EMPLOYMENT TRIBUNALS

Claimant: Mr Alex West

Respondent: David Lloyd Leisure Limited

Heard at: London South (Croydon) a CVP hearing **On:** 28/2/2

Before: Employment Judge Wright

Representation:
Claimant: Mr Alan West – Claimant's father
Respondent: Mr S Proffitt - counsel

RESERVED COSTS JUDGMENT

The Respondent's application for its costs to be paid by the Claimant under Rule 76(1) (a) and (b) is successful. The Claimant is ordered to pay to the Respondent the sum of £17,000 exclusive of VAT within 28 days.

REASONS

1. A final hearing took place between 30/11/2023 to 1/12/2023. Written reasons were sent to the parties on 15/12/2023. Following that hearing, the Respondent made an application that the Claimant pay its costs on the 11/1/2024. That resulted in this one-day costs hearing being listed.

2. The Claimant (Mr Alex West) did not attend the hearing. He was represented by his father Mr Alan West (referred to as Mr West) as per the liability hearing. Mr West was acting in his personal capacity as the Claimant's father. Mr West confirmed he was not charging his son for the representation. As such, Mr Proffitt did not object to Mr West representing the Claimant at this hearing.

3. At the conclusion of the final liability hearing, when the status of Tower Legal Services (TLS) was discussed (see paragraphs 67-73), Mr West set out the position. In two schedules of loss the Claimant had set out:

Interim costs assessment to TLS £21,000 [on 16/3/2023]; and

Interim costs assessment to TLS £29.820 [on 15/6/2023],

Mr West said that the Claimant had not paid anything to TLS, that there was a contingent fee agreement and that the Claimant would not be asked to pay for anything. Mr West went onto to say that TLS was a trading name for Questo Eperlei Ltd. Mr West said that he had made the point at the preliminary hearing the fees were for claims handling and that TLS was not purporting to act as solicitors or barristers. Mr West said that TLS was not registered with the FCA.

4. Both Mr West and the Claimant are statutory directors of Questo Eperlei Ltd and the Claimant is the company secretary.

5. Further to the comments made in respect of registration with the FCA in the liability written reasons, at this hearing Mr West sought to distance TLS from the proceedings. He now contended that TLS was not a claims management company, that it was a family business, that TLS was not acting as solicitors, barristers or (now in addition) as a claims management company. He sought to define TLS as a ‘communications hub’.

6. Confusingly, Mr West also said that although TLS was not a claims management company, it had incurred costs in representing the Claimant. TLS had on the 21/2/2024 made a costs application against the Respondent. By definition, if TLS was making a costs application, it must have incurred costs which it was seeking to recover (acknowledging the actual costs application was signed off by the Claimant and the costs sought were not specified). Mr West said:

   ‘Questo Eperlei Ltd trading as TLS has incurred costs by spending a huge amount of hours when it was not accustomed to acting as a claims handler or a communications hub as one might say; and that that had distracted from other business the company [Questo Eperlei Ltd] may otherwise have been carrying out.’

7. Throughout, the Claimant’s representative has been listed as Tower Legal Services (TLS), as noted on box 11 of the ET1 (page 13). No individual representative was named in the ET1, however, when the first email on the Tribunal’s file was received on behalf of the Claimant, the covering letter indicated it was from TLS (rather than an individual), within the ‘towerlegalservices@hotmail.co.uk’ email address, it gave a name of John Tower. The remained the case until the most recent email dated 21/2/2024. The attachments to the emails (for example the Claimant’s costs application) were invariably signed off by ‘AJ West’; the Claimant. The Tribunal and the Respondent had communicated directly with the TLS email address throughout the litigation.

8. The Respondent specifically asked Mr West at the conclusion of the liability hearing whether John Tower was a 'real person'? Mr West replied that he was 'part of the organisation'. At this costs hearing Mr West said that John Tower had left the organisation since the preliminary hearing. It is curious that statement implies that John Tower left TLS after the preliminary hearing and before the liability hearing. Whereas, Mr West said at the liability hearing that John Tower was (present tense) 'part of the organisation'. Those statement may be subject to a use of a tense or phraseology; however, they do contribute to the overall impression of a lack of candour from the Claimant and Mr West.

