EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
1. Mr S D'Auvergne 5. Mr P Coward	**v**	Metroline Travel Limited

Heard at: Watford by CVP
On: 15 December 2023
Before: Employment Judge R Lewis

Appearances
For the Claimants: C1 In person, C5 no attendance or representation
For the Respondent: Ms H Norris, solicitor

JUDGMENT

1. The respondent's application for a costs order against Mr D'Auvergne is upheld, and he is ordered to pay to the respondent costs of £2,500.00.

2. The respondent's application for a costs order against Mr Coward is refused.

REASONS

1. Ms Norris asked for written reasons after judgment had been given.

2. This was the costs hearing listed after I struck out these claims on 21 August 2023 and issued a case management order in respect of this hearing.

3. At the August hearing, Ms Norris advised that she wished to apply for costs against all five original claimants. At the start of this hearing, she advised that the respondent had compromised its application against the other three former claimants, and did not pursue any application against any of them today.

4. Mr Coward did not attend and was not represented. Mr D'Auvergne said that he could speak on his behalf but was not a formal representative. Later in the hearing he said that he had last spoken to Mr Coward at about the

time of the lockdown, which I take to be in advance of presentation of the ET1 on 8 June 2020, and therefore some 3 ½ years before this hearing.

5. I was satisfied that Mr Coward had been made aware of this hearing, through information provided to him at his home address by the respondent. The ET1 did not contain a telephone number or email address for him, and Mr D'Auvergne said that Mr Coward is in poor health, and has not responded to any recent attempts by Mr D'Auvergne to make contact with him. In those circumstances, it did not seem to me that the tribunal was required to take more steps in accordance with Rule 47, and I was able to proceed.

6. Ms Norris had prepared an extended bundle, and a written application. Mr D'Auvergne confirmed that he had received both. Ms Norris gave oral submissions. I offered Mr D'Auvergne a short adjournment to enable him to prepare his reply, but he said that that was not necessary and replied straight away. After an adjournment, I gave judgment.

7. Ms Norris' submission followed two broad strands. One was the merits strand. She submitted that it was evident that from the outset this claim had had no prospect of success, because it was an attempt to relitigate the claims heard and decided by Judge Skehan, as well as being based on a significant misunderstanding of TUPE and being several years out of time in part at least.

8. Related to that strand was Ms Norris' submission that the respondent had throughout made these points directly and clearly to the claimants, so that they might take advice and understand the weakness of their position. She referred not just to the pleadings and skeletons, but to correspondence, and a number of offers of a "drop hands" arrangement.

9. The second and related strand was that the proceedings had, in Ms Norris' submission, been conducted unreasonably by Mr D'Auvergne on behalf of all the claimants. Ms Norris meticulously identified a history of non-cooperation and prevarication on his part, which she submitted constituted unreasonable conduct, beyond the usual difficulties of a litigant in person. In particular, she submitted that the difficulties had continued even after the claimants were professionally represented by solicitors.

10. She submitted that it was overall in the interests of justice to make an award.

11. Mr D'Auvergne in reply insisted that the fundamental claim heard and decided against the claimants by Judge Skehan was well founded, and that transferred drivers were still today not being paid their due entitlement. He said that it had been 'proven' that there was a shortfall in pay, and that his union had advised him that he had the right to bring a second claim. The former remark was simply wrong; and the latter, in labstract, was a statement of the obvious.

12. He had thought that the guidance which I expressed on 4 January 2023 and which Ms Norris set out in an email to him of 5 January 2023, had related to the claim against Arriva only and not to the totality of the claim. I do not agree that that was a reasonable interpretation either of what I said or of Ms Norris' written summary of my remarks.

13. He accepted that there had been shortcomings in the conduct of his former solicitors, which he attributed to "below par" communication with the solicitors whom he had for a period instructed.

14. He had produced no information or evidence about means (as provided for in my case management order of August) but said that he had no issue with payment and referred to a monthly figure (I explained that I had no power to order instalment payments).

15. He had no separate information to give by way of reply on behalf of Mr Coward.

16. I deal briefly with Mr Coward's position first.

17. It appears that the claimant had Mr Coward's authority to name him on the claim form, and that he got this authority at some point late in the lockdown and before presenting the claim on 8 June 2020. Thereafter I have no evidence whatsoever of anything said or done by Mr Coward as an individual. The tribunal's and respondent's sole channel of communication with him, such as it was, was Mr D'Auvergne. I have no evidence of communications between Mr D'Auvergne and Mr Coward. I find that any advice which Mr D'Auvergne gave to Mr Coward about any aspect of law or procedure was probably wrong, and certainly distorted by Mr D'Auvergne's unshakeable conviction that he had been wronged.

18. Although it was plainly unreasonable of Mr Coward to present a claim for unfair dismissal some years after dismissal, I can go no further in any analysis of his conduct. The tribunal strikes out many cases which are out of time without making a finding of unreasonable conduct, or making an award of costs. I do not have sufficient material to find that as an individual Mr Coward has brought or conducted the proceedings unreasonably. In particular, I am not prepared to render him liable in costs for Mr D'Auvergne's faults and failures as a representative. I do not therefore go on to weigh up the interests of justice in the application against him. I decline to make any award for costs against him.

19. I now turn to discussion of the application against Mr D'Auvergne.

20. In my reasons of 21 August 2023 (which might usefully be read with these reasons) I set out my understanding of the claimant's case on underpayment which was put to me that day by his counsel. Mr D'Auvergne remains passionately committed to the proposition that the drivers on the 168 route who transferred from Arriva to Metroline were and remain significantly underpaid. Nothing in the experience of this litigation, including access to the advice of at least two barristers, one solicitor of whom I heard,

the previous lengthy hearings before Judge Skehan, the three case management hearings which preceded that hearing, the judgement of the EAT, and my strike-out judgment, have served to convince him otherwise.

21. I have noted that Mr D'Auvergne's understanding of the law and procedure of the tribunal is limited, and that on occasions when this has been pointed out, he has been quick to attribute to his union or his legal advisors any misunderstanding or mistake.

22. In approaching this application I must, in accordance with Rule 76, address three questions. The first is whether the claim has been brought or conducted in a manner which meets the definition in Rule 76(1) of, broadly, unreasonable conduct. The second is whether it is in the interests of justice to make an award of costs. The third is in light of any financial information I am given about the claimant's ability to pay, how much the award of costs should be.

23. I find that the claim was brought unreasonably. It was misconceived. I say so for the following reasons. First, it was a reiteration of a claim which had been fought and lost, and I refer to my own reasons of 21 August 2023. Secondly, to the extent that the claimant thought that it was a claim brought under TUPE, which related directly to breach of rights under TUPE, it was brought over four years out of time. Primary limitation expired on 25 December 2015. The claim was presented on 8 June 2020. Thirdly, it was misconceived, because it purported to exercise rights which were not those of the claimants to exercise (eg as to employee liability information). On this strand of submission, I find that the test of rule 76(1) has been met.

24. Ms Norris' frustration was clear when she made submissions in relation to the second strand, unreasonable conduct of the proceedings. That is a matter which I approach with very great caution. Whatever the burdens and frustrations of an irritating case or opponent, no member of the public is expected to be a lawyer, or should be penalised merely for ignorance or misunderstanding of the law. The tribunal cannot compel a litigant in person to take professional advice, or to follow it if taken, and has no control over the source or quality of any advice. The techniques of litigation involve a set of specialist skills which we cannot reasonably expect of the lay public. Furthermore, as Ms Norris generously admitted, however well put and cogent the submissions of a respondent may be, there is no obligation on a claimant to accept his opponent's submissions.

