EMPLOYMENT TRIBUNALS

Claimant: **Mr Philton Alfred**

Respondents: **(1) The Commissioners for His Majesty's Revenue and Customs**
(2) Maxtian Interim Limited

Heard at: **East London Hearing Centre** **On: 6 July 2023**

Before: **Employment Judge O'Brien sitting alone**

Representation:

Claimant: In person

Respondents: Mr Harris of Counsel for the first respondent
The second respondent did not attend and was not represented

JUDGMENT

The judgment of the Tribunal is that

1. **The claimant's application for me to recuse myself is refused.**

2. **The claimant's application for reconsideration of my decision to refuse to permit him to amend his claim and my decision to strike out that claim is refused.**

3. **The claimant shall by 6 October 2023 pay to the first respondent £4,203, in respect of costs, pursuant to rules 76(1)(a) and (b) of the 2013 Employment Tribunal Rules of Procedure.**

4. **The claimant's application for a preparation time order is refused.**

REASONS

1 On 26 March 2022, the claimant presented a claim to the Employment Tribunal complaining of unfair dismissal and race discrimination. Following a preliminary hearing on 18 January 2023, in a reserved judgment handed down in writing on 13 April 2023, I refused to permit the claimant to amend his claim and struck out his claims. The claimant applied

on 2 May 2023 for reconsideration of my judgment. The first respondent applied on 12 May 2023 for an order for costs against the claimant and the claimant applied in turn on 19 June 2023 for a preparation time order.

2 Whilst ordinarily I would have considered on the papers whether the claimant had a reasonable prospect of persuading me to vary or set aside my decision and only direct a hearing if I was so convinced, in light of the other matters before me I decided to deal with the claimant's application for reconsideration at a hearing.

3 The claimant subsequently applied on 27 June 2023 for me to recuse myself. He wished for me to do so ahead of the hearing; however, it appeared to me more appropriate to hear full argument and decide the point at this hearing as a preliminary issue.

4 I should add that the claimant has since this hearing bombarded the Tribunal with correspondence seeking to add to the submissions made at the hearing. Much of the submissions are repetitive of those made at the hearing. Certainly, nothing was raised in this correspondence which either was not or could not have been said at the hearing. It is disproportionate even to summarise the claimant's subsequent correspondence and I do not do so. I do, however, record that I gave the claimant full opportunity to present his case at the hearing, almost to the disadvantage of the respondents.

PRELIMINARY ISSUE – APPLICATION FOR RECUSAL

5 The claimant's application alleges that, at the hearing on 18 January 2023, I 'openly told [the claimant] that he would not give a decision in [his] favour in these proceedings before the matter has even been tried'. The claimant alleged that my continued participation proceedings could not be justified and gave rise to a real risk of prejudice to the claimant.

6 I invited the claimant at the hearing to set out as best he could what he alleges I said and which he understood to mean that I would decide against him before I even heard what he had to say. He gave two versions: 'you can go somewhere else for that', and 'you know where you can go for that'. He could not remember exactly when I made the comment in question save that it was in response to his setting out his case.

7 The House of Lords in **Porter v Magill** approved the following test formulated in **Re Medicaments and related Classes of Goods (No.2) [2001] 1 W.L.R. 700**:

> "The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility or a real danger, the two being the same, that the tribunal was biased."

8 The fair-minded observer is not unduly sensitive or suspicious (**Helow v Secretary of State for the Home Department [2008] 1 WLR 2416**). Where there are real grounds for doubt as to a lack of bias, it should be resolved in favour of recusal. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions (**Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451** at paragraphs 21 to 25.)

