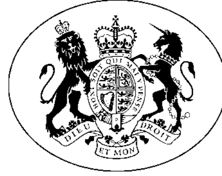

EMPLOYMENT TRIBUNALS

Claimant: Mr M Ithia

Respondents: (1) MUFG Securities EMEA Plc (2) Michael Conway

Heard at: (public, hybrid hearing, CVP/Victory House)

On: 19 April 2022

Before: Employment Judge Adkin

Appearances

For the Claimant: Claimant in person
For the Respondent: Ms T Barsam, Counsel

JUDGMENT

(1) The Respondents' application for costs succeeds in part.
(2) The Claimant is ordered to pay the Respondent **£2,500**.

REASONS

1. By a letter dated 22 March 2022 the Respondents applied for a costs order pursuant to rule 76(1)(a) and (b) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1.

The application for costs

2. The Respondents' arguments on costs are set out in the application letter dated 22 March 2022, to which is appended an appendix of some 10 pages. That has been supplemented orally in the hearing by Ms Barsam.

3. The application for costs has been supported by a Statement of Costs dated 22 March 2022 which comes to a grand total of £279,170.90. The nature of the exercise facing me does not involve assessing whether that figure has been reasonably occurred.

4. The amount of costs is capped by the Respondents pragmatically at £20,000 being the maximum that the Employment Tribunal may award without detailed assessment. It is acknowledged that the Claimant is a litigant in person who has represented to the Employment Tribunal that he has limited financial means.

5. In very summary terms the basis for the costs application is first under rule 76(1)(a) unreasonable conduct, specifically: failing to articulate the claims; the necessity for multiple hearings to understand the Claimant's claims; the shifting nature of the claimant's claim, a last-minute alteration of list of issues; despite the fact that there was a direction for him to do this at an earlier stage; non-compliance with tribunal orders in relation to the list of issues and disability; failure to provide proof of financial means; inappropriate applications and lack of cooperation over simple arrangements for delivery of documents.

6. Secondly pursuing claims which have no reasonable prospect of success under rule 76(1)(b): specifically late withdrawal of claims that had no reasonable prospect of success; claims which were withdrawn following the deposit order being made.

The Claimant's response

7. The Claimant opposes all aspects of the Respondents' application, in a 13 page letter of objection which is undated and in oral submissions.

8. Among his submissions are that:

    8.1. Time was wasted at the hearing in March 2021 by the Respondent providing a Scott Schedule in portrait instead of landscape with columns not visible.

    8.2. The Respondents have sought to create as much confusion and drama as possible.

    8.3. The Respondents asked for information, receive it, ask for more, receive it and then complains that it has received the information it asked for.

    8.4. He is perplexed by the increase of a costs bill said to have been £100,000 in November 2021 and then somewhere this £300,000 in January 2022.

    8.5. The Respondents have created a "trapdoor" whereby if he streamlines his claim they want costs and if he pursues his claim they want costs.

    8.6. The Respondents initially suggested interest in a judicial mediation but then changed track and said they didn't want this and wanted further case management before mediation.

8.7. The Respondents have caused issues wasted time and increased costs by arguing with him about which documents need to go in bundles.

9. While I would not have use precisely language that the Claimant has used, as a matter of impression there is some truth in what he says. The Respondents have been faced with the difficulty of a large and poorly explained claim and a Claimant whom it perceives, with some justification, has been uncooperative.

10. The approach of the Respondents has occasionally appeared to me to place a greater focus on showing the Claimant in a bad light than on progressing the litigation.

11. It is unfortunate feature of this litigation that neither side trusts the other and cooperation generally seems to be in short supply.

History

12. There has been a fairly lengthy procedural history to this matter.

13. The Claimant's employment with the First Respondent commenced in January 2011. The First Respondent provides financial securities products. The Claimant was employed initially as an Analyst, thereafter as an Assistant Vice President, from 1 January 2011 until 15 July 2020. He worked in the Information and Data Management Department.

14. The Claimant was dismissed on 15 July 2020 purportedly for an extended period of unauthorised absence.

15. On 9 October 2020 the Claimant presented a very large number of claims, relating to the period April 2014 to July 2020 including *inter alia* unfair dismissal, age, race, disability and sex discrimination; claims under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") and equal pay.

February 2021 hearing

16. At a preliminary hearing on 8 February 2021 with Employment Judge Stewart it was not possible to complete a list of issues. That hearing was held by Microsoft Teams, with the Claimant joining by mobile telephone.

17. Judge Stewart listed a full merits hearing commencing 23 July 2021. She ordered "all communications with the Claimant will be by post or telephone".

