EMPLOYMENT TRIBUNALS

Claimant: **Mr A Ikeji**

Respondents: **(1) Office for Rail and Road**
(2) Mr D Wilson
(3) Mr M Farrell
(4) Ms V Rosolia

Heard at: **East London Hearing Centre**

On: **29 May 2024 (with the parties)**
10 June 2024 (in chambers)

Before: **Employment Judge Gardiner**
Members: **Mrs B Saund**
Ms T Jansen

Representation
Claimant: In person
Respondent: Gordon Menzies, counsel

RESERVED COSTS JUDGMENT

The judgment of the Tribunal is that:-

1. The Claimant's application for a preparation time order and a wasted costs order are dismissed.

2. The Respondent's application for a costs order is granted in the sum of £5,000 plus VAT.

WRITTEN REASONS

1. The Tribunal has had to consider and decide two applications for costs – one from the Claimant and one from the Respondent. As the Claimant's application was the first in time, the Tribunal considers that application first.

Claimant's costs application

2. The Claimant makes an application for a wasted costs order or for a preparation time order. This was first made orally to the Tribunal during the Final Hearing. At that point, the Tribunal told the Claimant that his application would be considered at the conclusion of the case.

3. The basis of the Claimant's application is that the Respondent unreasonably objected to his inclusion of certain documents in the bundle which was being prepared for the Final Hearing. As a result, he claims he had to prepare his own bundle which was time consuming and costly. He seeks an order that the Respondent (preparation time order) or its legal representatives (wasted costs) should reimburse him for his time and his expenditure.

4. Employment Judge Russell had set out various directions about the preparation of the trial bundle for the Final Hearing. She directed that by 25 July 2023, the First Respondent was to provide the Claimant with a clear, indexed and paginated draft copy of the bundle "containing all the relevant documents which any party wishes to be included".

5. She directed that by 6 September 2023, the Claimant should notify the First Respondent of any further relevant documents to be included on his behalf. She added that if there was any dispute as to the admissibility of a document, the parties should include them in the bundle, behind a separate divider but sequentially numbered from the main bundle. The party seeking to include the document was responsible for providing sufficient copies for the Tribunal. Admissibility would be decided at the Final Hearing.

6. Employment Judge Russell was recognising the potential for there to be disputes about the admissibility of certain documents. She was providing a mechanism whereby such disputes would be resolved. As we read her Order, she was directing that relevant documents were to be included by the Respondent (our emphasis). If there was a dispute about the relevance of documents (such that one party reasonably maintained that potential documents were not to be included because they were irrelevant), then the cost of including the additional documents in a supplementary bundle should be borne by the party seeking their inclusion.

7. As a result, the starting point for the subject matter of the Claimant's application is that the further disputed documents he wanted included should be included at his own expense, rather than the Respondent's expense. If, however, he can show that these documents were clearly and obviously relevant, such that it was unreasonable for the Respondent to object to their inclusion, there is a potential basis for making a preparation time order against the Respondent for unreasonably putting the Claimant to unnecessary expense and inconvenience.

8. The Claimant's position is that the Respondent's refusal to include his documents was unreasonable; and that as a result of the Respondent's unreasonable stance the

final hearing bundle was not completed by 4 October 2023 as directed. Even by 21 March 2024 the bundle was not complete. As a result of the Respondent being five and a half months late in including these documents, the Claimant had to produce his own supplementary bundle. He says that this took him 40 additional hours and cost £500 in copying charges. He has not produced a breakdown of how the figure of 40 hours has been arrived at; nor has he produced any receipts evidencing £500 in copying charges.

9. The Respondent's position is that there was only one document that it initially decided not to include in the Tribunal bundle. This was the statement of Victoria Rosolia produced for separate proceedings addressing separate issues. At the Final Hearing, the Claimant chose not to cross examine her on the document and it was not specifically relied upon by the Claimant in any event. In the course of the argument at this costs hearing, the Respondent's counsel took the Tribunal through the chronology of correspondence between the parties about the contents of the bundle for the Final Hearing. At points in this correspondence, it appears that the Claimant accused the Respondent's solicitor of corruption and of perverting the course of justice. It is not necessary for the Tribunal to set out the detailed chronology.

