



Case Number 1305512/2022
Type V

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
Mr K Adams & Others

AND

Respondent
Walsall
Housing Group
Limited

ORDER OF THE EMPLOYMENT TRIBUNAL
AT A PRELIMINARY HEARING HEARD IN PUBLIC
COSTS APPLICATION
(RESERVED JUDGMENT)

HELD AT Birmingham **ON** 4 July 2023

EMPLOYMENT JUDGE GASKELL

Representation

For the claimants:

Mr M Mensah (Counsel)

For the respondent:

Mr R Leiper KC (Counsel)

ORDER

Pursuant to Rule 80 of the Employment Tribunals Rules of Procedure 2013, Simpsons solicitors are ordered to pay to the respondents the costs reasonably incurred by the following categories of work:

- (a) The steps taken by the respondent's solicitors to obtain confirmation that each claimant in these proceedings has given express authority for the proceedings to be brought on his/her behalf.
- (b) The work involved in preparation for and attendance at the preliminary hearing on 14 April 2023 to the extent that such work had to be repeated or was of no benefit to the respondent at the preliminary hearing on 4 July 2023.
- (c) The costs of preparing for and presenting the wasted costs application
- (d) The cost to be incurred in assessing the amount of costs payable.

REASONS

Introduction

1 The tribunal is considering an application by the respondent pursuant to Rules 80 – 84 of the Employment Tribunals Rules of Procedure 2013 for a wasted costs order against Simpsons Solicitors who act on behalf of the claimants. The scope of the costs sought against Simpsons relates to work done by the respondent's solicitors in seeking to establish the legitimacy of claims purporting to have been brought by a total of 169 individual claimant together with the costs involved in preparing for and attending a preliminary hearing before regional employment Judge Findlay on 14 April 2023 (see hearing which was largely ineffective) and the costs of dealing with the application today.

2 This application has been determined after hearing detailed submissions from Mr Leiper KC on behalf of the respondent's and from Mr Mensah of counsel representing the claimants and also representing Simpsons. The application has been determined on the basis of the papers submitted to the tribunal by the parties. Those papers included a witness statement made by Ms Justine Jones Regional Organiser for the GMB Trade Union. Ms Jones did not give oral evidence and was not cross-examined; her evidence was unchallenged. There was no witness statement from Simpsons. The facts are not substantially in dispute.

The Facts

3 The claims are brought pursuant to Section 145B(5) of the Trade Union & Labour Relations (Consolidation) Act 1992 (TULR(C)A). It is alleged that the respondent made an offer to the claimants who were employees or workers employed by the respondent the purpose of which was to undermine and circumvent a collective bargaining process with recognised trade unions. Claims pursuant to Section 145B(5) must be brought by individual employees or workers. The claims cannot be brought by the trade union on their behalf.

4 It is therefore highly important that when either alone or as part of a group, and individual commences litigation of any kind, that individual does so knowingly and where possible aware of potential risks. Ordinarily, where a firm of solicitors presents a claim on behalf of an individual or a group it is assumed by the opposing party and by the court or tribunal that the solicitor does so on instructions expressly given by the individual or members of the group. In the Civil Courts the acting solicitor must sign a statement of truth when presenting the claim - and this can only really be done with confidence where the client has approved the claim. There is no requirement for a statement of truth on the claim form to an Employment Tribunal, but the principles are the same.

5 Upon being served with these claims, it came to the respondent's attention that some of the purported claimants were not in the respondent's employment at any material time. Accordingly those claimants had no standing to bring the claim; and it seemed unlikely that those individual claimants would themselves have instigated the proceedings or authorised Simpsons to do so. This discovery prompted the respondent to enquire whether in fact the 169 claimants had given express individual instructions and authority for the claim to be brought.

6 The first enquiry as to authority from the individual claimants was made by email dated 22 September 2022 from this Ms Lisa Wallis, the respondent's Corporate Director of People and Learning to Ms Jones. This enquiry came just three weeks after the presentation of the claim form. Ms Jones did not respond to Ms Wallis. Five days later, on 27 September 2022, Ms Rebecca McGuirk of the respondent's solicitors forwarded the email to Ms Bull of Simpsons requesting her to provide a response to the enquiry. It was a straightforward enquiry: did Simpsons have instructions from each of the 169 claimant to commence litigation on that claimant's behalf?