18. She noted:

> "1. The Claimant is a litigant in person with no previous experience of Tribunal process and procedure. He states that he has no email address or Internet connection at home and insists on being indicated with by ordinary letter mail. He says he is not prepared to meet with couriers on his doorstep due to the covid pandemic risks and has also resisted having to sign for registered/recorded/special delivery mail. The Respondent states that a career with a bulky document package was sent away from

the Claimant's address and that a special delivery mailing was not accepted and has been returned to the local depot.

2. The Respondent states that confidential letters and documents containing personal and private data about the Claimant and confidential business material are not appropriate to be delivered by ordinary post and required special delivery. **The Claimant agreed today to go to the postal depot and to collect the document bundle awaiting him there**.

3. The Claimant also stated that he was unable to use computer screens to read because he suffers from serious headaches. He will attend a hearing in person or by telephone."

[**emphasis added**]

19. The judge emphasised to the Claimant that he would be greatly assisted by being able to obtain some legal advice and support. The Respondent had found it already sent him a list of possible organisations from which he might obtain advice.

20. Unfortunately the Claimant has not as far as I am aware taken any legal advice.

<u>March 2021 hearing</u>

21. At a further preliminary hearing on 10 March 2021, the matter came before me in a hearing listed for one day.

22. Despite spending an entire day it was not able to complete a list of issues. We grappled with elements of the claim that was set out in the following documents:

    22.1. ET1/claim form in which scant information is given, but a long list of Tribunal jurisdictions engaged is given. The Claimant has ticked "no" to the question do you have a disability at box 12.1.

    22.2. A "Scott Schedule" of some 17 pages containing 97 separate allegations, many of which fall under several of the Tribunal's jurisdictions. This has been provided by the Claimant under cover of letter dated 30 November 2020 in response to a request from the Respondent. Unfortunately the version of the hearing bundle provided to me in advance of today's hearing did not have all of the columns visible.

    22.3. A letter dated 22 January 2021 entitled "Further claimant particulars – short story", which is 8 pages of close type.

    22.4. A further letter dated 22 January 2021 entitled "Further claimant particulars – full story", which is 28 pages of close type.

    22.5. A letter dated 6 February 2021 in which he asserted that he was disabled by virtue of headaches, and provides some particulars of that alleged disability.

    22.6. A document headed "particulars of claim" dated 1 March 2021, which is 145 pages in length. The factual narrative in this document was quite well structured and accessible. This document purported to bring claims

under a very large number of statutory provisions, some of which fall outside of the Tribunal's jurisdiction.

23. Attempting to go through the individual allegations in that hearing was extraordinarily slow. Unfortunately after three hours of the hearing, we had only reached item 8 in the Scott Schedule containing 97 items.

24. It was clarified at that stage that claims were being brought under the following jurisdictions:

    24.1. Equal pay (s.65 and s.66 of the Equality Act 2010 ("EqA"));
    24.2. Direct age discrimination (s.13 EqA);
    24.3. Direct race discrimination (s.13 EqA);
    24.4. Direct sex discrimination (s.13 EqA);
    24.5. Disability discrimination, specifically failure to make reasonable adjustments (s.21 EqA);
    24.6. Victimisation (s.27 EqA);
    24.7. Detriment because of protected disclosures (section 47B of the Employment Rights Act 1996 ("ERA").
    24.8. Unfair dismissal (s.98 ERA);
    24.9. Automatic unfair dismissal (s.103A ERA);
    24.10. Unauthorised deduction of wages (s.13 of ERA);
    24.11. Failure to consult (reg 13 TUPE).

25. In that hearing I explained to the Claimant that it was his right to bring claims under a very large number of the Tribunal's jurisdictions. I also mentioned that this is likely to result in a large amount of Tribunal time and that the Respondent might seek to pursue him for legal costs if a large amount of time was taken up dealing with claims that are found to have no reasonable prospect of success or are unreasonably pursued, and in particular pursued after a deposit order is made (rule 76(1) & (2) and rule 39(5)).

26. It was clear based on the documents referred to above that the Claimant had access to word processing facilities in preparation of his claim having produced several hundred pages of pleadings and correspondence. I discussed with him whether he would accept an electronic draft from the Respondent by email, or alternatively if he would prefer not to use email, by a 'memory stick' to facilitate production of a joint updated list of issues. He declined to do this. The result was that the joint updated draft list of issues would have to be produced by exchange of post. In fact this never happened.

<u>June 2021 hearing</u>

27. A brief hearing took place on 10 June 2021 in front of Employment Judge Spencer at which the possibility of judicial mediation was considered.

