Case No: 1602119/20 & 1600120/21

EMPLOYMENT TRIBUNALS

Claimant: Mr D Perry

Respondent: Rema Tip Top Industry UK Ltd

Heard at: Cardiff (in chambers) **On:** 7 February 2023

Before: Employment Judge C Sharp
(sitting alone)

JUDGMENT

The judgment of the Tribunal is that:

1. Under Rule 76, **the Claimant** is ordered to pay to the Respondent the sum of **£12,950** being the costs reasonably and necessarily incurred due to his unreasonable behaviour, pursuing claims with no reasonable prospect of success, and breaching Tribunal orders.

2. The Respondent's application for a wasted costs order against Setfords Solicitors under Rule 80 of the Employment Tribunal Rules of Procedure is successful. **Setfords Law Ltd trading as Setfords Solicitors** is ordered to pay to the Respondent the sum of **£1600,** being the costs the Tribunal considers it unreasonable for the Respondent to pay.

REASONS

1. Rule 76 of the Employment Tribunal Rules of Procedure (as amended) 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;
   (b) any claim or response had no reasonable prospect of success;

   (2) A Tribunal may also make such an order where a party has been in breach of

any order or practice direction…"

2. Rule 80 of the same Rules states:

"(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;
(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.

(3) A wasted costs order may be made in favour of a party whether or not that party is legally represented and may also be made in favour of a representative's own client. A wasted costs order may not be made against a representative where that representative is representing a party in his or her capacity as an employee of that party."

3. Rule 76 is an ordinary costs order made against the party itself; Rule 80 is known as a wasted costs order and is made against the paid representative of the party as they are held responsible.

4. The Respondent has made an ordinary costs application against the Claimant and a wasted costs application against Setfords Solicitors, the Claimant's former legal representatives in these proceedings. Setfords and the Respondent have agreed to the application being determined on the papers; the Claimant has not responded to the Tribunal's correspondence. The Tribunal is aware that Setfords are no longer instructed by the Claimant, that it had also forwarded relevant correspondence to him, but it does not know when Setfords ceased to be instructed.

<u>Background</u>

5. The current application arises from two hearings that took place before me on 31 March & 1 April 2022. The Claimant had issued two claims against the Respondent, which were not consolidated formally, but listed to be dealt with on consecutive days by the same Judge.

6. On 31 March 2022, for case reference 1602119/20, I found that the Claimant was not disabled for the purposes of the Equality Act 2010. This meant that his claims of failure to make reasonable adjustments, discrimination arising from disability, direct disability discrimination, indirect disability discrimination and harassment related to disability were dismissed for lack of jurisdiction. It had been necessary

for Employment Judge S Jenkins to issue an Unless Order requiring the Claimant to serve an impact statement regarding his disability upon the Respondent.

7. On 1 April 2022, for case reference 1600120/21, I found that the Claimant's claim of unfair dismissal should be dismissed as it had been presented out of time and it had been reasonably practicable for the claim to be presented in time.

8. The Claimant gave evidence orally at both hearings. The parties were presented by Counsel at both hearings, and solicitors had been instructed by each party to conduct the litigation. The Claimant's solicitors were Setfords Solicitors, and Mr Rob Rocker was the solicitor with conduct.

9. Following the oral delivery of my Judgments for both hearings, the Respondent's solicitors wrote to the Tribunal on 14 April 2022, seeking both a costs order against the Claimant and a wasted costs order against Setfords. Submissions and evidence were attached. The Tribunal office did not deal with the correspondence. The Respondent's solicitors wrote again on 14 June 2022; the Tribunal office did not promptly deal with the correspondence. It was not until 9 December 2022 that the Tribunal office dealt with the Respondent's solicitors' correspondence by referring it to me. I immediately asked the administration to review why it had taken so long to action the correspondence and made directions to progress the application.