9. It should be noted that as an aside, the Claimant's costs application had been made outside of the time limit specified in Rule 82 and the Tribunal declined to extend the time limit under Rule 5. The Claimant's application was not therefore considered.

10. At the conclusion of the liability hearing, the status of TLS was discussed and Mr West confirmed TLS was not registered with the FCA. The Claimant was directed to confirm within seven days that TLS was properly registered.

11. Mr Proffitt submitted that for Mr West to suggest that TLS need not be registered with the FCA as it was subject to an exemption (that it was a charity or not for profit agency) was a major contradiction. Mr West said that the work conducted by TLS was not 'claims management'; yet he then said TLS was exempt from registration with the FCA. That cannot be right and Mr Proffitt said he made no 'bones' about saying the Tribunal should infer one statement or the other is a lie.

12. Mr West made other implausible statements. For example, he said that it was a fact the Claimant did not receive any remuneration as a director of TLS. Making a statement does not demonstrate that it is a fact. Particularly when if the statement were true, it would be possible to evidence the same by providing details of the directors' remuneration, or lack thereof.

13. A directions Order for the costs hearing were sent to the parties on 24/1/2024. The Claimant was directed to provide a written statement giving evidence of income, outgoings and assets relevant to his ability to pay any costs awarded. Any relevant documents were also to be provided to the Respondent. The Claimant did not comply with this Order.

14. There was no evidence produced to indicate that the FCA did indeed consider TLS to be exempt from the legislation and for the reasons already stated, the Tribunal was not prepared to accept Mr West's assertions as 'fact'. Furthermore, the Claimant was Ordered to produce any evidence which he

wished to rely upon and he did not do so. Unevidenced statements were therefore not accepted.

15. The Claimant did provide a very short document (page 117):

AJ West - Estimated Income & Expenditure - per month

Income & Expenditure.

	£	£	£	£
PAYE net pay 26/1/24 (Places for People Leisure.)	934.80			
Less expenses				
Housekeeping		400.00		
Food		300.00		
Car Fuel		250.00		
Car Tax (2)		28.12		
Car insurance		83.33		
Car Maintenance		50.00		
Travel		10.00		
Clothing		50.00		
Repayments				
Mobile phone		35.93		
DWP		50.00		
Net			-322.58	

Current Assets - value

		£		
Savings		50.00		
Bank account		167.95		
Total -		217.95		
Net assets -				-104.63

Date - 1st February 2024

16. The Claimant had previously supplied a copy of a payslip dated 28/7/2023 (page 131). It showed his employer as PfP Leisure Limited – Kingston. His pay for that month was £1,229.07 gross and £1,178.98 net. It showed his cumulative gross pay as £3,665.39. The Claimant had not disclosed any other documents. He did not explain the nature of this employment, when it started and whether or not it was ongoing. Unfortunately, this is indicative of the Claimant's selective use of evidence when he deems it assists him, without an appreciation of the wider implications for him in the conduct of the litigation. There may have been a reasonable explanation for the difference in net pay in the two specific months referenced, however, that was not provided by the Claimant when he was expressly Ordered to do so.

17. The notice of the costs hearing was dated 19/1/2024. On the 23/1/2024 TLS applied for the hearing to be postponed. An email dated 20/1/2024 gave

details of the Claimant's travel itinerary. It showed that on 24/2/2024 there was a flight from Heathrow to Cancun, a transfer to a hotel and accommodation for one night. Then accommodation for three nights in one hotel, followed by three nights in another hotel, with a transfer back to the airport and a return flight to Heathrow on 2/3/2024, arriving on 3/3/2024. There was no other explanation in respect of the trip. Mr West referred to the Claimant being on holiday,

18. The Claimant therefore did not attend the hearing and did not apply for permission to give evidence from Mexico.

19. On the 20/1/2023 the Respondent had written a 'without prejudice save as to costs' letter to the Claimant (page 52). The Respondent pointed out the weaknesses in the Claimant's case, including the claim of discrimination on the basis of sexual orientation (a claim which was subject to a deposit Order, which was not paid and which was subsequently dismissed). The Respondent proposed that the Claimant withdraw his claim, in return for which, the Respondent would not pursue him for its costs. It stated that if the offer was not accepted, it would apply for a public preliminary hearing to apply for the claim to be struck out or to be the subject of a deposit Order.

