Case Number: 2305423/2021

EMPLOYMENT TRIBUNALS

Claimant: **Mr. Zuniga**

Respondent: **Bartlett Mitchell Limited**

Heard at: **London South Hearing Centre**

On: **09/10/23**

Before: **Employment Judge McLaren**

Representation
Claimant Mr. Patrick, Counsel
Respondent: Mr. M Stephens, Counsel

JUDGMENT

The application for a wasted costs order under rule 80 against the claimant's representative does not succeed. No Order is made.

Background

1. This hearing was listed to consider the respondent's application for wasted costs under rule 80 against the claimant's representative. I was provided with two separate bundles. One was numbered up to page 171 and the second numbered up to page 6.I was provided with a witness statement from the Managing Partner for the firm of solicitors representing the claimant, Antonio Arenas ,with exhibits.
2. I received a skeleton argument on behalf of the claimant's representative dated 29th of September 2023 and an outline submission by the respondent's representative. I was also provided with a bundle of authorities from each counsel.
3. I agreed to allow one additional document into the bundle which was a letter of 29 September sent by the respondent's lawyers to the claimant's representatives directing them to Mindimaxnox and summarising its outcome.

Chronology of relevant events

4. The claimant had been employed as a kitchen porter/general assistant at the private hospital, the Priory, in Roehampton. The respondent supplied contract catering to the hospital. On 25 May 2021 a complaint was made about the claimant and he was subsequently dismissed for gross misconduct at a client site. His appeal was also dismissed.
5. On 7 November 2021 grounds of complaint were presented to the tribunal bringing claims of direct discrimination because of race, discrimination, discrimination because of something arising from disability, failure to make reasonable adjustments, ordinary unfair dismissal and underpayment of wages. At a preliminary hearing on 21 September 2022 the employment tribunal made a number of orders requiring the claimant to provide certain information in relation to the disability claim. These orders were not complied with.
6. The Employment Judge also made an order for a deposit to be paid in relation to the claim under section 15 of the Equality Act 2010. This was set at £100. Further orders were made in order to ensure the parties were ready for hearing, such as the provision of a schedule of loss, disclosure of documents and exchange of witness statements. These orders were not complied with.
7. On 28 September the claimant's representative wrote to the respondent's lawyers notifying of an intention to withdraw the race claim and putting them on notice they were instructed to bring a claim for psychiatric injury and negligence under the Protection from Harassment Act 1997.
8. On 5 October 2022 the claimant's representatives made an application to stay the proceedings and to vacate the hearing. The basis for doing so was that the claimant intended to bring a civil claim for damages for personal injury. This application was refused on 5 December because no claim form had been issued or served.
9. On the same date Employment Judge Wright wrote to the claimant's representatives stating that she was considering striking out the claim for their failure to comply with the tribunal orders and because the claim had not been actively pursued. The parties were ordered to exchange witness statements by 9 December 2022. The claimant's representatives failed to do so.
10. On 23 December 2020 the claimant's representatives applied for a reconsideration of the decision to refuse a stay. This was in part based on a change in facts because the claim form had now been lodged and issued. This reconsideration was refused on 19 January 2023. On 20 January the claimant's representatives then withdrew all proceedings before the employment tribunal.
11. As a result of withdrawing the day before the hearing, the respondent has made this application for wasted costs.

Relevant Law in relation to wasted costs

12. The parties broadly agreed the relevant authorities on this point and I set out a summary of the relevant law below.
13. Rule 80 provides that

(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".

14. I was directed to the Court of Appeal decision in Ridehalgh v Horsefield 1994 3 All ER 848, CA, which advocated a three-stage test for courts to adopt in respect of wasted costs orders. First, has the legal representative acted improperly, unreasonably, or negligently? Secondly, if so, did such conduct cause the applicant to incur unnecessary costs? Thirdly, 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?

15. The Court of Appeal also set out the meaning of 'improper', 'unreasonable' and 'negligent' —as follows:

> '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
>
> 'unreasonable' describes conduct that is vexatious, designed to harass the other side rather than advance the resolution of the case
>
> '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.

16. I was also directed to Ratcliffe Duce and Gammer v Binns (t/a Parc Ferme) EAT 0100/08 in which it was observed that, where a wasted costs order is concerned there is a distinction between conduct that is an abuse of process and conduct falling short of that. A legal representative should not therefore be held to have acted improperly, unreasonably or negligently simply because he or she acts on behalf of a party whose claim or defence is doomed to fail.

17. 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. 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 so doing

18. Legal privilege needs to be considered. I was provided with an extract from Harvey on Industrial Relations as set out below.

