EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr D Herry		**Dudley Metropolitan Borough Council**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL
COSTS APPLICATION
(RESERVED JUDGMENT)

HELD AT Birmingham **ON** 29 & 30 October 2020
11 December 2020
(Panel Only)

EMPLOYMENT JUDGE GASKELL **MEMBERS: Ms SP Outwin**
Mr P Simpson

Representation
For the Claimant: **In Person**
For Respondent: **Ms S Garner (Counsel)**

JUDGMENT

The unanimous judgment of the tribunal is that:

Pursuant to Rules 74 – 78 and 84 of the Employment Tribunals Rules of Procedure 2013, there is an award of costs to the respondent, payable by the claimant, in the sum of £20000.

REASONS

Introduction

1 By a unanimous judgement promulgated on 26 July 2018, this panel dismissed claims brought by the claimant against the respondent for direct disability discrimination; a failure to make reasonable adjustments; harassment; unfair dismissal; wrongful dismissal and victimisation. The claims have been heard over a period of 14 days in March 2018 and decided at a panel day on 16 April 2018. Reference should be made to our judgement and written reasons for details of the facts of the claims and of our findings.

2 By a letter dated 20 August 2018, the respondent made an Application for Costs. On 24 September 2018, Employment Judge Gaskell made Case Management Orders in relation to that application which included the following paragraph: -

> "*If, pursuant to Rule 84 of the Employment Tribunals Rules of Procedure 2013, the claimant wishes the tribunal, when deciding whether to make an order for costs and when deciding how much any order should be, to take account of his ability to pay then the claimant's written submissions shall be accompanied by a detailed statement of his financial circumstances showing his household income, expenditure, assets and liabilities – accompanied by copies of supporting documentation*."

The Evidence

3 At this hearing the only oral evidence we heard related to the claimant's ability to pay. The claimant gave evidence and was cross-examined. The claimant failed to comply with the Case Management Order set out above. The written statement of his means was out of date he was extremely vague as to be up-to-date information. Documentation produced by the claimant provided no information as to the current position. On behalf of the respondent we heard evidence from Mr Robert Marsh - HR Business Partner, who conducted research on behalf of the respondents as to the likely employment prospects of the claimant and the salary levels to which she could aspire. For the purposes of this hearing, Mr Marsh produced a witness statement dated 16 March 2020. In connection with another claim (which also resulted in a costs application), Mr Marsh had produced an earlier witness statement dated 4 March 2019. At the claimant's request, we considered both statements and the claimant had the opportunity to cross-examine Mr Marsh.

4 We found the approach of both parties regarding the claimant's means to be somewhat misguided. The respondents appeared to be pursuing the case along the lines that the claimant had failed to mitigate his losses and should, by now, be in gainful employment. The claimant appeared to be pursuing a claim for victimisation. Suggesting that the respondent's actions accounted for his continued unemployment.

5 Neither approach was appropriate. The object of the exercise was simply to appraise us of the claimant's current financial position and allow us to make an assessment as to his future prospects in the event that we exercise our discretion and take account of his ability to pay.

6 Apart from on the question of means, we had no oral evidence. We have determined the application on the basis of documentary evidence and the parties' written and oral submissions.

7 We had a Costs Bundle prepared by the respondent running to some 445 pages; an additional Bundle prepared by the claimant running to some 580 pages; and a Means Bundle of 22 pages. We have considered the documents from within those bundles to which we were referred by the parties during the course of the hearing

The Law

8 **The Employment Tribunals Rules of Procedure 2013**

Rule 74: Definitions

(1) "Costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing). In Scotland all references to costs (except when used in the expression "wasted costs") shall be read as references to expenses.

(2) "Legally represented" means having the assistance of a person (including where that person is the receiving party's employee) who—

(a) has a right of audience in relation to any class of proceedings in any part of the Senior Courts of England and Wales, or all proceedings in county courts or magistrates' courts;
(b) is an advocate or solicitor in Scotland; or
(c) is a member of the Bar of Northern Ireland or a solicitor of the Court of Judicature of Northern Ireland.

(3) "Represented by a lay representative" means having the assistance of a person who does not satisfy any of the criteria in paragraph (2) and who charges for representation in the proceedings.

Rule 75: Costs orders and preparation time orders

(1) A costs order is an order that a party ("the paying party") make a payment to—

(a) another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative;
(b) the receiving party in respect of a Tribunal fee paid by the receiving party; or
(c) another party or a witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual's attendance as a witness at the Tribunal.

