EMPLOYMENT TRIBUNALS

Claimant: Mr M Koncar

Respondent: Autocraft Drivetrain Solutions Group

Heard at: Nottingham (In Chambers) **On:** 13 August 2024

Before: Employment Judge McTigue sitting alone

Representation
Claimant: No representations
Respondent: Written representations

JUDGMENT AT A COSTS HEARING CONDUCTED ON THE PAPERS

1. The Claimant is ordered to pay £12,346.69 to the Respondent.

REASONS

Introduction

1. This hearing follows on from a judgment delivered at Lincoln Employment Tribunal on 15 May 2024 in which I dismissed all remaining complaints which the Claimant had brought against the Respondent. On that day the claimant failed to attend the public preliminary hearing and I dismissed the claim under Rule 47 of the Employment Tribunal Rules of Procedure 2013 ("the ET Rules"). That judgment was sent to the parties on 31 May 2024.

2. It should also be noted that, prior to that, on 28 November 2023 a judgment was sent to the parties which struck out the Claimant's claim for unfair dismissal. That strike out judgment was on the basis that the Claimant had failed to make representations in writing as to why the complaint of unfair dismissal should not be struck out because the requirement for the claimant to

have completed two years' continuous employment under section 108 of the Employment Rights Act 1996 ('ERA 1996') was not satisfied, nor did the Claimant request for a hearing to be listed in respect of this.

3. Following the hearing of 15 May 2024, the Respondent made an application pursuant to Rule 76 of the ET Rules for its Costs in respect of the Judgments sent to the parties on 28 November 2023 and 31 May 2024. The application was made on the following grounds:

   (a) the Claimant has conducted the proceedings in an abusive, vexatious and/or unreasonable manner (Rule 76(1)(a));

   (b) that bringing a claim for unfair dismissal, breach of contract, and discrimination was unreasonable and/or had no reasonable prospect of success (Rule 76(1)(b)); and

   (c) the Claimant has been in breach of the Tribunal's Case Management Orders (Rule 76(2)).

The hearing

4. The respondent was content for the costs application to be determined on the papers. I wrote to the claimant on 5 June 2024 stating:

   "In respect of the Respondent's application for costs, Employment Judge McTigue orders that the claimant should indicate whether he wishes to have that matter dealt with on the papers or at a hearing. Such indication should be received by the Employment Tribunal within 14 days of the date of this email. In addition, if the claimant wishes the Tribunal to have regard to his means and ability to pay any possible costs order, he should supply evidence of his means to the Tribunal within 14 days of the date of this email."

   . The Claimant did not respond.

5. I wrote to the parties on 20 June 2024 stating:

   "*There being no response from the claimant, Employment Judge McTigue has directed that the respondent's costs application will be heard by him on the papers on Tuesday 13 August at 10am. As this is a paper hearing, the parties should not attend.*

   If the claimant or respondent wish to make submissions in respect of that hearing, those submissions must be received by the Tribunal by no later than 4pm on 30 July 2024."

6. No submissions were received from the Claimant. The Respondent submitted written representations and also prepared a bundle running to 84 pages. The Respondent also supplied copies of ten invoices relating to its Solicitors' time together with breakdowns of the tasks claimed in relation to those invoices. The Respondent also supplied an invoice received from Counsel who attended the hearing on 15 May 2024.

7. The respondent seeks costs of £12,487.89.

Background

8. On 30 March 2023 the claimant commenced proceedings against the respondent claiming unfair dismissal pursuant to section 98 ERA 1996, race discrimination pursuant to s9 Equality Act 2010 ('EqA 2010'), and harassment pursuant to s26 EqA 2010, and breach of contract.

9. On 19 June 2023 a preliminary hearing for case management purposes was conducted by EJ Heap. In accordance with paragraph 1.1 of the Tribunal's Case Management Orders dated 19 June 2023 ("the CMOs), the Claimant was required to write to the Tribunal to confirm if he sought to continue with his constructive dismissal claim, and if so, to show cause as to why it should not be struck out because he lacked the 2 years' continuous service required to bring such a claim, or to request a hearing to make representations. He was also required to provide Further and Better Particulars of his claim for race discrimination. He was required to complete those actions by 3 July 2023.

10. On 2 July 2023, the Claimant submitted a document entitled 'Response to Orders'. (pages 34-37 of the Bundle). That document lacked sufficient clarity of the claimant's claims and on 21 July 2023, the Respondent made an application to the Tribunal for the Claimant to particularise his claims (pages 38-39). That application also set out a schedule of points required by the Claimant to do this.

