EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr D Phelan	**v**	**Kettering General Hospital NHS Trust**

JUDGMENT

The claimant is ordered to pay costs to the respondent in the sum of £20,000.

REASONS

Procedural Background

1. On 21 May 2018 at an open preliminary hearing Employment Judge Sigsworth dismissed the claims brought in these proceedings. In reserved reasons sent to the parties on the 8 June 2018 he explained why he had reached that decision. He found that the claimant had failed, and continued to fail, to comply with orders made by Judge King at a preliminary hearing on 8 December 2017 which the clamant attended. The orders required further information in respect of his complaints brought of direct discrimination, Section 13 of the Equality Act, under Section 26 of the same Act claims of harassment and full details of detriments alleged in relation to the claims brought under the provisions of Section 47B of the Employment Rights Act 1996. For the purposes of the Equality Act 2010 the claimant relied on the protected characteristics of race, Section 9, and religion or belief, Section 10. The claimant had also failed to comply with the Tribunal's order for disclosure of documents for the preliminary hearing listed for 21 May 2018. That hearing was to determine the following issues:

    1.1 Was the claimant an employee of the respondent in his role as a hospital trust governor?

    1.2 If not, was the claimant a worker in respect of the governor role in accordance with Section 47K of the Employments Rights Act 1996?

    1.3 In respect of the substantive role, was it reasonably practicable for the claimant to present his claim of unfair dismissal within the relevant time period?

2. The claimant applied for postponement of the hearing of 21 May 2018 on the 4 May 2018 stating that he had only just learned, for the first time, that a hearing was taking place on the 21 May 2018. That was notwithstanding that the hearing date of 21 May 2018 was fixed at the hearing on 8 December 2017 at which the claimant was present, and the hearing date of 21 May 2018 was confirmed in the written case management summary and orders sent to the parties on 30 December 2017.

3. The claimant made an application for postponement of the hearing on 14 May 2018, forwarding a sick note from his GP stating that he was not fit for work. Employment Judge Sigsworth refused that application, but permitted the claimant to renew it in person at the start of the hearing on 21 May 2018 as was confirmed at paragraph 3 of his judgment.

4. I set out in full below the paragraph setting out the conclusions in Employment Judge Sigsworth's judgment dismissing the claims following the hearing on 21 May 2018.

"Conclusions

9. The case is now no further on than it was nearly six months ago at the closed preliminary hearing. The Claimant has failed to provide particulars as ordered, and has failed to comply with orders so as to get ready for this open preliminary hearing. The Respondent still does not know the case it has to meet with regard to the Claimant's claims of discrimination and protected disclosure detriment. The dismissal claims are potentially barred by jurisdiction issues of time and employment status. The Claimant has not provided any documentation – a witness statement, written submissions or otherwise – as to his case on these jurisdiction points. He is not here in person to make his arguments orally, or at least to apply in person for a postponement of the hearing on medical grounds or otherwise.

10. In those circumstances, to postpone the hearing and re-list it would be prejudicial to the Respondent and not in the wider interests of justice as it would not be likely to move the case forward, having regard to the history. We are quite likely to be in the same position at the next hearing. Nor do I conclude that it is necessary to hear full evidence and argument from the Respondent on the jurisdiction issues listed to be determined today. On their face, the dismissal claims appear to be barred by reason of being out of time and/or because the Claimant was not an employee or a worker. The Claimant has not provided any argument to the contrary. He has not complied with Tribunal orders and, he having been warned that the Tribunal was considering it, I can strike out his claim on that basis alone.

11. I therefore strike out and dismiss his claims, both under rule 47 and, as necessary, under rule 37(1)(c) and (d). In making that determination, I have considered all relevant documentation that I have seen, including the Claimant's claim form, and his various relevant emails and letters to the Tribunal. I have also in mind that he knows that the Tribunal did not postpone this hearing at his original request, and that the Tribunal said that he might re-open his application today, but he has chosen not to attend, and indicated to the Employment Tribunal administration that he would not be attending. The case of Andreou makes it clear that a fit note obtained for the purpose of the employee's fitness for work does not mean that he is automatically not fit to

attend a Tribunal hearing. The Claimant has to establish that he is not fit to do so and he has not done this.

