# EMPLOYMENT TRIBUNALS

**BETWEEN**

| ***Claimant*** | ***Respondent*** |
|---|---|
| **Mr Adam McIntosh-Roffey** | **AND Eridge Green Bespoke Kitchens and Living Space Limited** |

## JUDGMENT OF THE TRIBUNAL

**On: 18 March 2023**

**Before: Employment Judge A M Buchanan (considered on the papers with the agreement of both parties)**

### JUDGMENT ON COSTS

It is the Judgment of the Tribunal that the respondent's application for the costs of these proceedings to be paid by the claimant fails and is dismissed.

### REASONS

**The Law**

1. In considering the application before me, I have taken account of the following provisions of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 Schedule 1 ("the 2013 Rules").

*Rule 76(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…*
*Rule 77 – A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the tribunal may order) in response to the application.*
*Rule 78(1) – A costs order may 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…*

*Rule 84 – In deciding whether to make a costs preparation time or wasted costs order and if so in what amount the Tribunal may have regard to the paying party's…ability to pay.*

2. I have reminded myself of the three stage exercise which I am required to undertake in connection with any application for costs. First, I must consider whether the claimant has engaged in unreasonable conduct by bringing and persisting in the claim up to the public preliminary hearing. Secondly, I must consider whether to exercise the discretion that I have to make a costs order. It is an unfettered discretion and should take account of all the particular circumstances of the case. Thirdly, if I decide to exercise that discretion then I should make an award of costs in such amount as will compensate the respondent and not to punish the claimant.

3.I remind myself that the awarding of costs is the exception in the Employment Tribunals rather than the rule. I have reminded myself of the guidance of Mummery LJ in ***Barnsley MBC -v- Verrakalva 2011 EWCA Civ 1255****: "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".*

4. I note that I may have regard to the claimant's means when considering whether to order costs and if so in what amount, but I am not obliged to take account of the claimant's ability to pay. I remind myself that if the costs order do not exceed £20,000 pounds then I make a summary assessment of the costs myself.

**The Application for Costs ("the Application")**

5. The respondent has made the Application arising out of a public preliminary hearing before me on 4 November 2022 ("the Hearing") which was convened in order for me to consider whether the claim advanced by the claimant to the Tribunal had been presented in time and, if not, whether it was appropriate for time to be extended. The Hearing took place by cloud video platform. The claimant appeared in person and the respondent was represented by Mr Matthew Sellwood of counsel. The claimant complained about various matters which occurred during his employment which began on the 8 February 2019 and ended on 1 July 2020. The claimant approached ACAS for an early conciliation certificate and the resulting certificate showed Day A to be 22 July 2020 and Day B to be 23 July 2020. The claimant did not advance a claim to the Tribunal until 27 June 2021.

6. At the Hearing I heard evidence from the claimant who was cross examined, and I heard submissions from the claimant and from counsel on behalf of the respondent. I noted that the claim to the Tribunal had been filed over 9 ,months out of time. I considered all relevant submissions and legal principles and I decided that it was not appropriate for time to be extended. Therefore, the complaints of disability discrimination, which were the only remaining complaints before the Tribunal were dismissed for want of jurisdiction.

7. The Application was made on 5 December 2022 and had attached to it 5 appendices. The Application is made on the basis that the claimant acted

