020, Ms Randall emailed Mr Sprack to confirm that she had read and she agreed to the particulars of claim subject to a minor amendment [352]. In his evidence in chief, Mr Sprack suggested that he might have sent the wrong version of the particulars of claim which was submitted to the Tribunal. He clarified this by saying that the

document was in the wrong format. It needed to be in RTF format. In that sense, it was not another version of the particulars of claim.

15. Ms Randall presented a claim form to the Tribunal on 21 July 2020. She claimed the following:

    a. ordinary unfair dismissal;
    b. age discrimination;
    c. a redundancy payment;
    d. notice pay;
    e. holiday pay;
    f. arrears of pay;
    g. “other” payments;
    h. unlawful deduction from wages;
    i. failure to provide itemised payslips.

16. Mr Sprack kept a record of some of his advice to Ms Randall in attendance notes. These were exhibited to his first witness statement. He changed his advice to suggest that Ms Randall could pursue an age discrimination case but in his oral evidence he could not recall if he had kept an attendance note recording that advice. In his oral evidence he said that, in his opinion, he did not think it was worth pursuing an age discrimination claim but this changed before the ET1 was submitted. He said that he had discussed an age discrimination claim in principle because Ms Randall had been concerned that a younger person had replaced her. When he was asked if Ms Randall had given him authority to submit an age discrimination case, he replied “I suppose so. I said to her that I would include it. She said yes and she pushed the button”. Mr Sprack confirmed to me that this was during a telephone call. When I asked him whether he had written an attendance note of that call with the instruction, he said that he took attendance notes of discussions that were significant, but it might have been possible that he had not written an attendance note of that particular advice. I take that to be a “no”. He also confirmed that he did not follow up on his advice in writing with her instructions. Under cross examination, Mr Sprack admitted that he did not take any attendance notes prior to Ms Randall submitting the claim to the Tribunal.

17. Under cross-examination, Mr Sprack accepted that the age discrimination claim was not particularised. There was no mention of it in the particulars of claim. He said that the open preliminary hearing on employment status had been arranged. He said that Miss Gurney had not applied to have the age discrimination claim struck out and was seeking further information about the claim. He said that Merali and FSL were seeking a strike out of the claims on the premise that they believed that Ms Randall was self-employed. He believed that this was something that could have been resolved before dealing with the request for further information.

18. Given that Ms Randall is a Spanish speaker, I asked Mr Sprack to confirm how he satisfied himself that she understood him when he was engaging with her in providing her with professional advice. He told me that he would test her understanding by asking relevant questions and he could see the reflection of her understanding in her responses. She was also accompanied by Niall, her partner who sometimes assisted her. Under those

circumstances, he had to check that he was the one giving advice. It was clear to him that Ms Randall understood what he was saying. However, he also acknowledged that he was dealing with complicated legal points and her understanding was not as clear and as permanent as one might have hoped for.

19. All three respondents defended the claims.

20. Mr Sprack's attendance note with Ms Randall of a conversation that took place on 30 July 2020 is exhibited to his first witness statement indicates that he was minded advising dropping FSL as a party. The note is very brief and provides little detail. It is Delphic and in the briefest of summaries it appears that the rationale for this was "harder to bring claim, possibility of costs, etc.". This would suggest at the very early stage of proceedings that Mr Sprack recognised that there were problems with citing FSL as a respondent and that there was a costs risk if the claim continued. Under cross examination, Mr Sprack acknowledged this and clarified matters by saying that this was an error. He believed that he was referring to Merali and not FSL. If that was his opinion one wonders why the claim against Merali was made in the first place. He clearly maintained that opinion because he ultimately withdrew the claim against Merali albeit at the end of the preliminary hearing (see below). Clearly, that was very late in the day if he had already formed at opinion at an early stage of the proceedings.

21. On 22 September 2020, Ronald Fletcher Baker LLP ("RFB") solicitors representing Merali and FSL wrote to Ms Camilla Marion, the Trade Union Representative at UVW. A copy of the letter was produced to the Tribunal [98]. The letter was written without prejudice save as to costs. It denied that their clients and Miss Gurney had ever employed Ms Randall. They asserted that she had always been self-employed. It went on to say that Ms Randall acknowledged that there was no requirement for her personally to provide service. She arranged cover (i.e. a substitute) when not carrying out cleaning work. They also pointed out that the claims were bound to fail. Furthermore, they took issue with the fact that the claims were not fully particularised especially the allegation of age discrimination. They warned that they would seek a strike out of that claim. They then set out the reasons why the other claims were bound to fail. And went on to say:

> *We will begin drafting the response to these outrageous claims on 29 September 2020. Should the Claimant not withdraw her claim by this date we are instructed to draft the response and pursue our client's costs in full.*
>
> *We trust that this will not be necessary and that we will receive confirmation that the Claimant will withdraw her claim by 29 September 2020 on the basis that our client will not pursue her for costs incurred to date.*

22. On 25 September 2020, Mr Sprack forwarded a copy of RFB's email of 22 September 2020 which contained costs warning [356]. He stated:

> *It is nothing to worry about-it is fairly standard correspondence this stage. We can discuss it after we have sent our offer letter to Betty (see my earlier email).*

23. On 28 September 2020 Mr Sprack wrote to Miss Gurney on a without prejudice save as to costs basis [37]. He set out the claims that were being made against. He then went on that Ms Randall was "confident of a substantial award". He made an offer to settle of £18,500. The offer was open for acceptance for one week.

