EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
v	
Mr L Ramdhanny	**Shepherd's Bush Housing Association Limited**

Heard at: London Central (by video)

On: 1 August 2022

Before: Employment Judge P Klimov (sitting alone)

Representation:

For the Claimant: Ms B Nunhoo, Solicitor

For the Respondent: Mr S Crawford (of Counsel)

JUDGMENT having been sent to the parties on 1 August 2022 and written reasons having been requested by the Claimant on 2 August 2022, in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. On 2 August 2022, the Claimant's solicitors send an email to the Tribunal asking for "*a copy of the written findings following the OPH on 1 August 2022 - **with specific reference to the EJ's findings on the Respondent's legal costs- which was between 1530-1600 hrs**.*"

2. I accepted it as a request for written reasons for my judgment on the Respondent's application for a costs order. Accordingly, these Reasons are limited to the reasons for that judgment and do not cover other issues decided

at the hearing for which oral reasons have been given to the parties at the hearing.

Background and Issues

3. This was an open preliminary hearing ("**the OPH**") ordered by Employment Judge Norris to decide the following issues:

    a. *Any application by the Claimant to amend his claim;*
    b. *Whether the Tribunal has jurisdiction to hear the claim (or any part of it), on the basis that it was presented out of time and whether time should be extended for any such complaint(s);*
    c. *Whether a deposit order (or more than one) should be made under Rule 39 (Schedule 1, Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013) as a condition of the Claimant proceeding with the claim if any part(s) of it stand little reasonable prospect of success;*
    d. *The Claimant's disability status, if not conceded and if the disability complaint proceeds;*
    e. *(In private) directions and Orders to progress the matter to a Hearing whether on the above or new dates*.

4. The Claimant was represented by Ms Hunhoo and the Respondent by Mr Crawford. I was referred to various documents in the bundle of documents of 74 pages and the additional document (appeal outcome letter of 6 August 2021) the parties introduced in evidence. After lunch the Claimant submitted further documents on the ability to pay issue (three bank account statements). The Claimant gave sworn evidence and was cross-examined. There were no other witnesses.

5. At the start of the hearing the Claimant withdrew his application to amend, and shortly after that he withdrew his complaints of age, race and disability discriminations.

6. Therefore, the remaining substantive issue was whether the Tribunal had jurisdiction to consider the Claimant's complaint of unfair dismissal and wages claims.

7. For the reasons given to the parties orally at the hearing I decided that it was reasonably practicable for the Claimant to present his claim in time, and therefore the Tribunal did not have jurisdiction to consider his claim. Accordingly, I have dismissed his remaining complaints for lack of jurisdiction.

8. Following my judgment on the time limit issue, the Respondent made a costs order application.

Findings of Fact

9. These are the relevant facts to my judgement on the Respondent's costs application.

10. The Claimant presented his claim on 14 December 2021. He was not legally represented at the time but had access to his union. The Claimant ticked unfair dismissal, age, race and disability discrimination, redundancy payment and other payments on the claim form. He claimed that he was automatically unfairly dismissed because, he claimed, the Respondent dismissed him in response to him raising health and safety concerns prior to being placed on furlough.

11. On 4 March 2022, the Respondent presented ET3, in which, *inter alia,* it stated that the Claimant's claim was out of time and the Tribunal did not have jurisdiction to consider it. The Respondent requested a preliminary hearing to consider the time issue.

12. On 7 April 2022, the Claimant instructed solicitors, who represented him at the case management preliminary hearing on 11 April 2022 ("**the PHCM**") and continued to act for him, including representing him at the OPH.

13. At the PHCM, when clarifying his claim, the Claimant materially changed the basis for his discrimination complaints against the originally pleaded in his ET1. For example, he said that he was discriminated against because of his age by the Respondent not giving him a van, when Miko (surname unknown), who was <u>older</u> than the Claimant, was given a van. That was in contrast with his original case, where in his ET1 he claimed that he was dismissed because he was <u>older</u> than younger apprentices and therefore was more expensive for the Respondent to employ. There were equally material changes to his pleaded case on race and disability discrimination. He withdrew his redundancy payment complaint.

