EMPLOYMENT TRIBUNALS

Claimant:	**Mr James Thomas**
Respondents:	**J Toomey Motors Limited**
Heard:	**East London Hearing Centre**
On:	**29 September 2017**
Before:	**Employment Judge G Tobin**
Members:	**Ms L Conwall-Tillotson**
	Mr L O'Callaghan

Representation

Claimant:	**In person**
Respondent:	**Mr P Strelitz (counsel)**

RESERVED JUDGMENT ON COSTS

It is the unanimous decision of the tribunal that the claimant do pay the respondent a contribution of £10,000 towards its costs.

REASONS

The application

1. By a decision promulgated on 8 June 2017, the claimant's outstanding complaints of race discrimination, harassment on the grounds of sex and wrongful dismissal (i.e. breach contract) were rejected and dismissed.

2. The respondent made an application for the reimbursement of all its legal costs on 3 July 2017. The application was detailed and enclosed 3 documents, namely: (1) a copy of the Employment Appeal Tribunal Judgment of *Daleside Nursing Home Limited v Matthews*[1]; (2) a copy of its costs warning sent to the claimant on 17 November 2016; and (3) the claimant's response of 21 November 2016.

The relevant law

[1] UKEAT/0519/08

3. Rule 75(1)(a) of the Employment Tribunal Rules of Procedure[2] – coupled with Rule 76 – gives employment tribunal's power to make a cost award against one party to the proceedings ("the pay party") to pay the costs incurred by another party ("the receiving party") on a number of different grounds. These grounds include circumstances where:

    a. A party has acted vexatious lady, abusively, disruptively or otherwise unreasonably in bringing or conducting of proceedings (or part thereof) – Rule 76(1)(a).

    b. A claim had no reasonable prospects of success – Rule 76(1)(b).

4. "Costs" for these purposes, means "fees, charges, disbursements are expenses incurred by or on behalf of the receiving party "including expenses that witnesses incurred for the purposes of, or in connection with, attendance at the tribunal hearing)" – see Rule 74(1).

5. The Employment Judge sought clarification at the outset of the hearing as to whether the respondent was pursuing its application based on Rule 76(1)(a) or Rule 76(1)(b) or both. The respondent's response was that it was pursuing its application on the basis of both subsections, i.e. on the grounds of the claimant's unreasonableness in bringing and/or conducting proceedings and because, the respondent contended, it was obvious that these claims had no reasonable prospects of success.

6. Rule 78(1) of the Tribunal Rules provides that a cost order can be made for:

    a. costs assessed by the tribunal, which cannot exceed £20,000; or

    b. a detailed assessment of costs in accordance with the Civil Procedure Rules of the County Court (for award that may exceed £20,000); or

    c. an amount of cost which has been agreed between the parties.

7. Where a witness attended to give oral evidence of the hearing on behalf of the respondent, the tribunal may order that the other party pay that party (or the witness) a specified amount in respect of the "necessary and reasonable" expenses – Rule 75(1)(c), Rule 76(5) and Rule 78(1)(d). The respondent did not pursue a separate order for the reimbursement of witness expenses.

8. Rule 84 provides that we (i.e. the tribunal) *may* have regard to the paying party's ability to pay.

The hearing

9. The respondent had prepared a hearing bundle running to 147 pages. The respondent had prepared a Costs Schedule up to the date of judgement, which totalled £38,908.70 and also a Costs Schedule for the costs application and hearing today. It was not made clear why this latter Costs Schedule was prepared as costs do not follow the event in the Employment Tribunal. This latter Costs Schedule

[2]Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (SI 2013/1237)

claimed £6,111.24. The respondent's representative did not pursue the costs of today's hearing and we could not think of any reason an award for the costs of today's hearing could possibly be considered.

10. Neither party had prepared witness statements. Mr Strelitz, on behalf of the respondent, confirmed that he had no oral evidence to adduce. Notwithstanding the claimant had not prepared a witness statement, the Employment Judge explained the difference between oral evidence and submissions to the claimant and the claimant said that he would give oral evidence as well as make submissions.

