EMPLOYMENT TRIBUNALS

Claimant: Mr E Aluede

Respondent: The Home Office

COSTS JUDGMENT

On the Respondent's costs application, written representations from the parties having been considered, and both parties having agreed to determination on the papers

It is the judgment of the Tribunal that:

The Claimant is ordered to pay £1,500 in costs to the Respondent.

REASONS

PROCEDURAL BACKGROUND

1. The Claimant presented a claim against the Respondent on 22 August 2021, early conciliation having taken place from 1 July to 12 August 2021. The claim form was drafted by Obaseki Solicitors who were named as the Claimant's representatives. The completion of the form was, on any view, of extremely poor quality. In section 8.1 of the form boxes were ticked for unfair dismissal, race discrimination, arrears of pay and other payments. The box for "another type of claim" was also ticked and the nature of the claim described as: "Victimisation and bullying. Pain and suffering arising from non-payment of the claimant's wages for five weeks". The details of the claim explained that the Claimant had worked for the Respondent as a contractor from 1 September 2020. It listed complaints of direct discrimination, indirect discrimination, victimisation, harassment and bullying and breach of contract, but insufficient detail was given and/or the complaints did not make sense.

2. The full details of claim stated:

> "The claimant was employed as an interim contractor through Public Sector Resourcing (recruitment agency), which started on 1 September 2020.
>
> Pursuant to 5.13 Equality Act 2010, the respondent directly discriminated against the claimant by needlessly delaying and/or withholding the claimant's wages. Consequently, the claimant suffered pain and suffering.

> Pursuant to s.19 Equality Act 2010, the respondent indirectly discriminated against the claimant by treating the claimant differently. and less favourably than the claimant's actual and hypothetical comparators.
>
> Pursuant to s.27 Equality Act 2010. the respondent victimised the claimant for the reason that, the claimant exposed a system that overpaid the ministry of justice to the tune of £350,000.
>
> Pursuant to s.26 Equality Act 2010. the respondent subjected the claimant to humiliating. intimidating, and degrading treatments such as unnecessarily withholding the claimant's wages and going back on the reassurance given to the claimant that his contract will be extended.
>
> Breach of contract in relation to non-payment of the claimant's wages timely and when payment became due pursuant to the contract and/or agreement.
>
> Pain and suffering as a result of the unlawful and illegal treatment the respondent subjected the claimant to."

3. The Respondent defended the claim and argued that the complaints were not properly particularised. Further information was requested. It was also argued that the Tribunal did not have jurisdiction to hear the claim for a number of reasons:

    3.1. Any alleged acts of discrimination that took place before 1 April 2021 were out of time.

    3.2. As regards the breach of contract claim, the Claimant was not an employee of the Respondent and/or the claim was brought out of time.

    3.3. There was no jurisdiction to hear the unfair dismissal complaint because the Claimant was not employed by the Respondent and did not have sufficient qualifying service.

4. The Respondent said the Claimant had been engaged on a six-month contract as a Project Accountant from 1 September 2020 until 5 March 2021. It was accepted there had been a delay in paying the Claimant's final timesheet. The timesheet had been submitted on 5 March 2021 and was not paid until the end of April 2021. This was said to be due to an accounting issue.

5. A strike-out warning for the unfair dismissal complaint was sent to the Claimant (via his then solicitors) on 29 November 2021 due to lack of qualifying service. He was given until 13 December 2021 to give reasons why the complaint should not be struck out. No response was received by that date.

6. The parties were informed that an open preliminary hearing would be listed to consider the Respondent's application to strike out the claims because of the jurisdictional issues raised in the response.

7. On 6 December 2021 the Claimant wrote to inform the Tribunal that he was no longer represented by Obaseki Solicitors.

8. On 17 December 2021 another representative, Ken Woodgate of Brain Legal Solutions, wrote on behalf of the Claimant submitting an amended ET1 and particulars of claim. The amended particulars listed 12 incidents alleged to amount to direct discrimination, indirect discrimination, harassment and/or victimisation. The document also included allegations of whistleblowing detriment and automatic unfair dismissal under s.103A of the Employment Rights Act 1996 ("ERA").

