Case Number: 2305977/2020
2306525/2020

EMPLOYMENT TRIBUNALS

Claimant: **Mrs L Oyebisi**

Interested party: **Mr H Ogbonmwan (claimant's former representative)**

Respondent: **Hyde Housing Association Limited**

Heard at: **London South (Croydon) via CVP** **On: 5/6/2023**

Before: **Employment Judge Wright**

Representation:
Claimant: **In person**

Respondent: **Mr J Cook - counsel**

JUDGMENT ON COSTS

The respondent's application for costs to be paid by the claimant is successful. The claimant is ordered to pay to the respondent the sum of £20,000. The respondent's application for wasted costs against Mr Ogbonmwan fails and is dismissed.

REASONS

1. At a preliminary hearing on 8/10/2021 the claimant's claim was struck out as: the manner in which the proceedings had been conducted by or on behalf of the claimant was scandalous, unreasonable or vexatious; and the claimant had not complied with the Order of the Tribunal dated 9/4/2021.

2. The claimant requested written reasons further to the oral reasons given on 21/10/2021. Unfortunately, for some reason that request did not reach the Employment Judge for some time and the written reasons were provided on 12/5/2022.

3. The respondent at the conclusion of that preliminary hearing, expressly reserved its position in respect of a cost application.

4. The respondent subsequently made an application for costs against the claimant and for wasted cost against Mr Ogbonmwan on 28/1/2022.

5. This costs hearing was listed on 19/1/2023.

6. That notice of hearing was sent directly to the claimant as Mr Ogbonmwan had ceased to act for her.

7. Cost directions were sent to Mr Ogbonmwan and the respondent on 7/12/2022. The claimant said she had seen the directions, however she did not comply with them. Those directions included a standard reference to Rule 42; that any written representations should be provided seven days before the hearing.

8. Mr Ogbonmwan's status is that of a lay representative. The respondent submitted and Mr Ogbonmwan did not disagree, that although he is a lay representative, he had acted and continues to act for a number of claimants and as such, he is familiar with Tribunal proceedings and the standard of conduct required of representatives.

9. Mr Ogbonmwan set out that he represented the claimant acting for a charity called CAMC Charity (Christ Ambassadors Miracle Centre) based in Reading. He no longer represents the claimant and he attended this hearing as wasted costs were sought against him. On occasions, it appeared that Mr Ogbonmwan considered he was still representing the claimant, he was not. The claimant represented herself.

10. There is another concern in respect of Mr Ogbonmwan's status. He said that he represented the claimant as a family friend of over 20-plus years. He said that he was not paid, but that he received expenses for things such as photocopying, taxis and hotels. The claimant said that she had paid Mr Ogbonmwan a sum of approximately £5,000 or just under that sum.

11. Mr Ogbonmwan joined the hearing, but he said that the camera on his laptop was not working. Mr Cook and the claimant agreed to proceed without Mr Ogbonmwan's video being switched on.

12. On the Friday preceding this hearing and again at the start of the hearing Mr Ogbonmwan made an application for the hearing to be postponed. He relied upon various reasons, including the fact that he was not on notice of the hearing (clearly he was) and the format of the documentation sent to him. He referred to racially aggravated intimidation he has experienced as a black lay representative and he accused the Tribunal and the Judge of bias, an orchestrated conspiracy to avoid a fair hearing and entrenched white privilege.

13. The respondent objected to the hearing being postponed and the claimant did not express a view. The respondent explained that he had sent copies of correspondence relating to this hearing to Mr Ogbonmwan and when he objected to an electronic copy of the bundle being sent to him, sent him a hard copy. Besides the delay and additional cost to the respondent, the respondent objected that the postponement application was made less than a working day before the hearing was due to start. Furthermore, this was a 2020 claim, which had never proceeded beyond a preliminary hearing.

14. Mr Ogbonmwan's application was refused. He was on notice of the hearing and had been copied into the correspondence. The Tribunal had confirmed to the claimant and respondent on 4/5/2023 that Mr Ogbonmwan had been notified of this hearing. He was aware that the respondent was making a wasted costs application against him personally. It was in the interests of justice and in accordance with the overriding objective that the hearing proceeded.

15. During the application, Mr Ogbonmwan repeated a statement he had made in his email. He said that at the previous preliminary hearing, the respondent's application for costs was 'denied', was not reasonable or warranted and that the response had been to strike out the claimant's claims. In essence, Mr Ogbonmwan contented that the costs application had already been determined and dismissed.

16. Mr Cook took the Tribunal to his note of the exchange, which read:

> '…on costs, we are expressly reserving our position on costs and/or expressly the wasted costs of this hearing. If instructed to make an application we will do so in the normal way. I'd be grateful if you could reserve that application to yourself.'

