EMPLOYMENT TRIBUNALS

In Case No: 2301782/2015

Claimant: Mr D Henry

Respondent: London General Transport Services Limited

In Cases No: 2300125/2014 & 2302472/2015

Claimant: Mr G Thompson

Respondent: London Central Bus Company Limited

Heard at: **London South (Croydon) On: 14 November 2017**

Before: **Employment Judge John Crosfill**

Representation

For the Claimant (Henry): Mr J Neckles Trade Union Representative

For the Claimant (Thompson): Mr J Neckles initially and after his withdrawal thereafter no appearance or representation.

Respondent: Mr Bailey of Counsel

JUDGMENT

1. Mr D Henry is ordered to pay London General Transport Services Limited the sum of £300 as a contribution to their legal costs in the proceedings.

2. Mr G Thompson is ordered to pay London Central Bus Company Limited the sum of £2,250 as a contribution to their costs of these proceedings.

3. The Respondents' applications seeking an order that Mr J Neckles personally pay the costs of either proceedings are dismissed.

REASONS

1. The hearing before me was listed to deal with applications by the Respondents for their costs, or a contribution towards their costs following the conclusion of the claims against them. In both cases the Claimant's claims had been struck out. The matters were listed together as, in both cases the Respondent sought an order not just against the Claimant but in addition against Mr John Neckles, a trade union representative, who had represented each Claimant throughout the proceedings.

2. The background to this matter is that both Claimants had worked for bus companies. Mr Henry had brought claims for unlawful deduction from wages (apparently relating to sick pay) and race discrimination. Mr Thompson brought his first claim in which he made claims of unfair dismissal and race discrimination. He was reinstated and withdrew his unfair dismissal claim but pursued his other claims. Those claims were struck out and/or were subject to deposit orders and an order for costs made against Mr Thompson in the sum of £850. In the midst of that Mr Thompson was dismissed for a second time, he then brought a second claim alleging that his dismissal was unfair, that it was on the grounds of trade union membership and that the Respondent had discriminated against him because of his race. He also brought claims alleging that he had been denied the right to be accompanied by the representative of his choice – Mr John Neckles.

3. Mr Henry's claim was struck out because Mr Henry had failed to pay a hearing fee. However, that failure was preceded by a number of failures to comply with case management orders. Mr Thompson's (second) case was withdrawn after a long procedural history only shortly before the date listed for the hearing.

4. At the outset of the hearing I noted that neither Claimant had attended and asked Mr John Neckles whether he was authorised to represent both Claimants at this hearing. I was concerned because, depending upon the instructions given (which the tribunal is not privy to) an application for a wasted costs order will commonly give rise to a conflict of interest between the representative and client. Whilst as a lay representative Mr John Neckles was not bound by any code of conduct, I was anxious to ensure that the Claimants were fully aware of the position.

5. Mr John Neckles informed me that both Claimants were happy to be represented by him at the hearing (which was listed when a previous hearing was adjourned). I then informed Mr John Neckles that the notice of hearing addressed to Mr Tompson had been returned in the post. Mr John Neckles then told me that he had been in touch with Mr Thompson after the last hearing had postponed. He stated that he had communicated through Marcia Frances who was his colleague and friend.

6. In respect of Mr Henry, Mr John Neckles told me that his brother Francis Neckles had spoken to Mr Henry after the last hearing.

7. At the outset of the hearing I was presented with a hearing bundle, in 2

volumes, prepared by the Respondents. I also had a skeleton arguments from Mr Bailey and from Mr John Neckles. As I needed to read a selection of documents I suggested that whilst I did so Mr John Neckles should make enquiries as to whether either of his clients intended to attend the hearing. Mr Henry appeared later as a consequence of being telephoned.

8. In his skeleton argument Mr Bailey outlined the applications made on behalf of the Respondents as follows:

   8.1. He argued that the conduct of the claims was such that the ordinary threshold for an order of costs was made out; and

   8.2. He invited me to find that Mr John Neckles was acting for both Claimants for reward and that in the circumstances he could not avail himself of the exception made for pro-bono representatives for the purpose of any application for wasted costs; and

   8.3. He invited me to conclude that Mr John Neckles' conduct was such that it justified a wasted costs order; and

   8.4. As an alternative to a wasted costs order, I should find that Mr John Neckles was in fact bringing these claims on his own behalf as part of a lengthy vendetta against the Respondents and others and that he should be joined as a party and should pay a costs order on that basis.

