EMPLOYMENT TRIBUNALS

Claimant: Mr M Latif

Respondent: Vodafone Limited

Heard at: Manchester **On:** 5 January 2018
4 April 2018
(in Chambers)

Before: Employment Judge Holmes
Mrs P Byrne
Ms S Khan

REPRESENTATION:

Claimant: In person
Respondent: Ms Snocken, Counsel

JUDGMENT ON APPLICATION FOR RECONSIDERATION AND COSTS APPLICATION

The judgment of the Tribunal is that:

1. The Tribunal do admit into evidence without prejudice settlement correspondence between the parties between the dates of 25 July and 11 August 2017.

2. The claimant's application for reconsideration is granted, and the Tribunal revokes its judgment dismissing the claimant's claims, which are reinstated. Further case management orders are issued under separate cover as to the re-listing of the claims.

3. The Tribunal orders that the claimant do pay the respondent's costs of and occasioned by the hearing on 11 August 2017, and of the application for reconsideration.

4. The respondent do by **11 May 2018** provide to the claimant and the Tribunal a statement of the costs claimed to have been of and occasioned by the hearing on 11 August 2017, and the application for reconsideration .

5. The claimant , if he wishes to make any further representations on the assessment of the amount of those costs shall make any further representations in writing by **8 June 2018** .

6. The respondent shall reply, if so advised, to the claimant's representations by **22 June 2018**.

7. The Tribunal shall thereafter consider and assess the amount of costs payable by the claimant to the respondent without a further hearing.

REASONS

1. The Tribunal convened to hear, firstly , the claimant's application for reconsideration of the Tribunal's judgment of 14 August 2017, sent to the parties on August 2017 , when the Tribunal refused an application that the claimant made on 11 August 2017 shortly before the hearing that the hearing be postponed. That application was refused, and, in the light of the non attendance of the claimant the claims were dismissed pursuant to rule 47. By an application dated 19 September 2017 the claimant sought reconsideration of that judgment, and has attended to pursue that application. Ms Snocken of counsel has appeared for the respondent.

2. The respondent raised at the outset of the hearing an issue in relation to documents that the respondent submitted should be before the Tribunal in its determination of the claimant's applications. The respondent wished to put before the Tribunal correspondence between the parties between the dates of 25 July and 11 August 2017. This is, it was accepted by the respondent, "without prejudice" correspondence, it was submitted that the Tribunal should admit this correspondence notwithstanding that it is "without prejudice" under the exceptions to the "without prejudice" rule that have been urged upon the Tribunal . The basis upon which the respondent sought to adduce this evidence is that it contends that it will be relevant to issues in the reconsideration application made by the claimant.

3. By its judgment announced to the parties orally in the hearing of 5 January 2018 the Tribunal acceded to the respondent's submissions, and the documents were admitted. The reasons for that judgment were given orally at the hearing, and will not be provided in writing unless a request is made within 14 days of this judgment being sent to the parties.

4. The Tribunal also held this hearing to determine the respondent's application for costs, made on 14 August 2017, by letter of that date.

5. There was a Bundle of documents for the preliminary hearing before the Tribunal, and the parties made their submissions at the hearing. The claimant gave evidence. At the conclusion of the hearing the Tribunal reserved its judgment, and met in Chambers to deliberate on 4 April 2018. The Tribunal regrets that there has been this delay, occasioned by pressure of judicial business , and the unavailability of the panel before this date.

The history of the claims , the Tribunal's judgment of 14 August 2017 and the procedural history of the applications.

6. The claimant brought claims of race discrimination against the respondent , his former employer, by a claim form presented on 11 February 2016.

7. A preliminary hearing was held on 9 May 2016, at which case management orders were made, and the claims listed for a final hearing on 20 to 24 February 2017.

8. After further preliminary hearings in 2016, on 2 February 2017 a further preliminary hearing was held. This was originally listed to determine an application made by the respondent to strike out the claims, on the grounds of the claimant's failure to comply with Tribunal orders, but this was later amended to include an application by the respondent for a postponement , in any event , of the hearing listed for 20 February 2017, on the grounds (in addition to others relating to the claimant's breach of Tribunal orders) that one of the respondent's witnesses was unavailable.

