Case No. 1305686/2020

EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr. Victormills Iyieke	v	**Bearing Point Limited**

Heard at: **Birmingham** **On:** **23 November 2022**

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Before: **Employment Judge Wedderspoon**

Members **Mrs. Forrest**

Mrs. Howard

Representation:

Claimant: **In Person**

Respondents: **Mr. C. Kelly counsel**

JUDGEMENT

1. The Tribunal refused the claimant's application to electronically record the hearing.
2. The respondent's application for costs against the claimant succeeds.
3. The amount of costs payable by the claimant will be determined by the Tribunal on the papers.

REASONS

1. By application dated 3 February 2022 the respondent applied for a costs order against the claimant on the basis (i)the claimant acted unreasonably in bringing or conducting the proceedings and/or (ii)his claim had no reasonable prospects of success in accordance with Rule 76 (1) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the regulations").

2. The Tribunal was provided with 226 page bundle (which included the claimant's skeleton argument); a skeleton argument from the respondent and a bundle of legal authorities.
3. At the commencement of the hearing the claimant raised two matters. Firs,t he stated that he had not received a court order about his application to have the hearing recorded to record the accuracy of what he had said. Secondly, he had only recently received the bundle and case law from the respondents for the hearing and was not ready and would have added other case law to include in the bundle of legal authorities.
4. The Judge stated that she was disappointed that the claimant had not received a response to his request for the hearing to be recorded because the Judge recalled considering this and rejecting the application. Hearings are not generally recorded electronically and it was a criminal offence to do in the absence of the Tribunal's consent. The claimant enquired whether this was a tribunal order or not because if it was he wanted to consider how he wished to proceed and whether he wanted to appeal that order.
5. The claimant also stated he received the bundle at 8am although the respondent should have filed this 7 days before. There was no consultation as to the contents of the legal authorities bundle. He would liked to have added to it.
6. The respondent was neutral about the recording of the hearing but wished to proceed with the application today. It was submitted that the claimant could challenge any outcome of today's hearing at the Employment Appeal Tribunal if he so wished. Counsel for the respondent apologised for the lateness of the filing of the material but he had been tied up with other matters. As for the case law bundle, he stated the relevant law is contained in his skeleton argument and he was only referring to the relevant passages in the skeleton argument.
7. The Employment Judge asked Mr. Iyieke how long did he need to consider the skeleton argument of the respondent. The claimant stated two hours. The Tribunal noted that the hearing had been listed for 4 hours but was prepared to give the claimant time to consider the material so that he was not disadvantaged.
8. The Tribunal sought to reassure the claimant that Litigants in Person frequently attend the Tribunal and the Tribunal is trained to deal with non legally represented parties and it applies the Equal Treatment Bench book; the claimant would not be disadvantaged before this Tribunal. The claimant stated he wanted the hearing recorded for accuracy and stated that the Tribunal had inaccurately recorded his evidence on the last occasion.
9. The Tribunal provided guidance to the claimant that the law in respect of costs in the Tribunal is clear. First costs remain the exception rather than the rule. Secondly the respondent would have to persuade the Tribunal that the claimant had brought the claim unreasonably or pursued it unreasonably or brought/pursued a claim with no reasonable prospects of success. Only if that was satisfied with that criteria would the Tribunal look at the next stage which is whether it is appropriate to make an order. The Court of Appeal in the case of **Yerrakalva** determined that all the

circumstances should be taken into account at this stage. Only if the Tribunal considered it was appropriate to make an order would the Tribunal then determine the amount to be paid to the respondent.

10. The claimant stated he wanted the hearing electronically recorded and he was not ready and wanted that noted by the Tribunal . The Tribunal stated that the claimant would be provided with 1 hour and 15 minutes to consider the material and at 11.30 the Tribunal would return. In the meantime, the Tribunal could check whether the claimant had been informed that the hearing would not be electronically recorded.
11. On checking the file the Tribunal noted that the claimant was informed by email dated 6 October 2021 from the Tribunal that "the hearing can not be recorded and it is a criminal offence to do so."
12. At 11.30 the Tribunal informed the claimant that it had noted the email on the file dated 6 October 2021 had been received. The Tribunal determined that the claimant had not raised anything exceptional so for the Tribunal to alter the default position that the hearing would not be electronically recorded. The recording of the Tribunal is its judgment and written reasons. The claimant was not seeking the recording of the hearing as a reasonable adjustment but as a means he submitted to ensure the Tribunal was accurate as to what it heard.
13. In respect of further time, the Tribunal noted that the costs application was made by the respondent on 3 February 2022. On 17 June 2022 the claimant provided a detailed submission in response to the application for costs and referred to a number of cases to support his resistance to the application. The Tribunal took into account that the claimant was a litigant in person. He was also an intelligent and articulate person. He had notice of the costs application dated February 2022 and had time to reflect upon it and make submissions to rebut the application. He was given further time to consider the respondent's skeleton argument. The Tribunal must apply proportionality and providing the claimant with an additional 1 hour and 15 minutes to consider the respondent's skeleton was adequate (he had already seen the bundle of documents).
14. The hearing was conducted via CVP. For a few minutes counsel for the respondent lost internet connection but swiftly got back on line. During the hearing (approximately 1 hour into the respondent's submissions) the claimant stepped away from the screen out of sight. He was away from the screen for a minute or so. On his return the Judge enquired if he was all right to which he replied yes.

