EMPLOYMENT TRIBUNALS

Claimant: **REV DR JAMES GEORGE HARGREAVES**

Respondents: **(1) EVOLVE HOUSING + SUPPORT**
(2) MR SIMON MCGRATH

Heard at: London Central (via video)

On: 5 April 2024

Before: Employment Judge P Klimov, sitting alone

Representation:

For the Claimant: in person

For the Respondents: Ms I Ferber, of counsel

JUDGMENT having been announced to the parties at the hearing on 5 April 2024, and having been sent to the parties on 12 April 2024, and written reasons having been requested by the claimant on 24 April 2024, in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Background and Issues

1. To understand my reasoning in full, these Reasons should be read together with my Reserved Judgment dated 3 June 2022 striking out the claimant's claim ("**the SO Judgment**") and the EAT Judgment promulgated on 1 February 2024 which overturned the SO Judgment ("**the EAT Judgment**").

2. In short, by the SO Judgment I struck out the claimant's claim under rule 37(1)(b) of Schedule 1 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("**the ET Rules**"), on the ground that the manner, in which the proceedings had been conducted by the Claimant had been scandalous, unreasonable and vexatious. The reasons for that decision are set out in the SO Judgment. The claimant successfully appealed the SO Judgment to the EAT. Mrs Justice Ellenbogen DBE, sitting at the EAT, ordered that the claimant's claims be reinstated and remitted to an open preliminary hearing at which all necessary directions enabling the matter to proceed to a substantive hearing should be considered.

3. In parallel, and following the strike out hearing on 12 May 2022, on 30 June 2022, the respondents applied for a costs order against the claimant pursuant to Rule 76(1)(a) of the ET Rules, on the basis that the manner in which the claimant had conducted proceedings had been vexatious, abusive, and unreasonable.

4. On 7 July 2022, I made the following order:

"*If the Claimant wishes to make representations in response to the application, he must send his representations to the Tribunal with a copy to the Respondents by 21 July 2022.*

The Claimant may wish to include information on his ability to pay. In addition to the Claimant's regular income and outgoings, it should cover his savings, other capital and prospective income.

If the Claimant objects to the application being determined on the papers (without a hearing) he must state that and give reasons."

5. On 21 July 2022, the claimant replied opposing the application and arguing that its determination would be premature in the light of the pending appeal to the EAT.

6. On 26 July 2022, I stayed the costs order application pending the outcome of the claimant's appeal to the EAT.

7. Having received the EAT Judgment, on 29 February 2024, I listed an open preliminary hearing pursuant to the EAT's orders and to determine the respondents' stayed costs order application.

8. Together with listing the hearing I made various orders to assist the parties in preparing for the hearing, including:

"If the Claimant wishes to make any additional representations on the Respondents' costs order application, he must submit his representations no later than 7 days before the hearing. If the Claimant wishes the Tribunal, when deciding whether to make a costs award against him, and if so in what amount, to have regard to the Claimant's ability to pay pursuant to Rule 84 of the Employment Tribunals Rules of Procedure, he must provide full and detailed information about his financial position, including his regular and anticipated income and outgoings, assets and contingent liabilities, and such other relevant information as he considers appropriate. This can be done by way of a witness statement.
The information should be supported by documentary evidence (e.g. bank statements, bills, etc). The Claimant may blank out irrelevant information."

9. On 25 March 2024, the claimant sent a statement with his additional arguments against the respondents' costs order application, however, he did not provide any information as to his ability to pay.

10. The claimant represented himself at the hearing and Ms Ferber appeared for the respondents. I was referred to various documents in the 211-page bundle of documents.

11. Upon hearing the parties' oral submissions, I called for a short adjournment to deliberate. I then announced my decision to grant the costs order application, giving my reasons for the decision orally. The reasons are as follows.

