Case No: 2302484/2022

EMPLOYMENT TRIBUNALS

Claimant: Mr P Hantig

Respondent: Bylor Services Limited

Heard at: **Croydon** **On:** **22 and 23 April 2024**

Before: **Employment Judge Leith**
Miss N Styles
Mrs J Bird

Representation
Claimant: In person, supported by Mrs Danci (wife)
Respondent: Mr Green (Counsel)

JUDGMENT

1. The complaints of direct age discrimination, unauthorised deduction from wages, and annual leave are struck out.

2. The deposits paid by the Claimant to continue the claims of unauthorised deduction from wages and annual leave, as set out in Employment Judge Dyal's Deposit Order of 2 October 2023, will be returned to him.

3. The Claimant acted unreasonably in the way he conducted the proceedings. The Claimant is ordered to pay the Respondent the sum of £2,000 in costs.

REASONS

Background and process

1. The claim was listed before us for a final hearing, for three days. We had in evidence before us a bundle of 389 pages, and witness statements on behalf of the Respondent from four witnesses (Mark Cooper, Daniel Crampsie, Jayne Sims and Charlotte Burt). There was no witness statement from the Claimant.

2. At the start of the hearing, the Respondent made an application to strike out the claim. The application was supported by a skeleton argument. Although the skeleton argument had apparently been emailed to the Claimant on the

Friday before the hearing, he told us that he had not received it. We therefore arranged for a copy to be printed, and we had a break of an hour and a half to give the Claimant time to read it.

3. We heard oral submissions from Mr Green on behalf of the Respondent. We then had a further break of around half an hour to allow the Claimant to consider Mr Green's submissions, before we heard oral submissions from the Claimant and Mrs Danci.

4. We decided that the claim should be struck out, for the reasons set out below. We finished delivering our oral decision a little after 4.30pm on the first day of the hearing. The Claimant asked for written reasons for our decision.

5. Mr Green then indicated that there was a costs application from the Respondent. Given the time, we indicated that we would hear the application on what would have been the second day of the hearing (23 April 2024). We explained to the Claimant that, as part of our consideration of whether to make a costs order, one factor we may take into account was his means. We therefore asked him if there was any evidence he wanted us to have regard to. He explained that he would want us to have regard to his recent pay slips (his pay slips up to October 2023 were already in the final hearing bundle). The Respondent agreed to provide copies of those.

6. In advance of the second day of the hearing, the Respondent circulated an updated costs schedule, and a clip of "without prejudice save as to costs" correspondence, as well as the Claimant's recent payslips. We gave the Claimant some time in the morning to look at those documents. We then heard oral submissions from Mr Green and from the Claimant and Mrs Danci on whether we should make a costs order in principle. After an adjournment, we delivered our decision, which was that we should make an award of costs.

7. We then heard submission from Mr Green and from the Claimant and Mrs Danci on the sum of the costs we should award. We adjourned to deliberate, then delivered our decision.

8. Although the decision was given orally in three, staged parts, as set out above, in the interests of clarity and concision we set out our written reasons in one document.

9. We had the benefit throughout of Ms Radulescu, Romanian interpreter, who interpreted for the Claimant and Mrs Danci. We are grateful for her assistance. On behalf of the Claimant, we heard submissions from both the Claimant himself and Mrs Danci. We allowed them both to address us interchangeably (and on occasion we allowed them some time to discuss matters between themselves during submissions).

<u>Relevant Law</u>
<u>Strike out</u>

10. Rule 37 of the Employment Tribunal Rules of Procedure 2013 deals with application to strike out. It provides as follows:

> 37.—(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—
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> (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."

11. Rule 2 of the Employment Tribunal Rules of Procedure, which sets out the overriding objective of the Tribunal:

> "2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
>
> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (d) avoiding delay, so far as compatible with proper consideration of the issues; and
>
> (e) saving expense."

