EMPLOYMENT TRIBUNALS

Claimant: **Mr R Ewujowoh**

Respondent: **Jennings Racing Ltd**

Heard at: **East London Hearing Centre (by CVP)**

On: **29 March 2022**

Before: **Employment Judge Jones**

Members: **Ms W Blake-Ranken**
Mr ML Wood

Representation
Claimant: Mr A Kaihiva (Counsel) with claimant
Respondent: Mr B Amunwa (Counsel)

JUDGMENT

JUDGMENT having been sent to the parties on 1 April 2022 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1. The liability judgment in this matter was given by EJ Hyde on 22 August 2019. This was the respondent's application for costs arising from having to defend this matter, including costs of the 4-day hearing in March 2019.

2. By letter dated 28 March 2022, the respondent updated its original application for a costs order under Rule 75 of the Employment Tribunal Rules of Procedure 2013. It was the respondent's application that the claimant acted vexatiously, abusively, disruptively and/or unreasonably by:

   a. Pursuing unmeritorious claims and then abandoning them mid-trial with no or no adequate explanation as to why, in respect of the claims for breach of contract, sex discrimination, race discrimination

by way of dismissal, victimisation by way of dismissal and by way of deliberate failure of the duty manager test and post-dismissal victimisation by way of refusal to amend a payslip;

b. Bringing four claims in quick succession when one would have been proportionate;

c. Bringing claims against both the corporate and individual respondents unnecessarily;

d. Making piecemeal amendments to his withdrawn sex discrimination claim and attempting to exceed the terms of Judge Russell's order, which only allowed the claimant a limited amendment;

e. Obtaining a witness order, discharging it (and discharging the summoned witness Mr Ballard, then, via his representative, changing his position and reapplying for a fresh witness order (despite Mr Ballard's evidence being wholly or mainly irrelevant to any of the remaining legal or factual issues);

f. Wasting tribunal time and resources by making incoherent and unduly wide all applications for a disclosure order in respect of CCTV images of an entire shift on the shop floor, despite the relevant footage having been disclosed already, the claimant not reviewing the footage and/or the stills that the respondent provided to him, only to decide, without notice or explanation, that he no longer relied on any CCTV evidence;

g. Or, in the alternative, that the claimant brought his claims with no reasonable prospect of success.

3. The claimant resisted the application. The Tribunal had legal and factual submissions from both parties. The claimant submitted a bundle of documents in support of his resistance to the application. Those documents were considered.

4. The Tribunal considered the following law in coming to its decision on the respondent's application.

Law

5. Rule 78(1) states as follows: –

(a) A costs order may 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;

(b) Order the paying party to pay the receiving party the whole of a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a County Court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge apply the same principles.

6. In the case of *Yerrakalva v Barnsley MBC* [2012] ICR 420, the Court of Appeal held per Mummery LJ that:

> *'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.'*

7. In *Power v Panasonic UK Limited EAT 0439/04* Clarke J described the exercise to be undertaken by the Tribunal as a two-stage exercise. First, the Tribunal must ask itself whether the paying party has acted unreasonably, vexatiously, abusively, disruptively, or brought a claim that was misconceived. If so, in the second stage the Tribunal must consider whether to exercise its discretion by awarding costs against that party.

8. Conduct is '*vexatious'* for the purposes of rule 76 'if an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or some other improper motive' (*ET Marler Ltd v Robertson* [1974] ICR 72).

9. Unreasonable conduct is defined by reference to its ordinary meaning and is separate from and wider than the concept of '*vexatious'* conduct (*Dyer v Secretary of State for Employment* UKEAT/183/83 (unreported)).

