EMPLOYMENT TRIBUNALS

Claimant: Mr B Handford

Respondent: Ms Y Shkop

Heard at: Watford (via Cloud Video Platform)
On: 16 May 2024

Before: Employment Judge Caiden

Representation
Claimant: In person
Respondent: Mr L Wilson (Counsel)

RESERVED JUDGMENT ON COSTS

The Respondent's application for costs is dismissed.

REASONS

A) Introduction

1. A judgment that was sent to the parties on 7 February 2023 dismissed the Claimant's complaints of automatically unfair dismissal under s.100(1)(c) Employment Rights Act 1996 and unlawful deductions of wages. However, the judgment concluded that claim of the Respondent being in breach of the requirement to provided amended written statement of particulars was well founded. That did not result in any financial award as the Claimant had not succeeded in any claim to which Schedule 5 of Employment Act 2002 relates (although the relevant terms were set out by the Tribunal).

2. Following the dismissal of the case, the Respondent made a written application for costs on 3 March 2023, thus within the 28-day time limit set out by rule 77 of Employment Tribunals Rules of Procedure, which is found in Sch.1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("ET Rules"). The cost application was made on the following basis

2.1. Vexatious/unreasonable conduct in the Claimant's applications that resulted in a Preliminary Hearing on 21 November 2022;
2.2. Vexatious/unreasonable conduct in the Claimant pursuing a strike out application at the hearing on 16 January 2023 which it said led to a third day being needed for submissions;
2.3. Unreasonable conduct/no reasonable prospect of success in the Claimant bringing a claim of unlawful deduction of wages.

B) Preliminary matters and Claimant's neurodiversity

3. The nature of the application and costs sought, led to an earlier Preliminary Hearing to case manage it and provide suitable orders. By the commencement of the hearing the Tribunal was provided with:
   3.1. a 259-page bundle, plus index, by the Respondent. In these reasons page numbers in **bold** relate to this bundle. It included the Respondent's costs applications and responses by the Claimant that were in writing, as well as evidence said to be in support of these;
   3.2. a 34-page document which was entitled "*Claimant's Oral Arguments for Costs Hearing of 16 May 2024, presenting in writing*". This was not in the above-mentioned bundle;
   3.3. a bundle from the Claimant that had 505 pages (including index). The majority of documents it contained were already in the Respondent's bundle and documents that were part of the earlier hearing bundle (document at paragraph 3.1 above);
   3.4. an earlier bundle for the applications that were made in the claim and responses to them, as well as withdrawals of application, in the year 2022. That ran to 666 pages. The term Applications Bundle is used to make clear when this is being referred to.

4. The Tribunal confirms it read all the applications and responses, as well as the Claimant's 'oral written arguments' (the document at paragraph 3.2 above). It also read the documents to which its attention was specifically drawn. Additionally, the nature of the application meant it looked at many documents in the Applications Bundle (the document at paragraph 3.2 above).

5. As had occurred at the previous hearings the Claimant represented himself and Mr L Wilson (Counsel) represented the Respondent. One factor that had changed was that by the stage of the costs applications being dealt with the Claimant had received information which indicated he had a diagnosable neurodiversity condition. For clarity the Claimant had provided something which was entitled "*Psychiatric Report*" and set out a diagnosis using the categorisation from the International Classification of Diseases 11th Revision ("ICD11"), however owing to potential stigma that may be associated if a document in the public domain used such labelling preferred that any public document use the more general phrase "*neurodiversity condition*" or "*neurodiverse*". The Tribunal invited observations or submissions from both parties on this matter, and ultimately agreed to use these phrases in any judgment/reasons it produced as both parties had suggested. There followed a discussion of adjustments that could be made to enable the Claimant to participate fully, and the following were agreed:
   5.1. 10 mins breaks to occur after around every 40 mins of the hearing had lapsed;

5.2. avoid use of figurative language, as the Claimant is liable to adopt a literal interpretation;
5.3. ensure instructions are very explicit and explain the purpose of the questions.

