EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr Graham Stretch	AND	Secretary of State for Justice

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY **ON** 19 August 2021
By Cloud Video Platform

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: **In person**
For the Respondent: **Miss H Masood of Counsel**

ORDER

The respondent's application succeeds, and the claimant is ordered to pay the respondent's costs to a limited extent, yet to be determined on assessment.

RESERVED REASONS

1. In this case the respondent seeks a proportion of its costs of defending this action which was brought by the claimant.
2. General Background
3. This Order follows, and should be read in conjunction with, the substantive judgment in this matter dated 12 March 2021 and which was sent to the parties on 23 March 2021 ("the Judgment").
4. The Application for Costs
5. The respondent makes an application for its costs on the basis that the claimant has acted abusively or otherwise unreasonably in the way in which the proceedings have been conducted. The claimant resists the application.
6. The Rules
7. The relevant rules are the Employment Tribunals Rules of Procedure 2013 ("the Rules").
8. Rule 76(1) provides: "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.

9. Under Rule 77 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.
10. Under Rule 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 …"
11. Under Rule 84, 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.
12. The Relevant Case Law
13. I have considered the following cases: Gee v Shell Ltd [2003] [2003] IRLR 82 CA; McPherson v BNP Paribas [2004] ICR 1398 CA; Monaghan v Close Thornton [2002] EAT/0003/01; Brooks v Nottingham University Hospitals NHS Trust [2019] WLUK 271, UKEAT/0246/18; NPower Yorkshire Ltd v Daley EAT/0842/04; Arrowsmith v Nottingham Trent University [2011] ICR 159 CA; Kapoor v Governing Body of Barnhill Community High School UKEAT/0352/13; Nicholson Highland Wear v Nicholson [2010] IRLR 859; Barnsley BC v Yerrakalva [2012] IRLR 78 CA; Topic v Hollyland Pitta Bakery & Ors UKEAT/0523/11/MAA; Ghosh v Nokia Siemens Networks [2013] All ER (D) 293; Kovacs v Queen Mary and Westfield College [2002] IRLR 414 CA; Shield Automotive Ltd v Greig UKEATS/0024/10; Jilley v Birmingham and Solihull Mental Health NHS Trust [2008] UKEAT/0584/06; Single Homeless Project v Abu [2013] UKEAT/0519/12; Vaughan v LB of Newham [2013] IRLR 713; and Raggett v John Lewis plc [2012] IRLR 906 EAT.
14. The Relevant Legal Principles
15. The correct starting position is that an award of costs is the exception rather than the rule. As Sedley LJ stated at para 35 of his judgment in Gee v Shell Ltd "It is nevertheless a very important feature of the employment jurisdiction that it is designed to be accessible to people without the need of lawyers, and that in sharp distinction from ordinary litigation in the UK, losing does not ordinarily mean paying the other side's costs …" Nonetheless, an Employment Tribunal must consider, after the claims were brought, whether they were properly pursued, see for instance NPower Yorkshire Ltd v Daley. If not, then that may amount to unreasonable conduct. In addition, the Employment Tribunal has a wide discretion where an application for costs is made under Rule 76(1)(a). As per Mummery LJ at para 41 in Barnsley BC v Yerrakalva "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." However, the Tribunal should look at the matter in the round rather that dissecting various parts of the claim and the costs application, and compartmentalising it. There is no need for the tribunal to find a causative link between the costs incurred by the party making the application for costs and the event or events that are found to be unreasonable, see McPherson v BNP Paribas, and also Kapoor v Governing Body of Barnhill Community High School in which Singh J held that the receiving party does not have to prove that any specific unreasonable conduct by the paying party caused any particular costs to be incurred.
16. When considering an application for costs the Tribunal should have regard to the two-stage process outlined in Monaghan v Close Thornton by Lindsay J at paragraph 22: "Is the cost threshold triggered, e.g. was the conduct of the party against whom costs is sought

unreasonable? And if so, ought the Tribunal to exercise its discretion in favour of the receiving party, having regard to all the circumstances?"