10. The reasonable prospect of success limb of rule 76 was recently addressed in the case of *Opalkova v Acquire Care Ltd* [2021] 8 WLUK 265 in which HH J Tayler in the EAT held that the correct approach to considering the issue of whether the case had reasonable prospects of success was to consider whether the respondent's defence to each of the appellant's 6 complaints had a reasonable prospect of success separately, rather than considering the defence as a whole. He further set out the following is a correct approach:

> *'Accordingly, there are three key questions. First, objectively analysed when the response was submitted did it have no reasonable prospects of success; or alternatively at some later stage as more evidence became available was a stage reached at which the response ceased to have reasonable prospects of success? Second, at the stage that the response had no reasonable prospects of success did the respondent know that was the case? Third, if not, should the respondent have known that the response had no reasonable prospects of success?*
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> *In considering whether the respondent should have known that a response had no reasonable prospects of success, the respondent is likely to be assessed more rigorously, if legally represented.'*

11. In this case, the claimant had withdrawn some of his complaints during the liability hearing. There is no general rule that withdrawal of a claim is tantamount to an admission that the claimant had no reasonable prospects of success, however, this will depend on the particular circumstances of the case (see again *Yerrakalva*).

12. Rule 78(1)(b) as already quoted above, gives the Tribunal the power to cap the amount of cost to be awarded upon detailed assessment, alternatively,

make award based on particular issues or relating to certain parts of the proceedings *(Kuwait Oil Co v Al-Tarkait* [2021] ICR 718).

13. The Tribunal has discretion in Rule 84; as follows:

> *In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amounts, the Tribunal may have regard to the paying party's (or, where wasted costs order is made, the representative's) ability to pay.*

14. The Tribunal therefore has a discretion to consider the paying party means and its decision on whether or not to consider means, should be recorded with brief reasons.

15. The Tribunal drew the following conclusions from the evidence and submissions at the hearing.

Findings of facts

16. The claimant brought four claims in this Tribunal. The 1st complaint (5 March 2018) was of breach of contract, direct race discrimination, pre-dismissal victimisation against his former employer, Jennings Racing Ltd. The 2nd complaint (23 March 2018) was of post-dismissal victimisation against Jennings Racing Ltd and Mr Jowett, his former manager and the 3rd complaint (4 May 2018) was also against Mr Jowett and was another complaint of post-dismissal victimisation. The 4th complaint (25 June 2018) was of sex discrimination and was against Jennings Racing Ltd and Mr Rogers. During the hearing, the claimant made allegations against a Ms Ryland, even though there was no complaint against her.

17. The Claimant was dismissed by the respondent on 28 February 2018 because he failed to pass a manager's test as required and had not made expected progress.

18. There were 2 preliminary hearings in the Tribunal prior to the liability hearing. In the preliminary hearing on 30 August 2018, EJ Russell granted the claimant limited leave to amend claim number 4 to add a complaint of sex discrimination related to a single text message between Mr Rogers and another manager, which he alleged demonstrated a pre-determined decision to dismiss him. Despite this limited permission, the claimant unreasonably sought to include wide-ranging fresh allegations in his amended sex discrimination complaint, which were not of sex discrimination. The respondent was required to respond to these additional allegations.

19. The liability hearing took place before a full panel on 12 – 15 March and 23 – 24 April 2019. The claimant conducted his case in an unreasonable way during the hearing. On 15 March, with no explanation, the claimant withdrew the complaints of sex discrimination and breach of contract. On 23 April, again without explanation, the claimant withdrew his complaints of race discrimination by way of dismissal on spurious grounds and dismissal by way of victimisation; victimisation related to the respondent deliberately failing him on the duty manager test and post-dismissal victimisation. It was submitted today on the claimant's behalf, that he did so in order to be helpful and because he agreed that they had little prospects of success. That was not the case. We find it likely

that those complaints were unmeritorious, but the claimant does not agree. In his submission to the EAT, he stated as follows:

> *'The sex discrimination and breach of contract claims were withdrawn by the appellant under duress following personal threats from the barrister of the respondent's on the appellant's lay representative during the hearing'.*

20. It is likely that the claimant withdrew his claim of sex discrimination after viewing CCTV evidence in the hearing and realising that it did not support his case. He had every opportunity to view the CCTV evidence prior to the hearing but chose not to do so. It was not clear what was the sex discrimination. Both the claimant and Ms Ryland were suspended, so there was no difference in treatment. There was no evidence that the claimant intended to rely on in support of his complaint of sex discrimination and his withdrawal of that complaint after viewing the CCTV demonstrates that it was always a thin case and had no merit.