20. In giving a 'costs warning' the Respondent estimated its costs, should a final hearing take place, to be in the region of £17,000 + vat.

21. The Respondent's costs application was set out in correspondence of the 11/1/2024 (page 100). It applied for costs under Rule 76(1)(a) and (b) of the ET Rules[1].

22. The unreasonable conduct, the Respondent suggested, was the Claimant and Mr West's conduct in respect of the purported legal fees incurred by TLS. It also referred to findings in the liability Judgment which it said, amounted to a finding that the Claimant had lied under oath.

23. The alternative contention was that the claim of unfair dismissal had no reasonable prospect of success and that the Claimant should not have had reasonable grounds for thinking he had prospects of success. Furthermore, the Respondent referred to its without prejudice save as to costs letter of 20/1/2023 and the fact that letter set out a clear basis for its contention and that from that date at the very least, its position was clearly set out. It also suggested the Claimant's unfair dismissal claim was doomed to fail.

24. It appeared the Claimant misunderstood the legal test which the Tribunal applies to a unfair dismissal claim. He did not seem to appreciate that the test under the Employment Rights Act 1996 relates to the reasonableness/fairness of the Respondent's conduct. Mr West instead focussed upon the

[1] The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1.

Respondent 'proving' the Claimant had committed the wrong-doing he was accused of. The law was set out in the liability Judgment.

The Law

25. The material provisions of the ET Rules 2013 governing costs applications are excerpted below:

> Rule 74. Definitions
>
> (1) "Costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing). […]
>
> Rule 75. Costs orders and preparation time orders
>
> (1) A costs order is an order that a party ("the paying party") make a payment to—
>
>> (a) another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative.
>
> Rule 76. Where a costs order or 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.
>
> (2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.
>
> Rule 77. Procedure
>
> A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.
>
> Rule 78. The amount of a costs order

> (1) A costs order may—
>
> > (a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;
> >
> > (b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles; […]
>
> (3) For the avoidance of doubt, the amount of a costs order under sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000.
>
> Rule 84. Ability to pay
>
> In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.

26. When determining an application for costs, the ET should apply a three-stage approach:

    a. Is the relevant jurisdictional threshold in rule 76 met?

    b. If so, should the ET exercise its discretion in favour of making a costs order?

    c. If so, what sum of costs should the ET order?

27. For the purposes of rule 76(1)(a) the word "unreasonable" is to be given its ordinary English meaning and is not to be interpreted as meaning something similar to vexatious (Dyer v Secretary of State for Employment UKEAT/0183/83).

28. The Tribunal should consider the nature, gravity and effect of the unreasonable etc conduct, but it is appropriate to avoid a formulaic approach and have regard to the totality of the relevant conduct. As Mummery LJ explained in Yerrakalva v Barnsley MBC [2012] ICR 420, CA at §41:

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

29. It should, however, be noted that the Tribunal is not confined to making an award limited to those costs caused by the unreasonable conduct. As Mummery LJ confirmed in McPherson v BNP Paribas (London Branch) [2004] ICR 1398, CA:

> 39. Miss McCafferty submitted that her client's liability for the costs was limited, as a matter of the construction of rule 14, by a requirement that the costs in issue were "attributable to" specific instances of unreasonable conduct by him. She argued that the Tribunal had misconstrued the rule and wrongly ordered payment of all the costs, irrespective of whether they were "attributable to" the unreasonable conduct in question or not. The costs awarded should be caused by, or at least be proportionate to, the particular conduct which has been identified as unreasonable.
>
> 40. In my judgment, rule 14(1) does not impose any such causal requirement in the exercise of the discretion. The principle of relevance means that the Tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion, but that is not the same as requiring BNP Paribas to prove that specific unreasonable conduct by the applicant caused particular costs to be incurred. As Mr Tatton-Brown pointed out, there is a significant contrast between the language of rule 14(1), which deals with costs generally, and the language of rule 14(4), which deals with an order in respect of the costs incurred "as a result of the postponement or adjournment". Further, the passages in the cases relied on by Miss McCafferty (Kovacs v Queen Mary and Westfield College [2002] ICR 919, para 35, Lodwick v Southwark London Borough Council [2004] ICR 884, paras 23-27, and Health Development Agency v Parish [2004] IRLR 550, paras 26-27) are not authority for the proposition that rule 14(1) limits the Tribunal's discretion to those costs that are caused by or attributable to the unreasonable conduct of the applicant.
>
> 41. In a related submission Miss McCafferty argued that the discretion could not be properly exercised to punish the applicant for unreasonable conduct. That is undoubtedly correct, if it means that the indemnity principle must apply to the award of costs. It is not, however, punitive and impermissible for a Tribunal to order costs without confining them to the costs attributable to the unreasonable conduct. As I have explained, the unreasonable conduct is a precondition of the existence of the power to order costs and it is also a relevant factor to be taken into account in deciding whether to make an order for costs and the form of the order.

