EMPLOYMENT TRIBUNALS

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals
"The substantive hearing in this case was a remote hearing which not objected to by the parties. The form of remote hearing was video. A face to face hearing was not held because it was not practicable and no-one requested the same. The costs application has been determined without a hearing, no request for an oral hearing having been made by the parties."

Claimant: Mr R Nagendra

Respondent: Enimed Ltd

Heard at: Watford **On:** 10 September 2021 (in chambers)

Before: Employment Judge George

Representation
Claimant: written representations only
Respondent: written representations only

JUDGMENT

1. The claimant is to pay to the respondent £1740 in respect of their legal costs of defending these claims.

REASONS

Background

1. By an oral judgement delivered with reasons on the 3 February 2021, I ordered the respondent to pay to the claimant the sum of £59.50 in respect of his claim of unauthorised deduction from wages. I dismissed the claim of breach of contract in respect of unpaid notice pay. Reasons having been given orally during the remote hearing, which was conducted by CVP, the written judgement without reasons were sent to the parties on 1 March 2021. No written reasons were requested.

2. The successful elements of the claim were in respect of a failure to pay, in full, holiday pay accrued and not taken on termination of employment which was due by reason of reg.14 of the Working Time Regulations 1998 and a failure to pay the claimant for 3.5 hours of work carried out on 25 June 2019.

3. Since written reasons were not requested, it is necessary to set out brief details of the reasons for my judgment in February 2021. The unsuccessful element of the claim concerned the claimant's allegation that his probationary period has been extended because, first, he had not been told in writing that it was unsuccessful and, secondly, the written notice of termination of employment was received outside the expiry of his probationary period and therefore took effect at a time when he was entitled to 3 months' notice.

4. However it was common ground that the claimant was expressly informed by Niral Patel, a director of the respondent, on 13 September 2019 that his employment would be terminated (see paragraph 7 of the claimant's witness statement for the final hearing). My finding was that it was agreed at that meeting on 13 September 2019 that the claimant could work for a longer period of notice than it was contractually necessary for the respondent to give and an agreed termination date of 27 September 2019 was set. My finding was that, on 13 September 2019, the claimant was told that the respondent was not confirming his employment, following the end of his initial three months' probation.

5. An email confirming this conversation was sent by the respondent to the claimant (at his work email address) on 16 September 2019 (see page 61 of the bundle of documents for the full merits hearing). It was alleged by the respondent that the claimant had avoided receiving that email. The claimant's case was that he did not read this email until after the end of the three months' probation period on the 17 September 2019 and therefore had not received termination of employment within the probationary period. Therefore, he argued, it should be presumed that the probation was successful. In this argument he relied upon the case of Przybylska v Modus Telecom Limited (UKEAT/0566/06). However I concluded that since he had received express oral notification of the termination of employment on 13 September 2019 the circumstances were completely different in the present case to those in Przybylska.

6. Although it was not therefore necessary for me to make a finding about when the claimant saw the email of 16 September or whether he had avoided receiving the written notification, I did conclude that the claimant probably did seek to avoid receiving the email of 16 September so that he could say that he hadn't received it until 18 September 2019. He had been absent from work on 17 September 2019 but gave differing accounts at different times of his reason for that absence. For that reason I rejected the claimant's explanation for his absence from work on 17 September. My conclusion was that on no basis could the claimant have thought that he had been successful in his probation. Not only was that made clear on 13 September but I accepted the respondent's evidence that there was a previous meeting on 2 September when he was warned that he was not meeting the standard of work required of him.

7. That is what I recorded in my notes from which my oral judgment was given. To judge by the respondent's application, they recorded that I concluded that the claimant had in fact received the email on either 16 or 17 September 2019 and argue that it was unreasonable conduct for him to deliberately seek to mislead the respondent and the Tribunal about the date on which he received the written notification of termination of employment in order to make his notice pay claim more attractive.

8. In my view, my findings at the February final hearing amount to the claimant

seeking to avoid receiving the email of 16 September 2019 so that he could argue that the probationary period had been extended and that he was entitled to notice period of three months, rather than of one week, when he had actual knowledge that his employment was ending on the agreed date of 27 September 2019. By this token the claimant was seeking to argue that his probation had extended when it was clear from his own evidence that he had actual knowledge that his probation had been unsuccessful.

The Application

9. On 15 February 2021, the respondent applied for an order under rule 76 of the Employment Tribunal Rules of Procedure 2013 that the claimant pay their costs of defending the proceedings. The claimant defended the application by a six page response sent to the tribunal on 11 March 2021.

