EMPLOYMENT TRIBUNALS

Claimant: **Mr C Walsh**

Respondent: **All Saints Catholic School**

Heard at: **East London Hearing Centre**

On: **20 September 2021**

Before: **Employment Judge Lewis**

Representation

Claimant: Did not attend
Respondent: Mr Green (Counsel)

JUDGMENT having been sent to the parties on 29 September 2021 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

For costs order made on 20 September 2021

Procedural background

1. The hearing was listed to consider the Respondent's costs application in respect of the claim which was stuck out by Employment Judge Crosfill on 10 August 202 for the reasons given in his judgment, sent to the parties on 25 August 2021. Employment Judge Crosfill also heard a Preliminary Hearing in this matter on 12 July 2021 and set out the relevant history to these proceedings in his summary of that Telephone Preliminary Hearing which the Claimant did not attend, the document was sent to the parties on 20 July 2021.

2. At paragraph 17 of the Preliminary Hearing summary from 12 July 2021, Employment Judge Crosfill noted that Mr Watson, on behalf of the Respondent, asked that any resumed Preliminary Hearing should be an open hearing, where if it wished to do so the Respondent could apply for an Order for the costs thrown away by the lack of progress at the hearing on 12 July 2021 and the cost of chasing the Claimant to comply with the Orders of the Tribunal. Employment Judge Crosfill agreed to this request.

3. By letter dated 10 August 2021 the Respondent made an application for costs and applied for the claims to be struck out requesting that in the event the claims were struck the Preliminary Hearing listed on 20 September 2021 be retained so that their cost application could be heard. This letter was sent by email to the Tribunal and copied to the Claimant, the last paragraph of the letter (paragraph 45) confirms that a copy of the application had been sent to the Claimant and that he had been notified that any objection to the application should be sent to the Tribunal as soon as possible. The Costs application was outlined at paragraphs 33 – 44 of that letter.

4. The claim was struck out by Employment Judge Crosfill and a Judgment with reasons was sent to the parties on 25 August 2021.

5. This hearing was retained in order to hear the Respondent's costs application. Before commencing today's hearing, I asked the Clerk to ascertain whether the Claimant was attending, or intended to attend, the hearing. On the Clerk confirming that the Claimant was not present and that she had checked three times in the Claimant's waiting area, I asked the Clerk to check the Case Management System for the Claimant's phone number. She reported that the telephone number was not on the file, she did however return with four emails from 14, 15, 17 and 19 September from the Claimant with an incomplete case reference number and not copied to the Respondent.

6. I asked the clerk to provide the Respondent with copies of the four emails, only one of which (that of 17 September) was copied to the Respondent's solicitor. The Claimant referred back to his email of 2 July requesting a general postponement of his claim to which he attached a general acknowledgement of receipt from the ET London East inbox dated 2 July 2021. The emails did not explain why the Claimant was not present today. I wanted to provide him with an opportunity to explain, if at all possible. I asked the Respondent to provide me with the Claimant's telephone number, as per Employment Judge Crosfill's Order of the previous occasion, so that my Clerk could contact him and make the enquiries. We then adjourned while my Clerk went to telephone the Claimant.

7. At 10:50am, the Clerk returned and reported that she had tried to call the Claimant's number ten times, she left a voicemail on the fourth occasion with her direct line number, that she had already sent an email to him at 10:08 am asking him to respond immediately to which there had been no response. The Claimant did not pick up any of his calls.

8. The Respondents were invited back into the hearing and at 10:58 the hearing resumed. The Respondents were asked if they knew what the Claimant's position was and if they had heard from him since the email of 17 September. I was informed that the Respondents believed that he may be carrying out some supply teaching and he is known to have done some teaching in the last academic year.

Respondent's Costs application

9. The Respondent then made its application for costs. It relied on the contents of the letter of 10 August 2021 and the procedural history from which it can be seen that on a number of occasions the Claimant was invited to comply with previous Orders and had not done so. He had failed to clarify his case so that the List of Issues could be agreed and had failed to prepare a Schedule of Loss despite being requested to do so both by the Employment Tribunal and by the Respondent's solicitors. The Claimant's emails from 15

April and 4 May 2021 had not complied with the rule requiring them to be copied to the Respondents The correspondence from the Tribunal to the Claimant pointed out that he had failed to comply with requirements of the Employment Tribunal Rules to copy in the Respondents and also pointed out that he had used an incomplete case number. The Case Management Orders made by Employment Judge Crosfill at the hearing on 12 July 2021 provided the Claimant with a further opportunity to comply with the Tribunal's Orders and warned him that failure to do so might lead to the claim being struck out. The Claimant had not applied for any reconsideration in time in respect of those Orders nor had he applied in a sensible way for postponement and nor had he explained his failure to attend at the hearing and he had not even taken the basic step of setting out the proper basis of his claim and had not given any proper explanation for his failures.

