Case Number: 2200417/2017

EMPLOYMENT TRIBUNALS

Claimant ***Respondents***

Mr A Kuznetsov **AND** Manulife Asset Management (Europe) Limited

JUDGMENT

The Claimant's application for costs is dismissed.

REASONS

Background

1. By a claim form presented on 3 March 2017, the Claimant brought complaints of automatic unfair dismissal for making protected disclosures, protected disclosure detriment, and holiday pay, against Manulife Asset Management (Europe) Limited under case number 2200417/2017.

2. By a decision promulgated on 2 March 2018, the Tribunal dismissed the claim.

3. The Claimant appealed the ET liability decision. An EAT Rule 3(10) hearing took place on 9 January 2019 and the transcript of the proceedings was promulgated on 22 February 2019. The EAT (HHJ Richardson) refused permission to appeal.

4. The Claimant appealed to the Court of Appeal. That application was dismissed by order of Underhill LJ promulgated on 12 November 2019.

5. By an order promulgated on 22 January 2020, the Court of Appeal also refused the Claimant's later application for permission to appeal HHJ Richardson's refusal to review his r.3(10) decision. On this occasion, Underhill LJ observed that:
    5.1. HHJ Richardson had been "unarguably right to hold that the proposed appeal was hopeless" para [1].
    5.2. But for the fact that the Claimant's application had pre-dated the Court of Appeal's order of 12 November 2019 by a few days, Underhill LJ would have been minded to have certified the Claimant's application as being totally without merit and to have made a civil restraint order against the Claimant, para [8].

6. In a Costs Judgment promulgated on 24 January 2019, the Tribunal held that the Claimant's claims had had no reasonable prospect of success. It exercised its discretion to make a costs order against the Claimant in the sum of £20,000.

7. The Claimant issued a further claim, number 2205144/2019 against the same Respondent, in the same terms as the first claim.

8. On 14 July 2021 Lord Justice Warby made an Extended Civil Restraint Order against the Claimant, ordering that he be restrained from issuing claims or making applications in any court, concerning any matter related to these proceedings, without first obtaining the permission of Choudhury J, or Johnson J (or a Judge nominated by them). The order made clear that the Claimant was prohibited from doing any of the following things without such prior permission:

> "(1) issuing any claim in any court which relates to or arises from the fact or circumstances or alleged circumstances of your dismissal in 2016, or the reasons or alleged reasons for that dismissal, and
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> (2) making any application in any proceedings in any court (whatever the nature or subject-matter of the proceedings) which concerns, involves, relates to, touches upon or arises from the fact or circumstances or alleged circumstances of your dismissal, or the reasons or alleged reasons for, your dismissal."

9. The Claimant had made an application for costs dated 18 February 2019 and received by the Tribunal on 21 February 2019 in claim number 2200417/2017. The application predated the civil restraint order.

10. The Claimant's costs application had not been determined for a number of reasons set out in more detail below. The judge who had had conduct of the case, EJ Taylor, was elevated to the EAT. Subsequently the case was allocated to me, EJ Brown. The covid pandemic meant that the Central London Tribunal building was closed for long periods of time and the application was not able to progress. In addition, as stated above, the Claimant had issued a further claim, number 2205144/2019, in materially identical terms, against the same Respondent. It was the subject of a number of hearings at the Employment Tribunal during 2021 which the Claimant failed to attend. I eventually struck out that claim on 23 July 2021.

11. The Claimant's costs application is the only outstanding matter to be resolved between the parties. I decided that it needed to be determined, despite the civil restraint order, because it predated the civil restraint order.

The Claimant's Costs Application

12. In his application, the Claimant sought costs from the Respondent on the following grounds:

> 12.1. Under *r76(3) ET Rules of Procedure 2013* as the result of a postponement. The Claimant said that the liability hearing had been postponed and that, as a result "the trial has taken place immediately before the annual performance bonuses and promotions being announced which resulted in the potential witnesses who were still Respondent's employees, being reluctant to attend the trial. This has a major impact on the outcome of the hearing. Similarly, despite being warned to preserve CCTV records, the Respondent alleged the CCTV

records were erased by the time of the trial in February/March 2018. This, along with the reluctance of Respondent's employees to act in a witness capacity, had a decisive impact for the outcome of the trial." The Claimant said, regarding *r76(3),* "As shown in… the Claim Form [ET1], interparty correspondence and the Agenda for the preliminary hearing, 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. Thus, requirement of rule 76(3) ETRP has been satisfied. The request for reinstatement has also been raised in the interparty correspondence. Having requested an adjournment of the final hearing from September 2017 to February/March 2018, the Respondent's counsel failed to provide any compelling reason. In any event, no evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment has been adduced. In the circumstances of the case, rule 76(3) ETRP applies."