11. The claimant gave us 4 pages of additional documents. These were a letter from Addison Lee, dated 28 September 2017, in connection with his wife's employment. This letter stated that Addison Lee had decided earlier this year to relocate its Customer Service Centre to Peterborough and that the appellant's wife had decided not to relocate and that her position would be made redundant on 31 December 2017. The letter said that the appellant's wife had been employed by Addison Lee since 17 September 2001 (so she will be made redundant on 16-years' service). The claimant also provided copies of his payslips for 22 June 2017, 25 July 2017 and 18 August 2017.

Costs in principle

12. Mr Strelitz provided a detailed and compelling application and submission. We will not rehearse the respondent's arguments other than to say that these were relevant and persuasive. The history of this case does not make encouraging reading. Prior to the 4-day liability hearing, which commenced on 2 May 2017, the case went through 3 Preliminary Hearing, specifically on 14 November 2016, 13 January 2017 and 6 March 2017. Upon reading the minutes of these hearings, 3 separate Employment Judges, noted the broad and/or weak nature of the claims and, we accept raised concerns that the claimant should have taken note of. Our subsequent determination noted the "weak and unmerited basketful of allegations." We were convinced "that the claimant would hurl any allegation against his former line manager to advance his claim". We accept Mr Strelitz submission that the claimant told unsustainable mistruths at the hearing. Furthermore, we were so dissatisfied with the evidence of the claimant's witnesses, Mr Flynn and Mr Zographos, that we could not believe anything they said. Upon close reflection, we believe the claimant lined up these witnesses to corroborate his lines. It is one thing telling lies to advance one's own claim, but orchestrating others to lie on one's behalf takes matters to a more serious level and one which abuses the whole tribunal process.

13. Although it is not necessary a party to give a prior warning about costs before it can pursue a cost application, we accept that the claimant was warned by the respondent's representatives about the consequences of pursuing such unmeritorious proceedings as early as the Response and in the immediate aftermath of the comments made by Employment Judge Prichard at the first Preliminary Hearing of 14 November 2016. The claimant's response to this warning was to threaten the respondent with publicity which, given the sensitive nature of his allegations, we regard as was wholly cynical and illustrative of the claimant's preparedness to abuse the proper process.

14. We reject the claimant's contention that he genuinely regarded himself as a victim of sex and race discrimination and that he was committed to his claim. The claimant put much emphasis upon his contention that he did not obtain legal advice. As the claimant was a litigant in person it is appropriate for him to be judged less harshly in terms of his conduct, then a litigant who was professionally represented. Justice requires that tribunal's do not apply professional standards to laypeople who may well be embroiled in legal proceedings for the first time in his life – see *AQ Limited v Holden*[3]. Laypeople are likely to lack the objectivity and knowledge of the law and practice, which a professional legal adviser can bring.

15. However, "if an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harasses his employers or for some other improper motive, he acts vexatiously"; see *ET Marler Limited v Robertson*[4]. Simply being "misguided" is not sufficient to establish vexatious conduct: *AQ Limited v Holden.*

16. In his witness statement, the claimant accused Mr Fuller of calling him "a black cunt" when this had never been part of his claim until that very late stage. At the hearing the claimant also accused Mr Fuller of being dismissed by a former employer because of racist behaviour and identified a friend by name as an attempt to bolster that accusation. The claimant said that the matter was surrounded by a settlement agreement and confidentiality provision as an attempt to justify any lack of further corroboration. The respondent made rather rushed enquiries and we were satisfied that this accusation by the claimant was a complete fabrication. These two late accusations represented a significant escalation of the original dispute and were outrageous in the circumstances. These late accusations were also spiteful and an attempt by the claimant to besmirch the reputation of his opponent without any justification whatsoever. We are satisfied that the claimant was also motivated by money. He pursued an unmerited claim in order to secure a settlement. When this was not forthcoming, he either prolonged proceedings in order to attempt to secure a deal at the last moment or alternatively to disrupt his former employer's business and perhaps teach them a lesson for attempting to discipline him. In any event, the claimant's claims were convoluted, ever-changing and found to be false. He changed facts and altered the truth to support his allegations. If he did obtain legal advice, then the deficiencies in his claim would have been made clearer; however, we were of the view that it did not need a lawyer to see the obvious deficiencies in a largely fabricated case. We accept the respondent's contention that these proceedings were conducted in a vexatious manner and in any event, the conduct of such proceedings exceeded the threshold so as to be regarded as "unreasonable".

