EMPLOYMENT TRIBUNALS

Claimant:	**Mr R Mervin**
Respondent:	**His Majesty's Revenue and Customs**
Heard at:	**Newcastle Employment Tribunal (remotely by video hearing)**
On:	**08 July 2024**
Before:	**Employment Judge Sweeney** **Paul Curtis** **Ann Tarn**

Appearances

For the Claimant,	**In person**
For the Respondent,	**Kara Lorraine, counsel**

JUDGMENT on costs having been given on **08 July 2024** and written reasons for the Judgment having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

WRITTEN REASONS ON COSTS JUDGMENT

Background and findings of fact from the liability hearing

1. We refer back to our findings of fact and conclusions as set out in our written reasons on liability, sent to the parties on **04 March 2024**. The Tribunal concluded that the complaint of direct disability discrimination was misconceived from the outset. What was advanced by the Claimant as an act of direct discrimination was no more than a gentle prompt and words of encouragement from Ms Hails, where he had been asked by her for his thoughts and to put forward suggestions as to how she could help with a return to the office. As regards complaints of harassment regarding emails between management which had only seen by the Claimant following a DSAR for the Respondent to send him all such emails, we concluded that the Claimant, when he read them after requesting them, had never in fact regarded them as creating a hostile environment for him and that he had simply latched on to 'harassment' as a suitable label to describe his disagreement and unhappiness with the

Respondent and in order to advance a claim to the tribunal. We further concluded that it was not reasonable to regard the emails as creating the proscribed environment, that by advancing these claims as harassment, the Claimant was trivialising the wording of section 28 EqA 2010 and that the claims of harassment were wholly without merit. As regards the complaint of failure to make reasonable adjustments, this too was misconceived from the outset in that:

1.1. The adjustment of home working which the Claimant argued should have been made had, in fact, been made prior to the start of the tribunal proceedings and in remained in place as at the date of the hearing. In paragraphs 112 and 113, the Tribunal concluded:

"*We conclude that the Respondent did apply the PCP in paragraph 16(a) of the issues set out in the Appendix [requirement to work from office]. However, it has taken reasonable steps to remove the disadvantage by agreeing for the Claimant to work from home, to be kept under review upon assessment of his health. The Claimant was happy with that in February 2023, as that was what he had asked for. As he confirmed to the Tribunal, he was also content that this has now been added to his Workplace Adjustment Passport …. As he confirmed in his submissions, the real complaint the Claimant has is that his passport was not updated*…."

1.2. As regards the question of 'targets', in paragraph 114 to 116, the Tribunal concluded that the Respondent not apply the specific 'targets' as advanced by the Claimant. Further, although we accepted (in paragraph 25) that the Claimant might reasonably regard the existence of KPIs/benchmarking targets as being individual targets, the Claimant was not put to any disadvantage by them (let alone a comparative disadvantage). He raised no issues regarding these targets when managed by Mr Clayton. He was at all times a high performer – one of the top performers in Ms Tennet's team and the quality of his work was high. and still managed to exceed the targets even when he voluntarily took on extra responsibilities as a trade union shop steward. He was never put under pressure by management and controlled the pace of his own work.

2. The Claimant was always aware that the adjustment regarding home working had been made and he was aware that he was a high performer and regarded as such by his managers.

The application for costs

3. Against this background, on **07 March 2024,** the Respondent made a written costs application under rule 76(1)(a) and (b) ET Rules of Procedure [**pages 151 to 152** of the costs hearing bundle]. The Respondent attached a schedule of costs showing a total cost to it in defending the proceedings of £55,587.60 but limited its application to a fixed amount limited to £20,000.

4. The application was made on grounds that:

4.1. The claims had no reasonable prospect of success from the outset.

4.2. The claimant had acted vexatiously, abusively, disruptively or otherwise unreasonably in bringing of the proceedings and in the way in which he conducted the proceedings by making unfounded allegations against his line managers.

