EMPLOYMENT TRIBUNALS

Claimant: **Mr Charles Iseki**

Respondents: **(1) McColl's Retail Group Limited (In administration)**
(2) Christopher Richardson

Heard at: **East London Hearing Centre**

On: **2 November 2022**

Before: **Employment Judge John Crosfill**
Members: **Ms G Forrest**
Ms S Jeary

Representation

Claimant: Ms Oliver, a lay representative

Respondents: Mr Singh, a Solicitor.

JUDGMENT having been sent to the parties on **30 June 2022** and corrected version sent on **22 July 2022** and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1. At the remedy hearing on 2 November 2022 we determined that the Claimant was entitled to a remedy of £2,000 for injury to feelings for the actions of the Second Respondent in harassing him contrary to Sections 26 and 40 of the Equality Act 2010. We found that the Claimant was entitled to interest in the sum of £578.63. We went on to consider a costs application made by the Respondents and held that the Claimant had acted unreasonably by being so late arriving at the hearing centre that a full day was required to determine remedy when otherwise a half day would have sufficed. We ordered the Claimant to pay the Respondents costs occasioned by the additional time taken in the sum of £510.00. We gave oral reasons for our decisions.

2. By e-mails sent on 4 November 2022 and 17 November 2022 the Claimant and Respondents respectively have asked for full written reasons for our decisions. These are our reasons.

The issues we needed to determine

3. We needed to assess what compensation the Claimant is entitled to for the one act that we found to have been unlawful. In his schedule of loss the Claimant had included a claim for loss of earnings from 18 July 2019, when he was dismissed, to 7 November 2019 when he got a job at a salary of £33,000. The Claimant did not complain that his dismissal was unlawful. The Claimant's case had been that James Coomber had falsely reported that he had been threatened by the him because of his race. We found that the Claimant had behaved as James Coomber had alleged and dismissed the Claimant's claims in this respect. He was later dismissed and did not suggest that the dismissal was a separate unlawful act. The Claimant had not argued that the act of harassment that we found unlawful caused him to lose his temper and behave as he did. That was not his case. His case was that he did nothing improper. Ms Oliver did not demure when we suggested that a claim for losses arising from the dismissal could not be recovered. The case that was argued before us was that the Claimant had suffered significant injury to feelings and had a depressive illness.

4. What we needed to assess was the extent of any injury to feelings attributable to the unlawful conduct and assess whether the unlawful conduct had caused or contributed to any personal injury. We then needed to assess the appropriate level of compensation.

The hearing and the applications for a postponement

5. The Notice of Hearing for the remedy hearing had been sent to the parties on 16 September 2022. The notice was sent directly to the Claimant and not, as it should have been, to the Claimant's solicitor. On 31 October 2022 the Claimant's solicitor sought a postponement of the hearing. The letter referred to the hearing being the following day and stated that the Solicitor who had conduct of the matter was unable to attend due to other professional commitments saying that it was too late to instruct Counsel to attend in his place. That application was refused by EJ Burgher who noted that the Claimant had known of the hearing since 16 September 2022. He directed that any further application for a postponement be made at the outset of the hearing. That decision was sent to the parties by e-mail on 1 November 2022. The e-mail refusing the postponement was copied to the Claimant at his own e-mail address.

6. The Respondent then made an application to convert the remedy hearing to CVP on the basis that there were anticipated rail strikes. That application was refused by EJ Crosfill. At 16:26 on 1 November 2022 the Claimant's solicitor sent an e-mail to the tribunal enclosing medical notes for the Claimant which it was said supported his claim for injury to feelings/personal injury. The e-mail informed the Tribunal that the Claimant would be represented by Ms Dawn Oliver an experienced lay advocate. The Claimant had provided medical notes at the liability hearing. The notes provided by the Claimant's Solicitor were updated. The last consultation was 21 April 2021 but the last prescription referred to was on 8 September 2022. The notes show that they were printed on 1 November 2022 at 4:09pm but it is not clear whether that was when they were printed by the surgery or by the Claimant's solicitor.

