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Costs

SUMMARY

(1) Costs are not usually awarded in tribunals.

(2) Tribunals have the power to order costs not only against a party but also their representative ('wasted costs') and also in favour of in-house representatives and litigants in person ('preparation time orders').

(3) A tribunal can award either a fixed sum that is either agreed or up to a maximum of £10,000 or the costs can be determined, or assessed, in the county court.

A. INTRODUCTION

12.01 An important distinction between proceedings in the courts and those in the tribunal is that the tribunal's powers to award costs to a successful party are very limited. In a civil claim the losing party will invariably have to pay the winner's costs; in the tribunal this will usually not be the case, and each side will bear its own costs. It is important therefore to assess the likely costs of pursuing or defending any claim at an early stage with this in mind.

12.02 Statistically, costs have tended to be awarded more frequently as the tribunal rules have changed and the amounts of orders made have also increased over the years. The jurisdiction to award costs under ETR 1993 was not frequently exercised. In the year 2000/01 there were 247 awards of costs out of 129,725 cases disposed of. The average amount of costs awarded was £295 (ETS Annual Report 2000/01). By the time of the 2003 Annual Report 126,793 cases were disposed of and there were 976 costs orders. The average costs awarded had risen to £1,859 (Annual Report 2003/04).

12.03 By the time of the 2005/06 Annual Report there were 432 costs orders made and the average award made was £2,256 (although in the 2007/08 Report the average award had fallen to £2,095). The average award for 2009–2010 was £2,288 so it is difficult to identify particular trends.

12.04 Tribunals may sometimes indicate to a party during the hearing that they are at risk of costs. In *Gee v Shell* [2003] IRLR 82, the Court of Appeal held 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. The court recognized that there is a line to be drawn between 'robust, effective and fair case management', on the one hand, and inappropriate pressure, on the other. In deciding which of the two to choose, a number of factors must be considered, such as the circumstances in which the warning was given, the strength of the case against the party, the nature and extent of the warning (for example, whether it referred to the possibility of a summary or a detailed assessment being made), and the manner in which it was given.

B. OVERVIEW

12.05 Costs can be made in the following circumstances:

(a) an adjournment occasioned by a failure to adduce evidence to deal with a request for reinstatement or re-engagement (ETR 2004, r 39(1));
(b) vexatious, unreasonable, etc conduct (see para 12.14 below) (ETR 2004, r 40(3));
(c) failing to comply with an order or Practice Direction (ETR 2004, r 40(4));
(d) where a party has been ordered to pay a deposit as a condition of being permitted to continue to participate in the proceedings and the tribunal or judge has found against that party (ETR 2004, r 47(1));
(e) where a claim form or response has not been accepted by the tribunal, a party may still be awarded costs in respect of his participation in the proceedings (ETR 2004, r 38(4)). This rule applies both to the situation where a respondent has put in a response but has not had it accepted by the tribunal and to the situation where a respondent has not presented any response at all. In each situation a tribunal only has power to make an order for costs against or in favour of such a respondent in relation to the conduct of a part of the proceedings in which he is entitled to take part (ie under any of the exceptions in r 9 (for example, applying for a review) and in which he has actually taken part (*Sutton v The Ranch Ltd* [2006] ICR 1170, EAT)).

12.06 Preparation time orders (PTOs) can be made in similar circumstances where the party has not been legally represented at, for example, the hearing (see further para 12.40). Wasted costs orders may be made against a party's legal representatives in certain circumstances (see further para 12.46).

12.07 A tribunal cannot make a costs order and a PTO in favour of the same party in the same proceedings (r 46(1)). If a tribunal makes a costs order or a PTO before the proceedings are determined it can decide to make the award for costs or preparation time after the proceedings have been determined—effectively reserving the final determination on costs (r 46(2)).

C. KEY TERMS

12.08 'Paying party' means the party against whom an order for costs is made. 'Receiving party' means the party in favour of whom costs are made. A 'costs order' is known in Scotland as an 'expenses order'. It can be made only when the receiving party is legally represented (r 38(2), (5)). Where the party is unrepresented, a PTO may be made.

