RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr N Anemouri**

Respondent: **Barnardo's**

Heard at: **East London Hearing Centre**

On: **18 January 2019 (In chambers)**

Before: **Employment Judge Goodrich**

Representation

Claimant: written submissions

Respondent: written submissions

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Claimant is ordered to pay the Respondent £2,000 costs, for the reasons set out below.

REASONS

Background and the issues

1 This hearing (in chambers) is to determine a costs application made on behalf of the Respondent, Barnado's, against the Claimant, Mr Anemouri.

2 There is a lengthy history to the claims. The history was summarised by me in my judgment at the Preliminary Hearing conducted on 18 June 2018 (in particular at paragraphs 3 – 30 of that judgment) and promulgated on 11 July 2018.

3 I do not repeat the background here, although this decision needs to be read in conjunction with that judgment; and, where relevant, other judgments referred to below.

4 At the hearing on 18 June 2018 my judgment was that:

4.1 The Claimant's application for this Preliminary Hearing to be adjourned is refused.

4.2 The Claimant's claims are struck out, as further set out below.

The judgment was sent to the parties on 11 July 2018.

5 By email, with attached letter, dated 8 August 2018 the Respondent's solicitors made an application for costs (I refer further below in more detail to the grounds of the application).

6 The Respondent's application for costs was for their costs incurred during the period between 29 November 2016 and 18 June 2018. The total costs referred to were £26,880.17 plus VAT. They asked for the costs to be limited to an award for £10,000 stating that this was in recognition of the Claimant's means.

7 The Claimant replied to the application by emails dated 29 August and 12 September 2018. He notified the Tribunal that he had lodged an appeal to the Employment Appeal Tribunal (to the judgment at the Preliminary Hearing described at paragraph 4 above). He attached a copy of the notice of appeal. Although the Claimant had represented himself at the Preliminary Hearing in question before me, his grounds of appeal were drafted on his behalf by representatives called Astute HR Limited. The Claimant asked for its decision to be reconsidered in the light of his appeal and to stay dealing with the Respondent's costs application until the appeal was determined. He also stated that he would be forwarding a letter from his GP confirming that he was now fit enough to attend a full day's hearing in court.

8 The Tribunal wrote a letter to the parties, dated 25 October 2018, at my direction. The main points made in that letter included:

8.1 It was unclear whether the Claimant was making an application for me to reconsider my strike out judgment, as well as for the costs application to be stayed. It did not appear to me to be appropriate for the case to be reconsidered both because (if it was an application) it was made out of time; and no grounds were given for why it would be just and equitable to extend time; and because my judgment was being challenged by way of appeal. It was stated that I would assume, unless notified to the contrary, that the Claimant was not making an application for the judgment to be reconsidered.

8.2 As regards staying the proceedings because of the appeal, I did not regard the lodging of an appeal as necessarily being a good reason for staying the case and would be minded to consider the costs application.

8.3 I had in mind considering the application on the basis of written submissions, rather than having a hearing, in order to save costs. I asked, however, for the Claimant to give his views on this; and to do so by 8 November 2018.

9 In response to the Tribunal's letter dated 25 October 2018 the Claimant replied, by letter dated 8 November 2018. He reiterated his request for his appeal to be determined before I dealt with the costs application; and responded to the Respondent's grounds for a costs order. I set out the main points of the Claimant's response later in this judgment.

10 By letter dated 15 November 2018 the Employment Appeal Tribunal notified the parties that it considered that the Claimant's appeal had no reasonable prospect of success and, in accordance with Rule 3(7), no further action will be taken on it. The reasons for this decision, made by the (then) President of the Employment Appeal Tribunal, the Honourable Mrs Justice Simler, were given in the letter.

11 I directed that a further letter to be written to the parties. In the Tribunal's letter dated 28 November 2018 I included the following points and directions:

11.1 I agreed to the Respondent's application to be determined without a hearing, on the basis of the written submissions made in the letters on 8 August and 8 November (referred to above).

11.2 If the Respondent wished to make any further written submissions they were to be sent to the Claimant and the Tribunal by no later than 6 December 2018.

11.3 If the Claimant wished to make any further submissions these were to be sent to the Respondent and the Tribunal by no later than 13 December 2018. I also asked the Claimant to note Rule 84 of the Employment Tribunal Rules of Procedure 2013 as to the Tribunal's discretion that, in deciding whether to make a costs order and, if so, what amount, the Tribunal may have regard to the paying party's ability to pay. I asked him, if he wished his means to be considered, to give details of his means particularly his income, outgoings, assets and debts.

12 By email dated 6 December 2018 the Respondent's solicitors made further submissions as to costs (to which I refer further below).