9. The Respondent opposed the new particulars on 31 December 2021, noting that no application to amend had been made. It also alleged that the Claimant's conduct was unreasonable and it reserved its position as to costs.

10. Mr Woodgate responded to that email on 5 January 2022 and enclosed a formal application to amend the claim.

11. On 8 April 2022 the Tribunal sent two notices of hearings, a preliminary hearing by video on 18 July 2022 and a final hearing in person on 28-30 November 2022.

12. On 17 May 2022 Mr Woodgate submitted a re-amended claim and further application to amend. The re-amended particulars consisted of 32 pages and included complaints of direct race discrimination, indirect race discrimination, harassment related to race, victimisation, unfair dismissal under section 94 ERA, "wrongful dismissal (section 98(1))", "Disclosure Qualifying for Protection" (ERA section 43B), "Agency Worker Rights", "Detrimental treatment, discrimination on grounds of disability and failure of making reasonable adjustment", "Prevention of less favourable treatment, under Section 4 Objective Justification of FTE Regulation 2002".

13. The Respondent opposed the application on 26 May 2022.

14. On 14 July 2022 the Claimant wrote to the Tribunal enclosing a "Notice of change of legal representative". It stated that Bruce Frew of St Philips Chambers had been instructed to represent the Claimant in place of Ken Woodgate. The Claimant also requested a postponement of the hearing on 18 July 2022 to allow further time for the parties to agree a list of issues and agenda and to "accord me sufficient time to instruct a new barrister to handle my matter". The application was refused and the parties informed on 15 July 2022 that the preliminary hearing remained listed.

15. The open preliminary hearing took place on 18 July 2022 before Employment Judge Wright. The Claimant was represented by Mr Frew. The Respondent applied to strike out the claim or for a deposit order to be made. Employment Judge Wright considered that the Tribunal needed to consider the Claimant's application(s) to amend before determining the Respondent's application. She directed the Claimant to make a consolidated application to amend within 7 days. She also gave the Claimant 21 days to provide evidence of his ability to pay any deposit awarded. She directed that the correspondence should be copied to the Skype email address she had given to the parties during the hearing. The order was sent to the parties on 3 August 2022. Mr Frew having

been added to the Tribunal record as the Claimant's representative, the order was sent by email to Mr Frew.

16. Employment Judge Wright also signed a judgment striking out the unfair dismissal complaint on 21 July 2021 but it was not sent to the parties until 19 August 2022. Again, it was sent to Mr Frew by email. The unfair dismissal complaint was struck out on the basis that the Claimant had not responded to the strike-out warning.

17. On 25 July 2022 the Claimant emailed the Tribunal, copying in the Respondent and Mr Frew, enclosing a cover letter from himself and a 10-page amended particulars of claim drafted by Mr Frew. The correspondence was not copied to the Skype email address with the consequence that it was not referred to Employment Judge Wright for some time. The amended particulars asserted that the Claimant was "under a contract personally to do work", or alternatively a contract worker under s.41 of the Equality Act 2010. The particulars included complaints of protected disclosure detriment, automatic unfair dismissal, direct race discrimination and victimisation.

18. The Respondent opposed the amendment application.

19. In his response to the costs application the Claimant asserts that he also provided evidence of his ability to pay any deposit awarded, but that correspondence is not on the Tribunal file. I accept that it may not have been added to the file in error.

20. Employment Judge Wright wrote to the parties on 5 October 2022. She noted that the correspondence had not been copied to the Skype address as directed. She considered the amended particulars of claim submitted on 25 July and noted fundamental flaws with many of the proposed complaints. She concluded:

> "Therefore, the only claims which will be heard are:
>
> Section 13 direct discrimination EQA particularised at paragraph 24 (xi) and the same allegation in the alternative as an allegation of harassment contrary to section 26 EQA; related to the delay in paying the final timesheet. Both are subject to a deposit Order. The breach of contract claim may be pursued and is also in respect of the late payment."

21. She gave directions for preparation for the final hearing, which remained listed on 28-30 November 2022. This included directions relating to disclosure, preparation of the bundle and exchange of witness statements.

