EMPLOYMENT TRIBUNALS

Claimant: Mr Mark Otti

Respondent: Chief Constable of Merseyside Police

Heard at: Liverpool **On:** 28 February and 3 March 2023

Before: Employment Judge Aspinall
Ms Heath
Mr R Cunningham

Representation
Claimant: In person, supported by his wife
Respondent: Mr Alexander Jones, Counsel

REASONS

JUDGMENT having been sent to the parties on 3 April 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

Background

1. By an oral judgment on costs on 3 March 2023 the respondent's application for costs succeeded. The claimant was ordered to pay £ 19 575, less the £ 600 deposit which had been paid.

The Hearing

2. Mr Otti had represented himself at the liability hearing and was well prepared for the costs hearing. He had seen the respondent's costs application which was made in writing. He attended with a written submission. He had support from his wife.

3. The Tribunal outlined the law on costs and the provisions of Rule 76 and 78 to the claimant.

4. There had been a deposit order in this case so Mr Jones set out early, in support of the litigant in person, that it would be his submission, as had been contained in the written application made by the respondent's solicitors, that Rule 39(5) applied and that meant that the claimant would be treated as having acted unreasonably in carrying on with his allegations beyond the date on which the deposit order was made, unless the contrary was shown.

5. The Tribunal went on to explain that determining whether a claimant has acted unreasonably is just the first stage and if the claimant was found to have acted unreasonably then the Tribunal would consider whether or not to make a costs order. That is to say that there is a discretion to make an order for costs or not, and that at that second stage the Tribunal would look at all the circumstances of the case and would apply the overriding objective which is to act fairly and justly. If an award were to be made the Tribunal would consider the amount of any costs order and would include scrutiny of the amounts claimed.

6. Mr Jones explained from the outset that it was the respondent's case that the claimant had been vexatious (in his pursuit of PC Devanna and the allegations he had made about her falsifying entries in her daybook) and abusive (in using race discrimination proceedings in the tribunal to further his quest to obtain documentation to assist him to have a conviction overturned).

7. He also submitted that the claimant proceeded otherwise unreasonably in continuing beyond the deposit orders as he had little or no prospect of establishing knowledge by the respondent of the protected act (the 2006 discrimination complaint he had brought) when it did what he alleges were the detriments he suffered. In this regard his submissions were made under both Rule 76(1)(a) *unreasonableness* and 76(1)(b) *no reasonable prospect of success.*

8. It was agreed that we would proceed on the basis of submissions alone today. The claimant had not prepared a separate witness statement. He confirmed that he had known the respondent's position on costs in advance of the hearing and that everything he wanted to say was in his written response. The respondent saw no need to question the claimant. The Tribunal went out to read the written application and response and returned to hear submissions.

9. The respondent made its submissions contained in its written application. The claimant made submissions in response. The Tribunal adjourned the hearing on 28 February 2023 to allow time for the claimant to adduce evidence on ability to pay and to look again at the schedule of costs claimed. The resumed hearing on 3 March 2023 heard evidence on ability to pay. The respondent did not wish to cross examine on ability to pay. The Tribunal supported the claimant to formulate his submissions.

10. The Tribunal adjourned to consider its decision.

Factual Background

The Complaints

11. The claimant was a police officer who was dismissed on 7 December 2005

after five years' service, for gross misconduct. He had been convicted of obtaining a pecuniary advantage by deception in that he had failed to disclose criminal offences of burglary, theft and criminal damage when being appointed as an officer and convicted of obtaining personal data in breach of the Data Protection Act in relation to his use of the Police National Computer. The claimant served a custodial sentence for his convictions.

12. He brought a complaint of race discrimination in 2006 arising out of that dismissal but his claim could not proceed as it was brought out of time. He appealed the decision that his claim could not proceed. The Employment Appeal Tribunal upheld the Tribunal decision. He was out of time.