21. The claimant referred in the appeal to the EAT to the conduct of respondent's counsel. On 20 March 2019, during the adjournment of the trial, he made spurious and baseless complaints against Mr Amunwa to the Bar Standards Board. His complaint was dismissed as not warranting an investigation. Unfortunately, on 18 September 2018 after he received the respondent's costs application, the claimant resurrected the complaint. He accused the Bar Standards Board of race discrimination and prompted them to re-open the investigation into Mr Awunma. If he had been bullied by Counsel into dropping his complaints of sex discrimination and breach of contract during the hearing, we would have expected him to raise this with EJ Hyde's Tribunal but there was no complaint at the time. He simply withdrew the complaints without explanation. The complaint to the Bar Standards Board was eventually rejected on 11 December 2020, after an investigation which no doubt caused Mr Awunma unnecessary stress and worry. This was vindictive, unnecessary and totally unwarranted and is part of the claimant's unreasonable, vexatious and disruptive conduct of his case.

Unreasonable conduct of proceedings

22. During the hearing, the claimant conducted his case unreasonably in relation to the evidence. Firstly, in relation to witness evidence. On 4 February 2019 the claimant made a written application for a witness order for Mr M Bollard to attend the liability hearing to give evidence on '*how the claimant was treated prior to his dismissal'*. The witness order was granted on 7 March. Despite requests from the Tribunal during the first few days of the hearing, the claimant failed to provide a statement or proof of evidence from Mr Bollard. During the hearing but while the claimant was out of the Tribunal room, the claimant's representative sought to discharge the witness order. Later, it appeared that he had changed his mind and the claimant sought to blame the Judge for the confusion. At the resumed hearing, the claimant provided 2 statements for Mr Bollard, one typed and a handwritten note, with unexplained discrepancies between the 2 documents. Mr Bollard gave evidence after the respondent's witnesses and in particular, Ms Ryland gave evidence, which meant that they were deprived of the opportunity to respond. In the end, the Tribunal found him to be an unreliable witness who gave inconsistent and exaggerated evidence. Mr Bollard's evidence was also irrelevant to the remaining legal and factual issues in the case. The claimant's unreasonable conduct was the decision to call

Mr Bollard as he did not have relevant evidence to give, the way in which Mr Bollard was called, the confusion over the witness order; and the claimant's attempts to blame EJ Hyde for the debacle around Mr Bollard's attendance at the hearing; which was directly contradicted by the Tribunal judgment at paragraphs 10 to 12. We find that the claimant's decision to call Mr Bollard as a witness at all and then handling his evidence in this way was unreasonable, consumed hearing time and rather than assisting the Tribunal actually served to further complicate matters.

23. The allegations addressed by Mr Bollard and the CCTV; were against Ms Ryland and the 1st respondent and were correctly described by the respondent as scurrilous. At the same time, they were serious allegations as if they had been proven, they would have had serious consequences for the respondent as well as Ms Ryland, as she was the subject of an allegation of assault. The respondent therefore had to prepare to defend all these allegations even though the claimant would have been well aware that there was no evidence to support them.

24. Secondly, in relation to the CCTV evidence. On day 4 of the hearing, the claimant made an application for a specific disclosure order in respect of CCTV images of his entire shift on 23 January 2018. The respondent is correct in its submission that this was disproportionate and that the claimant had given no thought as to how his application if granted, would be accommodated by the Tribunal. The claimant's entire shift produced 8 hours of CCTV footage, which would have taken a considerable time to review in a hearing.

25. The Tribunal released the respondent to prepare the CCTV evidence. The claimant maintained that he could not access the CCTV in a format that could be viewed on his laptop. The respondent took the time to go through the CCTV footage, prepared a guide to the stills that were included in the bundle, produced coloured slides and annotations. Although the claimant required the CCTV footage to be produced, when it was produced and he was asked to corroborate his account of the incident on 23 January 2018 by reference to relevant parts of the CCTV, the judgment confirms at paragraph 90 that he declined to do so.