10. The Cost application was made based on two limbs, Rule 76(1)(a) unreasonable conduct and 76(1)(b) no reasonable prospect of success. In respect of 76(1)(b) the Respondent submitted that the claim was incomplete and confused and a claim to which the Respondent could not respond and from which it could not extract a list of issues. The main plank of the application was unreasonable conduct under 76(1)(a). The Claimant had repeatedly failed to provide information requested and failed to comply with the Employment Tribunal's Orders and so put the Respondent to great expense and effort in trying to prepare and meet the claim and to ensure that the Claimant understood what was required and in encouraging him to comply. At the time of the strike out the trial date in January would have been lost due to the Claimant's failure, which is also a waste of the Employment Tribunal's precious resources. The Respondent submitted that all the Claimant had done was submit a claim making various very serious allegations against his former employer and then occasionally correspond with the Employment Tribunal only to say that he would like more time to investigate the allegations. It was suggested that the Claimant had an element of vexatiousness and that it could be said that the Claimant was using or pursuing the claim as a grudge and had used it as a stick with which to beat the Respondent.

11. The Respondent sought costs in the full amount of the jurisdiction of the Employment Judge, which was £20,000, its actual full costs were three times that amount. The Respondent had put before the Tribunal a schedule setting out the basis of that costs application, a large element of that was as a result of the Claimant's unreasonable failure to co-operate with the Respondent and seek to agree a list of issues putting it through a large and extensive investigative exercise in order to meet the claims that the Claimant was bringing, failure to comply with the Orders of the Tribunal, and failure to attend previous hearings meaning the costs were thrown away. The Respondent wishes to draw a line under the proceedings and did not seek to pursue a detailed assessment of costs in order to recover the full extent of its costs i.e. £67,000 but sought £20,000 which it submitted is a proportionate amount and entirely reflected some, but not the entirety, of the additional work caused by the Claimant's unreasonable conduct.

The Claimant's Means

12. In the absence of the Claimant, I did my best to ascertain what the Claimant's likely means might be, the Respondent was able to confirm that he had been employed as an Upper Pay Scale 3 Teacher which had lead him to expect to earn in the region of £200 per day gross as a Supply Teacher. He also had a TLR Allowance of £12,000 although the Claimant claimed in his case that this was £14,000. The Upper Pay Scale 3 in Inner London goes up to approximately £49,571 which therefore includes the TLR Allowance The

Respondent believes that the Clamant had been doing some supply teaching but was not able to provide any information as to the regularity or duration. In its experience in the current circumstances there was a lot of supply work available which could be cover for short term absences or could be a regular or long term. The Respondent believes that the Claimant also owns a property as he has contacted colleagues in the past with messages about renovations to that property.

Relevant law

13. Rule 76(1) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 provides that a Tribunal may make a costs 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 the proceedings (or part) have been conducted; or

(b) any claim or response had no reasonable prospects of success.

14. The Tribunal must apply a two stage test: firstly, to determine whether the circumstances set out in paragraphs (a) or (b) of Rule 76(1) apply; if so, secondly the Tribunal must exercise its discretion as to whether a costs order should be made and, if so, for how much.

15. The Court of Appeal has stated in Gee v Shell UK Ltd 2003 IRLR 82 that costs in Employment Tribunals are still the exception rather than the rule. Importantly, costs are compensatory, not punitive; see Lodwick v Southwark London Borough Council 2004 IRLR 554.

16. In McPherson v BNP Paribas (London Branch) [2004] IRLR 558 the Court of Appeal held that in exercising its discretion to award costs, a Tribunal must have regard to the nature, gravity and effect of the unreasonable conduct. It was also held in that case that unreasonable conduct is both a precondition of the existence of the power to make a costs order and is also a relevant factor to be taken into account in deciding whether to make a costs order and the form of the order.

17. In Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78, a case decided in the Court of Appeal, Lord Justice Mummery said that the vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and ask whether there was unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, identify the conduct, what was unreasonable about it and what effects it had. That case also decided that although there was no requirement for the Tribunal to determine whether there is a precise causal link between the unreasonable conduct in question and the specific costs being claimed, that did not mean that causation is irrelevant.

