EMPLOYMENT TRIBUNALS

Claimant: Mr D Clark

Respondent: Medway Norse Limited

Heard at: London South (determined on the papers)

Before: Employment Judge Heath

JUDGMENT

The Claimant is ordered to make a payment of the sum of **£11,800** to the Respondent in respect of the costs it has incurred from 8 August 2022.

REASONS

Introduction and background

1. This is the determination of the Respondent's application for costs made initially on 12 August 2024 with grounds following on 12 September 2024.

2. This judgment is to be read in conjunction with the Judgment and Reasons on liability sent to the parties on 14 June 2024 following a final hearing on 4 and 5 June 2024. By that judgment I held that the Claimant's claims of unfair dismissal were not well-founded, and I dismissed them for the reasons given.

Procedure

3. The Respondent initially made an application for costs by email dated 12 August 2024, but did not set out its grounds for the application.

4. By letter of 27 August 2024 I instructed that the Respondent set out its grounds for the application and its view as to whether the application should be determined at a hearing or on the papers. I instructed that the Claimant should set out his grounds for objecting to the application 14 days thereafter, together with his view on whether there should be a hearing or a determination on the papers.

5. On 9 September 2024 Mr Spalding, who had represented the Claimant at the liability hearing, emailed the Tribunal attaching a statement from himself, and an "Initial Response of David Clark". It was clear that a hearing was not required.

6. On 11 September 2024 the Respondent's representative, Mr Ashley, apologised for the delay in responding, setting out reasonable personal circumstances which led to the delay. He indicated that a written application would swiftly follow.

7. On 12 September 2024 the Respondent set out its detailed application for costs, attaching a costs schedule and a short supplementary bundle (I will refer to documents in this as follows – for example page 8 of this bundle [**Supp 8**]).

8. On 16 September 2024 Mr Spalding emailed the Tribunal to say he was coming off the record, but that the Claimant would be arranging new representation.

9. On 21 September 2024 Mr Mehmet, a friend of the Claimant's, emailed the Tribunal to indicate that he was helping the Claimant and asking for a further 30 days in which to respond. There was some further correspondence from the parties.

10. The file was referred to me, but it would appear that some of the latest correspondence had not made it onto the file when it was referred to me. By a letter sent on my instruction on 17 October 2024 I gave the Respondent a further 21 days in which to make any response to the Respondent's written application for costs.

11. On 6 November 2024 Mr Mehmet emailed the Tribunal with 6 attachments:

    a. An email from Mr Mehmet to the Tribunal the previous day setting out some history and quoting previous emails to the Tribunal;

    b. The statement of Mr Spalding dated 8 September 2024;

    c. A letter dated 29 October 2024 from HMRC to the Claimant setting out a payment plan;

    d. An "Income & Expenditure Report 04.10.24";

    e. An "Income & Expenditure Statement 04.10.24" containing seemingly identical information;

    f. A letter from the Claimant to the Respondent's representative of 26 July 2023;

The Respondent's application

12. The Respondent makes its application under Rule 76(1) Employment Tribunal Rules of Procedure 2013 ("ET Rules") on the basis that the Claimant acted vexatiously and/or unreasonably in both the bringing of the proceedings and in the way they were conducted (Rule 76(1)(a)), and further, that the claim had no reasonable prospect of success (Rule 76(1)(b)). The Respondent, in its application, sets out in considerable detail how it says the Claimant acted vexatiously and/or unreasonably, but also relies on the "shortcut" to the finding of unreasonableness in Rule

39(5) in that it says that the Tribunal decided specific allegations against the Claimant for substantially the same reasons as given in a deposit order made by EJ McLaren by Order sent to the parties on 31 August 2023 (which I will deal with below).

13. Ther Respondent's application for costs set out a history of the claims (paragraphs 9 to 27). The Respondent says, very much in summary:

    a. That a claim form prepared by Mr Spalding set out unparticularised allegations of unfair dismissal, race discrimination and victimisation, making serious and unfounded allegations;

    b. The Response set out the basis the Claimant was dismissed and pleaded a costs warning;

    c. Attempts were made to persuade the Claimant to drop his claims with no costs consequences;

    d. The Claimant attended a preliminary hearing before EJ McLaren on 8 August 2022 representing himself. This allowed for a more sensible discussion, and the Claimant withdrew his race discrimination and victimisation claims. The Claimant sought to explain his position on unfair dismissal and EJ McLaren made a deposit order on hearing such.

