EMPLOYMENT TRIBUNALS

Claimant: Mr P McKillen

Respondent: Thorncliffe Building Supplies Ltd

Heard at: Cardiff (in chambers) **On:** 21 December 2022

Before: Employment Judge C Sharp
Mr M Vine
Mr A McLean

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

Under Rule 76, the Claimant is ordered to pay to the Respondent the sum of £1,530, being the costs reasonably and necessarily incurred due to his unreasonable behaviour in not attending the final hearing on 8 & 9 August 2022.

REASONS

1. Rule 76 states:

   "(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; …

   (2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction…"

2. The Respondent has made a costs application against the Claimant. The application arose from the background to the case. The Claimant presented his claim to the Tribunal on 5 January 2021, asserting constructive unfair dismissal, direct disability discrimination and failure to make reasonable adjustments (an age discrimination claim was withdrawn and dismissed).

3. The final hearing was listed at a preliminary hearing before Employment Judge A Frazer on 22 April 2022 to take place in Mold, with the non-legal members attending remotely. Judge Frazer listed the hearing to be in person as the Claimant had never attended any preliminary hearing himself and it was unknown whether he wanted to attend remotely, but he could seek permission if desired. Judge Frazer also made the standard directions for the exchange of witness statements, specifically recording in her Order that "*everybody who is going to be a witness at the hearing, including the Claimant, needs a witness statement*". Judge Frazer also added the standard wording about costs consequences for non-compliance.

4. The Claimant failed to provide such a statement. His representative, Ms Alexander (also his domestic partner), emailed Ms Whiteley (the Respondent's solicitor) on 11 July 2022 to say no witnesses were being called; this was repeated when Ms Whiteley explained the position. The Tribunal when it raised the lack of any statement from the Claimant on 4 August 2022 was told by Ms Alexander that the Claimant would rely on a statement of events dated 19 September 2021, provided prior to Judge Frazer's order that witness statements be provided. The Tribunal explained in response that Judge Frazer's order superseded the "*statement of events*" and warned that the final Tribunal might not allow the Claimant to rely on the "*statement of events*" or give oral evidence; the matter would be dealt with at the start of the hearing. Ms Alexander responded asking if the Claimant could now submit a statement; the Tribunal responded that a fair hearing required the Respondent had time to consider such a statement and the matter could be discussed at the first day of the hearing. No statement was submitted.

5. The Judge, Respondent's representative Ms Whiteley, and the Respondent's witnesses all attended at the rearranged location of Llandudno on 8 August 2022, while the non-legal members attended remotely, but neither the Claimant nor his representative Ms Alexander attended. The Tribunal had notified in a Notice of Hearing the parties on 3 August 2022 of the change of location and that they were to attend in person on 8, 9 & 12 August 2022 and the hearing would be remote for 10 & 11 August 2022. This was also explained in emails from the Tribunal office.

6. On 8 August 2022, Ms Alexander emailed the Tribunal to ask for an electronic invite for the hearing as she asserted that she and the Claimant were to attend remotely. The Tribunal office corrected Ms Alexander and reiterated she and the Claimant were to attend in person. In response, Ms Alexander claimed that the Claimant was unwell and she could not drive, and therefore they would not attend that day. The Tribunal directed that, given the previous lack of any mention that the Claimant was unwell, it required medical evidence to be provided by 2pm. Specific questions were to be answered by the relevant medical professional. A letter from a GP was provided by the deadline; it did not sufficiently answer the Tribunal's questions and was viewed as vague by it. Ms Alexander said that the hearing should take place in the absence of the Claimant. The Tribunal directed that the hearing would be adjourned for the day and the Claimant was given a further opportunity to provide medical evidence that assisted the Tribunal and to answer its questions by 10.30am the following day. Later on 8 August 2022, Ms Alexander emailed to say that the Claimant wanted the case to proceed in his absence or be dismissed; she thought the stress of the case had caused his ill-health.