18. The Tribunal [Employment Judge] may properly have regard to the fact that the

party against whom a costs order is made is a litigant in person. In AQ Ltd v Holden UKEAT/0021/12/CEA His Honour Judge Richardson stated that a Tribunal cannot and should not judge a litigant in person by the standards of a professional representative. 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. Tribunals must bear this in mind when assessing the threshold tests in rule 40(3). Even if the threshold tests for an order for costs are met, the Tribunal must exercise its discretion having regard to all the circumstances and it is not irrelevant that a lay person may have brought proceedings with little or no access to specialist help or advice. This does not mean that lay people are immune from costs orders; some litigants in person will be found to have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity.

19. Rule 78 sets out the amount of a costs order that may be made by a Tribunal. Rule 84 provides that a Tribunal may have regard to the paying party's ability to pay when considering whether it shall make a costs order or how much that order should be.

20. In Jilley v Birmingham and Solihull Mental Health NHS Trust UKEAT/0584/06/DA, His Honour Judge Richardson said that if a Tribunal decided not to take account of the paying party's ability to pay, it should say why. If it decides to take into account ability to pay, it should set out its findings about ability to pay, say what impact this has had on its decision to award costs or on the amount of costs, and explain why. His Honour Judge Richardson also said that there may be cases where for good reasons ability to pay should not be taken into account: for example, if the paying party has not attended or has given unsatisfactory evidence about means. See also Doyle v North West London Hospitals NHS Trust UKEAT/02271/11/RN in which the Employment Appeal Tribunal suggested that there must be some circumstances (for example where a claimant is completely un-represented) where, in the face of an application for costs, the Tribunal ought to raise the issue of means itself before making an order. In that case it was also stated that a Tribunal should always be cautious of making an order for costs in a large amount against a claimant where such an order will often will be well beyond the means of the paying party and have very serious potential consequences for him or her and it may also act as a disincentive to other claimants bringing legitimate claims. Notwithstanding those rulings, it was held in Arrowsmith v Nottingham Trent University 2011 EWCA Civ 797 that a costs order does not need to be confined to the sums a party could pay as it may well be that their circumstances improve in the future.

21. Assessing a person's ability to pay involves consideration of their whole means. Capital is a highly relevant aspect of anyone's means; see Shields Automotive Ltd v Grieg UKEAT/0024/10/B1.

Decision

22. I went through the detailed schedule of work with the Respondent's counsel and was provided with further explanation in respect of the work done on the documents, preparation for the hearings and witness statements. The Respondent submitted that the Claimant had set a lot of hares running which the Respondent had had to chase down, it was regrettable that so much work had had to be done at that early stage. The Respondent acknowledged that there was a separate independent investigation that had taken place before the proceedings had been started, that work had not been included in their claim for

costs. Although reviewing the report from that investigation is a cost that has been included, the cost of the report itself and any preparatory work for that report has not been claimed. The Respondent had been faced with pleadings containing wide ranging allegations, including a number of personal and serious matters and accusations made of fraud and dishonesty, misuse of funds that had to be looked into and extensive enquiries made, detailed advice was sought in respect of each of the allegations in order to be able to respond to them. Also a considerable and very large amount of work was done to chase the Claimant and try to move the case along

Conclusions

76(1)(a) – Unreasonable Conduct

23. I am satisfied the procedural history set out in Employment Judge Crosfill's Orders (see those of 12 July 2021 and his decision to strike out) made on 10 August 2021 demonstrate unreasonable conduct of the proceedings. The Claimant was serially in breach of the Tribunal's Orders: he was required to produce statements of remedy and failed to do so which led to chasing by the Respondents. He ignored the content of correspondence from the Tribunal and apparently made no attempt to familiarise himself with or to follow the Tribunals Rules of Procedure. Despite being informed by the Tribunal on 4 May 2021, in an email sent to the address consistently used by the Claimant (including most recently on 19 September 2021), that his application could not be considered until he copied in the Respondent, he continued to fail to copy in the Respondent to his correspondence and continue to fail to use the correct case number in his emails, despite having had the fact that he was using the incorrect case number also pointed out to him by the Tribunal.

24. The Orders made by Employment Judge Crosfill were very clear and detailed, explaining exactly what the Claimant had to do and that it was imperative that the Claimant co-operate with the Respondent and comply with the Orders. He was also referred to sources of help and guidance, including the Presidential Guidance on General Case Management. The Claimant was clearly informed in April by the Employment Tribunal that any application would not be dealt with unless copied to the Respondent. He was sent further correspondence from the Employment Tribunal on 9 July 2021 in respect of the Case Management Hearing on 12 July and the strike out application by the Respondent, which was sent by email to the address used by the Claimant when emailing the Tribunal. The Claimant had no basis to assuming that the hearing would not go ahead in the absence of notification that a postponement had been granted. The summary for that hearing was prepared by Employment Judge Crosfill and that document was sent to the parties on 20 July 2021. This prompted no response from the Claimant, he did not apply for reconsideration or extension of time to comply with any of the Orders, he simply ignored them. The reasons for the strike out decision were given with clarity and no application for reconsideration was made. The Claimant simply asked for an explanation as to why the hearing proceeded despite his email of 2 July 2021.