<u>Case management order</u>

28. By paragraph 4 of an order dated 15 June 2021 and sent to the parties on 16 June 2021 I noted that there had been non-compliance possibly explained by the Claimant indicating interest in judicial mediation. I ordered that the Claimant provide to the Respondent any proposed additions to the updated draft list of

issues indicating clearly where those additions should go and referencing line numbers in the Scott Schedule and page number in the Particulars of Claim. It is unclear to me that this order was complied with.

July 2021 hearing

29. At a hearing on 19 – 20 July 2021, I granted the Claimant's application to add the Second Respondent (an application to add other parties was refused).

30. Much of the remaining two days were spent trying to identify the list of issues. A further hearing was then listed in January 2022, to determine disability, strike out and deposit order.

31. The order sent out had a 13 page list of issues attached. Under paragraph 8 the parties had 7 days to write to the Tribunal and the other party in the event that this order was wrong. The Claimant did not do this but nevertheless sought to argue approximately six months later, part way through the four day hearing in January 2022 that this list of issues did not correctly reflect his claim, as became clear from an application made on 17 January 2022.

Delivery attempts

32. By way of example, as documented in a letter from the Respondents dated 9 November 2021, on 29 September 2021 the First Respondent sent a letter to the Claimant. Delivery was attempted on 30 September 2021 and remained available for collection from Royal Mail until 19 October 2021. It was returned to the Respondent's solicitor as the time for collection had passed.

33. The Respondent sent a draft hearing bundle index on 29 October 2021 with documents relevant to the strike out application. The delivery was attempted but failed on 29 October 2021. By 9 November 2021 when the Respondent wrote further to the Claimant he had not collected that document. It was explained to him in that letter that it was not possible to deliver bundles by conventional Royal mail post since they were not fit through the letterbox and contain confidential information. Further, as highlighted in this letter the Respondents were incurring time and costs dealing with his position with regard to documents.

January 2022 hearing

34. At the request of the Respondents, realistically, this hearing was extended to a four-day hearing on 13, 14, 17, 18 January 2022.

35. In the January 2022 hearing the Respondents complained through counsel about the Claimant's conduct in refusing to accept hearing bundles.

36. The Claimant's application dated 17 January 2022 to amend the list of issues was granted part and refused in part. Approximately three quarters of that application succeeded. Despite the fact that the Claimant had not written within 7 days of the order being sent out following the July 2021 hearing, I considered it was in the interests of justice to ensure that the list of issues reflected the claim that the Claimant was trying to bring.

37. Two claims were struck out, namely issues 44 & 45 - unauthorised deductions from wages – claim for overtime and equal pay claim brought under section 65, 66 EqA by comparison with Employees A, B & C [names anonymised, key provided to the Claimant in correspondence] in relation to years 2014, 2015 and 2016 only.

38. Additionally, deposit orders were made in respect of 34 separate allegations.

39. During the course of this hearing the Claimant made a number of concessions and withdrew some elements of his claim.

40. At that hearing I clarified that delivery by Royal Mail Special Delivery was a reasonable method for the Respondent to send documents to the Claimant given that it was confidential information, and if the Claimant refused to sign the documents he would be expected to attend the Respondents' solicitor' office in person, or find a way of accepting documents electronically.

Deposit order

41. The Claimant paid deposit orders in respect of 11 of the allegations, with the result that a further 23 allegations were struck out by operation of rule 39(4) of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013, Schedule 1 ("the Rules").

Application to amend the list of issues/deposit order

42. By an application dated 24 January 2022 in a four-page letter the Claimant sought to make further alterations. I granted this application in respect of a single point, but refused the remainder, in a letter dated 2 March 2022. A certificate of correction and amended order was sent to the parties.

Correspondence regarding list of issues

43. By a 3 page letter dated 7 March 2022 the Claimant requested a series of alterations to the list of issues on the basis that these changes had been agreed but not reflected in the list of issues.

April 2022 hearing

44. At a hybrid hearing on 19 April 2022 I made case management orders, listing this matter for a 15 day final hearing in January-February 2023. In that hearing the Respondents' costs application was heard and the decision in respect of costs was reserved.

45. Also at this hearing we finalised and I approve the list of issues. The Respondents wisely did not pursue a potential further strike out application that had been mentioned in January 2022.

Procedure

46. I have received submissions from both parties in respect of the Respondents' application for costs.

The Law

47. Rule 2 provides

> 2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases
>
> fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
>
> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (d) avoiding delay, so far as compatible with proper consideration of the issues; and
>
> (e) saving expense.
>
> A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. **The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal**.

(emphasis added)

48. Rule 76 provides:

> **When a costs order or a preparation time order may or shall be made**
>
> 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) have been conducted; or
>
> (b) any claim or response had no reasonable prospect of success.

49. The following propositions relevant to costs may be derived from the case law:

50. 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 order (*Oni v Unison* ICR D17).

