EMPLOYMENT TRIBUNALS

Claimant: Miss M Stanescu

Respondents: 1. Crystal Chambers
2. Cohesion Legal Services Centre
3. Mr M Sheikh

Before: Employment Judge McDonald

JUDGMENT ON COSTS

The judgment of the Tribunal is that:

1. The first respondent's application for costs or a preparation time order against the claimant is refused.

2. The second respondent's application for costs or a preparation time order against the claimant is refused.

3. The third respondent's application for costs or a preparation time order against the claimant is refused.

REASONS

Introduction

1. This is my judgment on the applications for costs made by each of the 3 respondents against the claimant. The parties agreed that the applications should be decided on the papers without a hearing.

2. The claimant is Romanian. English is not her first language. There was no suggestion that she needed an interpreter for any of the hearings in the case.

3. The first respondent is a Barristers' Chambers based in Stratford, East London. In this judgment I will refer to it as "Crystal". The Head of those Chambers is Elizabeth Lanlehin ("Ms Lanlehin"). The second respondent is a limited company providing legal services based in Manchester. I will refer to it as "Cohesion". The third respondent (who I will refer to as "Mr Sheikh") is a director of the second respondent.

4. The costs applications were made after the claimant withdrew her claim against all 3 respondents. She did so by email on 10 November 2023 sent during a public preliminary hearing in which she did not otherwise participate.

5. That preliminary hearing had been listed by Employment Judge Porter at the case management hearing she conducted on 1 August 2023. During that case management hearing, Employment Judge Porter clarified the claimant's case and the respondents' positions in response. She listed the 10 November preliminary hearing to consider:

> (i) Whether the claim should be struck out on the grounds that it has no reasonable prospect of success;
>
> (ii) Whether the claimant should be ordered to pay a deposit as a condition of being allowed to pursue the claim;
>
> (iii) Whether the claim was presented out of time, and if so whether time should be extended under the reasonably practicable formula;
>
> (iv) Whether the tribunal has jurisdiction to hear the claim against the third respondent

6. In this judgment I refer to that 10 November 2023 hearing as "the Strike Out Hearing".

7. I was originally due to consider the costs applications in chambers in June 2024. In May 2024 I directed that the respondents provide a breakdown of the costs claimed for that hearing. I also directed that the claimant provide evidence about her financial circumstances if she wanted me to take her ability to pay into account in making my decision. The hearing in June had to be postponed because none of the parties had complied and their requests to extend time had not been referred to me. The matter was postponed to 9 August 2024. After considering the matter in chambers on that date I asked the parties for their submission on whether the orders to be made should be costs orders or PTOs.

8. I apologise to the parties that my absence from the Tribunal for various reasons and other judicial work has led to a delay in finalising this judgment.

The Relevant Law

<u>Costs and preparation time order ("PTO") applications</u>

9. The applications for costs were made under the Employment Tribunal Rules of Procedure 2013. From 6 January 2025, all ongoing cases are governed by the Employment Tribunal Procedure Rules 2024. I am making my decision under those 2024 Rules so will refer to them in these reasons. There are differences in rule numbers and wording between the 2013 and 2024 Rules. However, I am not aware of any suggestion that those differences make any differences to the legal tests I need to apply. Case-law authority relevant to the 2013 Rules is still relevant to decisions under the 2024 Rules.

10. So far as relevant this case, rule 73 of the 2024 Rules provides that:

> **"(1) A costs order is an order that the paying party make a payment to—**
>
> **(a) the receiving party in respect of the costs that the receiving party has incurred while represented by a legal representative or a lay representative, or**
>
> **(b) another party or witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual's attendance as a witness at a hearing.**
>
> **(2) A preparation time order is an order that the paying party make a payment to the receiving party in respect of the receiving party's preparation time while not represented by a legal representative.**
>
> **(3) A costs order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings."**

11. In terms of procedure, rule 75 of the 2024 Rules provides that a party may apply for a costs order or a PTO "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" (rule 75(1)). The party against who the order is sought must be given a reasonable opportunity to make representations in writing or at a hearing (rule 75(2)).

12. Crystal's application for costs was filed outside the 28 day time limit. Rule 5(7) of the 2024 Rules gives the Tribunal power to extend any time limit in the 2024 Rules on its own initiative or on the application of a party. An extension can be granted even where the time limit has expired.

13. In deciding whether to exercise its discretion to extend time, the Tribunal will have regard to all the relevant circumstances. That includes any explanation for the delay in making the application. It also includes the prejudice to the claimant if the extension of time is refused and to the respondent if it is granted.

14. In exercising its discretion to extend time the Tribunal must seek to give effect to the overriding objective. That is set out in rule 3 of the 2024 Rules:

> **"3.—(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.**
>
> **(2) Dealing with a case fairly and justly includes, so far as practicable—**
>
> **(a) ensuring that the parties are on an equal footing,**
>
> **(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues,**
>
> **(c) avoiding unnecessary formality and seeking flexibility in the proceedings,**
>
> **(d) avoiding delay, so far as compatible with proper consideration of the issues, and**
>
> **(e) saving expense."**

15. The circumstances in which a costs order or PTO may be made are now set out in rule 74(2) of the 2024 Rules. It provides as follows:

> **"A Tribunal must consider making a costs order or a preparation time order 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 that hearing begins."**

16. The respondents in this case rely on grounds 2(a) or (b). The wording of those paragraphs is identical the wording of rule 76(1)(a) and (b) of the 2013 Rules under which their applications were made.