10. The Claimant through his then representatives was given an opportunity to confirm if he sought a hearing and to provide any response or evidence; by implication his representatives were given the same opportunity to deal with the application against them. After the specified deadline, on 11 January 2023 Setfords responded to say that they were no longer retained by the Claimant and provided his contact details. Nothing further was said. I pointed out to Setfords that it was also facing a wasted costs application and extended time for it to respond, provide evidence and confirm if it sought a hearing. The Claimant was also written to and given a further opportunity to respond, provide evidence and confirm if he sought a hearing. The Claimant has never responded to the correspondence about this application.

11. Setfords did ultimately confirm that they were content for the hearing to take place on the papers and provided submissions; no witness statement was provided, but various Counsel notes were attached, containing copies of privileged WhatsApp messages between the Claimant and Counsel (litigation privilege). There is no evidence that the Claimant has agreed to waive privilege; the disclosure appears to be deliberate by Setfords but it has not disclosed the entirely of its privileged communications with the Claimant. In the circumstances, I have concluded that I cannot consider privileged information without the Claimant giving consent and disclosing all of the privileged correspondence.

12. It is appropriate to note that the Respondent's solicitors also provided a copy of its Counsel's notes of the two hearings at my request. I sought Counsel's notes as there was no written reasons in existence, though I had access to my own notes and the tape recordings of the oral reasons delivered. I also had an independent memory of the two hearings, though I bore in mind the risk that my memory may

not be wholly accurate (which was why I sought Counsel's notes, though it was also clear that the Respondent was relying heavily on its Counsel's note).

Legal Principles

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

    a. Has the Claimant or his representative acted in the matter alleged? In this case, has the Claimant acted unreasonably, pursued a claim with no reasonable prospect of success or breached an Order of the Tribunal? And/or had the Claimant's former representative acted unreasonably and/or negligently?
    b. If so, how should the Tribunal exercise its discretion in deciding whether to make a costs order against the Claimant and/or his representative?
    c. If it does decide to make a costs order, how much should the Claimant and/or his representative be directed to pay?

14. For the Rule 76 application, the common meaning of the word "*unreasonable*" applies; the test is not whether the impact of the conduct on the Respondent was unreasonable. It has been said that a tribunal can recognise unreasonable conduct when it sees it. The same applies to whether an order has been breached; a persistent failure to provide information may be unreasonable conduct (**Kaur-v-John Brierley Ltd** EAT 783/00). The Claimant can be held responsible for the unreasonable conduct of his representative. The Respondent points out that a failure to give truthful evidence to the Tribunal can be unreasonable conduct; the Tribunal must look at the nature, gravity and effect of the lie to determine the unreasonableness of the alleged conduct (**Arrowsmith-v-Nottingham Trent University** (2012) ICR 159 CA). Such conduct may also be vexatious (**Kotecha-v-Insurety plc t/a Capital Healthcare and others** EAT 0461/07).

15. The question as to whether a claim had no reasonable prospect of success is judged on what information as known or reasonably should have been known to the Claimant when he presented his claims to the Tribunal (**Radia-v-Jeffries International Ltd** EAT 0007/18).

16. For the Rule 80 application, the Tribunal reminded itself that the definitions for some words used within this Rule are different to definitions used for Rule 76 or other types of applications. The definition of "*improper*", as cited in the case of **Ridehalgh-v-Horsefield** [1994] 3 All ER 848, is action that justifies disbarment, a striking off or serious professional penalty. The definition of "*unreasonable*" is not the ordinary English meaning; it is vexatious conduct, designed to harass rather than advance the resolution of the case. The word "*negligent*" means a failure by a representative to act with the competence reasonably expected of a professional representative.

17. The case law is also clear on the point about advancing a hopeless case – this does not mean that a wasted costs order should be made. The reason for this is obvious and explained in the case of **Mitchells Solicitors-v-Funkwerk**

Information Technologies York Ltd EAT 0541/07. A representative who is following their client's instructions, even if the quiet advice of that representative to that client is "*I wouldn't do that if I was you*", is not acting in such a way that justifies a costs order, unless it is done improperly, unreasonably or negligently and amounting an abuse of the tribunal process. While ordinary costs orders are the exception, rather than the rule, Wasted Costs Orders are even more exceptional; the Tribunal should proceed carefully before proceeding to make one.