9. At that hearing the claimant was found to have failed to comply with case management orders. Unless orders , and a costs order, were made against him. The respondent's application for a postponement of the hearing was granted . The hearing was re-listed for 14 August 2017, for 5 days. Those hearing dates were set out in the Tribunal's orders sent to the parties on 8 February 2017.

10. Thereafter the claimant did comply with the Unless orders, and his claims were not struck out.

11. Whilst the parties were thereafter involved in discussions, no further formal steps remained to be taken, the claims were ready for hearing. No further applications to the Tribunal were made by either side. The parties prepared for the final hearing.

12. On 11 August 2017 at 19.44 the claimant sent an e-mail to the Tribunal and the respondent , seeking postponement of the hearing . In this email he says this:

"I have a hearing listed for 14/08/17 @ 1000am.

I have been working in Brussels for new NATO HQ as an IT consultant since 17/07/17.

I have been residing and working in Brussels since 14/07/17.

The respondent since the start of this case has desired to come to a settlement out of court on a number of occasions the most recent being a few days after I arrived in Brussels.

Now due to the Confidential and DV cleared nature of my work for completing IT infrastructure of a Highly Secret and confidential environment which is severely and heavily delayed and overdue and short of resource, it is with a heavy heart I have to request humbly I am unable to take any time off since the undertaking of this contract.

It is with great , and deep regret that the respondent have decided to close off all communication directly relating to settlement when they, themselves were so open about this issue just two weeks or so ago.

Please can you arrange for this case to be postponed as I will unfortunately be strictly unavailable due to my posting for this secure contract from which I did not envisage that the respondent would not communicate at this 11th hour in order to settle as this is in everyone's best interests and would save the public purse."

13. The hearing on 14 August 2017 went ahead, and the respondent attended, represented by Ms Snocken of counsel. The claimant's application for a postponement by e-mail of 11 August 2017 was considered, and rejected by the Tribunal. As the claimant had not attended, or been represented before the Tribunal, the Tribunal dismissed his claims pursuant to rule 47 of the 2013 rules of procedure.

14. The claimant made enquiries of the Tribunal by e-mail of 13.55, and by telephone , on 14 August 2017 as to what had taken place at the hearing. He was told he would receive notification by post. He received nothing, so by e-mail of 21 August 2017, and again on 23 August 2017, he enquired whether the case had been heard in full, and whether the respondent's witnesses were heard. He also asked if there was any chance of appealing the decision.

15. The judgment of the Tribunal was sent to the parties on 29 August 2017. The claimant was sent a copy by e-mail, and informed of the 14 day time limit for any application for reconsideration.

16. By letter of 29 August 2017 , the respondent made an application for costs . That application was for the costs of the claim as a whole, and was based upon the claimant's alleged unreasonable conduct of the proceedings, including his late application for a postponement and non – attendance at the hearing.

17. The Tribunal had, in fact, made case management orders in relation to the respondent's application for costs at the hearing on 14 August 2017. These had not been promulgated, however, with the judgment, and were therefore issued , with revised dates for compliance, on 6 September 2017. The parties were invited to inform the Tribunal of how they wished the costs application to be dealt with.

18. By e-mail of 11 September 2017the claimant said that he needed "to appeal" his case, and asked for the Tribunal's help. In fact there are three e-mails of that date, each asking to "appeal" the decision.

19. On 19 September 2017 the claimant sent an e-mail to the Tribunal in which he again stated that he wanted to appeal the decision to "throw out" his case, and that he was content for the costs application to be considered on paper.

20. In that e-mail he set out what could be considered his grounds, and attached some supporting documentation.

21. By letter of 29 September 2017 the Tribunal informed the claimant that his letters of 11, 14 and 19 September 2017 had been accepted as an application for reconsideration, effectively made on 19 September 2017, when the grounds relied upon were provided, and the time for making the application was extended to that

date. The application was not rejected at the initial consideration stage, and the procedure the Tribunal would follow was explained to the parties. In relation to the respondent's costs application , the Tribunal indicated that this would be heard at the conclusion of the reconsideration application, as it was likely to be substantially affected by it.

