EMPLOYMENT TRIBUNALS

Claimant: **Mr Marc Lyne**

Respondent: **Telmar Europe Limited**

Heard at: **East London Hearing Centre (by video)**

On: **9 February 2024**

Before: **Employment Judge C H O'Rourke**

Appearances
For the Claimant: Mr I Wheaton - counsel
For the Respondent: Ms C Davies - counsel

RESERVED COSTS JUDGMENT

The Claimant is ordered to pay the Respondent's costs, in the sum of £14,412.

REASONS

Background and Issues

1. The Claimant worked for the Respondent/related companies, from April 2019, until his dismissal with effect 31 March 2022.

2. The Respondent dismissed him for gross misconduct, which he denies. As a consequence, he brought a claim of unfair dismissal.

3. There was a Preliminary Hearing, before me, on 19 January 2023, to determine whether, subject to s.108(1) of the Employment Rights Act 1996 (ERA), the Claimant had sufficient qualifying service as an employee to make a claim of unfair dismissal. This was because it was contended by the Respondent that only part of the Claimant's claimed period of working for the Respondent was of employment, the balance being of a period of employment by another unrelated company, who, in turn, provided his services as a consultant to the Respondent.

4. The claim of unfair dismissal was dismissed, as it was found that the Claimant did not have the requisite service with the Respondent [101]. At the conclusion of that Hearing, the Respondent made a costs application and the Claimant (who was acting as a litigant-in-person at the time) was given leave to make written submissions in due course. Since then, there has been some to-ing and fro-ing

between the parties, with the Claimant since instructing solicitors. Both parties have finalised their submissions, and after some delay in arranging this hearing date, the application proceeded to hearing *de novo* today.

The Law

5. Rule 76 of the Tribunal's Rules of Procedure 2013 states:

When a costs order or a preparation time order may or shall be made

(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so,
where it considers that—

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

(b) any claim or response had no reasonable prospect of success;

6. Rule 84 provides that the Tribunal may have regard to the paying party's ability to pay and costs order that may be made.

7. Both parties referred to a range of authorities (and as set out, in particular, in both counsels' skeleton arguments of 8 February 2024), to which I shall refer, as I consider appropriate, below.

The Evidence

8. I was provided with a joint bundle of documents, the Respondent's costs schedule, an authorities bundle and the aforementioned skeleton arguments.

9. As the Respondent sought to rely on the contents of the written reasons for my Judgment, I refer, in general, to that document, contained in the bundle, but, for context and background provide the following extracts from it (using the original paragraph numbering):

4. The Claimant asserts that he was an employee of the Respondent throughout the above period (April 2019 to March 2022). *However, the Respondent states that from April 2019, until 28 February 2021, the Claimant's services were provided via a consultancy agreement ('the Agreement') between a company he had set up for the purpose, Lifelyne Dot Com Ltd (Lifelyne), of which he was an employee and one of their sister companies within the LiiV Group ('the Group'), Telmar Communications Ltd (TCL). They also state that from 1 March 2021, he then entered into a contract of employment with Telmar Europe Ltd (the Respondent), another company in the Group, which lasted just over a year, until his dismissal.*
…
9.h …. (The Respondent's evidence was that the Claimant) *was offered and accepted an employment contract [112] ('the Contract'), effective from 1 March*

2021. He subsequently provided the Respondent with his P45 from Lifelyne [128], indicating that he had therefore been in that Company's employment until then, but had now resigned. Mr Ingram (a Respondent witness) *said that at that point the Claimant made no assertion as to previous employment by TCL/the Respondent, or if he felt that was the case, queried why any new employment contract was necessary. He referred to the 'period of employment' clause 5 in the Contract which stated the Claimant's start date/continuous employment date to be 1 March 2021 and that no period of employment with a previous employer counted as part of that continuous employment [113]*.

9.i (As was not disputed by the Claimant) during the lifetime of the Agreement, Lifelyne invoiced TCL for the Claimant's services [158]. Following his entering into the employment contract, he was paid through PAYE. He continued to use his own equipment but became eligible for a monthly 'technology allowance' to purchase such equipment. He was provided paid holiday, enrolled in a pension scheme and received private healthcare insurance.