9. As the personal liability, if any, of Mr John Neckles turned on two the discreet issues of:

   9.1. whether he fell within the definition of "representative" for the purpose of making a wasted costs order; and

   9.2. whether there was any proper basis for joining him as a party;

   I decided to deal with those two issues before deciding whether the two Claimant's should be ordered to pay costs.

10. The first issue that arose between the parties was who bore the burden of proof where an application for wasted costs was made against a representative. Mr Bailey's position was that where a person sought to avail themselves of an exception to the definition of "representative" they bore the burden of proving that the exception applied. Mr John Neckles took an extreme position. He argued that what was being alleged against him was a criminal offence under the **Compensation Act 2006**. He said that if that was the case it was for the Respondent to show that he was acting for profit to the criminal standard "beyond reasonable doubt".

11. With the agreement of the parties I decided that I should resolve this issue at the outset. The issue concerned the interpretation of rule 80 of Schedule 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**. That reads as follows (with emphasis added):

   "80 When a wasted costs order may be made

   (1) A Tribunal may make a wasted costs order against a representative in

favour of any party ('the receiving party') where that party has incurred costs—

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

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

Costs so incurred are described as 'wasted costs'.

(2) 'Representative' means a party's legal or other representative or any employee of such representative, but it does not include a representative who is not acting in pursuit of profit with regard to the proceedings. A person acting on a contingency or conditional fee arrangement is considered to be acting in pursuit of profit.

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

12. I cannot accept the argument made by Mr John Neckles that the burden of proof is on the respondent and that the standard is the criminal standard. The **Compensation Act 2006** requires certain individuals who act for Claimant's in employment tribunals to be authorised by the Ministry of Justice (See Section 4 & 5). Section 6 provides for exceptions to be made and, by the **Compensation (Exemptions) Order 2007 (SI 2007/209).** An exception is made for Independent Trade Unions and not for profit organisations. Acting without authorisation is a criminal offence (see Section 7).

13. An assertion in civil proceedings of facts that amount to criminal offence does not mean that the criminal standard applies. There is only one standard of proof in civil claims and that is the balance of probabilities – whether something is more likely than not, ***Secretary of State for the Home Department v Rehman*** **[2001] UKHL 47**.

14. It seems to me that where a person makes an application for a wasted costs order they must bear an initial burden in establishing that the person against whom the application is directed is "a representative". However, as that person is best placed to know whether they are acting for profit or not, it seems to me that once the matter is properly in issue, they would bear the burden of establishing the terms upon which they have undertaken the representation. I am reinforced in that view by the words in Rule 80(2) that refer to contingency and conditional fees. It cannot be the case that the Applicant for wasted costs should have to prove the basis upon which it is said the other party is acting for profit.

15. I therefore conclude that the Respondents in this case must discharge an evidential burden of showing that Mr John Neckles acted in these cases "in pursuit of profit" if the matter is properly in issue then the Mr John Neckles bears the burden of showing the terms upon which he acts.

16. Mr John Neckles had in these proceedings presented himself as an officer of the PTSC Union. That Union is registered as a trade union by the Certification Officer for the purposes of Section 2 of the **Trade Union & Labour Relations (Consolidation) Act 1992**. The effect of registration is that it provides evidence that the organisation is a trade union. Mr Bailey accepted that, in general, trade unions would not act in proceedings on behalf of their members "in pursuit of profit". The issue before me was whether I would find that Mr John Neckles was acting in pursuit of profit in these 2 cases.

17. I invited Mr Bailey to outline the basis of his application. Mr Bailey asked me to have regard to the pages of the PTSC website on which John Neckles states that he has been involved in a large number of cases many, but not all, against bus companies. He further took me to a list of cases where Mr John Neckles had been a representative since the decisions have been posted publically on the government website. He argued that this must be what Mr John Neckles does for a living. In support of that contention he took me to the annual return for the PTSC which records that the union has no employees.