17. That concurred with the Tribunal's own note, which recorded:

> 'the respondent would not make an application now for costs, but requested the Tribunal to record that it expressly reserved its position on costs and/or wasted costs. That related not just to this preliminary hearing, but the whole proceedings, if instructed to make an application in due course.'

18. Unfortunately and not for the first time, Mr Ogbonmwan has completely misrepresented the discussion which actually took place. The result of that is that the Tribunal cannot rely upon anything Mr Ogbonmwan has to say. Mr Ogbonmwan referred to his character being attacked, but the reality is that he cannot be trusted to tell the truth.

19. Mr Cook set out the law as follows:

The Law

Costs Applications Against a Party

20. The material provisions of the ET Rules 2013 governing costs applications are excerpted below:

Rule 74. Definitions

(1) "Costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing). […]

Rule 75. Costs orders and preparation time orders

(1) A costs order is an order that a party ("the paying party") make a payment to—

> (a) another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative.

[…]

Rule 76. Where a costs order or preparation time order may or shall be made

(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 otherwise 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.

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

Rule 77. Procedure

A party may apply for a costs order or a preparation time order at any stage 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. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.

Rule 78. The amount of a costs order

(1) A costs order may—

> (a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;
>
> (b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles; […]

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

Rule 84. Ability to pay

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

21. When determining an application for costs, the ET should apply a three-stage approach:

    a. Is the relevant jurisdictional threshold in rule 76 met?

    b. If so, should the ET exercise its discretion in favour of making a costs order?

    c. If so, what sum of costs should the ET order?

22. It is apparent from the wording of rule 76(1)(a) that a costs order may be made against a party when that party's representative has acted, or conducted proceedings, "unreasonably" etc.

23. In Scott v Russell [2013] EWCA Civ 1432, the Court of Appeal cited with approval the following definition of "vexatious" conduct at §30:

> [T]he hallmark of a vexatious proceeding is … that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant, and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process.

24. For the purposes of rule 76(1)(a) the word "unreasonable" is to be given its ordinary English meaning and is not to be interpreted as meaning something similar to vexatious (Dyer v Secretary of State for Employment UKEAT/0183/83).

25. The ET should consider the nature, gravity and effect of the unreasonable etc conduct, but it is appropriate to avoid a formulaic approach and have regard to the totality of the relevant conduct. As Mummery LJ explained in Yerrakalva v Barnsley MBC [2012] ICR 420, CA at §41:

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

26. It should, however, be noted that the ET is not confined to making an award limited to those costs caused by the unreasonable conduct. As Mummery LJ confirmed in McPherson v BNP Paribas (London Branch) [2004] ICR 1398, CA:

> 39. Miss McCafferty submitted that her client's liability for the costs was limited, as a matter of the construction of rule 14, by a requirement that the costs in issue were "attributable to" specific instances of unreasonable conduct by him. She argued that the tribunal had misconstrued the rule and wrongly ordered payment of all the costs, irrespective of whether they were "attributable to" the unreasonable conduct in question or not. The costs awarded should be caused by, or at least be proportionate to, the particular conduct which has been identified as unreasonable.
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> 40. In my judgment, rule 14(1) does not impose any such causal requirement in the exercise of the discretion. The principle of relevance means that the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion, but that is not the same as requiring BNP Paribas to prove that specific unreasonable conduct by the applicant caused particular costs to be incurred. As Mr Tatton-Brown pointed out, there is a significant contrast between the language of rule 14(1), which deals with costs generally, and the language of rule 14(4), which deals with an order in respect of the costs incurred "as a result of the postponement or adjournment". Further, the passages in the cases relied on by Miss McCafferty (Kovacs v Queen Mary and Westfield College [2002] ICR 919, para 35, Lodwick v Southwark London Borough Council [2004] ICR 884, paras 23-27, and Health Development Agency v Parish [2004] IRLR 550, paras 26-27) are not authority for the proposition that rule 14(1) limits the tribunal's discretion to those costs that are caused by or attributable to the unreasonable conduct of the applicant.
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> 41. In a related submission Miss McCafferty argued that the discretion could not be properly exercised to punish the applicant for unreasonable conduct. That is undoubtedly correct, if it means that the indemnity principle must apply to the award of costs. It is not, however, punitive and impermissible for a tribunal to order costs without confining them to the costs attributable to the unreasonable conduct. As I have explained, the unreasonable conduct is a precondition of the existence of the power to order costs and it is also a relevant factor to be taken into account in deciding whether to make an order for costs and the form of the order.