12. The Respondent made an application for costs. However, that application has not been fully particularised for the Claimant (or the Tribunal) so that he can respond to it, even if he has been given some notice of it. I decline to hear that application today. The Respondent indicated that it would make the application fully in writing after the written reasons for the decision today have been sent to the parties. The Claimant will then be given an opportunity to respond in writing to it, and I will make a decision on it thereafter without a hearing."

5. The judgment was sent to the parties on 8 June 2018.The claimant mad application for reconsideration of that judgment. His application was refused in a judgment and reasons sent to the parties on 26 June 2018.

6. On the 4 July 2018 the respondent submitted an application for costs, copied to the claimant. The respondent submitted that the Tribunal's power to make an award for costs had arisen because:

   6.1 The claimant's conduct throughout the case of the Tribunal proceedings had been vexatious, abusive, disruptive and unreasonable;

   6.2 The claimant has failed to comply with the Tribunal directions and orders and:

   6.3 The claimant has failed to actively pursue his claim.

7. By letter dated 2 August 2018 on Judge Sigsworth's direction the claimant was required to respond to the respondent's application for costs on or before 17 August 2018.

8. Inexplicably, a further letter was sent by the Tribunal to the claimant on Judge Henry's direction on 20 September 2018 enclosing the application for costs and requiring the claimant to give reasons in writing by 12 October 2018 why the costs award should not be granted.

9. By email dated 12 October 2018 the claimant, in an email headed "costs application case number 3327589/2017" responded stating;

   "I would be most grateful if you would get clarification from the other side as to why they have not used the Government Legal Team and thereby have incurred unnecessary cost." He went on to state "I have not had a reply to my email of July 4 2018 to the ET and I am therefore at a loss as to understand why an application for costs against me is being contemplated."

10. That email to the Employment Tribunal stated that he had not yet received copies of the orders made at the hearing on 21st May which he did not attend, requested copies of the orders from that hearing and stated that:

    "As a consequence I asked for a 10 day internal appeal against any such decisions to throw my case out.

> Additionally if needs be I do not want to miss the 42 day deadline to appeal to the Employment Appeals Tribunal should this be necessary."

11. Notwithstanding that judgments recorded that they had been sent to the parties on the 2 August 2018 Judge Sigsworth directed that the claimant be sent a copy of the orders following the preliminary hearing of 8 December 2018 together with copies of the judgments following the 21 May hearing and the rejection of the reconsideration application.

12. On 15 October 2018 the respondents wrote to the Tribunal stating that they had no comment to make on the majority of the claimant's response to their costs application (12 October 2018) because;

> "…much of it has no bearing on the respondent's current application for costs. Noting however that the claimant asserts that the respondent should have used the "Government Legal Team", and that by not doing so the respondent has incurred unnecessary costs, we write to confirm that the Government Legal Profession (which we assume is the body the claimant was referring to) works solely for the government and as such was never a viable option to represent the respondent in this matter. The remainder of the points raised by the claimant are not material to the application."

The letter went on to state:

> "The respondent submits that the claimant has now had since 4 July 2018 (the date that the respondent submitted its costs application) to provide a substantive response, and that following the Tribunal's letter of 20 September 2018 he has now had a reasonable opportunity to make representations in response to the application."

13. That correspondence was referred to me and on 12 November on my direction the Tribunal wrote to the parties as follows;

> "REJ Byrne has reviewed the recent correspondence on file. He advises the parties that Judge Sigsworth retired on 31 September 2018. In all the circumstances in order to determine the application he proposes to deal with the determination of the application himself in accordance with the provisions of Rules 74 and 78 of the Employment Tribunal Rules of Procedure. Given that Judge Sigsworth heard no evidence in the proceedings there does not appear to be any prejudice to the parties in Judge Byrne determining the costs application. Any further written representations either party wishes to be considered in connection with determination of the costs application must be submitted to the Tribunal and copied to the other party no later than 19 November 2018".

