THE INDUSTRIAL TRIBUNALS

CASE REF: 1521/13

CLAIMANT: **Anthony Brophy**

RESPONDENT: **Norbrook Laboratories Ltd**

DECISION (COSTS)

This decision is supplemental to the main decision of the tribunal issued on 5 August 2014. Unanimously the tribunal finds that it would not be appropriate in this case to exercise its discretion to order the claimant to pay costs or to make a wasted costs order against the claimant's representatives. The respondent's application for costs is therefore refused.

Constitution of Tribunal:

Employment Judge: **Employment Judge McCaffrey**

Members: **Mr H Stevenson**
Mr P McKenna

Appearances:

The claimant was represented by Mr C Fegan, Barrister-at-Law instructed by McNamee McDonnell Duffy Solicitors LLP.

The respondent was represented by Mr J Algazy, Barrister-at-Law instructed by Mr G McGennity, the In-House Solicitor of the respondent.

1. The decision of the tribunal in this case was issued on 5 August 2014. The claimant's claim of unfair dismissal was dismissed. The crux of the case put forward by the claimant was that the disciplinary procedure carried out by the respondent (and in particular the investigation) had been unfair because of the appointment of Sean Canavan the Group Packing Manager as investigator. He alleged that this was a breach of natural justice because Mr Canavan was in effect a judge in his own cause. This argument was rejected by the tribunal as we set out in detail in paragraphs 43 and 44 of the decision. First of all we did not consider that Mr Canavan was "conflicted" in carrying out the investigation in this matter and secondly, we rejected the suggestion that Mr Canavan was acting in an adjudicative

capacity as investigator in carrying out an investigation into the alleged theft of goods from his own department.

2. The respondent then sought an order for costs against the claimant which is the subject of this decision. Mr Algazy argued that the claimant's case was premised on a faulty appreciation of the proper application of the principle of natural justice to one who was an investigating officer and not acting in a judicial or similar capacity. The respondent argued that this untenable line permeated the claimant's case in such a way the proceedings were thereafter "impermissibly and irretrievably tainted" and bound to fail. They also referred to the fact that the claimant had raised no issue about Mr Canavan's involvement at the investigation or disciplinary stages of the original disciplinary process, nor was it raised in the appeal letter. While the issue was raised in a very limited way during the course of the appeal hearing, this was confined to whether or not Mr Canavan should himself had been interviewed.

3. It was further suggested that, in spite of lack of evidence, the claimant had pursued the argument that Mr Canavan's job would be "on the line" if they didn't find the culprit; that Mr Canavan had a direct financial interest in the outcome of the disciplinary action and that he himself would be vulnerable to disciplinary action.

4. As against the claimant, the respondent argued that in bringing the proceedings the claimant had, or he or his representative had in conducting the proceedings, acted vexatiously and unreasonably or that they had pursued a claim which was misconceived in that it had no reasonable prospect of success. The claimant had included a claim for injury to feelings to the amount of £25000 as part of his claim and it was pointed out to his representatives that this was wholly inappropriate in an unfair dismissal claim. Mr Algazy highlighted in his submissions a number of other ways in which he alleged the claimant had acted unreasonably in pursuing the claim, including the fact that the claimant and his representative had not responded to a costs warning latter issued a few weeks before the hearing. Further, it was alleged that the claimant's solicitor had rejected an offer to withdraw the case in return for an undertaking from the respondent that they would not pursue an application for costs. At the time of the withdrawal offer, the respondents' solicitor reminded the claimant's representative of the tribunal's power to make a wasted costs order, which the claimant's representatives considered an unreasonable threat. As against the claimant's representatives, the respondent sought a wasted costs order arguing that representatives had behaved unreasonably and/or negligently in their conduct of the claim. The claimant's representative disputed both applications.

THE RELEVANT LAW

5. The tribunal's power to award legal costs is set out in the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 ("the 2005 Rules"). The general power to make costs orders is set out in Schedule 1 at Rule 38. We were referred specifically to the provisions of Rule 40, the relevant parts which state as follows:-

> *"(2) A tribunal or chairman shall consider making a costs order against a paying party where, in the opinion of the tribunal or chairman (as the case may be) any of the circumstances in paragraph (3) apply. Having*

so considered, the tribunal or chairman may make a costs order against the paying party if it or he considers it appropriate to do so.

(3) Circumstances referred to in paragraph (2) above are where the paying party has in bringing the proceedings, or he or his representative has in conducting the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably, or the bringing or conducting of the proceedings by the paying party has been misconceived".

"Misconceived" is defined at Regulation 2 as including "no reasonable prospect of success".

6. In relation to wasted costs, the tribunal's powers are set out in Rule 48 of the 2005 Rules and provide as follows:-

"(48(1)) A tribunal or chairman may make a wasted costs order against the party's representative.

(2) In a wasted costs order the tribunal or chairman may –

(a) disallow, or order the representative or the parties to meet, the whole or any part of a wasted costs order of any party (including an order that the representative repay to his client any costs which have already been paid); and

(b) order the representative to pay to the Department in whole or in part, any allowances paid by the Department to any person for the purposes of, or in connection with, that person's attendance at the tribunal by reason of the representative's conduct of the proceedings.

(3) "Wasted costs" means any costs incurred by a party –

(a) as a result of any improper, unreasonable or negligent act or omission on the part of any representative; or

(b) which, in the light of any such act or omission occurring after they were incurred, the tribunal or chairman considers it unreasonable to expect that party to pay.

(4) In this rule "representative" means the 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 those proceedings ..."

7. The tribunal's jurisdiction in relation to costs is outlined in Harvey on Industrial Relations and Employment Law Division P1 (Practice and Procedure) at paragraph 1044 and following. Harvey emphasises that, despite changes which have extended the tribunal's powers to make orders for costs considerably, the fundamental principle remains that costs are the exception rather than the rule and that costs do not automatically follow the event in employment tribunals (**McPherson v BNP Paribas (London Branch) [2004] EWCA Civ 569** at

paragraph 2; and **Barnsley Metropolitan Borough Council v Yerrakalva [2011] EWCA Civ 1255** at paragraph 7). It is also important to note that the tribunal must apply a two stage test to an application for costs. First of all, they must consider whether the relevant party's behaviour falls within Rule 40(3). Secondly, they must consider whether it is an appropriate case in which for them to exercise their discretion to make a costs order.

<u>Misconceived claims</u>

8. It is clear from considering the case law that the test to be applied in deciding whether or not to make an award of costs is more than a simple objective assessment whether the claimant knew or ought to have known that his case lacked substance or merit. The tribunal must look not just at the proceedings themselves but at the claimant's conduct in bringing or conducting the proceedings. The type of conduct which would be considered unreasonable by a tribunal will obviously depend on the facts of the individual case and there is no hard and fast principle applicable to every situation (Harvey, Paragraph 1083.) In **Cartiers Superfoods Ltd v Laws [1978] IRLR 315**, Philips J considered it was necessary "to look and see what that party knew or ought to have known if he had gone about the matter sensibly". In that particular case, the EAT held that if the employers had taken the trouble to enquire into the facts surrounding the alleged misconduct for which the employee had been dismissed, instead of reacting in a hostile manner with threats of statements that the employee was guilty of dishonesty, they would have realised that they had no possible defence at all to the claim except as to the amount of compensation. While it is important to treat this approach with caution given that it is all too easy to be wise with hindsight after the hearing of the case, it may nevertheless be reasonable to have regard to what a party knew or ought to have known if he had indeed "gone about the matter sensibly". If there is nothing in the evidence to support the allegations being made, this necessarily involves an assessment of the reasonableness of bringing the proceedings, including a consideration of the question of whether a claimant ought to have known that there was no such supportive material.

<u>Unreasonable conduct</u>

9. Harvey (see Paragraph 1064) indicates that unreasonable conduct includes conduct that is vexatious, abusive or disruptive. The discretion of the tribunal is not fettered by any requirement to link the award causally to the particular cost which had been incurred as a result of specific conduct which has been identified as unreasonable. In **McPherson,** Mummery LJ stated:-

> "The principle of relevance means 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 [the receiving party] to prove that specific unreasonable conduct by [the paying party] caused particular costs to be incurred".