<u>The Law</u>

15. Rules 75 and 76 of the ET Rules provide as follows :
"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.
"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 has no reasonable prospect of success.

19. In the case of **Cartiers Superfoods Limited v Laws (1978) 315** it was stated "..we think it is right to look and see what the party in question knew or ought ti have known if he had gone about the matter sensibly."

20. In **Keskar v Governors of All Saints Church of England School (1991) ICR 493** it was stated *"The question whether a person against whom an order for costs is proposed to be made ought to have known that the claims that he was making had no substance, is plainly something which is at the lowest capable of being relevant and we are quite satisfied from the decision itself in the paragraph which I have read and need not repeat that the industrial tribunal did have before it relevant material namely that there was virtually nothing to support the allegations that the applicant made from which they drew the conclusion that he had acted unreasonably in bringing the complaint."*

21. In **Beynon v Scadden (1999) IRLR 700** it was stated *"A party who despite having had an apparently conclusive opposition to his case made plain to him, persists with the case down to the hearing in the Micawberish hope that something might turn up and yet who does not even take such steps open to him to see whether anything is likely to turn up runs a risk when nothing does turn up that he will be regarded as having been at least unreasonable in the conduct of his litigation.*

22. In **Haydar v Pennine Acute Hospitals NHS Trust (UKEAT/0023/18/BA)** Mrs. Justice Simler stated "the proper approach to an award of costs in the Employment Tribunal is now well established and applies whether the costs in question are the costs of the legal representatives or preparation time costs. Costs are the exception and not the rule. An award of costs involves a two-stage approach. First consideration of the threshold question whether any of the circumstances identified in Rule 76(1) apply. At the second stage if the first stage is met, the Tribunal considers whether it would be appropriate to exercise discretion to make an order for costs in the particular circumstances of the case. There is a third stage if it is reached at which the Tribunal determines the amount of costs to be awarded or refers that question for assessment to a Judge in the County Court or a Tribunal

Judge. **Vaughan v London Borough of Lewisham (No. 2) (2013 IRLR 713** also refers to the two stage approach.

23. Further where offers of settlement have been made on an explicitly commercial basis then those offers are no reason for the Tribunal to conclude (i)that the threshold of no reasonable prospects/unreasonable conduct in bringing the claim has not been met or (ii) that the Tribunal should not exercise its discretion to make an order in respect of costs; see **Vaughan.**

24. Mummery LJ made clear in **Yerrakalva v Barnsley Metropolitan Borough Council (2012) IRLR 78** in exercising discretion to award costs, Tribunals should consider the whole picture of what happened in the case and ask whether there has been unreasonable conduct by the putative paying party in the bringing, defending or conducting of the case and in doing so should identify the specific conduct relied on, what was reasonable about that conduct and what effect it had on the proceedings.

25. In **Kopel v Safeway Stores plc (2003) IRLR 753** it was stated that *"From those decisions and from a reading of the rule itself it does not follow that a failure by an appellant to beat a Calderbank offer should by itself lead to an order for costs being made against the appellant. The employment tribunal must first conclude that the conduct of an appellant in rejecting the offer was unreasonable before the rejection becomes a relevant factor in the exercise of its discretion under rule 14."*