12. Strike out is a draconian step that should be taken only in exceptional cases.

13. In considering whether a claim has no reasonable prospect of success, the Tribunal must consider whether there is a "more than fanciful" prospect of the claim succeeding (*A v B and another* [2011] ICR D9). The Claimant's case must be taken at its highest.

14. In considering whether a claim should be struck out on the basis of scandalous, unreasonable or vexatious conduct, the Tribunal must usually consider whether a fair trial is still possible (*De Keyser Ltd v Wilson* [2001] IRLR 324).

15. The Court of Appeal in *Blockbuster Entertainment Ltd v Jones* [2006] IRLR 630 noted that it would take something very unusual indeed to justify striking out on procedural grounds a claim that had arrived at the point of trial. A claim can only be struck out in such circumstances where strike out is the only proportionate and fair course to take.

16. The EAT held, in *HM Prison Service v. Dolby* [2003] IRLR 694 EAT, at para 15, that the striking out process requires a two-stage test. The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim, order it to be amended or order a deposit to be paid. *Dolby* was decided under a previous version of the Employment Tribunal Rules, but the important part of the wording of the relevant rule was the same, in that it provided that the Tribunal may strike the claim out.

Costs

17. The Tribunal's power to make a costs order or a preparation time order is set out in Rule 76 of the Tribunal Rules:

> "76. (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."

18. Rule 39(5) deals with the consequences of a deposit order:

"(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."

19. Rule 75 defines a costs order and a preparation time order.

20. The process for considering a costs order or a preparation time order is set out in rule 77, as follows:

"77. A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application."

21. The amount of a costs order is set out in rule 78:

78.—(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;
(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-paragraphs (b) to (e) of paragraph (1) may exceed £20,000.

22. Rule 84 provides as follows:

> "84. In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay."

23. When considering whether to make a costs order under rule 76(1) or rule 76(2), the Tribunal must apply a two-stage test. Firstly, the Tribunal must consider whether the relevant ground is made out. Secondly, the Tribunal must consider whether it is appropriate to exercise its discretion in favour of awarding costs against that party. Where the Tribunal decides that costs should be awarded, the Tribunal must then go on to consider the amount of any award.

24. Costs in the Employment Tribunal compensatory not punitive. The Tribunal must consider the effect of any unreasonable conduct on the part of the Claimant, although there is no need for a precise causal link between the Claimant's conduct and the specific costs being claimed. The point was made in the following terms by the Court of Appeal in *Yerrakalva v Barnsley Metropolitan Borough Council and anor* [2012] ICR 420:

> "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* 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."

25. When considering unreasonable conduct, the Tribal should adopt a broad-brush approach against the background of all of the relevant circumstances (*Sud v Ealing London Borough Council* [2013] EWCA Civ 949).

26. A failure to accept a settlement offer, or to beat a settlement offer at trial, will not inevitably mean that a costs order should be made. It is, however, one factor to which a Tribunal may have regard in determining whether there has been unreasonable conduct (*Kopel v Safeway Stores PLC* [2003] WLUK 409).

27. The threshold test in the rules governing the award of costs are the same whether or not a litigant is professionally represented, but the Tribunal should not judge a litigant in person by the standards of a professional representative. Tribunals must bear in mind that lay people are likely to lack the objectivity and knowledge of law and practice brought by a professional legal adviser (*AQ Ltd v Holden* [2012] IRLR 648).

28. Section 18(7) of the Employment Tribunals Act 1996 provides as follows:

> "Anything communicated to a conciliation officer in connection with the performance of his functions under any of sections 18A to 18C shall not be admissible in evidence in any proceedings before an employment tribunal, except with the consent of the person who communicated it to that officer."

Background

29. The claim was presented on 25 July 2022. A preliminary hearing took place before Employment Judge Truscott KC on 26 April 2023. The claim was, at that point, listed for a final hearing to take place on 2 – 5 October 2023. In advance of the preliminary hearing, the parties were sent suggested case management orders to prepare the case for final hearing. These included an order that the Claimant prepare a schedule of loss.

