EMPLOYMENT TRIBUNALS

Claimant: Mr A Pepa

Respondent: Shorebutton Limited

HELD AT: Liverpool **ON:** 2 May 2017

BEFORE: Employment Judge Rice-Birchall
(sitting alone)

REPRESENTATION:

Claimant: Not in attendance
Respondent: Not in attendance

JUDGMENT ON APPLICATION FOR COSTS

The judgment of the Tribunal is that the respondent's application for a wasted costs order is unsuccessful. No order for wasted costs is made.

REASONS

Factual Background

1. The claimant, represented by Mr Nolan of Merseyside Employment Law, brought claims against the respondent and following several Case Management Orders, the case was listed for hearing before Employment Judge Rice-Birchall on 11 and 12 October 2016. The claimant attended that hearing in person and the respondent was represented by Mr David Jones. Mr Jones explained that during the course of the Friday preceding the hearing discussions had taken place between the parties. Despite numerous attempts on the respondent's behalf to finalise matters, there had been no response to the COT3 wording by 5.00pm, at which time the offer expired.

2. The claimant attended the final hearing without a witness statement and, as witness evidence had not been exchanged, neither party was in a position to proceed with the hearing. Mr Jones, on behalf of the respondent, made an application for wasted costs. He seized that opportunity because, although he had previously believed that the claimant's representative was a "not for profit"

organisation, the claimant gave evidence to the effect that he had made a payment of £180 for Mr Nolan, his representative, to attend a preliminary hearing on his behalf.

3. There were further outstanding costs applications at that hearing but it is the Tribunal's understanding that these matters are no longer being pursued in light of the claim now having been settled.

4. At the hearing, the respondent's representative referred the Tribunal to a number of the claimant's representative's failures to adhere to Case Management Orders, and based his application on the manner in which the pleadings had been conducted. Whilst acknowledging that the claimant raised serious issues, he relied on the manner in which the claimant's representative had conducted the litigation from start to finish. In the respondent's representative's view, the claimant's representative's behaviour made a mockery of the Tribunal's orders.

5. In light of the respondent's application, the Tribunal wrote to the parties on 12 October 2016 to inform the claimant's representative that the Tribunal was considering making a wasted costs order against it in respect of the hearing which took place on 11 October 2016 (as the claimant's representative had failed to attend the Tribunal hearing and the case was not ready to be heard as there was no witness statement for the claimant). The claimant's representative was invited to give reasons in writing why such an order should not be made.

6. The Tribunal then wrote to the parties on 16 February 2017 and explained that the Employment Judge would be dealing with the wasted costs application on a date to be notified in due course, but that she also proposed to deal with the other two costs applications. The parties were asked to comment on that proposal by no later than 23 February 2017 and if they did not object they were asked for any written representations in relation to all of the costs applications by no later than 2 March 2017.

7. The respondent replied on 2 February 2017 to state that it was agreeable to the proposal. It acknowledged that Merseyside Employment Law were a "not for profit" organisation but reminded the Tribunal that the claimant had previously confirmed at Tribunal that he had indeed paid his representative for his advice and representation.

8. By a letter dated 22 February 2017 Merseyside Employment Law wrote to the Tribunal to confirm that:

> "The claimant's case was funded by the Civil Legal Advice and he was officially referred to us by CLA on 19 November 2015."

9. Merseyside Employment Law also explained that it did not charge Mr Pepa at all and that, as his case was funded by the CLA, they could not charge the claimant, or indeed any client referred by CLA. They also confirmed that the matter had now been settled without their involvement and that the settlement ensured that the respondent recovered its costs. In these circumstances, said the claimant, the respondent has recovered any alleged wasted costs and it would not be just or equitable to have such costs recovered twice, albeit by different methods.

10. The respondent noted, in a response dated 22 February 2017, that the claimant had given evidence to the effect that he paid for advice and representation, and that: "Throughout their time representing the claimant, MEL had continually failed to adhere to the Tribunal's orders and on more than one occasion failed to attend Tribunal to represent their client, and/or attended without having any knowledge of the case."

11. The letter also explained that a settlement had been agreed through ACAS prior to the hearing on 11 October 2016 and COT3 wording sent to MEL to finalise. MEL failed to sign and returned the COT3, which caused the offer to be retracted and the hearing to proceed on 11 October 2016. The letter explained that there was no provision in the settlement for wasted costs, and that, in the respondent's view, it was MEL's gross negligence that caused the numerous delays in this matter and eventually the hearing to take place at all, hence their applications."

The Law

12. The Employment Tribunal Rules 2013 (rule 80) provide that a Tribunal may make a wasted costs order against a representative in favour of any party where that party has incurred "wasted costs".

13. "Wasted costs" mean costs incurred:

- As a result of any improper, unreasonable or negligent act or omission on the part of the representative (rule 80(1)(a)); or

- Which, in the light of any such act or omission occurring after they were incurred, the Employment Tribunal considers it unreasonable to expect the party to pay (rule 80(1)(b)).

14. The meaning of "wasted costs" therefore reflects the grounds for making such orders. These "wasted costs" orders can only be made against a representative, defined by rule 80(2) as "a party's legal or other representative or any employee of such representative. It does not include a representative who is not acting in pursuit of profit.

15. The rule 80 definition of "wasted costs" is identical to that contained in section 51(7) of the Senior Courts Act 1981 that applies in civil courts. Accordingly the authorities applicable to the wasted costs in the civil law generally are equally applicable in the Employment Tribunals.