7. Ms Oliver attended the hearing in good time. Mr Singh had a very early start as he had flown from Glasgow to attend the hearing. En-route he had sent an e-mail warning of delays to his flight but in the event he arrived shortly after 10am. There was no sign of the Claimant. When enquiries were made we were informed that the Claimant was in Canterbury and was returning to London to attend the tribunal. He eventually arrived and we were able to start the hearing shortly after 1pm.

8. We invited the Claimant to return to the witness box to give evidence in respect of the remedy he sought. The Claimant adopted the witness statement that he had used for the liability hearing and which referred to matters relevant to remedy. He identified the medical evidence that had been provided by his GP as being his medical records. He was cross examined by Mr Singh on behalf of the Respondents.

9. In re-examining the Claimant Ms Oliver asked him to explain why he had arrived late at the tribunal. The Claimant said that he had taken the week off work. He had spoken to his solicitor and was under the impression that the case would be adjourned. He said that he had been on his way to Holland by bus when he was told that he was expected to be at the Tribunal. He said that the driver of the bus had dropped him in the 'middle of nowhere'. He said that he had been in tears and had prayed for help. He said that a total stranger had approached him and had driven him back to the tribunal and was waiting downstairs.

10. At the conclusion of the evidence both parties made submissions. Mr Singh had provided written submissions which we read before reaching our conclusions below. Both advocates made oral submissions. We shall not set out the competing arguments but have taken them into account in our decisions below and refer to the key points made to us.

Findings of fact

11. Having heard from the Claimant we make the following findings of fact relevant to the issues we have identified above.

12. The Claimant's witness statement deals only briefly with issues of remedy. The statement was made at the point when the Claimant was advancing all of his claims. He says that he has been devastated by the race discrimination. He talks of his qualifications and experience. He said that he had turned his store around but despite those efforts he was subjected to racism. He said that he had obtained employment in September 2019 but he had struggled to regain his confidence.

13. The Claimant's GP's records show that he visited his GP on several occasions in April and May 2019. There were no references to symptoms of any depressive illness. The first reference to stress at work is found at an entry for 17 June 2019. The records report that the Claimant has had a telephone consultation and reported stress and anxiety and panic attacks. The note suggests that this is linked with his employment. The Claimant had already issues his claim at this stage and there was an ongoing grievance.

14. The Claimant attended the GP Surgery on 18 June 2019. The notes record the Claimant complaining of:

'Stress at work patient undergoing grievance at work against his boss who has also put in a grievance against him has been suspended now for last 2.5 months has been feeling very restless/palpitations/insomnia sleeping 2-3 hours a night lives with family and children, they have noticed he is stressed he tells me no depression, no DSH/suicidal ideation no alcohol has been doing lots of long walks/drinking herbal tea cousin gave him Valium which helped good eye contact/rapport'

The Claimant was referred for IAPT and prescribed Zopiclone 3.75mg tablets. That medication assists with sleep disorders. He was also proscribed Propranolol which is a beta blocker used to treat anxiety.

15. At a further consultation on 4 July 2019 the Claimant is recorded as saying that he remained suspended. He could not take time off work as he would not get paid. A prescription of Diazepam 2mg tablets was given. Diazepam is used to treat anxiety.

16. The Claimant has been prescribed Amlodipine, a blood pressure tablet 10mg a day since at least December 2018. He suggested that around April 2019 his blood pressure was rising. He did have his blood pressure tested on 3 April 2019 and it was 132/89. His medication was not varied.

17. The Claimant visited his GP again on 22 July 2019. That was 4 days after the disciplinary hearing after which he was dismissed. The GP notes show the Claimant reporting ongoing stress and anxiety around work issues. He is reported as feeling depressed. He was not keen to use antidepressants preferring lifestyle measures. There are no further entries relating to any mental health condition.

18. Having set out the evidence above we need to make findings about the level of any injury to feelings and the extent of any personal injury.

19. We need to assess how much we can rely on the Claimant's own account of his feelings. In our liability decision we have made findings about the Claimant's evidence which damage his credibility. We have found that his evidence was embellished in an attempt to advance his case. We shall not repeat those findings here.