22. The respondent replied to the claimant's application by letter to the Tribunal of 6 October 2017.

23. The Tribunal listed the hearing of the reconsideration application for 5 January 2018 by a notice of hearing dated 22 November 2017, the parties being informed that the Tribunal would , if reconsideration was granted, not proceed to hear the claims, which then be re-listed.

24. On 5 December 2017 the Tribunal issued further case management orders in relation to the reconsideration and costs applications, whereby the claimant was to serve upon the respondent any supporting documentation , and respond to the costs application, including providing details of his means if he wished these to be taken into account. The hearing was listed for a full day, to allow the respondent's costs application to be heard in the same hearing.

25. The claimant subsequently confirmed that he would be attending the hearing in person.

The claimant's application.

26. The claimant's grounds , in his written representations, and in his oral evidence, and submissions to the Tribunal, in summary are as follows:

His late application for a postponement was not because he had pinned his hopes on a settlement.

He could not possibly leave his new employment given the security and contractual restrictions.

The real reason for the delay was the pressure of debt, stress and strain of conducting the case on his own, without legal advice, or union support, leaving him scarred and not really able to take decisions.

His e-mail access whilst working on this NATO project was severely limited and he was under huge time restraints.

He could not afford the cost of flights back to the UK.

He could not risk breaching his NATO contract by returning to the UK for the hearing.

The respondent's response.

27. The respondent resists the application on a number of grounds. Firstly, it challenges many of the assertions relied upon by the claimant as explaining his conduct in not seeking a postponement earlier , or not returning for the hearing.

28. Secondly, it relies upon the claimant's previous conduct of the proceedings, in which he was found to have breached Tribunal orders, so that a costs order was made, and a previous hearing had been postponed from February 2017.

29. Thirdly, it refers to the prejudice that the delay will cause, and the affect upon the evidence, which, if the application is granted , would mean the Tribunal hearing the claims up to 3 years after the events complained of.

30. Further, one of the respondent's witness was on maternity leave until autumn 2018.

Discussion and Findings.

31. The 2013 rules provide one basis for reconsideration under rule 70, and that is that it is in the interests of justice to reconsider the judgment. No other grounds are specified, and the specific grounds under the 2004 rules were removed in the 2013 rules.

32. In terms of the claimant's grounds, the respondent has made a number of valid points as to the extent to which many of the matters relied upon by the claimant carry any real weight. It is unfortunate that the claimant sought, in his later submissions, to add factors to explain or justify his conduct of the proceedings, which do not, frankly, bear scrutiny.

33. The claimant was concerned that the Tribunal had formed the view that the claimant had not made an application for a postponement before the eve of the hearing because he was pinning his hopes on the respondent settling his claims. He therefore, in his later submission of 20 December 2017, sought to advance other reasons and factors in an attempt to dispel this impression.

34. The Tribunal , having considered everything the claimant has advanced, has come to the conclusion that the position was as follows. By July 2017 the claimant had accepted his position at NATO HQ in Brussels, knowing that once he took it up, he would be most unlikely to be able to return to the UK for his Tribunal hearing without jeopardising that engagement. He also knew , and had done since early February 2017, that his claims were due to be heard on 14 August 2017.

35. As soon as he was offered , and took up that post, therefore, he could, and should , have sought a postponement, which, due to his change of circumstances, and subject to requisite proof of his unavailability , would most probably have been granted. He chose not to do so, but continued negotiations with the respondent. Those negotiations resulted in an offer, but one that the claimant could not accept. His counter-offer was not accepted, and by 2 August 2017, the respondent made it clear that its last offer was no longer available for acceptance and rejecting the claimant's offer to accept a certain sum.

36. Thereafter the claimant , in his communications to the respondent, suggested that he was going to be represented at the hearing (maintaining, of course, the illusion that he was going to attend) and making offers to settle. Those offers were not accepted, and the respondent by 8 August 2017 maintained that the claimant's offer was not going to be accepted.

37. On 11 August 2017 the claimant frantically tried to settle the claims , through ACAS , making ever reducing offers to settle. At 19.44, when those had failed he finally bowed to the inevitable, and sought a postponement.