5. The Claimant responded to the application on **08 March 2024.** He disputed that the claims had no reasonable prospects of success from the outset, contending that the acts of discrimination had been dismissed by the tribunal on the grounds that he was not disabled. Had that not happened, he suggested his case would have been much stronger. By dismissing his disabilities, the Claimant maintained that the judge (meaning the full tribunal) had effectively ended his claim for discrimination. He went on to say that he was outmatched in court by the respondent and that he was not legally trained, nor did he have legal representation. He added that at no point was he asked to pay a Deposit Order as a condition of proceeding because he had a weak case and that three judges who conducted preliminary hearings did not advise him that his case was weak. If, he said, this had been stated to him at any point, he would have dropped the case against HMRC immediately. Mr Mervin went on to make some further observations in paragraphs 19 to 24 of his letter. He concluded by saying that the costs requested would impose a severe impact on his limited resources, that this would not be appropriate and that he brought his claim in good faith as a disabled employee.

6. The Claimant sent some further written representations on **29 April 2024** [**pages 176 – 181**]. He repeated the earlier points made on **08 March 2024** but made some additional points and referred to some case law. He also made some representations on his means [**pages 179 – 180**].

Further findings of fact from the costs hearing

7. The Claimant gave sworn evidence regarding his current circumstances and means from which we were able to make the findings in paragraphs 8 to 11 below.

8. The Claimant lives within his parents in a three bedroomed, semi-detached home owned by them on which no mortgage or rent is paid by him. His total net income is approximately £1,530 a month. In setting out his monthly outgoings of £1,521.76 on **page 180**, the Claimant included the outgoings for the household as a whole – that is, for him and his parents, both of whom the Claimant told us are disabled. However, he did not set out the total household income.

9. His parents are each in receipt of at least the basic state pension. Although the Claimant said he was in control of the household finances, he did not confirm precisely how much of a state pension his parents received other than that it was the basic state pension. The most a basic state pension pays is £169.50 a week (or £8,814 a year) and we infer that this is approximately what they are paid as of July 2024.

10. Therefore, the total annual household income is approximately £35,890 (£2,990 a month).

11. As regards the outgoings, this included a monthly season ticket for a football club in Manchester at £86 a month and travel costs of about £120 a month, the vast majority of which is for travel to Manchester to support his football team. It also included a payment of

approximately £174 a month for a broadband/television package which includes sky football package.

Relevant law

12. The tribunal's power to award costs is contained in the 2013 Tribunal Rules of Procedure and in particular within rules 75 to 84.

13. Under rule 76 (1) "a tribunal may make a costs order… And shall consider whether to do so where it considers that-

> (a) a party (…) Has acted vexatiously, abusively, disruptively or otherwise reasonably either bringing of the proceedings (or part) for the way that the proceedings (or part) has been conducted.

14. It is well established that 76 (1) imposes a two-stage test: first of all the tribunal must ask itself whether the party's conduct falls within the grounds identified in rule 76 (1) ("the threshold" stage). Secondly, and if it does, the tribunal must ask itself whether it is appropriate to exercise its discretion in favour of awarding costs against that party (the 'discretion' stage). There is in reality, a third stage, if reached, regarding the amount of an order and whether to take account of the claimant's means.

15. In the decision of **Yerrakalva v Barnsley Metropolitan Council** [2012] I.C.R.420, the Court of Appeal emphasised that it was important not to lose sight of the totality of the circumstances. The tribunal must look at the whole picture when exercising the discretion to award costs or not. It must ask whether there has been unreasonable conduct in the bringing, defending or conducting the proceedings or part thereof and, in doing so, identify the conduct, what was unreasonable about it and what was its effect. Reasonableness is a matter of fact for the tribunal which requires an exercise of judgement.

