EMPLOYMENT TRIBUNALS

Claimant:	**Mr R Smart**
Respondent:	**Newsteam Group Ltd**
Heard at:	Leicester Hearing Centre, 5a New Walk, Leicester, LE1 6TE
On:	18 April 2023
Before:	Employment Judge Adkinson sitting alone
Appearances	
For the claimant:	Mr K Smart, the claimant's father
For the respondent:	Mr F McCombie, Counsel

JUDGMENT

After hearing from the parties the Tribunal's judgment is as follows:

1. the claimant was not a worker of the respondent,
2. the claimant's claim for holiday pay therefore is dismissed, and
3. the claimant must pay to the respondent the sum of £100 towards the respondent's costs.

REASONS

1. Mr Smart, the claimant, claims £305.55 from the respondent, Newsteam Group Ltd, in respect of holiday pay for the period between 5 May 2022 (when the working relationship started) and 7 July 2022 (when it ended) or thereabouts ("the material time"). The respondent accepts that, if Mr Smart were a worker for them during the material time, it would owe to him that £305.55 for holiday pay. They deny however that he was a worker.
2. The respondent seeks its costs of the case, whatever the outcome. The respondent offered to pay the £305.55 in full, without admitting liability, and therefore says that the claimant should have accepted the offer. Mr Smart denies that there are circumstances that justify the making of a costs order. He says he acted reasonably, and the respondent's stance encouraged the claimant's approach. Besides Mr Smart says he lack means.
3. Mr Smart had earlier withdrawn all claims against a second respondent and had withdrawn a claim for unauthorised deductions of wages.

4. At this hearing, his schedule of loss suggested he also sought to claim other things such as lost earnings, vehicle expenses, future losses and aggravated damages. The claim is for holiday only. The past and future losses and expenses cannot possibly be claimed as holiday pay. Further, considering **Santos Gomes v Higher Level Care Ltd [2018] ICR 1571 CA** neither I, nor Employment Judges Butler and Hutchinson when managing the case before me, considered the Tribunal could award aggravating damages under the **Working Time Regulations 1998**. The schedule also intimated a claim relating to national minimum wage and loss of weekly rest period. I declined to hear those claims. No such claims had been presented and no application had ever been made to amend the claim to add them.

Issues

5. The issues for me to determine therefore are:

   5.1. **The Worker Issue:** During the material time, was Mr Smart a worker of the respondent?

   5.2. **The Costs Issue:** Should I make an order that Mr Smart pay some or all of the respondent's costs?

Hearing

6. The hearing was an attended hearing except in relation to one witness who attended by video link. Mr Smart was represented by his father Mr K Smart. The respondent was represented by Mr F McCombie, Counsel.

7. I heard oral evidence from:

   7.1. Mr Richard Smart himself;

   7.2. Mrs Catherine Hamilton-Woodthorpe by video link, called on the claimant's behalf. She was the respondent's financial director at the material time;

   7.3. Mr Jon Kennett, the respondent's chief operating officer.

   Each gave evidence-in-chief and was cross-examined. I think the witnesses have done their best to tell me what they believe to be the truth.

8. Each party made oral closing submissions and Mr K Smart provided also a written closing note that he had intended to read aloud. However, at my suggestion, the parties agreed I should have a copy of it instead for me to read.

9. There was an agreed bundle of about 233 pages. In addition the respondent provided me with the judgment and written reasons in, **Denizkan v Newsteam Group Ltd, case number 1301461/2022 ET**. This is a decision of **Employment Judge Meichen dated 23 March 2023** from the Employment Tribunal.

10. I have taken all of the above into account in making my decision.

11. During the hearing I had to stop Mr K Smart on a few occasions for questions that I considered were not relevant, such as questions about the dates for payments once it became apparent that they were not going to shed light on the key issues. I do not believe it hindered the fairness because it re-focused the case on the relevant issues. It also became

apparent that Mr Smart was seeking to argue there was in fact no contract at all through misrepresentation. After discussion I allowed him a few moments to reflect on his case, and he did not pursue that point further. We otherwise also took breaks mid-morning and for lunch.

12. I am satisfied the hearing was fair. No party has suggested to me the hearing was unfair.

The Worker Issue

Law

13. There is a different between a worker and his employer and a client and his customer. In **Byrne Brothers (Formwork) Ltd v Baird and others [2002] ICR 667 EAT**, the Employment Appeal Tribunal said that the exception from the definition of workers for clients and customers was to be interpreted as follows:

"The essence of the intended distinction must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves."