18. Mr Bailey then relied upon a reference in the first instance decision of Mr M ***Gnahoua v Abellio London Limited Case*** **No 2303661/2015** where it was said that in another case brought by Mr Francis Neckles, a costs order had been made both against Francis Neckles and John Neckles when it was held there had been falsification of a witness statement. It is said that it is implicit that that could only have been a wasted costs order and carried with it the implication that John Neckles was "acting for profit".

19. Mr John Neckles said that he had been in receipt of state benefits since 1996. He said that he had been unable to find work since he felt that he was blacklisted as an employee for his trade union activities. He said that he had never charged anybody for his representation and nor did the PTSC. He denied that he had ever been made the subject of a wasted costs order.

20. In the course of Mr John Neckles speaking Mr Bailey interjected to ask whether it was seriously Mr John Neckles' contention that he had never asked for money from the people he had represented. It was plain that Mr Bailey had in the course of his work personally heard a client or somebody else assert to the contrary. Very properly Mr Bailey recognised that his position as advocate precluded him giving evidence. I have therefore disregarded this matter although, given that I consider the matter to be finely balanced, evidence such as this may have resulted in a different outcome.

21. I agree with Mr Bailey that Mr John Neckles is a regular advocate before the Tribunals and that this must take up a considerable amount of his time. He has done so in the past prior to the formation of the PTSC. Since the formation of the PTSC this has been done ostensibly as part of the work of a trade union representative. That is the way Mr John Neckles is held out on the PTSC web pages I was shown. It is unsurprising that, if this is his role, he does appear regularly before tribunals.

22. It is somewhat surprising that Mr John Neckles, on his account, does a vast amount of work without reward. I have to take into account the campaigning nature of his trade union role. I also have regard to the suggestion, which from the submissions and other cases I have seen appears to have real substance,

that both Francis and John Neckles have a real animus against many of the bus companies in the London area. This would provide some motive for regularly taking on these cases.

23. There was not before me any direct evidence that Mr John Neckles had received any payment nor that he anticipated doing so from Mr Henry or Mr Thompson. ***Gnahoua*** was of little assistance to me as the comments of one judge about the conclusions of another provide little assistance to the issue that I had to decide. That was whether Mr John Neckles had agreed to act in pursuit of profit. Even if he had in another case, and I had no evidence of whether the issue was raised, it would only provide indirect support for the Respondents case in the present claim.

24. I consider that the Respondents are, in effect, asking me to act on mere suspicion, a gut reaction that there must be some financial reason why Mr John Neckles takes on all the cases he does. The Respondents may be right but I can only act upon evidence. At present there is simply insufficient evidence to support an inference that Mr John Neckles was acting for profit in these two cases. Wherever the burden of proof lies my conclusion would be the same.

25. Mr Bailey put forward an alternative case. He said that the words "pursuit of profit" were sufficiently wide to cover any form of gain and were not limited to monetary gain. He argued that it was clear that Mr John Neckles was acting in pursuit of his own agenda which he characterised as a vendetta. He argues that sort of success or purpose is or could be considers a "profit".

26. I cannot accept Mr Bailey's argument. On the evidence before me I would agree that Mr John Neckles is actively campaigning against various bus companies. That is evident both from the volume of claims and the manner in which they have been pursued. It is also clear from the number of decisions cited before me, including ***Gnahoua***, that the issue of the Neckles brothers being entitled to represent PTSC members at disciplinary hearings had the hallmarks of a campaign.

27. I consider that the purpose of excluding from the expression "representative" those people who are not acting in pursuit of profit is aimed at encouraging or permitting people in the voluntary sector or merely friends and family from acting on behalf a party before employment tribunal without fear of being made to pay the other party's costs. It seems to me that many perfectly respectable voluntary groups could be said to be acting for campaigning motives. If an examination of the bono fides of such motivation would be necessary to ascertain whether there was an element of "profit" the rule would be unworkable. I see no reason to interpret the expression "in pursuit of profit" in any other way than its usual meaning and that is obtaining financial reward.

28. Mr Bailey then put a further alternative position. He argued that if I were against him on the issue of "pursuit of profit", ruling out any reliance on rule 80, I should exercise my power under rule 34 to join Mr John Neckles to the proceedings as a party. I could then consider the exercise of the ordinary power to make a costs order under rule 76.