16. In **Radia v Jefferies International** [2020] IRLR 431, HHJ Auerbach considered the overlap between a claim or response having no reasonable prospect of success ([R76(1)(b)] and unreasonable conduct [R76(1)(a)]. In paragraph 64, he said:

> *"This means that, in practice, where costs are sought both through the r76(1)(a) and the r76(1)(b) route, and the conduct said to be unreasonable under (a) is the bringing, or continuation, of claims which had no reasonable prospect of success, the key issues for overall consideration by the Tribunal will, in either case, likely be the same (though there may be other considerations, of course, in particular at the second stage). Did the complaints, in fact, have no reasonable prospect of success? If so, did the complainant in fact know or appreciate that? If not, ought they, reasonably, to have known or appreciated that?"*

17. The case of **Opalkova v Acquire Ltd** was concerned with a preparation time order which was sought on the grounds that the Response to some of the Claimant's claims had no reasonable prospects of success. The principles distilled from that case apply where the

question is whether to award costs in circumstances where it is said that the Claim had no reasonable prospect of success. Referring back to **Radia**, the EAT (HHJ James Tayler) held that there are three key questions to be asked when considering a claimant's claims:

17.1. Objectively analysed, when the Claim was presented did it have no reasonable prospect of success, or alternatively at some later stage as more evidence became available, was a stage reached at which the Claim ceased to have reasonable prospects of success?

17.2. At the stage that the Claim had no reasonable prospect of success, did the Claimant know that that was the case?

17.3. If not, should the Claimant have known that the claim had no reasonable prospect of success?

18. HHJ Tayler went on to say in paragraph 24 that those questions are relevant, whether the matter is analysed on the basis that the Claim had no reasonable prospect of success or that the Claimant was guilty of unreasonable conduct in bringing the proceedings. The question of whether a claim had reasonable prospects of success is objective and is the threshold for making a costs order under rule 76(1)(b), even if the Claimant was not aware, and should not reasonably have been aware, that the claim had no reasonable prospect of success. However, the lack of understanding of the merits of the claim would be relevant, along with other matters, to the discretionary question of whether a costs order should be made. The questions of whether the Claimant knew that the claim had no reasonable prospect of success, or should reasonably have known, are relevant to the threshold question for a costs order on the basis that pursuing the claim was unreasonable conduct under rule 76(1)(a); after which the discretion to make an order has to be applied considering all relevant factors.

19. In considering whether a claimant should have known that a claim had no reasonable prospects of success, the legally represented claimant is likely to be assessed more rigorously than the unpresented.

20. In **AQ Ltd v Holden** [2012] IRLR. 648, HHJ Richardson QC held at paras 32 and 33 (emphasis added):

"The threshold tests in rule 40(3) [the predecessor provision under the 2004 ET Rules] are the same whether a litigant is or is not professionally represented. The application of those tests, however, must take into account whether a litigant is professionally represented. ***A tribunal cannot and should not judge a litigant in person by the standards of a professional representative****. Lay people are entitled to represent themselves in tribunals; and, since legal aid is not available and they will not usually recover costs if they are successful, it is inevitable that many lay people will represent themselves.* ***Justice requires that tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life****….* ***Lay people are likely to lack the***

objectivity and knowledge of law and practice brought by a professional legal adviser. ***Tribunals must bear this in mind when assessing the threshold tests****…Further****, even if the threshold tests for an order for costs are met, the Tribunal has discretion whether to make an order***. *This discretion will be exercised having regard to all the circumstances. It is not irrelevant that a lay person may have brought proceedings with little or no access to specialist help and advice.*

This is not to say that lay people are immune from orders for costs: far from it, as the cases make clear. ***Some litigants in person are found to have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity***. *But the Tribunal was entitled to take into account that Mr Holden represented himself…"*

21. The test of reasonableness is an objective one which will encompass a wide range of matters, one of which would be deliberately dishonest conduct, but which might also include an unreasonably distorted perception of matters. It is for the Tribunal to judge whether that perception was unreasonable in the circumstances and such that the discretion to award costs should be exercised: **Brooks v Nottingham University Hospitals NHS Trust** UKEAT/0246/18/JOJ, per Choudhury P @ para 47.