51. Costs orders in the Employment Tribunal are the exception rather than the rule (*Gee v Shell* [2003] IRLR 82, *Lodwick v Southwark* [2004] ICR 844).

52. The fact that a claimant has withdrawn a claim does not mean that there has been unreasonable conduct. Claimant should not be deterred from appropriately withdrawing claims. Withdrawal can sometimes save costs and in some cases might be the "dawn of sanity" (per Mummery LJ paragraph 29 in *McPherson v BNP Paribas* [2004] EWCA Civ 569; [2004] ICR 1404). On the other hand, as Mummery LJ also recognised that tribunals should not follow a practice on costs which might encourage speculative claims, by allowing applicants to start cases and pursue them down to the last week or two before the hearing in the hope of receiving an offer to settle, and then, failing and not receiving an offer, dropping the case without any risk of a costs sanction (para 29). A sudden withdrawal without good reason can amount to unreasonable conduct. In that case M withdrew his claim 18 days before the hearing on the basis that the stress of the litigation was having an effect on his health. While the tribunal was entitled to make a costs order, the order that M pay the whole of the respondent's costs of the litigation was wrong.

53. In *McPherson*, Mummery LJ held that a Tribunal should in deciding whether to make an order for costs, an Employment Tribunal should take into account the "nature, gravity and effect" of the putative paying party's unreasonable conduct.

54. In *Yerrakalva v Barnsley MBC* [2012] ICR 420 Mummery LJ said:

> "7. As costs are in the discretion of the employment tribunal, appeals on costs alone rarely succeed in the Employment Appeal Tribunal or in this court. The employment tribunal's power to order costs is more sparingly exercised and is more circumscribed by the employment tribunal's rules than that of the ordinary courts. There the general rule is that costs follow the event and the unsuccessful litigant normally has to foot the legal bill for the litigation. In the employment tribunal costs orders are the exception rather than the rule. In most cases the employment tribunal does not make any order for costs. If it does, it must act within rules that expressly confine the employment tribunal's power to specified circumstances, notably unreasonableness in the bringing or conduct of the proceedings. The *423 employment tribunal manages, hears and decides the case and is normally the best judge of how to exercise its discretion."

55. While a precise causal link between unreasonable conduct and specific costs is not required, it is not the case that causation is irrelevant. In *Yerrakalva* Mummery LJ said:

> "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."

56. 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).

Conclusion

WHETHER COSTS JURISDICTION INVOKED

Rule 76(1)(a) UNREASONABLE CONDUCT

Failure to articulate claims

57. The Respondents submit that the Claimant failed to pinpoint his claims with precision despite encouragement from more than one Employment Judge. It is said that they have incurred substantial costs in analysing the ever shifting and non-exhaustive complaints across a wide-ranging of voluminous submissions and documents. These are to some extent set out above in my procedural history.

58. The Claimant argues that he has been requested by the Respondents to provide more and more detailed "further particulars" documents, which he has done as a litigant in person and has then been criticised for providing this extensive detail as requested.

59. The pattern of several of the hearings before me is that the documents which identify the claim which are written in terms that both the Respondents' legal team and myself have found somewhat puzzling. During the course of the hearing the claims been explained by the Claimant orally such that they make sense, at least in concept. He has often referred to several documents of the pleadings collectively to explain what he means. This has been at times a frustrating and time-consuming process.

60. I have considered carefully whether the Claimant has been deliberately obtuse in the way that he has articulated his claims in writing. The Claimant is an intelligent person and has quite deliberately chosen to bring a large number of claims. As to the articulation of those claims however, I have concluded that he has not been deliberately obtuse. I do not consider that he has unreasonably failed to articulate the claims, but rather he has struggled to articulate his claims succinctly in a format that lawyers and judges would recognise. This is because he is not a lawyer, not because he is trying to be deliberately obtuse. I take account of the fact that a litigant in person should not be judged by the same standards as a lawyer *AQ Ltd v Holden*.

61. The Respondents point out that they offered on 23 April 2021 to pay £2,000 plus VAT toward the Claimant's legal costs, and have tried to direct him towards free sources of legal advice as has at least one Employment Judge. It is a pity that the Claimant seems not to have taken legal advice, especially when was being offered the opportunity free advice on this basis. A lawyer independently instructed would have a professional obligation to the Claimant irrespective of whether the source of the funding. It is unfortunate that this offer was not taken up, as a few hours of an independent lawyer's time might have helped the Claimant refine his claims to those with better prospects and saved time for both sides and costs for the Respondents.