…

10.b (the Claimant's evidence was that) *Both his and TCL's intention was that the Agreement would be temporary, perhaps no more than three months and be then converted to a full-time employment contract [84]. As he felt that this 'was just a temporary scenario', he 'did not hesitate to sign the Consultancy Agreement' and felt that he was 'doing Telmar a favour by agreeing to this method of working and remuneration.' When it was suggested to him in cross-examination that this arrangement also benefitted him, he said that he 'didn't think so'. When it was further suggested that it conferred tax benefits on him, he said that account needed to be taken of the administrative costs in that respect. He agreed that the earnings shown on his Lifelyne P45 (£28K for eleven months) were much less than that Company invoiced for his services (at £1500 per day) and that the balance of the payments were paid to him in a more tax-efficient way, through dividends.*

10.c He was informed that the Agreement would be terminated 'immediately when we convert to Employment Contract' [84]. He agreed, however, in cross-examination that while it was clear that he might become an employee in the future, at that stage he was only a consultant, stating that this was a short-term arrangement, of three months or less. He also agreed that he had previous experience of working as a consultant, for two years with BUPA.

…

10.g ….. (the Claimant) *agreed that it was his decision to set up Lifelyne and when it was suggested to him that this was not a requirement of TCL's, he said that 'Sam* (a Respondent manager) *may have suggested it', but when pushed further on this point, as to whether he was simply speculating, he said he couldn't remember.*

10.h He agreed that Lifelyne invoiced for his services and was registered for VAT. The payments were initially made to his own bank account, but later into a

commercial account. While he also agreed that his email of 4 April 2019 [84] could indicate that by discussing how VAT should be charged he understood that he would be a contractor and was thus negotiating to protect his interests, he said that this 'was on a short-term basis'.

10.i He also agreed that he sought legal and accountancy advice on the Agreement [85 & 87], describing this, however, as 'feedback'.

…

Conclusions

…

15. It is clear from the evidence that the Claimant freely entered into this arrangement (the consultancy agreement between his company, Lifelyne and TCL)*, taking both legal and accountancy advice before doing so. It was his choice to have Lifelyne contract with the Respondent, as it was clearly advantageous financially for him to do so, in respect of tax and it is noteworthy that when he subsequently provided a P45 at the end of his 'employment' with Lifelyne, his earnings were considerably lower than the amounts paid to Lifelyne by the Respondent.*

16. Generally, in respect of the oral evidence, I preferred that of Mr Ingram over that of the Claimant. Mr Ingram was generally direct in answering questions and where he was unsure or didn't know, said so. The Claimant, however, was on occasion evasive, implausible, or contradictory. His oral evidence as to whether or not it was his idea to set up Lifelyne contradicted what he said in his written submissions. When challenged as to that point, he made a clearly unfounded and not previously raised assertion that Mr Williams may have suggested it, but when challenged that this was speculation, referred to a memory lapse. He also sought to downplay the significance of the legal advice he received by describing it as 'feedback'. He also clearly sought to downplay the obvious financial benefits to him of the Lifelyne arrangement. As indicated below, I found his evidence as to badgering verbally Mr Williams monthly, over a two-year period as to when he might become an employee, highly implausible.

17. …. In contrast (to the scenario in **Autoclenz**)*, the Claimant is clearly a well-educated, intelligent man, with a wide breath of previous employment, to include consultancy work, at a high level in various organisations and for which he was very well remunerated. While keen to explore new opportunities with the Respondent, he was not short of other work and entered into detailed negotiation with the Respondent as to the terms of the contract, with several of his proposals for changes being accepted. As already stated, he took both legal and accountancy advice while doing so.*

18. The Agreement worked precisely as it was meant to – Lifelyne provided the Claimant's services and invoiced for them, and the Claimant carried out the services as envisaged in the Agreement. At his suggestion, its initial term was for six-months, automatically rolling over thereafter, unless either party

chose to terminate it. The Claimant clearly financially benefitted from the arrangement by being able to better manage his tax affairs, via Lifelyne, minimising his PAYE liability. He was also free, if he wished (and as he indicated during the initial negotiations) to limit his commitment to three days a week, to permit him to pursue other commercial and personal interests.