22. It is not the law that the issue of whether a claim is misconceived depends on whether the claimant genuinely believed in it.: **Vaughan v London Borough of Lewisham** [2013] IRLR 713, EAT @ para 14.

23. It is not wrong in principle to make a costs order against a claimant even though no deposit order had been made or that no costs warning had been issued. Respondents faced with what they believe to be weak claims do not always seek deposit orders. The failure to seek an order is not necessarily a recognition of the arguability of the claim. The existence of a costs warning is a relevant factor when considering whether to exercise a discretion to award costs. The absence of such a warning does not, however, preclude the making of an order: **Brooks v Nottingham University Hospitals NHS Trust** [2019] UKEAT/0246/18/JOJ @ para 51. These are all factors in the overall assessment.

24. Costs are compensatory not punitive. costs should be limited to those 'reasonably and necessarily incurred'.

Means

25. Rule 84 of the ET Rules expressly confers on the Tribunal a discretion to have regard to the paying party's means. It is not obliged to do so.

26. In the case of **Vaughan v London Borough of Lewisham** [2013] IRLR 713, EAT, Underhill J (as he then was) stated in paragraph 28:

"The starting-point is that even though the Tribunal thought it right to 'have regard to' the Appellant's means that did not require it to make a firm finding as to the maximum that it believed she could pay, either forthwith or within some specified timescale, and to limit the award to that amount. …. If there was a realistic prospect that the Appellant might at some point in the future be able to afford to pay a substantial amount it was legitimate to make a costs order in that amount so that the Respondents would be able to make some recovery when and if that occurred. That seems to us right in principle: there is no reason why the question of affordability has to be decided once and for all by reference to the party's means as at the moment the order falls to be made."

27. Therefore, there is no requirement to come to a concluded view that a claimant has funds at his or her immediate disposal so as to be able to pay forthwith or within some specified timescale the full amount which might be assessed in due course.

28. A tribunal is not necessarily required to limit costs to an amount that the paying party can afford to pay where they are of limited means: **Arrowsmith v Nottingham Trent University** [2012] ICR 159, CA at para 21 of note 7. Indeed, the Presidential Guidance on General Case Management for England and Wales states that a tribunal may make a substantial order 'even where a person has no means of payment'.

29. A tribunal having regard to a party's ability to pay needs to balance that factor against the need to compensate the other party, who has unreasonably been put to expense. The former does not necessarily trump the latter but it may do: **Howman v Queen Elizabeth Hospital Kings Lynn** UKEAT 0509/12/JOJ, per Keith J @ para 13. In an appropriate case, when considering the claimant's means, a tribunal may consider it appropriate to have regard to the means of third parties when looking at the wider resources that may be available to him/her: **Omooba v Michael Garrett Associates Ltd t/a Global Artists** [2024] IRLR 440 @ para 182.

30. In summary, costs are the exception in the employment tribunal, not the rule. An award of costs is designed to compensate the receiving party for costs unreasonably incurred, not to punish the paying party for bringing an unreasonable case or for conducting it unreasonably. We should:

30.1. first, decide whether the threshold in Rule 76 had been crossed, that is, whether a party had acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing or conducting of all or part of the case.

30.2. Secondly, consider as an exercise of discretion whether that conduct merited a costs order - it is not automatic that because the threshold is crossed, we should exercise it. The Tribunal may have regard to the claimant's means at this stage.

30.3. Thirdly, if we decide to make a costs order, consider the appropriate amount of costs incurred by the respondent in defending the unreasonable claims. If this was less than £20,000, we could make a summary award, making the

assessment ourselves in broad terms and ordering the claimant to pay it, if appropriate, again having regard to his means.