17. In Brooks v Nottingham University Hospitals NHS Trust the EAT confirmed that dealing with an application for costs requires a two-stage process. The first is whether in all the circumstances the claimant has conducted the proceedings unreasonably. If so, the second stage is to ask whether the tribunal should exercise its discretion in favour of the claiming party, having regard to all the circumstances.
18. With regard to costs warning letters, while it is good practice to warn a claimant of the weakness of his or her case where the respondents may be minded to apply for costs should they succeed at the end of the case, the failure to do so will not, as a matter of law, render it unjust to make a costs order even against an unrepresented claimant. In Vaughan v London Borough of Newham, the EAT upheld a substantial order for costs against the claimant, notwithstanding the absence of a costs warning letter, and in doing so had regard to the likely effect such a letter would have had.
19. The same approach is to be taken in circumstances where the respondent has not applied for a deposit order. Underhill P in Vaughan also acknowledged that respondents do not always, for understandable practical reasons, seek such an order even where they are faced with weak claims, so that failure to do so "is not necessarily a recognition of the arguability of the claim." On the facts of Vaughan, neither the failure to seek a deposit order nor the failure otherwise to warn the claimant of the hopelessness of her claims was "cogent evidence that those claims had in fact any reasonable prospect of success" and neither failure was "a sufficient reason for withholding an order for costs which was otherwise justified".
20. Where a party has been lying this will not of itself necessarily result in a costs award being made, although it is one factor that needs to be considered. As per Rimer LJ in Arrowsmith v Nottingham Trent University it will always be necessary for the tribunal to examine the context, and to look at the nature, gravity effect of the lie in determining the unreasonableness of the alleged conduct. Nonetheless, to put forward a case in an untruthful way is to act unreasonably, see Kapoor v Governing Body of Barnhill Community High School. The fact that a claimant may not have deliberately lied does not preclude reaching the conclusion that a claim had no reasonable prospect of success or that the claim had not been reasonably brought and pursued, see Topic v Hollyland Pitta Bakery & Ors. In addition, the result of a claim is not necessarily linked to the alleged unreasonable conduct. In Nicholson Highland Wear v Nicholson Lady Smith made it clear that: "a party could have acted unreasonably and an award of [costs] be justified even if there has been a partial (or whole) success. It will depend on the circumstances of the individual case."
21. With regard to the paying party's ability to pay, Rule 84 allows the tribunal to have regard to the paying party's ability to pay, but it does not have to, see Jilley v Birmingham and Solihull Mental Health NHS Trust and Single Homeless Project v Abu. The fact that a party's ability to pay is limited, does not, however, require the tribunal to assess a sum that is confined to an amount that he or she could pay see Arrowsmith v Nottingham Trent University which upheld a costs order against a claimant of very limited means and per Rimer LJ "her circumstances may well improve and no doubt she hopes that they will." One reason for not taking means into account is the failure of the paying party to provide sufficient and/or credible evidence of his or her means. The authorities also make it clear that the amount which the paying party might be ordered to pay after assessment does not need to be a sum which he or she could pay outright from savings or current earnings. In Vaughan v LB of Newham the paying party was out of work and had no liquid or capital assets and a costs order was made which was more than twice her gross earnings at the date of dismissal. Underhill P declined to overturn that order on appeal because despite her limited financial circumstances, there was evidence that she would be successful in obtaining some further employment. Per Underhill P: "The question of affordability does not have to be decided once and for all by reference to the party's means at the moment the order falls to be made" and the questions of what a party could realistically pay over a reasonable period "are very open-ended, and we see nothing wrong in principle in the tribunal setting them at a level which gives the respondents the benefit of any doubt, even

to a generous extent. It must be recalled that affordability is not, as such, the sole criterion for the exercise of the discretion: accordingly, a nice estimate of what can be afforded is not essential."