20. In his evidence before us the Claimant again sought to embellish his case. In trying to link concerns about his blood pressure with the unlawful treatment the Claimant said that his medication had been increased. When it was shown that that was not consistent with his GP records the Claimant sought to say that he had administer a different dose by breaking up tablets. We do not believe that this is true. The medical records clearly set out that the dose remained the same. We find that the Claimant was just seeking to deflect from the fact that evidence he had given us was untrue.

21. The Claimant had given an account of why he was late to the tribunal. He said that he was under the impression there was a postponement. When asked to explain why, if he thought the hearing was to be postponed, he had provided his solicitor with his medical notes the Claimant resiled from saying that he had dropped them around to his solicitor and adopted an account that his Solicitor must have obtained them himself. We find that is untrue. The Claimant's initial account is accurate. He took the medical records to his solicitor.

22. The Claimant told us that he had been on a bus on route to Holland. He said that the Driver had dropped him 'in the middle of nowhere'. He said that he had then been rescued by a stranger. We do not accept that account. It is implausible that the Claimant would ask to be dropped '*in the middle of nowhere'* or that a stranger would stop and drive him from Kent to the Tribunal. The Claimant later perceived us as rejecting his account that he was on a bus in our oral reasons. We did not do so nor do we here – it was his account of his return to London that we found implausible.

23. These matters taken together mean that we cannot take the Claimant's account of how he felt at face value as we might have done had we concluded that we could rely on the Claimant's evidence.

24. We accept that by June of 2019 the evidence shows that the Claimant had anxiety and by July symptoms of depression. It appears that those had receded by around the end of July. We do not consider that there is sufficient evidence for us to conclude that the Claimant's blood pressure was adversely affected by any treatment by his employers.

25. We would also accept that the Claimant was genuinely affronted by his treatment by McColl's. We have found a great deal of that treatment was not unlawful. The Claimant has described his response to the entirety of the treatment. If we were to look at the entirety that response we would accept that the Claimant was upset and anxious for the period of his suspension. We would accept that being dismissed is an experience that would ordinarily upset any employee.

The Law we Applied

26. The jurisdiction to grant a remedy under the Equality Act 2010 is found in Section 124 of the Equality Act 2020. The tribunal may award such compensation as might be awarded in the County Court. The measure of compensation is the same as in a claim in tort. the Claimant must be put into the position, as best as money can do it, he would have been in *but for* the unlawful conduct - ***Ministry of Defence v Cannock and ors*** 1994 ICR 918, EAT.

27. The compensation for unlawful discrimination can include compensation for injury to feelings falling short of a clinical injury. Injuries to feelings can include 'subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on' See Lord Justice Mummery in ***Vento v Chief Constable of West Yorkshire Police (No.2)*** **2003 ICR 318, CA**

28. In ***Prison Service and ors v Johnson*** **1997 ICR 275, EAT** the EAT summarised the general principles that underlie awards for injury to feelings:

    28.1. awards for injury to feelings are designed to compensate the injured party fully but not to punish the guilty party

    28.2. an award should not be inflated by feelings of indignation at the guilty party's conduct

28.3. awards should not be so low as to diminish respect for the policy of the discrimination legislation. On the other hand, awards should not be so excessive that they might be regarded as untaxed riches

28.4. awards should be broadly similar to the range of awards in personal injury cases

28.5. tribunals should bear in mind the value in everyday life of the sum they are contemplating, and

28.6. tribunals should bear in mind the need for public respect for the level of the awards made.

29. In ***Vento v Chief Constable of West Yorkshire Police*** the Court of Appeal gave guidance as to the appropriate level of awards for injury to feelings. Lord Mummery gave the judgment of the Court. He said:

Guidance

65. Employment Tribunals and those who practise in them might find it helpful if this Court were to identify three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury.

i) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. This case falls within that band. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.

ii) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.

iii) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.

66. There is, of course, within each band considerable flexibility, allowing tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case.

67. The decision whether or not to award aggravated damages and, if so, in what amount must depend on the particular circumstances of the discrimination and on the way in which the complaint of discrimination has been handled.