19. In those circumstances, I see no reason to imply any contract between the Claimant and the Respondent. The contract Lifelyne entered into was clear and the Claimant knew it. He would be an employee of Lifelyne, providing his services to the Respondent, who would pay Lifelyne for them. While there was reference to the possibility of future employment, it was clear to me that, firstly, on the evidence, the Claimant knew that he was not entering at the outset into a contract of employment but hoped to do so at some point in the future, so to now assert that that was not the case is irrational. He recognised that fact by himself stipulating an initial six-month term for the Agreement, with automatic roll-ever thereafter, clearly envisaging that any change would be later, rather than sooner. Secondly, there was no question, on the evidence, of any such 'hope' by TCL to employ him in the future as being contractually-binding or by way of an undertaking: it was simply an aspiration, which was in due course realised, but not as soon as either party might have initially envisaged. I don't believe the Claimant's evidence that he monthly chased Mr Williams as to becoming an employee, because despite almost two years having passed, he has been unable to provide a single written communication to that effect, when he clearly has no difficulty in putting his views in writing. While he asserts that he only did so verbally, I find that implausible without at least some written record, perhaps recording his dissatisfaction on this point, particularly after, as he said, many months of 'being fobbed off with excuses'.

…

21.e There was, despite the Claimant's protestations to the contrary, a distinct contrast between being a consultant and an employee. He ceased to be an employee of Lifelyne; he was paid via PAYE; was entitled to pension and other benefits, to include annual paid leave, and he also had fixed hours and days of work.

Submissions

10. Both counsel presented detailed written skeleton arguments and also made detailed oral submissions, which I summarise below.

11. On behalf of the Respondent, Ms Davies made the following submissions:

    a. The Respondent contends that the Claimant's claim had either no reasonable prospects of success, or that he had acted unreasonably in pursuing an unmeritorious claim; failed to engage with costs warning letters and gave evasive, implausible, or contradictory evidence in an attempt to bolster his unmeritorious claim. Reliance is placed on the relevant sections of the Preliminary Hearing Judgment.

b. To overcome the reality of the consultancy agreement [116], the Claimant had to argue that it was a 'sham' and that in fact he was directly employed by the Respondent or a sister company. However, he had no reasonable prospects of doing so and knew that to be the case, due to factors such as him choosing to set up and enter into this arrangement, clearly expressed in the Agreement and taking professional advice on it. He knew he would be an employee of Lifelyne, who would provide his services to TCL and his evidence to the contrary was unsupported by contemporaneous documents and was not credible.

c. When he did, eventually, become an employee of the Respondent, the change in the contractual and practical arrangements was clear [employment contract 138], with the Claimant resigning from Lifelyne and receiving a P45 to that effect [153].

d. The Claimant acted unreasonably in failing to engage properly with costs warning letters sent to him [87, 94, 96 & 100]. They referred him to paragraphs 8 to 12 of the Grounds of Resistance [32], which set out, in clear terms, the true nature of the relationship, but which he ignored.

e. It was unclear to the Respondent whether or not the Claimant sought to rely on legal advice given to him as to the merits of his claim (as a defence to unreasonable behaviour), but there has been no proper disclosure of such advice (**Brooks v Nottingham University Hospitals NHS Trust UKEAT 0246/18**) and therefore the Tribunal is not in a position to take that factor into account. (In fact, the Claimant did, in Mr Wheaton's oral submissions, seek to rely on this matter.)

f. It was unreasonable behaviour to seek to bolster his case as to the 'sham' nature of the Agreement by giving evasive, implausible or contradictory evidence in respect of his understanding of it.

g. The Respondent therefore considers that the threshold for making a costs order has been reached and that it is therefore appropriate for the Tribunal to exercise its discretion to make such an order. The Claimant was aware of the weakness of his case and of the Respondent's intention to apply for costs. Even if he had had legal advice that his claim had merit, he knew that the documents and circumstances leading up to the completion of the Agreement were genuine and no 'sham'. The Claimant's approach has been a cynical one, as indicated by his comments at the conclusion of the Preliminary Hearing that although he had been legally advised prior to that hearing, he thought the balance of power would present better if he appeared at the Hearing as a litigant in person.