7. On 9 August 2022 the Tribunal reconvened the hearing, and concluded that it would not be postponed on the basis that it was clear the Claimant wished it to proceed in his absence or be dismissed. The Tribunal considered that the Claimant had been given a reasonable opportunity to provide medical evidence and answer questions. It dismissed the claim under Rule 47.

8. There were two matters relied upon by the Respondent in relation to this application:

    a. the Claimant has acted vexatiously, abusively, disruptively and/or unreasonably in the way that part of the proceedings has been conducted, namely in the immediate lead up to the Final Hearing, and during the Final Hearing itself.

       The Respondent argues that due to the failure of the Claimant to attend the hearing, or to provide medical evidence that assisted the Tribunal, it incurred substantial preparation costs and attended with its representative and witnesses the Tribunal on two days. It said the failure of the Claimant to attend was foreseeable as he had never attended any previous hearing and in July 2021 his representative said that he could not attend that hearing.

       The Respondent also highlighted the constantly changing symptoms the Claimant alleged and failure to provide proper medical evidence supported a conclusion that the Claimant simply did not want to attend any hearing and had chosen to allow the proceedings to run to the detriment of the Respondent. It pointed out that Ms Alexander had never mentioned in any of the emails running up to the hearing or even when she asked for a virtual invitation to the hearing on 8 August 2022 that the Claimant was unwell or ask to attend remotely on 9 August.

       The Respondent has not specified whether the Claimant's conduct was vexatious, abusive, disruptive and/or unreasonable.

    b. The Claimant was in breach of an order of the Employment Tribunal during the process of the proceedings in relation to providing a Witness Statement as ordered by Judge Frazer at the Preliminary Hearing on 22nd April 2022.

       The Respondent argues that the failure of the Claimant to comply with this direction incurred further case preparation costs as it thought that the Claimant was not providing any witness evidence as stated by his representative. It adds that it would have been at a significant disadvantage at the final hearing, though it accepted it was not actually subjected to any disadvantage in respect of this matter as the Claimant did not attend the hearing. The Respondent asserts that the failure to provide a statement was unreasonable.

9. When dealing with costs applications, the Tribunal should adopt a three-stage process:

a. Has the Claimant acted in the matter alleged? In this case, has the Claimant acted vexatiously, abusively, disruptively and/or unreasonably or breached an Order of the Tribunal?
b. If so, how should the Tribunal exercise its discretion in deciding whether to make a costs order against the Claimant?
c. If it does decide to make a costs order, how much should the Claimant be directed to pay?

10. Directions were made to enable the Claimant to respond. On 16 October 2022, Ms Alexander forwarded a statement from him saying that the application could be dealt with on the papers, and that he *"did not attend the hearing as the pressure was too much, and I became ill."* The Claimant added that he was not in work and relied on state benefits. The Claimant did not engage with the issue of the failure to provide a statement.

11. A further opportunity was given to the Claimant to provide any further submissions or evidence by 24 November 2022. On 23 November, the Claimant provided a table setting out his income and spending (without any supporting objective evidence or mentioning his partner's contribution to the household), showing that the Claimant spent less than he received and spent sums on optional spending such as tobacco, Netflix and pocket money. Ms Alexander also sent another copy of the GP letter from 8 August 2022 that had not sufficiently assisted the Tribunal previously.

Legal Principles

12. The common meaning of the words "*abusive*", "*disruptive*", and "*unreasonable*" apply to this application; the test is not whether the impact of the conduct on the Respondent was unreasonable, and abuse may mean gratuitous rudeness or a misuse of tribunal proceedings. ***AG v Barker [2000] 1 FLR 759*** in contrast points out that the hallmark of a vexatious proceeding is that it has little or no basis in law and the effect is to subject the Respondent to inconvenience, harassment and expense out of all proportion to any likely gain (and so is an abuse of the process of the Tribunal).