26. Mr Jowett had helpfully brought his laptop to assist the Tribunal. When the Tribunal adjourned to give the claimant and his representative the opportunity to view the CCTV on Mr Jowett's laptop, the claimant indicated that he did not wish to continue to press for the CCTV to be viewed and it was at that point that he withdrew the sex discrimination complaint. The claimant's refusal to view the CD-ROM supplied to him, his failure to familiarise himself with the dossier of still images from the CCTV that had been provided by Mr Jowett, the claim in his witness statement that the CCTV would support his version of events, his failure to review the footage after an adjournment granted for that purpose and his decision to suddenly withdraw the allegation related to the footage all amounted to unreasonable conduct on his part. He wasted Tribunal time and the resources of the Tribunal and the respondent, even though he must have known that the CCTV footage would not support his case, as he would have known what actually happened on 23 January 2018.

27. By a written judgment dated 22 August 2019, the Tribunal dismissed all of the claimant's claims. The claimant applied for reconsideration of the judgment

and sought to appeal the Employment Tribunal's decision at the EAT. Both attempts failed.

28. Significantly, as stated above, in his appeal, the claimant stated that the sex discrimination and breach of contract claims were only withdrawn because of undue pressure from the respondent and not because he agreed that they were weak and had no reasonable prospects of success, which they clearly had.

Claimant on notice of likelihood of application for costs

29. On 29 August 2018, the claimant was invited to withdraw his 4th claim and put on notice of risks of an application for costs. Further warnings were given on 30 August 2018 and subsequently. Despite this and despite being a former solicitor himself and having legal representation in the case; the claimant did not withdraw any of his claims until the last minute i.e. during the trial. Up until those claims were withdrawn, even though they considered that they had no reasonable prospects of success, the respondents had to defend them, and this caused them to incur costs, and waste time and resources.

30. This was unreasonable conduct. This conduct was compounded in the way the claimant withdrew them; without notice and with no explanation and not because he was seeking to narrow the issues or to cooperate.

31. The context is that the claimant is a former solicitor who was struck off the roll following a conviction for fraud for which he was sentenced to 5 years imprisonment. His practice was mostly in crime but as a former officer of the court he would have been aware of the need to; and it would be reasonable for a tribunal to expect him to present his case in a reasonable and proportionate manner. It would also be reasonable for him to be expected to be aware of the need for an evidential basis for making serious allegations against the respondent as well as career threatening allegations against their legal representative.

32. The claimant brought 4 separate claims against individual and corporate respondents which required 4 ET3s to be prepared to respond to each claim and for all three respondents. The claimant was asked at the very first preliminary hearing why he brought claims against the individual employees, he was unable to answer but nevertheless, continued against all three, up to and at the hearing. In addition, the claimant indicated that he would withdraw against the 2nd respondent in exchange for certain concessions that he wanted from the 1st respondent. The Tribunal can see why the respondent submitted that it was more likely to be that in bringing multiple unnecessary claims against these respondents, the claimant was pursuing a personal vendetta against the 1st respondent and its employees, for his own reasons. It is likely that in bringing multiple claims against numerous respondents the claimant was seeking to put pressure on the 1st respondent without thinking of consequences for the Tribunal or the respondents.

No reasonable prospects of success:

The withdrawn claims

33. It is unlikely that the withdrawn claims had any reasonable prospects of success. The claimant did not provide any information today or refer to any evidence that he would have relied on in the hearing to support the withdrawn claims. There were no facts from which the Tribunal could have inferred discriminatory treatment on the basis of sex. As already stated, both the claimant and Ms Ryland were suspended pending investigation of the claimant's complaint. The evidence that the Tribunal considered suggested that it was likely that a non-male colleague had allegedly behaved aggressively to Mr Brooks and Ms Ryland and failed the duty manager test twice; would have been treated in the same way and been dismissed. Regarding the complaint of breach of contract, the claimant was paid notice pay which meant that he had no basis on which to bring a complaint of a breach of contract. It was vexatious to continue with an allegation of breach of contract in those circumstances. There was no evidence to support his complaint that he had been treated less favourably by being dismissed on spurious grounds. The liability judgment is clear that the reason for dismissal was related to the claimant's failure to pass the Duty Manager test and that it was reasonable to ensure that duty managers pass the exam and go on to become qualified store managers (see paragraph 138). There was also no evidence to support the claimant's complaints of pre-dismissal and post-dismissal victimisation. The claimant may have been uncomfortable that his last payslip stated *'pay on suspension'* but that was factually correct and to go further and allege that this was victimisation, was also vexatious. Those allegations had all been looked into and evidence disputing the complaints had been given to the claimant well before the hearing.

