Case Number: 2215341/2023 and 3315336/2023

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant: **Mr. G Greco** **and**

Respondent: **Vinci Construction**

SITTING AT: **London Central**

ON: **22 August 2024**

BEFORE: **Employment Judge G Smart**
Sitting alone in public by video.

RESERVED JUDGMENT

On hearing Mr. J Frederick (solicitor Advocate) for the Claimant and Mr. C Hill Counsel for the Respondent:

1. The Respondent's application for costs under rule 76 is refused.

2. There was no application for wasted costs under rule 80 before the Tribunal.

REASONS

The issues to be decided

1. Has a rule 80 wasted costs application been made?

2. Did any of the below conduct meet the threshold to trigger consideration of a costs aware under rules 76 (1) (a), (b), (c) and/or 76 (2)? Namely:

    2.1. Withdrawing the claim on 7 February 2024 when it could have been withdrawn earlier knowing that the Respondent had instructed counsel and incurred the brief fee;

2.2. Breaching the Orders of EJ Klimov by failing to supply a witness statement in time for the |preliminary hearing listed to take place on 12 February 2024;

2.3. Failing to proactively engage with the Respondent about preparations for that preliminary hearing;

2.4. Failing to apply to vacate the preliminary hearing;

2.5. By failing to follow the alleged "correct procedural approach" by submitting a fresh ET1 ("the Watford Claim") instead of applying to amend his existing claim argued to be in accordance with the case of **Edwards v London Borough of Sutton UKEAT 00111/12** as to amount to an abuse of process.

2.6. Did the Claimant's conduct cause the vacation of the preliminary hearing on 12 February 2024 in manner that caused unnecessary costs to be incurred?

3. Is any of the conduct attributable to the Claimant's representative's firm leading to the threshold being reached to consider a costs order under rule 80 (1)?

4. If so, should the Tribunal exercise its discretion to award costs taking into account:

4.1. All relevant circumstances;
4.2. the gravity, nature and effect of the conduct;
4.3. Whether that conduct resulted generally in increased costs being incurred;
4.4. the means of the Claimant and/or his representative to pay an award.

5. If the Tribunal exercises its discretion, how much should the costs order be for when considering the means of the paying party to pay and that costs are compensatory and not punitive.

Background

6. The London claim was presented to the Tribunal on 9 October 2023.

7. When presented it appeared to be out of time. The primary limitation period had expired on 31 August 2023. The Claimant commenced ACAS conciliation on 5 October 2023 and the certificate from conciliation was released on 9 October 2023.

8. The London Claim was a claim of race related harassment because the Claimant is Italian and there was a single alleged incident of verbal harassment.

9. On 22 December 2023, there was a case management hearing before Judge Klimov. He decided to list the time point for consideration at a preliminary hearing. The Preliminary hearing was listed for 12 February 2024.

10. When listing the hearing Judge Klimov made the following case management orders relevant to the costs application.

    10.1. On or before 12 January 2024, disclosure was to be done by copy documents.

    10.2. On or before 4pm on 19 January 2024, the parties needed to provide a copy of any witness statements for use at the preliminary hearing.

    10.3. On or before 5 February 2024, the bundle was to be prepared.

    10.4. At paragraph 20 of the order, it is relevant that it allowed the parties to vary the case management order deadline dates by agreement for a period of up to 7 days *"… provided it does not affect the preparation for any listed hearing, and not within 14 days of any hearing date."*

    10.5. The order warned that if the order was breached, that risked a case being struck out or costs being awarded.

11. The Claimant was unrepresented at the time he submitted the London claim and he was also unrepresented at the hearing before Judge Klimov.

12. On 29 December 2023, the Claimant secured representation with Mr. Frederick going on record as the acting solicitor through his firm Fredericks Solicitors. The email said as follows:

    "Dear Sirs

    We are now instructed by the Claimant. Please update your records accordingly.

    Can we ask the Tribunal or the Respondent to please provide us with a copy of the ET3 and Grounds of Resistance by return.

    As advance notice, we have today submitted a new claim on behalf of the Claimant to include the allegations from this claim, failure to provide s.1 statement, notice

pay, racial discrimination, harassment, and victimisation.

We have applied within the new claim for it to be joined to this current claim and for both claims to be heard together."

13. Nothing of note happened between 29 December 2023 and 22 January 2024, other than the second claim being sent to the Watford Tribunal office instead of the London Central Tribunal. No explanation for why it was sent to Watford has been put forward by either party. On balance I therefore believe this was simply an error by the Tribunal's systems.

14. On 22 January 2024, the Respondent had not received the Claimant's witness statement nor the Watford Claim. Its Representatives therefore email the Claimant's solicitors to request the witness statement be provided by no later than 4pm on 24 January 2024 or an unless order will be applied for.

15. The Claimant's solicitors respond the same day. They argued that it was highly likely the London and Watford claims will be consolidated and that it is likely at that point that once the Watford claim is confirmed as accepted by the Tribunal, the Claimant would withdraw the London claim.