22. Employment Judge Wright also made a deposit order in relation to the allegations of direct discrimination and harassment, ordering the Claimant to pay £100 for each, £200 in total, as a condition of continuing to advance those allegations. She noted that the Claimant had not provided evidence of his ability to pay, but that his schedule of loss referred to a daily rate of pay at the Respondent of £495 a day. She gave 14 days to pay in order to preserve the final hearing date.

23. Both the letter and the deposit order were sent to the parties by email on 5

October 2021. Mr Frew was still on the record as the Claimant's representative so they were sent to him by email. The Tribunal file includes a "bounce-back" email from Mr Frew on 5 October 2021. A note on the top of the document states "both docs sent to C by post".

24. On 17 October 2022 the Tribunal sent a standard pre-hearing check letter to the parties. The heading of the letter mistakenly named Ken Woodgate as well as Bruce Frew, above Mr Frew's chambers address. It was sent by email, however, to the Claimant directly.

25. On 24 October 2022 the Claimant wrote to the Tribunal, copying in Mr Frew, saying that it had come to his attention that none of the Tribunal documents since the preliminary hearing had been sent to him directly. He also believed that the judge had not received his revised particulars of claim drafted by Mr Frew, his schedule of loss or his statement of means. He asked for all missing correspondence to be provided immediately and for no further email correspondence to be sent to Mr Frew directly without the Claimant being copied into it.

26. The Claimant paid the deposit of £200 by post on 24 October 2022.

27. On 25 October 2022 the Claimant wrote to the Tribunal applying for "an extension of time for complying with orders". It is not clear from the Tribunal file who sent the documents to the Claimant but it is clear that by this time he had Employment Judge Wright's preliminary hearing order, letter of 5 October 2022 and deposit order. The Claimant applied for an extension of time for paying the deposit. He also applied for extensions to the case management orders to dates after the scheduled final hearing. The Claimant asserted that he was on medication for depression and stress and needed more time to gather documents, write witness statements and take legal advice. He also said he had approached ACAS to discuss a settlement. The Claimant referred to the fact he had not received the documents directly. He said that Mr Frew's PA had confirmed that the documents were received on 5 October 2022 but had not been forwarded to the Claimant. The Claimant took issue with the strike out of his unfair dismissal complaint. The Claimant's email was copied to Mr Frew.

28. On 9 November 2022 the Claimant wrote to the Tribunal saying that the case was not ready for a final hearing, in part because the parties had not agreed a list of issues. Again, the email was copied to Mr Frew.

29. On 15 November 2022 the Respondent's solicitors wrote to the Tribunal saying that they had been unable to finalise the bundle because the Claimant had not complied with the order for disclosure. They said that if the Claimant confirmed he did not have any further documents then the bundle could be finalised. The Respondent also objected to the Claimant's application to for extensions of time to the case management orders. They said they were unsure whether the Claimant was still being represented because they had been asked by the Claimant's representative not to include him in correspondence, so the email was copied to the Claimant only.

30. The Claimant responded the same day saying that Mr Frew was his counsel and not his solicitor/ legal representative. He asked that both Mr Frew and Mr Woodgate be removed from the record. The Claimant wrote a further email on

the same day saying that Mr Frew was not available for the final hearing on 28 November 2022 "for which I have already applied for an extension of time".

31. The Respondent's solicitors wrote to the Tribunal again on 22 November asking for an urgent update as to whether the hearing was doing ahead.

32. Employment Judge McLaren wrote to the parties on 22 November 2022 saying that the hearing would proceed as listed. She rejected the Claimant's argument about not having been sent the documents on the basis that he only advised the Tribunal on 15 November that Mr Frew was not his representative and it was appropriate for the Tribunal to send documents to Mr Frew before that date. She also said that the unavailability of counsel was not a reason for a postponement. She noted that the Claimant had asked for an extension of time on 25 October, but said that parties should not rely on an application to delay their preparation. She said the Claimant should immediately send his documents to the Respondent.

33. Unfortunately, for reasons I cannot ascertain, this letter was sent by email to the Claimant's first solicitor at Obeseki Solicitors, and not to the Claimant directly. The Respondent noticed this and forwarded the email to the Claimant on the same day.