24. UVW did not reply to RFB's letter. RFB then emailed Mr Sprack on 30 September 2020 attaching a copy of the letter that they had sent to UVW. A copy of the email was produced to the Tribunal [113]. The email was written without prejudice. It narrated the fact that UVW had not responded to them and that RFB had attempted to contact Ms Randall directly without success. They had been informed by her partner that all correspondence was to be passed to Mr Sprack. Mr Sprack was invited to acknowledge safe receipt and confirm Ms Randall's position on withdrawing her claims by no later than 5 PM on the same date. If she did not do that, costs would be incurred on behalf of RFBs clients, and they would seek recovery of them from Ms Randall.

25. On 30 September 2020, Mr Sprack had a conversation with Ms Randall and her partner. The attendance note of that conversation is exhibited to his first witness statement. Once again, it is somewhat brief. He notified Ms Randall about RFB's costs warning. He states:

> *I go on to explain Fordover's threat: will seek costs later if we don't drop case. I advise they'll lose that application, and it's worth something to keep them in play for now (eg. might try and get them to pay for something).*

What is also unclear from this note is whether he gave advice explaining why he believed the costs application would fail. When Ms Randall was cross-examined about the risk of a costs order being made against her she understood that she had nothing to worry about. If Mr Sprack had advised her that she was at real risk of having a costs award made against her, she would have withdrawn her claims. However, Ms Randall also said under cross examination by Mr Sheehan that she acknowledged that there was a small risk that she might have to pay costs. Having considered both of these answers, I believe that she thought that if there was only a real risk of costs being awarded would she have withdrawn her claims.

26. Mr Sprack replied to that email [112]. He confirmed that he was not on record but that he was representing Ms Randall under the public access scheme but was not conducting the litigation. He was, however, happy to correspond with RFB as UVW was no longer representing or advising Ms Randall. He sought an extension of the time limit to take instructions until 12 noon on the following day. RFB responded later on the same day by email agreeing to the extension of time [110].

27. On 6 October 2020, Rahman Lowe ("RL"), solicitors representing Miss Gurney wrote to Mr Sprack notifying that they were not instructed in the litigation and sought an extension of 10 days to submit the ET3 response [361]. This was agreed.

28. On 9 October 2020, Mr Sprack wrote to RL. A copy of the letter was produced to the Tribunal [199]. It was written without prejudice save as to costs. In that letter, Mr Sprack stated, amongst other things, that in relation to the alleged discriminatory dismissal, a tribunal would be unlikely to award less than £8800 for injury to feelings alone. Mr Sprack made an offer to settle the claims for £18,500 in full and final settlement. The offer was open for acceptance for one week.

29. Given that further particulars of the age discrimination claim were never provided, it is difficult to see how Mr Sprack could have quantified it. For example, what medical or other evidence had he seen to substantiate a valuation of £8800? In the absence of such evidence it is difficult to avoid the inference that he had "plucked the figure out of the sky". Furthermore, in the absence of a properly particularised claim, it is difficult to see how RL could engage in any meaningful discussion about quantification of such a claim.

30. On 14 October 2020, RL responded to Mr Sprack indicating that they were taking instructions on the offer to settle [363]. They substantively replied by writing a without prejudice save as to costs letter on 23 October 2020 [365]. They said, amongst other things:

> *For the reasons we have set out in our Grounds of Resistance, it is demonstrably the case that the allegations set out in the Claimant's claim are unsubstantiated, contrived, and misconceived.*
>
> *…*
>
> *It is perhaps unsurprising that now, having consulted a legal representative, your client's view of the situation has morphed into something bearing absolutely no resemblance of the actual relationship. We have seen this situation a number of times before with numerous clients and it amounts to nothing more than a disingenuous and contrived attempt to rewrite history, recasting matters already set in stone in a different manner in order to satisfy a statutory test and throwing in other wild allegations for good measure, such as the ridiculous allegation of age discrimination. It is nothing new. We can see through this strategy (as can our client) and we are absolutely confident that in the fullness of time, an Employment Tribunal will also see this tactic for what it is.*
>
> *Your client's claims, as articulated thus far, are unsustainable and we are quite frankly astounded that you would advance such demonstrably unsound allegations.*
>
> *Even if the allegations were true, which are strongly denied, we do not consider it to be in your client's interests to put forward a settlement sum, which even if your client was successful in substantiating all her claims, she would not obtain anywhere near the amount you are claiming. This coupled with the allegations raised in this claim, which are wafer thin and doomed to fail even with the weakest of cross examinations, the offer of £18,000 is rejected.*

In addition, we are surprised that you have sought to even come after our client given that she is someone of little means. Even if the Claimant is successful, what do you expect to recover from our client? Perhaps her white goods, fridge and washing machine? Unfortunately, it seems to us that the claim has not been thought through enough which is why the facts and evidence presented is bare and lacking in detail.

Our client is suffering from cancer and this claim does nothing more than aggravate her condition. We therefore strongly advise your client to withdraw her claims. Should she fail to do so, our client will robustly defend the claims and seek her costs in doing so, including against you for wasted costs. As a competent legal advisor, we have no doubt that you know full well that not only are all the claims misconceived, but some are quite frankly absurd, such as the age discrimination complaint, or the suggestion that your client will be claiming her loss of pay and holiday going back to 1998 despite legislation being place which restricts unpaid wages claims to 2 years only.