30. Mummery LJ did not resile from these observations in his later judgment in Yerrakalva, though he did emphasise in Yerrakalva that whilst the Tribunal is not limited to awarding those costs incurred by the receiving party as a result of the paying party’s unreasonable conduct, the ‘effect’ of the unreasonable conduct will often be a relevant factor in the Tribunal’s exercise of its discretion.

31. In circumstances where the Tribunal finds that the jurisdictional threshold in rule 76 is met, the Tribunal retains a broad discretion as to whether to make a costs order and the amount of any costs awarded. Whilst there is no closed list of factors relevant to the exercise of the Tribunal's discretion, the following factors are often relevant:

    a. Costs orders are intended to be compensatory, not punitive (Lodwick v Southwark LBC [2004] ICR 884, CA). Therefore, the extent of any causal link between the unreasonable etc conduct and the costs incurred will normally be a relevant discretionary factor (Yerrakalva), albeit there is no requirement to establish a causal link between the unreasonable conduct and the costs incurred before an order can be made (McPherson).

    b. The paying party's ability to pay is a factor which the Tribunal is entitled, but not obligated, to consider (see Rule 84). Where regard is had to the paying party's ability to pay, that factor should be balanced against the need to compensate the receiving party who has unreasonably been put to expense (Howman v Queen Elizabeth Hospital Kings Lynn UKEAT/0509/12).

    c. Any assessment or consideration of means need not be limited to the paying party's means as at the date the order is made. It is sufficient that there is a 'realistic prospect that [they] might at some point in the future be able to afford to pay' (Vaughan v London Borough of Lewisham [2013] IRLR 713, EAT).

    d. Where the Tribunal does decide to take the paying party's means into account, it must do so on the basis of sufficient evidence (for example by the paying party completing a county court form EX140) (Oni v NHS Leicester City UKEAT/0144/12).

    e. There is no requirement to limit costs to the amount the paying party can afford (Arrowsmith v Nottingham Trent University [2012] ICR 159, EAT).

    f. The Tribunal may have regard to the means of a party's spouse or other immediate family members (Abaya v Leeds Teaching Hospitals NHS Trust UKEAT/0258/16).

    g. Whether a party is legally represented may be a relevant factor. An unrepresented litigant may be afforded more latitude than a party who has the benefit of professional legal advice and representation (AQ Ltd v Holden [2012] IRLR 648, EAT).

32. In Radia v Jefferies International Ltd UKEAT/0007/18/JOJ the EAT said:

’61. It is well-established that the first question for a Tribunal considering a costs application is whether the costs threshold is crossed, in the sense that at least one of Rule 76(1)(a) or (b) is made out. If so, it does not automatically follow that a costs order will be made. Rather, this means that the Tribunal may make a costs order, and shall consider whether to do so. That is the second stage, and it involves the exercise by the Tribunal of a judicial discretion. If it decides in principle to make a costs order, the Tribunal must consider the amount in accordance with Rule
78. Rule 84 provides that, in deciding both whether to make a costs order, and if so, in what amount, the Tribunal may have regard to ability to pay.