9 The claimant was unable to explain why, if he believed me to have demonstrated bias against him at the hearing on 18 January 2023, he had not made an allegation to that effect any earlier than 27 June 2023. I recognise that one of his grounds for reconsideration was that my decision was 'biased and perverse'. However, it is one thing to say that a decision demonstrated bias and another entirely to allege that a judge behaved in an explicitly biased manner at a hearing. Neither had the claimant taken a contemporaneous note of my supposedly biased statements. I regret to say that I have grave doubts that the claimant's application was based on a genuine belief in my partiality as opposed to an attempt to derail proceedings.

10 Nevertheless, turning to the substance of the application, given the claimant's uncertainty as to the exact words used, I'm unpersuaded that I used either of the phrases alleged. However, I recall (as is recorded in my written reasons from the preliminary hearing) being faced with repetitive and unfocused submissions from the claimant and having at times to be quite robust in order to make progress. Many of the claimant's submissions were then, as are indeed now, legally misconceived.

11 The claimant misunderstands the obligation for me to take a claim factually at its highest when considering strike out with having to accept as well-founded any argument he may make. It is quite possible that, after giving the claimant a more than fair opportunity to argue his case, I indicated that certain submissions were weak and that he needed to move on. I may even have suggested, after the claimant refused to move on from a point despite my indicating its legal flaws, that he would be entitled to appeal against my judgment if ultimately I held against him. However, nothing I said or did, nor indeed which the claimant alleges I said or did, would lead a fair-minded and informed observer to conclude that there was a real possibility or a real danger that I was biased.

12 Consequently, I refused to recuse myself.

RECONSIDERATION OF MY PREVIOUS DECISION

13 In an email dated 2 May 2023, the claimant applied for my decision to be reconsidered on 20 grounds:

13.1 It does not conform to the ET's overriding objectives

13.2 It is a miscarriage of justice

13.3 It does not conform to the Employment Tribunal Constitution and Rules of Procedure Regulations 2013

13.4 It does not conform to the Employment Tribunal Act 1996

13.5 It does not conform to the Crown Proceedings Act

13.6 It does not conform to the Limitation Act 1980

13.7 It is biased and perverse

13.8 Both I and all other judges involved to date from the Tribunal are the wrong level of judge being that these are crown proceedings

13.9 It infringes upon his Human Rights

13.10 It does not conform to CPR rules

13.11 It is the end of what has been a cover up by the ET

13.12 It is against the rule of law

13.13 It is an abuse of a litigant in person

13.14 It could be considered fraudulent

13.15 It amounts to a conspiracy and corruption

13.16 It is a violation of his rights under the Magna Carta

13.17 It is a violation of his employment rights under many employment laws

13.18 It is a breach of trust against him and the public generally

13.19 It is an attack on justice and the sovereign laws of this land and a damage to the integrity of the law.

13.20 It is unjust and an affront to parliament who make those laws.

14 Rule 70 of the 2013 Employment Tribunal Rules of Procedure provides that a tribunal may, on its own initiative or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so.

15 I gave the claimant should an opportunity to clarify his written grounds at the hearing. In oral argument it appeared that some of these criticisms were actually levelled against the other parties rather than necessarily at myself. Nevertheless, I treated his criticisms as broad enough also to appertain to my decision.

16 They principally revolve around matters of procedure and what the consequences of those matters of procedure ought to have been vis-à-vis the respondents being permitted to defend the case.

17 Much of what was submitted was, or could reasonably have been, raised before me in January, and so now offended the principal of finality of litigation. Consequently, the interests of justice did not require reconsideration of my judgment on the basis of such arguments. Nevertheless, in the hope that the claimant might better understand why his core arguments are unmeritorious, I deal with the principal strands his reconsideration submissions below.

18 There are two aspects to the claimant's arguments regarding the engagement of the Crown Proceedings Act 1947. First, that by dint of his claim against the first respondent being Crown proceedings as defined, the CPR apply. Second, because s1 Crown Proceedings Act 1947 provides that he does not need the fiat, or in other words the permission, of His Majesty to bring the claim, that section resolves jurisdiction entirely in his favour.

