# EMPLOYMENT TRIBUNALS

**Claimant:** **William Donaghue**

**Respondent:** **Steamin Billy (Oadby) Limited**

**Heard at:** **Leicester**

**On:** **7th February 2024**

**Before:** **Employment Judge Heap (Sitting alone)**

**Representation**
**Claimant:** **In person (with assistance from his partner, Miss. A Hales)**
**Respondent:** **Ms. J Duane - Counsel**

# RESERVED JUDGMENT

The Respondent's application for costs is refused.

# REASONS

## BACKGROUND & THE ISSUES

1. This hearing was listed for the purpose of determining an application for costs which had been made on behalf of the Respondent at the conclusion of a public Preliminary hearing that took place before Employment Judge Fredericks-Bowyer on 8th and 9th August 2022.

2. At that hearing the Claimant's then representative, Mr. Christopher Johnstone, withdrew complaints of associative disability discrimination that the Claimant had up until that time been advancing. Employment Judge Fredericks-Bowyer dismissed

the remainder of the claim on the basis that the Claimant had at no time been either an employee or a worker of the Respondent within the meaning of Section 230 Employment Rights Act 1996. Accordingly, he had no standing to bring the remaining complaints that were therefore dismissed.

3. That Preliminary hearing had followed on from an earlier one for the purposes of case management which also took place before Employment Judge Fredericks-Bowyer on 1st June 2022. At that stage Employment Judge Fredericks-Bowyer listed the case for a public Preliminary hearing to determine the worker/employment status issue. That was on the basis that that particular matter was potentially determinative – and in the end was determinative - of all of the claims that the Claimant was advancing.

4. It is common ground that Employment Judge Fredericks-Bowyer reserved the substantive Preliminary hearing to himself. The parties are, however, at odds on why that was the case. The Claimant's position is that this was because Employment Judge Fredericks-Bowyer had expressed an interest in the case which he says suggests that he considered it to have reasonable prospects of success. The Respondent's position is that it was normal for him to have done so on the basis that he had read into the papers. I do not need to resolve which of those positions is correct for the purposes of dealing with this application nor in any events could I do so because I was not present at that hearing and am not privy to the Judge's reasoning.

5. Following dismissal of the remaining parts of the claim by way of an oral Judgment the Respondent then made its application for costs. As noted at paragraph 98 of Employment Judge Fredericks-Bowyer's written reasons (those reasons being supplied later on the application of the Claimant) the application was advanced on two fronts. The first of those was in relation to the claim being said to have had no reasonable prospects of success based upon the oral reasons given at the time and secondly, what was said to be the conduct of the Claimant's then representative, Mr. Christopher Johnstone, during the course of proceedings. The application was not determined at the Preliminary hearing.

6. Since the point of the Preliminary Hearing the Claimant applied for a Reconsideration of Employment Judge Fredericks-Bowyer's decision. I do not need to say anything about the grounds of that application other than to say that it was refused. The Claimant appealed to the Employment Appeal Tribunal. That appeal was dismissed at the sift stage by a Deputy High Court Judge on the basis that it showed no discernible error of law.

7. In accordance with the practice of the Regional Employment Judge in this particular region he held a further Preliminary hearing following the dismissal of the appeal by the Employment Appeal Tribunal. During that Preliminary Hearing it was agreed that the costs application would be referred to a Judge other than Employment Judge Fredericks-Bowyer which explains why I am dealing with the application despite not

having made the decision in question from which it flows.

## THE HEARING

8. The hearing was listed for 3 hours of Tribunal time. There was a considerable amount of documentation to consider but fortunately I had been able to review the vast majority of that the day prior to the hearing. There was one document which I had not seen previously which was the Respondent's skeleton argument which I only received on the morning of the hearing but which was able to be considered as a result of a slightly adjusted start time to the commencement of the hearing.

9. By the time that this hearing came around the Claimant was no longer represented by Mr. Johnstone as a result of what I understand to be the latter's ill health. Since the conclusion of the hearing before Employment Judge Fredericks-Bowyer he has been essentially representing himself. He was assisted today by his partner, Miss. Hales. Although I heard mainly from the Claimant I also allowed Miss. Hales, who had been taking detailed notes, to make some additional submissions on his behalf. The Respondent was represented by Ms. Duane of Counsel who had also represented the Respondent at the Preliminary Hearing before Employment Judge Fredericks-Bowyer at which the remaining claims were dismissed.

10. I am grateful to both parties for the helpful submissions that they have made during the course of this hearing and they can be assured that whether it is expressly referenced or not within this Judgment that I have taken into account all that they have told me and all the documentation that I have seen.

11. At the outset of the hearing the Claimant told me that he had only received the bundle which was to be used on Monday morning. The parties were at odds with each other about that position and I understand from Ms. Duane that the bundle was originally sent to the Claimant electronically on 29th January 2024 and the revised copy received on 5th February 2024 was as a result of the Claimant's supplying some further documentation which then required there to be an amended hearing bundle. The Respondent's position was therefore the Claimant had had the bundle since 29th January, albeit not in hard copy form, and that he had the other documents which were later added to it because those were his own documents.

12. However, who is right and who is wrong about that is not a matter that I ultimately need to resolve for the purpose of dealing with this hearing. That is on the basis that I asked the Claimant if he was making any application for the Tribunal to do something about the matter and he confirmed that he was not and particularly no application for a postponement or adjournment was made. I offered the Claimant additional time if he wished to consider the documents or any part of them but he indicated that that was not required. He did not have with him a hard copy of the bundle at the hearing, but one was helpfully supplied to him by Ms. Duane so that he was able to refer to the relevant pages had he had wished to do so.

