



## EMPLOYMENT TRIBUNAL

**Claimant:** Mr K Tbaily  
**Respondent:** Hutchinson 3G UK Ltd  
**Heard at:** Southampton **On:** 2/3/2017

**Before:** Employment Judge Wright  
**Members:** Mr D P Jenkins  
Mr P Flanagan

**Representation:**  
**Claimant:** Did not attend and no representation  
**Respondent:** Did not attend and no representation

## JUDGMENT

It is the unanimous judgment of the Tribunal that the respondent's costs application is successful. The claimant is to pay the respondent the sum of £500 under Rule 76(1)(b) of The Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013. The respondent's application for wasted costs under Rule 80 against the claimant's representative is rejected.

## REASONS

1. At a telephone case management hearing on 6/9/2016 the issues were identified, directions were given and the matter was listed with the agreement of the parties, for a three day hearing on 21/11/2016 to 23/11/2016 to consider liability and remedy.
2. The substantive part of the hearing concluded on day one. The Tribunal raised at the conclusion of day one whether it was necessary to hear from the one remaining witness (Lynsey Graham) for the respondent the following day as her evidence appeared to be of little relevance (she was not employed at the relevant time, but gave evidence as to what appeared in the claimant's HR file) and it was confirmed that it was. In fact, the totality of Ms Graham's evidence took eight minutes. The parties then moved onto closing submissions.
3. After deliberating, the Tribunal gave judgment and the case concluded at 12.20pm. The respondent then made a costs application. It was clear the respondent had intended to make a costs application if it successfully defended the claim on the basis which it did. The Tribunal found the costs application was worthy of consideration and it was prepared to do so there and then. There was plenty of time on the second day and there was also a third day listed. The Tribunal was not however able to consider the costs application at that time as the respondent was ill-prepared in that it did not have enough copies of the documentation which it relied upon and did not have a breakdown of the costs sought.
4. Furthermore, the respondent had not put the claimant on notice of its intention to make a costs application and had not served a schedule of loss upon the claimant. The claimant needed to seek advice and costs application was therefore adjourned and directions were issued.
5. It had been mooted that it was potentially possible for the application to be dealt with on the papers. As however the respondent made an application against the claimant's representative for an Order under Rule 80(1) of Schedule 1 of The Employment Tribunal (Constitution and Rules of Procedure)

Regulations 2013 ('The Rules') for 'wasted costs' (dated 6/12/2016); the Regional Employment Judge confirmed that the hearing would be in person; but that the parties were at liberty to send in written submissions in lieu of attendance.

6. The respondent provided submissions dated 10/1/2017. Neither party however expressly informed the Tribunal that they would not be attending the hearing in person. As a result of this discourtesy, the Tribunal awaited attendance until 11am.

7. The respondent's costs application is based upon Rule 76(1)(a) and (b) of The Rules.

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

76.—(1) A Tribunal may make a costs order or a preparation time order, and shall consider

whether to do so, where it considers that—

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or 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.

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8. Definitions

74.—(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). In Scotland all references to costs (except when used in the expression "wasted costs") shall be read as references to expenses.

(2) "Legally represented" means having the assistance of a person (including where that person is the receiving party's employee) who—

(a) has a right of audience in relation to any class of proceedings in any part of the Senior Courts of England and Wales, or all proceedings in county courts or magistrates' courts;

(b) is an advocate or solicitor in Scotland; or is a member of the Bar of Northern Ireland or a solicitor of the Court of Judicature of Northern Ireland.

(3) "Represented by a lay representative" means having the assistance of a person who does not satisfy any of the criteria in paragraph (2) and who charges for representation in the proceedings.

9. The amount of a costs order

78.

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

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10. Ability to pay

84. 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.

11. When a wasted costs order may be made

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(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.

