EMPLOYMENT TRIBUNALS

Claimant: **Mr D Advani**

Respondents: **1st Respondent ("R1"): VC Capital Ltd**
2nd Respondent ("R2"): VC Capital Management Ltd
3rd Respondent ("R3"): Audal Trading UK Ltd
4th Respondent ("R4"): Mr Cecil Anthony-Mike

Heard at: London Central (by video)

Date: 16 May 2022

Before: Employment Judge P Klimov (sitting alone)

Appearances

For Claimant: in person
For 1st and 2nd Respondents: Mr A. Johnston (of Counsel)
For 3rd and 4th Respondents: Mr G. Miller (legal executive)

CORRECTED JUDGMENT

Pursuant to Rule 69 of the Employment Tribunals Rules of Procedure 2013, paragraphs 1 and 2 of the Judgment sent to the parties on 20 May 2022, are corrected to read:

1. The claimant has acted unreasonably in the way that the part of the proceedings related to the preparation of the case for the open preliminary hearing on 16 May 2022 has been conducted by him.

2. The claimant must pay to the respondents their thrown away legal costs incurred in respect of the open preliminary hearing on 16 May 2022.

3. The exact amount of the respondents' thrown away costs to be paid by the claimant shall be determined by the Tribunal at the open preliminary hearing on 5,6 and 7 December 2022, if not agreed by the parties.

JUDGMENT having been sent to the parties on 20 May 2022 and written reasons having been requested by the claimant on 21 May 2022, in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Correction

The Judgment sent to the Parties on 20 May 2022 incorrectly referred to 18 May 2022 in paragraphs 1 and 2. The correct date of the open preliminary hearing is 16 May 2022.

Background and Issues

1. The Reasons should be read together with the Case Management Orders and Case Summary sent to the parties on 18 May 2022 to understand the reasoning in full.

2. This was an open preliminary hearing ("**the OPH**") to:

    a. decide which of the Respondents was the Claimant's employer at any of the material times, and
    b. consider R4's application to be removed as a respondent in these proceedings.

3. R4 abandoned his application to be removed from the proceedings, and therefore issue (b) fell away.

4. The OPH was fixed at the case management hearing on 25 February 2022, initially for 26 April 2022 and then, on the application of R3 and R4 postponed until 16 May 2022.

5. On 25 February 2022, the Tribunal gave the following case management orders for the OPH ("**the 25/02 CMOs**)".

> *1. There will be an open preliminary hearing in person on **26 April 2022,** starting **at 10am** or as soon as possible afterwards**.** Time estimate – 1 day. If the parties, consider that the time estimate is insufficient or excessive they must write to the tribunal as soon as possible. They must give reasons**.***
>
> *……*
>
> *3. The parties must liaise to agree on documents to be included in the bundle for the preliminary hearing. <u>Only documents relevant to the preliminary issues must be included in the bundle</u>.*
>
> *4. It is not anticipated that any witness evidence will be required to determine the preliminary issues. However, if any party intends to*

call witnesses, witness statements for all witnesses must be prepared in accordance with the rules set out in the Case Management Orders of 8 November 2021 (para 5.1) and exchanged on a date to be agreed by the parties, which must be ***at least 14 days before the date of the preliminary hearing****.*

5. *R1 must send to the tribunal the agreed bundle, any witness statements, any opening submissions, relevant authorities, and any other documents the tribunal will be referred to at the preliminary hearing* ***at least seven days before the date of the preliminary hearing****.*

……

9. *The parties must read the enclosed Information Sheet on hearings in Central London ET and act accordingly.*

6. The enclosed Information Sheet contained further instructions to the parties, including:

2. No later than five working days before the hearing you are to send the tribunal an email to londoncentralet@justice.gov.uk with the case number and date and time of your hearing in the subject line confirming that you are ready to proceed or asking for a postponement, with reasons. The email must:

……..

c. For preliminary hearings where there is to be a determination of an issue, final hearings and remedy hearings, attach the agreed bundle or a file of papers (containing the ET1, ET3, any case management orders and the documents relevant to the issues being determined) and any witness statements. Alternatively you should supply a link to a website where the bundle can be found. The HMCTS Document Upload Centre is available e – please contact the Tribunal for details of how to upload the bundle where it is too large to send as a PDF.