29. Mr Bailey developed his interesting argument as follows. He argued that rule 34 gives a broad permissive power to join any person into proceedings were

there is an issue between that person and any of the existing parties. He argued that his application for costs gave rise to such an "issue" and that it would be a proper exercise of my discretion to join Mr John Neckles as a party for the determination of that issue. He argued that I should interpret rule 34 in the same way as permitted by Section 51 of the **Senior Courts Act 1981** and CPR r46.2 of the **Civil Procedure Rules 1998** (as amended). He argued that it would be appropriate to do so in circumstances where there individual claimants in these cases were merely being used as a vehicle for a vendetta waged by Mr John Neckles against his clients.

30. The Tribunal has a power to make a costs order against a person where they behave vexatiously. Pursuing a claim for a collateral purpose could well be catagorised as vexatious conduct. However, the rules provide only for such an order to be made against a party.

31. I cannot accept Mr Bailey's argument. The Employment Tribunal is a creature of statute. It only has the powers conferred upon it by parliament. The rules of procedure in the civil courts do not apply in the Tribunal but may provide some indication of how the tribunal's own rules should be applied see ***Harris v Academies Enterprise Trust & Ors*** **UKEAT/0097/14/KN; UKEAT/0102/14/KN**. The Tribunal does not have the broad permissive power bestowed by Section 51 to order a non-party to pay costs. What Mr Bailey invites me to do is to use rule 34 as a backdoor route to achieve the same end.

32. I consider that rule 34 is limited to joining in a party to determine an issue *"falling within the jurisdiction of the Tribunal"*. I do not think that rule 34 can be used to create a jurisdiction that does not otherwise exist, that is the ability to make a costs order against a third party. I therefore reject Mr Bailey's argument without determining whether as a matter of fact Mr John Neckles has acted in the manner complained of. I do have some sympathy with the suggestion that Mr John Neckles has, in these proceedings and in other cases I have been referred to, taken points that he really ought to know are hopeless (his assertion that there is a free standing right not to be unfairly dismissed under the social chapter being a good example). He has doggedly pursued claims on behalf of PTSU members under Section 10 of the Employment Relations Act 1999 despite his clients receiving nominal damages on more than one occasion. If I had decided this point in Mr Bailey's favour there would have been some risk of a finding that there has been vexatious conduct but I do not have to decide that matter. Mr John Neckles told me that he intended to issue proceedings in the High Court to deal with the ongoing ability of the PTSU to represent its members at disciplinary and grievance meetings. It seems to me that that may well be an appropriate means of resolving what appears to be a degree of industrial warfare that must be disruptive to all parties.

33. What remained for me to decide were costs applications made under rules 74-78 of Schedule 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** against each of the Claimants.

34. At this stage in the proceedings Mr John Neckles informed me that he had not been able to contact Mr Thompson and that he did not consider that he was able to represent him. Mr Bailey pointed out that Mr Thompson is listed as an officer of the PTSU. Mr John Neckles said that this was no longer the case and that he was just an "Honorary Member". He claimed to have obtained a mobile

telephone number for Mr Thompson by speaking to a relative. All this was in very stark contrast to Mr John Neckles' assertion at the outset of the hearing that he acted upon the instructions of both claimants who were happy with his representation. I had a strong impression, which I conveyed to Mr John Neckles, that he was shifting his position. Mr John Neckles then suggested that I had taken against him and his clients from the outset of the proceedings. I pointed out that at that stage I had decided the majority of the points in issue in his favour. There was no application for me to recuse myself and if there had been I would not have acceded to it.

35. I was satisfied that Mr Thompson had been aware of the earlier hearing and had been informed by Mr John Neckles of the adjourned hearing date. I was satisfied that the decision not to attend the hearing was a conscious decision. I therefore decided that it was in the interests of justice to proceed in the absence of Mr Thompson.