D. TIMING OF ORDERS

12.09 An order can be made at any stage in the proceedings. An application which is made at the end of a hearing can either be oral or in writing. In each case it must be made within 28 days of an oral judgment or the date on which any reserved judgment was sent to the parties (r 38(7)) (if later than 28 days the application can only be considered if it is in the interests of justice to do so). The Secretary to the tribunal must send notice to the party against whom an order is sought allowing them the opportunity to give reasons as to why the order should not be made. There is no requirement to send a notice where the party has had the opportunity to respond orally.

12.10 Where a tribunal makes a costs order or PTO it should provide written reasons for doing so if a request for written reasons is received within 14 days of the date of the order.

E. WHEN ORDERS MUST BE MADE

12.11 An order for costs (as opposed to a PTO) must be made against a respondent in an unfair dismissal case where the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than seven days before the hearing and the respondent has obtained an adjournment based on its inability to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or comparable or suitable employment. The respondent can avoid such an order if the request was made less than seven days before the hearing and it can show a 'special reason' as to why it could not adduce the evidence. In many cases claimants will tick the box on the claim form indicating that they are seeking reinstatement/re-engagement. It is difficult to envisage circumstances in which a respondent will not have had at least seven days' notice as the schedule of loss and/or witness statements may also contain such an indication.

12.12 A party who has paid a deposit as a condition of being permitted to continue proceedings (under r 20) will have to pay costs if the tribunal finds against him and the tribunal considers that he has: (1) conducted the proceedings unreasonably in persisting in having the matter determined, and (2) the grounds on which he has failed are substantially the same as those recorded in the order for considering that the party's contentions had little reasonable prospect of success. Rule 47(1) provides, however, that this order can only be made provided no other order for costs has been made in the proceedings. The deposit will be forfeited as part of this costs order: if there is an excess it will be refunded.

F. DISCRETIONARY ORDERS

12.13 The tribunal has a discretion whether to order costs where there has been an adjournment of a hearing or pre-hearing review. The order will be against the party who has caused the adjournment.

12.14 There is also the discretion to order costs against a party who has in bringing the proceedings acted vexatiously, abusively, disruptively, or otherwise unreasonably. Costs may be ordered against the paying party where the bringing or conducting of the proceedings has been misconceived. Costs may be ordered against the party or his representative where they have behaved vexatiously, abusively, disruptively, or otherwise unreasonably. In *Health Development Agency v Parish* [2004] IRLR 550, the EAT held that the conduct of a party prior to proceedings, or unrelated to proceedings, cannot form the basis of an order for costs (see also *Davidson v John Calder (Publishers) Ltd and Calder Educational Trust Ltd* [1985] IRLR 97—prior conduct can be relevant to an assessment of whether it was reasonable to bring or defend the claim, but it cannot be treated as the act of vexatiousness or unreasonableness upon which an award of costs

can be founded). However, in *McPherson v BNP Paribas* [2004] IRLR 558, the Court of Appeal held that there is no requirement for the causal link between the party's unreasonable behaviour and the costs incurred by the receiving party. The tribunal should have regard to the nature, gravity, and effect of the unreasonable conduct as factors relevant to the exercise of its discretion but there is no need to link the conduct to any specific loss (this was followed in *Salinas v Bear Stearns Holdings Inc* [2005] ICR 1117).

Vexatious

12.15 The formulation used to describe conduct attracting an award of costs in the rules before 1993 was 'frivolous and vexatious' and the classic description of this was given by Sir Hugh Griffiths in *Marler (ET) Ltd v Robertson* [1974] ICR 72, 76:

> If the employee knows that there is no substance in his claim and that it is bound to fail, or if the claim is on the face of it so manifestly misconceived that it can have no prospect of success, it may be deemed frivolous and an abuse of the procedure of the tribunal to pursue it. 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 or acts vexatiously and likewise abuses the procedure [his action is vexatious].

