EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
	AND	
Mr G Madawho		Gen2 Properties Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Croydon (by video) **ON** 18th October 2021

EMPLOYMENT JUDGE A Richardson **MEMBERS** Ms M Oates-Hinds
Mr M Walton

Representation
For the Claimant: In person
For the Respondent: Mr S Harding, of Counsel

JUDGMENT having been sent to the parties on 29th October 2021 and written reasons having been requested in time in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

REASONS

1. The respondent makes an application for costs under both thresholds of Rule 76 of the Tribunal Procedural Rules: rule 76(1)(a) that the claimant had acted vexatiously disruptively abusively or otherwise unreasonably; and (b) that his claim had no reasonable prospect of success.

2. The respondent is claiming costs against the claimant capped at £20,000 whereas their overall costs were in excess of £25,000.

3. Mr Harding prepared and placed in a data room for access by all participants in the hearing, a costs bundle comprising documents extracted from the final hearing bundle plus the respondent's costs schedules. We also had access to the 'Conduct bundle' which had been a bundle of documents produced and in the data room at the final hearing in May 2021.

4. The Tribunal explained the relevant law as follows: The grounds for making costs orders fall into two categories: (*a*) a general discretionary ground relating to the bringing or conducting of the proceedings, and (*b*) specific grounds relating to postponements and adjournments, to non-compliance with orders, and witness expenses.

5. When considering either whether to make an order, or the amount of the order, the tribunal may have regard to the paying party's ability to pay (r 84).

6. The discretion in SI 2013/1237 Sch 1 r 84, whereby tribunals may have regard to the paying party's ability to pay, has been held to apply even where the tribunal orders a detailed assessment. In *Jilley v Birmingham & Solihull Mental Health NHS Trust* *UKEAT/0584/06*, the EAT held that, although ability to pay would be taken into account by the county court on such an assessment, it is also open to the employment tribunal to take it into account when making the order. It could do so, for example, by ordering that only a specified part of the costs should be payable or by placing a cap on the award. But whether or not it takes ability to pay into account, tribunals should always, according to Judge Richardson in *Jilley*, give reasons for their decision. He stated (at para 44):

"*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."*

7. The question of affordability does not have to be decided once and for all by reference to the party's means as at the moment the order falls to be made, so that if there is a realistic prospect that the claimant might at some point in the future be able to pay a substantial amount, it was legitimate to make a costs order in that amount thereby enabling the respondents to make some recovery 'when and if that occurred.

8. Where the tribunal has regard to ability to pay, it must show that it has given proper consideration to such matters as future earning capacity and, where appropriate, the alternatives to making a whole costs order

9. It is established that 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.

10. This is because lay people are likely to lack the objectivity and knowledge of law and practice brought by a professional adviser. Tribunals must bear this in mind when assessing the threshold tests in rule 76(1)(a). Further, even if the threshold tests for an order of 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.'

11. Litigants in person are not immune from orders for costs. A litigant in person may be found to have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity'

12. Findings of fact are made on the basis of the evidence before the Tribunal taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. Conflicts of evidence as arose have been resolved on the balance of probabilities. The credibility of the witness witnesses and the consistency of their evidence with surrounding facts and documents has been taken into account.

13. We heard evidence from the claimant about his financial means. We did not doubt the honesty of his responses to cross examination.

14. It was noted in the reserved judgment of 28th June 2021 that this matter had a long and difficult journey to the final hearing on 18th May 2021. It had been listed to be heard in January 2021. That hearing was postponed to 27th – 19th May 2021 because the electronic documentation relied upon by the claimant was not submitted in a manner which the Tribunal administration or the Tribunal panel could process. The claimant had been unwilling to agree a bundle with the respondent. The hearing had already been postponed once before from April 2020 to January 2021 because of the covid pandemic but in any event the parties were still not ready for the hearing and further case management directions had to be given in April 2020 and January 2021.