10. Subsequently in **Yerraklava**, he stressed that this passage in **McPherson** was not intended to be interpreted as meaning either that questions of causation are to be disregarded or that tribunals must dissect the case in detail and compartmentalise conduct. As he observed:

"The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and 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".

11. He also observed that, *"A costs decision in one case will not in most cases predetermine the outcome of a costs application in another case: the facts of the cases will be different, as will be the interaction of the relevant factors with one another and the varying weight to be attached to them".*

The significance of a costs warning letter

12. It was noted by the respondent's representative in this matter that a costs warning letter had been sent to the claimant's representative on 18 June 2014, approximately 10 days before the commencement of the hearing of this case. That costs warning letter set out the respondent's reservations about the claimant's case and indicated that if the claimant was unsuccessful at tribunal they reserved the right to draw to the tribunal's attention to this letter in support of a claim for costs. We were advised that subsequently, on the second day of hearing the respondent's solicitor approached the claimant's solicitor, putting forward a proposal that if the claimant withdrew his claim, the respondent would agree not to make an application for costs. He also reminded the claimant's representative of the tribunal's power to make a wasted costs order against the claimant's representative. This was construed by the claimant's representative as a threat and the decision was taken on the claimant's side that the case would proceed.

13. We were referred to the case of **Vaughan v London Borough of Lewisham & Ors [2013] IRLR 713** where it was held that it was not essential for a costs warning letter to have been issued in order for a costs application to be successful. In that case Underhill J noted that the failure of a respondent to seek a costs order or failure to warn the claimant of the hopelessness of her claims by way of a costs warning letter may not necessarily be fatal to an application for costs, if the order for costs is otherwise justified (see paragraph 19 at the judgment). In that case it was noted that the claimant had never suggested she would have discontinued her claim had she received such a letter and even if she had, such an assertion in that particular case would not have been credible.

<u>The claimant's means</u>

14. For reasons which become apparent later in this decision, the question of the claimant's means became significant. Mr Algazy referred us to the decision in **Jilley v Birmingham and Solihull Mental Health Trust and Others (UK EAT/0584/06)**. That decision makes it clear that the paying party's means may be taken into account and lack of means is not a bar to a costs order being made:-

> "[53] The first question is whether to take the ability to pay into account. The tribunal has no absolute duty to do so. As we have seen, if it does not do so, a County Court may do so at a later stage. In any case it will be desirable to take means into account before making an order; ability to pay may affect the exercise of an overall discretion, and this course will encourage finality and

> may award lengthy enforcement proceedings. But there may be cases where for good reason ability to pay should not be taken into account; for example, if a paying party has not attended or has given unsatisfactory evidence about means".

It is not essential for the claimant's means to be taken into account, although they may be a factor. The claimant's means may be taken into account but if they are, the party's whole means must be considered. This includes capital and savings as well as (see Scottish EAT case of **Sheilds Automotive v Greig UKEAT/0024/10**).

Reasons and Decision

(a) The costs application

15. Both counsel in the matter provided written submissions and supplemented these at length by oral submissions. We have attached copies of the written submissions to this decision, as they are too lengthy to rehearse in detail. At its core, however the respondent's application for costs is based on the assertion that the claimant's claim was misconceived and had no reasonable prospect of success. For that reason we have not set out in detail the submissions made in relation to other matters which were secondary to that core argument.

16. This is a case where the claimant confined his unfair dismissal claim to an assertion that the investigating officer, Mr Canavan, suffered from a conflict of interest in carrying out the investigation of the matter, that he was in fact a judge in his own cause and a decision maker in relation to the finding of unfair dismissal against the claimant. Mr Algazy indicated that in his view this approach was doomed from the start. The claimant's representative disputed this, arguing that if the argument was so flawed, the tribunal would not have spent some time in its decision setting out the reasons for its decision. It was pointed out to Mr Fegan that Industrial Tribunals are obliged to give reasoned decisions in every case and that failure to do so could well lead to adverse comment from a higher court in the event that the matter was appealed. The fact that the tribunal took some time to deal with the argument and set out its reasons for finding against the claimant on this point did not mean to say that the tribunal considered that the argument was a good one.

17. For the reasons set out at paragraphs 43 and 44 of our decision, we repeat that we were not satisfied that Mr Canavan was conflicted in carrying out investigation in this matter or that he was acting as a "de facto" decision maker. Indeed, we set out in our decision that in our opinion it would be normal to invite a manager of a department to carry out an investigation involving that department. No evidence was adduced by the claimant to show that Mr Canavan was convicted or that he was acting as a judge in his own course.

18. For the reasons we gave in our decision in relation to this matter, we consider that the claimant's claim was misconceived. The only aspect of the respondent's case which was really attacked by the claimant was the conduct of the investigation and for the reasons set out above and in our decision, we believe that the claimant's arguments in this matter were ill-founded and had no reasonable prospect of success. The question then remains for us as to whether this is an appropriate case in which to exercise our discretion to make an order for costs against the claimant.

19. Towards the end of the hearing when the issue of the claimant's ability to pay was raised, we were rather belatedly handed a copy of correspondence in relation to an individual voluntary arrangement which the claimant had recently entered into. Not surprisingly, this caused a strong reaction from the representatives for the respondent, who had not been made aware of the IVA until a copy of the documentation was handed to the panel.

20. The correspondence indicated that a meeting of creditors had been called for 21 November 2014, a week before the hearing in this costs application. At that meeting the individual voluntary arrangement had been approved. We were not told whether there was an interim order of the High Court in force in relation to the claimant, or the terms of any such order. We are aware that is highly probable such an order was in place and that an interim order will almost always impose a moratorium on the commencement or continuation of proceedings in any other court against the claimant. We are also aware that the Insolvency (Northern Ireland) Order 1989 provides at Article 234(4) that any interim order in force in relation to the debtor immediately preceding the expiration of 28 days from the day in which the report in relation to the Creditors' meeting is made to the High Court ceases to have effect at the end of that period. It may well be therefore that at the time the costs hearing in this matter took place, there was an Order of the High Court in place, preventing us from continuing with any other proceedings against the claimant. We were not however clearly told that this was the case and so did not halt the hearing.

21. What is also relevant is that the claimant's nominee under the IVA had sent him a copy of the summary sheet of his report. It was clear from this that the claimant, who is currently separated from his wife, now owes a substantial amount of money. His dwelling house, which is in joint names with his estranged wife, is in negative equity and that house is occupied by his wife and children. While the claimant is in full-time employment, he indicated that he was earning less than he had been while employed by the respondent and that, after paying his living costs, he had approximately £150 per month which he proposed to devote to repaying his creditors.

22. In all the circumstances of this case, we do not believe that it would be appropriate in this situation to exercise our discretion to make an order for costs against the claimant. While we accept his claim was misconceived, we are concerned that there may be a High Court order in place preventing the continuation of these proceedings and since the claimant is already in severe financial difficulties, we have decided against making an order for costs in this case.

(b) The wasted costs application

23. The application before us from Mr Algazy suggested that the actions and omissions of the claimant's representatives crossed the necessary threshold for the award of a wasted costs order. He suggested that their acts and/or omissions were unreasonable, if not actually negligent. He did not however set out in any detail the relevant authorities in relation to wasted costs orders. Mr Fegan clearly was concerned about this and set out the relevant authorities in more detail in his submission. He argued first of all that it was not possible for wasted costs to be made against counsel and he referred in this regard to the decision in **Davy-Chiesman v Davy-Chiesman**. He noted that while counsel and solicitor may be

liable in an action for negligence, in England barristers are no longer immune for actions in negligence for advocacy in similar criminal proceedings, but that does not appear to be the rule in Northern Ireland.