14. At the PHCM, Ms Nunhoo confirmed that it was accepted by the Claimant that the claim was submitted out of time.

15. In ordering the OPH EJ Norris made the following observations (***<u>my emphasis</u>***):

4. While I indicated that I cannot order the Claimant to make an application to amend, he must be aware that time is already running against him and that there are already considerable doubts about whether the Tribunal has jurisdiction to hear the complaints, or any of them, even though he had the benefit of union advice before his dismissal. ***<u>It was also not clear to me why he had instructed Ms Nunhoo so late in the day when the Respondent had already put him on notice of the time points, as this meant we could not progress the case as we might have liked at the PHCM</u>****.* ***<u>It will certainly benefit the Claimant now to take advice and consider carefully which of the claims he wants to pursue, and, if he does make an amendment application in line with the Presidential Guidance), to do so</u>***

as soon as possible *and in any event no later than 9 May 2022 so that the Respondent can include relevant documents in the bundle for the OPH, along with documents relating to the Claimant's disability and his means.*

5. ***There is also the question of the prospects of success of any of the complaints, including the issue of whether the Claimant maintains that the reason for his dismissal was his raising of health and safety matters previously, which at present appears to amount to little more than speculation by a colleague that has been passed on to the Claimant****. Again, now that the Claimant is advised by a lawyer, it may be beneficial to consider the prospects of the individual component issues within the claim and whether he is proceeding with them****; and if he does, the EJ may make a deposit order under Rule 39, or more than one, taking into account the Claimant's means if he wants to put such evidence into the bundle and to address it in his witness statement for the OPH.*

16. On 21 April 2022, the Respondent's solicitors wrote to the Claimant's solicitors stating that they fully expect the Claimant's claim to be stuck out at the OPH, inviting them to withdraw the claim within seven days, and putting the Claimant on notice that the Respondent intended to seek a costs order against the Claimant under Rule 76 of the Employment Tribunals Rules of Procedure 2013 ("**the ET Rules**"). The letter stated that the Respondent had already incurred significant legal costs, which would be in the region of £12,000 if the case went ahead to the OPH.

17. On 9 May 2022, the Claimant's solicitors sent an application to amend the Claimant's claim materially changing the basis of his originally pleaded case.

18. On 13 May 2022, the Respondent's solicitors wrote to the Tribunal opposing the Claimant's application to amend. The letter repeated the costs warning to the Claimant.

19. On 23 May 2022, the Claimant prepared a witness statement in support of his disability discrimination complaint.

20. On 1 June 2020, the Respondent responded stating that it continued to dispute the issue of disability.

21. On 29 July 2022, the Claimant's solicitors wrote to the Tribunal stating that the Claimant was "now" in the possession of a letter dated 6 August 2021 by which the Respondent dismissed the Claimant's appeal against his dismissal. The letter went on to criticize the Respondent's solicitors for not including that document in the bundle for the OPH and stating that the Claimant intended to rely on that letter on the issue of whether his claim was presented out of time and whether time should be extended.

22. In complete U-turn to the position Ms Hunhoo accepted at the PHCM, the letter stated that *"[t]he Claimant maintains that on the face of it the claim was*

presented in time", that *"[t]his remains a live issue which will be canvassed at the next hearing*" and that "*[t]he Claimant will resist any application by the Resist to strike out the claim.*"

23. Later that day, in response to the Claimant's solicitors' letter, the Respondent's solicitors wrote to the Tribunal stating that the Claimant was in receipt of the appeal letter since 9 August 2021, and until now the Claimant never indicated that the appeal outcome had any bearing on the time issue, and therefore the letter was not a relevant document. In any event, the Claimant was provided with the opportunity to send any relevant documents for the inclusion in the bundle for the OPH. He chose not to do so, and his solicitors agreed with the content of the bundle on 15 June 2022.

24. As already noted above, at the start of the OPH the Claimant abandoned his application to amend and shortly after that all his discrimination complaints.

The Claimant's Ability to Pay

25. The Claimant lives with his parents. He is single. He does not have a mortgage. He does not pay household bills. He has no dependents. His family helped him financially to fund these proceedings. He believes he owes them around £2,000, however there are no formal loan or other repayment arrangements made with his family members.

26. He works as a plumber on a fixed-term contract basis, which at the date of the OPH had another month to run. He earns about £2,500 a month. After the end of his current contract, he expects to find another job paying him a similar wage. After being made redundant by the Respondent he found his current job within two weeks of putting himself on the market.

27. His current account at the end of July 2022 is £2,274.30 in credit. He has an ISA "help to buy" (or a similar) savings account ("**the mortgage account**"), which has about £10,000 in it. He said that the terms of the mortgage account restrict his access to the funds there, however he accepts that he is the legal and beneficial owner of the money in the account.