34. The Claimant wrote to the Tribunal to complain about this on 25 November 2022. He referred again to not having received the documents following the preliminary hearing because they were sent to Mr Frew. He claimed that at the preliminary hearing Mr Frew "made it known to the Employment Tribunal Judge that he was only acting for me on a tribunal hearing basis based on his availability". The Claimant said "I believe he confirmed during the hearing that all communication should be sent directly to the claimant".

35. As I said when giving a decision on the Claimant's applications on the first day of the hearing, there is no reference in Employment Judge Wright's order, or in her typed notes of the hearing, to that effect. Further, if Mr Frew had said that communication should be sent directly to the Claimant, it would be surprising if Employment Judge Wright had not made a note and passed on the message to the administration. The Claimant may have been confused about the basis on which Mr Frew was acting for him, but it was entirely proper for the Tribunal to send correspondence to Mr Frew between 18 July and 15 November.

36. The Claimant also in his email of 25 November asked for the Tribunal to set aside its earlier case management and deposit orders under Rule 29. He said that if the Tribunal insisted on the hearing going ahead without him being able to prepare, he would be "left without an option but to withdraw my claim".

37. Acting Regional Employment Judge Khalil wrote to the parties on the same day saying that the hearing remained listed and the matters in the Claimant's email would be dealt with at the outset of the hearing.

38. Later on the same day the Claimant wrote again, saying that he disagreed with the Respondent's list of issues because they had focused only on the delayed pay issue and had overlooked victimisation and whistleblowing claims. He attached another application to postpone the final hearing and a document withdrawing the claim "for the reasons I have provided in my previous email".

The Claimant gave 10 reasons for requesting a postponement, mainly relating to needing more time to prepare. He also referred to feeling "unwell from mental stress".

39. The Claimant wrote to the Respondent, copying in the Tribunal, on Sunday 27 November at 10.18pm, saying that he could not access the bundle sent to him by the Respondent. He also wrote "I have not received any link for tomorrow's hearing due to health challenges with my voice I wouldn't be able to join and unfortunately due to lack of time, I was not able to arrange an alternative counsel to represent me."

40. The Respondent's solicitors wrote to the Tribunal at 9.29am on the morning of the hearing, 28 November, setting out their objection to the Claimant's application to postpone.

41. The Respondent attended the hearing at Croydon. The Claimant did not attend. The hearing did not commence at 10am because it was "floating" in the Tribunal list. During the morning it was allocated to me (and non-legal members) and I read the correspondence in the file.

42. The hearing commenced at 11.55am. Having noted that the Claimant appeared to be expecting the hearing to take place by video, that he lived too far from the Tribunal to attend on that day, and giving him the benefit of the doubt as a litigant in person, I adjourned the case until 2pm and converted the hearing to a hybrid hearing to enable him to attend. I wrote to him at 12.38pm explaining the position. He was provided with a CVP link. I said that the hearing would resume at 2pm, and that if he wished to maintain his application to postpone either he or someone on his behalf would need to attend by video.

43. The Claimant had not attended by 2.15pm so the hearing commenced in his absence. The Respondent noted that the Claimant had responded to the Respondent's email at 10.21am that morning saying that he was "in the urgent care awaiting to attend to my health issues". He referred to having a throat infection which he said had been affecting his speech in the last two weeks. The Tribunal proceeded to hear submissions from the Respondent's counsel on the Claimant's application to postpone. The Respondent's counsel argued that the claim should be struck out on various grounds.

44. The Claimant joined the CVP hearing room at 2.55pm. The hearing was adjourned briefly and then recommenced at 3.05pm with the Claimant in attendance by video. The Claimant was asked why he had not attended and he said he was expecting it to be changed to video and he had not received a link. The Claimant appeared to be unwell and his voice was croaky. He said it was painful to speak. He had been seen in urgent care and was given a leaflet about respiratory tract infection. He was advised to buy paracetamol, ibuprofen and throat spray. He said he was unable to continue with the hearing because it was painful to speak. He repeated the points made in his written application to postpone.

45. The Tribunal identified the following preliminary issues to be determined:

    45.1. The Claimant's application for an extension of the deadline for paying the deposit. The Respondent argued in that in the absence of such an

extension the discrimination complaints had already been struck out.