11. On 27 July 2023, the Respondent complied with the CMOs and submitted their Amended Grounds of Resistance (page 40 of the Bundle).

12. On 23 August 2023, and in accordance with paragraph 3.2.1 of the CMOs, the parties were required to complete disclosure of documents to each other. The Respondent provided the Claimant with their disclosure list and copy documents (page 41 of the Bundle). The Claimant failed to comply with the CMO made in respect of disclosure and, to date, has failed to disclose any documents.

13. On 11 September 2023, the Respondent filed an application to strike out the Claimant's claim (the 'First Strike Out Application') pursuant to Rule 37 of the ET Rules, with respect to the Claimant: (a) failing to comply with the Tribunal's CMOs; and (b) his claims having no reasonable prospect of success (pages 43-44 of the Bundle).

14. On 22 September 2023, the Tribunal advised that the 'draft schedule [in the Application for Further and Better Particulars] should be adapted by the claimant' to particularise his claims, and ordered for the Claimant to complete this by 6 October 2023 (pages 45-46 of the Bundle). The Claimant failed to comply with this order.

15. On 23 October 2023, the Respondent wrote to the Tribunal submitting a further application to strike out the Claimant's claim (the 'Second Strike Out Application') pursuant to Rule 37 of the ET Rules, with respect to the Claimant: (a) failing to comply with the Tribunal's orders; (b) not actively pursuing his claim; and (c) his claims having no reasonable prospect of success (page 47

of the bundle).

16. By 13 November 2023, the Respondent had received no acknowledgement or objection from the Claimant in respect of the Second Strike Out Application. The Claimant had also still failed to provide his Further and Better Particulars and disclosure. In view of the upcoming CMO to exchange witness statements on 12 December 2023, the Respondent referred the Tribunal to the Second Strike Out Application for consideration (page 48 of the Bundle).

17. On 28 November 2023, the Claimant's claim for unfair dismissal was struck out on the basis that he had failed to make representations in writing as to why the complaint of unfair dismissal should not be struck out because the requirement for the claimant to have completed two years' continuous employment under section 108 of the Employment Rights Act 1996 ('ERA 1996') was not satisfied, nor did the Claimant request for a hearing to be listed in respect of this.

18. Also on 28 November 2023, the Tribunal granted the following Unless Order against the Claimant: 'Unless within 14 days of the date of this order, the claimant provides the further and better particulars of his discrimination claims to the Tribunal and the Respondent, only his claims of discrimination already identified above will be allowed to proceed to the final hearing' (pages 51-52 of the Bundle).

19. Karen Stubbs ('KS') acknowledged receipt of the Tribunal's correspondence on behalf of the Claimant and confirmed that the Claimant would provide his Further and Better Particulars by no later than 4 December 2023 (page 53 of the Bundle).

20. On 29 November 2023, the Respondent advised KS that should the Claimant fail to comply with the outstanding case management steps, including his commitment to provide his Further and Better Particulars by 4 December 2023, the Respondent would make a further strike out application (page 54 of the Bundle).

21. On 1 December 2023, the Respondent wrote to KS, who had been corresponding on behalf of the Claimant, and the Claimant himself, to confirm who correspondence should be directed to going forward. The Respondent advised the claimant that the next CMO for the parties to comply with was exchanging witness statements on 12 December 2023. The respondent also requested for KS to provide a date by which the Claimant would provide his disclosure (page 55 of the Bundle).

22. The claimant failed to provide his Further and Better Particulars by 4 December 2023. That was the date that KS indicated they would be provided by.

23. On 19 December 2023, the Respondent wrote to the Tribunal in respect of the Claimant's failure to comply with his own deadline to provide Further and Better Particulars and the Tribunal's Unless Order. The Respondent requested that the Claimant was only permitted to advance the claims already pleaded. It should be noted that at this point in time, the Claimant had failed to comply with the Tribunal's orders in respect of providing Further and Better Particulars, disclosure, and exchanging witness statements.

24. The Respondent submitted a further application to strike out the Claimant's claim (the 'Third Strike Out Application') pursuant to Rule 37 of the ET Rules, with respect to the claim: (a) being scandalous, vexatious and unreasonable. The Respondent also requested that a Preliminary Hearing was arranged to consider the Third Strike Out Application (page 56 of the Bundle).

25. On 20 December 2023, KS advised that the reason for the Claimant failing to provide Further and Better Particulars was because he was 'content' with the claims already identified (page 57 of the Bundle).