62. At the first stage, accordingly, it is sufficient if either Rule 76(1)(a) (through at least one sub-route) or Rule 76(1)(b) is found to be fulfilled. There is an element of potential overlap between (a) and (b). The Tribunal may consider, in a given case, under (a), that a complainant acted unreasonably, in bringing, or continuing the proceedings, because they had no reasonable prospect of success, and that was something which they knew; but it may also conclude that the case crosses the threshold under (b) simply because the claims, in fact, in the Tribunal’s view,
had no reasonable prospect of success, even though the complainant did not realise it at the time. The test is an objective one, and therefore turns not on whether they thought they had a good case, but whether they actually did.

63. In this regard, the remarks in earlier authorities, about the meaning of “misconceived” in Rule 40(3) in the 2004 Rules of Procedure, are equally applicable to this replacement threshold test in the 2013 Rules. See in particular Vaughan v London Borough of Lewisham [2013] IRLR 713 at paragraphs 8 and 14(6). However, in such a case, what the party actually thought or knew, or could reasonably be expected to have appreciated, about the prospects of success, may, and usually will, be highly relevant at the second stage, of exercise of the discretion.

64. This means that, in practice, where costs are sought both through the Rule 76(1)(a) and the Rule 76(1)(b) route, and the conduct said to be unreasonable under (a) is the bringing, or continuation, of claims which had no reasonable prospect of success, the key issues for overall consideration by the Tribunal will, in either case, likely be the same (though there may be other considerations, of course, in particular at the second stage). Did the complaints, in fact, have no reasonable prospect of success? If so, did the complainant in fact know or appreciate that? If not, ought they, reasonably, to have known or appreciated that?

33. Mr Proffitt referred to Scott v Inland Revenue Commissioners 2004 ICR 1410 CA in which it was observed that ‘misconceived’ for the purposes of costs under the 2004 Tribunal Rules included ‘having no reasonable prospect of success’ and clarified that the key question in this regard is not whether a

party thought they were in the right, but whether they had reasonable grounds for doing so.

Conclusions

34. The threshold in Rule 76 is met in this case. TLS were involved from the outset and the Tribunal was misled on numerous occasions as to TLS' role and representation of the Claimant. That was unreasonable behaviour by either the Claimant or Mr West his representative. It may well have been the case that the directors of TLS did not appreciate the obligations to the FCA, however, the Claimant via Mr West continued to misrepresent the position of TLS to the Tribunal. TLS remains the Claimant's representative, yet there was no evidence that it was exempt from FCA registration. It is against public policy for what was held out as a claims management company to represent a Claimant if it has not complied with FCA registration requirements. This amounts to unreasonable conduct.

35. The nature, gravity and effect of the unreasonable conduct is in particular misleading the Tribunal in respect of TLS and its costs. The findings about the Claimant's credibility and lack of frankness are set out in the liability Judgment.

36. Furthermore, the unfair dismissal claim did not have reasonable prospects of success and certainly, the Claimant was put on notice of that from the 20/1/2023.

37. The threshold having been met, the Tribunal is prepared to exercise its discretion in making a costs award. Misleading the Tribunal is serious unreasonable conduct.

38. The costs the Respondent seeks are modest and were in the main incurred by junior members of staff (a trainee solicitor and a paralegal). Mr Proffitt's fees were also reasonable. The costs sought of £19,641.48 (exclusive of vat) exceeded the estimated costs of £17,000 (exclusive of vat), however, the Respondent perhaps did not factor in the addition of the costs hearing. The Tribunal is prepared to Order that the Claimant pay to the Respondent its costs of £17,000 exclusive of vat.

39. Other than the breakdown provided at paragraph 15, the Claimant did not provide any evidence further to the Order of 24/1/2024, much less proffer himself for cross-examination. Furthermore, the breakdown did not correlate to the one payslip disclosed. In fact, the Claimant was in breach of Rule 76(2), although the Respondent did not focus upon this and Rule 76(2) is not subject to the test of reasonableness, it focuses on whether or not there is simply a breach of Rule 76(2).

40. The Tribunal was not therefore able to take into account the Claimant's ability to pay any costs awarded in a substantive manner. The Claimant had the opportunity to comply with the Tribunal's Order and did not do so. He cannot escape that obligation by absenting himself from the proceedings.

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Employment Judge V Wright
Date: 28 February 2024