EMPLOYMENT TRIBUNALS

Claimant: Mr D Hughes

Respondent: (1) Costain Limited
Respondent : (2) ME Global Resources Limited

Heard at: Birmingham (via CVP) **On: 21/2/24**

Before: Employment Judge Beck

Representation
Claimant: In Person
Respondent: (1) Ms Senior, counsel
Respondent: (2) Ms Rumble, counsel

RESERVED JUDGMENT

1. The tribunal finds the claimant was neither an employee nor worker of either respondent, his claims against both are dismissed on the grounds of lack of jurisdiction.

2. The tribunal finds the claims had no reasonable prospect of success and the claimant has acted vexatiously, abusively, disruptively or otherwise unreasonably, in the conduct of proceedings **Regulation 76 (1) (a) and (b), Employment Tribunals (Constitution and Rules of Procedure) Regulations (2013)**.

3. The claimant is ordered to pay to respondent 1 the sum of **£19,889.50** in respect of its costs.

4. The claimant is ordered to pay to respondent 2 the sum of **£7,590.66** in respect of its costs.

REASONS

Background

1.The claimant lodged an ET1 form on the 11/5/23 bringing complaints that he was owed notice pay, arrears of pay and other payments. Respondent 1 was identified as Costain Group, and respondent 2 as Mactech Energy Group.

2. The claimant stated in his ET1 that he was employed in a tripartite contract between Costain, Mactech and himself. The role was described as a nuclear engineer in quality assurance. The contract was to run from April to October 2023, and the claimant was to be paid £30.00 per hour or £4,800 a month. He indicated Costain refused to sign off time sheets and failed to justify why it did not sign off the time sheets, when the work was carried out in accordance with its instructions.

3.The claim is for £28,800, which is stated to be the full contract from April to October 2023, plus £750.00 for a laptop which was not provided. This is based on a 5 day a week, 40 hour per week contract.

4. Respondent 1 in their ET3 confirmed their position was the claimant was not employed by them, or any group company. The respondent was incorrectly recorded as Costain Group, it should be Costain Limited. They confirmed a tripartite contract was in place between the respondent (1), Pretium Resourcing Limited and ME Global Resources Limited. The claimant had not been offered work by them, completed any work, submitted any timesheets and was not owed any monies. They reserved their position on costs.

5. Respondent 1's ET3 was submitted out of time. Legal Officer Metcalf granted their application to extend the time limit on the 24/6/23, on the grounds it was just and proportionate to do so.

6. Respondent 2 in their ET3 dated 2/6/23, confirmed Mactech Energy Group was the holding company for a number of other companies including ME Global Resources Limited. Their position was that the claimant had never been employed by the respondent, or any group company. The claimant had entered into an 'agreement for work finding services' with ME Global Resources Limited, which involves finding short term work. They referred to the claimant being employed by Brookson Solutions Limited and indicated a statement of terms of employment existed dated 3/5/23.

7. The second respondent also referred to County Court claim number K7QZ37Q6, and a breach of contract claim being issued in the County Court on the 2/5/23, by the claimant, against respondent 2. Respondent 2 highlighted the doctrine of estoppel, in respect of any breach of contract claim being pursued in the Employment Tribunal. They reserved their position on costs.

Case Management Hearing – 6/10/23

8. During the preliminary hearing, Employment Judge Kenward, with the agreement of the parties, amended respondent 1's name to Costain Limited, and substituted respondent 2 for ME Global Resources Limited.

9. The preliminary hearing involving the claimant and respondents 1 and 2, and 3 other named respondents. Employment Judge Kenward determined that the other 3 age discrimination claims should be split off and dealt with separately, and the claims against respondent 1 and 2 be dealt with together.

10. The case management order recorded that the County Court case against respondent 2 was understood to involve a claim of £4,000, for salary not paid for the month of April 2023, and there could be some overlap with this claim.

11. Employment Judge Kenward listed a preliminary hearing on the 21/2/24, to deal with the issues listed below:

(a) any striking out application being pursued by the Claimant, subject to the grounds of any such application being confirmed (as provided for in the Case Management Orders below);

(b) whether the Claim being made by the Claimant in the County Court proceedings causes an estoppel to operate so that the Claimant is estopped from bringing part or all of his Claim in the Employment Tribunal;

(c) whether the Employment Tribunal proceedings should be stayed pending the determination of the County Court proceedings;

(d) whether the Claim (or any part of it) is otherwise outside the jurisdiction of the Employment Tribunal:

(e) whether the Claim (or any part of it) should be struck out on the basis that it is scandalous, vexatious or has no reasonable prospects of success (rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013);

(f) whether it should be ordered that a deposit be payable by the Claimant as a condition of continuing proceedings on the basis of the Claim (or any part of it) having little reasonable prospects of success;

(g) whether the Claim (or any part of it) should be struck out on the basis that the manner in which the proceedings have been conducted by the Claimant has been scandalous, unreasonable or vexatious (rule 37(1)(b) of the Employment Tribunals Rules of Procedure 2013).

12. All parties were directed to file a single document confirming which applications they pursued at the preliminary hearing by the 24/1/24. Respondent 1 was ordered to file a bundle by the 31/1/24. Witness statements were ordered by the 31/1/24, and any skeleton arguments to be relied on by any party by the 7/2/24.

13. At paragraph 29 of Employment Judge Kenward's order, he detailed the circumstances in which a deposit order could be made and recorded that 'the tribunal will need to be provided with details of the claimant's financial position if it

is to be taken into account'.

14. At paragraph 7 of his order relating to all 5 claims, Employment Judge Kenward recorded issues raised with him by counsel for one of the age discrimination claims, concerning preliminary enquiries being made as to whether the claimant was a vexatious litigant. Consideration was being given to an application via the Government Legal Service to the Attorney General, under section 33 of the Employment Tribunals Act (1996), for a restriction of proceedings order. Applications to stay proceedings were made by all 5 respondents whilst an application for an order was made, and this was refused by the judge.

Preliminary Issues – 21/2/24

15. I had been provided with a 300-page electronic bundle by respondent 1. I enquired with the claimant whether he had received the 300-page bundle, and he advised he had not received the electronic version. He explained that he lived in Coventry but worked in Nottingham. He was at work in Nottingham using a work desktop computer and did not have access to his personal e mails. He had received a hardcopy bundle from respondent 1, but the bundle was at his Coventry address. The claimant was not able to provide me with a clear explanation as to why he had not brought the bundle with him, apart from explaining he was in Nottingham because the internet facilities were better, and he didn't think he would need the bundle.

16. Enquiries with respondent 1 revealed the bundle was sent electronically to the claimant on the 31/1/24, in accordance with tribunal directions. The claimant had his mobile phone with him, but no other device on which to view a bundle. Respondent 1 sent the bundle to the claimant again, but he was unable to download the attachment on his phone. The tribunal spent some time trying to assist the claimant access the bundle on his phone. The claimant advised he had sent in his own bundle of physical documents, which included 13 documents, on the 13/2/24. I had not seen this bundle, and neither had the respondents. I had received an e mail dated 12/2/24 from the claimant with a copy of his witness statement only.