7 Ms Bull purported to respond by simply sending to Ms McGuirk a further copy of the claim form with the details of the 168 claimants scheduled thereon. It is clear that Ms Bull had not understood what was being asked of her. On 29 September 2022, Ms McGuirk sent a further email of explanation setting out that she wished to see the signed authority from each of the 168 claimant to the effect that they have given authority either to Simpsons or to the GMB union for proceedings to be issued on their behalf. When no satisfactory responses received, on 4 November 2022, the respondent made an application for the claims to be struck out either for want of jurisdiction or as an abuse of the process of the tribunal that it appeared that they have been presented without the knowledge or consent of the named claimants.

8 The respondent's solicitors presented detailed and comprehensive arguments in support of the application which was eventually scheduled to be dealt with as part of the preliminary hearing which was listed for 14 April 2023. In the meantime, upon reviewing the file, on 13 February 2023, Employment Judge Battsby directed tribunal staff to write to the parties with the following suggestion as to how the matter could be resolved:

"It would appear from the Respondent's email of 20/12/2022 setting that the competing arguments that much would be resolved if claimants provide evidence that all claimants listed (see schedule attached to the ET1) gave their consent to the bringing of proceedings. Are the claimants prepared to provide such evidence which might be in the form of a witness statement (from an appropriate representative) or signed letters from each claimant?"

9 On 10 March 2023, Ms Bull indicated that Simpsons would respond with the requested information by the provision of a witness statement from Ms Jones. It is unclear from the papers before the tribunal today precisely when Ms Jones witness statement was provided. The statement makes clear that the process of which Ms Jones undertook in seeking purported authority to instruct solicitors on behalf of the claimants was that she wrote to the entire membership of the GMB Union who were employed by the respondent advising them of the proposed claims and inviting any who did not wish to participate to effectively opt-out. The process adopted meant that any who did not respond were assumed to have consented. There is no suggestion that Ms Jones acted other than in good faith, but it appears that the membership list from which she was working may well have been out of date.

10 the strikeout application was not pursued but at the preliminary hearing before Employment Judge Findlay on 14 April 2023 the judge made an order that Simpsons should file a statement with the tribunal setting out which of the claimants had given the solicitors express consent to pursue the claims and attaching written authorities to act.

11 It is not disputed that claimants can give authority retrospectively and effectively adopt the proceedings commenced on their behalf - some have done this. The upshot is that a number of claims are proceeding on the basis of retrospective express consent given by the claimants; a number of other claims have been withdrawn; and there are approximately 39 claimant for whom Simpsons have no authority to act but who's intentions with regard to the claims are currently unknown.

The Law

12 Rules 80 - 82 deal with wasted costs applications 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.

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

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.

13 In order to be successful on an application for wasted costs the Respondent must demonstrate, on the balance of probabilities that it has incurred costs as a result of an improper, unreasonable or negligent act or omission on the part of the Claimants solicitors, Simpsons. 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 in s.51(7) of the Senior Courts Act 1981.

14 Accordingly, the authorities applicable to wasted costs in the civil law generally are equally applicable in the Employment Tribunal. The two leading authorities analysing the scope of s.51 and the circumstances in which such orders can be made are ***Ridehalgh v Horsefield* (1994) 3 All ER 848 (CA)**, and ***Medcalf v Mardell* (2002) 3 All ER 721 (HL)**.

15 In ***Ridehalgh*** the Court of Appeal had advocated a three-stage to adopt in respect of wasted costs orders:

- (a) Has the legal representative acted improperly, unreasonably, or negligently?
- (b) If so, did such conduct cause 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?

The Court emphasised that even where the Court/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 and that it still has a discretion at that stage to dismiss an application for wasted costs where it considers it appropriate to do so.

