Case Number: 1301093/2019
Type V

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr AM Gai		**Tesco Stores Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL ON A COSTS HEARING (RESERVED JUDGMENT)

HELD AT Birmingham **ON** 15 July 2022

EMPLOYMENT JUDGE GASKELL

Representation
For the Claimant: **Written Submissions**
For the Respondent: **Ms A Greenley (Counsel)**

JUDGMENT

1 The claimant's application for Employment Judge Gaskell to recuse himself from hearing the respondent's costs application is refused.
2 The claimant's application to adduce expert evidence relating to the CCTV evidence is refused.
3 Pursuant to Rules 74 – 78 & 84 of the Employment Tribunals Rules of Procedure 2013, the claimant is ordered to pay a contribution toward the respondent's costs of these proceedings summarily assessed in the sum of £13199.80.

REASONS

Introduction

1 At an Open Preliminary Hearing (OPH) which I conducted on 21 March 2022, pursuant to Rule 37(1)(b), (c) & (e) of the Employment Tribunals Rules of Procedure 2013 (the Rules), I struck out the claimant's case in its entirety. At the same hearing I refused the requests by the claimant for permission to amend his claim. Full reasons for my decision were given orally at the time, and, on 16 June 2022, written reasons were provided to the parties pursuant to a request made by the claimant.

2 At the conclusion of the OPH, the respondent made an application for costs. I made Case Management Orders in respect of that application including

directing the parties to advise the tribunal whether they wished the costs application to be determined at an oral hearing or on the papers. The claimant promptly responds indicating that he wished the costs application to be determined at an oral hearing, but he has not attended today's hearing preferring instead to rely on extensive written submissions.

3 The claimant has filed two sets of written submissions: the first, dated 7 April 2022, running to some 63 pages; and the second, dated 1 July 2022, running to some 53 pages. These written submissions from the claimant have thrown up two further issues which, for the sake of completeness, I propose to deal with in addition to the respondent's application for costs. The two further issues are: an application that I should recuse myself from hearing the costs application; and an application by the claimant for permission to adduce expert evidence regarding the availability or otherwise of CCTV evidence in the substantive proceedings which have now been struck-out. I will deal with each in turn.

Recusal Application

The Law on Recusal

4 ***Mulegta Guadie Mengiste Addis Trading Share Company -v- Endowment Fund for the Rehabilitation of Tigray Addis Pharmaceutical Factory Place Mesfin Industrial Engineering Plc*** **[2013] EWCA Civ 1003 (CA)**

Judicial recusal occurs when a judge decides that it is not appropriate for him to hear a case listed to be heard by him. A judge may recuse himself when a party applies to him to do so. A judge must step down in circumstances where there appears to be bias, or, as it is put, "apparent bias". Judicial recusal is not then a matter of discretion.

5 ***Porter -v- Magill*** **[2002] AC 3578 (HL)**

The test which a tribunal should consider when an application for recusal is made is "whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

6 ***Locabail (UK) Limited -v- Bayfield Properties Limited*** **[2001] AER 65**.

The guidance, so far as it relates to apparent bias, includes the following: "The mere fact that a Judge, earlier in the same case or in a previous case, had commented adversely on a party or a witness, or found the evidence of a party or witness unreliable, would not by itself found a sustainable objection. In contrast,

a real danger of bias might well be thought to arise if there were personal friendship or animosity between the Judge and any member of the public involved in the case; or if the Judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or in a case where the credibility of any individual were an issue to be decided by the Judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings the Judge had expressed views, possibly during the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind; …"