The Facts

12. The relevant facts for the purposes of this costs order application can be found in the SO Judgment at paragraphs 5-22 and 55 – 85, and in the EAT Judgment at paragraphs 21 – 23. The parties are well aware of these facts and there is no need for me to repeat them here again.

13. Suffice to say that the EAT agreed with my conclusion (both at the sift stage (at [5] of the EAT Judgment) and when deciding the appeal on the merits (at [21] of the EAT Judgment) that the manner in which the proceedings had been conducted by the claimant had been such as to engage rule 37(1)(b), that is to say - scandalous, unreasonable and vexatious.

14. However, the EAT has overturned the SO Judgment on the basis that my conclusion that the result of the claimant's conduct was such that there could not be a fair trial and that the imposition of the strike out sanction was proportionate was an error of law.

The Error of Law

15. On my reading of the EAT Judgment the error of law on my part was that:

    (1) Firstly, in concluding that the claimant's "*openly declared intentions to continue to use the Tribunal proceedings to pursue his 'relentless' and 'unstoppable campaign' of creating the 'damning narrative' against the Respondents and their witnesses, and considering the extent to which the Claimant is prepared to go to inflict damage on anyone he considers has done wrong to him and irrespective [of] how the matter is viewed by the Tribunal*" (at [88] of the SO Judgment) will make the respondents' witnesses "*feel understandably intimidated of what the Claimant might unleash upon them if he feels dissatisfied with their evidence at the trial*" (at [89] of the SO Judgment) I "*proceeded on the basis of the assumed effect of the Claimant's conduct*" (at [22] of the EAT Judgment), which the EAT found was "*an error of legal principle in the Tribunal's approach*" (*per Emuemukoro v Croma Vigilant (Scotland) Limited and Others* [2022] ICR 335 [21] - see paragraph 17 of the EAT Judgment)[1];

    (2) Secondly, it was perverse to conclude that the claimant's conduct and declared intentions, which showed that he sought "*to usurp the trial and essentially use it as a means for his personal vendetta against the Respondents and as a platform to propagate his political views*" (at [9] of the SO Judgment) and as such "*to*

[1] I do not think that the EAT is saying that as a matter of principle it will always be an error in approach for an employment tribunal to make a finding about the effect of a person's conduct directed (or threatened to be directed) at another person without hearing from such other person. However, on the facts of this particular case, it was an error in approach to find that the respondents' witnesses will "*feel understandably intimidated*" without hearing from them (or that it was perverse to come to that conclusion based on the established facts). If, for example, instead of threatening a 'relentless' and 'unstoppable campaign' of creating the 'damning narrative' against the witnesses, the claimant was threatening the respondents' witnesses with physical violence (which, I must emphasis, he never did), it would seem surprising indeed if it were still not open for the tribunal to "assume" that the witnesses will "*feel understandably intimidated.*"

assume the role of the prosecutor and the judge in relation to the Respondents and their witnesses and deal with them inside and outside the proceedings as he finds appropriate" (at [92] of the SO Judgment) meant that a fair trial was not possible (at [22] of the EAT Judgment); and

(3) Thirdly, giving the above errors, it was also an error in principle in proceeding to strike out the claim, "*irrespective of [the Tribunal's] findings as to the Claimant's conduct*", even if no lesser sanction was merited or appropriate (at [23] of the EAT Judgment).

16. The EAT also observed that the respondents "*disavowed any concern over improper behaviour towards witnesses by the Claimant in the course of the hearing*"[2] (at [22] of the EAT Judgment) and that the claimant told the EAT Judge at the hearing that his life had moved on and that all he wanted now was to have his day in court (at [23] of the EAT Judgment).

17. I, however, do not read these observations as forming part of the *ratio decidendi* of the EAT Judgment. The SO Judgment was not based on the claimant's conduct at the hearing of his Original Tribunal Claim, and whatever the claimant might have told the EAT about his life moving on, was not what he told me at the strike out hearing, and as such ought to be irrelevant. I was deciding the strike out application based on the claimant's conduct at that time and his declared intentions, as he articulated them at the hearing of the strike out application.

