EMPLOYMENT TRIBUNALS

Claimant: Mr M Leader

Respondents: ES Cleaning Ltd

Heard: Remotely (by video link) **On:** 13 May 2021

Before: Employment Judge S Shore
NLM – Mr N Pearse
NLM – Mr J Howarth

Appearances

For the claimant: Mr A Willoughby, Counsel
For the respondent: Mr J Buckle, Counsel

RESERVED JUDGMENT ON COSTS

The unanimous decision of the Tribunal is that:

1. The claimant's conduct by continuing his claim after 27 January 2021 was unreasonable. The claimant ("the paying party") shall make a payment to the respondent ("the receiving party") in respect of the costs that the receiving party has incurred while represented by a lay representative and while legally represented (by counsel) in respect of costs incurred by the receiving party from 28 January 2021 to the date of this hearing.

2. The respondent's representative, AP Partnership, does not meet the definitions of "legal representative" contained in rule 74(2)(a) to (c) of The Employment Tribunal Rules of Procedure 2013.

3. Counsel for the claimant, Mr Buckle, meets the definition of "legal representative" contained in rule 74(2)(a) of The Employment Tribunal Rules of Procedure 2013.

4. The time spent on the case by AP Partnership from 28 January 2021 to the date of this hearing as recorded in the document titled "Time Sheet" is reasonable and proportionate.

5. It is not reasonable for the claimant to be expected to meet the costs of the respondent's witnesses attending the hearing and no order in respect of those expenses is made.

6. Counsel's fees as set out in the document titled "Time Sheet" are reasonable and proportionate. The paying party shall meet the entire costs of counsel instructed by the receiving party for the substantive hearing and this costs hearing of £8,700.00.

7. The paying party shall pay the receiving party the sum of £2,378.00 (58 hours x £41.00 per hour) under a preparation time order.

8. The total payable by the paying party to the receiving party is **£11,078.00**.

9. The conduct of the solicitors for the claimant did not meet the threshold of conduct contained in rule 76(1)(a) of the 2013 Rules.

REASONS

Introduction

1. The claimant presented claims of:

    2.1. Unfair dismissal (contrary to section 94 of the Employment Rights Act 1996);

    2.2. Automatic unfair dismissal for the reason or principal reason that he made a protected disclosure contrary to section 103A of the Employment Rights Act 1996.

    2.3. Automatic unfair dismissal for the reason or principal reason connected to a relevant TUPE transfer contrary to regulation 7 of the TUPE Regulations 2006.

    2.4. Unauthorised deduction of wages (contrary to section 13 of the Employment Rights Act 1996) in respect of:

        2.4.1. Recovery of the cost of damage to a company vehicle; and
        2.4.2. Holiday pay.

    2.5. Breach of contract (failure to pay notice pay) contrary to Article 4 of The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

3. The Tribunal dismissed all the claimant's claims in an oral judgment and reasons delivered on 18 February 2021. At the end of that hearing, Mr Buckle asked for written reasons and indicated that the respondent wished to make a costs application. We did not have time to deal with the application on the day, so made case management orders requiring the respondent to make an application for a costs order by 5 March 2021.

4. An application with a bundle and index was filed with the Tribunal by the respondent's representative on 5 March 2021. By an email of 8 March 2021, the

claimant's representative indicated an intention to resist the claim for costs, but was awaiting written reasons before filing a formal response.

5. Written reasons were sent to the parties on 9 March 2021 [113-131]. A case management order dated 10 March 2021 was sent to the parties regarding the arrangements for this hearing. The claimant's response to the costs application was filed on 23 March 2021 [132-134].

Law and Issues

6. Rules 76 and 78 of the 2013 Employment Tribunal rules state:

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.

(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.

78.— (1) A costs order may—

(a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;

(b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles; 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(23), 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.