19 The second point can be dealt with quickly. Requiring a claimant to bring a claim within a statutorily prescribed time limit is plainly not the same as requiring the Crown’s permission to bring a claim.

20 As for his first argument, CPR 66.1 provides in particular that:

> 'civil proceedings against the Crown' means the civil proceedings described in section 23(2) of the [1947] Act, but excluding the proceedings described in section 23(3);

21 It is not necessary to set out the provisions of s23 of the 1947 Act save that s23(4) provides that:

> 'Subject to the provisions of any Order in Council made under the provisions hereinafter contained, this part of this Act shall not affect proceedings initiated in any court other than the High Court or the county court'.

22 The claimant has not taken me to any such Order in Council extending the operation of the Crown Proceedings Act into the Employment Tribunal. Therefore, I do not I accept that the Civil Procedure Pules (or indeed any rules of procedure of any other superior court mentioned by the claimant) apply in preference to or supersede the Employment Tribunal Rules of Procedure. Moreover, the claimant has no reasonable prospect of persuading me that they would.

23 The claimant complaints that the Tribunal permitting of its own motion an amendment to the respondent's name is a breach of his human rights, his rights under the Magna Carta et cetera. Of course, this was a decision taken long before my involvement and therefore cannot be a basis for me to reconsider my own decision. It is in any event an entirely misconceived complaint, dealt with comprehensively by Deputy High Court Judge Carr KC in dismissing the claimant's appeal against that procedural decision amongst others under rule 3(10) on 25 May 2023 (case numbers EA-2022-000648-JOJ and EA-2022-000995-JOJ).

24 I need not deal in any detail of the claimant's submissions on the timeliness of the respondent's responses. Not only was nothing said today which would give rise to any reasonable prospect of my reaching any other conclusion on the point but also, more importantly, the point is immaterial. The claimant's argument is that, because no timely response was submitted and because no application had been made for relief from sanctions, his claim should succeed by default. However, that is simply not the case.

25 It is well established that under the Employment Rights Act 1996 and the Equality Act 2010 time is a matter of jurisdiction which has to be dealt with by the Tribunal irrespective of the parties' actions and irrespective of any purported agreement between the parties. In other words, whether the Tribunal has jurisdiction a matter for of law the Tribunal to satisfy itself.

26 The claimant argued that the Limitation Act 1980 applied to his claims. Of course, the limitation periods in that act are considerably more generous than those to be found in the Employment Rights Act 1996 and the Equality Act 2010. However, s39 Limitation Act 1980 provides:

> This Act shall not apply to any action or arbitration for which a period of limitation is prescribed by or under any other enactment (whether passed before or after the passing of this Act) or to any action or arbitration to which the Crown is a party and for which, if it were between subjects, a period of limitation would be prescribed by or under any such other enactment.

27 Each of the claimant's complaints in this claim are complaints to which a period of limitation is prescribed under another act of Parliament, and so the limitation act 1980 does not apply.

28 That leaves multifarious complaints about my own approach to the claimant and his claim. I rejected above an application to recuse myself on the basis of bias. I recall well, and it is evident from my written reasons, extending the claimant every opportunity to fully argue his case in January and have done so again today. It is a regrettable attribute of the claimant that he considers anything less than full agreement with him as evidence of bias and anything short of full rein to say whatever he wants whenever he wants (even during the handing down of judgment) as unfairness. He has advanced no well-founded basis for concluding that the interests of justice require any variation to my January judgment.

COSTS ORDER

29 The first respondent applied on 12 May 2023 for an order for costs on the basis of unreasonable conduct and on the basis that the claimant's claims had no reasonable prospect of success. I need not repeat the contents of the application. Suffice to say that the first respondent argued that the claimant must have known from the outset that his claims were significantly out of time and had no reasonable prospect of success and yet he persisted not only in the claim itself but repeated applications and appeals putting the first respondent to great unnecessary expense. The claimant resisted the application not only in principal but on the grounds of his lack of means to pay.