17. The case was put back for respondent 1 to e mail the claimant the bundle in 4 separate attachments, A, B, C, D so that he would be able to view the bundle on his phone. I requested a digital support officer from the tribunal contact the claimant to assist him with this process. I requested the tribunal clerk check the tribunal file for the bundle sent in by the claimant, and to scan a copy of the bundle and forward it to the me and the respondents.

18. The tribunal clerk found the documents sent in by the claimant and forwarded them on. The claimant could access the 4 separate attachments of the bundle on his phone, and respondent 1 sent him a copy of the index to the bundle to assist him. It was noted that the claimant should have submitted his witness statement by the 31/1/24, and the documents were received at the tribunal on the 14/2/24, the respondents did not take issue with this, and neither did I.

19. I had not seen copies of the claimants/respondent's skeleton arguments. The direction made on the 6/10/23 required copies to be submitted by the 7/2/24. Respondent 2 indicated it had been submitted on the 2/2/24, respondent 1 on the

16/2/24 and the claimant on the 10/2/24 and 14/2/24. The case was put back for the documents to be located and forwarded to me, the claimant and respondents. Again, I noted the claimant and respondent 1's arguments had been submitted late but did not take issue with this.

20. When the hearing resumed, I clarified if all parties had had sufficient opportunity to consider the skeleton arguments, which they confirmed they had. Resolving issues identified at paragraphs 15 –19 above took some considerable time, and the hearing resumed at 12.30.

21. I considered the single document each party had submitted identifying the applications they sought to pursue at this hearing, working through the list of issues identified on the 6/10/23.

22. In relation to (a) the claimant did not identify in his document that he pursued any strike out applications against the respondents and confirmed this today.

23. Paragraph (b) of the list of issues referred to estoppel of these proceedings in whole or part due to the County Court claim, and (c) refers to staying the proceedings pending the outcome of County Court proceedings. Respondent 1 had included in the bundle at page 175, a copy of a County Court judgment (K7QZ37Q6) dated 23/1/24, in which DDJ Smyth found the claimant had conducted his claim unreasonably and dismissed it. The claimant advised he has obtained a transcript of the judgment and is appealing to the Court of Appeal, lodging the appeal on the 31/1/24. I was not asked to pause these proceedings pending the appeal's outcome and would not have considered it appropriate to do so if this had been requested.

24. Issues identified in the list of issues at (d), (e), (f), and (g) above have been confirmed by both respondents in their single documents as issues they seek the tribunal to determine at this hearing. In addition, both respondents request the tribunal consider costs orders against the claimant. The claimant did not raise any other additional preliminary points in his single document.

25. I sought to confirm with the claimant if he pursued an argument that he was an employee only of the respondents, as set out in his ET1 claim form. Initially, the claimant confirmed he pursued his claim on the basis he was an employee of both respondents. He then indicated his case was he was either an employee or worker of Costain, respondent 1 only. In view of this I approached the remainder of the hearing on the basis it was in issue whether the claimant was an employee or a worker of both respondents, and the respondents were aware of this.

26. I indicated to the parties I proposed to hear evidence in relation to issue (d), whether the tribunal had jurisdiction to hear the claim, and would be content to hear representations from the parties on the applications for strike out and costs. The parties agreed with this approach. I highlighted that the claimant had not provided details of his means as required by paragraph 29 of the 6/10/23 case management order, this being relevant to deposit orders and cost orders. The claimant agreed he could give details of his financial position as part of his evidence, and that the applications for costs could be heard today.

27. In relation to possible applications to the Attorney General for restrictions on proceedings orders, respondents 1 and 2 confirmed they were not aware of any applications having been submitted relating to the claimant.

Law – Employee / Worker status

The Employment Rights Act 1996 (ERA)

Section 230: Employees, workers etc

(1) In this Act “employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of Employment.

(2) In this Act “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3) In this Act “worker” (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a) A contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly.

Article 3 [Employment Tribunals] Extension of Jurisdiction (England and Wales) Order (1994) provides that proceedings may be brought before an [employment tribunal] in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if -

(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;

(b) the claim is not one to which article 5 applies; and

(c) the claim arises or is outstanding on the termination of the employee’s employment.

Section 13(1) of the Employment Rights Act 1996 provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction. An employee has a right to complain to an Employment Tribunal of an unlawful deduction from wages pursuant to Section 23 of the Employment Rights Act 1996.

In **Ready Mixed Concrete (South East) Limited -vMinister of Pensions and National Insurance [1968] 2QB 497 (HC)**,

McKenna J summarised the essential elements of the contract of employment as follows:-

(a) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for hid Master.

(b) He agrees expressly or impliedly that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other Master.

(c) The other provisions of the contract are consistent with its being a contract of service.

In **Autoclenz Limited -v- Belcher & Others [2011] IRLR 820 (SC)**, the Supreme Court established the following principles to be considered by the tribunal in determining the true nature of the relationship:-

(a) It is important to be aware that employers may place substitution clauses, or clauses denying any obligation to accept or provide work, in employment contracts as a matter of form, even where such terms do not reflect the real employment relationship.

(b) A finding that a contract is in part a sham does not require a finding that both parties intended it to paint a false picture as to the true nature of their respective obligations. The question in every case is what is the true agreement between the parties?

(c) Where there is a dispute as to the genuineness of a written term in an employment contract, the focus of the enquiry must be to discover the actual legal obligations of the parties. All the relevant evidence must be examined, including: the written term itself, read in the context of the whole agreement; how the parties conduct themselves in practice; and their expectations of each other.

(d) Evidence of how the parties conduct themselves in practice may be so persuasive that an inference can be drawn that the practice reflects the true obligations of the parties, although the mere fact that the parties conduct themselves in a particular way does not of itself mean that the conduct accurately reflects the legal rights and obligations. For example, there could well be a legal right to provide a substitute worker and the fact that the right is never exercised in practice does not mean that it is not a genuine right.

(e) The relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed. The circumstances in which contracts relating to work or services are concluded are often very different from those in which commercial contracts between parties of equal bargaining power are agreed. Organisations which offer work or require services to be provided by

individuals are frequently in a position to dictate the written terms which the other party has to accept. In practice, in employment cases, it may be more common for a court or tribunal to have to investigate allegations that the written contract does not represent the actual terms agreed and the court or tribunal must be realistic and worldly wise when it does so.