14. To assist me to understand the approach I must take, I have considered guidance from a number of other cases, namely **Autoclenz Ltd v Belcher [2010] IRLR 70 CA, later [2011] ICR 1157 UKSC; Uber BV v Aslam [2019] ICR 845 CA, later [2021] ICR 657 UKSC; Ter-Berg v Simply Smile Manor House Ltd aors [2023] EAT 2 EAT; Windle aor v Secretary of State for Justice [2016] ICR 721 CA; Pimlico Plumbers Ltd v Smith [2018] ICR 1511 UKSC** and **Nursing and Midwifery Council v Somerville 2022 ICR 755 CA**. From these cases I derive the following principles:

    14.1. The key elements are:

        14.1.1. there must be a contract, whether express or implied, and, if express, whether written or oral,

        14.1.2. that contract must provide for the individual to carry out personal services, and

        14.1.3. those services must be for the benefit of another party to the contract who must not be a client or customer of the individual's profession or business undertaking;

    14.2. One does not apply the ordinary principles of contract law;

    14.3. The general approach is:

        14.3.1. to look at all the circumstances to determine what the terms were of the relevant agreement;

        14.3.2. treat the contract as only one facet of the case. It may convey the true agreement but if there is a genuine dispute one needs to look at the other factors;

        14.3.3. view the facts realistically and robustly, and keep in mind the purpose of the legislation;

14.3.4. Relevant factors include (but are not limited to):

14.3.4.1. the degree of control exercised by the putative employer over the work or services performed by the individual concerned (more control mean more likely a worker),

14.3.4.2. whether there is mutuality of obligation between the parties (mutuality suggests worker),

14.3.4.3. whether the putative worker is carrying out work personally or not (personal obligation suggests worker),

14.3.4.4. whether an apparent contractual right of substitution actually reflects the true arrangement between the parties in reality (the more fettered the right of a claimant to substitute someone to do his work, the more likely it is that he is a worker).

15. A decision of one employment tribunal is not binding on another. It is no more than persuasive, even if the facts and circumstances of the two cases appear to be identical: **Capita Translation and Interpreting Ltd v Siauciunas (debarred) and anor UKEAT/0181/16 EAT**. That said, I should accord those prior decisions respect.

Facts

16. Based on the evidence, I make the following findings of fact that I believe are necessary for me to resolve the issues in this case, on the balance of probabilities.

17. The respondent is a distributer of newspapers and magazines across the UK to approximately 85,000 locations. They are distributed by deliverers. The respondent has 70 employed deliverers and a further 900 deliverers ("the contractors") whose relationship with the respondent is governed by the contract that describes them as independent contractors. It is agreed the 900 contractors are crucial to the respondent's business. Mr Smart fell into the contractor's group.

18. Originally a deliverer would have a paper sheet on which was printed details of to whom a delivery was to be made and what was to be delivered. This has been replaced with an app that can be downloaded free to a mobile phone that runs either iOS or Android. The app tells the deliverer where to make deliveries and what to deliver. It suggests a route but the deliverer who is also a contractor is not obliged to follow the suggested route. If they can save time or cost by using a different route or would prefer a different route for some other reason, then they may use their choice of route. The only thing that the respondent is interested in is the deliveries are made to the right place.

19. On completing the delivery the deliverer presses a button on the app to confirm delivery. The app logs the date and location of the delivery and

relays that back to the respondent's office. If a delivery point requires photographic proof of delivery, the app has a method of capturing and uploading that too. It is not a general requirement that deliveries are evidenced by photo. The app does not monitor the routes used, efficiency or provide any real-time monitoring of the user.

20. The app requires a log-in and password. There is one per contractor. The deliverer who is also a contractor is free to share that with anyone doing the deliveries on their behalf. This is demonstrated to occur by one of the WhatsApp messages disclosed by Mr Kennett from "Saqib", who shared the log-in details with his substitute and without the respondent taking any issue with that.

21. The data such as delivery addresses stays within the app. The app is the only tool provided by the respondent. It is essential to doing the job.

22. Billing and payment take place automatically. Contractors who are also VAT registered must submit a VAT invoice to the respondent, without which they will not be paid. For contractors who are not VAT registered the system is far simpler and automatic to reflect the lack of regulation about invoices and the fact that the respondent would not be able to recoup any input tax. Mr Smart was not registered for VAT.