The Law

18. Rule 76 of the ET Rules states:

> "*(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*;
>
> […]"

19. Rule 78(1) of the ET Rules gives the Tribunal various options of assessing costs, including making an "*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.*"

20. The following key propositions relevant to the Tribunal's exercising its power to make costs orders can be derived from the case law:

    a. Costs awards in the employment tribunal are still the exception rather than the rule. The tribunals should exercise the power to order costs more sparingly and more circumscribed than the civil

[2] I read this as referring to the claimant's conduct during the hearing of his Original Tribunal Claim in February 2020, not the hearing of the strike out application, as no respondents' witnesses were called at the strike out application hearing.

courts (*Yerrakalva v Barnsley Metropolitan Borough Council* 2012 ICR 420, CA)

b. There is a two-stage exercise to making a costs order. The first question is whether a paying party has acted unreasonably or has in some other way invoked the jurisdiction to make a costs order. The second question is whether the discretion should be exercised to make an order. Only if the tribunal decides to exercise its discretion to make an award of costs the question of the amount to be awarded comes to be considered (*Haydar v Pennine Acute NHS Trust* UKEAT/0141/17).

c. While the threshold tests for making a costs order are the same whether or not a party is represented, in the application of the tests it is appropriate to take account of whether a litigant is professionally represented or not. Litigants in person should not be judged by the standards of a professional representative (*AQ Ltd v Holden* [2012] IRLR 648).

d. For term "vexation" shall have the meaning given by Lord Bingham LCJ in *AG v Barker* [2000] 1 FLR 759: "*[T]he hallmark of a vexatious proceeding is … that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be , its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant, and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process.*" (*Scott v Russell* 2013 EWCA Civ 1432, CA)

e. "Unreasonable" has its ordinary English meaning and is not to be interpreted as if it means something similar to "vexatious" (*Dyer v Secretary of State for Employment* EAT 183/83).

f. In determining whether to make a costs order for unreasonable conduct, the tribunal should consider the "*nature, gravity and effect*" of a party's unreasonable conduct — (*McPherson v BNP Paribas (London Branch)* 2004 ICR 1398, CA), however the correct approach is not to consider "nature", "gravity" and "effect" separately, but to look at the whole picture.

g. While a precise causal link between unreasonable conduct and specific costs is not required, it is not the case that causation is irrelevant. However, the tribunal must look at the entire matter in all its circumstances – (*Yerrakalva v Barnley MBC* [2012] ICR 420). Mummery LJ gave the following guidance on the correct approach:

"*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 McPherson's case was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the employment Tribunal 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".

21. Unlike in the civil court, there is no "costs follow the event" rule in employment tribunal proceedings, i.e. that the losing party must pay legal costs of the successful party. Furthermore, in *Kotecha v Insurety plc (t/a Capital Healthcare) and ors* EAT 0461/07, the EAT held that just because the tribunal made an error of law on a substantive issue in the claim did not mean that it was an error of law for the tribunal to make a costs order against the claimant (who succeeded on appeal in overturning the tribunal's substantive decision) based on his conduct.

22. Costs awards are compensatory, not punitive – (*Lodwick v Southwark London Borough Council* [2004] ICR 884 CA).

23. Under Rule 84 of the ET Rule, the tribunal may, but is not required to have regard to the paying party's ability to pay. In *Jilley v Birmingham and Solihull Mental Health NHS Trust* (21 November 2007) HH Judge David Richardson said:

"[44] Rule 41(2) gives to the Tribunal a discretion whether to take into account the paying party's ability to pay. If a Tribunal decides not to do so, it should say why. If it decides to take into account ability to pay, it should set out its findings about ability to pay, say what impact this has had on its decision whether to award costs or on the amount of costs, and explain why. Lengthy written reasons are not required. A succinct statement of how the Tribunal has dealt with the matter and why it has done so is generally essential."