3. The parties must agree between themselves who does this, unless one party has been ordered to do it. If agreement cannot be reached both sides can email documents to the tribunal, but this should be avoided. You must copy whatever you send to the tribunal to your opponent.

4. The documents provided electronically must be pdf files which are rendered text readable. The index to the bundle should be kept separate, so that the page numbers of the hearing bundle align with the thumbnail page numbers of the pdf. Any late additions to the bundle must be inserted at the end, not in the middle. Page reference in the witness statements (sent as a separate pdf bundle) must be aligned with the thumbnail page numbers.

OVERRIDING OBJECTIVE

In accordance with the overriding objective (see the Employment Tribunals Rules of Procedure 2013, rule 2), the parties are under a duty to co-operate in assisting the Tribunal to do justice to their dispute. They must try by every practical means to resolve procedural differences sensibly through private dialogue.

7. With the 25/02 CMOs the Claimant was provided with information on possible sources of free legal advice and encouraged to seek legal advice/representation "*including in preparation for the preliminary hearing*".

8. Paragraph 5.1 of 8 November 2021 case management orders, referred to in paragraph 4 of the 25/02 CMOs stated:

*5.1 "The Claimant and the Respondent shall prepare full written statements containing all the evidence they and their witnesses intend to give at the final hearing and must provide copies of their written statements to each other on or before **4pm on the day 4 weeks in advance of the hearing**. No additional witness evidence will be allowed at the final hearing without the Tribunal's permission. The written statements must:*

a. be typed in double line spacing;
b. have numbered paragraphs;
c. set out the relevant events in chronological order, with dates;
d. contain all the evidence which the witness is called to give;
e. be cross-referenced where relevant to the documents in the bundle (including references to the page numbers of those documents);
f. contain only evidence relevant to issues in the case;
g. state the source of any information not acquired at first hand;
h. *be signed and dated (prior to the hearing)."*

9. On 11 March 2022, the Claimant wrote to the Tribunal stating that a default judgment had been entered against the Respondents because of the Respondents' failure to comply with EJ Nicolle Unless Order of 8 November 2021.

10. On 16 March 2022, the Tribunal wrote to the Claimant stating:
"There is no default judgment against the Respondents. The Respondents substantially complied with the Unless Order of 8 November 2021 by submitting their Grounds of Resistance on 8 December 2021."

11. On 17 March 2022, the Claimant wrote a lengthy letter to the Tribunal seeking, *inter alia*, to strike out the Respondents' responses for failure to comply with the Unless Order of 8 November 2021, to set aside the 25/02 CMOs and to extend the deadline for disclosure to 8 April 2022.

12. On 22 March 2022, dealing with various applications by the Respondents, I wrote to the parties stating, *inter alia*:
"*If the Claimant wishes to delay the exchange of documents until 8 April 2022, he must liaise with the Respondents to agree a new date. The parties' attention is drawn to paragraph 28 of the Case Management Orders of 25 February 2022.*

The parties are reminded that Rule 2 of the Employment Tribunals Rules of Procedure 2013 requires that the parties assist the Tribunal to further the overriding objective and in particular by co-operating generally with each other and with the Tribunal."

13. On 22 and 23 March 2022, the Respondents submitted their representations on the Claimant's 17 March applications.

14. On 23 March 2022, Claimant sent another email to the Tribunal arguing for his 17 October applications and making various allegations about improper conduct of the proceedings by the Respondents.

15. On 25 March 2022, the Claimant wrote again to the Tribunal arguing that the Respondents should not be allowed to amend the Grounds of Resistance, and their original Grounds of Resistance should be struck out.

16. On 4 April 2022, I refused the Claimant's applications stating:
"There are no possible grounds to set aside the Order, and the Claimant's seeking to do so, after it has been complied with by the Respondents, and

despite the Claimant himself being late to comply with the Orders and offering the Respondents a 14-days extension, is improper and unreasonable.

The Claimant's repeated attempts to resurrect matters that have been dealt with, such as the Unless Order of 8 November 2021, are equally inappropriate.

I have already had occasion to remind the parties of their duty to cooperate generally and with the Tribunal. The Claimant should reflect on that and refrain from generating excessive and unnecessary correspondence, which diverts the Tribunal's limited resources from more urgent matters.

If the Claimant wishes to make any further applications, he must send them to the Tribunal and the Respondents seven days before the open preliminary hearing on 16 May 2022. Any such applications will be considered at the hearing.