14. On the 12 November the claimant wrote to the Tribunal stating he had "an Employment Appeal Tribunal hearing in connection with my other whistle blowing case against NHS England" and requested that the deadline for submissions in this case be extended until after the Employment Appeal Tribunal hearing the following week. By email dated the 20 November 2018 the respondent opposed that application stating the claimant had ample time to make representations and that the Employment Appeal Tribunal case was unrelated to this case.

15. On 23 November 2018 the claimant wrote to the Tribunal stating
> "I have sought and obtained legal advice in relation to this case.

> In the first instance I wish to make an out of time request to the Employment Tribunal to reconsider its decision."

The respondent objected to that application by pointing out that the application was out of time.

16. On the 12 January 2019 on my direction (given on 18 December 2018 but not actioned by the administration until 12 January 2019) the Tribunal wrote as follows:

> "Regional Employment Judge Byrne has asked me to write to you as follows:
>
> Your further application dated 23 November 2018 for reconsideration of the judgment sent to the parties on 8 June 2018 is refused. That is because you have already made an application for reconsideration of that judgment and the application was refused in a judgment and reasons sent to the parties on 26 June 2018. The application is nearly six months out of time. There must be finality in litigation. For all those reasons the application is refused. The costs application will now be determined on the basis of the written representations received from the parties in accordance with the Tribunal's letter of 12 November 2018."

17. On 18 February 2019 I directed that a letter be sent to the parties in the following terms:

> "Regional Employment Judge Byrne has directed that I write to the parties. He apologises for the delay in determination of the outstanding costs application made by the respondent. He anticipates that he will in a position to determine this application shortly. In advance of that determination given the amount of the costs order sought by the respondent the claimant is directed to set out in writing to the Tribunal and to the respondent details of the claimant's financial means, namely current income, capital and other assets with **14 days** of the date of this letter. In Regional Employment Judge Byrne's view given the total sum sought by the respondent, in deciding in this case whether to make a costs order it appears to Regional Employment Judge Byrne that in all the circumstances it is appropriate to have regard to the claimant's ability to pay and for the claimant to be given an opportunity to provide details of his ability to pay before the application is determined."

18. On the 20 February 2019 the claimant wrote to the Tribunal stating that he had not received from the Employment Tribunal the judgment in relation to the hearing of 21 May 2018 and requesting a copy of the orders from the hearing as a matter of urgency. On the 21 February 2019 he copied the Employment Tribunal with a letter to the Registrar of the Employment Appeal Tribunal which included "an electronic copy of the orders from the hearing on May 21st 2018".

19. On the 5 March 2019 the respondent wrote to the Tribunal. They stated

> "At the time of writing the respondent submits that the claimant has failed to set out details of his financial means and requested the Tribunal proceed with a determination of the outstanding costs application irrespective of the claimant's failure to engage".

They went on to say;

> "It is the respondent's assertion the claimant has now been provided with ample opportunity to make representations to the Tribunal, in accordance with Rule 77 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, but has failed to do so.
>
> The respondent notes that during the material time (i.e. within the last 14 days) the claimant has written to the Employment Appeal Tribunal to appeal the Tribunal's decision to strike out his claim in May 2018 and has also engaged in further correspondence with the respondent's solicitors on a separate, yet related, matter. The claimant is clearly capable of communicating to a high level with the Tribunal, however has chosen not to do so. The respondent therefore submits that there is no good reason for the claimant to have disregarded the Tribunal's directions of 18 February 2019; indeed the respondent submits that this type of unreasonable behaviour is indicative of his approach throughout the entirety of his Tribunal claim and goes to the heart of the costs application currently before the Tribunal.
>
> In light of the above, coupled with the extended period of time since the application was originally made (noting of course the extremely high workload that the Tribunal currently faces), we would therefore respectfully request that the Tribunal makes an order for costs against the claimant in the sum requested in our Costs Schedule of 4 July 2018 at its earliest convenience."