(2) A preparation time order is an order that a party ("the paying party") make a payment to another party ("the receiving party") in respect of the receiving party's preparation time while not legally represented. "Preparation time" means time spent by

the receiving party (including by any employees or advisers) in working on the case, except for time spent at any final hearing.

(3) A costs order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings. A Tribunal may, if it wishes, decide in the course of the proceedings that a party is entitled to one order or the other but defer until a later stage in the proceedings deciding which kind of order to make.

Rule 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 or where a hearing has been postponed or adjourned on the application of a party.

(3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if—

(a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and
(b) the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment.

(4) A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer's contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party.

(5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing.

Rule 77: Procedure

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.

Rule 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; or, in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993, or by an Employment Judge applying the same principles;
(c) order the paying party to pay the receiving party a specified amount as reimbursement of all or part of a Tribunal fee paid by the receiving party;
(d) order the paying party to pay another party or a witness, as appropriate, a specified amount in respect of necessary and reasonably incurred expenses (of the kind described in rule 75(1)(c)); or
(e) if the paying party and the receiving party agree as to the amount payable, be made in that amount.

(2) Where the costs order includes an amount in respect of fees charged by a lay representative, for the purposes of the calculation of the order, the hourly rate applicable for the fees of the lay representative shall be no higher than the rate under rule 79(2).

(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.

Rule 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.

9 **DECIDED CASES**

Beynon & others –v- Scadden & others **[1999] IRLR 700 (EAT)**
Gee –v- Shell UK Ltd. **[2003] IRLR 82 (CA)**
An award of costs in the employment tribunal is the exception rather than the rule. Costs are compensatory not punative.

Salinas –v- Bear Stearns International Holdings Inc. & another
[2005] ICR 1117 (EAT)
The reason why costs orders are not made in the vast majority of employment tribunal cases is that the high hurdle has to be overcome for a costs order to be made has not, in fact, been overcome.

AG -v- Barker **[2000] 1 FLR 759**
the hallmark of a vexatious proceeding is that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any likely gain. It involves an abuse of the process of the court, meaning the use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process.

Beynon & others –v- Scadden & others **[1999] IRLR 700 (EAT)**
Monaghan –v- Close Thornton Solicitors **UKEAT/0003/01**
Beat –v- Devon County Council & another **UKEAT/0534/05**
Lewald-Jezierska –v- Solicitors in Law Ltd. & others **UKEAT/0165/06**
The tribunal must not move straight from a finding that conduct was vexatious, abusive, disruptive, unreasonable or misconceived to the making of a costs order without first considering whether it should exercise its discretion, to do so.

Yerrakalva –v- Barnsley MBC **UKEAT/0231/10**
There is no general rule that withdrawing a claim is tantamount to an admission that it is misconceived. 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. There is no requirement for a direct causative link between the unreasonable conduct and the costs incurred but there should be some connection.

Dyer –v- Secretary of State for Employment **UKEAT/0183/83**
Whether conduct is unreasonable is a matter of fact for the tribunal to decide. Unreasonableness has its ordinary meaning.

McPherson –v- BNP Paribas **[2004] ICR 1398**
The late withdrawal of proceedings is not of itself evidence of unreasonable conduct. The claimant's conduct overall must be considered. But a late withdrawal is a factor in a case where the claimant might reasonably have been expected to withdraw earlier.

Kopel -v- Safeway Stores Plc **[2003] IRLR 753**
where there has been an offer of settlement for an amount that is equal to or in excess of the amount that the claimant could reasonably be expected to recover, the conduct in rejecting such an offer may be unreasonable conduct warranting payment of costs.

Keskar –v- Governors of All Saints Church of England School
[1991] ICR 493
A tribunal is entitled to take account of whether a claimant ought to have known his claim had no reasonable prospect of success.

Kaur –v- John Brierley Ltd. **UKEAT/0783/00**
An award of costs against the claimant was upheld in a case where the claimant had failed, despite several requests, to properly set out her claim. She proceeded with the claim only to withdraw at the commencement of the trial.

Arrowsmith -v- Nottingham Trent University **[2011] EWCA Civ 797 (CA)**
Vaughan –v- Lewisham LBC (No 2) **[2013] IRLR 713 (EAT)**
There is no requirement for the receiving party to have written a costs warning letter. It is not wrong in principle for an employment tribunal to make an award of costs against a party which that party is unable to pay immediately in circumstances where the tribunal considers that the party may be able to meet the liability in due course.

