EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr Andrew Woodcock	AND	Driver & Vehicle Standards Agency

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY **ON** 1 May 2024
By CVP Video

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: **In person**
For the Respondent: **Mr R Dunn of Counsel**

ORDER

1. The claimant's application for a preparation time order is dismissed on withdrawal by the claimant.
2. The claimant is ordered to pay the respondent's costs in the sum of £2,250.00.

RESERVED REASONS

1. In this case the respondent seeks its costs of defending this action against the claimant. The claimant opposes the application. The claimant had earlier made an application for a preparation time order, but that application has since been withdrawn and is now dismissed.
2. General Background
3. This has been a remote hearing which has been consented to by the parties. The form of remote hearing was by CVP Video. A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle provided by the parties, the contents of which I have recorded.
4. In this case the claimant pursued a monetary claim for unlawful deduction from wages against his employer the Driver & Vehicle Standards Agency. Following a hearing on 19 January 2024 I dismissed the claimant's claim. Reserved written reasons were provided in a judgment dated 19 January 2024 which was sent to the parties on 1 February 2024 ("the Judgment").

5. The Application for Costs
6. The respondent makes an application for its costs on the basis that the claimant has acted abusively or otherwise unreasonably in the way in which the proceedings have been conducted, and/or because the claim had no reasonable prospect of success.
7. The respondent makes the following three main submissions in support of its application.
8. In the first place, the claim had no reasonable prospect of success and pursuing it must constitute unreasonable conduct. There are seven submissions in support of this proposition: (a) section 27(1) of the Employment Rights Act 1996 ("the Act") defines wages, and s27(2)(b) clearly states that the definition of wages excludes "any payment in respect of expenses incurred by the worker in carrying out his employment"; (b) the claimant had clearly researched section 27 of the Act, and indeed made detailed submissions about the section when presenting his claim; (c) the claimant's claim is clearly one for expenses. His original signed schedule of loss made this clear (it referred to "lunch expenses") and his grounds of claim repeatedly referred to "lunch expenses". As soon as he realised the legal position with regard to expenses, he suddenly began calling these expenses "day subsistence" but continued pursuing the claim; (d) in any event the claimant was relying on receipts for supermarket lunches. It was inconceivable that a tribunal would ever find them not to be "expenses" but rather to be "wages"; (e) the respondent repeatedly informed the claimant that his claim would be dismissed because of lack of jurisdiction. This included the respondent's response, in its correspondence to the claimant, and the Costs Warning Letter of 29 November 2023; (f) the claimant persisted with his claim through to the final hearing, despite all of these warnings. Paragraph 29 of the Judgment made clear findings to exactly this effect: 29 – "*In this case, the claimant always considered his claim to be one for expenses. In his first schedule of loss he explained that it was a claim for expenses and he attached the relevant receipts. His first complaint to the respondent was one for expenses. The day subsistence payments are not rolled up expenses which can amount to wages. The expenses claimed by the claimant are limited to the individual instances where the claimant was required to travel to Winchester within his cluster. There is no indication in the relevant contractual documents that this would ever form part of the wages otherwise payable to the claimant. It is clear to me that the day subsistence payments claimed by the claimant were payments "in respect of expenses" and were not wages.";* and (g) there was no need for the respondent to have made a strike out application to pursue these points, not least because it would have been unlikely to have been heard before the final hearing and would have incurred further costs.
9. The respondent's second main submission is that the claimant's conduct was unreasonable in proceeding to a final hearing despite the respondent's repeated attempts to settle this claim in late 2023, for the following reasons: (a) on 3 November 2023 the respondent offered the claimant £77.55 (the sum claimed) on a commercial basis. There was no discrimination claim and so a recommendation from the tribunal was not an available remedy; (b) the claimant responded on 7 November 2023 and rejected the offer and instead contended he would only accept the offer if the respondent also paid £1,303.50 for his costs at the same time. There was no cogent basis for this request. On 4 December 2023 the respondent then paid the claimant the sum of £77.55 in an attempt to avoid the costs of the final hearing. The claimant's response was to reject this payment and to seek to repay it; (c) the respondent could not reasonably have done more to avoid a final hearing and avoid spending a high sum of taxpayers' money in legal costs. The respondent made a costs warning, offered the claimant the entire sum claimed, but the claimant still vowed to continue with the claim, which was unreasonable conduct; and (d) the claimant says that he continued with the claim because he wanted a declaration as to the contractual position. However, as had been notified by the respondent on multiple occasions, the tribunal did not have jurisdiction to consider a claim for expenses and therefore would not and did not determine that issue.
10. The third submission made by the respondent is that the claimant's correspondence was itself unreasonable. The claimant made a number of baseless applications to strike out the respondent's response, to seek a preparation time order, or to seek to restrict the respondent's involvement in the proceedings. The claimant sent multiple sets of