17. Rule 82 concerns ability to pay. It provides that:

> **"In deciding whether to make a costs, preparation time or wasted costs order and if so the amount of any such order, the Tribunal may have regard to the paying party's (or where a wasted costs order is made the representative's) ability to pay."**

18. It follows from these rules as to costs that the Tribunal must go through a three stage procedure (see paragraph 25 of **Haydar v Pennine Acute NHS Trust UKEAT 0141/17/BA**). The first stage is to decide whether the power to award costs has arisen, whether by way of unreasonable conduct or otherwise under rule 76; if so, the second stage is to decide whether to make an award, and if so the third stage is to decide how much to award. Ability to pay may be taken into account at the second and/or third stage.

19. The case law on the costs powers confirm that the award of costs is the exception rather than the rule in Employment Tribunal proceedings; that was acknowledged in **Gee v Shell UK Limited [2003] IRLR 82**.

20. An award of costs is compensatory and not punitive so there should be an examination of what loss has been incurred by the receiving party.

21. "Vexatious" was defined by Lord Bingham in **Attorney General v Barker [2000] 1 FLR 759** and cited with approval by the Court of Appeal in **Scott v Russell [2013] EWCA Civ 1432** in relation to costs awarded by a Tribunal:

> "The hallmark of vexatious proceedings is…that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant…"

22. In determining whether to make an order on the ground that a party has conducted proceedings unreasonably, a Tribunal should take into account the 'nature, gravity and effect' of a party's unreasonable conduct — **McPherson v BNP Paribas (London Branch) 2004 ICR 1398, CA**. However, this does not mean that the circumstances of a case have to be separated into sections such as 'nature', 'gravity' and 'effect', with each section being analysed separately. The vital point in exercising the discretion to order costs is to look at the whole picture. The Tribunal

has to ask whether there has been unreasonable conduct by the paying party in bringing, defending or conducting the case and, in doing so, identify the conduct, what was unreasonable about it, and what effect it had. This process does not entail a detailed or minute assessment. Instead the Tribunal should adopt a broad-brush approach, against the background of all the relevant circumstances: **Yerrakalva v Barnsley Metropolitan Borough Council and anor 2012 ICR 420, CA**.

23. In assessing the conduct of a party, it is appropriate for a litigant in person to be judged less harshly in terms of his or her conduct than a litigant who is professionally represented. An employment tribunal cannot, and should not, judge a litigant in person by the standards of a professional representative: **AQ Ltd v Holden 2012 IRLR 648, EAT**. That does not mean that that lay people are immune from orders for costs: a litigant in person can be found to have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity.

24. Whether or not a party was acting on legal advice is a relevant but not a decisive factor. It is something that this tribunal can take into account in deciding whether the party's conduct is unreasonable: **Clarke t/a Marine Chart Services v Davenport and Bull EAT 1120/96**.

25. In **Radia v Jeffries International Ltd [2020] I.R.L.R. 431, paras 62-64** HHJ Auerbach in the EAT gave guidance on rule 76(1)(b) and its interaction with rule 76(1)(a). The relevant rules are now at rule 74(2)(a) and (b) of the 2024 Rules:

> "62. ….There is an element of potential overlap between (a) and (b). The Tribunal may consider, in a given case, under (a), that a complainant acted unreasonably, in bringing, or continuing the proceedings, because they had no reasonable prospect of success, and that was something which they knew; but it may also conclude that the case crosses the threshold under (b) simply because the claims, in fact, in the Tribunal's view, had no reasonable prospect of success, even though the complainant did not realise it at the time. The test is an objective one, and therefore turns not on whether they thought they had a good case, but whether they actually did…….
>
> 64. This means that, in practice, where costs are sought both through the [Rule 74(2)(a)] and the [Rule 74(2)(b)] route, and the conduct said to be unreasonable under (a) is the bringing, or continuation, of claims which had no reasonable prospect of success, the key issues for overall consideration by the Tribunal will, in either case, likely be the same (though there may be other considerations, of course, in particular at the second stage). Did the complaints, in fact, have no reasonable prospect of success? If so, did the complainant in fact know or appreciate that? If not, ought they, reasonably, to have known or appreciated that?".

26. In **Radia** (paras 67-69) HHJ Auerbach set out the correct approach in assessing whether a claimant knew or ought to have known or appreciated that the complaint had no reasonable prospect of success from the start. He stressed the need for the Tribunal to focus on the question of how things would have looked at the time when the claim began. It may, and should, take into account any information

it has gained and evidence it has seen by virtue of having heard the case in deciding that question. It should not have regard to information or evidence not available at the time. The mere fact that there were factual disputes which could only be resolved by hearing evidence does not necessarily mean that the Tribunal cannot properly conclude that the claim had no reasonable prospect of success from the outset, nor that the claimant should have known or appreciate that from the outset. That depends on what the claimant knew, or ought to have known, were the true facts and what view they should have taken of the prospects of the claim in light of those facts.

Employment status

27. The claimant's entitlement to be paid the national minimum wage ("NMW") and to holiday pay depended on her establishing that she was either an employee or a worker of a respondent. The definition of those terms in s.54 of the National Minimum Wage Act 1998 is identical to that in section 230 of the Employment Rights Act ("the ERA")/ It provides, so far as relevant, that:

> **"(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.**
>
> **(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.**
>
> **(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)-**
>
> > **(a) a contract of employment, or**
> >
> > **(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual."**

28. The relevant principles in assessing employment status (including worker status) were reviewed by the EAT in **Sejpal v Rodericks Dental Ltd [2022] I.C.R. 1339.** It emphasised the need for a structured approach applying the language in the statute. There has to be a contract or similar agreement between the worker and the putative employer. The true nature of that agreement has to be ascertained, ensuring that any contractual wording does not detract from the statutory test and purpose. There also has to be mutuality of obligation. If there was a contract pursuant to which one party undertook to perform personally any work or services for the other, then it was necessary to consider whether the first party was excluded from being a worker because they carried on a profession or business of which the second was a client or customer.