In **Uber v Aslam UK/SC 2019/0029** the Supreme Court considered whether or not Uber drivers, whose work was arranged via a smartphone application, worked for Uber under workers' contracts so as to qualify for the national minimum wage, annual leave and other workers' rights or whether they were performing services solely for and under contracts made with passengers through the agency of Uber London. It took a purposive approach and instead of focusing entirely on the contractual documents, considered the nature of the relationship between drivers and Uber. In particular, it considered the subordinate status of drivers and the degree of control exerted by Uber towards the drivers.

Law – Strike out applications / Deposit Orders

Employment Tribunals (Constitution and Rules of Procedure) Regulations (2013)

37 - Striking out

(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

39 - Deposit orders

(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any

specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order;

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders), otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.

Law – Costs Orders

Employment Tribunals (Constitution and Rules of Procedure) Regulations (2013)

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;

(b) the receiving party in respect of a Tribunal fee paid by the receiving party; or

(c) another party or a witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual's attendance as a witness at the Tribunal.

(2) A preparation time order is an order that a party ("the paying party") make a payment to another party ("the receiving party") in respect of the receiving party's preparation time while not legally represented. "Preparation time" means time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at any final hearing.

(3) A costs order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings. A Tribunal may, if it wishes, decide in the course of the proceedings that a party is entitled to one order or the other but defer until a later stage in the proceedings deciding which kind of order to make.

76- 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; or

(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins].

(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.

(3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if

(a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and

(b) the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment.

(4) A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer's contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party.

(5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing

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; or, in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment and Further Provisions) 1993(b), or by an Employment Judge applying the same principles;

(c) order the paying party to pay the receiving party a specified amount as reimbursement of all or part of a Tribunal fee paid by the receiving party; (a) Added by the Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2016 (S.I. 2016/271). (b) S.I. 1993/3080. 26

(d) order the paying party to pay another party or a witness, as appropriate, a specified amount in respect of necessary and reasonably incurred expenses (of the kind described in rule 75(1)(c)); or

(e) if the paying party and the receiving party agree as to the amount payable, be made in that amount.

(2) Where the costs order includes an amount in respect of fees charged by a lay representative, for the purposes of the calculation of the order, the hourly rate applicable for the fees of the lay representative shall be no higher than the rate under rule 79(2).

(3) For the avoidance of doubt, the amount of a costs order under sub-paragraph (b) to (e) of paragraph (1) may exceed £20,000.

Consideration of not represented status of claimant

AQ Ltd v Holden [2012] UKEAT/0021/12/CEA,

per HHJ Richardson:

The threshold tests in [the predecessor to Rule 76] are the same whether a litigant is or is not professionally represented. The application of those tests may, however, must take into account whether a litigant is professionally represented. A tribunal cannot and should not judge a litigant in person by the standards of a professional representative. Lay people are entitled to represent themselves in tribunals; and, since legal aid is not available and they will not usually recover costs if they are successful, it is inevitable that many lay people will represent themselves. Justice requires that tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life. As Mr Davies submitted, lay people are likely to lack the objectivity and knowledge of law and practice brought by a professional legal adviser. Tribunals must bear

this in mind when assessing the threshold tests in rule 40(3) . Further, even if the threshold tests for an order for costs are met, the Tribunal has discretion whether to make an order. This discretion will be exercised having regard to all the circumstances. It is not irrelevant that a lay person may have brought proceedings with little or no access to specialist help and advice.

Unreasonable conduct

Dyer v Secretary of State for Employment [1983] UKEAT 183/83,

per Browne Wilkinson J:

Further, it is now very well established by Court of Appeal authority, and again we would have thought it was very widely known, that the question whether or not conduct is reasonable is not a question of law: it is a question of fact. In the present case the whole appeal turns on whether, within the meaning of the costs rule, the conduct of the Secretary of State can be categorised as being "otherwise unreasonably bringing or conducting the proceedings". On the face of it, that is a question of fact on which an appeal cannot succeed unless it is shown either that the industrial tribunal, in reaching its conclusion of fact, misdirected itself on a relevant point of law, or based itself on findings for which there was no evidence or reached a conclusion which, in a legal sense, is perverse, ie, a conclusion which no reasonable tribunal, properly directing itself, could have reached. Those are the only possible points of law in this case.

Reasonable prospects of success

T Opalkova v Acquire Care Ltd [2021] UKEAT/0056/21

per HHJ Tayler:

Determining that a response did not have a reasonable prospect of success or that a respondent acted unreasonably in defending the claim and/or in maintaining the defence is a threshold that results in the tribunal having a discretion to make a cost or preparation time order.

As **HHJ Auerbach noted in Radia v Jefferies International [2020] IRLR 431:**

“ 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 r 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 r 78. …” [Original emphasis]

HHJ Auerbach considered the overlap between a claim or response having no reasonable prospect of success and unreasonable conduct:

"This means that, in practice, where costs are sought both through the r 76(1)(a) and the r 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?"

Discretion to make an award

Barnsley MBC v Yerrakalva [2011] EWCA Civ 1255,

per Mummery LJ:

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. The main thrust of the passages cited above from my judgment in Mc Pherson was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the ET had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances.

Evidence Heard

28. The claimant gave evidence on oath to the tribunal. He stated he was interviewed by Anthony Meadows and his CV was sent to the Atomic Weapons Establishment. He was controlled by Anthony Meadows who instructed him to work from home. The statement of works dated 6/3/23 in his bundle demonstrated he was a worker for Costain. He required security clearance from the MOD and a secure MOD laptop. He relies on page 160 in the bundle which shows confirmation of assignment details with a start date of the 11/4/23. Costain were said to have bought his services from Mactech. Anthony Meadows advised him re: high visibility work wear and footwear. The claimant referred to working 11 days on site and 3 days from home.

29. He confirmed he was never issued with a laptop and was using his own laptop initially working from home. When asked what work he was undertaking from home, he indicated he was studying the statement of works at that time. He was in e mail correspondence with Mrs L Tomlinson, who is named on the statement of works as the Quality Manager Sustainment Programme. He advised

he attended the site once but was not allowed in as he did not have a security pass.

30. In cross examination by respondent 1, the claimant accepted stating in his ET1 that 'he could not work', explaining it was because he needed a security pass to get on site. He accepted he was not party to the tripartite agreement in the bundle at page 69 between Pretium Resourcing Limited ME Global Resources Limited and Costain Limited. He was not able to recall if he advised Ms Dodds, solicitor for respondent 1, he would drop his claim if provided with a copy of this contract. The claimant accepted clauses 4.6, 4.7, and 6.1 of the agreement included terms that temporary resources were not employees or workers, that this was the parties' intentions, and that ME Global was providing details of potentially suitable resources to Costain and Pretium.

31. The claimant was referred to page 156 and the agreement for work-finding services stated to be between him and ME Global Resources Limited. He advised he never signed it; it was a sham and denied it recorded at 2.2 that the claimant wishes to operate through a company. He was forced to sign a statement of terms with Brookson One at page 161, by Mactech, who he alleges played a scam on him. When I asked about the contract subsequently, the claimant said he did not think he had been sent the contract, and he did not accept those terms and conditions.