31. On 13 January 2021, RFB emailed Mr Sprack on a without prejudice basis [108]. They noted that the open preliminary hearing had been listed for 7 & 8 June 2021 to determine Ms Randall's employment status and they were confident that the Tribunal would strike out her claims for the reasons set out in the grounds of resistance and the previous without prejudice correspondence. They warned Mr Sprack that they had been instructed to pursue their clients' costs and would be doing so against Ms Randall personally and against Mr Sprack, as her representative, on the basis that the claim was entirely vexatious. They then briefly set out the reasons why they believed the claims were wholly unmeritorious. A nuisance value offer to settle in the sum of £2500 was made on behalf of all the respondents.

32. On 20 January 2021, Mr Sprack wrote to Ms Randall to update her on the case [367]. He explained the case management orders that had been made regarding the timetable. He informed her that RFB had made an offer to settle of £2500 in return for her withdrawing her claims. He suggested rejecting the offer. He went on to say that he could make a counter offer and suggested £16,000. He indicated that if the matter settled for £10,000 that would be "a very good result for you". Under cross examination, he accepted that he had not provided Ms Randall with a breakdown or an explanation given by the respondents for their offer of £2500 to settle. He did not give any view on the merits of that offer. Mr Sprack also admitted that there was no further correspondence between himself and Ms Randall concerning offers.

33. Mr Sprack replied to RFB's email on 1 February 2021 [107]. He rejected the offer and made a counteroffer of £16,000 in full and final settlement including any claim in the County Court under the National Minimum Wages Act. He also requested whether a single respondent would be willing to consider settlement of Ms Randall's claim in respect of that respondent.

34. On 5 February RFB replied to Mr Sprack by email [103]. On a without prejudice basis. In response to the suggestion of settlement by one party this was interpreted as meaning that Ms Randall intended to settle with one party and to continue litigation against the other parties which was characterised as "disingenuous behaviour". The email repeated the threat to seek costs against

Ms Randall and wasted costs against Mr Sprack. Mr Sprack was also requested to particularise the holiday pay claim. Reference is also made to the un-particularised age discrimination claim which was characterised as "not reasonable conduct and appears to be vexatious designed to harass and aggravate the claims against the respondents". Mr Sprack was invited to withdraw the age discrimination claim immediately. It was also noted that there was no valid ACAS Early Conciliation certificate against Merali and there was no jurisdiction for the Tribunal to hear the claim. Further, there was no evidence at all of any involvement by Merali and therefore claims against both respondents should be withdrawn. The email warned that if Ms Randall continued to pursue these claims based on the advice that she had received from Mr Sprack, RFB would consider this negligent advice. Turning to the suggestion that the National Minimum Wages Act claim could be brought in the County Court; this would be estopped as an abuse of process. RFB reiterated that it would not increase the offer of £2500 to settle and rejected the counteroffer. A further costs warning was issued against Ms Randall, and a wasted costs warning was issued once more against Mr Sprack. The offer was open for acceptance for seven days.

35. RL also emailed Mr Sprack on a without prejudice save as to costs basis on 5 February 2021 [102]. They said the following, amongst other things:

> *You have made a number of claims and have failed to evidence any of them. The age discrimination claim in particular is a clear example of simply adding matters to aggravate the claim and harass the Respondents. It is clearly unreasonable and vexatious. If throwing the kitchen sink is as a result of your client instructing you to do so, then that of course is a matter for her. If however she is pursuing misconceived and vexatious claims based on the advice you are giving her, then the issue falls squarely with you.*
>
> *What makes matters worse is that our client is 76 years of age, is suffering from cancer and is being caused to suffer from further stress and anguish as a result of the misconceived and vexatious claims. Quite what your client hopes to recover from our Client even if she were to win (which is not likely) we do not know. We trust you and your client will consider this matter seriously and withdraw the claims.*

Mr Sprack did not respond.

36. The parties prepared for the preliminary hearing. Documents were disclosed, the bundle and witness statements were prepared.

37. On 25 May 2021, RL emailed Mr Sprack. They copied the message to RFB [118]. The email was sent on a without prejudice save as to costs basis. It had been prompted by the exchange of witness statements that had recently taken place. The email states, amongst other things:

> *Having considered your client's statements, there appears to be no evidence whatsoever that supports her claim that she was an employee of our client. As stated previously, it is an extraordinary claim to suggest that an employee of a company would employ people to personally perform work for them. It is unheard of.*

> *We made this clear to you right at the outset of this claim on 23 October 2020, and again on 05 February 2021.*
>
> *The claim against our client simply does not take off, and is misconceived and an abuse of process. Given that your client has continued with the claim despite us highlighting these matters to her, her claim is also vexatious and amounts to unreasonable conduct. Our client is elderly and is being subjected to undue stress and anxiety as a result of this misconceived claim against her.*
>
> *We will be instructing Counsel today. We invite your client **one last time** to withdraw your claim against our client by **4pm today**, failure of which we will be seeking costs against her. In addition, in so far as your client has continued with the claim based on your advice, our Client will also be pursuing wasted costs against you.*

38. On 4 June 2021, at 10:54 hours, Mr Sprack emailed RL and RFB on a without prejudice save as to costs basis offering to settle the claims against all of the respondents for £9500 [121]. He did not include any justification for how he had quantified this figure and gave a very short time within which the offer could be accepted (4 PM on the same day). The offer which was characterised as "absurd", was rejected.

