EMPLOYMENT TRIBUNALS

Claimant **Respondent**

v

Mr M Loizou **Optivo**

Heard at: **London South Employment Tribunal**

On: **6-7 June 2024**

Before: **EJ Webster**
Ms Forecast
Ms C Oldfield

Appearances
For the Claimant: **In person**
For the Respondent: **Ms G Corby (Counsel)**

RESERVED COSTS JUDGMENT

1. The Respondent's application for costs is upheld.

2. The Claimant must pay the Respondent the sum of £10,000 in costs.

REASONS

Background and the hearing

1. This was an application for costs by the Respondent pursuant to a tribunal hearing in October 2022. That application was made in February 2023 shortly after the liability Judgment was promulgated. Unfortunately, due to administrative error the Respondent's application was not passed to EJ

Webster until early 2024. On receipt of that document EJ Webster ordered a 2 day costs hearing be listed.

2. It became apparent at the beginning of the hearing that the parties had not been sent the outcome of the Claimant's application for reconsideration dated 24 January 2023. EJ Webster checked her records and noted that she had sent her reconsideration decision to the Tribunal administration one week after it was received. It also appeared that despite forwarding that reconsideration decision to the administration again in February 2024 to check whether it had been sent, the parties had not received it.

3. The Tribunal of its own volition considered whether the costs hearing should proceed in these circumstances. The Claimant expressed his unease and unhappiness that the hearing was proceeding when he had an outstanding Rule 3(10) appeal hearing at the EAT and when he had not received my reconsideration decision.

4. EJ Webster ensured that my (short) reconsideration decision was promulgated an sent to the parties before we proceeded with the hearing. She had decided that it was not in the interests of justice to reconsider the Tribunal's decision.

5. On reflection we saw no reason as to why the costs hearing should not proceed. EJ Webster had already considered the Claimant's application for the costs hearing to be postponed until after the Rule 3(10) hearing and had refused it. The EAT had initially considered the Claimant's appeal (which was in similar terms to his application for reconsideration) and not allowed it through the 'sift' stage and the parties were aware of that decision.

6. The Tribunal concluded that the parties were not in any way disadvantaged by continuing with the costs hearing given that the reconsideration decision did not deviate from the position the parties believed themselves to be in at the outset of the hearing. We also considered that given the brevity of the reconsideration decision it did not put either party at a disadvantage to have to read that on the morning of the costs hearing albeit it is clear that the administration in this matter fell short of what ought to have occurred in terms of timing.

7. Mr Loizou was sworn in at the outset of his submissions/evidence so that any evidence or information he gave us was under oath and so that the Respondent could challenge any evidence he gave and the Tribunal could ask questions.

8. During the hearing Mr Loizou was ordered to provide further evidence of his finances by way of bank statements, tax returns and professional invoices. On day 2 he provided copies of his bank statement for a current account, one for a savings account, one professional invoice and a tax return for the relevant year.

The Law

9. Rule 76 (Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (The 'Rules) provides as follows:

"76.— When a costs order or a preparation time order may or shall be made
(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; [...]
(b) any claim or response had no reasonable prospect of success […]

10. The tribunal must approach such an application as follows. At the first stage it must identify whether there has been unreasonable conduct, and, if so, what it has been. It must then ask whether it is in the interests of justice to make an order. It should balance a number of factors: the tribunal is not a jurisdiction where costs follow the event, and although the rules do not use the word 'exceptional,' we should note that a costs order is an exception. We should balance the openness of the jurisdiction with our need to ensure that the resources of parties and the tribunal are well used. We should consider any information we are given about a party's ability to pay.

11. The Presidential Guidance on Case Management Guidance Note 7 para 1 which says, *'The basic principle is that Employment Tribunals do not order one party to pay the costs which the other party has incurred in bringing or defending a claim. However, there are a number of important exceptions to the basic principle...*"

12. The Respondent's application and submissions referenced the case of Yerrakalva v Barnsley Metropolitan Borough Council and nor 2012 ICR 420, CA. They relied upon paragraph 41 of that judgment as authority that there did not have to be a precise causal link between the unreasonable conduct in question and the specific costs being claimed.

> *"The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. The main thrust of the passages cited above from my judgment in McPherson's case was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the employment tribunal had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances."*

Relevant facts

13. Most of our conclusions are based on consideration of the submissions made to us by the parties as opposed to new factual findings. However we did reach some factual conclusions regarding the Claimant's financial position.