Submissions

31. In response to the Claimant's written argument that no one had questioned the merits at an earlier stage in the proceedings, Ms Lorraine accepted that there was no costs warning in this case. However, she did not accept that that no questions had been raised regarding the merits so as to give the Claimant food for thought. As regards the complaint of reasonable adjustments the initial complaint (prior to amendment) had been about home working. She referred to paragraphs 11 and 17 of Judge Loy's case management summary of the preliminary hearing on **22 May 2023**.

32. Judge Loy (see paras 17 to 22 of his orders) directed the Claimant to provide further information by **19 June 2023**. There was then a further preliminary hearing before Judge Smith on **08 August 2023**. Employment Judge Smith thought that further clarity and information was necessary and noted that the Claimant appeared to raise a new factual, unpleaded adjustment regarding work targets. He directed a further preliminary hearing to consider, among other things, the question of amendment. It was not until the hearing before Employment Judge O'Dempsey on **02 October 2023** that the amendment issue was determined and the list of issues revised.

33. Ms Lorraine accepted that whilst there was no application to strike out or for a deposit order, it was not right to say that no one observed the claimant's claim for failure to comply with reasonable adjustments had difficulties. Judge Loy had done so. It was only after this that the Claimant sought to introduce an additional complaint regarding adjustments about targets. Once the amendment was permitted by Judge O'Dempsey, the Respondent had then to respond to this by way of an amended response, search for documents, prepare a bundle and witness statements, all of which made for a relatively short timescale leading up to a final hearing which was listed to start on **05 February 2024**. It was, she submitted reasonable and proportionate to get on with defending the claim in February rather than potentially derailing matters by making applications for deposits or strike out.

34. She submitted that the threshold for costs had been met in this case; that we then had a discretion whether to award costs and that we must decide whether to take into account the Claimant's means. She submitted that there was limited evidence of the outgoings or the income of the Claimant's parents but noted that there was no mortgage on the property and no rent to pay. There was scope for costs to be paid. She submitted that there was scope for the Claimant to reduce some of the monthly outgoings (the football season ticket, the associated travel costs, the full sky tv package).

35. The Claimant submitted that the merits of his claim were not made clear to him nor were the risks of proceeding. He repeated the point that he was a litigant in person and that he believed he had a strong case. He asked us to read what he had written in his response to the application.

Discussion and Conclusion

The first stage: threshold

36. The first question for us was whether the Claimant's conduct fell within the grounds identified in rule 76 (1)? There were two aspects to this: (1) whether the claims had no reasonable prospect of success and (2) whether the Claimant acted unreasonably in the bringing of or in the conduct of the claims?

Reasonable prospect

37. It is clear from our findings and conclusions, as cited in the paragraphs referred to in the Respondent's application and above that the claims of failure to make reasonable adjustments, direct discrimination and harassment had no reasonable prospect of success. Contrary to the Claimant's submission, his claims were not simply dismissed because the Tribunal concluded he was not disabled. There had been a concession that he was disabled from July 2023. His complaints about matters before then failed on all fronts: disability and merits. His complaints about matters from July 2023 failed on their merits.

38. **Reasonable adjustments**: we found that the adjustments sought had been made prior to him commencing proceedings and the claimant was aware of this. We found that really his complaint was that his passport had not been updated. The complaint that the employer had failed to make that very adjustment had no reasonable prospect of success. To bring such a claim was also unreasonable conduct. The same was the case for the 'targets', albeit for different reasons. The Claimant was well aware that he was a high performer and that the 'targets' (insofar as we found they might be so regarded) never put him to any disadvantage compared to others. In addition, the 'targets' were not applied to him as he maintained they had been. As he knew, he had been told not to worry about targets.

39. **Harassment**: we found that this was utterly hopeless. As with the adjustments claim, the claim of harassment had no reasonable prospect of success. To bring a claim of harassment in circumstances where the claimant did not actually perceive there to be a hostile etc.. environment was unreasonable conduct.

