EMPLOYMENT TRIBUNALS

Claimant: **Mr K Sangar**

Respondent: **East Village Dental Limited**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **11 October 2021**

Before: **Employment Judge Gardiner**

Representation

Claimant: In person

Respondent: Mr Chris Payne, counsel

CORRECTED JUDGMENT

The Respondent's application for costs is refused.

REASONS

1. The Claimant's claim was due to be heard at a three-day Final Hearing on 17, 18 and 19 November 2022. The claims related to the Claimant's sixteen-week period of employment from 9 December 2019 to 31 March 2020 as Practice Manager of the Respondent's dental practice. When proceedings were originally issued, the Claimant made several complaints under various Employment Tribunal jurisdictions. As a result of withdrawal or strike out, many of these original complaints were dismissed. By September 2021, only a limited number of complaints remained. These were for automatically unfair dismissal, wrongful dismissal, race discrimination and unpaid expenses and overtime.

2. On 30 September 2021, the Claimant wrote to the Tribunal indicating that he wished to unconditionally withdraw his case. By way of explanation he said this:

   "It's pointless continuing as factors at play aren't consistent with a fair hearing. I now except this. I now simply ask that as I did nothing wrong, you note that & I ask that you consider my non-employment these last 18-19

months in any final settlement you may wish to make on this case. The hearing on 11th [October] is therefore cancelled. I don't wish to hear that it was held in my absence and I was in contempt of court etc Do confirm ASAP."

3. A hearing had been scheduled for 11 October 2021 to consider the Respondent's strike out application in relation to the remaining complaints and the Respondent's application for costs. That application had been made on 15 June 2021. This Hearing was originally cancelled following the Claimant's withdrawal but reinstated at the Respondent's request to consider the matter of costs.

4. The sole issues to be decided at this Preliminary Hearing are whether to make a costs order in the Respondent's favour; and if so in what amount.

5. The Respondent had provided an electronic bundle for use at the hearing which comprised 166 pages. In addition, there were two witness statements from the Respondent's solicitor, Lianne Payne, dated 1 October 2021 and 11 October 2021 in support of the application. In support of the costs application, Mr Payne, counsel for the Respondent had provided a Written Note, setting out the Respondent's position.

6. So far as is material, Rule 76(1) of the Employment Tribunal Rules 2013 provides that a Tribunal may make a costs order, and shall consider whether to do so, where it considers that a party 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". Rule 76(2) provides that a Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

7. Rule 84 provides that "in deciding whether to make a costs order, and if so in what amount, the Tribunal may have regard to the paying party's ability to pay".

8. Essentially there are three questions for the Tribunal to determine:

   a. Does the Tribunal have jurisdiction to consider whether to make a costs order;

   b. If so, should the Tribunal exercise its discretion to make a costs order;

   c. If so, in what amount should the costs order be made.

9. Mr Payne, on behalf of the Respondent, prepared a seven-page long note explaining the basis for the costs application. He also provided copies of the following cases:

   a. Saka v Fitzroy Robinson Limited

b. *Jilley v Birmingham and Solihull Mental Health NHS Trust*

c. *Yerrakalva v Barnsley MBC*

d. *AQ Limited v Holden*

10. The following legal principles emerge from these cases:

    a. The Tribunal should consider the whole picture when deciding whether there has been unreasonable conduct in the bringing and/or conducting of the claim;

    b. The threshold test is the same whether or not a litigant was professionally represented. The fact that an individual is not legally represented can be factored into account and a Tribunal should not judge a litigant in person by the standards of a professional representative;

    c. Previous claims and judgments can be taken into account when deciding whether to exercise the discretion to make an award of costs.

11. The Respondent argues that the Claimant's behaviour has been unreasonable and vexatious. It also refers to the Claimant's non-compliance with particular Tribunal Orders. It does not argue that the Claimant's complaints had no reasonable prospect of success, or that any costs consequences should follow from the existence of deposit orders in relation to certain complaints. The Tribunal restricts itself to deciding the costs issues which have been specifically raised by the Respondent. I will start with the second of the two bases advanced by the Claimant for making a costs order.

Non-compliance with the Tribunal's orders of 9 November 2020 and 10 March 2021

12. At the Preliminary Hearing on 5 November 2020, Employment Judge Burgher had listed an Open Preliminary Hearing for 18 January 2021 to consider whether various of the Claimant's complaints should be struck out or subject to a deposit order. In preparation for this hearing, Judge Burgher had ordered the Claimant to send a Schedule of Loss to the Respondent and to the Tribunal by 7 December 2020. On 7 December 2020, the Claimant sent a long email to both the Respondent and to the Tribunal in purported compliance with this direction.