Meanwhile, the parties must concentrate their efforts on cooperatively preparing the case for the open preliminary hearing on 16 May 2022"

17. On 2 May 2022, in accordance with the 25/02 CMOs, the Respondents sent their witness statements to the Claimant. The Claimant did not send his witness statement to the Respondents until 8 May 2022.

18. On 2 May 2022, the Claimant applied to postpone the OPH on the grounds that he was not ready with his witness statement and the hearing bundle had not yet been finalised.

19. On 9 May 2022, I refused the Claimant's application stating:
"*The Claimant's application does not disclose a justifiable reason as to why he was unable to comply with the Tribunal's Orders on exchange of witness statements.*
The Claimant being in breach of the Tribunal's Orders is not a good reason to postpone the hearing.
If the Claimant seeks further relevant information from the Respondents, which was refused, he can make an application at the hearing."

20. On 9 May 2022, in accordance with the 25/02 CMOs, R1&R2's solicitors sent to the Tribunal the index and the hearing bundle, which had not been agreed by the Claimant, three witness statements (including the Claimant's), opening submissions and legal authorities.

21. On 9 May 2022, the Claimant wrote to the Tribunal stating that his witness statement was a draft, and that there were over 500 files not included in the bundle that are referenced in his witness statement.

22. On 10 May 2022 at 00:38am, the Claimant again applied to postpone the OPH on the grounds that the parties were unprepared because the bundle was not complete as he wished to add a further 865 documents to it (the bundle already contained some 300 pages). He also sought an order for specific disclosure of a large number of documents, which relevance to the issue to be decided at the OPH was not apparent, and an order for the Respondents to re-submit their documentation changing the numbered order of the Respondents.

23. On the same day at 11:45am, the R3 and R4's representative wrote to the Tribunal objecting to the Claimant's renewed application and stating:
> *"It was only on Sunday 8th May that the Claimant provided his witness statement. Despite requests (made by the representative for R1 and R2) on 9, 14 and 19 April for the Claimant to state which documents he*

wanted to include in the bundle, the Claimant did not provide this information. It is only now apparent which documents the Claimant wishes to rely on as an extensive number of documents are referred to in his statement and the link the Claimant has produced to download his documentation consists of 865 documents that he wishes to include in the bundle. Amongst those documents are 484 audio recordings and 22 video recordings for which there appear to be no transcripts. We have already explained to the Claimant that in the time remaining before the preliminary hearing we do not have the capacity to amend the bundle to such an extent and have suggested that the Claimant provide a supplemental bundle for the hearing if he wishes to do so.
Had the Claimant co-operated with the parties earlier this situation may have been avoided, however it is the Claimant's failure to co-operate with the parties in relation to the documents to be included in the bundle, and his failure to serve his witness statement on time, that has led to his making a further application to postpone the hearing. In our submission, in those circumstances the application must be refused.
We also object to the Claimant's application for a disclosure order. The documents requested by the Claimant are not relevant to the issues to be decided in the case, let alone the issue to be decided at the preliminary hearing and the Claimant provides no explanation of their relevance. Further, the Claimant's requests are far too broad in scope and are clearly "fishing" expeditions only, which the Tribunal cannot permit.

(the Claimant's specific disclosure application was refused by me at the OPH for the reasons stated at paragraph 20 of the case management orders of 18 May 2022)

24. At 12:23am on 10 May 2022, the Claimant responded to R3/R4's representatives' email accepting that he was late in sending his witness statement and stating that he was unprepared for the OPH because the bundles was still incomplete, and he "*relies on such a considerable number of documents because the Respondent's policy to date has been to deny all facts and commit perjury*".

25. At 12:37am, R1/R2's solicitors sent to the Tribunal an updated bundle and index, including one further document.

26. On 11 May 2022, I refused the Claimant's renewed application to postpone the OPH for the same reasons as were given to the parties on 9 May 2022 stating: "*If the claimant wishes to submit additional documents for the hearing, he must prepare a supplemental .pdf bundle. The bundle must be indexed and paginated. If the claimant wishes to rely on any audio or video recordings, he must transcribe the relevant passages and include those as typed-up documents in his supplemental bundle. The respondents must review and state whether they agree that the transcribed passages are the true representations of the recordings.*
The claimant must send to the Tribunal and the respondents an electronic copy of the supplemental bundle ***by no later than 12pm on Friday, 13 May 2022***."