13. If the Tribunal finds unreasonable, vexatious or abusive behaviour during the conduct of the proceedings by the Claimant or a breach of an Order, it does not mean that the Tribunal must make a costs order against him. It has a discretion and should consider all relevant factors. Costs orders in the Employment Tribunal are the exception, rather than the rule (***Yerrakalva -v- Barnsley Metropolitan Borough Council 2012*** ICR 420, CA). Rule 76 uses the word "*may*" when talking about circumstances which may lead to the making of such an order. It is appropriate for a litigant in person to be judged less harshly in terms of his or her conduct than a litigant who is professionally represented (***AQ Ltd v Holden 2012 IRLR 648***).

14. The purpose of costs orders is to compensate the receiving party; punishment of the paying party is not a relevant factor (***Lodwick -v- Southwark London Borough Council*** 2004 ICR 884 CA). This means consideration of the loss caused to the receiving party as a result of the identified basis of any costs order is

required. The case of *Yerrakalva* demonstrates that costs should be limited to those "*reasonably and necessarily incurred*".

15. The ability to pay of the paying party can be a relevant factor in deciding how to exercise the Tribunal's discretion (and also when considering how much should be paid). However, this is a factor to be balanced against the need to compensate the receiving party if they have been unreasonably put to expense (***Howman -v- Queen Elizabeth Hospital Kings Lynn*** EAT 0509/12). The Tribunal is not required to consider ability to pay, but it may choose to do so. If a Tribunal is asked to consider the ability to pay, it has been said by the Employment Appeal Tribunal that it should tell the parties if it has done so, and if so, how it did so (***Benjamin -v- Interlacing Ribbon Ltd*** EAT 0363/05). In ***Jilley -v- Birmingham and Solihull Mental Health NHS Trust and others*** EAT 0584/06, the Employment Appeal Tribunal went further and said if a Tribunal was asked to take into account the ability to pay and refuses to do so, it should say why. If it does decide to take into account the ability to pay, it should set out its findings, identify the impact on its decision whether to award costs or on the amount of costs, and explain why.

16. Any assessment of the Claimant's ability to pay must be based on evidence before the Tribunal. It is not though restricted to the paying party's means at the date the costs order is determined. Provided that there is a "*realistic prospect that [he or she] might at some point in the future be able to afford to pay*", a costs order can be made against a person of limited ability to pay (***Vaughan -v- London Borough of Lewisham and others*** 2013 IRLR 713 EAT). Costs order have been made against those with significant debt. The case of ***Abaya -v- Leeds Teaching Hospital NHS Trust*** EAT 0258/16 confirmed that in principle a Tribunal can take into account the income of the paying party's spouse if it also considers the impact of the spouse's means on the paying party's ability to pay; tribunals are encouraged to exercise their discretion according to common sense and with "*a very real regard to the real world".*

17. Another potentially relevant factor can be whether the paying party was legally advised. The Claimant was represented by his partner, Ms Alexander, who is not legally qualified. The Respondent has not drawn to the Tribunal's attention as to whether she has relevant experience, such as human resources expertise.

18. The Tribunal bore in mind the case of ***Raggett -v- John Lewis Plc*** [2012] IRLR 906 case (the receiving party should not claim VAT if able reclaim it). The Respondent's representative confirmed no VAT was sought as the Respondent is registered for VAT.

<u>Has the Claimant acted vexatiously, abusively, and/or unreasonably or breached an Order of the Tribunal?</u>

19. There is no dispute that the Claimant did not provide a witness statement as ordered by Judge Frazer. This order was after the Claimant sent the "*statement of events*". If the Claimant or his representative were unclear whether a statement was required, Judge Frazer should have been asked at the hearing. Indeed, Ms Whiteley on behalf of the Respondent explained the matter to Ms Alexander who

persisted in stating, more than once, that the Claimant was not giving evidence and had no witnesses.

20. It was not until the Tribunal questioned the absence of a statement on 4 August 2022 that the Claimant's position changed. Despite being told the matter would be discussed on the first day of the hearing, no statement was provided. The Tribunal is satisfied that the Claimant breached the Order of Judge Frazer to provide a witness statement, which specifically told the Claimant that he was a witness and had to provide a witness statement that complied with the instructions set out by Judge Frazer.

