# EMPLOYMENT TRIBUNALS

**BETWEEN**

| **Claimant** | **AND** | **Respondent** |
|---|---|---|
| **Mr A K Abbasi** | | **City Solicitors t/a Farani Taylor Solicitors** |

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**SITTING AT: London Central** **ON: 24 February 2020**

**Representations**

For the Claimant: Mr R Kohanzad, Counsel
For the Respondent: Mr J Davies, Counsel

# JUDGMENT

(1) The Respondent's application for costs succeeds. The Claimant is ordered to pay the Respondent **£1,320**.

(2) The Claimant's application for costs does not succeed.

(3) No order as to the costs of this costs application hearing.

# REASONS

1. By a letter dated 1 November 2019 the Respondent applied for a costs order pursuant to rule 76(1)(a) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1 following a hearing on 14 October 2019 at which the Claimant withdrew claims of unfair and wrongful dismissal and at which, based on a concession by the Respondent, judgment was entered for the Claimant the sum of £1,500 in respect of a claim of unauthorised deductions.

2. The Claimant has also made a costs application by an undated letter received on 15 November 2019.

**Submissions**

3. Each party provided written submissions which they supplemented orally.

4. An agreed authorities bundle was provided.

**The Law**

5. Rule 76 provides:

> **When a costs order or a preparation time order may or shall be made**
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> 76.—(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.

6. The following propositions relevant to costs may be derived from the case law:

6.1. There is a two-stage exercise to making a costs order. The first question is whether a paying party has acted unreasonably or has in some other way invoked the jurisdiction to make a costs order. The second question is whether the discretion should be exercised to make order (*Oni v Unison* ICR D17).

6.2. Costs orders in the Employment Tribunal are the exception rather than the rule (*Gee v Shell* [2003] IRLR 82, *Lodwick v Southwark* [2004] ICR 844).

6.3. While the threshold tests for making a costs order are the same whether or not a party is represented, in the application of the tests it is appropriate to take account of whether a litigant is professionally represented or not. Litigants in person should not be judged by the standards of a professional representative (*AQ Ltd v Holden* [2012] IRLR 648).

6.4. The fact that a claimant has withdrawn a claim does not mean that there has been unreasonable conduct. Claimant should not be deterred from appropriately withdrawing claims. Withdrawal can sometimes save costs and in some cases might be the "dawn of sanity" (*per Mummery LJ paragraph 29 in McPherson v BNP Paribas* [2004] EWCA Civ 569; [2004] ICR 1404). On the other hand, as Mummery LJ also recognised that

tribunals should not follow a practice on costs which might encourage speculative claims, by allowing applicants to start cases and pursue them down to the last week or two before the hearing in the hope of receiving an offer to settle, and then, failing and not receiving an offer, dropping the case without any risk of a costs sanction (*para 29*). A sudden withdrawal without good reason can amount to unreasonable conduct. In that case *M* withdrew his claim 18 days before the hearing on the basis that the stress of the litigation was having an effect on his health. While the tribunal was entitled to make a costs order, the order that *M* pay the whole of the respondent's costs of the litigation was wrong.

6.5. While a precise causal link between unreasonable conduct and specific costs is not required, it is not the case that causation is irrelevant. In *Yerrakalva v Barnley MBC* [2012] ICR 420 Mummery LJ said:

> "41. 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. The main thrust of the passages cited above from my judgment in McPherson's case was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the employment tribunal had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances.
>
> …
>
> 43 …. When, as here, the case has been withdrawn before it has run the full course to a final conclusion on the merits, difficulties on costs applications are bound to arise from the absence of findings of credibility, the absence of findings of disputed facts and the absence of findings on issues of liability. The tribunal or court has to do the best it can with such material as it has in a case that has never been fully tried.
>
> 44. I am sure that it cannot be right to act on the suggestion of Mr Sendall, who appeared for the claimant, that, if the claimant was disabled then, even if she had exaggerated her disability in her evidence, she would have won her discrimination case and there would have been no order for costs. I am not prepared to act on the basis of suppositions about what might have happened, if the claimant had continued with the case. The plain fact is that she could not have won her case, because she dropped it before it could be decided by the employment tribunal."