30. The issues were not clarified at the hearing before EJ Truscott KC. The following order was made regarding further information:

"2.1 The claimant is ordered to provide the information sought by the respondent in terms of the draft list of issues prepared by it by 31 May 2023.
2.2 The respondent should amend its grounds of resistance, if so advised, by 28 June 2023."

31. On 15 June 2023 the Respondent applied to have the claim struck out. That application was put on two bases. The first was that the claim had no reasonable prospect of success The second was that the Claimant had failed to comply with orders of the Tribunal (namely, EJ Truscott KC's order for the provision of further information, and the order that he prepare a witness statement). On 13 July 2023, Employment Judge Wright wrote to the Claimant warning him that the Tribunal was considering striking out his claim because he had not complied with Orders set by the Tribunal, and the case had not been actively pursued.

32. On 13 September 2023, Employment Judge Burge converted the first day of the listed Final Hearing into a Preliminary Hearing to consider whether to strike out the claim (or alternatively make a deposit order) on two bases:

    a. That the claims had no reasonable prospect of success; and
    b. Non-compliance with an Order of the Tribunal.

33. That hearing took place on 2 October 2023. It was conducted by Employment Judge Dyal. A Romanian interpreter was present.

34. EJ Dyal spent some time clarifying the issues in the claim. EJ Dyal clarified that the following claims were being brought:

    a. A complaint of direct age discrimination, in respect of which there were two allegations of less favourable treatment:
        i. Taking 8 months to enrol the Claimant on a first aid course; and
        ii. In July 2022, the Claimant went on the course only to find that his place had been cancelled.
        In each case the Claimant relied upon a comparator who he said was 18 years old (the Claimant was 57 years old at the relevant time). The Respondent's case was that the comparator named by the Claimant was actually 42, and that the Claimant was treated in the same way as a 40 year old colleague.
    b. A complaint of unauthorised deduction from wages, arising from an allegation that the Claimant ought to have progressed to a higher grade earlier than he did, and covering the period from November 2020 to October 2021.
    c. A complaint that the Claimant was only permitted to take 17 days annual leave per year, rather than the 22 which his contract provided for.
    d. A complaint that the Claimant was underpaid for a period of leave taken in November 2020.

35. The Respondent then narrowed its strike-out application. The application was pursued on the basis of jurisdiction only, in respect of the wages claim and the claim relating to the period of leave in November 2020. EJ Dyal

refused the Respondent's strike out application but made deposit orders in respect of those two claims, of £500 each.

36. The reason for the deposit orders was set out in EJ Dyal's Order. Of particular relevance, he said this:

> "48. However, when considering whether to make a deposit order, I have greater leeway and where there is a proper basis for it I am entitled to doubt the likelihood of the Claimant establishing particular facts he needs to in order for the claim to have reasonable prospects of success. In this case:
>
> 48.1. I think it is very unlikely that the tribunal will find that the Claimant was ignorant of time limits, and even more unlikely it will find he was ignorant of time limits for as long as he says he was;
> 48.2. If the Claimant was ignorant of time limits, I think it is highly unlikely the tribunal will consider that ignorance was reasonable ignorance.
>
> 49. I note the following factors which I think will very probably weigh heavily when this issue is determined:
>
> 49.1. The Claimant is an intelligent man with decent, practical qualifications.
> 49.2. Even bearing in mind the Claimant has English as an additional language (his English is moderately good) it is not at all difficult to find out about the employment tribunal nor about time limits. There are free sources of advice on the internet and elsewhere.
> 49.3. If the Claimant was able to find ACAS he could equally as easily have found information about the employment tribunal;
> 49.4. The claim was already out of time by the time he contacted ACAS and I do not think blaming the late presentation of the case on ACAS is likely to assist the Claimant;
> 49.5. In any event, it seems highly and inherently implausible that ACAS said nothing about time-limits. Time-limits are the most basic of things and are the first if not one of the first matters that any employment advisor thinks of. Experience shows that is the case with ACAS who provide front line basic advice rather than something deeper. There is proper reason to doubt that ACAS said nothing about time-limits and I do doubt it."

