EMPLOYMENT TRIBUNALS

Claimant: **Mr Dean Owens-Cooper**

Respondent: **Odeon Cinemas Limited**

On: **8 January 2024**

Before: **Employment Judge H Clark**

ORDER

1. The claimant shall pay the respondent's costs of defending the claim limited to £10,000.

REASONS

1. The respondent has applied for a costs order against the claimant in relation to all the costs of these proceedings totalling £15,156.50. The application was submitted on 16 November 2023 and supplemented a previous application for costs made on 6 October 2023.

2. At a preliminary hearing on 2 November 2023, the Tribunal struck out the claimant's claims under rules 37(1)(b) and 37(1)(d) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013. The claimant did not attend this hearing or the previous two hearings of his claim (on 22 August 2023 and 14 September 2023).

3. Given the claimant's history of failing to attend hearings and the costs incurred by the respondent in doing so, the Tribunal agreed to determine the respondent's costs application in writing.

4. The respondent's first application for costs was due to be heard on 2 November 2023, but the respondent discovered shortly before that hearing that the claimant had made another claim to the Employment Tribunal against a different respondent which had also been struck out. A further search by the Tribunal of public judgments revealed that the claimant had made other

claims which were struck out either on the basis of his failure to actively pursue his claims or failure to comply with orders. In light of this, the respondent wished to widen the scope of its costs application.

5. As the claimant did not respond to the first costs application, the Tribunal ordered the claimant to provide evidence of his means (and any written submissions) by 16 November 2023. This was in order that the Tribunal could take into account the claimant's financial circumstances in determining the respondent's application. By an email dated 16 November 2023 (in direct response to the respondent's covering email to the application) the claimant opposed the making of a costs order in the following terms:……

> *"I have not had communication about this. I told the respondent I would not be sharing any info with Mills and Reaves due to a data breech. I also told the ET this on the phone and in email. So I am sorry I will be paying any costs. I am vulnerable disabled man living alone with a recent suicide attempt cost will and can not be paid."*

6. Whilst the claimant requested that his email be kept confidential from the respondent, rule 92 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 requires that communications with the Tribunal should be copied to the other party, so this email was forwarded to the respondent on 2 January 2024. The contents of the email were the claimant's response to the application for costs, so fairness requires that the respondent is aware of information put before the Judge determining the application.

7. For the purposes of this application, the Tribunal has considered the contents of the respondent's bundle of documents provided for the hearing on 2 November 2023, the respondent's solicitor's written submissions for that hearing, the application and up-dated schedule of costs dated 16 November 2023, the claimant's response to it dated 16 November 2023 and a bundle of pre-claim correspondence between the claimant and the respondent.

8. The sum of costs sought by the respondent includes the cost of responding to the claim, attendance at the three hearings and the costs associated with this application. Items 7 and 8 of the schedule describe "drafting application for costs and preparation for summary judgment hearing on 17 November 2023" and "drafting and review of statement of cost for summary judgment hearing on 17 November 2023." The associated costs totalled £1,420. Given the application was made on the 16 November 2023, it is assumed this description is a mistake.

The Law

9. The relevant costs provisions are contained in rules 74 to 84 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013.

Rule 77 provides that

"….*No [costs] order shall 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."*

Rule 76(1) sets out the circumstances in which a costs or expenses order may be made, the following part of which is relevant,

(a) "[where] 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 76 (2) "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."

10. The Court of Appeal in *Barnsley Metropolitan Council v Yerrakavla* [2011] EWCA Civ 1255 held that the task of the Tribunal is to "*look at the whole picture of what happened in the case and 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."*

11. Rule 78 deals with the amount of a costs or expenses order, which can either be restricted to £20,000, agreed between the parties or assessed by the County Court. Rule 84 provides: "*The Tribunal may have regard to the paying party's ability to pay*" when deciding whether to make a costs or order and, if so, in what amount. If the ET decides not to take a party's means into account it should say why (*Jilley v Brimingham & Solihull Mental Health NHS Trust* UKEAT/0584/06).

12. Costs orders are the exception rather than the rule in the Employment Tribunal and are compensatory rather than punitive in nature (*Gee v Shell UK Ltd [2002] EWCA Civ 1479*). If the threshold for making a costs order is passed, it does not follow that an order should be made, still less that an order should be made in the whole sum claimed.

