EMPLOYMENT TRIBUNALS

Claimant: Mr M Master

Respondent: Springfield Fuels Limited

Heard at: Manchester (by CVP) **On:** 16 March 2021

Before: Employment Judge Leach
Ms Berkeley-Hill
Mr M Smith

REPRESENTATION:

Claimant: In person

Respondent: Mr L Ashwood (Solicitor)

JUDGMENT – RESPONDENT'S APPLICATION FOR COSTS

The claimant is ordered to pay to the respondent the sum of **£7,622.57** (inclusive of VAT) in costs.

REASONS

Introduction

1. The final hearing of this case took place over six days from 7-14 December 2020. At the end of the hearing the respondent stated that it wished to apply for a costs order against the claimant. We decided not to proceed with a costs order there and then. The claimant is a litigant in person and it was important that the

claimant understood the terms of the application for costs and had an opportunity of considering his position and taking appropriate advice.

Application for Costs

2. The respondent's application was limited to its costs incurred in responding to two of the claims made by the claimant:

(1) Constructive unfair dismissal complaint; and

(2) Disability discrimination complaints.

This Hearing

3. We were provided with a bundle of documents that the respondent had prepared specifically for this costs hearing. We were also provided with written submissions setting out in some detail the respondent's position in support of the application for costs. The claimant had been provided with the bundle and submissions in advance of the hearing.

4. Before we considered the costs hearing, we informed the parties that the Tribunal proposed to reconsider its remedy judgment on its own initiative. This is dealt with in a separate reconsideration judgment.

Respondent's Letter dated 19 January 2021

5. The respondent's submissions were in large part a repetition of the terms of a detailed letter from Eversheds (respondent's solicitors) to the claimant dated 19 January 2021. We referred to the letter at the beginning of the hearing, noting the following at the start of the letter:

(1) That Eversheds stated it was providing the detailed letter in order that the claimant could prepare for the costs hearing;

(2) The inclusion of the following paragraph:

"We recognise that you are representing yourself. Accordingly we urge you to get qualified, specialist legal advice as soon as you can and, in any event, before the costs hearing. If the Employment Tribunal has not done so already, it may provide you with a list of organisations that may provide that advice free of charge."

6. We asked the claimant whether he had considered the letter. The claimant's response was that he had glanced at it but not paid any real attention to it because his wife had been poorly. We asked the claimant about whether he had considered the respondent's submissions document and bundle (which was provided much closer to this hearing) and the response was the same: that the claimant was aware that he had received it but had not really paid any attention to it.

7. The claimant also informed us that he had not sought any legal advice in relation to the respondent's application for costs.

Evidence about ability to pay

8. We explained to the claimant that if we were considering making a costs order we may take into account the claimant's ability to pay (pursuant to rule 84 of the Employment Tribunals Rules of Procedure 2013). We asked the claimant whether he would want to provide any information about this. The claimant explained that he would not be able to pay any costs and said that he would like an opportunity of providing some evidence.

9. We decided that we would break for almost two hours to allow the claimant a further opportunity of considering the details of the respondent's application, and to provide ourselves and the respondent with any information he wanted to provide about ability to pay.

10. The claimant provided three documents (to which we refer below) before we resumed the hearing. We took account of these documents.

Respondent's costs applications

11. The reasons for the application are set out in detail in the written submissions document and Mr Ashwood added to these only in respect of submissions made about the information provided by the claimant about ability to pay (see below under "Ability to Pay").

Disability discrimination

12. The basis of the respondent's claim for costs in relation to the disability discrimination complaints was that the claimant had acted unreasonably and/or vexatiously in bringing and continuing with the claim. In support of its application the respondent set out a chronology of the proceedings.

13. We also considered the key events in the progress of this claim. We note the following:

(1) 19 July 2018 – claim presented to Tribunal. The claimant's complaints were not clear from the detail provided.

(2) 26 September 2018 – respondent wrote to claimant to ask for more detail. The requests relating to the disability discrimination claim were reasonable and straightforward.

- *"What is the alleged disability relied upon?*
- *From the details provided in the claim form, on what basis do you believe you were discriminated on the grounds of your disability?*
- *From the details provided in the claim form, which acts are relied upon in support of your claim of disability discrimination?*

- *If you believe the respondent should have made reasonable adjustments please confirm what adjustments should have been made and how you consider it would have assisted you."*

(3) 14 December 2018 – preliminary hearing (case management). Unfortunately, the claimant did not attend this hearing. In his absence the claimant was ordered to confirm whether or not he was pursuing his claims and if so to provide the additional information requested. The claimant did not provide that information until 23 April 2019, although the information provided was still far from clear.

