EMPLOYMENT TRIBUNALS

Claimant: **Mr S. Sammon**

Respondent: **Valuation Office Agency People Group**

JUDGMENT

The judgment of the Tribunal is that: -

the Claimant shall pay to the Respondent the sum of £5,399 in respect of costs, pursuant to Rule 76, sch. 1 Employment Tribunal's (Constitution & Rules of Procedure) Regulations 2013.

REASONS

1. At the preliminary hearing on 19 March 2020 I struck out the Claimant's claim of unfair dismissal, because it was presented outside the statutory time limit, in circumstances where he had not shown that it was not reasonably practicable for him to present it in time.

2. Because Mr Kirk, Counsel for the Respondent, said at the end of the hearing that the Respondent intended to seek its costs, I decided of my own motion to provide written reasons for my decision, as the Claimant would require them to deal with that application. The judgment and reasons were sent to the parties on 20 April 2020, by email to the only email address which the Claimant had provided to the Tribunal, and from which he had corresponded with the Respondent earlier in the proceedings.

3. By a separate order, sent to the parties on 23 April 2020, I directed that the Respondent send to the Tribunal and to the Claimant by 7 May 2020 a written costs application, together with any attachments relied on, and including a detailed schedule of costs. I ordered that the Claimant write to the Tribunal, copying the Respondent in, by 14 May 2020, showing cause why a costs order in the amount sought by the Respondent should not be made. I specified that, if he wanted his financial means to be taken into account, he must set out

what they were and provide supporting evidence. I gave the Respondent an opportunity to respond to any material provided by the Claimant.

4. A detailed written costs application was lodged by the Respondent, and copied to the Claimant, on 4 May 2020. It was supported by eight annexes:

   4.1. the Respondent's ET3 and the application, dated 5 December 2019, to convert the final hearing on 19 March 2020 into a preliminary hearing;

   4.2. *inter partes* correspondence by email between 20 December 2019 and 10 March 2020;

   4.3. the notice of the preliminary hearing;

   4.4. a letter dated 31 January 2020 from the Respondent to the Claimant, marked 'without Prejudice Save As to Costs';

   4.5. the correspondence forwarded to the Claimant, converting the preliminary hearing into a telephone hearing and giving details of the access code;

   4.6. a copy of my judgment striking the Claimant's claim out, and my case management orders in relation to the cost application;

   4.7. the Respondent's schedule of costs, in the total sum of £10,348, excluding VAT;

   4.8. a printout of Counsel's fees, provided by his chambers.

5. The Claimant did not lodge any documents in reply to the Respondent's application. On 2 June 2020, the Respondent wrote to the Tribunal, copying in the Claimant, confirming that it wrote to him on 5 May 2020 by email (which it attached), drawing his attention to the deadline for responding to the costs application. Neither the Tribunal nor Respondent having received any response from the Claimant, the Respondent assumed that he did not wish to submit a response. If no response was received by 8 June 2020, the Respondent invited me to proceed to determine the cost application on the papers.

6. Nothing was received from the Claimant by 8 June 2020, and accordingly I have proceeded to determine the application. I apologise for the delay in doing so, which was caused by the competing demands of other cases.

The basis of the application

7. The Respondent seeks a costs order against the Claimant incurred in resisting his claim. The application is made pursuant to Rule 76, Sch. 1 of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 ('the Rules'). The Respondent submits that:

   7.1. the Claimant acted unreasonably in bringing/pursuing such proceedings within the meaning of rule 76(1)(a); and/or

   7.2. his claim had no reasonable prospect of success within the meaning of rule 76(1)(b).

The Respondent's specific complaints

8. At the beginning of its detailed application, the Respondent set out the main points, on which its application is based, as follows.

   8.1. It was argued that the Claimant acted unreasonably in either the bringing, or pursuing, of the proceedings, in that:

      8.1.1. he brought a claim which he knew, or ought to have known, was clearly out of time, and failed to give any reasons why it was not reasonably practicable to present the claim in time;

      8.1.2. he continued with his claim even after the issue of time limits was made clear to him by the Respondent in the grounds of resistance, the application to strike out the claim made on 5 December 2019, and the costs warning letter on 31 January 2020;

      8.1.3. the Claimant failed to engage at all with the Respondent after 10 January 2020, despite repeated attempts by the Respondent to contact him; and

      8.1.4. the Claimant failed to attend the preliminary hearing on 19 March 2020, without explanation.