13. In 2012 the claimant sought to overturn his criminal convictions and approached a former colleague PC Devanna for support. He spoke to her by telephone. He understood that she might offer him a statement in those terms that might assist him in seeking to have one of his two convictions overturned. The convictions in question related to the respondent's state of knowledge and the claimant's disclosures about his conviction history at the time of the decision made by Officer Formby in 2000 to put the claimant forward for appointment. PC Devanna did not provide a statement. The claimant went to the Court of Appeal but his convictions were not overturned.

14. In 2020 the claimant asked the respondent for a statement from PC Devanna as he wanted the Criminal Cases Review Commission to look at his convictions. He alleged that the opinion she had expressed in the 2012 telephone call showed that she had known that Officer Formby had known about the convictions prior to the claimant's criminal trial and that she had failed to act on that knowledge, had failed to report the matter within the police, for investigation. He also argued that action ought to have been taken in relation to Officer Formby. PC Devanna did not give a statement. The respondent did not formally investigate her and did not take action in relation to Officer Formby.

15. By a claim form dated 22 March 2021 the claimant brought complaints of direct discrimination and victimisation on the ground of race. He made multiple allegations of acts of discrimination. The complaints were clarified and deposit orders were made by Employment Judge Skehan on 7 July 2021. The claimant paid the deposits to proceed with three of the allegations he had made and the matter came to final hearing before this Tribunal in August 2022. The complaints failed. The respondent made its application for costs.

Relevant Law

16. The power to award costs is contained in the 2013 Rules of Procedure. The definition of costs appears in rule 74(1) and includes fees, charges, disbursements or expenses incurred by or on behalf of the receiving party. Rule 74(2) makes it clear that legal representation in this context can include the assistance of a person who is employed by the party, such as an in-house lawyer.

17. Rule 75(1) provides that a Costs Order includes an order that a party makes a payment to another party "in respect of the costs that the receiving party has incurred while legally represented".

18. The circumstances in which a Costs Order may be made are set out in rule 76, and the relevant provision here was rule 76(1) which provides as follows:

> **"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**
>
> **(b) Any claim or response had no reasonable prospect of success."**

19. The procedure by which the costs application should be considered is set out in rule 77 and the amount which the Tribunal may award is governed by rule 78. In summary rule 78 empowers a Tribunal to make an order in respect of a specified amount not exceeding £20,000, or alternatively to order the paying party to pay the whole or specified part of the costs with the amount to be determined following a detailed assessment.

20. Rule 84 concerns ability to pay:

> **"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."**

21. Rule 39(5) provides as follows:

> **"If the Tribunal at any stage following the making of a Deposit Order decides the specific allegation or argument against the paying party for substantially the reasons given in the Deposit Order**
>
> **(a) The paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76 unless the contrary is shown; and**
>
> **(b) The deposit shall be paid to the other party…otherwise the deposit shall be refunded."**

22. It follows from these rules as to costs that the Tribunal must go through a two stage procedure. The first stage is to decide whether the power to award costs has arisen under rule 76; and secondly if so, to decide whether to exercise a discretion to make an award and if so, in what sum.

23. Presidential guidance on costs contained within the Presidential Guidance on General Case Management 2018 at guidance note 7 reminds the Tribunal that the basic principle is that Employment Tribunals do not order one party to pay the costs which the other party has incurred. Costs are the exception not the rule. However there are a number of important exceptions to the basic principle. Paragraph 14 of note 7 provides that each case will turn on its own facts.

24. The case law on the costs powers (and their predecessors in the 2004 Rules of Procedure) include confirmation that the award of costs is the exception rather than the rule in Employment Tribunal proceedings; that was acknowledged in **Gee v Shell UK Limited [2003] IRLR 82**.

25. If there has been unreasonable conduct there is no requirement for the Tribunal to identify a precise causal link between that unreasonable conduct and any specific items of costs which have been incurred: **McPherson v BNP Paribas (London Branch) [2004] ICR 1398**. However there is still the need for some degree of causation to be taken into account as the Court of Appeal pointed out in **Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78**:

> **"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."**

26. Finally, it is apparent from the decision of the Employment Appeal Tribunal in **A Q Limited v Holden [2012] IRLR 648** that the fact a party is not professionally represented is no bar to a Costs Order being made, but it is a relevant factor for the Tribunal to take into account in assessing whether there has been unreasonable conduct.

