EMPLOYMENT TRIBUNALS

Claimant: **Mr AM Ashu**

Respondent: **New Red Planet Limited**

Heard at: **Leeds by CVP** **On: 17 August 2021**

Before: **Employment Judge Maidment**
Members: **Ms J Lancaster**
Mr DW Fields

Representation: No attendance – case determined on the papers

JUDGMENT

The claimant's application for costs by way of a preparation time order is refused.

REASONS

1. The claimant makes an application for a preparation time order. He was at no stage in these proceedings legally represented. The parties are in agreement that the matter should be dealt with by the tribunal on the papers without the need for an attended hearing.

2. The Tribunal has the power to make an award of costs by virtue of Rules 76 of the Employment Tribunals Rules of Procedure 2013, which provide, so far as material, as follows:

> *"**76 When a costs order or a preparation time order may or shall be made***
> *A Tribunal may make a costs order …, and shall consider whether to do so, where it considers that –*
> *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*
> *any claim or response had no reasonable prospect of success."*

3. The Tribunal must identify the unreasonable conduct, say what was unreasonable about it and say what its effect was: see ***Yerrakalva v Barnsley MBC*** **[2012] ICR 420 CA**. It was also reaffirmed in that case that costs in the employment tribunal are still very much the exception rather than the rule.

4. The claimant's application of 4 June 2021 relies on a number of specific communications made by him to the tribunal in the (reverse chronological) order set out below.

5. The claimant firstly relies on an email of 25 May 2021 which referred to witness statements having been exchanged on 19 April and the witness statement of Mr Phil Whelan of the respondent having since been changed without permission of the tribunal. Mr Whelan was accused of falsely indicating that the revised statement had been produced on 19 April. It was said that the new witness statement should be rejected by the tribunal.

6. As the final hearing in the matter was due to commence on 2 June, the tribunal directed that the claimant's issue be dealt with at the final hearing. The tribunal file is indicative of the claimant making frequent complaints about the respondent's conduct of the case and seeking tribunal orders at a pace which the tribunal was struggling to keep up with. At the final hearing, the tribunal quickly dealt with the issue – the claimant had had a chance to consider the statement and was not prejudiced by some changes which, in part if not in whole, related to mention of ACAS discussions referred to below. The tribunal does not consider that this materially impacted on the claimant's preparation.

7. The claimant further relies on an application he made to the tribunal on 17 May 2021. The claimant referred to a chain of email correspondence some of which

disclosed the Leeds Employment Tribunal's generic email address and other the individual work email addresses of members of the tribunal's administrative staff. It was said that the respondent had obtained and used those individual work email addresses in bad faith to falsely discredit the claimant. They were used, it is said, to contradict the claimant's assertion that he had never received any communication from particular members of the tribunal's administration at/from their work email addresses. The claimant compared the situation to a period when he was seeking information from the respondent prior to the initiation of tribunal proceedings and where communications came from the respondent under two different email addresses. This issue was raised briefly at the final hearing and Mr Whelan explained to the tribunal's satisfaction that there was a migration period from one email address to another and some emails sent to a particular address were effectively auto forwarded to the new address so that any reply would be from that new address.

8. The tribunal has no understanding as to how the claimant was in fact discredited in his conduct of the tribunal proceedings and certainly this various email correspondence played no part in the tribunal's decision making. There is no evidence of any improper conduct on the respondent's part as alleged. Emails from the tribunal's clerks can appear to be directly from them, but, when replied to, can be directed to a generic address. It is noted from the tribunal file that the claimant followed up this email with an email to the tribunal on 21 May 2021 stating that it appeared that tribunal staff had not been referring some of his applications to employment judges. He also telephoned on that day complaining of the amount of time it was taking the tribunal to deal with his correspondence. The tribunal responded to the claimant on 26 May 2021, Employment Judge Cox stating that she had noted the contents of the claimant's correspondence and that the parties should now concentrate on preparing for the hearing. The message given to the claimant is clear.