The relevant law

36. The jurisdiction to make an order of costs is found in schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) 2013. Rule 76 provides:

> *"When a costs order or a preparation time order may or shall be made*
>
> *(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—*
>
> *(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted;*
>
> *(b) any claim or response had no reasonable prospect of success*
>
> *(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.*
>
> *(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party"*

37. There is essentially a 2 (or perhaps 3) stage test. Other than in defined circumstances, before there is any jurisdiction to award costs at all the tribunal must be satisfied that one or more of the threshold conditions set out in Rule 76(1) or (2) has been satisfied. If, and only if, it has should the tribunal move on to consider whether, in the circumstances of the particular case, it is right to make a costs order. Finally, it is necessary to decide what amount, if any to award. Notwithstanding the existence of the jurisdiction to award costs the exercise of that jurisdiction remains exceptional ***Gee v Shell Ltd*** **[2003] IRLR 82**.

38. Harvey on Industrial Relations and Employment law contains the following explanation of what is meant by "vexatious conduct":

Within the context of the employment tribunal rules, the classic description of vexatious conduct is that of Sir Hugh Griffiths in ET Marler Ltd v Robertson [1974] ICR 72 at 76, NIRC:

"If an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive, he acts vexatiously, and likewise abuses the procedure. In such cases the tribunal may and doubtless usually will award costs against the employee …"

A more modern, and somewhat wider, meaning of 'vexatious' was given by Lord Bingham CJ in A-G v Barker [2000] 1 FLR 759, [2000] 2 FCR 1, at para 19, in the context of an application for a civil proceedings order under s 42 of the Senior Courts Act 1981. Under this formulation, the emphasis is less on motive and more on the effect of the conduct in question:

'"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."

39. There is probably no clear boundary between conduct which is unreasonable and conduct which is vexatious and there will be cases where the two definitions overlap to a substantial degree.

40. Withdrawing a case, even at a late stage will not necessarily amount to unreasonable conduct. Withdrawal, upon reasonably recognising that the prospects do not justify proceeding may be entirely reasonable. Much will turn on the circumstances and the reasons given for a late change of heart ***McPherson v BNP Paribas (London Branch)*** **[2004] IRLR 558.**

41. Some greater latitude may be appropriate depending upon the status of any representative. In ***AQ Ltd v Holden*** **[2012] IRLR 648** HH Judge Richardson held that where a person acts in person the following principles need to be born in mind:

"The threshold tests in rule 40(3) are the same whether a litigant is or is not professionally represented. The application of those tests, however, must take into account whether a litigant is professionally represented. A tribunal cannot and should not judge a litigant in person by the standards of a professional representative. Lay people are entitled to represent themselves in tribunals and, since legal aid is not available and they will not usually recover costs if they are successful, it is inevitable that many lay people will represent themselves. Justice requires that tribunals do not apply professional standards to such people, who may be involved in legal proceedings for the only time in their life. They are likely to lack the objectivity and knowledge of law and practice brought by a professional legal adviser. Further, even if the threshold tests for an order for costs are met, the tribunal has discretion whether to make an order. This discretion

will be exercised having regard to all the circumstances. It is not irrelevant that a lay person may have brought proceedings with little or no access to specialist help and advice. This is not to say that lay people are immune from orders for costs: far from it, as case law makes clear. Some litigants in person are found to have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity."

42. Where a tribunal does decide to make a costs order it is not necessary to show that the costs were caused by the conduct complained of but causation should be a material factor in the exercise of any discretion ***Barnsley MBC v Yerrakalva*** **[2011] EWCA Civ 1255, [2012] IRLR 788, [2012] ICR 420.**

43. Rule 84 of the procedure rules provides that, when deciding whether to make a costs order, and if so in what amount, the Tribunal may have regard to the means of the paying party. The rule is permissive rather than mandatory although it would be an unusual case where the means of the paying party were not a material factor. In ***Vaughan v London Borough of Lewisham*** **[2013] IRLR 713** the Employment Appeal Tribunal, following ***Arrowsmith v Nottingham Trent University*** **[2012] ICR 159** held that an assessment of means was not necessarily limited to the ability to pay at the time that the order is made but can have regard to the future prospects of the paying party.