13. As touched upon above, Ms. Duane had produced a helpful skeleton argument

setting out in detail the basis of the application which was being made on behalf of the Respondent. The Claimant confirmed that he had received that and that had scanned it albeit he had not read it in detail. He was asked but said that he did not require additional time to do so. Ms. Duane spoke to that document and I gave the Claimant a right of reply. Where the Claimant's response did not deal with certain aspects of the application made, I raised those with him of my own volition.

14. We made adjustments during the course of the hearing to allow the Claimant to eat when his blood sugar became low as a result of him being diabetic and also undertook a break to accommodate the same issue. The Claimant confirmed that he was well enough to continue and I am satisfied that we were able to have a fair and effective hearing.

15. I extend my apologies to the parties for the delay in this Judgment being sent to them which was caused by a variety of factors including other Judicial work, absence from the Tribunal and latterly unexpected and difficult personal circumstances. Their patience in awaiting the Judgment has been much appreciated.

## THE BASIS OF THE RESPONDENT'S APPLICATION

16. As touched upon above the Respondent pursues the application for costs on two fronts. The first of them is that it is said that the claim, as is evident from the decision of Employment Judge Fredericks-Bowyer, had no reasonable prospects of success and that position should have been evident to the Claimant and his then representative from at least the receipt of the Grounds of Resistance and also in relation to certain issues raised in County Court proceedings with which I am not concerned for the purpose of this application.

17. In the alternative it is said that the Claimant and/or his representative had pursued and conducted the litigation unreasonably, vexatiously or scandalously. That alleged conduct can be distilled into the following categories:

    17.1. That communications were sent by or on behalf of the Claimant on no less than six occasions within a short period of time seeking to strike out the Response with no basis in law to do so;

    17.2. That at the same time and/or separately communications were sent to the Solicitors Regulation Authority ("SRA") making unjustified and baseless allegations against the Respondent's representative;

    17.3. That there had been a failure to engage with an Order that had been made for Further & Better Particulars which remained outstanding as at the first day of the Preliminary hearing before Employment Judge Fredericks-Bowyer and which, if it had been complied with, may well have highlighted the deficiencies in the Claimant's argument to have been an employee of the Respondent;

    17.4. That there had been a withdrawal of a complaint of associative disability

discrimination on the first day of the Preliminary hearing which had put the Respondent to unnecessary costs in previously defending that part of the claim;

17.5. The way in which Mr. Johnstone conducted preparation for and representation at the Preliminary hearing, including failing to have furnished the Claimant's witnesses with a copy of the hearing bundle when they were giving evidence remotely;

17.6. That one of the witnesses, a Mr. Leander, had appeared to give evidence not even knowing the name of the Claimant whose case he was giving evidence in;

17.7. The paucity of the witness statements from the Claimant's three witnesses which Employment Judge Fredericks-Bowyer treated with some caution given that all assertions made within them were in what he described as "language particular to Mr. Johnstone".

17.8. That there was a concession made by Mr. Johnstone that he was unable to articulate or expand upon an alleged contractual relationship with Anita Lord, who the Claimant contended had been his employer, and which was therefore a corner stone of his claim; and

17.9. That the Claimant had been seeking by adding additional documents to the bundle for this costs hearing to further relitigate the matters which were before Employment Judge Fredericks-Bowyer.

18. Although the Claimant made plain today that he does not seek by way of his submissions to argue against the decision of Employment Fredericks-Bowyer in his attempts to articulate why he felt he was justified in bringing the proceedings, we have on occasion nevertheless crossed over into that particular territory. I make it plain as I did at the commencement of the hearing that this decision is only concerned with the question of whether the threshold for costs is in engaged and, if so, whether such an order should be made and that I am not revisiting any other findings and conclusions reached by Employment Judge Fredericks-Bowyer because quite simply it is not open to me to do so.

## THE LAW

19. Rules 74 to 84 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("The Regulations") deal with the question of whether an Employment Tribunal should make an Order for costs.

20. Rule 76 sets out the relevant circumstances in which an Employment Judge or Tribunal can exercise their discretion to make an Order for costs and the relevant parts of that Rule provide as follows:

> **"*When a costs order or a preparation time order may or shall be made***
>
> ***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."*

21. In short, therefore, there is discretion to make an Order for costs where a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing or conducting of the proceedings. Equally, the discretion is engaged where a party pursues either a claim or defence which has no reasonable prospect of succeeding or, to put it as it was termed previously, where a claim or defence is being pursued which is "misconceived".

22. It should be noted that merely because a party has been found to have acted vexatiously, abusively, disruptively or unreasonably or where a claim or response had no reasonable prospect of succeeding, it does not automatically follow that an Order for costs should be made. Once such conduct or issue has been found, a Tribunal must then go on to consider whether an Order should be made and, particularly, whether it is appropriate to make one. When deciding whether an Order should be made at all and, if so, in what terms, a Tribunal is required to take all relevant mitigating factors into account.

23. For something to have been pursued in a vexatious manner it must be that it is pursued not with the expectation of success but to harass the other side or out of some improper motive (**ET Marler Ltd v Robertson 1974 ICR 72)** or, more widely, as something that is an abuse of process.

24. With regard to unreasonable conduct it is necessary for the Tribunal to consider *"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." (***Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78).**

25. In accordance with Rule 84 of the Regulations, a Tribunal is entitled to have regard to the ability to pay any award of costs both in relation to the making of an Order at all, or the amount of any such Order. However, it is not a mandatory requirement that such consideration must automatically be given.

## CONCLUSIONS

26. I begin by considering whether the claim had no reasonable prospects of success which is the first strand of the Respondent's application.