12. The Tribunal reminded itself of the general principles in respect of cost applications. In the jurisdiction of the Employment Tribunal, costs are the exception, rather than the rule. Costs orders are not made in the majority of cases due to the high hurdle to be overcome. That said, it does not mean the facts of a case have to be exceptional for a costs order to be made. All that is necessary is that the relevant test is satisfied. The fact therefore that costs orders are exceptional is not a shield for the paying party.
13. The extent to which a party has had access to legal advice might be taken into account by a tribunal when considering to make a costs order. It is noted the claimant said in his witness statement dated 19/12/2016 - ‘I followed the proper procedures for my case, I visited the citizens advice bureau immediately after my dismissal, and they advised me to seek legal advice from local solicitors and to contact ACAS for further help. I spoke with a number of solicitors and each said I had 50 to 60% prospects of succeeding with my claim.’
14. There does not have to be a precise causal link between any relevant conduct and any specific costs claimed. In the Court of Appeal in Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78 said in exercising its discretion, the tribunal is to look at the whole picture, to ask whether there has been unreasonable conduct in bringing the case and to identify the conduct, what was unreasonable about it and what effects it had. In essence, the issue is to be looked at in the round.
15. Unreasonable conduct is a matter of fact for the tribunal and unreasonableness has its ordinary meaning. Pursuing a claim with little or no reasonable prospects may also be regarded as unreasonable.
16. In respect of wasted costs under Rule 80, the Court of Appeal’s general guidance in Ridehalgh v Horsefield and another [1994] Ch 205 was cited before the Employment Appeal Tribunal in Mitchells Solicitors - In a Matter of Costs Order v Funkwerk Information Technologies York Ltd UKEAT/0541/07 that a tribunal must, when deciding to make a wasted costs order, take into account that, unless the claimant waives privilege against his representative, client privilege/confidence is likely to prevent the representative from explaining why they have pursued their client’s case in the way they have.
17. In applying for a costs order, a schedule of costs should be prepared, setting out the costs incurred in respect of each stage of the case. The schedule should be signed and include a statement confirming the indemnity principle has been complied with. As the Tribunal has to assess the costs under Rule 78(1)(b), in accordance with the Civil Procedure Rules 1998, the schedule of costs should mirror the requirements of the Civil Procedure Rules. The respondent’s applicant was defective in this respect and this was despite a direction given by the Tribunal to provide a breakdown of the costs claimed. The respondent has provided a one page, unsigned costs schedule, without a breakdown. It has also not amended or updated the schedule, for example, it claims Counsel’s refresher fees of £2,000 (£1,000 per

day) when the hearing only lasted two days. It also claims photocopying and postage (£341) without any further explanation. The respondent has not even appended its time-print out to the application.