Jilley -v- Birmingham & Solihull Mental Health NHS Trust and Others
UKEAT/0584/06 & UKEAT/0155/07 (EAT)
The tribunal has no absolute duty to take ability to pay into account. If it does not do so, the County Court may do so at a later stage. This in many cases it will be desirable to take means into account before making an order. Ability to pay may affect the exercise of an overall discretion. But there may be cases where, for good reason, ability to pay should not be taken into account. For example, if the paying party has not attended or has given unsatisfactory evidence about means. If the tribunal decides not to take means into account it should express that conclusion and say why. If the tribunal decides to take means into account, it will then need to set out its findings about ability to pay, decide whether to make a costs order at all in the light of the paying party's means, and if it does what the order should be; and give succinct reasons for its decision.

The Basis of the Application

10 Essentially there are three limbs to the respondent's application by which it is the respondent's case that the claimant's conduct has triggered the obligation to consider an award of costs pursuant to Rule 76(1): -

(a) The claimant acted unreasonably in pursuing claims and/or allegations that were under meritorious, and which in some instances were vexatious.
(b) The claimant acted unreasonably in the way that he conducted the proceedings, putting the respondent to unnecessary additional expense (as well as wasting the tribunal's time) in making numerous applications that were totally without merit or of little merit.
(c) The claimant acted unreasonably in that he failed to accept an offer of settlement.

The Claimant's Response

11 As to the merit of his claims, the claimant referred us to legal advice which he had received assessing his prospects of success at 65% in favour. His submission to the tribunal was that it would be wrong for him now to be criticised for presenting an unmeritorious claim. As to the many applications which he made during the course of the proceedings, the claimant reminded us that whilst he may have been criticised by Employment Judges for such applications, there had been no adverse Costs Orders made; nor had he been subject to and Unless Order. With regard to the offer of settlement, the claimant explained that his reason for rejecting the same was his dissatisfaction with the proposed terms of a reference to be provided by the respondent.

Discussion & Conclusions

Threshold Criteria – Rule 76

12 Our judgement is that there are three aspects to this case where the claimant's conduct (including his decision to bring and continue the) claim was unreasonable – and, in one respect vexatious, such as to trigger an obligation on us under Rule 76 to consider making a Costs Order and a discretion to make such an Order if it is just to do so: -

(a) The claim to have been a disabled person (upon which the claim for disability discrimination clearly relies).
(b) The refusal to accept a reasonable offer of settlement.
(c) Claim 4 (Claim Number 1300217/2016) in its entirety.

13 Before dealing in detail with the matters referred to in the preceding Paragraph, it is right to refer to the legal advice given to the claimant upon which he relies. This is contained in a letter dated 5 August 2015 addressed to a senior official in the claimant's

trade union. Before we considered the letter, we warned the claimant as to the potential risks of waving legal advice privilege. He nevertheless insisted that he wished to rely on the letter and we should record that this did not prompt any application from the respondent for further disclosure of privileged material. The letter advises that the claimant has a 65% chance of success. But, on reading the letter carefully, it is clear that the solicitor had only been asked to advise as to the prospects of a successful claim for unfair dismissal; the letter does not refer to claims for disability discrimination or victimisation. Further, the solicitor places a potential value on the claim of £4156.25 and advises that the claimant should accept any offer in the region of £2700. For the record, we make no criticism of the claimant for bringing an unfair dismissal claim - it is clear from our judgement but there were important matters to consider; not least, the circumstances of the claimant's appeal. We suspect that if he had simply brought a claim for unfair dismissal, even if unsuccessful, the claimant would not now be facing an application for Costs.

Disability

14 Reference should be made to our substantive Judgement dated 25 July 2018 and to the Judgements of Employment Judge Goodier dated 24 April 2015 and His Honour Judge Richardson sitting in the EAT dated 16 December 2016. The claimant pursued the claim as he was a disabled person during the period 28 June 2014 - 23 March 2016. It was previously determined by Judge Goodier, in a decision upheld by Judge Richardson, that the claimant was not a disabled person during the period 4 April - 27 June 2014; significantly, the index period for our consideration commenced the following day. There was no evidence of any change or deterioration in the claimant's condition or its effect on his ability to carry out normal day-to-day activities between the periods considered by Judge Goodier/Judge Richardson in the period under consideration by us. In our judgement therefore, it was wholly unreasonable and wholly misconceived for the claimant to pursue a claim on the basis that he was a disabled person following the clear and unassailable determinations of Judge Goodier/Judge Richardson that he was not. Absent a basis to find that the claimant was a disabled person, there could be no successful claim for disability discrimination. From this it follows that that claim for disability discrimination had no reasonable prospect of success.