25. The basis for the Respondent's costs application was set out in detail in the letter of 10 August which was copied to the Claimant by email. The letter makes reference to the intention to pursue the costs application at this hearing taking place today. The Claimant has again failed to attend today.

26. During the course of my deliberation, my Clerk reported that she had called the

Claimant again at 12 O'clock and whilst she was making the call someone called on his behalf and left a message with another clerk to inform her to that the Claimant was not attending and referred to his emails. No other explanation was provided and the person did not leave a number.

27. I do not find that the contents of the Claimant's emails of 17 September and 19 September explains his non-attendance today. I am satisfied that they tend to show that the Claimant is under a misapprehension that he can bring proceedings and then chose whether to participate as it suits him.

28. I am satisfied that the Claimant has shown continuous disregard for the Orders from the Employment Tribunal, and that the possible consequences have been pointed out to him on numerous occasion by the Employment Tribunal and by the Respondents. I find that he has acted unreasonably in bringing proceedings making wide ranging and very serious allegation and then not pursing them, not co-operating with the Respondent or the Tribunal to clarify his claims, and in his conduct of these proceedings. The Claimant's conduct led to the claim being struck out and I am satisfied that it also amounts to unreasonable conduct that justifies an award of costs. I am satisfied that the threshold for making a costs order has been met, the next stage is the exercise of discretion.

29. I took into account that the Claimant is a litigant person who is not necessarily aware of the requirements of litigation, however, the Claimant refers to having legal advice in the early stage in the proceedings and refers to this on15 April 2021. He had the effect of Rule 92 spelled out to him by the Employment Tribunal on 4 May 2021 and also again by the Respondent's solicitor's letter on 10 August 2021, before his claim was struck out. He belatedly sent a series of emails in the run up to this hearing with no proper explanation as to his failure to comply with the previous Orders or to attend the hearings on any of the occasions in the past or today. He has made no attempt to engage with the solicitors for the Respondents or indeed the Employment Tribunal in response to the Tribunal's case management orders or progressing his case. The Claimant is a qualified teacher, he can be expected to read and respond to letters from the Tribunal and the Respondent's solicitors. The threshold for unreasonable conduct being met, I took into account the nature, gravity and effect of the Claimant's unreasonable conduct in considering whether to exercise my discretion to make an award of costs. I am satisfied that the Claimant's unreasonable conduct (as identified above) including his serious disregard and repeated failure to engage with the Orders of the Tribunal and to engage with the numerous attempts by the Respondent's solicitors to progress the case has had the consequence of substantially increasing the costs incurred by the Respondent in this litigation. I am satisfied that I should exercise my discretion and make a costs order in favour of the Respondent.

30. The Respondent seeks the sum of £20,000, that is the maximum that can be awarded without detailed assessment, based on a cost schedule of £64,549. It is a very large bill given the stage of proceedings reached. In limiting its application to £20,000 the Respondent is foregoing two thirds of its costs of which it says are reasonably and properly incurred. Having interrogated the Respondent on the schedule, I am satisfied that the costs sought have been reasonably and properly incurred. They reflect the wide-ranging scatter gun approach the Claimant took in bringing the claim and his failure to engage with the proceedings after having issued them. The schedule reflects the substantial additional work carried out by the Respondent's solicitors in seeking to meet the case in the absence of the Claimant clarifying his claims and in seeking to persuade the Claimant to engage with the

proceedings and the Tribunal's orders, and the costs of preparation for and attendance at the hearings which the claimant failed to attend.

Ability to pay

31. The Claimant is a qualified Teacher on Upper Pay Scale 3. He has the potential at least to earn in the region of £200 a day for days when he can be provided with work. There is no known impediment to him working and it is understood that he is indeed working; I note that his previous correspondence sent to the Tribunal refers to his unavailability due to his working hours and the fact he did not answer his phone but arranged for someone else to contact the Tribunal today in response to the voicemail message left for him is consistent with his being at work. Having taking into account his means I am satisfied that the sum awarded is a sum that there is a realistic prospect he would be able to meet even if it will take him some months or possibly years to pay it off.

32. I make an award of costs under Rule 76 (1) (a) in the sum of £18,000 to be paid by the Claimant within 28 days.

33. Having made my decision s under Rule 76(1)(a) it is not necessary for me to go on to consider 76(1)(b).

Employment Judge Lewis
Dated: 16 December 2021