16. The two leading authorities, which analyse the scope of section 51 and the circumstances in which wasted costs orders can be made, are **Ridehalgh v Horsefield and another [1995] 3 All England Reports 848 Court of Appeal**; and **Medcalf v Weatherill & others [2002] 3 All England Reports 72, HL**. In the **Mitchells Solicitors v Funkwerk Information Technologies York Ltd EAT 0541/07** the EAT confirmed that these cases are essential sources of assistance for Employment Tribunals in the matter of wasted costs.

17. Rule 81 provides: "A wasted costs order may require the representative to pay the whole or part of any wasted costs of the relevant party. It may also disallow any wasted costs otherwise payable to the representative and order the representative to repay his or her client any costs which have already been paid. The amount to be

paid, disallowed or repaid, must in each case be specified in the order. Note that there is no limit to the amount of wasted costs that can be ordered by an Employment Tribunal."

18. In **Ratcliffe Duce & Gammer v Elbins (t/a Park Firm) EAT 0100/08** the EAT observed that: "The Court of Appeal in **Ridehalgh** had advocated a three stage test for courts (and, by extension, Employment Tribunals) to adopt in respect of a wasted costs order:

(1) Has the legal representative acted improperly, unreasonably or negligently?

(2) If so, did such conduct cause the applicant to incur unnecessary costs?

(3) 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?"

19. The Court of Appeal in **Ridehalgh** emphasised that: "Even where a Tribunal is satisfied that the first two stages of the test are satisfied (i.e. conduct and causation), it must nevertheless consider again whether to exercise the discretion to make the order and to what extent. It still has a discretion at stage three to dismiss an application for wasted costs where it considers it appropriate to do so, for example if the costs of the applicant would be disproportionate to the amount to be recovered, issues would need to be re-litigated or questions of privilege would arise."

20. The Court of Appeal in **Ridehalgh v Horsefield** examined the meaning of "improper", "unreasonable" and "negligent", subsequently approved by the House of Lords in **Medcalf** as follows:

- "improper" covers but is not confined to conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice and other serious professional penalty;

- "unreasonable" describes conduct that is vexatious, designed to harass the other side rather than advance the resolution of the case; and

- "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."

21. In **Mitchells Solicitors** (above), the EAT considered that it was clear from the civil law authorities that:

> "A legal representative does not behave improperly, unreasonably or negligently simply by acting for a party who pursues a claim or defence which is plainly doomed to fail. Even if a legal representative can be shown to have acted improperly, unreasonably or negligently in presenting a hopeless case it remains vital to establish that the representative thereby assisted proceedings amounting to an abuse of the court's process thus breaching his or her duty to the court, and that his or her conduct actually caused costs to be wasted."

22. In **Ratcliffe Duce,** Mr Justice Elias observed: "Where a wasted costs order is concerned the question is not whether the party has acted unreasonably. The test is a more rigorous one. The distinction therefore is between conduct that is an abuse of process and conduct falling short of that. Costs orders require a high standard of misconduct on the representative's part.

23. In exercising its discretion, the Tribunal must be mindful that it remains a fundamental principle that the purpose of an award of costs is to compensate the party in whose favour the order is made and not to punish the paying party. Given that costs are compensatory, it is necessary to establish what loss has been caused to the receiving party. Such costs should be limited to those reasonably and necessarily incurred.

Conclusion

24. The Tribunal heard evidence from the claimant during the hearing to the effect that he was charged by his representative for attendance at a hearing. However, the Tribunal is unable to conclude that Merseyside Employment Law acted in pursuit of profit in relation to this matter. Merseyside Employment Law has made written representations to the effect that they are not in pursuit of profit and the Tribunal cannot reach a conclusion that they are, contrary to their submission, without hearing evidence.

25. The respondent's wasted costs application is in respect of the hearing dated 11 October 2016. The question for the Tribunal is whether the claimant's representative caused costs to be incurred for the respondent, as a result of any improper, unreasonable or negligent act or omission, which the Tribunal considers it unreasonable to expect the respondent to pay.

26. In this case the claimant's representative failed to attend the Tribunal hearing scheduled for 11 October 2016. However, this was in circumstances in which a settlement figure had been agreed, albeit that the final wording of an ACAS COT3 form had not been agreed. The Tribunal understands that the respondent stipulated that the offer would be withdrawn if not agreed, wording included, by 5pm, but it has no evidence to that effect.

27. The representative's conduct must be such as to amount to abuse of court. The Tribunal believes that, where a representative knows that a claim is listed for hearing, and knows that the settlement has not been concluded, it could amount to an abuse of court to simply not turn up at the Tribunal hearing, without any excuse. However, although such conduct could be an abuse of court, the Tribunal has not had the opportunity to hear evidence from the claimant's representative as to its understanding of the situation and is therefore unable to conclude that this was an abuse of court in the particular circumstances of the case.

28. Further, the Tribunal must ask itself whether the claimant's conduct caused the respondent to incur unnecessary costs. Again, the Tribunal does not have sufficient evidence before it to conclude that it did. It has not been able to establish whether MEL understood that the offer would be withdrawn at 5pm as alleged by the respondent, nor why the respondent took the decision to withdraw the offer at 5pm. At that stage it was, in any event, too late for the claim to be properly prepared, so

the respondent would almost certainly have had to attend the Tribunal hearing and ultimately prepare its case, and therefore the application is dismissed.

Employment Judge Rice-Birchall

Dated 6 June 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

13 June 2017

FOR THE TRIBUNAL OFFICE