Misconceived

12.16 A claim or response that is misconceived 'includes having no reasonable prospect of success' (2004 Regulations, reg 2). The definition is not exhaustive and clearly leaves the tribunal with a wide discretion.

12.17 The categorization extends not only to a party who knows that there is no merit in the case but also to one who ought to have known that the case had no merit. In *Cartiers Superfoods Ltd v Laws* [1978] IRLR 315, the EAT held that a tribunal should inquire as to what a party knew or ought to have known had he gone about the matters sensibly. The question of whether a party knew or ought to have known that a claim was without merit should be considered throughout the hearing and not just at the time of commencement. So, while it might be reasonable to commence proceedings, it may later become clear that they are misconceived. In *Beynon v Scadden* [1999] IRLR 700, the EAT suggested that it may be unreasonable conduct to fail to seek further information, written answers, or disclosure in order to assess the merits of the case (at para 28). In that case the EAT also said (at para 20):

> one does not necessarily judge a party who has had the benefit of advice as one would a lay person left only to his own perhaps inadequate devices.

12.18 The fact that a party has sought legal advice is a relevant factor but not determinative of itself. The tribunal ought, however, to be wary of the dangers of hindsight. The fact that a party loses before the tribunal does not mean that the case was misconceived or vexatious. What becomes clear to the parties, for example after cross-examination, at the end of the proceedings may not have been clear at the start.

12.19 A judge may also order costs against a party who has not complied with an order or a Practice Direction (r 40(4)) (see Chapter 6).

Collateral or improper purposes

12.20 In *Beynon* above, the employees pursued a TUPE claim which the union knew or ought to have known had no prospect of success. One reason for awarding costs was that the claims were proceeded with for the collateral purpose of forcing the employer to recognize the union. Similarly, in *Kovacs v Queen Mary & Westfield College* [2002] IRLR 414, the tribunal awarded costs on the basis, amongst other things, that there was no real claim against the respondent and they had been dragged in as part of a vendetta against the principal witness.

Otherwise unreasonably

12.21 Even if a party's case is meritorious, the way in which it is handled by the party or his advisers may be unreasonable. Late disclosure of documents or late withdrawals often form the basis of an application for costs under this heading. The rule also covers conduct during the hearing or outside it including intimidating witnesses.

12.22 When considering whether an award of costs should be made against a claimant who withdraws his claim, the crucial question is whether he has acted unreasonably in the conduct of the proceedings, not whether the withdrawal of the claim is itself unreasonable (*McPherson v BNP Paribas* [2004] IRLR 558). Mummery LJ at para 28 gave this guidance:

> [it would be] legally erroneous if, acting on a misconceived analogy with the CPR, tribunals took the line that it was unreasonable conduct for employment tribunal claimants to withdraw claims and that they should accordingly be made liable to pay all the costs of the proceedings.

12.23 In the next paragraph, however, he recognized the equal weight to be given to the principle of discouraging speculative claims with a hope of a settlement.

12.24 Withdrawal is not in itself to be equated with unreasonableness and in each case it must be shown that the claimant's conduct of the proceedings has been unreasonable. This is determined by looking at the conduct overall. If it is adjudged to have been unreasonable, then costs can be awarded but only in respect of the period after the conduct became unreasonable. However, the receiving party does not have to show that any particular item of expense after that was actually caused by the unreasonable conduct (*McPherson*, above and *Yerrakalva v Barnsley MBC* UKEAT/0231/10/RN). The EAT in *G4S Services v Rondeau* UKEAT/0207/09/DA held that a failure by a party to consider a reasonable settlement offer, even if just by making a reasonable counter-offer, can amount to unreasonable conduct and justify a costs order. The claimant was resisting the appeal, and settled just before the hearing, accepting an offer he had turned down some months previously. The EAT held that not accepting the initial offer, and/or failing to make a reasonable counter-offer, was unreasonable conduct which justified a costs award, even in the EAT. Burton J observed that a party is entitled to resist an appeal unless and until there is an outcome or an offer which requires consideration, and described making and considering settlement offers as 'part and parcel of any litigation proceedings'. In *Daleside Nursing Home Limited v Mathew* UKEAT/0519/08 the tribunal found that the claim was based on a lie but declined to make an order for costs. The EAT held that having made such a finding the tribunal should have gone on to conclude that the claimant had acted unreasonably and order costs (see also *Dundee Canmore Housing Association v Donaldson* UKEATS/0014/09 in which the EAT held that it was perverse for the tribunal to have refused to award costs where the claimant's assertions that she had not disclosed details of her compromise agreement in breach of a confidentiality clause were false). Similarly in *Arrowsmith v Nottingham Trent University* [2011] EWCA Civ 797 the Court of Appeal held that an employment tribunal had correctly considered on the facts that a claimant had conducted her claim for sex discrimination unreasonably by relying on untrue assertions that job interviewers knew about her pregnancy when deciding not to offer her the job, and had properly exercised its discretion to order costs against her.