27. On Friday, 13 May 2022, at 11:53am the Claimant sent to the Respondents and the Tribunal his supplemental bundle of 2,141 pages, over 19 ¼ hours of audio files and his 116-pages updated witness statement. The transcripts were of very poor quality. The Claimant did not indicate which parts of the recordings were relevant or who were speaking in the recordings. The supplemental bundle contained many duplicate documents with the Respondents' bundle and a very large number of documents, which relevance to the issue to be decided at the OPH was not apparent.

28. At 19:12 on 13 May 2022, the Claimant sent a further email attaching his updated witness statement and making various accusations about the Respondents.

29. On Sunday, 15 May 2022, the Claimant sent a re-numbered version of his witness statement, the list of authorities and his opening submissions.

30. The OPH started at 10am, on Monday, 16 May 2022. Due to the Claimant's late submission of his voluminous witness statement (116 pages) and very late disclosure of a large volume of documents and recordings (2,141 pages, 509 separate recordings of 19 ¼ hours in length, and 661 pages of poor quality and unreliable transcripts) and his insistence that all these materials be admitted in evidence the hearing of the preliminary issue had to be abandoned.

31. Before terminating the hearing, I gave the Claimant the option to continue with the hearing by first cross-examining the Respondents' witnesses, and after lunch giving oral evidence in chief for one hour and then be cross-examined. I explained to the Claimant that given the late submission of his documents and recordings and their sheer volume, they cannot be used in evidence at the OPH, however he was free to refer to the relevant parts of his witness statement in giving his evidence.

32. After taking advice from his trade union representative during a short adjournment, the Claimant said that he wanted to rely on his entire witness statement and the documents and recordings referred to in his statement, of which there were hundreds.

33. It would have been an impossible task in the remaining time to review the Claimant's documents to determine their relevance, let alone for the Respondents to cross-examine the Claimant on the full extent of his witness statement and the documents/recordings referenced in his statement.

34. I decided that it would be disproportionate and not in accordance with the overriding objective not to allow the Claimant to give his evidence at all and to refuse to admit any of his documents. In the circumstances, it was impossible to deal with the matter in the allocated time. Therefore, regrettably, the hearing had to be abandoned and re-listed.

35. The Respondents applied for a costs order against the Claimant with respect to their legal costs thrown away as a result of the hearing having to be abandoned.

The Law

36. Rule 76 of the Employment Tribunals Rules of Procedure 2013 (the "**ET Rules**") provides:

    (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

37. Rule 78(1) of the ET Rules gives the Tribunal various options of assessing costs, including making an "*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*"

38. The following key propositions relevant to the Tribunal's exercising its power to make costs orders may be derived from the case law:

    a. Costs awards in the employment tribunal are still the exception rather than the rule. The tribunals should exercise the power to order costs more sparingly than the courts (Yerrakalva v Barnsley Metropolitan Borough Council and nor 2012 ICR 420, CA)

    b. There is a two-stage exercise to making a costs order. The first question is whether a paying party has acted unreasonably or has in some other way invoked the jurisdiction to make a costs order. The second question is whether the discretion should be exercised to make an order. Only if the tribunal decides to exercise its discretion to make an award of costs the question of the amount to be awarded comes to be considered (Haydar v Pennine Acute NHS Trust UKEAT/0141/17).

    c. While the threshold tests for making a costs order are the same whether or not a party is represented, in the application of the tests it is appropriate to take account of whether a litigant is professionally represented or not. Litigants in person should not be judged by the standards of a professional representative (AQ Ltd v Holden [2012] IRLR 648).

    d. For term "vexation" shall have the meaning given by by Lord Bingham LCJ in AG v Barker [2000] 1 FLR 759:

    "*[T]he hallmark of a vexatious proceeding is … that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be , its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant, and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process.*" (Scott v Russell 2013 EWCA Civ 1432, CA)

    e. "Unreasonable" has its ordinary English meaning and is not to be interpreted as if it means something similar to 'vexatious' (Dyer v Secretary of State for Employment EAT 183/83).

    f. In determining whether to make a costs order for unreasonable conduct, the tribunal should take into account the "nature, gravity and effect" of a party's unreasonable conduct — (McPherson v BNP Paribas (London Branch) 2004 ICR 1398, CA), however the correct approach is not to consider "nature", "gravity" and "effect" separately, but to look at the whole picture.

    g. While a precise causal link between unreasonable conduct and specific costs is not required, it is not the case that causation is irrelevant. However, the tribunal must look at the entire matter in all its circumstances – (Yerrakalva v Barnley MBC [2012] ICR 420). Mummery LJ gave the following guidance on the correct approach:
    "*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 my judgment in McPherson's case was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the*

employment Tribunal 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".

h. Costs awards are compensatory, not punitive – (Lodwick v Southwark London Borough Council [2004] ICR 884 CA).