submissions to the respondent and the tribunal, including those on 22 October 2023; 29 October 2023; 2 November 2023; 28 November 2023; 30 November 2023; and 7 December 2023. This correspondence verged on the vexatious. Even when the claimant's application to strike out the respondent was reviewed, the claimant simply made another. This third strike out application was made in response to the respondent paying the claimant the sum he had claimed in order to avoid the final hearing. However, the claimant made it clear that he intended to proceed to obtain a declaration anyway despite the fact that the tribunal did not have jurisdiction to do so. Although the claimant is a litigant in person, he is a sophisticated and intelligent individual who undertook a depth of research. It was abundantly clear that his claim would always fail because he was claiming "expenses" as his own Schedule of Loss had said. Even when offered the exact sum that he was claiming, and despite the respondent pleas, the claimant continued with his meritless claim to a final hearing. Taken together, this conduct on the part of the claimant was at the very least unreasonable.

11. The respondent's application is for payment of its costs in defending this action consisting of solicitors' fees of £16,791.80, and counsel's fees of £765.00, totalling £17,466.80. VAT is not claimed.
12. The claimant resists the application. He has produced a witness statement running to 18 pages which explains his reasons for opposing the application, which he suggests should be read in conjunction with his objections already submitted to the tribunal on 26 February 2024.
13. The key points which the claimant makes are these. His claim was raised in good faith, and he entered discussions with an ACAS conciliator, who made no suggestion that the Tribunal did not have jurisdiction, nor that the claim did not have reasonable prospects of success. An internal Appeal Manager had upheld the claimant's complaint and it was reasonable therefore to expect that the tribunal would reach the same conclusion. The claimant discussed the claim with a representative of the PCS union who suggested that the claim had strong merits. The claimant made it clear from the outset that his claim was for unlawful deduction from wages and not for breach of contract. The claimant complied with all tribunal orders and directions. The respondent is said to have failed despite requests to have obtained a legal opinion on the effects of the claimant's contract. The claimant asserts that the respondent made no reasonable attempts to "negotiate a settlement in relation to my claim" but rather imposed payment. They did this without accepting liability or addressing the claimant's concerns about ongoing entitlement to day subsistence. The costs warning letter did not provide examples of case law which might have contradicted the claimant's findings. The claimant certainly was not legally qualified and that the costs warning letter should give more information as to the definition of "expenses" rather than "wages". The claimant always reasonably assumed that day subsistence was not "expenses" for the purposes of section 27 of the Act. If the respondent generally believed that the claim had no reasonable prospect of success then they could have applied to have the claim struck out under Rule 37, which they did not do. Prior to the hearing in January 2024 the claimant became aware that the respondent was planning to announce that day subsistence would in future be paid to employees under the same contract as the claimant. Within three weeks after the hearing the PCS union confirmed that the respondent intended to pay day subsistence in the future in the circumstances underlying the claimant's claim. In any event, costs orders by an employment tribunal are the exception and not the rule.
14. The claimant also raises the matter of comments which I made during the tribunal hearing, to the effect that the claimant was fully entitled to seek a declaration pursuant to section 24 of the Act. I confess I do not recall that comment, but I do not deny having made it because I agree that section 24 of the Act provides for the tribunal to make a declaration as to whether the claim under section 23 is well-founded.
15. The claimant has also referred to the following authorities to assist his position. The burden is not on the claimant to establish why costs should not be awarded (Warburton v Homes and Communities Agency 1303012/2022); it is not unreasonable conduct to reject settlement offers where the claimant wishes to retain the right to claim future losses in