26. In the case of **AQ Limited v Holden (Practice & Procedure : costs) (Rev 1) 2012 UKEAT 0021** held at paragraph 32 and 33 that *the threshold test in rule 40 (3) are the same whether a litigant is or is not professionally represented. The application of those tests should however take into account whether a litigant is professionally represented. A tribunal can not and should not judge a litigant in person by the standards of a professional representative. Lay people are entitled to represent themselves in tribunals and since legal aid is not available and they will not usually recover costs if they are successful it is inevitable that many lay people will represent themselves. Justice requires that tribunals do not apply professional standards to lay people who may be involved in legal proceedings for the only time in their life. …lay people are likely to lack the objectivity and knowledge of the law and practice brought by a professional legal adviser. Tribunals must bear this in mind when assessing the threshold tests in rule 40 (3). Further even if the threshold tests for an order for costs are met, the Tribunal has discretion whether to make an order. This discretion will be exercised having regard to all the circumstances. It is not irrelevant that a lay person may have brought proceedings with little or no access to specialist help and advice. This is not to say that lay people are immune from orders for costs: far from it as the case makes clear. Some litigants in person are found to have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity. But the Tribunal was entitled to take into account that Mr. Holden represented himself; we see no error in its doing so; and we do not accept that it misdirected itself in any way."*

<u>Submissions</u>

26. The respondent provided a written submission and supplemented this with oral submissions. The respondent submitted the key reason for dismissing the claimant's complaint was the material differences between the claimant and his identified comparators referring to paragraphs 50 and 52 of the judgment. The material differences were (i)salary level; (ii)role/experience and (iii)performance concerns. The respondent's case is that salary and performance were identified in the ET3 and all three grounds were identified in the Amended ET3 dated 12 February 2021.

27. Further before issuing his claim the claimant was aware of the respondent's concerns about his performance by virtue of email sent by the respondent to the claimant about his performance on 18 March 2020. The claimant had acknowledged the concerns in his email response dated 19 March 2020. The script prepared for the claimant's dismissal meeting on 1 April 2020; dismissal letter and grievance outcome letter on 8 April 2020 all referred to the claimant's poor performance. The script prepared for the claimant's dismissal meeting on 1 April 2020; dismissal letter and grievance outcome letter on 8 April 2020 all referred to the claimant's poor performance.

28. On 17 September 2021 the respondent disclosed to the claimant further documentation concerning performance concerns; an email dated 6 March 2020; email dated 19 March 2020 and an email dated 31 March 2020 which stated a manager's view that the claimant *"..still showed signs of neglect and indifference with his deliverables/contributions..The client said "if he was to be replaced with a new person there would be no difference" which neatly sums it up."*

29. The respondent exchanged its witness statements on 5 November 2021. The respondent's statements described a difference in salary between the claimant and S and P; further that the claimant was employed as a systems analyst and S and P were senior analysts and Ms. Sukhera Mr. Kumar described concerns about the claimant's performance along with Mr. Farnfield who identified poor performance as a reason for dismissal. The respondent submitted that the claimant's own witness statement did not dispute the difference in his salary and that of his identified comparators P and S; the claimant identified himself as a systems analyst and he did not dispute that his performance had been poor or that the respondent had communicated this to him.

30. The respondent submitted that the claimant was aware at the time of issuing his claim the relevance of material differences to the prospects of succeeding in a race discrimination claim. He was aware of the concerns about his performance contemporaneously when raised and he should have realised that his claim had no reasonable prospects of success.

31. The respondent made a number of offers to the claimant to settle his claim on a commercial basis. The respondent relied upon its letter to the claimant dated 14 January 2021 where it had offered not to pursue the claimant for costs if he withdrew his claim. In the letter the respondent referred to the respondent's concerns as to his performance and thew lack of any evidence of discrimination. The claimant had rejected that offer by letter dated 21 January 2021. The claimant disputed facts but the respondent submitted the claimant's letter did not identify any facts from which a Tribunal could conclude that the

