EMPLOYMENT TRIBUNALS

Claimant: **Mr G Kular**

Respondent: **Atos IT Services UK Limited**

Heard at: **Birmingham** **On: 31 August 2018**

Before: **Employment Judge Gilroy QC**

Representation

Claimant: In person
Respondent: Mr N Porter, Counsel

JUDGMENT

Introduction

1. The Respondent applied for its costs of these proceedings.

2. The primary basis of the Respondent's application was that the Tribunal should make an order under Rule 78(1)(b) of the Tribunal Rules for its costs in respect of part or whole of the proceedings, such costs to be determined by way of an assessment carried out either by the County Court in accordance with the Civil Procedurals 1998, "CPR", or by an Employment Judge applying the same principles. In the alternative, the Respondent sought an order capped at £20,000.00 in accordance with Rule 78(1)(a) of the Tribunal Rules, or, in the further alternative, such lesser amount as the Tribunal deemed appropriate.

3. The Claimant resisted the Respondent's application and contended that he should not be required to pay any costs of these proceedings.

4. In support of its application, the Respondent produced a skeleton argument dated 17 July 2018 and upon the commencement of the hearing, the Claimant indicated that he had only seen that document for the first time on the morning of the hearing. He was therefore given one hour to consider its contents and upon return to the Tribunal, the Respondent's submissions were taken as read and the Claimant made oral submissions in response to and/or rebuttal of the contentions set out in the Respondent's skeleton argument.

Background

5. To a significant degree, the matters the Tribunal was invited to consider for the purposes of the Respondent's application had already been significantly

foreshadowed by previous decisions of the Employment Tribunal and reference is made, in particular, to the decision communicated to the parties by letter dated 12 July 2018 of Employment Judge Perry, who had earlier struck out the Claimant's claims.

6. The claim form in this matter was issued on 17 March 2017. The Claimant pursued claims of unfair dismissal and disability discrimination. Although the Grounds of Complaint attached to the claim form were fairly lengthy, the claim was lacking in particulars. By Grounds of Resistance lodged with the Tribunal on 31 March 2017, the Respondent denied all of the Claimant's claims. The Respondent also sought further particulars of the Claimant's claims. Pending consideration of relevant medical evidence and a disability impact statement, the Respondent did not admit that the Claimant was a disabled person for the purposes of his disability discrimination claims, and whereas dismissal was admitted, it was contended that the same was for a "potentially fair" reason, and was fair in all the circumstances. The Respondent further contended that if the Claimant was a disabled person, his dismissal was in no way as a result of any act of discrimination on the grounds of disability. In relation to certain of the disability claims, the Respondent also pursued various "time limit" points. It was the Respondent's position generally that the claims were unreasonable, misconceived and had no reasonable prospects of success.

7. The matter came before Employment Judge Broughton for the purposes of a Case Management Preliminary Hearing on 22 June 2017, on which occasion the matter was set down for an eight day hearing from 19 to 28 February 2018 and various directions were given for the further conduct of proceedings. It was directed, amongst other things, that that the Claimant provide full particulars of his claims by 21 July 2017, that the parties provide disclosure by 10 August 2017, and that the Claimant provide a Schedule of Loss on or before the latter date. In relation to the further particulars, the Claimant was directed to particularise his claim as set out in an Annex appended to the Case Management Summary.

8. The Respondent gave disclosure as directed. The Claimant provided no disclosure and inadequate particulars of his claim. His Schedule of Loss was also deficient in that whereas it set out certain heads of alleged loss, it contained no figures and no calculations or specific periods of loss as contended for.