39. It is clear, having reviewed the party/party correspondence, that Mr Sprack was the point of contact. This was also confirmed by Ms Randall when she was cross examined. She confirmed that when the respondents send documents or witness statements there would be sent to Mr Sprack and not to her or her partner. Mr Sprack would then send them on to Ms Randall.

40. Mr Sprack withdrew the claim against Merali when he was making his closing oral submissions at the open preliminary hearing.

41. In paragraph 26 of her witness statement, Ms Randall states:

> *I do not have any previous experience of bringing legal proceedings. I work as a cleaner and English is not my first language. As such, I was entirely reliant on the advice of Mr Sprack to know what decisions to take. I sincerely believed that my case had good prospects, because that was his advice*.

42. When this was put to Mr Sprack in cross-examination he replied that he accepted responsibility as her legal adviser and that he could only give her options and the consequences of different courses of action. He went on to say that Ms Randall asked him what he thought was best and he would revert that it was her decision. He stated that it was not uncommon with clients when making a decision. I do not disagree with this as a general principle of client care and the role of a legal advisor. The fundamental basis of the relationship between a lawyer and their client is that of agent and principal. The lawyer gives advice, and the client gives instructions. However, in this case, the evidence does not point conclusively to Mr Sprack acting in accordance with those general principle. For example, I have already commented upon the paucity of evidence of the advice he gave. There are very few attendance notes and those which were produced are brief and, in one instance, incorrect (i.e. they refer to withdrawing the claim against FSL rather than Merali). They

postdate the issue of the claim. Furthermore, there is a lack of evidence explaining important matters such as the risk of a costs award being made against Ms Randall if she made or continued with the claim. Mr Sprack was alert to that risk as evidenced by his attendance note of 30 July 2020, but it is unclear whether he communicated that risk to his client or whether it was an aide memoire for him. I have already commented upon the fact that he did not refer to the risks of a costs award in his retainer letter. It is certainly standard practice for solicitors to do so when issuing their terms of business to their clients at the outset of the retainer. I would have expected the same of Mr Sprack when engaging with clients directly rather than through a solicitor. I have no doubt about what Ms Randall says in paragraph 26 of her witness statement. She relied entirely upon his advice. She was not a sophisticated client who had experience of the Law and litigation and required a higher level of client care than, for example a sophisticated client in a commercial matter with many years of experience in contractual negotiation and disputes.

Applicable law

43. A claimant who fails to sufficiently particularise his or her claim in the ET1 at the outset risks adverse consequences. At the very least, he or she may be ordered to provide additional information (previously termed 'further particulars') under pain of strike out if there is a failure to comply.

44. In **Chandhok v Tirkey 2015 ICR 527, EAT**, Mr Justice Langstaff (the then President of the EAT) made it clear that the ET1 is not an initial document free to be augmented by whatever the parties subsequently choose to add or subtract. It sets out the essential case to which a respondent is required to respond. In this regard, Langstaff P observed:

> *[A] system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an employment tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings*.

45. A costs order or a wasted costs order may be made either on the Tribunal's own initiative or following an application by a party. A party may make such an application at any stage of proceedings and up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. Before any order is made, the proposed paying party must be given a reasonable opportunity to make representations, either in writing or at a hearing, as the Tribunal may order in response to the application.

46. Rule 75 (1) (a) of the Tribunal Rules 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. Rules 76(1) sets out the grounds for making a costs order are which as follows:

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.

c. A party has breached an order or Practice Direction.

d. A hearing has been postponed or adjourned on the application of a party.

47. 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 proceedings the Tribunal may make a costs order against the party in question.

48. Within the context of the employment tribunal rules, the classic description of vexatious conduct is that of Sir Hugh Griffiths in **ET Marler Ltd v Robertson [1974] ICR 72 at 76, NIRC**:

> *If an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive, he acts vexatiously, and likewise abuses the procedure. In such cases the tribunal may and doubtless usually will award costs against the employee …*

49. A more modern, and somewhat wider, meaning of 'vexatious' was given by Lord Bingham CJ in **A-G v Barker [2000] 1 FLR 759** at [19], in the context of an application for a civil proceedings order under the Senior Courts Act 1981, section 42. Under this formulation, the emphasis is less on motive and more on the effect of the conduct in question:

> *"Vexatious" is a familiar term in legal parlance. The hallmark of a vexatious proceeding is in my judgment 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.*

50. Vexatious conduct can apply both to the bringing or conducting of the proceedings, and, as appropriate, to conduct by either a claimant or respondent. Instances of a specific finding of vexatious conduct are fairly rare, as the finding tends to be one of unreasonable conduct, even where there is shown to be an improper motive present. An example is **Keskar v Governors of All Saints Church of England School [1991] ICR 493, EAT**, where costs were awarded against a claimant in a discrimination case on the basis that he

was 'motivated by resentment and spite in bringing the proceedings', and that there was 'virtually nothing to support his allegations of race discrimination'. The ground on which the award was made was unreasonable conduct, but it could as easily have been vexatious conduct. It does not matter, however, what particular label is put on it; if the conduct of the party or their representative justifies an order for costs, its decision will be upheld even if the EAT would have used a different label from that used by the tribunal. In **Beynon v Scadden [1999] IRLR 700, EAT**, an employment tribunal categorised a union's behaviour as vexatious and unreasonable on the ground that its pursuit of a case on behalf of the claimants was both without merit and done with the collateral purpose of achieving union recognition from the respondent, and awarded costs against the claimants. The EAT upheld the award and the grounds on which it was made even though it would itself have categorised the conduct as simply unreasonable rather than vexatious.