16. In addition to this, significantly, the Claimant's solicitors argued that the next Preliminary hearing should not be needed because the Watford claim includes the allegation in the London Claim, plus further allegations of race discrimination that occurred afterwards, which they alleged the last of which were in time. They therefore averred that it would save time and money if the preliminary hearing listed for 12 February 2024 did not go ahead. They also attached a copy of the new claim.

17. It turned out the copy of claim that was attached to the Claimant's previous email was an undated grounds of complaint.

18. On the same date, by now 18.01 in the evening, the Respondent's representatives replied, setting out their position about the breach of the Tribunal's order they identified, the fact they had received a version of the ET1 and had received no application to amend the London Claim asking that if an application to amend the London claim had been submitted, it be sent to them.

19. In addition, the Respondents' reply said that they were not in agreement that the Preliminary hearing listed for 12 February 2024 be vacated. Instead, they wanted the Claimant's witness statement because in its view, the Claimant had failed to provide what it considered to be satisfactory reasons why the claim was presented late.

20. The final significant line in this email is *"Any attempt by your client to vary the Case Management Orders, vacate the Second Preliminary Hearing or to amend your client's claim will be vigorously defended."*

21. So, at this stage, the Respondent was vehemently against any application to vacate the very preliminary hearing this costs application is about with the Respondent now arguing that the Claimant was at fault for not applying to vacate it.

22. Certainly by this stage, it seems to me then that the only behaviour the Respondent might reasonably take issue with, was the failure to provide a witnesses statement as ordered by the Tribunal and the method chosen by the Claimant of expanding his case by submitting an additional ET1 rather than applying to amend his claim. Even then, the Respondent objected to an application to amend the claim as well, now arguing before me that an amendment application is what the Claimant should have done.

23. At 18.47, the Claimant's solicitors respond saying:

> "Dear Sirs
>
> It is not clear why you are referring to an application to amend, when our correspondence was clear that a new claim had been submitted and that we were providing the grounds of complaints as the ET has not yet served you with the new claim.
>
> We note that you are not willing to take the sensible approach and would prefer to incur both time and costs of preparing for and attending the PH."

24. By 23 January 2024, the Respondent had not received the notice of the new claim or a copy of the claim itself. It had also not received any ACAS certificate for the new claim. Its representatives wrote:

> "Dear Sirs
>
> Thank you for your email.
>
> To date, we have still not received your client's ET1 claim form, nor an ACAS Early Conciliation certificate in relation to the new claims he intends to bring. We should be grateful if you would please provide us with a copy forthwith.
>
> It does not follow that your firm providing an undated Grounds of Complaint by

email constitutes a properly submitted claim against our client. Until such a time we have received the above mentioned documents from the Tribunal and know when they were filed, we cannot comment on whether the new claims have been submitted correctly and our client reserves its position accordingly.

We also disagree that it would be sensible for the Preliminary Hearing to be cancelled simply because your client has issued a new claim. The fact that he has submitted a new claim does not impact whether the first claim was submitted in time. It is up to the Tribunal to decide whether it is just and equitable to allow the first claim to proceed and it is for that reason why the Second Preliminary Hearing was listed for 12 February 2024. Should your client decide not to submit a witness statement in support of his position, that is a matter for him though his failure to flagrantly ignore the Tribunal's Case Management Orders (despite now having legal representation) will be brought to the Tribunal's attention."

25. So, by lunchtime 23 January 2024, the Claimant wanted to vacate the 12 February Preliminary hearing, the Respondent did not. The Respondent wanted a copy of the Claimant's witness statement about time issues, the Claimant had failed to provide one, but there was a date for compliance that had been unilaterally requested by the Respondent of 24 January 2024 for compliance and the Claimant had submitted a new ET1, which had not been processed, not served on the Respondent and the Respondent had requested the Claimant to send to them a copy of the ET1 presented and the ACAS certificate relevant to that new claim.

26. Then at 12.32 on the same date, the Respondents write to the Tribunal to update it about what has happened. In that letter they make the following points of relevance to this costs application:

    26.1. The Claimant has failed to file a witness statement in breach of the Tribunal's orders;

    26.2. The Claimant has failed to provide a copy of the full ET1 or ACAS certificate for the new claim or any evidence it has actually been presented either at all or correctly;

    26.3. No application to amend the claim had been submitted;

    26.4. No application to vacate the preliminary hearing listed for 12 February 2024 had been submitted;

    26.5. The Respondent argues that the preliminary hearing should remain in the list;

26.6. The Respondent omitted to say that it had requested a copy of the statement be provided by 24 January 2024 or that the Claimant had stated that he intended to withdraw the London claim when the new claim had been processed by the Tribunal.