45.2. The Claimant's postponement application.

45.3. The Respondent's application to strike out the claim.

46. Having heard submissions from both parties we granted the extension to the deadline for paying the deposit but refused the postponement application. We accepted that the Claimant may have been confused about whether Mr Frew was on the record as his representative after the preliminary hearing on 18 July, so it may not have been his fault that he was unaware of the deposit order until after the deadline had passed. We considered, however, that it was not in the interests of justice to postpone the final hearing on medical or any other grounds. The Claimant had not provided any medical evidence and although he appeared to have a sore throat it was not so serious that he would not have been able to attend by video. We noted the main reasons for the postponement application were the Claimant's objections to Employment Judge Wright's decisions and his assertion that he did not have time to prepare. We noted it appeared he had not understood Employment Judge Wright's decision on the amendment application, but given that the letter of 5 October 2022 was clear about what remained of the claim, that was not a good reason to postpone. Even if the Claimant had been unaware of Employment Judge Wright's decisions initially, he had had all of the documentation since 25 October 2022 which was enough time to prepare. He should not have relied on his application to postpone being granted, and in any event when it was refused on 22 November 2022 he would still have had time to prepare a witness statement.

47. After giving our decision the Claimant said he wished to withdraw his claim. He confirmed he understood the claim would be dismissed upon withdrawal.

THE COSTS APPLICATION

48. The Respondent applied for costs on 19 December 2022 on three grounds:

48.1. that the Claimant 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 76(1)(a)); and

48.2. that the Claimant's claim had no reasonable prospects of success (Rule 76(1)(b));

48.3. that the remainder of the hearing was adjourned following the late withdrawal of the Claimant's claim, less than 7 days before the date on which the relevant hearing began.

49. I issued directions, providing for the Respondent to send a summary schedule of costs, a response from the Claimant and evidence from the Claimant about his financial means.

50. The Respondent provided a costs schedule, setting out the total claimed as £16,720.90, of which £3,632.20 related to counsel's fees for attending the final hearing.

51. The Claimant responded to the application on 28 February 2023. He argued that maladministration by the Tribunal meant that he never had an opportunity to be on an equal footing with the Respondent. He argued that the Tribunal should not apply professional standards to lay people.

52. The Claimant also provided a document outlining his financial means. He said he had been unemployed since November 2022 but recently started working, earning a minimum of £1,100 net per week "if I get to work 5 days a week". This was a short term contract expected to end by 31 March 2023. The Claimant enclosed a letter which purports to confirm a contract to work with the "Department for Levelling Up Housing and Communities Core" at a day rate of £470 from 20 February to 31 March 2023. He said he had £1,421.73 in a current account. In another account he was £1,363.77 overdrawn. He also had credit card debt of £5,000 and debt to friends and family of £5,000. He listed his monthly outgoings amounting to £5,149.82 a month, but I note that this includes some items that would not appear to be essential or regular spending, such as "child modelling session: £165" and "transport fares: £877.50". The Claimant has provided a print-out showing the cost of a monthly season ticket from his home in Northamptonshire to London but no evidence of him having purchased such a ticket or indeed any requirement to travel to London for work. He has provided evidence of child maintenance payments and nursery fees as well as some print-outs of bank transactions and balances. The Claimant says he has no single asset worth over £2,000.

53. Both parties have agreed to the costs application being determined on paper.

THE LAW

54. Rule 76 provides that a Tribunal may make a costs order, and shall consider doing so in the following circumstances:
    54.1. 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
    54.2. any claim or response had no reasonable prospect of success or
    54.3. a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.

55. Late withdrawal of a claim may constitute unreasonable conduct of the proceedings (McPherson v BNP Paribas (London Branch) 2004 ICR 1398). The Court of Appeal emphasised that a late withdrawal of a claim does not automatically justify a costs order; it depends whether the conduct of the claim in general was unreasonable. The Tribunal must not judge a litigant in person by the standards of a professional representative (AQ Ltd v Holden 2012 IRLR 648).