7 ***Ansar -v- Lloyds TSB Bank Plc*** **[2006] EWCA Civ 1462**

An application was made by a claimant in proceedings in the Employment Tribunal to a Regional Chairman (now called Regional Employment Judge) to direct that a particular Chairman (now Employment Judge) should not be further involved in case management of the case because the claimant had made allegations of bias against the Chairman in previous proceedings. The Regional Chairman declined to do so. A directions hearing was listed before the Chairman concerned. The claimant applied to him to recuse himself. He declined to do so. The claimant appealed. The EAT (Burton J, its then President, presiding) rejected the appeal. The Court of Appeal rejected a further appeal. In so doing it approved the judgment of Burton J. Burton J quoted the following passage from the judgment of Chadwick LJ in ***Dobbs v Theodos Bank NB*** **[2005] EWCA Civ 468**: "It is always tempting for a Judge against whom criticisms are made to say that he would prefer not to hear further proceedings in which the critic is involved. It is tempting to take that course, because the Judge will know that the critic is likely to go away with a sense of grievance if the decision goes against him. .. But it is important for a Judge to resist the temptation to recuse himself simply because it would be more comfortable to do so. The reason is this. If Judges were to recuse themselves whenever a litigant … criticised them …. we would soon reach the position in which litigants were able to select Judges to hear their cases, simply by criticising all the Judges they did not want to hear their cases. It would be easy for a litigant to produce a situation in which a Judge felt obliged to recuse himself simply because he had been criticised – whether that criticism was justified or not".

8 ***Otkrite International Investment Limited and Others v George Uromov and Others*** **[2014] EWCA (Civ) 1315**.

A judge who had conducted a civil trial in the Commercial Court was wrong to recuse himself from hearing a subsequent committal application. The fact that

one of the parties made serious allegations of actual bias did not make recusal appropriate where, as here, the judge considered that the allegations were entirely groundless. The mere elevation of an allegation from imputed bias to actual bias did not give rise to any difference of legal principle. It was important that judges did not recuse themselves too readily in long and complex cases.

9 ***Oni v NHS Leicester City PCT*** **[2013] ICR 91 (EAT)**

It was generally in the interests of justice that the tribunal which dealt with the liability hearing should also deal with the question of costs. Further, the mere fact that the tribunal had expressed itself in terms adverse to the claimant in the course of giving reasons for the liability judgment was not a ground for recusal. However, the tribunal ought not to express itself in a way which tended to demonstrate that it had already made up its mind, prior to hearing argument, not only on the issues that it had to decide but also on issues which only fell for decision if an application for costs was made. If a tribunal did that, the fair minded and informed observer would conclude that there was a real possibility that the tribunal had prejudged the question of costs.

The Claimant's Application

10 The claimant's application for recusal is contained in his written submissions dated 1 July 2022. The headline basis for the application is set out in the following terms:

> "***EJ Gaskell – Conduct fell afoul of the judicial conduct principles of independence, integrity, and impartiality.***
>
> ***EJ Gaskell's incorrect, deceitful, evasive assertions and deliberate omissions of facts in the written reasons of the 21 March 2022 Judgement to re-invent the wheel in favour of the respondent.***
>
> ***Deceitful and misleading assertions***"

There follows many pages of text in which the claimant sets out his justification for those headline accusations against me. It is clear that the claimant does not seek my recusal merely because I made a finding which was adverse to him in respect both of his amendment applications the respondent's strike-out application. The claimant goes much further: accusing me of quite serious judicial misconduct.

11 Of course, serious accusations of this kind are a cause for considerable concern. But I am mindful of the cases of ***Ansar*** and ***Otkrite*** set out above: no matter how disturbing these serious accusations may be, I should not recuse

myself simply because I have been criticised. I have revisited the material which was before me at the hearing on 21 March 2022 (including the claimant's detailed written submissions), and I have carefully reviewed my judgement and written reasons following that hearing. I am satisfied that I conducted myself entirely appropriately and that I have reached the correct decision on the basis of the available information. Even if my decision is deficient in some way, this is not because of any deceit, dishonesty or other impropriety on my part.

12 For the avoidance of doubt, I make clear that, prior to the hearing on 21 March 2022, to my knowledge, I had no previous involvement in this case or with the claimant, Ms Greenley, or the solicitor with conduct on behalf of the respondent, Ms Amy Hextell. In my many years sitting as a judge, I have of course dealt with cases involving the respondent's solicitors (a large regional firm) and/or the respondent.

13 Before determining the recusal application, I invited Ms Greenley to address me in neutral terms. She was aware that her duty to the tribunal would be to point out any error on my part particularly as to my conduct of the hearing or my reasoning for the judgement, even if such matters were potentially to her clients disadvantage. I am grateful to Ms Greenley for her confirmation that in her professional judgement hearing, the decision, and the reasoning for it were all entirely proper.