14. The Claimant stated that he had not worked for 4 years save for a small amount of self employed work as a tax consultant that earned him roughly £1-2000 per annum. He had provided, as part of the liability bundle, evidence of many applications for work which he said were not successful. He said that given his age he thought it was very possible he would not obtain work again. We accept that other than the self-employed income he evidenced, he has not received any work-related income since his dismissal by the Respondent.

15. For the period between April 2021 and August 2022 the Claimant received universal credit. We had evidence of that and accept that this was his position.

16. The Claimant ceased receiving Universal Credit when he inherited some money. He did not disclose how much he had inherited but said that he had to pay off significant debts and was now left with approximately £30,000. He did not provide evidence of those savings as he said that they were held in his sister's name. He did not explain why they were in his sister's name. He said that he asked her to keep hold of the money to act as a check on his spending and said that she would transfer money to him as and when he needed it. He said that his £30,000 was joined with money that belonged to his sister and said that overall there was roughly £40,000 in the account with £30,000 belonging to him and £10,000 belonging to his sister. He said that the money was in a savings account and generated roughly £1-200 worth of interest per month.

17. Whilst we understand the Claimant's desire for privacy and his reluctance to disclose some information, we consider that the Claimant knew that he needed to demonstrate his financial position to us as the Respondent had written to him on 21 April informing him that we would want to consider his means at a costs hearing. We also explained to him why we needed that information during the course of this hearing.

18. The Tribunal made some orders for disclosure on the first day and clearly explained the repercussions of failing to comply with those orders. It was explained that if he failed to disclose the information then we would not be able to take it into account if we found that any behaviour by his passed the relevant threshold and we had to consider whether we would exercise our discretion to award costs. The orders were that he disclose the following:

    (i) The last 6 months bank statements
    (ii) A statement for his savings account in his sister's name
    (iii) Any other financial information that would demonstrate his means

He was given an opportunity to provide that further financial information on the second day of the hearing and chose not to. We consider therefore that it is more likely than not that there is more than £30,000 available to the Claimant in a savings account and which he has a legal entitlement to.

19. The Claimant owns his own three bedroom house in London. He estimated that it is currently worth approximately £800,000 and he told us that he has no mortgage on that property.

20. The Claimant's salary was just under £63,000 at the time of his dismissal. He told us that he has no private pension save for a small amount with the Respondent's pension scheme. He is not yet entitled to his state pension. He says that any money that would normally have been invested in a pension was used to pay off his mortgage. We consider this to be a very unlikely state of affairs given that the Claimant is a professional tax consultant. We consider it more likely than not that he has some pension savings from previous employment and that on reaching scheme retirement age he will receive more than the state pension.

21. The Claimant has no dependants. We had evidence of his outgoings much of which was food and bills. He had a separate credit card account which we did not have sight of and which was not disclosed. We accept that his expenditure on that account was on similar things to that shown in his current account. Whilst we do not suggest that the Claimant has been a profligate spender or lives an extravagant lifestyle, he clearly does have disposable income and feels secure enough to spend some money on leisure and going out though this is far from excessive.

Conclusions and Discussion

22. The Respondent made submissions based on two limbs of Rule 76. Rule 76 states as follows:

" 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 unreasonable in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted;
b) Any claim or response had no reasonable prospect of success

23. Rule 84 states that when considering whether to make an order or the amount of the order, the tribunal may have regard to the paying party's ability to pay.

24. A three stage test applies. The Tribunal must consider:
    a) Whether the relevant ground is made out; if so
    b) Secondly, to exercise a discretion as to whether or not to actually awar costs; and

c) If the above discretion is exercised in favour of making a costs/ PTO order, the Tribunal needs to make an assessment of the sum to be awarded.

Vexatious and unreasonable conduct

25. We address each limb of the Respondent's application in turn. The first is the Respondent's allegation that the Claimant's conduct of the proceedings was vexatious and unreasonable. In their original written application for costs, they set out at paragraph 2.3.1 (page 204-205) the list of conduct that they said amounted to vexatious and abusive conduct. In submissions, Ms Corby made it clear that she wanted us to also consider the behaviour overall, taking a step back as well as considering the separate incidents in isolation.