30 I gave both parties the opportunity to supplement their written submissions and heard a little from the claimant about his means despite his reluctance to give sworn evidence on the point.

The Relevant Rules

31 A costs order is an order that one party makes a payment to another in respect of costs (rule 75(1)(a)), Tribunal fees (rule 75(1)(b)) and/or attendance expenses (rule 75(1)(c)).

32 Rule 76(1) provides:

> 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.

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

34 A costs order may in particular order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party (rule

78(1)(a)) or to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles (rule 78(1)(b)).

35 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 (rule 84).

36 In respect of the quantum of costs under an order granted on the basis of unreasonable conduct, in **Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78** at para 41 Mummery LJ said:

> 'The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had.'

37 In **Raggett v John Lewis plc [2012] IRLR 906**, Slade J said that the proper approach to costs under the vexatious/unreasonable conduct limb is as follows: (a) the tribunal need not identify the particular costs incurred by particular conduct; instead it should look at the whole picture and the overall effects of the conduct; (b) the tribunal may also take into account the conduct of the party applying for costs; (c) rejection by a claimant of a 'Calderbank' type offer may be taken into account if that rejection was unreasonable; (d) although the CPR do not apply directly to Tribunal proceedings, in general the Tribunal should follow their general principles (though not necessarily to the letter in all cases).

Conclusions

38 Following a preliminary hearing on 18 January 2023, I struck out the claimant's claim on the basis that it had no reasonable prospects of success.

39 The respondent has accurately set out the chronology of this claim. It reflects my personal experience of the claimant making persistent repetitive applications. I have also experienced now twice the claimant being disruptive in hearings and unwilling to accept any outcome less than total agreement with his point of view. In short, I accept that the claimant has acted disruptively and unreasonably in his conduct of proceedings.

40 I took into account as best I could the claimants means. Despite clear directions to provide a schedule of income and outgoings with supporting evidence, the claimant provided nothing but mere assertions. Moreover, when asked about his means, the claimant was once again uncooperative, obstructive and argumentative. He was not an impressive witness and I gravely doubt that he is as short of funds as he claims. However, it is my judgment that a costs order is necessary irrespective of the claimant's immediate ability to pay. His behaviour in conducting proceedings was so egregious that I consider a costs order necessary to deter further repetition. Nevertheless, I consider it appropriate to give the claimant a period of time to gather the funds to pay the amount ordered.

41 Turning to the question of that amount, I considered it inappropriate in all the circumstances to award any costs prior to the first respondent's costs warning letter of 10 October 2022. It appeared to me that the first respondent should be awarded costs from

the next major event: the beginning of preparation for the hearing before me on 18 January 2023. The only evidence of costs from that point were to be found in an invoice of 9 March 2023 showing £1,575 profit costs and £2,628 counsel's fees. I suspect that more costs were incurred by the first respondent thereafter; however, it did not appear that evidence of subsequent costs had been provided to the claimant in advance of this hearing. It would not, in my judgment, be fair to award such additional costs today.

42 Giving the claimant time to address his claimed banking difficulties, I ordered that the claimant pay £4,203 to the first respondent by 6 October 2023.

PREPARATION TIME ORDER

43 The claimant made a preparation time order application on 19 June 2023. This application was made well out of time, without any good reason. However, I have no doubt that the claimant would renew the application in time after receipt of this decision and so I extend time to admit his application.

44 The basis of his application in essence was unreasonable conduct on the part of the first respondent. That unreasonable conduct related in part to the repeatedly rejected submission that the first respondent had submitted its response late, but extended to unreasonable delay thereafter. To the extent that there was any such delay, I considered that the claimant had been compensated adequately by my disallowing costs prior to preparation for 18 January 2023 preliminary hearing, especially given his own unreasonable conduct. Consequently, I make no preparation time order.

Employment Judge O'Brien
Dated: 11 September 2023