13. The Claimant was also ordered to serve medical evidence relating to the issue of disability. According to the Tribunal file, the Claimant sent a medical report which he asked should be kept private and confidential. He did this within the timescale directed by Employment Judge Burgher.

14. That is the important context in which to assess the Claimant's alleged non-compliance with the Order relating to disclosure. The Order required that "on or

before 21 December 2020 the parties shall send to the other a copy of the documents in their possession or control relevant to the preliminary issues". It appears that both parties failed to comply with this Order. The earliest communication in relation to documents in the bundle from the Respondent's solicitor is dated 6 January 2021. This attached a draft bundle index and the accompanying documents. In a subsequent email on 7 January 2020, the Respondent's solicitor asked the Claimant if there were any additional documents on which he intended to rely at the forthcoming hearing. He was asked to provide them urgently, given that "ideally the bundle needs to be agreed by tomorrow, 8th January 2020". In response, the Claimant sent two emails that evening, 7 January 2020, at 20:23 and 23:53 attaching documents for inclusion. They were copied to Ms Payne. Earlier in the day, the Claimant had replied:

> "I appreciate your urgency and politely point out that this is a joint enterprise to bring to the Tribunal for 18th Jan. I share your urgency and will proceed to assist us in this endeavour, asap (as soon as possible)."

15. The emails were received by the Tribunal. For some reason they were not received by the Respondent, even though they were apparently sent to the Respondent's email address. This may be as a result of the total size of the attachments. Certainly, there were further email exchanges on 8 January 2021 in which the Claimant wrote "I think I may have a solution to your email capacity issue. I will be in contact within the next 2 hours to hopefully conclude this matter". By 8 January 2021 the documents had arrived with the Respondent – at 17:38 Ms Payne acknowledged that she had received 6 emails this afternoon/evening with documents attached. Those had not been included in the electronic bundle for this hearing.

16. On about 8 January 2021, the focus of the email correspondence changed to the potential inadmissibility of some of the documents that the Claimant wanted included in the bundle. It is not a fair criticism to make of a litigant in person at a costs hearing to argue that he unreasonably failed to appreciate whether particular documents were covered by without prejudice privilege.

17. From my review of the electronic bundle and the Tribunal file, I do not find that there was any unreasonable conduct by the Claimant in his attitude towards or attempts to comply with the Order of Employment Judge Burgher. The Respondent was as much in breach of the Judge's disclosure Order as was the Claimant. It is rather surprising, where a costs order is sought against a litigant in person, that the Respondent's solicitor has not included all potentially relevant emails from the Claimant in the bundle.

18. The Respondent also argues that there has been non-compliance with the Orders of Judge Jones sent to the parties on 10 March 2021. These Orders were sent to the parties as part of a letter headed "Acknowledgment of Correspondence". It was not set out in the standard template for Tribunal Orders which ordinarily specify the importance of compliance and the potential consequences of non-compliance. As

such, the status of the document was not as readily apparent on its face as it should have been.

19. The focus of the Respondent's criticism is the way that the Claimant responded to the Order concerning documents. Judge Jones ordered that by 12 April 2021 the parties should exchange a list of all documents that related to the issues in the case and each party should provide a copy of the documents in their list by 19 April 2021 if requested to do so by the other party. From the documents in the Tribunal bundle, it appears that the Claimant emailed Ms Payne in purported compliance with this order on 19 April 2021 [45]. Thereafter, it seems that Ms Payne's issue with the Claimant's approach to the Order in relation to disclosure was not that the Claimant had not provided any disclosure, but rather that the Claimant had provided too much disclosure, on the basis that several documents were not relevant. It was agreed that these documents would feature in a separate section headed "disputed documents". By 11 May 2021, Ms Payne was asking the Claimant to confirm that the draft joint index was now approved. This was ahead of the timetable of required steps set out by Employment Judge Jones. Whilst Ms Payne requested further categories thereafter, the email exchanges about documents do not reveal any particular ongoing failure to comply with Judge Jones' Orders. It is quite normal that parties will request further categories of documents which need to be provided as part of the ongoing duty of disclosure.