18. If the Tribunal finds unreasonable behaviour during the conduct of the proceedings by the Claimant, that a claim had no reasonable prospect of success or a breach of an Order, or that Setfords have acted unreasonably or negligently, it does not mean that the Tribunal must make a costs order. 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).

19. 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*".

20. 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.

21. 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".*

22. 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 seeks costs together with VAT, but has not confirmed if the Respondent is registered for VAT. Given the VAT threshold, I have proceeded on the assumption that it is more likely than not that the Respondent is registered for VAT; any costs award therefore would be made on the basis that VAT will not be awarded.

The Respondent's applications

23. The Respondent's overall position was that the Claimant and his representative acted unreasonably in bringing and continuing to pursue the disability discrimination and unfair dismissal claims as they had no reasonable prospect of success. The Respondent said it was particularly unreasonable after the exchange of documents when it should have been apparent to the Claimant that his allegations were wholly without merit and unsupported by his own evidence, while the unfair dismissal claim was clearly out of time and there was no reasonable prospect of success. The Respondent also pointed to the number of Tribunal orders breached by the Claimant, which caused delay and complication. The Respondent also argues that Setfords acted negligently, leading to the Respondent incurring costs unnecessarily.

Setford Solicitors' (the former representatives of the Claimant) response

24. Setfords made the point that it is bound by legal professional privilege; the Tribunal accepts this (which is why it will not consider privileged material). It accepted that the background as put forward by the Respondent's representatives was correct, and made the point that Rule 80 applications should be the exception, not the rule. Setfords denied that it had acted vexatiously, abusively, disruptively or unreasonably and that based on the instructions of the Claimant, the claims had a reasonable prospect of success. It added that the fact that the claims failed, largely due to the Claimant's oral evidence, did not automatically mean that the claims had little merit, and assisting a party to take a claim to a hearing was not negligence.

Has the Claimant acted unreasonably?

25. The Respondent has not plainly asserted that the Claimant acted vexatiously. It has used the term "*potentially*", unlike when discussing the alleged unreasonable behaviour. I am not willing to proceed on the basis of "*potentially*", particularly given that the definition of "*vexatious*" from ***AG v Barker [2000] 1 FLR 759*** 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). It is not set out how the Claimant's conduct meets that threshold.

26. Dealing with the discrimination claims first, the Respondent rightly submits that the onus is on the Claimant to prove disability. Despite having permission, no expert evidence was called. The impact statement provided did not deal with the issue of adverse substantive effect; most of it dealt with the symptoms, the position as at

the time of the hearing and relied on one activity that was a specialised work matter. This is not an uncommon error, but should not happen when a claimant is legally represented. The Respondent highlighted how the medical evidence did not support the Claimant's position at all – the GP repeatedly recorded that the Claimant's asthma did not limit his activities and confirmed so in a letter dated 9 February 2022. The Respondent noted how I found that the Claimant's evidence was not credible and sought to give the impression that he had been hospitalised, which was not true.

27. I find that it was unreasonable for the Claimant to bring a claim for disability discrimination when there was no evidence at all to support a finding that he was disabled. The fact that his asthma had no substantial adverse effect on him would have been known to him throughout. While a witness may not "*come up to proof*" when being cross-examined, the impact statement failed to adequately deal with the question of what adverse substantial effect was suffered by the Claimant at the relevant time. Any reading of the medical evidence by a reasonable layperson would have noted that not only was there an absence of evidence of such effect (which can happen), but there was repeated medical evidence of no effect at all on the Claimant's daily activities. The Claimant attempted to mislead the Tribunal in his evidence on the question of hospitalisation in my view. If Setfords failed to properly review the evidence or advise the Claimant, that is a matter between them – the requirements of Rule 76 are met either way.