26. On 15 February 2024, the parties received notice of a Preliminary Hearing to consider whether the Claimant's claim for discrimination and breach of contract should be struck out because: (a) the Claimant had not complied with the Tribunal's orders; (b) the Claimant was not actively pursuing his claim; (c) the claims of discrimination were out of time; and (d) the claims of discrimination and breach of contract had no reasonable prospect of success. The Preliminary Hearing was listed for 15 May 2024 (the 'Hearing').

27. On 10 May 2024, a costs warning letter was sent to the Claimant by the Respondent. The costs warning set out the Respondent's position on Costs, stating the Respondent believed the Claimant: (a) acted in a vexatious and unreasonable manner by failing to engage with the Tribunal process; (b) had no real prospect of success in bringing his misconceived claim for discrimination and breach of contract; and (c) had breached the Tribunal's orders (pages 82-84 of the Bundle).

28. On 14 May 2024, the Respondent wrote to the Tribunal to advise that they had received no acknowledgement by the Claimant or KS to the correspondence to the Tribunal sent on 10 May 2024, nor had they received any indication that the Claimant or KS intended on attending the Hearing. KS failed to confirm whether she was still acting on behalf of the Claimant and to assist the Tribunal, the Respondent requested that the Claimant and/or KS confirm whether they intended on attending the Hearing by no later than 3.00pm on 14 May 2024. The Respondent reminded the Claimant that they considered his failure to engage unreasonable conduct, of which the Respondent referred him to ET Rule 76(1)(a) on the matter of Costs (pages 66-67 of the Bundle).

29. At 8.36am on 15 May 2024, the day of the Hearing, KS notified the Tribunal and Respondent that the Claimant was not able to attend due to 'unforeseen personal circumstances' and advised that the Claimant would be withdrawing his claims. No supporting evidence was provided. A copy of that correspondence is at page 78 of the Bundle. The Respondent then requested that KS confirm that the Claimant wanted to formally withdraw his claim, and for that to be done before the Hearing commenced. KS did not acknowledge or respond to this correspondence, nor did she confirm whether she was still acting on behalf of the Claimant, or if she would be in attendance at the Hearing (page 79 of the Bundle).

30. The Respondent's Counsel attended the Hearing and assisted me in attempting to contact both the Claimant and KS, who had both failed to attend. As previously stated, due to the claimant's non-attendance, I dismissed the claim under Rule 47 of the Employment Tribunal Rules of Procedure 2013.

The Law

31. Rules 74 to 84 of the ET Rules deal with the question of whether an Employment Tribunal should make an Order for costs.

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

> "***When a costs order or a preparation time order may or shall be made***
>
> *76. (1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—*
>
> *(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or*
>
> *(b) any claim or response had no reasonable prospect of success.*
>
> *(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.*
>
> *(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been adjourned or postponed on the application of a party."*

33. **Milan v Capsticks Solicitors LLP & Others UKEAT/0093/14/RN** sets out that a structured approach should be taken in relation to an application for costs where the then President of the EAT, Langstaff J, described the exercise to be undertaken by the Tribunal as a 3-stage exercise at paragraphs 52:

> *"There are thus three stages to the process of determining upon a costs order in a particular amount. First, the tribunal must be of the opinion that the paying party has behaved in a manner referred to in [Rule 76]; but if of that opinion, does not have to make a costs order. It has still to decide whether, as a second stage, it is "appropriate" to do so. In reaching that decision it may take account of the ability of the paying party to pay. Having decided that there should be a costs order in some amount, the third stage is to determine what that amount should be. Here, covered by Rule [78], the tribunal has the option of ordering the paying party to pay an amount to be determined by way of detailed assessment in a county court."*

34. As the Court of Appeal reiterated in **Yerrakalva v Barnsley Metropolitan Borough Council and anor 2012 ICR 420**, CA, costs in the employment tribunal are still the exception rather than the rule. Given that costs are

compensatory, and not punitive (**Lodwick v Southwark London Borough Council 2004 ICR 884, CA**) it is necessary to examine what loss has been caused to the receiving party. In this regard the Court of Appeal in Yerrakalva held that costs should be limited to those ‘reasonably and necessarily incurred’ and also made clear that whilst there is no requirement for the Tribunal to determine whether there is a precise causal link between the unreasonable conduct in question and the specific costs being claimed, that does not mean that causation is irrelevant

35. When the tribunal is considering an order under rule 76(1)(b), the guidance offered in **Radia v Jefferies International Ltd (2020) IRLR 431**, **EAT** and **Opalkova v Acquire Care Ltd EA – 2020 – 000345 – RN**, **EAT** is that where there is an overlap between unreasonable bringing of or conduct of the claim under rule 76 (1) (a) and no reasonable prospect of success under (b), the key issues for consideration by the tribunal are in either case likely to be the same. Thus at paragraph 64 in **Radia** HHJ Auerbach posited three questions that should be addressed - 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? **Radia** also notes that tribunals should focus on what the parties knew about their cases at the time, not what the tribunal knows after hearing the evidence.