27. The Claimant's submissions did not focus upon whether the claim had no reasonable prospects of succeeding and focused on the fact that he had not acted unreasonably in pursuing it. However, I have nevertheless to ensure fairness to him considered the decision myself to determine whether or not it could be said that the claim had no reasonable prospect of succeeding.

28. The start and end point for that consideration is the decision of Employment Judge Fredericks-Bowyer at the last Preliminary hearing. Indeed, as that Judge had highlighted at the first Preliminary Hearing on 1st June 2022 the key consideration was the issue of employment/workers status and if the Claimant failed on that point all complaints fell away.

29. The Claimant's primary claim was that he was employed by his then wife, Anita Lord, and that she operated as the Manchisee (a form of franchise arrangement) of the Dog & Gun public house in which he worked and that his employment had been transferred to the Respondent under the Transfer of Undertakings (Protection of Employment) Regulations ("TUPE"). In the alternative, he said that he was employed directly by the Respondent.

30. In relation to employment by Ms. Lord and the TUPE point, Employment Judge Fredericks-Bowyer concluded that there was no employment relationship. He found that under cross examination neither the Claimant nor Ms. Lord could articulate any terms which would form the basis of contract between them.

31. He pointed out that neither of them offered a number in terms of the expected hours of work per week. The Claimant had said that a number was agreed and that he worked more than those, but the Judge set out that he did not explain what that number was.

32. The Judge also set out the following:

*"He knew he was getting paid a fixed monthly amount that he did not know what his salary was or how his pay was calculated. He said that he was, variously, the 'general manager', 'bar manager' and 'assistant'. He acknowledged that Ms Lord had a full time job elsewhere meaning that he would need to report to her periodically, but he could not describe a typical interaction where he was subject to Ms Lord's supervision. He acknowledged that he may have held himself out as an employer of*

*others with his words, but did not accept this meant that he was the Manchisee in charge of the whole establishment. Ms Lord could not answer these points either."* (See paragraph 81 of the Judgment of Employment Judge Fredericks-Bowyer).

33. The conclusion reached by the Judge when considering the question of employment by Ms. Lord and the TUPE point was as follows:

*"Considering all the relevant tests in the law outlined above, I do not consider that the Claimant has provided sufficiently cogent or detailed evidence to make out his assertion that Ms Lord employed him. The facts I have found do not support that. The Claimant was unable, in my judgment, to overcome the presumption that he was a self-employed contractor which arose through the factual findings above and through my findings that he was the Manchisee with overall control of the business unit at the Dog & Gun"* (see paragraph 85 of the Judgment of Employment Judge Fredericks-Bowyer).

34. As to the TUPE argument had his conclusion been that the Claimant had been an employee of Ms. Lord, Employment Judge Fredericks-Bowyer concluded this:

> *"Even if I had found that Ms Lord was the Manchisee, was in a position to employ the claimant in his role, did so, and then the business transferred to the respondent, then I do not consider this assists the claimant with his claims. I take into account the potentially wider definition of what an 'employee' is under the TUPE Regs, although the point was not pleaded or advanced by the Claimant in the hearing. Nevertheless, I still consider that this claim has an obvious and fatal flaw when considered in this hypothetical context.*
>
> *Ms Lord was very clear in her live evidence that she considered that she had dismissed the claimant prior to the transfer. She said that she would not be able to employ him any longer. Ms Lord stuck to what she said in her witness statement on the point: "As far as I am concerned having vacated the organisation and brought WD's employment to an end…". In my view, this was the only point about which Ms Lord demonstrated any clarity about exerting any sort of control over the claimant. She says she ended his employment. It did not continue in existence in a form that would transfer to another entity. There was no evidence that there was any instruction from the respondent to dismiss the claimant and no pleaded case that dismissal was done as a result of the business transfer and so I do not consider that Regulation 7 would have applied. Ms Lord has not even said in evidence that she considered the Claimant and employees at the Dog & Gun to have had their employment transferred.*
>
> *Really, in my judgment, all Ms Lord was describing here was the end to the mechanism by which the claimant received money under PAYE system. I accept that Ms Lord operated a payroll system for the claimant and others which made payments to staff, although I do not accept that this proves an employer/employee relationship. What this means, though, is that Ms Lord was required to cease those payments being made for PAYE purposes. Her clear evidence, repeated*

*when I asked for clarification, was that she had completed the claimant's P45 prior to the franchise ending. The TUPE provisions apply to those employed immediately at the point of the business transfer. Even if I considered the claimant had been employed by Ms Lord initially, I would have to consider that his employment had ended sometime prior to the transfer such that he would not have been caught a TUPE transfer. There would be no employment to transfer because Ms Lord ended it.*

*This would also have been the case in the un-pleaded alternative proposition, advanced by the claimant during his evidence, that the claimant's employment should have transferred to the new Manchisee. There would be no extant employment to transfer, even if the Claimant could explain the significant period where there was no business unit activity at the premises in early 2022. In my view, there was no business unit carrying out trading between January 2022 and May 2022. Consequently, there was no business transfer at all between the claimant or Ms Lord, or the respondent, or the incoming Manchisee. The claimant's actions, in refusing to vacate the premises and then stopping the premises from trading for six months, has interrupted the business activity at the Dog and Gun.*

*If the claimant's view really is that he should have had his employment transferred seamlessly from Ms Lord to the Manchisee, then I am not clear why he opted to sue this respondent with these claims. In any case, the claimant was not employed by Ms Lord or the respondent. He was self-employed, and so there was no employment to transfer."*

35. In respect of the alternative contention that the Claimant had been a direct employee of the Respondent Employment Judge Fredericks -Bowyer concluded this:

*"In the letter at page 286. Mr Johnstone asserts to the respondent that the claimant was their employee, and not an employee of Ms Lord. If this was indeed the claimant's view, as it seems to have been, then it further casts doubt on any claim that the claimant was an employee of Ms Lord in any event. No case was advanced that the claimant was ever under the control of the respondent. I can discern no argument or evidence indicating that there was any mutuality of obligation between the parties to these proceedings other than very bald and unsubstantiated statements in the witness statements prepared for the claimant's witnesses to the effect that his employment transferred to the respondent when it took control of the premises. The opposite is so; the claimant was free to run the establishment as he wished in line with the broad commercial aims and profitability and viability that would be expected in a commercial arrangement.*

*I have concluded that the Claimant was a self-employed franchisee, he was not the Respondent's employee".*

36. It is also worthy of note setting out the conclusions which finally disposed of the claim and these were as follows:

> *"I have concluded that the claimant was what the respondent refers to as the 'Manchisee' at the Dog and Gun public house. He was a self-employed contractor who held a premises licence fee establishment, and lived in that establishment under the commercial contract outlined above. Consequently, he was not employed by the respondent and was not employed in his position by Ms Lord either. She did not run business. His claim for unfair dismissal, in my judgment, must therefore be dismissed because the tribunal has no jurisdiction to hear it.*
>
> *Further, even if I had otherwise above and held that the claimant was Ms Lord's employee, then it is clear to me that Ms Lord's view is that she would have dismissed him prior to the transfer of the business taking place. This meant that, even on that alternative (and in my judgment untenable) view, the claimant would not have come to be in the respondent's employment. This would mean that his claim would come to be dismissed at that stage instead.*
>
> *Indeed, if, as seemed to be the case in evidence, the claimant is in fact saying that he should have his purported employment transferred to the new Manchisee, then it is apparent that he has sued the wrong entity. He should instead have sued Ms Lord and/or the new Manchisee, whom had and whom he now seems to say should have employed him. Any claim against this respondent would have to be dismissed if that is the case as it has evolved to be put.*
>
> *In those circumstances, it follows that there can be no breach of an employment contract which I have not found to exist. On the facts I have found, the claimant was arguably made redundant by Ms Lord. He was not made redundant by the respondent, and so his claim for redundancy payment against this respondent must be dismissed.*
>
> *In summary, having heard all the evidence and tested the arguments, I consider that the Claimant has brought no well-founded claims in these proceedings and they are all dismissed."*

37. As I have already observed I am bound by those findings and the conclusions reached by Employment Judge Fredericks-Bowyer. Against that background that then brings me back to the question of whether the claim had no reasonable prospect of succeeding. I take into account that issues as to employment status and worker status are often inherently complicated. Indeed, matters have frequently made their way up to superior Courts dealing with those particular questions. It is often simply unclear until all of the evidence has been properly ventilated and tested what the precise nature of the relationship between parties is.

38. However, this is not one of those cases. It was plain from the Judgment referred to above that the Claimant deployed no evidence of any form of contractual relationship between himself and Anita Lord and indeed neither of them could explain the basis

of that purported relationship during the course of their evidence. Moreover, even if they had been able to do so there still remained what Employment Judge Fredericks-Bowyer described as a fatal flaw with regard to any transfer to the Respondent under TUPE.

39. The assertion that the Claimant had come to be employed by the Respondent via TUPE therefore clearly had no reasonable prospect of success on the basis of the evidence which the Claimant had had all along and what was contained in Ms. Lord's witness statement.

40. The argument as to firstly being employed by Ms. Lord had no reasonable prospect of success because there was no evidential basis for it and secondly the assertion to have transferred under TUPE had no reasonable prospect of success based on the evidence of the Claimant's own witness.

41. Similarly, it is plain from the findings and conclusions of Employment Judge Fredericks-Bowyer that the Claimant deployed nothing by way of evidential substance to suggest that he was directly employed by the Respondent other than a bald assertion to that effect which would plainly be inadequate. Again, that would have been something that was known all along and not something that simply arose from the evidence that could not have previously been plain. That alternative assertion also had no reasonable prospect of succeeding because it was without evidential foundation.

42. Finally, the Claimant's position as it evolved in the evidence was that he should have come to be employed by the incoming Manchisee. If that was what his case was said to be then it is impossible to see how the Respondent could have had any responsibility for his claim and as Employment Judge Fredericks-Bowyer made plain he had sued the wrong entity.

43. The claim as against this particular Respondent therefore for all of those reasons can be properly said to have had no reasonable prospect of success and the first limb of the test for an Order for costs to be made is made out.

44. However, that is not the end of the matter. I must then consider whether I should exercise my discretion to make an Order for costs and in doing so I must take into account any mitigating factor which obviates against such an Order being made.

45. Ms. Duane had anticipated that the Claimant may seek to rely on advice which had been received from Mr. Johnstone in respect of the claim. The Claimant did not make submissions in relation to that point but of my own volition I asked him about that given he is now acting as a litigant in person and is unfamiliar with the costs regime. Nevertheless, it was something that I wished to explore with the Claimant because it was a relevant factor as to the second limb of the test that I needed to apply.

46. It appears from what he told me that other than the fact that he was told by Mr. Johnstone that he "had a shout" very little if anything appears to have been said to the Claimant about the legal test that the Tribunal would be required to apply and more importantly whether the evidence that he had and the information to hand meant that he was likely to succeed or at least have some prospects of succeeding at the Preliminary hearing in establishing in one way or another that he was an employee or a worker of the Respondent.