15. Throughout this case, the claimant's documents have proliferated and despite clear directions given at no fewer than four case management preliminary hearings, the Tribunal were nevertheless presented with separate files of evidence for the claimant and respondent relating to the dismissal and discrimination issues. This is because the claimant refused to engage with the respondent in the preparation and filing of an agreed bundle documents file for the hearing, a mitigation bundle or witness statements. The claimant instead pursued an agenda of his own, inter alia, inappropriately appealing a case management order to the Employment Appeal Tribunal, repeatedly alleging fraud by the respondent's legal representatives to the SRA, falsely alleging that one of the Tribunal non legal members previously worked for the respondent

company's holding company, and bombarding the Tribunal administration with correspondence. The claimant failed to focus on compliance with the clear case management directions given on 20th January 2021 or the preceding case management directions of 14th October 2019, 21st April 2020 and 14th June 2020.

Rule 76(1)(a) - did the claimant act vexatiously disruptively abusively or otherwise unreasonably.

16. The claimant was not at any time as far as the Tribunal is aware, abusive in terms of his language towards the respondents or its legal representatives.
17. Did he act disruptively or other unreasonably or vexatiously?

18. We find that he did for the following reasons which formed part of the full reserved judgment at paragraphs 3 and 4, already referred to above; paragraph 6 relating to the claimant's vehement but unsubstantiated claim that the respondents/their legal advisers had committed fraud by tampering with documentary evidence; paragraph 28 to 31 relating to examples of alleged fraud/tampering with evidence and paragraphs 43 – 44 relating to claims of 'white people getting black people to do their dirty work'.

19. It became clear at the final hearing that the allegations of fraudulent behaviour by the respondent merely related to the difference in time on emails of which two copies were in the bundle. For example, an email timed was sent at, say, 17.59 and received at 18.00. Two copies of the same email were in the bundle and apart from one minute difference in the time of being sent and being received, the emails were otherwise identical in content. This occurred with several emails. The claimant alleged that the respondent had 'doctored' the emails despite there being no plausible explanation for why the respondent or the respondent's solicitors would alter the time of an email by one minute nor for what purpose. The time difference was in fact obviously due to the time taken for an email having left one server to reach the recipient server. The claimant accepted this explanation in cross examination. He could not explain the significance of the difference in time or why the respondent would have altered identical emails in relation to a one minute time difference.

20. Another example of alleged fraud at the final hearing was the claimant's allegation that the P45 issued at the end of June 2020 by the respondent's outsourced pay roll service, showing a termination date of 30th June 2020 (instead of 6th June 2020) was "fraudulent" as it enabled the respondent to "fabricate" a disciplinary process, to manufacture bogus first and final written warnings, so that the respondent could justify dismissal on 30th

June 2019. The claimant's employment terminated on 6th June. There was no need for the respondent to fabricate a dismissal procedure. They did not fabricate a dismissal procedure. The allegation was fantasy and nonsensical. The issue at the core of this claim was whether the claimant was subjected to discriminatory conduct because of his ethnicity, including dismissal, not whether he was dismissed for conduct.

21. The claimant made serious allegations of fraudulent conduct personally against four of the respondent's employed solicitors having conduct of the case at various times on behalf of the respondent. The claimant lodged a formal complaint against all four individual solicitors for professional misconduct and fraud with the Solicitors Regulatory Authority. This allegation was baseless and unnecessary given that we could find not the slightest hint of potential fraud in any of the documents or the conduct of the respondent's solicitors or indeed Mr Jones or any other member of the respondent's staff, based on the evidence that we saw at the final hearing or indeed at this costs hearing. The claimant produced no plausible evidence at the final hearing to support his submissions of fraud and he continued to rely on those allegations at the costs hearing.

22. The claimant had up to the final hearing persisted in writing to the SRA tribunal and the EAT about allegations of fraud allegedly committed by the respondent's solicitors and that the SRA was investigating the individuals when this was not in fact . He maintained that position in this costs hearing. The allegations were and are vexatious.