38. The Tribunal remains of the view that the sole reason that the claimant found himself in the predicament that he did on 14 August 2017 was that he had , since he had accepted the post in Brussels, knowing that he would then not be able to attend and pursue his claims, taken the gamble that the respondent would settle his claim before the hearing. That the respondent might settle was , initially, not an unreasonable expectation, given that an initial offer was made on 25 July 2016, which was then increased in January 2017, further increased in March 2017, and then further increased on 4 July 2017. That last offer, however, was never increased, despite the claimant's counter offers, and by 2 August 2017, the respondent made it clear that this had been its final offer. The respondent never made any further offer, and rejected the claimant's offer. Whilst figures are not important, in general terms the claimant was seeking twice the amount the respondent was prepared to offer.

39. By 2 August 2017, therefore the claimant had a choice. He could hope that the respondent might , despite saying that its last offer was final, having incurred counsel's fees, blink, and increase its offer, did it never did. (Frankly, his negotiating position until 11 August 2017 was reduce his previous offer by only £50) . Or he could apply for a postponement. Whilst it would still have been late, any such application at that time , with 12 days to go until the hearing , would have stood a reasonable chance of success. Further the very fact of making it may have increased the pressure on the respondent to settle.

40. The claimant, however, made no such application, but sought to bluff the respondent that he was indeed going to attend and pursue his claims, possibly being represented, on 14 August 2017. The respondent called his bluff, and his hand folded on 11 August 2017, when he was forced to reveal the true position , which was that he could not attend the hearing on 14 August 2017.

41. That was the true position, and the Tribunal finds the claimant's attempts to explain his conduct by reference to limited e-mail access, inability to afford the plane fare back to the UK (of which no evidence was produced, nor of alternative, possibly cheaper, options such as Eurostar) , stress , or any other factors, unconvincing. The frequent e-mail communications with the respondent in the attempts to settle the claims, and potential engagement of a representative , belie the claimant's alleged inabilities to deal with the claims as they approached the hearing.

42. The claimant backed himself into a corner, and now seeks to be relieved of the consequences of his errors of judgment. To the extent that the claimant has relied upon other factors, the Tribunal does not find these well founded, for the reasons advanced by the respondent, and put to the claimant in cross – examination.

43. That in essence is the true nature of this application , and the claimant has perhaps sought to add extraneous and unmeritorious arguments to bolster his application, which in essence comes down to the simple question of whether it would be in the interests of justice to allow the claimant to reinstate his claims and proceed to a final hearing. His claims were struck out because he did not attend the hearing ,

and failed to make an application for a postponement until the (effectively, for it was a Friday) night before the hearing, because he had hoped that the respondent would settle his claims. Should he be relieved of the consequences of his error of judgment?

44. In addressing that issue, the Tribunal does take into account that the claimant acts in person, though that is not to be taken as *carte blanche* to excuse all errors made in the course of such litigation. It also takes into account that whilst lawyers are used to the adversarial system, and its opportunities for a degree of brinksmanship and risk – taking, lay persons are not. The claimant's problem here was that he engaged in this type of conduct, seeking to negotiate a settlement when he knew he would not be able to attend the final hearing, but bluffing that he was going to , which then unravelled when the respondent would not budge on its final offer. His error was then not to seek a postponement. He did not do so, possibly because he did not realise that he had good chances of obtaining one.

45. As observed above, given that he had only started his new post in mid July 2017, some time after the hearing date had been fixed, had he made an application even up to a week or so before the hearing , the Tribunal considers that there was every chance it would have been granted. Indeed, given that it was in the respondent's interests that the claimant mitigate his losses, and be in a position to pay the costs award already made, the respondent may not have opposed it. At the very least the claimant should have made the application, as he now accepts.

46. That is the main error that the claimant made, not seeking the postponement, and relying upon the respondent making a better offer to settle.

47. In deciding whether the claimant should be relieved of the consequences of his error, the Tribunal takes into account the following factors.

48. Had an application for a postponement been made in a timely fashion, it would almost certainly have been granted. The claimant had obtained his new employment only a month or so before the hearing date, which had been set at a time when he had no reason to believe that he would not be able to attend the hearing. Once the claimant had obtained that new employment, given that it was abroad, was in a security related field, and the claimant would have needed 5 days off work, when he had only just started working for his new employer, any Employment Judge considering his application to postpone , if made in good time, would have accepted that it would not have been reasonable to expect the claimant to risk his new employment (which was, of course, potentially of benefit to the respondent in terms of mitigation of his losses) by absenting himself for the hearing.