25. Ms Norris dealt at length with the poor use of time shown by the claimant and his advisors in the conduct of these proceedings, including last minute preparation (of which there was a striking example before me on 21 August), failure to engage with correspondence, and conduct which appeared at times to show gaming behaviour.

26. I recognise the burdens, irritations and frustration caused, but I would set a very high bar indeed before finding that conduct of litigation by a litigant in person met the threshold of Rule 76(1), as opposed to being the product of ignorance, inexperience, and what Lord Justice Sedley in Blockbuster

Entertainment Ltd v James 2006 EWCA Civ 684 may have had in mind when he commented that the doors of the tribunal are open to the difficult as well as the compliant.

27. I therefore do not find that the proceedings have been conducted unreasonably for the purposes of rule 76 in any respect save the following.

28. At the first preliminary hearing which came before me on 4 January 2023, an adjournment was granted, albeit on limited medical information. As the matter was not going to proceed, I took the opportunity to express guidance to the claimants, who were then in person. I was of course not aware that Ms Norris typed the guidance as I gave it, and then wrote the next day to Mr D'Auvergne to send him a copy of what she had typed. Having read her summary, I accept that while it is not a transcript, it is broadly accurate; I can see that it reflects my own speaking style.

29. The importance of that development is that by 5 January, the claimant had in writing a judge's provisional overview of the difficulties of the case. As this came from an independent and impartial source, with some experience of these matters, it would be reasonable for the claimant to attach greater weight to it than he attached to what had been said or written by the respondent or its representative. I noted in particular that Ms Norris notes my saying,

> "There's a basic legal rule. You get one chance, and one chance only to fight a case.. You don't get the chance to ask me or another judge to make another decision about the same point."

30. My recollection is that in reply, Mr D'Auvergne said that the present case was "not the same case" as that which had been decided by Judge Skehan. Seven months later, when Mr Wareing was asked to analyse the present case, he first accepted my offer of an adjournment to take specific instructions, after which his reply was that that was exactly the position: I repeat what is written in my August reasons.

31. In the same email of 5 January, Ms Norris repeated on behalf of the respondent the offer to the claimants of a drop hands deal.

32. The claimant was legally represented from February 2023 onwards. I infer that Mr D'Auvergne made very sure that Ms Norris' email was among the papers given to the solicitor.

33. In my judgment, the claimant conducted the case unreasonably by pursuing matters to the hearing of 21 August in the face of Ms Norris' email of 5 January which both placed on record my own guidance, and repeated a drop hands proposal. I therefore find that in that respect the test under Rule 76(1) has been met.

34. When I come to consider the interests of justice, I must bear in mind the appropriate balance. The tribunal must allow access to justice to the public; but it must at the same time safeguard respondents against unmeritorious

claims, and do what it can to ensure that the limited resources of the tribunal are well used.

35. In all the circumstances set out above, it seems to me that the balance in this case is firmly in favour of the respondent, and that the interests of justice favour an award of costs being made.

36. Ms Norris had prepared schedules in which she broke down the total expenditure of costs as claims against each of the former claimants. The sum claimed against Mr D'Auvergne was £3935, which Ms Norris said did not include an element in respect of today's hearing.

37. Mr D'Auvergne said in reply that he had no issue with paying costs if an award were made, but asked to do so by instalments. Despite the case management order of 21 August, Mr D'Auvergne had given the tribunal no information about means or ability to pay. Ms Norris said that she understood that he is working in London as a bus driver.

38. Ms Norris supported her application with a costs summary at an hourly rate of £300 exclusive of VAT. This was an appropriate case to award a fixed sum, without undertaking any form of detailed assessment.

39. I attached no weight to the claimant's failure to challenge any item in the costs summary, or to challenge the work done or the rate claimed: all of this was consistent with his lack of understanding and experience.

40. I did not award the full amount claimed. In the exercise of discretion it seemed to me first that I had not agreed with all the points upon which Ms Norris had made her application; and secondly, even in the absence of information from the claimant, I am entitled to rely on the mismatch in reality between the weekly earnings of a bus driver (where I understand Mr D'Auvergne still to be employed) and the hourly rate of a solicitor. I cannot disregard the reality that two or three hours of a solicitor's time may represent the gross weekly pay of a driver; and I therefore award what seems to me a fair and reasonable sum, albeit not the entire amount claimed.

_____

Employment Judge R Lewis

Date: 29 December 2023

Sent to the parties on: 25 January 2024

For the Tribunal Office

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
1. Mr S D'Auvergne 5. Mr P Coward	**v**	Metroline Travel Limited

Heard at: Watford by CVP
On: 15 December 2023
Before: Employment Judge R Lewis

Appearances
For the Claimants: C1 In person, C5 no attendance or representation
For the Respondent: Ms H Norris, solicitor

JUDGMENT

1. The respondent's application for a costs order against Mr D'Auvergne is upheld, and he is ordered to pay to the respondent costs of £2,500.00.

2. The respondent's application for a costs order against Mr Coward is refused.

REASONS

1. Ms Norris asked for written reasons after judgment had been given.

2. This was the costs hearing listed after I struck out these claims on 21 August 2023 and issued a case management order in respect of this hearing.

3. At the August hearing, Ms Norris advised that she wished to apply for costs against all five original claimants. At the start of this hearing, she advised that the respondent had compromised its application against the other three former claimants, and did not pursue any application against any of them today.

4. Mr Coward did not attend and was not represented. Mr D'Auvergne said that he could speak on his behalf but was not a formal representative. Later in the hearing he said that he had last spoken to Mr Coward at about the

time of the lockdown, which I take to be in advance of presentation of the ET1 on 8 June 2020, and therefore some 3 ½ years before this hearing.

5. I was satisfied that Mr Coward had been made aware of this hearing, through information provided to him at his home address by the respondent. The ET1 did not contain a telephone number or email address for him, and Mr D'Auvergne said that Mr Coward is in poor health, and has not responded to any recent attempts by Mr D'Auvergne to make contact with him. In those circumstances, it did not seem to me that the tribunal was required to take more steps in accordance with Rule 47, and I was able to proceed.

6. Ms Norris had prepared an extended bundle, and a written application. Mr D'Auvergne confirmed that he had received both. Ms Norris gave oral submissions. I offered Mr D'Auvergne a short adjournment to enable him to prepare his reply, but he said that that was not necessary and replied straight away. After an adjournment, I gave judgment.

7. Ms Norris' submission followed two broad strands. One was the merits strand. She submitted that it was evident that from the outset this claim had had no prospect of success, because it was an attempt to relitigate the claims heard and decided by Judge Skehan, as well as being based on a significant misunderstanding of TUPE and being several years out of time in part at least.

8. Related to that strand was Ms Norris' submission that the respondent had throughout made these points directly and clearly to the claimants, so that they might take advice and understand the weakness of their position. She referred not just to the pleadings and skeletons, but to correspondence, and a number of offers of a "drop hands" arrangement.

9. The second and related strand was that the proceedings had, in Ms Norris' submission, been conducted unreasonably by Mr D'Auvergne on behalf of all the claimants. Ms Norris meticulously identified a history of non-cooperation and prevarication on his part, which she submitted constituted unreasonable conduct, beyond the usual difficulties of a litigant in person. In particular, she submitted that the difficulties had continued even after the claimants were professionally represented by solicitors.