27. There appears to have been no response from the Claimant to the Respondent's letter to the Tribunal.

28. The letter was referred to Judge Klimov. In response, he said as follows by letter of 30 January 2024 and I quote it because it is relevant to the Respondent's arguments:

*"On the Tribunal's own initiative and having considered the Respondent's representations in the email of 23 January 2024, Employment Judge **Klimov** is considering striking out the claim because:*

- *the manner in which the proceedings have been conducted by or on behalf of the Claimant has been unreasonable;*
- *you have not complied with the Orders of the Tribunal dated **22 December 2023**;*
- *it has not been actively pursued;*
- *it is no longer possible to have a fair hearing in respect of the part of the claim to be decided at the public hearing on 12 February 2024.*

*If you wish to object to this proposal, you should give your reasons in writing or request a hearing at which you can make them by **6 February 2024.**"*

29. The Respondent submitted these were definitive findings of fact by Judge Klimov. I am not persuaded they are, because Judge Klimov had only seen the Respondent's letter, had heard no evidence from anyone or indeed reviewed anything from the Claimant and he was not therefore in a position to make definitive findings of fact. I am supported in that view because the Judge was *"considering"* striking out the claim and described it as a *"proposal"* allowing the Claimant time to object to it and request a hearing. These points were provisional points only, subject to being possibly rebutted by the Claimant.

30. There appears to have been a mistake made in the correspondence, namely that the version of the strike out notice sent out appears to have been sent to the Claimant directly, despite him being represented and appeared to have been dated 30 January 2024, but may have had a deadline of 29 January

2024 to be complied with. This is noted in the Claimant's solicitors' email of 31 January 2024.

31. Nevertheless, the Claimant's representatives responded on 2 February 2024 before the 6 February 2024 deadline in the version of the notice presented to me at the costs hearing. The Claimant objected to the proposal because:

    31.1. he had argued that both the London claim and the new claim be consolidated together;

    31.2. The new claim had been received by the Watford Tribunal for reasons unknown (hence why I now refer to it as the Watford claim);

    31.3. It would save time and costs to join the two claims together;

    31.4. The Claimant was applying for a stay in the proceedings pending the Watford claim being processed by the Tribunal.

    31.5. Once the Watford claim had been processed, it could either be joined, or the Claimant could consider whether to withdraw the London claim, given that the Watford claim mentioned a series of discriminatory acts including the allegation in the London Claim.

32. This email of course triggered an email response from the Respondent's representatives on 2 February 2024 at 14.50, arguing that the application to stay the case pending processing of the Watford claim was an entirely separate procedural issue from the Preliminary hearing, the order of the Tribunal was clear and the Claimant was still in breach by failing to provide a witness statement, his behaviour was unreasonable, he should have applied to amend his claim instead of submitting a new ET1 and the preliminary hearing on 12 February 2024 should continue and indeed that its rights would be prejudiced.

33. Therefore, by 2 February 2024, the Respondent is still arguing that the February 2024 preliminary hearing should go ahead and its rights would be infringed if it didn't.

34. On 3 February 2024 at 10.30, the Claimant's representatives serve the witness statement late. They explain that the delay was with *"good intentions"* in trying to save time and expense given the Watford claim being submitted and now state that case can continue to the Preliminary hearing rather than be struck out.

35. It is also important to note that by this time, the Claimant's representatives

knew the Respondent had instructed counsel to attend the 12 February 2024 preliminary hearing as also mentioned in the above email.

36. By this point then, we have belated but now full compliance with the Tribunal's Order to serve a witness statement and a live application to stay the case, pending processing of the Watford claim, submitted by the Claimant.

37. It is noteworthy to briefly list the arguments or relevant facts on the time points put forward by the Claimant in his witness statement:

    37.1. He had submitted a grievance and receipt of it was acknowledged by the Respondent on 16 June 2023;

    37.2. The Claimant then wen to Italy on annual leave 21 July 2023 returning 14 August 2023;

    37.3. The primary time limit expired on 31 August 2023;

    37.4. He argued he did not get the outcome letter from his grievance until 8 September 2023 and believed this delay was deliberate so the Claimant would submit his claim late;

    37.5. He is Italian and was not familiar with UK law at that time.

38. I make no findings about these points other than to say what I am bound to say, which is that all the above arguments are capable for being factors for extending time under the just and equitable extension available for discrimination complaints, if they are factually made out after the evidence and proper argument have been heard, considered and adjudicated.

39. On 5 February 2024, Judge Joffe responds to the recent correspondence and says *"The public preliminary hearing remains as listed to consider whether the Claimant's claims have been presented out of time. The Employment Judge at that hearing will additionally consider whether to strike out the Claimant's claims on any of the bases set out in the strike out warning of 30 January 2024. The Claimant should prepare to deal with all of these matters at the public preliminary hearing. I cannot see good grounds for a stay at present but it is open to the Claimant to make a renewed application at the hearing."*

40. So, the application for a stay at this point was refused but could be re-argued at the hearing and the strike out application remained live as did the time point which was the original focus of the preliminary hearing.

41. On 7 February 2024 at 15.12, the Claimant withdrew the London claim by writing to the Tribunal copying in the Respondent. This triggered the application for costs by the Respondent because it says it had wasted its brief fee.