10. The Tribunal accepts that on 13 November 2023, following a series of intemperate exchanges between the Claimant and the Respondent's solicitor, the Claimant took the initiative to prepare his own supplementary bundle containing 13 items, including the statement of Victoria Rosolia. It comprised 30 pages. With some slight modifications, the Claimant continued to insist that the additional pages should be included in evidence. The Claimant's witness statement was then prepared and statements were exchanged in accordance with the Tribunal's timetable at a point where there was no single agreed bundle of evidence.

11. It appears that in March 2024, the Respondent decided to consolidate the various additional bundles on which the Claimant was relying with the original bundle prepared by the Respondent so as to include the further documents requested by the Claimant. It prepared a further composite bundle of documents. It revised the original page numbers indicating in a revised index the original and new page numbers. This meant that cross references to page numbers in the bundle in the Claimant's witness statement were now inaccurate. However, in addition to updating the cross references in its own witness statements, the Respondent chose to update the cross references in the Claimant's witness statements so that they now corresponded to the composite bundle of documents.

12. The Tribunal has the jurisdiction to decide whether to make a preparation time order where it considers that a party or that party's representative has acted unreasonably in the way the proceedings have been conducted (Rule 76(1)(a) ET Rules 2013). In that event, it must go on to decide whether to exercise the discretion in the particular circumstances.

13. The Tribunal may consider whether to make a wasted costs order where the Respondent's solicitor has acted unreasonably, improperly or negligently.

14. The Tribunal does not consider that it would be appropriate to make a wasted costs order against the Respondent's solicitor. The Claimant has not established that the Respondent's solicitor has acted unreasonably improperly or negligently. It would not be just to require the Respondent's representative to show cause why it should not compensate the Claimant. Further, it would not be appropriate to make a preparation time order. The Respondent's conduct in relation to the preparation of a Final Hearing bundle does not amount to unreasonable conduct, for the following reasons:

    a. There is inevitable expense and inconvenience on both sides in preparing for a Final Hearing, particularly where the factual and legal issues were as complicated as they were in the present case.

    b. Here, Employment Judge Russell's order did not require that the Respondent agree to include every document in the Final Hearing bundle which the Claimant asserted to be relevant. Her order anticipated that documents that the Claimant maintained were relevant but which the Respondent reasonably considered to be irrelevant could be included, but at the Claimant's expense and inconvenience.

    c. The burden is on the Claimant to show that the stance adopted by the Respondent in correspondence about documents was an unreasonable one. He has failed to do so. It appears that the Respondent's objection to the inclusion of certain documents was reasonable - they concerned other litigation, rather than the current litigation, or otherwise reasonably appeared to be irrelevant. In any event, the Respondent did subsequently accept they should be included and updated the Claimant's cross references in his witness statement to reflect the new pagination.

15. Rather it appears that it was the Claimant who was using intemperate language in speaking about the Respondent's solicitor in the course of the correspondence. The reasonableness of the other party to litigation is a factor to consider when deciding whether to exercise any discretion to make a costs order in their favour, even if the Tribunal's jurisdiction to do so has been engaged.

16. It is unfortunate that there appears to have been a breakdown in co-operation between the parties over the issue of the preparation of a trial bundle with the result that the Claimant chose not only to produce his own bundle but also to make copies of that bundle months before a paper copy was required for the Tribunal Panel conducting the Final Hearing. He did not check with the Respondent before incurring the time and expense of doing so. That decision resulting from the breakdown in co-operation may have put the Claimant to additional expense and inconvenience. However, that decision appears to have been significantly impacted by the intemperate language and therefore unreasonable attitude adopted by the Claimant during the course of the correspondence.

17. For all these reasons, the Claimant's preparation time order and wasted costs order applications are refused.

The Respondent's costs applications

18. The First Respondent has made a lengthy written application for costs, spanning 14 pages. The costs application is not limited to the costs of contesting any particular issue, or from any particular point in time. Rather the Respondent is seeking the entirety of its costs, as set out in its Schedule of Costs. These total £108,591.50 plus VAT. Whilst a breakdown has been provided by fee earner, no breakdown has been provided based on the dates when the work was carried out.

19. If the Tribunal has jurisdiction to make a costs order and decides to exercise its discretion to do so, it may order costs in a specified amount, not exceeding £20,000, or may order a detailed assessment (Rule 78(1)(a) ET Rules 2013). The Respondent's application makes clear that "the sum claimed is in excess of £20,000" and as a result, "the Respondents seek detailed assessment by the Tribunal of the sum claimed".