12.25 Historically the position has been that it is not unreasonable to bring a claim simply for a declaration of unfair dismissal even where the employer offered to pay the maximum award (*Telephone Information Services Ltd v Wilkinson* [1991] IRLR 148). However the Scottish EAT in *Nicolson Highlandwear Ltd v Nicolson* UKEATS/0058/09 appears to have held differently although Telephone Information Services was not cited. Admittedly the facts of *Nicolson* are extreme. The employer applied for costs based on Mr Nicolson's unreasonable behaviour in bringing the case. He had (among other things) defrauded them through false accounting, run his own business out of the employer's premises, and diverted customers to

that business. His claim for unfair dismissal was successful as the employer had not followed a fair procedure, but the tribunal awarded him no compensation because the dismissal was 100 per cent attributable to his own fraudulent conduct. The tribunal refused to order costs, pointing out, among other things, that Mr Nicolson had not lied to the tribunal (although he had lied to the employer); that he had succeeded in showing that the dismissal was unfair; that claimants are entitled to seek 'simple findings of unfair dismissal' without the objective of compensation; and that unrepresented claimants should not be discouraged from asserting their rights where the applicable law is hard to understand.

12.26 The EAT overturned this decision as perverse as Mr Nicolson had persisted in a claim in which he knew that he had acted dishonestly, and that this had caused his dismissal. That he was successful in all or part of his claim did not necessarily mean it was not unreasonable of him to bring it. The employment judge was also wrong to say it was open to pursue a claim purely for the purpose of obtaining a declaration of unfair dismissal. Unlike in a discrimination case, a tribunal has no power to make such a declaration in an unfair dismissal case; its powers are limited to awarding remedies. Different principles may well apply in discrimination cases as it is arguable that there is a public interest in those claims being aired (although that principle cannot be limitless—see *Kovacs* for example).

G. *CALDERBANK* LETTERS

12.27 In proceedings in the civil courts a winning party who fails to do better than an offer made to him by the losing party will usually expect to pay the losing party's costs from the date of the offer (see generally CPR Part 36). The use of '*Calderbank* letters' is common—an offer to settle without prejudice, save as to costs. The letter is not revealed to the court until the end of the trial. Initially the practice of *Calderbank* letters was not looked upon favourably in tribunals (see Lindsay J in *Monaghan v Close Thornton Solicitors* EAT/3/01). In *Kopel v Safeway Stores plc* [2003] IRLR 753, however, it was held that a failure by a party to beat a *Calderbank* offer will not, by itself, result in an award of costs against him. What must be shown is 'that the conduct of an appellant in rejecting the offer was unreasonable before the rejection becomes a relevant factor in the exercise of its discretion under [r 38]' (at para 18). On the facts of that case, the EAT upheld a tribunal's award of £5,000 costs against the claimant where she had failed in her unfair dismissal and sex discrimination claims, and had not only turned down a 'generous' offer to settle the case but had persisted in alleging breaches of the provisions of the ECHR prohibiting torture and slavery, which the tribunal categorized as 'frankly ludicrous' and 'seriously misconceived'. In the circumstances, the EAT held that the tribunal was entitled to find that the rejection of the offer was unreasonable conduct of the proceedings justifying the award of costs that was made.