    e. On the afternoon of 8 August 2022, following the hearing, Mr Ashley emailed the Claimant explaining what a deposit order was, and the potential consequences of it. Mr Ashley set out his instructions that the Respondent would not apply for costs if the Claimant withdrew his claim by 12 August 2022. Mr Ashley encouraged the Claimant to take professional legal advice "*i.e. not from Mr Spalding before deciding to proceed with your claim in the face of a Deposit Order*".

    f. The Claimant presumably paid a deposit, but appeared to take no further steps to pursue his claim. On 14 June 2023 Mr Ashley repeated the costs warning and indicated that he was considering making an application to strike out the claim.

    g. On 12 July 2023 Mr Ashley provided a link to the Respondent's disclosure <u>including video files of CCTV footage.</u> The application refers to correspondence during 2023 and 2024 which makes clear that the video files were repeatedly made available to both the Claimant and Mr Spalding (an email of 13 August 2023 provides a Dropbox link which had been sent twice before, and an email the following day explained how the files could be downloaded, watched and shared), and that the Respondent's position that the claims were misconceived, subject to a deposit order and that costs would be sought was made clear on a number of occasions.

h. It was clear from the judgment following the final hearing that the claim was dismissed for substantially the same reasons as appeared in the deposit order of EJ McLaren.

i. Attempts to engage with the Claimant and Mr Spalding after the judgment led to nonsensical responses that were untrue and failed to engage with the issues.

14. At paragraph 28 of the application the Respondent sets out factors which, it says, demonstrate that the Claimant had acted vexatiously or otherwise unreasonably. These include:

a. Presenting a claim with two unviable causes of action and one weak one that was bound to fail;

b. Failing to heed warnings that the claim was not going to succeed;

c. Persistently failing to receive and consider CCTV evidence;

d. Pursuing a claim he made no serious effort to engage in.

15. The Respondent alternatively put its application on the basis that it had no reasonable prospect of success. That pursuant to Rule 39(5)(a) he is to be treated as having acted unreasonably. That what was done by Mr Spalding in proceedings is to be taken as having been done on the Claimant's behalf.

The deposit order

16. EJ McLaren's conclusions on the deposit order are set out in paragraphs 20 to 28 of her Order. She concluded that the following allegations in the unfair dismissal claim had little reasonable prospects of success:

a. An argument about procedure not being followed by the Respondent (paragraph 22);

b. An allegation of bias – the investigation outcome was based on a thorough investigation (paragraph 23);

c. The investigation was tainted as charges were added during the investigation (paragraph 24);

d. An allegation that the decisionmaker may not have genuinely believed in the fact of the gross misconduct (paragraph 25);

e. The sanction of dismissal was not reasonable (paragraph 26);

f. The Claimant was treated inconsistently with others (paragraph 27).

The Claimant's objection to the application

17. Mr Spalding's statement of 8 September 2024 includes the following:

a. Mr Spalding has been involved in assisting someone else with a claim against the Respondent, and he asserts that the Respondent

made an application for wasted costs against him which included untruths. He says there is other conduct by people associated with the Respondent which is suspicious;

b. He has various health conditions;

c. More relevantly, at paragraphs 13 to 20 he says that the Claimant was not shown CCTV during the internal investigation, that numerous requests were made for CCTV were made but it was not supplied, that CCTV was only offered after all the costs had been incurred, that the Claimant genuinely believed while he had not seen the CCTV that he had a good chance of success in his case.

18. The "Initial Response of David Clark" is undated. Given its legal content I suspect it was also written by Mr Spalding, but will take it as the Claimant's evidence. This statement includes:

a. The Respondent did not set out its grounds for an application for costs, and the provisions of Rule 76 ET Rules were set out;

b. The Claimant had a genuine belief in his claim and had not acted vexatiously or disruptively in bringing it. He believed he had a reasonable chance of success.

c. The Claimant said the judge at the preliminary hearing did not say he had no chance of success (I note that she repeatedly said his claims had <u>little</u> reasonable prospects of success in respect of a number of arguments he was putting forward). Rule 76(1)(b) refers to a claim having "no" reasonable prospects of success;

d. The judge at the preliminary hearing put the Respondent on notice that the CCTV was fundamental to the Claimant's case.

e. It was only after the final hearing started at 11.02 that the Respondent finally offered to provide the CCTV. Why had they waited so long to provide it when it was so crucial?

f. By the time the CCTV was offered, all costs had been incurred.