23. For contractors who are not VAT registered, the app and systems operate what Mrs Hamilton-Woodthorpe called a "self-billing" system. Upon the app recording that a contractor has completed all of their deliveries, the respondent's financial systems and creates a credit to the contractor of the fee due for that day. On a 4-week cycle the system pays out the funds credited to the contractor automatically with a remittance advice. The contractor receives that remittance advice by email and payment directly to their bank account. No tax, national insurance or pension contributions are deduced. It is for the contractor to pay any substitutes used. Mr Smart did not receive remittance advices for a while. This is because he provided the wrong email address. Mr Smart suggested his address was tampered with deliberately. I think the suggestion is preposterous. There is no motive for the respondent not to send the remittance advice to Mr Smart, particularly when they were actually paying him. For a while Mr Smart received less than his daily rate. That was corrected by a one-off remittance. Mr Smart seemed to suggest there was some significance in this. However at the heart of it is this: he was underpaid for a few payments. When the respondent realised, they paid up the shortfall without hesitation. What significance there may have been was lost on me.

24. Mr Smart sought to attack the aforesaid system as somehow showing that it was evidence of employment. I reject his attacks as misguided.

    24.1. Firstly, he took issue with Mrs Hamilton-Woodthorpe's use of the words "self-billed" to describe how the app worked with payment of non-VAT registered contractors. He pointed out that "self-billed" has a specific meaning under VAT regulations in which VAT registered suppliers and customers can agree that the customer prepares the supplier's invoice (see **VAT notice**

700/62 and **The Value Added Tax Regulations 1995 (as amended) regulation 13**).

I can see no objection to the use of the phrase "self-billing" or similar to describe the arrangement through the app for non-VAT registered entities to be paid. The regulation and notice do not restrict the term purely to VAT law. It is no different to how people use "negligence" in a non-technical sense even though it has a specific legal meaning in tort. It seems to me "self-billed" is as good a description as any. I consider this argument therefore is an irrelevance.

24.2. Secondly, he appeared to suggest that there was a legal requirement for a contractor to produce an invoice, and the lack of invoice showed the payments were for wages. I disagree. VAT-registered entities must produce a VAT invoice when requested by another VAT-registered entity, but I have been referred to no rule that shows that this extends into the general law. I am aware of no such rule. It is contrary to experience in daily life. In an individual case it may be a contractual condition precedent to payment, depending on the individual arrangement between the parties. It may in many cases be a sensible step for a business. However there are other ways to ensure payment of contractors, and I see no argument that the respondent's method is unlawful or inconsistent with self-employment.

25. Mr Smart applied for the role in 2022. I have not seen the specific advert that Mr Smart replied to, but those I have seen do not suggest anything other than applicants being retained on a self-employed basis. Mr Smart had only to provide his national insurance number to confirm his right to work in the United Kingdom. There were no other checks.

26. Mr Smart commenced as a contractor deliverer on 5 May 2022. He required time to consider the contract. After carefully considering the contract, he signed the terms on 8 May 2022.

27. The contract provides the following terms (so far as relevant):

"This is the entire agreement between the Contractor [Mr Smart] and the Client [the respondent] …

"In consideration for the services to be performed by the Contractor, the client agrees to pay the Contractor the following: £45 per day. The Contractor shall be paid… based on the number of deliveries completed by the Contractor's operation and as is recorded via the [app]….

"Independent Contractor Status

"The Contractor is an independent contractor, and neither the Contractor nor the Contractor's employees or contract personnel are, or shall be, deemed the Client's employees. As an independent contractor, the Contractor and the Client, agrees [sic.] as follows (1) The Contractor has the right performed services for others during the term of this agreement. (2) Subject to the agreed service standards outlined in this document, The

Contractor has the full right and obligation to hire assistance/substitutes/ subcontractors to provide the services required by this Agreement.

"Agreement

"If for whatever reason the Contractor is unable to complete the contracted work and the work must be completed by [The respondent] or another party, the Contractor will be charged at cost of carrying out this work.

"The services required by this agreement shall be performed in full by the Contractor, the Contractor's employees or their contract personnel, and the Client shall not hire, supervise, or pay any assistants to help the Contractor. Neither the contractor, nor the Contractor's employees or contract personnel travel required by the Client to devote full time to the performance of the services required by this Agreement."

28. The amount was fixed for the route. Therefore the respondent paid Mr Smart the same whether it took him 2 hours or 8 hours. He was free to take on alternative or additional work before or after he had completed the deliveries, provided he delivered what he had agreed to deliver and performed the task to the requisite standard.