7. The Respondent has relied on the case of *Nicholson Highlandwear Ltd v Gordon Nicolson* (UKEATS/0058/09/BI), in many ways an unusual decision in which an Employment Tribunal did not make a costs order notwithstanding that G freely admitted in his oral evidence having carried out what appeared to be a fraud on the respondent company. He was not a reliable witness and was unable to distinguish between truth and fiction. The Scottish EAT upheld the employer's appeal and substituted a finding that there had been unreasonable conduct and that NHL was entitled to expenses [i.e. costs]. It was relevant that the letter of dismissal set out in detail that the claimant was guilty of substantive financial irregularity amounting to fraud which was repeated in the ET3 which referred to breach of trust and false accounting.

## The Evidence

8. I retained a final hearing bundle of some 391 pages and additionally that witness statements provided for the final hearing.

9. I provided an opportunity by my order of 26 November 2019 to introduce by 31 January 2020 any documents not already contained in the existing witness statements or final hearing bundle. No documents were provided pursuant to that order.

10. The Respondent introduced an email exchange dated 4 – 5 September 2019 at today's hearing. No objection was made by the Claimant.

11. There was no live evidence at today's hearing. The position as to the Claimant's means was put forward by his Counsel on instruction and not challenged by the Respondent.

## The Background

12. In June 2012 the Claimant worked for Farani Javid Taylor Solicitors LLP ("the LLP") in the accounts department.

13. In September 2013 the Claimant was contacted by Mr Farhan Khan Farani ("Mr Farani") and accepted an offer to work as an assistant to him on a part-time basis.

14. In approximately 2015 the Claimant started working on a full-time basis. The Respondent accepts that at this earlier stage he was an employee.

15. On 7 July 2017 the LLP entered a creditors' voluntary liquidation and a liquidator was appointed. The Respondent (City Solicitors t/a Farani Taylor Solicitors) purchased the business of the LLP from the liquidator on that same day. The Claimant continued working with Mr Farani and says that he was oblivious to the liquidation and change of name. The Respondent maintained, until a concession at the hearing on 14 October, that this liquidation interrupted the Claimant's continuity of employment.

16. On 1 December 2017 the Claimant signed an agreement that stated he would be a self-employed fee earner. The precise circumstances of this signature and the nature of the agreement were in dispute between the parties. The Claimant contends that, notwithstanding the express wording of this agreement, he remained an employee. The Respondent says that the Claimant was no longer an employee from this point onward.

17. On 5 June 2018 the Claimant resigned. It is his case that this was in response to a letter before action dated 5 June 2018 from the Respondent that was tantamount to a dismissal. This letter read:

> "We write in connection with your contract for services as a self-employed paralegal with us.
>
> We draw your attention to this letter which originates from the circumstances mentioned herein below:
>
> 1. It has been brought to our attention that despite your contract with us you have started contacting Clients of this Firm and have started advising them to sign a new Letter of Authority to enable them to divert their business belonging to Farani Taylor Solicitors to another competing Law Firm.
>
> 2. Such actions have not only prejudiced the integrity and veracity of the Law Firm but have also sabotaged its notoriety and prestige. Needless to say such actions have caused financial and reputational losses.
>
> 3. In addition, it has been reported to us that you have not only siphoned off funds from clients into your own personal account and defrauded the Firm.
>
> 4. You have also appropriated files from the office without our consent in breach of the provisions of Data Protection Act, 1998.
>
> 5. [….]
>
> In view of the above, we have no other option but to treat this as repudiation of your contract you have with us and we have accepted your breach.
>
> As you are aware there are further investigations against you for which we have asking your explanation but you have either ignored them or refuse to comply. We urge you to attend our city office the address of which is [*address*]…
>
> … [*Various undertakings and requests for compliance are set out*]
>
> We suggest you seek independent legal advice in respect of this letter"

18. It is said that this was the precursor to High Court litigation to be initiated by the Respondent. I have not been provided with any evidence that such litigation has in fact commenced.

