THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mrs S Gooding	**AND**	**North Tees & Hartlepool NHS Foundation Trust**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: **Middlesbrough** **On:** **3 April 2017**

Before: **Employment Judge JM Wade (sitting alone)**

Appearances

For the Claimant: **In person**

Mr Oliver (former representative) **In person**

JUDGMENT

The sum of £4459.75 in costs and disbursements invoiced to the claimant by Mr Oliver is disallowed and shall not be recoverable by reason of his unreasonable omission in failing to correct her belief that he acted as her solicitor in these proceedings.

REASONS

Introduction, the law and the issues

1 The application before me today is a wasted costs application. I gave permission for that to proceed out of time on a limited basis, upon reading correspondence from Mrs Gooding which included her concerns about the nature of the retainer with Mr Oliver and that she had been surprised to learn that he was not a solicitor. That concern had first emerged during the course of the substantive hearing involving the respondent trust when I had identified his capacity as part of the general housekeeping.

2 The law and the issues for me derive from the Tribunal Rules. Rule 80 provides that:

"80(1) A Tribunal may make a wasted costs order against a representative in favour of any party, the receiving party, where that party has incurred costs; (a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative;

…

80(3)A wasted costs order may be made in favour of a party whether or not that party is legally represented and may also be made in favour of a representative's own client. A wasted costs order may not be made against a representative where that representative is representing a party in his or her capacity as an employee of that party".

3 Other provisions make clear that these rules only apply to those who are operating for profit in conducting and advising individuals before the Employment Tribunal. Rule 81 provides that as to the effect of a wasted costs order:

"81 A wasted costs order may order the representative to pay the whole or part of any wasted costs of the receiving party, or disallow any wasted costs otherwise payable to the representative including an order that the representative repay to its client any costs which have already been paid. The amount to be paid, disallowed or repaid must in each case be specified in the order".

4 The issues for me are firstly whether Mr Oliver has engaged in any improper, unreasonable or negligent act or omission, secondly whether Mrs Gooding has incurred costs as a result, and thirdly whether I should exercise my discretion to disallow or order the repayment by Mr Oliver of any sums paid to him by Mrs Gooding.

Evidence

5 I have heard this morning from Mrs Gooding who submitted three witness statements in advance in accordance with orders I made: from herself, from Mrs Shipley who was unwell and not in a position to attend today, and from Mr Gooding, Mrs Gooding's husband. Those statements set out some of the circumstances in which Mrs Gooding came to feel so unhappy about the charges levied by Mr Oliver in representing her before the Employment Tribunal. I have also had before me a short witness statement from Mr Oliver signed and dated, and he has also given oral evidence before me this morning.

6 I have a short bundle of relevant document before me prepared by Mrs Gooding, again in accordance with directions, to which I had limited reference to a number of pages. There is an exchange of e-mail on the Tribunal's file to which I have also had reference. That e-mail exchange is dated 28 November 2015, 30 November and 1 December 2015 and those documents are labelled L, M and N in a short bundle of documents on the file that has previously been provided by Mr Oliver.

Findings of fact

7 The relevant facts in this matter can be very shortly summarised. Mr Oliver was a solicitor who had practiced in Hong Kong and other jurisdictions and was subject to striking off by the Law Society many years ago. He more recently worked for insurer based claims management firms and he also set up his own small claims management business latterly.

8 At the time Mr Oliver encountered Mrs Gooding his claims management business involved him operating as a sole practitioner from home. His e-mail letterhead, or the e-mail signature attached to e-mails sent on behalf of his business records as follows:

"RJ Oliver, BA(Hons)

ROBIN OLIVER LEGAL (his trading name)

His address in Colchester

Telephone details

"Regulated by the Claims Management Regulator in respect of regulated claims management activities."

His logo, and a further label: "Robin Oliver Legal".

There are then generic small font notices dealing with representations, the sending of e-mails, confidentiality and so on which do not take the matter of qualification or capacity any further. All written communications between the claimant and Mr Oliver were by email.