19. There is a letter from the Claimant to the Respondent's representatives dated 26 July 2023 (24 crossed out and 26 added by hand) in which the Claimant says he cannot open the Dropbox link as he has a basic mobile phone and no laptop or computer. He said that Mr Spalding similarly could not open the link, and asked for it to be re-sent to an email address for Mr Spalding.

20. The Claimant's income and expenditure report and statement indicated that he receives net monthly income of £2355.83. He sets out a "Basic Income of £13 per hour and is required to work a minimum of 50 hours. This must be per week as he gives a gross monthly income of £2,816 (which is £13 x 50 x 52 ÷ 12).

21. This document also states that he does overtime in addition to his 50 hours a week which “regularly” involves working at weekends and at unsociable hours. He does not set out how many hours of overtime he works, or what rate of pay he receives for overtime or whether he receives a supplement or enhanced rate for working weekends or antisocial hours.

22. His monthly outgoings are £2644 and include rent and utilities, council tax, child support and other expenses.

23. The Claimant sets out that he has certain difficulties with his own physical and mental health. He also explains that he has eight children and 3 grandchildren. Four of his children and two of his grandchildren have disabilities.

24. No documentary evidence has been supplied to support the income and outgoings such as payslips or bills.

25. The HMRC payment plan sets out an agreed arrangement for the Claimant to pay £5257.23 by 6 monthly instalments of £876.20 beginning on 1 December 2024 with a final instalment on 1 May 2025.

The law

26. Rule 75 ET Rules provides:

> *(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;*

27. The power to make a costs order is in Rule 76 which provides:

> *(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—*
>
> *(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted;*
>
> *(b) any claim or response had no reasonable prospect of success;*

28. Rule 84 ET Rules provides:

> *“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”.*

29. Rule 39 ET Rules deals with deposit orders, and includes:

> *(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—*
>
> > *(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and*
> >
> > *(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),*
>
> *otherwise the deposit shall be refunded.*

30. Costs orders are the exception rather than the rule in employment Tribunal proceedings, but that does not mean that the facts of the case must be exceptional (*Power v Panasonic (UK) Ltd* UKEAT/0439/04).

31. Costs orders are compensatory in nature rather than punitive (*Lodwick v Southwark London Borough Council* [2004] ICR 884).

32. Such awards can be made against unrepresented litigants, including where there is no deposit order in place all costs warning (*Vaughan v London Borough of Lewisham* UKEAT/0533/120). However, whether a party is professionally represented is a factor to be taken into account (*AQ Ltd v Holden* [2012] IRLR 648).

33. It was observed in *Bennett v London Borough of Southwark* [2002] EWCA Civ 223 that "*what is done in a party's name is presumptively, but not irrebuttably, done on her behalf. When the sanction is the drastic one of being driven from the judgment seat, there must be roo for the part concerned to dissociate herself from what her representative has done*". The Respondent makes the point that this is an important point when the representation is by a lay representative who is not amenable to a wasted costs order.

34. 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).

35. 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".*

36. 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).

37. Rule 84 ET Rules says that the Tribunal "may" have regard to the party's ability to pay. When making an order for costs against a party of limited means, the Tribunal is not required to limit the sum awarded as being confined to an amount they could pay; it may be that their circumstances will improve (*Arrowsmith v Nottingham Trent University* [2011] EWCA Civ 797. It may, however, not be a proper exercise of discretion to award more than a party could reasonably be expected to pay over a reasonable period.

38. Rule 39(5) ET Rules provides a shortcut to finding unreasonable conduct for the purpose of considering the discretion to award costs under Rule 76, but the discretion as to whether to award costs remains to be exercised by the Tribunal taking account of all relevant circumstances in determining whether it is appropriate and proportionate to make an order, and if so, in what amount (*Oni v UNISON* UKEAT/0370/14).

Conclusions

39. There are three stages in determining whether or not to award costs under Rule 76 ET Rules; first, whether the applicant has reached the threshold of establishing that a party had acted vexatiously, abusively or disruptively or that a claim had no reasonable prospects of success. Second, if the threshold has been reached, the Tribunal will go on to consider whether it is appropriate to make an order for costs. Finally, if it is appropriate to make an order for costs Tribunal will go on to consider the amount.

Threshold

40. As set out above, if the Tribunal has made a deposit order, then where a Tribunal subsequently decides that allegation or argument against that party then that party will be treated as having acted unreasonably unless the contrary is shown.