claimant had been a victim of race discrimination. By email dated 19 August the respondent made an offer of settlement of £2,500. The email referred to material differences between the claimant and P and S in the respondent's grounds of defence. The claimant offered to settle via email dated 21 August 2021 for £19,973.31. By email dated 18 October 2021 the respondent offered to settle the claim for £7,500. The claimant had received the respondent's documentary evidence by this stage. The respondent noted that the claimant had provided no evidence establishing less favourable treatment but the respondent's documents identified problems with the claimant's performance. By email dated 18 October 2021 the claimant responded and offered to settle the claim for £18,973.31. The claimant stated he had identified "several gaps failures and less favourable treatment" but the respondent submitted the claimant omitted to identify what these were. On 22 October 2021 the respondent increased its offer to settle the claim on a commercial basis for the sum of £10,000 verbally via ACAS. By email dated 25 October 2021 the claimant increased his offer to settle to the sum of £25,000. By email dated 18 November 2021 the respondent repeated its offer to settle the claimant a commercial basis for £10,000 following the exchange of witness statements. The respondent set out why none of the four reasons relied upon in the claimant's witness statement supported the claim to have been the victim of race discrimination. By his email dated 7 December 2021 the claimant rejected the respondent's offer. By email 10 December 2021 the respondent repeated its offer of £10,000. On the same date the claimant stated he disagreed with the respondent's assertions. The respondent submitted that the claimant had failed to engage with the respondent's offers of settlement in particular his failure to adequately respond where the respondent identified the lack of any evidence for his claim; this was unreasonable conduct. Further it submitted on 16 December 2021 the respondent applied for an in person final hearing to be converted into a CVP hearing due to omicron variant and the availability of the respondent's witnesses. On 17 December 2021 the claimant objected. The Tribunal listed the hearing as a hybrid hearing on 31 December 2021. The claimant did not attend in person but via CVP. The respondent incurred unnecessarily the cost of counsel's travel and accommodation expenses of £227.40 excluding VAT. The respondent submitted that the claimant acted unreasonably in the manner in which he conducted the proceedings and the Tribunal should make an order for costs of £20,000 or such other sum as the Tribunal summarily assesses.

32. The claimant had provided a written submission and he supplemented this with oral submissions. He relied upon case law including **Maler Limited v Robertson (1974) ICR 72 and Gee v Shell Limited (2003) IRLR 82 and Scott v Commissioners of Inland Revenue.**

33.The claimant submitted that he was a PhD student and the Tribunal should take account of his inability to pay pursuant to rule 84 of the 2013 Rules. The claimant submitted that in the current circumstances it was not feasible for him to pay a costs order.

34. The claimant submitted that the Tribunal should take into account the case of **Scott**; which considered whether a claim was misconceived as unreasonable grounds. The claimant submitted that having no reasonable prospect of success from the beginning of the claim is not the correct test; it was not about prospect of success. The key question for the Tribunal

was whether he was right whether he had grounds to believe he had grounds; he submitted he had reasonable grounds because his belief in his claim was based on the less favourable treatment he was subjected to. There was no basis for an assertion that his race claim was without merit; the Tribunal found there were differences between comparators S and P but the Tribunal did not find his case had no merit. The claimant relied upon the evidence that they were senior analysts; there was a purpose in recruiting S and P with no intention to deploy them elsewhere. The claimant stated he argued that he and P were hired on the same basis as systems analyst and he argued they were doing the same activity. He believed his case to have a reasonable prospect of success. The Tribunal took a different view. Although the tribunal found three reasons why P and S were not comparators the claimant submitted there were 15 reasons why they were. In the circumstances it was not reasonable conduct to pursue the case. The claimant referred to his skeleton argument he submitted there was a difference in treatment but the core test which the tribunal did not consider pursuant to **Shamoon** was whether there was less favourable treatment. The respondent can not say that the claimant knew his claim would be unsuccessful.

35. Further the claimant submitted that the rejection of an offer does not constitute unreasonable conduct see the case of **Lake v Vasako Gravity UK Limited UKEAT/05/11/04**. Further the respondent has not submitted that the motivation caused harm or commercial damage. In the case of **Keskar** there was an order for cost where there was a negative finding of spite and motivation was established. The Tribunal did not find anywhere in its judgment that the claimant was motivated by an ulterior motive. The Tribunal failed to address the start of the definition of race discrimination namely less favourable treatment.

36. Further the respondent failed to provide full disclosure and the claimant had to seek additional documents. There were reasonable grounds for bringing his claim. The claimant stated that salary was not a relevant factor. The claimant had drawn similarities between role/experience namely senior analyst and consultant roles. As for performance the claimant submitted that he was paid a bonus; a suggestion that this was paid as a gesture of goodwill was in contradiction to the payment of a notice.

37. The claimant submitted he did not know that his case was going to fail. The Tribunal accepted that Mr. Kumar was experienced in procedure. There were several inconsistencies. The respondent failed to follow its disciplinary procedure. Mr. Kumar's meeting with the claimant at page 225 was not about performance of the claimant but it was 1 to 1. The respondent pretended it was about performance; it was about goal setting. T, the Tribunal did not accept this glaring inconsistency.

38. In respect of the settlement offers the claimant offered to cover his cost of his previous solicitors. The claimant did reduce the amount he was prepared to settle his claim. The fact he did not accept the respondent's offers does not amount to unreasonable conduct. The tribunal ordered the respondent to provide a document showing the day to day activities of the comparators; the claimant could not ascertain the salaries of the comparators and requested the payslips of comparators. The wage slips were provided in December 2021.