39. Under Rule 84 of the ET Rule, the Tribunal may, but is not required to have regard to the paying party's ability to pay.

40. However, where the costs award may be substantial, the tribunal must proceed with caution before disregarding the paying party's means – (Doyle v North West London Hospitals NHS Trust [2012] ICR D21, EAT, at paras.14-15).

41. The assessment of means is not limited to the paying party's means as at the date of the hearing. The Tribunal is entitled to take account of the paying party's ability to pay in the future, provided that there is a "realistic prospect" that he will be able to satisfy the order in the future - (Vaughan v LB Lewisham [2013] IRLR 713, EAT, at paras.26-28).

42. Once a tribunal has decided to have regard to the paying party's ability to pay, it must take into account his or her capital, as well as income and expenditure. In Shields Automotive Ltd v Greig EATS/0024/10, unreported, at para.47, the EAT in Scotland stated that '*assessing a person's ability to pay involves considering their whole means. Capital is a highly relevant aspect of anyone's means. To look only at income where a person also has capital is to ignore a relevant factor*.' The EAT also rejected the claimant's submission that capital is not relevant if it is not in immediately accessible form, observing that '*a person's capital will often be represented by property or other investments which are not as accessible as cash but that is not to say that it should be ignored*.'

43. In Howman v Queen Elizabeth Hospital Kings Lynn EAT 0509/12, the EAT said that any tribunal when having regard to a party's ability to pay needs to balance that factor against the need to compensate the other party who has unreasonably been put to expense. The former does not necessarily trump the latter, but it may do so.

44. The Presidential Guidance on General Case Management state:

"*17. Broadly speaking, costs orders are for the amount of legal or professional fees and related expenses reasonably incurred, based on factors like the significance of the case, the complexity of the facts and the experience of the lawyers who conducted the litigation for the receiving party.*"

18. In addition to costs for witness expenses, the Tribunal may order any party to pay costs as follows:

18.1 up to £20,000, by forming a broad-brush assessment of the amounts involved; or working from a schedule of legal costs; or, more frequently and in respect of lower amounts, just the fee for the barrister at the hearing (for example);

….

21. When considering the amount of an order, information about a person's ability to pay may be considered. The Tribunal may make a substantial order even where a person has no means of payment. Examples of relevant information are: the person's earnings, savings, other sources of income, debts, bills and necessary monthly outgoings."

Submissions

45. The Respondents argued that the Claimant had been acting unreasonably in preparing the case for the OPH in that he:
    a. was in breach of the Tribunal's orders by sending his witness statement and the documents late,
    b. in breach of the Tribunal's orders did not cooperate with the Respondents in preparing the hearing bundle, in particular by not responding to R1/R2's representatives' emails of 9, 14 and 19 April asking him to confirm what additional documents he wished to be included in the bundle,
    c. sent less than one business day before the hearing 2,141 pages of unpaginated and unindexed additional documents, of which 661 pages were transcripts of very poor quality and not corresponding to the audio recordings,
    d. sent less than one business day before the hearing 19 ¼ hours of audio recordings without giving any explanation as to their relevance to the issue to be decided at the OPH and not identifying the relevant parts of the recordings or who was speaking on them,
    e. objected to the R3's and R4's application to postpone the OPH from the originally fixed date of 26 April 2022, yet himself not taking necessary steps to prepare his case for the re-scheduled date of 16 May 2022.

46. The Claimant submitted that:
    a. he was a litigant in person and was doing his best to prepare for the hearing,
    b. he considered all his additional documents and recordings were relevant because they would show that the Respondents' witnesses were not telling the truth,
    c. he sent his draft witness statement to the Respondents on 8 May 2022. It did not have page reference numbers, but nor did the Respondents' witness statements,
    d. he was following the Tribunal's order of 11 May, but it was not humanly possible to transcribe all audio recordings in time for the OPH, and he used an automatic voice recognition tool (Amazon Transcribe) which produced poor quality transcripts,
    e. the Respondents opposed his postponement applications knowing the length of his witness statement,
    f. he was destitute and would not be able to meet a costs order.