Settlement Offers

15 In the letter of legal advice relied upon by the claimant which is dated 5 August 2015, the claimant was advised to accept any offer in the region of £2700 in settlement of his claim. In the event, the respondent made an offer of settlement in the sum of £30,000 on 5 December 2017. An offer which was increased to £52,976 on 31 January 2018. The claimant's explanation for his rejection of those offers was his dissatisfaction with the terms of a reference offered by the respondent. Bearing in mind that it is outside the jurisdiction of the tribunal to set the terms of any reference; and that there will inevitably be occasions where employees are dissatisfied with proposed references; and

acknowledging the protection available in a claim for victimisation, our judgement is that the claimant's refusal of these most generous offers and his decision to continue with the claims thereafter is wholly unreasonable conduct.

Victimisation – Claim 4

16 The circumstances of Claim 4 are quite extraordinary. The claimant had been dismissed from his teaching position for gross misconduct; he commenced proceedings (Claim 3) for unfair dismissal and disability discrimination; the respondent then placed an advertisement for potential candidates to fill the vacancy created by the claimant's dismissal; the claimant applied. (Bearing in mind his recent dismissal (fairly or unfairly) from the post for gross misconduct we do not accept that the claimant had any serious belief as to suitability.) Unsurprisingly, the claimant was not shortlisted for interview (in our judgement, it would have been astonishing if he had been). The claimant then presented Claim 4 to the effect that the failure to shortlist him was an act of victimisation. In our judgement, the claimant must have known that the reason for the failure to shortlist him was the respondent's belief that he was unsuitable for the position having recently dismissed him. The claimant cannot have believed that, but for the commencement of Claim 3, he would have been found to be suitable for shortlist. Our judgement is that the claimant's pursuit of Claim 4 was unreasonable from the outset; there was no reasonable prospect of success; and this claim was vexatious because the claimant simply could not have believed in its merits - but pursued it for other reasons.

The Exercise of Our Discretion

17 For the reasons explained in Paragraphs 12 - 16 above, we have found that, by his conduct in bringing and conducting these claims, the claimant has behaved unreasonably; vexatiously; and with no reasonable prospect or genuine expectation of success, such that, pursuant to Rule 76, the threshold criteria have been triggered whereby we have discretion to make an Award of Costs - and we are compelled to consider such an Award.

18 In this case we conclude that it is proper, and in the interests of justice, for an Award to be made. We have reached this conclusion because we have been dealing with Claims 3 and 4 brought by this claimant against this respondent. The claimant had already failed in Claims 1 and 2 and, indeed, in Claim 1 an Award of Costs had been made against him which was awaiting quantification. It cannot therefore be said therefore that the claimant was unaware of the rigour with which his allegations would be tested; or of the burden and standard of proof which would be required of him. He nevertheless continued with these claims in which he made profoundly serious allegations without justification. His claims of disability discrimination and victimisation were totally without merit; and whilst his claim for unfair dismissal may have had some merit, its continuation cannot be justified following the offers of settlement made in advance of the Hearing.

The Claimant's Ability to Pay – Rule 84

19 Although we find that this is a case where it would be proper and just to make an award of costs, before doing so we must consider whether or not we will take account of the claimant's ability to play and if so how. Simply put, the claimant did not comply with the Case Management Order set out at Paragraph 2 above. The claimant relied on a very brief statement of means which was considerably out of date. And he produced some documents, also out of date. But, he did not provide a comprehensive statement of his financial affairs as ordered nor did he make any reference to his household living arrangements. When Ms Garner attempted to cross-examine on the statement, almost every response from the claimant was that the information in the statement was no longer applicable.

20 The claimant's failure to comply would provide justification for us to refuse to take account of his ability to pay. However, we are satisfied that, currently, the claimant is unemployed and in receipt of jobseekers allowance. We have taken this into account in making our decision.