42. The arguments contained in the Respondent's costs application itself are the issues I need to determine mentioned earlier in this judgment. One paragraph is of note is the penultimate paragraph in the application which stated:

"Separately, and in accordance with Rule 80 of the Tribunal Rules, we reserve our client's right to pursue a wasted costs application against the Claimant's legal representative, Fredrick Solicitors, on the grounds of its own unreasonable conduct in managing these proceedings. The Claimant has had the benefit of legal representation since 29 December 2023 and despite that, has continued a claim which does not have prospect of succeeding and in an unreasonable manner."

43. This paragraph is not an actual wasted costs application under rule 80. It is simply a statement of position about the pursuit of a future costs application against the Claimant's solicitors that has not yet been submitted but may be applied for in the future.

44. The Claimant and his representatives allege in the response to the costs applications as follows:

44.1. Whilst it was identified when the Claimant was a litigant in person that there was only one claim of harassment in his ET1, the ET1 clearly alleges other complaints of discrimination namely that his grievance was handled correctly, was delayed and had an insufficient investigation into it missing out interviewing a key witness and the Claimant was not given the opportunity to appeal, all of which culminated in his resignation making the resignation a constructive dismissal;

44.2. Therefore, when the Claimant then got legal advice, the case was identified as being one of a continuing course of discriminatory conduct;

44.3. The Respondent had unreasonably refused to agree to the proposal of vacating the 12 February 2024 hearing;

44.4. It was not the Claimant's fault the online ET1 for the Watford claim was sent to Watford for processing when the addresses for the parties remained the same;

44.5. There was an arguable case for extending time on the London claim anyway;

44.6. No prejudice was caused by the delay in submitting a witness statement, which was a genuine attempt by the Claimant to try to save time and cost in furtherance of the overriding objective;

44.7. The reason why the London Claim was withdrawn on 7 February 2024 was because at that time the Claimant became aware the Watford claim had been received and accepted by Watford.

45. At the costs hearing, I did not have sight of any of the acceptance of claim/notice of claim correspondence about the Watford claim. I therefore reserved my decision pending the parties sending me the correspondence they had received about the Watford claim (by consent) so I could determine what had taken place and ensure I had the full information about what had taken place in February 2024 that was argued to have triggered the withdrawal of the London Claim.

46. Shortly after the costs hearing, I was sent the following documents by the parties:

46.1. An email chain where the Claimant had asked Watford Tribunal whether the Claimant had been accepted. In response, the Tribunal clerk said *"Thank you for your email. We apologise for the delay, your claim form has been referred to a Legal Officer, we are awaiting their directions. The Tribunal will be in contact in due course. Thank you."*

46.2. A notice of claim dated 24 July 2024, sent to the Respondent about the Watford Claim;

46.3. The email from 22 January 2024, Claimant's solicitor to Respondent's solicitors, attaching the undated Grounds of Complaint for the Watford claim.

47. I also suggested at the hearing that I look at the Tribunal's file for both complaints. The parties consented. At the time, the case plans were not up to date, hence my request for further information to be provided by the parties. However, now the case plans are up to date I can say as follows:

47.1. Not only was there an email from the Watford Tribunal on 7 February 2024, but there was also a telephone call on the same date between the Claimant's representatives and the Tribunal as confirmed by a note on the case plan. This one line note, simply stated a call had come in from

the Claimant's representative chasing an update and they had been told the claim was with the Legal Officer for directions after being referred on 17 January 2024.

47.2. The claim was transferred from Watford to London Central on 9 April 2024;

47.3. The Notice of claim and acknowledgement of claim were not sent to the parties until 24 July 2024.

48. In advance of the hearing the Respondent submitted a costs schedule stating that it was claiming £9,806.00 exclusive of VAT, less a concession of £1,704, which it conceded would not have been wasted because it was time and fees that would be saved preparing for the second ET1 defence anyway making the total claim for costs £8,102 exclusive of VAT.

49. Attached to its objection to the costs application, the Claimant submitted an income and expenditure form, which was not challenged by the Respondent. The key parts of this form are:

49.1. The Claimant is not working at present. He is on job seekers allowance as his only source of income at £542.14 per month;

49.2. His "priority debts" including rent and utilities amount to £498.68 per month in expenditure;

49.3. Other living costs including TV licence, phone, internet and food come to £346.60 per month.

49.4. Consequently, his net income is -£303.14 per month.

49.5. It was submitted that the Claimant was living off his savings which in April 2024 totalled £1,051.36 and £2,568.00 in two accounts totalling £3,619.36.

49.6. I enquired if the situation had changed, and the Claimant's representative confirmed it had not. Therefore, the savings figure is now more likely to be £2,406.80 after a further 4 months of financial deficit (-£1,212.56).

50. When considering any allegations against the Claimant's representatives themselves, there is no evidence that privilege has been waived and neither party submitted that it had been.

The Law

51. The relevant rules to this application are set out below:

> *"**Definitions***
>
> *74. (1) "Costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing). In Scotland all references to costs (except when used in the expression "wasted costs") shall be read as references to expenses.*
>
> *(2) …*
>
> *(3) …*
>
> ***Costs orders and preparation time orders***
>
> *75. (1) A costs order is an order that a party ("the paying party") make a payment to*
>
> *(a)another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative;*
>
> *(b)…*
>
> *(c)…*
>
> *(2) …*
>
> *(3) …*
>
> ***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; or*

(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 postponed or adjourned on the application of a party.