62. Does it follow that the Claimant was unreasonable not to take up the offer of £2,000 toward an independent lawyer? The Employment Tribunal from its inception as the Industrial Tribunal was and is intended to be a less technical forum in which parties are not obligated to be represented by professional advisors. In very many cases one or both of the parties has no legal advisor. I would be reluctant to come to a conclusion that failing to instruct a lawyer was unreasonable. I do acknowledge however that the Claimant has chosen to bring a plethora of claims, some of which are complex and somewhat technical.

63. That the Claimant might have been better advised to take some advice and better advised as a result of having taken such advice does not in my judgment necessarily lead me to a conclusion that he has been unreasonable in not taking advice. Finding an advisor in employment law who is competent in that area, who was available to meet with the Claimant during the pandemic, who charged affordable fees and with whom the Claimant could develop a rapport and sufficient trust I suspect would not have been a straightforward business. I am conscious of the fact that during periods during which this litigation has been running government advice has been directed toward minimising contact with others. The Claimant reports difficulties using screens which would likely have precluded video conferencing and appears to have a degree of nervousness about Covid transmission risk.

64. In conclusion I do not find that the Claimant has been unreasonable in failing to take legal advice.

<u>Multiple hearings to understand Claimant's claims</u>

65. The Respondents point to the number of hearings required to understand the Claimant's claims.

66. Progress has been extraordinarily slow. In most cases it is possible to identify what the claim is about at the first preliminary hearing and the matter is listed for a final hearing. More rarely a second hearing is required either for further particulars or to clarify some points. To spend seven days in this way is exceptional, a point made in the Respondent's submissions.

67. The number of hearings in this case is largely a function of the difficulty in understanding the lengthy process described above. Again I have considered whether the Claimant has been unreasonable in this respect. For the reasons given above under 'Failure to articulate claims' I consider that he has not been.

Efforts to recast claims

68. It is argued that the Respondent faced a "shifting landscape" in which the Claimant was reformulating the claims. Specific examples given are in relation to the claim of disability: 13 November 2021 the Claimant served 75 pages of documents.

69. Taking this specific example, I do not consider it was unreasonable for the Claimant to serve all of the documents he had which he thought might show that he was disabled. He was seeking to show disability looking at his medical picture more broadly than had been captured in a previous hearing.

70. The Claimant applied to amend the definition of disability in his claim to include anxiety, depression, stress, bradycardia as well as headaches. I did not allow this application, but I did not consider it unreasonable for the claimant to seek to prove he had a disability in this way. It seems to me it was reasonable of him to put forward all evidence in his possession relating to his contention that he was disabled. A clip of 75 pages in the context of this litigation is not in itself unreasonable. I do not accept this argument.

71. As to the list of issues the Respondents point out that at the hearing in January 2022 a sizeable portion of this hearing was devoted to dealing with new comments on a list of issues which had been sent out with the order of 21 July 2021 with a request that the parties write in to the Tribunal within 7 days. I have dealt with this below.

72. The Respondents say that they wasted costs in dealing with claims that the Claimant was not in fact pursuing. For example Filippos Niforas had not harassed the Claimant by email dated 14 January 2016, but rather the Claimant reported the harassment to Filippos Niforas on that date. It became clear that the specific allegation regarding Filippos Niforas was a misunderstanding, which is frustrating but not unreasonable itself.

73. It is argued that the Respondents wasted time producing a witness statement support of the application to strike out. I have dealt with the effect of the claims struck out separately below.

74. Part of the problem in this case is that the Claimant finds difficult to express himself in a easily understood way in writing and tends to be better understood following a discussion in the hearing.

75. I acknowledge and understand the Claimant's submission that he been asked to provide more and more particulars and than is criticised when these seem difficult to understand or overly elaborate. That to some extent because of the process not him and is because he is a litigant in person.

76. On balance I do not consider that what the Respondents have characterised as "recasting the claim" amounts to unreasonable conduct. The Claimant has been faced with requests for further particulars. Unfortunately, in my experience some litigants in person when faced with this kind of request simply generate more and more material and do not understand that what they're being asked to do is to be specific about the claim that they have already made.

77. I do not find that the costs threshold is crossed in respect of these matters.

NON-COMPLIANCE –

78. It is said that the Respondent were put to significant additional time and costs by the Claimant's repeated and deliberate non-compliance with Tribunal orders. Specifically:

Disability documents

79. The unless order application made on 23 April 2021 also mentioned the failure of the Claimant to provide documents relating to disability, which he had been ordered to do so by 21 April 2021. In fact he only provided documents by 25 June 2021, which is no doubt frustrating for the Respondents.

80. It is unclear to me how this delay in itself has caused the Respondent to incur additional cost. I have also taken account of the fact that my experience in other litigation in the last two years is that medical practitioners are especially stretched due to the direct and indirect effects of the pandemic. Obtaining medical documents has taken even longer than usual.