32. The claimant accepted Anthony Meadows e mail 31/3/23 page 124 did not give an instruction to begin work, and that he was told to ignore start / end dates. The claimant maintained he had been offered a job on the phone on the 3/4/23 by Anthony Meadows. He accepted there was no confirmation in the bundle that he had been granted security clearance.

33. The claimant maintained he could only access the statement of work as he had security clearance but did not comment when questioned that the document was freely available via a google search on the internet. In answer to questions he was trying to negotiate a £65,000 salary, he stated he was establishing his position whether as a worker or self-employed.

34. In cross examination by respondent 2, the claimant was asked twice if he accepted, he was not an employee or worker for ME Global. The claimant replied that his position was he was an employee or worker of respondent 1, Costain. He maintained that ME Global forced him to sign a global contract. I asked him to clarify on page 193, in his statement dated 15/10/23, his reference to being a party to a quadripartite agreement involving the Atomic Weapons Establishment, the claimant confirmed he had not seen a four-party contract.

35. I have considered the 300-page bundle provided by respondent 1, the claimants bundle with 10 documents which was not numbered and received on the 14/2/24. Also, oral representations from the parties on strike out and deposit orders, and the claimants written submissions dated 10/2/24 and 14/2/24, and respondent 1's submissions dated 16/2/24 and respondent 2's submissions dated 2/2/24.

Facts

36. A managed service preferred supplier agreement dated 21/2/23 was entered

into between Pretuim Resourcing Limited, ME Global Resources Limited (supplier) and Costain Limited (client). Pretium was obtaining temporary staffing services from the supplier for the client.

37. Anthony Meadows, Team Leader, Costain, spoke to the claimant on the 31/3/23, and e-mailed him attaching a statement of work identifying a quality engineers' role and advising the onboarding team would be in touch.

38. The claimant e mails Anthony Meadows on the 31/3/23 and 1/4/23 setting out proposals to rent air bnb premises, and an e mail on the 3/4/23 referring to 'your very kind job offer' , 'I am disengaging today from my full time permanent role to join your company', 'annual salary of £65,000 is accepted' 'I hold Rolls Royce Security clearance until 2027'.

39. Anthony Meadows e-mailed the claimant on the 3/4/23 advising the claimants cv had been submitted to their client and they were awaiting feedback. He was advised not to leave his current position based on their phone conversation.

40. The claimant e-mailed Anthony Meadows on the 3/4/23 confirming 'I am disengaging from my company to join your company', 'I would await 15 days for your client to confirm the engagement'.

41. Anthony Meadows on the 4/4/23 responds to the claimants e mail of the 3/4/23 advising of the need to set the claimant up with a laptop, Hi vis and steel capped trainers being acceptable. He advises further in an e-mail 6/4/23 that the claimants' start date will be dependent on 'how quickly your agency and Costain HR can agree terms', those responsible for determining start dates being off until the 11/4/23.

42. The claimant responds by e- mail to Anthony Meadows on the 6/4/23 referring to payment via umbrella, advising he will start on the 8/4/23 and await his instructions.

43. The claimants bundle at exhibit 5 - Anthony Thompson of Mactech sending the claimant the work finding services agreement, referring to an assignment through Brookson from 11/4/23 at Costain.

44. There is an agreement for work finding services (page 156) between ME Global Resources and the claimant dated 5/4/23, signed by respondent 2, but not by the claimant.

45. A 'confirmation of assignment details' document from ME Global Resources (page 160) refers to the claimant as the resource, the client as Costain, quality engineer role commencing on 11/4/23, £30.00 per hour, and engaged via Brookson.

46. There is a statement of terms from Brookson One, to the claimant at his stated address, setting out his terms of engagement with Brookson One as an employee, in the role of quality engineer, signed by Brookson One, but not by the claimant.

Conclusions

47. I find on the balance of probability that the claimant was neither an employee nor worker of either the first or second respondent. I set out my reasons below for forming this conclusion.

48. In his ET1 form the claimant refers to a tripartite contract between himself, Costain and Mactech as an engineer. No evidence has been presented to me of such an agreement or contract, I conclude one does not exist. The only tripartite contract in the bundle at page 69 relates to a managed service preferred supplier agreement between Pretium Resourcing Limited, ME Global Resources Limited and Costain limited dated 21/2/23.

49. The managed service agreement is clear in its terms. It clearly provides at 4.6 that temporary resources are not employees of Pretium or Costain and the parties acknowledge this at 4.7, confirming at 6.1 that ME Global would be responsible for the payment of all temporary resource, and at 8.8 are responsible when issues arise in respect of any temporary resource. At 30.3 it clarifies that all personnel are deemed employees of ME Global.

50. At page 193 of the bundle, the claimant in his witness statement dated 15/10/23, refers to a quadripartite agreement, between himself, Costain, Mactech and Atomic Weapons Agency. There is no evidence in the bundle, or additional bundle provided by the claimant of such a four-way agreement. I asked the claimant whilst he was giving evidence about the existence of such a contract, and he confirmed he had not seen a copy of it. This was not mentioned in the ET1. I conclude such a contract does not exist.

51. In relation to the agreement for work finding services between the claimant and respondent 2, page 156, I accept the claimant's account that he did not sign the document, this accords with the copy provided in the bundle, signed by an employee of ME Global Resources on the 5/4/23. I do not accept the claimant's account, that it did not refer at 2.2 to 'you have advised us that you wish to work through a company', it is recorded in the copy in the bundle. It is clear from the claimants e mail at page 135, dated 6/4/23, that he did not want payment via umbrella because 'out of £1200 earnings they would deduct £500'. Presumably this is one of the reasons why the claimant did not sign the agreement. It is apparent from the claimants e mail that he is familiar with umbrella arrangements. This is also supported by page 207 in the bundle, the judgement of Employment Judge Gaskell, in **Hughes and Aktrion Group Limited ET/1301951/2016**, when the claimant advanced an argument unsuccessfully that he was an employee or worker and was found to be an independent contractor. I have also noted **Hughes and Benson Viscometers ET 1601595/2021,** in which Employment Judge Frazer dismissed an argument that the claimant was an employee or worker and found an agency relationship via a limited company.

52. The work findings services agreement, whilst not signed by the claimant, was clear in its terms. At 2.2, 'this agreement between you and us is for work finding services only, and you are not our employee'. 4.(a) 'we do not guarantee that any work will be found'. This was not a contract of employment. There is no evidence to support the claimant's assertion this agreement was a sham.

