EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**v**	**RESPONDENT**
Mr B Lingard		(1) Sussex Partnership NHS Foundation Trust

Heard at: London South Employment Tribunal **On:** 09 March 2022

Before: Employment Judge Hyams-Parish
Members:

Representation
For the Claimant: In person
For the Respondent: Mr G Burke, Counsel.

RESERVED JUDGMENT ON COSTS

The claimant is ordered to pay a contribution to the respondent's costs in the sum of £10,000.

REASONS

A. APPLICATION AND HISTORY

1. This is an application by the respondent in respect of its costs for defending proceedings brought by the claimant under the above case number.

2. It is necessary to explain a little about the background to this application.

3. By a claim form presented to the Bristol Employment Tribunal on 26 December 2019 ("claim 1") the claimant brought claims of whistleblowing detriment and disability discrimination.

4. On 4 February 2020, the respondent filed its response to claim 1 and requested that the matter should be listed for a preliminary hearing to consider an application to strike out the whistleblowing claims, or in the alternative, a deposit order.

5. On 9 February 2020, the claimant emailed the respondent's solicitor, Ms Daw, to say [sic]:

> **After seeking advice over the weekend, I can confirm I wish to withdraw my employment tribunal in its entirety. It would seem your view is correct that this case could be [struck] out on technicality. However as you properly aware its not down to the strength of the case. As you are objection to the case, I'm advised I'm still in time to raise these concerns and will get a solicitor to do my F1 form if no settlement can be reach through early resolution.**

6. On 10 February 2020, Ms Daw wrote to the Bristol Employment Tribunal forwarding the claimant's email of 9 February 2020 and inviting the Employment Tribunal to dismiss the claim upon the claimant's withdrawal. Ms Daw added in her email that the claimant had been copied in on her email, advising that he should set out his objections in writing as soon as possible if he objected to the dismissal application. Ms Daw also confirmed that the claimant should seek legal advice if he was unclear about the matter.

7. In response to Ms Daw's email, the claimant emailed the Employment Tribunal on 10 February 2020 stating:

> ***I can confirm that I believe the solicitor Catherine Daw was correct in her assumption that this case on the balance of [probability] would be struck out. However this is due to technical reasons with the claim rather than substance. Consequently I'm happy to confirm that I wish to withdraw the tribunal claim I wrote on 26th December 2019. As time allows a new case has [been set] out.***

8. On 12 February 2020, an Employment Tribunal clerk acknowledged receipt of the claimant's notice that he had withdrawn his claim, and confirmed that the file would be retained until February 2021 and then destroyed. It stated that a dismissal judgment would follow in due course.

9. Two weeks later on 26 February 2020, a dismissal judgment was signed by Employment Judge Midgeley.

10. On 9 March 2020, the claimant presented a further claim to the Employment Tribunal ("claim 2").

11. On 3 and 4 April 2021, claim 2 was listed before Employment Judge Richardson to consider whether it should be struck out on the grounds of *res judicata* because it was a repeat of claim 1. As a result of that hearing, claim 2 was struck out for the above reason.

12. The claimant sought a reconsideration of Employment Judge Richardson's decision to strike out claim 2 on 8 March 2021. This application was refused on 29 March 2021 as there was no reasonable prospect of the judgment being varied or revoked.

13. On 10 May 2021, the claimant applied for a reconsideration of Employment Judge Midgeley's dismissal judgment on claim 1. He also lodged an appeal in the Employment Appeal Tribunal ("EAT") against Employment Judge Richardson's decision on claim 2.

14. On 26 January 2022, the claimant withdrew his appeal to the EAT, which was then dismissed upon withdrawal.

15. The claimant informed me at the costs hearing that the previous day he had submitted a renewed application for reconsideration of claim 2.

16. The application before me is an application by the respondent for an order that the claimant pay a contribution to its costs. I say contribution because the respondent seeks £20,000 in unassessed costs (£20,000 being the capped amount). The respondent's actual costs of defending this claim total £90,048.50 excluding VAT.