68. Common sense requires that regard should also be had to the overall magnitude of the sum total of the awards of compensation for non-pecuniary loss made under the various headings of injury to feelings, psychiatric damage and aggravated damage. In particular, double recovery should be avoided by taking appropriate account of the overlap between the individual heads of damage. The extent of overlap will depend on the facts of each particular case.

30. All awards for personal injury were increased by 10% as a consequence of the decision of the Court of Appeal in ***Simmons v Castle*** **[2013] 1 ALL E.R 334** which was held to apply to awards of injury to feelings in ***De Souza v Vinci***

Construction (UK) Limited **[2017] EWCA Civ 879**. Presidential guidance has been given as to how those levels of awards should be updated and applied in the Employment Tribunal. The relevant guidance for this case is the second addendum to the guidance originally issued in 2017. The guidance provides that:

> *'In respect of claims presented on or after 6 April 2019, the Vento bands shall be as follows: a lower band of £900 to £8,800 (less serious cases); a middle band of £8,800 to £26,300 (cases that do not merit an award in the upper band); and an upper band of £26,300 to £44,000 (the most serious cases), with the most exceptional cases capable of exceeding £44,000.'*

31. The guidance in ***Vento*** is not to be understood as suggesting that the gravity of the act must correspond with the level of the injury to feelings award. The focus most be on the effect of the unlawful discriminatory treatment on the claimant, not on the gravity of the discriminatory acts of the respondent - see ***Komeng v Creative Support Ltd*** **EAT 0275/18**. That is not to say that the gravity of the act (or lack of it) is irrelevant. The gravity of any act may support an inference about the effect on the person subjected to discrimination.

32. In ***Hatton v Sutherland and other cases*** **2002 ICR 613, CA** Hale LJ said *'where the harm suffered has more than one cause, the employer should only pay for that proportion of the harm suffered that is attributable to its wrongdoing, unless the harm is truly indivisible. It is for the employer not the claimant to raise the question of apportionment'*. That dicta is not binding on Employment Tribunals but has subsequently been approved in ***BAE Systems (Operations) Ltd v Konczak*** **2018 ICR 1, CA**. Whilst the cases deal with the possible divisibility of psychiatric injury there is no reason in principle to treat an injury to feelings falling short of a personal injury any differently. Where there are concurrent lawful and unlawful causes of injury to feelings, if the injury is divisible, the wrongdoer should only pay for the part that they caused.

Discussion and conclusions - remedy

33. We start with the wrongdoing that we have found. Christopher Richardson repeated his father's views that linked the Claimant's abilities (or lack of them) as a manager to his race or nationality. The remark was not made in front of the Claimant but was relayed to him. It is significant in our view that Christopher Richardson was not expressing the same views himself. His error was to repeat such views in the workplace.

34. We have rejected other claims made by the Claimant. What is left is a single incident. We have set out in our findings of fact in the liability decision the steps taken by the Respondents to investigate the Claimant's grievances. We have disagreed with some of the conclusions but we consider that the grievances were investigated in good faith.

35. We consider the context to be important. We consider it is relevant in assessing how offended the Claimant was at hearing this that he would have known why Christopher Richardson was repeating criticism of him. We rely on our findings of fact in the liability decision. Our findings amount to a conclusion that the it must have been almost intolerable to have been managed by the Claimant. His attitude to those reporting to him was appalling. Christopher Richardson's account of this was widely supported by other staff members. Relying on those findings we find

that the Claimant would have been aware that the staff in general, and Christopher Richardson in particular were justified in raising complaints about his abilities as a manager.

36. The Claimant says that he was an employee who had turned around his store. We have no need to question whether he had met various performance targets but it is clear from the comments of his staff that he had wholly failed as a manager.

37. We must not and do not fall into the trap of finding that the Claimant deserved the treatment that was unlawful. He did not. Harassment related to race is unlawful and is to be depreciated. By its very nature it must be capable of creating an offensive environment. The context set out above is relevant because the Claimant would have known that the treatment was not random or totally without cause. It was an unlawful response to the conduct he had inflicted on his staff. It is nevertheless to be condemned.