81. I do not consider that the Claimant was unreasonable in this respect such as to lead to the making of a costs order.

Failure to provide proof of financial means

82. The order dated 15 June 2021 and also the Notice of Preliminary Hearing dated 17 June 2021 contained "the Claimant will be expected to produce a signed witness statement explaining his financial means (e.g. his approximately common outgoings) if you wishes this to be considered under rule 39 (2).". The Respondent reminded the Claimant of the on 29 October 2021 and 30 December 2021. Again during the hearing on January 2021 the Claimant was reminded that he ought to provide evidence if he wished to rely upon this as a reason to modify the level of any deposit order.

83. The Claimant ultimately did provide an ATM print out showing the balance in his current account.

84. The fundamental problem with this part of the application is that, as I identified in the order dated 2 March 2022, the order and notice in June 2021 were expressed

in optional terms. There was no requirement on the part of the Respondent to chase the Claimant.

85. I do not consider that this amounts to non-compliance, and make no costs order in respect of this point.

Inappropriate applications

86. It is argued that the Claimant made five applications which were inappropriate, specifically:

87. On 30 November 2020 an application for unless order, accompanied by 500 pages of disclosure documents which was said to be premature. It seems to me that premature disclosure should not in itself cause the other party to incur costs, since they can simply hold onto that disclosure until the time comes for mutual exchange.

88. On 22 January 2021 an application for extension of time without adequate specifics and repeated an application an unless order. Given that the Respondent had themselves recently made an application for extension of time, and that the Claimant is a litigant in person I do not see that this crosses the threshold for making a costs order.

89. On 17 March 2021 an application to join multiple Respondents, which he failed to mention at the first Preliminary Hearing on 8 February 2021 and failed to copy the First Respondent in his original application on 16 February 2021. I note that the Claimant was partly successful in this application in that permission was granted to join an additional respondent. Bearing in mind this success and that the Claimant is a litigant in person I do not see that this crosses the threshold for making a costs order.

90. On 16 April 2021, rather than sensibly engage with the process of agreeing the list of issues the Claimant sought to vacate the hearing is listed for 10 June and 19 – 20 July 2021 in favour of a six-day hearing to agree the list of issues. In my view the Claimant's approach to the list of issues has been unhelpful, as considered further below.

91. Pursuing an application to amend his claim at the hearing commencing on 13 January 2022, having registered no concerns about the list of issues produced after the hearing in July 2021. I do not consider that making an application to amend his claim was in itself unreasonable, but failing to raise difficulties with the list of issues in July 2021 on good time I consider has contributed to delay and required additional Tribunal case management time.

Failure to co-operate bundles for hearings

92. The Respondents point out that the Claimant has refused open the door to couriers and has refused to collect items sent by special delivery. In this respect it was said that the hearing of 8 February 2021 was largely unproductive because the Claimant refused to accept the bundle and sent a courier away. Bundles sent to the Claimant were returned from late September 2021 onward. The Respondents say they have incurred substantial costs not only failed courier costs and special

delivery costs but making a spare set of bundles available for collection. There was a failure to cooperate with the bundle for January 2022 hearing. The Claimant has refused to accept delivery by courier, so that documents must be sent in standard post.

93. The Respondent says that the Claimant has offered no explanation. That is not quite accurate. At the hearing with Employment Judge Stewart the Claimant suggested that he had a concern about opening the door to a courier because of concerns about Covid-19. When I asked him about his reasons in the hearing on 19 April 2022, he said that there is a reason but he could not tell me.

94. I accept that the Claimant has suffered from a measure of anxiety about Covid-19. He has for example attended all hearings before me with a facemask, which was unremarkable and in keeping with most people in public places during the course of 2021. By April 2022 this was slightly less common, though I acknowledge that a small minority of people continue to wear masks in public places and public transport. He has not sought to argue that he is clinically extremely vulnerable or that he has anxiety to an extent that would prevent him from signing for a parcel.

95. Do I accept that this is the reason why the Claimant has failed to either accept signed for delivery or failing that to attend to pick documents up? He declined to give an explanation to me. I take account of the fact that he has chosen to attend case management hearings in person in Central London in a public building on 7 different days in the last 13 months at a venue some 7-8 miles away from his home in North London. This requires him to come into a public building, pass a reception area with security guards with a signing in procedure and then find his way to hearing room in which he has spent the majority of the day with myself and the Respondents' lawyers. I do not accept that to answer a door to a courier, which is on any view an interaction of a few seconds on a door step is comparable.