(3) …

(4) …

(5) …

Procedure

77. A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.

The amount of a costs order

78. (1) A Costs order may

(a)order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;

(b)order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles; …

(c)…

(d)…

(e)if the paying party and the receiving party agree as to the amount payable, be made in that amount.

(2) …

(3) For the avoidance of doubt, the amount of a costs order under sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000.

When a wasted costs order may be made

80. (1) A Tribunal may make a wasted costs order against a representative in favour of any party ("the receiving party") where that party has incurred costs—

(a)as a result of any improper, unreasonable or negligent act or omission on the part of the representative; or

(b)which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay.

Costs so incurred are described as "wasted costs".

(2) "Representative" means a party's legal or other representative or any employee of such representative, but it does not include a representative who is not acting in pursuit of profit with regard to the proceedings. A person acting on a contingency or conditional fee arrangement is considered to be acting in pursuit of profit.

(3) A wasted costs order may be made in favour of a party whether or not that party is legally represented and may also be made in favour of a representative's own client. A wasted costs order may not be made against a representative where that representative is representing a party in his or her capacity as an employee of that party.

Effect of a wasted costs order

81. A wasted costs order may order the representative to pay the whole or part of any wasted costs of the receiving party, or disallow any wasted costs otherwise payable to the representative, including an order that the representative repay to its client any costs which have already been paid. The amount to be paid, disallowed or repaid must in each case be specified in the order.

Procedure

82. A wasted costs order may be made by the Tribunal on its own initiative or on the application of any party. A party may apply for a wasted costs order at

any stage up to 28 days after the date on which the judgment finally determining the proceedings as against that party was sent to the parties. No such order shall be made unless the representative has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application or proposal. The Tribunal shall inform the representative's client in writing of any proceedings under this rule and of any order made against the representative.

Ability to pay

84. 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 representative's) ability to pay."

52. Following the case of **Kharkimov v Nikko Asset Management Europe Limited [2023] EAT 38,** at paragraph 47, there is no need for cross examination of any witnesses to be performed before a safe costs order can be made. In some cases, for specific reasons, it may be necessary for witnesses to be called and cross examination to be performed, but not in all cases and the Tribunal should avoid the costs hearing descending into a mini trial of a party's credibility.

53. It is now well settled that the Tribunal must answer the following three questions in order before a costs order can be safely made after the cases of **Vaughan v London Borough of Lewisham [2013] IRLR 713, Hossani v EDS Recruitment Limited [2020] ICR 491, J v K and L [2022] UKEAT 131 and FDA and Others v Ms U Bhardwaj [2022] UKEAT 97:**

53.1. Has the defender of the application crossed the relevant threshold for a costs order to be considered e.g. unreasonable conduct of the proceedings?

53.2. If so, should the Tribunal exercise its discretion to order costs?

53.3. If so, how much should the costs order be for?

54. It is now well settled that costs should be ordered as the exception rather than the norm in the Employment Tribunal.

55. If the ground relied upon by the applicant is that the behaviour warranting a costs order was that the case had no reasonable prospect of success, the Tribunal must only take into account the information known to the potential paying party either at the start of the proceedings or at any material point

during the proceedings **Radia v Jeffries International Limited UKEAT/0007/18/JOJ.**

56. In **Yerrakalva v Barnsley MBC [2012] IRLR 78, CA [41],** Mummery LJ said:

*"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** was to reject as erroneous the submissions to the court that, in deciding whether to make a costs order, the ET had to determine whether or not there was a precise causal link between the unreasonable conduct and the specific costs being claimed. In rejecting that submission, I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances."*

57. In addition, if the ground relied upon is that a party behaved unreasonably, after **McPherson v BNP Paribas (London Branch) [2004] ICR 1398, CA [40]**, per Mummery LJ.

"…the Tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion, but that is not the same as requiring the receiving party to prove that specific unreasonable conduct by the paying party caused particular costs to be incurred"

58. Therefore, there need not be a causal link proven between the conduct complained of and the specific costs incurred. There just needs to be a review of the whole picture and that the adverse conduct caused an increase in costs generally. The costs award is not obliged to reflect the full costs incurred by the innocent party, which are attributable to the unreasonable conduct decided upon.

59. In deciding whether to make an award of costs, a litigant in person is not to be judged by the standards of a legal professional after **Vaughan v London Borough of Lewisham & Others [2013] IRLR 713** at paragraph 25.

60. In deciding whether the conduct of litigation is unreasonable, the Tribunal must bear in mind that in any given situation there may be more than one reasonable course to take. the Tribunal must not substitute its view for that of the litigant after **Solomon v University of Hertfordshire, Hunter and**

Hammond (UKEAT/0258/18-19/DA) at para 107.