40. **Direct discrimination**: we refer to paras 102 – 104 of our written reasons on liability. This claim was also misconceived.

Reasonable or unreasonable conduct

41. We find that it was unreasonable conduct not only to advance the above unreasonable claims but also to advance baseless and reckless allegations of fabrication against Ms Tennet without the slightest evidence of it and of dishonesty against Mr Clayton. The Claimant, on the one hand, accepted that Ms Tennet was one of the best managers he had ever had, yet on the other hand persisted she had fabricated a straightforward, contemporaneous note in the course of her duties. There was no rationale for the suggestion of fabrication. The note was not used in any way against the Claimant by Ms Tennet. It was in keeping with the suggestion by him that Mr Clayton had also deliberately falsified a note

of a telephone conversation they had had. We had no doubt that the Claimant was being reckless with such allegations and that it was an example of his rather stubborn pernickety approach to things that he simply disagreed with. If he did not agree with a note his first resort appeared to be to make an assertion of fabrication and dishonesty. The assertion of fabrication was, as we concluded, a 'label' to describe his disagreement with the content. But of course, it is a serious matter for a person to be accused of fabricating a document in the course of their employment.

42. The Claimant had made similar allegations against Mr Lagay, the HR adviser. The Claimant had initially referred to Mr Lagay in paragraphs 12(d) and (f) of the list of issues. At the outset of the hearing, he explained that 12(d) was not harassment but was simply Mr Legay being dishonest. The Claimant said that the act of harassment was as set out in paragraph 12(f) of the list of issues (this referred to a piece of HR advice that Mr Lagay had emailed to Mr Clayton in November 2022 and which the Claimant saw following his DSAR). In discussion it was apparent that the Claimant only saw this advice after his ET1 had been submitted and no application to amend had been made. He confirmed that he wished to apply to amend. As the Respondent had called Mr Lagay as a witness, expecting to deal with the complaint, it took a pragmatic approach and did not object. The tribunal, whilst having reservations, also took a pragmatic approach and allowed the amendment (also in relation to paragraph 12(c) of the list of issues. In the end (during submissions) the Claimant abandoned the amended claim in para 12(f) because in the course of fairly straightforward questioning by Ms Lorraine, he had accepted that Mr Lagay had simply given advice and was not threatening or recommending formal action against him. We mention this because to any reasonable reader of Mr Lagay's email it was clear that he was not threatening formal action. The nature of the allegation was in the same vein of the Claimant's other allegations of dishonesty or falsification, which he has a tendency to resort to when he sees something he does not like or agree with. What he took exception to in that email was the procedural advice that at some point a manager may consider issuing the Claimant with a formal letter of return (i.e. to the office).

43. We reminded ourselves of the case of **Radia v Jefferies International,** and asked ourselves whether, in fact the Claimant knew or appreciated that his claims had no reasonable prospect of success (or that he was unreasonable in making baseless allegations of fabrication and dishonesty) and that if not, ought he, reasonably, to have known or appreciated this?"

44. We could not say for sure that the Claimant in fact appreciated that his claims had no reasonable prospect of success or that he was acting unreasonably in the way set out above. However, even having regard to the fact that the Claimant was a litigant in person (and reminding ourselves of the observations of HHJ Richardson in **AQ Ltd v Holden**) we were nonetheless satisfied that he ought reasonably to have known this because:

44.1. The Claimant had been told by Judge Loy that the fact that the desired adjustment had been made (home working) was a difficulty for him.

44.2. The Claimant was aware that he was permitted to work from home (and that the only thing that had not been done was to update his 'passport', which was something he himself could have initiated).

44.3. The fact that it was only after Judge Loy raised this 'difficulty' that the Claimant sought to amend his claim to complain of workplace targets. This we take to be an appreciation of the difficulties.

44.4. He was aware that he was not subject to targets as he put it and was aware that he was not put to any disadvantage by any targets.