Mr Henry

44. The procedural history of Mr Henry's case is as follows:

44.1. Mr Henry issued proceedings only against Abellio London Limited. That company asserted that there had been a TUPE Transfer and that liability had passed to London General Transport Services Limited and at a preliminary hearing permission was given to join them as a party; and

44.2. Amended Particulars of Claim were served on 15 August 2015 they claimed arrears of sick pay and race discrimination

44.3. The Second Respondent sought further particulars of those Amended Particulars of Claim and these were ordered by the Tribunal

44.4. When the matter was properly particularised London General Transport Services Limited conceded the wages claim leaving only the race discrimination claim

44.5. In the run up to the trial of the race claim listed for 10-12 May 2017 the Respondent had prepared a trial bundle and was pro-actively taking steps to progress the matter to trial. Mr Henry, through Mr John Neckles took no active part in the proceedings throughout February and March of 2017 despite being chased and reminders being sent by the Respondent.

44.6. On 18 April 2017 the Employment Tribunal wrote to the Claimant making an "Unless Order" in respect of the hearing fee.

44.7. Between 25 and 28 April 2017 the Respondent wrote to the Mr Henry and the Tribunal raising the failure to progress the claim.

44.8. On 28 April 2017 the claim was struck out because Mr Henry had not

paid the hearing fee.

45. Mr Bailey on behalf of the Respondent maintained that the race discrimination case was hopeless and should have been known to be so. He sought the Respondent's costs for the period beyond which the Respondent conceded the wages claim.

46. Mr John Neckles in response suggested that it was the Respondent's case that was misconceived. He argued that TUPE did not transfer the liability for a pre-existing discrimination claim. He appeared to say that a transferee could never rely upon evidence given on behalf of a transferor. He is plainly wrong about both of those matters which, in any event are irrelevant to the issue of Mr Henry's conduct.

47. Mr John Neckles then went on to argue that the reason that the claim was never heard was the fee regime which has subsequently been held to be unlawful. That submission is correct but does not mean that I am unable to determine an application for costs relating to the conduct of the proceedings prior to them being struckout.

48. As set out above the first question is whether or not there has been any conduct which means that the threshold for the exercise of any discretion has been reached. I cannot accept Mr Bailey's argument that I have sufficient material to determine that the race case was hopeless ("misconceived"). For all of the same reasons that apply to strike out applications, it is usually impossible to determine a discrimination case other than by hearing evidence. That is the case here. The case was not heard because Mr Henry did not pay a fee which was unlawfully imposed. I am unable to say whether the case was "misconceived".

49. However, in the run up to the final hearing Mr Henry gave no indication that he could not, or would not, pay that fee. He had failed to comply with the orders of the Tribunal for the exchange of witness statements and that caused the Respondent to have to write on several occasions. Those letters would have been unnecessary had Mr Henry either complied or informed the Respondent that he was considering his position. He did neither of those things. Breaching an order of the Tribunal is sufficient to trigger the threshold by itself but in any event I find that effectively ignoring the Respondent for many weeks would in any event be unreasonable conduct I therefore conclude that I have a discretion whether to make an award of costs.

50. Not every breach of a tribunal's orders should attract an award of costs. However, here I find that Mr Henry, through Mr John Neckles had failed to properly engage with the proceedings over a period of months. Ultimately that caused the Solicitor for the Respondent to write a lengthy letter to the Employment Tribunal on 21 April 2017 complaining that there had been no progress in the matter. Having reviewed the correspondence I find that those complaints were properly made.

51. I do not have any regard to the failure to pay a fee but make my decision only on the basis that there was a wholly unreasonable failure to exchange witness statements. I consider that it is right to make a costs order in this case.

52. Having explored his means I note that Mr Henry is of modest means. I consider

that the direct costs caused by the failure I have held to be culpable were the series of letters written by the Respondent chasing Mr John Neckles for the exchange of witness statements.

53. In the circumstances I find that the appropriate order is that Mr Henry should pay the Respondent £300 towards its legal costs.

Mr Thompson

54. Mr Bailey, in his skeleton argument took me through the procedural chronology of this case and referred me to the material orders and correspondence. I shall not repeat that history but I have accepted the history as set out in paragraphs 13 to 22 of the skeleton argument. The following is a brief summary of the matter:

    54.1. What that history shows was there was a lamentable failure to properly set out Mr Thompson's case properly in the first instance. An early preliminary hearing held on 15 October 2015 was abandoned when Mr John Neckles had to attend Brixton Police station before the hearing had concluded.