21 We are satisfied that at the present time the claimant is unable to pay a meaningful about amount in respect of the respondents costs. Applying ***Arrowsmith*** and ***Vaughan*** we have taken account of potential improvements in the claimant's financial position which may enable him in due course to deal effectively with an Award of Costs against him. We also bear in mind that in the event of enforcement proceedings, the County Court Judge will also have a discretion to take account of the claimant up to date financial position.

22 The claimant produced documents to show that he had recently applied to the University of Bedfordshire to join the MSc Social Work Programme. He had been provisionally accepted onto the Programme but the offer was withdrawn when the Admissions Panel became aware of the circumstances of the claimant's dismissal from his role as a Teacher with the respondent. The Admissions Panel were particularly concerned that one factor in the decision to dismiss the claimant was his serious breach of the DBS Policy. The claimant had used this evidence in an effort to demonstrate that he is now unemployable because of adverse references likely to be provided by the respondent. However, what is clear from the documents is that the claimant himself informed the University of the circumstances of his dismissal - the information was merely confirmed in a reference provided by the respondent. And, in any event, the respondent has an obligation to provide accurate information to those seeking a reference. The claimant further argued that, because of his health, is unlikely ever to be employed again. But, in our judgement, this argument does not stand scrutiny bearing in mind that the claimant had indicated to the University a desire to pursue a career in Social Work - closely aligned as that would be to his previous career in Teaching and Youth Work.

23 The evidence provided by Mr Marsh was that, taking a snapshot of vacancies recently shown to be available on publicly accessible databases, the claimant had the potential, either as a Teacher, or in the fullness of time as a Social Worker, to attract a summary in the range £30,000 - £40,000 per annum.

24 We do not accept the proposition that the claimant is unemployable because of adverse references. It is a matter for the claimant to provide to a prospective employer a proper explanation for what happened with the respondent and to demonstrate that when it comes to such matters as the administration of an Absence Management Policy; or the DBS Policy, he now appreciates the importance and necessity for strict compliance. Neither do we accept that the claimant is unemployable on health grounds: our findings on the question of disability are relevant here. When the claimant wishes to pursue the argument is kept out of work by the respondent's actions, of necessity he must argue that there are no other obstacles. However, when it is convenient to him he chooses to argue that he is prevented from working for health reasons.

25 In the circumstances, despite our acceptance of the fact that the claimant is currently in receipt of jobseekers allowance, we nevertheless find that this is a proper case to make a substantial Award of Costs on the basis that, in the future, the claimant will regain employment with a substantial salary and will then be a to make realistic proposal for the payment of any Award. In coming to this conclusion we are mindful of the powers of the County Court in the event of enforcement proceedings.

The Amount of the Award

The Amount Of Costs Properly Incurred

26 The respondent has produced a Schedule of Costs showing the Costs incurred at £203,711:16. We have not conducted any form of assessment of this figure; but, from our knowledge of the case including the substantial Final Hearing and the many Interlocutory Hearings, it appears to us that this figure is reasonable. It is unnecessary for us to conduct an assessment because the respondent is limiting its application to the sum of £20,000 (Pursuant to Rule 78, the maximum amount we can award without a detailed assessment). We are quite satisfied that the total costs very substantially exceed £20,000.

Apportionment

27 Applying ***Yerrakalva***, we remind ourselves that there is no necessity for a direct causative link between the costs awarded and the unreasonable conduct. But, we also take account of the fact that, in our judgement, the claimant was entitled to bring a claim for unfair dismissal; and, inevitably, some of the respondent's Costs were incurred in

defending that claim. Even if we were minded to attempt an apportionment of the respondent's costs so as to relieve the claimant of any liability for the Costs of the unfair dismissal claim, the residual amount would still very substantially exceed the amount sought of £20,000.

28 Accordingly, in our judgement, an Award of £20,000 is justified and appropriate.

Ability to Pay

29 Before finalising our Award however, we should revisit the question of the claimant's ability to pay. Potentially, such consideration might result in an Award being reduced from what it otherwise might be. Our findings with regard to the claimant's ability to pay are set out in Paragraphs 19 - 25 above; and, in this regard, we also note that the claimant has outstanding against him and Award of Costs in Claim 1 which has now been quantified in the sum of £40,000. However, our judgement is that, having regard to our findings as to potential improvements in the claimant's financial position, it is realistic; just; and equitable to fix our Award at the sum sought by the respondent - namely £20,000.

Award

30 Accordingly, and for these reasons, we make an Award of Costs in favour of the respondent payable by the claimant in the sum of £20,000.

Employment Judge Gaskell
31 December 2020