24. The argument put forward by Mr Fegan was that the claimant was strongly of the view that Mr Canavan was in a position of conflict in carrying out the investigation against him and that he was the decision maker in relation to this matter. Notwithstanding the fact that the claimant did not raise this in any detail during the disciplinary procedure and (and only briefly at the appeal hearing) and that he did not make this case in his claim form, it is set out in some detail in his witness statement to the tribunal. That witness statement (which was the cause of some adverse comment from Mr Algazy) set out legal arguments and included the appropriate Latin maxim for the relevant principle of natural justice, that no-one should be a judge in his own cause. It was pointed out that the witness statement should contain only evidence and not legal argument. It was implied that the witness statement was not the claimant's own words, but had been prepared by his representatives. It was suggested that all of this prolonged the case and that effectively the arguments put forward on behalf of the claimant in this regard were untenable.

25. Mr Fegan referred us to the decision of the Court of Appeal in England and Wales in **Ridehalgh v Horsefield [1994] CH205**, which deals with the issue of wasted costs orders. The test in deciding whether or not to make a wasted costs order is to consider first of all, whether the legal representative against whom the complaint was made acted improperly, unreasonably or negligently. Secondly, if so, did their conduct cause the applicant to incur unnecessary costs? Thirdly, if so, is it in all the circumstances just to order the legal representative to compensate the applicant for whole or part of the relevant costs?

26. Mr Algazy suggested that the claimant's representatives had acted unreasonably or potentially negligently. According to the principles set out at Harvey Division P Paragraph 1110 and following, "unreasonable" aptly describes conduct which is vexatious, designed to harass the other side rather than advance resolution of the case and it makes no difference that the conduct is the product of excessive zeal and not improper motive. The acid test is whether the conduct permits a reasonable explanation. "Negligent" should be understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession. It is also noted however in Harvey that:-

> *"A legal representative is not to be held to have acted improperly, unreasonably or negligently simply because he acts for a party who pursues a claim or defence which is clearly doomed to fail. It is rarely if ever safe for a court to assume that a hopeless case is being litigated on the advice of the lawyers involved. They are there to present the case; it is for the judge and not the lawyers to judge it. On the other hand, a legal representative must not lend his assistance to proceedings which are an abuse of the process of the Court. It is not entirely easy to distinguish between a hopeless case and a case which amounts to an abuse of process, but in practice is not hard to say which is which, and if there is doubt, the legal representative is entitled to the benefit of it ..."*

> *"Where an applicant seeks a wasted costs order against the lawyers on the other side, legal professional privilege may be relevant as both the applicant and his lawyers and as between the respondent lawyers and their client. If the applicant's privileged communications are germane an issue in the application, he can remove 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 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 but it can be appropriate to make a wasted costs order."*

27. Mr Fegan made it clear that the claimant was determined to proceed with his case and that while the claimant's statement had included legal arguments and principles, that these had been inserted in the witness statement at the claimant's request. He acknowledged that he and his instructing solicitor had assisted the claimant in formulating these comments, and took on board that legal arguments should not have been included in the witness statement. He was adamant however that at all times they were following the claimant's instructions. We are not in a position to go behind this representation. In a perfect world, clients would give solicitors reasonable instructions and lawyers would provide sound and comprehensive advice, which their clients would take on board and follow. In the real world, this does not always happen.

28. We are not persuaded in this case that we have evidence before us to show that the claimant's representative acted unreasonably or negligently. We are not persuaded, either, that it would be just in all the circumstances to make an order for wasted costs in this case. We appreciate that, as set out in Harvey, there is a fine line between a lawyer presenting a case on behalf of a party, having advised him that his argument is likely to fail, and a legal representative lending his assistance to proceedings which are an abuse of the process of the court. We cannot say definitively that the latter occurred in this case, and in all the circumstances we do not consider that it would be just to make an award for wasted costs. Accordingly the respondent's application for costs against both the claimant and legal representatives in this matter is dismissed.

Employment Judge:

Date and place of hearing: 28 November 2014, Belfast.

Date decision recorded in register and issued to parties:

objective,the Respondent's application is that the Tribunal specify the sum payable up to the Statutory maximum [1]

2. The Respondent confirms that the Claimant's representatives have been informed of the application and of the right to object to the application in accordance with Rule 11(4) of the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 (hereinafter referred to as the "Rules").

3.

3.1. The costs are sought against the Claimant pursuant to Rules 40 and 41 of the Rules.

3.2. Alternatively if the Tribunal considers it appropriate that the Claimant's representatives should bear some or all of the Respondent's costs, then the application is made against the Claimant's representatives under Rule 48.

LEGAL BASIS

4. As against the Claimant, the Respondent relies on Rule 40(3) of the Rules in that he had in bringing the proceedings, or he or his representative has in conducting the proceedings, acted as follows:-

   (i) vexatiously;

   (ii) unreasonably;

[1] This approach was followed in the Costs Application in **O'Hagan v Norbrook Laboratories 0400/09IT.** The Claimant was ordered to Pay £9000.

(iii) pursued a claim that was misconceived in that it had no reasonable prospects of success.

5. As against the Claimant's representatives, the Respondent relies on Rule 48(2A) and/or 48(3) of the Rules in that the representatives have acted unreasonably and/or negligently.

PRELIMINARY CONSIDERATIONS

6. A number of general points can be gleaned from the relevant authorities in this area. These are set out below. The Respondent reserves the right to augment these, either at any oral Hearing or in written response to any objections to this Application that may be raised by the Claimant/the Claimant's representative.

7. As correctly observed by the very experienced EAT Judge (England and Wales), His Honour Judge Clarke, costs orders remain the exception and not the rule. However, this does not mean that the facts of a case have to be exceptional for a costs order to be made – see paragraph 12 **Power v. Panasonic (UK) Limited** **UKEAT/0439/04**.

8. All the Respondent needs to show is that the appropriate test is satisfied. See also **Vaughan v. London Borough of Lewisham** **[2013] IRLR 713** in which the former President, Underhill J., upheld a costs order in excess of £80,000 against an unemployed claimant.

9. A costs warning by the Tribunal is not a necessary precondition of making a costs order – see paragraph 29 of **Towu v. Lewisham Hospital NHS Trust** **UKEAT/0314/05**.

10. Failing to engage with the Respondent's costs warning letter can constitute unreasonable conduct so as to warrant an award of costs – see **Peat & Ors v. Birmingham City Council UKEAT 0503/11**. In such circumstances it is not even necessary to establish that the claim is misconceived – per Supperstone J. See also **Growcott v. Glaze Auto Parts Limited UKEAT/0419/11** in which a Respondent's email setting out the Respondent's position and the difficulties of the Claimant's position in "accurate, straightforward and simple" terms was a significant factor properly taken fully into account in deciding to award costs.

11. The Tribunal need not find a precise causal link between any relevant conduct and the specific costs claimed. See the Decision of the English Court of Appeal in **Barnsley Metropolitan Borough Council v. Yerrakalva [2012] IRLR 78 at paragraph 41** which sets out the correct approach.

12. Whether the conduct is unreasonable is a matter of fact for the Tribunal. The possibility for Appeal is hence limited. Unreasonable conduct is not to be equated with, or considered "**ejusdem generis**" to, vexatious conduct. It is not to be "...**read in a particularly narrow or anything other than its ordinary sense**" – per Browne-Wilkinson, President, in **Dyer v. SoS for Employment UKEAT/183/83.**

FACTS AND MATTERS RELIED ON IN SUPPORT OF THE RESPONDENT'S APPLICATION

13. As Mummery L.J. held in **Yerrakalva (op cit)**:

> **"A 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."

14. The Respondent points to and relies on the total picture painted by the matters set out below:-

14.1. the Claimant's entire case was premised on a faulty appreciation of the proper application of the principle of natural justice to one who was an investigating officer and not acting in a judicial or like capacity. See paragraphs 33 and 34 of the IT Judgment. This untenable line permeated the Claimant's case that the proceedings were thereafter impermissibly and irretrievably tainted. It was bound to fail.