56. As to "no reasonable prospect of success", this question is determined objectively on the basis of the information that was known or reasonably available at the start Radia v Jefferies International Ltd EAT 0007/18. Further, "claim" in this context means "complaint" or cause of action (Opalkova v Acquire Care Ltd EAT 0056/21). The EAT in Opalkova held there were three

key questions: first, did the claim/ response have no reasonable prospect of success when submitted, or did it reach a stage where it had no reasonable prospect (the objective 'threshold' test for making an order)? Secondly, at the stage when the claim/ response had no reasonable prospect of success, did the claimant/ respondent know that was the case? Thirdly, if not, should they have known? In considering the third question, a Tribunal is likely to assess a legally represented party more rigorously.

57. There is no need for the Tribunal to find a precise causal connection between the unreasonable conduct and the costs claimed (or ordered) but causation may still be relevant to the exercise of the Tribunal's discretion (Yerrakalva v Barnsley Metropolitan Borough Council and another 2012 ICR 420).

58. The jurisdiction of the Tribunal to hear claims for breach of contract arises from the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623. The Order permits the Tribunal to hear a claim for damages for breach of a contract of employment brought by an employee if the claim arises or is outstanding on the termination of the employee's employment.

59. The right to claim unfair dismissal under Part X of the Employment Rights Act 1996 applies only to an employee, defined in section 230 of the Act as "an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment".

CONCLUSIONS

60. I am satisfied that the breach of contract and unfair dismissal complaints had no reasonable prospect of success because the Claimant was not an employee of the Respondent and has always accepted that he was contracted to work for the Respondent as a worker via an agency. The Claimant has never asserted that he was employed by the Respondent under a contract of employment. On an objective basis those complaints were always bound to fail. The unfair dismissal claim was struck out in August 2022, so I accept that the inclusion of this claim did not cause the Respondent to incur substantial costs, but there were some costs incurred by the initial response and dealing with the Claimant's multiple applications to amend. The breach of contract claim was pursued up to the final hearing and until the Claimant withdrew his claim on the first day of the hearing so this resulted in substantial cost to the Respondent.

61. As for the Equality Act 2010 complaints, I am unable to find that objectively the direct race discrimination or harassment complaints relating to the delayed payment had no reasonable prospect of success. Neither party has provided any evidence to assist with this issue. Employment Judge Wright permitted those complaints to proceed, noting that they had little reasonable prospect of success (and therefore made a deposit order in respect of them). There is no further information about these complaints to justify a departure from that assessment. Again, these complaints were pursued until the Claimant's withdrawal at the final hearing so considerable cost was incurred by the Respondent in defending them. The withdrawal in itself does not demonstrate that these complaints had no reasonable prospect of success; the Claimant's reasons for withdrawing were more to do with his misunderstanding of Employment Judge Wright's decisions and his perception that he had not had

adequate time to prepare.

62. The victimisation complaint had no reasonable prospect of success because it appeared to rely on a "protected act" of exposing an overpayment to the Ministry of Justice. The act was not alleged to have any connection to the Equality Act 2010 and so could not fall within section 27(2). The indirect discrimination also had no reasonable prospect of success because it was nonsensical and bore no relation to section 19 of the Equality Act 2010. These complaints were effectively struck out by Employment Judge Wright on 5 October 2022. Although she did not expressly say so, that was the effect of her conclusion as to the matters that would proceed to a final hearing. The Respondent incurred significant costs in responding to the applications to amend which sought to pursue these complaints.

63. The Claimant has not been well served by any of his three representatives. The first firm of solicitors submitted an unbelievably poorly drafted claim form and included complaints that they should have realised had no reasonable prospect of success. The second firm of solicitors provided more information about the claim, but should not have sought to pursue complaints that apply only to employees. It is still unclear what the basis was for Mr Frew's instruction, but he must have been instructed on a direct access basis for the preliminary hearing and the subsequent drafting of the amended particulars because there is no record of any solicitors acting for the Claimant at that stage. Even if the agreement with Mr Frew did not include him dealing with Tribunal correspondence, so the Claimant should not have notified the Tribunal he was his representative, when the Tribunal communicated with Mr Frew directly he should have corrected the position with the Tribunal and ensured that all correspondence was sent to the Claimant straight away.

64. As regards the elements of the claim that had no reasonable prospect of success, the fact that the Claimant may have been poorly advised and not been aware of the prospects does not preclude a costs order on that basis. The issue must be considered on an objective basis and the threshold is met. The level of responsibility borne by the Claimant personally is a matter I can take into account when exercising my discretion in deciding whether to make a costs order and in what amount.