23. During the course of the litigation and up to the final hearing, as the tribunal found, the claimant bombarded the respondent solicitors, the Employment Tribunal judicial administration service with discursive complaints about the respondent and about the tribunal panel accusing the panel of bias. Inter alia he objected to the Employment Tribunal's jurisdiction to hear his case at all because allegations of fraud should be heard in the High Court. He wrote multiple emails to the Tribunal in Croydon. For example in the 12 days between 21st January 2021 – 2nd February 21 the claimant wrote 9 emails to the Tribunal administration and then followed up with further emails asking why he had not had a response.

24. The examples of the claimant's unreasonable conduct in writing to the respondents and Tribunal administration are too numerous to list. His correspondence was relentless, persistent. This inevitably caused the respondent's solicitors not to mention the Tribunal's judicial administration, additional unnecessary work and no doubt caused to the individuals about whom he had complained to the SRA, personal concern. That conduct was unreasonable and vexatious.

25. The claimant acknowledged at this costs hearing that although he *"had written a lot*", his correspondence to the tribunal and also the respondent was only his attempt as a Litigant in Person to ensure that his documents went into the tribunal bundle. It is evident from the correspondence before us that the claimant had, without any basis, no trust in the respondent's solicitors and unreasonably insisted on producing his own bundles in breach of Tribunal orders.

26. The respondent had attempted to agree the final hearing bundles in accordance with the tribunal's directions. We note that the tribunal was satisfied at the final hearing that most if not all the documents that the claimant wished to refer to during the course of the three day hearing, were actually available to all the participants in the hearing in the respondent's bundle. In fact the claimant's bundles of document were largely duplicated in the respondent's final hearing bundle. His repeated accusations about his documents not being included, being altered and the respondent's solicitors failing to comply with their professional code of conduct were baseless.

27. In addition to allegations of fraud, the claimant gave another example of his objections to the respondent's conduct: the fact that the witness statement of Olivia Cooper had been submitted a month after the direction made by EJ Jones QC in June 2020 and because it had been served a month late, he objected to it being admitted into evidence at the final hearing. At the final hearing the Tribunal explained why it ruled that the witness statement would be accepted into evidence - because it had been in the claimant's possession for several months prior to the final hearing, and that the claimant had in fact drafted and submitted a 'reply' to that witness statement. The claimant was fully aware of what the witness's evidence was. The claimant claimed that the statement had been served after his statement and therefore the late witness statement could 'reply' to his statement, yet he gave no example of where that had occurred. The fact that the respondent had served the witness statement late had not been prejudicial to the claimant and had absolutely no impact on the fairness of the hearing. It had been appropriate therefore and in accordance with the overriding objective to admit the witness statement. Nevertheless the claimant persistently objected to the inclusion of this witness statement and it generated applications from him for it to be struck out.

28. This is illustrative of the claimant's entire approach to the litigation despite having been told by EJ Tsamados in the Case management order of 21/4/2020 that the parties had to cooperate with each other, it was not a war, and a party's claim or defence would not be struck out unless it was

impossible for orders to be complied with or a party refused to comply. The overriding object was to have a fair hearing.

29. Looking at the overall picture we find that the claimant's conduct of proceedings with his false allegations of fraudulent conduct by the respondents, caused additional cost and expense not only the respondent's solicitors but also caused additional unnecessary administrative work for the tribunal staff. We find unanimously that his conduct was consistently unreasonable and disruptive.

Rule 76(1)(b) – the claim has no reasonable prospect of success

30. The claimant had originally brought a long list of claims for which the Tribunal has no jurisdiction. At a case management hearing non 14th October 2019, Employment Judge Hyde ordered that the claims of negligence, claims under the Unfair Contract Terms and Misrepresentation Act would be dismissed. Also the claims for written particulars of employment and an order for payslips to be produced. These were also dismissed.