96. I have come to the conclusion on the balance of probabilities that the Claimant has deliberately refused to accept delivery of documents from the Respondents and refused to attend to pick the documents if he could not answer the door. He agreed with Employment Judge Stewart that he would pick up documents.

97. Under rule 2 of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013, Schedule 1 ("the Rules") parties are required to cooperate. I drew this to the Claimant's attention in an order sent on 12 March 2021. I find that the Claimant's refusal in this respect amounted to a lack of cooperation and was unreasonable.

98. I accept the submission put forward on behalf of the Respondents that the Claimant's motivation was (at least in part) to cause inconvenience and expense to the Respondents.

99. The effect of this Claimant's action has been to cause unnecessary costs to the Respondents and marginally lengthen what has been a protracted phase of case management in this case.

Failure to co-operate: list of issues

100. It is argued that the Claimant has failed to accept electronic communication which has led to cost and confusion as a result of the very slow progress with the updating of the list of issues.

101. The Claimant did explain to the judge at the first case management hearing that he would only be communicated with by telephone and by post and that he has no email address for Internet connection at home. He explained to Employment Judge Stewart that using screens caused headaches. I note that the Claimant in his claim form submitted on 9 October 2020 said that he would prefer to be contacted by post. That was his preference regarding communication with the Tribunal.

102. The Claimant plainly has access to word processing facilities. He has as I have detailed above, produced substantial documentation using word-processors during the course of this litigation. The Claimant mentioned that someone helps him with this. He can print hard copies. I have seen documents provided in hard copy to the Respondents and hard copies printed and produced to me during hearings. If he did not wish to read documents on the screen, he could at least do this.

103. The claim for submitted in October 2020 contains some particulars. There is a schedule of 17 pages. There are numerous letters to the Tribunal and the Respondent. There is the particulars claim document 145 pages dated 1 March 2021. The documents must have required hours and hours of preparation.

104. I gave the Claimant the option to either receive documents electronically by email or alternatively via a memory stick. He refused either approach.

105. The Claimant says that he does not have email, which is surprising, but I cannot find that this is unreasonable in itself, and do not have an evidential basis to find that he has not told the truth about this.

106. I do find however that the Claimant's refusal to engage with the exercise of refining the list of issues outside of hearing has marginally added to the amount of time that this case has spent in the case management stage. It seems to me that this is a breach of rule 2 that the parties must cooperate with each other and the Tribunal. I find that this was unreasonable and did cross the threshold for making a costs order.

NO REASONABLE PROSPECT OF SUCCESS

107. The Respondent argues that the following matters had no reasonable prospect of success and apply for their costs under rule 76(1)(b).

Late withdrawal of claims

108. The Respondent argues that the Claimant waited until the hearing on 13 – 18 January 2022 before withdrawing a significant number of claims which have been pursued for in excess of the year. It is argued that the Respondent had already

incurred the costs associated with applications for strike out/deposit orders and updating the grounds of response.

109. It is said that the Claimant "casually" withdrew the claims, at the January 2022 hearing in particular – claims under TUPE; Equal pay claims brought against Lydia Ho, Maura O'Sullivan and Belinda Hudson; claims of direct age, race and sex discrimination in relation to 16 named comparators; claim of direct age discrimination in respect of reducing pension contributions, which the Respondent had explained could not succeed due to a specific statutory exemption; direct race and sex discrimination in relation to voluntary redundancy, which were re-cast at the January 2022 hearing as indirect discrimination complaints; direct sex discrimination claim in relation to severance package, in respect of which the First Respondent submitted witness evidence; harassment in relation to an email dated 14 January 2016.

110. Although this has been characterised by the Respondents' representative as a "late" withdrawal, although the litigation has been ongoing for some time, the Respondents have not yet been put to the time and expense of preparing for a final hearing, although I acknowledge that they have incurred expense responding to these elements. This is not a withdrawal made at the door of a final hearing when practically all costs have been incurred.

111. While it may have been ill-advised to bring so many claims in the first place, I have borne in mind that the Claimant is a litigant in person who should not be judged by the standards of a professional representative. He has not brought these claims with the benefit of legal advice. I have considered the guidance of Mummery LJ in the case of *McPherson*.

112. The Claimant has, in my view appropriately, responded to the process of judicial analysis of his claims as part of the processes of strike out and deposit and voluntarily withdrawn substantial parts of his claim. I would characterise this as a "dawn of sanity" situation rather than unreasonably and speculatively pursuing a claim until the last moment in hopes of a settlement.