27. As to the question of means or ability to pay the Tribunal had regard to the decision in **Vaughan v London Borough of Lewisham & Others (No. 2) [2013] IRLR 713**. That was a decision of the EAT chaired by Underhill J dealing with an appeal against a costs order made against a claimant following a 20 day hearing of complaints of discrimination, race/disability harassment, and public interest disclosure detriments. The Tribunal had ordered the claimant to pay one third of the costs incurred by the respondent which in total were said to amount to £260,000. The potential liability of the claimant following that order was therefore in the region of £87,000. No application for a Deposit Order had been made in that case and no costs warnings issued. In reviewing the grounds of appeal in paragraph 14 of the Judgment, the Employment Appeal Tribunal said the following:

> **"The fact that the claim depended on issues of fact about the motivation of the individual respondents or other council employees did not automatically mean that it was reasonable for the appellant to believe that she had a good chance of success. It depends on the facts and the allegations in the particular case…Nor does it make any difference that some questions were only finally resolved as a result of the evidence at the Hearing. That would generally be the case; but it does not mean that a reliable assessment of the prospects of success could not have been made at an earlier stage…It is not the law, as the appellant asserted before the Tribunal, that the issue of whether a claim is misconceived depends on whether the claimant genuinely believed in it…In the context of whether a claim could be characterised as 'frivolous' this Tribunal said [in Cartiers Superfoods Limited v Laws [1978] IRLR 315] that it was necessary 'to look and see what [the claimant] knew or ought to have known if he had gone about the matter sensibly…'"**

Applying the Law

The first stage: unreasonable

28. The Tribunal finds that the claimant acted unreasonably within Rule 76. The claimant ought to have known that he could not succeed when proceeding beyond the deposit orders because

(i) of the time elapsed between the protected act and detriment of over 14 years and
(ii) because he could not establish the discriminators' knowledge of his protected act. The ET3 set out that the alleged discriminators did not know of the protected act. The claimant was warned by the deposit orders and given detailed reasoning as to why the complaints had little reasonable prospect of success.

The deposit orders

29. On 7 July 2021 Employment Judge Skehan made deposit orders in relation to all of the claimant's allegations of race discrimination. The claimant chose to proceed with just three of the allegations. The deposit orders for those three were as follows:

Allegation 6

Victimisation contrary to section 27 Equality Act 2010 being that the respondent compelled Constable Devanna on around 30 December 2020 to change her mind about providing the witness statement to support his application to the Criminal Case Review Commission.

Allegation 7

Victimisation contrary to section 27 Equality Act 2010 being that the respondent refused to record and refer conduct matters against Constable Devanna on or around 28 January 2021 to the Independent Office for Police Conduct (IOPC) which they are obliged to from being aware of serious operational corruption from the material they had given to them.

Allegation 8

Victimisation contrary to section 27 Equality Act 2010 being that the respondent refused to conduct a criminal investigation into ex-Inspector Formby in misleading the jury about his knowledge of criminal convictions.

30. Employment Judge Skehan gave the following reasons for those orders:

These are allegations of victimisation arising from a "protected act" said to be the issue of proceedings in March 2006:

a) The claimant has little reasonable chance of success in showing a connection between the alleged detriment and the protected act. Particular reference is made to the fact that the act happened

approximately 14 years prior to the alleged detriment. There appears to be no reference to the protected act in the intervening time.

b) ...relevant only to allegation 5, not proceeded with.

c) ...relevant only to allegation 5, not proceeded with.

d) The claimant has little reasonable prospect of success in showing that the respondent compelled Constable Devanna to change her mind about providing the witness statement. The contemporaneous written evidence of the respondent's case report documentation from 7 October 2020 and 21 December 2020 records that Constable Devanna was free to volunteer information that could assist the claimant should she choose to do so [in relation to allegation 6].

e) Alternative reasons for the detriment are referred to within the documentation by both the respondent [insufficient evidence to investigate] and the claimant [an unwillingness to review the evidence for fear of damage to the respondent's reputation]. The claimant has little prospect of successfully showing that the detriments referred to are in any way connected to the protected act [in relation to allegations 7 and 8].