20. I do not accept that there has been any particular failure to comply with Judge Jones' Orders or that this should be a basis for a costs order against the Claimant.

21. Insofar as the nub of this criticism appears to be the amount of time that Ms Payne spent in email correspondence with the Claimant engaging with the disclosure issue, I do not consider that the amount of time was wholly unreasonable given the breadth of the issues raised in the various claims and given that the litigant was acting in person.

22. Although the Respondent has sought to argue (at paragraph 43 of Counsel's Note) that the Claimant had produced a fabricated version of his email to the CQC, I do not consider that this is a basis for making a costs order against the Claimant. It is not possible for me at a costs hearing to make any findings about the authenticity of the document. In those circumstances, there is no finding that a key document was fabricated, and therefore no relevant finding that could impact on whether or not to make a costs order.

Has the Claimant's conduct been unreasonable and/or vexatious and/or abusive?

23. The Respondent relies on the manner which the Claimant has chosen to conduct his communications with the Respondent and with the Tribunal. It argues that both the content and the volume of the emails was unreasonable and/or vexatious and/or abusive and/or disruptive. As a result, it is argued, the Respondent's attention was diverted away from the preparation of the case in having to read lengthy emails which served no legitimate purpose.

24. I have read the correspondence which is relied upon by the Respondent in the electronic bundle of documents prepared for this hearing in the bookmarked section “Claimant’s unreasonable and vexatious conduct”, starting at page 56. The Claimant was fully entitled to oppose the Respondent’s application for an extension of time to present its Response. It appears from page 57 that both parties were commenting on the strength of the other’s case in correspondence. It is not surprising if a litigant in person should choose to express a view about the Respondent’s Response, particularly in circumstances where the Respondent’s position was that the Claimant’s complaints should be struck out as having no reasonable prospect of success. It appears that by 14 January 2021, the Respondent’s solicitor was complaining that the Claimant was in breach of tribunal orders and threatening costs (see page 59). In those circumstances, it is unsurprising that the Claimant reacted against those allegations by making allegations of his own. On 7 and 8 January 2021 the Respondent sent the Claimant several emails, seemingly prompting the Claimant to respond with lengthy defences of his conduct and criticising the manner in which Ms Payne was corresponding with him.

25. By that stage there appears to have been a breakdown between both sides as sometimes occurs in litigation. The Claimant did start to express himself in language that was unreasonable and abusive. He made a complaint to the Legal Ombudsman about Ms Payne. It would not be right to take into account correspondence with the Legal Ombudsman in considering whether to make a costs order against the Claimant. Restricting myself to the correspondence in the course of these proceedings, there are the following examples of abusive and unreasonable correspondence, although this is not an exhaustive list:

    a. “The Respondents are wilfully trying to mislead the evidence trail” (email of 14 January 2021, page 11);

    b. “I see it’s “Angry Friday” for you … again”; “Your conduct as it’s beyond a joke now and is unacceptable .. I will be making contact with your trade regulator unless you apologize asap” (Email of 15 January 2021, page 65)

    c. “If you attempt, for a second time, to amend /control /remove /direct /or otherwise as you have, I will direct the court a motion against you - and the case will ultimately be awarded against you. Why are you so afraid of the evidence??” (Email of 7 May 2021, page 66);

    d. “I am staggered that a). You have been allowed to get away with your Evidence exclusion and attempting to do so again is breathtaking arrogance b). It ends now.” (Email of 7 May 2021, page 68);

    e. “Ms Payne is not judge, jury and executioner - yet !” (page 71)

    f. “Let me remind you that Ms Payne has sought to mislead your Court and my Tribunal by excluding items as she sees fit - well, good job this isn't a Murder

inquiry or else her client would be Scot-Free ... (they did murder my career though!) .....” (page 74)

g. “I think she has a serious ethical problem with her conduct which is not professional. I have taken a lot of nonsense from her and been extra patient with her but she needs re-training and an alternative career, perhaps. THIS IS UNACCEPTABLE. HER conduct and lack of basic professionalism is shocking/distressing!!!!” (page 74)

h. “I cannot take another word of your false economy of truth. Its all rather jolly considering the previous Tone. I don't care for you and your conduct” (page 84);

i. “Let's see if your tiny, sick mind can accept that or if you wish to continue as you have been these last few months (or is it years already).” (page 85);

j. “Let's have a clean fight in Court in November. Shame you won't actually be there - maybe you might have fully qualified by that time to do so? I sincerely hope so. Have a good life and hope to never hear or see you again ......” (page 85);