27. Mummery LJ did not resile from these observations in his later judgment in Yerrakalva, though His Lordship did emphasise in Yerrakalva that whilst the ET is not limited to awarding those costs incurred by the receiving party as a result of the paying party's unreasonable conduct, the "effect" of the unreasonable conduct will often be a relevant factor in the ET's exercise of its discretion.

28. A finding of unreasonable etc conduct is not necessary for a costs application to succeed under rule 76(2) ET Rules. It is sufficient, under rule 76(2), that the paying party is responsible for breaching the ET's

orders. Clearly, however, the explanation for breaching the ET's orders may be a relevant factor at the discretionary stage in applications made under rule 76(2).

29. In circumstances where the ET finds that the jurisdictional threshold in rule 76 is met, the ET retains a broad discretion as to whether to make a costs order and the amount of any costs awarded. Whilst there is no closed list of factors relevant to the exercise of the ET's discretion, the following factors are often relevant:

    a. Costs orders are intended to be compensatory, not punitive (Lodwick v Southwark LBC [2004] ICR 884, CA). Therefore, the extent of any causal link between the unreasonable etc conduct and the costs incurred will normally be a relevant discretionary factor (Yerrakalva), albeit there is no requirement to establish a causal link between the unreasonable conduct and the costs incurred before an order can be made (McPherson).

    b. The paying party's ability to pay is a factor which the ET is entitled, but not obligated, to consider (see rule 84 ET Rules). Where regard is had to the paying party's ability to pay, that factor should be balanced against the need to compensate the receiving party who has unreasonably been put to expense (Howman v Queen Elizabeth Hospital Kings Lynn UKEAT/0509/12).

    c. Any assessment or consideration of means need not be limited to the paying party's means as at the date the order is made. It is sufficient that there is a "realistic prospect that [they] might at some point in the future be able to afford to pay" (Vaughan v London Borough of Lewisham [2013] IRLR 713, EAT).

    d. Where the ET does decide to take the paying party's means into account, it must do so on the basis of sufficient evidence (for example by the paying party completing a county court form EX140) (Oni v NHS Leicester City UKEAT/0144/12).

    e. There is no requirement to limit costs to the amount the paying party can afford (Arrowsmith v Nottingham Trent University [2012] ICR 159, EAT).

    f. The ET may have regard to the means of a party's spouse or other immediate family members (Abaya v Leeds Teaching Hospitals NHS Trust UKEAT/0258/16).

    g. Whether a party is legally represented may be a relevant factor. An

unrepresented litigant may be afforded more latitude than a party who has the benefit of professional legal advice and representation (AQ Ltd v Holden [2012] IRLR 648, EAT).

30. Rule 78 specifies two bases upon which the ET may deal with assessment of costs when an application succeeds against a party:

    a. The ET may summarily assess costs up to a sum of no more than £20,000.

    b. The ET may order that the paying party pay the whole or a specified amount of the costs of the receiving party to be subject to detailed assessment either carried out in the county court or by an Employment Judge applying the same principles. This will likely be the appropriate course where the ET considers it appropriate to award costs in excess of the £20,000 summary assessment cap.

31. Where the ET considers it appropriate to order detailed assessment either in the county court or by an Employment Judge, the ET is entitled to place a cap on the amount of costs that may be awarded following detailed assessment (Kuwait Oil Company v Al-Tarkait [2021] ICR 718, CA).

Wasted Costs Applications Against a Representative

32. The relevant provisions of the ET Rules governing wasted costs applications are as follows:

Rule 80. When a wasted costs order may be made

(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.

[…]

Rule 81. Effect of a wasted costs order

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.

Rule 82. Procedure

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

33. In accordance with rule 84, the ET is entitled, but not obligated, to consider a representative's ability to pay a wasted costs order as part of exercising its discretion as to whether to make an order and if so in what amount.

34. The determination of an application for wasted costs requires consideration of a three-stage test. In Ratcliffe Duce and Gammer v Binns (t/a Parc Ferme) UKEAT/0100/08, the EAT, applying the Court of Appeal's judgment in Ridehalgh v Horsefield [1994] Ch 205 identified the three elements of the test as follows:

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

    b. If so, did that conduct cause the applicant to incur unnecessary costs?

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

35. In Ridehalgh, the Court of Appeal considered how the terms "improper", "unreasonable" and "negligent" are to be construed in the context of wasted costs applications. At pp232-233 the Court of Appeal gave the following guidance:

a. “Improper” conduct includes, but is not limited to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty.

b. “Unreasonable” means conduct which is vexatious and/or designed to harass the other side rather than advance the resolution of the case. It makes no difference if the conduct is the product of excessive zeal rather than improper motive. The “acid test” is whether the conduct permits of a reasonable explanation.

c. Negligent” should be understood in a non-technical way to denote failure to act with the competence reasonably to be expected of the (legal) profession.

