EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Ms Rachel Mayhew	AND	Isle of Wight NHS Trust

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY **ON** 28 October 2021
By Cloud Video Platform

EMPLOYMENT JUDGE N J Roper

Representation
For the Claimant: Mr O Aniagwu, Consultant
For the Respondent: Mr L Harris of Counsel

ORDER

The claimant is ordered to pay the respondent's costs in the sum of £1,400.00

REASONS

1. In this case the respondent seeks its costs on the hearing of its application to strike out the claimant's claims. That application to strike out was withdrawn following late compliance by the claimant but the respondent pursues an application for costs thrown away.
2. Procedural Background
3. The claimant presented these proceedings on 9 June 2020, claiming unfair dismissal and additional monetary claims. The respondent presented its response resisting the proceedings on 22 July 2020. On 5 December 2020 the Tribunal office issued a notice of hearing listing the claim for hearing on 24 and 25 June 2021, and it included a standard order for directions which required the parties to provide disclosure of their relevant documents by list of documents no later than 18 January 2021.
4. The claimant failed to comply with this order until 22 October 2021, some nine months late. During that time the parties exchanged emails, which include the following relevant extracts. On 10 February 2021 the claimant's representative suggested that he was having difficulty producing the documents and had not been able to pursue the claimant for confirmation, but he stated "Please let me deal with everything next week". On 4 March 2021 the claimant's representative emailed to the effect "Regarding the outstanding items from me, I should hope that you will receive them tomorrow afternoon." On 5 March 2021 the claimant's representative emailed to the effect that he was awaiting "vital documents" from the claimant but that if he did not have them by the end of the week he would send what he had "including payslips and P45s as the case may be". On 16 March 2021 the

claimant's representative emailed to the effect that the claimant was "experiencing great difficulty in getting all across to me in these Covid pandemic times" and asked the respondent to "bear with me for a little longer".

5. As a result of these delays the matter was not ready for its listed hearing and on 20 May 2021 the Tribunal office vacated the final hearing date. On the same day (20 May 2021) the claimant's representative emailed to the effect that "He could have sent the list about three weeks ago but I suddenly had to be away for family reasons". He added "Please bear with me, and without fail, I will send the list you on Friday, May 28, 2021".
6. Employment Judge Midgley then made further directions and the Tribunal office listed this matter for a final three-day hearing on 5, 6 and 7 July 2021.
7. The claimant failed to provide any list of documents as promised on 28 May 2021, and on that day the respondent applied to strike out the claimant's claim because of the claimant's repeated failure to comply with directions and to provide disclosure.
8. On 4 June 2021 the claimant's representative applied to the Tribunal for a postponement of the listed hearing and added "I have now received all outstanding documentation and can confirm ready compliance with a revised Order".
9. On 11 June 2021 the respondent wrote to the Tribunal office and repeated its application that the claimant's claim should be struck out and noted that the respondent was unable to prepare for the final hearing which was listed to commence on 5 July 2021 because of the claimant's failure to disclose documents. In the circumstances the respondent agreed to the claimant's postponement application, but it made it clear that it intended to pursue its application to strike out the claims. On 14 June 2021 the claimant's representative made representations to the effect that an unless order would be more appropriate than striking out the claim. On 25 June 2021 the Tribunal postponed the final hearing and listed the respondent's strike out application to be heard today (28 October 2021).
10. By email dated 22 October 2021 (four working days before this hearing) the claimant eventually served a list of documents as ordered. The respondent then withdrew its application to strike out by email dated 27 October 2021 in circumstances where a fair trial of the claimant's claims was still possible, but on the basis that it was to pursue its application for costs. That application is opposed by the claimant.
11. <u>The Application for Costs</u>
12. The respondent makes an application for its costs on the basis that the claimant has acted unreasonably in the way in which the proceedings have been conducted. The respondent's application is straightforward, and asserts that the claimant only served the list of documents some nine months after having been ordered to do so, and despite repeated confirmation that the list of documents was ready to be served, and promises to serve it, the claimant failed to do so until this time. In addition the claimant was on notice of the date of the strike out application since 15 July 2021 but decided to delay until 22 October 2021 before complying. The respondent asserts that it instructed Counsel to pursue the strike out application and that a brief fee of £1,400.00 plus VAT was incurred for that purpose. The claimant's late compliance was after the brief fee was incurred, and it would not have been so incurred if the claimant had complied on time.
13. The claimant resists the application for reasons set out in an email from her representative dated 27 October 2021. In short, the claimant's representative effectively argues (i) that delays were caused by personal reasons and the Covid pandemic; and (ii) that he had made it clear that the strike out application was always doomed to fail, and the reason the respondent withdrew its application was because of its limited prospects of success rather than the late compliance with the disclosure order.
14. <u>The Rules</u>
15. The relevant rules are the Employment Tribunals Rules of Procedure 2013 ("the Rules").
16. 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.

