EMPLOYMENT TRIBUNALS

Claimant: Mr M Whitaker

Respondents: The Environment Agency

Heard at: Manchester (in chambers) **On: 18 December 2023**

Before: Employment Judge Leach

JUDGMENT –RESPONDENT'S APPLICATION FOR COSTS

The respondent's application for costs is granted to the extent that the claimant must pay costs of **£400.** Payment must be made within 28 days of the date that this judgment is sent to the parties.

REASONS

Introduction

1. On 27 February 2023, the claimant presented a claim form raising complaints of unfair dismissal, sex discrimination and being subjected to detriments because he made protective disclosures.

2. The complaints relate to the claimant's employment which ended in May 2017. Some complaints relate to a grievance process that continued beyond the date the claimant's employment ended.

3. All complaints were issued well beyond the primary time limits set out in the Employment Rights Act 1996 and the Equality Act 2010. At a preliminary hearing on 16 November 2023 (November hearing) I decided that it was not just and equitable to allow the Equality Act complaints to proceed and that it was reasonably practicable for the claimant to have presented his claim form within the time limits set by the Employment Rights Act 1996. As a consequence, all complaints were dismissed.

4. At the end of the November hearing the respondent made an application for costs. It had written to the claimant already in relation to costs. It was agreed that the application would be considered and determined on the basis of written submissions. The claimant was provided with an opportunity to respond to the respondent's application and to provide details of ability to pay. The respondent was also provided with an opportunity to comment on the claimant's submissions.

The respondent's application for costs

5. The respondent applies for costs under rule 76(1)(a) and (b) of the Employment Tribunal Rules of Procedure 2013 ("Rules") on the basis that (1) it was clear that the claimants' claims had no reasonable prospects of success, and (2) that the claimants acted unreasonably and/or vexatiously in bringing the proceedings so long after the expiry of the primary time limits. The time points themselves, say the respondents, made it clear that the claim had no reasonable prospects of success.

6. In its letter dated 16 August 2023 the respondent estimated its legal costs up to and including the hearing on 16 November 2023 as being £4220. In fact, the costs application made at the end of the preliminary hearing is more limited than this. The respondent provided a schedule setting out costs totalling £1408. I note that this schedule does not for example include counsel's fees and the schedule amounts to a claim for part only of the overall costs of the respondent.

7. To support the application for costs, the respondent refers to paragraphs 23 and 24 of the record of the preliminary hearing held or case management purposes on 5 July 2023 (July hearing).

> ***Costs***
>
> *23. The claimant is aware that there is a risk in the Employment Tribunal that parties can be ordered to pay the costs of the other side. It is in the light of this that this hearing was focussed on matters that needed to be discussed to prepare for the next preliminary hearing. This ensured that the parties costs incurred to date are kept to the minimum needed to determine which, if any, of the claimant's claims can proceed beyond that hearing.*

> *24. The respondent's representative agreed to ensure that the claimant was made aware of, in advance of the next preliminary hearing, whether the respondent intends to make an application for costs.*

8. The respondent's application for costs is based on what it describes as vexatious and unreasonable conduct in bringing an Employment Tribunal claim nearly 6 years after the relevant events even though, by 31 May 2018, the claimant was aware of the Tribunal deadlines. Further, that the claimant made many references to him accessing legal advice, many years before his claim was presented.

9. In its letter of 16 August, the respondent made clear its intention to make an application for costs incurred in defending the claim and these could include time spent preparing for the preliminary hearing on 16 November 2023. By email dated 6 September 2023, the respondent told the claimant that he had already been made aware of the intention to apply for costs at the next hearing. The respondent also noted that, whilst the Judge at the hearing on 5 July asked the parties to keep costs to a minimum in preparing for the hearing on 16 November, the claimant was continuing to email on a weekly basis.

10. In an email dated 10 October 2023, the respondent made a further representation about costs. This is what it said: -

> *"If any of your claims are given the "go ahead" by an Employment Judge to continue on 16 November 2023 then at the same hearing an Employment Judge will consider an application made by the Environment Agency for a deposit order and whether a costs order should be made."*

11. In further submissions dated 1 December 2023, the respondent noted that the claimant had admitted in evidence that he was aware of the relevant time limits as long ago as 2018 (and that admission was supported by various emails that had been included in the bundle of documents used at the hearing on 16 November 2023 ("Bundle").

The claimants' response to the application

12. On 20 November 2023, the claimant provided a written response to the respondent's costs application. In summary, this is what the claimant says: -

a. That the application is "another sign of contempt" that the respondent has for the claimant.
b. That the Judge at the July hearing told the claimant that a deposit order of up to £1000 per claim can be made if the case were to go to a full hearing (here the claimant appears to be saying that the Judge did not tell him he could be faced with a costs threat if he only took the case to the November hearing.

c. That he considered the recommendation by the respondent's solicitor that he obtain legal advice about the potential costs risk as relevant to a future hearing if he had been successful at the November hearing.
d. That he and the respondent's solicitor had cooperated in the sharing of information in the lead up to the November hearing as requested.
e. That he cannot afford to pay any costs ordered against him. The claimant provides evidence of his wife's serious health conditions and some evidence of means and outgoings including evidence that he is eligible for Universal Credit.

13. In further submissions dated 1 December 2023 the claimant accuses the respondent of actions that are *"corrupt, malicious and criminal."* I note that this reflects much of the correspondence over the years that was included in the Bundle, and which appears to have culminated in these Tribunal proceedings.

The Law

14. Unlike the general procedure in Civil Courts, costs do not "follow the event" in Employment Tribunals. Traditionally, Employment Tribunals have allowed employees to challenge the fairness of dismissals (or other matters within the jurisdiction of Employment Tribunals) without a threat of costs in the event that a claim is unsuccessful and also allowed employers to respond to claims, without a threat as to costs in the event that a claimant is successful.

15. The Rules provide Tribunals with a power to award costs in the circumstances set out in those Rules.

16. The Rules which are relevant to the respondent's costs application state as follows:

> "*76. When a Costs Order or Preparation Time Order may or shall be made*
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> *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 has no reasonable prospect of success….*
>
> *……*
>
> 77. *Procedure*

> *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.*
>
> *78. The amount of a Costs Order*
>
> (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;*
>
> *(b) Order the paying party 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 a 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."*
>
> *…….*
>
> *84. Ability to Pay*
>
> *In deciding whether to make a costs ……. order and if so in what amount, the Tribunal may have regard to the paying party's…. ability to pay."*

17. In relation to an application under rule 76(1)(b) (no reasonable prospect of success), this test should be considered on the basis of the information that was known or reasonably available at the start of proceedings (see paragraph 67 of the decision in **Radia v Jefferies International Limited [UKEAT/007/18/JOJ]** ("Radia"):

> *"Where the Tribunal is considering a costs application at the end of, or after, a trial it has to decide whether the claims 'had' no reasonable prospect of success judged on the basis of the information that was known or reasonably available at the start, and considering how at that earlier point the prospects of success in a trial that was yet to take place would have looked. But the Tribunal is making that decision at a later point in time, when it has much more information and evidence available to it, following the trial having in fact taken place. As long as it maintains its focus on the question of how things would have looked at the time when the claim began, it may and should take account of any*

> *information it has gained and evidence it has seen by virtue of having heard the case, that may properly cast light back on that question. But it should not have regard to information or evidence which would not have been available at that earlier time."*

18. I also note the judgment in **Lodwick v. Southward LBC [2004] ICR 884** and particularly paragraph 26 of that judgment:

> *"While referring to the weakness of the claims the tribunal did not find that the proceedings were misconceived within the meaning of the Rule. Moreover as Sir Hugh Griffiths stated in E.T Marler Limited v. Robertson [1974] ICR 72, "ordinary experience of life frequently teaches us that that which is plain for all to see once the dust from the battle has subsided was far from clear to the combatants when they took up arms." To order costs in the Tribunal is an exceptional course of action and the reason for and the basis of an order should be specified clearly."*

19. Where a party seeking costs makes out one or more of the grounds for costs to be awarded, then the Tribunal must consider whether to award costs. This consideration requires the Tribunal to exercise a discretion. There is no finite list of matters that Tribunals must take into account when exercising this discretion, and the relevant importance of various factors will depend on the particular circumstances of the case. In the case of Barnsley MBC v. Yerrakalva [2011] EWCA Civ 1255 the Court of Appeal said this:-.

> *"On matters of discretion an earlier case only stands as authority for what are or what are not the principles governing the discretion and serving only as a broad steer on the factors covered by the paramount principle of relevance. A costs decision in one case will not in most cases predetermine the outcome of a costs application in another case: the facts of the cases will be different as will be the interaction of the relevant factors with one another and the varying weight to be attached to them."*

20. In the 2012 case of AQ Limited v. Mr A J Holden [2012] UKEAT/0021/12 ("AQ Limited") the Employment Appeal Tribunal noted the following in relation to costs applications against litigants in person:-

> *32. The threshold tests in rule 40(3) are the same whether a litigant is or is not professionally represented. The application of those tests may, however, must take into account whether a litigant is professionally represented. A tribunal cannot and should not judge a litigant in person by the standards of a professional representative. Lay people are entitled to represent themselves in tribunals; and, since legal aid is not available and they will not usually recover costs if they are successful, it is inevitable that many lay people will represent*

> *themselves. Justice requires that tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life. As Mr Davies submitted, lay people are likely to lack the objectivity and knowledge of law and practice brought by a professional legal adviser. Tribunals must bear this in mind when assessing the threshold tests in rule 40(3). Further, even if the threshold tests for an order for costs are met, the Tribunal has discretion whether to make an order. This discretion will be exercised having regard to all the circumstances. It is not irrelevant that a lay person may have brought proceedings with little or no access to specialist help and advice.*
>
> *33. This is not to say that lay people are immune from orders for costs: far from it, as the cases make clear. Some litigants in person are found to have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity.*

21. That judgment considered an Employment Tribunal's refusal to make a costs order under the previous version of the Tribunal rules (2004) which is why there is a reference to rule 40(3) rather than rule 76. However, the principles noted in the extract above in relation to litigants in person remain relevant.

22. When considering whether a claim had any reasonable prospects of success (for the purposes of Rule 76(1)(b)) Tribunals are required to assess this objectively (see for example Hamilton-Jones v. Black EATS/0047/04). Where a claim, assessed objectively, has no reasonable prospects of success, it is irrelevant (for the purposes of rule 76(1)(b)) that the claim has been brought by a litigant in person. However, and as made clear by the AQ Limited case, the fact that the claim was brought by a litigant in person may be relevant when the tribunal goes on to consider whether to make a costs order once the threshold of 76(1)(b) has been met.

23. The respondent's application for costs is, in part, made on the basis that the claimant has engaged in vexatious conduct. In the 1974 case of ET Marler v. Robertson the National Industrial Relations Court included the following description of vexatious conduct in Tribunal litigation

> *"If an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive, he acts vexatiously, and likewise abuses the procedure."*

24. In the more recent case of AG v. Barker [2000] 1 FLR 759 (not an employment case but cited by the Court of Appeal in the case of John Scott v. Sir Bob Russell MP [2013] EWCA Civ 1432 – an appeal against a costs order made by an Employment Tribunal) Lord Bingham LCJ stated:

> *"[T]he 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, 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."*

25. It is not uncommon for an offer of a financial settlement to include a notification, that an application for costs will be made if the offer is rejected and the case pursued. In this case, there was no offer of a financial payment. Even so it was an offer of settlement as it provided the claimant with an opportunity to withdraw her claim without adverse financial consequences. These types of letters are sometimes called "Calderbank" letters.

26. In other jurisdictions a Calderbank letter can be an effective tactic, ensuring that a party rejecting a financial settlement has some confidence that he or she will recover more than was offered at a trial. "Calderbank" letters do not lead to a successful costs application in Employment Tribunals, in the event that the party rejecting the offer does not succeed at a full Tribunal hearing. It is Rule 76 which sets out the circumstances in which costs orders may be made. However, Tribunals can take these types of letters into account in appropriate circumstances when applying Rule 76 (see for example Anderson v. Cheltenham & Gloucester plc UKEAT/0221/13).

Analysis and Conclusion

Did the claims have no reasonable prospects of success?

27. The claims were issued well out of time. The complaints under the Employment Rights Act were bound to fail on the time limit point alone. The evidence that the claimant had available before issuing his claim would (or should) have made clear to him that any argument that it had not been reasonably practicable for him to have issued his claim in time was hopeless.