44.5. As regards the claims of harassment he never actually perceived any of the proscribed effects. It was a convenient label to attach to the circumstances to enable him to air his grievances before the tribunal.

44.6. As a trade union local representative, he had access to employment legal advice.

45. In the circumstances, we were satisfied that this was a clear case where the threshold for costs has been met. Given the facts known to the Claimant, his position as a shop steward and his ability to access union advice, he ought reasonably to have known that the claims had no reasonable prospect, that the bringing of the claims was unreasonable and he ought reasonably to have appreciated that his assertions of fabrication and dishonesty were recklessly made.

46. Standing back and looking at the whole picture (as we are urged to do in the case of **Yerrakalva**), the overall impression we had was that the Claimant was defensive and resistant to reasonable overtures from management to ease him back into the office after Covid restrictions were lifted. He had not positively engaged with his managers to find a solution designed to encourage him even to have a go. His bringing of claims with no reasonable prospects was a part of this overall resistance to management, in our judgement. It did not matter if this meant advancing wholly unmeritorious allegations of fabrication or dishonesty or that it meant pursuing weak claims. The effect of all of this was that the Respondent was unreasonably put to the cost of responding to the claims and preparing for and attending a four day hearing. The cost was substantial. We also infer that the effect of the unreasonable conduct in the making of baseless allegations of fabrication was that it created a wholly unnecessary worry for those at the receiving end of the allegations, in that they would have to await the outcome of tribunal proceedings before it was safe for them to be sure that no personal consequences to them would attach to the allegations.

The second stage: discretion

47. As set out above, crossing the threshold of unreasonableness does not lead to an order for costs. We had to consider whether to exercise our discretion to do so. We first of all

addressed the Claimant's contention that no judge told him he had a weak claim and the Respondent did not seek a deposit order or a strike out. We agree with Ms Lorraine that, whilst there was no application for any such order, it was not quite right to say that no judge touched on the weakness of any part of his claims.

48. At the Preliminary Hearing of **22 May 2023**, Employment Judge Loy observed:

"a potential difficulty in relation to any claim for reasonable adjustments based on this particular complaint is that at the moment there does not appear to be any particular requirement being placed upon the claimant as things stand not to work from home, and it may be that any such complaint of a failure to make reasonable adjustments is premature."

49. Judge Loy added, in paragraph 17:

"*The claimant plainly does not want to do work in the office at all and has an outstanding application for an SWA (Special Working Arrangement) entitling him to work full-time from home on a contractual basis. I explained to the claimant that this Tribunal is here to determine existing legal disputes between the parties. It is not to be used as a form of leverage to obtain the claimant's preferred working arrangements*."

50. This ought reasonably to have been understood by the Claimant that there was a serious difficulty for him in his complaint of failure to make reasonable adjustments. Indeed, he must have recognised this as he followed this up with an application to amend to include a complaint about targets (albeit this too had no reasonable prospects of success).

51. We agree with Ms Lorraine that it was then reasonable for the Respondent to focus on dealing with the amended claim and that the Respondent acted reasonably and proportionality in preparing for a full hearing rather than making interim applications to the tribunal. In any event, we refer back to paragraph 23 above and the case of **Brooks v Nottingham University Hospitals NHS Trust.** The law does not require an employer to have made an application for a deposit order or strike-out before an order for costs can be made. The fact that no such application was made is no answer to an application for costs but it was part of the overall picture and circumstances that we had regard to in considering whether to exercise our discretion to make an order.

52. Our discretion is not fettered by any requirement to determine whether or not there is a precise causal link between the unreasonable conduct in question and the specific costs being claimed. We have identified the unreasonable conduct above and its effect as per **Barnsley v Yerrakalva** (above).