38. Mr Singh sought to persuade us that this was one of the rare cases where it would not be just and equitable to make any award at all. We disagree. We find that the Claimant was offended by the unlawful conduct. It is right and proper to compensate him for that.

39. In his schedule of loss the Claimant seeks a total injury to feelings award of £90,000 and a total award for personal injury to feelings of £8,000. He suggests separate awards including an award against James Coomber who we find did not act unlawfully. In submissions Ms Oliver put the case more modestly. She suggested that the proper award for injury to feelings would fall into the mid band of Vento.

40. We are prepared to accept that the unlawful act was one of several causes to the brief period when the Claimant was suffering clinically recognised anxiety and later depression. We note that the ill health emerged only during the grievance process. That process was instigated only when the Claimant was suspended and in circumstances where he would have known that his future employment was untenable.

41. We accept that the Claimant was angry and upset during his suspension. Again there were numerous causes for that all of which were lawful with the exception of the one unlawful act we have found.

42. We consider it artificial to separate the clinically recognised anxiety and depression from the non-clinical injury to feelings. The clinical symptoms were not very serious and resolved within a short period. The personal injury is best dealt with as an aspect of the injury to feelings.

43. We consider that it is possible to separate out the elements of the injury to feelings and to make an award only for the injury caused by the unlawful act. Assessing the entirety of the injury to feelings we would have come to the conclusion that the totality of the injury would have merited an award on the boundary of the lower and middle bands.

44. Allocating a proportion of such an award to the unlawful act is not an exact science. Doing the best that we can we find that an appropriate award for the unlawful harassment is £2,000. We note that that is twice the lowest award

appropriate to mark an act of discrimination. We find that that award is the proper level to make in a case of a one off unfortunate, but offensive remark, made by a junior employee to his manager in the context we have set out above.

Interest

45. An employment tribunal is required to consider ordering a party paying compensation to pay interest. The power to award interest is governed by the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. The material regulations are:

    45.1. Regulation 2 which provides that a tribunal may include interest on any sum awarded and shall consider whether to do so; and

    45.2. Regulation 3 which provides that the interest is calculated as simple interest at a rate fixed by section 17 of the Judgments Act 1892 presently 8%; and

    45.3. Regulations 4 and 6 which together provide that in the case of any sum for injury to feelings interest shall be paid for the period beginning on the date of the contravention or act of discrimination complained of.

    45.4. Regulation 6(3) which provides that:

    'where the tribunal considers that in the circumstances, whether relating to the case as a whole or to a particular sum in an award, serious injustice would be caused if interest were to be awarded in respect of the period of periods in paragraphs (1) or (2) it may-

    (a) Calculate interest, or as the case may be interest on the particular sum, for a different period, or

    (b) Calculate interest for such different periods in respect of the various sums in the award

    As it considers appropriate in the circumstances, having regard to the provisions of these regulations'

46. In his submissions Mr Singh sought to persuade the Tribunal not to award any interest in this case of to depart from the standard dates over which interest was awarded. The thrust of his submission was that there had been a long delay in bringing the matter to a final hearing. He argues that that was no fault of the Respondents and that it would be unjust to award interest for the entire period. As we understood his submissions he also relied upon the conduct of the Claimant as a reason not to award interest.

47. The regulations set out above require the Tribunal to consider awarding interest. There is a discretion not to do so provided by Regulation 2 but once that discretion is exercised the method of calculation and rate of interest is that set out in the regulations subject only to a disapplication where to award interest over the period set out in the regulations would amount to a serious injustice.

48. The purpose of awarding interest is compensatory. It is to make up for the fact that money, which was due, has not been paid. At present the judgment rate of

8% is generous in comparison to the rates available to savers. It is not so generous in comparison to the cost of borrowing.

49. We have found that there has been unlawful discrimination. Our findings mean that to put the Claimant back in the position he would be 'as far as money can do so' he should have been paid £2,000 to compensate him for the injury he suffered. He has been without that money throughout the period of this litigation.

