EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mr P Baker	**v**	Mr N Morgan & Others

Heard at: Cambridge (by CVP) **On:** 29 June 2022

Before: Employment Judge Tynan (sitting alone)

Appearances
For the Claimant: Mr L Varnam, Counsel
For the Respondents: Mr N Morgan, Fourth Respondent

COSTS JUDGMENT

The Tribunal Orders the Respondents to pay the Claimant's costs of the Remedy Hearing on 29 June 2022, to include the Claimant's costs incurred in preparing for the hearing, such costs to be summarily assessed if they cannot be agreed.

REASONS

1. Having cautioned the parties that there may be some short delay in providing a decision on the Claimant's costs application, in the absence of any hearings on 30 June 2022, I have been able to determine the application whilst the issues are still fresh in my mind.

2. By a Reserved Judgment dated 22 October 2020, sent to the parties and entered into the Register on 28 October 2020 (the "Liability Judgment"), the Claimant's various complaints were upheld as against Mr Morgan, the Fourth Respondent to these proceedings. Mr Morgan was Ordered to pay to the Claimant sums which I calculate total £13,374.50 in respect of certain of his complaints, with the issue of remedy in respect of unfair dismissal to be determined at a further Remedy Hearing. In the event, and as I shall return to, that Hearing was also to consider the Claimant's application for costs, as well as potential reconsideration of the Liability Judgment as regards the claim for holiday pay. In the event, it was not in fact necessary in the interests of justice for the Liability Judgment to be reconsidered, it being common ground that Judge Kurrein's award to the Claimant in respect of holiday pay had been correctly calculated by him

and, accordingly, that it should not be increased. The further potential for Employment Judge Kurrein to recuse himself from the Remedy Hearing fell away as the matter had instead come before me in Judge Kurrein's absence on sabbatical. I addressed the Respondents' concerns about this when giving reasons as to why I decided not to recuse myself from hearing this matter.

3. The Claimant's unchallenged evidence before me was that the sums awarded to him in the Liability Judgment have not been paid. The Respondents submitted Notice of Appeal to the Employment Appeal Tribunal on 1 December 2020. Their Grounds of Appeal were considered by The Honourable Mr Justice Cavanagh, who Ordered on 22 March 2021 that the Appeal was totally without merit. I was told by Mr Varnam that the Respondents' further application to the Court of Appeal for leave to appeal has since been refused. In light of those decisions it is unclear on what basis the sums awarded have not now been paid by Mr Morgan.

4. In his Written Reasons for his Order, Cavanagh J noted that most of the Grounds of Appeal were given over to trenchant criticism of the Employment Tribunal systems and of bias on the part of Employment Judge Kurrein, who the Appellants described as a "bigoted, twisted, contradictory parasite". He was also described by the Appellants as "prejudiced and corrupt". In similar vein, Mr Morgan claimed that I was biased, had projected an intense personal dislike of him and, whilst he said he did not have evidence that I was corrupt, that I was part of a corrupt system. He asserted that I had effectively engineered a situation in which I could then make criticisms of him. Throughout the Hearing on 29 June 2022, Mr Morgan reiterated the Respondents' various criticisms of the Employment Tribunal system and of Employment Judge Kurrein, notwithstanding Cavanagh J's observation that "there is not a shred of support for these allegations" and that no evidence had been put forward to sustain them. Cavanagh J observed that the Appellants had lost all objectivity and that allegations had been made that had no possible basis in reality. His observations equally apply to Mr Morgan's comments to me about the system and Employment Judge Kurrein.

5. I do not set out in further detail here why I declined to recuse myself from the proceedings. I gave detailed oral reasons for my decision on 29 June 2022; the parties may request Written Reasons should they require them. Likewise, they are entitled to request Written Reasons for my Judgment on Remedy.

6. The Claimant's costs application was emailed to the Tribunal at 11.44am on 3 February 2022. He contends that the threshold test has been met under sub-paragraphs (a) and (b) of Rule 76(1) of the Employment Tribunals Rules of Procedure, namely by reference to which the Tribunal should consider whether to award costs against the Respondents. Mr Morgan claimed that he was unaware of any costs application until receipt, on or around 27 June 2022, of the Bundle for use at today's hearing. I do not accept that. The parties have been on notice since 7 February 2022 (pages 41 and 42 of the Hearing Bundle) that the Hearing on 29 June