9. On 16 August 2017, the Respondent applied to the Tribunal by letter for an "unless order", requiring the Claimant to provide disclosure, proper particulars of his claim and a proper Schedule of Loss, failing which his claims be struck out. The Claimant's particulars fell significantly short of what was required by virtue of the order of 22 June 2017. In its letter of 16 August 2017 to the Tribunal, the Respondent stated that as a consequence of the Claimant's failure to provide proper particulars of his claim as required by the Tribunal, the Respondent was unable at that stage, amongst other things, to create an agreed list of issues or to identify the areas of dispute and agreement. The Respondent nevertheless filed Amended Grounds of Resistance, in which it sought to address certain issues which had been identified at the 22 June 2017 Preliminary Hearing. In its letter of 16 August 2017, the Respondent also raised the issue of the complete lack of disclosure on the part of the Claimant. One particular difficulty that this caused was that in the absence of any medical disclosure it was impossible for the Respondent to give informed consideration to the issue of whether it would concede that the Claimant was for all material purposes a disabled person. The Respondent also raised the complete lack of proper particulars set out in the Schedule of Loss. The Respondent observed that under the terms of the procedural timetable which had been set on 22 June 2017 the Claimant's failure to provide proper particulars of

his claim, a proper Schedule of Loss and any disclosure meant that the case timetable was in jeopardy, and in the circumstances the Respondent indicated that it was seeking an unless order requiring the Claimant to provide proper particularisation of the claim in the form required pursuant to the Tribunal Order made on 22 June 2017, to provide disclosure as ordered, and to provide a properly itemised Schedule of Loss as ordered by, say 14 days, failing which the claim should be struck out without further order.

10. By letter dated 4 October 2017, the Tribunal notified the parties that a further Preliminary Hearing would take place on 7 November 2017.

11. By e-mail sent to the Tribunal on 10 October 2017, the Claimant sought an adjournment of the Preliminary Hearing listed for 7 November 2017, stating as follows:

"… due to my illness I will be overseas during this time getting treatment to help with my illness with a renowned Clinic Dr. As I have waited several years for this date with this exclusive clinic to provide dates to me and other contributing factors, it would prove very difficult to change this date, considering all the losses associated to it also. Due to the effect on my life and health, it is essential I receive this treatment as planned. Also, due to the pre-clinic work and medication that has run its course, would have a huge effect on my health, if this date is missed with the clinic and Dr".

12. The Claimant indicated that he would be available from 14 November 2017 onwards.

13. By letter dated 21 October 2017, the Employment Tribunal notified the Claimant that an Employment Judge had directed that he provide written confirmation of the appointment referred to in his e-mail of 10 October 2017, and the date it was fixed, such reply to be provided by 26 October 2017, and that in the meantime the Respondent was asked for its comments on the Claimant's letter of 10 October 2017, by the same deadline of 26 October 2017.

14. By e-mail sent to the Tribunal on 25 October 2017, the Claimant forwarded an e-mail chain containing an exchange between himself and "Ashok Chopra" of an organisation called "Hands of Care". On the face of that e-mail exchange, the Claimant had been booked in for treatment at Hands of Care's Nurmahal Clinic in India *"with Dr Sharma and his colleagues"* from 30 October to 13 November 2017. In an e-mail from Hands of Care to the Claimant, Dr Chopra stated:

"Your treatment at this clinic was arranged in February 2015, by Dr Manta (Marylebone Clinic). As per the terms and conditions of the treatment and the part treatment/medication which you have already received, we would not be able to refund any monies back to you if you decided to cancel this appointment/treatment date. The current waiting time for a new appointment is a few years, August 2020 at the earliest".

15. On 3 November 2017, in view of the evidence provided by the Claimant, the Employment Tribunal vacated the Preliminary Hearing which had been fixed for 7 November 2017. The matter was subsequently re-listed for 7 December 2017.

16. A Closed Preliminary Hearing took place as listed on 7 December 2017 before Employment Judge Perry. The Respondent was represented by Counsel. The Claimant did not attend. The Tribunal ordered that on or before 4.00 pm on 21 December 2017 the Claimant show cause why his claim should not be struck out

and that, when responding he was required (a) to provide an explanation why he had not complied with the orders of Employment Judge Broughton, and (b) to ensure that all non-compliances were remedied. I refer to and adopt (but do not repeat here) paragraph 1(i) to (v) of the order made by Employment Judge Perry on 7 December 2017 as to the specific matters the Claimant was required under the terms of that order to provide. The procedural timetable was varied and the matter was listed for a further Case Management Preliminary Hearing on 1 February 2018 to address compliance and any applications that were made in the interim.