18. The Tribunal reminded itself that the purpose of a costs award is to compensate the receiving party and not to punish the paying party. That however does not mean that a paying party without means is able to misbehave with impunity without fearing that a costs order (or even a significant costs order) will be made - Kovacs v Queen Mary and Westfield College and another [2002] EWCA Civ 352.
19. The Tribunal also considered that the prospect of a costs order being made may act as a disincentive to those with a legitimate claim.
20. In considering a party's ability to pay, the Tribunal should consider the party's whole means, including capital and savings, not just income.
21. It is also an option for the Tribunal to place a cap on the award of costs.
22. The Tribunal considered the guidance provide by the Employment Appeal Tribunal (The Honourable Mrs Justice Simler) in Mrs D M Chadburn v Doncaster and Bassetlaw Hospital NHS Foundation Trust and another UKEAT/0259/14/LA.
23. It is clear that Rule 76 imposes a two-stage exercise when considering ability to pay. At the first stage the Tribunal must determine whether the paying party had acted unreasonably or in any other way such as to invoke the jurisdiction to make an order for costs. If satisfied that there has been unreasonable or other relevant conduct at that stage, the second stage is engaged. At the second stage the Tribunal is required to consider making a costs order but has discretion whether or not to do so. Then Rule 84 makes it clear means to pay the award should be considered twice. Firstly when deciding to make an award and secondly, when deciding how much should be awarded.
24. The respondent primarily relies upon its two without prejudice save as to costs letters of the 5/10/2016 and 14/11/2016 (it is not a requirement that a costs warning has been given, but the warnings the respondent gave were appropriate). It refers to these letters in its applicant of the 6/12/2016. The respondent submits the claimant had no reasonable prospect of success and that it put the claimant on notice of this, further to the telephone preliminary hearing on 6/9/2016. The respondent set out the reasons why it said the claimant's claims would fail (in summary, the claimant in his ET1 admitted manhandling the customer out of the shop and therefore, the Tribunal would agree this was a fair conduct dismissal, there was no direct discrimination because of the claimant's race and there was no indirect discrimination as the claimant would not be able to establish the PCP which he relied upon). The respondent's analysis broadly matched the Tribunal's reasons for dismissing the claimant's claims.
25. The Tribunal is in agreement with the respondent that the claimant's claims had no reasonable prospect of success for the reasons given in its oral judgment of 22/11/2016.
26. It is also the respondent's position that there was unreasonable conduct of the proceedings by the claimant and/or his representative. The respondent relies the same reasons as its contention that the claims had no reasonable prospect of success.
27. The respondent also relies upon the claimant's representative's failure to return telephone calls and to respond to emails. The respondent did provide some evidence of this, but not enough to persuade the Tribunal that it was unreasonable conduct by the claimant's representative.
28. The respondent also referred to the claimant failing to agree to the evidence of Lynsey Graham, failure to discuss the matter prior to the hearing and her attendance at on the second day of the hearing. It is a matter for the respondent who it calls as a witness (not the claimant). Ms Graham was not employed at the time of the matter to which she gave evidence and therefore her evidence was hearsay evidence; she was repeating what she had gleaned from a file. The respondent should have considered calling a more cost effective witness (one who did not have to fly from Scotland to attend) and whether or not one of its other witnesses could have reviewed the file and provided that evidence. In fact, at the conclusion of the first day's hearing, when considering the timetable for the following day, the Tribunal questioned whether it was in fact necessary to hear from Ms Graham as her evidence seemed to be of little relevance to the issues to be determined and the respondent said that it was, albeit on the basis that her evidence was not agreed with the claimant.
29. The respondent also relies upon the claimant's failure to properly respond to settlement offers.
30. The respondent also makes an application against the claimant's representative for wasted costs under Rule 80. The reason for this is that in his initial response to the respondent's application on 22/11/2016,

the claimant stated that he had been acting on the advice of his legal representatives. The conduct the respondent relies upon is the same as that which it cites in respect of its unreasonable conduct.