39. In respect of the application for a CVP hearing this had been made without any consultation with the claimant. The claimant submitted he had a lawful basis for bringing the case.

40. Under affirmation the claimant said he had no student loan but was sponsored. He was not presently employed and had no savings. He had some credit card debt but was unsure how much. At the end of the month he had £50 left in his bank account.

41. The respondent stated that disclosure of payslips included the period of October 2019 to April 2020. The claimant had seen the contracts of the comparators in the disclosure process and he received on application the March 2020 payslip; this payslip made no material difference to the evidence the claimant already had. Further the respondent submitted that the claimant repeats his case; this is not an unfair dismissal case.

41. The claimant added that Mr. Kumar and comparator S are from the same region.

Conclusions

42. By judgment sent to the parties on 10 January 2022 the claimant's complaints for direct race discrimination failed. The claimant's complaints were unsuccessful because the Tribunal rejected the claimant's case that S and P were actual comparators. Although the Tribunal found there were some similarities between the claimant and P (see paragraph 51) fundamentally the Tribunal determined there were significant differences between the identified comparators and the claimant namely in terms of salary, experience and difference in feedback.

42. An allegation of direct race discrimination is a serious allegation. A claim should therefore be brought and/or pursued where there is a basis for it. There is a statutory requirement to consider pursuant to section 13 of the Equality Act 2010 whether a claimant has been treated less favourably than an actual comparator if one is identified; a comparator being an individual pursuant to section 23 of the Act where there is no material difference between the circumstances relating to each case. The case of **Madarassy** made clear that simply a difference in status and nothing more is insufficient to establish a prima facie case of discrimination.

43. In **Yerrakalva** it was stated that Employment Tribunal costs orders are the exception rather than the rule (see paragraph 7). In determining a cost application, the Tribunal must first consider whether the threshold criteria has been met (following the case of **Haydar v Pennine Acute Trust**) namely whether a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in either bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted. Bringing or pursuing a claim in the absence of a reasonable prospect of establishing a prima facie case may amount to "unreasonable conduct" pursuant to Rule 76 (1)(a) of the 2013 Rules. The Tribunal may factor in the status of the party

(namely whether they are legally represented or a litigant in person) to consider whether there has been unreasonable conduct because the recognition of whether a case has no reasonable prospects may be less apparent to a litigant in person (see the case of **AQ Limited v Holden 2012 UKEAT 0021 paragraph 32**).

44. The claimant is a litigant in person. He is an intelligent and articulate person and is studying for a PhD. He conducted his own case at the Tribunal and submitted his own EAT Notice of appeal; he provided a detailed skeleton argument referring to case law to resist the cost application and oral submissions and was capable of legal research. The claimant had the benefit of legal advice in early 2021 and at the time the respondent made offers to settle the case in January 2021.

45. From the respondent's ET3 dated 29 July 2020 the claimant was aware that the respondent differentiated the claimant and his identified comparators by way of salary and performance; the Tribunal found these were significant differences. From the amended ET3 dated February 2021 the claimant was also aware that the respondent also distinguished the claimant from his comparators in terms of roles and skills. Disclosure took place on 5 November 2021 and witness evidence was exchanged on 9 December 2021. At the time of disclosure on 5 November 2021 the claimant would have had available to him the comparators contracts and wage slips. The additional wage slip ordered in December 2021 was for one month only namely March 2020. The Tribunal determines that this did not provide any material difference to the complexion of the case and in fact by 5 November 2021 the claimant had the documentary evidence which showed the differences between himself and his identified comparators namely role; salary and performance. Further the additional document obtained pursuant to the claimant's application at the hearing about day to day activity of comparators was not a significant document; the claimant already had the contracts and the witness evidence of the respondents about respective roles. The Tribunal finds that salary and performance were both material differences so it would have been apparent that P and S could not be actual comparators pursuant to section 23 of the Act. The Tribunal is mindful that the claimant was a litigant in person and therefore may not have recognised the apparent difficulty in succeeding in his claim at this stage. However when the claimant received the witness statements of the respondent on 9 December 2021, the Tribunal finds a litigant in person taking account of the disclosed documentary material along with the respondent's witness evidence would or should have recognised that his claim would fail at final hearing because it was apparent from all of this material that the claimant could not establish that the identified individuals were actual comparators within the meaning of section 23 of the Act. The Tribunal finds at this point in time the claimant had no reasonable grounds to think he would succeed (see Sedley LJ's comments in **Scott v Commissioners of Inland Revenue (2004) IRLR 713**). In the circumstances the Tribunal finds that the conduct of the

claimant in continuing to pursue a claim beyond 9 December 2021 which had no reasonable prospect of success amounted to unreasonable conduct.