**The Claim**

19. On 3 December 2018 the Claimant presented a claim form in the Employment Tribunal. That claim contained among others an allegation that Mr Farani was threatening the Claimant and trying to force him, at pain of repercussions for his career and further a threat of reporting him to the police, that he must give evidence to support him in a legal dispute with a former colleague Mr Khan. The Claimant regarded this as a vendetta and felt that what he was being asked to do was entirely wrong. It was not explicitly clear from the claim form that the Claimant was being asked to give false evidence.

20. The Respondent put in its response by 31 December 2018. At paragraph 32 of the response the Respondent alleged that a barrister had raised a concern that the Claimant had personally taken £2,000 from a client and had signed that client's witness statement himself. It was also alleged, as stated in the letter of 5 June, that in June 2018 the Respondent discovered that various clients had been asked by the Claimant to sign new Letters of Authority transferring their files to another firm.

21. The matter was case managed by Employment Judge Walker at a Preliminary Hearing on 12 March 2019. At that stage the Claimant (a paralegal, though not an employment law specialist) represented himself. The Respondent was represented by Mr H Khan a solicitor.

22. On 4 September 2019 the Claimant sent an email to the Respondent indicating that his witness statement was being prepared by counsel and that required a further 7 days for finalising statements, to allow an exchange of witness statements on 16 September 2019. It was clarified on behalf of the Claimant today that, notwithstanding the content of this email in fact he was not represented by a barrister but that he had informally taken the advice of a colleague at this stage who was a solicitor specialising in immigration law.

23. In the event there was a further delay and a number of extensions of the time for exchange before witness statements were exchanged on 3 October 2019. In the Claimant's witness statement he made allegations about the Respondent that went significantly further than those contained in the claim form:

    23.1. Mr Farani planned to split off from the partnership in 2016 and directed the Claimant to retain funds from clients rather than place them in the client account. The Claimant contends that Mr Farani was at that stage deliberately trying to force the partnership into liquidation.

    23.2. Mr Farani requested that the Claimant make false statements about Mr Khan and create evidence and fabricate information further to the dispute between them. He became angry and aggressive toward the Claimant when the Claimant refused.

23.3. In February 2018 Mr Farani asked the Claimant assist him with an eviction of a business partner in a laundry business which became violent as a result of Mr Farani making other employees use force to carry out the eviction, which by implication was unlawful.

24. A second witness statement of Mr Afzal Rehman was served by the Claimant on 7 October 2019, which was objected to by the Respondent.

25. On Thursday 10 October 2019, the Claimant had a 4pm conference with Mr Kohanzad, a barrister specialising in employment who appeared at the hearing on 14 October and today's costs hearing. This was the first time that the two had met. This is first time that the Claimant took any advice from an employment law specialist.

26. By an order made on Friday 11 October 2019 the Acting Regional Employment Judge Wade determined that this claim would not be consolidated with the claims of Mr Rashpal Singh and Mr Afzal Rehman.

**The Hearing**

27. The Claimant's claims of unfair dismissal, wrongful dismissal and unauthorised deductions from wages were listed to be heard in a four day hearing before a judge sitting alone commencing on Monday 14 October 2019. This is how the matter came before me.

28. The morning of 14 October was taken up with a number of applications:

28.1. The Claimant's application that a deposit order should be made in respect of the Respondent's position on employee status. (An application for strike out in the alternative on this point was mentioned but, I suspect, not seriously pursued). In respect of this application the Respondent took instructions and made the concession that the Claimant was an employee at an earlier stage but not was not an employee following the signing of the document in December 2017. The Respondent also indicated that they would not argue an interruption in continuity of employment in July 2017 under regulation 8(7) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"). I declined to make a deposit order given *inter alia*, given that the parties were at a final hearing and ready to give evidence and the timetable was very tight and it was going to take me some time to make a deposit order. The principal benefit of a deposit order is when it is made at an early interlocutory stage to give the parties the opportunity to re-evaluate their position.