26. Assessing each one in turn by reference to the paragraph numbers in the Respondent's application, we consider that those incidents referred to at paragraphs 2.3.1a), b) d) i) and j) do not amount to unreasonable conduct. They are by and large behaviours and misunderstandings that are common for litigants in person and we consider that it was not unreasonable for the Claimant to behave in those ways given that he was not accessing any legal advice. In brief we find as follows:

(a) Case not clearly pleaded

This is common amongst litigants in person and the Claimant attempted to narrow the issues and work with the Tribunal and the Respondent to ensure that a List if Issues was agreed.

(b) Refuse to reasonably cooperate in the preparation of a list if issues

The behaviour outlined in the Respondent's application is not unreasonable for a litigant in person particularly before a Judge has explained the purpose and function of a list of issues.

d) The Claimant has the right to appeal to the EAT and it is understandable that he considered that proceedings might need to be delayed until that appeal had concluded. His unwillingness to attend a hearing via CVP where he did not have the requisite technology and in circumstances where an in person hearing was possible does not amount to unreasonable conduct. The Respondent's medical emergency could not have been foreseen.

i) The fact that the Claimant had not pleaded his case well does not amount to unreasonable conduct

j) The Claimant has the right to ask for a reconsideration of the Judgment and doing so is not unreasonable even if the application is lengthy.

27. Incidents outlined at c), e) and f), when taken together, in our view do amount to unreasonable behaviour. They are (in brief) as follows:

c) The Claimant applied to the Tribunal for a third party disclosure order against East Croydon Policy station for the disclosure of non-existence documents.

E) The Claimant refused to reasonably cooperate in the preparation of the tribunal bundle. Of particular relevance to the Tribunal's conclusions were the fact that he threatened to complain to the tribunal if dividers were not included in the manner that he wanted and that he insisted on including lengthy descriptions of documents in the index thus meaning that it ran to 17 pages.

F) During the summer of 2022, the Claimant made disclosure requests to the Respondent for irrelevant documents and made unusual enquiries about the names of the Respondent's employees who had no relevance to his claims. Of particular relevance to the Tribunal's conclusions that this was unreasonable was that when he did not receive the response he wanted, he started copying in senior members of the Respondent's representatives.

28. We have taken into account that the Claimant was a litigant in person and allowed a wide latitude in respect of, for example, producing different documents, producing his own index or list of issues or not trusting the Respondent's solicitors to be providing him with accurate or helpful advice on how matters should proceed. We acknowledge that whilst (most) lawyers understand that they must work together in the interests of the overriding objective as well as their clients, a litigant in person has no reason to automatically trust the other side's representative, however clear and reasonable their suggested course of action may be.

29. Had E and F above happened in isolation we would probably not have considered that the Claimant was being unreasonable or vexatious in the way that he was bringing proceedings. However, taking them together with the third party disclosure order application we consider that they demonstrate an overall approach to the litigation of being wholly unwilling to cooperate in any way whatsoever and behaving in a way that was calculated to ensure that the Respondent's representatives had to spend far more time than normal on various aspects of preparation. The conduct outlined at E and F meant that:

    (i) We had an enormous bundle most of which we were not taken to;
    (ii) An index to that bundle that numbered 17 pages with a detailed descriptive index that was wholly unnecessary and we accept put the Respondent to unnecessary time and cost
    (iii) The Claimant persisted in making disclosure and information requests that were, at best, relevant to peripheral issues. The Claimant's requests for the names of two individuals who sat in a certain place, as a one off request, would not amount to unreasonable conduct. However, on receipt of a refusal to provide that information, with an explanation of

why it was not relevant to the case he had brought, the Claimant persisted, requiring the Respondent to reply on several further occasions on this issue. Against a backdrop where the Claimant's description of these two individuals was vague at best and he was unable to convincingly explain its relevance the issues at hand, we consider that his persistence beyond the first explanation by the Respondent was unreasonable.

30. Finally however, there were two significant incidents in the preparation of the case that we consider amount to unreasonable and possibly vexatious conduct.

31. The first relates to the requirement for a third party disclosure order from the police. A large amount of time was spent, both during the preparation for and during the hearing discussing whether evidence existed of whether the Respondent had reported the Claimant's grievance to the police. Despite being told on numerous occasions that no such report had been made, the Claimant persisted in making that point. We are not, in this hearing, concerned with the costs spent on any EAT hearing given that such an award would be for the EAT to make. However, we note that the preparation for the ET process in relation to this spurious and inexplicable aspect of the Claimant's claim was considerable.