29. It was up to the contractor to decide how to discharge his task of making deliveries.

30. The contract also made the contractor responsible for providing vehicles, tools etc, paying duties and taxes and national insurance and subjected him to a charge if he did not meet the requisite standard. The only tool the company provided was the app. He was not supervised by the respondent in any way while making his deliveries. I do not consider pressing a button on an app to confirm the delivery has been made can properly be described as supervision. The app is no more than being provided with a paper sheet with details on it and which recipients sign or even being told orally where to go and what to deliver. I do not consider it is inconsistent with self-employment.

31. As I set out above, the respondent retains many other contractor deliverers. Many of them arrange for others from time to time to carry out their duties. There are a number of text and WhatsApp messages that show contractors telling the respondent that they have arranged for others to carry out some or all of the deliveries allocated to them. None of the messages show the contractors seeking the respondent's consent to arrange the substitution. Rather they merely tell the respondent the substitution is happening. None of the messages show the respondent objecting. The only replies of note are a few asking the driver to be added to WhatsApp so they can receive messages and a reminder it is the contractor's responsibility to pay the substitute, not the respondent's.

32. Mr Smart says it would not be realistic for him to be able to arrange a substitute when he was paid only £45 per day. That may be so, but that is a question of affordability for Mr Smart – in other words a business question. As Mr Kennett explained, and I accept, other contractors had structured their business to make it affordable. The evidence shows that substitution happens more than rarely – and happens without the respondent's consent.

Whether Mr Smart thought it economical is another matter – I find as a fact he was legally free to arrange for a substitute for himself.

33. This accords with what the contract says a contractor may do. I find as a fact therefore that the right to substitute was a genuine right and was exercised freely by contractors who wanted to exercise it. I accept therefore Mr Kennett's evidence on this point.

34. In order to perform as a deliverer, Mr Smart supplied his own vehicle and his own mobile phone to access the app. He was responsible for and paid for maintenance, insurance, fuel, vehicle duties, phone charges and the like.

35. HM Revenue and Customs investigated the respondent in 2022. The outcome is in a letter dated 21 April 2022. The investigation focused on newspaper delivery drivers who were contractors. HM Revenue and Customs concluded they were self-employed and outside the scope of national minimum wage legislation, therefore. The rest of the letter related to recordkeeping.

36. Mr Smart sought to make reference to the payment dates only being provided after he had commenced work. He did not present to me any convincing explanation about why that has any bearing on whether he was a worker or not. I do not consider it takes the case forward.

37. In previous cases, contractors like Mr Smart have been held not to be workers by the Employment Tribunal. The ones to which I have been referred are:

    37.1. **Denizkan** (see above)

    37.2. **Mr D Perkins v Newsteam Group Ltd, case 2416507/2019, Employment Judge Porter on 9 November 2020**

    37.3. **Ms S Abbas v Newsteam Group Ltd, case 2413773/2019, Judge Brian Doyle, President of The Employment Tribunal (England and Wales) on 23 November 2020**

Conclusions

38. Drawing all of this together, the facts show that

    38.1. Mr Smart signed a contract after careful consideration;

    38.2. The contract makes clear he is self-employed;

    38.3. The contract makes clear he could substitute others to do the work, but would be liable for those substitute's costs;

    38.4. In reality substitution happened freely and far more than rarely. The respondent did not and could not object. The only requirement was to provide the substitute's contact details. The right to substitute is therefore a genuine and exercisable right;

    38.5. Mr Smart provided all of the key tools to do the role: van, phone, fuel, insurance etc., the only exception being the app;

    38.6. While the app is key to conveying information and delivery instructions, and capturing evidence of delivery, it merely a way

of conveying information that is no different to the use of the paper delivery sheet from before the app.

38.7. While the contractors are crucial to the respondent's business, I do not accept that means that they must be employees. It seems as plausible to me that a business may choose to depend entirely on sub-contractors as it may choose to depend on employees to do its work. Either arrangement is equally plausible in my opinion, and this does not point one way or the other.

38.8. The app suggests routes but the deliverer may ignore it without penalty;

38.9. Payment to Mr Smart is the same regardless of time taken;

38.10. He is free to take on other work using his transport, mobile etc.;

38.11. HM Revenue and Customs concluded the contractors are self-employed;

38.12. This Tribunal has reached the same conclusion on 3 separate occasions. I consider nothing shows they are plainly wrong in their conclusions that might entitle me to put them to one side.

39. In my view this case strongly points to Mr Smart being at all relevant times a self-employed contractor and not a worker. His claim for holiday therefore fails.