relation to the unlawful deduction claim (Taffler v Devon Doctors Ltd and another 1402522/2022); it is not unreasonable to turn down an offer of full compensation where the respondent is not willing to accept that it has made unlawful deductions (Rybak v Wade MacDonald Ltd 3308781/2022); a failure to accept an offer not to pursue a party for costs does not, of itself, constitute conduct that is to be considered unreasonable (Lake v Arco Grating (UK) Ltd UKEAT/0511/04; Where complaints did not have reasonable prospects of success, because of the lack of jurisdiction or the tribunal's bar to consider them, this does not itself automatically lead to the making of a cross-border (Morrison v London Borough of Southwark 2300950/2023); just because a respondent is judged to be right for the reasons it gave in advance does not mean that a costs order is appropriate. That is tantamount to costs following the event, which is not the case in Employment Tribunal Cases. Costs are not often awarded, unless there is a deposit order, when the losing party will have known the judge felt that the case put forward had little reasonable prospect of success. No such application was made in this case (Allan v Oakley Builders and Groundwork Contractors Ltd 1403798/2018); simply because the costs jurisdiction is engaged, it does not mean that costs will automatically follow (Haydar v Pennine Acute NHS Trust UKEAT/0141/1); orders for costs in employment tribunals are the exception, not the rule (Gee v Shell UK Ltd 2003); and litigants in person should not be judged by the standards of a professional representative (AQ Ltd v Holden [2012] IRLR 648.

16. In addition, the claimant asserts that I "made it very clear to counsel for the respondent, that I did not look favourably upon the respondent's repeated warnings of a costs application. As I recall, he also made it very clear that he would not be minded to grant such an order." Again, I do not recall having made comments of exactly that nature, but I do not dispute that I could well have said to respondent's counsel at the end of the hearing that this was not the sort of case where a costs application would obviously be granted. That was before I had seen any application, and before I had seen the costs warning letter.
17. The application falls to be determined before me today on the basis of the respondent's application now made, and the claimant's detailed objections.
18. The Costs Warning Letter:
19. The respondent's solicitors, namely the Government Legal Department, wrote to the claimant by letter dated 29 November 2023. This was a costs warning letter, and it is worthwhile in the context of this application to set this letter out in detail, as follows:
20. "As you are aware I act for the DVSA in connection with the above Employment Tribunal claim. Please read this letter and give careful consideration to its contents. For the reasons detailed below, I consider that your claim has no reasonable prospect of success and that you are acting unreasonably in continuing to bring it. My client is a publicly funded body whose resources are finite. If you do not withdraw your claim, my client will be required to continue to defend it, incurring further costs to the public purse. The purpose of this letter is to invite you to withdraw your claim before further significant additional time and resources are expended on taking the matter to the hearing scheduled for 19 January 2024. I am also writing to put you on notice that, if you continue to pursue your claim my client intends … to make an application to the Employment Tribunal for a costs order to be made against you. The effect of this and the reasons for my client's position are explained below. I therefore draw your attention to the offer set out at the end of this letter and encourage you to seek independent legal advice in relation to it.
21. "No Reasonable Prospect of Success: as detailed in the respondent's response, my client's position is that the Tribunal does not have jurisdiction to consider your breach of contract claim. This is because an employment tribunal cannot consider a claim for breach of contract while the contract is still running. Further, expenses are excluded from the definition of wages set out in section 27 of the Employment Rights Act 1996, so it is my client's position that the Tribunal has no jurisdiction to consider your claim as an alleged unlawful deduction of wages. My client has in any event, without admission of liability, made arrangements to pay you the disputed sum of £77.55 so you have obtained the remedy you are seeking. It is for these reasons that I consider that your claim, in its entirety, has no reasonable prospect of success, and that your continued pursuit of it is therefore unreasonable.