65. As regards unreasonable conduct, even taking into account that much of the fault in the way the claim was conducted appears to have been attributable to the Claimant's representatives, I consider the Claimant's conduct of the case at least in the month before the hearing and at the hearing itself, was unreasonable.

66. It is true that there were some failings on the part of the Tribunal. It is very unfortunate that the Tribunal included Mr Woodgate's name in the header of its letter of 17 October 2022, long after Mr Woodgate had stopped acting for the Claimant. The letter was not in fact sent to Mr Woodgate, however, so this error did not have any practical consequences. It is also regrettable that the Tribunal's letter of 22 November was sent to Obaseki solicitors. Fortunately, the Respondent's solicitor noticed this and forwarded the correspondence to the Claimant, but it is understandable that this caused the Claimant to feel that he was not being treated fairly. That does not, however, excuse the Claimant's conduct of the proceedings.

67. From 25 October 2022 onwards the Claimant had Employment Judge Wright's letter of 5 October and the deposit order. He knew that the claim was proceeding to a final hearing on 28-30 November. The complaints that were going foward had been identified and directions for preparation for the final hearing had been made. It would have been preferable if the Tribunal had responded to the Claimant's subsequent applications to extend the deadline for the deposit and for a postponement of the final hearing sooner, but the Tribunal's resources are severely stretched and it is not always possible for correspondence to be dealt with straight away. It was unreasonable for the Claimant to refuse to engage with the Respondent in preparing for the final hearing until he heard back from the Tribunal. Further, from 22 November 2022 he was aware the postponement application had been refused. At this stage it would still have been possible to prepare for the final hearing, given the limited scope of the issues, if the Claimant had engaged properly. The Claimant's decision effectively to issue an ultimatum – that he would withdraw if the hearing was not postponed – was unreasonable. Withdrawal was not necessary; there was no reason why he could not have pursued the claim.

68. Postponement of the hearing on medical grounds was refused; again, this was not a good reason not to prepare, or for the Claimant's non-attendance. The Tribunal went to some lengths to facilitate the Claimant's attendance, delaying the start and converting the hearing to a hybrid hearing. The hearing could have continued on the following two days that had been allocated if the Claimant had not withdrawn the claim.

69. I conclude, therefore, that the threshold for making a costs order is met on two grounds. There is no need to determine the "late withdrawal" ground as well, but I am not convinced it would apply to the present situation. The hearing was not postponed or adjourned; it simply finished early because the Claimant withdrew his clam.

70. Exercising my discretion under Rule 76, I consider this is an appropriate case in which to make a costs order. The Claimant knew that the Respondent was preparing for the final hearing and must have known, or should have known, that his application to postpone might not be granted. His conduct had the effect of causing the Respondent to incur significant cost in preparing for a final hearing which the Claimant had no intention of engaging in. I do not apply the standards of a professional representative to the Claimant, but I do note that the Claimant was continuing to copy Mr Frew into his emails to the Tribunal after 25 October 2022 so he could have asked Mr Frew for advice if he was unsure about Tribunal procedure.

71. I take into account that the Claimant has paid the price to some extent of his unreasonable conduct, because he felt he had to withdraw his case and the claim has been dismissed. I also take into account that claimants should not be dissuaded from withdrawing a weak claim. In all the circumstances, however, the Claimant's conduct was such that he appears to have been avoiding a final hearing with no regard for the costs implications for the Respondent.

72. I have taken into account the information I have available to me as regards the Claimant's means. I accept that he has some debts, but his typical day rate when working is just under £500 which equates to gross income of around

£10,000 a month if he works full time. I accept there may be gaps in his work as a contractor, but as at the time the information was provided the Claimant was in work and I have no reason to believe he is not still in work. I consider he has overstated his outgoings and he would often have disposable income. I also note that pursuant to Rule 39 the deposit must be refunded, so the Claimant will also have that £200 available.

73. Taking all of the matters above into account, I make a costs order in the sum of £1,500.

_____
Employment Judge Ferguson
Date: 9 May 2023