17. In setting out his reasons for making the above order, Employment Judge Perry referred to the fact that the Respondent was still not aware of the specific mental impairment the Claimant contended for. He noted that whilst the matters leading to the Claimant's dismissal were in dispute, it nevertheless appeared to be the case that despite attempts to arrange a disciplinary hearing following further investigations to allow for submissions, the Claimant had been dismissed by letter dated 2 November 2016 on the grounds of gross misconduct. Employment Judge Perry recorded in his reasons that upon the Claimant not appearing for the hearing on 7 December 2017, he had instructed his clerk to make enquiries as to why the Claimant was not present, and that when contacted the Claimant indicated to the clerk that he had been told that the date of the hearing had been changed and offered to try to come to the Tribunal but indicated that (the time being approximately 10.15 am) it would take an hour and a half for him to get to the Tribunal. Employment Judge Perry noted that he had a full list that day involving other cases and that the instant case was listed for three hours. He noted that the Respondent had attempted to change the date of the Closed Preliminary Hearing, but subsequently withdrew that application and that the Tribunal had confirmed to the parties by e-mail on 1 December 2017 that the hearing remained listed for 7 December. Further, on the afternoon before the Preliminary Hearing of 7 December 2017, the Respondent e-mailed to the Claimant a copy of a skeleton argument it had prepared "*for tomorrow's preliminary hearing"*. In all the circumstances, Employment Judge Perry was satisfied that the Claimant was or ought to have been aware that the hearing of 7 December 2017 remained listed and that if there had been any doubt in his mind as to that matter, he should have contacted the Tribunal after the e-mail of 1 December, and there was no such correspondence on the file. Employment Judge Perry considered it imperative that action be taken immediately to ensure that the substantive hearing was not jeopardised. He indicated that it would be open to the Claimant to apply to the Tribunal subsequent to the order of 7 December 2017 if he deemed it appropriate to do so.

18. The Claimant failed to comply with the 7 December 2017 order, and on 22 December 2017, the Respondent submitted an application for the Claimant's claims to be struck out.

19. The Respondent applied to strike out the Claimant's on two separate bases, namely *"the Claimant's complete failure to comply with the Employment Tribunal's Order of 7 December 2017"*, and/or *"the Claimant's submission of fabricated and false evidence to the Employment Tribunal in support of an application for postponement of a preliminary hearing fixed for 7 November 2017"*. As to the first ground, the mere fact of non-compliance with the order of 7 December 2017 would, if correct, have sufficed for the purposes of the application to strike out the Claimant's claims. Nevertheless, the Respondent provided substantial detail in support of that ground. As to the second ground, I refer to paragraph 41 below. In making its application to strike out, the Respondent expressly reserved its rights to apply for costs.

20. By order dated 17 January 2018, sent to the parties on 23 January 2018, the Employment Tribunal (again Employment Judge Perry) struck out the Claimant's claims in view of his failure to comply with the Tribunal's orders of 22 June 2017 and 7 December 2017.

21. By letter dated 14 February 2018, the Respondent made a formal application for its costs limited to the costs incurred of external representation by Counsel in the sum of £24,362 (excluding VAT). The Respondent indicated that it would seek a detailed costs assessment to be conducted by an Employment Judge pursuant to Rule 78(1)(b) of the Tribunal Rules. The Respondent contended that the Claimant's conduct throughout the claim, culminating in the striking out thereof, had been unreasonable, alternatively, vexatious for the purposes of Rule 76(1)(a) of the Tribunal Rules, had evidenced a persistent disregard of required procedural steps, and that the Employment Tribunal, in its discretion, should make an award of costs in favour of the Respondent. Prior to the Preliminary Hearing conducted on 31 August 2018, the Respondent informed the Claimant and the Tribunal that it would be seeking a further £6,500, being the cost of representation at the hearing, bringing the total to £30,862 excluding VAT.

22. I refer to the full detail of the grounds of the Respondent's costs application as set out in its letter of 14 February 2018 to the Employment Tribunal, I do not repeat those grounds here. They were, in essence, relied upon and developed by Counsel for the Respondent at the Preliminary Hearing on 31 August 2018. Again, I refer to that skeleton argument for the detail of the Respondent's submissions.

23. On 26 February 2018, the Claimant e-mailed the Employment Tribunal expressing astonishment that the hearing of 7 December 2017 had gone ahead in his absence, stating that he had been contacted on that morning by a member of Employment Tribunal staff and told *"that there was no need to attend as it was not an important hearing"*. The Claimant concluded his e-mail by stating: *"Could you please update me on my claim ? (please follow the agreed process of responding by letter to my postal address, as i do not have regular internet access)"*.

24. The Employment Tribunal wrote to the Claimant on 15 March 2018, inviting him to *"provide evidence of means and ability to pay to the Respondent and the Tribunal"*. The Claimant provided no such evidence. By e-mail sent on 3 April 2018, the Claimant asked the Tribunal a long series of questions about the manner in which the Tribunal had communicated or attempted to communicate with him, and generally expressed a complete lack of awareness of the procedural steps that had been taken in his case. By letter dated 19 April 2018, the Employment Tribunal acknowledged the Claimant's e-mail of 3 April 2018 and provided further copies to him of the Tribunal's letter of 15 March 2018 and the Employment Tribunal's Judgment.

25. The Respondent's application for costs was listed for hearing on 8 June 2018.

26. On 16 May 2018, the Respondent's bundle of documents for the costs hearing was sent to the Claimant at the e-mail address for service specified on the ET1 form. By letter dated 1 June 2018, the Employment Tribunal directed that the Respondent's bundle be served on the Claimant by 6 June 2018. On 1 June 2018 the Respondent's Solicitors wrote to the Employment Tribunal (a) confirming that the bundle had been served on 16 May 2018, and (b) attaching the relevant e-mail correspondence to the Claimant evidencing service of the bundle. Also on 1 June 2018, the Respondent sent a further copy of the bundle to the Claimant's new outlook.com e-mail address, and copied the same to the Tribunal.

27. On 7 June 2018, the Claimant e-mailed the Employment Tribunal seeking an adjournment of the hearing which had been listed for the next day. That application was not copied to the Respondent. Essentially, the Claimant maintained that it was unfair for him to attend a hearing "*in (his) current condition"*, and he therefore asked the Tribunal to rearrange the hearing to allow him to recover *"and be in a stable state"*. He again maintained that there had been a general lack of communication with him by the Respondent and the Tribunal throughout the course of the proceedings. He repeated his position concerning the hearing of 7 December 2017. He requested a response from the Tribunal by close of business on 7 June 2018.

28. Later on 7 June 2018, acceding to the Claimant's request, the Tribunal adjourned the hearing listed for the next day to 18 July 2018.

29. The Claimant communicated by e-mail again with the Employment Tribunal in similar terms on 2 July 2018, repeating again his position concerning the hearing of 7 December 2017. The Claimant sent a further e-mail to the Tribunal on 10 July 2018, but nothing turns on that.

30. By letter dated 12 July 2018 the Employment Tribunal informed the Claimant that his e-mail of 2 July 2018 had been referred to Employment Judge Perry who had treated it as an application to reconsider his decision of 17 January 2018 to strike out the Claimant's claim. The Claimant was informed that his application for reconsideration had been made "out of time". It was indicated that the Employment Judge had considered if he should exercise his discretion to consider the application out of time, and whilst the Claimant had directed various letters to the Tribunal in the interim he had not expressly stated why he had not sought to make his application earlier. It was pointed out to the Claimant that whilst the basis of his application was that he had not received notice of the hearing of 7 December 2017, that was not the reason his claim had been struck out. He was reminded that the reason for the strike out had been twofold, namely his non-compliance with various requirements set out in the Employment Tribunal's order of 22 June 2017 and his failure to explain why he had not complied with that order. It was stated that even if the strike out order had not been received by the Claimant, had he made enquiries it was possible that he would have identified that the strike out judgment was also published on the Tribunal's decisions website on 26 January 2018. It was observed, however, that Employment Judge Perry did not consider that as a lay person the Claimant could have been expected to know that.

31. I quote from Employment Judge Perry's reasoning as set out in the Tribunal's letter of 12 July 2018, at paragraphs 10 to 21:

"10. I have thus considered if you received the order of 7 December 2018 or strikeout order of 17 January 2018.

11. It is clear that you have received some correspondence from the tribunal after 7 December as you have engaged in correspondence from the tribunal (for example the tribunal's letter of 15 March by responding to it on 3 April).

12. None of that correspondence appears to have been returned and has been sent to the address the tribunal has on file for you, that being the address the notice of hearing of 7 December was sent to (sent out on 3 November).

13. Further at the hearing on 7 December 2017 I directed my clerk to contact you and was informed by her that you did not state you had not received the notice

of hearing but that you had been told the hearing was not going ahead. Further, I was directed to an e-mail the Respondent sent to you on 6 December referring to the tribunal hearing taking place the following day.

14. Having been aware that (that) hearing was taking place, you offered to attend but stated that you would take an hour and a half to get to the tribunal. The hearing proceeded for the reasons given in the Order of 7 December 2017 and I made the Show Cause Order. You suggest you did not receive the same.

15. You do not explain why given you say you received no correspondence, you took no steps to check what had happened or to chase the tribunal until you set an e-mail of 26 February 2018 in which you suggested you had received no correspondence since 25 November.

16. That being so, I directed the tribunal to write to you on 15 March informing you that correspondence had been sent to the correct address and had not been returned and it would be for you to show why it had not been received. That is because rule 90 provides that documents are to be taken to be received by the addressee unless the contrary is shown, in the ordinary course of post.

17. Your response of 3 April repeated you had received no correspondence from the tribunal after 25 November. That is at odds with what you told my clerk on 7 December (see (13)). You also implied the tribunal should show the correspondence had been sent.

18. The correspondence having been sent to the address the tribunal has on file for you, that such correspondence now appears to reach you at that address and none of that correspondence having been returned, in my view you have not shown those documents have not been received by you.

19. You should have applied for a reconsideration by 8 or 9 February allowing for postage. The earliest correspondence from you was dated 26 February 2018. Accordingly, you did not do so and have shown no good reason why you did not do so. That being (so) you have not set out grounds such that I could exercise my discretion to extend time.

20. In any event, had you made the application in time you have still failed to comply with the Orders of Judge Broughton of 22 June 2017 and mine of 7 December requiring you to explain why you had not done so.

21. For those reasons in my judgment there is no reasonable prospect of the original decision being varied or revoked. That being so, r.72(1) mandates that the application shall be refused".

32. The hearing of the Respondent's costs application having been put back, at the Claimant's request, from 8 June 2018 to 18 July 2018, the Claimant made a further application for an adjournment on 15 July 2018. That application was refused by Employment Judge Gaskell, but the hearing was subsequently vacated as the Tribunal was unable to hear the matter on 18 July 2018. The matter was relisted for 31 August 2018. By e-mail sent to the Tribunal on 8 August 2018, the Claimant again applied for an adjournment, citing a "family function" on 31 August 2018 as the reason. That application was refused on 16 August 2018 on the basis that (a) no new material had been provided since the previous adjournment application was rejected by employment Judge Gaskell; (b) there was no up to date medical evidence, and (c) the Claimant could not avoid the hearing indefinitely. Furthermore, the application had not been copied to the Respondent. On 20

August 2018, the Claimant again applied by e-mail for an adjournment of the hearing listed for 31 August, this time stating that his sister's wedding *"which was arranged several years ago"* was due to take place on that date and because he was suffering a mental illness. This latest adjournment application was refused.

33. The Respondent's costs application was put on the basis that the Claimant's conduct throughout the claim (culminating in the striking out thereof) has been unreasonable, alternatively vexatious for the purposes of Rule 76(1)(a) of the Tribunal Rules, and has evidenced a persistent disregard of required procedural steps, and that the Employment Tribunal's discretion should make an award of costs in favour of the Respondent.

34. The Tribunal Rules provide as follows:

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.

(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction ……

78. The amount of a costs order

(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 ……..

(3) for the avoidance of doubt, the amount of a costs order under sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000.

84. Ability to pay

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.

35. In ***McPherson v BNP Paribas (London Branch) [2004] IRLR 558***, the Court of Appeal, when considering an earlier version of the Employment Tribunal Rules (which were not materially different to the current Rules) held that where a Tribunal is satisfied that a party has been responsible for unreasonable conduct, in exercising its discretion to award costs, a tribunal must have regard to the nature, gravity and effect of the unreasonable conduct but its discretion is not limited to

those costs that are caused by or attributable to the unreasonable conduct. The unreasonable conduct is a pre-condition of the existence of the power to order costs and is also a relevant factor to be taken into account in deciding whether to make an order for costs and the form of the order, but that is not the same as requiring a party to prove that specific unreasonable conduct caused particular costs to be incurred.

36. In ***Barnsley MBC v Yerrakalva [2012] IRLR 78***, the Court of Appeal, again referring to the materially similar costs rules preceding the current version thereof, held that the words of the rules were clear enough to be applied *"without the need to add layers of interpretation"* and 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 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. Causation of costs is not irrelevant and it is not necessary for separate aspects of conduct to be distinguished into sections with each section analysed separately so as to lose sight of the totality of the relevant circumstances. Case law can only provide a *"broad steer on the factors covered by the paramount principle of relevance"*.

37. In ***Raggett v John Lewis Plc [2012] IRLR 906***, the Employment Appeal Tribunal held that the proper approach to the issue of *"vexatious or unreasonable conduct"* in the context of an application for costs in the Employment Tribunal is that the Tribunal need not identify the particular costs incurred by particular conduct; instead it should look at the whole picture and the overall effects of the conduct. The tribunal may also take into account the conduct of the party applying for costs, and although the CPR do not apply directly to tribunal proceedings, in general the tribunal should follow their general principles as opposed to the detail thereof.

38. The Respondent observed that it was limiting its application for costs to the external costs to representation by Counsel notwithstanding that costs could be awarded to an employer in respect of representation by its own in-house lawyers (***Wiggins Alloys Ltd v Jenkins [1981] IRLR 275*** and ***Ladak v DRC Locums Ltd [2014] IRLR 851***).

39. An Employment Tribunal, even where it has sought evidence of ability of the paying party to pay may nevertheless decide not to take means into account in relation to any order of costs if it comes to the view that the disclosure of means is inadequate or incomplete (***Jilley v Birmingham & Solihull Mental Health NHS Trust UK EAT/0584/06***). This is particularly the case if the paying party has given unsatisfactory evidence about means. The Claimant provided the Tribunal with no evidence whatsoever about his means including the fact (as discovered by the Respondent) that he is the sole director of a company, Engage Transport Ltd.

40. Although an assessment of costs to be conducted by an Employment Judge pursuant to Rule 78(1)(b) and (3) will usually be on the standard basis, a Tribunal has power to order that the assessment be on an indemnity basis (***Howman v Queen Elizabeth Hospital UK EAT/0109/14***).

41. Given its conclusions generally in respect of the Respondent's costs application, the Tribunal did not consider it necessary to consider the second limb of that application namely the ground that costs should be awarded on the basis that the Claimant had fabricated evidence.

42. At the hearing on 31 August 2018 the Tribunal was provided with medical evidence in the form of (a) a psychiatric report dated 23 December 2014 of Dr J K Appleford,

Consultant Psychiatrist, and (b) a letter dated 5 June 2018 from Diana Newson of "Umbrella Medical" (apparently a GP Practice). The psychiatric report was over three and a half years old. The Tribunal assumed that the author of the much more recent June 2018 letter, Diana Newson, is a doctor, probably a general practitioner, although her name did not appear in the list of partners of the Umbrella Medical Practice in the heading to the letter, which stated:

"This gentleman has had anxiety and depression since 2013. He has had cognitive behaviour therapy and medication, but still feels he is struggling mentally and as yet he is unable to cope with the extra stress of a tribunal. He is currently taking Mirtazapine at night and is being supported by his family. He is looking for some more counselling appointments. I have given him another Fit Note today until the end of July when he will be reassessed. At the moment, I think the extra stress of tribunal would be detrimental to his recovery".