10. She submitted that it was overall in the interests of justice to make an award.

11. Mr D'Auvergne in reply insisted that the fundamental claim heard and decided against the claimants by Judge Skehan was well founded, and that transferred drivers were still today not being paid their due entitlement. He said that it had been 'proven' that there was a shortfall in pay, and that his union had advised him that he had the right to bring a second claim. The former remark was simply wrong; and the latter, in labstract, was a statement of the obvious.

12. He had thought that the guidance which I expressed on 4 January 2023 and which Ms Norris set out in an email to him of 5 January 2023, had related to the claim against Arriva only and not to the totality of the claim. I do not agree that that was a reasonable interpretation either of what I said or of Ms Norris' written summary of my remarks.

13. He accepted that there had been shortcomings in the conduct of his former solicitors, which he attributed to "below par" communication with the solicitors whom he had for a period instructed.

14. He had produced no information or evidence about means (as provided for in my case management order of August) but said that he had no issue with payment and referred to a monthly figure (I explained that I had no power to order instalment payments).

15. He had no separate information to give by way of reply on behalf of Mr Coward.

16. I deal briefly with Mr Coward's position first.

17. It appears that the claimant had Mr Coward's authority to name him on the claim form, and that he got this authority at some point late in the lockdown and before presenting the claim on 8 June 2020. Thereafter I have no evidence whatsoever of anything said or done by Mr Coward as an individual. The tribunal's and respondent's sole channel of communication with him, such as it was, was Mr D'Auvergne. I have no evidence of communications between Mr D'Auvergne and Mr Coward. I find that any advice which Mr D'Auvergne gave to Mr Coward about any aspect of law or procedure was probably wrong, and certainly distorted by Mr D'Auvergne's unshakeable conviction that he had been wronged.

18. Although it was plainly unreasonable of Mr Coward to present a claim for unfair dismissal some years after dismissal, I can go no further in any analysis of his conduct. The tribunal strikes out many cases which are out of time without making a finding of unreasonable conduct, or making an award of costs. I do not have sufficient material to find that as an individual Mr Coward has brought or conducted the proceedings unreasonably. In particular, I am not prepared to render him liable in costs for Mr D'Auvergne's faults and failures as a representative. I do not therefore go on to weigh up the interests of justice in the application against him. I decline to make any award for costs against him.

19. I now turn to discussion of the application against Mr D'Auvergne.

20. In my reasons of 21 August 2023 (which might usefully be read with these reasons) I set out my understanding of the claimant's case on underpayment which was put to me that day by his counsel. Mr D'Auvergne remains passionately committed to the proposition that the drivers on the 168 route who transferred from Arriva to Metroline were and remain significantly underpaid. Nothing in the experience of this litigation, including access to the advice of at least two barristers, one solicitor of whom I heard,

the previous lengthy hearings before Judge Skehan, the three case management hearings which preceded that hearing, the judgement of the EAT, and my strike-out judgment, have served to convince him otherwise.

21. I have noted that Mr D'Auvergne's understanding of the law and procedure of the tribunal is limited, and that on occasions when this has been pointed out, he has been quick to attribute to his union or his legal advisors any misunderstanding or mistake.

22. In approaching this application I must, in accordance with Rule 76, address three questions. The first is whether the claim has been brought or conducted in a manner which meets the definition in Rule 76(1) of, broadly, unreasonable conduct. The second is whether it is in the interests of justice to make an award of costs. The third is in light of any financial information I am given about the claimant's ability to pay, how much the award of costs should be.

23. I find that the claim was brought unreasonably. It was misconceived. I say so for the following reasons. First, it was a reiteration of a claim which had been fought and lost, and I refer to my own reasons of 21 August 2023. Secondly, to the extent that the claimant thought that it was a claim brought under TUPE, which related directly to breach of rights under TUPE, it was brought over four years out of time. Primary limitation expired on 25 December 2015. The claim was presented on 8 June 2020. Thirdly, it was misconceived, because it purported to exercise rights which were not those of the claimants to exercise (eg as to employee liability information). On this strand of submission, I find that the test of rule 76(1) has been met.

24. Ms Norris' frustration was clear when she made submissions in relation to the second strand, unreasonable conduct of the proceedings. That is a matter which I approach with very great caution. Whatever the burdens and frustrations of an irritating case or opponent, no member of the public is expected to be a lawyer, or should be penalised merely for ignorance or misunderstanding of the law. The tribunal cannot compel a litigant in person to take professional advice, or to follow it if taken, and has no control over the source or quality of any advice. The techniques of litigation involve a set of specialist skills which we cannot reasonably expect of the lay public. Furthermore, as Ms Norris generously admitted, however well put and cogent the submissions of a respondent may be, there is no obligation on a claimant to accept his opponent's submissions.

25. Ms Norris dealt at length with the poor use of time shown by the claimant and his advisors in the conduct of these proceedings, including last minute preparation (of which there was a striking example before me on 21 August), failure to engage with correspondence, and conduct which appeared at times to show gaming behaviour.

26. I recognise the burdens, irritations and frustration caused, but I would set a very high bar indeed before finding that conduct of litigation by a litigant in person met the threshold of Rule 76(1), as opposed to being the product of ignorance, inexperience, and what Lord Justice Sedley in Blockbuster

Entertainment Ltd v James 2006 EWCA Civ 684 may have had in mind when he commented that the doors of the tribunal are open to the difficult as well as the compliant.

27. I therefore do not find that the proceedings have been conducted unreasonably for the purposes of rule 76 in any respect save the following.

28. At the first preliminary hearing which came before me on 4 January 2023, an adjournment was granted, albeit on limited medical information. As the matter was not going to proceed, I took the opportunity to express guidance to the claimants, who were then in person. I was of course not aware that Ms Norris typed the guidance as I gave it, and then wrote the next day to Mr D'Auvergne to send him a copy of what she had typed. Having read her summary, I accept that while it is not a transcript, it is broadly accurate; I can see that it reflects my own speaking style.

29. The importance of that development is that by 5 January, the claimant had in writing a judge's provisional overview of the difficulties of the case. As this came from an independent and impartial source, with some experience of these matters, it would be reasonable for the claimant to attach greater weight to it than he attached to what had been said or written by the respondent or its representative. I noted in particular that Ms Norris notes my saying,

> "There's a basic legal rule. You get one chance, and one chance only to fight a case.. You don't get the chance to ask me or another judge to make another decision about the same point."

30. My recollection is that in reply, Mr D'Auvergne said that the present case was "not the same case" as that which had been decided by Judge Skehan. Seven months later, when Mr Wareing was asked to analyse the present case, he first accepted my offer of an adjournment to take specific instructions, after which his reply was that that was exactly the position: I repeat what is written in my August reasons.

31. In the same email of 5 January, Ms Norris repeated on behalf of the respondent the offer to the claimants of a drop hands deal.

32. The claimant was legally represented from February 2023 onwards. I infer that Mr D'Auvergne made very sure that Ms Norris' email was among the papers given to the solicitor.

33. In my judgment, the claimant conducted the case unreasonably by pursuing matters to the hearing of 21 August in the face of Ms Norris' email of 5 January which both placed on record my own guidance, and repeated a drop hands proposal. I therefore find that in that respect the test under Rule 76(1) has been met.

34. When I come to consider the interests of justice, I must bear in mind the appropriate balance. The tribunal must allow access to justice to the public; but it must at the same time safeguard respondents against unmeritorious

claims, and do what it can to ensure that the limited resources of the tribunal are well used.

35. In all the circumstances set out above, it seems to me that the balance in this case is firmly in favour of the respondent, and that the interests of justice favour an award of costs being made.