The judgment of the Tribunal

31. The Reasons set out in relation to allegation 6 at paragraphs 74, 79 and 80 the reasons why Constable Devanna did not give the claimant the statement he wanted.

> *"74. PC Devanna made her own mind up. She was not compelled or coerced by anyone else not to help the claimant.*
>
> *79…….The Tribunal accepted her oral evidence that she did not give a statement because the claimant had covertly recorded her and his convictions were more numerous and more serious than he had told her. These two things destroyed her trust in him……*
>
> *80….PC Devanna was not aware of the 2006 race discrimination complaint. She was not manipulated nor coerced by anyone who was*."

32. The Tribunal found, exactly as Employment Judge Skehan had warned in the deposit order that (i) the claimant could not show a connection between the 2006 protected act and the alleged detriment in allegation 6 and (ii) that he could not show PC Devanna had been compelled or coerced as alleged in allegation 6.

33. In relation to allegations 7 and 8, exactly as Employment Judge Skehan had warned, the claimant could not show a connection between the 2006 act and the alleged detriments. Further the alternate reasons for the detriment as cited by Employment Judge Skehan in her reasons were exactly those found by the Tribunal at paragraph 102:

> *" 102……the reason for allegations 7 and 8 were determined above to be that there was insufficient evidence in DCI Sumner's assessment to proceed to either conduct or criminal investigations. The protected act played no part in the reason why and had no influence on the decisions at allegation 7 and 8."*

34. The Tribunal also records at paragraph 103 of the Reasons the claimant's alternate posited reasons for the detriments. They were all rejected.

35. The Tribunal had regard to the fact that the claimant was a litigant in person. In his submission he asked that the Tribunal "*view my behaviour (which I believe was reasonable prior to and throughout these proceedings) through the prism of an unqualified unrepresented litigant in person" .* The fact that he did not have legal representation did not prevent him from being able to reach the sensible conclusion at the point of the deposit orders that he could not succeed in his complaints.

36. The claimant's complaints failed for exactly (more than substantially as required by rule 39) the reasons warned by the Employment Judge in the deposit orders.

37. Rule 39 (5) requires the claimant be treated as having acted unreasonably in pursuing each of allegations 6,7 and 8 *unless the contrary is shown*. The claimant's written submissions on his reasonableness in proceeding were set out over 87 paragraphs. They did not undo the position that (i) he knew at the point of the deposit orders being made that the respondent said its alleged discriminators did not know about the protected act and that the protected act was not the reason why it did or did not do the things at allegations 6,7 and 8 and (ii) that he had no evidence to show that they did know or that they were motivated by the protected act to commit the detriments at allegations 6,7 and 8. All he had was his belief that the discriminators *must have known* and his belief that that knowledge *must have been* the reason why the respondent did what was alleged at allegations 6, 7 and 8. His 87 paragraphs were largely an attempt to restate his case on liability, revisiting matters that had been determined at specific disclosure application stage and at final hearing (the HR file conspiracy and database cascade arguments as to how the respondent discriminators must have acquired knowledge).

38. The claimant has not shown that it was reasonable for him to have proceeded beyond the deposit orders.

39. The Tribunal therefore finds under Rule 39 and Rule 76(1) (a) and (b) the claimant acted unreasonably and with no reasonable prospect of success in proceeding beyond the date of the deposit orders of 7 July 2021.

40. In relation to vexatious conduct, it was not necessary to make a determination because the claimant had behaved otherwise unreasonably in proceeding beyond the deposit orders. In relation to abusive conduct, it was not necessary to make a determination because the claimant had behaved otherwise unreasonably in proceeding beyond the deposit orders.

The second stage: discretion

41. Turning then to whether or not to exercise its discretion to make an award of costs the Tribunal had regard to Yerrakalva and took into account the nature, the gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion. The Tribunal looked at the whole picture and took into account that there need not be a causal link between the unreasonable conduct and the costs incurred.