h. The Claimant can afford to pay any costs order made (limited by the Respondent to £20,000). (This was not seriously disputed by Mr Wheaton.)

i. The following points were made in respect of the Claimant's skeleton argument:

i. This is not a reconsideration or appeal hearing of the Judgment and therefore Mr Wheaton's view that the Tribunal got the law wrong is not relevant. In any event, his criticism is misplaced, as borne out by the EAT recently rejecting an appeal by the Claimant, at first sift.

ii. The Claimant argues that this case was a complicated one and while it is accepted that sometimes cases of this nature can be, this was not one of those. There was a clear consultancy agreement in place which the Claimant had negotiated and fully understood, but now sought to allege was a 'sham'.

j. As to the amount of any order, a broad assessment should be made, based on the Respondent's schedule [separate document].

12. On behalf of the Claimant, Mr Wheaton made the following submissions:

a. That the judgment is wrong in law, thus indicating that the claim had reasonable prospects of success. In any event, the threshold is not met – this was an issue that needed to be disposed of and was not so obvious to the Claimant. There is still an argument on the merits, hence the pending appeal to the EAT (the Claimant has made a Rule 3(10) application [232]).

b. The Claimant had taken legal advice which supported the continuation of his claim, on its merits. It is surprising that this advice was not disclosed, but it should be noted that the Respondent did not pursue an application for such disclosure.

c. He challenged the costs schedule, as to both the amount of time spent on the case, the level of fee-earner carrying out the work, the hourly rates claimed for solicitor's work (when compared to the Guideline Hourly Rates [257]) and the level of counsel's fees, stating that while a party in litigation was entitled to spend what they wished on legal fees, that was not a choice for which a potential paying party could be held liable. In any event, the costs of dealing with this application should not be included. There are also unexplained discrepancies between the various costs schedules provided, over time.

d. He contended that the Respondent was attempting to 'bring out the big guns' against the Claimant, effectively hoping to cow him into submission, for fear of inflated costs from a costly firm of solicitors, both in this litigation and in any potential breach of contract action in the High Court. This 'tactical' approach was illustrated by the robust and frequent nature of the costs warning letters sent to the Claimant.

e. Costs do not 'follow the event' in the Tribunal and are the exception rather than the rule.

f. The application was not pleaded on both heads of Rule 76, but only on unreasonable conduct. 'No reasonable prospect' was added as an afterthought.

13. Ms Davies offered some rebuttal to those submissions which, to the extent relevant I will deal with in my findings below.

Findings

14. Threshold for Making a Costs Order. I find that the threshold for the making of a costs order in this case has been reached, for the following reasons:

    a. As should be clear from my Judgment, I did not believe that the Claimant genuinely considered that the Agreement was a 'sham', which was the only approach by which he could successfully assert that he was, in reality, an employee for the relevant period. All the evidence indicated that, as an experienced consultant and businessman is his own right, he entered into the Agreement freely, having taken professional advice in respect of it, which arrangement was to his financial benefit and which document clearly set out the nature of his role. He had no reasonable prospects of proving it to be a 'sham'. Therefore, by persisting in bringing such a claim, once he was aware of the Respondent's Grounds of Resistance and which should have left him in doubt as to the position, he pursued a complaint that had no reasonable prospects of success.

    b. Contrary to Mr Wheaton's submissions, I find that the Respondent brought its application under both heads of Rule 76. The oral application at the conclusion of the Preliminary Hearing was on such basis and the follow-up written submissions, on 24 February 2023 [157] specifically refer to reliance on Rule 76(1)(a) and/or (b), and also refers to alleged abusive behaviour by the Claimant, as to giving evasive evidence and his failure to comply with the Tribunal's direction, clearly, at least potentially, falling under Rule 76(1)(a). I note also, in this respect, the inevitable overlap between both heads, in an application such as this and as described in **Radia v Jefferies International Limited [2020] UKEAT IRLR431**.

    c. I find also that there has been unreasonable conduct by the Claimant in the bringing of his claim and in his pursuance of it because he brought a claim which he knew had no reasonable prospects of success and then, at the Hearing, gave evasive, implausible, or contradictory evidence, for the purpose of attempting to bolster that unmeritorious claim.