34. The complaints that were withdrawn by the claimant during the liability hearing were without merit, had never had any reasonable prospects of success. The claimant conducted his case unreasonably, vexatiously and disruptively by pursuing all complaints up until they were withdrawn in the hearing.

The maintained claims

35. Having heard evidence and submissions by both parties and considered its judgment, the Tribunal at the liability hearing did not make any findings of fact which would support any of the claimant's claims.

36. The Tribunal found no evidence that the respondent treated the claimant less favourably than they treated or would have treated a non-black duty manager on probation, in similar circumstances to the claimant. At paragraph 49 of the judgment, the Tribunal stated as follows:

> *'There was no specific evidence put forward on behalf of the claimant to assist the tribunal to reach a finding which would lead to the burden of proof being shifted in terms of Mr Crook's reaction to the claimant being on grounds of race.'*

37. The Tribunal made similar findings regarding the allegations against Ms Ryland.

38. The claimant's comparators were not in the same or materially similar circumstances as he was (see paragraphs 120 – 122 of liability judgment). His comparators were misconceived.

Conclusion

39. It is this Tribunal's judgment that the respondents have made a strong case that the claimant conducted his case vexatiously, unreasonably and disruptively in a number of aspects both in the way he conducted all his claims and in the way he conducted those he withdrew and the timing of those withdrawals.

40. Given that he conducted his claim in this way, the Tribunal next considered whether it should exercise its discretion to award costs against him.

41. At this stage of the process, the Tribunal considered that the claimant had been represented throughout his case and that he had been put on notice by the respondent quite early in the proceedings that there was likely to be an application for a costs order against him if he continued to pursue all of his claims. The claimant's unreasonable conduct of his claims did not happen because of a lack of understanding on his part. His attempts to use his complaint against Mr Jowett as leverage when he indicated that he was prepared to withdraw it for certain concessions; shows that he was not pursuing a genuine claim but was deliberately using the Tribunal process for other reasons. The respondent suggests as a personal vendetta against the respondent. Similarly, the way in which the claimant treated the CCTV evidence also shows that he had no intention of pursuing the complaint but simply insisted on it being produced to cause the respondent difficulty. When it was produced, he refused to look at it himself and it was only after the respondent took time, effort and resources to collate, assess and present the evidence in a format that would assist the claimant and the Tribunal, he withdrew the complaint that it related to. It was not for lack of understanding or unfamiliarity with Employment Tribunal proceedings that the claimant refused to look at the CCTV footage when arrangements were made for him to view it and refused to point out the evidence he wanted the Tribunal to pay attention to, having said in his witness statement that there was evidence on there that would support his complaint.

42. The Tribunal at the liability hearing was critical of the claimant and recorded that he had displayed a belligerent attitude at work (paragraph 35), did not appear to take correction well (paragraph 38), that he had not taken up the opportunity to use the training opportunities available to and that he reacted poorly to Mr Crooks' questioning his knowledge of the basic principles of betting products (paragraph 34).

43. The Hyde Tribunal made clear in its judgment (paragraph 24) that although he had a history of dishonesty, the reason for termination of the claimant's employment with the 1st respondent was not related to his conviction or to any allegation of dishonesty. The Tribunal also found Mr Jowett, against whom serious allegations had been made by the claimant, to be a very fair man and someone who '*stuck his neck out'* for the claimant at the start of his employment and then played an important part in the events that led to the termination of the claimant's employment. This was not an unfair dismissal

complaint, but the Hyde Tribunal was clear that the claimant's dismissal was related to his failure to perform to an adequate standard and not a matter related to his honesty or his race or gender.

44. In the circumstances, taking all the above and the findings of the Hyde Tribunal and its judgment into account; it is this Tribunal's judgment that the statutory threshold has been met and it is appropriate to exercise its discretion to award costs against the claimant.