20. The Respondent advances several distinct bases for its argument that the Claimant should be subject to a costs order:

    a. Firstly, the Respondent notes that a deposit order was made in relation to the complaints of unauthorised deduction of wages and of unfair dismissal. It argues that these complaints were decided against the Claimant for substantially the reasons given in the deposit order. Therefore, by reason of Rule 39(5)(a), the Claimant should be deemed to have acted unreasonably in pursuing those specific allegations or arguments for the purpose of Rule 76, unless the contrary is shown.

    b. Secondly, the Respondent points to the intemperate language that the Claimant has chosen to use in correspondence with the Respondent's solicitor, which the Respondent characterises as vexatious, abusive or otherwise unreasonable conduct.

    c. Thirdly, the Respondent notes the number of iterations of this case in terms of the length of the list of issues and the seriousness of the issues. It argues that the allegations have "multiplied like topsy the longer the case has gone on".

    d. Fourthly, the Respondent argues that the Tribunal found that the Claimant was lying in the way that he gave his evidence.

    e. Fifthly, the Respondent points to the Claimant's failure on the remaining issues. It argues that it was unreasonable for the Claimant to pursue those other issues.

Deposit order

21. The consequences of losing on a complaint which is subject to a deposit order are detailed within Rules 39(5) and 39(6) of the Employment Tribunal Rules 2013: "(5) If the Tribunal at any stage following the making of a deposit order decides the specific

allegation or argument against the paying party for substantially the reasons given in the deposit order-

(a) The paying party shall be treated as having acted unreasonably in pursuing the specific allegation or argument for the purposes of rule 76, unless the contrary is shown; and

(b) The deposit shall be paid to the other party (or, if there is more than one, to the other party or parties as the Tribunal orders),

otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph 5(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order."

22. The Tribunal made a deposit order in relation to two of the Claimant's complaints - the unauthorised deduction of wages and the unfair dismissal complaint. The Tribunal's reasons given for each were as follows:

> Unfair dismissal – "I have carefully considered the information relied upon by the Claimant as amounting to a protected disclosure (namely his email of 24 May 2022 and its attachments). I am satisfied that the Claimant has little reasonable prospect of showing that he disclosed information in these documents. Even if he does, then I conclude that when considered objectively by references to the circumstances of the Claimant, he has little reasonable prospect of successfully showing either that he reasonably believed that such information was in the public interest or that it tended to show a relevant breach."
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> Unauthorised deduction of wages – "[the Claimant's case was] that, in short, the Claimant was willing and able to return to work if reasonable adjustments were made, the Respondent refused to do so therefore the Claimant was unable to return to work and was not paid. Whilst the lost pay may be a remedy for a successful failure to make reasonable adjustments, the contractual entitlement to pay is conditional upon performance of the contracted job. In the circumstances, I am satisfied that the Claimant has little reasonable prospect of establishing a contractual right to pay as a matter of law."

23. The reason why the Claimant lost his automatic unfair dismissal claim was for the same reason as identified by Employment Judge Russell. The Tribunal did not accept that any of the alleged protected disclosures amounted in law to protected disclosures. The reason why the Claimant lost his claim for unauthorised deduction of wages was again for the same reason as identified by Employment Judge Russell. The Claimant was not willing to carry out his contracted duties and this was why he was not paid.

24. In accordance with Rule 39(5), the Claimant should be treated as having acted unreasonably in pursuing this allegation unless the contrary is shown. The Claimant

alleges that he has shown the contrary. He points to documents that were disclosed after the deposit order was made and paid, which he says vindicated his decision to proceed with these allegations. He points to the following documents:

(a) The disclosure of an email dated 22 March 2022 from Jo Napper (HR Business Partner) to Donald Wilson and Tom Wake stating "May I suggest that we keep declarable email comms to the minimum? Happy to chat as needed on this" [833].

(b) An email exchange between Tom Wake and Donald Wilson in early March 2022 with the subject Adrian Ikeji, started by Donald Wilson writing as follows on 4 March:

> "I think we need a chat next week Tom! If he's serious, and he's not the type to joke, I see little point in training him up just for him to leave. I don't want a part-timer or load of pointless PPCF form filling! Yesterday I hauled him in over his lateness habit and other matters.
> He is in a probationary period. Have a good weekend" [777]

The response to this from Tom Wake on 7 March 2022 was as follows:

> "Morning Don
> Have you spoken to HR? I think you need to find out what his contract says and what grounds there might be for dismissal/failure of probation. Likewise did he sign a training contract and how enforceable is that?
> Happy to speak today" [778]

25. The Claimant also says that the evidence on which he wanted to rely at the Final Hearing could not be tested because the Respondent chose not to call the HR Business Partner.