The Costs issue

40. The respondent seeks its costs. It argues that it was unreasonable or vexatious for him to pursue a claim for £305.55 when the full amount had been offered. It seeks £10,356 (net of VAT which it can recover from HM Revenue and Customs).

41. The claimant denies that saying it was reasonable to have a judicial determination. He also argues the respondent's approach was aggressive and somewhat contributed to the claimant pursuing the claim and should be reflected in any order.

Facts

42. Early conciliation was from 20 September to 22 September 2022. The claim was presented on 30 September 2022.

43. On 18 January 2023 the respondent, though their solicitors, made an open offer to pay to Mr Smart £305.55. Mr Smart did not accept this offer.

44. At a preliminary hearing on 20 January 2023, the respondent openly offered before Employment Judge Hutchinson to pay to the claim the sum of £305.55 even though they did not accept liability. It is recorded in Employment Judge Hutchinson's case management summary, along with the respondent's costs warning and the Learned Judge's advice to consider this. A claim for unauthorised deductions from wages was withdrawn. The claimant knew that the only remaining claim was for holiday pay which he valued at £305.55. He knew therefore the remaining issue and its value. Mr Smart did not accept this offer.

45. On 24 January 2023, the respondent's solicitors wrote to Mr Smart a letter marked as being without prejudice except as to costs. It repeated the offer of £305.55 and warned him if the case proceeded to a hearing and that Mr Smart did not recover more than that, then the respondent would seek an order for costs against him. Mr Smart did not accept that offer.

46. On 27 March 2023, the respondent told Mr Smart they intended to refer to that warning.

47. On 28 March 2023 in correspondence Employment Judge Butler told the claimant he could not recover aggravated damages. EJ Hutchinson confirmed this in correspondence on 6 April 2023. Therefore, even if it were not clear to him before for some reason, by now it would have been even clearer to Mr Smart his claim was limited to £305.55.

48. As noted above, at the start of the hearing, it was confirmed the claim was only for £305.55. Therefore the claimant could not beat the offer even if he won. The claimant has lost.

49. The claimant's means are as follows:

    49.1. He has no income. Everything is paid for by his mother and father who live with him, including the mortgage.

    49.2. He owns a house with about £120,000 of equity in it.

    49.3. He has no savings.

    49.4. He has debts of about £20,000. These include mortgage arrears.

    49.5. He is looking for work but finding it difficult because of gaps in his curriculum vitae.

    49.6. He had intended to start a business. However he does not have the capital he needs to do this.

Law

50. The rules on costs in the Employment Tribunal provide (so far as relevant):

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

"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; or

""…

"The amount of a costs order

"78.—(1) A costs order may—

"(a) 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;

"…

"Ability to pay

"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 (or, where a wasted costs order is made, the representative's) ability to pay."

51. The case law so far as relevant provides as follows:

51.1. Costs should be seen as an exception not the rule: **Gee v Shell UK Ltd [2003] IRLR 82 CA**.

51.2. The Tribunal must ask: Has the threshold has been met to make a costs order? If so, should we exercise our discretion to make a costs order: **Robinson v Hall Gregory Recruitment [2014] IRLR 761**.

51.3. The amount to award arises only for consideration if the Tribunal has decided to exercise our discretion: **Hayder v Pennine Acute NHS Trust UKEAT/0141/17**.

51.4. "Unreasonableness" should be given its ordinary meaning: it is not the equivalent to vexatiousness. **Dyer v. Secretary of State for Employment UKEAT/183/83**.

51.5. "Vexatious" means as follows:

"The hallmark of a vexatious proceeding is… that it has little or no basis in law (or at least no discernible basis); **that whatever the intention of the proceedings may be** [my emphasis], 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".

See **Scott v Russell [2014] 1 Costs LO 95 CA** (a case concerning costs in the Employment Tribunal) where the court adopted the definition given by Lord Bingham in **Attorney General v Barker [2000] 1 FLR 759, QBD (DivCt)**.

51.6. A costs order is compensatory not punitive. Where there is unreasonable conduct the award of costs need not be limited to those costs which can be shown to be causally linked to that conduct – **McPherson v. BNP Paribas [2004] ICR 1398**[1]; **Salinas v. Bear Stearns International Holdings [2005] ICR 1117**. In **McPherson** the Court of Appeal said the Tribunal should have regard to the "nature, gravity and effect of conduct".

In **Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78**, the Court of Appeal 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 if had."