(4) 10 September 2019 – a second preliminary hearing (case management) took place. Some time was spent at that hearing clarifying the claimant's various claims, including the claim of disability discrimination.

(5) 30 October 2019 – a third preliminary hearing (case management) took place at which the claimant was ordered to provide medical information, which he did. Crucially, at this preliminary hearing the claimant was given further guidance including a recommendation that the claimant seek legal advice. We note the following from the Employment Judge Hoey's Case Management Summary (at paragraph (14)):

"I recommended the claimant seek legal advice, whether via a solicitor, Law Centre, Law Clinic or Citizens Advice Bureau, to ensure the rules of evidence and the law around the claims were fully understood and the claimant properly set out his case and what he seeks."

The claimant was also provided with links to helpful guidance and other materials.

(6) The claimant provided medical information as required but then on 5 December 2019 he appeared to make an application to amend his claim. The claimant's email provided details of an injury in 2010 and appeared to provide allegations of alleged poor treatment between 2010 and 2016.

(7) 9 December 2019 – the respondent wrote objecting to any application for amendment to the complaints.

(8) 11 December 2019 – the respondent wrote to the Tribunal and the claimant setting out why it considered that the claimant was not disabled. The respondent's solicitors had by this time reviewed the medical information provided by the claimant. The respondent's correspondence included the following information:

"An Occupational Health report of 10 August 2016 confirmed his shoulder injury had been resolved by that date."

"Additionally, the claimant completed numerous annual health assessment forms from 2012 in which he confirmed he was not disabled."

The form also asked:

"Do you have any muscle/joint problems, neck, back or shoulder pain?"

"On each occasion the claimant was asked the question he confirmed that he did not."

(9) The respondent made clear on 11 December 2019, that it did not accept that the claimant had a disability for the purposes of the Equality Act 2010 and had explained why.

(10) On 30 January 2020 – the claimant responded to this email stating as follows:

"I was not a disabled person for the purposes of the Equality Act 2010 in response to respondent's solicitor's email of 11 December 2019."

It appeared by that stage, therefore, that the claimant was not pursuing his claim of disability discrimination. The respondent wrote to the Tribunal and asked for that complaint to be dismissed on withdrawal. Nothing further was heard for some time.

(11) 6 August 2020 – the respondent applied for the disability discrimination claim to be struck out or dismissed.

(12) 11 August 2020 – the claimant asked the claimant to disregard his email of 30 January 2020 and said that he was in fact disabled. By this stage the final hearing was close (due to commence on 7 December 2020). Even so, a further and final preliminary hearing (case management) was listed.

(13) 10 November 2020 – a preliminary hearing (case management) was held at which the claimant conceded that he was not disabled and withdrew his disability discrimination claim.

Constructive Dismissal Claim

14. The respondent's application for costs in relation to this claim is on two bases:

(1) That it had no reasonable prospect of success;

(2) That in bringing and continuing with it the claimant acted unreasonably and/or vexatiously.

15. We note here the Tribunal's finding on day two of the final hearing that the constructive dismissal claim had no reasonable prospects of success and our decision to strike out the constructive dismissal claim.

Claimant's ability to pay

16. In relation to the claimant's ability to pay, the three documents provided were as follows:

(1) A current account summary (1 page) that showed the current account to be in credit;

(2) A credit card balance/summary (1 page) that appeared to show that there was an amount outstanding on the credit card but for the previous month a payment had been made which exceeded the minimum payment due on the credit card;

(3) An Amazon account balance/summary (1 page) which appeared to be called a "New Day Account" which showed a current balance (which we have taken to be an amount outstanding) of £3,185.08 and availability to spend of £814.92 (which we take to mean a credit limit – like a credit card – of £4000 in total) with a payment due in April of £78.94.

17. In relation to the claimant's ability to pay, Mr Ashwood noted the following:

(1) That a Tribunal did not have to take into account a party's ability to pay even though it may do;

(2) That the claimant had received a significant lump sum from the respondent amounting to 130 weeks' pay when he accepted the option of voluntary redundancy in 2018 and this payment would have provided him with an ongoing income for much of the time that this case ran.