22. “Costs Order - although an Employment Tribunal will not automatically order the losing party to pay the other side costs, it may do so where the losing party has pursued a case that had no reasonable prospect of success, or where its pursuit was in some other way unreasonable. [The letter then set out rule 76(1) in full] My client’s position is that if your case is dismissed for any of the reasons set out above, you should be treated as having acted unreasonably by continuing to pursue your claim. On this basis, we will ask the Tribunal to make an order that you pay my client’s reasonable costs in defending the claim.
23. “Our Offer: the respondent is prepared not to pursue a costs order against you if you withdraw your claim by no later than 4 pm on Monday, 11 December 2023. In order to do so you will need to email the Employment Tribunal confirming that you wish to withdraw your claim number 1404972/2023 copying me into your correspondence.”
24. The Rules
25. The relevant rules are the Employment Tribunals Rules of Procedure 2013 (“the Rules”).
26. Rule 76(1) provides: "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.
27. Under Rule 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.
28. Under Rule 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 …"
29. Under Rule 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.
30. The Relevant Case Law
31. I have been referred to and have considered the following cases: Gee v Shell Ltd [2003] [2003] IRLR 82 CA; McPherson v BNP Paribas [2004] ICR 1398 CA; Monaghan v Close Thornton [2002] EAT/0003/01; FDA and Others v Bhardwaj [2022] EAT 97; Vaughan v London Borough of Lewisham [2013] IRLR 713 EAT; Oko-Jaja v LB Lewisham EAT 417/00; Brooks v Nottingham University Hospitals NHS Trust [2019] WLUK 271, UKEAT/0246/18; NPower Yorkshire Ltd v Daley EAT/0842/04; Radia v Jefferies International Ltd [2020] IRLR 431 EAT; AQ Ltd v Holden [2012] IRLR 648 EAT Kapoor v Governing Body of Barnhill Community High School UKEAT/0352/13; Barnsley BC v Yerrakalva [2012] IRLR 78 CA; Homeless Project v Abu [2013] UKEAT/0519/12; Raggett v John Lewis plc [2012] IRLR 906 EAT.
32. The Relevant Legal Principles
33. The correct starting position is that an award of costs is the exception rather than the rule. As Sedley LJ stated at para 35 of his judgment in Gee v Shell Ltd “It is nevertheless a very important feature of the employment jurisdiction that it is designed to be accessible to people without the need of lawyers, and that in sharp distinction from ordinary litigation in the UK, losing does not ordinarily mean paying the other side’s costs …” Nonetheless, an Employment Tribunal must consider, after the claims were brought, whether they were properly pursued, see for instance NPower Yorkshire Ltd v Daley. If not, then that may amount to unreasonable conduct. In addition, the Employment Tribunal has a wide discretion where an application for costs is made under Rule 76(1)(a). As per Mummery LJ at para 41 in Barnsley BC v Yerrakalva “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." However, the Tribunal should look at the matter in the round rather than dissecting various parts of the claim and the costs application, and then compartmentalising it.