14.2. Further, the Claimant raised no issue about Mr Canavan's involvement at either the investigation and disciplinary process. Nor was it even raised in the appeal letter. It is accepted that there was some very limited reference made during the course of the appeal hearing. That was limited to whether or not Mr Canavan should himself have been interviewed;

14.3. the Claimant's alternative (and unpleaded) premise that the outcome of the disciplinary procedure was predetermined was wholly unsupported by any evidence. The Respondent's witnesses were not even cross-examined on this topic. See paragraphs 45 and 26 of the IT's Judgment;

14.4. there was no evidence for the suggestion that Mr Canavan's job would be "on the line" if he didn't find the culprit (see parasgraphs 33, 34 and 36 of the IT Judgment);

14.5. there was <u>no</u> evidence that Mr Canavan had any direct financial interest in the outcome of the disciplinary action. Such an allegation was wholly groundless. See paragraph 43 of the IT Judgment;

14.6. there was <u>no</u> evidence for the proposition that Mr Canavan would be vulnerable to disciplinary action. See paragraph 43 of the IT Judgment;

14.7. Notwithstanding the matters set out at 14.3 to 14.6, the Claimant's representative sought to advance a positive case in respect of those allegations;

14.8. there was no evidential basis for attacking the Respondent's disciplinary and/or appeal procedures. Mr O'Hara, who heard the appeal, was not cross-examined at all. Mr Logan, who heard the disciplinary hearing, was not challenged about the fairness of the procedure either. See paragraph 36 of the IT Judgment. The complaint was limited to Mr Canavan's involvement in the investigation but he had not made any relevant decision. These matters were known to the Claimant and must have been (or should have been) to the forefront of the mind of the Claimant and/or his representatives when bringing and maintaining the proceedings;

14.9. the poverty of the Claimant's legal position was accurately set out in a partly open and partly "Without Prejudice Save as to Costs" letter dated 18 June 2014 and sent at 16:16 on that day (copy attached). The relevant test in **Burchell** and its application to the facts was spelt out clearly. It was of course the test that the IT was to apply to the conduct

reason for the dismissal. The Claimant's representatives did not deign to even reply. A "read" receipt was received for the letter timed at 16:37 (copy attached);

14.10. the offer was repeated orally by the Respondent's solicitor at lunchtime on day 2 of the hearing, 1 July 2014. Reference was also made to the wasted costs jurisdiction in respect of a representative. The Claimant's solicitor responded by indicating that they were "here now" and might as well proceed as the Claimant had nothing to lose. After lunch, the Claimant's solicitor confirmed that his instructions were to continue (copy attendance note attached);

14.11. The Claimant, throughout the conduct of the Hearing, appeared not to appreciate or acknowledge that there was a second SOSR reason for the dismissal ; the matter was barely addressed;

14.12. the Claimant's Witness Statement was clearly and self-evidently not a document of the Claimant's crafting. It was a "cut and paste" document largely derived from the ET1. It contained a number of defects including the following:-

14.12.1. it fell foul of the usual rule that witness statements should not contain legal arguments;

14.12.2. it caused unnecessary use of Tribunal time and cross-examination of the Claimant on matters about which the Claimant could not sensibly offer any assistance. See the

words of Brook L.J. in **Alex Lawrie Factors Limited v. Morgan** **[1999] Times Law Report, 18 August 1999:**

> **"The case was a very good warning of the grave dangers which could occur when words are put into witness's mouths, in the affidavits which they settled for them, sophisticated legal argument which in effect represented the lawyer's arguments in the case to which the witnesses themselves would not be readily able to speak if cross-examined on their affidavits."**

The same perils exist for witness statements as for affidavits;

14.12.3. Furthermore, as was referred to in the Respondent's solicitors' letter of 18 June 2014, this approach specifically went against an indication given by Mr Kelly (VP) at a telephone case management discussion which took place on 11 October 2013. Mr Kelly expressed the view that a witness statement was to be precisely that – the evidence of the witness and nobody else's;

14.12.4. the purpose of a witness statement is to replace oral testimony. It is not to rehearse arguments, legal or otherwise. It should not be a document crafted in the language of a lawyer;

14.12.5. In **Aquarius Financial Enterprise inc v Underwiters at Lloyd's [2001] Ll. Rep. 542 at 547,** referring to the Commercial Court guidance that witness statements, should be in the witness's own words, Toulson J said:

"46. It cannot be too strongly emphasised that this means the words which the witness wants to use and not the words

which the person taking the statement would like him to use

14.13. the Claimant prosecuted his claim, at least in part, on the wholly erroneous basis that he was entitled to a substantial award for injury to feelings in respect of his unfair dismissal claim. The schedule of loss put the sum sought at no less than £25,000. When this was pointed out to the Claimant's representatives, the position was maintained until the 11th and ½ hour in closing submissions when it was finally conceded that such awards were only available in discrimination claims;

14.14. unnecessary tribunal time was expended in dealing with the Claimant's unformulated application to amend. In making the application, no reference was made to, or reliance made on, the leading case of **Selkent Bus Company v. Moore [1996] IRLR 661**.

CONCLUSION ON MAKING A COSTS ORDER

15. The Tribunal can be satisfied that the first stage question, namely whether the conditions for the making of a costs order have been met, can and should be answered in the affirmative on the basis of all the material above set out.

16. It is also submitted that, insofar as the actions/omissions of the Claimant's representatives are concerned, that they do cross the necessary threshold. That is, the acts and/or omissions are unreasonable, if not actually negligent (Rule 48(iii)).

EXERCISE OF DISCRETION

17. Turning to the exercise of the discretion to make a costs order, the Respondent repeats and relies upon the matters above set out under preliminary considerations. Applying those principles derived from the authorities to the facts and matters set out in the previous section of this application, the Tribunal can, and should, consider that this is a proper case for the exercise of that discretion.

ABILITY TO PAY

18. This is a matter that may be taken into account under Rule 40(2). For the correct approach to this question, see **Jilley v. Birmingham and Solihull Mental Health Trust and Ors UKEAT/0584/06**. If this is done, the party's whole means must be considered. This includes capital and savings as well as income – see the Scottish EAT case of **Shields Automotive v. Greig** **UKEAT/0024/10**.

19. The Claimant does not condescend to much particularity in respect of his present position in his Witness Statement. However the Schedule of Loss indicates that he is in full-time ongoing employment.

20. Further, in the case of **Vaughan (op cit)**, it was held that the Tribunal did not have to make a firm finding as to the maximum that it believed the Claimant could pay, either forthwith or within some specified time scale. That is not what the rule provides for. It was further held that it was right in principle that there is no reason as to why the question of affordability has to be decided once and for all by reference

to the party's means as at the moment the order falls to be made.

DISPOSAL

21. All of the authorities relied on in this application accompany the document. The Claimant and/or his representatives will no doubt express their views on the application in due course. This is potentially a case which might be dealt with on the papers. It is respectfully submitted that such would also accord with proportionality and the overriding objective. If that is the Tribunal's view, the Respondent respectfully requests an opportunity to comment on the Claimant's opposition to this application.

JACQUES ALGAZY BL
(Northern Ireland)
1st September 2014

Cloisters
Temple
LONDON
EC4Y 7AA

Case No. 1521/131T

IN THE INDUSTRIAL TRIBUNAL IN NORTHERN IRELAND

BETWEEN:

ANTHONY BROPHY

Claimant

-and-

NORBROOK LABORATORIES LIMITED

Respondent

RESPONDENT'S APPLICATION FOR COSTS

IN THE INDUSTRIAL TRIBUNAL
BELFAST

Case Ref: 1521/13IT

BETWEEN

ANTHONY BROPHY

Claimant

And

NORBROOK LABORATORIES LIMITED

Respondent

STATEMENT OF COSTS
(SUMMARY ASSESMENT)

Description of Fee Earner's

(1) Gervase McGenity ("GMM") – In-house Solicitor - £220.00 per hour

Item	Hours		Rate	Amount
Letters Out GMM	5.5	hours at £	220	£1,210.00
Letters in GMM	3.3	hours at £	220	£726.00
Telephone Calls GMM	4.8	hours at £	220	£1,056.00
Attendances on Client (Witnesses) GMM	17.9	hours at £	220	£3,938.00
Other work not covered above (preparation schedule) GMM	20.4	hours at £	220	£4,488.00
Work done on bundles GMM	6.8	hours at £	220	£1,496.00
Attendance at hearing GMM	15	hours at £	220	£3,300.00
Travelling and Waiting GMM	12	hours at £	220	£2,640.00
			Sub Total	**£18,854.00**

Case No. 1521/131T

IN THE INDUSTRIAL TRIBUNAL IN NORTHERN IRELAND

Between:

ANTHONY BROPHY

Claimant

and

NORBROOK LABORATORIES LIMITED

Respondent

CLAIMANT'S SKELETON ARGUMENT IN REPLY TO THE RESPONDENT'S APPLICATION FOR COSTS

I. INTRODUCTION

1. This is the Claimant's skeleton argument augmenting oral submissions that will be made by the Claimant in reply to the Respondent's application for costs against the Claimant and/or his solicitor pursuant to Rule 40, 41 and 48 of the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 ('Rules') to be heard before the Tribunal on 28 November 2014.