36. The burden of proof in establishing improper, unreasonable and/or negligent conduct is on the party making the allegation (in this case R).

37. It is clear from the foregoing that there is a higher threshold for “unreasonable” conduct under rule 80 in comparison with rule 76. In the rule 76 context, “unreasonable” is to be given its ordinary English meaning (see Dyer above) whereas, in the context of rule 80, it is to be read as meaning something similar to vexatious.

38. In Ratcliffe, Elias J, as he then was, suggested that it is important for a Tribunal, when considering a wasted costs application, to distinguish between conduct which is an abuse of the Tribunal’s process (which may engage the wasted costs jurisdiction) and conduct which falls short of that threshold.

39. It is also important to draw the ET’s attention to the House of Lords case of Medcalf v Mardell [2003] 1 AC 120. In Medcalf, the House of Lords stressed that the wasted costs jurisdiction should be approached with caution and endorsed the Court of Appeal’s observations in Ridehalgh about the gravity of the conduct required to engage the jurisdiction. The House of Lords also noted that where there is or may be relevant privileged material which cannot be deployed by a representative in response to a wasted costs application, courts must approach a wasted costs application with particular care. If any doubt is raised due to the existence of potentially relevant privileged material which cannot be placed before the court, the court must give the respondent to the application the benefit of that doubt in reaching its decision (Medcalf at eg §§60-61).

40. Lord Bingham explained the approach to be adopted where issues of privilege arise in the following way at §23 of Medcalf:

> Even if the court were able properly to be sure that the practitioner could have no answer to the substantive complaint, it could not fairly make an order unless satisfied that nothing could be said to influence the exercise of its discretion. Only exceptionally could these exacting conditions be satisfied. Where a wasted costs order is sought against a practitioner precluded by legal professional privilege from giving his full answer to the application, the court should not make an order unless, proceeding with extreme care, it is (a) satisfied that there is nothing the practitioner could say, if unconstrained, to resist the order and (b) that it is in all the circumstances fair to make the order.

41. The wasted costs jurisdiction is not limited to representatives who are practising solicitors or barristers or otherwise legally qualified. It is clear from the words "other representative" in rule 80(2) that a wasted costs order can be made against a lay representative. However, per rule 80(2), a wasted costs order cannot be made in circumstances where a representative is "not acting in pursuit of profit". The rule expressly states that acting on a conditional fee basis will amount to acting in pursuit of profit. However, where a representative is acting pro bono, a wasted costs order cannot be made (see Jackson v Cambridgeshire County Council UKEAT/0402/09).

42. The wasted costs jurisdiction also requires a different approach to causation than a costs application made against a party. In a costs application against a party, the ET may consider causation as part of the exercise of its discretion, but is not required to strictly apply principles of causation (see McPherson above). However, in the wasted costs jurisdiction, it is a necessary precondition of an application succeeding that the ET must find that costs were incurred due to the improper, unreasonable and/or negligent conduct of the representative. As Langstaff P explained in Hafiz & Haque Solicitors v Mullick and anor [2015] ICR 1085, EAT at §15:

> Mr Cohen argues that it would be unfortunate if, in applying the wording of Rule 80, I were to conclude that there was a causative requirement to be met when this would not be the case in the general costs rule. I cannot accept that submission. The Rule says what it states. It is a different rule from the general costs rule. It clearly requires that the costs which are to be indemnified were incurred as a result of the conduct complained of. The conduct itself need not, it seems to be (sic), be identified with such specificity that it can be said that this particular aspect of improper conduct caused this particular loss. To that extent, I adopt the general approach in respect of what is another rule from another set of rules considered by the Court of Appeal in McPherson v BNP Paribas, but it seems to me it is not for me to ignore the precise wording which is used,

which is in contradistinction to the absence of any such wording in Rule 76.

43. Where a wasted costs order is made, the order must specify the amount to be paid (rule 81). However, it should be noted that, in contrast to the position in respect of applications against parties in rule 78, the ET cannot order that there be a detailed assessment of wasted costs in the county court. Under rule 81, the ET must itself undertake an assessment of the wasted costs to be ordered and stipulate the amount to be paid (Casqueiro (in a Matter of Wasted Costs) v Barclays Bank Plc UKEAT/0085/12 at §10).