12.28 In *Power v Panasonic* EAT/439/04, the EAT again stressed that the rule in *Calderbank v Calderbank* [1976] Fam 93 has no place in the employment tribunal jurisdiction and cited with approval *Kopel v Safeway Stores plc* [2003] IRLR 753, paras 17–18. However, where a party has obstinately pressed for some unreasonably high award despite its excess being pointed out and despite a warning that costs might be asked for against that party if it were persisted in, the tribunal could in appropriate circumstances take the view that that party had conducted the proceedings unreasonably.

H. COSTS AGAINST RESPONDENTS

12.29 In *Cartiers Superfoods Ltd v Laws* [1978] IRLR 315, the EAT stated that great care should be exercised by tribunals before awarding costs against respondents as they must be entitled to defend proceedings. However, the proceedings must still be defended reasonably.

I. AMOUNT

12.30 Where it has been decided to make a costs order against a party, a tribunal or judge may make one of the following orders (see r 41(1)):

(a) an order for a specified sum not exceeding £10,000;
(b) an order for a specified sum agreed by the parties; or
(c) an order that the whole or a specified part of the costs to be determined by way of a detailed assessment in a county court in accordance with the CPR or, in Scotland, as taxed according to such part of the table of fees prescribed for proceedings in the sheriff court as shall be directed by the order. A detailed assessment is where the court will assess whether the amounts claimed as costs are reasonable in relation to the length of time spent on any work and the hourly rate, for example, claimed by a party's representative. See para 12.36.

12.31 The latter two types of order may exceed £10,000. When considering either whether to make an order, or the amount of the order, the tribunal may have regard to the paying party's ability to pay (r 41(2)). This reverses the position under the previous rules where there was no such power, and it had been held that there was no discretion to take means into account (*Kovacs v Queen Mary & Westfield College* [2002] IRLR 414). It is not mandatory to take means into account and it may be that the tribunal cannot, in some circumstances, ascertain what those means are. In *Jilley v Birmingham & Solihull Mental Health NHS Trust* [2008] All ER (D) 35 (Feb) the EAT held that rr 41(1) and (2) taken together were wide enough to allow a tribunal to take account of ability to pay by placing a cap on an award of costs even where it ordered a detailed assessment. If a tribunal was satisfied that a paying party had not been frank as to his means, it might be positively desirable to do so as it might render it unnecessary to go through the expense of a detailed assessment, or assist parties to reach terms of payment. If a tribunal decided not to take ability to pay into account, it had to say why. If it decided to take into account ability to pay, it should set out its findings about ability to pay, state what impact that had had on its decision whether to award costs or on the amount of costs, and explain why. The extent of those means was held to extend to all of the claimant's assets in *Shields Automotive v Greig* UKEATS/0024/10/BI although in that case, because the claimant had given misleading evidence about his assets, the tribunal could properly assess them and therefore it was proper to disregard them.

12.32 Even if means are taken into account, the Court of Appeal in *Kovacs* quoted with approval the principle set out by the tribunal (at 417):

> It does not appear, on the face of the relevant Regulations, that it was intended that poor litigants may misbehave with impunity and without fearing that any significant costs order will be made against them, whereas wealthy ones must behave themselves because otherwise an order will be made.

12.33 In *Walker v Heathrow Refuelling Services Co Ltd* EAT/0366/04 the EAT had to consider its own power to award costs under r 34B(2) of the EAT (Amendment) Rules 2004 which provides that the Appeal Tribunal may have regard to the paying parties' ability to pay when considering the amount of the costs order. The EAT in that case took into account the fact that the claimant was backed by his union when having regard to his ability to pay.