The claimant has failed to respond to the Tribunal's direction of 18 February 2019.

The basis of the respondent's cost application

20. The respondent's case is that from the time when the claimant issued proceedings on 30 August 2017 his actions were vexatious and unreasonable because instead of providing a properly pleaded claim the claimant simply copied a BBC news article that made reference to him by name in relation to an historical dispute with the respondent. Nothing within the article provided any clarity in respect of the claimant's claims, there was no mention of any purported "dismissal" of the claimant from the respondent, nor was there any suggestion that he had suffered any detriment due to his race and/or religion or belief.

21. The details in the claim form were as follows. At Section 8 headed "type in details of claim" the claimant has ticked the box "I was unfairly dismissed (including constructive dismissal), I was discriminated against on the grounds of race, religion or belief." In the section that provides for the background details of the claim appeared the following;

> "Kettering General Hospital "fiddled" waiting time records
>
> By Matt Precey
>
> BBC East
>
> 26 May 2017

> Thousands of patients were removed from a hospital's waiting lists in a bid to "fiddle" the system, it is claimed.
>
> A BBC investigation found thousands of Kettering General Hospital patients had waited a year or more for operations.
>
> David Phelan, a hospital trust governor, claims patients were removed from lists because national targets were being missed.
>
> The hospital admitted there had been "anomalies" and that a thorough review of data had been carried out.
>
> 'Systematic fiddling'
>
> A hospital review has found that 138 patients were harmed – including one who had substantial sight loss – as a result of the long waits.
>
> Mr Phelan, who raised concerns under whistleblowing procedures, was working as associate general manager in the trauma and orthopaedics department when he discovered discrepancies in the referral to treatment time (RTT) data in October 2015.
>
> He warned managers that the daily RTT report was understanding the true position by half when checked against patient records.
>
> He told the BBC he discovered managers at Kettering General Hospital had used six exclusion categories to remove patients from their official waiting list data.
>
> "It became apparent to me that a systematic fiddling of the waiting list figures was taking place," he said.
>
> "I made a whistle-blowing submission about this. I have been stonewalled about this for two years."
>
> He says the trust manipulated the figures to avoid being fined for patients waiting longer than 52 weeks.
>
> The NHS regulator fines for breaches of waiting times are per patient."

22. The respondent in their ET3 defence to the claim and grounds of resistance stated that to consider the claims the claims needed to be properly pleaded and as early as 16 October 2017 requested further and better particulars from the claimant to allow it to properly defend the claim. Those further particulars were not provided voluntarily by the claimant and so at a preliminary hearing scheduled for 8 December 2017 Employment Judge King ordered the claimant to provide further particulars no later than 22 December 2017 and further scheduled a further preliminary hearing for 21 May 2018 to deal with the question of the claimant's employment status and the other issues identified at paragraph 1.1 to 1.3 above.

23. The respondent submits that the claimant was in attendance at the preliminary hearing on 8 December 2017 representing himself and at no time during the hearing did he indicate that he was unaware of what was being ordered or indicate that he was unsure of what was required of him.

The directions also set out in writing the case management summary sent to the parties on the 13 December 2017. It is the respondent's case that those further particulars were not provided by the claimant, either by the Tribunal's deadline or at all.

24. That is factually correct and the claimant has not challenged that ha has failed to provide the further particulars ordered. I am mindful that the claimant is unrepresented. It is not uncommon for an unrepresented claimant to complete a claim form and provide very little detail of the claims and issues. It is then the task of an Employment Judge at a preliminary hearing to identify with the parties present exactly what the nature of the dispute is and to make all necessary case management orders. So, I am not critical of the claimant prior to the hearing of 8 December 2017 and do not find that his conduct prior to the hearing of 8 December 2017 could amount to unreasonable conduct or a failure to pursue the claims. I am, however, entirely satisfied that his failure after 8 December 2017 to comply with the clear orders made by the Tribunal to provide further particulars does amount to unreasonable conduct and a failure to actively pursue his claim.