44. Moving on from Mr Cook's statement of the law, recently, the EAT has said the following in respect of costs under Rule 76 starting at paragraph 8 in B.L.I.S.S Residential Care Ltd v Fellows EA-2022-000068-AT:

> 8. If one of the thresholds for making a costs order is reached the employment tribunal still has a discretion to exercise in deciding whether to award costs, and if so, in what sum.
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> 9. In considering an application for costs the employment tribunal should bear in mind that it is generally a costs free jurisdiction: Gee v Shell Limited [2003] IRLR 82. Where a party considers that a claim or response is misconceived, a costs warning letter may be sent. There is no obligation to do so and a failure to do so does not prevent the employment tribunal making a costs order. However, the failure to do so is a matter that the employment tribunal may take into account in deciding whether to award costs, or in fixing the amount of an award. The respondent did not send the claimant a costs warning letter in the employment tribunal.
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> 10. [set out Rule 84]
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> 11. The employment tribunal is empowered to consider the paying party's ability to pay, but is not required to do so. If the employment tribunal exercises the discretion to disregard the paying party's ability to pay it should generally give reasons: Jilley v Birmingham and Solihull Mental Health NHS Trust and others UKEAT/0584/06 at paragraph 44. In considering ability to pay the employment tribunal is entitled to have regard to the likelihood that a person's financial circumstances may improve in the future: Chadburn v Doncaster & Bassetlaw Hospital NHS Foundation Trust UKEAT/0259/14/LA. This can include the possibility that money will be received from a third party.

The respondent's application

45. In summary the respondent's application was focused upon a costs award against the claimant and for those costs to be subject to detailed assessed

by an Employment Judge (rather than referring the assessment to the County Court). One reason was that there was a lower threshold for the costs application against the claimant, than wasted costs against her representative. Mr Cook also acknowledged the difficulty in that unless the claimant waived privilege, Mr Ogbonmwan may be restrained due to litigation privilege from explaining his actions; i.e. he may have behaved in the manner in which he did, due to his instructions from the claimant.

46. Mr Cook then went through the incidents which he submitted engaged the cost jurisdiction. The first was submitting four lengthy emails in the early hours of the morning prior to the Interim Relief hearing. The claimant was not well prepared for that hearing and applied for a postponement. Mr Ogbonmwan sent through approximately 120 unindexed pages and then did not refer to them in the course of the hearing. It was submitted it was unreasonable conduct to send such a large quantity of irrelevant material and then not to refer to it.

47. The next issue was the reconsideration application in respect of the outcome of the Interim Relief application on 27/1/2021. That application was not copied to the respondent and that was rectified on the 3/2/2021. That application made serious allegations, without foundation. Mr Ogbonmwan referred to the Employment Judge's decision being indirectly discriminatory under the Equality Act 2010, referred to unlawful and biased judgment, failing to apply the correct test and premeditation and prejudicial bias.

48. Not only that, Mr Ogbonmwan made allegations regarding the respondent's then counsel (not Mr Cook) in a further application made on the 5/4/2021 (copied to the claimant with the result that she aware of the approach Mr Ogbonmwan had taken). That application referred to the respondent's 'false defence' and to obtaining a judgment by fraud or fraudulent misrepresentation and that counsel had mislead the Employment Judge for 'financial gain'.

49. Mr Cook characterised this as a disgraceful application which amounted to it being abusive and improper allegations against a regulated professional, made for collateral purposes to harass the respondent and its representatives; rather than having any expectation the application would succeed.

50. The respondent sent a costs warning letter to Mr Ogbonmwan on 23/4/2021. That letter referenced the allegations against counsel and make the point that there was no credible basis for those allegations, other

than to seek leverage in settlement negotiations. That letter offered a 'drop hands' settlement offer. The claimant was warned, that she risked a costs application if she proceeded in her claim and its aim was to encourage a proportionate response. In fact, the conduct of the claim worsened.

51. A preliminary hearing had been listed for 7/4/2021 and two days before that, Mr Ogbonmwan filed three copies of further and better particulars, without setting what, if any differences there were. The result was that the particulars of claim ran to 95-pages of incoherent detail which did nothing to advance or explain what exactly the claimant's claims against the respondent were based upon. This incurred unnecessary costs for the respondent in it attempting to ascertain what the claim(s) against it was.

52. Six weeks late and not in compliance with the Order (and despite reminders from the respondent) Mr Ogbonmwan attempted to comply with the Order. This was a breach of the Order and unlike Rule 75(1), under Rule 76(2), there is no requirement of unreasonable conduct. The claimant was in breach of the Order, whether or not that breach was itself unreasonable.