28. On the issue of the unfair dismissal claim, the Respondent submitted that the ET1 itself did not disclose any basis for an unfair dismissal claim – it set out the attempts made by the Respondent to discuss the Claimant's absence from work. The Respondent said that on the Claimant's own account, it was plain that it would be open to a reasonable employer to dismiss in the circumstances. More critically, the Respondent noted that the claim was out of time, but the Claimant and his representative did not address the correct legal test of whether it was reasonably practicable to bring the claim in time. The Respondent highlighted that in my findings, I again found that the Claimant's evidence on when he received key documents was not credible, though I did not go as far as expressing a positive view that he was dishonest.

29. Setfords in its response submits that the Claimant did not concede that he had received an email dismissing him on 15 October 2020 until his oral evidence on 1 April 2022. It says that in essence it did not know the full facts from the Claimant and if any contrary evidence had been available, Setfords would have taken further instructions. Setfords does not deal with the point that it had contrary evidence before it – the P45 said that dismissal was on 15 October and the Respondent had disclosed its evidence, including the dismissal letters. It also does not deal with the point about the reference to the wrong legal test in the Claimant's statement.

30. I am not persuaded that a claimant who presents a claim of unfair dismissal, even when he accepts that he was absent from work with no proper explanation, is automatically acting unreasonably. Procedural fairness is a key part of issues to be determined in such a claim; it is not uncommon for an employer, even when doing their best in difficult circumstances, to have been found to have acted unfairly due to a procedural failing (though this can ultimately result in no compensation if

Polkey applies). The Tribunal exists to ensure that such decisions are carefully scrutinised, even if they may fail.

31. Where this Claimant has gone wrong in my view is failing to admit the whole truth about what happened. Contrary to the submissions of Setfords, the Claimant did not concede that he received the email of 15 October 2020. He persisted in giving inconsistent and implausible evidence that he could not access it and had not told anyone, and could not explain why Setfords were then given that email for contact purposes. None of this was in his witness statement. Claimant's Counsel's note confirms that this is what happened at the hearing. The Claimant in my view acted unreasonably by failing to give truthful evidence on both this point and his evidence about his disability and what he had told medical professionals. This was evidence about key elements of his claim, designed to get the Claimant's desired outcome.

<u>Did the claims have no reasonable prospect of success?</u>

32. In light of the above findings, this is a relatively simple question to answer. The Claimant knew that he did not suffer any adverse substantial effect on his ability to carry out daily activities at the relevant time; this is confirmed by the medical evidence disclosed – he told the medical professionals that there was no impact. Accordingly, once the issue of bringing disability discrimination claims were discussed with him, he should have told Setfords that he suffered no impact. I am presuming that Setfords did give proper advice to the Claimant, but accept that I do not have the evidence before me, quite properly, as privilege has not been waived.

33. Continuing to make an assertion of disability given the contents of the impact statement and the medical evidence is in my view inexplicable; even before the Claimant gave any oral evidence, he had *prima facie* failed to provide any evidence enabling a finding of disability to be made. One explanation that could explain this is that the Claimant did not understand the legal test and those advising him did not review the evidence or give the required advice that on the basis of what the Claimant had provided, he should withdraw. Regardless as to the reason why the situation arose, it was unreasonable to persist on the basis of the evidence relied upon, but it could have been established from the outset as the Claimant told the GP more than once he did not suffer any effect on his daily activities.

34. Turning to the unfair dismissal claim, the Claimant's position was that time should be extended if necessary on the basis of fairness. As I made clear at the hearing, this was not the correct legal test. The test of "*reasonably practicable*" has little to do with fairness; it is about whether the Claimant reasonably could have brought the claim in time. The failure to identify the right test is concerning for a represented party. No evidence at all was adduced to deal with the correct legal test until his oral evidence at the hearing, where entirely new matters were raised. The oral evidence was confused, contradictory and unimpressive.