6. Whilst the Respondent was content for the Tribunal to make such adjustments and proceed on the basis that the Claimant was "*neurodiverse*", it made clear that as a fact it refuted that in fact the Claimant was. The reason for this critical distinction was the Respondent was alleging that the Claimant was using the relatively recently diagnosed condition to justify or excuse the events which were the subject of the costs application. It set out that the alleged diagnosis was insufficient and that it was only provided in short form after a conversation by telephone. The Claimant refuted this, explaining that it had been provided by a medical professional, that the telephone conversation was lengthy (he stated it involved a 90 minute interview and reviewing an extensive questionnaire which had to be completed by the Claimant and his mother) and the reason he opted for this short form private report is that no one would provide a court style report as those required a solicitor to instruct according to their (the experts) insurance policies. Further he was forced to take the private route as the NHS funding was limited and wanted to be in the best place for resisting the costs application.

7. Whilst it is unusual in costs judgments for conclusions of facts to be made, in this case whether the Claimant did indeed have the "*neurodiverse condition*" he was alleging, in this case the Tribunal concluded that it was necessary. That is because it had central importance to the issues at the heart of the application which included both (i) whether a cost threshold had been passed and (ii) the Tribunal exercising any discretion if it had been (the Claimant wishing to rely upon him being "*neurodiverse*" to explain that he was not being unreasonable and equally that discretion should not be exercised). The Tribunal on the balance of probabilities concluded that the Claimant did indeed have the "*neurodiverse condition*" for the following reasons:
7.1. His GP provided a letter on 14 June 2023 that set out that under a screening assessment, the Claimant had a high score for a particular "*neurodiverse condition*" which indicated a 'possible' diagnosis of such a condition. It also noted that he had earlier diagnosis which already put him within the "*neurodiverse*" class, and which reinforced the 'possible' diagnosis for the new condition;
7.2. The "*psychiatric report*" was compiled by a consultant psychiatrist who is registered under the GMC. That individual has professional obligations and set outs their professional opinion;
7.3. In the case of disability there is no requirement for formal court reports and the decision is ultimately one for the Tribunal. It is acknowledged that this is not the issue, that is it is not a claim of disability discrimination. However, it would seem illogical for the material provided by the Claimant, including setting out the effects on his day-to-day life in documentation, on the one hand to be sufficient for that purpose but for the purpose of defending a cost application that very issue, what would be a disability under the Equality Act 2010, to require a formal report. Ultimately, the Tribunal has considered the points made by the Respondent that it is a short private report, and it may not have taken place with a physical assessment but rejects this for the reasons set out in the sub-paragraphs above, namely that two medical professionals who are regulated using diagnostic tools led

to a possible diagnosis and then an actual diagnosis of a "*neurodiverse condition*".

C) Relevant legal principles

8. In terms of the ET Rules:
   8.1. Rule 76(1)(a)-(b) 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; or*
> *(b) any claim or response had no reasonable prospect of success…*

   8.2. Rule 78(1)(a)-(b) states

> *(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 (Taxation of Judicial Expenses Rules) 2019, or by an Employment Judge applying the same principles;*

   8.3. Rule 84 states

> *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.*

9. With respect to general principles:
   9.1. costs are the exception rather than the rule (*Barnsley Metropolitan Borough Council v Yerrakalva* [2011] EWCA Civ 1255, [2012] IRLR 78, at [7]);
   9.2. costs are compensatory and not punitive: *Lodwich v London Borough of Southwark* [2004] EWCA Civ 306; [2004] IRLR 554 at [23]. However, whilst the fact that costs are compensatory means there is some causal analysis that is relevant and it is undoubtedly a factor, that is the conduct has to have caused the costs being claimed in broad terms, it is not necessary for a precise causal link to be established: *Yerrakalva* at [39]-[41];
   9.3. there is a three stage process to awarding costs, namely (i) has a cost threshold be passed/triggered (stage 1), (ii) if so, should the Tribunal exercise its discretion to award costs (stage 2), (iii) if so, what amount of costs should a Tribunal assess under rule 78 ET Rules (Stage 3), *Haydar v Pennine Acute NHS Trust* UKEAT/0141/17 at [25] and *Radia v Jefferies International Ltd* [2020] IRLR 431 at [61], *Hossaini v EDS Recruitment Ltd* [2020] ICR 491 at [64];