17. The respondent brings its application under Rule 76(1)(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013/1237 ("ET Rules") due to the unreasonable manner in which the claimant has conducted the proceedings.

B. THE HEARING

18. This hearing was conducted using CVP with the consent of both parties. Due to technical difficulties, the claimant participated by telephone, which he was content to do.

19. Prior to the hearing, the claimant had indicated that he believed the costs hearing should be postponed due to there being an outstanding application for further reconsideration on claim 2.

20. I therefore heard the claimant's application to postpone today's hearing as a preliminary issue.

21. The claimant was asked about the basis of his application for further reconsideration. As well as making serious accusations against solicitors and Counsel representing the respondent, which formed part of his grounds for

reconsideration, the claimant tended to reargue the very same points that had been aired before Employment Judge Richardson.

22. I was surprised that the claimant had left it until the day before the costs hearing to present his application for further reconsideration, given that he could have presented his application well before then.

23. The respondent was opposed to any postponement. Mr Burke submitted that the application for further reconsideration raised no new matters. It was in any event almost a year out of time. The claimant had exhausted all avenues of appeal, the EAT appeal having been withdrawn, and the application for costs should proceed.

24. Before reaching my decision on the postponement application I read some of the papers on file, including the strike out judgment, which also set out in detail the submissions made by both parties. I also considered carefully the overriding objective contained in the ET Rules.

25. I could see no merit at all in postponing the costs hearing and did not consider that a postponement was in accordance with the overriding objective. I could not see any immediate merit in the application for further reconsideration. I agreed that such an application would be considerably out of time. Further delay would increase costs for the respondent and given the current listing delays, it could be many months, indeed more than a year, before it was relisted. I therefore refused the application to postpone this hearing.

26. I asked the claimant whether he was inviting me to take into account his means when deciding whether to make an order for costs, and if so, how much he should pay. He said that he did. He therefore gave evidence at the hearing under oath.

27. The solicitor for the respondent, Ms Daw, also gave evidence and was questioned by the claimant.

28. Both parties provided their own document bundles for the hearing.

C. FINDINGS OF FACT

29. The claimant is a registered mental health nurse. He has been working through an agency but for the past six weeks has not worked because he has been unwell. He has the capacity to earn a significant amount of money and told Employment Judge Midgley at a previous hearing that he was earning £6,000 a month. He lives with his girlfriend who currently supports him and pays all of the outgoings. He has one child and his partner has three children. He has no savings or assets. When asked what he did when he needed money, he said that he received some money from his father.

30. The content of Ms Daw's witness statement was not challenged in cross examination. I therefore accept that evidence as fact. She said that throughout the conduct of this case the claimant engaged in extensive email correspondence. Her firm had received in excess of 12,000 emails from the claimant during the life of the claim and beyond. On occasions the claimant sent emails in quick succession, sometimes only minutes apart, some containing inappropriate content about the respondent, Ms Daws and Mr Burke. Some of the emails contained jokes and others song lyrics, with the words changed to comment on the respondent, solicitors and counsel.

31. The claimant was asked on a number of occasions to reduce the level of his correspondence, to be respectful, not to send draft documents, not to send correspondence relating to other unrelated organisations about whom the claimant wished to complain, not to contact the respondent directly and not to email the respondent's counsel. The claimant was warned that the respondent did not consider the level of correspondence to be reasonable and he was warned that their position on costs would be reserved. The level of correspondence affected Ms Daw's ability to work.