   8.2. The Claimant's claim had no reasonable prospects of success because it was presented out of time, without providing any explanation as to why it was not reasonably practicable to presented in time.

The law to be applied

9. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provide as follows (as relevant):

> **(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;**
> >
> > **(b) any claim or response had no reasonable prospect of success …"**

10. Orders for costs in employment Tribunals are the exception, not the rule (*Gee v Shell UK Ltd* [2003] IRLR 82 CA *per* Sedley LJ at [35]). However, the facts of a case need not be exceptional for a costs order to be made. The question is whether the relevant test is satisfied (*Vaughan v London Borough of Lewisham and others* [2013] IRLR 713).

11. The EAT in *Haydar v Pennine Acute NHS Trust* UKEAT/0141/17 held that the determination of a costs application is essentially a three-stage process (*per* Simler J at [25]):

> **'The words of the Rules are clear and require no gloss as the Court of Appeal has emphasised. They make clear (as is common ground) that there is, in effect, a three-stage process to awarding costs. The first stage - stage one - is to ask whether the trigger for making a costs order has been established either because a party or his representative has behaved unreasonably, abusively, disruptively**

> **or vexatiously in bringing or conducting the proceedings or part of them, or because the claim had no reasonable prospects of success. The trigger, if it is satisfied, is a necessary but not sufficient condition for an award of costs. Simply because the costs jurisdiction is engaged, does not mean that costs will automatically follow. This is because, at the second stage - stage two - the Tribunal must consider whether to exercise its discretion to make an award of costs. The discretion is broad and unfettered. The third stage - stage three - only arises if the Tribunal decides to exercise its discretion to make an award of costs, and involves assessing the amount of costs to be ordered in accordance with Rule 78"**

12. 'Unreasonable' has its ordinary meaning. It is not equivalent to 'vexatious' (*Dyer v Secretary of State for Employment* UKEAT/183/83).

13. Costs awards are intended to be compensatory, not punitive. The costs awarded should be no more than is proportionate to the loss caused to the receiving party by the unreasonable conduct (*Barnsley Metropolitan Council v Yerrakalva* [2012] IRLR 78). However, unlike the wasted costs jurisdiction, in exercising its discretion to order costs, the Employment Tribunal does not have to find a precise causal link between any relevant conduct and any specific costs claimed. Mummery LJ gave the following guidance at [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 was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the ET 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.'**

14. A failure to accept an offer not to pursue a party for costs does not, of itself, constitute unreasonable conduct: *Lake v Arco Grating (UK) Ltd*, UKEAT/0511/04. However, if a party issues a clear costs warning, but the other party (particularly if represented) fails to take it seriously and to engage with it, by addressing their minds to the issues raised in support of the warning, a costs order on the basis of unreasonable conduct will be more likely. If the Tribunal makes a finding of unreasonable conduct on that basis, there is no need for it to go on to make a finding that the claims were misconceived: *Peat v Birmingham City Council* UKEAT/0503/11 [28-32].

The conclusions reached at the preliminary hearing

15. For the sake of convenience, I set out below the relevant passages from my judgment striking out the claim at the preliminary hearing.

> 7. 'Mr Kirk explained that the Claimant was originally represented by Paytons solicitors. On 2 January 2020 Paytons wrote to the Respondent, notifying them that they would no longer be acting for the Claimant and asking the Respondent to contact the Claimant directly. The Respondent did so on the same day at the email address which the Claimant had provided on the ET1; they asked him if he had instructed a different solicitor and whether he intended to pursue the claim; they

informed him that they had spoken to the Tribunal and had been informed that the hearing would be converted to a preliminary hearing.

8. On 10 January 2020 the Claimant replied saying that he was seeking further legal advice and would advise them in due course as to who they should contact; in the meantime he asked to be contacted directly. That was the last the Respondent heard from him. I note that the postal address on the email was an Australian address. Mr Kirk's instructions were that the Claimant had been living in Australia for some time; that is consistent with the Claimant's case that he had taken an extended career break to live there with his partner.