9.4. the fact that the paying party is a litigant in person is a relevant factor in assessing both stage 1, whether a cost threshold has been passed, and stage 2, whether to exercise discretion (*AQ Ltd v Holden* [2012] IRLR 648 at [32]-[33])

9.5. the potential paying parties ability to pay may be considered both at the stage 2, discretion to exercise costs stage, and as to the sum to award, stage 3 (*Haydar* at [25]);

9.6. rule 76(1)(b) ET Rules expressly relates to any claim or response only having no reasonable prospects of success and therefore it is inapplicable to applications made, and so costs that relate to applications must fall within rule 76(1)(a) ET Rules (that is the application in issue was conduct that was vexatious, abusive, disruptive or otherwise unreasonable): *Warburton v Chief Constable of Northamptonshire* [2022] EAT 42 at [95]-[103].

10. In terms of the meaning of 'vexatious', Lord Bingham defined it by reference to the "*hallmark*" as "*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* " (AG v Barker [2000] EWHC 453 (Admin) at [19] which was applied in the Tribunal context in costs case of *Scott v Russell* [2013] EWCA Civ 1432 at [30])

11. With respect to the meaning of 'unreasonable', although it is often stated that it is given its ordinary English meaning and certainly not to be equated with vexatious (*Dyer v Secretary of State for Employment* UKEAT/183/83) it is notable that:

11.1. the test of unreasonable conduct is wide and objective, and so it may include having an unreasonable perception of matters: *Brooks v Nottingham University Hospitals NHS Trust* UKEAT/0246/18 at [47].

11.2. there may be more than one reasonable form of conduct during proceedings and the tribunal should not substitute its view of what was reasonable for that of the litigant acting within a spectrum of reasonable conduct: *Solomon v University of Hertfordshire* UKEAT/0258/18 at [107].

12. As regards to the exercising of discretion, without detracting from the fact that it is unfettered (*Haydar* at [21]), and that matters are specific to each case so authorities on costs cannot be taken as simply being of being of general application (*Yerrakalva* at [42]), it is notable that:

12.1. fact that a party is a litigant in person may be relevant factor in the exercising of discretion (*AQ* at [32]);

12.2. the nature, gravity and effect of the conduct giving rise to the application (*McPherson v BNP* [2004] EWCA Civ 569; [2004] ICR 1398 at [40]);

12.3. the behaviour of the potential receiving party (*Yerrakalva* at [48], [50] and [52]).

13. In terms of the amount of costs, given the sums in dispute are considerable and so above the 20,000 cap set by rule 78(1)(a) ET Rules, the Tribunal canvassed with the Respondent its position in terms of whether detailed assessment had

to take place if the 'claimed' costs were well in excess of £20,000 but the Tribunal would not actually exercise discretion for sums above the 'cap' (for one reason or another, including properly having regard to compensatory principles of costs). The Respondent agreed that the Tribunal can continue to use the summary assessment and make an award of under £20,000. That also seems consistent with the point made in *Kovacs v Queen Mary and Westfield College* [2002] EWCA Civ 352, [2002] IRLR 414 at [35] and [38].

D) Analysis and conclusions

14. The Tribunal will deal with each application in turn.

Application 1: Vexatious/unreasonable conduct in the Claimant's applications that resulted in a Preliminary Hearing on 21 November 2022;

Stage 1: cost threshold

15. The Respondent's written application for costs states that "*On the application for costs, commenced by written application dated 8 November 2022, namely the costs of, and up to that date occasioned by, the Claimant's numerous and vexatious items of correspondence and applications, including the costs of, and occasioned by, the preliminary hearing held on 21 November 2022: the Claimant acted vexatiously, abusively, disruptively or otherwise unreasonably in his correspondence and in the bringing of his numerous applications (Rule 76*[(1)]*(a)), and/or those applications had no reasonable prospects of success (Rule 76*[(1)]*(b))*." (**p.66** [16(1)]).