34. Unreasonable conduct in this context has its ordinary meaning – see Dyer. This can include a party making wholly unsubstantiated allegations, rejecting settlement, failing to check important legal principles, and pursuing a claim with no reasonable prospect is success. Each case will depend upon its own facts.
35. There is no need for the tribunal to find a causative link between the costs incurred by the party making the application for costs and the event or events that are found to be unreasonable, see McPherson v BNP Paribas, and also Kapoor v Governing Body of Barnhill Community High School in which Singh J held that the receiving party does not have to prove that any specific unreasonable conduct by the paying party caused any particular costs to be incurred.
36. In FDA and Others v Bhardwaj it was held that: "The citation of authority in applications for costs must be strictly constrained to those which genuinely establish a point of principle not apparent from the words of the rules themselves. Costs awards do not operate by precedent. They are fact specific and to be determined as summarily as possible. The expectation must be that nothing more than the words of the relevant rule require addressing before the ET exercises its discretion on the particular facts of the case. When the threshold requirements for an order for costs are met under rule 76(1)(a) and/or (b) of the 2013 ET rules, it by no means follows that, because it may make a costs order, it will proceed to do so. It has a discretion. The discretion is very broad, and it would require a clear error of principle to justify an appeal, whether for or against an order for costs. In a case involving multiple issues, it will often be unrealistic to hive off some issues from others when addressing whether costs should be awarded and, if so, in what amount. Most cases stand or fall as a whole, even though in many cases there will be some issues on which the losing party is successful or partly successful. Issue-based costs orders are on the whole to be avoided.
37. When considering an application for costs the Tribunal should have regard to the two-stage process outlined in Monaghan v Close Thornton by Lindsay J at paragraph 22: "Is the cost threshold triggered, e.g. was the conduct of the party against whom costs is sought unreasonable? And if so, ought the Tribunal to exercise its discretion in favour of the receiving party, having regard to all the circumstances?"
38. In Brooks v Nottingham University Hospitals NHS Trust the EAT confirmed that dealing with an application for costs requires a two-stage process. The first is whether in all the circumstances the claimant has conducted the proceedings unreasonably. If so, the second stage is to ask whether the tribunal should exercise its discretion in favour of the claiming party, having regard to all the circumstances. In the case of reasonable prospects of success, the first stage is whether that ground is made out, and if it is, then to apply the exercise of discretion as to whether or not to award costs.
39. There is considerable overlap between the two grounds in Rules 76(1)(a) and (b). This was analysed by HHJ Auerbach in Radia: [61] It is well established that the first question for a tribunal considering a costs application is whether the cost threshold is crossed, in the sense that at least one of Rule 76(1)(a) or (b) is made out. If so, it does not automatically follow that a costs order will be made. Rather, this means that the Tribunal may make a costs order, and shall consider whether to do so. That is the second stage, and it involves the exercise by the Tribunal of a judicial discretion. If it decides in principle to make a costs order, the tribunal must consider the amount in accordance with Rule 78. Rule 84 provides that, in deciding both whether to make a costs order, and if so, in what amount, the Tribunal may have regard to ability to pay. [62] … There is an element of potential overlap between (a) and (b). The Tribunal may consider, in a given case, under (a) that a complainant acted unreasonably, in bringing, or continuing the proceedings, because they had no reasonable prospect of success, and that was something which they knew; but it may also conclude that the case crosses the threshold under (b) simply because the claims, in fact, in the tribunal's view, had no reasonable prospect of success, even though the complainant did

not realise it at the time. The test is an objective one, and therefore turns not on whether they thought they had a good case, but whether they actually did.