The Law

28. Rule 76 of the Employment Tribunals Rules of Procedure 2013 (the "**ET Rules**") provides:

(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, or

[…]

29. Rule 78(1) of the ET Rules gives the Tribunal various options of assessing costs, including making an "*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*"

30. The following key propositions relevant to the tribunal's exercising its power to make costs orders may be derived from the case law:

    a. Costs awards in the employment tribunal are still the exception rather than the rule. The tribunals should exercise the power to order costs more sparingly than the courts (Yerrakalva v Barnsley Metropolitan Borough Council and anor 2012 ICR 420, CA)

    b. There is a two-stage exercise to making a costs order. The first question is whether a paying party has acted unreasonably or has in some other way invoked the jurisdiction to make a costs order. The second question is whether the discretion should be exercised to make an order. Only if the tribunal decides to exercise its discretion to make an award of costs the question of the amount to be awarded comes to be considered (Haydar v Pennine Acute NHS Trust UKEAT/0141/17).

    c. While the threshold tests for making a costs order are the same whether or not a party is represented, in the application of the tests it is appropriate to take account of whether a litigant is professionally represented or not. Litigants in person should not be judged by the standards of a professional representative (AQ Ltd v Holden [2012] IRLR 648).

    d. For term "vexation" shall have the meaning given by by Lord Bingham LCJ in AG v Barker [2000] 1 FLR 759: "*[T]he hallmark of a vexatious proceeding is … that it has little or no basis in law (or at least no discernible basis); that, and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process.*" (Scott v Russell 2013 EWCA Civ 1432, CA)

    e. "Unreasonable" has its ordinary English meaning and is not to be interpreted as if it means something similar to 'vexatious' (Dyer v Secretary of State for Employment EAT 183/83).

    f. In determining whether to make a costs order for unreasonable conduct, the tribunal should take into account the "nature, gravity and

effect" of a party's unreasonable conduct — (McPherson v BNP Paribas (London Branch) 2004 ICR 1398, CA), however the correct approach is not to consider "nature", "gravity" and "effect" separately, but to look at the whole picture.

g. While a precise causal link between unreasonable conduct and specific costs is not required, it is not the case that causation is irrelevant. However, the tribunal must look at the entire matter in all its circumstances – (Yerrakalva v Barnley MBC [2012] ICR 420). Mummery LJ gave the following guidance on the correct approach at [41]:

"*41. The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the Claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. The main thrust of the passages cited above from my judgment in McPherson's case was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the employment Tribunal had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances*".

h. As to whether a claim had reasonable prospects of success, this is an objective test. It is irrelevant whether the claimant genuinely thought that the claim did have reasonable prospects of success: Scott v. Inland Revenue Commissioners [2004] ICR 1410 CA, at [46].

i. In considering whether a claim or defence had no reasonable prospects of success, the ET is not to look at the entire claim, but each individual cause of action: Opalkova v Acquire Care Ltd EAT/0056/21, unreported, at [17].

j. Whether a claim had no reasonable prospects of success from the outset is to be judged by reference to the information that was known or was reasonably available at the start of the proceedings: Radia v. Jefferies International Ltd EAT/0007/18, unreported, at [65]. The tribunal should be wary of being wise with hindsight. However, if a claim was such that it cannot be said that it had no reasonable prospects of success from the outset, pursuing it after it has become clear that it does not have reasonable prospects of success will engage the costs jurisdiction. Radia, at [62], is also authority for the proposition that there may be an overlap between unreasonable conduct under

rule 76(1)(a) and no reasonable prospects of success under rule 76(1)(b).

31. With respect to the issue of quantum the following key principles arise from authorities:

    a. Costs awards are compensatory, not punitive – (Lodwick v Southwark London Borough Council [2004] ICR 884 CA).

    b. The fact that a costs warning has been given is a factor that may be taken into account by a tribunal when considering whether to exercise its discretion to make a costs order, however a warning is not precondition to the making of an order — (Raveneau v London Borough of Brent EAT 1175/96)

    c. Under Rule 84 of the ET Rule, the tribunal may, but is not required to have regard to the paying party's ability to pay.

    d. However, where the costs award may be substantial, the tribunal must proceed with caution before disregarding the paying party's means – (Doyle v North West London Hospitals NHS Trust [2012] ICR D21, EAT, at [14-15]).