61. In addition, incompetent presentation of a case causing an increase in costs incurred by the opposing party is not necessarily unreasonable conduct **Francois v Castle Rock Properties limited UKEAT/0260/10.**

62. Notice of costs is relevant to exercising discretion but is not a pre-requisite **Millin v Capsticks Solicitors LLP [2014] All ER (D) 12 (Dec).**

63. Costs orders are compensatory and must not be punitive: **Lodwick v Southwark London Borough Council [2004] IRLR 554, CA [23].**

64. Then there is the **Edwards** case relied upon by the Respondent. The Respondent argues that this case is authority that if the Claimant wishes to add claims to his ET1 that are in time, the correct process is via amendment and not to submit a fresh ET1. I have read the case, and it contains no such authority.

65. There is also no authority or rule of law that I am aware of (and indeed I wasn't taken to any other authority) that means that if an allegation is in time but took place after the events that are already the subject of a presented claim to the Tribunal, the correct and only way a Claimant should proceed is to apply to amend the claim rather than submit a separate ET1. Indeed, it is often the case that discrimination claims are brought whilst the Claimant is still employed and then for whatever reason they resign or are dismissed and then a fresh ET1 is submitted with a concurrent application to conjoin the claims because the facts and allegations of the second claim are a continuation in the time line of the first.

66. Of course, an application to amend the claim can be refused by judicial discretion, whilst an ET1 form can only be refused if it is not submitted on the correct form, is not submitted in the correct way or does not contain the minimum prescribed information. There is no discretion about that and a properly drafted and presented claim form has to be accepted by the Tribunal. If that form is then deemed to be an abuse of process it can be struck out later on, but the form will be accepted nonetheless.

67. After the cases of **Ridehalgh v Horsefield [1994] Ch 205, [1994] 3 All ER 848 (approved by the House of Lords in Medcalf v Mardell [2002] UKHL 27, [2003] 1 AC 120, [2002] 3 All ER 721)** when considering any allegations against the Claimant's representatives in circumstances where solicitor client privilege or indeed litigation privilege have not been waived, I remind myself that I must be very slow indeed to find in favour of a costs applicant against a Respondent solicitor, without first taking full account of privilege preventing

the Respondent to the wasted costs application from being able to fully argue their position, without first giving the legal representative the benefit of any doubt, such a finding must be fair in all the circumstances and that the Tribunal must be satisfied that there is nothing the representative could say to resist the order if unconstrained by privilege.

68. Abuse of process has been explained as *"a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process"* **Attorney General v Barker EWHC 453 (Admin).**

Discussion and conclusions

69. I have decided each of the identified issues as below.

70. **Has a rule 80 wasted costs application been made?**

70.1. The simple answer to this question is no, a rule 80 application has not been made and I am surprised it was argued by the Respondent that one had been made. There is clearly no Rule 80 application before me hence why the notice requirements of rule 82 have not been complied with by the Tribunal.

71. **Did any of the below conduct meet the threshold to trigger consideration of a costs aware under rules 76 (1) (a), (b), (c) and/or 76 (2)? Namely:**

71.1. **Withdrawing the claim on 7 February 2024 when it could have been withdrawn earlier knowing that the Respondent had instructed counsel and incurred the brief fee; and**

Failing to apply to vacate the preliminary hearing; and

Failing to proactively engage with the Respondent about preparations for that preliminary hearing;

71.1.1. I am not persuaded the Claimant has behaved unreasonably here. He had suggested to the Respondent that it may save time and costs to vacate the preliminary hearing and await processing and consolidation of the Watford Claim with the London Claim.

71.1.2. In response, the Respondent did not want the hearing on 12 February 2024 to be vacated and argued strenuously against it both to the Claimant in correspondence and to the Tribunal.

71.1.3. The Claimant did not apply to vacate the hearing per se, that is correct. However, what he did do was apply for the claim to be stayed pending processing of the Watford claim and consolidation with the London claim. That would almost certainly have ended up with a postponement of the 12 February Preliminary hearing if it had been agreed to by the Respondent or granted by the Tribunal. The Respondent objected to such an application.

71.1.4. Both these points are clearly examples of the Claimant and his representatives trying to communicate with the Respondent to find a mutually acceptable way forward where the parties would not need to incur the costs of the Preliminary hearing.

71.1.5. There was no unreasonable conduct here. In fact, the contrary could be said.

71.1.6. Then we come to the decision of the Claimant to withdraw his claim on 7 February 2024. I am persuaded that following the call between the Claimant's representatives and the Tribunal, in their view, they had sufficient comfort that the Watford claim would not be rejected and that this comfort triggered the withdrawal email on the same date.

71.1.7. I am persuaded by the submissions of the Claimant, because the Claimant informed the Respondent some weeks in advance of the actual withdrawal, that he was considering the withdrawal of the London Claim once the Watford claim had been processed. This was also said to the Tribunal, and was the reason for requesting the stay in the proceedings. Then, when the Claimant's representatives had spoken to the Tribunal to ensure the Claim had been received and was receiving attention, not simply that it was being acknowledged, but also that it had gone to a Legal Officer for directions, the Claimant withdrew that claim as he said he would do. I am not persuaded that the Claimant has been underhand here or acted in any way to make the Respondent receive increased costs.