14 In the circumstances, having considered the claimant's application carefully, having reviewed the entirety of the documentation available on 21 March 2022, having reviewed my decision and written reasons, and taking account of the assistance provided to me by Ms Greenley, I am satisfied that this is not a proper case for recusal. The claimant's application that I should recuse myself is accordingly refused.

CCTV – Expert Evidence

15 As I stated in Paragraph 51 of my written reasons, the question of CCTV footage has been extensively explored. If the claimant wished to rely on expert evidence in connection with disclosure issues, such an application should have been made a very long time ago. In any event, the substantive claim has now been struck-out: accordingly, there is no basis for expert evidence on this point, and there will be no such basis unless and until the claim is reinstated. In the circumstances, the claimant's application at this time is entirely misconceived and is refused.

The Costs Application

The Law

16 **The Employment Tribunals Rules of Procedure 2013 (the Rules)**

Rule 74: Definitions

(1) "Costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing). In Scotland all references to costs (except when used in the expression "wasted costs") shall be read as references to expenses.

(2) "Legally represented" means having the assistance of a person (including where that person is the receiving party's employee) who—

(a) has a right of audience in relation to any class of proceedings in any part of the Senior Courts of England and Wales, or all proceedings in county courts or magistrates' courts.
(b) is an advocate or solicitor in Scotland; or
(c) is a member of the Bar of Northern Ireland or a solicitor of the Court of Judicature of Northern Ireland.

Rule 75: Costs orders and preparation time orders

(1) A costs order is an order that a party ("the paying party") make a payment to—

(a) another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative.
(b) the receiving party in respect of a Tribunal fee paid by the receiving party; or
(c) another party or a witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual's attendance as a witness at the Tribunal.

Rule 76: When a costs order or a preparation time order may or shall be made

(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.

(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

(3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if—

(a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing: and

(b) the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment.

(4) A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer's contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party.

(5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing.

Rule 77: Procedure

A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.

Rule 78: The amount of a costs order

(1) A costs order may—

(a) 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 or 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 applying the same principles; or, in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993, or by an Employment Judge applying the same principles;
(c) order the paying party to pay the receiving party a specified amount as reimbursement of all or part of a Tribunal fee paid by the receiving party;
(d) order the paying party to pay another party or a witness, as appropriate, a specified amount in respect of necessary and reasonably incurred expenses (of the kind described in rule 75(1)(c)); or
(e) if the paying party and the receiving party agree as to the amount payable, be made in that amount.

(2) Where the costs order includes an amount in respect of fees charged by a lay representative, for the purposes of the calculation of the order, the hourly rate applicable for the fees of the lay representative shall be no higher than the rate under rule 79(2).

(3) For the avoidance of doubt, the amount of a costs order under sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000.

Rule 83: Allowances

Where the Tribunal makes a costs, preparation time, or wasted costs order, it may also make an order that the paying party (or, where a wasted costs order is made, the representative) pay to the Secretary of State, in whole or in part, any allowances (other than allowances paid to members of the Tribunal) paid by the Secretary of State under section 5(2) or (3) of the Employment Tribunals Act to any person for the purposes of, or in connection with, that person's attendance at the Tribunal.

Rule 84: Ability to pay

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

17 **DECIDED CASES**

Beynon & others –v- Scadden & others **[1999] IRLR 700 (EAT)**
Gee –v- Shell UK Ltd. **[2003] IRLR 82 (CA)**

An award of costs in the employment tribunal is the exception rather than the rule. Costs are compensatory not punative.

Salinas –v- Bear Stearns International Holdings Inc. & another
[2005] ICR 1117 (EAT)

The reason why costs orders are not made in the vast majority of employment tribunal cases is that the high hurdle has to be overcome for a costs order to be made has not, in fact, been overcome.