12.2. "The Respondent's vexatious, abusive and unreasonable conduct". The Claimant said that the Respondent had unreasonably refused to engage in ACAS conciliation and Judicial Mediation. He said that the original hearing date had been postponed on the application of the Respondent and that the Respondent had refused to disclose information and documents and had included irrelevant material in the bundle. He said that the Respondent had failed to cooperate with him in preparing for the hearing. He said that the Respondent had misled EJ Lewzey. He also alleged that the Respondent's Counsel had, on the day of a Preliminary Hearing, entered a room where the Claimant was taking preliminary advice from a legal professional and "had deprived the claimant.. from effectively exercising his right of access to the tribunal by ensuring that the claimant is not assisted by an ELIPS representative." The Claimant said that the Respondent had provided untrue reasons for the Claimant's dismissal.

13. On 26 February 2020 the Respondent objected to the Claimant's costs application.

14. It said that it would not respond substantively to the points raised in the Claimant's Costs Application, principally because judgment was promulgated in writing to the parties in person on 2 March 2018 and the date by which any costs application should have been filed was 30 March 2018. The Claimant's Costs Application was therefore presented over 10 months out of time and the Tribunal had no jurisdiction to determine it. However, the Respondent observed that:

(a) Many of the grounds raised in the Claimant's Costs Application had already been dismissed as not arguable in the context of an appeal by the Claimant against case management orders made by EJ Lewzey on 21 June 2017. The Claimant's appeal against EJ Lewzey's orders was dismissed:

(i) by HHJ Eady QC at the sift stage in accordance with r.3(7) EAT Rules 1993 on 22 August 2017; and (ii) by Kerr J at a r.3(10) hearing (by order dated 20 December 2017).

In addition, certain of the grounds relied upon by the Claimant in the Claimant's Costs Application were also considered and rejected

(iii) by Underhill LJ in dismissing the Claimant's application for a stay of case

number 2200417/2017 (by order dated 7 February 2018); and (iv) by Kitchin LJ on a reconsideration of Underhill LJ's decision (by order dated 15 February 2018:

(b) The Claimant's claims had been heard by the Employment Tribunal over 7 days between 19 and 28 February 2018. Judgment was promulgated in writing to the parties in person on 2 March 2018. The Tribunal emphatically rejected the Claimant's claims, holding, inter alia, that the reason for the Claimant's dismissal was gross misconduct, and that his dismissal was fully justified. The Tribunal also made a series of findings of dishonesty against the Claimant.

(c) The Claimant's appeal had been rejected as disclosing no arguable grounds for appeal by HHJ Richardson following a r.3(10) hearing, by order dated 22 January 2019.

(d) The Respondent had been awarded its costs by the Tribunal which heard the claim In its judgment, promulgated on 24 January 2019 the Tribunal repeated its determinations that the Claimant had acted dishonestly (paragraph 33); that he had been guilty of gross misconduct (paragraphs 40-41); and that it was "clear" that his claim had no reasonable prospects of success (paragraph 34). It also observed that "the Claimant throughout these proceedings has inundated the tribunal with huge amounts of material in an attempt to obscure the basic and simple truth at the centre of the case" (paragraph 35).

(e) The Claimant had presented a separate complaint to the Bar Standards Board on 13 June 2018 regarding the alleged conduct of the Respondent's counsel, Mr Sebastian Purnell, set out in the Claimant's Costs Application. The Bar Standards Board had summarily dismissed that complaint on 7 August 2018, determining that "the complaint does not disclose any evidence of professional misconduct and does not warrant further investigation by the Bar Standards Board."

15. On 21 February 2020 EJ Tayler ordered that, within 14 days, the Claimant should provide submissions in support of the contention that the costs application was made in time and/or that it should not be struck out as being an abuse of the process; and, if he wished the matter to be considered at a hearing, make an application for a hearing.

16. The Claimant responded on 5 March 2020,questioning the process and referring at length to quoting at length from the European Convention of Human Rights and ECJ caselaw.