42. The nature of the unreasonable conduct was proceeding with allegations 6 and 7 and 8 which he must have known he could not succeed in but with his own agenda of pursuing PC Devanna and Inspector Formby and seeking to obtain evidence with which to overturn his conviction. The gravity of that was serious and the effect was that it engaged the respondent in litigation, using up its resources and time.

43. The Tribunal had regard to the claimant's ability to pay. He produced a spreadsheet showing that he owns his own home, with his wife valued at approximately £ 300 000 with a mortgage of just £ 18 000. They own two cars and have savings of around £ 20 000. They have children and a monthly income of £ 3950 with outgoings of £ 2370 leaving a disposable income of £ 1579. Apart from an outstanding balance on a pre-booked family holiday of £ 3819 they had no debt.

44. He gave oral evidence to attest to the content of the spreadsheet but was not cross-examined on his ability to pay.

45. The Tribunal had regard to the fact that there was no costs warning letter in this matter. That was not determinative either way.

46. The Tribunal decided:

a. In relation to vexatious conduct, it was not necessary to make a determination because the claimant had behaved otherwise unreasonably in proceeding beyond the deposit orders.

b. In relation to abusive conduct, it was not necessary to make a determination because the claimant had behaved otherwise unreasonably in proceeding beyond the deposit orders.

c. In relation to otherwise unreasonable conduct, the Tribunal decided to exercise its discretion to award costs.

The amount of the award

47. It then turned its attention to the amount of the award. The Tribunal requested and was provided with a chronological accumulation of costs from the date of the deposit orders to the date of the costs hearing so it could scrutinise what was incurred at what rate, by whom and when.

48. The Tribunal had regard to Samsung Electronics and Co Ltd & Ors v LG Display Co Ltd 2022 EWCA Civ 466 a case in which a successful litigant had sought fees at a charging rate of £ 1,100 per hour, and to LJ Males reference to the guideline hourly rates set out in Appendix 2 to the Summary Assessment of Costs.

49. The Tribunal had regard to HMCTS solicitors' guideline hourly rates. The rates for National Band 1 applicable to Liverpool for 2021 were as follows:

For solicitors and legal executives with over 8 years' experience	£ 261
For solicitors and legal executives with over 4 years' experience	£ 218
For other solicitors or legal executives and fee earners	£ 178
For trainee solicitors, paralegals and other fee earners	£ 126

50. The total claimed by the respondent was £ 28 716 inclusive of vat being £17 510 plus vat for solicitors fees and £ 3850 plus vat Counsel's fees. The Tribunal scrutinised the solicitors' fees, line by line of entry on the schedule, with the parties, supporting the litigant in person to make arguments as to the proportionality and reasonableness of the fees incurred.

51. The claimant submitted that the costs were presented and billed in units of six minutes, that is to say it was notional time and he should only be ordered to pay actual time. The Tribunal found that the time recording was industry standard and that the use of notional time has to be seen in the context of the rate charged for that time. The submission was rejected.

52. The rates charged were £ 135 for junior fee earning staff and £ 165 for more senior specialist employment lawyers. The rates charged by the respondent were considerably less than the guideline hourly rates. The Tribunal could see that different rates were applied by the respondent according to the complexity of the work being carried out. For example, bundle preparation was done at a lower charging rate than drafting. Overall, the rates were low and possibly the result of a particular contractual arrangement between the solicitors and respondent client.

53. The Tribunal had regard to the time charged for the particular tasks, and found, save for the amounts disallowed below, the time charged to have been reasonable and proportionate to the nature of the work.

54. *Witness statements:* The respondent incurred 12 hours and 36 minutes of time in taking proofs of evidence, drafting them into witness statements not just for the 3 respondent witnesses called but also taking initial instruction from the other witnesses in respect of whom the claimant made applications for witness orders. The respondent needed to do that work to form a view as to whether or not the witnesses should be called and the applications for orders opposed. The time incurred in preparing the witness evidence was reasonably incurred.