35. In my view, the unfair dismissal claim had no reasonable prospect of success as the Claimant had brought it too late and had no reason to give as to why he could not have brought the claim in time. This should have been plain to Setfords as it was on notice that the date of termination may not have been the date asserted by

the Claimant from the P45 Setfords was sent by him shortly after receipt on 27 October 2020, three months before the claim was presented, stating that the date of termination was 15 October 2020. Its inability to ask about this point is unexplained. It is also unexplained why if Setfords knew of the dismissal on or around 27 October 2020 why it took so long to present the claim of unfair dismissal. No effort was made to explain this to the Tribunal at the hearing on 1 April 2022. Without answers to these questions, the Claimant was never going to succeed in establishing that it was not reasonably practicable for him to present the claim in time.

<u>Has the Claimant breached an Order of the Tribunal?</u>

36. There is no dispute that the Claimant has breached a number of orders by the Tribunal. He failed to provide further and better particulars, a schedule of loss, evidence relating to disability, or provide an expert report by the original or extended deadlines. This led to the postponement of a hearing listed for 26 July 2021. The Claimant then failed to write to the Tribunal to explain his non-compliance by the original or extended deadline., which led to an unsuccessful application for a strike out. Finally, the Unless Order was made, and separately the Claimant did not adduce evidence for the hearing on 1 April 2022 until 30 March 2022. By any definition, the Claimant failed to comply with orders on a persistent and extended basis.

<u>Has the Claimant's former representatives acted unreasonably or negligently?</u>

37. This is a very serious allegation to levy at a professional lawyer. The Respondent notes that Setfords used the wrong legal test when the Claimant in his statement sought an extension of time to bring a claim of unfair dismissal. It pointed out that this showed that Mr Rocker had failed to consider at all the test or the merits of the claim. I have already said that I am content that it was not unreasonable for a claim of unfair dismissal to be brought if the issue of time is ignored. However, the total failure to engage with the correct test is concerning. Setfords did not comment on the reference to the wrong legal test in the Claimant's statement.

38. Setfords' explanation is that it was told by the Claimant he did not know that he was dismissed until 27 October 2020 when he received his P45. It says that it had no reason to believe otherwise, though this argument does not engage with the fact that the P45 said the date of termination was 15 October 2020. There is no explanation given, presumably due to privilege not having been waived, of any efforts made by Setfords to ask the Claimant if he was sure he had not received anything earlier or to consider the evidence to the contrary provided by the Respondent.

39. I am not persuaded that Setfords' actions meet the threshold of "*unreasonable*" or "*improper*" for a Rule 80 order. I am hamstrung by the inability to review privileged material to ascertain whether the Claimant in essence lied to Setfords, or whether it failed to ask the obvious question about the date of termination in light of the P45/evidence from the Respondent. The reference to the wrong legal test to extend time in itself is not sufficient to reach the threshold of negligent. I reminded myself

that Rule 80 is a more stringent test and if there is any doubt, the order should not be made. I will not make a Rule 80 order for the unfair dismissal claim.

40. Turning to the disability discrimination claims, Setfords asserts that the Claimant told it that he had been hospitalised due to asthma, but he generally failed to co-operate throughout the claim. Apart from the possibility that Setfords have disclosed in its response further privileged material (the nature of the Claimant's instructions), it does not deal with the point as to why the evidence it provided (including the impact statement that it claims it drafted) failed to meet the requirements of the legal test or why it failed to notice that the medical evidence did not support a claim of hospitalisation. Setfords appear to be under the impression that it was an adequate argument, undermined by a poor oral performance by its client.

41. The Respondent's observation earlier about the failure to provide evidence that could support a finding of disability is in my view correct. No competent solicitor would have failed to realise that the impact statement and medical evidence not only failed to support the Claimant's position, but fatally undermined it. The evidence provided did not address the legal test. It was negligent.