28.2. The Respondent objected to two of the Claimant's witness statements. In respect of a witness statement of Mr Rashpal Singh there were certain parts that were objected to on the basis that they were irrelevant. My approach to this was that Counsel should only be dealing with and cross-examining on matters of relevance. I could and would ignore any irrelevant material, which is done by judges routinely without the need to strike out paragraphs. Accordingly I ruled that the statement should stand with no modifications.

28.3. The other witness statement was a second statement of Mr Rahman, which had been served late, slightly after mutual exchange. I decided to defer this question until such time as I had a better understanding of the witness evidence as a whole. In the event the claim settled before I needed to consider this point.

28.4. Finally there was an application from the Claimant to remove pages 361-372 from the agreed bundle on the basis that these were prejudicial and potentially incriminated the Claimant in criminal allegations, at least part of which related to matters outside of the UK. These documents had already been removed from the judge's version of the agreed bundle handed up to me. These documents had been put in the agreed bundle before Mr Kohanzad had been instructed. I ruled that the documents should remain in the agreed bundle since these were relevant to the Respondent's argument that in the event of the claim of unfair dismissal succeeding damages should be reduced for the Claimant's contributory conduct and/or under the principle in *Polkey v AE Dayton Services Ltd* [1987] UKHL 8, on the basis that the Claimant might have been fairly dismissed in any event. I indicated that I would review the question of relevance at such time as the documents were referred to in cross examination or submissions. I never saw these disputed documents which were never re-inserted into my version of the agreed bundle. Indeed the bundle I retained for this cost hearing still does not have the documents and I do not know what they contain, although a single line summary description is listed for each in the bundle index.

29. After these applications at the hearing on 14 October 2019, Claimant's Counsel indicated that he was no longer pursuing the claims of unfair dismissal and wrongful dismissal. In the face of this withdrawal, the Respondent conceded the remaining claim of unauthorised deductions with a value of £1,500.

30. I made an order dismissing the withdrawn claims and confirming that the Respondent did make authorised deductions to the value of £1,500.

31. Each party made their costs applications subsequently in writing.

32. At the costs hearing I explicitly flagged up to the parties that I had not seen the alleged incriminating documents pages 361 – 372. Neither party sought to provide copies of these documents, nor explain the content to me.

**The Respondent's application for costs**

33. The Respondent's application, as set out in their letter of 1 November 2019, was further developed in a skeleton argument put forward by Mr Davies, which he made oral submissions in support of.

34. The Claimant's conduct said to be unreasonable is that

34.1. making, continuing and expanding upon unfair and wrongful dismissal claims then dropping them at the last minute after various applications had been refused; and

34.2. where the dismissal letter, the ET3 and the Respondent's witness statement had made it clear that the Respondent said that any dismissal or termination was caused or justified by serious concerns about the Claimant's financial and professional misconduct, making, continuing and expanding upon serious professional and regulatory allegations against the Respondent (and individual partners) as part of the relevant claims and then dropping them at the last minute.

35. Mr Davies clarified during the course of his argument that he contended that the Claimant was unreasonable to continue to pursue his claim once he saw the content of the ET3.

36. The counter-allegations made by the Claimant did not appear in his ET1 claim form, but rather in his witness statement.

37. The Respondent says that these claims and allegations caused approximately 70% of the total costs. The Respondent says that no more than 30% of the total costs related to the questions relating to "employee" or "worker" status.

**Claimant's response to the Respondent's application**

38. The Claimant's reasons for the very late withdrawal of the two main claims only really became clear in Mr Kohanzad's skeleton argument dated 10 February 2020 which he amplified orally at the costs hearing. In the undated letter of 15 November all that was said was that "the Respondent's suggestion that the Claimant did not want to be cross examined is pure conjecture. The Claimant was until the week before the trial unrepresented and had not had the benefit of advice from counsel specialising in employment law". In the skeleton argument Mr Kohanzad explained at paragraphs 34-35:

> "34. The Respondent intimated High Court action against the Claimant in its letter before action dismissing the Claimant and has continued to hold such action as a threat hanging over the Claimant, including at the ET proceedings. Had the ET decided the contributory fault arguments against the Claimant (which the Claimant vigorously denies) then those findings would likely bind the High Court in any subsequent action brought against the Claimant by the Respondent. Given the Claimant's relatively moderate Schedule of Loss [p260], the Claimant was perfectly entitled upon receiving legal advice to decide to withdraw the claim. The potential downside of a contributory fault finding clearly outweighed the potential upside any unfair dismissal finding. Withdrawing in those circumstances was not unreasonable. A relatively complex cost/in a fit analysis involving the interaction between Employment Tribunal and High Court proceedings is not something that is easily done by a layperson.
>
> 35. For the reasons set out above, the Claimant's strike out application was not misconceived. The Claimant was entitled to a finding of unfair dismissal. Upon that application being rejected, the cost/benefit analysis changed so that the benefit of

> establishing that the Claimant was unfairly dismissed and entitled to compensation became outweighed by the risk of having an adverse finding against him that could bind the High Court in subsequent proceedings. Such proceedings, it should be remembered, would likely involve a huge costs order against the Claimant, potentially bankrupting him."

39. The reference to 'strike out' here was, I suspect to an application for strike out or deposit in the alternative.

40. I note that the grounds of resistance ("GOR") at paragraph 29 contains the following "The Respondent wishes to make this clear at this stage that it is currently in the process of instigating a proper claim against the Claimant in the High Court for the losses that it has suffered as a result of his gross misconduct and unlawful dealings whilst working for the Respondent".

41. Mr Kohanzad set out in his submission to me in stark but clear terms a cost benefit analysis of the situation facing his client. It is not clear to me what the precise content of the High Court proceedings nor the likely quantum would be. I have the letter before action dated 5 June 2018 and paragraph 29 of the GOR. Mr Kohanzad explained that the potential upside of the Claimant winning the Tribunal claim was dwarfed by the downside of losing. He pointed out that that the Schedule of Loss for the claims in the Employment Tribunal was worth £13,000 [page 57]. He contended that the potential exposure regarding costs if nothing else for the Claimant losing in the High Court might be £150,000 and the costs order at the following a fully contested losing claim at in the Tribunal might be £40,000. Findings of the guilt of the Claimant as part of consideration of his contribution to dismissal would, he contended, bind the High Court.

42. As to the timing of the Claimant's withdrawal, when asked why this was not done earlier Mr Kohanzad explained that a decision had been taken to start the hearing on the basis that settlements between parties do occur even at the last minute and it might have been that the outcome of the various applications made on the first morning of the hearing was different such that either the claim could be pursued or alternatively a settlement reached.

**Conclusion on Respondent's application**

43. The nature of the allegations and counter allegations made by both parties in this case is very serious. The claim settled on the afternoon of the first day of the listed hearing. I did not hear any oral evidence. I have not seen the content of documents pages 361-372. I do not consider that it would be appropriate for me to make findings on any of these allegations, even at the level of assessing the weight of evidence to attempt to gauge likely outcomes had the four day hearing been fought to a conclusion. There would be a real likelihood of doing a significant injustice to those individuals mentioned. On the basis of the material I have, in the absence of live evidence and fully argued submissions I do not consider that I can form a conclusion that either party has been dishonest or lied or is guilty of the various allegations made. I simply cannot say whether or not the Claimant might

have contributed to his dismissal, if indeed he was dismissed. I cannot say that he has made allegations without foundation.

44. I take account of the fact that he was a litigant in person for the vast majority of the litigation of this matter.

45. I do not find, considering all of this, that it is appropriate to make an order under Rule 76 in respect of the bringing or conducting of the litigation in the period before the final few days before the final hearing.

46. I am left with the timing of the Claimant's withdrawal of his claims of unfair dismissal and wrongful dismissal.

47. The Claimant took advice from a colleague who was an immigration specialist in early September 2019. He had a conference with his employment law specialist counsel for the very first time at 4pm on the Thursday before the trial commenced on the Monday. It seems that it is only with the advice of counsel that a global view has been taken about the tribunal claim and potential High Court action and the costs risks associated.