24. Where the costs award may be substantial, the tribunal must proceed with caution before disregarding the paying party's means – (*Doyle v North WestLondon Hospitals NHS Trust* [2012] ICR D21, EAT), where at [15 (a)] HHK Shanks said:

"*15. We consider the relevant circumstances to go somewhat further:*
(a) the Tribunal was being asked to make an order for costs in a very large amount against a claimant; such an order will often be well beyond means of the paying party and have very serious potential consequences for him or her and it may also act as a disincentive to other claimants bringing legitimate claims; for those reasons in our view a tribunal should always be cautious before making such an order;
(b) *[…]*"

25. The assessment of means is not limited to the paying party's means as at the date of the hearing. The tribunal is entitled to take account of the paying party's ability to pay in the future, provided that there is a "realistic prospect" that he will be able to satisfy the order in the future - (*Vaughan v LB Lewisham* [2013] IRLR 713, EAT, at [26] – [28]).

26. Once a tribunal has decided to have regard to the paying party's ability to pay, it must take into account the paying party's capital, as well as income and expenditure. In *Shields Automotive Ltd v Greig* EATS/0024/10, unreported, at [47], the EAT in Scotland stated that "*assessing a person's ability to pay involves considering their whole means. Capital is a highly relevant aspect of anyone's means. To look only at income where a person also has capital is to ignore a relevant factor.*" The EAT also rejected the claimant's submission that capital is not relevant if it is not in immediately

accessible form, observing that "*a person's capital will often be represented by property or other investments which are not as accessible as cash but that is not to say that it should be ignored.*"

27. In *Howman v Queen Elizabeth Hospital Kings Lynn* EAT 0509/12, the EAT said (at [13]) that any tribunal when having regard to a party's ability to pay needs "*to balance the need to compensate the litigant who has unreasonably been put to expense against the other litigant's ability to pay. The latter does not necessarily trump the former, but it may do so.*"

28. More recently, in *Ms Seyi Omooba v (1) Michael Garrett Associates Ltd (ta Global Artists) (2) Leicester Theatre Ltd*: [2024] EAT 30, Mrs Justice Eady (P) held (at paras. 182 - 184) that in making a substantial award the tribunal was entitled to have regard to wider sources that might be available to the claimant in meeting the award.

29. The Presidential Guidance on General Case Management state:

"17. Broadly speaking, costs orders are for the amount of legal or professional fees and related expenses reasonably incurred, based on factors like the significance of the case, the complexity of the facts and the experience of the lawyers who conducted the litigation for the receiving party."

18. In addition to costs for witness expenses, the Tribunal may order any party to pay costs as follows:

18.1 up to £20,000, by forming a broad-brush assessment of the amounts involved; or working from a schedule of legal costs; or, more frequently and in respect of lower amounts, just the fee for the barrister at the hearing (for example);
[…]

21. When considering the amount of an order, information about a person's ability to pay may be considered. The Tribunal may make a substantial order even where a person has no means of payment. Examples of relevant information are: the person's earnings, savings, other sources of income, debts, bills and necessary monthly outgoings."

Analysis and Conclusion

30. Considering my findings concerning the claimant's conduct, as recorded in the SO Judgment, which the EAT confirmed was such as to engage Rule 37(1)(b), I find that the Rule 76(1)(a) is equally engaged. Although the language in these two Rules is slightly different:

> Rule 37(1) (b) - "*that the manner in which the proceedings have been conducted by or on behalf of the claimant or respondent (as the case may be) has been scandalous, unreasonable or vexatious.*"
>
> vs.
>
> Rule 76(1) (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.*"

I see no real substantive difference between the two. In any event, my findings on the strike out application included that the claimant's conduct was scandalous, vexatious, unreasonable, and an abuse of process, and for the purposes of Rule 76(1)(a) it is sufficient that the conduct in question meets one of the descriptors – i.e. *"has acted vexatiously, [or] abusively, [or] disruptively or otherwise unreasonably*."