53. The claimant made a strike out application on 2/9/2021 which repeated the abusive and vexatious allegations against counsel. Mr Ogbonmwan referred to 'unreasonable, criminal acts and vexatious behaviours, particular having aided and abetted race discrimination during the the course of the litigation'. The paragraph went onto refer to 'unreasonable criminal' behaviour, despite (it was said) the claimant being unrepresented at the time; whereas, in fact the claimant was represented by Mr Ogbonmwan from the time her first claim form was presented on 28/9/2020. Although Mr Ogbonmwan was not identified as the claimant's representative in respect of the second claim (presented on 15/10/2020). The notice of the Interim Relief hearing in the second claim was sent to the claimant and she was represented at that hearing on 6/1/2021 by Mr Ogbonmwan. Mr Ogbonmwan was thereafter treated as the claimant's representative.

54. The claimant was directed at the preliminary hearing on 9/4/2021, if she wished made any additions or alterations to her pleadings, to do so by means of tracking by the 18/7/2921. The claimant did not do so and instead, in breach of the Order, provided 50-pages without track changes.

55. In response to a draft hearing bundle sent to Mr Ogbonmwan and after being asked for any additional documents by the 1/10/2021, Mr Ogbonmwan sent 251-pages, contained in three emails and without an index on 5/10/2021. The additional documents were either duplicates or not relevant.

56. The final conduct issue which Mr Cook seeks to rely upon was Mr Ogbonmwan's conduct at the preliminary hearing on 7/10/2021 and 8/10/2021. The day before the hearing, Mr Ogbonmwan sent a document titled:

> 'Schedule of fraud, fraudulent misrepresentation aiding and abetting to disrepute legal obligations related to respondent's counsel's fraud and respondent's witness statement [Wendy Edward] to be heard 7-8 October 2021'

57. The document then went onto refer to a 1999 film *The General's Daughter*. Besides that reference was bizarre, unreasonable and only served to incur further costs for the respondent; it also repeated serious allegations. An example being the respondent 'manufacturing of evidence and falsifying records to plant in the mind of a third party tainted image of that attempted to disrepute the [claimant]…'

58. Finally, Mr Cook referred to the findings of fact made in the written reasons further to the hearing on 7/10/2021 and 8/10/2021.

59. Mr Cook also referred to Mr Ogbonmwan's suggestion that a document he (Mr Ogbonmwan) had produced and which did not comply with the Tribunal's Order, had been tampered with by the respondent or its representative. Other that this bald allegation, there was no other substantiation by Mr Ogbonmwan.

60. Mr Cook submitted that if the jurisdiction threshold was met, Mr Ogbonmwan's conduct was such that it engaged Rule 76 (1) and (2) and that it did so for essentially the same reasons was when the claim was struck out. That is notwithstanding that it may not have been the claimant herself who was guilty of the culpable conduct. There was no escape that Mr Ogbonmwan behaved in such a way which engaged the threshold.

61. Mr Cook pointed out that an award of costs is at the discretion of the Tribunal, however he invited the Tribunal to exercise its discretion in the respondent's favour.

62. Mr Cook went on to address the ability to pay and the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the Tribunal's discretion.

63. In respect of ability to pay, Rule 84 requires the Tribunal to have regard to it, but it is not required to do so. The claimant was directed on the 7/12/2022 to provide evidence in respect of her ability to pay. She confirmed she had seen the direction but had not complied with it. The claimant was reminded of the direction by the respondent. There was no engagement by the claimant, other than her attendance at the hearing. There was therefore no evidential basis of the claimant's ability to pay or otherwise.

64. The only evidence there was, was from the respondent, which was the Official copy of register of title from HM Land Registry. This related to a property owned by the claimant and her husband. The property was purchased on 19/2/2016 for £494,995. Mr Cook submitted that in the absence of any other evidence, that it is fair to assume the property has increased in value in the intervening seven years and that should be reflected is and when taking into account ability to pay.

65. In respect of the effect of the conduct, Mr Cook submitted that from the time the claim was first presented and then at all stages up to and including the strike out, the case was conducted unreasonably, vexatiously and pursued to harass and cause maximum convenience to the respondent. There was no legitimate interest in the claimant pursuing her claims and there was a thread of unreasonable conduct, such that the Tribunal is invited to exercise its discretion to order the claimant to pay the entirety of the respondent's costs.

66. That was the respondent's primary position, with the detailed assessment being carried out by an Employment Judge. It was submitted that there was little to be gained by transferring the assessment to the County Court. The respondent also said costs can be summarily assessed to the cap of £20,000. The costs claimed of just over £66,000 (excluding vat) were surprising low, considering there had been an Interim Relief hearing, two preliminary hearings over three days, lengthy pleadings, unparticularised further particulars and time engaged dealing with vexatious applications.