47. If the Claimant had been representing himself in these proceedings then I may have had less sympathy because I would have expected him to have researched properly the basis upon which he may have had any recourse against the Respondent to these proceedings. However, although the underlying facts were known to him, he had sought advice from someone who described himself to be a Specialist Employment Practitioner he was told by that practitioner that he "had a shout". That to me suggests that he was told in terms that he had a reasonable chance of success in establishing employee/worker status. Whilst it is unusual for advice to be in such bold and undetailed terms unfortunately it is not unheard of.

48. Whilst Ms. Duane points to the fact that the Claimant is an intelligent man, regrettably even those who are intelligent can and do rely simply on what they are told by an advisor and that is particularly the case when somebody is referring to themselves as a Specialist Employment Advisor.

49. There is nothing before me to suggest that the Claimant was the driving force in how the claim was advanced before the Tribunal or at the Preliminary hearing (and I come to that further below) because he was being represented and relying on advice from Mr. Johnstone.

50. Moreover, it was clear from what the Claimant told me during the course of this hearing that he had a fundamental misunderstanding about how the claim process works. The Claimant was present at the Preliminary Hearing on 1st June 2022. However, he had mistakenly taken from that hearing and the fact that Employment Judge Fredericks-Bowyer had listed the August Preliminary hearing and reserved it to himself that there was effectively a case to answer and that had the Judge not thought so then he would have "kicked out" the claim at that particular stage. As we have discussed today it was not open to the Employment Judge to do that because that was a private Preliminary hearing for the purposes of case management and the Tribunal Rules do not permit the striking out of claims at that stage even if they have no reasonable prospects of succeeding.

51. I therefore have to determine whether there are any mitigating factors pointing against me exercising my discretion to make an Order for costs against the Claimant in respect of the "misconceived" point. While I am mindful of the point raised by Ms Duane that I should be cautious in accepting that what happened in this case was down to an advisor rather than on the instructions of the Claimant and also that should not in any event vitiate against an Order for costs because the recourse would

then be against Mr. Johnstone, ultimately I am satisfied that the driving force was Mr. Johnstone and that the Claimant was an unwitting passenger in this litigation.

52. I am satisfied that the Claimant having relied on poor, bald and undetailed advice and having been under a misunderstanding in relation to the initial Tribunal process that those are adequate mitigating facts against making an Order for costs in these circumstances. I do not think that a costs Order in these circumstances would be just where a Claimant has relied on being told that he "has a shout" - which suggested not unsurprisingly to him that he had a reasonable chance of succeeding in his claim – from someone who holds themselves out to be an employment law expert. I would not expect in those circumstances for the Claimant to have felt a need to go off himself and research whether the advice that he had been given was right or wrong.

53. There is nothing that emerged from the hearing before Employment Judge Fredericks-Bowyer which would not have been known to Mr. Johnstone when he provided his advice to the Claimant in relation to his pleaded case. If the Claimant gave evidence that had been wholly inconsistent with the instructions provided and upon which the advice was given then that would have been a different matter but the underlying facts were at all times known to Mr. Johnstone and that was the basis of his advice that the Claimant "had a shout". It perhaps did not help that the Claimant's claim evolved as he gave his evidence with his view that he should have transferred to the incoming Manchisee from Ms. Lord but that was still consistent with the pleaded case that he was her employee and there is nothing to say that an expressed view during the course of evidence would have likely changed the advice that Mr. Johnstone was giving that he had a "shout" against this Respondent.

54. For all of those reasons, I do not consider that it is just to exercise my discretion under the second limb of the test to make an Order for costs in these circumstances where the Claimant was advancing the claim against the Respondent based on advice from someone who was describing himself as a specialist in the field. I take on board the argument advanced by Ms. Duane that the Claimant would in turn have recourse against Mr. Johnstone but that does not persuade me that I should make a costs Order. Firstly, further litigation is undesirable and I know nothing of whether Mr. Johnstone holds any form of indemnity insurance which might yield anything from successful litigation. Secondly, the Respondent clearly anticipated that the position may have been that the Claimant relied on the advice that he was given by Mr. Johnstone and so it was open to them to deal with that as an alternative argument regarding wasted costs. That argument was abandoned at the hearing before Regional Employment Judge Swann.

55. I turn then to the second strand of the application which relates to the Claimant's conduct and/or that of his representative during the course of these proceedings.

56. The first issue in that regard is said to be pursuing any case unreasonably has he knew it had no reasonable prospects of success and that that was emphasised by Mr. Johnstone conceding that he was unable to articulate or expand upon the

Claimant's then alleged contractual relationship with Ms. Lord. For the same reasons that I have already given in relation to the first limb of the application I dismissed that part of the application because I do not consider it to be unreasonable conduct to follow legal advice to the effect that he had a shout i.e. that there was some merit in the argument that he was seeking to run. Employee/worker status at TUPE are inherently complex matters and I do not find the Claimant to have acted unreasonably to have followed advice which he received from someone who describes himself as a Specialist Employment Practitioner and who had been specifically retained by the Claimant for the purposes of dealing with these proceedings.

57. The second part of the application relates to the conduct of the Claimant and/or Mr. Johnstone making no less than six applications to strike out the Response within a short period of time. Leaving aside the number of those applications, which in itself is highly unusual, five of them were made within 15 days of each other and the final one being made only 28 days later. In addition to that, I agree with Ms. Duane and with other Employment Judges who had viewed the various applications at various times that there was no discernible basis in law for those applications to have been made. They arose, on a very generous interpretation, from a misunderstanding about what had been said at the first Preliminary hearing and/or umbrage which appeared to have been taken by Mr. Johnstone to entirely unremarkable communications from the Respondent's Solicitors. Added to that the applications were often in a form which could not sensibly be responded to and it was nearly always impossible to discern what the actual basis for the application was. They were made entirely unreasonably and in a florid language which was bordering on the insulting. They accused the Respondent's Solicitors of negligence, a breach of their professional standards and, on occasion, criminality. I have read each of the applications and they are as baseless as they are absurd.