48. Realistically the Claimant would have needed to take time to consider his position based on advice. In my assessment this should have been done by Friday before the trial. Was it reasonable to pursue the matter and commenced the hearing on Monday morning, making applications and holding out for a potential settlement?

49. It has not been suggested to me that the parties were close to settlement which might have meant that some last-minute brinkmanship understandable.

50. In my assessment the Claimant, faced with the stark position outlined by Mr Kohanzad, was entering into the 'speculative' territory described in *McPherson* by continuing to pursue applications which had little prospects of success.

51. The application for a strike out or deposit order on the morning of a four-day hearing was in my assessment highly unlikely to bear fruit. The parties were ready for a trial. The point about employee status was disputed with evidence going either way on the point, not least the express wording of a contract supporting the Respondent's position. It was highly unlikely that I would have found that there was no real prospect of success.

52. Deposit orders are considered at a much earlier stage of proceedings. Rule 39(1) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1 begins "Where at a preliminary hearing…". It is clear from the rubric of the rule itself it is intended to be a procedure to be carried out at an early stage. Parties must be given time to pay an order. Made at this stage, this was not an application with great merit. I should acknowledge however, that the focus placed on the issue of employee status as a result of this application did lead to two partial concessions from the Respondent.

53. The second application was to remove from a bundle which had already been agreed, documents that pointed to conduct on the part of the Claimant which the Respondent said would assist the contribution/Polkey arguments. It was argued

on behalf of the Claimant that these were "prejudicial". In some contexts it is appropriate to keep prejudicial documents from decision-makers, for example criminal trials being heard by juries or 'without prejudice' documents. Judges sitting alone however are routinely required to sift the evidential value of documents and disregard irrelevant, or documents that are simply designed to smear an opposing party. I have not had the opportunity to see these documents which I infer reflect blameworthy conduct which has some connection either with the circumstances of the termination of the Claimant's employment or at least good reasons to believe that his employment might have been fairly terminated in any event. These are the sort of documents that a Tribunal judge would expect to deal with in the context of a claim of unfair dismissal. An application to remove such documents on the first day of a trial from an agreed bundle was unlikely to succeed.

54. I accept at face value what I have been told about the cost benefit analysis which led to the Claimant withdrawing his claim. This must have been clear to him in his conference with Counsel on the Thursday before the hearing. There was the potential for a 'dawn of sanity' as referred to in *McPherson*. That did not happen however.

55. In my assessment the Claimant ought to have withdrawn his claim on the Friday and it was unreasonable to continue beyond this point. To pursue the matter was speculative. The costs jurisdiction under Rule 76 is therefore invoked.

56. Turning to the second stage, is it reasonable to make an order? Although the Claimant was a litigant in person, he was a paralegal and not unfamiliar with litigation. By the time of the unreasonable conduct I have identified he had the benefit of legal advice as to the risks of his position viewed globally. Against this I recognise that two of the applications made on the first morning were made by the Respondent and further that the Respondent made two concessions in response to the Claimant's application and did of course concede the £1,500 unlawful deduction claim for the first time at this stage.

57. On balance I consider in the circumstances of this case that it is appropriate to make a costs order for the last working day before trial and trial itself.

58. *Costs incurred as a result of unreasonableness* - although I am not required to trace out precise causation between the unreasonable conduct and costs incurred, it seems to me clear only a very small element of the Respondent's total costs of £35,510 can reasonably be connected with the Claimant pursuing the matter between the Friday before the trial and commencing trial. The majority of the Respondent's costs were already incurred. Mr Kohanzad made the point that Respondent's Counsel's brief fee would have been incurred by the time of the conference. This accords with my general experience of the way that Counsel's fee is incurred. This proposition was not disputed by Mr Davies. The Respondent's solicitor's costs of attending the trial are **£1,320**. This plainly would have been saved had the Claimant reasonably conceded on the Friday before trial.

59. *Financial means* - it is open to the Tribunal the consider the means of a party. The Claimant does not own a property. I am told that he earns between £1,500 – £3,000 per calendar month and that his income is variable. He has no dependents.