67. In the alternative to the respondent's primary position that the claimant should be ordered to pay its costs in full, the respondent seeks wasted costs against Mr Ogbonmwan. It does not seek double recovery.

68. Conduct for which Mr Ogbonmwan is liable for wasted costs is said to be:

> the reconsideration of the Interim Relief outcome;
>
> the strike out application of the 5/4/2021 which made serious allegations as leverage to obtain an enhanced settlement;
>
> repetition of those allegations in the strike out application of August 2021;
>
> the correspondence of 6/10/2021 containing allegations of fraud; and
>
> the conduct at the October 2021 preliminary hearing which led to the claim being struck out.

69. In respect of wasted costs, Mr Cook referred to the different approach to causation, than in respect of a costs application against a party. The Tribunal must find that the costs were incurred as a result of the improper, unreasonable and/or negligent conduct of the representative.

70. The final point was that it would be just to make a wasted costs order against Mr Ogbonmwan. Although he is a lay representative, that does not mean he can act with impunity and disregard the expected standards of behaviour. Mr Ogbonmwan is recorded as acting as a lay representative as shown by a perusal of past decisions. Lastly, Mr Ogbonmwan also did not provide any evidence of his ability to pay any costs ordered against him.

71. In response to the application, it was taken as the claimant's and Mr Ogbonmwan's position that the Tribunal should reject the respondent's application.

72. Mr Ogbonmwan said that he did not have the documentation, although he accepted the respondent had sent it. Mr Ogbonmwan saw the respondent's application as an attack on his character and he objected to this. Mr Ogbonmwan repeated his allegation that to not allow the claimant's claim to proceed was racist. He said that he had not acted irresponsibly and that he was a man of good character.

73. Unfortunately and puzzlingly, Mr Ogbonmwan then went onto make reference to the Second World War and to the compassion of the British people. He was informed that this did not assist the Tribunal in the issue it had to determine and he was asked to address the issue, which was whether or not he should be liable for wasted costs.

74. Mr Ogbonmwan repeated his allegations against the respondent's former counsel and then referenced Boris Johnson and other Judges he claimed were biased. Again, he was asked to respond to the salient point.

75. As Mr Ogbonmwan did no do so, he was asked if it was a fair summary to say the respondent's application should be rejected and that he did not accept what the respondent had said about his conduct. Mr Ogbonmwan said he had acted as a friend to the claimant and had done so to the best of his knowledge. He then referred to the video evidence which the claimant had relied upon and as his comments were not relevant, the Tribunal moved onto hearing from the claimant.

76. The claimant said that she had not responded to the Tribunal's directions. She said she engaged a lawyer to assist her, but he had recently passed away. She referred to her health and her personal circumstances. She was understandably upset.

Conclusions

77. If Mr Ogbonmwan could not access the documentation, it was up to him to notify the respondent of that and to seek assistance. That Mr Ogbonmwan did not do so until less than one working day before the hearing is down to him. Mr Ogbonmwan was capable of sending lengthy documents to the respondent in the early hours before a hearing and expected the respondent to be able to process that documentation. He was equally capable of requesting an accessible copy of the bundle, if indeed it was the case that he could not access the bundle which was sent it him.

78. At all previous hearings and up until 9/6/2022 Mr Ogbonmwan was the claimant's representative.

79. Mr Ogbonmwan's conduct was unreasonable. It was unreasonable at this hearing. He further demonstrated disregard for standards of reasonable behaviour. He repeated scurrilous and unfounded allegations. Mr Ogbonmwan had not complied with the Tribunal's Orders. The claimant had similarly failed to comply with Orders and was in breach of it.

80. In respect of the costs application against the claimant, she had, via her representative Mr Ogbonmwan acted unreasonably and vexatiously. Mr Ogbonmwan had not advanced the claimant's case and he had 'harassed' the respondent in the sense referred to in Scott v Russell [2013] EWCA Civ 1432. His conduct was unreasonable in that not only did he bombard the respondent with documentation at the last minute, that was compounded by his failure to comply with Orders of the Tribunal. He also made and continued to make damning and serious allegations, without foundation.

81. Although Mr Obgonmwan is a law representative, he is not inexperienced. For example, he made an Interim Relief application for the claimant on 15/10/2020. He cannot however act with impunity.