12.34 A costs order includes the legal costs and the allowances paid by the Secretary of State for witnesses' allowances (r 38(1)) and those fees, charges, disbursements, or expenses incurred by or on behalf of a party in the proceedings. Solicitors', counsels', and experts' fees, letter-writing, conferences, and written advice, travelling time, and hearing time are all within this description. In *Verma v Harrogate NHS Trust* 2009 UKEAT 0155 a costs order was made pursuant to dismissal of a 'hopeless' strike out application made by the respondent. The EAT held that in such circumstances it is perverse to allow recovery of Counsel's fees for attending the

pre-hearing review (PHR) and drafting a skeleton argument, whilst excluding recovery of the solicitor's costs of preparation for the PHR and attendance on Counsel at the hearing.

12.35 In an equal value claim, an order for costs may include the costs or expenses incurred by a party in connection with any investigation carried out by an expert preparing his report (r 38(3)).

J. ASSESSMENT

12.36 An assessment is the process by which the court or tribunal decides the amount of any costs orders made. An assessment can either be summary or detailed, the former usually an assessment of the costs performed by the tribunal and the latter by a costs officer in the county court or High Court (although wasted costs orders are assessed by the judge making the order). In either case it is advisable for a party to prepare a schedule of costs and, wherever possible, serve it on the paying party so that he can make representations on it.

K. COSTS SCHEDULES

12.37 There is guidance on the format for a schedule of costs in CPR 43PD section 4 (and *Health Development Agency v Parish* [2004] IRLR 550 states that regard should be had to CPR principles). Of particular note is para 4.6 which sets out the various headings that can be claimed which include:

(a) attendances on the court;
(b) attendances on and communications with the receiving party;
(c) attendances on and communications with witnesses;
(d) communications with the court and counsel;
(e) work done on documents;
(f) work done in connection with negotiations.

12.38 The summary should show the total profit costs and disbursements claimed separately from the VAT claimed.

L. WITNESS ALLOWANCES

12.39 If an order is made for the payment of witness allowances they will usually cover the loss of wages, travel costs, and other expenses incurred by the individual concerned. Section 5(3) of ERA 1996 sets out the fixed scales that are applicable for each head.

M. PREPARATION TIME ORDERS

12.40 In *Kingston Upon Hull City Council v Dunnachie (No 3)* [2003] IRLR 843, the EAT held that under the 2001 Rules there was no jurisdiction to award costs in favour of a litigant in person The circumstances in which a PTO must now be made and those in which it is discretionary are the same as those relating to orders for costs. In both sets of circumstances the PTO may only be made in favour of a receiving party who has not been legally represented at a hearing or in proceedings determined without a hearing where the party has not been represented when the proceedings are determined.

12.41 It would appear that employment consultants do not count as legal representatives because of the definition in r 38(5) which covers only those with qualifications within: (a) the meaning of the Courts and Legal Services Act 1990, s 71; (b) advocates and solicitors in Scotland; and (c) solicitors and barristers in Northern Ireland.

Preparation time

12.42 Preparation time is the time spent: (1) by the receiving party or his employees carrying out preparatory work directly relating to the proceedings, and (2) by the receiving party's legal and other representatives (for example, accountants, human resources consultants) relating to the conduct of the proceedings. In both cases preparation time covers that spent up to the hearing, but not the hearing itself. The time spent by advisers must relate to the conduct of the proceedings so it would not cover any advice given at a stage before proceedings were commenced.

12.43 In accordance with r 42(4) PTOs may be made against respondents who have not had their response accepted.

The amount of a preparation time order

12.44 Once it has decided to make a PTO the tribunal has to assess the number of hours spent on preparation. It is directed to do so using information provided by the receiving party and its own assessment of what is a reasonable and proportionate amount of time bearing in mind the complexity of the proceedings, the number of witnesses, and the documentation required. This figure is then applied to an hourly rate (currently £25 and increasing by £1 each year after 6 April 2006) with a maximum of £10,000.

12.45 The tribunal may have regard to the paying party's ability to pay when considering whether to make the order and how much it should be.