2022 (originally listed on 8 April 2022) would be to consider, amongst other things, the issue of costs and this was further confirmed in the Tribunal's letter to the parties dated 31 March 2022. In any event, Mr Morgan and Ms Abbott of the First Respondent were copied into the costs application at the email addresses they have used for correspondence in the course of these proceedings. There is no suggestion that other correspondence to or from those email addresses has not been received. I find that Mr Morgan and Ms Abbott received the costs application when it was submitted on 3 February 2022 and, accordingly, that they have been on notice of it since that date, and aware since 7 February 2022 that it would be considered at the same time as the Tribunal determined remedy for unfair dismissal. The Respondents have had every reasonable opportunity to prepare themselves on the issue and, had they wished to do so, to make written submissions in response to those submitted on behalf of the Claimant. In any event, Mr Morgan was able to make submissions on the issue at the Hearing, albeit, as I shall return to, he failed to make the best use of that opportunity, using the hearing instead as a platform to make unfounded allegations against Mr Varnam and his instructing solicitor.

7. I can understand why the Claimant in particular may have preferred that the costs application was heard by Employment Judge Kurrein, given his previous involvement and potentially greater knowledge of the history of the proceedings. On the other hand, his Judgment and Reasons stand as a detailed and final record in the matter, the Respondents having been unsuccessful in their efforts to appeal his decision. Having carefully read the Liability Judgment, I cannot identify a proper basis to conclude that the responses had no reasonable prospect of success (Rule 76(1)(b)). That is the same threshold test for striking out claims and responses under Rule 37, a power that is used sparingly and only in the clearest cases, where either the facts are not in dispute (or are capable of summary determination) or the claim(s) or response(s) are legally misconceived. This was not such a case. At the heart of the dispute was the Claimant's status as a groundworker at the Respondents' sites. On advice, the Respondents asserted that the Claimant was self-employed. Such disputes regarding a Claimant's status are the bread and butter of the Tribunals, particularly in the 'Trades'. Although Employment Judge Kurrein determined that the Claimant had been employed by Mr Morgan, he did not state in his Judgment that the Respondents' positions were misconceived or hopeless. On the contrary, the Judgment sets out the parties' respective evidence and arguments before concluding at paragraph 112.11 of the Judgment that the Claimant had established, "on the balance of probabilities", that he was an employee. I consider it essentially besides the point that Employment Judge Kurrein questioned the Respondents' credibility and integrity. In making findings and arriving at a Judgment, Tribunals routinely reach conclusions as to a party's credibility, even if they perhaps less commonly express a view as to their integrity. I do not agree with Mr Varnam that it may be inferred from the fact that the Respondents lacked integrity (or indeed, credibility) or otherwise from the Judgment that they were pursuing, and knew that they

were pursuing, a hopeless response or otherwise acting vexatiously. As I shall come to, Employment Judge Kurrein was highly critical of the Respondents' conduct (or, more specifically, Mr Morgan's conduct of the proceedings on their behalf). If he had considered their responses to be without merit and vexatious, he might have said so explicitly rather than simply conclude that the Claimant had established his status as an employee on the balance of probabilities.

8. I am, however, satisfied that the Respondents (or, more specifically, Mr Morgan) acted abusively, disruptively or otherwise unreasonably in the conduct of the proceedings (Rule 76(1)(a)). I have referred already to Cavanagh J's stinging criticisms of the Respondents/Appellants. I refer to paragraphs 22 to 41 of the Liability Judgment, in which Employment Judge Kurrein made what can only reasonably be described as trenchant criticisms of Mr Morgan's conduct. He agreed with Mr Varnam's submission that throughout the bulk of his evidence Mr Morgan had been truculent, confrontational, rude and evasive. He stated at paragraph 37 of the Liability Judgment that Mr Morgan was being "disruptive", this being one of the stated thresholds in Rule 76(1)(a). That finding alone would be sufficient to require me to consider whether to make an award of costs.