The Transfer of Undertakings (Protection of Employment) Regulations 2006 ("the TUPE Regulations")

29. One of the issues in the case appeared to be whether there had been a transfer of undertakings from the second or third respondent to the first respondent. Employment Judge Porter records the first respondent as specifically denying that was the case at the case management hearing.

30. Under Reg 4(2)(a) of the all rights, powers, duties and liabilities under or in connection with an employee's contract of employment are transferred on a TUPE transfer. Reg 4(2)(b) provides that 'any act or omission before the transfer is completed, of or in relation to the transferor in respect of the contract of employment of a transferred employee is deemed to have been an act or omission of or in relation to the transferee. The rights which transfer include those derived from statue such as the right to the national minimum wage and statutory holiday entitlements.

31. If there was a TUPE transfer to the first respondent, then the claimant's contract of employment (if there was one) would be transferred to it. Any acts or omissions of the transferor (on the claimant's case Cohesion or Mr Sheikh) before the transfer would be treated as having been done by the transferee (on the claimant's case, Crystal) and any liability arising there from would accordingly attach to Crystal.

32. The Court of Session confirmed in **Stirling District Council v Allan and ors 1995 ICR 1082** that once reg 4(2) of the TUPE Regulations has operated to transfer rights and duties to a transferee, it is not possible for a transferring employee to bring a claim against the transferor in respect of them.

Time limits in unauthorised deduction complaints

33. S.23(2) of the ERA says that an unlawful deductions claims has to be brought before the end of the period of three months beginning with the date of payment of the wages from which the deduction was made or (in the case of a series of deductions) beginning with the date of the last deduction in that series.

34. That time limit is extended by the rules relating to ACAS Early Conciliation so long as Early Conciliation is begun within that primary three-month time limit (**Pearce v Bank of America Merrill Lynch and ors EAT 0067/19**).

35. If the claim is brought outside that time limit the Tribunal does not have jurisdiction to hear it unless the Tribunal is satisfied (i) that it was not reasonably practicable for the claim to be presented before the end of the relevant period of three months and (ii) that it was presented within such further period as the Tribunal considers reasonable (s.23(4) of ERA).

36. When it comes to the meaning of "reasonably practicable", the courts have said that that means "reasonably feasible" **Palmer v Southend-on-Sea Borough Council [1984] ICR 372, CA**. In **Marks and Spencer Plc v Williams-Ryan [2005] ICR 1293** the Court of Appeal confirmed that a liberal approach in favour of the employee was still appropriate. What is reasonably practicable and what further period might be reasonable are ultimately questions of fact for the Tribunal.

The effect of non-compliance with early conciliation requirements

37. Mr Sheikh relied on **Pryce v Baxterstorey Ltd [2022] EAT 61** as authority that the failure to comply with the ACAS Early Conciliation ("EC") scheme meant the claim against him was a nullity. In **Abel Estate Agent Ltd and others v Reynolds [2025] EAT 6**, the EAT held that the decision in **Pryce** was manifestly incorrect.

38. In summary, **Reynolds** held that a failure to comply with the EC scheme does not render a claim a nullity. If a Tribunal accepts a claim when there has been a failure to comply with the scheme, the correct approach is that set out by the Court of Appeal in **Clark v Sainsbury's Supermarket Ltd [2023] ICR 1169**. The respondent's remedy in such circumstances is to raise any points about non-compliance and to seek dismissal of the claim under [rule 28 of the 2024 Rules] or apply for it to be struck out under [rule 38 of the 2024 Rules]. When considering such an application, what in **Clark** was described as the Tribunal's "very wide power" in what is now rule 6 of the 2024 Rules to waive non-compliance with the Tribunal Rules applies.

The Agarwal case

39. Cohesion and Mr Sheikh's strike-out submissions also relied (at para 33) on the EAT's decision in **Agarwal v Cardiff University**. The EAT held that an employment tribunal does not have jurisdiction to hear a claim under s.13 ERA if the claim requires a decision on the construction of the employment contract. However, that EAT decision was reversed by the Court of Appeal in **Agarwal v Cardiff University & Anor [2018] EWCA Civ 2084** which (para 27) confirmed that an employment tribunal does have jurisdiction to resolve any issue necessary to determine whether a sum claimed under Part II of ERA is properly payable, including an issue as to the meaning of the contract of employment.

The claimant's substantive claim and the respondents' response to it

40. Because the case did not go to a final hearing there was no judgment making findings of fact and reaching conclusions on the issues in the case. There were no witness statements exchanged and no bundle of documents produced. My summary of the case and the parties' respective positions below is based on the pleadings in the case, the parties' written submissions and Employment Judge Porter's case management summary.

Summary of the claim

41. The claimant asserted that she was a worker or employee of Cohesion at its office in Manchester from 2017 to September 2021. She said that from September 2021 the part of the business in which she worked (immigration) was transferred to Crystal. She continued working at the office in Manchester but says she was a worker or employee of Crystal from September 2021 until she left work on 15 December 2022. The claimant says that she worked under the instruction and management of Mr Sheikh throughout the whole of the period of work from 2017 to 2022. She also asserted that she was a worker or employee of Mr Sheikh throughout that period.

42. The claimant asserted that she was entitled to be paid at the relevant NMW rate throughout her period of work. She based her claim on working hours of 40 hours per week (8 hours per day for 5 days a week). She said she was on average

paid £150 per week in cash by Mr Sheikh during the relevant period. She claimed the difference between that and the amount she said she was due under the NMW. The amounts claimed per year were significant. For example, in her particulars of claim, she said the underpayment she was claiming from Crystal for the period she was its worker or employee was £16,621.60.

43. Employment Judge Porter identified the complaints as being of unauthorised deductions from wages and a failure to pay statutory holiday pay.