22. Insofar as it does have regard to the paying party's ability to pay, the tribunal should have regard to the whole means of that party's ability to pay, see Shield Automotive Ltd v Greig (per Lady Smith obiter). This includes considering capital within a person's means, which will often be represented by property or other investments which are not as flexible as cash, but which should not be ignored.
23. Under Rule 78(1)(a) a costs order may order the paying party to pay the receiving party a specified amount not exceeding £20,000. Under Rule 78(1)(b) a costs order may order the paying party to pay an amount to be determined by way of detailed assessment, carried out either by the County Court or by an Employment Judge applying the principles of the Civil Procedure Rules 1998. Where the receiving party does not regard the limit of £20,000 to be sufficient an order for summary assessment should not be made in those circumstances, see Kovacs v Queen Mary and Westfield College.
24. Recovery of VAT
25. VAT should not be included in a claim for costs if the receiving party is able to recover the VAT, see Raggett v John Lewis plc which reflects the CPR Costs Practice Direction (44PD).
26. Conclusion
27. In its application today, the respondent seeks 70% of its costs of successfully defending the claimant's claims which in total approximately £55,000. The application is made under Rules 76(1)(a) and (b) on the basis that the claimant acted unreasonably in bringing these proceedings, or part of them, and that some of his claims had no reasonable prospect of success.
28. The claimant resists the application, in short on the basis that (i) costs are the exception and not the rule; and (ii) his allegations would have been found to have been true but for the absence of witnesses who were either intimidated or too concerned to give evidence on his behalf, and (iii) there was never any finding in the Judgment or otherwise that the claimant had lied or acted dishonestly; and (iv) in any event at no stage did the respondent inform him that it would seek its costs, and nor did the respondent seek a deposit order. In reply to each of these points: (i) The correct starting position is that an award of costs is the exception rather than the rule (Gee v Shell Ltd); (ii) the claimant is bound by the findings of fact in the Judgment which has not been appealed; (iii) The fact that a claimant may not have deliberately lied does not preclude reaching the conclusion that a claim had no reasonable prospect of success or that the claim had not been reasonably brought and pursued, see Topic v Hollyland Pitta Bakery & Ors. and (iv) the failure by a respondent to issue a costs warning or to seek a deposit order will not, as a matter of law, render it unjust to make a costs order (Vaughan v London Borough of Newham).
29. The claimant's claims were for unfair dismissal following his dismissal for gross misconduct, and for victimisation relying on the protected act of earlier tribunal proceedings for disability discrimination. With regard to the unfair dismissal claim, the respondent concedes that those elements of the claimant's unfair dismissal claim arguing procedural deficiencies and/or that dismissal was not within the range of reasonable responses open to the respondent were claims which it always had to face, without the likelihood of successful costs award in its favour. The respondent argues that they were weak, but it does not argue that it was unreasonable to present those claims and/or that there was no reasonable prospect of success such as to trigger a costs award. The allegations of unreasonable conduct relate to allegations of collusion and conspiracy which I now refer to as "the Conspiracy Allegations". My findings in this respect are explained in full in the Judgment, but summarised in paragraph 95 of the Judgment as follows:
30. "[95]: The allegations against the claimant were then examined in detail over an extensive disciplinary hearing lasting three days, and the claimant and his very experienced representative were given the opportunity to question all of the witnesses in detail before Mr Lucas made his decision. The events occurred in HMP/YOI Portland, but the investigating officer, the hearing authority, and the appeal authority were all from different institutions, and the claimant accepted in cross examination that none of these individuals

(Mr Simpson, Mr Lucas and Mr Trent) could be said to have had an axe to grind against him. Mr Lucas initially had evidence from the CCTV footage, Prisoner A's two statements, and the evidence of Mr Browne, that the claimant had tried to strangle Prisoner A. Mr Lucas decided to reject that allegation because Prisoner A and Mr Browne were not present to be questioned on their evidence, and he felt it unsafe to conclude on the balance of probabilities that that specific allegation had been proven. This shows that Mr Lucas adopted a thoughtful and considered approach and is contrary to any suggestion that he was doing Mr Hodson's bidding to apply a predetermined outcome. I found the evidence given by the dismissing and appeal officers Mr Lucas and Mr Trent to be measured and credible. The suggestion that an array of senior managers were persuaded by Mr Hodson to act dishonestly or disingenuously to carry out his preferred outcome is in my judgment not only implausible on the facts of this case, but also wholly unrealistic."