15. Exercise of Discretion to make an Order. I consider that I should exercise my discretion to make a costs order, for the following reasons:

    a. While he denies his state of knowledge, from receipt of the Grounds of Resistance, as to the weakness of his claim and, via Mr Wheaton's submissions, attempts to portray an image of him as the 'small man' being subjected to oppressive tactics by an overbearing employer and their expensive solicitors, I don't consider that to be the truth. The Claimant is an exceptionally well-informed litigant-in-person, bearing in mind his wide-ranging, high-level and well-remunerated career and own business interests, to date. Crucially, as I've already set out above, he was an equal

party in the drawing up of the Agreement, choosing to set up his own service company to facilitate the provision of his services. He negotiated, from a position of strength, to change the terms to suit him and then, from a tax perspective, financially benefitted from it. Both he and the Respondent knew that the long-term intention was that he would, in due course, all being well, become an employee, rendering it crystal-clear that at the point of him entering into the Agreement, he was not such. Further, when the position did change, by mutual agreement and he did become an employee, he resigned his 'actual' employment with Lifelyne and entered into a self-evident contract of employment, thereafter being paid pension, holidays, sick leave etc. Therefore, for him to attempt, with all of that knowledge and his past experience as a consultant, to nonetheless argue that the Agreement was a 'sham' and that he had been an employee all along was entirely untenable and dishonest.

b. In the knowledge that he needed, therefore, to bolster an untenable argument, he gave evasive, implausible, or contradictory evidence at the Hearing. He sought, in cross-examination, to downplay his active involvement in the drawing up of the Agreement, relying on a memory lapse, when challenged as to speculative, 'on the hoof' answers that he gave on that subject. He also sought to downplay the reality of the strength of his negotiating position, as he was able to source his own legal and accountancy advice, by disingenuously referring to it merely as '*feedback'*. His assertion that he effectively badgered the Respondent monthly, over nearly two years, as to becoming an employee, but without being able to provide a single text, WhatsApp, or email to that effect was deeply implausible. I consider such behaviour to be unreasonable conduct.

c. In contrast to his assertion that as a litigant-in-person he was not in a position to know whether or not his claim had reasonable prospects of success, until tested before a tribunal, he also asserts that he relied on favourable legal advice he received as to his claim being meritorious. However, he has not disclosed that legal advice, or the information he provided to such advisors, to enable them to come to a view on his case. The burden of proof is clearly on him in this respect, and he has not discharged it. In **Brooks v Nottingham University Hospitals NHS Trust [2019] UKEAT/0246/18**, it was stated that:

36. … Reliance upon advice is a factor that may be taken into account by the Tribunal but positive professional advice will not necessarily insulate a Claimant against an award for costs. There may be many reasons for the advisers reaching a different view as to the prospects of success from the Tribunal: these may include the fact that the advice was based on more limited material than that which is considered by the Tribunal, the advice being based on the Claimant coming up to proof, or the advice being negligent. In the absence of any evidence to the contrary, the Tribunal is entitled to proceed on the assumption that a represented party has been properly and appropriately advised as to the merits.

37. In the present case, the Tribunal was faced with little more than a bare assertion that the Claimant had been advised that he had a good case. The Respondent, not surprisingly, had sought disclosure of such advice on the assumption that the Claimant had waived privilege in this regard. Notwithstanding that apparent waiver no evidence was disclosed to the Tribunal or to the Respondent setting out the terms of any advice received. An assertion in submissions falls short of evidence as to the advice. Such evidence would ordinarily set out the context in which the advice was given, the particular instructions which led to the advice and the evidence taken into account in coming to that conclusion. Without such contextual material, the Tribunal will have little to warrant departing from the normal starting assumption that a represented party has been properly advised.

d. The Claimant evidenced a somewhat cynical approach as to his choice of being unrepresented at the Preliminary Hearing. He stated in the Hearing (as submitted by Ms Davies and recalled by me) that while he had taken legal advice prior to it, it had been his choice not to be represented at the Hearing (despite being clearly able to afford such representation), as he thought that the balance of power would present better if he appeared as a litigant in person, with the implication, as I took it, that by doing so, he considered that any liability for his unreasonable conduct would be lessened or obviated.