53. Conflicting accounts were given in relation to whether the claimant had signed the statement of terms and conditions as an employee of Brookson One. (page 161). In evidence the claimant said Mactech had forced him to sign the

statement of terms. When I asked further questions, he indicated that he did not think he had been sent the contract, and did not agree to its terms and conditions. Based on the claimant giving 2 contradictory accounts, and the version in the bundle being unsigned, I conclude that this statement was not signed by the claimant. There is no evidence to support the claimant's assertion he was forced to sign the contract, and this evidence is contradictory with his later evidence.

54. I refer to the chronology of e mails in paragraphs 37 – 43 above. The claimant in evidence referred to Anthony Meadows offering him the role of quality engineer in a phone call on the 3/4/23. This was the first time this had been raised by the claimant. This was not contained in his ET1, statement dated 15/10/23 at page 193, or in his statement submitted as part of his paper bundle. The claimant has not provided any other supporting evidence that a verbal offer of a role was made. That assertion is inconsistent with the documentary evidence in the bundle of e mails exchanged on the 3/4/23. Anthony Meadows advised the claimant his CV had been submitted to the client, and they were awaiting feedback. It is highly unlikely given this contemporaneous evidence, that a verbal job offer was made, assuming Anthony Meadows had authority to make such an offer, which seems unlikely given the recruitment arrangements described above.

55. The claimants e- mail of the 3/4/23 refers to a job offer and a £65,000 salary. This figure is not mentioned anywhere else in the bundle or in evidence. Its noteworthy that the e – mail from 6/4/23 from Anthony Meadows advising start dates would depend on how quickly your agency and Costain can agree terms, is met with a response advising the claimant has given up his full time job and will start on the 8/4/23, despite Anthony Meadows advising those who would determine start dates would not be available until the 11/4/23. It is apparent from the e mails that the claimant is trying to drive the agenda, referring to arrangements which have not been agreed.

56. Conflicting accounts have also been given by the claimant regarding the terms offered, which does not support his claim he was an employee or worker. In his e mail dated 6/4/23, he refers to the hourly rate of £30 being too low, not being adequate to cover the required 3 days on site in Reading, mileage and overnight stays. On page 154 in his witness statement dated 28/9/23, the claimant refers to a 1-year contract at £49.00 per hour, 11 days on site and 3 days at home, based on 12 hours a day and £100 a day accommodation subsidy. In the ET1, £30 an hour was claimed, £4,800 a month, and a total claim of £28,800 for the period April to October 2023.

57. The claimant described the work involving Trident Submarine Nuclear Warheads, and stated only those with security clearance would be able to attend site and deal with the work, which had elements of confidentiality. I noted cross examination of the claimant concerning the absence of evidence of security clearance in the bundle. The claimant's response was that there was no evidence he did not have security clearance. It seems to me there was evidence to suggest he did not have security clearance. On the claimant's own admission, he was never issued with a laptop. He refers to attending site once and being refused entry because he did not have a security pass. This suggests he had not completed or complied with initial checks that would have been required before starting work, and I find that this was the position.

58. There is a lack of evidence that he had any e mail correspondence with Mrs

Tomlinson, the quality manager of the project, despite the claimant saying he was in correspondence with her. The claimant accepted in cross examination the only e mail to her was dated 28/4/23, at page 139, threatening legal proceedings. I asked the claimant what work he undertook, when he said he was initially working from home on his own laptop and he said he was studying the statement of work, which is a 6-page document. Whilst the claimant indicated he sought payment for 152 hours work in April 2023, there is no evidence showing what work was undertaken during that period. I do not accept that the claimant was undertaking work for either respondent, a 6-page document could not equate to 152 hours work.

59. The claimant in his e mail dated 15/10/23 at page 193 in the bundle, refers to Costain owing him 172 hours worked in April 2023, which is 20 hours more than the 152 hours previously referred to. He also refers to ME Global owing him the 172 hours, and a 1-year contract he was working under. In this e mail the claimant appears to be stating that ME Global owe him monies, not Costain.

60. It was suggested by the claimant he had been given an instruction by Anthony Meadows to work from home in his e mail dated 3/4/23, page 129. I do not find the words ‘so initial period will be remote working’ was a specific instruction to work from home. This e mail was dealing with answers to specific questions posed by the claimant, and it is clear from the e mail from Anthony Meadows dated 6/4/23 at page 134, that the claimant's agency and Costain HR had still to agree terms regarding the claimant.

61. My attention was drawn by the claimant to exhibits 6 –8 in his bundle, which were e mail exchanges between him and Robert Dixon at Mactech, 18/4/23 concerning timesheet submissions. No actual timesheets are attached detailing hours worked, what work was undertaken, where any work took place, or under whose management or instruction. I do not find these e mails demonstrate the claimant had been instructed to start work, did any work, or support his argument his was either an employee or worker of either respondent.

62. The claimant in his submissions placed much reliance on the document ‘statement of work’, as providing evidence of his status as an employee or worker of the respondents. The reality is this is a generic document, issued on the 6/3/23, describing a quality assurance role with approximate dates of engagement of the 3/4/23 to the 29/9/23. It does not refer to the claimant specifically, and details in general terms the tasks to be undertaken in such a role. I do not find this is evidence of contractual arrangements between the claimant and either respondent.

63. The claimant also relied on the case of **Uber and Aslam UK/SC 2019/0029**, and stated he was controlled by Costain, who had authority to approve his timesheets, and Anthony Meadows was controlling him, approving him working on / off site. His argument focused on the degree of control he says Costain had over him. I did not find this argument persuasive and refer to paragraphs 54 – 62 above.

64. I have not found the claimant's evidence to be reliable. He has given 3 different accounts of the contractual arrangements he says were in place with the respondents in his ET1, statement and then in oral evidence. At the start of the hearing, he changed his position and confirmed he sought to establish he was an employee or worker of respondent 1 only, not respondent 2. He relies on the

statement of work document which I find does not support his arguments that he was an employee or worker of either respondent. Aspects of his evidence did not seem logical, for example stating that he needed security clearance to undertake work, but conceding he was not issued with a laptop, but sought to pursue a claim for 152 hours work in April. Contemporaneous e mails and other contemporaneous documents do not support the claimant's assertions.

65. Considering **Section 230 ERA (1996)**, I do not find on the balance of probabilities the claimant has demonstrated the existence of a contract of employment, with either respondent either express or implied, oral or in writing. As I find the claimant is not an employee of either respondent, he is not able to pursue a claim under **Article 3 [Employment Tribunals] Extension of Jurisdiction (England and Wales) Order (1994).**

66. In relation to whether the claimant was a worker of either respondent, in accordance with **Section 230 ERA (1996)**, the claimant was not working under a contract of employment with either respondent express or implied, oral or in writing. I find the claimant was not a worker for either respondent, and is not able to pursue a claim as a worker under **Section 13(1) of the Employment Rights Act 1996.**

67. Therefore I conclude I have no jurisdiction to hear the claims.

68. With reference to the list of issues, considering my findings in relation to jurisdiction at paragraph (d), I do not need to go on further and consider paragraphs (e), (f), and (g) in relation to strike out applications and deposit orders.