46. The Tribunal takes account that a refusal of an offer of settlement does not in itself amount to unreasonable conduct but may be taken together with other factors so to amount to unreasonable conduct. The respondent sought to make commercial offers of settlement from January 2021. The claimant received legal advice during this period and rejected the settlements.

47. By email 10 December 2021 the respondent repeated its offer of £10,000; the claimant's rejection of this in his email of the same date repeated his increased offer of £25,000 with a disagreement of the respondent's assertions. There was no indication that the claimant was considering the deficiencies in his performance and negative feedback alerted to him by the respondent's ET3, disclosure, witness evidence or email dated 18 October 2021. The Tribunal determine that it was unreasonable in the context of receipt of the documentary material and witness evidence for the claimant to have rejected the offer of settlement on 10 December 2021.

48. On 17 December 2021 the claimant objected to the respondent's application dated 16 December 2021 to conduct the case via CVP. The basis of the respondent's application was that the case was limited to determining whether the claimant's dismissal was an act of race discrimination; there were five witnesses for the respondent; one witness based in Ireland. The claimant objected on the basis that it was a final hearing; unsuitable for CVP and evidence needed to be tested. The Tribunal determined that the hearing would be hybrid. The claimant did not attend the Tribunal but appeared via CVP. The Tribunal determined that the default position is that hearings should be in person. A party is entitled to object to a hearing being held via CVP where it is deemed for example that credibility is key and evidence is contentious. The claimant acted in a contradictory manner to his asserted position namely he objected to CVP yet failed to attend the Tribunal in person himself. The Tribunal consider that the claimant's conduct was inconsistent with his initial position but parties can object to CVP hearings and the Tribunal can not say that a litigant changing his mind is necessarily unreasonable conduct and decline to do so here.

49. The second stage of a cost application determination is whether it is appropriate to make an order for costs following the case of **Yerrakalva.** The Tribunal consider the claimant's conduct and the whole picture and note that the claimant he pursued a case which by 9 December 2021 he should have been aware he would not succeed at final hearing which was unreasonable conduct; he rejected an offer dated 10 December 2021 (having increased previously his counter offer to £25,000) with no

engagement with the clear deficiencies in his claim. The claimant is a litigant in person but has received legal advice and is also an intelligent person capable of research. The claimant's unreasonable conduct has meant that the respondent has gone to the expense of instructing counsel and a legal team to defend the claim at final hearing. The Tribunal determined it was appropriate to make an award of costs against the claimant payable to the respondent for the period from 9 December 2021.

50. The next stage is the consideration of the amount of costs. The claimant had put his student status and lack of means at the forefront of his submissions to resist the application for costs. In the circumstances, the Tribunal would have expected the claimant to have provided full details of his means. He did not do so. From questioning by the Tribunal of the claimant as to his means the claimant's evidence was vague. He was unclear how much was in his bank account and unclear about the amount of his credit card debt. Pursuant to the rules the Tribunal is not obliged to have regard to the paying party's ability to pay; Rule 84 states that the Tribunal "may" have regard to the paying party's ability to pay. The Tribunal takes into account that the claimant is a litigant in person and there was no order for him to provide this information. Pursuant to the overriding objective the Tribunal determined that it would assess the amount of costs payable by the claimant upon receipt of further information. The Tribunal determined that the claimant must disclose to the Tribunal and the respondent three months of bank statements and credit card statements by 30 November 2022. By 21 December 2022 the parties have a further opportunity to make written representations to the Tribunal as to the amount of costs award payable by the claimant to the respondent. The Tribunal would determine the amount of costs award on the papers.

51. The Tribunal announced its summary oral judgment. The claimant sought a stay because he informed the Tribunal he would appeal. The Tribunal took time to consider the claimant's stay application. On returning the claimant did not come back online. The Tribunal requested the Tribunal clerk to contact the claimant but the clerk was unable to do so because his mobile telephone went straight to answerphone. The Tribunal determined the fact that a party wishes to appeal is no basis for a stay of a judgment; the stay application was refused. The Tribunal sent out its judgment in writing as requested by the claimant.

Employment Judge Wedderspoon

6 December 2022