10. The application and response were referred to me and, on 18 May 2021, I directed that the respondent provide certain particulars of their schedule of costs and the claimant provide a response to a particular allegation in the application which he had not addressed in his response. I also made provision, should the claimant wish me to take into account his ability to pay any costs order,he should serve on the respondent and the tribunal a schedule of income and outgoings, assets and liabilities. This order was sent to the parties on [DATE].

11. The respondent provided the required particulars on 23 June 2021 and the claimant provided a further defense and schedule of income and expenditure on 24 June 2021. No request was made for an oral hearing and I have therefore decided the application on the papers on the basis of the above documentation. I also had available the bundle of documents for the original hearing, witness statements prepared on behalf of the claimant, Mr N Patel and Mr V Patel as well as my notes of the evidence given on 3 February 2021.

12. The basis of the application was twofold: that the claim for notice pay had no reasonable prospects of success and alternatively that the claimant had acted unreasonably in his conduct of the proceedings. The respondent relied on an offer expressed to be without prejudice save as to costs which was made by email on 20 August 2020. By this they offered to pay the claimant the sum of £175.92 in full and final settlement of both claims, subject to deduction for tax and national insurance.

13. Additionally, in the email the respondent's representatives set out their understanding that the issues for the tribunal to decide at the final hearing would be:

    a. On what date did your probationary period have ended (sic)?

    b. Were you notified that you had not successfully passed your probationary period? If so on what date?

    c. Did you work 3.5 hours on 25 June 2019?

    d. Are you owed £117.99 for unpaid holiday pay?

14. The respondent's case on the key factual matter which was determinative of the second question was set out in the email of 20 August 2020 as being that the claimant had been notified verbally on 13 September 2019 that he

had not passed his probationary period. The representatives went on to refer to the overriding objective which includes to deal with the case in a way which is proportionate to the complexity and importance of the issues and to save expense and argued that it was disproportionate to allocate resources to the present case. The respondent's representatives drew attention to the Tribunal's power to award costs and said that, while they were willing to settle for the above sum on the basis that each side bore their own costs, were the claimant to proceed and be unsuccessful in securing an award in excess of £175.92 the respondent would rely upon the offer in support of an application for an order of the kind which they presently seek. The offer was open for 5 days.

15. The respondent argues that the claimant's claim for notice pay had no reasonable prospects of success because his pleaded case (see page 25) was that his employment was terminated during the meeting on 13 September 2019 and therefore claim for notice pay had no basis in law, dependent as it was upon the argument that his employment continued beyond the three month probationary period. This, they argued, was made clear to the claimant by the communication of 20 August 2020.

16. The respondent further argues that the attempt deliberately to mislead the Tribunal about the basis of his claim to be entitled to three months' notice pay was unreasonable conduct. They initially claimed costs of £1,740.00 excluding VAT and there is no claim for the VAT. They explain in the particularized schedule of costs that this was based upon an estimate of 29 hours' work but, in compiling the particularized schedule, explained that they had underestimated the work done and had in fact carried out 34 hours. The schedule also separates out, where possible, work carried out in respect of Case No: 3302370/2020. It was by that claim, the second in time to be presented, that the claimant complained of breach of contract in respect of the alleged failure to pay three months' pay in lieu of notice of termination of employment.

17. In his response, the claimant points out that the claim of unauthorised deduction from wages was well-founded. He points out that the first ET1 claim form, presented on 6 February 2020, was for unpaid wages and holiday pay and that was defended by the respondent. However, they had had to accept at the final hearing that they should pay unpaid wages "after viewing evidence of the claimant's travel to work and email sent from work".

18. In relation to the claim for long notice pay, in his defence to the costs application he repeats the arguments I rejected at the final hearing. He further points out that it was only on 10 August 2020 that the respondent's representatives were appointed to represent them in Case Number 3302322/2020, but that it is only costs referable to Case Number 3302370/2020 which should be under consideration in the present application since it is that claim which was about the notice pay and which failed.

19. He asserts that the respondent and respondent's representative failed to comply with the Case Management orders sent by the Tribunal on 13 May 2020 until after he had made a request for the Tribunal to take action against them. He further argues that the respondent should not be reimbursed for the full amount of the time they claimed to have been spent since it is excessive (see the full arguments in paragraph 36 of the June 2021 defence to the costs application). He argues that false evidence was given by the respondent when they prepared a witness statement to the effect that he did not

work on the hours for which I ordered that he should be paid. The implication from that is that he argues that the respondent should not be paid for their legal fees where those were incurred preparing documents which have been found to contain inaccuracies or untruths. He argues that, by their refusal to communicate effectively with him, the respondent has incurred legal costs "due to their own default".