49. Further, the respondent had itself sought , and been granted, a postponement of the original hearing listed for 20 to 24 February 2017. The claimant at that time, however, was in breach of the case management orders, and arguably would have been in difficulty if the respondent had been in a position to proceed. To that extent, the postponement on that occasion assisted him, but it is relevant that the respondent too had sought a postponement at that time. That might have been of greater support to the claimant in this application, were it not for his defaults at that stage, which probably meant that he too could not have proceeded. The upshot therefore is that this Tribunal considers the application by the respondent in January

2017 is a rather neutral element, cancelled out by the claimant's own defaults at that stage.

50. Again the issue comes down to the claimant seeking to be relieved from the consequences of what he now acknowledges was bad judgment in seeking to obtain a settlement, rather than seeking a postponement .

51. The respondent has argued that it would be prejudiced by the grant of the application. That is, of course, so, in a general sense, in that it would then have to face the hearing of a claim that at present stands dismissed. Further, if the application is granted, that hearing will be likely to be considerably later than it would otherwise have been, i.e. August 2017, and may well now not be until late 2018 or even into 2019.

52. In terms of specific prejudice, however, whilst Ms Snocken referred to one witness who is on maternity leave, the respondent has been unable to refer the Tribunal to any other aspect of specific prejudice. That is not surprising , given that the claim has been fully prepared for a hearing in August 2017, witness statements have been made and exchanged, the Bundle has been prepared. There is no reason to suppose that, with appropriate refreshing of memories from statements and the Bundle, witnesses will not be able to give cogent evidence. The Tribunal appreciates the argument that memories dim with time, and that the events at issue in some of the claims go back to November 2014. That is, and will be, quite some time before the final hearing. That said, it is not unusual, particularly in discrimination claims, for Tribunals to hear evidence relating to events spanning several years of a claimant's employment history, several years after the events in question. At most the timespan in this case between the events and a final hearing now will be some 5 years, probably nearer 4. Had the hearing taken place in August 2017, it would still have been close to 3 years after some of the events.

53. In essence, therefore the Tribunal has to weigh up the prejudice to the claimant of not allowing his application, against that to the respondent of granting it. The loss of the right to pursue a claim with some merit (there has been no application to strike out or for a deposit order on the grounds of lack of prospects of success) is clearly a serious prejudice to the claimant, whereas the only real prejudice to the respondent, other than the loss of the windfall of dismissal of the claims without a hearing, is the delay in the hearing taking place. That is not to be underestimated, but given the advanced stage of preparation of the case , in the overall scheme of things the period of further delay, which may be 12 to 15 months from the original date of August 2017, is not, in the Tribunal's view sufficient prejudice to outweigh the prejudice to the claimant in not allowing his application.

54. There are further considerations. Firstly, we do take into account that these are discrimination claims. Whilst this is not a strike out application, there are similarities, in that the Tribunal is being asked to consider how to exercise its discretion. In discrimination cases, Tribunals are urged (see, for example ***Anyanwu v South bank University [2001] ICR 391***) to be slow to use their strike out powers where there may be a public interest in having such claims heard. Whilst far from determinative, we do consider that the nature of the claims made is a factor that can legitimately also be weighed in the balance in the exercise of our discretion.

55. Further, and this is by analogy with applications to strike out for failure to comply with Tribunal orders or otherwise unreasonable conduct, or applications for relief from sanction, it is a principle of the exercise of the Tribunal's discretion in such cases that the Tribunal should always consider it the sanction is a proportionate one, or whether any prejudice caused can be remedied by other means.

56. In this instance there is clearly also a financial prejudice to the respondent, but this can, and, as will be seen, will be, remedied by an award of costs. Rule 6 of the 2013 rules of procedure expressly empowers Tribunals to consider such alternatives when considering what sanctions to impose for breach of any Tribunal rules or orders, and by analogy, the Tribunal considers that the availability of a costs award would adequately meet the real financial prejudice that the respondent undoubtedly has suffered as a result of the claimant's conduct of the proceedings in August 2017.