7. The Tribunal also has regard to the structured approach set out in the case of **Millan v Capsticks Solicitors LLP & Others** UKEAT/0093/14/RN where the then President of the EAT, Langstaff J, described the exercise to be undertaken by the Tribunal as a 3-stage exercise at paragraphs 52:

> "There are thus three stages to the process of determining upon a costs order in a particular amount. First, the tribunal must be of the opinion that the paying party has behaved in a manner referred to in Rule 40(3); but if of that opinion, does not have to make a costs order. It has still to decide whether, as a second stage, it is "appropriate" to do so. In reaching that decision it may take account of the ability of the paying party to pay. Having decided that there should be a costs order in some amount, the third stage is to determine what that amount should be. Here, covered by Rule 41, the tribunal has the option of ordering the paying party to pay an amount to be determined by way of detailed assessment in a county court."

8. The Tribunal therefore considered the following issues:

    8.1. Has the putative paying party behaved in the manner proscribed by the rules?

8.2. If so, it must then exercise its discretion as to whether or not it is appropriate to make a costs order, (it may take into account ability to pay in making that decision).

8.3. What should the amount of the order be?

9. These are the issues that we considered.

10. 'Unreasonable' has its ordinary English meaning and is not to be interpreted as if it means something similar to 'vexatious' (**Dyer v Secretary of State for Employment** EAT 183/83).

11. In determining whether to make a costs order for unreasonable conduct, a tribunal should take into account the 'nature, gravity and effect' of a party's unreasonable conduct — (**McPherson v BNP Paribas (London Branch)** [2004] ICR 1398)

12. 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 Barnsley 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*".

13. Under Rule 79 of the Rules a tribunal must decide the number of hours in respect of which a preparation time order should be made. This assessment must be based upon:

13.1. information provided by the receiving party in respect of his or her preparation time, and

13.2. the tribunal's own assessment of what is a reasonable and proportionate amount of time for the party to have spent on preparatory work, with reference to such matters as the complexity of the proceedings, the number of witnesses and the documentation required.

14. The current hourly rate is £41 for a preparation time order (Rule 79(2)).

15. The amount of preparation time order shall be the product of the number of hours assessed under Rule 79(1) and the current hourly rate (Rule 79(3)).

16. In interpreting, or exercising any power given to a tribunal under the Rules, it must seek to give effect to the overriding objectives set out in Rule 2 of the Rules, which

requires the tribunal to deal with a case fairly and justly, "*including so far as practicable—*

(a) ensuring that the parties are on an equal footing;
(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
(c) avoiding unnecessary formality and seeking flexibility in the proceedings
(d) avoiding delay, so far as compatible with proper consideration of the issues; and
(e) *saving expense*."

17. We were referred to a number of precedent cases by counsel and referred ourselves to other cases, which we have quoted in this decision where appropriate:

    9.1. **Radia v Jeffries International Ltd** [2020] IRLR**;**
    9.2. **Millan v Capsticks Solicitors LLP & Others** UKEAT/0093/14/RN;
    9.3. **Dyer v Secretary of State for Employment** EAT 183/83;
    9.4. **McPherson v BNP Paribas (London Branch)** [2004] ICR 1398;
    9.5. **Yerrakalva v Barnsley MBC** [2012] ICR 420;

Housekeeping

10. The respondent produced an agreed bundle for this hearing that ran to 188 pages. If we refer to pages in the bundle, the page number(s) will be in square brackets [ ]. It also produced a schedule of costs in a document titled "Time Sheet".

11. We received written and heard closing submissions from Mr Buckle. Mr Willoughby made oral submissions. We then considered our position and indicated that we were considering making a costs order and/or a preparation time order and invited the claimant to give evidence. Whilst we were deliberating, we realised that we had not heard sufficient evidence to determine if the respondent's representative, AP Partnership, met the definition of "legally represented". We instructed our clerk to make enquiries of the representative by email and are grateful for his swift response, which was to confirm that he did not meet any of the definitions of "legally represented" and that, therefore, any cots awarded in respect of his work would be at the prescribed rate for lay representatives set out in Rule 79(2).

12. The claimant gave evidence in person. He had not produced a witness statement or any documents relating to his income, expenditure, debt or financial assets. We were mindful of the overriding objective and Rule 77 (although the claimant had been given reasonable opportunity to file documents and submit a witness statement) and allowed him to give oral evidence. He was cross-examined by Mr Buckle. The respondent called no evidence.