Facts not in dispute

44. Certain facts are not in dispute. The respondents did not dispute that the claimant worked at Cohesion's Manchester office in some capacity from 2017 until 2022. There is a dispute about the exact dates she worked and about the hours she worked. The respondents say she was not a worker or employee but worked on an ad-hoc and self-employed basis.

45. It is also agreed that there was no employment contract nor any other contractual document which clarifies the basis on which the claimant worked. It does not appear to be disputed that she was not given payslips or P60s/a P45. Mr Sheikh accepted that he personally paid the claimant for work done. He said that his relationship with the claimant began as one of friendship and mutual support. He said the claimant then started volunteering at the Manchester office before then providing services on a self-employed basis.

46. It is not disputed by the claimant that she returned to Romania for health treatment for a period between at least 28 May 2021 and the end of July 2021. It does not appear to be disputed that she then had a period of COVID quarantine before returning to work at some point by September 2021.

47. It is not disputed that in the second half of 2021, Ms Lanlehin agreed that she would establish a "branch" of Crystal Chambers in Manchester to take on the immigration work which Cohesion had previously done. It was agreed that Mr Sheikh would assist with the transition of that work. The respondents agree that Ms Lanlehin engaged Mr Sheikh as a self-employed contractor during that transitional period.

48. There is another fact which the claimant does not dispute and which the respondents say fatally undermines her case that she was a worker or employee. As Employment Judge Porter recorded in her case management summary, the claimant accepts that from 5 May 2020 and throughout the relevant period of work she claimed Universal Credit ("UC") on the basis that she was a self-employed contractor. The claimant says she now understands that she was in fact a worker or employee. The respondents say that claimant clearly understood herself to be self-employed otherwise she would not have claimed UC on that basis. The alternative, they submit, is that the claimant knew she was not self-employed but fraudulently claimed and received UC on the basis that she was.

Factual matters in dispute

49. Alongside the accepted facts there are a number of factual matters in dispute.

50. They include the regularity and number of hours worked by the claimant. Her claim is based on working 40 hours per week. Mr Sheikh said she worked on an ad hoc basis for a few hours per week. The claimant said (para 6 of her particulars of claim) that she was paid weekly on a Friday. Mr Sheikh and Cohesion said that she was paid on an ad hoc basis for work actually done.

51. There appears to be dispute about what work the claimant did for others. Mr Sheikh asserted that the claimant worked as a Romanian interpreter for other firms providing immigrations services. He also asserted that the claimant would on occasion contact him to say she was not available to work.

52. The claimant's case was that she started working as a Reception Assistant and from around September 2018 she became Assistant Manager. She said that from that point she started working on immigration cases.

53. The extent to which the claimant worked for Crystal and the capacity in which she did so is also in dispute. The claimant said that in August 2021, Mr Sheikh told her that Cohesion's work would from then operate under the name Crystal Chambers. She said that in carrying out her work she used the Crystal Chambers' name in answering the phone and used its letterhead and a Crystal Chambers email address in carrying out her work. She said she worked on immigration cases and that all the clients she helped were clients of Crystal. She said that Mr Sheikh had engaged her and other staff members in working for Crystal, making them believe they were working for Crystal. She said she had access to Crystal's client files on the computer system she worked on. The claimant asserted that when Ms Lanlehin came to the Manchester office Mr Sheikh prevented the claimant from meeting her.

54. There is a dispute about when the claimant stopped work. She said in her claim form it was on 15 December 2022. Mr Sheikh said it was on 28 November 2022.

55. There was also a dispute about the identity of the respondents. In her case management summary, Employment Judge Porter recorded Mr Lanlehin as asserting that the correct name of Crystal was Crystal Chambers Limited. A company with that name of which Ms Lanlehin is the director is registered with Companies House (reg. no 06631366). The claimant at that hearing indicated she wanted to add Ms Lanlehin personally as a further respondent. Employment Judge Porter in her case management summary (para 24) indicated that the correct names of the respondents would be considered after a determination of the strike out applications, as appropriate

<u>The strike out submissions on the substance of the claim</u>

56. The Strike Out Hearing did not proceed because the claimant withdrew her claim during it. She did so after the Tribunal had contacted her by phone because she did not attend the hearing. The respondents attended that hearing, with Ms Lanlehin representing Crystal and Mr Sheikh representing himself and Cohesion. I heard no evidence before the case was withdrawn. However, the respondents had each, as directed by Employment Judge Porter, provided written submissions in support of their strike out applications. Part of those submissions argued that the claimant's claim had no reasonable prospects of success for jurisdictional reasons, including time limit points. I deal with those issues below. Part of the submissions,

however, dealt with reasons why it was asserted the claimant's substantive claim had no reasonable prospect of success. In addition to the points already set out above, the respondents made the following points on the substantive claim.

57. All three respondents relied on the claimant's claim for and receipt of UC on a self-employed basis as being inconsistent with worker or employee status.

58. Cohesion and Mr Sheikh's submissions went further and said that the claimant's behaviour demonstrated she was a liar. They requested that the Tribunal refer the claimant to the DPP for prosecution for fraud. They accused the claimant of including misleading information about her work history and experience in her LinkedIn profile. They said they had to contact the claimant to get her to correct that information. They also pointed to inconsistencies in the claimant's case as evidence of the unreliability of her version of events. In particular, they highlighted inconsistencies in the dates when the claimant claimed to have been an employee/worker of each respondent. For example, in her ET1 she claimed to have worked for Crystal from August 2021 to 15 December 2022. In her Particulars of Claim she said 1 June 2021 to 15 December 2022. At the case management hearing before Employment Judge Porter she said September 2021 to December 2022.

59. Crystal submitted that Mr Sheikh was entitled to take on any assistance he required to carry out his tasks. It said that there was no contract of employment between it and the claimant. It also asserted that there was no transfer of undertaking from Cohesion to it so the claimant's contract of employment 9fi there was one) did not transfer to it.