71.1.8. It turns out that had the Claimant chased the Tribunal on or after 17 January 2024, it might have got the comfort it wanted sooner. However, that is with hindsight. Was it unreasonable for the Claimant to wait for month for the form to be processed

given the form was submitted during the festive period on 29 December 2024? - not in my judgment, in all the circumstances.

71.2. The Respondent's application for costs for a vacated hearing it was robustly pursuing to remain in the list is without merit.

71.3. What has happened here is the Respondent tactically wanted to keep to the preliminary hearing because it thought it had a strong case for striking out the Claimants claim for the time issue and, later, the breach of Tribunal orders. I do not criticise the Respondent for following that strategy. Many Respondents would have. However, this tactic then backfired when the Claimant actually withdrew the case as he said he would and, by that time, the Respondent had instructed counsel at its expense.

71.4. Those instructions were lodged because of the Respondent's own choice to fervently pursue the hearing of 12 February 2024 going ahead, rather than agreeing to a stay as applied for by the Claimant, or to opt to vacate that hearing by consent and have the same time issues for the London claim aired later after probable consolidation with the Watford claim as the Claimant had suggested.

71.5. The Respondent got what it wanted; the preliminary hearing remained listed. However, the fact it turned out to be an expensive strategy after the Claimant withdrew the claim, was not because of unreasonable conduct by the Claimant or any deliberate delay to withdraw the case once the Respondent had instructed counsel.

71.6. **Breaching the Orders of EJ Klimov by failing to supply a witness statement in time for the preliminary hearing listed to take place on 12 February 2024;**

71.6.1. The Claimant accepted that it was in breach of the order of Judge Klimov by failing to provide the witness statement on time.

71.6.2. He submitted that there was an agreement to vary the order to 24 January 2024 between the parties. I find there was no such agreement. The Respondent was behaving reasonably by unilaterally giving the Claimant the chance to submit the statement late. It was not an agreement to vary the order.

71.6.3. On 3 February 2024, notwithstanding the breach of the order, the Claimant submitted the witness statement 15 days late and

9 days before the Preliminary hearing.

71.6.4. In doing so, the Clamant argued that it was trying to save time and expense by trying to convince the Respondent to vacate the 12 February hearing by consent.

71.6.5. If that was the intention, I agree with the Respondent that it would have been far better to have informed the Tribunal of its intentions at that stage or to have simply drafted the statement and submitted it when the Claimant knew the Respondent did not share the view of putting the hearing off to a later date.

71.6.6. I am persuaded that this was unreasonable conduct by the Claimant under rule 76 (1) (a) and also met the threshold in rule 76 (2).

71.6.7. I am unable to say for the purposes of Rule 76 whether that conduct was because of the Claimant's representatives conduct because privilege has not been waived and the benefit of the doubt remains as to whether the Claimant's representative was simply following his client's instructions after providing proper professional advice.

71.7. **By failing to follow the alleged "correct procedural approach" by submitting a fresh ET1 ("the Watford Claim") instead of applying to amend his existing claim argued to be in accordance with the case of Edwards v London Borough of Sutton UKEAT 00111/12 as to amount to an abuse of process.**

71.7.1. The case relied upon by the Respondent only applies if an application to amend the claim is proposed to be made. It contains no authority for the proposition submitted to me that the Claimant should have applied to amend the claim rather than submit a second ET1.

71.7.2. The Claimant is right in submitting that there were two options here, one was to apply to amend the other to submit a fresh ET1.

71.7.3. Either of those were potentially reasonable options and I remind myself that I must not substitute my view for the Claimant's after **Solomon.**

71.7.4. The Claimant argued that if it had applied to amend the Claim

and that had been refused, then he could have been left with nothing if the time points did not succeed to extend the time limits for the London claim submitted, he admitted with poor pleadings because the Claimant was a litigant in person at that time. However, with a new ET1 where the last causes of actions were conceded by the Respondent as being submitted in the Watford claim in time, which was much less likely to be rejected.

71.7.5. Those are reasonable points of view. The fact the Claimant got no comfort confirming the Claim to have been accepted until 7 February 2024 was not the Claimant's fault.

71.7.6. I am not persuaded the Claimant has used the court process in a way or for a purpose that is significantly different from how Tribunal procedures are usually used to amount to an abuse of process. As explained above, the circumstances of the Watford claim being submitted arise fairly frequently.

71.7.7. I am not persuaded there was any unreasonable conduct by the Claimant under rule 76 (1) (a).

71.7.8. I am similarly not persuaded that rule 76 (1) (c) is relevant here. The Claimant has not made an application to vacate a hearing 7 days or less before it was due to take place. Therefore, any application for costs made under this head was misconceived.