13 So far as I am aware the Claimant did not make further submissions in opposition to the Respondent's application for costs.

Submissions of the parties

14 The submissions on behalf of the Respondent, dated 8 August 2018, included the following points:

14.1 The application was made on the following grounds. Firstly, under Rule 76(1)(a) in that the Claimant acted vexatiously, abusively, disruptively and/or unreasonably in the way he conducted these proceedings. Alternatively :

14.2 Under Rule 76(2) in that the Claimant failed to comply with an order of the Tribunal. Alternatively;

14.3 Under Rule 76(1)(c) and/or Rule 76(2) in that a number of hearings in these proceedings were postponed upon the application of the Claimant.

14.4 In support of their application under Rule 76(1)(a), the Respondent's submissions referred to the primary reason for the strike being due to the Claimant not actively pursuing the claims. This, they submitted, amounted to vexatious, abusive, disruptive and/or unreasonable behaviour in the way proceedings had been conducted by the Claimant. They had incurred significant costs in defending the claims, exacerbated by continued and deliberate assertions put forward by the Claimant that the Respondent and/or this firm was misleading the Tribunal and/or intimidating the Claimant and/or subjecting him to harassment. The total sums incurred through preparing the strike out application and for solicitor and counsel costs in attending the strike out hearing amounted to £9,320 plus VAT.

14.5 The application by the Respondent to strike out the claims was ultimately successful; and, had the Claimant's conduct been reasonable, the application would not have been required.

14.6 The application under Rule 76(2) was based on submitting that the Claimant had failed to comply with orders of the Tribunal. They made reference to the part in my judgment in which I stated that the Claimant has undoubtedly been in breach of a number of Tribunal orders and directions, with a serious breach being in respect of my request for medical evidence. They stated that there had been breaches of orders of Employment Judge Jones, Regional Employment Judge Taylor and myself requiring the Claimant to produce medical evidence and, in my case, specific medical evidence, which the Claimant had breached. They referred to paragraph 66.3 of my judgment, as this being a deliberate failure of the Claimant. The Respondent, they submitted, incurred costs of £1,516.50 plus VAT in seeking from the Claimant adequate medical documentary evidence. His failure to do so was also a significant factor in the Respondent applying for strike out of the claims, for which they incurred costs of £9,320 plus VAT in preparing a strike out application and attending the hearing on 18 June 2018.

14.7 With regard to their application under Rule 76(1)(c) and/or Rule 76(2) they referred to postponements of a judicial mediation hearing listed to take place on 8 February 2017; the five day hearing listed to take place on 21 March 2017; the Preliminary Hearing listed for 26 June 2017; and submitting that the number of hearings which had been postponed was a significant factor in the Respondent applying for strike out of the claims. They stated that they had incurred £1,614.00 plus VAT and £350.00 plus VAT preparing for the judicial mediation hearing that had been listed; £351 plus VAT preparing for the March 2017 hearing; £2,598.50 plus VAT preparing for the hearing listed on 26 June 2017; and £9,320 plus VAT (referred to at paragraph 14.4 above) in preparing for and attending the hearing on 18 June 2018 when the Claimant's claim was struck out.

14.8 They enclosed a schedule of costs incurred between 29 November 2018 amounting (as referred to above) to £26,880.17 plus VAT.

15 The Claimant's submissions dated 8 November 2018 including the following points:

15.1 As referred to above, a request for consideration of the costs application to be postponed pending his appeal.

15.2 The Respondent's court costs were overstated, stating that the Respondent's solicitors attended court with at least four to six people every time, increasing court costs incredibly and unnecessarily.

15.3 The Respondent's solicitors kept requesting court dates when he was clearly unable to attend due to medical reasons, ignoring this and sending unnecessary correspondence to raise court costs. This he submitted displayed high levels of thoughtlessness towards ex-employees who they put through financial hardship due to the lack of health and safety care and responsibilities.

15.4 Attaching a letter from his GP practice dated 14 August 2018 (describing the Claimant's medical condition) and his letter to the Tribunal dated 11 September 2018 (referred to above).

16 The Respondent's further submissions, in a letter dated 6 December 2018 including the following points:

16.1 It was misleading for the Claimant to state that their firm had attending hearings "with at least four to six people every time", giving reasons.

16.2 Objecting to the Claimant's assertion that their firm had "significantly overstated" the Respondent's costs at the Preliminary Hearing on 18 June 2018, giving reasons for this.

16.3 Asserting that the timeframe in respect of which the Respondent was claiming costs did not include the time for which the Respondent had previously been awarded costs by Employment Judge Prichard dated 9 November 2015 and attaching a copy of his judgment.