36. Ms Norris had prepared schedules in which she broke down the total expenditure of costs as claims against each of the former claimants. The sum claimed against Mr D'Auvergne was £3935, which Ms Norris said did not include an element in respect of today's hearing.

37. Mr D'Auvergne said in reply that he had no issue with paying costs if an award were made, but asked to do so by instalments. Despite the case management order of 21 August, Mr D'Auvergne had given the tribunal no information about means or ability to pay. Ms Norris said that she understood that he is working in London as a bus driver.

38. Ms Norris supported her application with a costs summary at an hourly rate of £300 exclusive of VAT. This was an appropriate case to award a fixed sum, without undertaking any form of detailed assessment.

39. I attached no weight to the claimant's failure to challenge any item in the costs summary, or to challenge the work done or the rate claimed: all of this was consistent with his lack of understanding and experience.

40. I did not award the full amount claimed. In the exercise of discretion it seemed to me first that I had not agreed with all the points upon which Ms Norris had made her application; and secondly, even in the absence of information from the claimant, I am entitled to rely on the mismatch in reality between the weekly earnings of a bus driver (where I understand Mr D'Auvergne still to be employed) and the hourly rate of a solicitor. I cannot disregard the reality that two or three hours of a solicitor's time may represent the gross weekly pay of a driver; and I therefore award what seems to me a fair and reasonable sum, albeit not the entire amount claimed.

_____

Employment Judge R Lewis

Date: 29 December 2023

Sent to the parties on: 25 January 2024

For the Tribunal Office

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
1. Mr S D'Auvergne 5. Mr P Coward	**v**	Metroline Travel Limited

Heard at: Watford by CVP
On: 15 December 2023
Before: Employment Judge R Lewis

Appearances
For the Claimants: C1 In person, C5 no attendance or representation
For the Respondent: Ms H Norris, solicitor

JUDGMENT

1. The respondent's application for a costs order against Mr D'Auvergne is upheld, and he is ordered to pay to the respondent costs of £2,500.00.

2. The respondent's application for a costs order against Mr Coward is refused.

REASONS

1. Ms Norris asked for written reasons after judgment had been given.

2. This was the costs hearing listed after I struck out these claims on 21 August 2023 and issued a case management order in respect of this hearing.

3. At the August hearing, Ms Norris advised that she wished to apply for costs against all five original claimants. At the start of this hearing, she advised that the respondent had compromised its application against the other three former claimants, and did not pursue any application against any of them today.

4. Mr Coward did not attend and was not represented. Mr D'Auvergne said that he could speak on his behalf but was not a formal representative. Later in the hearing he said that he had last spoken to Mr Coward at about the

time of the lockdown, which I take to be in advance of presentation of the ET1 on 8 June 2020, and therefore some 3 ½ years before this hearing.

5. I was satisfied that Mr Coward had been made aware of this hearing, through information provided to him at his home address by the respondent. The ET1 did not contain a telephone number or email address for him, and Mr D'Auvergne said that Mr Coward is in poor health, and has not responded to any recent attempts by Mr D'Auvergne to make contact with him. In those circumstances, it did not seem to me that the tribunal was required to take more steps in accordance with Rule 47, and I was able to proceed.

6. Ms Norris had prepared an extended bundle, and a written application. Mr D'Auvergne confirmed that he had received both. Ms Norris gave oral submissions. I offered Mr D'Auvergne a short adjournment to enable him to prepare his reply, but he said that that was not necessary and replied straight away. After an adjournment, I gave judgment.

7. Ms Norris' submission followed two broad strands. One was the merits strand. She submitted that it was evident that from the outset this claim had had no prospect of success, because it was an attempt to relitigate the claims heard and decided by Judge Skehan, as well as being based on a significant misunderstanding of TUPE and being several years out of time in part at least.

8. Related to that strand was Ms Norris' submission that the respondent had throughout made these points directly and clearly to the claimants, so that they might take advice and understand the weakness of their position. She referred not just to the pleadings and skeletons, but to correspondence, and a number of offers of a "drop hands" arrangement.

9. The second and related strand was that the proceedings had, in Ms Norris' submission, been conducted unreasonably by Mr D'Auvergne on behalf of all the claimants. Ms Norris meticulously identified a history of non-cooperation and prevarication on his part, which she submitted constituted unreasonable conduct, beyond the usual difficulties of a litigant in person. In particular, she submitted that the difficulties had continued even after the claimants were professionally represented by solicitors.

10. She submitted that it was overall in the interests of justice to make an award.

11. Mr D'Auvergne in reply insisted that the fundamental claim heard and decided against the claimants by Judge Skehan was well founded, and that transferred drivers were still today not being paid their due entitlement. He said that it had been 'proven' that there was a shortfall in pay, and that his union had advised him that he had the right to bring a second claim. The former remark was simply wrong; and the latter, in labstract, was a statement of the obvious.

12. He had thought that the guidance which I expressed on 4 January 2023 and which Ms Norris set out in an email to him of 5 January 2023, had related to the claim against Arriva only and not to the totality of the claim. I do not agree that that was a reasonable interpretation either of what I said or of Ms Norris' written summary of my remarks.

13. He accepted that there had been shortcomings in the conduct of his former solicitors, which he attributed to "below par" communication with the solicitors whom he had for a period instructed.

14. He had produced no information or evidence about means (as provided for in my case management order of August) but said that he had no issue with payment and referred to a monthly figure (I explained that I had no power to order instalment payments).

15. He had no separate information to give by way of reply on behalf of Mr Coward.

16. I deal briefly with Mr Coward's position first.

17. It appears that the claimant had Mr Coward's authority to name him on the claim form, and that he got this authority at some point late in the lockdown and before presenting the claim on 8 June 2020. Thereafter I have no evidence whatsoever of anything said or done by Mr Coward as an individual. The tribunal's and respondent's sole channel of communication with him, such as it was, was Mr D'Auvergne. I have no evidence of communications between Mr D'Auvergne and Mr Coward. I find that any advice which Mr D'Auvergne gave to Mr Coward about any aspect of law or procedure was probably wrong, and certainly distorted by Mr D'Auvergne's unshakeable conviction that he had been wronged.

18. Although it was plainly unreasonable of Mr Coward to present a claim for unfair dismissal some years after dismissal, I can go no further in any analysis of his conduct. The tribunal strikes out many cases which are out of time without making a finding of unreasonable conduct, or making an award of costs. I do not have sufficient material to find that as an individual Mr Coward has brought or conducted the proceedings unreasonably. In particular, I am not prepared to render him liable in costs for Mr D'Auvergne's faults and failures as a representative. I do not therefore go on to weigh up the interests of justice in the application against him. I decline to make any award for costs against him.

19. I now turn to discussion of the application against Mr D'Auvergne.

20. In my reasons of 21 August 2023 (which might usefully be read with these reasons) I set out my understanding of the claimant's case on underpayment which was put to me that day by his counsel. Mr D'Auvergne remains passionately committed to the proposition that the drivers on the 168 route who transferred from Arriva to Metroline were and remain significantly underpaid. Nothing in the experience of this litigation, including access to the advice of at least two barristers, one solicitor of whom I heard,

the previous lengthy hearings before Judge Skehan, the three case management hearings which preceded that hearing, the judgement of the EAT, and my strike-out judgment, have served to convince him otherwise.

21. I have noted that Mr D'Auvergne's understanding of the law and procedure of the tribunal is limited, and that on occasions when this has been pointed out, he has been quick to attribute to his union or his legal advisors any misunderstanding or mistake.