26. We find that the Claimant has not shown to the contrary by referring to these particular documents. They do not provide evidence countering the points identified by EJ Russell which formed the basis of her deposit order.

27. Where Tribunal finds that a party has acted unreasonably in bringing a particular allegation, "the Tribunal may make a costs order or a preparation time order and shall consider whether to do so" (Rule 76(1)). This section requires the Tribunal to consider whether to exercise its discretion to make a costs order where it finds that there has been unreasonable conduct.

28. The Tribunal considers it would be appropriate to exercise its discretion to make a costs order in relation to the issues on which a deposit order was made. The Claimant has not pointed to any persuasive factors tending against exercising the discretion to make a costs order.

29. The next issue is to identify the proportion of the total costs incurred by the Respondent that were wholly or mainly attributable to the two complaints that were the subject of the deposit orders. The Respondents argue that the Tribunal should

take a broad-brush approach estimating the proportion of the total issues covered by the complaints subject to the deposit order.

30. The Tribunal considers that the appropriate approach to take to the costs attributable to the two issues the subject of the deposit order is to ask to what extent the Respondent's costs have been increased as a result of the Respondent having to deal with those two issues on their merits rather than them being withdrawn by the Claimant following the outcome of the deposit application. The onus ought to be on the Respondent to indicate at least in broad terms the additional costs that have been incurred in arguing those two issues from 1 June 2023 onwards. If there is doubt as to what those costs have been, then the Claimant should be given the benefit of the doubt. With the quantification issue so framed, the Tribunal estimates this to be no more than £1,000.

Intemperate language - Vexatious, abusive and unreasonable behaviour in correspondence

31. The manner in which the Claimant conducted himself in correspondence is clearly abusive. By way of example, on 30 March 2023, the Claimant wrote to Respondent "stop this charade and send me a copy of the updated bundle containing the documents forthwith". On 13 August 2023, he accused the Respondent of improper conduct and deliberately concealing documents. He also accused the Respondent of misleading Employment Judge Russell and acting in bad faith. On 19 August 2023, he accused the Respondents of perverting the course of justice. On 6 October 2023, he claimed that the Respondent had not complied with Tribunal orders. The latter in itself was not vexatious, abusive or unreasonable. What was abusive was to accuse them of impropriety and corruption without providing any plausible evidence that this had taken place. On 17 October 2023, he accused the Respondent of deleting documents to cover up their acts in the hope of prejudicing the determination of the dispute. On 26 October 2023 he made a further reference to perverting the course of justice. On 27 October 2023 he said: "Your bogus assertion that there has been no delay is ill advised, but consistent with your reprehensible conduct and psychological abuse".

32. The Tribunal has reviewed the entirety of the email correspondence in which these remarks were made. There is no legitimate basis whatsoever for repeatedly and consistently communicating in those terms. It does amount to vexatious abusive and unreasonable conduct. It is a sufficient basis for engaging the Tribunal's jurisdiction to make a costs order.

33. This correspondence appears to have continued for a period of over seven months between 30 March 2023 and 4 November 2023. The Tribunal infers that this intemperate language would have increased the costs of reviewing the correspondence as well as discussing it with the Respondent's witnesses and then responding where appropriate. Whilst no figures have been provided by the Respondent and giving the Claimant the benefit of the doubt on matters of quantification, the Tribunal takes the view that this additional work would have been

at least a further 20 hours over this period of time. Given the solicitors hourly rate, this would have been an increase of about £4000 plus VAT.

34. Relevant to whether to exercise the Tribunal's discretion to make a costs order is the impact that the Claimant's abusive correspondence had on particular individuals. Ms Rosolia states (and the Tribunal accepts) that the Claimant's communications and tone were having a substantial impact on her mental health and well-being.

35. The Tribunal finds that it should exercise its discretion to make a costs order for the Claimant's vexatious abusive and unreasonable conduct.