58. It is worthwhile looking at some examples of those communications to emphasise the point. One such came in response to a perfectly measured email from the Respondent's Solicitor asking for evidence that Mr. Johnstone was now unavailable to attend the Preliminary hearing which had been listed with the agreement of the parties for 12th July 2022 at the first Preliminary hearing. No issue had been raised by Mr. Johnstone that he was not available on that date, although his agenda had made reference to unavailability at that time. He subsequently made a postponement application citing is unavailability in connection other proceedings.

59. The email from the Respondent's solicitor in reply was entirely unremarkable and it is the sort of communication that Tribunals regularly receive in connection with postponement applications, for example, in relation to proof of a pre-booked holiday or medical incapacity to attend. The reply was no different. It produced, however, what has to be described as an outrageous response which was copied to the Tribunal making reference to possible future applications for costs or to strike out the Response. It accused the author, Ms. Ball, of insinuating that Mr. Johnstone had tried to mislead the Tribunal (which she plainly had not) and indicating that she was seeking to impress her client, that she was wasting her clients money by casting

unwarranted and spurious aspersions "*designed to disrupt the professional fluidity that should be homogeneous and conducive to the consistency of flow of contentious litigation, alleged non-compliance with no less than four principals of the SRA's Code of Conduct*", made reference to an application for wasted costs and that he would not permit "*anyone especially a professional to enter the arena and deliver only aspersions which bastardise my profession*". It also threatened should there be any repeat of the conduct which Mr. Johnstone appeared to complain of and the "*throwing of marbles under the feet of [his] client's claim*" to "*constructive unilateral suit of which both you and your organisation should be subject to*". Although not entirely clear, that appears to be some reference to threatening Ms. Ball and Howes Percival (the firm by whom she was employed) with some form of unspecified legal action.

60. A further notable example was written by Mr Johnstone to the Employment Tribunal on 23rd June 2022. It is worth setting it out in full and it said this:

*"Please find this as a formal and deeply concerning declarative with regard to the potential witness intimidation that at best is complete negligence and at worst is complicit with section 51(1) of the Criminal Justice and Public Order Act 1994. We have a primary witness namely Mrs Lord who is a primary witness in another jurisdiction and we are deeply concerned that she is being adversely coerced in to removing herself as such by way of intimidation. This I believe supersede all jurisdictions as it filters into the realms of criminality. I shall consider contacting Her Majesty's Crown Prosecution Guidance Notice. Rebecca Davies is vicariously complicit indemnified by SBL and shall not be afforded non-pursuit of personal litigation."*

61. Again, that was all completely baseless and frankly outrageous. All that had happened was that Ms. Davies (another employee of Howes Percival) had forwarded a copy of a charge which had been levied over the property in connection with, as I understand it, concurrent County Court proceedings brought by the Respondent against the Claimant. Those had been sent to Ms Lord because she co-owns the property with the Claimant. That could not by any stretch of the imagination possibly be tantamount to witness intimidation or criminality nor give rise to whatever unspecified legal proceedings Mr Johnstone had in mind of seeking to bring against Ms. Davies. It was again an extraordinary letter to have written.

62. I accept that the Respondent has spent time and expense needlessly dealing with these matters given the context of the communications and the applications to strike out the Response and they plainly had to do so.

63. I have no hesitation in concluding that either singularly or cumulatively these communications alleging criminality, unspecified threats of legal action and entirely unwarranted applications to strike out the Response amounted to unreasonable conduct. The first limb of the test for costs is therefore made out in accordance with this particular part of the application.

64. It then falls for me to consider whether I should exercise my discretion to make an

Order for costs. I should note that some of the communications in question were written by the Claimant, however, it was made plain that he was writing them as they were being dictated to him by Mr. Johnstone and having viewed them they are plainly written in language which, to coin a phrase from Employment Judge Fredericks-Bowyer, written in language which was particular to Mr Johnstone.

65. I accept what the Claimant has told me that those applications came from Mr. Johnstone and he did not believe that Mr. Johnstone was doing anything wrong in making them. Given the content that position may be described as being naive but I take into account the fact that those who are represented by people describing themselves as experienced legal professionals more often than not leave matters in the hands of that representative to best advance their case. As the Claimant indicated in the hearing before me, he understood Mr. Johnstone to be acting in his best interests and had no reason to think otherwise. Even though he was aware of the communications and it would be plain as a pikestaff to most people looking back to see that they were inappropriate in content, that has to be looked at from the prism of the Claimant having instructed Mr. Johnstone to represent him and his belief that he was acting in his best interests to advance his claim.

66. Again, it is plain that it was Mr. Johnstone who was the driving force and again the Claimant was his unwitting passenger. In those circumstances and for largely the same reasons as I have already given in respect of the second limb of the test for the "misconceived" part of the application, I do not consider that that should result in an award of costs against the Claimant as there are clear mitigating factors at play.