13. In deciding whether to make a costs order, the Tribunal must give effect to the overriding objective in the 2013 Rules to deal with cases justly, which includes ensuring that the parties are on an equal footing and dealing with cases in ways which are proportionate to the complexity and importance of the issues. This means that the Tribunal should take account of the fact that a litigant in person cannot be expected to know the all the intricacies of the law and Tribunal procedures. A litigant in person should not be judged by the standards of a professional representative (*AQ ltd v Holden* [2012] IRLR 648).

Laypeople are likely to lack the objectivity and knowledge of law and practice brought by a professional adviser and this may be relevant to the exercise of a discretion in making a costs order.

Factual Background

14. By a claim form presented on 27 May 2023, the claimant claimed that the rejection of his job application by the respondent constituted an act of disability discrimination. On 3 February 2023 the claimant applied for the role of DEI & Wellbeing Manager with the respondent and, following a screening call/telephone interview, the claimant was informed he had not been shortlisted for the role. The type of disability discrimination alleged was unclear from the details in the claim form (ie. whether direct, indirect or a failure to make reasonable adjustments). It is accepted by the respondent that one of the reasons why the application was rejected was that there were a number of spelling and grammatical errors in the claimant's CV. The disability relied upon was dyslexia, albeit it is the respondent's case that it was unaware of this claimed disability and that the claimant did not indicate on his application that he needed adjustments to the process to accommodate a disability (notwithstanding the presence of a box to tick to make such a request).

15. The claimant raised an internal complaint against the rejection of his application in the course of which he informed the respondent that he was planning to publish transcripts of conversations with the respondent online and obtain press coverage of the issue. He also threatened to report the respondent's HR personnel to their regulatory body. The internal process did not resolve the claimant's grievance.

16. Early conciliation was commenced by the claimant on 25 April 2023 and a certificate was issued on 26 May 2023. A response form was submitted by the respondent on 13 July 2023 and a case management hearing was listed on 22 August 2023. In preparation for that hearing, on 16 August 2023, the respondent's solicitors sent the claimant a bundle of documents, a draft agenda and a draft list of issues for agreement/comment. The respondent also made a request for further and better particulars of the claim. Having sent the documentation for the preliminary hearing, the respondent's solicitors realised that they had sent a bundle related to a different claimant to the claimant. On 18th August 2023, once the error had been discovered, the respondent's solicitors immediately contacted the claimant by email to ask him to delete the email and attachments sent on the 16 August 2023 and not to read them. The solicitors also telephoned the claimant to ask the same thing. Notwithstanding the fact that the claimant confirmed he had not read the attachments, the claimant informed the respondent's solicitors that he proposed to do so and contact the unrelated claimant to inform them of the error.

17. The respondent's solicitors had already reported the data breach to the Office of the Information Commissioner and contacted the unrelated claimant to inform them of the error, apologise for it and explain what they were doing to rectify the situation. The claimant contacted the unrelated claimant (amongst others,

including the Tribunals hearing both the claimant's and the unrelated claimant's claims) attaching the bundle of documents and alleged that he had been asked to cover up the breach, which was untrue. The Tribunal notes that the claimant wrote in his email dated 18 August 2023 (copied to members of staff at Mills and Reeve and Odeon Cinemas), "@LondonET please dismiss my case with Mills and Reeve representing." The email was not directed at the Tribunal, however, so it is unsurprising that this remark was not referred to a Judge for directions.

18. The claimant failed to attend the preliminary hearing on 22 August 2023. On that occasion, Employment Judge Burns ordered the claimant to explain why he had not attended hearing, indicating that a failure to do so might result in his claim being struck out. Employment Judge Burns assured the claimant that his explanation could be brief in light of his claimed disability.

19. On 23 August 2023 the claimant explained to the Tribunal in two emails that he had not attended the hearing due to the data breach on the part of the respondent's solicitors and suggested he would not attend the adjourned hearing on 14 September 2023 whilst Mills & Reeve were representing the respondent. He did not indicate a wish to formally withdraw his claim, however. The respondent's solicitor wrote to the Tribunal (copied to the claimant) on 23 August 2023 explaining the data breach and the fact that the solicitors remained instructed. The respondent's solicitors also explained to the claimant that the Employment Tribunal had no jurisdiction concerning the data breach.

20. The claimant failed to attend the second preliminary hearing on 14 September 2023. Employment Judge Nicklin addressed the claimant's concerns about his data in the record of the hearing, suggesting that they could be explored at the next hearing, which was fixed for 2 November 2023. This was listed as a hearing to strike out the claimant's claims on the basis that he was not actively pursuing them or that his conduct of the proceedings was unreasonable. The claimant was ordered to provide further particulars of his claim and to provide an impact statement in relation to his relevant disability by 20 October 2023. The claimant did not comply with this order and he did not attend the hearing on the 2 November 2023.