"(g) Where an applicant seeks a wasted costs order against the lawyers on the other side, legal professional privilege may be relevant both as between the applicant and his lawyers and as between the respondent

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

19. I was directed to Medcalf v Mardell [2002] UKHL 27, [2003] 1 AC 120 which confirmed the need for a court to exercise caution when making a wasted costs order against a lawyer who is prevented by legal professional privilege from answering the complaints against him in full. It was said that where the lawyer cannot give his account of the instructions he received and the material before him, the court 'must be very slow to conclude that [he or she] could have had no sufficient material',

> *"Only rarely will the court be able to make "full allowance" for the inability of the practitioner to tell the whole story or to conclude that there is no room for doubt in a situation in which, of necessity, the court is deprived of access to the full facts on which, in the ordinary way, any sound judicial decision must be based'.'*

20. 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."*

21. I was also directed to the issue of a causal link and I refer to the passage in Harvey with which I was provided.

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

Grounds of the application/submissions

22. The respondent broadly relied on three grounds:-. that the representative had advanced hopeless/unarguable positions, that they had breached tribunal orders and engaged in discourteous correspondence. This latter point was not expanded upon in submissions. In looking at the correspondence I am not persuaded that its tone or language are particularly discourteous or expressed in an unusual manner compared with much of the correspondence received by the employment tribunal. I do not propose to deal with this point any further.
23. The general ground relied upon was negligence, it being submitted that no reasonably competent lawyer would act as the claimant's representative had done.

Hopeless/unarguable positions

Claim for race discrimination

24. The respondent suggested that the claim for race discrimination under paragraph 22 of the grounds of complaint was presented more than three years out of time and no factual basis was disclosed to support the allegation. There was no prospect that the employment tribunal would accept jurisdiction to hear the claim. The claimant's representative had not identified any real explanation as to why it had pleaded a defective claim which was bound to be struck out.

Disablilty claims: Claim under section 15 of the Equality Act 2010/ Claim for reasonable adjustments

25. It was also submitted that the s15 claim was incoherently pleaded and failed to identify the "something" said to arise. A deposit order had been made. It was submitted that no reasonably competent employment lawyer would have raised the claim in this way
26. It was submitted the adjustment claim did not identify a PCP, what amounted to the disadvantage, when the disadvantage was engaged or when it was breached. It was said to be an unarguable claim and no reasonable explanation had been given for advancing it. It was submitted no reasonably competent employment lawyer would have done so.
27. In general terms the tribunal was asked to take the view that all the unarguable heads of claim were improper make weights raised to bulk out a weak case of unfair dismissal and it was unreasonable for the claimant's representative to have done this
28. It was pointed out that the claimant had withdrawn the race claim and had also withdrawn another serious and wholly irrelevant allegation in the pleadings in relation to drug-trafficking trafficking on site. It was noted that this was evidence the claimant did not behave unreasonably and by inference that the unreasonable conduct in framing and pursuing hopeless claims was that of the representative acting as no reasonably competent lawyer would act.
29. On behalf of the claimant it was submitted that neither of the claims related to disability had been struck out. The claimant does not have to raise the something arising, merely state that is his position. No deposit order was made in relation to the adjustments claim.
30. For all three claims relied on by the respondent here, the claimant's representative submitted that there was no suggestion made of an abuse of process. This is required where it is said that the representative acted unreasonably, negligently or improperly in pursuing a hopeless claim.
31. Further, while it was said by the respondent's representative that the claimant's representative had offered no explanation, it was submitted that they were unable to do so because of the effect of legal privilege.
32. This was not a case where I could be satisfied that there was nothing that could be said by the claimant's representatives. This could be a case where, despite advice, the claimant insisted upon pursuing matters. The fact that he continued to pursue some and not others is not evidence of any wrongdoing or persuasion by the representatives. Instead that could

be evidence of a successful attempt to persuade the client on some occasions although not others.

Conclusion on this part of the application

33. I do not find there has been any abuse of process. I do not find the fact that the claimant withdrew some claims as evidence that he would act reasonably therefore anything which appears unreasonable is the fault of the representative. While I accept that the claims brought had many issues on their face, there must be an abuse of process which I have not found. Wasted cost orders are not made simply where hopeless cases are pursued.
34. While no explanation for the pursuit of these claims has been given, I cannot be satisfied that there is nothing that the claimant's representative could say were he not bound by legal privilege to explain their pursuit. I can see that it could be a matter of a client insisting and not taking advice given.
35. I was directed to an extract from the solicitors regulatory authority's code of conduct. It was submitted that this prohibits the solicitor singing a hopeless case from wasting employment tribunal time in this way. The absence of evidence represented, which you cannot give me, I cannot determine if there were more factor information available suggested the claims pursued were not without merit. The existence of this regulatory obligation does not change the picture in the absence of an explanation.
36. In these circumstances I am not making a wasted costs order relation to these matters.

Application to stay

37. This was said by the respondent's representative to be a misconceived application. I was referred to two specific authorities. The first was Mindimaxnox LLP [2010] UKEAT/0225/10. Both agreed this is authority that it is not in accordance with the overriding objective to have concurrent proceedings in the same factual territory and generally High Court proceedings take precedent over employment tribunal proceedings. It was also agreed that concurrent proceedings had not been served at the time of the application for a stay made on 5 October
38. What was not agreed, however, was whether a claim had to be issued **and** served before a stay could be considered in the employment tribunal. On behalf of the claimant's representative it was submitted that there is no authority on this point.
39. The respondent's representatives sought to rely on second authority to which I was taken, Halstead v Paymentshield Group Holdings Ltd [2010]EWCA Civ 524.On the facts of that case a claimant had drafted High Court proceedings, having already started employment tribunal proceedings, but then changed his mind. It was the respondent's who applied for a stay of the tribunal proceedings. The Court of Appeal held that the EAT had erred in ordering a stay. Correspondence short of proceedings in the High Court did not deprive the claimant's right to proceed in the employment tribunal. It made reference to Mindimaxnox

and confirmed that those factors have force where there are concurrent proceedings, but are not determinative in their absence.