17. On 20 June 2019 EJ Taylor wrote again to the parties, inviting their comments on whether, Pursuant to rule 77 of Employment Tribunal Rules 2013 ("the ET Rules") the "judgment finally determining the proceedings" was the Judgement on liability sent to the parties on 2 March 2018, or the Judgment determining the Respondent's application for costs sent to the parties on 24 January 2019. He said that, if the Claimant's costs application had been presented in time, EJ Taylor might go on to consider, of his own motion, pursuant to rule 37 ET Rules, whether the application for costs should be struck out on the basis that it was scandalous, unreasonable or vexatious, as the Claimant could and should have made any

application for his costs so that it could have been considered at the hearing to determine the Respondent's application for costs held on 14 December 2018.

18. On 3 July 2019 the Respondent replied, saying that the Claimant was seeking to recover costs that he allegedly incurred in pursuing his claim to establish liability on the part of the Respondent. Accordingly, the relevant judgment, from which time ran for making a costs application, was the liability judgment.

19. The Respondent also said that the Claimant could and should have made any application for costs as a counter-claim to the Respondent's application for costs, so that both applications could be considered at the same time. Waiting until the Respondent had successfully obtained its costs judgment against him before making his own application was contrary to the Overriding Objective. If the Application were allowed to proceed, it would result in a completely avoidable waste of the Tribunal's and the Respondent's resources.

20. The Respondent also contended that the Tribunal should strike out the Application on the basis that it had no reasonable prospect of success. Given the determinations already made by the Tribunal in the Liability Judgment and the Costs Judgment, the Claimant had no prospect of making out any of the grounds in Rule 76 for awarding costs in his favour. The Respondent contended that:
    - 20.1. The Respondent's defence in the liability hearing and its application for costs had reasonable prospects of success because, as a matter of record, both had succeeded.
    - 20.2. There was no evidence that the Respondent had acted vexatiously, abusively, disruptively or otherwise unreasonably during the course of the proceedings. Instead, the Tribunal repeatedly favoured the Respondent's evidence over assertions made by the Claimant in the Liability Judgment (for example, see paragraphs 48, 49, 51, 55, 65, 70, 81, 75, 79, 81, 83, 85, 91, 94, 101, 102, 104, 106, 108 and 114)
    - 20.3. The Application was the most recent example of the Claimant's vexatious approach to the proceedings. He had repeatedly sought to prolong the resolution of the matter by bringing numerous failed interim applications and appeals. The Claimant appeared to be unable or unwilling to accept the decisions of the Tribunal.

21. On 21 February 2020, EJ Taylor again ordered the Claimant to provide any submissions in support of the contention that the costs application was made in time and/or that it should not be struck out as being an abuse of the process; and, if he wishes the matter to be considered at a hearing, make an application for a hearing.

22. On 5 and 6 March 2020 the Claimant replied, saying that he had made the application in time, within 28 days of the costs judgment on the Respondent's costs application. He requested a hearing. He said that he was being denied a fair hearing. He also requested a stay of the proceedings to allow the Claimant to seek a view from the Institute of Arbitration in Stockholm. The Claimant explained his failure to make his costs application earlier, relying on a number of matters: he said that it would not have been possible to consider the Claimant's own costs

application at the same hearing as the Respondent's application because the Respondent's application was listed for a whole day. He said that the Respondent had failed to deliver the documents in support of its own application, and failed to provide the Claimant with a bundle for the Respondent's costs hearing until the day of the hearing. The Claimant said that he had heart condition which had required an urgent operation in January (2019) and that he had needed, as a litigant in person, to seek legal advice.

23. The Claimant also made submissions on EJ Taylor recusing himself. That matter is no longer relevant.

24. On 13 March 2020 the Respondent wrote further to the Tribunal, challenging the Claimant's contentions.

25. EJ Taylor was elevated to the EAT and the file was passed to me, EJ Brown.

26. On 17 September 2020 I wrote to the parties asking them to set out their proposed directions regarding how the Claimant's costs application should now be determined, including: a. Whether it could be determined on the papers by EJ Brown; b. Whether strike out is available for costs applications; c. The procedure which should be adopted. I said that, in the absence of EJ Taylor, it was fair to allow the parties to comment on these matters.

27. On 1 October 2020 the Respondent responded, saying that the Tribunal had jurisdiction under r.37 to strike out (or, under r.27, to dismiss) the Costs Application. However, it should instead list a one day final hearing via CVP for the determination of the Claimant's Costs Application, to avoid further delay.