31. The question, therefore, is whether in all the circumstances it is appropriate for me to exercise my discretion and make a costs award against the claimant.

32. If I were deciding this application back in June 2022 (before the EAT Judgment), considering the nature, gravity and effect of the claimant's conduct, and giving due regard to the fact that the claimant is a litigant in person and his conduct must not be judged by the same standard as a professional representative's, I would have had no hesitation in deciding that it would be appropriate to exercise my discretion and make a costs order against the claimant.

33. The claimant's conduct was an extreme example of vexatious, scandalous, and unreasonable conduct. It was an abuse of the Tribunal's process. It was highly disruptive to the orderly progression of the case. It was aimed to intimidate the respondents and force them into a settlement far exceeding what the claimant could have realistically hoped to achieve in the tribunal. It was not a one-off incident, but a campaign which the claimant had unleashed against the respondents and their witnesses and vowed to pursue relentlessly. There were no mitigating factors or other circumstances that could sensibly have swayed my discretion in the claimant's favour.

34. However, things moved on, and now the key issue, in my view, is whether, in the light of the EAT Judgment overturning the SO Judgment, it is still appropriate for me to exercise my discretion and make a costs order against the claimant.

35. Although the simple fact that the claimant has prevailed on appeal in and of itself, in my judgment, is not enough to outweigh the above factors in favour of making a costs order, I must give full weight to the fact that the basis upon which he so prevailed was the EAT's decision (binding on me) that my conclusion that a fair trial was not possible was essentially perverse. That is to say that the claimant succeeded in establishing "*an overwhelming case […] that the employment tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached.*" (*Yeboah v Crofton* 2002 IRLR 634, CA at [93]).

36. Looking at the matter from that angle, one may argue that, given the very high hurdle the claimant was able to surmount, the respondents' strike out application was always doomed to fail and should not have been brought in the first place. Therefore, it cannot be just and proper to make the claimant to pay for what the claimant himself described to me as the respondents' "folly".

37. Whilst I see the force in this argument, I do not find that it trumps all other considerations I ought to take into account when deciding whether to exercise my discretion.

38. I have already described above (see paragraphs 15-17 above) the basis upon which (on my reading of the EAT Judgment) the EAT decided that my conclusion that a fair trial was not possible was an error of law. However, if

I read the EAT Judgment correctly, the EAT does not suggest anywhere that the respondents' strike out application was unmeritorious and should not have been brought in the first place. On the contrary, the EAT (at [23] of the EAT Judgment) acknowledges my concern that the claimant was seeking to weaponize the proceedings, and that the opprobrium which I attached to the claimant's conduct was justified.

39. The EAT also said that the respondents' remedy for any repetition of the claimant's conduct "*lie[d] elsewhere*". I am not clear whether by "*elsewhere*" the EAT meant outside the employment tribunal process (e.g. an anti-molestation order), but I do not read this passage as suggesting that the respondents should be entitled to any remedy (such as a costs order) only if the claimant repeated his condemned conduct. The respondents' costs order application had not been decided at that stage, and it was not an issue before the EAT.

40. At the other end of the scale it is the claimant's conduct, which on any view was extremely serious and wholly unacceptable. In my view, with the possible exception of physical violence, it is hard to imagine a more egregious example of unreasonable conduct justifying the tribunal using its limited costs jurisdiction.

41. Furthermore, as Ms Ferber submits, the very fact that it was necessary for the respondents to resort to this drastic measure of seeking the strike out, for the claimant's claim to be struck out, and for the matter to go to the EAT, before the claimant has realised how inappropriate his conduct was, telling the EAT that "*his live moved on*" and now he only wanted "*to have his day in court*", just goes to show how seriously inappropriate the claimant's conduct at the relevant time was, and that in those circumstances it was proper and unsurprising that the respondents sought to strike out the claimant's claim. I agree.