2. It is intended that this Argument will deal with the Respondent's application for costs as against the Claimant, followed by the Respondent's application for costs as against the Claimant's solicitor and then finally the recovery of costs. This arguments concludes that no order should be made.

II. THE APPLICATION AGAINST THE CLAIMANT

General principles of law

3. The Tribunal will know that it must go through a two-stage process in determining whether to award costs. Firstly, under Rule 40(3) this Tribunal must determine whether the respondent or his representatives in conducting the proceedings acted vexatiously, unreasonably or pursued a claim that was misconceived in that it had no reasonable prospects of success. This has become known as the threshold test. Secondly, the tribunal

must decide whether or not it is appropriate to exercise its discretion to award costs in the particular circumstances of the case. [1]

4. Costs orders are exceptional in nature in the Tribunals where costs do not normally follow the event as in the civil courts. The fundamental principle remains that costs are the exception rather than the rule, and that costs do not follow the event in employment tribunals. In *Gee v Shell UK Ltd*[2] Sedley LJ stated:

> It is nevertheless a very important feature of the employment jurisdiction that it is designed to be accessible to ordinary people without the need of lawyers, and that – in sharp distinction from ordinary litigation in the UK – losing does not ordinarily mean paying the other side's costs.

5. It is open to a Tribunal to issue a costs warning. In *Gee* (above), the English Court of Appeal ruled that a tribunal should only give a costs warning where there is a real risk that an order for costs will be made against an unsuccessful claimant at the end of the hearing. It has long been an established statement of law that an order for costs must be compensatory and not punitive.

The Respondent's legal basis for the application

6. In support of its application, the Respondent relies on Rule 40(3) in that the Claimant had, in bringing the proceedings, or he or his representative has in conducting the proceedings, acted as follows:

    (a) vexatiously;
    (b unreasonably:
    (c) pursued a claim that was misconceived in that it had no reasonable prospects of success.

(a) Vexatious

The Respondent fails to set out the legal or factual basis for its mere averment at paragraph 4 (i) that the Claimant's claim was vexatious. In fact, the Respondent relies on the authority of *Dyer v SoS for Employment* UKEAT/183/83 to distinguish 'vexatiousness' from 'unreasonableness' (para 12). Having made the distinction, no further mention of the word

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[1] (See *Criddle v Epcot Ltd* [UKEAT/0275/05] and *Khan v Kirklees BC* [2007] EWCA Civ 1342.)

[2] [2003] IRLR 82

'vexatious' is made in the written submissions. Therefore, the Claimant does not propose to make a lengthy rebuttal of this allegation. However, for the sake of completeness, the Claimant denies that his claim was vexatious within the meaning given in this jurisdiction by Gillen J in *Rush v Police Service of Northern Ireland and the Secretary of State*[3] or otherwise[4]. At [13], Gillen J held that vexatious or frivolous claims include cases which are "obviously unsustainable" and an abuse of the process of the court.

(b) Unreasonable

The Respondent's arguments are more properly categorised as being grounded under the rubric of 'unreasonableness'. The Respondent correctly avers that it is for the Tribunal to decide as a matter of fact whether the conduct complained of was unreasonable (paras 12 and 13). The Claimant adds to this by further submitting that before the Tribunal exercises its discretion it must also take in to account Mummery LJ's *dicta* in *McPherson v BNP Paribas (London Branch)*:[5]

> ...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 [the receiving party] to prove that specific unreasonable conduct by [the paying party] caused particular costs to be incurred.

As set out in *Harvey on Industrial Relations and Employment Law* it is accepted that each case

needs to be considered on its own facts, The authorities only give the principles governing discretion and serve only as a 'broad steer on the factors covered by the paramount principle of relevance'[6]. However, in *Harvey* the examples given of general unreasonable behaviour that have led to costs orders all centre on a party's dishonesty and untruthfulness.

1] NIQB 28 (Gillen J)

:he meaning of 'vexatious' given by Lord Bingham CJ in *A-G v Barker [2000] 1 FLR 759, [2000] 2 FCR 1*, at para 19:

> "Vexatious" is a familiar term in legal parlance. The hallmark of a vexatious proceeding is in my judgment 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.

4] EWCA Civ 569, [2004] ICR 1398

'ey on Industrial Relations and Employment Law/Division PI Practice and Procedure/1. Employment Tribunals/ZB. Preparation Time, Wasted Costs/(1) Generally, [1065], quoting Mummery LJ in *Yerrakalva* at [42].

Even then, it seems that costs orders will not necessarily follow even if a party has been found to have lied.[7]

(c) Pursued a claim that was misconceived in that it had no reasonable prospects of success

Again, the Respondent fails to set out the legal or factual basis for its mere averments at paragraph 4(ii) that the Claimant's action was misconceived in that had no reasonable prospect of success and that it was '"bound to fail" as per paragraph 14.1. The word 'misconceived' only appears once more at paragraph 13 whereat the Respondent undermines its own case when it states that "it is not even necessary to establish that the claim is misconceived". Therefore, the Claimant does not propose to make a lengthy rebuttal of this allegation. However, again for the sake of completeness, the Claimant denies that his action was 'misconceived in that it had no reasonable prospects of success'. *Harvey* suggests that the test is more than a simple objective assessment of whether the claimant knew or ought to have known that his case lacked substance or merit.[8] The Tribunal must look at not just the proceedings themselves but the claimant's conduct in bringing or conducting the proceedings. A factor to be taken in to consideration in assessing whether or not a claim should be deemed as one that had no reasonable prospects of success is a Respondent's failure to apply to strike out the claim or to apply for a deposit at an earlier stage.[9]

The facts relied upon by the Respondent

7. As examined above, the Respondent makes an inchoate argument on the issue of whether the Claimant has acted vexatiously or pursued a claim that was misconceived in that it had no reasonable prospects of success. Therefore the only legal basis as set out by the Respondents is one of 'unreasonableness'. It is on this premise that the Claimant will analyse the purported facts as relied upon the Respondent.

8. In line with the *Yerrakalva* case, the Respondent sets out a litany of purported facts (14 in total) in support of its contention that the Claimant has acted unreasonably. Each one is of very minor or no consequence at all. In fact, a closer examination of these 'facts' reveals that they should be more properly regarded as pedantry assertions. Taking each in turn:

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[7] Ibid at [1068]
[8] Ibid at [1083]
[9] See *AQ Ltd v Holden* [2012] IRLR 648, EAT referred to in *Harvey*, ibid at [1062]

9. 14.1 – Here the Respondent attempts to re-run the natural justice arguments that were made at the hearing. That should not be permitted by the Tribunal. The Respondent's assertion is that the 'natural justice' argument was bound to fail. This is wholly unsupported by the facts for the following reasons.