28. The Respondent said that Rule 1(1) of the ET Rules provides that a "Claim" means any proceedings before an ET making a complaint and that a "Complaint" means anything that is referred to as a claim, complaint, reference, application or appeal in any enactment which confers jurisdiction on the Tribunal. Rule 1(3) provides relevantly that a "judgment" is a decision, made at any stage of the proceedings (but not including a decision under r.13 or 19) which finally determines, inter alia, a claim, or part of a claim, as regards liability, remedy or costs, r.1(3)(b)(i). Rule 27 provides that if an Employment Judge considers either that the Tribunal has no jurisdiction to consider the "claim", or that the "claim" has no reasonable prospect of success, the Tribunal shall send a notice to the parties – (a) setting out the Judge's view and the reasons for it; and (b) ordering that the claim shall be dismissed on such date as is specified in the notice unless, before that date, the claimant presents written representations to the Tribunal explaining why the claim should not be dismissed. Under r.27(3), if such representations are received within the specified time period, they shall be considered by an Employment Judge, who shall either permit the claim to proceed, or fix a hearing for the purpose of deciding whether it should be permitted to proceed. R.37(1) provides that a tribunal, at any stage of the proceedings, either on its own initiative or on the application of a party, may strike out all or part of a "claim" on grounds which include: (a) that it is scandalous or vexatious or has no reasonable prospect of success. A claim may not be struck out unless the party in question

has been given a reasonable opportunity to make representations, either in writing, or if requested by the party, at a hearing (r.37(2)).

29. The Respondent contended that, properly construed, it is clear from the ET Rules:
    a. An application for costs falls within the wide definitions of "claim" and "complaint" set out in r.1(1).
    b. The Tribunal is entitled under r.27 to dismiss the "claim" (i.e. the Costs Application) if it considers either that the Tribunal has no jurisdiction to consider it (i.e. because it was filed 10 months out of time), or that it has no reasonable prospect of success, as the Respondent averred.
    c. However, there was in practice no useful purpose in the Tribunal dismissing the Costs Application under r.27 because, were it to do so, r.27(3) would nevertheless entitle the Claimant to provide representations within a specified period as to why the Costs Application should not be dismissed, which – given the procedural history of this matter – he would invariably provide, with the consequence that the Tribunal would then, upon consideration of those representations, be obliged by the Rules either to permit the application to proceed to a hearing or fix a preliminary hearing for the purpose of deciding whether it should be permitted to proceed.

30. On 1 October 2020 the Claimant wrote to the Tribunal saying that the Claimant's Costs Application should be listed for a hearing because, inter alia, he is a litigant in person and not a native speaker. He asked that a hearing take place in person.

31. Also on 1 October 2020 the Claimant presented a lengthy and detailed document setting out the reasons why he contended that his costs application was meritorious.

32. He relied on ET Rules of Procedure 2013 r76(3), "(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."

33. He said that the rules provided that a costs order "shall be made" in these circumstances.

34. The Claimant also said that the Respondent's contentions on strike out lacked merit.

Discussion and Decision

35. Notwithstanding that both parties had, in 2020, asked that the Claimant's costs application be determined at a hearing, I decided that I would determine it on the papers. I informed the parties of my decision on this by letter on 6 September

2021. I asked the parties to compile a bundle of all the relevant documents. The Respondent sent this bundle to me in accordance with my direction.

36. During 2021 I had listed 3 hearings to consider whether to strike out the Claimant's linked second claim, number 2205144/2019. The Claimant had not attended any of the hearings, purportedly on medical grounds. I had specified the contents of medical reports required to establish whether the Claimant was unfit to attend and when he would be fit to attend. The Claimant had nevertheless provided medical reports which I considered to be highly unsatisfactory.

37. Eventually, at the third hearing in case number 2205144/2019, on 16 May 2021, I decided that I would determine whether to strike out case number 2205144/2019 on the papers. I had concluded that there was no reliable evidence that the Claimant would be fit to attend an "in person" hearing at any date in the future. At that point, I had already postponed the hearing on 2 previous occasions, to dates after the Claimant's symptoms were due to have resolved. I decided that it was not in accordance with the overriding objective to postpone the hearing to yet another date. The Respondent had prepared for, and attended 3 hearings, no doubt at considerable expense. The Tribunal had already allocated 3 days' hearing time to the issue of strike out. Further postponements would result in further delay and further expense. I said that the Claimant had provided lengthy written submissions on the issue in any event, so it was fair to proceed on the papers.

38. For the same reasons, I decided that I would determine this costs application on the papers. I have no confidence in the reliability of medical reports which the Claimant has produced in those linked, duplicate proceedings. I consider that it is highly unlikely that the Claimant will attend any hearing which is listed.

39. Most importantly, however, having considered the extremely lengthy course of this costs application and all the Claimant's correspondence, I decided that the Claimant had had ample opportunity to set out all his arguments in favour of his application for costs, in writing. A further hearing was not necessary to ensure that the application was determined fairly.