36. In terms of abusive, disruptive or unreasonable conduct, “unreasonableness” bears its ordinary meaning and should not be taken to be equivalent of “vexatious” (**National Oilwell Varco UK Ltd v Van de Ruit UKEAT/0006/14**).

37. Guidance has been given by the Court of Appeal in **Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78** on the approach to assessing unreasonable conduct:

> *“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”.*

38. The tribunal does not need to identify a direct causal link between the unreasonable conduct and the costs claimed (**MacPherson v BNP Paribas (London Branch) (No 1) [2004] ICR 1398**).

39. Where costs are awarded under Rule 76(2) there is no need to find that the party has acted vexatiously, abusively, disruptively or otherwise unreasonably. It is sufficient that they are clearly responsible for the breach.

40. With regard to litigants in person the Employment Appeal Tribunal stated in **AQ Ltd v Holden 2012 IRLR 648** at paragraph 32 that when assessing the threshold tests in the then equivalent to rule 76(1) of the Tribunal Rules 2013:

> *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.

Conclusions

41. Following the 3-stage test, I now turn my attention to the following matters:
    41.1. Has the Claimant behaved in a manner proscribed by the Rules?
    41.2. If so, should I exercise discretion to make a costs order in the Respondent's favour?
    41.3. If I exercise discretion in favour of a costs order, what amount should be paid?

Stage 1 - Has the Claimant behaved in a manner proscribed by the Rules?

42. When considering whether the first stage I shall first consider rules 76(1)(a) and (b) before considering 76(2).

<u>Did the Claimant act unreasonably in the conduct of proceedings? Did the Claimant bring claims with no reasonable prospect of success?</u>

43. **Radia** confirms the key issues for consideration when dealing with Stage 1 overlap between the two limbs relied on by the Respondent in respect of this part of their application. Whether the Claimant was unreasonable in bringing or continuing the claims is closely connected to the issue as to whether the claims had no reasonable prospect of success and whether the Claimant knew or ought to have known that. The limbs in this case cannot be sensibly separated in my view, and so are considered together.

44. The Claimant's claim for unfair dismissal had no reasonable prospect of success. The Claimant lacked the requirement to have completed two years' continuous employment under section 108 ERA 1996 to bring such a claim, and it was struck out on the basis that the Claimant had failed to make representations in writing as to why the claim should not be struck out, or to request a hearing. I take into account the fact that the Claimant is a litigant in person but it was explained to him by EJ Heap at the preliminary hearing on 19 June 2023 that two years' continuous service was required for an unfair dismissal complaint. EJ Heap also observed that it did not appear from the claim form that he was complaining of any category of automatically unfair dismissal. The claimant was given until 3 July 2023 to confirm whether he wished to pursue his unfair dismissal claim and, if so, show cause. He did not respond and the unfair dismissal claim was eventually struck out on 28 November 2023. Following the preliminary hearing heard by EJ Heap the claimant had knowledge that his unfair dismissal claim had no reasonable prospects of success but he took no action and continued to pursue his complaint. It was therefore unreasonable to pursue the unfair dismissal complaint.

45. In respect of the race discrimination claim, the Claimant was given several opportunities to provide Further and Better Particulars. By way of example, on 21 July 2023 The Respondent provided a schedule to assist the Claimant in particularising his allegations and on 22 September 2023 the Claimant was

ordered by the Tribunal to utilise this format. No further Particulars were provided and it was not until 20 December 2023 that KS indicated that the reason the Claimant had failed to provide Further and Better Particulars was because the Claimant was content with the allegations already identified.

46. Despite that, the Claimant failed to adequately particularise his remaining allegations, and the only allegations of discrimination which proceeded were out of time. This claim therefore had no reasonable prospect of success.

47. In respect of his race discrimination claim, the claimant also acted unreasonably in indicating to EJ Heap on 19 June 2023 that he would particularise his claim and then failing to do so. If, as KS communicated on 20 December 2023, he was content with the allegations already identified, that fact should have been communicated to the respondent at a much earlier opportunity.

48. The Claimant has also conducted the proceedings unreasonably by (a) failing to attend the preliminary hearing on 15 May 2024, (b) failing to provide evidence of the unforeseen personal circumstances that he said prevented him from attending that hearing and (c) failing to respond to the respondent's email sent at 9.15am on the day of the preliminary hearing which sought confirmation that the Claimant was formally withdrawing all his claims.