unreasonably in bringing (and conducting) the proceedings or alternatively that the claim had no reasonable prospect of success. The respondent seeks costs in the amount of £6350 pursuant to a schedule of costs which was submitted with the Application. It is noted that at the Hearing I found the claimant's explanation for delay - namely that he had been told by an ACAS officer that he had 24 months in which to bring a claim - to be inherently unlikely and also that the cogency of evidence upon which the respondent would be bound to rely had been impugned by the delay. The claimant's accepted disability was a physical disability and did not relate to his mental health and did not explain the delay. The respondent asserts that it had repeatedly warned the claimant that the outcome of the Hearing would be dismissal of the claim. This warning had been set out first in the respondent's grounds of resistance. The respondent relied on two letters sent by it to the claimant. The first letter dated 10 December 2021 sent to the Tribunal and copied to the claimant had requested the claim be struck out. In the absence of a reply, on 2 February 2022 the respondent warned the claimant that, if he did not withdraw the claim, an application would be made against him for costs in relation to the Hearing "*along with any other costs which the respondent might seek to claim".* The claimant was urged to consult a solicitor. When the claimant replied he asserted that he had sent the correspondence to his solicitor who would reply in due course. There was no such reply. At the Hearing the claimant asserted he did not have a solicitor and the respondent asserted it had never been contacted by a solicitor. The respondent submitted the claim had no reasonable prospect of success from its outset. The claimant attended the Hearing without any credible reason why time should be extended, and he had put the respondent to the further costs of defending the matter and attending the Hearing. The respondent specifically requested this matter be determined by me on the papers.

8. The respondent relies on its schedule of costs in respect of the period from 7 February 2022 until 2 December 2022 being the date of the Application. The schedule claims 17 hours work by a solicitor at an hourly rate of £250 namely £4250 and counsel's fees of £2100 being £750 for a telephone hearing on the 27 July 2022, £1000 pounds for the Hearing and £350 for drafting the application for costs. The grand total of costs claimed is £6350.

**Submissions of the Claimant.**

9. I invited the claimant to comment on the Application. The claimant was given the opportunity to request a hearing at which the Application would be considered or to make written submissions. The claimant chose to make written submissions. The submissions were received on 4 January 2023 but not passed to me until I made enquiries about the submissions. That explains the resulting delay in me being able to consider this matter.

10. In his submissions, the claimant asked me to consider various factors in relation to the Application for costs and I have considered those matters in detail. The claimant asks that I take into account the lack of support received by him from the Citizens Advice Bureau and from ACAS because of the global pandemic. The claimant asks me to take account of the effect of the proceedings on his mental health and the fact that he considered he had a strong claim to advance against the respondent had the time limit point been decided in his favour. The claimant asserts that he had a right to represent himself and should not be penalised for not being able to afford the services

of a solicitor. The claimant asks me to take account of the current economic crisis and the reduction in available household income when considering the Application. The claimant gives me no further information about his means.

## Conclusion

11. I have first considered whether it is appropriate to make any order for costs on the basis that the claimant was pursuing a claim which did not have reasonable prospects of success on its merits. Leaving aside the time limit issue which I consider separately below, I note that the respondent had conceded that the claimant was at all material times a disabled person and so the gateway to a successful claim was passed. I conclude that there was insufficient information placed before me to consider whether the remaining complaints of disability discrimination, howsoever advanced, were without reasonable prospect of success. The point was not argued at the Hearing. Indeed, the submissions of Mr Sellwood related solely to the time limit issue and then, in the alternative, to the question of whether or not a deposit order should be made. The test for deposit orders is of course whether a complaint has only little reasonable prospect of success rather than no reasonable prospect of success which is the basis of any costs order under rule 76(1)(b) of the 2013 Rules. Accordingly, in the absence of any further information in respect of the merits of the complaints advanced, I do not consider there are grounds for me to make any order for costs against the claimant in respect of his complaints having no reasonable prospects of success on their merits.

12. I have next considered whether the time limit issue alone meant that the claim advanced by the claimant had no reasonable prospect of success. The claim was advanced over 9 months out of time and the explanation given by the claimant was one which I found to be inherently unlikely albeit that I did accept that the claimant had by some means come to believe that a time limit of 24 months was the time limit although he had taken no steps to check the position. The question of the time limit applicable to a complaint of disability discrimination is governed by section 123 of the Equality Act 2010. The claimant must advance a complaint before the end of the period of three months (plus one day for early consideration in this case) starting with the date of the act to which the complaint relates or "*such other period as the employment tribunal thinks just and equitable".* That gives the Tribunal a very wide discretion to allow claims to be advanced out of time and it is far from unknown for claims to be allowed to proceed to final hearing which have been filed after a longer period of delay than was present in this case. It all turns on the reason for the delay and how the Tribunal assesses the strength of the explanation. The fact that I did not chose to exercise my discretion to extend time does not mean that another Tribunal would have been bound to reach the same conclusion. There is a discretion placed on the Tribunal and I cannot conclude that the complaint had no reasonable prospect of success on the time point alone. Another Tribunal may have taken a different view of the explanation and the submitted absence of support from ACAS and the Citizens Advice Bureau. I could well be persuaded that the explanation advanced by the claimant could have had only little reasonable prospect of success before considering it but that is not sufficient ground to make an award of costs pursuant to Rule 76(1)(b) of the 2013 Rules.