Number of iterations of the case

36. Whilst the Claimant has added to the list of issues at various points by way of issuing a further claim or making an application for an amendment, the Tribunal does not consider that this is unreasonable conduct. It is always open to any litigant to make an amendment application or to issue further proceedings if further events occur which are alleged to amount to discrimination. Here an Employment Judge was persuaded to grant the Claimant's amendment application because on the face of it, the allegations merited resolution at the Final Hearing. The mere making of amendment applications did not amount to unreasonable conduct.

Bringing a complaint against Mr Prosser

37. The basis of this application for costs is that it was unreasonable conduct to include Mr Prosser as a named Respondent. He, as Employment Judge Russell found, had only been included as a named Respondent because he was one of two recipients of an alleged protected disclosure. He was not otherwise criticised in the second claim. The Respondent took no issue about Mr Prosser's inclusion in the original Response. In the weeks leading up to the hearing before Employment Judge Russell on 4 April 2023, the Claimant sought to add a complaint specifically against Mr Prosser. This was resisted and was ultimately refused by Employment Judge Russell. In the meantime, the Respondent had focused on the absence of any original complaint against Mr Prosser for the first time and had asked for him to be removed as a Respondent.

38. The Tribunal has decided that it was not unreasonable conduct for a litigant in person to include Mr Prosser's name as a named Respondent, even though there was no specific original allegation against him. The Claimant did have a complaint about how Mr Prosser had treated him, but this proposed complaint was not added by way of amendment. At that point, the Respondent applied for him to be removed as a Respondent and that application was granted. A key purpose in holding any Preliminary Hearing is to specifically identify the complaints which are to be determined at the Final Hearing. That is what was done at this particular Preliminary Hearing. Merely because the Claimant had made a mistake in his original second claim in including Mr Prosser does not render it unreasonable for Mr Prosser to have been named as a Respondent.

39. Even if it had been unreasonable, it would not have been appropriate to exercise the Tribunal's discretion to make a costs order in this regard. The Respondent has not identified particular additional costs which have been prompted by that mistake.

Claimant found to be lying

40. The Tribunal does not agree with the Respondent's characterisation of the way that the Claimant gave his evidence. Specifically, we do not find that he deliberately lied to the Tribunal as the Respondent alleges. Rather he has persuaded himself in various respects that events occurred in a manner which is different from what the Tribunal has found. The most striking example is at paragraph 310 where we found that his self-help solutions discovered on the internet could not reasonably be described as private cognitive behavioural therapy. This was an embellishment of the fact that he was engaged in self-help therapy rather than a lie about having therapy when no therapy had taken place. We therefore do not consider that this potential basis for a costs order has been made out.

Lack of merit in remaining claims

41. The Respondent sought a deposit order in relation to each of the complaints which were determined at the Final Hearing. Employment Judge Russell decided not to make a deposit order in relation to direct race discrimination issues 3.1, 3.3 and 3.4; on all the harassment issues and on the victimisation issues.

42. However, on Thursday 21 March 2024, only two full working days before the start of the Final Hearing, the Respondent sent a cost warning letter to the Claimant. The letter warned that it would be seeking a costs order in relation to the claims that were not the subject of a deposit order [206]. It explained that the basis was that these claims were claims that the Claimant ought reasonably to have known never had reasonable prospects of success. It added:

> "The common theme among these allegations is that our client has had a fair and legitimate reason for acting as it did, which can be supported by documentary and witness evidence, whilst you will have to demonstrate not only that all this evidence is effectively false, but also that your race was the motivating factor behind these allegations".

43. The Respondent also explained why the various disability discrimination claims would fail. Entirely unrealistically, the letter concluded by suggesting that "if you have not [taken legal advice] already, we would respectfully encourage you to take advice ahead of the final hearing and consider whether you wish to continue advancing these claims".

44. Even if a reputable law firm had been contacted the following day, the Tribunal considers it most unlikely that they would have been able and willing to review the evidence and provide a considered advice on merits before the start of the Final Hearing two working days later. In any event, the Respondent was not making any settlement offer on a commercial basis to save itself the costs of the Final Hearing. There was therefore no offer of substance for legal advice to consider. In any event, at that point, the Tribunal infers that the Claimant would have been fully engaged in

preparing for the Final Hearing. He cannot be reasonably criticised for failing to take up their suggestion of seeking legal advice at that point; or failing to engage with the substance of the costs warning letter.