25. The next factual ground relied on by the respondent in support of the costs application relates to the claimant's conduct with regard to the preliminary hearing listed for the 21 May 2018. The respondent submits that in advance of this hearing the claimant was ordered to:

    25.1 Provide further particulars;

    25.2 Disclose relevant documents to the respondent; and

    25.3 Provide the respondent with a written witness statement, setting out the facts that the claimant intended to put before the Tribunal in support of his contention that had been an employee of the respondent or, in the alternative, that he fell within the definition of worker under Section 47K of the Employment Rights Act 1996.

26. The respondent accepts that as part of those same directions it was required to provide any relevant documents to the claimant, prepare a paginated bundle of agreed documents, and to exchange the witness statements of any witnesses on which the respondent intended to rely in order to defend the claimant's claims.

27. Despite the claimant's on-going refusal to engage with the Tribunal's direction to provide the further particulars the respondent was clear in its correspondence with both the Tribunal and the claimant that it was ready to comply with the Tribunal's directions wherever possible, including attending a preliminary hearing.

28. The respondent's case is that despite the claimant missing the Tribunal's deadline to provide the further particulars from January 2018 onwards, the respondent gave the claimant several further opportunities to provide the further particulars and that during that time the respondent delayed

performing a substantial portion of the necessary preparations for the Tribunal hearing for as long as it was able. The respondent's case is that in order to ensure that the preliminary hearing of the 21 May 2018 could go ahead as ordered it sent several detailed letters putting the Tribunal on notice of the claimant's on-going refusal to engage with the process, and proposed revised directions as a result of his failure to comply with those orders made at the preliminary hearing in December 2017, requested an unless order following the Tribunal's strike out warning of 15 January 2018 , and made subsequent strike out applications due to the claimant's to the claimant's on-going failure to engage.

29. The respondent's position is that at the beginning of April 2018 a decision was made by the respondent that to delay any longer preparation for the May hearing would prejudice the respondent's ability to source all the relevant documents and to provide cogent and detailed witness evidence and accordingly preparation for the preliminary hearing began in earnest on the 4 April 2018. The claimant's case is that the significant portion of costs attributed to the preparation for the preliminary hearing accrued from the 4 April 2018 onwards. The respondent received no documents, witness evidence or comment on any of the respondent's documentation from the claimant.

30. The respondent further relies on the claimant's failure to attend the preliminary hearing. The claimant's application for postponement of the preliminary hearing having been rejected by Judge Sigsworth on the 17 May 2018 the claimant was expressly notified that he could renew his application in person at the hearing on the 21 May 2018. As is recorded in paragraph 3 of the reserved reasons sent to the parties on the 8 June 2018 Employment Judge Sigsworth recorded:

> "On Friday 18 May 2018, when contacted by the Employment Tribunal administration on the telephone, the claimant stated that he would not be attending the hearing on 21 May 2018."

31. The respondent's case is that the claimant's failure to attend the preliminary hearing was a further example of his failure to pursue the claim. He was fully aware that either he or a representative was required to attend and by failing to do so must have been aware at that point at the very latest that the claim would have no reasonable prospect of succeeding in his absence. Accordingly, the respondent submits that it was unnecessarily put to the substantial cost of preparing for and attending a substantive preliminary hearing which had been listed for a full day. I find as a fact that the claimant's failure to prepare for the preliminary hearing amounted to failure to actively pursue his claim.

32. I go on to consider whether the claimant's failure to attend the hearing amounted to unreasonable conduct of the proceedings. The basis of his postponement application made by email on the 14 May 2018 was that his doctors were trying to stabilise his Type 2 diabetes condition. The statement for fitness for work stated that he was unfit for work but nowhere in any of the documentation provided by the claimant with his email of 14

May was there any information explaining how any medication/treatment affected his ability to attend a preliminary hearing, whether his general practitioner had declared him as unfit to attend a preliminary hearing and whether he might be able to do so.

33. The claimant was advised by the Tribunal that Judge Sigsworth had directed that although he had produced a doctor's note it did not say that he was unfit to attend the Tribunal and that the claimant could renew his application for postponement at the start of the hearing. His response to that appears to be in an email to the Tribunal of the 18 May 2018 timed at 04:51am.