31. The claimant has not waived privilege in respect of the advice he received as to the prospects of success and where privilege has not been waived, this is likely to prevent the representative from explaining why the case was pursued in the way it was. In view of that, it is not possible for the Tribunal to make any findings and therefore to make an award for wasted costs under Rule 80.
32. By response dated 19/12/2016, the claimant objects to the respondent's application. the claimant refers to Employment Judge Livesey's 'support' of the claimant's claims at the Preliminary Hearing. It is not accepted by the Tribunal that an Employment Judge would express 'support' for a party's case at a hearing listed to identify the issues and for case management purposes. Indeed, the Order which resulted from that hearing does not support the claimant's contention there was such support.
33. The claimant states that the respondent increasing its settlement offers was indicative that the respondent believed there were prospects in the claimant's claim. The claimant could not be more misguided on this point and the respondent's view is not relevant. The respondent made a settlement offer of £2,000 in September 2016, it repeated this offer in November 2016 and it made an increased offer of £5,000 on 14/11/2016. These offers were made against a background of the respondent's very thorough analysis of the claimant's case and it clearly pointed out where it thought and where indeed, the claimant's claims did fail. In contrast, on 3/11/2016 the claimant put forward a settlement offer of £40,000. The claimant should have been made aware that a respondent putting forward 'commercial' value settlement offers (more of a gesture to settle the claim without incurring further costs) does not indicate any concern about or make any concession in respect of the strength of the claimant's case.
34. The claimant submitted that it had complied with the Tribunal's directions and that Ms Graham's attendance could not have been avoided. We have dealt with Ms Graham's attendance above.
35. In accordance with the directions, the claimant provided a witness statement and documents as to his means.
36. In summary, the claimant urged the Tribunal to exercise its discretion and not to make an order for costs.
37. The respondent replied by means of written submissions dated 10/1/2017.
38. The respondent maintained its position or set out its objection to the claimant's submissions.
39. The respondent requested the Tribunal take into account the means of the claimant's household (i.e. his wife's income which had been referred to during the course of the hearing). The respondent said that it had requested this information and had been told it was pending. The respondent referred to the equity in the claimant's property, again, it said this information was pending. The Tribunal was not aware of anything more forthcoming from the respondent on these points.
40. The Tribunal finds the culpable conduct on the part of the claimant which led it to consider exercising its discretion to make an award of costs was that these claims should never have been brought or continued with and therefore the bringing and continuing of the proceedings was unreasonable. Pursuing a claim with no reasonable prospect of success is regarded as unreasonable conduct and none of the claims advanced by the claimant had prospects; they were hopeless. As the Tribunal had made that finding, it was prepared to exercise its discretion to award costs.
41. The Tribunal then considered the claimant's ability to pay any award of costs which it made. It considered the information which it had available to it. It was clear the claimant was 'managing' on a day-to-day basis, probably with his wife's support. It was also clear that he had debts (he had four credit cards) and that he had borrowed money in order to finance his claim (barrister's fees and Tribunal fees). The Tribunal found that the claimant was in debt, but that some of the debt related to the costs of this case. It found that the claimant was in a very poor financial position, but that he could afford to pay something towards the respondent's costs.
42. Following from that, the Tribunal then turned to consider whether to in fact make a costs order.
43. The Tribunal would certainly have been minded to make an order that the claimant pay the respondent's costs from a certain point in time, most likely from the point of the respondent's first costs warning letter and the respondent was certainly justified in making an applicant on that basis. The Tribunal however simply did not have enough information in order to do so. Had the respondent provided a proper breakdown of the costs claimed or at least provided a time print out, the Tribunal could have given this further consideration.
44. Based upon the information which the respondent had provided, the only cost which the respondent had incurred which could have been identified as being incurred from 5/10/2016, was its Counsel's fee of £2,000. There was also the refresher fee for the 22/11/2017. The Tribunal however takes the view that

calling Ms Graham, which took the case into a second day was a matter for the respondent and the Tribunal had raised the issue of the necessity of hearing from her. Had the respondent been better prepared (bundles were not located on the first day) the hearing could have started on time/earlier (there was a direction that the reading material be available from 9.30am but it was not) and the hearing could have concluded within a day. On that basis the Tribunal is not prepared to allow the refresher fee.

45. The Tribunal is therefore prepared to make a costs award in the sum of Counsel's fee of £2,000. In however taking into account the claimant's ability to pay that sum and reminding itself that the purpose of the costs award is not to punish the claimant (but is to compensate the respondent), the Tribunal has decided to cap that sum at £500. The Tribunal finds that the claimant will certainly be stretched in paying such a sum on top of the debts he currently has, but that it is an affordable sum for him. The claimant therefore ordered to pay the respondent the sum of £500 under Rule 76(1)(b) of The Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013. As stated above, the respondent's application under Rule 80 is dismissed.

Employment Judge Wright

Date:- 8<sup>th</sup> March 2017

JUDGMENT SENT TO THE PARTIES ON

16<sup>th</sup> March 2017

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS