EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr A Foster	AND	Rowes Garage Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Exeter **ON** 5 February 2020

EMPLOYMENT JUDGE N J Roper **MEMBERS** Mr B Knox
Mr T Slater

Representation

For the Claimant: **In person**
For the Respondent: **Miss D Grennan of Counsel**

ORDER

The majority decision of the Tribunal is that the Claimant is ordered to pay the Respondent's costs in the sum of £9,600.00

RESERVED REASONS

1. In this case the respondent seeks its costs of defending this action against the claimant.
2. The Claimant's Illness
3. On 2 February 2020 the claimant sent an email to the Tribunal asking that the Tribunal panel should consider an attached letter dated 30 January 2020 from his GP Dr Kasliwal. This letter reported that the claimant had been suffering from severe depression for many years and that the claimant was "very withdrawn, anxious and has a pervasive low mood." Dr Kasliwal confirmed that the symptoms were having "a severe impact on his life at the moment" and that these proceedings had caused his symptoms "to have acutely worsened". The claimant was asked to confirm whether he was seeking to apply for a postponement of today's hearing based on this medical evidence, but on 3 February 2020 the claimant confirmed that he did not wish to postpone this hearing and intended to attend. On attending this morning, the claimant confirmed that he wished for the application to go ahead so that the matter could be resolved.

4. Having heard and considered this application, and the claimant's reply, the Tribunal adjourned temporarily to reach its decision. I then gave a summary outline of that decision having confirmed that full written reasons would follow. Towards the end of that process the claimant collapsed. He was immediately assisted by the Tribunal staff and an ambulance was called. The Tribunal wishes the claimant a speedy recovery, and confirms that its decision was reached having considered in full the respondent's application and the claimant's response to that application, and before he unfortunately fell ill.
5. General Background
6. The claimant issued these proceedings in 2016 following his dismissal by reason of gross misconduct. The claimant claimed that he had been unfairly dismissed, and that he had been discriminated against because of a protected characteristic, namely his disability. He pursued claims for direct discrimination, discrimination arising from his disability, and harassment because of his disability. He also brought a claim for age discrimination which was subsequently withdrawn. The respondent conceded that the claimant was a disabled person by reason of two impairments: namely rheumatoid arthritis, and a hearing impairment. Otherwise the respondent denied the claims.
7. The claims were determined on 3, 4 and 5 July 2017 by this Tribunal sitting at Exeter. By unanimous judgment the claimant's claims were all dismissed. Full written reasons for that judgment were provided in a judgment dated 5 July 2017 which was sent to the parties on 4 August 2017 ("the Judgment"). This judgment on the respondent's costs application should be read in conjunction with that original Judgment.
8. The Application for Costs
9. The respondent makes an application for its costs on the basis that the claimant has acted vexatiously in the bringing and conduct of these proceedings, or otherwise unreasonably in both bringing these proceedings and in the way in which the proceedings have been conducted, and also on the basis of the claims had no reasonable prospect of success.
10. The respondent asserts that the unfair dismissal claim was always doomed to fail. In the first place the reason for the claimant's dismissal was clear and obvious, not just to a qualified lawyer, but to anyone reasonable or sensible. The claimant admitted the gross misconduct of which he was accused (in short aggressive and offensive behaviour in the presence of customers), and his subsequent suggestion that there was some conspiracy or alternately some ulterior motive leading to his dismissal was always unsupported by any evidence. There was only ever going to be one finding which was that the reason for the claimant's dismissal was his admitted misconduct.
11. As for the reasonableness of the decision, the respondent asserts that this was also clear and obvious. The process adopted by the respondent was exemplary, and undoubtedly fair. There was a full and fair investigation and the claimant was afforded all the required measures of protection during the disciplinary process, during which he was accompanied by his Trade Union representative. This is dealt with in paragraphs 16 to 19 and 20 to 24 of the Judgment. In addition, there was a careful and independent appeal process, which is dealt with in paragraphs 25 to 29 of the Judgment. There was a detailed audit trail of these protective measures and this should have been abundantly clear to the claimant before he commenced proceedings. Effectively this respondent bent over backwards to ensure a fair process. Given that the claimant (by his own admission) had committed misconduct within the scope of examples of gross misconduct in the relevant Disciplinary Policy, the decision to dismiss him was clearly within the range of reasonable responses open to the respondent.
12. As for the disability discrimination claims, the respondent asserts that the direct discrimination claim and the claim for discrimination arising from disability were both doomed to fail simply because the reason for the claimant's dismissal was always going to be held to be his gross misconduct. There was never any evidence to support the suggestion that the claimant was dismissed because he was disabled or because of something arising from his disability.
13. As for the claim for harassment related to the claimant's disability, this is dealt with in the Judgment at paragraphs 30 et seq. The claimant pursued a raft of allegations (21 in total) spanning a period over many years between 2012 to 2016. On his own admission the

claimant had not complained of these before his dismissal. As noted in paragraphs 30 and 56 of the Judgment, the claimant admitted that it was important to keep contemporaneous records such as diary entries to support such complaints. Unfortunately, the diary notes which the claimant did adduce did not include any contemporaneous notes or any record of the complaints which he had raised in these proceedings. The respondent asserts that this was a huge flaw in his case which would have been obvious to anyone. This was a clear and obvious gap in the evidence, and in any event the majority of the allegations of harassment had no link at all to any disability. The claimant asserted that was a conspiracy of the respondent's witnesses, or some other concoction of evidence, whereas as it happened the claimant's version was roundly rejected. The weight of evidence was substantially against the claimant, and there was a stark absence of any contemporaneous supporting evidence. In addition, it is clear that this Tribunal did not find the claimant to be a credible witness, and three examples with reasons are given at paragraph 54 of the Judgment. The respondent asserts that the claimant would have known that his claim had no prospects of success, which is why he deliberately included these extra and unsupportable allegations which were effectively vexatious mudslinging.

14. The claimant resists the application. He asserts in reply that he did seek legal advice at the outset and was advised that he had a strong case. If he had not received that advice he says he would not have pursued his claim. The claimant makes the point that he did not receive any letter from the respondent at any stage in the proceedings threatening him with an application for costs, and the Tribunal did not any stage make any Deposit Order indicating that his claims had little reasonable prospect of success.
15. The claimant still asserts the accuracy of the allegations of harassment against him which were rejected in the Judgment. He still accuses the respondent of a conspiracy or concoction of the evidence at the hands of the respondent's witnesses, who were employees of the respondent at the time and scared of the consequences of not assisting the respondent, but whom he claims have now all been forced by the respondent to move on to further employment.
16. The Rules
17. The relevant rules are the Employment Tribunals Rules of Procedure 2013 ("the Rules").
18. Rule 76(1) provides: "a Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that – (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or (b) any claim or response had no reasonable prospect of success.
19. Under Rule 77 a party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.
20. Under Rule 78(1) a costs order may – (a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party; (b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles …"
21. Under Rule 84, in deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.
22. The Relevant Case Law
23. I have been referred to and have considered the following cases: Gee v Shell Ltd [2003] [2003] IRLR 82 CA; McPherson v BNP Paribas [2004] ICR 1398 CA; Monaghan v Close Thornton [2002] EAT/0003/01; Brooks v Nottingham University Hospitals NHS Trust [2019] WLUK 271, UKEAT/0246/18; NPower Yorkshire Ltd v Daley EAT/0842/04; Arrowsmith v Nottingham Trent University [2011] ICR 159 CA; AQ Ltd v Holden [2012] IRLR 648 EAT

Kapoor v Governing Body of Barnhill Community High School UKEAT/0352/13; Barnsley BC v Yerrakalva [2012] IRLR 78 CA; Shield Automotive Ltd v Greig UKEATS/0024/10; Jilley v Birmingham and Solihull Mental Health NHS Trust [2008] UKEAT/0584/06; Single Homeless Project v Abu [2013] UKEAT/0519/12; Vaughan v LB of Newham [2013] IRLR 713; [VAT] Raggett v John Lewis plc [2012] IRLR 906 EAT.

24. The Relevant Legal Principles
25. The correct starting position is that an award of costs is the exception rather than the rule. As Sedley LJ stated at para 35 of his judgment in Gee v Shell Ltd "It is nevertheless a very important feature of the employment jurisdiction that it is designed to be accessible to people without the need of lawyers, and that in sharp distinction from ordinary litigation in the UK, losing does not ordinarily mean paying the other side's costs …" Nonetheless, an Employment Tribunal must consider, after the claims were brought, whether they were properly pursued, see for instance NPower Yorkshire Ltd v Daley. If not, then that may amount to unreasonable conduct. In addition, the Employment Tribunal has a wide discretion where an application for costs is made under Rule 76(1)(a). As per Mummery LJ at para 41 in Barnsley BC v Yerrakalva "The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it, and what effects it had." However, the Tribunal should look at the matter in the round rather that dissecting various parts of the claim and the costs application, and compartmentalising it. There is no need for the tribunal to find a causative link between the costs incurred by the party making the application for costs and the event or events that are found to be unreasonable, see McPherson v BNP Paribas, and also Kapoor v Governing Body of Barnhill Community High School in which Singh J held that the receiving party does not have to prove that any specific unreasonable conduct by the paying party caused any particular costs to be incurred.
26. When considering an application for costs the Tribunal should have regard to the two-stage process outlined in Monaghan v Close Thornton by Lindsay J at paragraph 22: "Is the cost threshold triggered, e.g. was the conduct of the party against whom costs is sought unreasonable? And if so, ought the Tribunal to exercise its discretion in favour of the receiving party, having regard to all the circumstances?"
27. In Brooks v Nottingham University Hospitals NHS Trust the EAT confirmed that dealing with an application for costs requires a two-stage process. The first is whether in all the circumstances the claimant has conducted the proceedings unreasonably. If so, the second stage is to ask whether the tribunal should exercise its discretion in favour of the claiming party, having regard to all the circumstances. In the case of reasonable prospects of success, the first stage is whether that ground is made out, and if it is, then to apply the exercise of discretion as to whether or not to award costs. When exercising that discretion at the second stage a tribunal can take account of reliance upon positive legal advice which had been received by the unsuccessful claimant, but positive professional advice will not necessarily insulate a claimant against a costs award. In the absence of any evidence as to the actual advice given, and the basis on which that advice was provided, it would be reasonable for a tribunal to assume that a legally represented claimant has been properly advised as to the risks and weaknesses of his or her case, and of the potential for an adverse costs order. Where privilege has been waived, such evidence would ordinarily need to explain the instructions given, the context in which the advice was provided, and the evidence considered.
28. The threshold to trigger costs is the same whether a litigant is or is not professionally represented, although in applying those tests, the EAT has held that the status of a litigant is a matter which the tribunal must take into account – see AQ Ltd v Holden in which Richardson J commented: "Justice requires the tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life. As [counsel] submitted, lay people are likely to lack the objectivity and knowledge of law and practice brought about by a professional adviser. Tribunals must bear this in mind when assessing the threshold tests in [rule 76(1)(a)]. Further, even if the threshold tests

for an order of 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 specialist help and advice." However, Richardson J also acknowledged that it does not follow from this "that lay people are immune from orders for costs: far from it, as the cases make 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". These statements were approved by Underhill P in Vaughan v London Borough of Newham.

29. With regard to costs warning letters, while it is good practice to warn a claimant of the weakness of his or her case where the respondents may be minded to apply for costs should they succeed at the end of the case, the failure to do so will not, as a matter of law, render it unjust to make a costs order even against an unrepresented claimant. In Vaughan v London Borough of Newham, the EAT upheld a substantial order for costs against the claimant, notwithstanding the absence of a costs warning letter, and in doing so had regard to the likely effect such a letter would have had. Underhill P pointed out that the claimant had never suggested that she would have discontinued her claim if she had received such a letter, and, even if she had, such an assertion would not have been credible. The claimant was "convinced, albeit without any rational or evidential basis, that she was the victim of a conspiracy and of a serious injustice, and it seems to us highly unlikely that a letter from the respondents, however well crafted, would have caused the scales to fall from her eyes."
30. The same approach is to be taken in circumstances where the respondent has not applied for a deposit order. Underhill P in Vaughan also acknowledged that respondents do not always, for understandable practical reasons, seek such an order even where they are faced with weak claims, so that failure to do so "is not necessarily a recognition of the arguability of the claim." On the facts of Vaughan, neither the failure to seek a deposit order nor the failure otherwise to warn the claimant of the hopelessness of her claims was "cogent evidence that those claims had in fact any reasonable prospect of success" and neither failure was "a sufficient reason for withholding an order for costs which was otherwise justified".
31. With regard to the paying party's ability to pay, Rule 84 allows the tribunal to have regard to the paying party's ability to pay, but it does not have to, see Jilley v Birmingham and Solihull Mental Health NHS Trust and Single Homeless Project v Abu. The fact that a party's ability to pay is limited, does not, however, require the tribunal to assess a sum that is confined to an amount that he or she could pay see Arrowsmith v Nottingham Trent University which upheld a costs order against a claimant of very limited means and per Rimer LJ "her circumstances may well improve and no doubt she hopes that they will." One reason for not taking means into account is the failure of the paying party to provide sufficient and/or credible evidence of his or her means. The authorities also make it clear that the amount which the paying party might be ordered to pay after assessment does not need to be a sum which he or she could pay outright from savings or current earnings. In Vaughan v LB of Newham the paying party was out of work and had no liquid or capital assets and a costs order was made which was more than twice her gross earnings at the date of dismissal. Underhill P declined to overturn that order on appeal because despite her limited financial circumstances, there was evidence that she would be successful in obtaining some further employment. Per Underhill P: "The question of affordability does not have to be decided once and for all by reference to the party's means at the moment the order falls to be made" and the questions of what a party could realistically pay over a reasonable period "are very open-ended, and we see nothing wrong in principle in the tribunal setting the At a level which gives the respondent's the benefit of any doubt, even to a generous extent. It must be recalled that affordability is not, as such, the sole criterion for the exercise of the discretion: accordingly, a nice estimate of what can be afforded is not essential."
32. Insofar as it does have regard to the paying party's ability to pay, the tribunal should have regard to the whole means of that party's ability to pay, see Shield Automotive Ltd v Greig (per Lady Smith obiter). This includes considering capital within a person's means, which

will often be represented by property or other investments which are not as flexible as cash, but which should not be ignored.