20. In his expanded defence of 24 June 2021 (paragraph 39) the claimant says that he does not accept that he was aware that the notice pay claim had no reasonable prospects of success and the respondent's unreasonable behaviour of not responding or communicating led him to believe that he had such reasonable prospects. "This is supported by the case of [Przybylska] which established the principle that in the absence of express communication to the contrary, that an employee is deemed to complete their probationary period (sic)". He had believed there were reasonable prospects of success for his notice pay claim and therefore had not accepted the offer.

The Law

21. The power to order that one party pay the legal costs of the other is found in rule 76 of the Employment Tribunal Rules of Procedure 2013 (hereafter referred to as the Rules of Procedure). So far as is relevant, rule 76 reads as follows:

"(1) 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; or

(c) a hearing has been postponed or adjourned on the application of a party made less than seven days before the date on which the relevant hearing begins.

(2) A tribunal may also make such an order where the party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of party."

22. By rule 78 (1), the Tribunal may order the paying party to pay a specified amount not exceeding £20,000 or the whole or a specified part of the costs of the receiving party, to be determined by way of detailed assessment. In the present case, the respondent applies for an order that the claimant pay their costs in a specified amount not exceeding £20,000.

23. There are therefore two stages to determining a costs application. First, the Tribunal must consider whether the grounds for making a costs order in rule 76(1) exist and secondly, if they do, then the Tribunal must consider whether or not to make one. In deciding whether or not to make a costs order, and if so, in what amount, the Tribunal may have regard to the paying party's ability to pay: rule 84 Rules of Procedure 2013. The Tribunal has an open discretion whether or not to take means into account but if it declines to do so, having been asked to consider the paying party's financial circumstances, it should

explain its decision: Herry v Dudley MBC [2017] I.C.R. 610 EAT.

24. When deciding whether or not the litigant's conduct of the proceedings has been unreasonable, the words of the rule are the starting point, remembering that, in the employment tribunal, a costs award is the exception, rather than the rule. As Mummery LJ said in Barnsley MBC v Yerrakalva [2012] I.R.L.R. 78 CA at para.41,

> "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. The main thrust of the passages cited above [from Mummery LJ's judgment in McPherson v BNP Paribas [2004] EWCA Civ 586] was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the ET had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances."

25. Further guidance about the correct approach to whether a litigant in person has acted vexatiously, abusively, disruptively or otherwise unreasonably in the conduct of the litigation is found in AQ plc v Holden [2012] IRLR 648,

> "The threshold tests in rule 40(3) are the same whether a litigant is or is not professionally represented. The application of those tests may, however, must take into account whether a litigant is professionally represented. A tribunal cannot and should not judge a litigant in person by the standards of a professional representative. Lay people are entitled to represent themselves in tribunals; and, since legal aid is not available and they will not usually recover costs if they are successful, it is inevitable that many lay people will represent themselves. Justice requires that tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life. As Mr Davies submitted, lay people are likely to lack the objectivity and knowledge of law and practice brought by a professional legal adviser. Tribunals must bear this in mind when assessing the threshold tests in [what is now rule 76(1)]. Further, even if the threshold tests for an order for 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.
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> This is not to say 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. But the tribunal was entitled to take into account that Mr Holden represented himself; we see no error in its doing so; and we do not accept that it misdirected itself in any way."

26. There is no general principle that a lie, untruth or false allegation constitutes unreasonable conduct in presenting the claim. It is necessary to examine the

context and to look at the nature, gravity and effect of the lie in determining the unreasonableness of the alleged conduct: HCA International Ltd v May-Bheemal (EAT/0477/10) approved by the Court of Appeal in Arrowsmith v Nottingham Trent University [2012] ICR 159, CA.

Conclusion on the application

27. In the present case the claimant presented two claims. He was successful on the first but unsuccessful on the second. The first claim was for the comparatively small sum of £169.16 and, in the event, he was awarded £59.50. I consider that that claim had reasonable prospects of success.

28. I accept the respondent's argument that the claim for notice pay had no reasonable prospects of success. It was based upon a contrivance. The claimant knew at all times from 13 September 2019 that the respondent considered that he had not performed in a way that justified them confirming him in post and they had told him that they were terminating his employment. Although the contract provided for that to be given in writing, the oral termination was effective to end it, in my view.