16. The starting point is for the Tribunal to identify the relevant conduct. In writing it was not particularly clear and in oral submissions the Respondent confirmed that this application amounted to "*Costs of numerous correspondence and having the 21 November 2022 preliminary hearing*". The Tribunal pointed out that there were numerous application and some of which, by way of example an application to amend, were not on the face of it 'unreasonable'. The Respondent made clear that in fact it was Applications 1-8 that were said to fall within this first cost application and the total costs of it were 90% of the costs shown in the Schedule at **pp.236-241**. Broadly there for it was 90% of 35,796.00 of costs (including VAT), which amounts to £32,216.40. The use of the Application numbering appears to relate to the index of the Application Bundle, and it is useful to note that the 7th Application is in fact an application for the Respondent's costs.

17. The 1st Application, appears to be made by a letter of 19 May 2022. This sought to (i) apply to make an amendment that the reason for the dismissal was not solely the health and safety concerns in relation to the live lobster incident (see Judgment, **p.25** at [2.2]) but also in broad terms him allegedly raising concerns (a) about maintaining a residential Covid-19 'bubble' allegedly preventing the Claimant getting treatment and (b) the effect of his mental health owing to the residential Covid-19 'bubble'; (ii) admit a cover recording (which in fact was later included in the hearing bundle); (iii) striking out the entire response. On the face of it there was nothing unreasonable or vexatious, having regard to the

law at paragraphs 10-11 above. Therefore, it is really the strike out application that *may* be in issue. In relation to that it in broad terms is seeking to query the specific assertion that denied that "*staff were prohibited from visiting their family and friends and leaving Wentworth estate*" (p.4 of Application Bundle) and generally alleging inconsistencies with positions in the response.

18. The 2nd Application is made by letter of 30 May 2022. This once again deals with the above 3 points, although it is responding to points made by the Respondent in correspondence. Of relevance to the costs application, it is noted that "*I am not legally qualified, I am a layman but my amateur understanding is that Tribunals must bear in mind the importance of a swift determination of disputes….I have provided enough evidence for a Prima Facia case that the Respondent's response is scandalous on three counts (a) The Respondent's denial in paragraph 10 of the Response that the resident staff were prohibited from visiting their family and friends and leaving Wentworth Estate is scandalous (b) The Respondent's claim in Paragraph 16 of the Response that my post-Christmas quarantine, which started on the 31st of December 2020, was due to a legal requirement caused by the fact that my girlfriend tested positive for Covid on the 8th of January 2021, is scandalous. (c) The Respondent's claim in Paragraph 22 of the Response that on 12 April 2021, the Respondent intended to pay for my wrist surgery through their insurance is scandalous." (*p.31 of Application Bundle).

19. The 3rd Application by letter of 31 May 2022, is an attempt to strike out the response as the alleged pleaded reason for dismissal is alleged to be "*scandalous*" on the basis that there was an alleged contemporaneous document that showed otherwise (p.68 of Application Bundle). The 4th Application by letter of 13 June 2022 the Claimant repeated the striking out application and importantly set out that he was clarifying that the earlier application of 31 May 2022 was misunderstood as being further information as opposed to an independent application (p.70 of Application Bundle).

20. The 5th Application was by letter of 20 September 2022, and this sought to strike out the response for having no reasonable prospects of success. It was seeking to expand the schedule preliminary hearing of 21 November 2022 to also determine the strike out applications the Claimant was making. In short, it was challenging the veracity of the reasons put forward (p.73 of Application Bundle).

21. The 6th Application was for an Unless Order of the Vodafone call records made on 5 October 2022. In short, there were disputes as to the order of events and the Claimant believed that call records and WhatsApps were therefore relevant to the issue (p.105 of Application Bundle).