60. It also said that Crystal Chambers is not a separate entity capable of entering into an employment contract. It says that Ms Lanlehin, as a practising barrister, was personally registered to provide immigration services. Crystal was not registered to do so. That meant, it said, that it was only Ms Lanlehin who was capable of employing the claimant as part of providing an immigration service. It pointed out that the claimant accepts never having met Ms Lanlehin and submitted that in those circumstances there could never have been an employment contract (or worker contract) between them.

61. Cohesion submitted that the claimant had no contractual relationship with Cohesion. It pointed out that on the claimant's own case, she says she stopped working for it on 28 May 2021. In Cohesion's strike out submissions it submitted that the claimant was directly engaged by Mr Sheikh rather than Cohesion (para 16 of those submissions dated 24 September 2023).

62. Mr Sheikh and Cohesion submitted that there was no mutuality of obligation between them and the claimant – she could, and did in practice on occasion say she was unavailable and would carry out work on her own account for other firms.

The procedural history of the claim and strike out submissions based on it

63. The claimant commenced EC in relation to Crystal on 29 January 2023. The EC certificate in relation to Crystal was sent to the claimant on 28 February 2023. The claimant commenced EC in relation to Cohesion on 29 January 2023 with the EC certificate being issued on 6 March 2023. The claimant did not commence EC in relation to Mr Sheikh before presenting her Tribunal claim.

64. The claimant filed her claim form on 14 April 2023. She named all three respondents. The Tribunal on 17 May rejected the claim form against Mr Sheikh because there was no valid early conciliation certificate relating to him.

65. On 17 May 2023 Employment Judge Johnson also directed that the claimant provide further details of her claim. On 31 May 2023 the claimant sent the Tribunal her particulars of claim. She confirmed she was not bringing a whistleblowing claim.

66. The Tribunal listed a final hearing in the case for 8, 9 and 10 July 2024. The case management hearing was listed for 1 August 2023.

67. On 19 June 2023 the claimant sent an EC Certificate in relation to Mr Sheikh. That recorded a period of EC in relation to Mr Sheikh from 15-19 June 2023. The claimant did not present a fresh claim form dated after the EC certificate was obtained but applied by email for Mr Sheikh to be added as third respondent.

68. The claim against Mr Sheikh was accepted after referral to an Employment Judge. It was served on Mr Sheikh on 26 June 2023 giving him until 27 July 2023 to file his response.

69. On 29 June 2023 Mr Sheikh applied to the Tribunal for a rejection of the claim against him relying on **Pryce v Baxterstorey Ltd [2022] EAT 61**. REJ Franey directed that that jurisdictional question matter be considered at the case management preliminary hearing on 1 August 2023. Employment Judge Porter decided that was not a matter she could decide at that hearing and had listed it to be decided at the Strike Out Hearing. The issue was never decided because the claimant withdrew her claim at that hearing.

70. The claimant had also presented a second Tribunal claim against the same 3 respondents. That claim (no.2404676/2023) was presented on 26 April 2023. It was dismissed on withdrawal on 24 May 2023 after the claimant confirmed it was a duplicate of the claim I am considering.

Strike out submissions - jurisdictional and time limit points

Time limits-Crystal

71. All 3 respondents submitted that the claim against them was out of time.

72. For Crystal, it was submitted that the primary time limit was 14 March 2023. That was based on time starting to run from 15 December 2022, when the claimant said her employment terminated. Crystal submitted that adding the “stop the clock” period in its case meant that the claimant had an additional 44 days from the date ACAS issued the EC certificate on 28 February 2023 to file her claim. It calculated that date as being 13 April 2023. The claim was presented on 14 April 2023 so was out of time.

73. I find the calculation of the date is correct although the reference to “an additional 44 days” is a little confusing. The primary time limit would be extended by the “stop the clock” period (s.207B of the ERA). S.207B(3) provides that the period beginning with the day after Day A (when EC is initiated) and ending with Day B (the date the EC certificate is deemed received by the claimant) is not to be counted. In

the case of Crystal, that means that the primary time limit is extended by 30 days. As Crystal says, that means the new time limit would be 13 April 2023.

74. If Crystal is correct that the time limit ran from 15 December 2022, the claim against it was brought out of time. For it to be allowed to proceed, a Tribunal would have to accept it was not reasonably practicable for the claimant to have brought it within the time limit and that it was brought within such further period as the Tribunal considered.

75. There is, however, an issue as to whether Crystal is correct that time ran from 15 December 2022. For unauthorised deduction complaints, time runs from the date when the deduction was made. The claimant's case is that she was paid every Friday. If the Tribunal was satisfied on the evidence that that was the case, the primary time limit would run from Friday 16 December 2022 and expire on 15 March 2023. If that is the case then the claim against Crystal would be in time, the extended limitation date being 14 April 2023.

Time limits - Cohesion

76. As Cohesion submitted, the claim against it appears to be significantly out of time. On the claimant's own case, her employment with it ended in 2021. Even if it ended in September 2021, which is the latest date the claimant suggests, the primary time limit would have expired long before the claim was brought in April 2023. For it to be allowed to proceed, a Tribunal would have to accept it was not reasonably practicable for the claimant to have brought it within the time limit and that it was brought within such further period as the Tribunal considered.

Time limits – Mr Sheikh

77. Mr Sheikh submitted that the claim against him was also out of time. The claimant did not begin EC in relation to Mr Sheikh within the primary time limit (regardless of whether that expired on 14 or 15 March 2023). She does not benefit from the provisions extending the primary time limit because EC has been undertaken. The claim against him was accepted by the Tribunal on 19 June 2023 and was therefore some 3 months out of time. For it to be allowed to proceed, a Tribunal would have to accept it was not reasonably practicable for the claimant to have brought it within the time limit and that it was brought within such further period as the Tribunal considered.