Consideration of the claimant's financial means

45. Under Rule 84 the Tribunal heard submissions regarding the claimant's financial means and ability to pay.

46. The claimant has presented the Tribunal with a copy of County Court order made against him which appears to be a charging order. The order refers to a schedule of assets, which the claimant has not provided. The claimant has not complied with his disclosure duties in this respect. The claimant has failed to disclose details of his capital, savings or income to this Tribunal.

47. The Tribunal noted that the claimant has had resources to pay legal representatives on several occasions over the years, including at the trial in 2019 and in settling grounds for his appeal to the EAT. He has not told the Tribunal of the source for those funds.

48. The claimant had Counsel representing him at today's hearing. We were not told that Mr Kaihiva was doing so on a pro-bono basis. The Tribunal had limited evidence of the claimant's financial means.

49. The claimant has medical problems, including kidney disease and hypertension, for which he takes medication.

50. The claimant attended this hearing by CVP from Nigeria. We agree with the respondents' submission that air travel is expensive and that whether the claimant is attending his aunt's funeral, as he stated after he heard the judgment, or seeking medical treatment for himself, or both, it is still expensive. We were not told how the claimant was able to afford a return airline ticket to Nigeria. We were told that he was receiving medical treatment there but not how he was meeting the likely costs of such medical treatment in a country where it is unlikely (we were not told that there is) a free national health service. There are likely to be costs associated with that. The claimant referred to his sister having contributed to his costs but there was no information on his sister's income and assets as there would need to be if she was paying his living and travelling expenses.

51. In the UK, the claimant is likely to be in receipt of state benefits such as PIP (Personal Independence Payments) and Universal Credit. We are aware that one can be in receipt of PIP while employed. The Universal Credit letter that was shown to the Tribunal referred to the claimant being homeless, but we were not sure how that related to the charging order on his matrimonial home. The existence of the charging order suggests that the claimant owns or has a financial interest in a property in the UK and that there is equity in that property. We therefore had conflicting evidence on the claimant's financial means. This

Tribunal did not have sufficient evidence to assist us to make any further conclusions on the claimant's financial situation as he failed to provide anything else.

52. The claimant may well be in work in the UK or in Nigeria. If not, he may well return to work in the future. The claimant has assets, at least an interest in his former matrimonial home which is highly likely to have equity in it. It is likely that the claimant has the means to satisfy a costs order. Whether or not he has regular income, it is our judgment that the claimant is likely to have other sources of financial support as he has been able to afford to visit Nigeria for a family funeral and for medical treatment. He also has been able to afford legal representation today and previously in this litigation. He has not disclosed the means of those providing him with financial support.

53. Having considered the claimant's financial situation, it is this Tribunal's judgment that the claimant should be ordered to pay towards the respondents' costs incurred in defending these vexatious and unmeritorious claims, some of which, such as the complaints of sex discrimination, breach of contract and the complaint related to the pay slip; had little reasonable prospects of success at the start of the case.

The Tribunal then considered the amount of the award that is payable - how much costs to order the claimant to pay?

54. As stated in the case of *Beynon v Scadden* [1999] IRLR 700*, EAT:*

> *"The proper test for the employment tribunal was not whether its order accorded with this authority or that but, ultimately … whether it was just to have exercised as it did the power conferred upon it by the rule … [The EAT] must not consider whether we would have ordered as the [employment judge] did but instead ask ourselves whether the employment tribunal took into account matters which it should not have done, or failed to take into account that which it should have done or whether in some other way it came to a conclusion to which no employment tribunal, properly directing itself, could have arrived."*

55. The Tribunal was aware that the purpose of an award of costs is to compensate the party in whose favour the order is made, and not to punish the party ordered to pay the costs.

56. As far as ability to pay is concerned, in the case of *Jilley v Birmingham & Solihull Mental Health NHS Trust UKEAT* [2008] All ER (D) 35 (Feb), Judge Richardson acknowledged that there was no absolute duty to take ability to pay into account and that although in many cases it would be desirable to do so as it would affect the exercise of an overall discretion; there may be good reasons for not taking them into account such as in this case where the paying party has given unsatisfactory or conflicting evidence about means.