22. In approaching this application I must, in accordance with Rule 76, address three questions. The first is whether the claim has been brought or conducted in a manner which meets the definition in Rule 76(1) of, broadly, unreasonable conduct. The second is whether it is in the interests of justice to make an award of costs. The third is in light of any financial information I am given about the claimant's ability to pay, how much the award of costs should be.

23. I find that the claim was brought unreasonably. It was misconceived. I say so for the following reasons. First, it was a reiteration of a claim which had been fought and lost, and I refer to my own reasons of 21 August 2023. Secondly, to the extent that the claimant thought that it was a claim brought under TUPE, which related directly to breach of rights under TUPE, it was brought over four years out of time. Primary limitation expired on 25 December 2015. The claim was presented on 8 June 2020. Thirdly, it was misconceived, because it purported to exercise rights which were not those of the claimants to exercise (eg as to employee liability information). On this strand of submission, I find that the test of rule 76(1) has been met.

24. Ms Norris' frustration was clear when she made submissions in relation to the second strand, unreasonable conduct of the proceedings. That is a matter which I approach with very great caution. Whatever the burdens and frustrations of an irritating case or opponent, no member of the public is expected to be a lawyer, or should be penalised merely for ignorance or misunderstanding of the law. The tribunal cannot compel a litigant in person to take professional advice, or to follow it if taken, and has no control over the source or quality of any advice. The techniques of litigation involve a set of specialist skills which we cannot reasonably expect of the lay public. Furthermore, as Ms Norris generously admitted, however well put and cogent the submissions of a respondent may be, there is no obligation on a claimant to accept his opponent's submissions.

25. Ms Norris dealt at length with the poor use of time shown by the claimant and his advisors in the conduct of these proceedings, including last minute preparation (of which there was a striking example before me on 21 August), failure to engage with correspondence, and conduct which appeared at times to show gaming behaviour.

26. I recognise the burdens, irritations and frustration caused, but I would set a very high bar indeed before finding that conduct of litigation by a litigant in person met the threshold of Rule 76(1), as opposed to being the product of ignorance, inexperience, and what Lord Justice Sedley in Blockbuster

Entertainment Ltd v James 2006 EWCA Civ 684 may have had in mind when he commented that the doors of the tribunal are open to the difficult as well as the compliant.

27. I therefore do not find that the proceedings have been conducted unreasonably for the purposes of rule 76 in any respect save the following.

28. At the first preliminary hearing which came before me on 4 January 2023, an adjournment was granted, albeit on limited medical information. As the matter was not going to proceed, I took the opportunity to express guidance to the claimants, who were then in person. I was of course not aware that Ms Norris typed the guidance as I gave it, and then wrote the next day to Mr D'Auvergne to send him a copy of what she had typed. Having read her summary, I accept that while it is not a transcript, it is broadly accurate; I can see that it reflects my own speaking style.

29. The importance of that development is that by 5 January, the claimant had in writing a judge's provisional overview of the difficulties of the case. As this came from an independent and impartial source, with some experience of these matters, it would be reasonable for the claimant to attach greater weight to it than he attached to what had been said or written by the respondent or its representative. I noted in particular that Ms Norris notes my saying,

> "There's a basic legal rule. You get one chance, and one chance only to fight a case.. You don't get the chance to ask me or another judge to make another decision about the same point."

30. My recollection is that in reply, Mr D'Auvergne said that the present case was "not the same case" as that which had been decided by Judge Skehan. Seven months later, when Mr Wareing was asked to analyse the present case, he first accepted my offer of an adjournment to take specific instructions, after which his reply was that that was exactly the position: I repeat what is written in my August reasons.

31. In the same email of 5 January, Ms Norris repeated on behalf of the respondent the offer to the claimants of a drop hands deal.

32. The claimant was legally represented from February 2023 onwards. I infer that Mr D'Auvergne made very sure that Ms Norris' email was among the papers given to the solicitor.

33. In my judgment, the claimant conducted the case unreasonably by pursuing matters to the hearing of 21 August in the face of Ms Norris' email of 5 January which both placed on record my own guidance, and repeated a drop hands proposal. I therefore find that in that respect the test under Rule 76(1) has been met.

34. When I come to consider the interests of justice, I must bear in mind the appropriate balance. The tribunal must allow access to justice to the public; but it must at the same time safeguard respondents against unmeritorious

claims, and do what it can to ensure that the limited resources of the tribunal are well used.

35. In all the circumstances set out above, it seems to me that the balance in this case is firmly in favour of the respondent, and that the interests of justice favour an award of costs being made.

36. Ms Norris had prepared schedules in which she broke down the total expenditure of costs as claims against each of the former claimants. The sum claimed against Mr D'Auvergne was £3935, which Ms Norris said did not include an element in respect of today's hearing.

37. Mr D'Auvergne said in reply that he had no issue with paying costs if an award were made, but asked to do so by instalments. Despite the case management order of 21 August, Mr D'Auvergne had given the tribunal no information about means or ability to pay. Ms Norris said that she understood that he is working in London as a bus driver.

38. Ms Norris supported her application with a costs summary at an hourly rate of £300 exclusive of VAT. This was an appropriate case to award a fixed sum, without undertaking any form of detailed assessment.

39. I attached no weight to the claimant's failure to challenge any item in the costs summary, or to challenge the work done or the rate claimed: all of this was consistent with his lack of understanding and experience.

40. I did not award the full amount claimed. In the exercise of discretion it seemed to me first that I had not agreed with all the points upon which Ms Norris had made her application; and secondly, even in the absence of information from the claimant, I am entitled to rely on the mismatch in reality between the weekly earnings of a bus driver (where I understand Mr D'Auvergne still to be employed) and the hourly rate of a solicitor. I cannot disregard the reality that two or three hours of a solicitor's time may represent the gross weekly pay of a driver; and I therefore award what seems to me a fair and reasonable sum, albeit not the entire amount claimed.

_____

Employment Judge R Lewis

Date: 29 December 2023

Sent to the parties on: 25 January 2024

For the Tribunal Office

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
1. Mr S D'Auvergne 5. Mr P Coward	**v**	Metroline Travel Limited

Heard at: Watford by CVP
On: 15 December 2023
Before: Employment Judge R Lewis

Appearances
For the Claimants: C1 In person, C5 no attendance or representation
For the Respondent: Ms H Norris, solicitor

JUDGMENT

1. The respondent's application for a costs order against Mr D'Auvergne is upheld, and he is ordered to pay to the respondent costs of £2,500.00.

2. The respondent's application for a costs order against Mr Coward is refused.

REASONS

1. Ms Norris asked for written reasons after judgment had been given.

2. This was the costs hearing listed after I struck out these claims on 21 August 2023 and issued a case management order in respect of this hearing.

3. At the August hearing, Ms Norris advised that she wished to apply for costs against all five original claimants. At the start of this hearing, she advised that the respondent had compromised its application against the other three former claimants, and did not pursue any application against any of them today.

4. Mr Coward did not attend and was not represented. Mr D'Auvergne said that he could speak on his behalf but was not a formal representative. Later in the hearing he said that he had last spoken to Mr Coward at about the

time of the lockdown, which I take to be in advance of presentation of the ET1 on 8 June 2020, and therefore some 3 ½ years before this hearing.

5. I was satisfied that Mr Coward had been made aware of this hearing, through information provided to him at his home address by the respondent. The ET1 did not contain a telephone number or email address for him, and Mr D'Auvergne said that Mr Coward is in poor health, and has not responded to any recent attempts by Mr D'Auvergne to make contact with him. In those circumstances, it did not seem to me that the tribunal was required to take more steps in accordance with Rule 47, and I was able to proceed.

6. Ms Norris had prepared an extended bundle, and a written application. Mr D'Auvergne confirmed that he had received both. Ms Norris gave oral submissions. I offered Mr D'Auvergne a short adjournment to enable him to prepare his reply, but he said that that was not necessary and replied straight away. After an adjournment, I gave judgment.

7. Ms Norris' submission followed two broad strands. One was the merits strand. She submitted that it was evident that from the outset this claim had had no prospect of success, because it was an attempt to relitigate the claims heard and decided by Judge Skehan, as well as being based on a significant misunderstanding of TUPE and being several years out of time in part at least.

8. Related to that strand was Ms Norris' submission that the respondent had throughout made these points directly and clearly to the claimants, so that they might take advice and understand the weakness of their position. She referred not just to the pleadings and skeletons, but to correspondence, and a number of offers of a "drop hands" arrangement.

9. The second and related strand was that the proceedings had, in Ms Norris' submission, been conducted unreasonably by Mr D'Auvergne on behalf of all the claimants. Ms Norris meticulously identified a history of non-cooperation and prevarication on his part, which she submitted constituted unreasonable conduct, beyond the usual difficulties of a litigant in person. In particular, she submitted that the difficulties had continued even after the claimants were professionally represented by solicitors.

10. She submitted that it was overall in the interests of justice to make an award.

11. Mr D'Auvergne in reply insisted that the fundamental claim heard and decided against the claimants by Judge Skehan was well founded, and that transferred drivers were still today not being paid their due entitlement. He said that it had been 'proven' that there was a shortfall in pay, and that his union had advised him that he had the right to bring a second claim. The former remark was simply wrong; and the latter, in labstract, was a statement of the obvious.

12. He had thought that the guidance which I expressed on 4 January 2023 and which Ms Norris set out in an email to him of 5 January 2023, had related to the claim against Arriva only and not to the totality of the claim. I do not agree that that was a reasonable interpretation either of what I said or of Ms Norris' written summary of my remarks.

13. He accepted that there had been shortcomings in the conduct of his former solicitors, which he attributed to "below par" communication with the solicitors whom he had for a period instructed.

14. He had produced no information or evidence about means (as provided for in my case management order of August) but said that he had no issue with payment and referred to a monthly figure (I explained that I had no power to order instalment payments).

15. He had no separate information to give by way of reply on behalf of Mr Coward.

16. I deal briefly with Mr Coward's position first.

17. It appears that the claimant had Mr Coward's authority to name him on the claim form, and that he got this authority at some point late in the lockdown and before presenting the claim on 8 June 2020. Thereafter I have no evidence whatsoever of anything said or done by Mr Coward as an individual. The tribunal's and respondent's sole channel of communication with him, such as it was, was Mr D'Auvergne. I have no evidence of communications between Mr D'Auvergne and Mr Coward. I find that any advice which Mr D'Auvergne gave to Mr Coward about any aspect of law or procedure was probably wrong, and certainly distorted by Mr D'Auvergne's unshakeable conviction that he had been wronged.

18. Although it was plainly unreasonable of Mr Coward to present a claim for unfair dismissal some years after dismissal, I can go no further in any analysis of his conduct. The tribunal strikes out many cases which are out of time without making a finding of unreasonable conduct, or making an award of costs. I do not have sufficient material to find that as an individual Mr Coward has brought or conducted the proceedings unreasonably. In particular, I am not prepared to render him liable in costs for Mr D'Auvergne's faults and failures as a representative. I do not therefore go on to weigh up the interests of justice in the application against him. I decline to make any award for costs against him.

19. I now turn to discussion of the application against Mr D'Auvergne.

20. In my reasons of 21 August 2023 (which might usefully be read with these reasons) I set out my understanding of the claimant's case on underpayment which was put to me that day by his counsel. Mr D'Auvergne remains passionately committed to the proposition that the drivers on the 168 route who transferred from Arriva to Metroline were and remain significantly underpaid. Nothing in the experience of this litigation, including access to the advice of at least two barristers, one solicitor of whom I heard,

the previous lengthy hearings before Judge Skehan, the three case management hearings which preceded that hearing, the judgement of the EAT, and my strike-out judgment, have served to convince him otherwise.

21. I have noted that Mr D'Auvergne's understanding of the law and procedure of the tribunal is limited, and that on occasions when this has been pointed out, he has been quick to attribute to his union or his legal advisors any misunderstanding or mistake.

22. In approaching this application I must, in accordance with Rule 76, address three questions. The first is whether the claim has been brought or conducted in a manner which meets the definition in Rule 76(1) of, broadly, unreasonable conduct. The second is whether it is in the interests of justice to make an award of costs. The third is in light of any financial information I am given about the claimant's ability to pay, how much the award of costs should be.

23. I find that the claim was brought unreasonably. It was misconceived. I say so for the following reasons. First, it was a reiteration of a claim which had been fought and lost, and I refer to my own reasons of 21 August 2023. Secondly, to the extent that the claimant thought that it was a claim brought under TUPE, which related directly to breach of rights under TUPE, it was brought over four years out of time. Primary limitation expired on 25 December 2015. The claim was presented on 8 June 2020. Thirdly, it was misconceived, because it purported to exercise rights which were not those of the claimants to exercise (eg as to employee liability information). On this strand of submission, I find that the test of rule 76(1) has been met.

24. Ms Norris' frustration was clear when she made submissions in relation to the second strand, unreasonable conduct of the proceedings. That is a matter which I approach with very great caution. Whatever the burdens and frustrations of an irritating case or opponent, no member of the public is expected to be a lawyer, or should be penalised merely for ignorance or misunderstanding of the law. The tribunal cannot compel a litigant in person to take professional advice, or to follow it if taken, and has no control over the source or quality of any advice. The techniques of litigation involve a set of specialist skills which we cannot reasonably expect of the lay public. Furthermore, as Ms Norris generously admitted, however well put and cogent the submissions of a respondent may be, there is no obligation on a claimant to accept his opponent's submissions.

25. Ms Norris dealt at length with the poor use of time shown by the claimant and his advisors in the conduct of these proceedings, including last minute preparation (of which there was a striking example before me on 21 August), failure to engage with correspondence, and conduct which appeared at times to show gaming behaviour.

26. I recognise the burdens, irritations and frustration caused, but I would set a very high bar indeed before finding that conduct of litigation by a litigant in person met the threshold of Rule 76(1), as opposed to being the product of ignorance, inexperience, and what Lord Justice Sedley in Blockbuster

Entertainment Ltd v James 2006 EWCA Civ 684 may have had in mind when he commented that the doors of the tribunal are open to the difficult as well as the compliant.

27. I therefore do not find that the proceedings have been conducted unreasonably for the purposes of rule 76 in any respect save the following.

28. At the first preliminary hearing which came before me on 4 January 2023, an adjournment was granted, albeit on limited medical information. As the matter was not going to proceed, I took the opportunity to express guidance to the claimants, who were then in person. I was of course not aware that Ms Norris typed the guidance as I gave it, and then wrote the next day to Mr D'Auvergne to send him a copy of what she had typed. Having read her summary, I accept that while it is not a transcript, it is broadly accurate; I can see that it reflects my own speaking style.