16 In **Ridehalgh**, the Court of Appeal examined the meaning of ‘improper’, ‘unreasonable’ and ‘negligent’ and this was subsequently approved by the House of Lords in **Medcalf**— as follows:

- (a) ‘improper’ covers, but is not confined to, conduct that would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty.
- (b) ‘unreasonable’ describes conduct that is vexatious, designed to harass the other side rather than advance the resolution of the case;
- (c) ‘negligent’ should be understood in a non-technical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession.

17 As to the first stage, it is necessary to show that the legal representative has breached a duty to the Tribunal, something akin to an abuse of the process of the Tribunal: **KL Law Ltd v Wincanton Group Ltd [2019] PNLR 1**. As to the second stage, it is necessary for the applicant to demonstrate that the impugned conduct caused a waste of costs, and it is only the wasted costs so caused that can be recovered: **Isteed v London Borough of Redbridge EAT 21 July 2016**. As to the third stage, the tribunal should be mindful that a wasted costs order against a legal representative is a punitive order of last resort. It is the last resort, because the damage has been done (so other summary remedies which might have prevented the damage are no longer available).

18 The principles were confirmed by the EAT in **Ratcliffe Duce and Gammer v Binns UKEAT/0100/08/CEA**, where it observed that where a wasted costs order is concerned, the question is not whether the party has acted unreasonably. The test is a more rigorous one, as the leading authorities make plain. The distinction therefore is between conduct that is an abuse of process and conduct falling short of that. A wasted costs order requires a high standard

of misconduct on a representative's part. An abuse of the court includes such matters as issuing or pursuing proceedings for reasons unconnected with success in the litigation; pursuing a case known to be dishonest; and knowingly making incomplete disclosure of documents.

19 In **Godfrey Morgan Solicitors Ltd v Cobalt Systems Ltd [2012] ICR 305** the EAT gave guidance on the approach to be taken in relation to applications for wasted costs. At paragraph 36, Underhill P, as he then was, said:

“Despite the various cautions and caveats about its use, the weapon of the wasted costs order is a valuable one, which the rule-maker intended should be used in proper cases. The need to observe the essential requirements of a fair procedure and good reasons need not involve undue formality or elaboration and should not operate as a deterrent”.

The Respondent's Submissions

20 The respondent's case against that it is a fundamental and basic duty of a firm of solicitors issuing a claim to ensure that it has proper instructions to do so. Such instructions must be given expressly. The tribunal and the respondent effectively accept the issue of a claim by a firm of solicitors as a representation by that firm that proper instructions have been received. The tribunal and the respondent depend on such a representation and ordinarily there is no reason to question it.

21 In this case the respondent argues that it is patently clear from the documentation that Simpsons presented the claims without such instructions. The respondent promptly raised a query but it was many months before the query was properly addressed and resolved. The preliminary hearing before Judge Findlay on 14 April 2023 could and should have addressed case management more generally was limited to this single issue and could not proceed further. Accordingly the respondent argues that it has incurred substantial costs in resolving the query which should never have arisen and when it did arise was not properly addressed.

Simpson's Response

22 In written submissions prepared by Mr Robert Lassey of counsel in advance of the hearing before Judge Findlay, Simpsons appeared to suggest that the process adopted by Ms Jones was sufficient to provide authority for the commencement of proceedings by all those claimants who did not opt-out. That submission was not repeated by Mr Mensah today.

23 Mr Mensah relies on the fact that those claimants who could not have had standing to bring the claim very few in number and of themselves are unlikely to have caused the respondent to incur costs. He goes on to concede that criticism

can attract to the failure to provide the detail of the individual claimants but this was due to administrative oversight and human error. He accepts that the tribunal may conclude that the way that the litigation was conducted at that time (in September/October 2022) was sub-optimal.

24 Most importantly it is denied that Simpsons “wrongly represented” that they had the Claimants authority. Simpsons contend that they acted on the instructions of their client, the GMB Union.

