EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr Christopher Warwick	AND	Patterson Law Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Exeter **ON** 9 November 2018

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: Did Not Attend - Written Representations
For the Respondent: Miss S Hornblower of Counsel

ORDER

The claimant is ordered to pay the respondent's costs in the sum of £10,510.00.

RESERVED REASONS

1. In this case the respondent has made two separate applications for its costs relating to the successful defence of this action against the claimant. The respondent was represented by Miss Hornblower who made the applications on the respondent's behalf.
2. The Claimant's Application to Adjourn
3. The claimant did not attend today, and made an application to adjourn this hearing by email which was received at the Tribunal office at 06:55 this morning. The claimant stated: "I am unfortunately going to be unable to attend this morning. I am travelling a long distance from Blackpool Lancashire, I set off at 4 am this morning, and my vehicle has unexpectedly broken down. I have just explored urgent public transport arrangements, however it appears I will not be able to get there until 3 pm. I fear the tribunal will already be concluded by this point. Could I please ask the matters adjourned until a later date to enable me to attend."
4. The respondent opposed the application to adjourn the hearing and argued that it should commence as listed at 10 am this morning. The reasons why the respondent asserts that it was in the interests of justice to do so were set out as follows: (i) the claimant has a history of acting dishonestly and disruptively during these proceedings, and this email is scarcely credible and is yet another example; (ii) the email was sent from the claimant's

normal “Outlook.com” email address, and not from a mobile device such as an iPhone or an iPad, which indicates that the claimant had access to his computer. If he had genuinely “unexpectedly broken down” as he now alleges then that would not have been possible; (iii) no other supporting evidence of his alleged predicament has been supplied, for instance photographs of the same by way of an iPhone; (iv) the claimant had initially agreed to the Tribunal’s suggestion to have these applications for costs dealt with on paper without the need for a hearing in person, and has already supplied written representations setting out his objections in response to both costs applications, and the Tribunal is therefore in a position to proceed in any event; (v) the claimant subsequently notified the Tribunal that he wished to attend in person instead, and having made that indication this hearing was listed for that purpose, but the claimant has now failed to attend; (vi) the claimant has already been sent the respondent’s bundle of documents in support of their two applications, and was invited to add documents to this bundle if he wished, but declined to do so; and (vii) the respondent’s solicitors sent the claimant a statement of means form inviting him to provide information as to his means which they explained might be required at this hearing, but having established the same had not been ordered by the Tribunal, the claimant chose not to provide any information as to his means.

5. On consideration I agree with all of the points put forward by the respondent and given that the interests of justice apply to both parties, I decided to hear the respondent’s applications today. In particular I bore in mind that the claimant was fully aware of the nature of the applications and the documents in support, and had been able to respond by way of written representations to the applications, which was his preferred method of dealing with the matter at that time.
6. Enquiry Agent’s Report:
7. The respondent also adduced an enquiry agent’s report this morning, which it received only last night. The claimant has not had the opportunity to see this or to comment upon it, and the respondent will now send it to the claimant for completeness. That enquiry agent’s report confirms the claimant’s new address in Blackpool, and confirmed that he is in employment with Turner White Solicitors in Blackpool.
8. General Background
9. The claimant initially issued these proceedings claiming unfair dismissal, discrimination on the grounds of his disability, and for breach of contract in respect of his notice period. The unfair dismissal claim was struck out because the claimant had insufficient service for the Tribunal to hear that claim. The matter was listed for a preliminary hearing in person to determine whether the claimant was ever a disabled person, and whether the respondent knew, or ought reasonably to have known, of that disability (“the Preliminary Hearing)”. That Preliminary Hearing also considered an application by the claimant to amend his claim to include one of direct sex discrimination. The Preliminary Hearing took place on 12 March 2018 and the Reserved Judgment following that hearing was dated 16 March 2018 and sent to the parties on 20 March 2018 (“the Judgment”). Under that Judgment the claimant was held not have been a disabled person and his disability discrimination claims were dismissed. His application to amend to include direct sex discrimination was refused. Case management orders were then made to list the claimant’s remaining claim of breach of contract for a substantive hearing, and to prepare appropriately for that hearing. The claimant subsequently withdrew his remaining breach of contract claim before that hearing, and that claim was dismissed on withdrawal by the claimant. The respondent has made two applications for its costs: in the first place for its costs incurred in preparing for and defending the claims against it up to and including the date of the Judgment (“the First Application”); and secondly, for its costs in defending the remaining breach of contract claim up to the date of dismissal, and for preparing its costs under the First Application (“the Second Application”).
10. Findings of Fact Relevant to the First Application
11. The detailed findings made in the Judgment are of direct relevance to the respondent’s applications, and that Judgment should be read in conjunction with the contents of this judgment.