Costs Application

69. Respondents 1 and 2 have both applied for costs orders, set out in their list of applications to be determined at the preliminary hearing submitted on the 24/1/24. Respondent 1 seeks £19,889.50 and respondent 2 £7,590.66.

70. Both respondents put forward their applications based on **Rule 76 (1) (b) of the 2013 regulations** the claim had no reasonable prospect of success. **And /or Rule 76 (1) (a) of the 2013 regulations,** that the claimant has acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing of proceedings, or the way the proceedings have been conducted.

71. I heard submissions from the respondents and the claimant in respect of the cost's application.

72. The first respondents' position was that the claimant knew or ought to have known that the claim was without merit. My attention was drawn to page 242 of the bundle, the case of **Hughes and Benson Viscometers Limited ET 1601595/2021.** The claimant was said to be familiar with umbrella contracts, and that they did not give worker status, this case the claimant was involved in in 2021, being similar on the facts to this case. At page 182 in an e mail dated 28/5/23, the claimant was asking for a copy of the ‘mactech Costain contract’. The respondent's position was that when the claimant was provided with a copy of the tri-partite agreement, he should have withdrawn his claim. Respondent 1 drew attention to page 184, in the claimants e mail of the 14/9/23, where he

accepted the importance of the tri partite agreement and stated, 'if I find the tripartite contract exonerates your client, I will indeed withdraw'.

73. In relation to conduct, the first respondent referred to threats made by the claimant to the respondent at page 182, in an e mail sent to them on the 28/5/23. She refers to threats made in e mails to K Dodd, Legal Director at page 183 - 17/7/23, 14/9/23 page 184, 25/9/23 at page 185, 28/9/23 at page 187, 29/9/23 at page 189/190, 13/10/23 at pages 191/192, 15/10/23 at page 193, 3/11/23 at page 197, 4/11/23 at page 196 and 6/11/23 at page 201.

This included:

'As such you will be drowning in e mails' - 29/9/23

'The refusal of Ms K Dodd to disclose documents is legendary in the UK' - 27/9/23

'As such you yourself Ms Dodd will be back in Court in 28 days' - 25/9/23

'A word of advice Employment Judge Gaskell is terrifying to deal with' - 29/9/23

'You are advised of the consequences of not making an out of court settlement now' - 29/9/23

'The longer you take to persuade your client to settle the more money I will ask from you' - 17/7/23

'There is evidence your client runs a albanian gangster style operation in the united kingdom soil' - 17/7/23

'He scorches the earth in each site as he rapes pillages and plunders each site and causes tremendous harm by simply taking money out of the workers which he finds a way to cheat and put money in their pocket' - 17/7/23

'You have created an illusion of missing documents, and you fooled the court' - 17/7/23

'The nasty thing about your reluctance is that judgment comes out in the internet and everyone can read' - 28/5/23

Also e mail's addressed to the Respondent 1 CEO, Alex Vaughan, dated 27/9/23:

'You steal off workers...and still you don't settle or negotiate'

'You stole 1 million GBP off HS2 workers'

'You operate a Ponzi scheme'

74. Respondent 1 also referred to the claimant's conduct at today's hearing, it in their view being unreasonable for the claimant not to have the paper bundle in his possession, and him delaying proceedings during the hearing, which they assert amounts to unreasonable conduct.

75. The first respondent had included in the bundle from page 207, copies of judgments of the employment tribunal and other press articles concerning the claimant and 'David Casqueiro'. In the bundle at page 266 respondent 1 put the claimant on notice in an e mail dated 31/1/24, she sought to rely on amongst other things a conviction and custodial sentence in December 2007 for blackmail / obtaining a pecuniary advantage and perverting the course of justice. The respondent's position was the claimant was deliberately obstructive, he would not answer the claimant's previous e mails asking for confirmation regarding his alias name, previous convictions and employment tribunal cases.

76. In relation to the 3 previous employment tribunal cases in 2016, 2018 and 2021 brought by the claimant, respondent 1 highlighted that they related to similar claims in relation to employment status and were all unsuccessful. Considering this, the claimant should know or reasonably be aware that his claims against the first respondent had no prospect of success, and the bringing of the claims was scandalous and vexatious.

77. The first respondent draws attention to the volume of e mails sent to them by the claimant, in the region of 140 e mails since mid-June 2023. It was also drawn to my attention that the claimant has sent 16 e mails to the respondent over the last 3 days prior to this hearing commencing.

78. In their submissions, the first respondent outlined the warnings it had given to the claimant regarding the prospect of them seeking a costs order. In the grounds of resistance accompanying its ET3 on 14/6/23 the respondent stated 'the respondent reserves its position in relation to costs'. In the case management agenda for the first preliminary hearing dated 29/9/23, and at the first preliminary hearing on the 6/10/23. In its summary of applications to be made at the second preliminary hearing dated 24/1/24. In its skeleton argument for the second preliminary hearing dated 15/2/24.

79. The second respondent adopted the same arguments as respondent 1. They also highlighted the fact that the claimant had changed his position at the outset of the hearing today, indicating he was pursuing his claim on the grounds he was an employee or worker of the first respondent. Their position was that the claimants continued pursuance of proceedings against the second respondent, was the hallmark of vexatious behaviour. It was unreasonable for the claimant to change his position today in respect of the second respondent. The second respondents' position had remained the same since it lodged its grounds of resistance, and maintained the claimants claim against them never had any reasonable prospects of success.

80. It was brought to my attention, the large number of e mails send to the respondent between May 2023 and February 2024, said to be more than 170, some of which were said to be threatening.

This included:

'I would invite you to write to me and make me an out of court settlement offer because your client will bleed money and Tony Phillips will be my guest in court when we goes before the judge for a costs order on him for being unreasonable'. - 10/7/23

‘Your client will not recover a penny and he will be wiped out when it comes to the internet’ - 10/7/23

‘It is contended that....were the true pay involved and the respondent intended to cheat the claimant out of between £2,000 - £3,000 a month as the engagement was a hustle’ - 28/9/23

‘The Employment Judge is warned that the engagement was a hustle of deception and both Mr Kieran and Mr Tony McPhillips are part of the hustle’ - 28/9/23

81. I was also advised of attempts to get the claimant to seek legal / or free advice on his claim, and warnings regarding the second respondent seeking costs. The second respondent recorded this in their grounds of resistance dated 2/6/23, they indicated the claimant threatened to pursue them for harassment, strike out and costs and is said to have described the business arrangements of the respondent as ‘illegal and unlawful and if not Modern Slavery Act UK’. It was raised at the preliminary hearing on the 6/10/23, and in the document setting out the respondent's applications to be heard at the preliminary hearing dated 25/1/24. It was also referred to in the respondents' written submissions for the preliminary hearing dated 30/1/24.