57. In this case, as we outlined above, the Tribunal has had conflicting evidence about means from the claimant so that it is difficult to come to a reliable conclusion on his means. The evidence provided did not assist the Tribunal. It is this Tribunal's judgment to go ahead and make the order for costs as it is

appropriate given the claimant's unreasonable conduct of the litigation as stated above.

58. The respondent presented the Tribunal with three costs schedules. The first related to the period 15 March 2018 – 18 April 2019. The second schedule related to the period after the resumption of the hearing, 23 April 2019 to 18 September 2019. The third and last schedule showed costs incurred since the final hearing, up to today. There are also additional costs, including counsel's fee for today's hearing.

59. The first schedule amounts to £78,518.16, the second to £2, 817 and the last to £12,093. Counsel's costs for today are £3,000 plus VAT. The respondent has therefore incurred a total of £96,428.16 (plus VAT on Counsel's fees), in defending this claim.

60. In respect of the amount of costs claimed, the Tribunal made the following observations: This litigation was protracted, due in large part to the way the claimant pursued his case, with multiple claims, which required two preliminary hearings to case manage. During the life of the case the claimant sent a large volume of correspondence to the respondent which needed to be addressed and responded to. The claimant made repeated serious allegations and threats to escalate matters to external bodies, all of which had to be addressed. The case was run by the senior solicitor in the firm, but he made as much use of an associate and a trainee as was possible, given the seriousness of the allegations against the respondent and its senior employees such as Mr Jowett and Mr Rogers.

61. Rule 78(1)(a) of the Employment Tribunal Rules 2013, referred to above, gives the Tribunal the power to award costs to the receiving party up to £20,000.

62. Rule 78(1)(b) gives the Tribunal the power to award the receiving party the whole or a specified part of the costs, with the amount to be paid to be determined by way of a detailed assessment either conducted by a county court or by an Employment Judge. Although such assessment will usually be done on a standard basis, the Tribunal could order that it be done on an indemnity basis and is not under a duty to put a cap on it.

63. The respondent submitted that the Tribunal should assess the costs to be awarded on the indemnity basis.

Standard basis

64. On the standard basis, costs must be proportionate (in relation to the value of the claim or relief, complexity, additional work generated and any wider factors) and either: reasonably incurred; or reasonable in amount (pursuant to the Civil Procedure Rules r.44.3 and Practice Direction 44.6.

Indemnity basis

65. Indemnity costs may be awarded where there has been blameworthy or abusive conduct by a party that is '*outside the norm'*. The respondent referred as examples to cases where the claimant has aggressively pursued unjustified

serious allegations of deception or fraud. On the indemnity basis costs are recoverable if they are reasonably incurred and reasonable in amount. Proportionality does not arise. Any doubt must go in favour of the receiving party.

66. The respondent submitted that due to the claimant's unreasonable conduct, the Tribunal should award costs to be assessed on the indemnity basis. In support of their application the respondent referred to the claimant's actions in bombarding it and the Tribunal with a multiplicity of claims, (containing serious allegations of misconduct) and with intemperate and tactically motivated correspondence without any substance and in disregarding and abusing the Tribunal's own procedures.

Judgment

67. The Tribunal's judgment is to assess the costs on the standard basis. It is also to make an award of costs against the claimant for his unreasonable and vexatious conduct of these proceedings, including pursuing complaints that demonstrably had no reasonable prospects of success.

68. It is our judgment that if there had been no vexatious conduct by the claimant, there were parts of his claim that could still have been litigated although they had little reasonable prospects of success.

69. It was our judgment not to award the respondent its full costs. If the vexatious complaints – the complaints that were withdrawn at the start of the hearing – had not been pursued, the hearing would have lasted 3 – 4 days and would not have required the second listing. Also, if the claimant had conducted this litigation in a proportionate manner and not sent the respondent a barrage of unreasonable, threatening correspondent, it is likely that the respondent would not have incurred the solicitors' costs that it did.

70. It is our judgment that the claimant should pay towards the respondent's costs. To reflect the fact that we assess that there would still have been a trial, we award the respondent's costs up to our jurisdiction, in the sum of £20,000, which we consider to be a reasonable amount.

Employment Judge Jones
Date: 30 June 2022