32. As well as excessive numbers of emails, the content of them has been offensive and inappropriate. Ms Daw gave the following extracts from emails by way of examples in her evidence [sic]:

- Email of 5 May 2020 "show some bloody humility" and "Disgrace – Get lost"
- Email of 21 May 2020 "You and your client are twisted in the head" and "your client is sick"
- Email of 25 June 2020 "Your client is lowest of low"
- Email of 25 June 2020 "sam allen is not a leader she is a danger to the public", "she allows her directors to manipulat and lie with evidence" and "Sam Allen is a veil evil woman"
- Email of 28 July 2020 "Typical solicitor thinks thru a step above normal people"
- Email of 29 July 2020 "The conduct of Catherine daw and your client is utterly disgusting"
- Email of 29 July 2020 "She is scum"
- Email of 2 September 2020 "Trouble there is a huge flaw in their bull shit"
- Email of 25 January 2021 "Sam Allen is utterly corrupt and dishonest"
- Email of 25 January 2021 "bachers mafia"…"trying to manipulate the hearing"
- Email of 26 January 2021 Claire Webster "appalling abuser"…"absolute disgrace"
- Email of 26 January 2021 "Brachers the lowest of all solicitors. Morally bankrupt…Abusing with every nasty desperate trick"
- Email of 26 January 2021 "mafia boards"
- Email of 26 January 2021 "sam allen leads discriminatory mafia"…"sam allen mafiasto"

- Email of 26 January 2021 “change pf respondent name lingad v mafia”
- Email of 26 January 2021 “mafia board”…”I stand by it”
- Email of 26 January 2021 “i stand by these comments, sam allen is mafia leader…bachers are abusers”…”covering up for sure”
- Email of 27 January 2021 “mafia boards and solicitors”
- Email of 4 March 2021 “gutter trash pleadings”
- Email of 10 March 2021 “Catherine daw mafia solicitor stealing from the public purse”
- Email of 20 January 2022 “Boring”
- Email of 20 January 2022 “in my eyes you are the devil defending these monsters”
- Email of 20 January “I write emails as I hate you and what u did”
- Email of 21 January 2022 “What I’mSaying is your personal behaviour as a solicitor has lots to do with the pure hatred from me”
- Email of 22 February 2022 “Stop chatting nonsense love”
- Email of 22 February 2022 “Ur not very good. Ur not very good, ur not very good”…”Another day another daw dirty scam”
- Email of 22 February 2022 “Cheat, cheat, cheat”
- Email of 22 February 2022 “I told mr burke to block me! Another crook”
- Email of 23 February 2022 “Daw is such a dishonest crook”
- Email of 23 February 2022 “U lot are a bunch of white collar con artists mate”
- Email of 25 February 2022 “It’s immotive for me. I have pure hatred for Burke.”
- Email of 25 February 2022 “Pair of you are sick in the head”
- Email of 26 February 2022 “lingard moves in for kill”
- Email of 26 February 2022 “I Uber aggressive”
- Email of 26 February “She is lying again. Catherine daw – she’s lying again”
- Email of 27 February 2022 “Next how you vaxatious to defend to kill u”
- Email of 1 March 2022 “Every offensive remark about Burke is meant. Corrupt piece of dirt”
- Email of 1 March 2022 “Lingard ups Burke professional assault further as preparation intensifies”
- Email of 1 March 2022 “We can damage you further”
- Email of 2 March 2022 “U have deserved every single email”
- Email of 2 March 2022 “Brachers will focus on emails – we will explain the hatred”

33. Some of the claimant’s email messages were copied to third parties.

34. They indicated his enjoyment in the process and reference is made to emails in which the claimant said: “*This is kind of fun” and “U’m going in for the kill to win tribunal I doing it for the t[h]rill*”.

35. The claimant was warned about his behaviour by Employment Judge Richardson at the hearing on 3 and 4 April 2021, yet took no notice of this and continued sending the same abusive emails.

36. In addition to emails, the claimant resorted to leaving abusive voicemail messages.

37. In his defence to Ms Daw's evidence, whilst not challenging the accuracy of it, the claimant referred to PTSD caused by childhood trauma and abuse. He referred me to documents supporting this diagnosis. There is evidence that he had become pre-occupied, perhaps even obsessed, with "*work and past events*". There is no doubt that the claimant was also angry about what he perceives happened to him in the workplace and which was the subject matter of his claims.