21. Was the Claimant's failure to attend the hearing disruptive? The Tribunal could not identify any disruption and the Respondent has not identified anything.

22. Was the Claimant's failure to attend the hearing unreasonable? In the unanimous view of the Tribunal, it was unreasonable. It did not consider that any weight could be put on the non-attendance of the Claimant at earlier preliminary hearings; it is not uncommon for representatives to attend alone. However, the overall picture from the evidence before the Tribunal was that the Claimant deliberatively failed to attend the final hearing.

23. First, the Claimant does not live in Mold, but raised no concerns about attending a hearing in person. Ms Alexander was expressly asked about his possible attendance by CVP by Judge Frazer, and the hearing was listed in person as she did not know. Having been told that the Claimant was a witness by Judge Frazer, in July 2022 Ms Alexander repeatedly told Ms Whiteley that there would be no witnesses and no statements provided; the emails before the Tribunal do not show that the Claimant wanted at that time to rely on his "*statement of events*". It is evident that in July 2022, there was no intention to call the Claimant as a witness.

24. When the Tribunal asked the Claimant to confirm the position in August 2022, at that point Ms Alexander asked to adduce a statement. She was told that the matter would be discussed at the first day of the hearing; no statement was ever provided. Again, this indicates that the Claimant was not going to give evidence.

25. Ms Alexander on 8 August 2022 told the Tribunal office that she would attend remotely; she was reminded that she was required to attend in person. This triggered the first assertion that the Claimant was ill and that Ms Alexander could not drive. There was no explanation why Ms Alexander could not use public transport to attend Llandudno from Rhyl; such transportation exists. Ms Alexander provided medical evidence, which was vague and said that the Claimant had "*headache, neck pains and visual disturbance";* the symptoms of a migraine. The evidence does not support the contention during the hearing and in a letter to this Tribunal of 14 October 2022 that the Claimant did not attend due to stress.

26. When the Tribunal made clear to Ms Alexander on 8 August 2022 in an email that the evidence provided was unsatisfactory and set out questions for her/the Claimant and a medical professional to answer, the response was not as invited to seek a postponement or permission to attend remotely, or indeed to offer to attend on one of the scheduled remote hearing days. Instead, Ms Alexander said that the

hearing should continue in the absence of the Claimant or be dismissed. The Tribunal concludes that this shows that the Claimant had decided that he was not going to attend the hearing; again, no explanation is given why Ms Alexander could not attend.

27. The Tribunal concluded that given the vague and unhelpful nature of the medical evidence, the fact that the Claimant's ill-health was not mentioned until Ms Alexander was told she had to attend in person, and the failure of the Claimant to address any of the possible options suggested by the Tribunal or answer its questions, the failure to attend the final hearing was unreasonable.

28. Was the Claimant's failure to attend abusive or vexatious? The Tribunal came close to concluding that the Claimant's conduct was vexatious. It appeared that he may have conducted himself in such a fashion in order to flush out a last-minute offer of settlement, particularly when the failure to provide a witness statement was considered. This would explain the conflicting accounts for non-attendance and the failure to seek a postponement or virtual attendance, or send Ms Alexander to the hearing. It was noted that the claim of disability faced evidential hurdles and the claim of constructive unfair dismissal was to be rebutted by CCTV and witness evidence about what really happened in the yard. However, the Tribunal did not consider that there was quite enough evidence to support such a serious finding that the Claimant effectively did not attend in order to put the Respondent to disproportionate cost.

<u>How should the Tribunal exercise its discretion?</u>

29. The Tribunal decided that it would not make a costs order in respect of the failure to comply with directions and provide a witness statement, despite the clear directions of Judge Frazer and the repetition by Ms Alexander that no witnesses were to be called. This was because the usual sanction for such a breach is to refuse to allow oral evidence from a witness without a statement or to allow them to rely on the claim form or another document if it was in the interests of justice to do so. Indeed, Ms Whiteley must have appreciated this as in her Schedule of Costs, she claimed the time for preparation of cross-examination of the Claimant after she was told no statements would be provided.