(a) Although in its final decision the Tribunal did not accept that the principles of natural justice were infringed, it did acknowledged by an interim ruling that the Claimant had always made out the case that Mr Canavan was a wholly inappropriate person to conduct the investigation as he had a vested interest in the outcome. While the Claimant may not have been able to ascribe the term, in essence this was a natural justice argument. A number of hours were taken up opening and debating the law on natural justice and *nemo judex in causa sua*. The Claimant contended that on the basis of the law, principles of natural justice apply to employment investigations and hearings. At one point Learned Counsel for the Respondent made the incredible argument that while reasonableness applies to employment investigations and hearings, natural justice does not. While the Tribunal in its decision did not accept the submissions of the Claimant, it makes no finding that this natural justice argument was one that was 'misconceived', 'bound to failed', 'without merit', 'without a reasonable prospect of success', 'inarguable' or any like language. In fact, the Tribunal gives proper and very detailed consideration of the arguments and counter-arguments made over many paragraphs of its decision. Consequently, this completely undermines the Respondent's assertion that it was bound to fail.

(b) Indeed the Tribunal had the opportunity at that point to dismiss the Claimant's case as one that was bound to fail or was inarguable and therefore was an abuse of its processes. The Tribunal could have given a warning that the claim was bound to fail. The Tribunal could have even given a costs warning. That no such action was taken by the Tribunal further undermines the Respondent's already flawed argument.

(c) Until now, the Respondent failed to make an application to have the proceedings stayed or struck out as an abuse of process by reason that they were bound to fail. Further, the Respondent could have made an application to strike out those parts of the Claimant's claim or witness statement that it felt were bound to fail. Moreover, the phrase 'bound to fail' or like language has never been mentioned by the Respondent until now.

The Respondent neglected to make such applications or to even mention that it was a claim that was bound to fail at the following times:

(i) No stand-alone application to stay the proceedings was brought under the Rules;

(ii) In correspondence;

(iii) At CMDs;

(iv) As a preliminary application on the day of the hearing itself;

(v) At the time of the close of the Respondent's case;

(vi) It was never put in cross-examination to the Claimant that his case was vexatious or misconceived;

(vii) At the time when the successful application was made to have the Tribunal rule that the natural justice argument was always made out as a ground by the Claimant.

Instead the Respondent, on its own case, set about purportedly incurring costs of some £43,564.56 (which is denied) in a case where it knew that the statutory maximum recovery was £10,000. This is wholly inconsistent and rather points to the conclusion that the Respondent's argument is an *ex post facto*, opportunistic one and should be treated accordingly.

10. 14.2 – The Respondent's complaint that the Claimant raised no issue about Mr Canavan's involvement at either the investigation and disciplinary process has no bearing on the case or this application as the Tribunal had ruled that the natural justice arguments formed part of the Claimant's case from an early point.

11. 14.3 – This is irrelevant. This was merely a further limb of the Claimant's case that only became apparent during cross-examination, although the Tribunal did rule that it could not form part of the case (paras 2-7). In any event it was always the Claimant's case that he was unfairly dismissed by reason of the breach of natural justice of having Mr Canavan sitting as a judge in his own cause when he was permitted to carry out the investigation. It was certainly put to witnesses that the Respondent failed to give the appropriateness of the Mr Canavan as the investigatory any consideration which was borne out by the fact that he was not also treated as a suspect. It was the wholesale acceptance of a theory

without any question as to conflict of interests that the investigator clearly had that was the flaw in the process. This avenue of cross-examination was pursued with the witnesses.

12. 14.4 – No evidence is required. This line of cross-examination was a perfectly logical consequence of the fact that so many failures were identified in Mr Canavan's department

and in the process breach the customary practise of solicitors, that is a matter for him. However, the Claimant's solicitor now has no choice other than to provide the contents and context of that conversation but does so reluctantly and regards Mr McGennity's reliance upon a without prejudice conversation as nothing short of dishonourable.

Paragraph 14.10 as pleaded is misleading. The conversation actually took place on the first day of hearing, day one had been adjourned because of illness of Counsel. The conversation was very much an offer to settle, albeit done in an intimidatory way and on conditions that were never going to be acceptable. It was not a costs warning; it was a threat. Mr McGennity offered to allow the Claimant to withdraw his case in return for a payment of £10,000. It was made clear to Mr McGennity that the Claimant felt very strongly about the case and it was unlikely that he would accept the offer, particularly given his limited means and that he was likely to proceed irrespective of advice. When it was clear that this threatening offer was unlikely to deter the Claimant, Mr McGennity stated that he held a standing brief from the board to make "all sorts of imaginative costs applications in all of these cases". He then made a very blatant threat that if the Claimant did not agree, then he could (as opposed to would) seek a costs order against the Claimant's solicitors. The Claimant's solicitor viewed this as a very clear attempt to intimidate the Claimant's legal advisors and was evidently designed to have the solicitor influence his client's decision-making to protect himself rather than in the client's best interests or based upon the client's instructions (regardless of whether they were contrary to advice). This threat was made without any prior warning in correspondence. As will be seen below, 'the threat of a wasted costs order should not be used as a means of intimidation'.[10] It was quite clear to the Claimant's solicitor that intimidation was the premise of Mr McGennity's comments. It was Mr McGennity's decision to make the threat; no one else's. He did not reduce his imaginative threat to writing. The threats for costs against the Claimant and against the Claimant's solicitor were made simultaneously. Limited time was given to take instructions from the Claimant. The intervention was improper and made at a point where Mr McGennity knew that there was limited prospect of the client agreeing to such a course. The Claimant's solicitor is considering making a formal complaint about Mr McGennity's conduct in this matter to the *Law Society of Northern Ireland*.

Cook on Costs 2014 (Butterworths, 2013) at para 23.10

19. 14.11 – The matters were addressed. The focus was more properly on the fairness of the disciplinary process.

20. 14.12 - None of the criticisms levied in this paragraph had any material effect on the proceedings. By the time of the appeal, the Claimant had identified that there was something inherently unfair that Mr Canavan should sit in judgment on him as he saw it. That he could not ascribe the term 'natural justice' or indeed *nemo judex in causa sua* to his thoughts does not mean that he did not have the principle in his mind. The legal terms were explained to the Claimant and he agreed to have them in his witness statement, lest the Respondent complained that they had not been expressly pleaded or mentioned. As regards the pedantic criticism that the facts of the case were cut and paste from the lengthy and detailed ET1: the facts and the Claimant's case had not changed from the ET1, so why the need for a completely new way to say the same thing? If the Respondent felt so strongly about the witness statement, it was open to it apply to strike out those parts of the statement that it found bothersome. There is an allegation at 14.12.2-3 that the *evidence* is not the Claimant's. This is simply wrong. Moreover, the Respondent is attempting to rely on English procedural case law that are post-CPR and which has little or no persuasive value to the Courts in Northern Ireland in terms of practice.

21. 14.13 – This was a drafting error that was brought to the Claimant's attention by the Tribunal, not by the Respondent. It was rectified without consequence. To rely on this error as a basis for unreasonable behaviour shows the desperate nature of the Respondent's application.

22. 14.14 – The Claimant did not waste unnecessary time on an application to amend. The application was 50% successful in respect of the natural justice point. The Claimant contended that the other 50% arose during cross-examination (although this was not accepted by the Tribunal). Again this has no material effect on the Claimant's sole point: that there was a breach of natural justice. It is simply wrong to state that the Claimant did not rely on the principles as expounded in *Selkent Bus Company v Moore* [1996] IRLR 661. They were relied upon. In any event, the application was partially successful.

Further submissions

23. Each of the complaints made by the Respondent either are hopeless arguments or are of such little consequence that they have had no bearing whatsoever on the outcome or conduct of the case.

24. The Respondent has itself acted unreasonably and/or in breach of the Rules:

(a) It was late in filing its witness statements

(b) A CMD was required to compel it to provide discovery following a failure to make discovery

(c) When the Claimant's Counsel was ill and unfit to attend Court (for the first time in his career), the matter was raised with Mr McGennity. His consent to an adjournment was sought which was refused immediately. Outrageously, Mr McGennity then threatened to seek an order for costs due to Counsel's illness. This meant that a CMD was required for something that should have been made on consent. Not only was this a personal discourtesy and taking a fellow professional short to gain an advantage, it was highly unreasonable and led to an extra and unnecessary hearing. This is in marked contrast to the latitude extended by the Claimant and his representatives to the Norbrook employees who wished to attend a ceremony at Westminster to mourn the death of Edward Haughey on one of the days allocated for the hearing. There was no difficulty with that request. Moreover, when the hearing had to be adjourned previously due to one of the Respondent's undergo witness's health issues, again there was immediate consent to adjourn the hearing, even if it was inconvenient.