9 Between September and December 2015, Mr Oliver and the claimant were engaged in discussions about difficulties the claimant was experiencing at work and advice was provided in that context. That culminated in the claimant's resignation towards the end of November 2015. At that point no arrangement had been put in place for the payment of any fees for that advice. Mr Oliver's practice is that often when advising employees concerning work difficulties he will not make any charge for initial advice, but if a claim is to proceed then a retainer is put in place.

10 On 27 November 2015 he e-mailed Mrs Gooding including the following:

"Before I press ahead I would like to have an agreement with you along the lines of the attached draft, amended and formalised to suit the particular circumstances of your case. As to payment of my fees my usual arrangement is to have a dual payment regime. By this I mean that I charge for my time at the rate of £65.00 per recorded hour for work done on the case, £10.00 an hour for travelling time and £0.45 per mile for using my private car and reasonable and necessary travel in connection with your case".

11 A further bullet point provided as follows:

"The second alternative limb of this charging regime is to charge you a global fee of 35% of the amount you recover from your opponent plus my reasonable expenses. I have the option to choose which of these limbs is the more beneficial for me".

12 There was then provision in relation to the need for fees to be paid to commence an Employment Tribunal including an error as to the amount of hearing fee (stated to be £900 rather than £950). The e-mail also provided as follows:

"Because the case is almost certain to be complex and lengthy I would like to be paid some money on account of costs from time to time, as the case proceeds. Credit will of course be given for these payments at the final reckoning".

13 That e-mail contained no estimate of the amount of time charge costs that might be incurred in the claimant's case, nor, at that time was there any schedule of loss. In fact, the claimant replaced her earnings post resignation and only sought a Basic Award; the case was not about money for the claimant, but about her perception of an injustice in her earlier treatment.

14 In replying to that email about fees, the claimant raised a number of questions including asking about whether Mr Oliver had won cases against the NHS and whether she would be needing to make instalments of payments as the case continued. She also raised the issues of the attendance of witnesses and highlighted her concern that they were not present at her disciplinary hearing.

15 She closed her e-mail this way:

"Apologies for all of my uncertainty – legal chicanery is not my strong point!"

16 There was a reply to that e-mail and subsequent forwarding by Mrs Gooding of £750, £250 of which was to cover the cost of issuing the claim and £500 as monies on account of fees to be incurred. Mr Oliver advised as follows:

"As the case goes on I might ask for further payments from you on account from time to time so as not to have to confront you with a single large bill at the end of the case".

17 He reassured the claimant about the attendance of witnesses alluding to witness orders and also to his success in cases involving the NHS.

18 The draft retainer that was attached to Mr Oliver's e-mail was headed up "Client care agreement for employment tribunal claim". The document contained the logo" Robin Oliver Legal". It dealt with a number of generic matters that one would expect to find; it included a cancellation clause at the end: "You have the right to cancel this agreement within 14 days without any costs to yourself". The draft contained signature lines and Mr Oliver had omitted to delete the name of a previous client on the third and final page.

19 The draft retainer included a Ministry of Justice logo and under a paragraph headed "If you lose your case" the letter set out a summary of the 2013 Employment Tribunal Rules of Procedure provisions as to the threshold for making costs orders. The draft did not in fact contain any provisions in the "Paying us" section, as to which Mr Oliver had included the commentary about fees in an email to which I have referred above.

20 During the period from September to December there had been an amount of preliminary work done by Mr Oliver. That work included negotiations and the ACAS early conciliation process, it having been explained to the claimant that the claim could not proceed without that process having been completed.

21 On 30 January 2016, by which time there was no signed engagement letter or retainer, but only the draft and email exchanges above, Mrs Gooding responded by e-mail to what she described as "The Trust's offer". She explained her reasons for not accepting that offer. She ended her e-mail sent at 3:15 on 30 January as follows:

"One final question, I have not received any meeting notes from my three disciplinary hearing [sic]; in your capacity as my solicitor are you able to request them?".

22 Mr Oliver's reply to that e-mail sent at 17:23 on 2 February 2016 was as follows:

"Dear Susan, Thanks for this; apologies for the delay in replying but I have been pretty busy over the past few days.

Yes – I agree the facts of your case are quite complex and I have difficulty identifying all the events and individuals involved.