50. We accept that there have been delays in this case. The case was due to be heard in July 2020 but was postponed as a consequence of the Covid pandemic. It was postponed again in September 2021 because of a lack of judicial resources. There was some delay in providing a judgment again due to a lack of judicial resources. Overall the delay has been over 3 years.

51. The fact that there has been delay may not be the fault of the parties but against that a decision was taken by the Respondents to defend the claim that succeeded. No admissions were made at any time. The Respondents had documents that supported the Claimant's case on the claim that succeeded.

52. The effect of an award of interest is that the Respondents will have to pay more. If we declined to award interest then the Claimant would be out of pocket by whatever he has lost by not having the money available. We are prepared to infer that there would be some loss.

53. We do not see any good reason not to award interest at all. The fact that we have disapproved of many aspects of the Claimant's conduct and the fact that we have held that he has not been frank with the Tribunal should not deprive him of the ordinary award that he is entitled to. We have reminded ourselves above that the purpose of compensation is not to punish a wrongdoer. We consider that declining to make an award of interest would be an unjustified punishment of the Claimant.

54. We do not see any good reason to depart from the usual period over which interest should be calculated. In order to do so we would have to find that there would otherwise be a serious injustice. We do not find that that test is met.

Costs

55. After we announced our decision on remedy the Respondent made an application for the costs it had incurred caused by the failure of the Claimant to attend the Tribunal at 10am. When we enquired whether there were any such costs Mr Singh told us, and he quite properly was not challenged on the point by Ms Oliver, that he charged the Respondents on the basis of the time spent in court. He had a full day rate and a half day rate. He said that had the Claimant attended at 10am the remedy hearing would have been completed by 1pm and his clients would only have been charged for a half day. He said that the day rate was £1500 and the half day rate £990. The difference being £510.00.

56. Mr Singh suggested that the conduct of the Claimant in arriving as late as he did was unreasonable, vexatious and disruptive. He asked us to make a costs order on that basis.

57. In reply, Ms Oliver asked us to take account of further evidence. she said that the Claimant had told the truth about his whereabouts. She produced booking for bus

and hotels that had been made by the Claimant and which supported his account that he was on his way to Holland when he learned that he was expected at the Tribunal. She did not accept that that amounted to unreasonable, vexatious or disruptive conduct.

The relevant law

58. The jurisdiction to make an order of costs is found in schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) 2013. Rule 76 provides:

"When a costs order or a preparation time order may or shall be made

(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted;

(b) any claim or response had no reasonable prospect of success"

59. There is essentially a 2 (or perhaps 3) stage test. Other than in defined circumstances, before there is any jurisdiction to award costs at all the tribunal must be satisfied that one or more of the threshold conditions set out in Rule 76(1) has been satisfied. If, and only if, it has should the tribunal move on to consider whether, in the circumstances of the particular case, it is right to make a costs order. Finally, it is necessary to decide what amount if any to award. See ***Monaghan v Close Thornton Solicitors*** **[2002] EAT/0003/01**

60. Notwithstanding the existence of the jurisdiction to award costs the exercise of that jurisdiction remains exceptional ***Gee v Shell Ltd*** **[2003] IRLR 82**.

61. In ***Barnsley BC v Yerrakalva*** **[2012] IRLR 78** CA Mummery LJ said:

> *"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."*

62. The meaning of the phrase 'vexatious' has been the subject of a number or cases. In ***ET Marler Ltd v Robertson*** **[1974] ICR 72** Sir Hugh Griffiths said at 76:

> *"If an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive, he acts vexatiously, and likewise abuses the procedure. In such cases the tribunal may and doubtless usually will award costs against the employee …"*

63. Lord Bingham CJ in ***A-G v Barker*** **[2000] 1 FLR 759**, at para 19, suggested that the emphasis is less on motive and more on the effect of the conduct in question:

> *""Vexatious" is a familiar term in legal parlance. The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; 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."*

64. There is no need for the tribunal to find a causative link between the costs incurred by the party making the application for costs and the event or events that are found to be unreasonable, see ***McPherson v BNP Paribas*** **[2004] ICR 1398 CA**