His partner isn't part-time work. For someone who lives in the London area this is not a particularly high income.

60. I have considered the Claimant's means and do not consider that it is necessary to modify such a comparatively small amount. The costs figure therefore is **£1,320**.

**Claimant's application for costs**

61. The Claimant's application for costs is that the Respondent unreasonably disputed the Claimant's employee status. Furthermore it is contended that the Respondent has in other fairly recent cases before other Employment Tribunals also unreasonably disputed employee status. He also argues, based on the letter of 5 June 2018 that the Respondent thereby dismissed the Claimant without process and this must, realistically speaking be an unfair dismissal which the Respondent was unreasonable to dispute.

62. The Respondent argues that the Claimant cannot pursue an argument that it was bound to win the question of employee status or unfair dismissal when the Claimant chose not to pursue this claim and further that it would be inappropriate to make findings based on what Claimant's counsel says occurred in other proceedings, particularly when one of them is subject to a confidential and binding COT3 which prevents the Respondent from referring to the details of that claim.

63. Mr Kohanzad argues in reply that there is no prohibition on him referring to things said by judges in open court, notwithstanding that these matters were subsequently settled and apparently subject to confidentiality clauses.

64. I do not have pleadings, evidence or written reasons relating to the other sets of proceedings. What I do have in one case are Mr Kohanzad's notes of remarks made by a judge at the East London Employment Tribunal. While I accept that these were comments made in the context of that case, I do not feel that I have sufficient understanding of that case which related to a junior receptionist, nor another case relating to a caseworker from which I could legitimately find what Mr Kohanzad characterised as a "course of conduct" on the part of the Respondent as a finding to support a costs order in this case.

65. I consider that I should confine myself to the Respondent's position in relation to the Claimant's employee or worker status in the present proceedings.

66. The Respondent conceded worker status ultimately by conceding the unlawful deduction claim.

67. There were further concessions in that first, it was conceded by the Respondent that the Claimant was an employee prior to his signing an agreement dated 12 December 2017 [page 60.44 of the hearing bundle]. This agreement designated the Claimant as a Self-Employed Consultant, also known as an Independent Contractor. Second, the Respondent did not pursue an argument that under Regulation 8(7) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") rights and liabilities and continuity of employment did not continue following a creditors' voluntary liquidation on 7 July 2017.

68. The Claimant's position at this cost hearing is that this is obviously a sham designed for tax avoidance and that it would be unusual for a full-time worker paralegal to be anything other than an employee.

69. I do not consider based on the documentary evidence and argument that I can conclude that I would have inevitably have found that the Claimant was an employee. There was due to be oral evidence on the disputed circumstances under which the Claimant signed the document dated 12 December 2017. Before I could conclude that this document was a sham I would need to hear detailed evidence about the workplace and the Claimant's role in it. It may well have been the case that the Claimant would have won the argument about employee status. It is not appropriate at this stage at a costs hearing for me to carry out what would amount to a mini trial on the question of employee status. The Claimant has foregone the right to argue this by choosing, for tactical reasons, relating to High Court litigation not to pursue his claim.

70. I can see the force in Mr Kohanzad's argument that the letter of 5 June 2018 was very likely a dismissal. I do not conclude however that the Respondent was unreasonable not to concede the point. They were in any event bound to run arguments for substantial deductions for the Claimant's contribution and under *Polkey,* such that a concession on the unfair dismissal itself would have made little difference to the running of the hearing.

**Costs of the costs hearing**

71. I have been invited to make a costs order in respect of the costs of this costs application hearing.

72. I do not find that either party has been unreasonable or has in any other way engaged rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1 during the course of submissions on costs.

73. The Respondent may argue that their costs application is a result of the Claimant's earlier unreasonable conduct. The Respondent was however seeking costs in the region of £20,000. Given the amount that I have actually ordered for costs, it was plainly reasonable of the Claimant to argue his position on costs. Accordingly I make no order for the costs of the costs hearing.

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Employment Judge Adkin

Date14th March 2020

WRITTEN REASONS SENT TO THE PARTIES ON

16/3/2020

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FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.