16.4 Repeating that they were limiting their application for costs to £10,000; and disputing that they sent the Claimant unnecessary correspondence to increase the court costs.

The Relevant Law

17 Rule 76(1) of the Employment Tribunals Rules of Procedure 2013 provides as follows:

"(1) a tribunal may make a costs order …, and shall consider whether to do so, where it considers that –

(a) A party … has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted;

> (b) 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."

18 Rule 76 involves, therefore, a two-stage process. The first stage is for the Tribunal to consider whether the threshold required a Rule 76(1)(a) or (c) has been reached. The second stage, if the Tribunal considers that the threshold has been reached, is to consider whether to exercise the discretion to award costs.

19 Rule 76(2) provides:

> "A tribunal may also make 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"

20 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.

21 In the High Court or County Court the unsuccessful party in litigation will usually be ordered to pay the successful party's costs, in accordance with the CPR rules in those venues. In contrast, costs in Employment Tribunal proceedings are the exception rather than the rule and are granted in the limited circumstances set out in Rule 76.

22 In the case of *Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78 (CA)* it was held that 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 was 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.

23 In the case of *AQ Ltd v Holden [2012] IRLR 648 (EAT)* consideration was given as to whether, or what, account to take of a party being a litigant in person.

24 It was held that the threshold tests were the same whether a litigant is or is not professionally represented. It was held that the application of those tests, however, must take account of whether a litigant is professionally represented. The Tribunal cannot and should not judge a litigant in person by the standards of a professional representative. Lay people are entitled to represent themselves in Tribunals and, since legal aid is not available and they will not usually recover costs if they are successful, it is inevitable that many lay people will represent themselves. Justice requires that Tribunals do not apply professional standards to such people, who may be involved in legal proceedings the only time in their life. They are likely to lack the objectivity and knowledge of law and practice brought by a professional legal adviser. Further, even if the threshold tests for an order for costs are met, the Tribunal has discretion whether to make an order. This discretion will be exercised having regard to all the circumstances. It is not irrelevant that a lay person may have brought proceedings with little or no access to specialists help and advice. This is not to say that lay people are immune from orders for costs: far from it, as caselaw makes clear. Some litigants in person are found to have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity.

25 The power to award costs under Rule 76(2) is entirely discretionary, although costs should only be awarded against the party if he/she is at fault in applying for a postponement or adjournment. Unlike under Rule 76(1)(a), however, when costs are

awarded under Rule 76(2) there is no need to find that a party has behaved vexatiously, abusively, disruptively or otherwise unreasonably. It is sufficient that he/she is clearly responsible for the delay.

Conclusions on Application for Costs

26 My reasons for striking the Claimant's claims were set out in paragraphs 63 – 66 of my judgment, particularly paragraphs 66.1 – 66.10. I have them in mind.

27 I have considered the three alternative ways in which the Respondent's application for costs was based. In regard to the first ground, under Rule 76(1)(a) (the Claimant acting vexatiously, abusively, disruptively and/or unreasonable) my conclusions are as follows:

27.1 The Respondent refers to the principal reason of the strike out being due to the Claimant not actively pursuing the claims. They refer to the Tribunal recognising that no real progress was made with the claims since the Preliminary Hearing conducted by Judge Jones on 25 and 28 November 2016; and referred to paragraph 66.2 of my judgment.

27.2 The fact, however, of the lack of progress in the litigation does not of itself amount to unreasonable conduct of the proceedings. The Claimant was undoubtedly in poor health.

27.3 The Respondent referred to incurring significant costs in defending the claims, exacerbated by what they stated to be continued and deliberate assertions put forward by the Claimant that the Respondent and/or this firm was misleading the Tribunal and/or intimidating the Claimant and/or subjecting him to harassment.

27.4 The Respondent did not, however, give specific details, or examples, of such communications in order for me to be able to make an informed assessment of this point.

27.5 I also have in mind the guidance in the *AQ Ltd v Holden* case that a Tribunal cannot and should not judge a litigant in person by the standards of professional representative, for the reasons set out by Judge David Richardson in that case. I am not satisfied, therefore, that the Respondent has made out its grounds under this heading.

28 The second ground of the application, under Rule 76(2) is as to the Claimant's failure to comply with an order of the Tribunal.

29 The Respondent refers to paragraph 66.3 of my judgment, in which I referred to Claimant having undoubtedly been in breach of a number of Tribunal orders and directions, although my decision was based on case not been actively pursued. I referred to a serious breach being his failure, although he had obtained medical evidence, to address my request for medical evidence as to whether he would be able to attend and conduct his hearing with suitable adjustment; and for a prognosis, if unfit, as to when he would be fit. I explained why this was important to my decision making. I referred to having met the Claimant on a number of occasions, that he was an intelligent individual;

and that I considered his failure to supply this information, despite obtaining a number of GP letters following my request, to be deliberate.