17. Even where the threshold tests are met, to tribunal still has a discretion whether or not to make an order. That discretion should be exercised having regard to all the circumstances. We note that, in the employment tribunal's jurisdiction, cost orders are very much the exception and not the rule: see *Gee v Shell UK Limited*[5] and *McPherson v BMP Paribas*[6].

18. As Sedley LJ said in *Gee v Shell UK Limited*:

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[3] [*2012] IRLR 648*
[4] 1974 ICR 72 NIRC
[5] [2003] IRLR 82
[6] {2004] IRLR 558

> "It is nevertheless a very important feature of the employment jurisdiction that it is designed to be accessible to ordinary people without the need of lawyers and that in sharp distinction for ordinary litigation in the United Kingdom losing does not ordinarily mean paying the other site's costs."

19. What this means is that people are entitled to come to an employment tribunal to say, without fear of punishment in the form of a costs order, "this is what has happened to me, I think it is unfair, I think it is unreasonable, I think it is discrimination, what do you think?" Costs remain the exception rather than the rule in such proceedings. That said, in contrast, employers should not be subject to expensive, time-consuming, resource draining claims that are without merit. The Employment Tribunal Rules say that we may order costs in the circumstances set out in Rule 76 and if the conduct of a litigant meet that definition then we have a discretion to order costs.

20. The Employment Appeals Tribunal has reminded us in the aftermath of a number of cases (including *Daleside*) which appeared to indicate the contrary, the mere fact that the claimant may have given false evidence is not reason on its own to automatically order costs against him. We should look at the case as a whole: see *Kapoor v Governing Body of Barnhill School*[7].

21. *Yerrakalva v Barnsley Metropolitan Borough Council*[8] emphasised that the tribunal has a broad discretion and we should avoid adopting an over analytical approach, for instance by dissecting the case in detail or attempting to compartmentalise the relevant conduct under separate headings.

22. In this respect, it was not irrelevant that a layperson may have brought proceedings with little or no access to specialist help and advice. Laypeople are, of course, not immune from orders for costs as many litigants in person are found to have behaved vexatiously or unreasonably even with proper allowances made for their inexperience and lack of objectivity. However, the claimant's pursuit of this matter was cynical and opportunistic and our determination makes this clear. We regard it was appropriate in the circumstances to make a cost award against the claimant.

The amount of our costs award

23. The aim of an order for cost is to compensate the party which has incurred expense in winning the case and not to punish the losing party: see *Lodwick v London Borough of Southwark*[9]. We have a wide discretion which should not be fettered by the case law: the proper test is for us to exercise our powers under the Employment Tribunal Rules "justly": see *Benyon & Others v Scadden & Others*[10]. Proportionality may be a feature, although there could be a substantial disproportionality between the costs incurred and the award given: see *Brash-Hall v Getty Images Limited*[11].

24. We note that the claimant will be reimbursed for employment tribunal fees amounting to £1,200 in due course.

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[7] UKEAT/0352/2013
[8] [2012] ICR 420
[9] [2004] IRLR 554
[10] [1999] IRLR 700
[11] [2006] EWCA Civ. 531

25. In evidence, the claimant emphasised his lack of savings and his impecuniosity. We went through his income and his outgoings. Although we were struck by the lack of documentary corroboration provided by the claimant and, unaccountably, his lack of preparation for this hearing.

26. The claimant said that following his departure from the respondent's employment he initially worked for Volkswagen and then 3 months ago he moved on to Chingford Audi, which he said was different company from his former Volkswagen employers. The claimant said that he was unemployed for 2 weeks before he obtained his job at Chingford Audi. So according to the claimant's own evidence, he found an alternative job with relative ease following his troubles with the respondent and he was able to move from Volkswagen to a different company without much further disruption. This point reinforces our view of the claimant as an outstanding sales person, and, if he is prepared to modify his conduct, someone who would be a real asset to a future employer. Accordingly, we believe the claimant occupies a strong position in the labour market.