43. In this judgment, reference has been made to certain authorities referred to by Counsel for the Respondent at the hearing on 31 August 2018. For the avoidance of doubt, the Tribunal had regard to all of the authorities provided by Counsel for the Respondent (12 in number provided to the Tribunal and to the Claimant in a separate bundle with a frontispiece setting out the names of each of the cases).

44. The Claimant made brief submissions at the hearing on 31 August 2018. He said that he was not a liar and that he was an honest person. He repeated his case as set out in his correspondence with the Tribunal as to his lack of awareness of various tribunal hearings and what he regarded as the lack of communication from the Tribunal to himself. He said that he had "no means", stating that the company referred to by the Respondent was dormant. He had always responded when aware of tribunal orders. The case having been struck out had been "very unfair" on him. He had not done anything scandalous. The Respondent had misled the Tribunal with "bogus evidence ". The Respondent had "played the system" in the way that it had conducted these proceedings. The Respondent had deliberately made applications to postpone hearings to cause him harm. The Claimant did not support any of these allegations by reference to any specific event or evidence. The Claimant stated that he had missed his sister's wedding in order to attend the hearing on 31 August 2018. He maintained that it was the Respondent and not the Claimant which had acted scandalously, vexatiously and/or unreasonably. He further contended that the Tribunal had not properly considered his mental illness.

45. I invited the Claimant to confirm on oath (and therefore as evidence) the submissions he had made orally as set out above.

46. He had kept in touch with the tribunal. He had not ignored the tribunal. The Claimant complained that there had been a "protocol" whereby the tribunal had agreed only to communicate with him by hard copy correspondence and yet in his ET1 form he had ticked as his correspondence preference: "E-mail". There was in any event no order from the Tribunal to the effect that communication with the Claimant would only be by hard copy means.

Discussion and Conclusions

47. The Tribunal concluded that the Claimant's conduct throughout the claim, culminating in the striking out thereof, had been unreasonable, alternatively, vexatious for the purposes of Rule 76(1)(a) of the Tribunal Rules. In the judgment of the Tribunal, this was one of those exceptional cases where the high threshold for a costs order in the Tribunal was made out. The Tribunal was also satisfied, given the history or this case, that this was a case where an order under Rule

78(1)(b) should be made for the whole of the Respondent's costs to be paid by the Claimant with the amount to be determined by an Employment Judge applying the CPR principles.

(a) The Claimant acted in flagrant and wholesale breach of the order of 22 June 2017. His receipt or otherwise of communications from the Respondent or the Tribunal could have no relevance to that breach. He was present at the hearing on 22 June 2017. He knew or must have known of the importance of the directions given at that hearing. Yet he simply disregarded the order made at that hearing. His complete failure to comply with the order caused the Respondent significant inconvenience and prejudice.

(b) The Tribunal accepted that the Claimant has a form of depression. Reference is made to the latter dated 5 June 2018 from Umbrella (see paragraph 42 above), and the bundle contained certain "fit notes". Whilst the Tribunal did not reject the suggestion that the Claimant has some form of depression, that did not in any way explain the various accounts he gave as to his receipt or non-receipt of documentation during the course of these proceedings, and it would appear that exactly the same position was put before Judge Perry on the occasion of the application for reconsideration.

(c) The Tribunal concluded that the Claimant was not telling the truth about his alleged lack of knowledge of hearing dates and communications from the Tribunal and the Respondent. I refer to paragraphs 10 to 21 of the reasoning of Employment Judge Perry when rejecting the Claimant's application for reconsideration of his decision to strike out the Claimants claims, as set out in the Tribunal's letter of 12 July 2018 (see paragraphs 30 and 31 above).