41. I first consider whether at the liability hearing I decided the specific allegations or arguments against the Claimant for substantially the same reasons as given in the deposit order. I am satisfied that I did. I will repeat the sub-paragraphs at paragraph 16 above and cross-reference them with my Judgment and Reasons in **bold**:

    a. An argument about procedure not being followed by the Respondent (paragraph 22); (**see paragraph 69-90**)

    b. An allegation of bias – the investigation outcome was based on a thorough investigation (paragraph 23); (**see paragraph 78**)

c. The investigation was tainted as charges were added during the investigation (paragraph 24); (**see paragraph 76-7**)

d. An allegation that the decisionmaker may not have genuinely believed in the fact of the gross misconduct (paragraph 25); (**see paragraph 63-68**)

e. The sanction of dismissal was not reasonable (paragraph 26); (**see paragraph 91-99**)

f. The Claimant was treated inconsistently with others (paragraph 27) (**see paragraph 94**).

42. I am to treat the Claimant as having pursued these arguments or allegations unreasonably unless the contrary is shown. The Claimant has not shown the contrary. His (or, I suspect, Mr Spalding's) evidence and submissions have largely been directed towards an argument that the Respondent had persistently withheld the CCTV footage from him until the final hearing started, and that while he had not seen the footage, he still believed he had a strong case.

43. This argument is contrary to the facts both as I found them at the final hearing, and the material put before me in this application. As I set out in my Judgment and Reasons;

a. I was provided with material at the liability hearing which tended to suggest that numerous attempts were made to provide the Claimant with the CCTV footage (paragraph 8);

b. The Claimant did not engage with the allegations against him internally, or at the final hearing (paragraphs 62) and that he and Mr Spalding were "throwing up thin obstacles to participation with the process to justify non-engagement" (paragraph 74) and were not engaging meaningfully in the process (paragraph 84).

44. In terms of material put before me with the application, Mr Ashley sent a Dropbox link to the Claimant on 12 July 2023 which included the CCTV footage [**Supp 31**]. This was re-sent on 13 August 2023 (after the Claimant's letter of 26 July 2023 in which he said he was having difficulties) and the following day it was explained how to download, view and share the video files [**Supp 36**].

45. In broad brush terms my findings at the final hearing were that the Claimant and Mr Spalding were pursuing a strategy of non-engagement at the internal disciplinary proceedings. I have no hesitation in concluding that they were pursuing a similar line during the Tribunal proceedings, certainly from summer 2023 onwards. Mr Spalding's contention in his statement of 8 September 2024, and the contention in the "Initial Response of David Clark" (which I suspect was drafted by Mr Spalding), that there were numerous attempts to secure the CCTV footage by the Claimant, but that the Respondent did not supply it until the morning of the first day of the final hearing, are simply untrue. I accept the submissions of

the Respondent that the Claimant and Mr Spalding were in actual fact avoiding the footage as it would be devastating to any claim for unfair dismissal. On this point, I refer to paragraph 19 of my liability decision where I set out what the investigating officer, Mr Esposito, said about the footage; and paragraph 40 where I set out Mr Stuart's evidence to the Tribunal, unchallenged by Mr Spalding, about what the footage showed.

46. I therefore consider that the Respondent has crossed the threshold of establishing that the Claimant has acted unreasonably, by operation of Rule 39(5). The Claimant has acted unreasonably in pursuing the specific allegations or arguments subject to the deposit orders.

47. Mr Ashley's application is framed in a way to invite me to conclude that the Claimant has acted vexatiously or unreasonably independently of, or in addition to, the operation of Rule 39(5) ET Rules. He also pursues the application under Rule 76(1)(b) that it had no reasonable prospect of success.

48. I have not considered it appropriate to decide whether the Claimant had, aside from pursuing the claim after the deposit orders had been made, conducted the case unreasonably or pursued a claim which had no reasonable prospects of success. Unless there are particular features of the case which might need to be considered at stages two and three of the approach to cost outlined above, an applicant for costs need only get over the threshold once.

49. Had I been inclined to determine the application as Mr Ashley framed it, I would have decided that the Claimant acted unreasonably from mid July 2023 onwards when he and Mr Spalding were being sent the CCTV multiple times, but were not accessing it. I would not have determined that the claim had no reasonable prospects of success, but unhesitatingly agree with EJ McLaren's assessment that it had little prospects of success.