45. The Claimant had previously engaged lawyers to assist him with earlier stages of the litigation. No detailed analysis has been provided by the Respondents about the extent of their involvement. However, it appears that the Claimant has been a litigant in person at least since the point when witness statements were exchanged. As a result, he did not retain lawyers at a point when a sufficiently clear picture of the evidential landscape and the resulting prospects of success might have been apparent.

46. At no point did the costs warning letter promise the Claimant that if he withdrew the complaints in their entirety, the Respondents would not seek to recover their costs incurred to date – either in relation to the complaints that were subject to the deposit order, or the entirety of the claims. There was therefore no concession offered in the costs warning letter as an incentive for him to drop the Tribunal claim.

47. The Tribunal is left with the clear impression that this letter was written as a litigation tactic to support a costs argument once liability had been decided, rather than in a genuine attempt to bring the litigation to an end.

48. No good reason has been given for why this letter was not sent far earlier if it was genuinely intended to save costs and bring the litigation to a speedy conclusion. Reference to the Respondent's intention to seek costs in the Respondent's Response is not the same as a detailed costs warning letter. Therefore, the Tribunal does not accept that the Claimant has behaved unreasonably in failing to respond to the costs warning letter by withdrawing all his complaints at that stage.

49. The Respondents' application to be awarded the costs of defending the entirety of the complaints is not necessarily dependent on the unreasonableness of the Claimant's response to the costs warning letter. However, the fact that no relevant costs warning letter was sent before that very late stage is an important consideration (*Rogers v Dorothy Barley School* UKEAT/0012/12 (14 March 2012)). So is the outcome of the deposit order application. Given that the Respondent failed in its attempt to obtain a deposit order in relation to the remainder of the issues, the Claimant (as a litigant in person from mid-2023 onwards) could be forgiven for thinking that there was at least sufficient merit in the remainder of his claims to avoid a costs sanction.

50. The Tribunal's standard approach is not to make a costs order against a party in relation to an issue merely because the party has lost on that issue. There must be some particular feature which indicates that pursuing the claim or part of the claim was unreasonable. The Tribunal has carefully reviewed the specific paragraphs of the Judgment referred to in paragraph 14 of the Respondent's written costs application. It would be disproportionate to address each costs in turn. Most of the points made reflect the fact that the Tribunal preferred the evidence of the Respondent's witnesses to that of the Claimant.

Amount of Respondent's costs incurred

51. The letter ended "Our client's costs to date are £45,663.49 and they will incur approximately £15,000 in costs for the remainder of this case. Our client intends to seek the full value of these costs from you and you are encouraged to strongly consider whether you wish to pursue these claims further" [209].

52. Notwithstanding the figure given in this letter, by 23 May 2024, the Claimant's total costs were £108,591.50 plus VAT. Mr Menzies, counsel for the Respondent, has not explained the discrepancy between the future costs of £15,000 envisaged in the letter of 21 March 2024 and the additional sum of almost £63,000 plus VAT set out in the Respondent's Costs Schedule. It is not clear to what extent they relate to his own fees as counsel. It is unlikely his fees would account for the majority of this sum, given that by that point his brief fee would have been incurred, two working days before the first day of a seven-day Final Hearing. The anticipated further costs would ordinarily relate to counsel's daily refreshers for attending the six subsequent hearing days, together with any work necessary arising from the Judgment and attending to the issue of remedy (in the event that the Claimant succeeded to any extent, which the Respondent must have assumed he would not have done, given the tenor of the letter).

53. The reasonableness of the Respondents' costs is primarily a matter for detailed assessment. However, this stark discrepancy based on the Claimant's own figures, is a reason to be sceptical as to whether the Respondents' costs are indeed as high as the Schedule of Costs suggests.

The exercise of the Tribunal's discretion to make a costs order

54. In summary the factual features here which are relevant to whether the Tribunal should exercise its discretion to make a costs order are:

    a. The Claimant has succeeded in his claim for wrongful dismissal, albeit that he has only received nominal damages.

    b. The Claimant has lost on two complaints where the Tribunal has made a deposit order and has not shown he has acted reasonably in continuing to pursue those complaints.

    c. The Claimant has repeatedly acted abusively in correspondence and in the way he has conducted himself towards the Respondent's witnesses.

    d. The Tribunal has found that the Claimant has a tendency to embellish matters in an attempt to make points more compelling (paragraph 310) but not that he has lied.

    e. The total costs said to have been incurred by the Respondents as detailed in its Schedule is not consistent with the sum set out in its costs warning letter.