12. With regard to the merits of the claimant's claim that he was a disabled person, at a previous case management preliminary hearing the claimant was ordered to disclose the medical evidence upon which he relied in support of his contention that he suffered from post-traumatic stress disorder ("PTSD)". Despite being on notice of what was required, the claimant failed to comply with those orders and failed to adduce any evidence of a formal diagnosis of PTSD; he adduced no medical assessment or other document explaining the alleged cause of any PTSD, and no direct evidence of ever having undertaken cognitive behavioural therapy ("CBT") as alleged; and the claimant adduced no medical evidence of any sort more recent than 2013. Findings in the Judgment concluded that there was "no cogent evidence" that the claimant had ever suffered from a disability whilst employed by the respondent, and that throughout all of the discussions concerning his application for remote working, the claimant never raised the suggestion that he required remote working because of any illness.
13. Prior to that preliminary hearing, the respondent had sent a costs warning letter to the claimant on 20 February 2018. That letter made it clear that the claimant had failed to provide any formal diagnosis of PTSD; had failed to provide any evidence that he had attended CBT; and had adduced no medical evidence more recent than 2013. It stated that none of the contemporaneous correspondence relating to the claimant's request for flexible working had ever mentioned any illness or PTSD or related symptoms. In addition, that letter pointed out that it was clear even from the claimant's own submissions that he had never alleged that he had suffered any sort of disadvantage because of a medical issue, but rather his difficulties stemmed from the length of his chosen commute to and from the office. That letter also pointed out that the application to amend the claim to include one of direct sex discrimination was doomed to failure and was vexatious because the sole chosen comparator was not in the same position as the claimant. That letter explained why the respondent considered the claimant's claims to be vexatious, unreasonable and with no prospect of success. The claimant was invited to withdraw his claims prior to the hearing and in that event the respondent would agree not to pursue any application for costs. The respondent warned the claimant that if he proceeded with his claims and application to the Preliminary Hearing then the respondent would make an application for costs, which it estimated would then be in the region of £8,000.00 plus VAT.
14. The respondent also makes the following points in support of its First Application. Given the finding in the Judgment that the claimant had "deliberately and dishonestly altered the content of the Study Aid and Study Strategies Report from Staffordshire University to assist a subsequent application for assistance in connection with his CILEx Legal Executive exams" and had relied upon this document to support his claim, the claimant had behaved dishonestly in his attempts to secure a legal qualification, and was guilty of a serious abuse of process in seeking to rely upon this fabricated medical evidence in these proceedings.
15. The respondent also asserts that the claimant has acted unreasonably in publishing comments on this case on his Facebook account which amount to false and defamatory statements which are insulting and detrimental to the reputation of the respondent. The claimant chose to use social media as a tool to seek to harm the respondent's reputation and business. These Facebook posts include the following: that the respondent had used "fabricated dishonest evidence"; that the respondent "lied, they were misleading, dishonest and doctored documents to their own ends"; that the respondent had "admitted breach of contract, they were in the wrong"; that the respondent had "lied and conspired together" and were "a bunch of crooks". As can be seen from the Judgment, these were false statements. Indeed, it was the claimant who had acted dishonestly in doctoring documents to his own end. It is also clear that the statements created significant ill feeling towards the respondent as indicated by subsequent comments from the claimant's followers on Facebook.
16. Finally, the respondent suggests that the claim was vexatious in any event. The claimant's resignation was followed immediately by that of his partner Ms Ling and it is alleged was orchestrated to cause maximum disruption to the respondent's business. Immediately following his dismissal, the claimant made a number of personal remarks to Emma Patterson of the respondent on Facebook. These included: "this is just the beginning"; "this

will become personal. You've tried to fuck with the wrong person"; "the reason I blame you is because you made it personal. That was the worst thing you could have done." This suggests that the claimant was motivated by personal vendetta against Emma Patterson rather than by a genuine assessment of his legal position.