82. The second respondent also referred to a cost letter, at page 148 of the bundle sent on the 20/9/23 by Mr McPhillps, partner at Muckle Solicitors. It referred to the respondent's position that the claimants claim, 'is entirely without merit and if you pursue such a frivolous and vexatious claim, we will seek a costs order from the employment tribunal on the grounds it is an abuse of process, the claim has no reasonable prospect of success’.

83. Employment Judge Kenward recorded at paragraph 15 of his order dated 6/10/23, that the respondents had raised concerns with him regarding the claimants conduct of proceedings, regarding the frequency and content of e mails sent by him.

84. The claimant confirmed he was currently employed under a contract of employment, earning £3,000 per month. He referred to 2 years' unemployment before this role. He indicated he was considering applying for bankruptcy, because he had received a costs order to pay the defendants costs in the County Court proceedings previously referred to, for £13,500. This order was made on the 10/1/24, although he was appealing to the Court of Appeal. He advised he had 2 rented properties, one in Coventry, which was his main home, and one in Nottingham, where he lived during the week, as his job was based in Nottingham. He had no other dependents and had approximately £20,000 in savings.

85. In submissions the claimant said the accumulation of costs if ordered would bankrupt him, leave him homeless and destitute. He described his belief that his claim had merit, that he had been dragged into bringing proceedings because he complained about timesheets and had been derailed by the respondents who had a maze of arrangements to avoid liability. When asked about the volume of e mails, he accepted sending e mails, but said he couldn't recall how many he had sent to either respondent, and did not think he had sent that many e mails. He did not behave unreasonably and was working under the direct instructions of Costain. He did not recall any agreement to withdraw his claim after he had considered the tri partite agreement.

86. In relation to the 3 employment tribunal proceedings, the claimant stated his employment had been destroyed by those companies, that he was provoked by them and acted impulsively in relation to his conduct in those proceedings. He accepted the conviction in 2007 related to him and the alias name of David Casqueiro, and he served a 2-year custodial sentence. In relation to a Employment Appeal Tribunal ruling in the case of **Casqueiro and Barclays Bank plc UKEAT/0085/12/MAA,** (page 288) in which a wasted costs order was made against the claimants lay representative, the claimant initially said he wasn't sure if he was involved, but then accepted he represented a claimant as a lay person, but stated the case was dismissed on appeal. The claimant was asked if he had been prohibited in the name of David Casqueiro, from being employed by a law firm, by order of the Solicitors Regulation Authority, dated 1/7/10. (page 287) The claimant said he wasn't prohibited.

87. The claimant accepted when asked that he had been made subject to a bankruptcy order on the 4/4/19, as set out in the Bankruptcy Order contained at page 300 of the bundle.

Is one or more of the threshold criteria set out in Rule 76 (1) (a) or (b) satisfied?

88. Consider the approach taken in the case of **Opalkova and Acquire Care Limited (2021) UKEAT/0056/21**, the first question I am required to answer, in determining whether the test in rule 76 (1) (b) is met, is whether in fact the claim had no reasonable prospect of success.

89. I refer to my finding in paragraph 48. The claimant's initial claim was based on a tri-partite agreement between him and the 2 respondents. This agreement has never been produced or established. I concluded it did not exist. I rely on my findings in the conclusions section above.

90. I have considered **AQ Limited and Holden (2012) UKEAT/0021/12/CEA,** that a litigant should not be judged by a professional representative's standards. Also, HHJ Richardsons comments that lay people are likely to lack the objectivity and knowledge of the law that a professional legal adviser has. I note paragraph 86 above, and the claimant's acceptance of 3 previous sets of Employment tribunal proceedings in 2016, 2018 and 2021 where the claimant has pursued similar arguments regarding employee and worker status. He also accepted appearing as a lay representative in the Employment Appeal Tribunal.

91. I have also noted a judgment in the bundle (page 247) from the 2/1/24, Employment Judge Hindmarsh, **Hughes and Allen Lane Limited 1303286/2023,** in relation to an age discrimination claim, which was dismissed under rule 37 on the grounds the claim had no reasonable prospect of success and the proceedings had been conducted in a scandalous, unreasonable and vexatious manner.

92. It is apparent from the previous proceedings that the claimant clearly has some knowledge of the law and tribunal procedure, particularly in relation to employee and worker status. I do accept that this is a complicated area of law, however this is the fourth similar argument advanced by the claimant in the employment tribunals. I note that the case of **Hughes v Benson Viscometers**

Limited ET 1601595/2021 was based on similar facts to this case.

93. I do find, looking at the matter objectively, that the claimant had no reasonable prospect of success against either respondent in respect of his claim.

94. I am then required to consider whether subjectively, the claimant knew that his claim had no reasonable prospect of success, or ought reasonably to have known. I refer to paragraph 86 and the claimant's previous cases, in which he had appeared in person. I take the view that he knew, or if he did not know, he ought reasonably to have known, there was no reasonable prospect of success based on his previous tribunal experience and the lack of tri-partite agreement between him and the respondents.

95. Accordingly I find that regulation 76(1) (b) test of the claim having no reasonable prospect of success is met.

96. If I am wrong about my conclusions in respect of regulation 76 (1) (b), I find the regulation 76 (1) (a) test is met, that the claimant has acted vexatiously, abusively, disruptively or otherwise unreasonably in the conduct of the proceedings and set out my reasons below.

97. I have considered **Dyer v Secretary of State for Employment (1983) UKEAT 183/83**, and the question of whether or not conduct is reasonable, is a question of fact not law. The claimant has not disputed the figures given by respondent 1 of 140 e mails being sent and 170 e mails to respondent 2. The case is listed for a preliminary hearing today. It seems wholly unreasonable for the claimant to have sent 140 / 170 e mails, over a 10-month period since June 2023, on a case which is listed for preliminary hearing stage. The sending of a further 16 e mails over a 3-day period to respondent 1, prior to this hearing, supports my view that the claimants conduct is not reasonable, in terms of the volume of e mails sent.

98. I also consider the nature of some of those e mails sent to both respondents to be threatening. I refer to the examples given in paragraphs 73 and 80 above, highlighting in particular remarks below concerning those employed by both respondents' solicitors:

Regarding Ms Dodd – respondent 1's solicitor

'You have created an illusion of missing documents, and you fooled the court' - 17/7/23

'The refusal of Ms K Dodd to disclose documents is legendary in the UK' - 27/9/23

'As such you yourself Ms Dodd will be back in Court in 28 days' - 25/9/23

'The nasty thing about your reluctance is that judgment comes out in the internet and everyone can read' - 28/5/23

Regarding Mr McPhillips – respondent 2's solicitor

'I would invite you to write to me and make me an out of court settlement offer

because your client will bleed money and Tony Phillips will be my guest in court when we goes before the judge for a costs order on him for being unreasonable'. - 10/7/23

'The Employment Judge is warned that the engagement was a hustle of deception and both Mr Kieran and Mr Tony McPhillips are part of the hustle' - 28/9/23

99. I find based on the volume and content of the claimants e mails to the respondents the claimant has acted in a vexatious, abusive and unreasonable manner.