37. EJ Dyal set the case down for a three day final hearing, from 22 to 24 April 2024. He made orders to prepare the case for hearing. Of particular relevance:

    a. He directed the Claimant to prepare a Schedule of Loss by 23 October 2024 (this was presumably a typographical error).
    b. He directed the parties to exchange witness statements by 4 December 2023. Within the part of his Case Management Order dealing with witness statements, he said this:

> "72. The claimant and the respondent must prepare witness statements for use at the hearing. Everybody who is going to be

a witness at the hearing, including the claimant, needs a witness statement.

73. A witness statement is a document containing everything relevant the witness can tell the Tribunal. Witnesses will not be allowed to add to their statements unless the Tribunal agrees.

74. Witness statements should be typed if possible. They must have paragraph numbers and page numbers. They must set out events, usually in the order they happened. They must also include evidence about financial losses and any other remedy the claimant is asking for. If the witness statement refers to a document in the file it should give the page number."

38. The Claimant paid the deposits. He also sent the Respondent a document purporting to be a Scheule of Loss. The document was hand-written. It referred to significant pension loss (although the Claimant is still in the Respondent's employment). It valued the claim at over £1M.

39. The Claimant did not prepare a witness statement. The Respondent did prepare witness statements (although some time after the date provided in EJ Dyal's Case Management Orders – the delay was apparently at least in part due to a confusion about whether the Claimant had paid the deposit ordered).

40. The Respondent applied for the claim to be struck out on two, interlinked bases:

    a. That the claim had no reasonable prospect of success (rule 37(1)(a)).
    b. The claimant's conduct and/or his non-compliance with the Tribunal's orders (rule 37(1)(b) & (c).

41. Mrs Danci explained that the Claimant had not understood what was required of him by EJ Dyal's order. She indicated that Claimant was not ready for the hearing, and asked if the hearing could be postponed for a month to allow him to seek legal advice. This request was made for the first time in the submissions in response to the Respondent's strike out application. We explained that if the Tribunal did agree to postpone the hearing, it was unlikely that the case would be able to be relisted before well into 2025. Mrs Danci confirmed that the Claimant was not ready to go ahead with the hearing and was asking for it to be postponed. We took some care to ensure that that was really what the Claimant was saying. The Claimant's firm position was that he was not ready to go ahead with the hearing.

42. Mrs Danci explained that the Claimant also had further documents to disclose, which had only come to light within the last few days. She explained that the Claimant had tried to seek legal representation three times, without success (as the lawyers were too busy). She explained that the Claimant had also sought representation via the Trade Union, again without success.

<u>Discussion and conclusion – strike out</u>

43. We have considered the totality of the Claimant's conduct, in that:

a. He had been directed to prepare a schedule of loss and directed by EJ Truscott KC to clarify his claim.
b. He failed to comply with those orders, leading to the previously listed final hearing to have to be converted to a preliminary hearing.
c. At that hearing, EJ Dyal listed the hearing for this final hearing, for three days, and directed the Claimant to produce a schedule of loss and a witness statement.
d. The Respondent took issue with the Claimant's schedule of loss, in that it was difficult to follow and appeared to claim losses which do not flow from the present claims. While it was not an entirely helpful document, we did consider that the Claimant had sought to comply with the order. We did not consider that the way the Claimant approached the schedule of loss (after being ordered to prepare one by EJ Dyal) reached the threshold of being unreasonable.
e. The Claimant had not prepared a witness statement. The only explanation given was that he did not understand what was required of him. We consider that EJ Dyal's Order was abundantly clear.
f. The Claimant was not ready for the final hearing. He made an application for the hearing to be postponed, in the face of the Tribunal, and only after hearing the Respondent's strike-out application.