55. *Disclosure:* The Tribunal finds the time charged for disclosure was reasonable. The claimant made wide ranging, voluminous requests for disclosure not all relevant to the complaint he brought. He continued with a disclosure application beyond the date of the deposit order in relation to disclosure that was

broader than that needed to address the allegations with which he had chosen to proceed.

56. *Perusal category:* This category was a generic label for work on the case. The Tribunal mapped high points of time incurred against high level of activity needed in compliance with case management orders, in response to correspondence or applications made by the claimant and finds that the costs of perusal were modest and proportionate to the work incurred. The Tribunal noted work was done at a junior level charging rate where appropriate.

57. *Bundles:* The time charged for the preparation of the bundle was around 29 hours. This seemed high to the Tribunal. It undertook a rough and ready calculation and decided to reduce the time charged by one third. The Tribunal noted here also that work was being charged at a lower rate showing that the expertise was being matched to the task.

58. *Transcripts:* the claimant had covertly recorded some meetings so that the respondent had to listen to the recordings to check the accuracy of transcripts. The Tribunal considered that not all of this task had needed to be done at the higher charging rate, therefore the Tribunal reduced the time allowed for transcripts at the higher rate.

59. The Tribunal also made reductions in two other areas. The first was the currently unbilled work. The Tribunal only orders the claimant to pay the amounts already billed to the client. It is not making any order for work in progress, that is billable time incurred but not yet billed.

60. The second area is in relation to the claimant's submission that he does not act unreasonably in seeking to defend a costs application and ought not therefore to have to pay the respondent's costs of seeking its costs. The Tribunal accepts that submission. The Tribunal has not found that the claimant acted unreasonably *prior to* the deposit order. He was entitled to defend the costs application and to some extent was successful in doing so as the Tribunal has not ordered costs prior to the deposit order and has disallowed some of the costs that were recorded. It makes no order for the costs of the costs application. It is therefore not allowing any costs or counsel's fees beyond the date of the final hearing.

61. In summary, the total solicitors' fees claimed were:

£ 17510.00

The Tribunal disallows the following:

£ 1088.00 bundles
£ 973.50 transcripts
£ 1419.00 unbilled time
£ 1567.50 costs on costs

62. That makes a total amount of reasonably and proportionately incurred solicitors fees of £ 12 462.50 plus vat.

63. Counsel's fees incurred for the final hearing were reasonably incurred. The Tribunal notes a modest use of counsel in this case and might have expected to see charges for an earlier conference or specific instruction in relation to the breadth of the disclosure applications in the police context. The Tribunal finds £ 3850 plus vat counsels fees were reasonably and proportionately incurred to the end of final hearing.

64. For the reason set out above the Tribunal finds that the claimant has not acted unreasonably in seeking to defend the costs application and makes no award for counsel's fees in the costs application.

65. At this point the Tribunal again took time to consider the award in all the circumstances of the case. It had regard to the claimant's written submissions and ability to pay and found no reason not to award the respondent those costs it had reasonably and proportionately incurred.

66. The total amount the Tribunal awards in costs reasonably incurred is

Solicitors' fees	£12,462.50
Counsel's fees	3,850. 00
	=========
	£16,312.50 plus vat
Vat	£3262.50
Final order to pay	£19,575
Less	£600

deposit paid by the claimant which must now be released to the respondent, an instruction having been given in those terms direct to the deposit holder.

67. At this point the Tribunal again considered the exercise of its discretion. It looked at the overall amount of the costs award and the ability to pay and all the circumstances of the case. The Tribunal decided to exercise its discretion.

68. The Tribunal expressed the view that given that there is a young family with two dependent children and that Mrs Otti has also contributed to the household income and that the family appears to have managed its finances well so that there is no debt and there are savings, the claimant ought to be allowed to settle a proportion of the liability now and a proportion in instalment so as to not totally erode the family's savings.

Employment Judge Aspinall

Date: 22 May 2023

REASONS SENT TO THE PARTIES ON

5 June 2023

FOR THE TRIBUNAL OFFICE

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