57. For all those reasons, the Tribunal does consider that it is in the interests of justice that its previous judgment dismissing the claims on 14 August 2017 is revoked, and the claims be reinstated, to be re-listed for a final hearing. The Tribunal will makes separate case management orders in relation to re-listing the claims, and, given that it has seen much without prejudice material in the course of this hearing, will recuse all members of this panel from any further final hearing.

The respondent's costs application.

58. We turn now to the respondent's costs application. The application as originally formulated was for the costs of defending the whole claim, based upon the fact that the claim had been dismissed. The basis for the application was the claimant's unreasonable conduct, in part in his conduct in August 2017, but also in continuing the claims in the face of offers to settle made by the respondent, accompanied by costs warnings on the basis of the principles set out in ***Kopel v Safeway Stores plc [2003] IRLR 753*** .

59. The Tribunal's judgment on reconsideration, however, alters the landscape, in that the claimant has not yet failed in his claims, and any determination of the costs application made on the basis that his claims have failed must be premature.

60. The respondent, however, in the alternative, seeks the costs thrown away, as lawyers put it, by reason of the wasted hearing on 14 August 2017. The application is again made on the basis of the claimant's unreasonable conduct, in failing to make any application to postpone the hearing until 11 August 2017, and then not attending the hearing. That put the respondent to the cost of attending with counsel and instructing solicitor. At least one witness, Emma Couch is also noted as having attended that day.

61. The provisions as to costs in Employment Tribunals are contained in rules 74 to 84 of the 2013 rules of procedure. The circumstances in which a costs order can be made are set out in rule 76, which provides:

76 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; or

(b) any claim or response had no reasonable prospect of success; or

(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.

62. The claimant has not really responded to this application, other than to contend that he considers it to have been made out of time. Frankly, the Tribunal does see how he can argue that his conduct was not such that the conditions for making a costs order are satisfied. His conduct in leaving it to the 59th minute of the 11th hour to make his application was clearly unreasonable, and disruptive. Further, had his application been granted, he would still have triggered a costs entitlement, in that his application was within 7 days of the hearing, another ground for the making of an award of costs, had his application succeeded. In effect, by dint of his reconsideration application succeeding, the claimant has achieved by other means that which he failed to achieve by his application of 11 August 2017, effectively a postponement of the hearing. On any view, the provisions of rule 76 are satisfied, and the Tribunal is entitled to consider making an award of costs.

63. That does not mean that the Tribunal must do so, it still has a discretion. The Tribunal can see no reason not to make an award of costs. This situation was wholly of the claimant's making, the respondent is blameless in all this, and should not be out of pocket. Further, as observed above, the potential for an award of costs to compensate the respondent for the financial prejudice it has clearly suffered as a result of the wasted hearing on 11 August 2017 is one of the factors taken into account in deciding the application for reconsideration in the claimant's favour. The claimant cannot seriously expect the Tribunal to grant his application for relief from the consequences of his own foolish conduct , but not to award the respondent the costs it has been put to as a result.

64. The claimant suggests that the application is out of time, Rule 77 provides that such an application must be made at any time up 28 days of any judgment determining the proceedings. This application was, it was made at the hearing on 14 August 2017, and in writing on 29 August 2017.

65. Finally, rule 84 provides that in deciding whether to make a costs order, and if so, in what amount, the Tribunal may have regard to the paying party's ability to pay. The claimant has not relied upon any financial issues in relation to his ability to pay, indeed his submission to the Tribunal was than he was now debt free, and was in a

much better position than he had been previously. Accordingly the Tribunal can see no reason why it should not make a costs order because of the claimant's ability to pay, nor should it take his means into account when determining the amount of any costs order.

The amount of the costs order.

66. In the application for costs, and the documentation supplied in support, the respondent has set out its legal costs for the whole claim. The Tribunal, however, is only making an order in respect of the costs thrown away by reason of the aborted hearing on 14 August 217. Those are not readily identifiable from the schedules provided.