Agarwal – Cohesion and Mr Sheikh

78. As already mentioned, Cohesion and Mr Sheikh relied on the EAT's decision in **Agarwal** to argue that the Tribunal had no jurisdiction to deal with the unauthorised deduction claim. That decision has been reversed and there is no merit in that submission.

Pryce -Mr Sheikh

79. Mr Sheikh also relied on **Pryce** to argue that the claim against him was a nullity because the claimant did not comply with EC scheme before issuing her claim against him. **Reynolds** decided that Pryce was manifestly incorrect on that point. That is not necessarily the end of the matter. As **Pryce** makes clear, it would be

open to Mr Sheikh to apply to dismiss the claim under rule 28 or for it to be struck out under rule 38. The Tribunal has a wide power to waive the failure to comply with the EC Rules but that does not automatically mean it would do so. It would need to consider the relative prejudice to the parties and how the overriding objective applied in the circumstances of the case before reaching its decision. In the case of a strike out application, it would also need to consider whether it was still possible to hold a fair hearing and whether strike out was the proportionate step to take.

Discussion and decisions on the costs/PTO applications

80. None of the applications refer to or rely on the withdrawal of the claim at the Strike Out Hearing as being the unreasonable conduct giving rise to grounds for making the costs/PTO application. Instead, all applications rely on the claimant having acted vexatiously and/or unreasonably in bringing the claim (rule 74(2)(a)) and on the claim having no reasonable prospects of success (rule 74(2)(b)). Each respondent claims the costs/a PTO relating to the whole of the proceedings.

81. There is a lot of cross over between the respondents' submissions but they also each raise some different points for consideration. I have dealt with each in turn but to avoid repetition have cross referred where common issues arise.

82. I will deal at this point with the respondents' submissions about the claimant's credibility. Cohesion and Mr Sheikh assert in their submissions that she is a liar. Crystal does not use that term but points to the inconsistency of her claiming UC on a self-employed basis while asserting in her claim that she is a worker/employee. Cohesion and Mr Sheikh also point to inconsistencies in the claimant's version of events, particularly when it comes to the dates she worked for each respondent, as further evidence of her unreliability.

83. I considered carefully whether the fact of the claimant's receipt of UC on a self-employed basis in itself fundamentally undermines her credibility. I have decided that it does not. The claimant's case, as I understand it, is that she claimed UC on a self-employed basis because she only latterly realised she was a worker or employee. I do not know how credible that explanation is because I have not heard evidence from the claimant. I have not heard what the criteria for self-employed UC are nor what information the claimant provided about her position when claiming it.

84. I find that I cannot base a finding that a claim has no reasonable prospect of success solely on an assessment of the claimant's credibility as a witness when she has not given evidence. This is not a case where there is documentary evidence which is manifestly inconsistent with the claimant's version of events. The lack of proper documentation of the working relationship is one of the reasons for there being scope for dispute.

85. I do not have the basis to find that the claimant is a liar or that she would be an unreliable witness. That does not necessarily meant that her claim has any reasonable prospect of success. It may be that even on her version of events there are no reasonable prospects of success. The respondents also submit that there are also time limit and/or jurisdictional issues which mean the claim has no reasonable prospect of success. I consider those next.

<u>Crystal's application</u>

Extension of time limit for making the application for costs/PTO

86. There is a preliminary issue with Crystal's application which is that it is out of time. The judgment disposing of the claim was sent to the parties on 14 November 2023. The 28-day deadline in rule 75(1) expired on 12 December 2023. Crystal's costs application was made by email timed at 00:13 on 13 December 2023. The email apologised for "the few minutes delay that our IT issues made us lodge this application".

87. The first decision I need to make is whether to extend time and allow the application to proceed.

88. The Tribunal has a discretion whether to extend a time limit. Time limits are important and should not be disregarded lightly. This is not the case of an application being made by a litigant in person. Ms Lanlehin is a barrister although, based on the information I have from the case documents, one primarily specialising in immigration rather than employment law. There is prejudice to the claimant if I allowed the application to proceed out of time because she faces the prospect of a costs order or PTO. On the other hand, there is a prejudice to Crystal if I refuse the application to extend time because it will be denied the opportunity to seek to recover its costs. The delay in this case is of a few minutes only and an explanation has been provided (IT issues). It does not seem to me that there is significant, if any, practical prejudice to the claimant arising from the delay. It does not in any way prevent or impair her from responding fully to the application. On balance I have decided that it is in accordance with the overriding objective to grant a short extension of time and allow Crystal's application for costs to proceed.

89. I decided that the appropriate way to approach matters was to first consider whether the claim had no reasonable prospect of success (rule 74(2)(b)). That will help inform my decision on rule 74(2)(a). I am not deciding whether I think on balance the claimant was likely to win. Nor am I applying the "little reasonable prospect of success" threshold which applies when considering whether to make a deposit order. "No reasonable prospect" is a much higher threshold.

Crystal's costs/PTO application

90. Crystal claims £3900 in costs. That was based on Ms Lanlehin being a Senior Barrister so that her time for defending this claim should be recoverable in line with her hourly rate charge.

Time limit points

91. To succeed with her claim against Crystal, the claimant would first of all have to satisfy the Tribunal that her claim was in time or that the time for bringing her claim should be extended. As I've already said, it is not entirely clear whether the claim against Crystal is out of time. That will depend on when the time limit for bringing an unauthorised deduction claim started to run. That can be after the last date of employment if the last payment due date falls after employment ended. To decide the time limit issue the Tribunal would first have to hear evidence and decide when the claimant's final payment was due. If, as she has asserted, she was paid on Friday so that her final payment was due on 16 December 2022, her claim against Crystal would be in time.