51. The terms 'abusive' and 'disruptive' in the context of the bringing or conducting of proceedings are not defined in the rules but have a straightforward meaning that will be applied by tribunals. Abusive bringing or conducting of proceedings will be close to vexatiousness in many cases and connotes the use of tribunal litigation for something other than, or in a way other than, its intended use within the judicial system. Abusive and disruptive conduct in this context may also be apt to cover gratuitous insults or unsubstantiated slurs which have no justification in the context of the litigation, directed by one party to another during a hearing, or in correspondence. 'Disruptive' may cover excessive prolixity and time wasting, unduly lengthy or aggressive cross-examination of witnesses, calling unnecessary witnesses, and failing to respect the tribunal's attempts to manage the claim and maintain an orderly hearing. The grounds for a finding that there has been abusive or disruptive conduct will be all the stronger if a party has continued their behaviour in the face of a warning from the tribunal that it considers it to be unacceptable.

52. Tribunals have a wide discretion to award costs where they consider that there has been unreasonable conduct in the bringing or conducting of proceedings. Every aspect of the proceedings is covered, from the inception of the claim or defence, through the interim stages of the proceedings, to the conduct of the parties at the substantive hearing. Certain common examples relied upon as alleged unreasonable conduct are knowingly pursuing a hopeless claim, the unreasonable refusal of an offer to settle and where a claim has been withdrawn late in the day after costs have needlessly been incurred.

53. Where a party makes an offer to settle a case, which is refused by the other side, costs can be awarded if the Tribunal considers that the party refusing the offer has thereby acted unreasonably (**Kopel v Safeway Stores plc [2003] IRLR 753, EAT**). It is important to recognise, however, that the principle applicable in matrimonial proceedings by virtue of the decision in **Calderbank v Calderbank [1975] 3 All ER 333, CA**, namely, that a party can protect himself against costs in a case involving a money claim by making an offer marked 'without prejudice save as to costs', with the result that a failure by the other side to beat the offer will normally mean that an award of costs will be made against that party—does not apply as such in proceedings before employment tribunals. As Mitting J pointed out in **Kopel,** not only must a true Calderbank offer be accompanied by a payment into court, as to which there is no provision in the tribunal procedure, but (citing Lindsay J in **Monaghan v Close Thornton Solicitors EAT/3/01, [2002] All ER (D) 288 (Feb)**) if the Calderbank principle

became widely applied, it would run counter to the whole legislative basis for awarding costs in tribunals. In employment tribunals, therefore, it does not follow that a failure by a party to beat a Calderbank offer will, by itself, result in an award of costs against him. In Kopel, Mitting J stated that the tribunal 'must first conclude that the conduct of an appellant in rejecting the offer was unreasonable before the rejection becomes a relevant factor in the exercise of its discretion under [r 76(1)(a) of the 2013 Rules]' (see also **Anderson v Cheltenham & Gloucester plc UKEAT/0221/13 (5 December 2013, unreported**). On the facts of that case, the EAT upheld a tribunal's award of £5,000 costs against the claimant where she had failed in her unfair dismissal and sex discrimination claims, and had not only turned down a 'generous' offer to settle the case but had persisted in alleging breaches of the provisions of the Human Rights Convention prohibiting torture and slavery, which the tribunal categorised as 'frankly ludicrous' and 'seriously misconceived'. In the circumstances, the EAT held that the tribunal was entitled to find that the rejection of the offer was unreasonable conduct of the proceedings justifying the award of costs that was made.

54. When considering whether to award costs in respect of a party's conduct in bringing or pursuing a case that is subsequently held to have lacked merit, the type of conduct that will be considered unreasonable by a tribunal will obviously depend on the facts of the individual case, and there can be no hard-and-fast principle applicable to every situation. In general, however, it would seem that the party must at least know or be taken to have known that their case is unmeritorious. In **Cartiers Superfoods Ltd v Laws** (which was decided under the 1974 rules, when the only grounds for awarding costs were whether the claimant or respondent to any proceedings had acted frivolously or vexatiously), Phillips J considered that, in order to determine whether a party had acted frivolously, it was necessary 'to look and see what that party knew or ought to have known if he had gone about the matter sensibly'. On the facts of that case, the EAT held that if the employers had taken the trouble to inquire into the facts surrounding the alleged misconduct for which the employee had been dismissed, instead of reacting in a hostile manner with threats and false statements that the employee was guilty of dishonesty, they would have realised that they had no possible defence at all to the claim, except as to the amount of compensation.

55. 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 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.

56. It was well established under previous versions of the Rules of Procedure that the term ‘misconceived’ could cover unmeritorious claims brought by employees who, possibly because they are unrepresented, are unaware of the legal position and genuinely believe that their employers have committed illegal acts against them. This continues to be the case under the current Procedure Rules, and of course the same will apply to unmeritorious responses put in by unrepresented employers, since now a Tribunal merely has to decide whether or not a claim had reasonable prospects of success. The effect of this is also to emphasise that the test for whether the claim had no reasonable prospect of success is objective, not subjective (**Vaughan v London Borough of Lewisham [2013] IRLR 713**).

57. 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.