42. I also find that the claimant's conduct had a highly disruptive effect on the proper progression of his claim to a full merits hearing, and caused the respondents to incur unnecessary and avoidable legal costs. To put it simply, the claimant's conduct forced the respondents to apply to have his claim struck out to get the claimant to come to his senses and to abandon his vindictive campaign. While this step has achieved the effect of the claimant "moving on" and abandoning his vindictive campaign, this also meant the respondents incurring unnecessary legal costs. Furthermore, this has resulted in a substantial delay in the claim coming to be considered on its merits, which delay, considering the issues in the claim, the burden of proof, and the number of witnesses on each side, is likely to be more prejudicial to the respondents than to the claimant.

43. I reject the claimant's arguments that the disruption was caused by the respondents' first strike out application, decided in March 2021. It was largely a successful application and helped to narrow down the issues in the claim. In any event, it was not based on the claimant's conduct and is of no relevance to the costs order application.

44. Stepping back and looking at all these factors and circumstances, I find that it will be just and proper for me to exercise my discretion and make a costs

order against the claimant.

Quantum

45. The next question I must decide is how much should be awarded. The respondents' original costs order application of 30 June 2022 sought £9,523 (inclusive of VAT), being the solicitors' and counsel's fee incurred in connection with the strike out and costs order applications. The respondents now seek an additional sum of £3,600 (inclusive of VAT), being Ms Ferber's brief fee for this hearing.

46. Despite being invited by the Tribunal well in advance of the hearing to provide information as to his ability to pay, the claimant chose not to provide any such information for the hearing.

47. However, when I raised that matter at the hearing, the claimant said that he had no regular income, other than occasional royalty payments of up to £800 a month for a song he had composed some time ago. He said that he had no capital or savings. He said he was expecting to start receiving his pension when he turns 67 in the coming July. He did not know how much his pension payments would be.

48. However, he said, his wife has a stable job. The claimant described her as "a successful psychiatrist". He said she receives a salary of £92,000 per annum, from which all the household's bills are paid.

49. The claimant said their outgoings were: £75 a week on "oil", £50 on diesel, £150 telephone bill. He also said that any costs award would fall on his wife's shoulders, and it would cause tremendous hardship and be unfair.

50. Whilst I appreciate that personally the claimant has modest financial means, and it is his wife and not him who is likely to be the source of funds to meet a substantial costs award, this by itself cannot be the reason for not making an award. The claimant said that a costs award would be "hitting" his wife. He also said that he would be asking for a longer period to pay it. This tells me that, albeit causing a "hit" on the claimant's household's finances, the claimant does have available means to meet a substantial costs award.

51. Furthermore, I must balance the financial hardship a substantial costs award is likely to cause to the claimant against the need to compensate the respondents for costs incurred by them due to the claimant's unreasonable conduct.

52. Neither in his two written submissions, nor in his oral submissions at the hearing, did the claimant argue that the legal costs claimed by the respondents were unreasonable. Having reviewed the costs schedule provided by the respondents I do not find the costs claimed to be unreasonable or not being properly incurred in connection with the strike out and costs order applications. I also find that Ms Ferber's fee for this hearing is reasonable. However, because the hearing was to deal with the costs order application and case management, and the time spent on the two matters was split in more or less equal proportions, I find that it will be fair to award 50% of her brief fee. i.e. £1,800 (including VAT).

53. Therefore, I make the total costs award in the sum of £11,323 (including VAT).

54. Finally, bearing in mind the claimant's request to give him more time to pay the award, and the fact that he will be receiving additional income by way of pension when he turns 67 in July this year, I find that it will be just and equitable to give the claimant until 5 August 2024 (that is four months from the date of the order) to pay to the respondents the ordered sum.

Employment Judge Klimov

Date: 12 May 2024

JUDGMENT SENT TO THE PARTIES ON

17 May 2024

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FOR THE TRIBUNAL OFFICE

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