9. On the same day the Respondent replied to the Claimant's email, saying that they would be in touch in due course, once the Claimant had had an opportunity to seek legal advice.

10. On 15 January 2020, the Tribunal wrote to the Claimant's former solicitors, who had not formally come off the record, to inform them that the hearing had been converted to an open preliminary hearing and attaching a notice stating that the time limit issue would be dealt with. Quite properly, the Respondent forwarded this to the Claimant at his email address on 16 January 2020, asking him to confirm his intentions regarding the claim.

11. On 30 and 31 January 2020 the Respondent wrote again to the Claimant on a without prejudice basis. I was not told the content of that correspondence. The Claimant did not reply.

12. On 28 February 2020 the Respondent chased the Claimant by email for information as to what his intentions were: they pointed out that the date for the PH was approaching; they sought to discuss preparation for the hearing; they asked if he proposed to submit a written statement; and whether he had instructed a solicitor or barrister to represent him. He did not reply.

13. On 10 March 2020 the Respondent emailed the Claimant again, asking him whether he would be attending the hearing and saying that, if he did not, they would be asking the Tribunal to proceed in his absence. They received no reply.

…

16. The Claimant had not provided a telephone number on his ET1 form. I considered the information which was available to me and I was satisfied that the Claimant was aware of the fact that today's hearing was taking place. There had been no application by him to postpone the hearing. If it is right that the Claimant is in Australia, there was nothing to prevent him from instructing solicitors based in the UK to represent him at the hearing. Alternatively, he could have lodged written evidence or submissions himself with the Tribunal in advance of the hearing and asking it to take that material into account. He did not do so.

17. The fact that the hearing took place by telephone made it easier for the Claimant to attend than if it had gone ahead in person. No explanation was received by the Tribunal as to why the Claimant failed to attend today's hearing or to make contact with the Tribunal or the Respondent to explain his absence.

18. I considered that the Claimant had had a reasonable opportunity to participate in today's hearing. I concluded that it was just in the circumstances for me to proceed to deal with the Respondent's application in his absence.

[…]

31. The claim was presented six days out of time. The Claimant has had ample time and opportunity to make representations, in writing or in person, as to why time should be extended. Absent any explanation from him as to why he submitted his claim late, and why it was not reasonably feasible for him to present it in time, I conclude that the Claimant has not discharged the burden on him to show that time

should be extended. The Tribunal does not have jurisdiction to hear his claim of unfair dismissal and it is struck out.'

Additional findings of fact

16. I have now seen the correspondence of 31 January 2020 from the Respondent to the Claimant, which was marked 'Without Prejudice Save As to Costs'.

17. The letter contended that the claim had no reasonable prospects of success because it was time-barred, and that it was unreasonable for the Claimant to continue to pursue it; it explained in detail why the claim was presented outside the relevant time limit; made the point that the Claimant was professionally represented at the time; explained the position as regards costs in the Employment Tribunal; warned the Claimant that the Respondent reserved the right to make an application for costs against him; but offered not pursue a costs order if the Claimant withdrew his claim no later than 4 p.m. on 10 February 2020. The Respondent also suggested that the Claimant seek legal advice on the contents of its letter as soon as possible.

The Respondent's submissions

18. The Respondent's submissions are set out in detail in the written application and are a matter of record. I will not repeat them here.

Conclusion

19. I first considered whether the claim had no reasonable prospect of success and/or whether the issuing of the claim was unreasonable conduct, in order to determine whether the Respondent might be entitled to its costs of presenting an ET3 and engaging in the initial preparation of the case.

20. The fact that a claim is presented out of time does not, by itself, mean it has no reasonable prospects of success; the Tribunal has a power to extend time. However, the fact that no steps were taken to persuade the Tribunal that it was not reasonably practicable to present it in time strongly suggests that there was no basis for such an argument. That, in turn, leads me inevitably to the conclusion that the claim had no reasonable prospects of success.