29. The importance of that development is that by 5 January, the claimant had in writing a judge's provisional overview of the difficulties of the case. As this came from an independent and impartial source, with some experience of these matters, it would be reasonable for the claimant to attach greater weight to it than he attached to what had been said or written by the respondent or its representative. I noted in particular that Ms Norris notes my saying,

> "There's a basic legal rule. You get one chance, and one chance only to fight a case.. You don't get the chance to ask me or another judge to make another decision about the same point."

30. My recollection is that in reply, Mr D'Auvergne said that the present case was "not the same case" as that which had been decided by Judge Skehan. Seven months later, when Mr Wareing was asked to analyse the present case, he first accepted my offer of an adjournment to take specific instructions, after which his reply was that that was exactly the position: I repeat what is written in my August reasons.

31. In the same email of 5 January, Ms Norris repeated on behalf of the respondent the offer to the claimants of a drop hands deal.

32. The claimant was legally represented from February 2023 onwards. I infer that Mr D'Auvergne made very sure that Ms Norris' email was among the papers given to the solicitor.

33. In my judgment, the claimant conducted the case unreasonably by pursuing matters to the hearing of 21 August in the face of Ms Norris' email of 5 January which both placed on record my own guidance, and repeated a drop hands proposal. I therefore find that in that respect the test under Rule 76(1) has been met.

34. When I come to consider the interests of justice, I must bear in mind the appropriate balance. The tribunal must allow access to justice to the public; but it must at the same time safeguard respondents against unmeritorious

claims, and do what it can to ensure that the limited resources of the tribunal are well used.

35. In all the circumstances set out above, it seems to me that the balance in this case is firmly in favour of the respondent, and that the interests of justice favour an award of costs being made.

36. Ms Norris had prepared schedules in which she broke down the total expenditure of costs as claims against each of the former claimants. The sum claimed against Mr D'Auvergne was £3935, which Ms Norris said did not include an element in respect of today's hearing.

37. Mr D'Auvergne said in reply that he had no issue with paying costs if an award were made, but asked to do so by instalments. Despite the case management order of 21 August, Mr D'Auvergne had given the tribunal no information about means or ability to pay. Ms Norris said that she understood that he is working in London as a bus driver.

38. Ms Norris supported her application with a costs summary at an hourly rate of £300 exclusive of VAT. This was an appropriate case to award a fixed sum, without undertaking any form of detailed assessment.

39. I attached no weight to the claimant's failure to challenge any item in the costs summary, or to challenge the work done or the rate claimed: all of this was consistent with his lack of understanding and experience.

40. I did not award the full amount claimed. In the exercise of discretion it seemed to me first that I had not agreed with all the points upon which Ms Norris had made her application; and secondly, even in the absence of information from the claimant, I am entitled to rely on the mismatch in reality between the weekly earnings of a bus driver (where I understand Mr D'Auvergne still to be employed) and the hourly rate of a solicitor. I cannot disregard the reality that two or three hours of a solicitor's time may represent the gross weekly pay of a driver; and I therefore award what seems to me a fair and reasonable sum, albeit not the entire amount claimed.

_____

Employment Judge R Lewis

Date: 29 December 2023

Sent to the parties on: 25 January 2024

For the Tribunal Office

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
1. Mr S D'Auvergne 5. Mr P Coward	**v**	Metroline Travel Limited

Heard at: Watford by CVP
On: 15 December 2023
Before: Employment Judge R Lewis

Appearances
For the Claimants: C1 In person, C5 no attendance or representation
For the Respondent: Ms H Norris, solicitor

JUDGMENT

1. The respondent's application for a costs order against Mr D'Auvergne is upheld, and he is ordered to pay to the respondent costs of £2,500.00.

2. The respondent's application for a costs order against Mr Coward is refused.

REASONS

1. Ms Norris asked for written reasons after judgment had been given.

2. This was the costs hearing listed after I struck out these claims on 21 August 2023 and issued a case management order in respect of this hearing.

3. At the August hearing, Ms Norris advised that she wished to apply for costs against all five original claimants. At the start of this hearing, she advised that the respondent had compromised its application against the other three former claimants, and did not pursue any application against any of them today.

4. Mr Coward did not attend and was not represented. Mr D'Auvergne said that he could speak on his behalf but was not a formal representative. Later in the hearing he said that he had last spoken to Mr Coward at about the

time of the lockdown, which I take to be in advance of presentation of the ET1 on 8 June 2020, and therefore some 3 ½ years before this hearing.

5. I was satisfied that Mr Coward had been made aware of this hearing, through information provided to him at his home address by the respondent. The ET1 did not contain a telephone number or email address for him, and Mr D'Auvergne said that Mr Coward is in poor health, and has not responded to any recent attempts by Mr D'Auvergne to make contact with him. In those circumstances, it did not seem to me that the tribunal was required to take more steps in accordance with Rule 47, and I was able to proceed.

6. Ms Norris had prepared an extended bundle, and a written application. Mr D'Auvergne confirmed that he had received both. Ms Norris gave oral submissions. I offered Mr D'Auvergne a short adjournment to enable him to prepare his reply, but he said that that was not necessary and replied straight away. After an adjournment, I gave judgment.

7. Ms Norris' submission followed two broad strands. One was the merits strand. She submitted that it was evident that from the outset this claim had had no prospect of success, because it was an attempt to relitigate the claims heard and decided by Judge Skehan, as well as being based on a significant misunderstanding of TUPE and being several years out of time in part at least.

8. Related to that strand was Ms Norris' submission that the respondent had throughout made these points directly and clearly to the claimants, so that they might take advice and understand the weakness of their position. She referred not just to the pleadings and skeletons, but to correspondence, and a number of offers of a "drop hands" arrangement.

9. The second and related strand was that the proceedings had, in Ms Norris' submission, been conducted unreasonably by Mr D'Auvergne on behalf of all the claimants. Ms Norris meticulously identified a history of non-cooperation and prevarication on his part, which she submitted constituted unreasonable conduct, beyond the usual difficulties of a litigant in person. In particular, she submitted that the difficulties had continued even after the claimants were professionally represented by solicitors.

10. She submitted that it was overall in the interests of justice to make an award.

11. Mr D'Auvergne in reply insisted that the fundamental claim heard and decided against the claimants by Judge Skehan was well founded, and that transferred drivers were still today not being paid their due entitlement. He said that it had been 'proven' that there was a shortfall in pay, and that his union had advised him that he had the right to bring a second claim. The former remark was simply wrong; and the latter, in labstract, was a statement of the obvious.

12. He had thought that the guidance which I expressed on 4 January 2023 and which Ms Norris set out in an email to him of 5 January 2023, had related to the claim against Arriva only and not to the totality of the claim. I do not agree that that was a reasonable interpretation either of what I said or of Ms Norris' written summary of my remarks.

13. He accepted that there had been shortcomings in the conduct of his former solicitors, which he attributed to "below par" communication with the solicitors whom he had for a period instructed.

14. He had produced no information or evidence about means (as provided for in my case management order of August) but said that he had no issue with payment and referred to a monthly figure (I explained that I had no power to order instalment payments).

15. He had no separate information to give by way of reply on behalf of Mr Coward.

16. I deal briefly with Mr Coward's position first.

17. It appears that the claimant had Mr Coward's authority to name him on the claim form, and that he got this authority at some point late in the lockdown and before presenting the claim on 8 June 2020. Thereafter I have no evidence whatsoever of anything said or done by Mr Coward as an individual. The tribunal's and respondent's sole channel of communication with him, such as it was, was Mr D'Auvergne. I have no evidence of communications between Mr D'Auvergne and Mr Coward. I find that any advice which Mr D'Auvergne gave to Mr Coward about any aspect of law or procedure was probably wrong, and certainly distorted by Mr D'Auvergne's unshakeable conviction that he had been wronged.