51.7. The Tribunal ought to consider the extent to which a claimant was in fact 'unrepresented'. Those representing themselves cannot be judged by the same standard as those who are represented: **AQ Ltd v Holden [2012] IRLR 648**. However the Tribunal should go on to consider whether the lack of representation caused or contributed to the misconduct in question. In **Vaughan** however, the Court said that where a litigant's conduct was not such which could readily be attributed to [his] lack of experience as a litigant, his unrepresented status may be of little relevance or weight.

51.8. Where a party makes an offer to settle a case, which is refused by the other side, costs can be awarded if the tribunal considers that the party refusing the offer has thereby acted unreasonably. I must be satisfied it was unreasonable to refuse the offer before it is relevant to my discretion (**Kopel v Safeway Stores plc [2003] IRLR 753 EAT***).*

51.9. In **Vaughan**, the tenor of the judgment was that, short of evidence that the making of an offer had actually encouraged a claimant to have an inflated view of the merits of the case, an attempt to settle a claim on commercial grounds cannot be used against a respondent as a reason to refuse to make an order of costs where there are otherwise grounds for making it. It remains the other party to assess the merits of their claim.

51.10. While I 'may' have regard to ability to pay, it is not a requirement. Either way, reasons must be given: **Jilley v. Birmingham & Solihull Mental Health NHS Trust UKEAT/0584/06**. Even if he has an inability to pay, it does limit costs to those that can be afforded (particularly where circumstances may improve): **Arrowsmith v. Nottingham Trent University [2012] ICR 159**. So it follows that a realistic prospect of a future ability to pay may justify an award significantly higher than current affordability: **Vaughan**

51.11. A generous benefit of doubt may be afforded to the receiving party in relation to what might be afforded over a reasonable period of time: **Vaughan**.

Conclusions

52. I am not satisfied that Mr Smart behaved vexatiously to begin with. He had a legitimate claim and he pursued it. For the same reasons I am not satisfied he was unreasonable to begin with.

53. I am satisfied that Mr Smart was unreasonable when he refused to accept the first offer. This is not a case where any benefit accrues to him of being identified as a worker. He no longer works with the respondent. The amount claimed is fixed and does not affect future claims that might otherwise accrue to him out of this contract. A ruling that he was a worker has no

value to him. The value was the £305.55 he claimed. He was offered it in full.

54. I am also satisfied that to continue with the claim after the first offer was vexatious. The continuation of the claim caused the respondent inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant. This therefore involved 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.

55. I have considered when the latest date is that the claimant should have accepted the offer. I consider the 27 January 2023 is the deadline. He had been aware of the offer from 18 January 2023. It was repeated twice more with costs warnings. He knew or ought to have known the value of his claim was only £305.55 and realised he was being offered what he wanted exactly. He chose not to accept the offer. The respondent was therefore put to expense it should not need to have incurred.

56. I then turn to whether I should exercise my discretion to make a costs order. I have concluded that an order should be made. The respondent has been subjected to expense and had to deploy its resources to defend a claim when the litigation could have been resolved in late January with the claimant recovering his full claim in full. There is no reason why the respondent should be out of pocket. He should therefore face liability for this unreasonable action and decision. He had been warned about possible consequences but chose to proceed even though he was never going to recover more than the offer because it equalled what he was claiming. It is not reasonable to attribute his decision not to take the offer to the respondent's conduct because he still should have realised he would do no better than the offer of full payment of what he claimed.

57. Applying my mind to the amount at stake I have to reflect the unreasonable conduct started from 27 January 2023 and meant that it only costs from then that it was unreasonable and vexatious to make the respondent incur. The costs schedule I have covers the whole of the proceedings. I think it is Counsel's fee and some work on top that is likely to be attributable to the conduct. I apply the broad brush and I recognise that disclosure, preparation of the bundle and of witness statements all took place after the hearing on 20 January 2023. I conclude therefore that the amount of £6,000 reflects the costs attributable to the claimant's conduct.

58. I then go on to consider how much the claimant should pay. He is of limited means. There is no evidence of a reasonable prospect of significant improvement in his finances any time soon, even if he does secure employment. Therefore a large award is unreasonable because it is not likely to be payable. However it is reasonable to expect he will secure a job because he is looking for work and he is clearly an able man. He also has significant equity in his home but it is an illiquid asset, he depends on others to pay the mortgage secured against it and there are arrears on that mortgage already which implies an increased risk of repossession. He is indebted.

59. In my view his means and prospects of future employment mean that he should pay a sum, but it should be limited. I award therefore a sum of £100.

Employment Judge Adkinson

Date: 21 April 2023

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.