71.8. **Did the Claimant's conduct cause the vacation of the preliminary hearing on 12 February 2024 in manner that caused unnecessary costs to be incurred?**

71.8.1. First, it is obvious that the withdrawal of the London Claim caused the vacation of the preliminary hearing listed on 12 February 2024.

71.8.2. If the Claimant only received comfort enough that the Watford claim was not going to be rejected on 7 February 2024 and he then immediately that same day withdrew the complaint, in my view that cannot be said to be unreasonable. It strikes me that this is a situation of unfortunate timing that the comfort was received by the Claimant after counsel for the Respondent had been instructed to attend the preliminary hearing.

71.8.3. That said, the Respondent argued that if the Claimant's argument that the withdrawal happened when the Watford claim

was processed was true, then the withdrawal of the case should have happened on 24 July 2024 when the notice of claim and acknowledgement of claim documents were sent out by the Tribunal proving acceptance. Let's consider what then would have happened. In my judgment, even if that were true, or indeed the preliminary hearing had gone ahead on 12 February 2024 and, for whatever reason the London Claim went no further, the Respondent would still have spent its brief fee and would still be defending the Watford Claim. If the 12 February 2024 hearing went ahead and the Claimant was successful in extending time and seeing off the strike out threat, the Respondent would still have spent its brief fee. It would be in no different costs position to what it was faced with when the Claimant withdrew his claim on 7 February 2024.

71.9. When considering the argument that the London Claim had no reasonable prospect of success, I have no hesitation in rejecting that argument.

71.10. When considering **Radia** and **Vaughan,** there was no point where I can conclude on the documents and submissions that the Claimant had information that would have informed him, either when he was represented or before, that his claim had no reasonable prospect of success.

71.11. The Claimant was about 6 weeks late in presenting the London Claim. This was not a claim that was months or years out of time. It is clear there were clearly arguable grounds for extending time if they were proven by the evidence, as I discussed earlier in this judgment. It was, in my judgment, misconceived for the Respondent to argue the grounds put forward were not arguable.

71.12. Just and equitable time extensions are always fact sensitive and situation specific to the individual Claimant. There is no broad-brush approach or fixed checklist of what will or will not succeed or be taken into account in consideration of extensions of time. All depends on the facts of the individual case. Being legally represented throughout, the Respondent should have known that.

71.13. When considering the harassment allegation itself, that would also have been very fact sensitive and initially taken from the viewpoint of the Claimant. Again, it simply cannot be said that it would have had no reasonable prospect of succeeding. Much would depend on the evidence.

71.14. When considering rule 76 (1) (b) the case not being actively pursued, it is also clear that the Claim was being actively pursued at all material times, as evidenced by the correspondence between the parties, the later correspondence with the Tribunal and the late service of the Claimant's statement. I have no hesitation in rejecting that argument having reviewed the relevant documents in the bundle.

72. **Is any of the conduct attributable to the Claimant's representative's firm leading to the threshold being reached to consider a costs order under rule 80 (1)?**

72.1. I have already found that no rule 80 application is before the Tribunal and, even if it had been, after **Ridehalgh** and **Horsefield,** I would be unable to attribute any failings to the Claimant's representatives given that privilege has not been waived and I have to give any benefit of the doubt to the representatives before going behind the representatives' conduct, as simply following their client's instructions. There is insufficient evidence the Claimant's representatives were doing anything other than following their client's instructions.

73. **If so, should the Tribunal exercise its discretion to award costs taking into account:**

73.1. **All relevant circumstances;**
73.2. **the gravity, nature and effect of the conduct;**
73.3. **Whether that conduct resulted generally in increased costs being incurred;**
73.4. **the means of the Claimant and/or his representative to pay an award.**

74. The only unreasonable conduct is the Claimant's breach of the Tribunal's order.

75. Following **Yerrakalva** and **McPherson,** the nature of the breach was delay and delay alone. It was not a grave breach of the Tribunal's orders and did not deprive the Respondent of being able to prepare for the preliminary hearing on 12 February 2024. The statement was concise, to the point, was two pages in length and had 11 paragraphs.

76. The effect of the delay in serving the witness statement was to cause the Respondent to write a few more emails than what it ordinarily would have done. However, in employment Tribunal litigation, it is normal for there to be some chasing correspondence between the parties about various issues that

crop up or slippage in compliance with Tribunal directions. There isn't anything that I considered to be exceptional about the way this case progressed, when it comes to the late service of the Claimant's witness statement.

77. I have also considered the fact that the Claimant has very limited means.

78. When considering all the circumstances of this case, I refuse to exercise my discretion to award costs. This is not an exceptional case. The effect of the unreasonable behaviour was relatively minor, albeit it no doubt irritating for the Respondent, and the Claimant is of very limited means that appear to be reducing month by month.

79. **If the Tribunal exercises its discretion, how much should the costs order be for when considering the means of the paying party to pay and that costs are compensatory and not punitive.**

    79.1. I have not exercised my discretion, so this issue falls away.

80. The Respondent's costs application is refused.

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EMPLOYMENT JUDGE SMART
28 August 2024

Judgment sent to the parties on

29 August 2024
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For the Tribunal Office

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