13. Neither party requested an adjournment of the proceedings on the grounds that the claimant had not filed a witness statement or for any other reason.

14. The hearing was listed for 3 hours, but we spent far longer on the hearing and were not able to consider our decision and produce an oral judgment and reasons on the day. We reserved our decision.

15. The hearing was conducted by video on the CVP application.

Findings of Fact

16. All findings of fact were made on the balance of probabilities. If a matter was in dispute, we will set out the reasons why we decided to prefer one party's case over the other. If there was no dispute over a matter, we will either record that with the finding or make no comment as to the reason that a particular finding was made. We have not dealt with every single matter that was raised in evidence or the documents. We have only dealt with matters that we found relevant to the issues we have had to determine. We make the following findings.

17. We find that the claimant's claims did not meet the high bar of having no reasonable prospect of success at the outset. We make that finding principally because the respondent expressly accepted that the claimant had TUPE'd to it from Enviroserve Training Limited and therefore had sufficient service to bring a claim of unfair dismissal and claims related to the TUPE transfer. It was open to the respondent to be equivocal on the point in its original response, but it chose to make concessions.

18. We find this to be an important point because the issue of whether or not the claimant transferred from Enviroserve Training Limited to the respondent is of fundamental importance to his claims of 'standard' unfair dismissal, automatic unfair dismissal contrary to section 103A of the Employment Rights Act 1996 and automatic unfair dismissal for the reason or principal reason connected to a relevant TUPE transfer contrary to regulation 7 of the TUPE Regulations 2006. All require two years' continuous service and without this, the claimant had no claim under any of the three heads.

19. His claim of unauthorised deduction of wages (contrary to section 13 of the Employment Rights Act 1996) could proceed irrespective of length or service, as could his claim for breach of contract (failure to pay notice pay).

20. We note that this matter was litigated by both parties and their representatives in a manner that we found to be overly aggressive and not in compliance with the requirements of the overriding objective. We found the issuing of a costs warning by the claimant's solicitors and their insistence on including a schedule of loss in the bundle to be an act of unfortunate hubris.

21. However, we do not find that the conduct of the claimant's solicitors in issuing the costs warning (and concomitant strike out application) met the threshold of Rule 76(1)(a), as neither really remained in issue for any period of time. We agree with Mr Buckle's submission that the bundle for the substantive hearing contained far too many documents, but do not consider that the late addition of approximately 500 pages was conduct by the claimant's solicitors that met the threshold.

22. The most concerning act of the claimant's solicitors was the submission of a schedule of loss that included a claim for breach of contract in the sum of £84,000.00, which exceeded the maximum the Tribunal may award under its jurisdiction by £59,000.00. He had also included a claim of £5,000 for injury to feelings, which we have no jurisdiction to award in respect of the claims advanced.

23. We considered that this may be unreasonable conduct, but found that its impact was minimal and have decided not to make an order against the solicitors. We reject

Mr Willoughby's submission that £59,000.00 is not a significant amount, but note that after we pointed out the issue on the first morning of the substantive hearing, he produced a revised schedule that addressed the issues that we raised. Whilst we accept that a solicitor follows the instructions of its client, they are officers of the court and should not produce schedules that cannot be awarded under the jurisdiction of the Tribunal. We took into account that the respondent had not noticed the error.

24. The claimant's position, as expressed by Mr Willoughby, on his potential liability, was that the key issue was the TUPE transfer and that the claimant was reasonable to rely on his written and oral evidence together with the documents that he had been able to produce. Mr Buckle pointed to the many and frequent pieces of correspondence from the respondent to the claimant pointing out perceived flaws in the claimant's case. We find that Mr Willoughby's submission was a correct interpretation: but only up to a point.

25. That point was the email dated 27 January 2021 from the respondent to the Tribunal (copied to the claimant's representatives) [58-62] and attached amended Grounds of Response [63-67]. The respondent's email went into great detail explaining its request to amend its claim so as to row back from its acceptance of the claimant's TUPE transfer. The application was granted, but from the point it was made, we find that it was incumbent on the claimant to consider his claim and the new challenges that could be (and were) placed between him and a successful outcome to his claims. He had a firm of solicitors from whom he could take advice.