40. Mr. Stephens relied on this as authority that a tribunal claim would not be stayed where there were no concurrent proceedings. Mr. Patrick submitted that this case is distinguishable on its facts from the current situation. Here, the claimant had set out clearly that he intended to pursue a claim, letting the employment tribunal know that he had lodged a claim in the County Court on 5 October, although it had not been served on that date. There was nothing that required service of the pleadings before an application for stay could be made, considered and potentially granted by the employment tribunal. The tribunal would need to be satisfied that there were or would be concurrent civil proceedings and the claimant had all times a reasonable argument that should be so satisfied and that was properly presented to the tribunal. He was not therefore relying on this authority and submitted that there was in fact no authority on the point. The application was not therefore misconceived and was arguable.
41. It was agreed that and exercise any discretion to stay proceedings and employment tribunal would also consider any overlap in fact. The respondent submitted that there was no such overlap. The claimant's representative identified a number of factual issues that are common to the claim form and the claim for the County Court as described at the time and correspondence. I find this is also an arguable point the application is not therefore misconceived or wholly without merit on this basis.

Conclusion on the stay application

42. The question I have to consider is not what the ultimate decision on the stay application would have been, but whether or not the application was misconceived at its outset and if so whether this was an improper unreasonable or negligent action by the representative.
43. In looking at the correspondence between the parties alone, I share the respondent's perspective that the way in which they were relying on the authorities appeared to hinder the claimant's position and not to help it. The correspondence was far from clear and I understand how the respondent interpreted it as evidencing no prospect of the stay application succeeding. It was only with the benefit of Mr. Patrick's submissions explaining in more detail the position the claimant's representative was taking and explaining what the intention behind the correspondence was that I could understand their point. However, having done so I cannot say that the initial application was wholly misconceived. It is arguable that having lodged a claim form is sufficient. It is arguable that this case is distinguishable on its facts from the other authorities. Further, the factual position had of course changed by 23 December when a reconsideration was sought. At that point, the claimant's circumstances were such that an application for a stay could have been considered/reconsidered.
44. I cannot therefore say that the application and further application for reconsideration were improper, unreasonable or negligent actions. Further, I cannot say that, even if the application was a hopeless one, that the representative who made it knowingly participated in an abuse of process. Again, legal privilege prevents any further explanation by the representative of their conduct. I cannot say there is nothing that he could

tell me, if unconstrained, to resist the order. I must give him the benefit of the doubt and for all these reasons do not find wasted costs order would be appropriate. Accordingly, I have not gone on to consider fairness or causation. The application does not succeed before I need to consider these further points.

Breached orders/failure to prepare for trial

45. It was accepted that the claimant failed to provide information documents required by the various directions and orders of the employment tribunal. Mr. Stephens set out the history of the claimant's failure to prepare for trial. He submitted that no reasonably competent employment lawyer would have continued to press for a reconsideration and failed to progress the case for trial.
46. While it does seem to be the case that the claimant took almost no steps to be ready for trial, I only have only limited explanation from the representative as to why. Some reference is made to inability to obtain documents from the NHS due to IT issue. I was taken to some evidence that documents had been provided and in fact Spanish translation provided, contrary to the respondent's assertion. However, in the main, no explanation was forthcoming as to why it seemed nothing had happened on this claim and yet the claimant's representatives were disputing the claim should be struck out.
47. On its face I understand the respondent's position that this appears to be negligent conduct by the representatives. Indeed, I agree with the statement made by Mr. Patrick when he began his submissions by accepting that the underlying chronology did not make happy reading that any employment tribunal would have concerns when directions clearly were not followed and the claim is withdrawn the day before. However, again there is no suggestion that the representative was knowingly participating in an abuse of process. In the absence of the representative being able to give an explanation as he is bound by legal privilege, I must be satisfied that there is nothing he could say if he was not so restrained to resist the order. I can see that it is entirely possible that a claimant with little money could have been giving instructions to focus entirely on the County Court/High Court proceedings and/or simply not providing information as requested by his lawyer.
48. It was submitted that legal privilege cannot be an answer to a rule 80 application such that no applications can succeed. I agree, it is not. However I must proceed with extreme care in the circumstances and I cannot conclude that this practitioner could have had no sufficient material to explain what occurred.
49. In those circumstances a wasted costs order is not appropriate. Again, I have not therefore to consider issues of fairness in the round or of causation.

Employment Judge **McLaren**
Date: **10 October 2023**

Sent to parties:
Date: **8 November 2023**

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FOR EMPLOYMENT TRIBUNALS