The Claimant's means

55. Rule 84 provides as follows:

> "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 representatives') ability to pay"

56. As part of its costs application, the Respondent applied to the Tribunal for a specific disclosure application in relation to documents disclosing the extent of the Claimant's assets. The Claimant had refused to provide this when requested in correspondence. The Tribunal had not determined the Respondent's application before the start of the hearing. The Respondent indicated that it was content to proceed with its costs application, notwithstanding the Claimant's failure to provide documents confirming the accurate and up to date position. It did not seek an adjournment to a future date after the Respondent's specific disclosure application had been resolved.

57. The only evidence before the Tribunal as to the Claimant's means was that provided in answer to the Tribunal's questions and under cross examination by the Respondent's counsel. In summary:

    a. The Claimant stated that he had not received any regular income from employment since the date of his dismissal in July 2022. He said he did one's day's work as a polling clerk on 2 May 2024 for which he received a payment of £300.

    b. He receives £700 a month in rental income from his lodger, which helps him significantly with the mortgage costs.

    c. He states he is not entitled to benefits given the level of his savings and the equity in his properties.

    d. He stated that he had around £20,000 to £30,000 in equity in his current residential property.

    e. His family owned four properties with a total value of around £280,000. He said that the mortgage covered about 75% of the property, leaving a total sum of around £70,000 in equity.

58. So far as his monthly expenditure was concerned, he told the Tribunal that he lived frugally. His child lived abroad. He tended to walk or use public transport. He did not have a car.

59. He was cross examined about his income, equity and savings as well as about his expenditure. He said that the company received about £29,000 in rent from the four properties every year. The fixed assets of the company he accepted were just over £580,000. The company had received an unsecured loan from the Claimant of £165,000 during the year ending August 2023. He was evasive about where he had obtained such funds, other than by saying that he had been working for 25 years and this had accrued over time.

60. So far as his pension plan was concerned, he said that various previous pension plans had been transferred into a single pension plan with Legal & General. He was unable to provide any information as to the amount currently in his pension fund. He explained that he was previously able to afford to be represented by counsel at earlier hearings because he had legal expenses insurance (through his home insurance) which had lapsed. He had crowd funded his legal representation in other cases with funds provided by family members.

61. Despite not providing any documents as to his finances, the Claimant's position is that he has very limited means and would not be able to afford a costs order. The Respondent's position is that he has (through his company) declared assets of £580,000 which pays him an annual income of almost £30,000. In addition, he has monthly rent paid by his current lodger.

62. Whilst it has not proved possible for the Tribunal to reach a clear view as to the full extent of his income and his assets, we are persuaded that he does have the financial means to satisfy the level of costs order that we have decided to make in this case. Whilst our order does not provide a period for payment, it is always open to agree a specific period over which this costs order should be discharged.

The amount of a costs order

63. The Tribunal is given a broad discretion to determine the amount of any costs order where the sum to be paid does not exceed £20,000, taking into account the Claimant's means. In *Yerrakalva v Barnsley MBC* [2012] ICR 420, Mummery LJ said:

> "41. 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 [such as 'nature'; 'gravity' and 'effect'] and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances."

64. In *Sud v Ealing LBC* [2013] ICR D39, the Court of Appeal held that when making a decision as to costs, a tribunal needed to consider whether the claimant's conduct of the proceedings was unreasonable and, if so, it was necessary to identify the particular unreasonable conduct, along with its effect. This process did not entail a detailed or minute assessment. Instead, the tribunal should adopt a broad-brush approach, against the background of all the relevant circumstances.

65. In circumstances where the Respondent has not been as helpful as it might have been in providing a breakdown of its costs in relation to each of the different cost

bases it has advanced, the Tribunal must do the best it can to decide on a fair figure to reflect the matters that influence the outcome.

66. The Tribunal concludes that a fair figure for costs is £1000 plus VAT in relation to the consequences of failing on the issues covered by the deposit order and £4000 plus VAT on vexatious conduct in the way he conducted the correspondence for a period of months. This is a cumulative sum of £5000 plus VAT, which is a total of £6,000.

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Employment Judge Gardiner
Dated: 5 July 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON:
Date:

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FOR THE TRIBUNAL OFFICE