17. Findings of Fact Relevant to the Second Application:
18. Following the Judgment, the sole remaining live claim for the claimant was that of breach of contract in respect of the balance of his notice period. The claimant had resigned his employment on three months; notice, but subsequently was dismissed for gross misconduct within his notice period. He then obtained alternative employment almost immediately. During the case management preliminary hearing which followed the main Preliminary Hearing, I explained to the claimant that if he had secured alternative employment at a comparable rate of pay after just one month then credit should be given for the same, and the claimant was ordered to provide an updated Schedule of Loss to include all "earnings in any employment since the date of dismissal". Despite this guidance and the tribunal order the claimant presented an updated Schedule of Loss which still claimed three months' notice pay without any mention of the alternative earnings which had been received, and also claimed damages for unfair dismissal despite the fact that that claim had been dismissed long ago.
19. The respondent asserts that it obtained a copy of the claimant's contract of employment from his new employers which indicated that the claimant had lied on oath as to the amount of earnings in his new employment. The claimant then continued to fail to prepare and exchange witness statements as ordered by the tribunal, ahead of the listed hearing to determine the breach of contract claim on 19 July 2018. Nonetheless the respondent had to continue to prepare its defence of the claim appropriately, which included interviewing witnesses, preparing a proposed bundle of documents, and finalising its witness statements. These were all served on the claimant. On 29 May 2018 the claimant then wrote to the tribunal to withdraw his breach of contract claim. The reasons given were that the claimant asserted that he was now homeless and was leaving the country and would have no access to emails. This does not seem to be accurate given that he remained in his alternative employment.
20. The Applications for Costs
21. The respondent makes its two applications for its costs under Rule 76 on the basis that the claimant has acted abusively, vexatiously or otherwise unreasonably in the way in which the proceedings have been conducted.
22. The claimant resists both applications, and asserts that he has not acted unreasonably or dishonestly and was entitled to proceed with genuine claims.
23. The Rules
24. The relevant rules are the Employment Tribunals Rules of Procedure 2013 ("the Rules").
25. Rule 76(1) provides: "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.
26. Under Rule 77 a party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.
27. Under Rule 78(1) a costs order may – (a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party; (b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles …"

28. Under Rule 84, in deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.
29. The Relevant Case Law
30. I have been considered the following cases: Gee v Shell Ltd [2003] [2003] IRLR 82 CA; McPherson v BNP Paribas [2004] ICR 1398 CA; Monaghan v Close Thornton [2002] EAT/0003/01; NPower Yorkshire Ltd v Daley EAT/0842/04; Arrowsmith v Nottingham Trent University [2011] ICR 159 CA; Kapoor v Governing Body of Barnhill Community High School UKEAT/0352/13; Nicholson Highland Wear v Nicholson [2010]IRLR 859; Barnsley BC v Yerrakalva [2012] IRLR 78 CA; Topic v Hollyland Pitta Bakery & Ors UKEAT/0523/11/MAA; Kovacs v Queen Mary and Westfield College [2002] IRLR 414 CA; Shield Automotive Ltd v Greig UKEATS/0024/10; Jilley v Birmingham and Solihull Mental Health NHS Trust [2008] UKEAT/0584/06; Single Homeless Project v Abu [2013] UKEAT/0519/12; Vaughan v LB of Newham [2013] IRLR 713; Raggett v John Lewis plc [2012] IRLR 906 EAT.
31. The Relevant Legal Principles
32. The correct starting position is that an award of costs is the exception rather than the rule. As Sedley LJ stated at para 35 of his judgment in Gee v Shell Ltd "It is nevertheless a very important feature of the employment jurisdiction that it is designed to be accessible to people without the need of lawyers, and that in sharp distinction from ordinary litigation in the UK, losing does not ordinarily mean paying the other side's costs …" Nonetheless, an Employment Tribunal must consider, after the claims were brought, whether they were properly pursued, see for instance NPower Yorkshire Ltd v Daley. If not, then that may amount to unreasonable conduct. In addition, the Employment Tribunal has a wide discretion where an application for costs is made under Rule 76(1)(a). As per Mummery LJ at para 41 in Barnsley BC v Yerrakalva "The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it, and what effects it had." However, the Tribunal should look at the matter in the round rather that dissecting various parts of the claim and the costs application, and compartmentalising it. There is no need for the tribunal to find a causative link between the costs incurred by the party making the application for costs and the event or events that are found to be unreasonable, see McPherson v BNP Paribas, and also Kapoor v Governing Body of Barnhill Community High School in which Singh J held that the receiving party does not have to prove that any specific unreasonable conduct by the paying party caused any particular costs to be incurred.
33. When considering an application for costs the Tribunal should have regard to the two-stage process outlined in Monaghan v Close Thornton by Lindsay J at paragraph 22: "Is the cost threshold triggered, e.g. was the conduct of the party against whom costs is sought unreasonable? And if so, ought the Tribunal to exercise its discretion in favour of the receiving party, having regard to all the circumstances?"
34. Where a party has been lying this will not of itself necessarily result in a costs award being made, although it is one factor that needs to be considered. As per Rimer LJ in Arrowsmith v Nottingham Trent University it will always be necessary for the tribunal to examine the context, and to look at the nature, gravity effect of the lie in determining the unreasonableness of the alleged conduct. Nonetheless, to put forward a case in an untruthful way is to act unreasonably, see Kapoor v Governing Body of Barnhill Community High School. The fact that a claimant may not have deliberately lied does not preclude reaching the conclusion that a claim had no reasonable prospect of success or that the claim had not been reasonably brought and pursued, see Topic v Hollyland Pitta Bakery & Ors. In addition, the result of a claim is not necessarily linked to the alleged unreasonable conduct. In Nicholson Highland Wear v Nicholson Lady Smith made it clear that: "a party could have acted unreasonably and an award of [costs] be justified even if there has been a partial (or whole) success. It will depend on the circumstances of the individual case."