26. We find that by deciding to continue with his case from 28 January 2021, the claimant's continued conduct of his claims was unreasonable conduct of the proceedings and met the test in Rule 76(1)(a). Mr Willoughby came close to suggesting that we had misapplied the law in our substantive findings by placing great weight on the claimant's failure to produce corroborative documents, and less weight on his written and oral evidence. We respectfully reject the implication. Our finding on the claimant's assertion of continuous service going back to 2011 was made on a combination of our findings that his evidence was largely incredible **and** that he had produced very few documents, when he had access to many (see paragraphs 20 to 24 of our reasons [123-124]).

27. We find that any conscientious analysis of the claimant's claim, once the amendment to the respondent's case was a possibility, should have alerted him to the fact that his case had some very large holes in it. We found in our reasons that the claimant had sought to fill one of the holes with a contract that was purportedly made in 2014. We would respectfully refer the claimant to paragraphs 27 to 30 of our reasons [124-126].

28. Whilst the claimant's claim for notice pay was not extinguished by the lack of a TUPE transfer, the finding that his 2014 contract could not be relied upon reduced his claim for breach from £84,000.00 (or £25,000.00) to one week's pay at most (£807.69). We found that the claimant fabricated this contract to enhance his position with the respondent. We find that to be unreasonable behaviour that was absolutely key to most of his claim.

29. The claimant's claims of unauthorised deduction of wages (holiday pay and recouped monies in respect of damage to a vehicle) were also conducted unreasonably. We repeat our findings at paragraph 54 of our reasons:

> *"We find that the claimant brought little evidence in support of his holiday pay claim. He brought no evidence of his holiday dates and the contractual basis of his claim (the 2014 contract) was entirely discredited. He brought little evidence of his claim for unauthorised deduction of wages, so did not meet the required standard of proof to evidence a claim of unauthorised deductions, but we find that the claimant agreed that he had been paid the sum of £4,559.48 net on 18 November 2020, which was more than that claim in any event."*

30. We have not set out each and every instance where we found the claimant's evidence not to be credible, but agree with Mr Buckle's submissions that there were several and some of our findings were of dishonesty, collusion with witnesses, and being disingenuous. Such conduct is unreasonable.

31. We heard from the claimant about his financial position. We found his credibility to be impaired by his failure to produce a witness statement or a single document that corroborated his financial position. However, he confirmed that he has two paid positions as an employee that produce a month gross income of approximately £4,800. He owns a home that has between £30,000 and £40,000 of equity. He owns five businesses that he anticipates will produce dividends of approximately £90,000 per year, once the economy improves. We find that the claimant demonstrated no circumstances under which we ought to reduce the amount of his liability to the respondent for costs/preparation time.

32. Mr Willoughby made no criticism of the time expended by the respondent's representatives in preparing the case. It would have been difficult for him to have done so when the claimant's schedule of costs in the trial bundle amounted to approximately £25,000.

33. We find that the time spent on the case by AP Partnership from 28 January 2021 to the date of this hearing is reasonable and proportionate given the complexity of the case and the huge number of documents produced. That time was 58 hours at the current rate for lay representatives of £41.00 per hour = £2,378.00.

34. It is not reasonable for the claimant to be expected to meet the costs of the respondent's witnesses attending the hearing and no order in respect of those expenses is made.

35. We find that Mr Buckle's fees are reasonable and proportionate given the complexity of the case and the huge number of documents produced. The claimant shall meet the entire costs of counsel instructed by the respondent for the substantive hearing and this costs hearing of £8,700.00.

36. The total payable by the claimant to the respondent is £11,078.00.

Applying the Findings of Fact to the Law and Issues

37. Using the list of issues above, we make the following findings:

17.1. The claimant behaved in the manner proscribed by the rules.

17.2. It is appropriate to make a costs order, which we find that the claimant will be able to pay in the future.

17.3. The amount of the order is set out above - £11,078.00.

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. It was not practicable to hold a face to face hearing because of the Covid19 pandemic.

Employment Judge Shore

Date: 19 May 2021