9. The claimant then relies on an email sent to the tribunal by him on 22 April complaining that the respondent had included communications with ACAS and without prejudice correspondence in evidence and referred to this in the witness statement exchanged on 19 April. The claimant described himself as having been embarrassed by the respondent's unreasonable behaviour and asked the tribunal to order that those parts of the respondent's witness statement should not be read at the final hearing and that costs should be awarded against him. He attached to this email a chronology of events which formed part of the witness statement of Mr Whelan. It did refer to a proposal of the claimant through ACAS in a stated amount to settle the claim. The tribunal made an order dated 13 May stating that there was no time to list a further hearing before the main hearing in June to decide whether or not references to any settlement should be struck out of Mr Whelan's statement. Employment Judge Wade expressed the view that it was unlikely that privilege did not attach to that correspondence and said that a costs order may follow if the case was delayed as a result.

10. The tribunal notes that the witness statement of Mr Whelan which was before it had been amended in a manner which still referred to there having been settlement discussions with ACAS, but omitted any sums of money discussed.

11. The issue was raised at the beginning of the final hearing. The claimant was concerned that there was a reference to settlement discussions and references to documents within the bundle which mentioned settlement discussions. As recorded in its reasons, the tribunal explained that it was mindful that any such discussions were conducted on a without prejudice basis and said that such documentation would not be read or considered. The tribunal did not consider it proportionate at this stage to go through the statement of Mr Whelan line by line to redact references to settlement discussions and to conduct a similar exercise going through a bundle of documents which numbered in excess of 500 pages. The tribunal would obviously see the references at the point it made the redactions. The tribunal was never aware of the detail of any settlement discussions and the fact that they took place was not within the tribunal's mind when it made its decisions. They would not have been material to its decisions in any event. There was no delay caused to the hearing.

12. The claimant finally relies on an application he made on 15 April notifying the tribunal of an intention to apply for a costs order on the basis of unreasonable behaviour on the respondent's part. In this he stated that the respondent had refused to try to settle the matter through ACAS whilst at the same time he stated that the communications with ACAS were without prejudice. He further raised that at a preliminary hearing on 25 November 2020, the Employment Judge had advised the parties to make use of mediation and the respondent had strongly objected. He then went on to refer to the respondent having included the aforementioned without prejudice communications in evidence. Despite explanations from the tribunal as to the status of without prejudice communication, he said that Mr Whelan was seeking to add further without prejudice communications in evidence. He said that if the respondent went on to include such communications, the tribunal should strike them out and make an award of costs against the respondent.

13. The respondent had written to the tribunal on 14 April, it appears prompted by the claimant's schedule of loss which was not regarded by Mr Whelan as genuine in circumstances where it was said to be vastly in excess of figures that had been discussed through ACAS. The tribunal had already written to Mr Whelan on 6 April stating that details of settlement offers were without prejudice and must not be referred to in witness evidence before the tribunal. In the correspondence of 14 April, he argued that the without prejudice protection fell away in circumstances where there was no genuine attempt in his view to settle an existing dispute.

14. The claimant has subsequently then submitted an analysis of his preparation time costs. Within this he maintained now that the respondent had defended the wrongful dismissal/notice pay claim despite knowing it had no reasonable

prospect of success. He noted that the respondent had not sought to argue in its response that the claimant had resigned, but rather had introduced new evidence through Mr Whelan's witness statement by "falsely arguing" that the claimant resigned on 7 May and that the claim was time-barred. The respondent was also at fault in not admitting that financial liability arose out of a successful notice pay claim based on an average of earnings in the period during which the claimant was actually provided with work. The claimant maintained that he had expended 33 hours of time in dealing with this point.

15. He further sought an additional 49 hours of preparation time in researching the issue of the status of settlement negotiations and corresponding with the tribunal on that point.

16. He claimed a further 10 hours of preparation time in relation to his complaint to the tribunal that the respondent had misused personal information of the tribunal staff in bad faith to unfairly discredit the claimant as described above.