I'd appreciate your summary [Mrs Gooding offered to provide a summary].

I can ask for these notes to be disclosed later. It helps your case that they have failed to supply as a matter of course.

Kindest regards, Robin".

23 The claimant's claim to the Employment Tribunal was presented on her behalf by Mr Oliver on 15 March 2016, some six weeks after that e-mail exchange.

24 The events that followed are well known to the parties in front of me. The preparations continued and work was undertaken between the claimant and Mr Oliver on her case. The constructive unfair dismissal complaint was heard by me between 9 and 11 August 2016 with an extemporary judgment on the third day. The claim failed. The judgment was sent to the parties on 17 August with written reasons on 8 September 2016. The time for the wasted costs application expired at the end of 14 September 2016, but for the reasons set out in my judgment of 10 January 2017 I extended time for a wasted costs application to be presented on limited grounds (not to include grounds of negligence or incompetence which I did not have permit).

25 The claimant's application was presented not least following a final invoice from Mr Oliver issued to her on 13 September 2016 which is at page 9 of my bundle. The balance of fees and disbursements due from the claimant was said to be £4,459.75. The time charge was £5,289.60, in respect of which it was acknowledged that £1,250.00 had already been paid in two instalments, one of £500 and one of £750. The claimant had also paid the £950 hearing fee and the £250 issue fee either directly or via Mr Oliver.

26 Mrs Gooding had asked for, and been provided with, a detailed breakdown of how the time charge had been recorded and this had been sent to her in July of 2016 before the hearing commenced.

27 After the invoice there was then correspondence and a number of complaints presented by Mrs Gooding both to Mr Oliver directly and also to the claims management regulator.

Submissions, discussion and conclusions

28 I heard from both parties to understand the basis for the application on the part of Mrs Gooding, and why it was resisted on behalf of Mr Oliver. It was clear that Mr Oliver considers that he had done his best for Mrs Gooding and that the result of the Tribunal was not one for which he bears the responsibility which Mrs Gooding has attributed to him. That alleged responsibility is the subject of other complaints not before me. Mr Oliver did identify that he had not provided a final retainer letter in order to conclude or formalise his retainer with his client and had inadvertently left another client's details on the draft.

29 On Mrs Gooding's part, as a result of these complaints and other matters, she has come to learn of Mr Oliver's earlier striking off from the roll of solicitors and has come to learn of matters of which she had no knowledge at the time of entering into the arrangement with him. She describes herself as not being sophisticated in matters of legal chicanery, as she describes them. At the time that was a fair summary, although she is considerably more well informed now. She drew my attention to law society guidance which describes the words and descriptors best avoided if the public are not to be misled into believing that they are dealing with a solicitor. The descriptors which can confuse include those such as "legal advisor" and "legal".

30 The question for me is essentially whether Mr Oliver has acted either by omission or otherwise in such a way as is unreasonable, or improper within the language of rule 80(1)(a).

31 In my judgment the facts in this case sadly disclose that the unreasonable action threshold has been crossed. I say that for a number of reasons as follows.

32 The entering into a retainer for potentially incurring a large legal bill, in whatever form, is a matter not to be entered into lightly by lay and private individuals. In order to do so it is reasonable for them to have basic information and for that information to be comprehensible to lay parties.

33 I accepted Mrs Gooding's evidence that she did not in fact know that Mr Oliver was not a solicitor on the roll, nor indeed insured and regulated as such, until it became apparent during the course of the hearing in August last year because I had identified that. He told me that he always identifies himself as a consultant on attendance sheets at the Tribunal, which is entirely proper: in doing so he informs both the Tribunal and the ushers that he attends and represents not in the capacity of either counsel or solicitor.

34 The subtlety of that information is not navigable to a lay client unless it is explicitly communicated. The use of the trade name "Robin Oliver Legal" and the use of e-mail and text communication with a letterhead that repeats simply that trade name and regulation by the Claims Management Regulator, is not such as to convey to a lay client that there is a difference between the individual advisor's capacity and that of a solicitor. That is the starting point in this case.