40. The threshold to trigger costs is the same whether a litigant is or is not professionally represented, although in applying those tests, the EAT has held that the status of a litigant is a matter which the tribunal must take into account – see AQ Ltd v Holden in which Richardson J commented: "Justice requires the tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life. As [counsel] submitted, lay people are likely to lack the objectivity and knowledge of law and practice brought about by a professional adviser. Tribunals must bear this in mind when assessing the threshold tests in [rule 76(1)(a)]. Further, even if the threshold tests for an order of costs are met, the tribunal has discretion whether to make an order. This discretion will be exercised having regard to all the circumstances. It is not irrelevant that a lay person may have brought proceedings with little or no access to specialist help and advice." However, Richardson J also acknowledged that it does not follow from this "that lay people are immune from orders for costs: far from it, as the cases make clear. Some litigants in person are found to have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity". These statements were approved by Underhill P in Vaughan v London Borough of Newham.
41. With regard to costs warning letters, failure to heed such a letter may well amount to unreasonable conduct – see Oko-Jaja. However, while it is good practice to warn a claimant of the weakness of his or her case where the respondents may be minded to apply for costs should they succeed at the end of the case, the failure to do so will not, as a matter of law, render it unjust to make a costs order even against an unrepresented claimant.
42. The EAT held in Growcott v Glaze Auto Ltd UKEAT/0419/11/SM that costs can be awarded if a reasonable offer is made to settle and a hopeless case is still pursued.
43. The same approach is to be taken in circumstances where the respondent has not applied for a deposit order. Underhill P in Vaughan also acknowledged that respondents do not always, for understandable practical reasons, seek such an order even where they are faced with weak claims, so that failure to do so "is not necessarily a recognition of the arguability of the claim." On the facts of Vaughan, neither the failure to seek a deposit order nor the failure otherwise to warn the claimant of the hopelessness of her claims was "cogent evidence that those claims had in fact any reasonable prospect of success" and neither failure was "a sufficient reason for withholding an order for costs which was otherwise justified".
44. Ability to Pay:
45. With regard to the paying party's ability to pay, Rule 84 allows the tribunal to have regard to the paying party's ability to pay, but it does not have to, see Jilley v Birmingham and Solihull Mental Health NHS Trust and Single Homeless Project v Abu. In this case the claimant declined to give evidence as to his means on the basis that (although we strongly oppose the making of a costs order) it conceded that his means were sufficient to meet one within the context of the application before us.
46. Recovery of VAT
47. VAT should not be included in a claim for costs if the receiving party is able to recover the VAT, see Raggett v John Lewis plc which reflects the CPR Costs Practice Direction (44PD).
48. Conclusion
49. Bearing in mind all of the above matters my conclusion is as follows.
50. In the first place I do not agree with the respondent that the claimant acted unreasonably in issuing these proceedings at the outset, nor that this claim at that stage had no reasonable prospects of success. The claimant is a litigant in person (albeit as the respondent concedes an intelligent and sophisticated one). At one stage the respondent's manager had recommended agreeing with the claimant's claim and paying it. It was not unreasonable of the claimant at that stage to seek a tribunal decision on the matter, and in my judgment it cannot be said at that stage that the claim had no reasonable prospect of success, which is a high hurdle.