    e. The assessment of means is not limited to the paying party's means as at the date of the hearing. The tribunal is entitled to take account of the paying party's ability to pay in the future, provided that there is a "realistic prospect" that he will be able to satisfy the order in the future - (Vaughan v LB Lewisham [2013] IRLR 713, EAT, at [26-28]).

    f. Once a tribunal has decided to have regard to the paying party's ability to pay, it must take into account his or her capital, as well as income and expenditure. In Shields Automotive Ltd v Greig EATS/0024/10, unreported, at [47], the EAT in Scotland stated that '*assessing a person's ability to pay involves considering their whole means. Capital is a highly relevant aspect of anyone's means. To look only at income where a person also has capital is to ignore a relevant factor*.' The EAT also rejected the Claimant's submission that capital is not relevant if it is not in immediately accessible form, observing that '*a person's capital will often be represented by property or other investments which are not as accessible as cash but that is not to say that it should be ignored*.'

    g. In Howman v Queen Elizabeth Hospital Kings Lynn EAT 0509/12, the EAT said that any tribunal when having regard to a party's ability to pay needs to balance that factor against the need to compensate the other party who has unreasonably been put to expense. The former does not necessarily trump the latter, but it may do so.

32. The Presidential Guidance on General Case Management state:

"*17. Broadly speaking, costs orders are for the amount of legal or professional fees and related expenses reasonably incurred, based on factors like the significance of the case, the complexity of the facts and the experience of the lawyers who conducted the litigation for the receiving party.*"

18. In addition to costs for witness expenses, the Tribunal may order any party to pay costs as follows:

18.1 up to £20,000, by forming a broad-brush assessment of the amounts involved; or working from a schedule of legal costs; or, more frequently and in respect of lower amounts, just the fee for the barrister at the hearing (for example);
….]

21. When considering the amount of an order, information about a person's ability to pay may be considered. The Tribunal may make a substantial order even where a person has no means of payment. Examples of relevant information are: the person's earnings, savings, other sources of income, debts, bills and necessary monthly outgoings."

Wasted Costs

33. Rule 80 of the ET Rules states:

When a wasted costs order may be made

(1) A Tribunal may make a wasted costs order against a representative in favour of any party ("the receiving party") where that party has incurred costs—
(a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative; or
(b) which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay.
Costs so incurred are described as "wasted costs".
(2) "Representative" means a party's legal or other representative or any employee of such representative, but it does not include a representative who is not acting in pursuit of profit with regard to the proceedings. A person acting on a contingency or conditional fee arrangement is considered to be acting in pursuit of profit.

34. Wasted costs order can be made in favour of any party to the proceedings, including the party, whose representative is found to have acted improperly, unreasonably or negligently.

35. Rule 80 is based on the wasted costs provisions that apply in the civil courts, with the definition of 'wasted costs' being identical to that contained in S.51(7) of the Senior Courts Act 1981. Accordingly, the authorities applicable to wasted costs in the civil law generally are equally applicable in the employment tribunals — *Ratcliffe Duce and Gammer v Binns (t/a Parc Ferme)* EAT 0100/08 and *Mitchells Solicitors v Funkwerk Information Technologies* York Ltd EAT 0541/07.

36. The two leading authorities analysing the scope of S.51 and the circumstances in which such orders can be made are *Ridehalgh v Horsefield and ors* 1994 3 All ER 848, CA, and *Medcalf v Mardell and ors* 2002 3 All ER 721, HL. In the *Mitchells Solicitors* case, the EAT confirmed that these cases are '*sources of essential assistance*' for employment tribunals in the matter of wasted costs.

37. In *Ridehalgh v Horsefield* 1994 3 All ER 848, CA the Court of Appeal examined the meaning of 'improper', 'unreasonable' and 'negligent' — subsequently approved by the House of Lords in *Medcalf v Mardell and ors* 2002 3 All ER 721, HL — as follows:

    'improper' covers, but is not confined to, conduct that would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty,

    'unreasonable' describes conduct that is vexatious, designed to harass the other side rather than advance the resolution of the case,

    'negligent' should be understood in a non-technical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession.

38. A legal representative should not be held to have acted improperly, unreasonably or negligently simply because he or she acts on instructions of a party whose claim or defence is doomed to fail, even if that was or should have been obvious to the representative (see *Ridehalgh v Horsefield and Medcalf v Mardell and ors).*

Submissions and Conclusions

39. After I have delivered my judgment on the time limit issue, the Respondent proceeded to make its costs order application on the grounds that the Claimant's conduct of the proceedings was unreasonable and vexatious and, in the alternative, that his claim had no reasonable prospect of success.