9. I lost count on 29 June 2022 of the number of times I had to remind Mr Morgan that I would not go behind, nor allow him to go behind, the findings and conclusions in the Liability Judgment or the decisions of the Employment Appeal Tribunal and Court of Appeal. It was to no avail; Mr Morgan remained determined to criticise findings and decisions that he still does not agree with, including my decision on 29 June 2022 to proceed. In spite of his previous allegations "having no possible basis in reality" he continued to make them before me and to then complain that I was unfairly seeking to prevent him from pursuing lines of questioning and submissions that were a collateral attack on the findings and decisions in question, all the time asserting that this was not what he was seeking to do. His conduct during the Hearing on 29 June 2022 was often challenging. It is regrettable, not least because he is evidently capable of making relevant points when he turns his mind to it. I am particularly critical of his scurrilous attacks upon Mr Varnam and his instructing solicitor, Mr Hyland. Notwithstanding I have concluded that the threshold under Rule 76(1)(b) has not been met, the Claimant quite reasonably pursued an application for costs against the Respondents; his legal representatives, in turn, acted entirely professionally in terms of how they pursued that application on his behalf. Indeed, they are to be commended for showing great restraint in the face of Mr Morgan's abusive provocations. Amongst other things, Mr Morgan asserts that they have manufactured a "tissue of lies … with Mr Baker as their patsy" and that they have manipulated the legal system and the truth. Those assertions have no basis in the real world. They are the expression of what Employment Judge Kurrein rightly described as Mr Morgan's fixed and cycnical view of this litigation. He has not only abused his rights as a party to this litigation but he has also abused the privilege afforded to parties to engage in confidential settlement discussions by seeking to use the cloak of a "without prejudice" communication with the

Claimant on 27 June 2022 (which, tellingly, was sent to the Claimant directly rather than communicated through his solicitors) to threaten the Claimant and heap yet further personal abuse upon his legal advisers; Mr Morgan did not dispute that he referred to Mr Hyland in that correspondence as a "parasitic shit", amongst other things. All that Mr Morgan's abusive comments and assertions have served to achieve is to further undermine his credibility and integrity.

10. The Respondent's misconduct was not restricted to Mr Morgan's conduct on 21 August 2020 and before me. I find that the Respondents effectively sought to ambush the August 2020 Hearing by serving their witness statements on the Claimant at 7.30pm the evening before the start of the Hearing. It is irrelevant in my Judgment that the Respondents had lost the benefit of legal expenses cover prior to the Hearing; even if they unexpectedly found themselves unrepresented prior to the Hearing that does not excuse their failure to serve witness statements that had evidently been finalised some weeks or even months prior to the Hearing.

11. It does not automatically follow that because a Respondent has behaved abusively, disruptively or otherwise unreasonably that the Tribunal should make a Costs Order. The Tribunal retains a discretion in the matter and in the exercise of that discretion should have regard to the nature, gravity and effect of the conduct, though on the latter issue it is not necessary for the Tribunal to determine whether or not there was a precise causal link between the conduct in question and the specific costs being claimed. However, as I observed during the Hearing, a Costs Order is not intended to be punitive.

12. In this case, the Respondents' conduct, through Mr Morgan, was serious and deliberate. It had its origins in Mr Morgan's "fixed and cynical" views which lacked any possible basis in reality and, I find, was partly with a view to securing the Respondent's desired outcome, namely a postponement of the August 2020 Hearing. I find, on the balance of probabilities, that the Respondents' conduct resulted in Employment Judge Kurrein being unable to give Judgment on liability on 21 August 2020 and thereafter deal with remedy in relation to unfair dismissal. In my judgement, but for the Respondents' conduct the Claimant's remedy for unfair dismissal was eminently capable of being dealt with in under an hour and accordingly should have been capable of being determined immediately following Judgment on liability. The issues on remedy were limited. The fact that it took me until approximately 3pm on 29 June 2022 to give Judgment on remedy is a reflection of Mr Morgan's ongoing disruptive conduct at the Hearing. I find that the Hearing before me would have been avoided altogether had the Respondents not acted abusively, disruptively or otherwise unreasonably both prior to but particularly during the Hearing in August 2020. Legal costs have been incurred unnecessarily as a result. In the exercise of my discretion I shall make a Costs Order against the Respondents in respect of the Claimant's costs both of the Hearing on 29 June 2022 and in preparing for that Hearing. However, before finally determining the amount of those costs I shall afford the parties a further

opportunity to make written submissions as to the amount of the costs, having regard to the revised Schedule of Costs that I have directed the Claimant to file and serve by 7 July 2022. Without limiting anything the parties may wish to say on the subject, I would wish to understand why the preparations for the Remedy Hearing are said to have given rise to 16.3 hours of correspondence. If the Respondents wish to make any representations as to their ability to pay costs, they will need to set out their financial circumstances, which in the case of Mr Morgan should include a detailed statement of his assets, liabilities, income and outgoings. The Respondents should bear in mind that the Tribunal will not go behind the finding at paragraph 11 of the Liability Judgment. I shall Order that the parties have 21 days in which to make any further written submissions.

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Employment Judge Tynan

Date: 2 July 2022

Sent to the parties on: 19/7/2022

N Gotecha

For the Tribunal Office