Analysis and Conclusions

Was the claimant acting unreasonably?

47. Having considered the parties' representations, I decided that the Claimant had acted unreasonably in the way that the part of the proceedings related to the preparation of the case for the open preliminary hearing on 16 May 2022 had been conducted by him for the following reasons.

48. The Claimant had ample time to prepare for the OPH (over 2.5 months). The issue to be decided was fairly narrow and did not call for a substantial factual enquiry. As directed in the 25/02 CMOs it was "*not anticipated that any witness evidence will be required to determine the preliminary issues".* The Claimant himself acknowledged that when, on 17 March 2022, he wrote a lengthy letter to the Tribunal, *inter alia*, opposing the R3's & R4's postponement application, stating (***emphasis added***):

> "*The Claimant highlights the same fact that Judge Klimov has stated in his decision of 16 March 2022, that the Case Management Orders of 25 February 2022 state, "It is not anticipated that any witness evidence will be required to determine the preliminary issues."* ***For clarity, the preliminary issue is who the Claimant's employer was and that is something that would be determined by documentary evidence, such as the Claimant's contract, rather than by opinion.*** *Therefore, Mr Anthony-Mike's value in determining the identity of the Claimant's employer is unclear.*"

49. Yet, the Claimant produced a 116-page long witness statement containing in large part irrelevant evidence and submissions, ranging from hearsay evidence on unrelated past court cases involving R4 and R4's general business dealings to business arrangements (as the Claimant saw them) between other staff members and the Respondents. In addition, his witness statement cross-referenced hundreds of documents and recordings in his bundle of no clear relevance to the issue. In cross-referencing the recordings, the Claimant did not even state which part of the recording/transcript was relevant, as was ordered by the Tribunal on 11 May 2022. In contrast, the Respondents' two witnesses' statements were 8 and 2 pages long.

50. The Claimant was late in disclosing his witness statement and documents. He did not co-operate with the Respondents in preparing the case for the OPH, as he was ordered to do by the Tribunal on 25 February and reminded on 22 March and again on 4 April.

51. He did not assist the Respondents with the preparation of the hearing bundle, as he was required to do. Instead, he sought specific disclosure of a whole raft of irrelevant documents. The 25/02 CMOs made it clear that "*Only documents relevant to the preliminary issues must be included in the bundle*." Yet, the Claimant insisted on including 2,141 pages of largely irrelevant documents and recordings and refused to move from that position when I gave him that opportunity at the hearing.

52. He sent to the Respondents and the Tribunal over 19 ¼ hours or recordings and 661 pages of unusable transcripts less than a business day before the OPH, and without identifying the relevant parts of the recordings and the transcript (as he was ordered to do by the Tribunal). He insisted at the hearing that all his recordings and the transcripts be taken in evidence without identifying the relevant parts, and despite accepting that the transcripts were not accurate.

53. It would have been obvious to the Claimant, and recognising that he is a litigant in person, that it would be impossible for the Respondents and the Tribunal to deal with that volume of information in one-day's hearing, yet the Claimant, while seeking to postpone the hearing, never applied to have the length of the hearing extended, as he was required to do by the 25/02 CMOs.

54. In short, the Claimant has adopted the "everything but the kitchen sink" approach and completely disregarding his duty to co-operate with the Respondents and the Tribunal, of which duty he was reminded by the Tribunal on several occasions. His unreasonable and uncooperative approach to the disclosure, the inclusion of a vast number of largely irrelevant and poor-quality documents in his supplemental bundle,

coupled with his insistence on using the full extent of his witness statement and the documents referred to in it, led to the inevitable result of the OPH having to be abandoned and re-listed.

55. In my judgment, that was unreasonable conduct of the proceedings. Therefore, Rule 76(1)(a) was engaged.

Should a costs order be made?

56. The next question I had to decide was whether I should exercise the discretion to make a costs order sought by the Respondents. To decide that question I must look at the whole picture and consider whether the "*nature, gravity and effect*" of the Claimant's unreasonably conduct of the proceedings justify making a cost order under Rule 76(1)(a).