32. The second and most serious behaviour relates to the Claimant's behaviour on exchange of witness statements. The Claimant insisted on attending the Respondent's representatives offices with his brother to exchange witness statements. After leaving the premises he discovered that one statement was unsigned and two were only digitally signed. He called the Respondent's representative for an explanation. We accept that the Respondent's representative explained to the Claimant during that call that signed copies would be sent in due course and explaining why one was unsigned. We accept that he also explained that it would have no legal bearing or effect as the respondent was not going to change their statements between exchange and the hearing and in any event the Claimant would have the original statements to show the Tribunal if indeed the Respondent attempted to change them between then and the final hearing.

33. Despite this, the Claimant returned to the premises. He and his brother raised their voices on at least one occasion. Security officers became concerned. The Claimant threatened to refuse to leave the premises until a partner came down and initialled each page of the witness statements. Several employees felt intimidated and worried by their behaviour. The Claimant finally left after he had stamped the pages using a firm stamp and he took photos of the reception and the security staff.

34. Whilst we accept that he may have initially had valid concerns about whether a statement was signed or not, on receiving the explanation from the

Respondent's solicitor that signed statements would be sent to him and that they would not be changed in the interim, the Claimant's behaviour thereafter was wholly unacceptable and amounts to vexatious conduct. There is no aspect of his behaviour in this incident that can be explained or justified by being a litigant in person. We accept the statements we had in the bundle from the various members of the respondent's staff that the Claimant's behaviour was worrying and at times hostile and intimidating.

35. Therefore, as an overall conclusion, taking into account the cumulative effect of the Claimant's behaviour, we find that the Respondent has established that in various ways, as detailed above, the ground of vexatious and unreasonable conduct during the preparation for the proceedings is made out.

36. As an alternative finding, we consider that this threshold would have been met by the Claimant's behaviour in relation to the exchange of witness statements alone.

No prospect of success

37. We conclude that the Claimant's claim for direct discrimination based on two mutually exclusive 'characteristics' namely that he was both perceived to be gay and simultaneously because he was heterosexual, had no prospect of success.

38. The fact that this claim could not succeed was clearly explained to the Claimant in the 'Without prejudice' letter sent by the Respondents dated 2 November 2021. Whilst many aspects of discrimination law introduce difficult concepts that are easily misunderstood or misinterpreted; the concept of direct discrimination is a relatively simple one.

39. We do not accept that it is reasonable or genuine for the Claimant to pursue a claim where he relied upon two grounds that must be mutually exclusive; that he was discriminated against because someone thought he was gay and also because the same people knew he was not gay. He appeared to predicate his claim on the idea that his treatment of being perceived to be gay was worse because he was not in fact gay. This was against a backdrop where he had no reason or evidence to suggest that anyone knew or had thought about his sexuality.

40. The concept of direct discrimination or understanding that any negative treatment must happen 'because of' the protected characteristic is normally understood even by litigants in person. The idea of a comparator can be confusing but when explained to him as it was in the Respondent's letter dated 2 November 2021, we believe on balance that the Claimant ought reasonably to have understood that he would need to show that he had been treated less favourably than someone who was either not perceived to be gay or was gay and that demonstrating both in relation to the same incidents would have been

impossible. We consider that this is particularly the case for someone who clearly did a lot of legal research given that he made detailed submissions including referencing case law and statutes. He had also worked as a financial professional for many years and was therefore a qualified, educated individual.

41. We therefore consider that the direct discrimination claim had no prospect of success.

42. We do not accept that the claims for harassment and victimisation had no prospects of success. Whilst we accept that we found that the incidents of harassment did not occur; the Claimant believed that they did. Further, we made it clear in our Judgment (and this is mainly relevant to the victimisation claims) that the Respondent's investigation into the Claimant's conduct and their dismissal process were poor procedurally and had the Claimant been entitled to bring a claim for unfair dismissal then he may well have succeeded. It was, at least in part, the lack of transparency and information provided to the Claimant during the investigation and then the dismissal process, that left the Claimant feeling aggrieved. We accept that being aggrieved does not necessarily mean you have a claim at law that can or ought to be pursued in a tribunal – however, subject to findings of fact, the claims for victimisation and harassment whilst not upheld were not fundamentally misconceived even though we found that the relevant acts did not occur.