22. The 8th Application was for on order striking out the witness statement of one of the Respondent's witnesses and that was made on 8 November 2022. (As previously noted, the term 7th Application relates to the Respondent's application for costs made on 8 November 2022, p.171-178 of the Applications Bundle, it also included an application for a deposit for claims having little reasonable prospects of success). The Tribunal notes that the same day the

Claimant had been informed by it that it would not be considering the strike out application on the 21 November 2022 hearing but would deal with the application for specific disclosure.

23. The Tribunal at the 21 November 2022 stated the following in its Case Management Summary

> *I explained that in my view he appeared to be trying to force the case to be heard on the papers through applications rather than allowing the final hearing to take place at which the tribunal could consider the evidence in detail and draw its conclusions. The claimant said to me that he thought that he had to strip the case to its bare essentials before the hearing. He said that he thought he had to 'separate the wheat from the chaff' at this stage. He also said that he had sought to strike out the respondent's witness statements because they were untrue. When I said to him that he could cross-examine the witnesses on this at the final hearing, which was part of the purpose of the final hearing, he said that the witnesses would not appear and were relying on their witness statements. Mr Wilson confirmed that the witnesses would be attending and it appears that the claimant was under a misapprehension as to the process of an employment tribunal and what takes place at a final hearing. I encouraged the claimant to observe a hearing before 16 January 2023. The claimant said that the reason for his applications was that he had not understood that he would have the opportunity to challenge the respondent's case at the hearing. He said he would now consider this information and at his request I told him what he would need to do if he wanted to withdraw any applications. He also asked if any withdrawals would have costs repercussions. Mr Wilson said that the respondent's costs application would be based on the conduct already exhibited and that if there was no future work required on applications then costs of such work could not accrue or be claimed. Mr Wilson said that in his view the claimant's continuous applications were putting the final merits hearing in jeopardy and that was a costs issue for the respondent.*

24. Stepping back on the face of it the applications for specific disclosure and for amendments, both of which were dealt with at the 21 November 2022 hearing, do not cross a cost threshold in that they are neither unreasonable nor vexatious. This conclusion is reached for the following reasons:
    - 24.1. both had a basis in law, so do not meet the 'vexatious' test in *Barker* (see paragraph 10 above);
    - 24.2. both fall within the objective definition of unreasonable, there were grounds for pursuing it and some litigators may believe that they were an appropriate course to adopt (this being in line with *Solomon* and *Brooks*, see paragraph 11 above);
    - 24.3. no explanation has been set out by the Respondent in its document for *these* specific aspects being unreasonable or vexatious and oral argument did not set anything else out.

25. That leaves the numerous applications for striking out. It is fair to record, as already noted by a Tribunal previously, that the correspondence on this was

"*voluminous*". Indeed, that really appeared to be the crux of the Respondent's position. The Tribunal by no means wishes to encourage such behaviour by litigants. However as at *this stage* it has concluded that in fact the behaviour was not unreasonable or vexatious for the following reasons:

25.1. the Claimant was a litigant in person and so that, given *AQ* (see paragraph 9.4 above), is a factor in determining whether the conduct was reasonable. In short, the Claimant appears to have adopted a literal approach to the rules and used the everyday sense of scandalous. The Tribunal's judgment at [6] (p.26) set out why the Claimant's approach was incorrect but that does not mean that it is unreasonable for a litigant in person to act in this way;

25.2. likewise, it is not properly understood vexatious. It was not in fact subjecting the Respondent to harassment or inconvenience out of all proportion to the gain (see *Barker* at paragraph 10 above). The Claimant' position was this was a fatal blow. The phrasing in so far as "*scandalous*" was not apt and *may* have led a Tribunal to conclude that it is vexatious. But fairly read the application was not limited to that (or applications), it was also being asserted that the grounds of response simply could not be right, nor could their position, as there was by way of the covert recording or otherwise material that showed material aspects to be incorrect. So, the Tribunal concludes as a fact this is not falling within the classification of vexatious.