57. In doing so I reminded myself that costs orders are exceptional in employment tribunals and conduct of litigants in person should not be judged by the same standards as expected of a professionally represented party. Nevertheless, the Claimant is an intelligent and educated man, and judging by his various applications and submissions to the Tribunal, sufficiently familiar with the employment law and the employment tribunals' rules of procedure. Also, he has support of his trade union representative, with whom he consulted during the OPH.

58. I find that the Claimant knew, or at any rate - this should have been obvious to him, that submitting volumes of largely irrelevant documents and recordings and 116-page witness statement with hundreds of references to those documents and recordings less than a business day before the hearing and insisting on all of that being admitted in evidence would inevitably result in the OPH having to be abandoned because it would not be possible to deal with all that information in the allocated time.

59. It would have been also obvious to him that his approach was wholly disproportionate to the narrow issue that the Tribunal had to decide at the OPH, which largely required considering his contract of employment and examining limited factual background, as indeed, he himself submitted when opposing the R3&R4's postponement application (see paragraph 48 above).

60. After opposing the R3&R4's application to postpone the OPH (which was granted, thus giving him an extra 3 weeks to prepare his case), he still failed to prepare his case in time and was late in exchange of witness statements and documents.

61. His actions caused the Respondents to incur costs, which were wasted because the OPH could not proceed and had to be re-listed.

62. The Claimant was already warned by the Tribunal that his scattergun and highly confrontational approach to the conduct of these proceedings was improper and unreasonable, and urged to reflect upon that (see paragraph 16 above). He was remined several times about his duty to co-operate with the Respondents and the Tribunal. Unfortunately, it appears he failed to take heed of the Tribunal's warnings.

63. For these reasons I decided that it would be just and proper to exercise my discretion and make a costs award against the Claimant.

How much the claimant should be ordered to pay?

64. The Respondents asked that the Claimant be ordered to pay their thrown away costs in respect of the OPH. The exact amount to be determined by the Tribunal at the next preliminary hearing, if not agreed by the parties.

65. R3&R4 indicated that their thrown away costs are likely to be around £540+VAT. R1&R2 did not provide an estimate.

66. The Claimant submitted that he was not in a position to pay a costs order because since February 2021 he had no income and could not afford even a Tube fare to come to the Tribunal. However, he said that he was looking for a new job. The Claimant did not provide any further evidence concerning his income, capital, and outgoings.

67. Since quantum of the award was left to be determined at the next preliminary hearing in December 2022 (if not agreed), I did not need to decide on the exact amount to be awarded. I directed the Claimant to submit relevant evidence and documents as to his ability to pay for the December's preliminary hearing, at which the issue will be considered and finally determined.

Observations

68. The OPH has been re-listed to decide the Claimant's employer issue over 3 days on 5,6 and 7 December 2022. The three days' hearing was agreed with the parties based on the Claimant's insistence on using all his evidence submitted for the OPH.

69. I strongly encouraged the Claimant to speak with his union representative and repeated by previous suggestion for him to seek legal advice. This is in part because it appears to me that three days to decide this narrow issue might be excessive. If that proves to be the case, and a large part of what the Claimant presents at the next preliminary hearing is found by the Tribunal irrelevant, he might be at risk of a further costs order for unreasonable conduct.

70. I have already ordered (see paragraphs 3, 4 and 5 of the case management orders dated 18 May 2022) that the Claimant must update his list of documents and witness statements, which must be strictly relevant to the preliminary issue. The Claimant must make every effort to substantially reduce his witness statement and the supplemental bundle (if it is at all required).

71. While I did not consider appropriate to impose a page limit on his additional documents or the witness statement, it appears to me that most of the relevant documents are already included in the Respondents' 300-page bundle, and a 15 - maximum 20 pages of a double-spaced witness statement should be more than enough for the Claimant to deal with any factual matters relevant for the preliminary issue.

Request for Reconsideration

72. Since sending the Judgment on 20 May 2022, the Claimant's emails 16 and 18 May 2022 containing his application for reconsideration of the costs order have been passed on to me. The Claimant's application was premature, as it had been submitted before the date on which the Judgment was sent to the parties. The Claimant is requested to confirm whether in light of these Reasons he still seeks reconsideration of the Judgment on the grounds set out in his application.

Case No: 2204491/2021

Employment Judge **Klimov**

Date: 5 June 2022

JUDGMENT SENT TO THE PARTIES ON

. 06/06/2022.

FOR THE TRIBUNAL OFFICE

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