D. LAW

38. The Employment Tribunal's powers to make an award of costs are set out in the ET Rules. Any application for costs must be made pursuant to those rules. The relevant rules are set out below:

> ***74(1) "Costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purposes of or in connection with attendance at a tribunal hearing).***
>
> ***76(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) had been conducted; or***
>
> ***(b) any claim or response had no reasonable prospect of success.***
>
> ***(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.***
>
> ***……***
>
> ***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 ability to pay.***

39. As the Court of Appeal reiterated in ***Yerrakalva v Barnsley Metropolitan Borough Council anor 2012 ICR 420, CA,*** costs in the Employment Tribunal are still the exception rather than the rule. It commented that the tribunal's power to order costs is more sparingly exercised and is more circumscribed than that of the ordinary courts, where the general rule is that costs follow the event and the unsuccessful litigant normally has to foot the legal bill for the litigation.

40. A litigant in person should not be judged by the same standards as a professional representative, as lay people may lack the objectivity of law and practice brought to bear by a professional adviser and this is a relevant factor that should be considered by the Tribunal.

41. A tribunal is not obliged by Rule 84 to have regard to ability to pay — it is merely permitted to do so. However, if a tribunal decides not to take into account a party's ability to pay after having been asked to do so, it should say why. If it does decide to take into account ability to pay, it should set out its findings on the matter, say what impact these have had on its decision whether to award costs or on the amount of costs, and explain why. While lengthy reasons are not required, a succinct statement of how the tribunal has dealt with the matter and why it has done so is generally essential.

42. There is no requirement that the costs awarded must be found to have been caused by or attributable to any unreasonable conduct found, although causation is not irrelevant. What is required is for the Tribunal to look at the whole picture of what happened in the case and to identify the conduct; what was unreasonable about the conduct and its gravity and what effects that unreasonable conduct had on the proceedings.

E. ANALYSIS, CONCLUSIONS AND ASSOCIATED FINDINGS OF FACT

43. I determined this application by asking myself the following questions:

    43.1. Are there grounds for making an award of costs in favour of the respondent?

    43.2. If so, should I exercise my discretion in favour of making an award?

    43.3. If there are grounds, and I have exercised my discretion in favour of making an award, what award should be made?

44. When considering each of the questions at 43.2 and 43.3 above, I considered the claimant's means and ability to pay.

45. Having listened carefully to the evidence of Ms Daw, together with the submissions by Mr Burke, I was shocked at the manner in which the claimant had conducted this case and the level of abuse suffered by the respondent and those representing them. It is wholly unacceptable; they should not have to tolerate the level and content of emails sent by the claimant, amounting in my view to harassment. There is no doubt in my mind that the claimant acted abusively, disruptively and unreasonably within the meaning of Rule 76(1)(a) of the ET Rules.

46. I then considered whether to make an award for costs, noting that it was within my discretion not to make such an award even though the threshold under

Rule 76(1)(a) had been met. In doing so, I considered the claimant's means and his mental health.

47. Having considered carefully the documents shown to me by the claimant, I do not consider the claimant's PTSD to be the *cause* of the claimant's behaviour and concluded that he was in control of what he did. However I do accept that it was a factor. I accept that there have been periods when he has not been well. Before me, the claimant was calm and polite albeit I sensed the anger he felt about the way he believes he has been treated. I was concerned about his continuing to make serious allegations about those representing the respondent, without any evidence of such claims.

48. Regarding means, whilst the claimant is unable to work currently, he is fortunate to have a profession that he can return to and therefore has significant earning potential going forward, bearing in mind what he said about his previous earnings through agency work. He also currently has no outgoings and is being supported.

49. I concluded, weighing everything up, that I should make an award of costs in this case.

50. I bear in mind that an award of costs is intended to be compensatory, not punitive. Were it not for the claimant's background circumstances and mental health, an award at the upper end of the capped amount would have been fully justified, bearing in mind the level of costs incurred by the respondent as a direct result of the claimant's behaviour. However, taking into account the claimant's means and disability, I have decided to make an award of £10,000, which is the amount the claimant must pay the respondent.

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Employment Judge Hyams-Parish
14 March 2022