26. Finally, the Tribunal on this issue makes clear that rule 76(1)(b) ET Rules cannot be engaged as its phrasing only connotes the claim itself having no reasonable prospects of success and *not* an application. In this regard, the Tribunal is bound by *Warburton* (paragraph 9.6 above) which in any event is reasoning which it sees as convincing and would have adopted.

Stage 2: discretion

27. It follows that as stage 1 has failed, the Tribunal's conclusion on discretion is not strictly relevant as there can be no costs awarded for this application. However, in the event the Tribunal is mistaken or found to have erred in any way, it sets out its considerations on discretion. The Tribunal would *not* have exercised any discretion even if a cost threshold had been crossed looking at all factors in the round. In particular it is notable that:

27.1. the Claimant appeared as a litigant in person, that is a factor in deciding whether to exercise discretion and in the circumstances, he should not be approached as if he were a professional. The Tribunal however acknowledges that costs can of course be made as against litigants in person, and they do not have licence to behave however they like,

27.2. allied to the above, the Claimant's "*neurodiverse condition*" is a factor that explains his behaviour and approach to the litigation. That is something for which the Tribunal considers it is appropriate and points away from exercising discretion, noting of course that costs are the exception not the rule in Tribunal,

27.3. the nature, gravity and effect of the conduct are in the Tribunal's view relatively slight. One can appreciate the annoyance and that there is *some* element of cost in having to read all the applications that have come in and provide a short reply. However, a reasonable litigator would only have needed to spend about a couple of hours or so reading through all the applications and perhaps up to an hour responding. It would have been obvious, including given the Tribunal's response, that these applications were not going to go anywhere and that one only need to repeat an objection and refer to earlier correspondence. The Tribunal has not seen all the responses so is not clear how an estimated £32,216.40 was spent on matters that did relate to this conduct (that is even applying a broad brush to causation as *Yerrakalva* indicates is what is needed, paragraph 9.2 above);

27.4. in a similar point to the above point, and a factor that is in favour of discretion being to refuse costs, is the Respondent's conduct. Its response or approach to the applications seems to have been 'over the top' from what it has seen;

27.5. additionally, the Claimant is of limited means and that is also a factor in favour of discretion being refused. The Tribunal had seen in this regard **pp.195-228**. He only had just over £2,000 in his bank accounts as at the date of the hearing, and his new net pay was £1,759.76 which was almost the same amount as the amount of his outgoings (including rent for his accommodation). Further he had no significant assets (it was a computer, camera and mobile telephone that were listed in the evidence provided).

28. For the avoidance of doubt, a point that the Claimant was made in his response was that whilst he is of limited means the Respondent is a well-off individual. In short, this made no sense to him why he was being asked to pay costs which were of, in his view, little significance. The Tribunal during oral argument stated that this was not a factor per case law. It has revisited the matter and considered that it perhaps put the bar too high given *Brooks* appears to indicate the statement in *Kovacs* is not necessarily good law and does not apply to the ET Rules (but rather the earlier version). That said, on first principles it has rejected this and has *not* declined to exercise discretion because the Respondent is well-off. In this regard, the Tribunal's reasoning is based on what was stated in *Brooks* at [44]

> *44. I cannot accept that submission. What was said in Kovacs was in relation to the Old ET Rules and cannot readily be applied in interpreting the ET Rules . There is no automatic error of law in the Tribunal referring to the Respondent's " stretched resources ". It is right to note that there are good policy reasons for the means of the receiving party generally not to be taken into account. It would be unconscionable if, for example, a party that had acted unreasonably in conducting proceedings were to avoid having to contribute towards the other party's costs merely because that other party was well-off or had substantial means or had, prudently, taken out an insurance policy which meant that it would not be out of pocket if a costs order were not made in his favour: see the discussion in Mardner v Gardner & ors UKEAT/048/13/DA at [34] and*

[35]. However, as acknowledged by HHJ Eady QC (as she then was) in Mardner :
"34 …there may be cases where the means of the receiving party will be relevant but this will be highly fact specific and examples do not immediately come to mind." (emphasis added)