30 The Claimant's deliberate failure to supply information required by me, was, I consider, unreasonable conduct on his behalf.

31 The Respondent also referred to Orders of Employment Judge Jones and Regional Employment Judge Taylor for medical evidence to be supplied by specific dates and the Claimant having breached these Orders. They referred to the Respondent incurring costs of £1,516.50 plus VAT in seeking for the Claimant adequate medical documentary evidence. They referred to the Claimant's failure to comply with an Order of the Tribunal being a significant factor in the Respondent applying for strike out the claims. The costs they submitted they incurred for preparing the strikeout application and attending the hearing on 18 June 2018 as amounting to £9,320 plus VAT.

32 The third basis of the Respondent's application was the postponement of a judicial mediation hearing listed to take place on 8 February 2017; a five day hearing listed to take place on 21 March 2017; and a Preliminary Hearing due to take place on 26 June 2017. These were vacated and postponed on 6 February 2017, 8 February 2017 and 26 June 2017. All postponements were on the basis of the Claimant's ill health. These postponements, the Respondent submitted, was a significant factor in the application for the strike out claims and the costs incurred in preparing for and attending the hearing on 18 June 2018.

33 I do not consider that the Respondent has made out the aspect of their application relating to the postponements of hearings. The applications for postponements were granted, so the judges concerned must have been satisfied that it was the appropriate course of action on the basis of the Claimant's ill health. The Respondent's application appears to be based on the fact of the postponements rather than any detailed analysis of why the postponements amounted to unreasonable conduct on the Claimant's behalf.

34 I have considered what effect the unreasonable conduct I have found the Claimant to have carried out had on the proceedings. This is difficult to say because I am considering a hypothetical situation. Depending on what the advice was, it is possible that the Respondent may not have made their strike out application; or that, if they had made such an application, that it would not have been successful. From reading paragraphs 66.1 – 66.10 of my strike out judgment, it can be seen that the Claimant's unreasonable conduct was one factor, not the only factor in my decision.

35 Having found that the Claimant did conduct the proceedings unreasonably, to the extent I have identified above, I considered whether or not to exercise my discretion to make an award of costs. I have considered that it would be appropriate to do so in this case. I have sympathy for the Claimant's ill health; and sympathy for the difficulties on litigants in person in complex litigation. I am also mindful that it is important that litigants who behave unreasonably can expect to face consequences of their unreasonable conduct. As referred to in the Tribunal's overriding objective, Tribunals are required to deal with a case fairly and justly; and justice involves justice to both sides. The Respondent is a charity, dealing with vulnerable individuals, and it has incurred very large sums defending these proceedings.

36 I have, next, considered what the extent of the costs award should be. The costs claimed by the Respondent for breaches of Tribunal Orders that I have found to amount to

unreasonable conduct, are £1,516.50 plus VAT. The costs claimed by the Respondent of their strike out application claim, which I have found, at least to a limited extent, to be attributable to the Claimant's unreasonable behaviour are £9,320 plus VAT. The latter sum in particular appears to be high and higher than I would award had I been sitting as an Employment Judge in the County Court making an assessment of costs on a standard basis.

37 I have also considered Rule 84 of the Employment Tribunal Rules, namely the Claimant's ability to pay.

38 It would have been helpful if the Claimant had responded to my invitation to set out his financial circumstances. I invited him to do so in an attempt to assist him, as a litigant in person, in setting out his case.

39 I have in mind, however, that when Employment Judge Prichard made an order for costs against the Claimant in the sum of £2,000 at the hearing he conducted on 29 September 2015 he gave consideration to the Claimant's means in paragraphs 48 to 51 of his judgment. He set out details of the evidence the Claimant had given to him on oath about his means. This showed him of being of limited means. He referred to it being wrong if he would just make a token costs order but that he would wish to take the Claimant's means into account under Rule 84 of the 2013 Rules.

40 Although the Claimant has not given the details of his means that I required, it appears likely to me that his financial circumstances are no better, and quite possible worse, than they were when considered by Judge Prichard. He has lost his job with the Respondent; and, although the Claimant has not given details of his circumstances, it appears unlikely in view of his health that he has obtained new employment.

41 I have taken account of the Claimant's means and all the matters referred to in my decision above. I order the Claimant to pay a contribution to the Respondent's costs in the sum of £2,000.

Employment Judge Goodrich

1 March 2019