(d) The case put by the Claimant in relation to the matters resulting in Employment Judge Perry's refusal to reconsider his decision to strike out the Claimant's claims has a strong resonance with the arguments placed before the Tribunal by the Claimant in opposition to the Respondent's application for costs. There is a consistent theme in the submissions then and now that the Claimant did not receive certain key documents during the course of these proceedings and therefore to the extent that he had not complied with Tribunal orders, he was not in default in so doing, the explanation being that he had simply not received the relevant documentation. Employment Judge Perry was not impressed by the Claimant's case on that issue and I was equally unimpressed with the explanations proffered by the Claimant in the context of the Respondent's application for costs as to his knowledge of the key events in these proceedings.

(e) To give but one example, the Claimant having made submissions in opposition to the Respondent's costs application was invited to adopt those submissions as sworn oral evidence. He accepted that invitation. He stated that certain documentation relating to the proceedings had been received by him by e-mail but that he had been unable to open the attachments to those e-mails. This included the Respondent's skeleton argument for the purposes of its costs application. It then transpired that he had produced a document in opposition to the Respondent's application by way of rebuttal of the matters advanced in the Respondent's skeleton argument, despite the fact that this was a document which he had earlier maintained he had only seen for the first time on the morning of the hearing on 31 August

2018. As recorded at paragraph 4 above, having informed the Tribunal at the commencement of the hearing on 31 August 2018 that he had only seen the Respondent's skeleton argument for the first time on the morning of the hearing, the Claimant was given one hour to consider its contents. In securing that indulgence, the Claimant blatantly misled the Tribunal. The above is but one example of conduct on the part of the Claimant which led the Tribunal to conclude that it simply did not accept the Claimant as a witness of truth.

(f) I also rejected the Claimant's assertion that when he was contacted by one of the Tribunal's clerks on the morning of the hearing which took place on 7 December 2017, he was told *"that there was no need to attend as it was not an important hearing"*.

(g) Whilst I was sceptical of the authenticity of the e-mails relied upon by the Claimant for the purposes of securing the adjournment of the hearing listed for 7 November 2017, which material is relied upon by the Respondent for the purposes of the "fabricated evidence" limb of its application for costs, I reached no conclusion on that aspect, because it is immaterial given my findings on the first limb of the Respondent's application.

(h) In my judgment, the Claimant's conduct of these proceedings, as identified above, was unreasonable and/or vexatious. In the exercise of my discretion, I have had regard to the nature, gravity and effect of the unreasonable conduct but my discretion is not limited to those costs that are caused by or attributable to the unreasonable conduct.

(i) I have had regard to the plain wording of the Tribunal Rules. I have looked at the whole picture of what happened in the case and have asked myself whether there has been unreasonable conduct by the Claimant in conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. By his conduct in demonstrating flagrant disregard for the orders of the Tribunal the Claimant effectively prevented the Respondent from understanding the case it had to meet, and put it to considerable unnecessary expense.

(j) When exercising my discretion, I was not required to have regard to the Claimant's means. The Claimant singularly failed to assist the Tribunal in this regard in any event. In all the circumstances given the Claimant's failure to provide proper evidence as to his means the Tribunal did not take account of ability to pay when reaching its decision on the Respondent's costs application.

48. The total costs claimed are £30,862.00 excluding VAT, and in the light of my determination that this should go forward for an assessment, it would not be appropriate for the Tribunal to say any more as to that aspect at this stage, other than that there will be a detailed assessment and it will be a matter for the Employment Judge conducting that assessment to decide the ultimate figure.

49. In my judgment, the appropriate order as to the basis upon which costs should be assessed is the standard basis as opposed to the indemnity basis. In practice, it is rare even for the civil courts to assess costs on the indemnity basis and they will only be awarded if there are specific factors which justify them. I refer to CPR Part 44.3. Given my conclusion that costs should not be awarded on the indemnity basis, it is unnecessary for me to analyse those factors.

50. In short, it is my conclusion that the justice of this matter is met by an order that the Claimant do bear the Respondent's costs of these proceedings, such costs to be determined by way of an assessment carried out either by the County Court or by an Employment Judge, and that for me to order, in addition, that those costs be paid on an indemnity basis would be excessive and/or punitive.

Employment Judge Gilroy QC

17/01/2019