Beynon & others –v- Scadden & others **[1999] IRLR 700 (EAT)**
Monaghan –v- Close Thornton Solicitors **UKEAT/0003/01**
Beat –v- Devon County Council & another **UKEAT/0534/05**
Lewald-Jezierska –v- Solicitors in Law Ltd. & others **UKEAT/0165/06**

The tribunal must not move straight from a finding that conduct was vexatious, abusive, disruptive, unreasonable or misconceived to the making of a costs order without first considering whether it should exercise its discretion, to do so.

Yerrakalva –v- Barnsley MBC **UKEAT/0231/10**

There is no general rule that withdrawing a claim is tantamount to an admission that it is misconceived. There is no requirement for a direct causative link between the unreasonable conduct and the costs incurred but there should be some connection.

Dyer –v- Secretary of State for Employment **UKEAT/0183/83**

Whether conduct is unreasonable is a matter of fact for the tribunal to decide. Unreasonableness has its ordinary meaning.

McPherson –v- BNP Paribas **[2004] ICR 1398**

The late withdrawal of proceedings is not of itself evidence of unreasonable conduct. The claimant's conduct overall must be considered. But a late withdrawal is a factor in a case where the claimant might reasonably have been expected to withdraw earlier.

Keskar –v- Governors of All Saints Church of England School **[1991] ICR 493**

A tribunal is entitled to take account of whether a claimant ought to have known his claim had no reasonable prospect of success.

Kaur –v- John Brierley Ltd. **UKEAT/0783/00**

An award of costs against the claimant was upheld in a case where the claimant had failed, despite several requests, to properly set out her claim. She proceeded with the claim only to withdraw at the commencement of the trial.

Vaughan –v- Lewisham LBC (No 2) **[2013] IRLR 713 (EAT)**

There is no requirement for the receiving party to have written a costs warning letter. It is not wrong in principle for an employment tribunal to make an award of costs against a party which that party is unable to pay immediately in circumstances where the tribunal considers that the party may be able to meet the liability in due course.

The basis of the Respondent's Application

18 The respondent applies for an order under Rules 76(1)(a) and 76(2) that the claimant pays its costs incurred in the period between 24 September 2021 and the date of this application, on the basis that (a) he has acted vexatiously, abusively, disruptively or otherwise unreasonably in conducting the proceedings in that period, and/or (b) that the claimant has been in deliberate and persistent breach of the Tribunal's orders.

19 The respondent submits that the claimant has acted unreasonably in a number of ways, and deliberately and persistently failed to comply with the Tribunal's Orders:

(a) At every stage of the proceedings, which were first commenced in March 2019 and in relation to which a total of 6 preliminary hearings took place, the claimant has made multiple claims of serious malpractice and misconduct against the respondent's representatives, respondent counsel,

the Regional Employment Judge and Employment Judges involved in his case (including of bribery and discrimination).

(b) Following a four day preliminary hearing which took place 20-23 September 2021, the Respondent sought to agree a bundle and exchange updated witness statements with the claimant in accordance with the Tribunal's orders and to ensure the readiness of the case for the final relisted hearing listed for 7 days in October 2022. The claimant refused to engage with the Respondent in this regard.

(c) The Tribunal reiterated on more than one occasion that having rejected the claimant's application for reconsideration/variance, the parties must comply with the orders unless they are overturned on appeal. The orders have not been overturned yet still the claimant has persistently and deliberately disregarded them in full knowledge of the potential consequences of doing so.

(d) The claimant failed to attend the preliminary hearing in a further example of his refusal to comply. His repeated non-compliance and indication of continuing default was found to fall foul of Rule 37(1)(b) and Rule 37(1)(c).

(e) The claimant even suggested that Tribunal clerks and administrative employees were involved in a conspiracy against him.

(f) As to the claimant's amendment applications, the Tribunal refused these applications. In respect of both applications, the respondent's position is that they were made very late in the day, considerably out of time and after 6 preliminary hearings had already taken place in the proceedings, including the one in September 2021 where Employment Judge Meichen had permitted the claimant's previous application to amend his claim and drawn up a definitive list of issues. Neither application set out particulars of a claim which could reasonably be responded to. The applications introduced new heads of claim and in response to which, if accepted, the respondent would have been severely prejudiced by the need to call additional witnesses and give evidence in relation to matters which had not been raised until over 2 years after the claim was first submitted. Neither claim had any reasonable prospect of success.