Claimant's response to the costs application.

18. The claimant noted the following:

(1) That his income was now much less than when he was working;

(2) He had been looking for work since he left the respondent and had not succeeded in finding it;

(3) That he had an occupational pension scheme and was now in receipt of a pension of "£700 and something" per month. The claimant did not provide any evidence about any lump sum payable under the pension scheme;

(4) That any amount that he might have to pay would be a great detriment as he is unable to survive on his pension income as it is;

(5) That he did not consider taking legal or other appropriate advice. He had asked the union for some assistance right at the beginning of the claim but they would not support his claim;

(6) That he has built up debts and he had creditors knocking on his door, including for payments for gas and electricity. In addition, he does not know how long he will be able to pay his rent on his house;

(7) A costs order should not be paid because otherwise who would want to bring a claim to an Employment Tribunal?

(8) That the respondent was motivated to bring the costs application because he was awarded £3,500 compensation. On this point the claimant was asked about the terms of the respondent's email of 21 January 2021 which was sent without prejudice save as to costs and stated as follows:

"As you know…Springfield is asking the Employment Tribunal to order you to pay Springfield's legal costs of £17,472.10 plus VAT at the costs hearing on 16 March 2021. However, Springfield will stop its efforts to have to pay costs if you agree that Springfield does not have to pay the £3,500 compensation and to bring your claim to an end.

Do you agree to that? If you do I will draw up an agreement for you to sign."

The claimant explained that he was not prepared to trade away his judgment because it was the judgment itself that was more important to him than being awarded £3,500.

(9) That the claimant believed that the respondent's HR Manager, Mrs Beauchamp, was unreasonable and was behind the respondent's application.

The Law

19. Unlike the general procedure in Civil Courts, costs do not "follow the event" in Employment Tribunals. Traditionally, Employment Tribunals have allowed employees to challenge the fairness of dismissals, raise allegations of unlawful discrimination (or other matters within the jurisdiction of Employment Tribunals) without a threat of costs in the event that a claim is unsuccessful and for employers to respond to claims, without a threat as to costs in the event that a claimant is successful.

20. The Tribunal Rules provide Tribunals with a power to award costs in the circumstances set out in those Rules.

21. The Rules which are relevant to the respondent's costs application state as follows:

"*76. <u>When a Costs Order or Preparation Time Order may or shall be made</u>*

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 has no reasonable prospect of success….

……

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.

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 a 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."

…….

84. Ability to Pay

In deciding whether to make a costs …….order and if so in what amount, the Tribunal may have regard to the paying party's….ability to pay."

22. In relation to an application under rule 76(1)(b) (no reasonable prospect of success), this test should be considered on the basis of the information that was known or reasonably available at the start of proceedings (see paragraph 67 of the decision in **Radia v Jefferies International Limited** [UKEAT/007/18/JOJ] ("**Radia**"):

"Where the Tribunal is considering a costs application at the end of, or after, a trial it has to decide whether the claims 'had' no reasonable prospect of success judged on the basis of the information that was known or reasonably

available at the start, and considering how at that earlier point the prospects of success in a trial that was yet to take place would have looked. But the Tribunal is making that decision at a later point in time, when it has much more information and evidence available to it, following the trial having in fact taken place. As long as it maintains its focus on the question of how things would have looked at the time when the claim began, it may and should take account of any information it has gained and evidence it has seen by virtue of having heard the case, that may properly cast light back on that question. But it should not have regard to information or evidence which would not have been available at that earlier time."

23. In relation to an application for costs under rule 76(1)(a) (vexatious, abusive, disruptive or unreasonable conduct) we note the following (recognising that the respondent's application relies on what is claims is vexatious and unreasonable conduct on the part of the claimant:-

(a) Vexatious. In the written submissions document from Eversheds, there is reference to the judgment in **ET Marler Ltd v Robertson** [**1974] ICR 72** which included a description of vexatious conduct as being where *"an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive*".

(b) Unreasonable. We note that unreasonable in the context of rule 76(1)(a) has its ordinary meaning.

24. Where a party seeking costs makes out one or more of the grounds for costs to be awarded, then the Tribunal must consider whether to award costs. This consideration requires the Tribunal to exercise a discretion. There is no finite list of matters that Tribunals must take into account when exercising this discretion, and the relevant importance of various factors will depend on the particular circumstances of the case. In the case of **Barnsley MBC v Yerrakalva [2011] EWCA Civ 1255** the Court of Appeal provided some guidance to Tribunals when considering costs applications:-.