e. Costs warnings were given by the Respondent, to include estimates of likely costs, but were not heeded by the Claimant. Such warnings are unlikely, on their own, to justify a costs order, but are a relevant factor in considering, overall, whether discretion should be exercised to make an order. The Claimant was aware of the likely liability he could incur, but perhaps, based on his comment at the Preliminary Hearing, thought he could evade such liability, by relying on his litigant-in-person status.

f. This is not a case of 'costs following the event', but, as the Rules allow, an award of costs following the Claimant meeting the requirements of Rule 76. While such awards are 'the exception rather than the rule', that does not mean that when awarded, the case has to be exceptional, merely that the relevant Rule is met, which it is in this case.

16. Amount of Costs Order. Making a broad and summary assessment of the appropriate costs in this matter, I reach, firstly, the following conclusions:

a. The issues dealt with in the Preliminary Hearing were not, for lawyers, particularly difficult or complex ones. Indeed, the Respondent's assertion that they were sufficiently straightforward to be understood by the Claimant (as a litigant in person, albeit with some legal advice in the background) conflicts with their assertion that they needed to engage relatively expensive solicitors and counsel to represent them. Arguments as to whether or not a claimant is an employee, or not, are routine in employment tribunals and the law on the issue is well-known and well-rehearsed. Accordingly, adopting Mr Wheaton's analogy, the Respondent's choice to engage 'Rolls-Royce', as opposed to 'Ford Focus'

legal advisors is not a choice, I consider that the Claimant can be held liable for. Therefore, there is, to my mind, no justification for the Respondent engaging lawyers whose fees exceed the 'Guideline Rates' for solicitor's fees and then expecting the Claimant to pay such rates. The appropriate 'band' therefore is 'London 2', with hourly rates ranging from £398 for solicitors with over 8 years' experience, to £148 for trainee solicitors and paralegals [258] (still, in context, relatively generous rates), as opposed to the equivalent hourly rates of the Respondent solicitors, of £650 to £220.

b. There should be only minimal involvement of fee-earners in the '8 years' plus Grade A, with the bulk of the higher-level work being done by Grade B solicitors (those with over four years' experience), at hourly rates of £308, with lower-level preparation done by Grade C or D fee-earners, at £260 or £148 per hour, respectively. I am conscious, in this case that both parties have referred to at least the possibility of a High Court breach of contract claim by the Claimant and I note that his contract of employment entitled him to nine months' notice, which pay in lieu of would, on his salary, have come to approximately £225,000, which he did not recover, as he was dismissed for alleged gross misconduct. It may be that the Respondent solicitors' focus is or was, understandably, on the potential for such proceedings, hence the extensive involvement of a Grade A fee-earner, but the claim before me was one of straightforward unfair dismissal, on the preliminary issue of length of service, not, as I have stated, of itself, justifying that level of involvement.

c. The same principle should apply to instructed counsel. There are no equivalent 'guideline rates' for counsel (as far as I am aware), so I will endeavour to apply Grade B rates to approximate likely hours of work/attendance by counsel. A day's preparation and a day's attendance (16 hours in total), at £308 per hour, comes to just short of £5,000, which I consider, therefore, to be the appropriate figure for a brief fee for the Preliminary Hearing. In respect of the costs hearing, I don't consider that, the same counsel having been instructed that quite the same amount of preparation time would be required, so consider a total of 12 hours appropriate in that case, thus just short of £3,700. Total recoverable counsel's fees are therefore £8,700 (excluding VAT, which the Respondent can obviously recover).

d. I see no reason why, if counsel attends hearings that there should be additional charges for instructing solicitor attendance. When an advocate (counsel or solicitor) is present, the function of anybody accompanying them is usually limited to taking notes, for which I see no reason that a paying party should be liable for the costs of doing so. If, during the hearing, the advocate requires instructions from any instructing solicitors, then that can be done by telephone, having requested a break to do so.
e. I don't consider the discrepancies between the various costs schedules, at different times, is significant and Mr Wheaton was unable to clarify what his concerns were in this respect. The latest costs schedule is confirmed as accurate and reflecting the costs billed to the Respondent, by a partner

of the Respondent's firm of solicitors and that is enough for me. It is often the case, for example, I know from my own past experience that costs billed to a client may be subject to negotiation with that client and therefore alter over time.