44. We bore in mind that the Claimant was a litigant in person, and that English is not his first language. Set against that, EJ Dyal recorded (rightly, we think) that he is an intelligent, qualified man. And at least at the time of the hearing before EJ Dyal, he was a man of some means – EJ Dyal recorded that he had £50,000 of savings, and the Claimant accepted that that was accurate as at the time of that hearing (although he submitted that he no longer had those funds at the time of the hearing before us). If he struggled to understand EJ Dyal's orders, he could have had them translated. He could have sought legal advice; he certainly had the means to do so.

45. We were satisfied that the Claimant had failed to comply with Orders of the Tribunal. We were also satisfied that, in the circumstances, the Claimant had acted unreasonably. Therefore, we concluded that the threshold test for striking out was met.

46. Mr Green suggested in his submissions that there were three options open to the Tribunal:

a. Postponing the hearing.
b. Proceeding and, as he put it "muddling through" on the basis of the Claimant giving oral evidence in chief (although he accepted that there was an annotated, more detailed version of Claimant's ET1 in the bundle which could stand as his evidence in chief).
c. Striking out the claim.

47. We agree that those would, in principle, have been the three options available. But given that the Claimant indicated that he was not ready to proceed with the hearing, we considered that the second option was not one that was properly open to us. We considered that we could not artificially press ahead using Claimant's annotated ET1 as his evidence in

chief, in circumstances where he had told us (and reiterated when pressed) that he was simply not ready to go ahead with the hearing.

48. That left us with only two options. We did not consider that postponement was fair or proportionate, for the following reasons:

    a. A listed final hearing had already had to be postponed once, at least in part because of the Claimant's non-compliance with the order of EJ Truscott KC.
    b. The Tribunal had set aside three days to hear this case. The Respondent had prepared for it. If it was postponed, the Tribunal would have to set aside another three days, and the Respondent would be put to further expense.
    c. It would take many months, and likely well into 2025, before a three-day final hearing could be relisted. Therefore, postponing the case would significantly delay resolution for all involved.
    d. Fundamentally, there was nothing to satisfy us that, if we did postpone, the position would be any different on the next occasion. EJ Dyal's directions were set out very clearly. The Claimant simply did not comply them (at least insofar as production of a witness statement was concerned).
    e. The Respondent very fairly did not advance a positive case that a fair trial would be rendered impossible by further delay. We noted, however, that the Respondent was already not calling two potentially relevant witnesses who had moved on from its employment. We considered that the passage of a further year was not likely to improve the quality of the evidence on either side, not least since the allegations dated back to 2020.
    f. We were mindful that if we did postpone and allowed the Claimant to produce a witness statement, there would be an inherent and irremediable unfairness to the Respondent. That is because the Claimant would have produced his witness statement having already had sight of the Respondent's witness statements (and indeed its skeleton argument).

49. We therefore reached the conclusion that the claim must be struck out, as that was the only fair and proportionate option in the circumstances. We were fortified in that conclusion by reminding ourselves of the following factors:

    a. The Claimant had failed to comply with the orders set by the Tribunal to prepare the case for final hearing. He had attended a final hearing for which he was unprepared, without having asked for a postponement in advance, and despite having known about the hearing for six months.
    b. Even had we been able to proceed using the Claimant's annotated ET1 as his evidence in chief, he would have been faced with significant (and probably unsurmountable) difficulties with his claim. Even the annotated claim form was silent about the reason he had not brought the claims sooner than he did. So, he would have been left with no evidence to overcome the burden of showing that it was not reasonably practicable for him to have brought Deposit Order the claims in time. He would have had no evidence beyond a bare assertion regarding the other part of the holiday pay claim (in circumstances where the Respondent had contemporaneous

documents). And the evidence he would have relied upon to shift the burden of proof in the age discrimination claim would have been limited to a bare assertion about the age of his comparator, which was significantly at odds with the Respondent's evidence. In other words, while we were not striking the claim out on the basis that it had no reasonable prospect of success, the lack of a detailed witness statement from the Claimant rendered the claim inherently weak. That was relevant to the question of proportionality.