51. However, I do find that it was unreasonable conduct of the claimant to have continued with this claim having received the Costs Warning Letter, for the following reasons.
52. The claimant has repeatedly asserted that the position adopted by the respondent and/or in its Costs Warning Letter were misleading or disingenuous because they repeatedly dealt with a potential claim for breach of contract, which was not pursued, whilst at the same time not making their position clear with regard to lack of jurisdiction for the unlawful deduction from wages claim. I do not agree with that assertion. The claimant's originating application was very succinct, and only referred to a claim for "compensation of £77.55" and a reference to "same contractual terms". The respondent's response commented that the claimant had not specified what claim he was pursuing and that they understood that this was either for breach contract or for unlawful deduction from wages. The Response made it clear that the tribunal did not have jurisdiction to hear a breach of contract claim because the claimant's employment was continuing. The Response also denied any unlawful deduction from wages and stated: "it is denied that the claimant is entitled to the sum of £77.55 or any sum by way of subsistence expense and there is no basis for a claim for unlawful deduction from wages." The respondent's response to the claim has been consistent throughout, namely that there is no breach of contract claim, and secondly that there is no basis for claiming expenses under the unlawful deduction from wages provisions.
53. It is correct to point out that under section 24 of the Act a claimant will receive a declaration as to whether the claim is well-founded. However, that is not to say it is necessarily reasonable for a claimant to pursue a claim where there is no jurisdiction come what may in order to seek that declaration.
54. Any arguments as to the construction of the claimant's contractual terms (and what payments should be reimbursed when working from what venues) would only have been engaged if the Tribunal had jurisdiction to hear the claim. I agree with the respondent's assertion that the claimant repeatedly referred to his claim as being for expenses, and he changed his definition to subsistence payments once it was pointed out to him, and after his own detailed research, that the tribunal did not have jurisdiction to hear the claim for unlawful deduction from wages relating to expenses.
55. I have set out the Costs Warning Letter in full above. In my judgment it is a measured and sensible letter and upon receipt the claimant was clearly in full possession of the following information: (i) the tribunal lacked jurisdiction to determine a claim for expenses; (iii) the claimant had described his claim as being one for expenses which given it relied on receipts for sandwiches at lunchtime they were not going to consist of "wages" (iii) the respondent had repeatedly explained that this claim would be dismissed because of lack of jurisdiction; (iv) the respondent had paid the sum claimed (albeit without admission of liability); (v) the respondent was a public body and had already spent a disproportionate sum of limited public resources in defending the claim; (vi) the claimant had a clear opportunity to withdraw his claim which had been paid in full and without any cost consequences; (vii) alternatively if the claimant continued to the hearing, the respondent would then rely on the Costs Warning Letter in a subsequent application for costs on the basis that continued pursuit of the claim was unreasonable. In addition, the claimant was encouraged to seek independent legal advice. Instead of heeding the warning, the claimant says that he continued with the claim because he wanted a declaration as to the contractual position. However, as had been notified by the respondent on multiple occasions, the tribunal did not have jurisdiction to consider a claim for breach of contract nor for expenses and therefore would not (and did not) determine that issue.
56. In my judgment the first of the two-stage process outlined in <u>Monaghan v Close Thornton</u> is met, and the costs threshold is triggered because the claimant's conduct in not withdrawing his claim that stage and continuing to pursue it was unreasonable.
57. The second stage of the process is to determine whether or not to exercise discretion in favour of the receiving party, having regard to all the circumstances. Given the set of circumstances which prevailed after receipt of the Costs Warning Letter, namely that the respondent would have to pay a disproportionate sum in costs from the public purse to defend a claim which it had tried to pay and for which there was no jurisdiction, I consider

that it is appropriate to exercise my discretion and to make an award of costs in favour of the respondent.

58. The Amount of Costs:
59. I have seen a schedule of the costs claimed by the respondent which was sent in advance of this hearing to the claimant. The costs have been claimed at a variety of hourly rates ranging from £139 per hour to £261 per hour, depending on the seniority of the fee earner. These rates seem to me to be reasonable for London-based solicitors. The costs claimed are for the entirety of the defence of this claim, and more specifically broken down as to (a) attendances on the client, the claimant, and others; and (b) work done on documents; (both of these amounting to solicitors' fees of £16,791.80) and (c) Counsel's fees of £765.00. The total claimed is £17,466.80.
60. Unfortunately, I do not have a detailed breakdown of exactly how much work was undertaken after the date of the costs warning letter, and so it is not easy to ascertain what fraction of the costs relate to this period. Given the lack of a schedule which breaks it down, I have erred on the side of caution in favour of the claimant. It seems to me that the respondent is entitled to recover their costs relating to instructions to counsel claimed at £522.00; reviewing the Judgment and reasons, reviewing with Counsel, and preparing the draft costs application of £718.20; and Counsel's fees at the hearing of £765.00, which is a subtotal of £2,005.20. In addition, further work was required to finalise the bundle, to have a final meeting with the client and the witness, and to finalise and exchange the witness statements. Allowing an estimated £150-£200 for each of these three elements, it is clear that the work undertaken following the costs warning letter is at least £2,500.00 to £2,570.00. In the absence of a more detailed breakdown, I err the side of caution and summarily assess the costs at £2,250.00. VAT has not been claimed on this amount.
61. In conclusion therefore I order the claimant to pay the respondent's cost summarily assessed and limited to the sum of £2.250.00.

Employment Judge N J Roper
Dated 1 May 2024

Judgment sent to Parties on 21 June 2024

For the Tribunal Office