29. I accept the respondent's argument that it was unreasonable conduct of the proceedings for the claimant to pursue a claim that depended upon this contrivance. I found that he had probably sought to avoid receiving of termination of employment and I found his evidence on that point to lack credibility. I accept the argument that, in this case, it was unreasonable conduct to pursue a claim that depended upon an argument that his employment had extended beyond the probationary period when he knew at all times, and indeed it was his pleaded case, that he was told on 13 September 2019 that his employment would end. The consequence of him running this contrived argument was that the claim changed from one with a relatively modest potential value to one with a potential value of three months' salary; from one which was capable of resolution between the parties to one which was not.

30. I also accept that the weakness of the case was explained in the email of 20 August 2020 and the choice open to the claimant of settling the stronger claims was made clear. In the present circumstances I consider that it was unreasonable conduct for him to continue to pursue the notice pay claim after receipt of that without prejudice save as to costs letter.

31. I therefore go on to consider whether to make a costs order, and if so, in what amount. I can see from the costs schedule that a significant amount of additional work was incurred after the expiry of the without prejudice save as to costs letter. The respondent has included in that two hours for drafting the costs application and submitting it to the Tribunal which seems to me to be slightly more than is justified. Other than that the time spent does not appear to me to be unreasonable.

32. It is not necessary for me to identify precisely which costs were incurred as a result of which unreasonable behaviour. On the one hand the claim for notice pay had no reasonable prospects of success and therefore one might consider that an argument runs that the respondent should not have been put to any expense of defending it. It was the first claim in respect of which the legal representatives were instructed and it appears that all of

the work done prior to the cost warning was done on that second claim. On the other hand it is right that the respondent defended a claim of some monetary value that ultimately they conceded at least in part and the claimant was successful in that claim. As the claimant says, they continued to claim that he had not worked particular hours when their evidence did not support that claim and some of the time at final hearing was concerned with that. On the other hand, they took the proportionate approach to that part of the litigation by seeking to compromise it.

33. The claimant, whose correspondence address so far as he has told the Tribunal is in Harrow, has submitted schedules of income and expenditure which show income from a property in the U.K. projected to generate income between May 2021 and April 2022 of between £600.10 and £780.10 per month. The property is valued at £745,245.54 with a mortgage of £590,210 and he has a small cash balance in his bank account.

34. It appears from the third page of the financial information supplied, all of which contains a statement of truth, that the claimant lives in Australia and has an income there of Aus$ 4,216.00 per month (from June 2021). To judge by the salary slip he has provided, he was at the time of preparing the schedule, anticipating a rise in income from employment. He rents a property and lets a property in his name upon which there are three loans secured. Overall, he has budgeted that, after essential outgoings, he will have an excess of income over expenditure of Aus$350.28. It is not clear to me whether he has included in that repayments towards a Aus$9,306.30 Mastercard liability.

35. It is therefore clear that the claimant has the means to satisfy a costs order of the size sought even if it is likely that payment terms will need to be agreed with the respondent.

36. I take into account the evidence that the bulk of the work carried out by the respondent's representatives was done in respect of the notice pay claim which had no reasonable prospects of success from the outset and which was based upon, at best, a highly technical argument that ran contrary to what the claimant knew had happened on 13 September 2019. In those circumstances I have decided that, despite the fact that the claimant was also running a meritorious separate claim, it is just to order the claimant to pay a contribution towards the legal costs of the respondent.

37. Once one reaches the period of time after expiry of the settlement offer and, in particular, the immediate run-up to the final hearing in reality much of the preparation is done on the consolidated cases in the round. It is not practicable to separate out amounts incurred in respect of the notice pay claim. It is the part of the claim that required more consideration at the final hearing and consideration of the law relied on by the claimant.

38. I have considered the schedule with care and accept that, by and large, the periods of time claimed seem reasonable. Similarly, the claimed rate of £60 per hour is a reasonable one, taking into account the seniority of the individuals concerned. I disallow four hours work which is the approximate time specified in the second part of the schedule to have been spent preparing Case Number 3302322/2020 and I disallow one hour of the time claimed for the cost of preparing the costs application itself.

39. I therefore ordered the claimant to pay 29 hours at £60 per hour or £1,740 towards the legal expenses incurred by the respondent in defending these claims.

I confirm that this is my Costs Judgment and Reasons in the case of Case No: 3302322/2020 and 3302370/2020 and that I have signed the Judgment by electronic signature.

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Employment Judge George

Date 29 September 2021

JUDGMENT SENT TO THE PARTIES ON

...22nd October 2021.....

...THY.....
FOR THE TRIBUNAL OFFICE

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