92. If Crystal is correct and the time for bringing a claim runs from the last date of employment. i.e. 15 December 2022, then the claim is out of time. However, that is not the end of the matter. The Tribunal would need to hear evidence to decide whether it was reasonably practicable for the claimant to have brought a claim in time and, if not, within what further period it was reasonable to expect her to bring that claim. That was a matter on which the claimant was due to give evidence at the Strike Out Hearing.

93. I find I cannot say that there is no reasonable prospect of the claimant succeeding on the time limit point without having heard her evidence on that issue. I do not know what her explanation would be for the delay nor whether it would meet the relevant legal tests to be allowed to proceed out of time.

Substantive points

94. When it comes to the submission that the claimant's substantive claim that she was an employee or worker had no reasonable prospect of success, it seems to me similar issues about evidence arise. This is a case where there is a dearth of relevant documentation. The Tribunal would have to decide the true nature of the contractual relationship (if any) between the parties primarily if not exclusively by hearing evidence about how matters worked in reality.

95. There are undisputed facts which point to there being some kind of "work" relationship between the respondents. As I have said, it is accepted that the claimant worked under Mr Sheikh's instruction at Cohesion's office. It is accepted that she was paid for that work. The nature of that relationship is what is in dispute.

96. The respondents rely heavily on the claimant's claim for UC on a self-employed basis as being fundamentally inconsistent with worker/employee status. I have already explained why I do not find that fatal to the claimant's credibility in the absence of hearing evidence about it. The same applies to the submission that receipt of UC on a self-employed basis is a "knock-out blow" to a claim of worker/employee status. I accept it would be one of the factors which a Tribunal would take into account in applying the statutory definition of worker/employee. It might be an important one depending on the claimant's evidence about it. However, it would need to be taken into account alongside the other evidence about how the working relationship operated. The number of recent high-level legal authorities on the issue of employment and worker status illustrates how fact-sensitive such an analysis can be.

97. I do not find that without having heard evidence I can conclude that the claimant's claim of being a worker/employee has no reasonable prospect of success.

98. There is a separate question which is whether there is any reasonable prospect of the claimant showing she was a worker or employee of Crystal's. Crystal's argument is that if she was a worker or employee, the claimant was employed by Mr Sheikh and/or Cohesion. Crystal submits that there could be no contractual relationship between Crystal and the claimant. The first reason it says that is because the claimant herself accepts she never met Ms Lanlehin.

99. As I understand it from Employment Judge Porter's case management summary, the claimant's case is that there was a TUPE transfer to Crystal in late

summer 2021. Crystal denies that. However, it accepts that it agreed with Mr Sheikh that it (or at least Ms Lanlehin) would take on Cohesion's immigration business in which the claimant was employed. The claimant's case is that she worked for Crystal using its name, email address and accessing its files from then on. Whether or not that means there was a TUPE transfer under which the claimant's contract transferred to Crystal again seems to me to be something which would turn on evidence. I find I cannot say there is no reasonable prospect of success on that point based solely on Crystal's assertions.

100. In summary, viewed objectively, I do not find that the claimant's claim that she was a worker or employee and that her employment transferred to Crystal under TUPE from late Summer 2021 has no reasonable prospect of success. I am not saying it is a strong case but I do find the "threshold test" for making a costs order/PTO under rule 74(2)(b) against the claimant is not met in relation to her claim against Crystal.

101. I have found that, objectively, I could not say there was no reasonable prospect of the claimant's claim that she was a worker or employee succeeding. The claim is not one which I can say on the information before me is vexatious in the sense of having no or little legal foundation.

102. The respondents (and particularly Cohesion and Mr Sheikh) submitted that the claimant lacked sincerity and was, in essence, bringing the claim with malicious or vexatious intent. I have not heard evidence from the claimant about why she brought her claim. There is no direct evidence to support a finding that her intentions were vexatious or (as Crystal submitted) frivolous. I accept I do not necessarily need to hear evidence to find the threshold in 74(2)(a) met. Such a finding could, it seems to me, be based on the contents of the claim itself or the claimant's conduct of the case

103. There are some undisputed elements of the case which could be said to support the respondents' submissions that the claimant was pursuing the case vexatiously or unreasonably. There are aspects of the case which appear to support a submission that she knew that she was not really a worker or employee. One of those is the fact that she did not bring a claim for non-payment of the NMW during the 5 years or so when she worked with Mr Sheikh. That might support the respondents' argument that the claim was a "try on" rather than a genuine attempt to enforce employment rights. The fact that the claimant was claiming UC on a self-employed basis could also be said to support that, pointing to the claimant knowing all along that she was not a worker or employee. On the other hand, it is not that uncommon for a claimant not to bring a claim to enforce their rights until they have left employment. Equally, whether someone is self-employed or not is not necessarily straightforward for that person to know. A person can be a "worker" within s.230(3)(b) ERA even if they are self-employed, so long as the person for whom they work is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual. I do not find those points sufficient basis in themselves for a finding that the claimant was acting vexatiously or unreasonably in brining her claim.

104. I have considered whether the way the claimant conducted the case also supports a submission that she was acting vexatiously in bringing it. This was not a case where the claimant presented a claim and then did not actively purse

proceedings. The claimant filed particulars of claim when ordered to so do, obtained (albeit belatedly) an EC certificate or Mr Sheikh when her claim against him was rejected and participated in a case management preliminary hearing. I do accept that she had to be contacted by the Tribunal on the day of the Strike Out Hearing before confirming her withdrawal of the claim. She did, however, give an explanation for withdrawing her claim, namely an inability to afford legal representation. She could potentially be criticised for not proactively withdrawing her claim before that hearing but I have no evidence about efforts (if any) she was making to obtain legal representation in the lead up to the hearing.