50. We therefore concluded that this was exactly the sort of exceptional claim in which strike out was appropriate without directly considering whether a fair trial was still possible. That was because, having concluded that a postponement would be disproportionate and not in the interests of justice, and with Claimant not being prepared to proceed, we were left with no other realistic option.

Conclusion - costs

51. The Respondent applied for a costs order, on three bases:

    a. The operation of rule 39(5) (in respect of the complaints that were subject to a deposit order);
    b. The Claimant's unreasonable conduct; and
    c. That the claim had no reasonable prospect of success.

52. We first considered whether rule 39(5) was engaged.

53. We struck the claim out on the basis of the Claimant's non-compliance with Tribunal orders, and the manner in which he conducted the proceedings, in that he had not prepared a witness statement, and was not ready for the hearing.

54. Mr Green submitted that we ought to take a purposive approach to the interpretation of rule 39(5). We could see the force in that submission. It might at first glance appear to be a perverse result if the Claimant, having had his claim struck out, had his deposit returned to him. Ultimately, however, we concluded that we could not look beyond the wording of the rule. We considered that the word "decided", in the context in which it came, implied a reasoned decision on the facts. That was not the exercise we carried out in deciding to strike out the claim. The reference in the rule to a "specific allegation or argument" also gave weight to that conclusion. Our decision was to strike out the whole claim based on the Claimant's conduct, rather than to deal with the individual allegations which were made the subject of a deposit order.

55. Mr Green submitted that that result would not do justice to the Respondent, and again we can see why that submission was made. But we bore in mind that the Respondent applied for the claim to be struck out. That was a tactical choice. The success of that application shortened the final hearing (indeed it would have shortened it from three days to one day, but for the costs application). It avoided the need for the Respondent's witnesses to

attend. And of course, it resulted in the Respondent succeeding within the litigation as a whole.

56. So, for those reasons we concluded that rule 39(5) was not engaged. It followed that we did not make a costs order on that basis.

57. The effect of that was also that the Claimant's deposit will be returned to him.

58. We next considered whether the claim could be said to have no reasonable prospects of success. In that regard:

    a. We bore in mind that "no reasonable prospects of success" is a high bar.
    b. While we did not think it was binding on us, we considered that it was relevant that EJ Dyal was faced with a strike out application on the basis that the claim had no reasonable prosects of success at the Preliminary Hearing in October. At that hearing, the Respondent narrowed its application to only two specific allegations. EJ Dyal elected not to strike out those allegations.
    c. All of the complaints were fact-sensitive. In respect of the age discrimination complaint, there was a dispute about the age of the Claimant's comparator. In respect of the holiday pay claim, there was a dispute about what holiday the Claimant had been allowed to take. In respect of the pay claim, there was a dispute about when the Claimant ought to have progressed. And in respect of the time-limit issues, once again the Tribunal would have needed to make factual findings regarding reasonable practicability.
    d. We struck the claim out based, broadly, on the Claimant's conduct rather than his prospects of success (although we did take the merits of the claim into account in satisfying ourselves that our approach was a proportionate one).
    e. Even after the Claimant had failed to produce a witness statement, that did not leave the claim with no reasonable prospect of success. There were a number of ways in which the Tribunal might have approached the lack of a witness statement from the Claimant. The lack of a witness statement may have rendered the claim weak; it did not render it entirely hopeless.

59. For those reasons, we did not consider that the claim could be said to have had no reasonable prospect of success. It followed that the threshold test was not met, so we did not make a costs award on that basis.