k. “IF you retract what you wrote to the Court, yesterday and apologise, unreservedly - ! might reconsider my stance with regards to Legal Ombudsman and the intervention of the Police in your harassment of me. I remind you that I believe you would never treat a white person in this way and therefore you are obsessed with me and that may or may not be because I am non-white - but I cannot imagine you treating a White male or female in this way as you have, I. I cannot. Its shameful what you have inflicted upon me. When someone tells you to stop, you must stop. And yet - you continue. Again and again.” (page 87)

l. “Judge, how far can a solicitor go before it IS harassment/Bullying please? Does the Claimant have to commit suicide first?” (page 91)

m. “You must ACT immediately to Sanction Ms Payne by an Order of Contempt of Court for subverting the Evidence I submitted and failure to respond to your Direct Orders. Else - Please find me another Judge as clearly I will not accept this conduct from Ms Payne nor ANY failure to keep my case to your Orders” (page 94);

n. “Ms Payne should suffer professional punishment for Tampering with evidence provided/exclusion of evidence/pro-offering advice/coercion of said evidence - to which she has now finally admitted being guilty of, on 11/8/21 for 1st time” (page 108);

26. This prolonged unreasonable and abusive correspondence from the Claimant to the Respondent does engage the Tribunal’s jurisdiction to make a costs order. It is

also true that the Claimant has expressed himself in intemperate and unreasonable terms in the way he has communicated with the Tribunal, and specifically his criticisms of Employment Judge Burgher. The issue is whether it would be appropriate to exercise the discretion to make a costs order in the present case.

Factors relevant to the exercise of the Tribunal's discretion

27. I bear in mind the following factors which are potentially relevant to the exercise of the Tribunal's discretion:

    a. On 1 March 2019, the Claimant had been ordered to pay costs of £500 at the conclusion of his claim against his former employer on the basis of his unreasonable conduct in pursuing his claim. He was therefore well aware of the Tribunal's jurisdiction to make a costs order in the current claim if his conduct was assessed to have been unreasonable;

    b. On several occasions, the Claimant was encouraged to seek legal advice – either by the Tribunal (EJ Burgher in the record of the hearing on 5 November 2020) [22] or by the Respondent (on the specific topic of the admissibility of settlement communications [40] or the preparation of a Schedule of Loss [42]). Had the Claimant been able to obtain legal advice from a pro bono organisation (such as the Free Representative Unit or the Bar Pro Bono Unit), he would have had the opportunity to better assess the merits of the various claims he was making, and a sensible stance to take in relation to procedural issues. However, I note that it is often difficult to obtain free legal advice;

    c. The Respondent's solicitor warned the Claimant in correspondence that she "continued to retain a detailed record of your abusive conduct in support of the Respondent's costs application against you in due course";

28. However, I have decided on balance that it would not be appropriate to exercise the discretion to make a costs order for the following reasons:

    a. The only potential basis on which the Tribunal has jurisdiction to make a costs order concerns the language that the Claimant chosen to use to refer to the Respondent's solicitor and the manner of his criticisms of Judge Burgher. Whilst this choice of language is to be deprecated, the language in and of itself has not put the Respondent to significant additional expense;

    b. Since the termination of the Claimant's employment with the Respondent, 18 months ago, he has not been in work, and he is currently unemployed. As a result, he does not have a regular income stream apart from Universal Credit payments. He has relied on his savings which he told the Tribunal had now been exhausted. He is currently in debt, paying back between £50 to £100 a month depending on what he can afford. Therefore, he would be unable to pay anything but a very small proportion of the total costs claimed by the

Respondent in this application, and even then over a lengthy period of time. This could have been anticipated by the Respondent in advance of pursuing the application;

c. The Claimant has chosen to withdraw all his complaints. This decision has saved the Respondent the costs of attending a strike out hearing in October 2021, and potentially the costs of attending the Final Hearing scheduled to take place in November 2021;

d. The Respondent’s solicitor has not disclosed to the Tribunal all relevant documents in the contents of the electronic bundle. She has not included emails from the Claimant disclosing documents, nor has she accepted that the Respondent itself was in breach of the order of Employment Judge Burgher requiring disclosure by 21 December 2021.

29. Taking all these matters into account, I have decided to reject the Respondent’s costs application.

Employment Judge Gardiner
Date: 16 December 2021