27. Prior to leaving the respondent, the claimant earned significant commission, in the region of £4,400 per month. The claimant said that his commission prospects were now much diminished; however, we do not believe this. In accordance with our previous determination, we did not regard the claimant as a reliable witness and we have previously remarked on his tendency to embellish the truth. The lack of documentation is something that we construe against the claimant because, we were in no doubt, that the claimant would have disclosed documents that would have supported his version of events (as he did with the Addison Lee letter).

28. Nevertheless, we took into account the letter from Addison Lee that stated the claimant's wife would shortly be made redundant. This is after long service with her current employers and, because she worked part-time and undertakes most of the child-care responsibilities, we determine that she may find it difficult to obtain suitable replacement employment. Consequently, we accept the family income is likely to fall. The claimant said that his wife would qualify for mere statutory redundancy pay without any enhancement and, although we were generally reluctant to accept the claimant's evidence at face-value, there was no basis to suggest any enhanced termination payment.

29. Where a party was relying upon limited financial means, we expected to see a detailed breakdown of their finances, supported by bank statements, budget forecasts, copies of bills, etc. so given the dearth of corroborative evidence we were reluctant to accept that the claimant's finances were as limited as he portrait.

30. That said, the Addison Lee letter did suggest that there was, at least, some degree of financial insecurity for the family income in the near future. We were aware that the claimant was a family man and we accept, to a degree, his submission that any financial penalty would have a detrimental effect upon his wife and children.

31. The claimant was, however, an outstanding sales person. He received a relatively low basic salary with most of his remuneration, like his previous employment, made up of commission. The claimant was not able to provide us with a copy of his new contract of employment, nor of his bonus structure. Accordingly, we reject the claimant's contention that he would not be in a similar income position to that which he had enjoyed with the respondent.

32. So far as the respondent quantification of costs, although our jurisdiction extended to an order, not exceeding £20,000, we nevertheless scrutinised the respondent's costs so as to assess the totality of the picture. Mr Strelitz informed us that the respondent was not covered by legal expenses insurance and we accept that representation.

33. We note that counsel seemed to have undertaken the vast bulk of work in the respondent's defence. Indeed, it is difficult see what preparation the respondent solicitors have undertaken. So, it seems difficult to sustain the respondent's solicitors' fees over and above a fairly low amount for liaising with the employment tribunal and the claimant. Mr Strelitz spent: 8 hours preparing, liaising and drafting the grounds of resistance; 3 hours 45 minutes drafting the list of issues; 7 hours 30 minutes preparing for the March hearing; 3 hours 30 minutes preparation in April; followed by 6 hours 45 minutes reviewing and advising upon the respondent's witness statements. Mr Strelitz's fees and refreshes appear reasonable to us, but this is the vast amount of the work undertaken or required. We cannot say Ms Witherington's fees for one of the Preliminary Hearing appears reasonable. This represents 3 times the amount of Mr Strelitz brief fee of 14 November 2016. Mr Strelitz was unable to account for this discrepancy when asked, but he said it would be explained if this case proceeded to detailed assessment in the county court. This was not a satisfactory response. Mr Strelitz total fees at the conclusion of the final hearing amounted to £20,304 (inclusive of vat). We assessed a reasonable amount for all of the respondent's fees incurred for a case of this nature would be £25,000.

34. We do not regard it as just to order the claimant to repay the respondent's full costs of this case. A cost order is exceptional and the claimant's behaviour was not so manifestly unreasonable that we make an order that he reimburse all of the respondent's *reasonable* costs. Although our order represents 40% of what we determine the respondent's reasonable cost should have been, we regard our award as proportionate.

35. We are mindful that this is a no cost regime and we do not wish to deter genuine complainants to the employment tribunal. That said, we do feel that a strong message is required and one that will have a significant effect upon the claimant and reimburse the respondent with a substantial proportion of its costs. Therefore, we determine that £10,000 is a just amount to order the claimant to contribute towards the respondent's legal costs. This is a substantial amount considering our estimation of the claimant's means and his likely future financial insecurity. We are satisfied that this is a sum that the claimant should be able to meet thereby making our costs award enforceable. In all of the circumstances we regard this award as just.

Employment Judge Tobin

23 October 2017