30. However, the Tribunal decided that it would use its discretion to make a costs order in respect of the Claimant's unreasonable failure to attend the final hearing. It was unreasonable behaviour, and the Claimant did not seek a postponement or to attend remotely. The Claimant and his representative's accounts for the non-attendance conflict with other statements; even the very limited and vague medical evidence provided conflicts with the accounts provided (for example, the Claimant now says that he was stressed; the GP letter does not record this or say that the symptoms recorded arose from stress). The impact of the Claimant's conduct was that very limited Tribunal resources, especially in North Wales which faces its own challenges, were wasted and other parties waited longer for their hearings as a result. The Respondent was put to significant expense.

31. The Claimant's response is to plead an inability to pay. However, the Tribunal noted further inconsistencies and absence of key information in what the Claimant

submitted. First, he has not proven with objective evidence (such as bank statements) that he is only in receipt of benefits; the award letters are about 18 months old, and circumstances change. For all that the Tribunal knows, the Claimant may be in work again.

32. The Claimant said on 14 October 2022 that his income was £8,952 but in the table of income and spending sent in November 2022, he claims to have an income of £11,419.20. The Claimant by his own account spends less than he receives, and spends on discretionary items such as tobacco, Netflix and pocket money. He appears to have £221.04 per month available to pay the Respondent. Critically, the Claimant claims to have no housing costs, which is unlikely, and it is more likely that his partner, with whom he lives, covers such costs. Ms Alexander has provided no evidence of her income, and it is the experience of the Tribunal that two people in the same household (and the evidence shows Ms Alexander's address) share finances and bills.

33. The Claimant has not provided sufficient objective evidence of an inability to pay, and the Tribunal is not willing to rely on his assertions, given the conflicting accounts given by him or on his behalf. The Claimant was given two opportunities to provide evidence.

Amount to be paid

34. The Tribunal was not persuaded that the costs of preparation for the hearing, preparation of witness statements or correspondence generally should be paid by the Claimant. These amounts were always going to have to be incurred. There is insufficient evidence to draw a firm conclusion that the Claimant never intended to attend or be represented.

35. In relation to the costs of witnesses attending the final hearing, there is no evidence of those alleged costs. They are simply asserted. In addition, the witnesses on 8 August 2022 were employed by the Respondent and the hearing did not take the whole business day; it is likely business activities were or could have been carried out that day. In relation to the ex-employees who attended on 9 August 2022, again, there is no evidence. In any event, it is unexplained why they were not contacted on 8 August 2022 and cancelled as it was clear that the hearing timetable would change significantly and the option of dismissal if the Claimant continued to fail to attend was not only raised, but expressly accepted by Ms Alexander in her email of the same date.

36. However, the Tribunal did consider that the time costs of Ms Whiteley (who seeks £150 per hour, within the permitted guide rate), in attending on 8 and 9 August 2022 are costs that would have been saved if the Claimant had not acted unreasonably by failing to attend. They were reasonably and necessarily incurred due to the Claimant's unreasonable behaviour in not attending the final hearing on 8 & 9 August 2022. These total (excluding VAT) £1230. In addition, while the costs of making the costs application of £450 have been sought, the Respondent has not been entirely successful and the rules of standard assessment apply. The Tribunal considers that £300 excluding VAT is a fair and appropriate cost to prepare the costs application arising from the Claimant's unreasonable conduct.

37. The Tribunal again considered the Claimant's ability to pay. It reminded itself of its earlier findings – that the Claimant had not evidenced this and by his own account had a surplus enabling him to pay the Respondent's costs in a relatively short timeframe. It did not consider it fair or in the interests of justice to further reduce the costs to be paid by the Claimant.

38. As a result of the summary assessment, the Claimant is ordered to pay the following costs (all figures exclude VAT):

    a. £1,230 – cost of legal representation at the final hearing;
    b. £300 – discounted fee preparing cost submissions.

    The total payable is £1,530.

Employment Judge C Sharp
Dated: 21 December 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 4 January 2023

FOR EMPLOYMENT TRIBUNALS Mr N Roche