58. In **Hamilton-Jones v Black EAT 0047/04**: B instituted tribunal proceedings against a number of parties, including H-J. In due course, the employment tribunal determined that H-J had never been B's employer and, accordingly, that he should not have been a party to the proceedings. Despite this, it refused H-J's application for a costs order to be made against B on the basis that B had a genuine belief that H-J was his employer. On appeal, the EAT held that the tribunal's decision could not stand. It understood why B — a layman without any legal experience — might not understand the true employment situation. His decision to issue proceedings against H-J was not therefore 'vexatious' (a word that connoted a degree of malice or ulterior motive). However, for the purposes of the 'misconceived' rule, that was not the point: the tribunal was simply required to assess objectively whether the claim had any prospect of success at any time of its existence. This it had not done. There had been no rational basis for B's belief (even if genuinely held) that H-J had been his employer, meaning that the claim against that respondent had been misconceived from the outset. The EAT remitted the matter to a different tribunal to decide whether costs should be awarded on this basis.

59. Rule 78 (1) sets out how the amount of costs will be determined. The Tribunal 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 v Barnsley Metropolitan Borough Council 2012 ICR 420, CA**, 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 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. It is not unreasonable conduct *per se* for a claimant to withdraw a claim. I remind myself that in **McPherson v BNP Paribas (London Branch) 2004 ICR 1398, CA** the Court of Appeal observed it would be unfortunate if claimants were deterred from dropping claims by the prospects of an order for costs on withdrawal in circumstances where such an order might well not be made against them if they fought on to a full hearing and failed. It further commented that withdrawal could lead to a saving of costs and the tribunal should not adopt

a practice on costs that would deter claimants from making "sensible litigation decisions". On the other hand, the Court was also clear the tribunal should not follow a practice on costs that might encourage speculative claims, allowing claimants to start cases and to pursue them down to the last week or two before the hearing in the hope of receiving an offer to settle, and then, failing an offer, dropping the case without any risk of costs sanction. The critical question in this regard was whether the claimant withdrawing the claim has conducted the proceedings unreasonably, not whether the withdrawal of the claim is in itself unreasonable.

62. If a party allows preparations for the hearing to go on too long before abandoning an untenable case that party may be liable for costs on account of their conduct.

63. In order to deter an un-meritorious claim, respondents may write to the claimant warning them that they will apply for costs if they persist with the claim. Alternatively, they may apply to the Tribunal for a preliminary hearing if they believe that the claim has no prospects of success. The fact that a costs warning has been given is a factor that may be considered by the Tribunal when considering whether to exercise its discretion to make a costs order. The absence of a warning may be a relevant factor in deciding that costs should not be awarded. A costs warning is not, however, a precondition of making an order.

64. The extent to which a party acts under legal advice might be a relevant factor for a tribunal considering making a costs (or preparation time) award against that part. In **Abrahams v Royal National Throat, Nose and Ear Hospital EAT 183/82**: A made a late withdrawal of his race discrimination claim and the employment tribunal ordered him to pay £500 costs for acting vexatiously and unreasonably. In setting aside this decision, the EAT held that there was no evidence that A had acted other than in good faith, so the tribunal must have been wrong to find his conduct 'vexatious'. Furthermore, he had originally been supported by the Commission for Racial Equality, had then waited for ACAS to try to conciliate, and had eventually taken advice from a Citizens Advice Bureau before withdrawing his complaint. In the circumstances, the EAT did not think he had acted 'unreasonably.

65. 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, we remind ourselves 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.

66. Although tribunals have power to make wasted costs orders against representatives, there is still a principle that a party may themselves be rendered liable to pay costs because of the way their representative conducts the proceedings. An example of the type of situation that can give rise to an award of costs against a party on account of the conduct of a representative is afforded by **Beynon v Scadden [1999] IRLR 700, EAT**. On analogy with the position when assessing whether to strike out a claim because of a

representative's conduct, what is done in a party's name by a representative is presumptively, but not irrebuttably done on their behalf (**Bennett v London Borough of Southwark [2002] EWCA Civ 223**).

67. Rule 80 gives the power to make an order against a party's representative known as a "wasted costs" order. 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 (rule 80(1)). 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'. A legally qualified representative will not constitute a representative if he or she is not acting in pursuit of profit. Rule 80 (2) expressly provides that a representative acting on a contingency or conditional fee arrangement is considered to be acting in pursuit of profit. Thus, a wasted costs order can be made against such a person. 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. Note that there is no limit to the amount of wasted costs that can be ordered by an employment tribunal.

68. Rule 80 is based on the wasted costs provisions that apply in the civil courts, with the definition of 'wasted costs' being identical to that contained of the Senior Courts Act 1981, section 51(7). Accordingly, the authorities applicable to wasted costs in the civil law generally are equally applicable in the employment tribunals (**Ratcliffe Duce and Gammer v Binns (t/a Parc Ferme) EAT 0100/08** and **Mitchells Solicitors v Funkwerk Information Technologies York Ltd EAT 0541/07**). The two leading authorities analysing the scope of section 51 and the circumstances in which such orders can be made are **Ridehalgh v Horsefield and other cases 1994 3 All ER 848, CA**, and **Medcalf v Mardell and ors 2002 3 All ER 721, HL**. In the **Mitchells Solicitors** case, the EAT confirmed that these cases are 'sources of essential assistance' for employment tribunals in the matter of wasted costs.