105. I bear in mind what was said in **Holden** about it being appropriate for the conduct of a litigant in person to be judged less harshly than a litigant who is professionally represented. I take into account that the claimant worked in the legal field, although in relation to immigration rather than employment law. She is a litigant in person. She is also someone for whom English is not her first language although not such as to require an interpreter.

106. Taking everything in the round I do not find I can say based on the information before me that the claimant acted vexatious or unreasonably in pursuing her claim. I have already explained why I do not find I can base my decision on the respondents' assertions about the claimant's sincerity or lack of it. This is not a case where the claim is so weak or hopeless that I can make a finding of vexatious or unreasonable conduct on that alone. The threshold condition for making a costs order/PTO under rule 74(2)(a) is not met.

Conclusion on the application

107. Crystal's application for a costs order or PTO is refused.

Cohesion's application

Time Limit points

108. Cohesion claimed £3500 in costs for dealing with the claim.

109. The claim against Cohesion does seem to me to have been submitted significantly out of time. For it to be allowed to proceed, the Tribunal would need to hear evidence to decide whether it was reasonably practicable for the claimant to have brought a claim in time and, if not, within what further period it was reasonable to expect her to bring that claim. As I have said, that was a matter on which the claimant was due to give evidence at the Strike Out Hearing.

110. The claim is almost 2 years out of time. However, the length of delay does not alter the focus on why it was not reasonably feasible for the claimant to bring her claim earlier. The longer delay might make it harder for her to explain why she did not take action or seek advice sooner. That would be something for the claimant to explain. As with the time limit issue in relation to Crystal, I find I cannot say that there is no reasonable prospect of the claimant succeeding on the time limit point without having heard her evidence on that issue. I do not know what her explanation would be for the delay nor whether it would meet the relevant legal tests to be allowed to proceed out of time.

Substantive issues

111. I have already dealt with the points Cohesion made in relation to the substantive claim above. In summary, it said the claimant was a liar and relied particularly on her claim for UC on a self-employed basis as fundamentally damaging her claim. I have explained above why I did not find either of those points justified a finding that he threshold for a costs order or PTO under rule 74(2)(a) or (b) was met. I do not repeat those reasons here. It find that the claimant's claim is stronger against Cohesion than against Crystal. There is no dispute that she worked for it in some capacity. Without hearing evidence I cannot say that there is no reasonable prospect of the claimant showing that she was an employee or worker of Cohesion's.

Conclusion on the application

112. Cohesion's application for a costs order or PTO is refused.

Mr Sheikh's application

113. Mr Sheikh claimed £3500 in costs.

Time limits

114. Mr Sheikh submitted that the claim against him was also out of time. It seems to me it was. There was no EC process started within the primary time limit so no extension of time arising from the EC scheme under s.207B of the ERA. The claim was accepted some 3 months out of time. The Tribunal would need to hear evidence to decide whether it was reasonably practicable for the claimant to have brought a claim in time and, if not, within what further period it was reasonable to expect her to bring that claim. As with the time limit issue in relation to Cohesion, I find I cannot say that there is no reasonable prospect of the claimant succeeding on the time limit point without having heard her evidence on that issue. I do not know what her explanation would be for the delay nor whether it would meet the relevant legal tests to be allowed to proceed out of time.

Jurisdictional Issue - Pryce

115. Mr Sheikh relied on **Pryce** to argue that the claim against him was a nullity because of the failure to comply with EC requirements. As I have explained above, **Reynolds** decided that **Pryce** was manifestly incorrect on that point. It would be open to Mr Sheikh to apply to dismiss the claim under rule 28 of the 2024 Rules or for it to be struck out under rule 38 of the 2024 Rules. I have considered whether I can say that the claimant's claim has no reasonable prospect of success because it would be dismissed or struck out if such an application were made. I find I cannot. As was made clear in **Clark**, the Tribunal has a wide power to waive the failure to comply with the EC Rules. It will also only strike out a claim if it was no longer possible to hold a fair hearing and if striking out was the proportionate step to take. In this case, there was very limited practical prejudice to Mr Sheikh if the claim against him were allowed to proceed. He was already aware of the proceedings as the managing director of Cohesion. EC had been started in relation to that respondent so the purpose of the EC scheme had arguably been fulfilled. The circumstances of the claimant's case and **Reynolds** are different. In **Reynolds** the Tribunal had not rejected the claim despite the failure to comply with EC

requirements. In the claimant's case the claim had been rejected and the claimant was given an opportunity to apply for a reconsideration of that decision. I am not saying that an application to dismiss or strike out would inevitably fail. What I am saying is that there were certainly arguments against such applications which means I cannot say there is no reasonable prospect of the claimant's claim surviving such an application.

Substantive Issues

116. I will not repeat the points I have already made above. I find the threshold conditions are not met under either rule 74(2)(a) or (b). I would add that in Mr Sheikh's case there were arguably stronger prospects of success than the other respondents. He accepted he paid the claimant. The other respondents also asserted that it was with him the claimant had any contractual relationship.

Conclusion on the application

117. Mr Sheikh's application for a costs order or PTO is refused.

Summary of conclusions

118. Taking into account all the points made by each respondent I do not find the threshold condition for making a costs order or PTO under rule 74(2)(a) or (b) is met. I am not saying that the claimant's conduct is beyond criticism or that her claims against each of the respondents were likely to succeed. I am saying that the conditions for making a costs order or PTO are not met. That decision seems to me consistent with the exceptional nature of such orders in the employment tribunal.

119. Each respondent's application for costs or a PTO is refused

_____

Employment Judge McDonald

Date: 28 January 2025

JUDGMENT AND REASONS SENT TO THE PARTIES ON

Date: 6 February 2025

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

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