35. Where a claim has been withdrawn, the question for the Tribunal is not whether the withdrawal of the claim is itself unreasonable, but whether the party concerned has acted unreasonably in the conduct of the proceedings, see McPherson v BNP Paribas. A tribunal should not therefore award costs simply because the claimant has withdrawn his or her claim. It should determine whether the conduct overall is unreasonable, and this includes the impact of the later withdrawal.
36. With regard to the paying party's ability to pay, Rule 84 allows the tribunal to have regard to the paying party's ability to pay, but it does not have to, see Jilley v Birmingham and Solihull Mental Health NHS Trust and Single Homeless Project v Abu. One reason for not taking means into account is the failure of the paying party to provide sufficient and/or credible evidence of his or her means. The authorities also make it clear that the amount which the paying party maybe to pay after assessment does not need to be a sum which he or she could pay outright from savings or current earnings. In Vaughan v LB of Newham the paying party was out of work and had no liquid or capital assets and a costs order was made which was more than twice her gross earnings at the date of dismissal. Underhill LJ declined to overturn that order on appeal because despite her limited financial circumstances, there was evidence that she would be successful in obtaining some further employment. Insofar as it does have regard to the paying party's ability to pay, the tribunal should have regard to the whole means of that party's ability to pay, see Shield Automotive Ltd v Greig (per Lady Smith obiter). This includes considering capital within a person's means, which will often be represented by property or other investments which are not as flexible as cash, but which should not be ignored.
37. Under Rule 78(1)(a) a costs order may order the paying party to pay the receiving party a specified amount not exceeding £20,000. Under Rule 78(1)(b) a costs order may order the paying party to pay an amount to be determined by way of detailed assessment, carried out either by the County Court or by an Employment Judge applying the principles of the Civil Procedure Rules 1998. Where the receiving party does not regard the limit of £20,000 to be sufficient an order for summary assessment should not be made in those circumstances, see Kovacs v Queen Mary and Westfield College.
38. Recovery of VAT
39. VAT should not be included in a claim for costs if the receiving party is able to recover the VAT, see Raggett v John Lewis plc which reflects the CPR Costs Practice Direction (44PD).
40. The Claimant's Means
41. The claimant was on notice of this hearing, and on notice from the respondent that it required evidence of his means, which the claimant declined to provide. It now seems clear from the enquiry agents report that the claimant has obtained alternative employment with another firm of solicitors in Blackpool. The following conclusions have been reached bearing in mind such information as I have on the claimant's means.
42. Conclusion
43. I deal first with the First Application. In my judgment the claimant has acted unreasonably in bringing and pursuing his disability discrimination claims, and his application to amend, to the Preliminary Hearing. He had earlier deliberately and dishonestly doctored a document in support of an application for assistance, and had dishonestly relied upon that same document in the Preliminary Hearing to seek to establish that he was a disabled person. To put forward a case in an untruthful way is to act unreasonably, see Kapoor v Governing Body of Barnhill Community High School. In addition, despite orders to produce the same, the claimant failed to adduce any medical evidence in support of his contention that he was disabled. That assertion was wholly inconsistent with the contemporaneous documents which indicated that the claimant had never suggested that he had suffered any disadvantage by reason of any illness. Furthermore, the claimant ignored the respondent's clear costs warning letter which gave an explanation as to why his claims had no reasonable prospect of success, and declined to withdraw his claims against an offer that the respondent would not pursue its costs. Nonetheless it was made clear to him that the respondent would pursue an application for costs in the event that he continued, and assessed these at approximately £8,000.00 plus VAT (which was an accurate estimate, for which see further below).