Stage 3: amount of costs

29. As the costs application has been refused the amount of costs does not strictly need to be determined. However, the Tribunal has reviewed the claimed costs and had it exercised its discretion, having regard to the fact that costs are compensatory and there is a need for a broad causal link, as well as factoring in the Claimant's limited means, it would only have awarded costs of 6 hours' worth of work (see paragraph 27.3 above). This did not need to be done by a Grade A fee earner and given the Guideline Hourly rates as the matter would be London 2 and Grade B (so £308). The result would have been costs awarded at £1,848

Application 2: Vexatious/unreasonable conduct in the Claimant's applications that resulted in a Preliminary Hearing on 21 November 2022;

30. The next application was divided into two parts by the Respondent during oral arguments. Its position was that what it termed the 9th and 10th application had caused 10% of the costs of the Schedule at **pp.236-241** which meant the sought after costs were £3,796.00 broadly speaking. Separately, it was alleging that as a result of pursuing the strike out on day 1, the trial had to have submissions going into a third day rather than finish within the two allocated days. That was shown on in the costs of the Schedule at **pp.249-253**; namely £3,060.00.

Stage 1: cost threshold

31. In terms of the conduct at issue that was:
    31.1. The 9th Application is a further application, made on 13 November 2022, to strike out parts of the Response. It refers in large part to breaches of the CPR (p.445 of Application Bundle). The Tribunal notes that the first mention of such was made by the Respondent.
    31.2. The 10th Application is another striking out application and that was made on 20 November 2022 (as well as seek to add additional documents to the bundle, p.516 of Application Bundle).

32. At that stage the Claimant had not had the Preliminary Hearing that made the observations set out at paragraph 23 above. The Tribunal therefore concludes that the first part of the application does not meet the cost threshold for the same reasons the earlier application failed. That is in essence paragraph 25 above. However, in relation to the second part of the application the continued

pursual of the Tribunal does conclude that a cost threshold has been passed. That is because objectively it was now unreasonable as the Claimant had already been given a form of a warning in terms of how matters should progress. The Claimant places great reliance on the fact that scandalous had not been explained to him but it was clear that, or should have been, that this approach to having litigation by correspondence and without hearing the evidence was not correct. In response to that the Claimant reliance on his "*neurodiverse condition*" and says that unreasonable has to be viewed in light of that. The Tribunal rejects that as fundamentally the test is objective, although acknowledging some allowance for a litigant in person being imbued into the test. Its view is that the "*neurodiverse condition*" is instead something that should be considered in relation to discretion (which the Tribunal has done as below).

Stage 2: discretion

33. The Tribunal has concluded that the continuation of the application on the first day of the hearing was unreasonable but nothing else crossed a cost threshold. Notwithstanding, the Tribunal concludes that it is not appropriate to exercise its discretion to make a costs award in all the circumstances. These factors include the following:
    33.1. the Claimant appeared as a litigant in person;
    33.2. the Claimant's "*neurodiverse condition*" is a factor that explains his behaviour and approach to the litigation. That is something for which the Tribunal considers it is appropriate and points away from exercising discretion, noting of course that costs are the exception not the rule in Tribunal. In particular, although a reasonable person would have 'read in between the lines' and that is why a Tribunal believes a threshold for cost was crossed, it is right to record that the Case Management Summary at [22] recorded that *"From the discussion today it appears that the strike out applications, should any remain on 16 January 2023, are based on the claimant's responses to the respondent's defence which is likely to be a matter on which the tribunal will want to hear evidence in the full merits hearing. I therefore concluded that two days was still an appropriate time frame*". That could be read by someone who has a "*neurodiverse condition*" that not only has obsessive elements to it but leads to literal interpretation with there being (a) enough time to deal with a strike out at commencement, (b) with it being something that could continue. None of this of course should be taken as criticising the phrasing by the earlier Tribunal, no one knew of the condition and even if had it is not the case the phrasing itself is wrong. The reason for making the point is to explain that there is no logical inconsistency to on the one hand this Tribunal concluding that a cost threshold has been crossed and the Claimant should have appreciated what he was being told, and on the other hand it not exercising discretion as he did not appear that he had understood the message;
    33.3. the nature, gravity and effect of the conduct are in the Tribunal's view relatively slight. Indeed, the point being made by the Claimant, which is accepted, is that the reason for the extra day was not solely because of a strike out. There had been a change of the witness order that had thrown