40. The Respondent sought a costs order on two alternative basis: (1) that by bringing the proceedings the Claimant has acted vexatiously and

unreasonably, and should be ordered to pay the Respondent's costs from the start of the proceedings (£12,290), or (2) that the Claimant continuing to pursue his claims after the PHCM on 11 April 2022 was unreasonable and vexatious conduct and/or his claim had no reasonable prospect of success, and he should be ordered to pay the Respondent's costs from the PHCM to the OPH (£6,800).

41. Mr Crawford argued that the Claimant's case was extremely weak from the start, as it was based on hearsay evidence and had no merits whatsoever. He argued that in the circumstances when the Respondent put 60 other employees at risk of redundancy, it was unreasonable for the Claimant to pursue his unfair dismissal claim based on someone telling him that the management was unhappy with the Claimant because he had "*made a fuss about health and safety during Covid*".

42. With respect to the alternative basis, Mr Crawford argued that after the PHCM, at which the Claimant was represented by his current solicitors, it ought to have become clear to the Claimant that his claim had no reasonable prospect of success. The Respondent's solicitors wrote to the Claimant's solicitors on 21 April 2022 stating why all Claimant's complaints were doomed to fail, inviting the Claimant to withdraw the claim and giving a costs warning. The Claimant's solicitors did not respond and continued to pursue the claim on behalf of the Claimant.

43. Mr Crawford further argued that the Claimant's withdrawal of the application to amend and his discrimination complaints at the start of the OPH was by itself unreasonable conduct. His discrimination complaints were not credible in any event and that should have been obvious to the Claimant and his solicitors, and he should have abandoned them months ago.

44. With respect to the unfair dismissal claim, Mr Crawford argued, that it was out of time, and it should have been obvious to the Claimant and his solicitors that there were no grounds for extending time, as the evidence showed.

45. Therefore, Mr Crawford submitted that by pursuing his complaints the Claimant acted vexatiously and wholly unreasonably, especially in light of the EJ Norris's observations at the PHCM and the warnings given by the Respondent's solicitors in their letter of 21 April 2022. Therefore, in the circumstances it would be just and proper for the Tribunal to exercise its discretion and make a costs order against the Claimant.

46. Ms Hunhoo in reply accepted that the Claimant's conduct after the 11 April PHCM was unreasonable. She, however, did not accept that the Claimant's conduct in commencing the proceedings was vexatious or unreasonable. She made no submissions on the alternative Rule 76(1)(b) ground.

47. She did not argue that in the circumstances, even though unreasonable conduct was admitted, the Tribunal should not exercise its discretion and make a costs order award against the Claimant. She said: "*we are, where we are*". However, she argued that the costs sought by the Respondent were unreasonable. She also asked that the Claimant was given an extended period of time to pay.

48. The hearing was adjourned for lunch. Before adjourning the hearing, I asked the Claimant's representative to submit evidence as to the Claimant's ability to pay if the Claimant wished this to be taken into account.

49. As part of my deliberation on the costs application I came to a provisional view that there might be grounds for a wasted costs order against the Claimant's representative under Rule 80 of the ET Rules to be made in favour of one or both parties.

50. The reason for that being a rather unorthodox way in which the Claimant's solicitors pursued the claim on his behalf. They did not engage with the Respondent's solicitors on the 21 April 2022 letter. They appear to have ignored EJ Norris' observations about serious issue the Claimant was likely to face at the OPH. Despite EJ Norris suggesting that any application to amend needed to be made promptly, they left it to the last day indicated in her Orders.

51. Further, despite accepting at the PHCM that the Claimant's claim was out of time, they did a complete U-turn on 29 July 2022 and submitted that the claim was in time. They said that they would rely on the appeal outcome letter to show that the claim was in time, however made no such submissions at the OPH.

52. Despite submitting an application to amend and a witness statement in support of the Claimant's disability discrimination claim, they abandoned the application and all discrimination complaint at the start of the OPH.

53. Finally, Mr Nunhoo accepted that the Claimant's conduct was unreasonable and did not even argue against a costs order, but just the quantum of it, and that was without her even asking for a short adjournment to take instructions from the Claimant.