69. A three-stage test is applied:

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

    b. If so, did such conduct because the applicant to incur unnecessary costs?

    c. 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?

70. In **Ridehalgh**, the Court of Appeal emphasised that even where a court and, by extension, a 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 the 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 relitigated or questions of privilege would arise.

71. The concept of "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.

72. The concept of "unreasonable" describes conduct that is vexatious, designed to harass the other side rather than advance the resolution of the case.

73. It was stated that the concept of "negligent" should be understood in a nontechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession. However, in **Persaud v Persaud and Others [2003] EWCA Civ 394** the Court of Appeal held that there must be something more than negligence for a wasted costs jurisdiction to arise. There must be something akin to an abuse of process if the conduct of the legal representative is to make him liable for a wasted costs order.

74. The purpose of civil procedure is to enable the court to do justice; namely, to decide controversies fairly and in accordance with the law and the true facts. The processes established by the rules, such as issuing claims and defending claims, obtaining disclosure or adducing witness testimony, are meant to enable the parties to advance their cases and assist the court to bring litigation to a satisfactory conclusion. Procedural rules are designed to promote fairness, but no rules can be drafted with such specificity or detail to guarantee that they are never exploited to divert the process from its aim of doing justice. By analogy this must also extend to the Tribunal. In relation to the wasted costs jurisdiction, the concept of abuse of process arises. In **A-G v Baker** Lord Bingham CJ explained that abuse of process consists in:

> *using [the court's] process for a purpose or in a way significantly different from its ordinary and proper use.*

75. A legal representative should not be held to have acted improperly, unreasonably, or negligently simply because he or she acts on behalf of the parties whose claim or defence is doomed to fail. It is the duty of advocates to present their client's case even though they may think that it is hopeless and even though they may have advised their client that it is. It is for the judge and not the lawyers to judge it. 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 it is entirely erroneous. Such conduct does not of itself demonstrate that there representative has acted improperly or unreasonably. Clients frequently insist on pursuing a case against the best advice of their lawyers.

76. Similarly, other aspects of litigation that lead to unnecessary costs should not readily be blamed on the representatives.

77. 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. In **Ratcliffe** Mr

Justice Elias observed that where a wasted costs order is concerned, the question is not whether the parties acted unreasonably. The test is more rigorous. 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 doing so. The distinction therefore is between conduct that is an abuse of process and conduct falling short of that.

78. In **Wentworth-Wood v Maritime Transport Ltd UKEAT/0184/17** (17 January 2018, unreported), Simler J set aside orders for costs against the claimants and wasted costs against their solicitors which had been made by an employment judge following the striking out of various multi-handed claims, holding that the judge had failed to have regard to the well-established principles applicable to both types of order and had failed to give adequate reasons for her decision. So far as the wasted costs order was concerned, Simler J emphasised (at para 30) the need, referred to in **Ridehalgh** and **Medcalf**, for courts and tribunals to approach the question of wasted costs orders with real care and to bear in mind that, from the point of view of the lawyer, the wasted costs jurisdiction is penal. Making such an order should, therefore, be a last resort. According to Simler J, the judge in **Wentworth-Wood** did not identify or adopt the three-stage approach in Ridehalgh; did not allude to the constitutional position of the solicitors; wrongly equated mere negligence with unreasonable conduct; made no attempt to identify the breach of duty owed by the solicitors that was relied on as akin to an abuse of process; failed to consider what costs had been caused to the respondent by what particular breach of duty; and failed to address the question posed by the third limb of the **Ridehalgh** test as to whether it was just to make the order in the circumstances of the case (see paras 35–36). In addition, she failed to give any reasons for rejecting the solicitors' written submissions as to why the costs should not be ordered.

79. Although it may be rare for a wasted costs order to be made on the ground that a representative was negligent in not advising the claimant to abandon a claim, the EAT has held that there is not an absolute bar on making such an order, provided that the causative link is established between the negligence and the extra costs incurred by the receiving party (**Robinson v Hall Gregory Recruitment Ltd UKEAT/0425/13,** at para 20). So where an order is sought on such a basis, the respondents must show, and the tribunal must find: (a) that the representative was negligent; (b) that if the advice to abandon had been given, the claimant would in fact have abandoned the claim; and (c) if the claim had been abandoned, the amount of the costs that are attributable to the fact that it was not abandoned.

80. It was previously unclear how tribunals would approach the wasted costs regime introduced by the 2013 rules. The cases on the matter have established that a wasted costs order requires a high standard of misconduct on the part of a representative. Accordingly, acting on a client's instructions, even in a hopeless case, will not incur liability for costs in the absence of an abuse of process. The case law confirms that it will be very difficult to succeed in a wasted costs application against a representative is 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; unknowingly making incomplete disclosure of documents.

Discussion and conclusions

81. I am satisfied that Ms Randall was properly and timeously notified of the applications for costs against her. Both RL and RFB had reason to believe that Mr Sprack was representing her and were justified in submitting the applications to him. He sent and received documents on her behalf. He referred to Ms Randall as his client in correspondence.