Discretion

43. Having found that two separate grounds are made out (Rule 76(a) and Rule 76(b)) and the threshold for a costs award have been met, we shall consider whether it is in the interests of justice for us to make an award for costs.

44. We have considered the various relevant factors.

45. We consider that the Claimant is a person of means. Even if we wholly accept his evidence regarding his savings, he owns an £800,000 house outright, he has no dependants, he has savings of approximately £30,000 and whilst he may need to live off those savings to an extent, we do not accept that his wealth is limited to those savings. The Claimant will be entitled to a state pension from next year.

46. We also find, on balance of probabilities, that he is more likely than not to have income from a private pension as well though we cannot ascertain the value of that. The transfer from his sister on 10 April 2024 as evidenced in his bank statements is entitled Marios 'Pension' which he said was his own pension but could not explain why she was calling it a pension. He was also unable to reconcile this evidence with the oral evidence on day one that he was receiving £1-200 per month in interest payments. We also consider that the claimant has more savings than he has told us about as he has failed to disclose evidence of the balance of the savings account which he says in his sister's name.

47. We do accept that he has not had an 'earnt' income since his dismissal and he has attempted to find alternative work. We agree that he is unlikely to secure alternative employment before his normal retirement age in these circumstances and given the efforts at mitigating his loss evidenced in the bundle.

48. The Claimant had not had any deposit orders or indications from the Tribunal regarding the merit or otherwise of his claims. He has also not availed himself of legal advice. Nevertheless he had received the letter dated 2 November 2021 from the Respondent's representative which clearly outlines the problems with his claims. We understand that the Calderbank principles enshrined in the Civil Procedure Rules do not necessarily apply in the same way to Employment Tribunal and so the suggestion that the Claimant was unreasonable for continuing his claims and ought to automatically bear the costs incurred after the date of this letter ought not to be automatically applied to our consideration.

49. As a litigant in person, the Claimant, as already discussed, may have a genuine and understandable mistrust of the Respondent's representatives. We do not criticise him for not 'dropping hands' immediately on receipt of this letter. However this letter could and should have been a prompt for the Claimant to reflect on the merits of his case, particularly that of direct discrimination and possibly consider obtaining some legal advice, even if it was to be limited or with an attempt to find a free legal advice source. The Respondent's letter is clear and does not threaten the Claimant but points out many of the issues that the Tribunal found against the Claimant on in the liability Judgment. That the Claimant refused to even consider the information therein does inform our discretion as to whether to award costs.

50. Taking all of the above into account we have decided to exercise our discretion and award costs. As outlined The Respondent had to defend itself against what amounted to detailed and unfounded yet serious allegations of discrimination. To do that properly it incurred £60,000 of costs and we have seen that schedule of costs that appears broadly reasonable in the circumstances. At least part of the Claimant's claim had no prospect of success and in pursuing the litigation the Claimant behaved, at times, in a manner which caused the Respondent to incur more costs.

51. There does not necessarily need to be a causative link between the behaviour and the costs. However in order to reach our assessment of how much we should award against the Claimant we have, in part, considered the amount of time that was spent fighting the Claimant's direct discrimination claim (as opposed to the claims for harassment and victimisation) as well as the amount of time incurred having to deal with the behaviour we concluded was unreasonable or vexatious.

52. This is not an exact process and we have had to take a broad brush approach. We heard from Respondent's counsel as roughly how they believed their time was apportioned between the various heads of claim but it was accepted that this was a very broad approach. The Claimant also provided us with evidence as to which he believed caused the bulk of the disputes between the parties.

53. We conclude that through a combination of dealing with the unreasonable conduct and the meritless claims, the Respondent incurred roughly one third of the overall time set out in their schedule. This would therefore equate to approximately £20,000 in costs.

54. However, taking into account the Claimant's age, that he is unlikely to secure regular alternative employment between now and retirement and that although he has savings, he is potentially going to need them to support him for some time, we conclude that the award of £10,000 of costs is appropriate in all the circumstances.

Employment Judge Webster

27 June 2024

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Sent to the parties on
Date: 8 July 2024