40. I noted that, pursuant to *r77 Employment Tribunal Rules 2013,* an application for costs must be made "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".

41. The Claimant's application for costs was made on 21 February 2019. The liability decision, in respect of which the costs application was made, had been promulgated on 2 March 2018. I agreed with the Respondent that this was "the judgment finally determining the proceedings" under r77. I did not agree that the costs judgment against the Claimant was the relevant judgment. The Claimant was not seeking his costs arising out of that costs hearing. His application was based on the conduct of the liability proceedings. The costs application was therefore made out of time.

42. I would not extend time for it. Applying the overriding objective, the Claimant's application for costs should have been considered at the same time as the Respondent's costs application against the Claimant. The Claimant was making competing contentions regarding costs which should properly have been considered as part of the whole factual and procedural matrix relevant to the costs of the proceedings. It would duplicate proceedings and waste time and costs to have separate hearings on the Respondent's and Claimant's costs applications. I did not accept that the Claimant had been prevented from bringing his costs application earlier than he did. He produced no medical evidence which explained the delay between 2 March 2018 and 21 February 2019. I did not accept that such a lengthy delay could be explained by the Claimant's need to seek legal assistance.

43. If I was wrong about the time limits, I considered the costs application on the merits. I considered that it was wholly without merit.

44. I looked at the preliminary hearing summaries and case management orders in the case.

45. I noted that EJ Glennie had vacated the original hearing listed for 4 September 2017 at a Preliminary Hearing on 4 May 2017. At paragraph 5 of his case management summary dated 5 May 2017, he explained his reasons for doing so, "Although the Claimant wished to retain the trial date in September, I concluded that it was unlikely that this would be met given the dispute about the issues and the need to resolve this before the case can be properly prepared for hearing. I also took into account the effect on the Tribunal's listing of other cases if a 12-day hearing is kept in the list but ultimately not used." At paragraphs 1 and 2 of the same summary, EJ Glennie had said that the parties had been unable to agree the issues in the automatic unfair dismissal and protected disclosure detriment claims. The case management summary did not mention any issues regarding reinstatement or reengagement; it did not mention remedy at all.

46. I decided that the Claimant's contentions regarding costs under *r 76(3) ET Rules of Procedure 2013* were completely misconceived. The original hearing had <u>not</u> been postponed because the claimant had expressed a wish to be reinstated or re-engaged and the respondent had failed to adduce reasonable evidence as to the availability of his previous job or of suitable alternative employment. The hearing was postponed because the parties had not agreed the issues in the substantive claims and the case could therefore not be prepared for the liability hearing. The Tribunal had never reached the remedy stage of considering whether the Claimant should be reinstated or reengaged. His claim for unfair dismissal was dismissed and so the remedy of reinstatement or reengagement was never contemplated by the Tribunal. *R 76(3)* was irrelevant.

47. I rejected the Claimant's lengthy description in his costs application of the Respondent's alleged vexatious, abusive and unreasonable conduct. The Respondent was entirely reasonable not to seek to settle a claim which it eventually won and in which the Tribunal made findings of dishonesty against the Claimant.

48. The Respondent's defence in the liability hearing and its application for costs had reasonable prospects of success because, as a matter of record, both had succeeded.

49. There was no evidence that the Respondent had acted vexatiously, abusively, disruptively or otherwise unreasonably during the course of the proceedings. On the contrary, the Tribunal repeatedly favoured the Respondent's evidence over assertions made by the Claimant in the Liability Judgment (paragraphs 48, 49, 51, 55, 65, 70, 81, 75, 79, 81, 83, 85, 91, 94, 101, 102, 104, 106, 108 and 114). The Claimants numerous appeals have all been dismissed.

50. I accepted the Respondent's written submission that the Claimant had presented a separate complaint to the Bar Standards Board on 13 June 2018 regarding the alleged conduct of the Respondent's counsel, set out in the Claimant's Costs Application. The Bar Standards Board had summarily dismissed that complaint on 7 August 2018, determining that "the complaint does not disclose any evidence of professional misconduct and does not warrant further investigation by the Bar Standards Board." The Claimant had produced nothing to contradict the Respondent's account of this. I was satisfied that there was no unreasonable conduct on the part of the Respondent's representatives.

51. There were no grounds for awarding costs against the Respondent. The Claimant's application for costs is dismissed.

Employment Judge Brown
Central London Employment Tribunal

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3 November 2021
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Judgment sent to the parties on:

03/11/2021.

For the Tribunal Office