67. It should be observed that the Claimant himself made a further application to strike out the Response effectively seeking a dismissal of the costs application. That was done, as Ms. Duane points out, in the same florid and confusing style of pseudo legal language previously adopted by Mr. Johnstone and she contends therefore that the Claimant must have been an accomplice in writing the earlier emails or instructing Mr. Johnstone in relation to the tone and content. Having heard from the Claimant I am satisfied that what he actually did is simply pasted parts from earlier applications made by Mr. Johnstone into his own application because he did not know otherwise what to put. As identified by Employment Judge Broughton his application was misconceived because it was based on a misunderstanding of Orders which had been made by Regional Employment Judge Swann. His application was clearly misconceived and it was plainly unwise but I accept that at the time that the Claimant was still labouring under the misapprehension that Mr. Johnstone's conduct had been in his best interests and not inappropriate. Whilst he was wrong about that on both fronts, I do not consider that of itself to be unreasonable conduct on his part.

68. I turn then to the issues about a failure to comply with case management Orders. That largely falls in relation to the provision of further information which had been Ordered by the Tribunal to be provided and which was pertinent to the employee/worker question and in respect of which the Respondent was forced to apply for an Unless Order. As it was that information was not provided until the first

day of the August 2022 Preliminary hearing. It is plainly unreasonable conduct for a party to fail without adequate excuse to comply with an Order of the Employment Tribunal and no representations had been made that there was an adequate reason for that particular failure. The information was plainly relevant to the issues which were going to be determined and it could and should have been provided.

69. The first limb of the test for costs is therefore made out because there was unreasonable conduct in respect of the failure to comply with Orders which had been made by the Tribunal. However, the question then again falls as to whether I should exercise my discretion under the second limb to make an Order for costs. I am satisfied that ultimately I should not. There is nothing to suggest that the Claimant had instructed Mr. Johnstone not to respond and as with other issues he had left matters in Mr. Johnstone's hands to deal with. In these circumstances, I do not consider it just to visit those particular costs on the Claimant. In all events those particular costs would have been limited to the application made for an Unless Order. Whilst it could be said that if that information had been provided it might have led to greater engagement in terms of the merits of the employee/worker status point I am far from convinced given what the Claimant has told me as to the level of advice he received as being he "had a shout" that would have made any difference to the eventual outcome.

70. I turn then to the next issue which is in relation to the preparation for and conduct during the August Preliminary hearing before Employment Judge Fredericks-Bowyer.

71. The first of those issues concerns the late withdrawal of an associative disability discrimination complaint. I have asked the Claimant how that claim came to be withdrawn on the first day of the August Preliminary hearing. I am told by the Claimant - and again I have no reason to doubt that what he tells me is accurate - that he withdrew that complaint on advice received from Mr. Johnstone on the morning of the hearing to the effect that they should just concentrate on the other complaints. The Claimant accepted that advice and that led to the withdrawal of that element of the claim. I cannot know the reasons why Mr. Johnstone decided on that course nor why he advised the Claimant to have pleaded that head of claim in the first place.

72. Whilst a withdrawal of a claim at a late stage of the proceedings, and particularly at a hearing, can of itself amount to unreasonable conduct I do not take the view that it was in the circumstances. The August hearing was not a final hearing of the claim, the parties had not prepared other than putting in a relatively brief part of the response dealing with the associative discrimination claim for a full hearing of the matter. The June Preliminary hearing would still have been required to deal with consideration of whether to list the matter for a substantive Preliminary hearing on the employee/worker status issue. The August 2022 hearing would still have gone ahead on the same basis. Even if I had found that the withdrawal of this particular head of claim amounted to unreasonable conduct, I would nevertheless again not have visited costs in relation to that issue on the Claimant give that he withdrew on

advice given by his then legal representative. That is again a demonstrative of the fact that the Claimant was leaving things in the hands of Mr. Johnstone to act in his best interests.

73. As to other conduct at the hearing this included the rather curious issue whereby Mr. Leanders did not even know the name of the Claimant whose case he was supposed to be giving evidence in connection with; the fact that none of the witnesses had been furnished with the hearing bundle and all of the witness statements were lacking in detail and contained little other than bold assertions written in language particular to Mr. Johnstone. As far as I can ascertain from what the Claimant has told me today his involvement in relation to the issue of witness evidence was limited to speaking with the witnesses initially prior to Mr. Johnstone taking over. It seemed clear from what I have read within the Judgment of Employment Judge Fredericks-Bowyer that the witness statements were prepared by Mr. Johnstone on the basis that they contained some reference "*to inserting a standard mantra prepared by CJ*" (which must be Christopher Johnstone).

74. Indeed, it would be normal practice for a legal representative to deal with matters such as supplying or furnishing copies of the bundle, preparing and ensuring that witness statements were in order and making sure that witnesses knew what it was that they were supposed to be given evidence about. There is nothing before me to suggest that the Claimant was the one responsible for that state of affairs and again I have regard to what he has told me that he had left matters in the hands of Mr. Johnstone to act in his best interests.

75. I can fully accept that the almost shambolic way in which the Preliminary hearing proceeded with regard to preparation on the Claimant's side is something which plainly amounted to unreasonable conduct because a legal representative, particularly one who was making it plain in correspondence with the Respondent's Solicitors had over 10 years' experience in employment law practice, could and should have prepared this case much better. That amounted to unreasonable conduct for him to fail to do so and particularly the situation with regard to poor and differing copies of witness statements and witnesses not knowing whose case they were supposed to being given evidence in connection with was astounding.

76. However, whilst I accept that was unreasonable conduct again there are mitigating factors which mean that it would not be equitable to make an Order for costs against the Claimant in these circumstances. That is again on the basis that the Claimant had left matters in the hands of Mr. Johnstone and understood him to be acting in his best interests. There is nothing to say that the Claimant instructed Mr Johnstone to deal with matters in the way that he did indeed it would be extremely unusual for him to have done so on the basis that the only person that such a poorly prepared case could have caused detriment to was the Claimant himself. Again, for those reasons I do not consider it appropriate to make a costs Order against the Claimant in these circumstances because there are clear mitigating circumstances pointing against it.