53. Matters relevant to the first stage can overlap with the assessment at the second stage and we repeat what we say in paragraphs 44 and 45 above. As we have already referred to above, we also rejected the Claimant's contention that the claims were simply dismissed on the basis that the Claimant was not disabled. Finally, we also considered that the Respondent acted reasonably throughout, that its costs were substantial and that the Claimant had an ability to pay towards the Respondent's costs. This latter point is more fully explained below. Having considered these matters, we decided to exercise our discretion in favour of making an order for costs.

The third stage: the amount of the costs order

54. Attached to its costs application, was a schedule of costs totaling £55,587.60, including disbursements and VAT. The time taken and the amounts charged by the GLD to its client, the Respondent, seemed reasonable to the tribunal as did counsels' fees, invoices for which were attached. Although the total cost exceeded £55,000 the Respondent limited its application to £20,000. The amount sought by the Respondent, albeit about 35% of its total cost, was nevertheless very substantial. For that reason, and because the Claimant had provided information on his income and outgoings in his response to the application, we considered it appropriate to have regard to his means. The Claimant had come prepared to give an account of only his income but to give an account of the outgoings for the whole household. If one looked at only his income versus the whole household expenditure, he was left with approximately £10 a month [**page 180**]. It was not until he was asked about the outgoings and wider household income that a fuller picture of income/outgoings emerged. We considered it appropriate in the circumstances to have regard to the wider resources available to him, that being the income of his parents. He was, after all, as he told us, the person who had control of the household finances and he lived in an unencumbered property.

55. Having regard to our findings in paragraphs 9 and 10 above (and recognising that we had limited evidence from the Claimant) we nevertheless erred on the side of caution by assuming a lower total net income of circa £33,680 (approximately £16,000 a year from the Claimant and £17,680 combined pension from his parents). This produced a figure of £2,806 a month. Although there was no supporting evidence provided, we accepted the Claimant's evidence on outgoings as being approximately £1,520. That left a surplus of £1,286 a month after outgoings. We did not accept the Claimant's suggestion that there were substantial on going maintenance costs on the property. He gave no evidence of what these were or on the costs. We recognised that were it not for his parents' combined income this surplus would not be there. However, as the Claimant told us he manages the total household finances and as he has given no credit for the proportion of the outgoings attributable to his parents, it was appropriate, we felt, to factor in the total resources available to him. We could have divided the outgoings by 3 as an alternative method but either approach would have resulted in more available funds that could in principle be used towards costs. This is not a formulaic or scientific approach. It is way more broad brush than that. Ultimately, we concluded that there was scope for his own contribution to outgoings to reduce (costs within his personal control being the trips to Manchester) and for his parents' contribution to increase thereby significantly increasing the Claimant's ability to contribute towards an award of costs. There must also be the facility of raising some money on the property, even though (as we understand it) the home is in his parents' name.

56. Therefore, having had regard to the Claimant's means and the principles stated in paragraphs 28 to 30 above we concluded:

56.1. He had the ability to pay some of the Respondent's costs.

56.2. As to the amount, £20,000 was in our judgement not within the Claimant's reach, so to speak. However, we felt that £5,000 is within reach. In so concluding, we took account of the likelihood that the Respondent, being a government department employer, will agree a payment plan which is, in our experience, not

unusual where an employee owes money. It would not be in the interests of the Respondent to lose an employee and not recover a debt. For example, payment over a period of say 48 months would not be unrealistic. That would be the case even ignoring the total combined household income by making small changes like renegotiating the sky tv package and making some sacrifice with regard to travel to Manchester, even if for a couple of seasons.

56.3. The amount of £5,000, although less than 10% of the total cost to the Respondent, in our judgement, represents a good balance between on the one hand the need to compensate the Respondent in dealing with and responding to hopeless claims and unreasonable conduct in their pursuit and on the other hand the ability of the Claimant to pay or raise the money to contribute towards a payment of costs. It almost covers the expense of instructing counsel.

57. Accordingly, we ordered the Claimant to pay the total amount of £5,000 as a contribution towards the Respondent's costs.

Employment Judge Sweeney

Date: 13 August 2024