65. Rule 84 of the procedure rules provides that when deciding whether to make a costs order and if so in what amount the Tribunal may have regard to the means of the paying party. The rule is permissive rather than mandatory although it would be an unusual case where the means of the paying party were not a material factor. In ***Vaughan v London Borough of Lewisham*** **[2013] IRLR** the Employment Appeal Tribunal, following ***Arrowsmith v Nottingham Trent University*** **[2012] ICR 159** held that an assessment of means was not necessarily limited to the ability to pay at the time that the order is made but can have regard to the future prospects of the paying party.

Discussion – Costs

66. Unless one of the threshold conditions is passed the Tribunal has no jurisdiction to make a costs order. The Respondents say that arriving late is both unreasonable, vexatious and disruptive.

67. We find that the Claimant's late arrival was unreasonable. To an extent the submissions on this point were side-tracked by the Claimant's belief that we had indicated in our earlier judgment we did not believe his account of his whereabouts. What we meant is more clearly set out above. We did not accept that the Claimant asked a bus driver to drop him in the middle of nowhere, that he was crying and praying for help and that a stranger approached him and drove him back to London. We did not say that we did not accept that the Claimant was on a bus on his way to Holland. This had little relevance to the costs application.

68. The Claimant had received the Notice of Hearing for the remedy hearing in September. He had sent this to his solicitor who had requested a postponement. He ought to have known that unless and until the postponement was granted the hearing would proceed. We find it utterly implausible that the Claimant's solicitor would have given the Claimant the impression that the hearing had been postponed. We find that the Claimant was the person who provided his GP records to his solicitor. The Claimant was sent an e-mail from the Tribunal informing him that the hearing was proceeding. He says that he did not read that e-mail.

69. The Claimant did book a trip abroad. We accept that he set off and was on his way to Dover in the morning of the hearing.

70. We approach the question of whether the Claimant acted unreasonably on the simplest basis. We find that it was unreasonable of the Claimant to assume that the hearing had been postponed without checking with the Tribunal or his Solicitor. We do not need to explore whether the Claimant read the e-mail that he was sent by the Tribunal or why, having arranged for his GP records to be sent to the Tribunal he still believed that the hearing was not effective. It is fortunate for the Claimant that we do not need to explore those matters. It is utterly improbable that the Claimant's solicitor did not inform him that Ms Oliver was representing him. She attended on time.

71. We therefore find that the threshold condition of acting unreasonably has been passed. We do not find that the Claimant's conduct merits the description of being vexatious in the sense we have set out above nor was it disruptive.

72. We then turn to the exercise of our discretion. It does not follow that because we have found the Claimant to have acted unreasonably we will necessarily make a costs order. We consider the conduct of the behaviour was wholly irresponsible (at best). He has caused additional expense to the respondents that could easily have been avoided.

73. In our liability decision we set out the fact that the Claimant was late attending the Tribunal not once but twice during the hearing. On the second occasion the Employment judge spelt out very clearly that it was unacceptable to waste the time of the Tribunal and the Respondents by being late. From this we conclude that the Claimant was on notice of a need not to waste the time of the Tribunal.

74. We find that the Claimant's conduct is such that despite the fact that costs orders are exceptional it would be appropriate to make a costs order. Here there is a direct correlation between the unreasonable conduct and the costs claimed by the Respondent. The Respondents incurred costs of £550 because the Claimant was late. The hearing was completed in less than 3 hours and would have been completed even sooner had time not been taken up dealing with the fact that the Claimant was late.

75. We turn to the Claimant's means. The Claimant has said that he has found alternative employment. We have made an order that Christopher Richardson pay the Claimant £2,000 plus interest. We find that it follows that the Claimant has the means to meet a costs order of £510. We make an order in that sum.

76. The Employment Judge apologises for the time taken to produce these reasons. As he indicated to the parties he has a heavy workload and has prioritised cases where the parties did not know the outcome of their claims.

Employment Judge Crosfill
Date: 30 March 2023