44. Even without bearing in mind the other abusive and vexatious behaviour of the claimant during the course of these proceedings, by way of this unreasonable conduct (and applying the two-stage process outlined in Monaghan v Close Thornton) in my judgment the cost threshold is triggered because the conduct of the party against whom costs is sought was unreasonable, and having regard to all the circumstances in my judgment I decide to exercise my discretion in favour of the receiving party. The respondent therefore succeeds in the First Application.
45. I now turn to the Second Application. It is not generally unreasonable conduct to withdraw proceedings prior to a hearing to determine the matter, and to penalise a party who does so by way of a costs award would discourage others from making sensible and timely decisions to withdraw their cases which save both the parties and the Tribunal system prospective time and costs. I do not find therefore that the claimant's withdrawal of his claim was of itself unreasonable, which in any event was at least six weeks before the listed hearing.
46. However, the claimant's conduct must be seen in the light of his conduct throughout these proceedings generally. It can be seen from the above findings that the claimant had acted unreasonably and abusively during the course of the proceedings genuinely. With regard to the breach of contract claim, the claimant gave a deliberately inflated valuation as to his potential claim, and was late in disclosing relevant documents and his potential witness statement as the Tribunal had earlier been ordered him to do. The claimant's inflated valuation of his own claim was in the region of £14,000, including damages for the claim for unfair dismissal which had been dismissed months previously, whereas the respondent's counter schedule of loss indicated that the claim could be worth no more than about £350. The respondent was then put to the time and costs of preparing a detailed response to this remaining overinflated claim, which commitment was wasted when the claimant decided to withdraw.
47. In my judgment this was further unreasonable conduct by the claimant in bringing and conducting his claim against the respondent. This gave rise to the unnecessary expenditure of costs in further defending the remaining claim. However, I do not see why the respondent's preparation time in respect of the First Application for costs should be added to their Second Application. For these reasons allow the Second Application, but only in part.
48. The Amount of Costs:
49. I have seen a schedule of the costs claimed by the respondent under the First Application which was sent in advance of this hearing to the claimant. The costs have been claimed at the hourly rate of £160.00 plus VAT for the respondent's solicitor, who is a partner in his firm. This hourly rate is below that of the local County Court equivalent rates and in my judgment is reasonable. The total solicitors' costs claimed amount to over £8,000 plus VAT, but have been capped at the level of £6,000 plus VAT (and counsel's fees) in accordance with an earlier estimate which was given to the respondent. I consider that this is a reasonable sum for the work undertaken in defence of various claims up to and including conclusion of the original Preliminary Hearing. In addition, Counsel's fees have been charged in the total sum of £2,510.00 plus VAT of £502.00, for preparing for the case management preliminary hearing; advising on the evidence; advising on draft applications and on the evidence; and the brief for appearing at the Preliminary Hearing. The respondent has paid these sums to its legal advisers, which satisfies the indemnity principle.
50. The total costs under the First Application (which have been incurred and paid by the respondent) are therefore £6,000.00 plus VAT of £1,200.00 and Counsel's fees of £2,510.00 plus VAT of £502.00 which is a total of £8,510.00 plus VAT of £1,702.00. This is a total sum of £10,212 inclusive of VAT. The respondent is registered for VAT purposes and it is not therefore appropriate to order payment of these sums inclusive of VAT.
51. The claimant is therefore ordered to pay the respondent's costs under the First Application in the sum of £8510.00
52. I have also seen a schedule of costs claimed by the respondent under the Second Application, which net of VAT comes to £4,144.00 and counsel's fees of £311.67. I decline

to award the full amount of these costs because a certain amount of the work undertaken would necessarily have been undertaken in any event even if the claimant had acted reasonably with regard to his potential breach of contract claim, and some of the work involves preparing and finalising the application for costs under the First Application. Nonetheless I do accept that the was a substantial proportion of this work which was undertaken unnecessarily by the respondent as a result of the claimant's unreasonable conduct. I award a further £2,000.00 under the Second Application by way of a rough estimate of this amount.

53. In conclusion therefore the claimant is ordered to pay the respondent's costs in the sum of £10,510.00 which for the avoidance of doubt does not include VAT.

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Employment Judge N J Roper
Dated 9 November 2018

Judgment sent to Parties on

26 November 2018

For the Tribunal Office