18. Although it was plainly unreasonable of Mr Coward to present a claim for unfair dismissal some years after dismissal, I can go no further in any analysis of his conduct. The tribunal strikes out many cases which are out of time without making a finding of unreasonable conduct, or making an award of costs. I do not have sufficient material to find that as an individual Mr Coward has brought or conducted the proceedings unreasonably. In particular, I am not prepared to render him liable in costs for Mr D'Auvergne's faults and failures as a representative. I do not therefore go on to weigh up the interests of justice in the application against him. I decline to make any award for costs against him.

19. I now turn to discussion of the application against Mr D'Auvergne.

20. In my reasons of 21 August 2023 (which might usefully be read with these reasons) I set out my understanding of the claimant's case on underpayment which was put to me that day by his counsel. Mr D'Auvergne remains passionately committed to the proposition that the drivers on the 168 route who transferred from Arriva to Metroline were and remain significantly underpaid. Nothing in the experience of this litigation, including access to the advice of at least two barristers, one solicitor of whom I heard,

the previous lengthy hearings before Judge Skehan, the three case management hearings which preceded that hearing, the judgement of the EAT, and my strike-out judgment, have served to convince him otherwise.

21. I have noted that Mr D'Auvergne's understanding of the law and procedure of the tribunal is limited, and that on occasions when this has been pointed out, he has been quick to attribute to his union or his legal advisors any misunderstanding or mistake.

22. In approaching this application I must, in accordance with Rule 76, address three questions. The first is whether the claim has been brought or conducted in a manner which meets the definition in Rule 76(1) of, broadly, unreasonable conduct. The second is whether it is in the interests of justice to make an award of costs. The third is in light of any financial information I am given about the claimant's ability to pay, how much the award of costs should be.

23. I find that the claim was brought unreasonably. It was misconceived. I say so for the following reasons. First, it was a reiteration of a claim which had been fought and lost, and I refer to my own reasons of 21 August 2023. Secondly, to the extent that the claimant thought that it was a claim brought under TUPE, which related directly to breach of rights under TUPE, it was brought over four years out of time. Primary limitation expired on 25 December 2015. The claim was presented on 8 June 2020. Thirdly, it was misconceived, because it purported to exercise rights which were not those of the claimants to exercise (eg as to employee liability information). On this strand of submission, I find that the test of rule 76(1) has been met.

24. Ms Norris' frustration was clear when she made submissions in relation to the second strand, unreasonable conduct of the proceedings. That is a matter which I approach with very great caution. Whatever the burdens and frustrations of an irritating case or opponent, no member of the public is expected to be a lawyer, or should be penalised merely for ignorance or misunderstanding of the law. The tribunal cannot compel a litigant in person to take professional advice, or to follow it if taken, and has no control over the source or quality of any advice. The techniques of litigation involve a set of specialist skills which we cannot reasonably expect of the lay public. Furthermore, as Ms Norris generously admitted, however well put and cogent the submissions of a respondent may be, there is no obligation on a claimant to accept his opponent's submissions.

25. Ms Norris dealt at length with the poor use of time shown by the claimant and his advisors in the conduct of these proceedings, including last minute preparation (of which there was a striking example before me on 21 August), failure to engage with correspondence, and conduct which appeared at times to show gaming behaviour.

26. I recognise the burdens, irritations and frustration caused, but I would set a very high bar indeed before finding that conduct of litigation by a litigant in person met the threshold of Rule 76(1), as opposed to being the product of ignorance, inexperience, and what Lord Justice Sedley in Blockbuster

Entertainment Ltd v James 2006 EWCA Civ 684 may have had in mind when he commented that the doors of the tribunal are open to the difficult as well as the compliant.

27. I therefore do not find that the proceedings have been conducted unreasonably for the purposes of rule 76 in any respect save the following.

28. At the first preliminary hearing which came before me on 4 January 2023, an adjournment was granted, albeit on limited medical information. As the matter was not going to proceed, I took the opportunity to express guidance to the claimants, who were then in person. I was of course not aware that Ms Norris typed the guidance as I gave it, and then wrote the next day to Mr D'Auvergne to send him a copy of what she had typed. Having read her summary, I accept that while it is not a transcript, it is broadly accurate; I can see that it reflects my own speaking style.

29. The importance of that development is that by 5 January, the claimant had in writing a judge's provisional overview of the difficulties of the case. As this came from an independent and impartial source, with some experience of these matters, it would be reasonable for the claimant to attach greater weight to it than he attached to what had been said or written by the respondent or its representative. I noted in particular that Ms Norris notes my saying,

> "There's a basic legal rule. You get one chance, and one chance only to fight a case.. You don't get the chance to ask me or another judge to make another decision about the same point."

30. My recollection is that in reply, Mr D'Auvergne said that the present case was "not the same case" as that which had been decided by Judge Skehan. Seven months later, when Mr Wareing was asked to analyse the present case, he first accepted my offer of an adjournment to take specific instructions, after which his reply was that that was exactly the position: I repeat what is written in my August reasons.

31. In the same email of 5 January, Ms Norris repeated on behalf of the respondent the offer to the claimants of a drop hands deal.

32. The claimant was legally represented from February 2023 onwards. I infer that Mr D'Auvergne made very sure that Ms Norris' email was among the papers given to the solicitor.

33. In my judgment, the claimant conducted the case unreasonably by pursuing matters to the hearing of 21 August in the face of Ms Norris' email of 5 January which both placed on record my own guidance, and repeated a drop hands proposal. I therefore find that in that respect the test under Rule 76(1) has been met.

34. When I come to consider the interests of justice, I must bear in mind the appropriate balance. The tribunal must allow access to justice to the public; but it must at the same time safeguard respondents against unmeritorious

claims, and do what it can to ensure that the limited resources of the tribunal are well used.

35. In all the circumstances set out above, it seems to me that the balance in this case is firmly in favour of the respondent, and that the interests of justice favour an award of costs being made.

36. Ms Norris had prepared schedules in which she broke down the total expenditure of costs as claims against each of the former claimants. The sum claimed against Mr D'Auvergne was £3935, which Ms Norris said did not include an element in respect of today's hearing.

37. Mr D'Auvergne said in reply that he had no issue with paying costs if an award were made, but asked to do so by instalments. Despite the case management order of 21 August, Mr D'Auvergne had given the tribunal no information about means or ability to pay. Ms Norris said that she understood that he is working in London as a bus driver.

38. Ms Norris supported her application with a costs summary at an hourly rate of £300 exclusive of VAT. This was an appropriate case to award a fixed sum, without undertaking any form of detailed assessment.

39. I attached no weight to the claimant's failure to challenge any item in the costs summary, or to challenge the work done or the rate claimed: all of this was consistent with his lack of understanding and experience.

40. I did not award the full amount claimed. In the exercise of discretion it seemed to me first that I had not agreed with all the points upon which Ms Norris had made her application; and secondly, even in the absence of information from the claimant, I am entitled to rely on the mismatch in reality between the weekly earnings of a bus driver (where I understand Mr D'Auvergne still to be employed) and the hourly rate of a solicitor. I cannot disregard the reality that two or three hours of a solicitor's time may represent the gross weekly pay of a driver; and I therefore award what seems to me a fair and reasonable sum, albeit not the entire amount claimed.

_____

Employment Judge R Lewis

Date: 29 December 2023

Sent to the parties on: 25 January 2024

For the Tribunal Office