67. Further, in terms of what those costs should include, the Tribunal considers that the respondent is entitled to recover the reasonable (i.e those permitted under the relevant Costs guidelines as to hourly rates and fees) costs comprising of:

a) Counsel's Brief fee for 14 August 2017.

b) Attendance of a solicitor on 14 August 2017. Whilst a Grade A fee earner is claimed for, and this may seem excessive, the Tribunal considers that the attendance of the fee earner with conduct of the case, at Grade A, on the first day of a 5 day hearing, with a complex procedural history, and the attendance of witnesses at the outset of the hearing, would be reasonable, and the Tribunal will allow this at the appropriate number of hours.

c) Travel costs – for any witnesses, but not for Counsel or solicitors. If the respondent chooses representation by lawyers outside the Region, when there are firms of solicitors and Chambers with the requisite expertise within it, that is a matter for them.

d) The costs of the reconsideration application : again Counsel's Brief Fee is recoverable, subject to the amount being reasonable. There was no attendance by any solicitor or representative noted on the Tribunal's file. The Tribunal considers that it was reasonable of the respondent to oppose the application , the onus being upon the claimant to make out his grounds. Much of the respondent's challenge to the claimant's additional grounds that were advanced was found to be correct, and the respondent was justified in its approach. Further, the respondent was entitled to seek a costs order, if not in the terms originally sought. The costs of this application are considered by the Tribunal also to be occasioned by the claimant's conduct in not seeking a postponement of the hearing of 14 August 2017 sooner than 11 August 2017, and these costs too are recoverable.

e) In addition, therefore , to Counsel's Brief Fee for 5 January 2018, the respondent is entitled to the costs of its solicitors considering and responding to the claimant's application, and preparing the Brief to Counsel.

69. These costs, however, are not yet specified, and may include other items that the Tribunal has not considered above. The respondent is therefore ordered to

provide the Tribunal and the claimant with a Statement of Costs in relation to the hearings on 14 August 2017, and 5 January 2018, and of considering and responding to the claimant's application for reconsideration. The claimant will be afforded the opportunity to comment upon the items claimed. The claimant should be clear, however, that it will not be open to him to dispute his liability to pay any costs, nor to rely upon any issues as to his means, unless the position that he presented to the Tribunal has dramatically changed. His representations therefore must be confined solely to the Statement of Costs claimed, and the reasonableness of the items contained therein.

Postscript – further correspondence from the claimant .

70. Following the conclusion of the hearing on 5 January 2018, and the Tribunal reserving its judgment, the Tribunal received an e-mail on 8 January 2018 from the claimant on in these terms:

"I would like to challenge the order or (sic) *costs made against me.*

I understand that I'm making an out of time application due to not be aware of aware of the order and its implications.

Please can you kindly offer me the information I need to respond to and thereafter I will forthwith respond."

71. The Tribunal did not understand what the claimant meant, as no costs order had been made against him, other than that made on 2 February 2017 by Employment Judge Ryan. The claimant wrote again in similar terms on 23 January 2018. The Tribunal accordingly wrote to him on 24 January 2018 asking him to clarify what he meant, and whether he was referring to the previous costs order of 2 February 2017, or the present application. If the latter he was reminded that he should comply with the case management orders previously made in relation to the costs application before the Tribunal.

72. The claimant replied by e-mail of 27 January 218 that he was simply responding to the current costs application, and he needed help and guidance in complying with the case management order regarding costs.

73. The Tribunal replied in its letter of 1 February 2018 (informing the parties of a change of date for the Chambers hearing) that as an independent judicial body the Tribunal could not give parties advice. Nothing further has been heard from the claimant.

74. The Tribunal does not understand what the claimant was seeking to achieve in his later e-mails. The case management orders in relation to the costs application were made on 5 December 2017, and sent to him by e-mail on 8 December 2017. They required compliance no later than 7 days before the hearing date of 5 January 2018, i.e. 29 December 2017. The claimant did not submit any response or information as to his means. The hearing was held on 5 January 2018, and he made whatever submissions he wished to. He gave no indication that there was anything

else he wished to advance, and expressly declined to rely upon his financial position which was much improved.

75. Consequently, other than to comment upon the amounts claimed by the respondent in its Statement of Costs, the Tribunal can see no basis for him to make any further submissions on costs.

Employment Judge Holmes

Dated : 16 April 2018

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

5 April 2018

FOR THE TRIBUNAL OFFICE