82. Following the Interim Relief hearing, an Order for directions was made. That included a reference to Rule 6 which states:

> Irregularities and non-compliance
> A failure to comply with any provision of these Rules (except rule 8(1), 16(1), 23 or 25) or any order of the Tribunal (except for an order under rules 38 or 39) does not of itself render void the proceedings or any step taken in the proceedings. In the case of such non-compliance, the Tribunal may take such action as it considers just, which may include all or any of the following—
>
> (a) waiving or varying the requirement;
>
> (b) striking out the claim or the response, in whole or in part, in accordance with rule 37;
>
> (c) barring or restricting a party's participation in the proceedings;
>
> **(d) awarding costs in accordance with rules 74 to 84.**

[emphasis added]

83. That was followed by a preliminary hearing on 9/4/2021 and the written outcome of that hearing contained paragraph 7.6 which read:

> **Under rule 6, if any of the above orders is not complied with, the Tribunal may take such action as it considers just which may include: (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.**

[the original was in bold font]

84. On the 23/4/2021 the respondent sent a without prejudice save as to costs letter. That letter did address the merits of the claimant's claims and considered them to be weak. The letter also referred to the conduct of the proceedings. Criticisms included the repetitive and voluminous pleadings, lack of response to reasonable requests, lack of preparation for the Interim Relief hearing (the hearing did not start at 10am as Mr Obgonmwan was not prepared), sending substantial documents in the early hours prior to the hearing, which were not then referred to, the lack of merit of the Interim Relief hearing itself and serving three different versions of a 51-page documents two days before the preliminary hearing, without identifying the differences. There was then a costs warning. At this stage, the costs warning focused on the weakness of the claimant's claims, rather than the conduct of them.

85. In applying the three stage test as set out above, the Tribunal is satisfied the conduct of the proceedings by Mr Obgonmwan substantially crosses the threshold so as to engage the jurisdiction under Rule 76.

86. The next question therefore is should the Tribunal exercise its discretion to award costs? The Tribunal finds Mr Obgonmwan's conduct was extreme and continued over a sustained period of time, despite warnings from the respondent and from the Tribunal itself. As such, it is correct that the Tribunal should exercise its discretion.

87. The next consideration is the sum which should be awarded. The Tribunal may have regard to the paying party's ability to pay.

88. In the absence of any evidence of her ability to pay and in breach of the Tribunal's Order; all the Tribunal has to go on is the evidence provided by the respondent. Even allowing that there is a charge or mortgage over the claimant's property, it is assumed that there is considerable equity in the property. She therefore has the means to pay any costs awarded.

89. The respondent contends that the claimant should pay its costs in full. The Tribunal declines to award the respondent's full costs. Although the costs warning letter focused on the merits of the claims, this costs application related to the conduct of the proceedings. The respondent would have had to incur some costs in defending the claim and in making the assessment regarding the merits. The strike out application was made based upon the conduct of Mr Obgonmwan and his failure to comply with the Tribunal's Orders. It is however accepted that the respondent will have incurred additional costs due to the manner in which the claim was conducted.

90. The Tribunal has also given consideration to the fact that costs are compensatory and not punitive.

91. In order to compensate the respondent and not to punish the claimant, the Tribunal awards the claimant to pay to the respondent costs in the sum of £20,000. This is considered to be a proportionate sum to compensate the respondent and as it does not involve detailed assessment, in accordance with the overriding objective, it avoids any further delay.

92. In respect of the wasted costs application against Mr Obgonmwan, the Tribunal would have no hesitation in considering his conduct to be unreasonable and under Rule 80, unreasonable is akin to vexatious. Similarly, the Tribunal has no hesitation in concluding that conduct caused the respondent to incur additional costs. It is the third limb of the test referred to above which causes the Tribunal to pause. Is it just in the circumstances to order Mr Obgonmwan to compensate the respondent for some of its costs?

93. The issue which causes concern is that identified by Mr Cook of litigation privilege. Had the claimant waived privilege (she said she had taken further legal advice) the outcome may have been different. As she has not waived privilege, it is not clear whether or not Mr Obgonmwan was acting in accordance with her instructions or not. In those circumstances, the Tribunal has to give Mr Obgonmwan the benefit of the doubt.

94. Furthermore, it was not clear whether or not Mr Obgonmwan was acting in pursuit of profit or not. As with all other preparation, neither the claimant nor Mr Obgonmwan came prepared to address that issue.

95. To conclude, although Mr Obgonmwan's conduct brings him within the first two limbs of the test to be applied when considering awarding wasted costs, the Tribunal is not satisfied, due to litigation privilege, that it is just to order Mr Obgonmwan to compensate the respondent.

96. For those reasons, the costs application against the claimant succeeds and she is ordered to pay to the respondent the sum of £20,000. The wasted costs application against Mr Obgonmwan fails and is dismissed.

14/6/2023

Employment Judge Wright