Discussion & Conclusions

25 Having listened to counsel’s submissions and carefully considered the papers, it appears to me that Mr Mensah and Simpsons still misunderstand the position. There has never been any criticism regarding alleged failure to provide the details of individual claimants - indeed the appropriate level of detail was provided with the claim form. However what is clear is that Simpsons acted on the instructions of GMB who in turn had not obtained express instructions from all (or possibly any) of the claimants. Accordingly, neither GMB nor Simpsons had authority present the claims.

26 A legitimate query was then raised: firstly by the respondent, and then by their solicitors to which there was no satisfactory response. Employment Judge Battisby gave Simpsons the opportunity to provide confirmation of instructions from each claimant but they did not do so. What they did was to provide a witness statement from Ms Jones which actually confirms that instructions from individual claimants have not been received.

27 In my judgement, it is the fundamental duty of any firm of solicitors to ensure that they have proper instructions to commence litigation of any kind and that would include proceedings in the Employment Tribunal. I can certainly envisage situations where a firm of solicitors may accept instructions via a third party such as a trade union or an insurance company and act on the representation of that third party that proper authority has been given. But there is no evidence before me from Simpsons that any such enquiry was made or representation given. And when it was pointed out that in fact proper authority could not have been given in all cases Simpsons response was inadequate.

28 My judgement is that Simpsons actions in presenting the claims, and the response to the query then raised, falls far below the standard of competence reasonably to be expected of ordinary members of the solicitors profession. Accordingly, applying the principles set out in ***Ridehalgh*** and approved in ***Medcalf***, my judgement is that the threshold criteria have been met for a wasted costs order to be made against Simpsons.

29 Applying my discretion as to whether an Order should be made, my judgement is that this is a proper case for such an Order because: firstly a

fundamental failing has been identified; secondly Simpsons did not respond in a remotely satisfactory way when the query was raised; and thirdly considerable effort was required by the respondent's solicitors to ensure that the situation was regularised.

30 Accordingly, I order that Simpsons solicitors should pay to the respondents the costs reasonably incurred by the following categories of work:

- (a) The steps taken by the respondent's solicitors to obtain confirmation that each claimant in these proceedings has given express authority for the proceedings to be brought on his/her behalf.
- (b) The work involved in preparation for and attendance at the preliminary hearing on 14 April 2023 to the extent that such work had to be repeated or was of no benefit to the respondent at the preliminary hearing on 4 July 2023.
- (c) The costs of preparing for and presenting the wasted costs application
- (d) The cost to be incurred in assessing the amount of costs payable.

The Amount of Costs

31 As canvassed before counsel during the hearing on 4 July 2023, it was my intention if I find for the respondent merely to make an order that the costs were payable and then that they should be assessed by detailed assessment. However, on reflection I am not certain that such an approach is a correct application of the Rules. Rule 78 of the Employment Tribunals Rules of Procedure 2013 provides for a detailed assessment in appropriate circumstances relating to a costs order. But there is no corresponding provision in the Rules relating to a wasted costs order made pursuant to Rule 80. Indeed Rule 81 requires that the amount to be paid should be specified in the order.

32 I propose therefore to use an analogous process, I will list a further hearing at which I will determine the amount of the costs. In respect of that further hearing, I have given Case Management Orders set out below.

Case Management Orders

33 By 4.00pm on **11 August 2023**, the respondent shall file with the tribunal, and serve on Simpsons solicitors, a draft bill of the wasted costs sought in a form suitable for detailed assessment and accompanied by copies of all disbursement vouchers.

34 By 4.00pm on **8 September 2023**, Simpsons solicitors shall file with the tribunal, and serve on the respondents, a detailed response to the bill.

35 The amount of the wasted costs order shall be determined by employment Judge Gaskell at an oral hearing to be conducted by CVP on a date to be fixed

by the tribunal and notified to the parties with the time allocation of one day. Not less than five working days before the date of the hearing, the respondent's solicitors shall submit to the tribunal and to Simpsons solicitors copies of relevant extracts from their file of papers which may be redacted to conceal confidential or privileged or irrelevant information.

Employment Judge Gaskell
7 July 2023