77. Moreover, I would observe that even had I had been minded to make a costs order in relation to issues that occurred at the substantive Preliminary hearing then it is difficult to see what those costs would have been. The case was disposed of within the two day listing and the delays which resulted in, for example, the copies of the hearing bundles needing to be furnished to the Claimant's witnesses did not alter that position nor did the Respondent incur any additional costs in relation to the poorly prepared, inadequate and different witness statements in relation to the Claimant's witnesses.

78. Standing back and looking at matters as a whole it is plain that either singularly or cumulatively there has been unreasonable conduct in this case which passes well over the first limb of the test for a costs Orders to be made and I am entirely unsurprised that an application was made by the Respondent. However, I am satisfied that the things that I have found to amount to unreasonable conduct were matters which were done at the hands of Mr. Johnstone and not the Claimant and that the latter was unaware that he was doing anything wrong. For those and the reasons that I have previously given I do not consider it just in the circumstances to make an Order for costs against the Claimant. Had the Respondent continued to have pursued the wasted costs application against Mr. Johnstone that, however, may have had an entirely different outcome.

79. I should observe that one aspect of the application does relate solely to the actions of the Claimant and so I should deal with that separately. This is that on 1st February 2024 the Claimant had attempted to add a further nine documents to the costs bundle which are said to relate to the liability issue and are said to be a further attempt to relitigate the decision of Employment Judge Fredericks-Bowyer which has already been exhausted. I do not consider that to be unreasonable conduct which meets the threshold for the first limb of the costs test. I say that on the basis that it is not unusual for a party to be unable to accept a decision which is adverse to them and which they strongly believe – even wrongly – was incorrect. It is plain that the Claimant still believes that the Respondent was in some way responsible for the treatment of which he complained in these proceedings. Whilst that is ultimately wrong, it is not conduct which is unreasonable nor was his attempt to include documents within the bundle to that effect. I therefore find no unreasonable conduct on the Claimant's part in respect of this part of the application.

80. I turn then to the final aspect of the application for costs which is in relation to scandalous or vexatious conduct. The Respondent contends that it was the Claimant's intention and the proceedings had been orchestrated to cause as much harassment, inconvenience and cost to them as feasibly possible. Ms. Duane relies on three issues in connection with this strand of the application. The first is the making of unfounded threats against the Respondent and their representative, the second is causing distress to the Respondent by threatening non-molestation orders and making malicious allegations to the Police and the third it is said that the proceedings had been brought to cause as much disruption to the Respondent due to an eviction notice which had been served on him by them.

81. In respect of the first issue, I can deal with that relatively swiftly because as I have already concluded in relation to other parts of the application those communications however unwise they may have been, were being led by Mr. Johnstone and not the Claimant and the Claimant believed that there was nothing wrong with them and that Mr. Johnstone was acting in his best interests. Looking at those communications logically, objectively and with the benefit of hindsight they were of course anything other than highly inappropriate, highly unusual and offensive communications. Whilst they did amount to scandalous conduct of the proceedings, again that lay at the door of Mr. Johnstone and not the Claimant. For the same reasons therefore as I did not make costs order in respect of unreasonable conduct against the Claimant I am equally not making one in relation to the issue of scandalous conduct in respect of this particular part of the claim.

82. I then deal with the remainder of the strands of this part of the application which in effect go hand in hand. I have not heard evidence about the circumstances of the non-molestation order or threats to the Police. The Claimant sought to tell me about the eviction notice and that was at his behest but that is an entirely new matter and no evidence has been called upon it. What is clear is that events between the Claimant and the Respondent has been unhappy and unfortunate ones. The Claimant has taken steps in relation to unsuccessful non-molestation orders which at best might be described as unwise. However, I do not feel that I can extrapolate from those matters that the sole purpose of the Claimant bringing these proceedings was not in the hope of discerning any benefit from it but with the intention of causing harassment and spite to the Respondent. I can take judicial notice of the fact that litigation can and does become heated and that is not least in a case such as this where inflammatory correspondence has been sent by one representative to another and the parties are involved in more than one set of proceedings.

83. It is regrettably not unusual for litigation to spill outside the arena and into other areas such as reports to the Police and the like. Whilst that rarely has its appropriate place in litigation it does not mean that the initial proceedings were brought with ill will and there is nothing to suggest that the Claimant brought this claim without hope of a remedy and only to cause inconvenience to the Respondent.

84. The position may have been different if the Claimant had been acting throughout as a litigant in person and having himself sent or directed to be sent the inflammatory correspondence to which I have referred. However, he did not he retained the services of Mr. Johnstone. Whilst Mr. Johnstone makes reference in communications to acting on pro bono basis the Respondent's submissions at least as to the Claimant's means and ability to pay any award of costs made suggested that the Claimant would have been making payment for those services. The Claimant is of relatively modest means albeit he has some small amount of saving and a relatively modest pension. It would seem unusual to have expended funds on legal representation to advance a case against the Respondent in respect of which he had knew that he had no reasonable expectation of recovering anything and was simply done for spite and the purposes of harassment. Whilst many unwise and unfortunate

events have befallen this particular set of proceedings, I am not satisfied that the Claimant acted vexatiously either in bringing or in the pursuit of the claim.

85. It follows for all of those reasons that the application for costs is refused.

86. I should say, however, that I can entirely see given the catalogue of events which occurred and the way in which the hearing in August 2022 unfolded and concluded why the application was made.

Employment Judge Heap

Date: 28th April 2024

JUDGMENT SENT TO THE PARTIES ON

....30 April 2024.....

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FOR THE TRIBUNAL OFFICE

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