42. The Respondent says that Setfords failed to comply with Tribunal orders, which was an abuse of process. Setfords in its response said that Judge Jenkins had found in March 2022 that it had done all it could to comply, but had been hampered by a lack of co-operation by the Claimant. It pointed out that no order was made against it at that time, though this argument does not assist as it would have been inappropriate to make such an order without notice and full submissions. There are no written reasons for Judge Jenkins' refusal to strike out the claims. I do though have access to his notes, the Claimant's statement prepared for the hearing in March, and Claimant's Counsel's note from the hearing of 11 March 2022. I accept that Counsel's note is more likely than not to be an accurate account of what Judge Jenkins said as it is consistent with the other evidence from that hearing; I also can see that Counsel's note of the two hearings with me is consistent with my notes and that of Respondent's Counsel's. Accordingly, I am not persuaded that Setfords is responsible or contributed to the Claimant's failure to comply with tribunal orders.

43. The Respondent submitted that it has been put to the costs of defending meritless claims due to the actions of Setfords. It takes the position that if Setfords had acted competently, the hearings of 31 March & 1 April 2022 would not have taken place, and the costs in chasing the Claimant to comply similarly would not have been necessary. It noted the delay that resulted.

44. However, the question about whether a claim has been brought or proceeded with when it had no reasonable prospect of success is a matter under Rule 76, not Rule 80. I note that the Respondent seeks to argue it as a negligence issue, but no authority has been cited. I am concerned as if Parliament had intended Rule 76(1)(b) to apply to Rule 80, it should have specified so using the same wording in Rule 80. In addition, privilege has not been waived and wasted cost orders are exceptional. I was not referred to the case of *Mitchells Solicitors-v-Funkwerk Information Technologies York Ltd* by either party, but it is plain that the advancing of a hopeless case is not grounds for a wasted costs order – it is how it is done

and whether it amounts to an abuse of the tribunal process. This in my view is not addressed sufficiently by the Respondent. I do not find that Setfords acted negligently, unreasonably or otherwise in breach of Rule 80 regarding this matter.

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

45. In relation to the Rule 76 application, the Tribunal has found that the Claimant (and potentially Setfords) have acted unreasonably, brought and continued claims with no reasonable prospect of success, and breached a number of orders made by the Tribunal. The question is whether I should exercise my discretion to make a costs order against the Claimant.

46. The Respondent submitted that I should because it has incurred costs and it would not be just for the Claimant to walk away without any financial repercussions. It pointed out that the Claimant is a carpet fitter and has income.

47. I have no submissions or evidence from the Claimant regarding his means. I do know due to his oral evidence that he was as of 31 March-1 April 2022 a carpet fitter.

48. My discretion is wide, but I must consider all the relevant factors. I take the view that it would be appropriate to make a costs order against the Claimant. Bluntly, the Claimant has brought and continued claims, breaching many tribunal orders along the way, which his own evidence did not support. There is a question as to his honesty; his former representatives say that the Claimant told them he had been hospitalised and confirmed again that the Claimant was still using the email address about which he said did not receive the dismissal letter. I found that the Claimant's evidence was not credible and no weight could be placed on his evidence unless supported by written contemporaneous evidence, and refrained from formally finding that he had lied as it was not necessary for the Judgment. It is both necessary and appropriate for the Tribunal to record its disapproval of the Claimant's attempts to use its process for his own gain.

49. In relation to the Rule 80 application, I have found that Setfords acted negligently in relation to the disability discrimination claims, and in particular on the issue of the disability test. The Respondent repeated its arguments in paragraph 46, adding that Setfords should be insured. Setfords had nothing to say about the exercise of my discretion.