60. We turned then to consider the question of unreasonable conduct.

61. Evidence was put before us of two settlement offers made to the Claimant. The first, of £500, was made on 3 May 2023. The second, of £2,500, was made on 20 November 2023. It was stated to be open for acceptance until 27 November 2023. Both offers were made on a "without prejudice save as to costs" basis.

62. Both offers, and various associated pieces of correspondence including responses from the Claimant, were copied to ACAS. There was also, within the clip of without prejudice correspondence put before us, emails from ACAS. Although the Claimant did not take any specific objection to the correspondence being adduced, we considered the application of section 18(7) of the Employment Tribunals Act 1996. Given that the Respondent had adduced the correspondence, we considered that we had their consent for the purposes of section 18(7). We were therefore satisfied that the offers were not rendered inadmissible by that section. The Claimant had not specifically consented to his responses being included. We therefore focused only on the Respondent's offers (and indeed, Mr Green confirmed that he could make the submissions he wished to make based on the Respondent's correspondence only).

63. We carefully considered the two settlement offers made. The payslips before us suggested that the Claimant had been paid holiday pay at a rate in the region of £400 per day. That suggested that the value of five days holiday pay would be around £2,000. We also bore in mind that in addition to the complaints of unauthorised deduction from wages and holiday pay, there was a complaint of direct age discrimination, consisting of two allegations relating (broadly) to a failure to provide training to the Claimant. The allegations spanned a period of eight months. The Claimant's position was that the situation had caused him considerable stress and upset. Even the higher offer, of £2,500, was at the lower end of the bottom *Vento* band. If the Claimant had succeeded in his claims, we consider that he could reasonably have expected to have bettered even the higher offer of £2,500 on the age discrimination complaint alone. That is not to say he would necessarily have beaten the offer; but it was not unreasonable for him to think that he might. To put it another way, this was not a case where the Claimant was being made an offer which he had no hope of beating.

64. Of course, the Claimant did not beat the sum on offer, in that his claim was struck out so no award was made to him. With hindsight, he may now think that he ought to have responded to the second offer somewhat differently. But we do not consider that it could be said that he acted unreasonably in turning down either of the offers.

65. We do, however, find that the Claimant did act unreasonably in the conduct of the litigation, as follows:

    a. He failed to comply with EJ Truscott KC's orders. The Claimant suggested in his submissions on costs, for the first time, that there had been some issue with the interpreter at that hearing. That was not borne out by EJ Truscott KC's Orders, and had not been raised in the previous preliminary hearing. And in any event, EJ Truscott's Case Management Orders were sent to the Claimant in writing.
    b. He failed to comply with EJ Dyal's order to prepare a witness statement.

c. He attended a final hearing, listed for three days, for which he was not ready (and then requested a postponement in the face of the Tribunal).

66. Having found that there was unreasonable conduct, we then considered at the second stage whether to exercise our discretion to make a costs order. In that regard, we took into account the following factors:

a. We bore in mind the seriousness of the Claimant's default. Orders of the Tribunal are not to be taken lightly. We did not consider that the failure to comply with EJ Truscott KC's Order was particularly serious in the circumstances. The Claimant was a litigant in person, operating in his second language. While he ought to have made efforts to comply with the order to clarify his claim when ordered to do so, we bear in mind that it is not unusual for self-representing litigants to struggle with that process. That generally necessitates a Preliminary Hearing where, in the words of HHJ Taylor in *Cox v Adecco & Others*, the Judge has to roll up their sleeves and identify the claims and issues. If the fact that such a Preliminary Hearing was needed implied that there had been unreasonable conduct on the part of a claimant, the Tribunal would be awash with costs applications.
b. The failure to produce a witness statement was, in our judgement, much more serious. EJ Dyal's order was in the clearest possible terms. The Claimant submitted that he did not know what a witness statement was. If he had simply read EJ Dyal's order (or taken it to be translated, if necessary), he would have been left in no doubt about what was required of him.
c. Turning up to the final hearing unprepared was also, in our judgment, a serious default. There is a wealth of publicly available information on the Tribunal process, to assist litigants in person to present their cases. The Claimant had had ample notice of the final hearing.
d. Of course, we bore in mind that the legislature has made this a generally cost-neutral jurisdiction. We bear in mind also that, had the Claimant complied with EJ Dyal's orders, this hearing would still have been required – indeed, it would have lasted for (at least) three days rather than the one day it took to hear the strike-out application (with a further day to deal with costs). The Respondent would have been put to considerable cost even if the Claimant had acted reasonably throughout.
e. We also bore in mind that the Claimant's had been on sick pay for the three months leading up to the hearing. Based on the payslips before us, that reduced his net income from around £5,000 per month to around £600 per month. That is a significant decrease for anyone to bear. Set against that, we also bore in mind that the Claimant was about to have the deposit of £1,000 returned to him. So looked at in the round, we considered that his means were not such that it would have been inappropriate to make a costs order at all.