28. The complaints under the Equality Act 2010 require a Tribunal to exercise its discretion on just and equitable grounds. Whilst, it was very unlikely that the claimant would have been able to convince a Tribunal to exercise its discretion in the claimant's favour in this case, the fact that the time limit issue is subject to that discretion means that it was not known at the commencement of proceedings that the claimant's position was entirely hopeless; very difficult but not entirely hopeless.

Was the claimant's conduct unreasonable or vexatious?

29. I make a distinction here between the claimant's conduct prior to proceedings being issued – (for example the various and repeated threats of litigation made to the respondent's chair) and the conduct that is specifically referred to by the respondent for the purposes of this costs application – which is the conduct of bringing these proceedings so far out of time. The conclusion in relation to unreasonable conduct really follows the conclusion in relation to reasonable prospects of success. It is unreasonable conduct to bring proceedings that have no reasonable prospects of success where, as here, the claimant had available information knowing how hopeless his argument would be under the reasonably practicable test in the Employment Rights Act.

30. The respondent states that in bringing the proceedings, the claimant's conduct was vexatious as well as unreasonable but does not develop this argument further. As I have found that, in relation to the complaints under the Employment Rights Act 1996, the conduct meets the threshold of unreasonable, I have not considered it further.

Should costs be awarded?

31. As the respondent has shown that the threshold under Rules 76 a and b have been met, it is necessary for me to go on to consider whether a costs order should be made. It is at this stage that I have considered and reached a decision about the various points raised by the claimant (other than ability to pay). I deal with each below.

32. The respondent's application for costs cannot be reasonably interpreted as a sign of contempt for the claimant. The Rules provide for an application to be made under certain restricted circumstances and I have found that those circumstances apply. The application is of course most unwelcome as far as the claimant is concerned. However, he should be in no doubt that this application for costs is entirely reasonable. It would perhaps have been more surprising if there had been no application for costs.

33. Having considered the written record of the July hearing, I do not accept that the claimant could reasonably have left that hearing understanding that there would be no costs implications if he proceeded to the hearing in November. Paragraph 24 (quoted above) makes clear that the respondent might write to the claimant in advance of the November hearing to tell him it would make an application for costs at the hearing. The Judge warned the claimant about the potential for this application. He had plenty of time to consider his position and decide whether to proceed.

34. In these circumstances and subject to consideration of the claimant's ability to pay, I have decided that an award of costs should be made. However, the award should reflect my findings in relation to reasonable prospects of success. Only part of the costs claimed should be awarded.

Ability to Pay.

35. Rule 84 provides that I may have regard to the claimant's ability to pay. By emails dated 20 November 2023, the claimant provided some details about his financial means. He summarises his position by saying *"at present I have no means to pay any amount if sanctioned."* I do not repeat in this public judgment the claimant's personal circumstances, but I have taken them in to account.

36. I accept that it will not be easy for the claimant to make pay costs, but I have decided that it is in the interests of justice to award some costs. The claimant has over many years threatened various legal actions against the respondent. The threats appear to have culminated in these Tribunal proceedings. It is apparent from correspondence which was included in the bundle used at the hearing, that the claimant was aware of the legal tests that would be applied. He knew that he was pursing complaints, some of which were very difficult indeed and some that were entirely hopeless. Despite this and the warning from the Judge at the preliminary hearing stage, he persisted.

37. The claimant must be in no doubt that he cannot pursue hopeless legal claims, without consequence. Costs have been necessarily incurred in responding to the claim. The costs now sought are reasonable. Initially the respondent had told the claimant that costs of some £4220 would be claimed. The claim now made is of £1408.

Conclusion

38. Taking in to account my findings about reasonable prospects of success and having regard to the information provided by the claimant in terms of his ability to pay, I have decided that the claimant must make a payment of **£400** towards the respondent's costs.

39. I have decided that the claimant must make payment made within 28 days rather than the period of 14 days that is generally applied under Rule 66.

Employment Judge Leach
Date: 28 December 2023

SENT TO THE PARTIES ON
4 January 2024

FOR THE TRIBUNAL OFFICE