20 It is the respondent's case that the claimant's conduct led the Respondent to incur additional costs between the period of 24 September 2021 (the day after the four day preliminary hearing took place, at which outstanding issues were addressed and a definitive list of issues was agreed with Orders made
for the preparation of the case for final hearing) and the date of making this application, such as the following:

(a) Correspondence with the claimant concerning his disregard for Tribunal Orders, unreasonable behaviour and applications to amend.

(b) Consideration by the respondent of its position and in making an application for strike out, which required to be updated as a consequence of excessive correspondence from the claimant.
(c) The preparation for and attendance at a preliminary hearing on 21 March 2022 which would otherwise not have been required.
(d) The making of this application for costs as a consequence of the Tribunal striking out the claim and refusing the claimant's amendment applications.

21 The respondent provided a detailed schedule setting out the total costs incurred by the respondent in the relevant period. The schedule did not include costs incurred in performing and complying with the orders made by Employment Judge Meichen at the September 2021 preliminary hearing relating to the final hearing.

22 The respondent seeks a costs order in the full amount of the of the schedule, £13,199.80, on the basis that during this period, the respondent was required to incur these costs as a result of the claimant's conduct.

The Claimant's Response to the Application

23 I have carefully considered all 116 pages of the claimant's written submissions. The reality is that the claimant does not properly respond to the application made by the respondent as summarised in Paragraphs 18 – 22 above. A proper response would have to start with the decision and reasons issued by the tribunal following the hearing on 21 March 2022. The claimant does not appear to appreciate that, for the purposes of the costs application, that decision and reasons stand: and will only be overturned either on a successful application for reconsideration or a successful appeal.

24 The claimant's written submissions instead attack the respondent's position generally with regard to the substantive issues; the conduct of the Employment Judges and the Regional Employment Judge and seek to undermine the decision made on 21 March 2022. In his submissions the claimant repeats his allegations of serious misconduct and as observed in the context of the recusal application I have now been added to the list of those against whom he makes allegations. The claimant is entitled to make these points at the proper time and in the proper context - namely reconsideration or appeal. But they do not provide an adequate response to the costs application.

My Decision on Costs

25 In Paragraphs 5 – 23 of my written reasons I have set out the procedural history of the case and provided a summary of the claimant's behaviour. In my judgement, the claimant's conduct is fairly and accurately described in the

application made by the respondent (Paragraphs 18 - 22 above). In my judgement the conduct clearly crosses the threshold criteria for consideration of a costs order pursuant to Rule 76(1)(a) and (2).

26 Having determined that the threshold criteria have been met, I must consider whether, in the interests of justice, an award of costs should be made. In my judgement, this is a proper case for an award. The claimant's conduct is egregious: he has not only breached tribunal Orders, he has done so quite deliberately. He has challenged the authority of the tribunal to make such Orders. The claimant has attacked the integrity of Employment Judges and the Regional Employment Judge, together with the respondent's representatives who appear to me to have conducted themselves entirely professionally. The claimant's conduct rendered it impossible to proceed any further with the case and destroyed the prospect of a fair trial.

27 Before deciding whether to make an award of costs I have given consideration to Rule 84. In the Case Management Order which I issued in respect of the costs application, I directed that, if the claimant wish the tribunal to have regard to his ability to pay, he should file a detailed statement of his means. The claimant has made no application for any consideration of his means, nor has he provided a statement or any evidence of his means. Accordingly, I take no account of the claimant's ability to pay: I have no basis upon which I could make any relevant assessment.

28 For the reasons I have set out above, I consider that this is a proper case for an award of costs.

29 As to the amount of the award. I have had the opportunity to consider the respondent's cost schedule which was provided to the claimant with the application. The claimant has not commented on the amount sought. Having considered the schedule, I am satisfied that the respondent has been proportionate in its application. The costs sought have been properly incurred and the respondent seeks a modest contribution by comparison to the total costs which must have been expended. I am therefore satisfied that the amount of costs sought £13,199.80 is an appropriate sum.

30 Accordingly, and for these reasons, I make an award of costs of the sum of £13,199.80.

Employment Judge Gaskell
14 September 2022