113. It follows that I do not make a costs order in respect of this withdrawal.

<u>Strike out</u>

114. At the January 2022 the following claims were struck out as having no reasonable prospect of success: (i) claim for unauthorised deductions from wages - claim for overtime; (ii) equal pay claim brought under section 65, 66 EqA by comparison with Employees A, B & C in relation to years 2014, 2015 and 2016 only. In respect of the first of these claims the Respondent make the point that there was no contractual entitlement and any one of the free sources of legal advice to which he was directed could have explained that in minutes. As to the second of these claims the argument is made that this related to certain comparators who were paid the same less than the Claimant in specific years requiring witness evidence and supporting HR data.

115. The basis for the decision to strike out these claims was that they had no reasonable prospect of success. This falls squarely within rule 76(1)(b).

116. It seems to me that the threshold for making a costs order has been met in respect of these two parts of the claim.

Deposit orders

117. Finally the Respondents highlight that the Claimant did not pay deposits in respect of 23 of the 34 allegations in which I made a deposit order.

118. I take a similar view to these claims to the arguments about "late withdrawal". Again my finding is that the Claimant has responded to the deposit order process and made his own analysis of which of the 34 allegations he wishes to pursue. He may of course still face costs sanctions in respect of the 11 allegations which he has chosen to pursue should these allegations not succeed at the final hearing.

119. In respect of the allegations he has withdrawn, again I feel that this falls into a "dawn of sanity" sort of situation and do not feel that the threshold for making a costs order is passed.

WHETHER APPROPRIATE TO MAKE A COSTS ORDER

120. The costs jurisdiction has been invoked under both rule 76(1)(a) unreasonable conduct and rule 76(1)(b) no reasonable prospect of success, to the limited extent set out above. Much of the application for costs, which was itself on the long side, I have dismissed.

121. I have separately considered whether I should make a costs order at all.

122. I have taken some account of the fact that there has been more than one occasion during the course of this litigation on which the Claimant has rightly queried the content of the list of issues, for example to ensure that effect was given accurately to the discussion on and the Respondents have not given due consideration to the point he has raised.

123. I do however consider it is appropriate to make a costs order, given that there are elements of the claim pursued by the Claimant that had no reasonable basis at all and my finding that the Claimant has deliberately failed to cooperate in respect of the delivery of bundle and in the refinement of the list of issues.

124. I have borne in mind Mummery LJ's guidance in *Yerrakalva* that a precise causal link between unreasonable behaviour and specific costs is not required, but that causation is not irrelevant. I have not attempted to precisely attribute costs to the Claimant's conduct and the claims which had no reasonable prospect of success.

125. The specific claims that I found to have no reasonable prospect of success and the lack of cooperation outside of hearings in refinement of the list of issues can only amount to a small part of the Respondents' costs bill, the greater part of which has been incurred due to the size, scope and complexity of the claim and the fact of the Claimant being a litigant in person. I suspect that even if the Claimant had tried to cooperate with refining the lists of issues, the product would still have required some judicial attention at a case management hearing. I feel that it is fairly safe to conclude that at least two of the seven days spent in case management would not have been required had the Claimant cooperated with the

list of issues exercise. Counsel's refresher fees for are £2,500 per day, suggesting £5,000 of counsel's fees that might have been saved.

126. Given the nature of this exercise, I am not going to forensically analyse the costs schedule submitted. Based on the work that I think must have been done dealing with the lack of cooperation over bundles and in response to the two claims that were struck out, it seems fairly safe to conclude that at least £5,000 worth of solicitor's fees have been incurred dealing with these matters. I recognise the true figure may be higher.

127. It follows that at least £10,000 in my view can be attributed to the Claimant's conduct and pursuit of claims with no reasonable prospect of success. I have not needed to be more precise, given my findings below.

The Claimant's means

128. I find based on evidence in the bundle provided for the April 2022 hearing that the Claimant has in the region of £240,000 to £300,000 equity in a property, taking account of the likely value of the property and the outstanding balance of his mortgage. It is not necessary in the context of this public judgment to give the precise figures of the value of the house and the outstanding balance on his mortgage. I understand that the Claimant is not presently in employment.

Conclusion

129. I do take some account of the fact that equity in a property is not an "liquid" asset. I do not consider it would be just to make a costs order at a level that would inevitably force him to immediately sell his home, or make it impossible for him to pursue the remainder of his claims. On the other hand I consider it appropriate to make an order that is more than simply a trivial sum, given the costs of been incurred. The Claimant has chosen not to provide a great deal of detail about his financial circumstances. I have not concluded that he would be immediately be in a dire situation because of the making of a costs order. The Claimant was able to find substantial sum to pay part of the deposit order.

130. I find that the just figure for the Claimant to contribute to the Respondent's legal costs is **£2,500**.

Employment Judge Adkin

Date 7 June 2022

WRITTEN REASONS SENT TO THE PARTIES ON

.07/06/2022.

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.