> "My GP has given me sick note for 2 weeks from May 8th, 2018. My GP has given me the only sick cert that NHS doctors have.
>
> My GP is trying to stabilise my Type 2 diabetes, a condition might I add, that has been triggered by the unnecessary stress that I have been put under as a consequence of whistleblowing about very serious matters.
>
> I will not be in a position to attend the hearing on Monday next as I am not well.
>
> Should the Court strike my case out I will appeal."

34. He emailed the Tribunal again at 05:26 on 18 May 2018 stating:

> "Should you require a medical report from my GP I am willing to request one to submit to the Court.
>
> The key point about my doctor's current interventions is that my diabetes is not yet in a stable state and my doctor is trying to identify an appropriate medication regime to bring my diabetes under control.
>
> One of the unfortunate consequences of diabetes is that one has to go to the toilet to urinate at regular intervals as the body tries to purge itself of toxins hence my being awake at this unearthly hour.
>
> The waiting list fraud at Kettering General Hospital NHS FT that I and two of my former work colleagues have whistle blown about were first formally reported in October 2015.
>
> A couple of months in order to bring my condition under control is neither here nor there in terms of this timeline."

35. I am satisfied that it was clear to the claimant prior to the hearing on Monday 21 May that because there was no independent medical evidence before the Tribunal to confirm that his general practitioner had declared him unfit to attend the preliminary hearing, that it was open to him to produce additional medical information to the Tribunal, and to attend to renew his application or indeed to arrange for someone to attend on his behalf, none of which he did. In all those circumstances I consider his conduct in failing to attend or arrange for representation on 21 May 2018 was unreasonable.

36. The respondent submits that the claimant conducted the proceedings unreasonably in asserting that he was unaware of the preliminary hearing of 21 May 2018 when he asserted in an email of 4 May 2018 to the Employment Tribunal and to the respondent, responding to a letter written on my direction on the 3 May 2018, "this is the first time I have heard that there is a hearing planned for this case against the respondent on May 21st, 2018."

37. The respondent points out that the claimant was present at the preliminary hearing on the 8 December 2017 and the date was fixed and having received case management summary sent to the parties by the Tribunal on 30 December 2017. The respondent submits that the claimant sought to;

> "deliberately mislead the Tribunal in order to get a postponement of the preliminary hearing and that this is a further example of his unreasonable vexatious conduct of the claim".

They point out that the claimant himself made specific reference to the May preliminary hearing in emails to the Tribunal of 9 December 2017 and 15 March 2018. The respondent is correct. Having reviewed the claimant's email to the Tribunal of 9 December 2017 it clearly states:

> "At the hearing today the Judge pencilled in May 21st, 2018 as a 1 day preliminary hearing to determine what aspects of my claim the Court would sanction to forward to a full hearing.
> I asked the Judge if would be possible
> a) for this 1 day PH to be held earlier
> b) for 10 days to be set aside for the full hearing which could then be pared back if necessary.
> The Judge declined on both counts."

38. I find as a fact that the claimant's assertion in his email to the Tribunal of Friday 4 May 2018 at 12:31pm, "This is the first time that I have heard that there is a hearing planned for this case against Kettering General Hospital MHS FT on May 21st 2018" is simply untrue. I am satisfied that making an untrue statement as part of a postponement application amounts to unreasonable conduct of the proceedings.

39. The respondent also raises in support of its application for costs that throughout January and February 2018 the claimant made regular reference in his correspondence to the Tribunal to the fact that he had instructed solicitors and that "Sydney Mitchell LLP are now on record….in this case" and also that on more than one occasion the claimant had identified Mr Dean Parnell as his "lawyer" and "lead legal advisor". This led to the respondents making attempts to engage in correspondence with Mr Parnell, most notably in an attempt to ascertain if and when the claimant intended to begin complying with the now overdue Tribunal directions. The respondents did not receive any response to their enquiries and assert that to the best of their knowledge neither Mr Parnell or Sydney Mitchell LLP were ever on the record as acting for the claimant. The respondent submits the claimant's behaviour in this regard led to an unnecessary increase in costs to the respondent. It may be the case that the claimant was in contact with

Sydney Mitchell LLP and that for whatever reason it never came to pass that firm were instructed by him. I am not satisfied on the basis of the documentation before me, notwithstanding the respondent's assertions, that I can find as a fact that the claimant's reference to having instructed solicitors amounts to unreasonable conduct of the proceedings.