17. 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.
18. 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 …"
19. 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.
20. The Relevant Case Law
21. I have been referred to and 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; AQ Ltd v Holden [2012] IRLR 648 EAT; Barnsley BC v Yerrakalva [2012] IRLR 78 CA; 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; Raggett v John Lewis plc [2012] IRLR 906 EAT.
22. The Relevant Legal Principles
23. 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.
24. 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?"
25. 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.

26. The threshold to trigger costs is the same whether a litigant is or is not professionally represented, although in applying those tests, the EAT has held that the status of a litigant is a matter which the tribunal must take into account – see AQ Ltd v Holden in which Richardson J commented: "Justice requires the tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life. As [counsel] submitted, lay people are likely to lack the objectivity and knowledge of law and practice brought about 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." However, Richardson J also acknowledged that it does not follow from this "that lay people are immune from orders for costs: far from it, as the cases make clear. Some litigants in person are found to have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity". These statements were approved by Underhill P in Vaughan v London Borough of Newham.
27. 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 the At a level which gives the respondent's 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."
28. 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.
29. Recovery of VAT
30. 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).
31. The Claimant's Means
32. The claimant did not attend today's hearing. Despite being on notice of the costs application against the claimant, her representative had limited information with regard to her means. This includes that the claimant has now regained her certification (which was suspended following her dismissal) and has obtained alternative employment.
33. Conclusion

34. In my judgment it is clear from the facts set out above that the conduct of the claimant and/or her representative in conducting these proceedings has been unreasonable. This is a straightforward unfair dismissal case, and the claimant failed to comply with repeated Tribunal directions and repeated requests from the respondent to serve her list of documents until some nine months after the original direction. This was despite the fact that the claimant's representative had acknowledged that the list of documents was ready and would be served imminently. As a direct result of these delays the listed final hearing has been postponed on two occasions. This has caused disruption to the Tribunal listing process when other parties are encountering significant delays in obtaining dates for hearing. It was appropriate for the respondent to withdraw its application to strike out once a list of documents was served, because it could no longer be said that a fair trial was not possible. Nonetheless the respondent did not know that a list of documents would be served when it incurred its brief fee for today's application to strike out the claim, and those costs of £1,400.00 plus VAT have effectively been wasted by the conduct of the claimant and/or her representative in their late compliance.
35. I have regard to the two-stage process outlined in Monaghan v Close Thornton by Lindsay J as noted above. In the first place the cost threshold is triggered because the conduct of the party against whom costs is sought was unreasonable. Secondly, in my judgment it is appropriate to exercise discretion in favour of the receiving party, having regard to all the circumstances of this case.
36. The respondent originally sought the cost of the brief fee in the sum of £1,400.00 plus VAT but was unclear at this hearing whether the respondent was registered for VAT, in which case it would be inappropriate for it to seek to recover the VAT. On that basis the respondent limited its application for costs to £1,400.00, but net of VAT.
37. In conclusion therefore, and bearing in mind the information which I have with regard to the claimant's means, I order the claimant to pay the respondent's costs in the sum of £1,400.00.

Employment Judge N J Roper
Date: 28 October 2021

Judgment sent to Parties: 24 November 2021

Sent to the Tribunal Case