"On matters of discretion an earlier case only stands as authority for what are or what are not the principles governing the discretion and serving only as a broad steer on the factors covered by the paramount principle of relevance. A costs decision in one case will not in most cases predetermine the outcome of a costs application in another case: the facts of the cases will be different as will be the interaction of the relevant factors with one another and the varying weight to be attached to them."

25. In the 2012 case of **AQ Limited v Mr A J Holden [2012] UKEAT/0021/12** ("AQ Limited") the Employment Appeal Tribunal noted the following in relation to costs applications against litigants in person:-

> *32. The threshold tests in rule 40(3) are the same whether a litigant is or is not professionally represented. The application of those tests may, however, must take into account whether a litigant is professionally represented. A tribunal cannot and should not judge a litigant in person by the standards of a professional representative. Lay people are entitled to represent themselves in tribunals; and, since legal aid is not available and they will not usually recover costs if they are successful, it is inevitable that many lay people will represent themselves. Justice requires that tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life. As Mr Davies submitted, lay people are likely to lack the objectivity and knowledge of law and practice brought by a professional legal adviser. Tribunals must bear this in mind when assessing the threshold tests in rule 40(3). Further, even if the threshold tests for an order for 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.*
>
> *33. This is not to say 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.*

26. That judgment considered an employment tribunal's refusal to make a costs order under the previous version of the Tribunal rules (2004) which is why there is a reference to rule 40(3) rather than rule 76. However, the principles noted in the extract above in relation to litigants in person remain relevant.

27. When considering whether a claim had any reasonable prospects of success (for the purposes of Rule 76(1)(b)) Tribunals are required to assess this objectively (see for example **Hamilton-Jones v Black EATS/0047/04**) Where a claim, assessed objectively, has no reasonable prospects of success, it is irrelevant (for the purposes of rule 76(1)(b)) that the claim has been brought by a litigant in person. However, and as made clear by the AQ Limited case, the fact that the claim was brought by a litigant in person may be relevant when the tribunal goes on to consider whether to make a costs order once the threshold of 76(1)(b) has been met.

Analysis and Conclusion

Constructive Dismissal Claim

28. We have already made a finding that the claim had no reasonable prospects of success.

29. In relation to unreasonable conduct, we consider the hearing of 30 October 2019 to be significant. The proceedings had been in play for over a year by then. The claimant, as a litigant in person, had not engaged sufficiently in the process. He had not attended one hearing and had not complied with Case Management Orders

at the time that he was required to. The claimant's claim (including his constructive dismissal claim) was confusing.

30. We accept the claimant's submission that making a costs order against unsuccessful claimants is bound to discourage potential claimants from bringing claims even where those claims may have merit. However, when claimants choose to commence proceedings in Employment Tribunals they must be willing to engage fully in those proceedings, receive correspondence from the Tribunal and listen carefully to instructions and guidance from Judges at hearings. Significant time and costs have been taken up in dealing with these claims even by the stage of the preliminary hearing on 30 October, but it is clear that there was a strong recommendation to the claimant to take advice on his claims and ensure he understood matters. The claimant did not do that. He was not obliged to but, at that stage there was a clear "red flag" that the claims had difficulties, that they were unclear and that a good deal of careful consideration needed to be given to them. It is clear to us that the claimant did not embark himself on carefully considering his claims either.

31. The claimant appeared to have been mistaken that the decision to take an option of voluntary redundancy amounted to a resignation for which he could then raise a constructive dismissal claim. Considered objectively, that claim had no reasonable prospects from the outset.

32. Further, we regard the claimant's conduct in persisting with a constructive dismissal claim that had no reasonable prospects of success from that day onwards to be unreasonable.

Disability Discrimination Claim

33. We apply the same analysis to the disability discrimination claim as we have when considering unreasonable conduct in relation to the constructive dismissal claim.

34. Discrimination claims are often far from straightforward. The claimant appeared to need assistance in formulating his claims and taking them forward or to better understand what claims he could bring and the Tribunal process. Attempts were made to clarify the claims in case management hearings. It appeared clear to the Judge by 30 October 2019 that advice was needed and that "steer" was given. The claimant did not consider taking any sort of appropriate advice and there was significant confusion with the disability discrimination claim as outlined above. Our decision is that the claimant's conduct in pursuing the disability discrimination claim following the preliminary hearing on 30 October 2019 up to the date when he withdrew his claim, was unreasonable.