17. The context of this case is of two unrepresented parties with no legal qualifications or particular knowledge of the tribunal system. The tribunal's file is illustrative of significant disputes between the parties as to the conduct of proceedings and of the claimant in particular raising repeated complaints and applications. No criticism is made of him in that regard, but they would not all have been made had he been legally represented and had sufficient knowledge to enable him to adopt a more pragmatic approach.

18. The respondent might be criticised for the stance it took at various points including by referencing without prejudice correspondence. Whilst it persisted in doing so having been warned of the status of such correspondence, the without prejudice rule (which is not straightforward) was clearly genuinely not fully understood by the respondent. Rather than straightforwardly ignore the tribunal's directions, the respondent in fact raised arguments regarding the loss of privilege of certain correspondence due to the claimant's actions. The respondent's approach was not gratuitous and arose out of its own understanding of the legal position having clearly conducted some legal research. The respondent may not always have been correct in its interpretation, but that does not necessarily mean that it was acting unreasonably in the conduct of proceedings.

19. A significant part of the claimant's application relates to without prejudice communications. The tribunal has already addressed the fact that it was able quickly to ensure that the claimant was not prejudiced by any references to such correspondence without any delay caused to the hearing which Employment Judge Wade had anticipated might occur and which might in turn then be a basis for a costs application. The claimant was similarly not prejudiced by the revised witness statement which it appears was revised in an attempt to remove references which were truly without prejudice. The claimant had the statement sufficient time before the tribunal hearing to consider it and

became more concerned about changes to it than he reasonably needed to have been, although again this is no criticism of the claimant given his lack of experience in such proceedings.

20. The tribunal struggles to understand why the claimant was so concerned about the display and use of personal work email addresses of members of the tribunal staff. However, there is no basis for concluding that there was any attempt by the respondent to discredit the claimant in doing so and certainly the claimant was not discredited in the eyes of the tribunal by this email correspondence. It was not considered by the tribunal at the final hearing.

21. The tribunal does not consider it appropriate to make any preparation time order in respect of time expended by the claimant on the basis of the respondent's unreasonable conduct of the proceedings. The matter did not proceed straightforwardly in accordance with the tribunal's directions, but this is not unusual when parties lack experience with the tribunal process. The respondent's conduct cannot be characterised as unreasonable in the context and at a level as should cause the awarding of costs against it. The tribunal would comment in any event that the time claimed by the claimant in respect of this limb of the costs application appears to be excessive and disproportionate to the issues involved.

22. The claimant within his analysis of preparation time costs makes effectively a further application for costs based upon the respondent's attempt to defend his notice pay claim. The tribunal can accept that the respondent did not originally envisage running an argument that the claimant had resigned from his employment, but the claimant was clearly aware in advance of the hearing that this was an argument of the respondent. This argument failed, not least in circumstances where the respondent had not appreciated the difference between a notification of an intention potentially to resign and the definitive service of notice of termination. Again, that is in the context of the respondent's lack of legal knowledge and unrepresented status. Whilst a preparation time order does not relate to the hearing itself, the tribunal notes that it did not hear any additional evidence relevant to this point which was effectively a submission's point made by the respondent on the basis of the correspondence. The tribunal does not accept that the claimant's preparation for the case was materially affected.

23. Not every unsuccessful argument raised by a party in proceedings ought to give rise to consideration of an award of costs and certainly the respondent's position in respect of this particular claim is not of such a category. Again, the tribunal is mindful of the lack of additional time taken up by such argument and also reminds itself of the overall context of the application in circumstances where the claimant himself brought claims which took up significantly more of the tribunal's time and which did not succeed and which could be said by the tribunal to have only ever had limited prospects of doing so. The respondent did not recognise that any notice pay was due to the claimant in circumstances

where he had not worked for the respondent for a significant amount of time and where there was no obligation to provide work or any particular amount. Whilst this stance was taken without any regard to statutory minimum notice rights, the respondent again must be seen in the context of a party without legal advice and the claimant's application in circumstances where, again, no significant time was taken up in preparing to and dealing with the point.

24. The claimant's application for costs by way of a preparation time order is refused.

Employment Judge Maidment

Date 17 August 2021