31. The remaining claims of unfair dismissal, race discrimination and notice and holiday pay were to proceed to a two day hearing on 20th and 21st Apr 2020. Because of the covid 19 pandemic, the case did not proceed and in any event it was not ready to proceed. Employment Judge Tsamados conducted a case management preliminary hearing at which he ordered further information from the claimant to be provided relating to his claims of having made public interest disclosures.

32. On the 11th June 2020 Employment Judge Jones QC at a preliminary hearing dismissed the claims of public interest disclosure upon withdrawal and the respondent's application for strike out and /or deposit order relating to the race were refused.

33. Employment Judge Jones' reasons for refusing to strike was because there were disputed facts relating to the termination of the claimant's employment on 6th June 2019 whether by dismissal or resignation. We had the benefit at the final hearing of witness evidence under cross examination and contractual documents which Employment Judge Jones did not and was therefore was not in a position to dismiss either the discrimination claim.

34. With regard to the monetary claim of miscalculated holiday and notice pay, Employment Judge Jones explained to the parties the calculation of notice pay under the Apportionment Act in cases where the employment contract did not make appropriate provision for calculation of pay. At that

time Employment Judge Jones could make no finding because he did not have the claimant's contractual documentation before him and neither party had addressed him on the principals of the Apportionment Act and its application.

35. The issue of notice pay could have and should have been resolved following Employment Judge Jones' guidance. His guidance was ignored or not accepted by claimant. The respondent believed it had already paid the claimant more than his entitlement.

36. The final hearing of this case should have taken only two days. It was listed on 21st January 2021 for three days to include half a day on fraud allegations because of the claimant's vehement allegations of fraud which, as we have said, turned out to be completely unfounded.

37. With regard to the claim having no reasonable prospect of success, we accept that the case was rightly permitted to continue to a full hearing by Employment Judge Jones with regard to the race discrimination claim for the reason stated above, but a substantial part of the claimant's case relied on his unfounded allegations of fraud by the respondent. We find that the costs of the additional day at the final hearing was attributable entirely to the claimant and his conduct of proceedings up to the final hearing in terms of his approach to preparation documentation, spurious allegations and his lack of cooperation with the respondent. His conduct of the proceedings was not in accordance with the overriding objective, it was unreasonable and, his claim of unfair dismissal had no reasonable prospect of success because he could not establish facts from which it could be inferred that the respondent had acted in a discriminatory towards him. The Claimant submitted no plausible evidence of any race related conduct by the respondent; no incident with any racial undertone. His monetary claim was also flawed and bound to fail. In summary neither of his claims had any reasonable prospect of success.

38. With regard to the claimant's means, we took into account that he has currently a well paid job at £60,000 per annum for one year ending in March 2022. He has outgoings which are unavoidable such as mortgage payments and child support; he has outgoings which are avoidable or could be reduced such as his car which costs more than his child support.

39. The claimant is a well qualified, highly intelligent, articulate and educated man in a profession in which we believe there is work obtainable in the construction industry as he has demonstrated. He will be able to find further work. In short the claimant is not impecunious and we do not

expect him to become impecunious. He appears to have limited personal debt and an unencumbered property with a relatively small mortgage.

40. We therefore order the following: That the claimant will pay

(i) the equivalent of one day's refresher fee payable to counsel, being the third day of the hearing listed for three days because of the claimant's vehemence that he could prove fraud. That sum is £950.00; and

(ii) 50% of the respondents costs £18,016 which were excessively increased from a figure which the respondent could have been expected to incur, by the claimant's persistent and unreasonable conduct throughout the proceedings commencing in 2019. We found the respondent not to have inflated its costs. The award is £9,008.00.

The total sum awarded against the Claimant is £9958.00

Signed by ___________________

Employment Judge A Richardson
Signed on 16th November 2021