31. In my judgment the claimant acted unreasonably in the conduct of these proceedings in bringing these Conspiracy Allegations. I have regard to the two-stage process outlined in Monaghan v Close Thornton by Lindsay J at paragraph 22: "Is the cost threshold triggered, e.g. was the conduct of the party against whom costs is sought unreasonable? And if so, ought the Tribunal to exercise its discretion in favour of the receiving party, having regard to all the circumstances?" In my judgment the claimant's conduct in bringing these allegations was unreasonable and it is appropriate to exercise my discretion in favour the receiving party having regard to all the circumstances.
32. However, these allegations were only raised by the claimant in his witness evidence at the stage of the proceedings at which written witness statement were exchanged between the parties. The respondent asserts that this inevitably incurred further costs on the part of the respondent by way of further investigation and discussion with its witnesses, and that it may have extended the length of the final hearing from two or three days to the eventual four days required.
33. The Conspiracy Allegations also featured to a degree in the claimant's claim for victimisation which is dealt with in paragraphs 97 to 107 inclusive in the Judgment. However, this is not the case for all the allegations, which were clarified by way of further information from the claimant rather than at the commencement of proceedings. As noted in paragraph 104 of the Judgment each of the allegations can be considered to be a stand-alone allegation with which the respondent was always having to deal. The respondent did not do so thoroughly with regard to the first allegation relating to the reason for the change in the claimant's operational duties in October 2018.
34. It seems to me therefore that the respondent was always bound to face allegations of unfair dismissal relating to procedural deficiencies and the range of reasonable responses, and some elements of the victimisation claim, which even when successfully defended would not have resulted in any award of costs in its favour. I am conscious that the Tribunal should look at the matter in the round rather that dissecting various parts of the claim and the costs application, and compartmentalising it. There is no need for the tribunal to find a causative link between the costs incurred by the party making the application for costs and the event or events that are found to be unreasonable, see McPherson v BNP Paribas, and also Kapoor v Governing Body of Barnhill Community High School in which Singh J held that the receiving party does not have to prove that any specific unreasonable conduct by the paying party caused any particular costs to be incurred. However, in exercising my discretion under the two-stage process outlined in Monaghan v Close Thornton I do consider it appropriate to limit the costs award in favour of the respondent in general terms to such costs as can be said to result directly from the claimant's Conspiracy Allegations which is the unreasonable conduct relied upon by reference to Rule 76(1)(a).
35. Accordingly, the award of costs in favour of the respondent is to be limited to such additional costs as have been incurred in the respondent's successful defence to the Conspiracy Allegations in both the unfair dismissal and the victimisation claims. It should not include the time and costs involved in defending the majority of the claimant's claims, that is to say those aspects of the unfair dismissal and victimisation claims which do not relate to the Conspiracy Allegations.

36. I have invited the respondent within 21 days from the date this Order is sent to the parties to provide to the Tribunal and to the claimant the following information: (i) whether it intends to pursue this application and to seek a payment of its costs; (ii) if so, the amount sought and how this has been calculated; and (iii) how those costs should then be assessed (that is to say whether it is a claim in excess of £20,000 which will then be assessed under the CPR pursuant to Rule 78(1)).

Employment Judge N J Roper
Date: 19 August 2021

Judgment sent to Parties: 08 September 2021

FOR THE TRIBUNAL OFFICE