Should a costs order be made?

35. Having reached the conclusions above, the threshold for considering a costs order has been crossed and we have therefore considered whether to exercise our discretion in making a costs order, and if so for how much.

Constructive dismissal claim – reasonable prospects of success applying ***Hamilton-Jones*** *(see above)*

36. We are required to assess this objectively. The claim had no reasonable prospect of success at the outset. However, we have taken into account the fact that the claimant is a litigant in person when deciding whether a costs order should be made, and if so how much. We have decided that it is appropriate to factor in the confusion that the claimant may have had as a litigant in person at an earlier stage of the proceedings about whether an employee's decision to accept a voluntary redundancy package is in fact a dismissal. It is a matter that a legal adviser would have been able to assist the claimant with or the claimant could have engaged with the process and found out himself. (We note the claimant's evidence that his Trade Union would not support him at the outset of the claim but we have not heard evidence about why and therefore have not taken this in to account). Our decision in relation to both the application (no reasonable prospects) and the application under rule 76(1)(a) (unreasonable conduct) is that we should order costs incurred from immediately following the preliminary hearing of 31 October 2019 up to the final hearing.

Disability Discrimination Claim

37. We have applied the same factor to the disability discrimination claim. Claims are complicated, the claimant is a litigant in person, but by 31 October 2019 he had had the benefit of two case management hearings which he had attended, and a further one which he did not attend. Clarification of the claimant's complaints was sought in these hearings and, at the third hearing (30 October 2019) it was strongly recommended to the claimant that he obtain advice. Factoring in the claimant's status as a litigant in person we consider that it is appropriate to look at costs from the date of that hearing up to the date that his disability discrimination claim was withdrawn.

How much should be awarded?

38. The respondent had provided details of the costs incurred by way of a schedule. This schedule sets out all costs in relation to work carried out on all complaints. It then notes a total of 31 complaints, including 7 for disability and 13 allegations collectively giving rise to a fundamental breach of contract and claim of constructive dismissal. The respondent was therefore looking for the following:

(1) 13/31 of the total costs incurred in relation to the constructive dismissal claim;

(2) 7/31 of the total costs incurred in relation to the disability discrimination claim, but only up to the date of withdrawal of that claim, being 10 November 2020.

39. The respondent was not looking for an amount in excess of £20,000 in total and did not require a detailed assessment of costs either by a County Court or by this Tribunal. Whilst the respondent's proposal was to some extent a "rough and ready" assessment, we have been prepared to consider matters on that basis,

limiting the period of time for the claims as noted above and applying further deductions. Taking all of this into account we consider the approach is fair and reasonable.

40. The hourly rate applied is £255. Sometimes the rate is a little less than this (£230). On one occasion (11 May 2020) a rate of £360 applied, albeit for half an hour of work. That is too much for these proceedings. We have adjusted this amount to £255.

41. This provides for the following amounts:

Costs (disability discrimination) from 31 October 2019 to 10 November 2020	£1,580.08
Constructive dismissal claim	£9,006.90
Total (less VAT)	£10,586.98

The claimant's ability to pay

42. We have decided that it is appropriate to factor in the claimant's ability to pay. We accept some but not all of the claimant's evidence/submissions on this. We have taken into account the following:

(1) That the claimant is not employed.

(2) His income is currently a pension of just over £700 per month.

(3) That the claimant is 62 years old and therefore is likely to have a limited number of working years ahead;

(4) That we have seen some evidence that the claimant has credit card debts;

(5) On the basis of the evidence that we have seen, we do not accept the claimant's personal circumstances are anything like as difficult as he has stated;

(6) The claimant is in receipt of an award for injury to feelings (now with interest following our reconsideration);

(7) The claimant may well have received a pension lump sum on retirement;

(8) The claimant received a significant voluntary redundancy payment.

43. We have decided to factor in the claimant's ability to pay and to reduce the amount above by 40%. This reduces the amount to £6,352.14. However, VAT is payable and this needs to be added, which makes a total amount payable of **£7,622.57 inclusive of VAT.**

Employment Judge Leach

Date: 19 March 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
23 March 2021

FOR THE TRIBUNAL OFFICE

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