(d) The Respondent's application for a wasted costs order is in itself unreasonable and entirely without merit. (see below)

Conclusion on making a costs order

25. The Respondent's only basis for making an order for costs is the unreasonable behaviour of the Claimant or his representatives. No unreasonable behaviour has been identified for the reasons above. As identified above, it is only in exceptional cases that the Tribunal makes costs orders and they are usually made in circumstances where there has been outrageous behaviour or dishonesty. The Tribunal must also look at the full circumstances of the case. The circumstances of this case are that the Claimant was accused of the very serious accusation of theft from his employer which he vehemently denied and in respect of which the police found that there was no case to answer following a full investigation.

The Tribunal should be very slow to make any order where the Claimant wanted to vindicate his good name and his rights pursuant to law.

26. As to the second step, the Tribunal is respectfully reminded of Mummery LJ's guidance: "the tribunal must have regard to *the nature, gravity and effect* of the unreasonable conduct as factors relevant to the exercise of the discretion." If the Tribunal does find that a costs order should be made against the Claimant, for the reasons given at paragraph 24, because of the Respondent's and Mr McGennity's own outrageous and unreasonable behaviour and because the complaints made are of such a minor and technical nature with little or no consequence on the proceedings, the Tribunal should exercise its discretion not to award the Respondent with its costs.

Ability to pay

27. The Claimant will give evidence of his inability to pay at the hearing.

III. THE APPLICATION AGAINST THE CLAIMANT'S REPRESENTATIVES

28. The Tribunal should be under no doubt: this aspect of its application is malicious and has the intention of 'sending out the message' to local lawyers that you continue to act for your client against Norbrook at your peril. It has no basis in fact or law, is ill-conceived, is itself vexatious and is bound to fail.

The legal basis

29. Again the Respondent fails to particularise the legal basis for the application for wasted costs save that scant reference is made to Rule 48(iii). No case law is relied upon at all. The reason for this would seem to be that the case law is not supportive of this part of Respondent's application.

30. It is assumed that by 'representatives', the Respondent means solicitor and Counsel. However, this is wrong in law. In this jurisdiction, counsel is immune from an order for costs. As Valentine observes in *Civil Procedure: The Supreme Court in Northern Ireland*[11]:

[11] (SLS, 1997)

Costs cannot be awarded against counsel.[12] English counsel are, since 1991, not so fortunate. Of course, counsel, and solicitor, may be liable in an action for negligence in the conduct of proceedings outside the area or advocacy.[13]

While this distinction is of little consequence for the purposes of resisting the application, the remainder of this argument will focus on the law on costs orders against solicitors.

31. According to *Harvey*[14], "a wasted costs order may be made against a party's legal or other representative (provided he is acting for profit) on the same grounds as are applicable in the civil courts." The relevant extracts from Valentine's most up-to-date work, *All of the Law of Northern Ireland 2012*[15], that relate to the High Court of Northern Ireland's ability to make an order for wasted costs pursuant to Order 62 rule 11 are as follows. These principles can be transposed to the Rules of this Tribunal:

> The principles applicable in Northern Ireland remain as stated in the 1991 English case of *Gupta v Comer.*[16] There is no need to show gross dereliction or misconduct; the purpose is compensatory rather than punitive. It is not serious dereliction of duty to pursue a hopeless case on client's instructions: *Harley v MacDonald* [2001] 2 AC 678 (PC)
>
> ...
>
> The purpose of making a wasted costs order against a solicitor in pursuance of this rule is compensatory and not punitive. Furthermore, the making of such an order is not dependent upon the demonstration of serious dereliction of duty, gross misconduct or gross negligence or neglect. Lawyers should not be deterred from pursuing their clients' interests by fear of incurring a personal liability to their clients' opponents; that they should not be penalised by orders to pay costs without a fair opportunity to defend themselves; that wasted costs orders should not become a back-door means of recovering costs not otherwise recoverable against a legally-aided or impoverished litigant; and that the remedy should not grow unchecked to become more damaging than the disease.
>
> ...
>
> The test is: (1) Has the legal representative of whom complaint is made acted improperly, unreasonably or negligently? (2) If so, did such conduct cause the applicant to incur

[12] *Davy-Chiesman v Davy-Chiesman* [1984] Fam 48, where the solicitor was held liable for following the glaringly wrong advice of counsel. In *Reid v Edinburgh Accoustics*, 1995 SLT 982, the solicitor was held not liable for following counsel's wrong advice.
[13] Op cit at p377
[14] Op cit at [1045]
[15] 'Rules of the Judicature', pp 271-272
[16] [1991] 1 QB 629.

unnecessary costs? (3) If so, is it in all the circumstances just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs? [here quoting the three-stage test established in *Ridehalgh v Horsefield*[17] which is examined below] (If so, the costs to be met must be specified. All kinds of mitigating circumstances may be relevant to the exercise of that discretion: *Ulster Bank v Taggart and Taggart* [2012] NIQB 24 [2012] 6 BNIL 56 (McCloskey J).

32. As noted in *Cook on Costs*, 'the threat of a wasted costs order should not be used as a means of intimidation'.[18]

33. It is evident from the foregoing that the making of an order for costs as against a solicitor is only made in very exceptional circumstances. They are a very rare thing in any litigation in this Jurisdiction and are much less used than in England and Wales. A look at the decisions of this Tribunal show that they are only made where there has been a default by the solicitor or a failure to take certain steps and are very, very rare. An order for wasted costs against a solicitor for the sort of conduct that the Respondent impugns cannot be found.

General principles

34. The definition of wasted costs order has been considered by the Court of Appeal in England and Wales, in the case of *Ridehalgh v Horsefield*[19]. The principles as laid down by are covered in great detail in *Harvey* at [1110], the relevant extracts being:

(a) When considering whether to make a wasted costs order, a three-stage test should be applied:

(i) Has the legal representative of whom complaint was made acted improperly, unreasonably or negligently?

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

(iii) If so, is it, in all the circumstances, just to order the legal representative to compensate the applicant for the whole or part of the relevant costs?

(b) 'Improper' covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penal-ty. Conduct which would be regarded as improper according to the consensus of

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[7] [1994] 3 AER 848.

[8] See *Cook on Costs 2014* (Butterworths, 2013) at para 23.10

[9] [1994] Ch 205, [1994] 3 All ER 848 (approved by the House of Lords in *Medcalf v Mardell* [2002] UKHL 27, 2003] 1 AC 120)

professional (including judicial) opinion can be fairly stigmatised as such, whether or not it violates the letter of a professional code.

(c) 'Unreasonable' aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. The acid test is whether the conduct permits of a reasonable explanation.

(d) 'Negligent' should be understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession. In adopting an untechnical approach to the meaning of negligence in this context, the Court firmly discountenanced any suggestion that an applicant for a wasted costs order under this head need prove anything less than he would have to prove in an action for negligence.

(e) A legal representative is not to be held to have acted improperly, unreasonably or negligently simply because he acts for a party who pursues a claim or defence which is plainly doomed to fail. It is rarely if ever safe for a court to assume that a hopeless case is being litigated on the advice of the lawyers involved. They are there to present the case; it is for the judge and not the lawyers to judge it. On the other hand, a legal representative must not lend his assistance to proceedings which are an abuse of the process of the court. It not entirely easy to distinguish between the hopeless case and the case which amounts to an abuse of process, but in practice it is not hard to say which is which, and if there is doubt, the legal representative is entitled to the benefit of it.

(f) If an advocate's conduct in court is improper, unreasonable or negligent, he is liable to a wasted costs order. But a judge must make full allowance for the fact that an advocate in court often has to make decisions quickly and under pressure. Mistakes will inevitably be made and things done which the outcome shows to have been unwise. Advocacy is more an art than a science and cannot be conducted according to formulae. Individuals differ in their style and approach. It is only when, with all allowances made, an advocate's conduct of proceedings is quite plainly unjustifiable that it can be appropriate to make a wasted costs order against him.