54. After the lunch break, I indicated to the parties that on its own initiative the Tribunal was considering whether a wasted costs order should be made against the Claimant's solicitors and explained the grounds for that.

55. I also explained to the Claimant that for this matter to be properly considered, the Tribunal would need to know what happened between him and his solicitors since he instructed them, and in particular after the PHCM.

56. I explained that it appeared to me there were two likely scenarios. The first one being where the Claimant's solicitors explained to the Claimant that his case was bad and his complaints were most likely to fail, that it would be unreasonable for him to continue to pursue it, and that if he wished to continue, he would be at risk of a substantial costs order made against him, but the Claimant still instructed them to proceed. In that scenario, the solicitors continuing to pursue the claim would not be improper, unreasonable or negligent conduct (see paragraph 38 above).

57. The alternative scenario would be where none of that was explained to the Claimant and he was led to believe by his solicitors that he had a reasonable chance of succeed on his claims, or at any rate, his claim was not such that had no reasonable prospect of success. He was not told by his solicitors that by continuing to pursue his claim and the application to amend would be unreasonable conduct, as was then admitted by Ms Nunhoo at the hearing.

58. I further explained that communications between him and his solicitors were privileged, and the Claimant was not obliged to disclose them. However, as privilege belonged to him, he was at liberty to waive it, if he wished.

59. The Respondent said that it was neutral on the wasted costs issue.

60. A short adjournment was called for the Claimant to consider the matter. Upon resumption of the hearing the Claimant confirmed that he did not wish to waive privilege. Accordingly, I have decided that in the circumstances the matter could not be pursued further on the Tribunal's own initiative, as there was no sufficient evidence in front of me to make such a wasted costs order.

61. The Claimant then gave oral evidence on his ability to pay and was cross-examined by Mr Crawford. My findings of fact on this issue are recorded at paragraphs 25-27 above.

62. Based on the Claimant's evidence Mr Crawford submitted that the Claimant had sufficient means to meet a costs order in the amounts sought, in particular considering his savings and the earning potential.

63. Ms Nunhoo argued that the Claimant was candid in his disclosure, that the Tribunal should not take into account the money in his mortgage account because the Claimant worked hard to save to buy a property. She said that the Claimant would have difficulties in accessing the money in the mortgage account, however she was unable to explain what difficulties these would be.

She also argued that the Claimant cared for his grandmother and nephew, however there were no evidence as to how much the Claimant was spending in caring for them. Finally, she submitted that there should be "a lower bar" as to the amount the Claimant could afford to pay, which could be increased when the Claimant found his next job.

Has the Claimant acted vexatiously or otherwise unreasonably in bringing the proceedings?

64. I find that in bringing the claim the Claimant did not act vexatiously or otherwise unreasonably.

65. First, I do not find that there is anything unreasonable or vexatious in the Claimant's relying on hearsay evidence as the basis for his unfair dismissal claim. It is not uncommon for employees to suspect that their dismissal might have been for a different and impermissible reason and not for the reason given to them by their employer. The employees not having any direct evidence of that is common, especially at the start of the claim and before disclosure and exchange of witness statements. In those circumstances, it is a task for an employment tribunal to discover the real reason for the dismissal at the trial based on oral and documentary evidence submitted by the parties.

66. The fact that 60 other employees were placed at risk of redundancy, in my view, is not sufficient to demonstrate that it was vexatious or unreasonable for the Claimant to challenge the Respondent's reason and the fairness of his selection. There is no evidence in front of me to show that at the time the Claimant knew that 60 other employees were placed at risk. It was stated in the Respondent's ET3, however it came after the Claimant had started the proceedings.

67. Further, the Claimant's unfair dismissal claim challenged not only the reason for his dismissal, but also the fairness of the selection process. He argued that it was unfair on him because he had not been given an opportunity to obtain electrical qualification, which meant that he was selected for redundancy automatically. That was not a matter I required to determine at the hearing on the merits, however, on the face of it, it does not strike me as being vexatious or unreasonable to present an unfair dismissal claim on that basis.

68. Complaints of discrimination require the Tribunal to examine motivations of the relevant actors, often looking beyond what might initially appear as obvious reasons for their acts and omissions. It is very rare that discriminatory motivations are admitted by respondents.

69. Finally, I must give allowance to the fact at the time the Claimant did not have legal representations, and the serious difficulties his case had from the outset would not have necessarily been apparent to him.

70. For these reasons I find that in bringing the proceedings the Claimant's has not acted unreasonably or vexatiously.

Did the Claimant's claim have no reasonable prospect of success from the start?