N. WASTED COSTS

12.46 Tribunals can now make a wasted costs order against a party's representative. Representatives include legal or other representatives (r 48(2)). Only where an application was presented after 1 October 2004. Wasted costs means any costs incurred by a party as a result of any improper, unreasonable, or negligent act or omission, or any costs incurred by such conduct which the tribunal considers it unreasonable for a party to pay.

12.47 It seems clear that a party may apply for the wasted costs order against his own, or the other side's, representative (see r 48(5)), but it is not so clear as to whether the tribunal may do so of its own motion (compare with the High Court position in *Brown v Bennett* [2002] 2 All ER 73, where the court may proceed of its own motion).

12.48 The tribunal must ask itself three questions:

(1) Has the legal representative acted improperly, unreasonably, or negligently?
(2) Did such conduct cause the party to incur unnecessary costs?
(3) If so, is it unreasonable that the other party should pay those costs?

12.49 The tribunals will draw on the principles in the civil cases of *Ridehalgh v Horsefield* [1994] Ch 205 and *Medcalf v Weatherill* [2002] UKHL 27 (see *Ratcliffe Duce & Gammer v (1) L Binns (t/a Parc Ferme) (2) N McDonald [2008]* UKEAT/0100/08 in which the EAT confirmed this).

12.50 Improper conduct includes that which is very serious under the representative's professional code of conduct (*Medcalf*). Negligent is to be defined in the normal sense of failing to act with reasonable competence but also something akin to abuse of process (see *Persaud (Luke) v Persaud (Mohan)* [2003] EWCA Civ 394 and *Charles v Gillian Radcliffe & Co* 5 November 2003, Ch D). Problems of privilege have arisen, for example, where a hopeless case has been pursued. A representative against whom the application is made does not have to waive privilege on advice given (and indeed the client may not allow him to do so). The Court of Appeal has held that it cannot be inferred from those circumstances that the representative has advised the course of action taken. The task for the court is to ask whether or not a reasonably competent

legal adviser would have evaluated the chances of success such as to continue with it, but the judge may only come to a conclusion adverse to the party's advisers if he has seen their advice (*Dempsey v Johnstone* [2003] EWCA Civ 1134).

12.51 The order may be one, or a combination, of the following:

(a) the representative pays costs to another party;
(b) the representative pays costs to his own client;
(c) the representative pays any witness allowances of any person who has attended the tribunal by reason of the representative's conduct of the proceedings.

12.52 'Representatives' means a party's legal or other representatives and any employee of such representatives (r 48(4)). Excluded from wasted costs orders are representatives who do not act in pursuit of profit—principally law centres and Citizens Advice representatives—although those acting under conditional fee arrangements are deemed to be acting in pursuit of profit. Wasted costs orders against representatives who are the employees of a party may not be made. They can be made in favour of a party regardless of whether he or she is legally represented. In *Wilsons Solicitors v Johnson and others* UKEAT/0515/10/DA the EAT upheld the decision of an employment judge who made a wasted costs order against a representative under r 48 arising from the conduct of a telephone Case Management Discussion (CMD). The solicitors acted for two employees who raised a wide variety of claims in their ET1. The pleadings were obscure and lacked detail. Amended particulars were filed before the CMD but they were still not satisfactory and still not clarified at the CMD itself. The tribunal decided the respondents incurred wasted costs as a result of the claimants' solicitors' unreasonable and negligent acts and omissions and that the CMD had been a waste of time.

When can wasted costs orders be made?

12.53 An order does not have to be made at the end of the case but the party's representative should be given the notice in writing of the wasted costs proceedings and any order made. The representative should be given a reasonable opportunity to make oral or written representations as to why the order should not be made. The tribunal may have regard to the representative's ability to pay when considering whether to make an order or the amount.

Amount

12.54 There is no limit to the amount of a wasted costs order and the order should specify the amount to be paid or disallowed which is decided by the tribunal (as opposed to the county court). The tribunal should give written reasons for any order provided a request for them has been made within 14 days of the date of the order. It is expressly provided that no extension may be made to this time limit under r 10.