Appropriateness of a costs order

50. I have taken a number of factors into consideration in determining whether it is appropriate to make a costs order. Some of them I will deal with briefly as I will be repeating certain matters I have raised above.

    a. For the most part the Claimant was represented by Mr Spalding. Although he was a lay representative, as I set out in my liability judgment at paragraph 22 to 25 Mr Spalding has considerably more qualifications and experience than most lay representatives.

    b. Although I strongly suspect that Mr Spalding has been a factor in the fact and manner of this case being pursued, it is not possible to say quite how much of a factor. This question is probably irrelevant anyway, as the Claimant has done nothing to distance himself from the actions of Mr Spalding, who is presumed to act on his behalf. Even if 100% of the unreasonableness in pursuing the allegations or arguments is down to Mr Spalding, the responsibility lies with the Claimant (see *Bennett*).

c. The Respondent has made numerous costs warnings from as early as its Response to the ET1 (see paragraphs 13b, 13c, 13e and 13 f above).

d. During the final hearing Mr Spalding and the Claimant did not focus on the issues, but chose not to engage with the issues (see liability decision paragraph 62 and 84). A similar approach seems to have been made in resisting the application for costs. The Claimant and Mr Spalding are focused on the contention, which is just not true, that they have been chasing CCTV footage which the Respondent fails to provide.

e. The Claimant was told in no uncertain terms that his unfair dismissal claim had little prospects of success for a variety of reasons in the deposit order decision of EJ McLaren.

51. I also had regard to the Claimant's means. The documents he has supplied would tend to indicate that his outgoings exceed his income by around £300 per month. I note from the deposit order that EJ McLaren was satisfied that he had no savings or other assets, and I assume this is still the case. He has given no evidence of debts other than his liability to HMRC of £5257.23. However, I note that there is no documentary evidence of income or outgoings, and the Claimant says nothing about the amount or payment rate of overtime, just giving a basic figure.

52. These factors persuade me that it is appropriate to make a costs order in this case.

<u>The amount of costs order</u>

53. I consider that it was unreasonable of the Claimant to pursue his claim after the deposit order was made on 8 August 2022. In the absence of a deposit order I would have considered that he conducted himself unreasonably after the summer of 2023. This does not really add anything. I do not strictly speaking have to tie the amount of costs into the unreasonable conduct that led to the order, but the timing of what I see as unreasonable conduct is a factor I bear in mind in exercising my discretion as to the amount of the order.

54. Looking at the Respondent's cost schedule:

a. I consider that it is appropriate to consider the sums incurred after the preliminary hearing on 8 August 2022 at which the deposit order was made. I therefore take off the brief fee for the preliminary hearing on that date, but award all other hearing fees, namely £8,500.

b. I also conclude that it is appropriate to award the fees relating to the costs application itself, namely £1400.

c. In relation to the section "Neil Ashley costs from 09.07.2021 to 27.07.2024" I note that the costs are not broken down so it is

impossible to tell when the costs were incurred. I would only consider awarding those incurred after 8 August 2022. I will not award any of these cost. In part it is because I cannot tell when the costs were incurred, and in part because, for reasons which I will shortly explain, the figure I come to adding the costs under the previous two sub-paragraphs (£8,500 plus £1400 plus VAT of £1980 – total £11,800) is an appropriate and proportionate sum, having regard to all the circumstances in the case.

55. As I set out above, the Claimant appears to have an income/expenditure shortfall of around £300 per month, but he has not set out what he earns from overtime. He will also be commencing his payment plan in respect of his liability to HMRC, and will be paying of £5,257.23 over the next 6 months at a rate of 876.20 a month. I am assuming he entered into this payment plan on the understanding that he could stick to it – or in other words, he has the "ability to pay" HMRC just short of £900 per month. He will have discharged his debt to HMRC by 1 May 2025.

56. If the Claimant began paying the Respondent from 1 June 2025 at a similar rate to the HMRC payment plan he could pay of the costs award of £11,800 by around July 2026. Standing back, and looking at this figure as a whole in the context of the unreasonable conduct by the Claimant (in continuing to pursue his claim after being made subject to deposit orders) we consider it an appropriate and proportionate sum.

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Employment Judge Heath
Date: 21 November 2024

Sent to the parties on
Date: 6 January 2025

Note

Written reasons will not be provided unless a written request is presented by either party within 14 days of the sending of this written record of the decision.

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