50. I have found the decision about how to exercise my discretion regarding the Rule 80 application the most difficult question. On one hand, Setfords have been found to be negligent, and appears to still fail to understand that the evidence provided as to disability was woefully deficient. A prompt recognition of this would have avoided the costs of the hearing of 31 March 2022. On the other hand, while I do not know exactly when the Claimant provided his impact statement to Setfords, it must have been close to the hearing date and between 11 and 18 March 2022. I note the comments of Judge Jenkins that the Claimant was to blame for the late provision and remind myself that the Claimant has been found to be an untruthful witness. The deciding factor is that the medical evidence, including the GP letter of 9 February 2022, effectively told the reader, which should have included

Setfords, that there was no evidence of any adverse effect at the relevant time. This was available earlier than the impact statement. Setfords ploughed on nevertheless; it did not withdraw from representing the Claimant. I therefore consider it appropriate to exercise my discretion to make a Rule 80 wasted costs order against Setfords.

Amount to be paid

51. In order to avoid double recovery, and to reflect the fact that I have found that the Claimant is responsible for a wider range of misconduct than Setford Solicitors, I will consider the amount to be paid under Rule 80 first, and not award such costs against the Claimant. This reflects the likelihood that Setfords Solicitors are more likely to pay than the Claimant.

52. What are the costs that the Tribunal considers it unreasonable for the Respondent to pay due to the negligent conduct of Setford Solicitors? A schedule of costs, together with details of the work done by fee-earners and Counsel's fee notes have been provided to assist the Tribunal. However, I have no details about the grade of the fee-earners involved, why there is more than one, or the exact detail of the work carried out. I assess on a summary basis. It appears for the solicitors a flat rate of £150 per hour is sought, which is within the usual court guideline. Setfords have made no submission on what I should consider awarding.

53. As this is a summary assessment, and to be proportionate to the issues, I consider that by 18 March 2022, Setfords were negligent in not realising that the Claimant's evidence, both in terms of the impact statement and the medical evidence, would not suffice to discharge the burden of proof upon him. At this point, it should have advised withdrawal of the discrimination claims or ceased to act. I cannot from my review of the evidence provided by the Respondent's solicitors identify what work it carried out that would not have been necessary if the disability claims had been withdrawn on or around 18 March 2022. The entries do not assist me. Accordingly, the only cost I can identify are the costs of the Respondent's Counsel in preparing and attending the hearing of 31 March 2022. They total £1600, exclusive of VAT. This is the sum that I order Setfords to pay. I do not order any costs in respect of the making of the costs application as the majority of the complaints are best laid at the door of the Claimant.

54. Turning to the Rule 76 costs judgment to be paid by the Claimant, the Respondent seeks the entirety of its legal costs, including the costs of seeking costs. As I am aware that the Claimant was working when I handed down the original judgements, and he has failed to respond or provide any evidence to assist today, I consider it reasonable to conclude that if the Claimant does not currently have the monies to pay any costs order in full, he is likely to be able to do so in the future, though it may take years. I also consider that the Claimant's unreasonable behaviour in bringing and continuing the claims, and repeatedly breaching tribunal orders, have caused the entirely of the legal costs paid by the Respondent.

55. Having considered the evidence provided as to legal costs, and reminding myself that my observations in paragraph 52 above, adopting a broad brush approach I consider that while the Respondent's solicitors costs at first sight appear larger

than I would normally expect, they compass two claims and several preliminary hearings. The disability discrimination claim in particular was substantial, and required significant work to defend. The Claimant's repeated breaches of orders inevitably increased the Respondent's costs. I am content that the entirely of the net sum sought by the Respondent should be paid by the Claimant, with the deduction of £1600 to be paid by Setford Solicitors. This includes the costs of seeking this Judgment as the Respondent has done so successfully. No award is made for VAT.

56. However, the numbers sought in the schedule of costs are not correct – for example, £150 per hour x 5.4 = £810, not £824. I have checked the calculations and prefer my own. Therefore, I find that the Claimant should pay £12,950. This takes account of the £1600 deduction to be paid by Setfords.

Employment Judge C Sharp
Dated: 7 February 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON 8 February 2023

FOR EMPLOYMENT TRIBUNALS Mr N Roche