67. Weighing all of that up, we considered that it was appropriate to exercise our discretion to make a costs order, reflecting the effect that the Claimant's unreasonable conduct had on the proceedings.

68. The Respondent had put before us a schedule of costs. The schedule was in the sum of £19,964.59. Mr Green explained that the Respondent's total costs were in the sum of around £55,000 to the point of trial, and £65,000 including trial costs. The reduced schedule had been submitted because the Respondent wished the Tribunal to carry out a summary assessment of costs. The schedule of costs covered only the costs incurred up to 14 June 2023, and the cost associated with the trial. It did not break down the costs associated with the Preliminary Hearing before EJ Dyal. Nor did it include the costs associated with preparing for trial, such as disclosure, preparation of the bundle, or preparation of witness statements. Importantly, that meant that it did not set out how the preparatory steps had been affected by the Claimant's failure to produce a witness statement.

69. Regarding the amount of the award, Mr Green's submitted that the Claimant's conduct, albeit relatively late in the proceedings, had rendered all of the work to that point a waste. He therefore submitted that we should award all of the Respondent's cost. Mr Green took us to *Yerrakalva* as authority for that proposition. He submitted that it would be an error of law to look for a causal link between the conduct and the costs claimed. We did not think that that is what *Yerrakalva* says. We have quoted paragraph 41 of the judgment of the Court of Appeal above – it includes this:

> "In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant…"

70. What we were required to carry out was a broad-brush exercise. In doing so, we bore in mind the following factors:
    a. The nature and seriousness of the unreasonable conduct (as described above)
    b. The effect of the unreasonable conduct (in that, in respect of the failure to provide a witness statement and failure to prepare for the final hearing, they did not alter the course of the proceedings up to the point of trial, and the net effect was that the hearing which disposed of the claim took less time than had been listed).
    c. The costs incurred by Respondent as a whole (the majority of the work on the costs schedule before us having been carried out by an Associate Solicitor whose hourly rate was £225 per hour).
    d. The fact that, while they had not been itemised before us, in the Tribunal's experience the Claimant's non-compliances will inevitably have contributed to the totality of the costs incurred.

71. In our judgment, adopting that broad-brush exercise, the correct sum to award was £2,000.

72. We then took a step back and considered the Claimant's means. In that regard:
    a. We bore in mind that the Claimant would receive the deposit of £1,000 back.
    b. The Claimant explained that he had subsequently spent the savings referred to by EJ Dyal's Case Management Order. There was, however, no specific evidence of that before us.
    c. We noted that the Claimant's income was significant curtailed by the fact that he is currently absent from work on sick pay. But the payslips showed that his earning capacity is significant, in that he was earning around £5,000 net per month before his current period of absence.

73. There was therefore nothing in the Claimant's means that led us to consider that the sum we had arrived at was inappropriate or excessive. Therefore, that was the sum we awarded.

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Employment Judge Leith

25 April 2024

Date