35 The matter is then made worse by the exchanges about the retainer and that the draft retainer letter itself contains no description of the capacity in which Mr Oliver would appear as advocate or otherwise during the course of the proceedings. In this particular case a final retainer was not signed or sent, and the terms as to fees being incurred were only those set out in the e-mail.

36 Mrs Gooding confirmed her willingness to proceed on the terms as she had understood them. Implicit in those terms as she understood them, and as a result of the failure to make it clear that Mr Oliver did not act as a solicitor, was his capacity as her solicitor.

37 That was despite the e-mail signature deployed by Mr Oliver, or rather because of it, containing no appropriate information as to his capacity. Her genuine belief is evidenced by her question to him on 30 January which could not have been clearer, "In your capacity as my solicitor are you able to request them?" in reference to documents. The reply to that e-mail was woefully silent as to the capacity in which Mr Oliver acted and he failed to advise the claimant in reply that he did not and could not act as her solicitor.

38 I also take into account that the claimant's circumstances included the wish to assert constructive dismissal, which often involves complex facts, and it is not a matter which lay people undertake with potential considerable cost, lightly. It was an unreasonable omission in my judgment for Mr Oliver not to make Mrs Gooding aware that he acted and practiced not in the capacity as a solicitor, nor regulated by the Solicitors Regulations Authority in these circumstances. I am satisfied that the omission on February 2 2016 was a cause of the claimant incurring costs going forward.

39 Having reached that conclusion I am now going to pause. The amount and form of any wasted costs order that I make is a matter within my discretion. I have explained

that the rules allow me to disallow any wasted costs which might otherwise be payable to Mr Oliver, or indeed to order the repayment of any wasted costs which have already been paid.

40 Before doing so the rules also provide me with a discretion as to whether to take into account a party's ability to pay. I consider it just on this occasion to make those enquiries and to take ability to pay into account so I am going to ask Mr Oliver to let me know about his ability to pay or in this case either make repayment or do without the fees set out in his invoice.

41 The exercise of discretion in making a wasted costs order is a matter which has to be undertaken judicially, taking account of all the permissible factors.

42 I have heard from Mr Oliver that he is 72 years old, he has a state pension, and a small private pension of around £300 per year. He has no assets or savings and declares approximately £13,000 in profit arising from this type of work, or at least that was the sum or thereabouts on his last tax return. He lives in private accommodation and he has no current dependents, albeit he has grown up children. I record from the time charge information that in the period up to 30 January 2016, that is the period before Mr Oliver replied to the e-mail which identified him as a solicitor, that the claimant had incurred £514.80 by way of time charge.

43 I also take into account that on the face of the bill he records £420.15 in mileage and lodgings in connection with the claim, that is his out of pocket expenses, in dealing with the matter. I also take into account that he clearly did conduct the claimant's case on her behalf before the Tribunal and there is no doubt that they had a number of visits and meetings prior to that. I take into account that he undertakes, he tells me, two or three cases of this or other kinds a year and might expect to earn from those sums similar to those finally invoiced to the claimant, and in some cases considerably more where the success fee provision in his standard terms might be engaged. I consider he does have the ability to go without the fees invoiced to Mrs Gooding.

44 I also take into account that I have made no finding as to the validity of the retainer prior to 2 February 2016, not least because the Claims Management Regulator may impose specific provisions in that regard of which I am unaware, and there may be consumer protection arguments which have not been canvassed before me.

45 I consider it to be an unreasonable omission to have replied to the e-mail in the terms of the reply (without correcting the claimant's belief) against the history in this case, including Mr Oliver's own history. I consider that the just order is to disallow the balance of fees and disbursements he now says is due: that sum is broadly equivalent to the time cost charge incurred from 2 February onwards, which in my judgment would not have been incurred had Mr Oliver been clear with the claimant as to his capacity. My judgment is that to the extent a valid retainer was in place, I disallow £4,459.75 and that sum shall not be recoverable from the claimant by Mr Oliver.

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EMPLOYMENT JUDGE JM WADE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON

6 April 2017
JUDGMENT SENT TO THE PARTIES ON

21 April 2017

AND ENTERED IN THE REGISTER

G Palmer

FOR THE TRIBUNAL