the Claimant, and he was tired which required an earlier finish. It is therefore not the case that the matter would not have required extra time to hear submissions even if the application for strike out had not been pursued. The result is that the alleged conduct did not actually result in costs being incurred (as it appears there is a reasonable ground for concluding the same costs would have been incurred anyway);

33.4. once again, the Claimant is of limited means and that is also a factor in favour of discretion being refused.

Stage 3: amount of costs

34. As the costs application has been refused the amount of costs does not strictly need to be determined. However, the Tribunal has reviewed the claimed costs and had it exercised its discretion, having regard to the fact that costs are compensatory and there is a need for a broad causal link, as well as factoring in the Claimant's limited means, it would only have awarded costs of counsel's attendance which is set out as being £1,500.

Application 3: Unreasonable conduct/no reasonable prospect of success in the Claimant bringing a claim of unlawful deduction of wages.

35. The final application is that the claim of unlawful deduction of wages had no reasonable prospects of success. The issue is set out in the judgment as being (**p.25**)

> *2.3.Were the wages paid to the Claimant on the ten dates specified in the particulars of claim at paragraph 29 less than the wages that were "properly payable"? The dispute between the parties is whether the Claimant actually did more than his 48 hours per week, in effect overtime, by virtue of the hours he worked which included disputed working time of the Claimant having meals with the family and being on 'standby' to deal with the child and/or periods where he was in quarantine.*

Stage 1: cost threshold

36. The Tribunal reminds itself that the test is objective and is based on the position at the time in respect of whether a claim had no reasonable prospects of success. Its conclusion is that in this case it cannot be said that there were *no* reasonable prospects of success at that stage (or indeed as it happens at all). A significant aspect of the claim was based on a factual dispute – whether the Claimant was *required* to attend meals with the Respondent and her son. Accordingly, the cost threshold has not been reached.

Stage 2: discretion

37. Once more, as a cost threshold has not been surpassed there is no need to move on to discretion. However, the Tribunal would not have exercised its

discretion in any event. Factors that led it to on balance reaching this conclusion are:

37.1. the Claimant appeared as a litigant in person in what was, notwithstanding the primacy of the factual dispute, something that was quite legally complex. Non-lawyers often are unclear on whether in fact 'lunch' or time which to them appears mandated by their employer is something that is time that counts for pay;

37.2. approach, the Claimant's "*neurodiverse condition*" is a factor that explains his behaviour and approach to the litigation in that there was an element of continuing along a track despite potential evidence to the contrary;

37.3. the nature, gravity and effect of the conduct are in the Tribunal's view extremely slight. This claim did not take up much if any time in cross-examination or submissions. It is not understood how there would have been in the real world any saving;

37.4. once again, the Claimant is of limited means and that is also a factor in favour of discretion being refused.

Stage 3: amount of costs

38. The Respondent was asking for 15 hours of costs. Had the Tribunal been minded to award any costs it would not have been at that level. That appears disproportionate. Properly speaking at most it is 3 hours' worth of costs that would have been ordered. As above it would appear London 2 and Grade B fee earner would be more than appropriate (so £308 per hour). The result is that the amount of costs ordered would have been £924 (if a cost threshold had been passed and the Tribunal had been minded to exercise discretion).

Employment Judge Caiden
10 June 2024

RESERVED JUDGMENT AND REASONS
SENT TO PARTIES ON 12 June 2024

FOR EMPLOYMENT TRIBUNALS

Notes

Public access to employment tribunal decisions: Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.