The wasted costs application

82. The wasted costs jurisdiction is not engaged, and the application is dismissed for the following reasons:

    a. I do not believe that Mr Sprack acted improperly. The evidence does not point to conduct that would ordinarily be held to justify his disbarment or other serious professional penalty.

    b. There is nothing to suggest that Mr Sprack acted unreasonably. He was not acting to harass the other side rather than advancing the resolution of the case. Indeed, there is evidence that he was seeking settlement which would resolve the case. How he communicated and whether he explained the offers to Ms Randall is another matter.

    c. I do not think that Mr Sprack acted negligently as understood by the Court of Appeal in **Persaud**. Mr Sprack was not using the Tribunal process for a purpose or in a way significantly different from its ordinary and proper use. There is no evidence of abuse of process. There were, undoubtedly deficiencies in the service that he provided in the following respects:

        i. He did not make Ms Randall aware in his retainer letter that she might be at risk of a costs award against her. There is little evidence that he advised her of the significance of the several cost warning letters that were sent. It was not enough simply to say that the applications would fail. He needed to explain why to enable Ms Randall to make an informed decision about whether to accept the offer.

        ii. He advised that there could be an age discrimination claim and acknowledged that this was not particularised. The claim should have been particularised in the ET1 or in separate particulars of claim as required by **Chandhok**. However, Ms Randall read the claim form and approved it. He should, however, at least have provided further information when it was requested by the other side. Given that the age discrimination claim was not particularised, he could not meaningfully quantify injury to feelings when valued at £8,800.

        iii. He did not explain the rationale of the offer to settle for £2,500.

        iv. He withdrew the claim against Merali at the open preliminary hearing when he knew that the claim had difficulties as far back as July 2020. He should not have waited until the eleventh hour to withdraw the claim.

d. These deficiencies **might amount** to negligence in the non-technical sense but following **Persaud** a higher standard applies to engage the wasted costs jurisdiction.

83. Mr Sprack should not be held to have acted improperly, unreasonably or negligently simply because he acted on behalf of Ms Randall whose claim was doomed to fail. It was his duty to present her case even though he might have thought that it was hopeless and even though he may have advised Ms Randall that it was. Indeed, he believed the case had some prospect of success as set out in his preliminary advice. It was for the Tribunal to judge the merits of the claim. Following **Ratcliffe**, 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 the representative has acted improperly or unreasonably. Clients frequently insist on pursuing a case against the best advice of their lawyers.

The costs application

84. In her skeleton argument, Miss Egan states that Merali and FSL rely upon two elements in support of their application for costs to be awarded against Ms Randall namely:

a. The claims had no prospects of success.

   I agree with Miss Egan. The evidence before me at the open preliminary hearing was sufficient for me to conclude that Ms Randall was truly self-employed. Therefore, objectively, the claims had no reasonable prospect of success for the reasons given in my reserved judgment. The claim was misconceived.

b. Ms Randall acted unreasonably in rejecting an offer of settlement worth more than her claim.

   I disagree with Ms Egan. Ms Randall did not act unreasonably in rejecting an offer of settlement worth more than her claim because she had not, in my opinion, been properly advised by Mr Sprack how the offer of £2500 had been quantified. Had she been so advised, it is possible that she would have accepted the offer.

85. Only the first limb of the application is engaged. This opens the gateway to the Tribunal to exercise discretion as to whether to award costs. I am not minded exercising discretion to make an award of costs against Ms Randall for the following reasons:

a. She is not a sophisticated litigant. She is a native Spanish speaker and English is not her first language.

b. She entirely relied upon Mr Sprack for his advice on complex legal matters. Given her personal circumstances that was a reasonable thing to do.

c. For the reasons given above, there were deficiencies in the quality of the service that was provided to Ms Randall by Mr Sprack which, in my opinion, deprived her of the ability to make properly informed choices

about how she would continue to conduct or even if she would conduct litigation against the respondents from the outset. She was not warned in the retainer letter of the risk of costs being awarded against her. She should have been. There is little evidence, because of the paucity of attendance notes, about what exactly she was advised of in relation to the offer to settle and why the offer should be rejected. She placed her absolute confidence in Mr Sprack to help her and to advise her. Had she known of the risk of costs and had she been properly advised of the reasons underlying the costs warning letters that had been sent by RL and RFB she could have taken an informed decision about whether to accept the offer to settle. She was deprived of that option and did not, in my opinion, make an informed choice to continue with the litigation. It would be unfair to blame her for Mr Sprack's failings.

86. This is an unfortunate case. I am troubled by the fact that Mr Sprack did not keep attendance notes and/or follow up advice based on all of the conversations that he had with Ms Randall from the outset of his retainer. Speaking as a solicitor appointed to practice in England & Wales in 1993 and in Scotland in 1995 the importance of attendance notes cannot be over emphasised. From the very first day when I started my Articles, it was drummed into me and my fellow Article Clerks to write accurate attendance notes after every meeting and every telephone call we had with clients or with the other side in contentious or non-contentious business etc... Indeed part of our training involved the supervising partner regularly reviewing our attendance notes and our keeping an up-to-date file ("file hygiene"). Attendance notes serve several purposes. They provide an accurate record of what was said and to whom. They provide an accurate record of advice given and instructions received. If there is ever a dispute about what was advised or what instructions were given, a properly drafted attendance note is important contemporaneous evidence to resolve such a dispute and, in certain circumstances, essential in successfully defending claims of professional negligence or allegations of acting outside the client's authority.

    Had Mr Sprack exercised better "file hygiene" by writing and keeping attendance notes that sufficiently detailed all the advice that he gave and the instructions that he received, matters in this case could have been very different.

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Employment Judge Green

_____

Date 23 February 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

1st March 2023

GDJ
FOR EMPLOYMENT TRIBUNALS