21. As to whether the Claimant or his representatives acted unreasonably in issuing proceedings, there is no evidence that the Claimant knew that the claim had no reasonable prospects when it was presented. There are a number of possibilities as to why it was presented out of time, one of which is that he was wrongly advised; the fact that he later parted company with his professional representatives tends to support that conclusion. Absent any evidence that he knowingly issued a misconceived claim, or indeed that his representatives advised him to do so, knowing that the claim was out of time, I do not find that the Claimant or his representatives acted unreasonably in the initial stages. The Claimant continued to engage with the Respondent into January. Had he withdrawn his claim in response to the Respondent's costs warning letter, I would not have considered this a suitable case to make an award of costs at all. For these reasons, although the threshold for making an award of costs in relation to the initial period is met, because I have concluded

that the claim was misconceived, I have decided not to exercise my discretion to award costs in relation to that period.

22. It is the Claimant's conduct after the Respondent's costs warning letter which causes me the greatest concern.

23. I accept the Respondent's submission that, had the Claimant properly engaged with that warning, he must have understood that his claims were out of time, and that the Tribunal would require an explanation from him as to why it was not reasonably practicable to present them in time, if the case were to be allowed to proceed to a final hearing. I conclude that the Claimant acted unreasonably by not engaging in any way with the Respondent's costs warning letter. The letter was fair, appropriately expressed, and it accurately predicted the outcome of the hearing. He had a perfect opportunity to withdraw his claim, and to avoid the risk of a costs order being made against him, but he chose not to take it.

24. The Respondent did everything it reasonably could to apprise the Claimant of the position, yet he did nothing in response: not only did he not respond to the costs warning letter, he did not apply to postpone the preliminary hearing, and he did not attend it, nor did he instruct a representative to do so on his behalf; he did not make written representations in advance of the hearing; he did not even respond to correspondence from the Respondent, telling them that he proposed to take no part in the hearing.

25. He then continued to do nothing after his claim was struck out: he did not acknowledge correspondence from the Respondent; nor did he comply with the Tribunal's order to lodge a response to the cost application. I conclude that, by his inaction from the point of the costs warning letter onwards, the Claimant acted unreasonably, putting the Respondent to the cost of preparing for, and attending the hearing, and the cost of making a costs application in an attempt to recover the earlier costs.

26. Consequently, the threshold for a costs order has been met in respect of the period after the expiry of the costs warning.

27. I then considered whether it was appropriate to exercise my discretion to award costs, and concluded that it was. I accept the Respondent's submission that, by doing nothing, the Claimant effectively ensured that his claim was struck out for want of jurisdiction, and that the Respondent would incur unnecessary costs in achieving that result. He has provided no explanation for that conduct, and has taken no steps to persuade me not to make a costs order. I have concluded that the Claimant's failure to engage with the warning, and his complete inaction thereafter, was deliberate and egregious, and that an award of costs is justified.

28. I then turned to the question of the amount of costs to be awarded. Helpfully, the Respondent has broken down the costs into separate periods. In accordance with my conclusion above, I do not allow the costs in relation to the period between 25 November 2019 and 10 February 2020 (the date of instruction up to the expiry of the costs warning letter).

29. I am minded to award costs in respect of the following periods:

29.1. from 11 February 2019 to 19 March 2020 (the day after expiry of the costs warning letter until the date of the preliminary hearing), for which £2,146 is claimed;

29.2. from 20 March 2019 to 5 May 2020 (the period after the preliminary hearing to the date of the costs application), for which £2,133 is claimed;

29.3. and the costs of instructing Counsel, for which £1,120 is claimed

30. I then considered the Respondent's calculations in its schedule of costs and concluded that the work done, the amount of time spent on it, and the charging rate are all reasonable and proportionate.

31. By not responding to the Respondent's costs application, the Claimant has also not taken the opportunity to invite me to have regard to his means, and I cannot do so.

32. The core figures have been shown by the Respondent exclusive of VAT, but VAT has been added to the grand total claimed. Absent any explanation as to why costs should be awarded inclusive of VAT, I do not do so, on the assumption that the Respondent is likely to be VAT-registered, and able to reclaim the relevant sums.

33. Accordingly, I award the Respondent its costs in the amount of £5,399.

Employment Judge Massarella
Date: 3 August 2020