40. Rule 76 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides

> "(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 parties representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either bringing the proceedings (or part) or the way that the proceedings (or part) have been conducted."

41. In view of the findings made at paragraphs 24,31,35 and 38 above that the claimant has acted unreasonably in the conduct of these proceedings the power to make a costs order arises. The application for costs has been made in accordance with the provisions of Rule 77 which provides

> "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 proceedings in respect of that party were sent to the parties. No such order may be made unless the paying parties had a reasonable opportunity to make representations (in writing or at the hearing, as the Tribunal may order) in response to the application."

42. The claimant has had ample opportunity to make representations in writing but, save for submitting that the respondent should not have incurred any legal costs but should have used the "Government Legal Team" has not made any written representations in opposition to the costs application.

43. The amount of the costs order applying the provisions of Rule 78(1)(a) may be up to £20,000 and it is that figure that the respondent seeks. The Schedule of Costs provided with the costs application, which schedule was copied to the claimant with the application, totals £25,259.80 which with VAT at £5,051.96 totals £30,311.76.

44. Rule 84 states

> "in deciding whether to make a costs, preparation time or a wasted costs order, and if so, what amount, the Tribunal may have regard to the paying parties (or where a wasted costs order is made, the representatives) ability to pay."

45. The claimant was directed by the Tribunal's letter of 18 February 2019 to set out in writing details of his financial means within 14 days of the date of that letter i.e. by no later than 4 March 2019, but has failed to do so. Given the amount of the costs order sought by the respondent it appeared to me that in all the circumstances of the case and in deciding whether to make a costs order it was appropriate to have regards to the claimant's ability to pay and for the claimant to be given an opportunity to provide details before the application was determined. The claimant having failed to provide any

details there is no basis on which I can conclude that he is unable to pay and I proceed accordingly that he can pay.

46. The description of work done provided with the Schedule of Costs separates costs out into four specific periods. The first period is from the 20 September 2017 until the 8 December 2017, the date of the first preliminary hearing. The total amount of costs in relation to that period is £7,689.30. I have not made any findings that the claimant's conduct of the proceedings up to the date of the preliminary of 8 December 2017 amounted to unreasonable conduct. I particularly mindful of the fact that the claimant was unrepresented at the time when the proceedings were issued and that the purpose of the preliminary hearing on 8 December 2017 was to get to grips with exactly what the case was about clarifying the claims and issues and making all necessary orders to progress it to a determination. Accordingly, I discount from the Schedule the sum of £7,689.30.

47. For the reasons set out above I am entirely satisfied that the claimant's conduct of the proceedings was unreasonable from 9 December 2017 onwards and it is appropriate in all the circumstances of this case to make an award of costs in favour of the respondent from that date. The total costs claimed in all relation to that period amount to £15,070.50 plus counsel's fees of £2,500 for the hearing of 21 May 2018 together with VAT at 20% of £3,514.10 a total of £21,084.60. I accept that the hourly rates charged for the fee earners involved in the work are reasonable and proportionate. Applying the provisions of Rule 78(1a) I limit the total of the costs order made to £20,000.

48. Finally, I regret the time it has taken to deliver this judgement following the 4 March 2019, the date by which date the claimant was directed to set out details of his financial means but failed to do so. I have been extensively committed with judicial duties both at Watford and across the South East Region and as a result it has taken longer than I would wish for this costs application to be determined.

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Regional Employment Judge Byrne

Date: …16 May 2019……..

Sent to the parties on: 17 May 2019.

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For the Tribunal Office