49. In respect of the breach of contract complaint, quite simply the Claimant resigned without notice in breach of his contract of employment and his complaint for breach of contract therefore had no reasonable prospect of success. It would be clear to any litigant in person that the complaint had no reasonable prospect of success. The Claimant had such knowledge and so acted unreasonably in pursuing such a complaint.

50. In conclusion, I am satisfied that the Claimant has conducted the proceedings in an unreasonable manner (Rule 76(1)(a)) and that bringing the complaints of unfair dismissal, breach of contract, and discrimination was unreasonable and they had no reasonable prospect of success (Rule 76(1)(b)).

<u>Did the Claimant breach of the Tribunal's Case Management Orders?</u>

51. I shall deal with this briefly as the Respondent has already demonstrated that the Claimant has acted in a manner proscribed by the Rules. As detailed in the background provided above, it is clear to me that there was non-compliance by the Claimant with:
    - 51.1. The Orders of EJ Heap made on 19 June 2023.
    - 51.2. The Order of EJ M Butler made on 22 September 2023.

52. The Claimant has breached the Tribunal's Case Management Orders and I am satisfied that the Claimant has acted in a further manner proscribed by the Rules.

Stage 2 - Should I exercise discretion to make a costs order in the Respondent's favour?

53. The Claimant provided no evidence of his ability to pay, so this could not be considered. I bear in mind that the Claimant was a litigant in person. I

also remind myself that costs orders are "not the norm" in this jurisdiction, and that no one wishes to discourage good claims being brought to the Tribunal.

54. However, the I am satisfied that that the Claimant had met the threshold for the making of a costs order and had put the Respondent to significant expense defending claims. I also note that the Claimant has offered up no mitigation to be considered as to why I should not exercise discretion to make an order for costs

55. Considering all the relevant factors, including the fact that the Claimant received a costs warning on 10 May 2024, I am satisfied that I should exercise my discretion to make a costs order in the favour of the Respondent.

Stage 3 - What amount should be paid?

56. What is required is a consideration of what costs were reasonably and necessarily incurred by the Respondent. The Respondent's application was for the total costs as stated in its costs schedule to 30 July 2024. That figure was £12,487.89 ex VAT. The time costs of the Respondent's solicitor are £11,613. Counsel's fees are £875.89.

57. To evidence the costs incurred the Respondent has supplied 10 invoices. I have examined the invoices and their breakdowns and I am not prepared to allow the following amount to be recovered as it does not appear to relate to work done on this particular matter:
    57.1. Invoice 1530 – 9/6/23 – Emails to Client re maternity pay £27 (AS)

58. Although the preliminary hearing was held in Lincoln, this was a claim lodged in the Midlands East region. Consequently in assessing the Respondent's costs I have had regard to the Solicitors' guideline hourly rates and categorised the applicable costs guidelines as those pertaining to 'National 1'. Work was done on this matter by both Grade A and Grade D fee earners. The maximum I am therefore prepared to allow a Grade A fee earner to recover is £278 per hour. The maximum I am prepared to allow a Grade D fee earner to recover is £134 per hour. After reviewing the invoice breakdowns I have therefore reduced the amount that can be claimed in respect of the following individuals on the following invoices:

    58.1. Invoice 1530 – Only £278 can be recovered for Pam Loch (a difference of £42).
    58.2. Invoice 2651 – Only £1278.80 can be recovered for Ashley Scriven (a difference of £55.20).
    58.3. Invoice 2655 – Only £250.20 can be recovered for Ashley Scriven (a difference of £10.80).
    58.4. Invoice 2798 – Only £55.60 can be recovered for Ashley Scriven (a difference of £2.40)
    58.5. Invoice 2873 – Only £111.20 can be recovered for Ashley Scriven (a difference of £4.80).

59. Making the adjustments above I am prepared to allow the Respondent to recover £11,147.08 for their time costs and Counsel's fees of £875.89. I am satisfied that it was reasonable of the Respondent to solicitors at Grade A to deal with potentially serious claims and also require Grade D fee earners to

undertake work on the matter. It was also perfectly reasonable to instruct Counsel to attend the preliminary hearing scheduled for 15 May 2024.

60. The Claimant is therefore ordered to pay £12,346.69 to the Respondent in respect of the costs it has incurred defending his claim.

Employment Judge McTigue

Date: 13 August 2024

JUDGMENT SENT TO THE PARTIES ON

.....05 September 2024..............................

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FOR THE TRIBUNAL OFFICE

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