33. Under Rule 78(1)(a) a costs order may order the paying party to pay the receiving party a specified amount not exceeding £20,000.
34. Recovery of VAT
35. VAT should not be included in a claim for costs if the receiving party is able to recover the VAT, see Raggett v John Lewis plc which reflects the CPR Costs Practice Direction (44PD).
36. The Claimant's Means
37. The claimant chose to give some limited information as to his means. He explained that his wife is now disabled and he is her main carer. He himself suffers from mental health issues as noted above. He has no savings. However, he is in regular employment, and does own his own home, subject to a mortgage, which he is able to pay from his salary.
38. Conclusion
39. We have considered the above case law and guidance in detail. This application has given rise to a majority decision of this Tribunal. The Employment Judge and Mr Slater are in the majority. Mr Knox is in the minority. The minority decision of Mr Knox is that the claimant was an unrepresented lay claimant and it cannot be said that it was clear at the time that he issued these proceedings that they were inevitably doomed to fail, but more particularly it cannot be said that the claimant acted vexatiously or unreasonably in bringing or conducting these proceedings, nor that they had no reasonable prospects of success at the outset.
40. The majority disagrees with that view. Our decision is that from the time when the claimant had the agreed bundle of documents and the respondent's written witness statements it must have been clear that the claimant's claims (which were always weak in any event) no longer had any reasonable prospect of success. It was therefore unreasonable conduct of the claimant to continue with these proceedings through to the full main hearing. For this reason, the majority decision is that the claimant acted unreasonably in conducting these proceedings following receipt of the agreed bundle of documents and the respondent's witness statements.
41. We apply the two-stage process outlined in Monaghan v Close Thornton as noted above, and we decide that the cost threshold is triggered, because the conduct of the claimant against whom costs is sought was unreasonable.
42. In addition, and as for the second stage of that process, the Tribunal is unanimous in deciding to exercise its discretion in favour of the receiving party, having regard to all the circumstances. Mr Knox agrees that once the majority view is that the cost threshold is triggered, then it is reasonable for some sort of costs award to be made against the claimant. The unanimous decision of this Tribunal is therefore to make a costs award against the claimant.
43. In addition, the unanimous decision of this Tribunal is that the starting point for the costs award should include the costs incurred by the respondent in defending these proceedings, but only from the time after the respondent's witness statements had been prepared and sent to the claimant to accompany the agreed bundle of documents. In addition, we are unanimous in confirming that an award should be made for the initial preparation of this application for costs, and attending on that application. However, there have been a number of postponements, adjournments, reconsideration applications, and other difficulties before this costs application has eventually been heard, and these occurrences have not been because of any unreasonable behaviour on the part of the claimant. For these reasons we decline to award any further costs relating to the pursuit of this costs application.
44. The starting point for the award of costs therefore is as follows, by reference to a schedule of the costs claimed by the respondent's solicitors. They have claimed £1,037 for just over seven hours work completing the preparation for the hearing after the exchange of witness statements, and £1,201 for just over seven hours attending during the full main hearing of this claim. We allow £2,200 in this respect. The respondent's solicitors have also claimed £720 in preparing this costs application and their schedule of costs, in respect of which we allow only £400 as being a more reasonable sum. This is a total sum of £2,600 for

completing preparation for the full main hearing, attending at the hearing, and preparing the initial costs application. In addition, the respondent claims its disbursements being Counsel's fees of £6,500 for the main liability hearing and a further £3,000 for the (initially abortive) costs application hearings up to and including today. We allow the £6,500 for the main liability hearing, but only £500 for attending on the costs application (including today). This is £7,000 in total for counsel's fees, which gives rise to a total of £9,600. We consider that this is a reasonable sum for the work undertaken in the circumstances described above. The respondent did initially claim VAT in addition, but we decline to award VAT, because the respondent is VAT registered, and VAT should not be included in a claim for costs if the receiving party is able to recover the VAT, see Raggett v John Lewis plc which reflects the CPR Costs Practice Direction (44PD).

45. However, again we are not unanimous in making the award. We have carefully considered the information which the claimant has given us with regard to his means. Mr Knox, who is again in the minority, is of the view that the claimant cannot afford any award over the sum of £500, and his decision is to limit the award of costs payable by the claimant in favour of the respondent to the sum of £500. The majority (being the Employment Judge and Mr Slater) do not agree. We have carefully considered the guidance above with regard to the claimant's potential ability to pay, and the majority decision of this Tribunal is that the claimant is ordered to pay the respondent's costs limited to £9,600.

_____
Employment Judge N J Roper

Dated: 5 February 2020
……