(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.

(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.

(i) As to the timing of an application for wasted costs, such an application is generally best left until after the end of the trial.

(j) As to the appropriate applicant, the court itself may initiate the enquiry whether a wasted costs order should be made. In straightforward cases (such as failure to appear, lateness, negligence leading to an otherwise avoidable adjournment, gross repetition or extreme slow-ness) there is no reason why it should not do so. But save in the most obvious case, courts should be slow to initiate the enquiry, and will usually be well advised to leave an aggrieved party to make the application if so advised.

Applying the facts

35. The Claimant's solicitor has never been put on notice of this application for wasted costs. Mr McGennity did not say that if the case proceeded that an application for wasted costs 'would' follow, merely 'could' follow. At no stage did the Respondent give the Claimant's solicitor a written warning that they would seek costs, nor did they give him any notice of the amount of such costs. In line with *Rogers v Dorothy Barley School*[20], this Tribunal ought to see this as a failure to provide a fully reasoned written warning letter that gives sufficient time for the Claimant's solicitor to consider his position and dismiss this application accordingly.

36. Even taking the Respondent's case at its height, the Respondent's complaint is that the Claimant's representatives acted negligently rather than improperly or unreasonably. That being so, there is absolutely nothing alleged by the Respondent that could reasonably be considered to be "a failure to act with the competence reasonably to be expected of ordinary members of the profession." However, failing to following instructions, regardless of advice, is such a failure. Taking the Respondent's fresh and opportunistic allegation that this was a claim that was bound to fail, the Tribunal is referred to the instructions and privilege warnings at 32(e) and (g) above in *Ridehalgh*. As to the enquiry that the Respondent has insisted in opening in regard to the wasted costs, the Tribunal's attention is drawn to 32(j).

[20] UKEAT/0013/12 (14 March 2012, unreported), referred to in *Harvey* op cit at [1087]

37. The Tribunal should also view the oral threat as an attempt to intimidate the Claimant's solicitor during a hearing and refuse on this basis alone as being reprehensible behaviour.

IV. THE APPLICANT'S ABILITY TO RECOVER THE COSTS CLAIMED

The indemnity principle and the inability to recover profit

38. As is noted in *Cook on Costs*, "as a general rule...costs between the parties can never exceed the solicitor and client costs."[21] This is known as the indemnity principle. The principle was expounded in *Harold v Smith*[22]:

> Costs as between party and party are given by the law as an indemnity to the person entitled to them: they are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them. Therefore, if the extent of the indemnification can be found out, the extent to which costs ought to be allowed is also ascertained.

39. Notwithstanding any statutory cap, therefore a party against whom an order for costs is made can only be liable the actual costs incurred. No profit element is permitted where the party is represented by an in-house solicitor, only the actual cost of his time.

The Respondent's bills

40. The Respondent's solicitor is an employee and is an in-house lawyer. In the submissions provided to the Tribunal supporting the costs application the Respondent provided a bill of costs which totalled £37,599.00 with a rate of £220.00 per hour charged for Mr McGennity. This bill is basic but does itemise the works purportedly undertaken by Norbrook in the matter. By letter dated 21 November 2014 the Respondent provides a further bill which has increased to £43,564.56. These are the fees that Norbrook say they have reasonably incurred in this matter which was a hearing which lasted one day and submissions which lasted half a day.

41. With the greatest of respect to Mr McGinnity, it is almost certain that he is not paid £220.00 per hour. Therefore the Respondent is placed on strict proof of his hourly rate. Further, even if he was paid the hourly rate £220.00, the Tribunal and Mr McGinnity will know that the hourly rate the High Court taxing Master currently allowed from 1st April 2014 is £102.00.

[21] Op cit at [12.2]

[22] (1860) 5 H&N 381

Therefore however by using an hourly rate of £220.00 per hour this is essentially an hourly rate of £101.00 per hour with an uplift of around 115%. This is grossly excessive.

42. Further a charge has been included for Letters and Emails in. In High Court actions which are taxed the cost of Letters/Emails In is not allowed and the charge for same is included within the Letters/Emails Out. There is a substantial charge for a large number of emails between staff within Norbrook which is very questionable. Also the time spent on documents is calculated at 3 minutes a page. The Taxing Master does not assess costs using this method and has in the past strongly advised against doing so. VAT should not be claimed if Norbrook can re-claim any VAT paid out as this would be duplication.

43. Another, more worrying aspect to the Respondent's application is the glaring contractions between the two bills submitted. In the first bill 17.8 hours is claimed as being 'attendance on client (witnesses)' claiming an amount in the sum of £3,938.00. In the second bill no such claim is made and in fact there appears to have been no claim whatsoever for attendance on clients. In addition there is a claim for 4.8 hours of telephone calls in the first bill amounting to a claim of £1,056. The second bill states there were a total of 11 telephone calls claiming £242 with a claim for a non-standard telephone call for a CMD of £220. This should trouble the Tribunal. It illustrates that the Respondent has presented two different bills which purport to apply to the same case but claim for completely different works. At best one of the bills is inaccurate but at worst it provides evidence that Mr McGennity is again using his ceaseless imagination to claiming for hours which were not undertaken. In such a context how can the Tribunal accept that any of the hours claimed by Mr Mc Gennity can be relied upon as being accurate at all?

44. Finally, the retention by the Respondent of a specialist Queen's Counsel from outside the jurisdiction at a cost of £19,905.96 (£300 per hour plus VAT plus considerable expenses) for a case which the Respondent now claims was misconceived and bound to fail is grossly disproportionate. Why not use Mr McGennity if it was bound to fail? Better still why not simply ask Mr Logan or one of the senior managers to run the case if it was so doomed to failure? Again this undermines the Respondent's whole approach. The fairer assessment is that there *was* a case to answer. However, it is one that could easily have been undertaken by junior counsel from this jurisdiction at a fraction of the cost of the QC retained. The fact

that the Respondent decided to incur the cost of senior counsel is of course its right, but to do so in this case was unreasonable and disproportionate.

Conclusion

45. The Respondent has deliberated inflated its costs: it should have known that profit cannot be claimed; the hourly rate was over twice what the Taxing Master allows; items claimed for are disallowed; and the two bills are irreconcilable to the point of concern. Then we have the use of an extra-jurisdictional QC at a rate of £300 plus VAT in a case now categorised as being doomed to failure from the outset. This is a case that ought to have cost the Respondent well below £10,000.00. It is submitted that the costs were inflated so as to cross the statutory maximum and make an award of £10,000 seem like a reasonable and proportionate one. Again these are compelling reasons for the Tribunal not to exercise its discretion on costs for both the Claimant and his solicitor, if applicable.

V. CONCLUSION

46. The Respondent has failed to establish that the Claimant's claim was vexatious, unreasonable or was misconceived in that it had no reasonable prospects of success. Therefore the Respondent's application for costs does not cross the threshold. In the alternative, for the reasons given above, and in particular the Respondent and its representatives' egregious conduct, the Tribunal should refuse the application.

47. As to the Respondent's application for a wasted costs order against the Claimant's solicitor, this is an even more ill-founded application. Nothing that the Claimant's solicitor did could be construed as negligent, improper or unreasonable. Indeed, the Claimant's representatives' courtesy to the Respondents when requested stands in contrast to the discourtesy and reprehensible behaviour that Northern Irish solicitors would not be expected to engage in.

48. Of course the Respondent's tactical objective with this application is to discourage current and ex-employees from exercising their rights within this Tribunal's statutory framework. It is meant as a warning to them. Any order for costs against the Claimant's solicitor would have a chilling effect on other solicitors in Northern Ireland. But again this another of the Respondent's objectives: get a costs order and no local solicitors will take a case against it in the future. The Respondent can be sure that its tactics have failed in this regard.

49. If the Tribunal were to make any order in this case, it respectfully submitted that it would have wider negative repercussions for access to justice. It is submitted that the Tribunal should make no order.

Conan Fegan

The Bar Library

Belfast

26 November 2014