    54.2. The case concerned allegations where details of comparators was essential. Despite being asked to do so details of comparators were only provided one month before the date initially fixed for a final hearing, only in compliance with an unless order made by the tribunal and then 14 comparators were named. That would obviously involve the Respondent in a considerable amount of work and the hearing date in September 2016 had to be abandoned.

    54.3. The matter was listed again for 10-13 April 2017. The Respondent wrote to Mr Thompson putting him on notice that it took the view that his claim was misconceived and that if successful it would seek its costs.

    54.4. In the run up to the final hearing the Respondent's solicitor wrote several letters seeking to agree to exchange witness statements.

    54.5. On 7 April 2017 there was a late application by Mr John Neckles to postpone the hearing. The basis of this was that he had another hearing to attend. He also suggested that the matter was not ready to proceed which was possibly correct but if true was entirely the fault of the Claimant's side.

    54.6. Mr Thompson then offered to withdraw his case if no application was made for costs. The Respondent declined but Mr Thompson withdrew his claim anyway.

55. Mr Bailey urged me to find that the case was without any merit at all. Again, this is a case of discrimination or quasi discrimination. Absent some knock-out blow it is impossible to assess on the papers. I cannot infer from the fact that a case was withdrawn that it was necessarily hopeless.

56. I was also asked to find that the claim was vexatious. Much of the claim concerned treatment associated with the Neckles brothers and the PTSU. Given that there is plainly a difference of views between the bus companies

and the Neckles brothers and the PTSU there is clearly some possibility that PTSU members will assert that they have been treated less favourably on trade union grounds. Just like in a discrimination case such matters are impossible to determine on the papers. Whilst some PTSU members have received nominal awards in respect of Section 10 claims it does not follow that all such cases are hopeless. I do not have any sufficient material upon which I could infer that the claims were vexations. I would infer that they form part of a campaign to obtain rights for the PTSU but that cannot be catagorised as vexatious per-se.

57. I do not know why Mr Thompson decided to withdraw his case in April 2016. I can infer that he did not believe that his case would succeed. I do not know what brought him to that view. It may well have been that the unavailability of Mr John Neckles placed him in some difficulties. Overall I do not have any sufficient basis for concluding that the bringing of the second claim was misconceived ab initio or that Mr Thompson ought to have realized it was misconceived at any earlier stage than the date it was withdrawn.

58. I turn then to the conduct of the proceedings. It was lamentable. There was a failure to set out a properly though through case and then the September 2016 hearing was effectively sabotaged by the late provision of comparators.

59. In common with the case of Mr Henry there followed a failure to prepare the matter for a final hearing and in particular a failure to exchange witness statements. These failures involved breaching the orders of the Tribunal.

60. I consider that it is impossible that Mr John Neckles did not know that he had professional commitments that clashed. Tribunal hearings of 4 days are not listed only weeks before a hearing. Seeking an adjournment at such a late stage on that basis was wholly unreasonable. By that stage the Respondent had made arrangements to bring in a witness from Ireland and had incurred the costs associated with that. This failure followed on from the attendance at a preliminary hearing when Mr John Neckles knew he had to be elsewhere. Such conduct is wholly unreasonable and particularly so for a person who regularly appears before an employment tribunal.

61. Overall Mr Thompson's conduct of these proceedings, of which Mr John Neckles had conduct, was utterly unreasonable. I consider that in this regard the threshold condition is passed and that I should exercise my discretion to make a costs order.

62. I am prepared to assume in the absence of any evidence that Mr Thompson is of modest means.

63. The majority of the failings that I have found culpable relate to the second claim. Given that I have found that I am unable to assume what the outcome of the second proceedings would have been had they not been withdrawn, the proper approach is for me to attempt to arrive at a figure that corresponds with the additional costs that have been incurred by the unreasonable conduct of the proceedings.

64. I have used a somewhat broad brush and come to the conclusion that Mr Thompson should be ordered to pay £1750 in respect of the general unreasonable conduct but that in addition he should be ordered to pay £500 in

respect of Counsel's brief fee in respect of the preliminary hearing of 15 October 2015.

65. Mr Thompson is therefore ordered to pay London Central Bus Company Limited the sum of £2,250.

Employment Judge John Crosfill

Date 29 January 2018