71. For the same reasons I find that at the start of the proceedings his case (as pleaded in ET1) was not such that it had no reasonable prospect of success. I accept that his claim was out of time, but that would not be sufficient without something more to find that it had no reasonable prospect of success from the outset. The delay in submitting his ET1 was not such that it can be said that in any circumstances there was no reasonable prospect of success that the Tribunal would extend time either under not reasonably practicable or just and equitable principles.

Has the Claimant (or his representative) acted vexatiously or otherwise unreasonably in the way the proceedings have been conducted after 11 April 2022?

72. Ms Nanhoo accepted that the Claimant had acted unreasonably in continuing to pursue his claim after CMPH. Considering the events leading up to the OPH and what happened at the OPH (see paragraphs 15-24 above), I find that the Claimant's conduct can only be described as unreasonable and vexatious.

73. It appears that the Claimant knew, or at any rate, it should have been obvious to him and his solicitors after the PHCM, that he had no case on discrimination complaints, and that he had no proper grounds to overcome the time issue with respect to his unfair dismissal claim. Yet, he continued to pursue both, just to abandon the former at the start of the OPH, and to see the latter collapsing based on the evidence he gave.

74. Furthermore, the last minute U-turn by his solicitors on the time issue (see paragraphs 21-22 above) and Ms Nanhoo's attempt to blame the Respondent for not including the appeal letter in the bundle with a misleading suggestion that it had only come to the Claimant's attention "now", in my view, is demonstrably unreasonable conduct.

75. The only sensible conclusion that I can draw from the Claimant's and his solicitors' conduct is that the main purpose of it was not to pursue a legitimate claim, but to create as much nuisance to the Respondent as possible and cause the Respondent to incur legal costs, most likely in the hope of extracting a favourable settlement offer. The admission by Ms Nunhoo that the conduct was unreasonable speaks for itself.

76. Therefore, I find that the Claimant and his solicitors have acted vexatiously and unreasonably in the way they conducted the proceedings after the PHCM on 11 April 2022.

Did the Claimant's claim have no reasonable prospect of success after PHCM?

77. For the same reasons I find that after the PHCM the Claimant's claim had no reasonable prospect of success. The abandonment of all discrimination complaints at the start of the OPH is the best evidence that they did not have any reasonable prospect of success. Based on the evidence the Claimant gave to the Tribunal on the time issue, he had no reasonable chances to demonstrate that it was not reasonably practicable for him to present his unfair dismissal and wages complaints in time, and that should have been obvious to him and his solicitors.

Should I exercise my discretion and make a costs order?

78. Now, having found that the costs jurisdiction under Rule 76(1)(a) and (b) was engaged, I need to decide whether in the circumstances it would be just and proper for me to exercise my discretion and make a cost order against the Claimant. In doing so, I must look at the whole picture considering the nature, gravity and effect of the Claimant's and his representative's conduct.

79. Ms Nanhoo did not argue that I should not exercise my discretion in favour of making a costs order. Nonetheless, as it is a matter of judicial discretion, I must still consider the issue myself.

80. My conclusions at paragraphs 72- 76 inevitably draw me to the conclusion that the nature, gravity and effect of the Claimant's and his representatives' vexatious and unreasonable conduct justify making a costs order and it will be just and proper for me to do so. Making a costs order is also justified by my determination at paragraph 77 above.

How much should be awarded?

81. Considering my findings on the Claimant's ability to pay and balancing that with the need to compensate the Respondent for costs incurred because of the Claimant's and his representatives' vexatious and unreasonable conduct in continuing to pursue the claim after PHCM, when it should have been obvious to them that it had no reasonable prospect of success, and the manner in which they have done that, I find that it will be just and proper to order that the Claimant pays to the Respondent the full amount of the Respondent's legal costs incurred by the Respondent after PHCM on 11 April 2022.

82. Whatever practicalities and difficulties there might be for the Claimant to have to withdraw money from his mortgage account, in my judgment, they do not outweigh the need to compensate the Respondent for costs incurred, which clearly would have been avoided but for the Claimant's and his representatives' vexatious and unreasonable conduct.

83. On a summary basis I accept the Respondent's figure of £6,800 and order that the Claimant pays to the Respondent that sum towards its legal costs.

Employment Judge Klimov

14 August 2022

Sent to the parties on:

15/08/2022

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For the Tribunals Office

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