100. There were some difficulties during this hearing, because the claimant did not have the paper bundle or alternative second device apart from his phone. The claimant had been involved in a CVP video hearing as recently as November 2023, in respect of **Hughes and Allen Lane Limited ET 1303286/2023** so would have been fully aware of the requirement to use a bundle / second device. I do not accept the claimant's explanation that he did not think he would need the paper bundle. The claimant could not provide a cogent explanation for the paper bundle's absence. It does seem to me this was disruptive and unreasonable behaviour by the claimant, which caused delays to the start of the hearing.

Is it appropriate to make costs orders?

101. Rule 76 (1), requires me to consider whether to exercise my discretion to make a costs order or not, 'may make a costs order and shall consider whether to do so...where rule 76 (1) (a) or (b) are met'. I have found both limbs are met. The starting point is the principle that costs orders are the exception rather than the rule.

102. I have considered the guidance in **Barnsley MBC v Yerrakalva (2011) EWCA Civ 1255.** This guidance requires me to identify the conduct, what was unreasonable about it, and what effects it had. As I have identified at paragraphs 97, 98, 99, the conduct was the sending of excessive volumes of e mails to the respondents, 140 / 170 respectively to respondent 1 and 2. It was also the content of some of those e mails, which I found to be threatening to both respondents.

103. In terms of the effect of the conduct, both respondents confirmed today that because of the excessive nature of the volume of e mails, and their content, the partner at each firm dealt with most of the communications with the claimant. In respect of respondent 1 this was Ms K Dodd, Legal Director and in respect of respondent 2, Mr T McPhillips, Partner. The correspondence took longer to deal with due to its volume. Both respondents confirmed they were not able to delegate the claim to a more junior member of staff, which would normally have happened. The effect of this on the costs claimed by the respondents is that they are predominantly at partner rate, rather than associate / trainee rate.

104. Whilst I have referred to the claimant's disruptive behaviour during this hearing at paragraph 100, its impact was partly (respondent 1's skeleton argument was also filed late) to delay the start of the preliminary hearing, but the hearing was able to conclude within the allotted 1-day listing, in terms of hearing

evidence and submissions.

105. It is relevant in the exercise of my discretion to consider whether, when and in what terms a costs warning letter was sent to the claimant. As identified above at paragraph 79, Mr McPhillips on behalf of the second respondent sent a cost warning letter on the 20/9/23. The terms of the letter were very clear, as highlighted in paragraph 82 above. Mr McPhillips also stated in the letter 'we reserve the right to refer the tribunal to this e mail and cost warning in the event that you proceed with a claim against our client'.

106. Whilst a costs warning letter was not sent by the first respondent, I have considered paragraphs 78 and 81 above, which include details of both respondents' warnings given to the claimant concerning a subsequent application for costs. The claimant was clearly on notice from an early-stage costs orders were likely to be pursued by both respondents.

107. I have also noted Employment Judge Frazer's judgment on reconsideration in January 2023 (page 246), in **Hughes and Benson Visometers Limited ET 1601595/2021**, when he ordered costs of £7,500 in respect of the nature of the claimant's correspondence and the excessive number of e mails. Also, in respect of the EAT decision in **Casqueiro (In a matter of waster costs) v Barclays Bank PLC UKEAT/0085/12/MAA**, in which a wasted costs order based on voluminous correspondence was set aside and remitted to the employment tribunal for a wasted costs hearing before a different judge. At page 175 the County Court ordered the claimant to pay the respondents costs of £13,500 'upon the court finding the claimant has conducted the prosecution of this claim unreasonably'. The claimant has experience of costs being awarded against him and has familiarity with the tribunal process regarding costs, and the factors to be considered. He has also had previous costs orders made against him for excessive e mails being sent, and the nature of his correspondence.

108. I have not taken into account the claimants means in determining whether to make costs orders. The claimant has not provided any documentary evidence of means, savings or income, although he has stated he has £20,000 savings. Given the conduct of this claim, and the lack of documentary evidence, I have not taken means into account.

109. It is in my view appropriate to make costs orders, taking into account all the circumstances of the case. The claimant was put on notice by both respondents several times that they may seek a costs order, and respondent 2 sent a detailed and specific costs warning letter on the 20/9/23.

Determining the amount of any costs orders

110. I have regard to the principle that an award of costs if made is compensatory to the party in whose favour it is made and is not a punishment to the paying party. I am required to consider losses which have been reasonably and necessarily incurred and can consider the claimants' means and the conduct of the parties. Both respondents have submitted detailed schedules of costs incurred.

111. The first respondent seeks £19,889.50. The schedule of loss sets out a total of 67.2 hours work, 37.5 hours undertaken by Ms Dodd at £370.00 per hour and

the remainder split between associate and trainees. The majority of which was 26.9 hours at a trainee rate of £165.00 an hour. I refer to paragraph 103, and respondent 1's explanation about a partner dealing with most correspondence, which seems reasonable. Considering the volume of e mails at 140, and correspondence with the claimant, tribunal and second respondent, preparations for the preliminary hearing and briefing counsel, the hours claimed do not seem excessive considering the circumstances of the case.

112. The second respondent seeks £7,590.66 plus VAT. The schedule of loss sets out a total of 49 hours work, 25.6 hours work undertaken by Mr McPhillips at £375.00 per hour and 23.4 hours undertaken by a trainee solicitor at £155 per hour. I refer again to paragraph 103, and a partner dealing with most correspondence which seems reasonable. Again, considering the volume of e mails at 170, and correspondence with the claimant, tribunal and first respondent, preparations for the preliminary hearing and briefing counsel, the hours claimed do not seem excessive considering the circumstances of the case.

113. I have decided not to exercise my discretion, in accordance with rule 84, to consider the claimants means, when considering the amount of any costs orders. This is based on the claimant's conduct of this claim, and the lack of any supporting evidence of income / capital / expenditure.

114. The second respondent has sought VAT is added to their claim for costs. Considering **Raggett v John Lewis PLC 2013 ICR D1 EAT,** VAT should not be included in a costs order if a receiving party is able to reclaim the VAT as input tax. I anticipate that ME Global Resources Limited would be registered for VAT due to their size and nature, and I have no evidence to the contrary. On this basis, I do not include VAT in the second respondent's costs order.

115. Considering the findings I have made in relation to the claim having no reasonable prospect of success, and the claimant should have known of this, and the claimant having acted vexatiously, abusively, disruptively and unreasonably, I find it is reasonable in the circumstances to order the claimant to pay the respondent's the full amounts of costs claimed, on the basis they have been reasonably incurred.

Employment Judge Beck

Date 19/3/24

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/