f. The costs of preparation for and attendance at this Hearing flow from the Claimant's unreasonable conduct and are therefore recoverable by the Respondent. I note, in this respect that the Claimant did not comply with the Tribunal's direction that within two weeks of the Preliminary Hearing he provide any written submissions he wished in response to the Respondent's oral submissions at that Hearing, or evidence as to his means to pay any such order. Had he done so, it is likely that the application would have been dealt with on the papers, avoiding the need for this Hearing. Instead, following his instruction of solicitors, in or about May 2023, there was a prolonged correspondence between them, the Tribunal and the Respondent solicitors, with delay imposed by a unsuccessful appeal, prolonging the matter and creating such an extent of correspondence that it prompted the Tribunal to list this Hearing.

17. Hours Claimed and Appropriate Fee-Earner. Again, taking a broad and summary approach, I find the following:

a. Work done up and including the Preliminary Hearing.

i. I find that the Claimant should not be held liable for the costs of preparing and filing the ET3 and Grounds of Resistance, as it was not until receipt of that document that I consider he was 'on notice' of the details of the Respondent's case (followed up closely, as it was, by the first costs warning letter).

ii. Total preparation of six hours in preparation for the Preliminary Hearing does not seem excessive, bearing in mind the preparation of a bundle and the drafting of a detailed witness statement. I don't consider, however that the bulk of that work was required to be carried out by a Grade A fee-earner/partner and instead find that one hour is appropriate at that grade, shifting the balance of 2.9 hours to the Grade B fee-earner, increasing his or her time to 3.6 hours, at £308 per hour - £1109 (rounded up to the nearest £). The Grade A fee-earner's time, at one hour, gives a fee of £398. The other fee-earners' time, of 1.1 hours and 0.3 hours, is recoverable at the guideline rates, of £286 and £44, respectively. The total recoverable amount for this element of work is therefore £1837.

iii. No solicitor attendance at either hearing is recoverable.

iv. I don't consider that Grade A involvement was necessary for the settlement offers, or costs warning letters. 1.9 hours does, however, seem appropriate, at Grade B rate, thus £585.

v. The total figure recoverable for the Respondent solicitors' work to this stage is £2422.

b. Work done up to and including the Costs Hearing.

i. The amount of time spent on correspondence (4.3 hours) seems appropriate, bearing in mind the amount of time that has passed since the Preliminary Hearing, the Claimant's non-compliance with Tribunal direction as to filing a response to the costs application and his belated instruction of solicitors. I shift the Grade A 1.5 hours to the Grade B position (therefore £462) and permit £728 for the Grade C charge – a total of £1190.

ii. In respect of preparation for the Hearing, while 8.8 hours may seem generous, I have no reason to doubt that calculation and therefore make the same calculations as before, shifting the Grade A hours, to Grade B and charging at the Guideline rates, which gives a total recoverable of £2100.

iii. As before, not permitting any costs for attendance, the total recoverable for this stage is £3290.

c. Total Recoverable Solicitors' Fees - £5712 and Total Recoverable Counsel's fee - £8,700 – Grand Total £14,412 (excluding VAT)

18. Ability to Pay an Order of £14,412. On the basis that, on his own evidence, the Claimant has savings of £35,000, even if, as he asserted, he has an upcoming tax bill of £21,000, he can, nonetheless, clearly afford to pay such an award. I note, also, in this context, the Claimant's past high earnings and his capability, in the future, to continue such level of earnings; his multiple sources of income and his ownership (even if subject to mortgage) of a property valued at £750,000 ten years ago ['Rightmove' print-out attached to Respondent's skeleton argument].

Judgment

19. The Claimant is ordered to pay the Respondent's costs, in the sum of £14,412.

Employment Judge O'Rourke
Dated: 12 February 2024