13. Accordingly for those reasons, there can be no award of costs under Rule 76(1)(b) of the 2013 Rules.

14. I turn to consider the provisions of Rule 76(1)(a) of the 2013 Rules. There was no suggestion that the claimant had acted vexatiously, abusively or disruptively. Accordingly, I must consider whether the claimant acted unreasonably in bringing the proceedings or in the way he conducted the proceedings.

15. I do not consider that the claimant acted unreasonably in bringing the proceedings. The complaints received detailed consideration by Employment Judge Tsamados at a private preliminary hearing for case managemebnt pursioes on 27 July 2022. The case summary attached to the resulting orders describe complaints that were relatively detailed, and which received detailed judicial attention. Nothing resulting from those orders suggests unreasonableness in the bringing of the proceedings. I have already concluded that the time limit point was one which might have persuaded another Tribunal and thus I do not consider that the claimant acted unreasonably in bringing the proceedings.

16. I have considered if the claimant acted unreasonably in conducting the proceedings and that brings into consideration the warnings given to the claimant by the respondent about the consequences of pursuing the claim.

17. The claimant is a litigant in person. I can understand that he might have been confused by the fact that after two warnings were issued to him by the respondent, the Tribunal went ahead with a case management hearing in July 2022 and then the Hearing itself. The three so called warnings from the respondent repay close consideration. |

18. The first so called warning is contained in the form of response at paragraphs 16 and 17. Those paragraphs do no more than set out the respondent's position that the claims are out of time: they contain no explicit warning as to costs or anything else to the claimant.

19. The next letter to consider is the letter addressed to the Tribunal and copied to the claimant seeking an order by the Tribunal that the claim be dismissed for want of jurisdiction as being out of time. The Tribunal did not accede to that request but instead on 8 July 2022 Employment Judge Reed set down the time issues to be considered at the Hearing. In the meantime, the claimant received the letter from the respondent of February 2022 which issues a costs warning but gives little information to the claimant as to why the respondent considers his complaints will not survive scrutiny by an Employment Judge at the Hearing.

20. For entirely understandable reasons, I have been made aware that the respondent made a commercial offer to settle the matter but that only served to confuse further the claimant, who was acting in person, as to the merits of his claim. The claimant saw that the Tribunal had set down the question of time limits to be considered by the Tribunal at the Hearing. I do not consider that the claimant conducted the proceedings unreasonably by availing himself of an opportunity to argue for an extension of time at the Hearing. The Tribunal had set down the Hearing in answer to an application from the respondent to dismiss the claims as out of time without a hearing which was what the letter of 10 December 2021 requested. That is not something which any Tribunal would do without affording the claimant a hearing.

21. I do not consider that the claimant has acted unreasonably in either bringing or conducting these proceedings. Accordingly, the Application fails and is dismissed.

22. I would add two final matters. First, if I had been satisfied that the gateway for an award of costs had been passed then I would have moved onto the question of whether to exercise my discretion. In the circumstances of this case, I would not have been minded to exercise my discretion. Secondly, the amount of costs claimed by the respondent was wholly unreasonable in my judgment. The respondent chose to employ both solicitors and counsel for the preliminary stages of this litigation. The respondent is entitled to act as it wishes but had I been required to assess any costs payable by the claimant, I would have been minded to award a sum considerably less than that claimed.

23. The award of costs in the Employment Tribunal is still the exception rather than the rule. This matter is not one of those exceptional cases.

**EMPLOYMENT JUDGE A M BUCHANAN**
**JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 18 March 2023**