21. The Tribunal has considered whether the claimant's stated disability (dyslexia) could have prevented him from engaging with these proceedings. It is appreciated that a claimant with dyslexia might well find litigation more challenging than others or that it takes more time to deal with correspondence. However, having seen some of the claimant's correspondence with the respondent contained in the bundle, the Tribunal is satisfied that the claimant is perfectly capable of making himself understood in writing.

22. In support of the respondent's application for a strike out, the respondent provided the Tribunal with a strike out judgment made in the London Central Employment Tribunal on 6 September 2023 in case number 2207961/2023, a claim by the claimant against the Alzheimer's Society. This strike out order was made on the grounds that the claimant had not actively pursued the claim. A subsequent search of the public judgments also revealed that on 15 August

2022, the claimant's claim against Network Rail was struck out for the claimant's failure to comply with an unless order. In case number 2411509/2021 a claim by the claimant against a hospital trust in Manchester Employment Tribunal was struck out on 7 September 2022 for the same reason. A further claim (in which the claimant's name was anonymised) was also struck out in the Manchester Tribunal.

23. No adverse inference should be drawn simply from the fact that the claimant has made a number of claims to the Employment Tribunal. Although the Tribunal has not made a determination as to whether the claimant qualifies as a disabled person, it is clearly conceivable that a disabled job applicant might experience multiple acts of discrimination in the course of a number of separate recruitment processes (or might reasonably believe that they have done so). The relevance of the claimant's other claims lies in the pattern of his apparent lack of engagement with the Tribunal process, leading to the striking out of his claims.

24. On 2 November 2023 the Tribunal struck out the claimant's current claims under rules 37(1)(b) and 37(1)(d). It is understandable that a claimant would have had concerns about data protection in circumstances where someone else's data was sent to him by mistake by the respondent's solicitors. The question for the Tribunal in the context of the costs application, however, is whether these concerns were the reason for the claimant's failure to attend hearings and engage with the proceedings and, if so, whether that was a reasonable approach to take.

25. The Tribunal has only had the respondent's version of the events which followed the discovery of the data breach. That version is consistent with the documents which the Tribunal has seen and is unchallenged by the claimant. The Tribunal is, therefore, bound to accept it. The claimant's actions once he was informed of the respondent's solicitor's mistake were not wholly consistent with his stated concern about data protection, given he read the document he was sent even though he was asked not to and then used the personal data of the unrelated claimant to contact him direct. The claimant's own data was not compromised by the respondent and the claimant could have minimised the impact of the respondent's mistake, but chose not to do so. This Tribunal has no jurisdiction over data protection issues, which is the remit of the Information Commissioner, but the claimant's actions cast doubt as to whether his reasons for failing to attend hearings were genuine.

26. It could be said that the claimant was ensuring that the victim of the data breach was aware of it. Whilst the respondent's solicitors had made it clear that they had reported the breach, the Tribunal appreciates that there is often a degree of mistrust between parties to litigation which extends to a distrust of representatives. However, this is not the only Employment Tribunal claim which the claimant has brought and then failed to attend hearings or comply with orders made. This suggests a pattern of behaviour on the part of the claimant which is unrelated to concerns about his data.

27. The role for which the claimant applied was that of DEI (Diversity, equality and

inclusion) & Wellbeing Manager. As set out in the response form at paragraph 12, the claimant described himself in his CV as a "Subject matter expert in EDI". Given the number of claims the claimant has made, together with his claimed expertise, he can be regarded as a reasonably sophisticated claimant, who would be aware of the need to comply with orders of the Tribunal and attend hearings. He would also have known that a failure to engage with the Tribunal's processes would eventually result in the striking out of his claim, as this has happened on previous occasions.

28. The Tribunal has considered whether the claimant, as a litigant in person, might have thought he had withdrawn his claim on 18 August 2023 by copying the Tribunal into correspondence with a third party and various members of the respondent's staff and instructing solicitors in which he stated that he wanted "his claim dismissed with Mills and Reeve representing". The suggestion in that correspondence was that the claimant did not wish to take part in proceedings whilst the respondent was represented by Mills and Reeve, but not that he wished to discontinue his claim completely. If there was any confusion in the claimant's mind in this respect, it should have been clear to him when the case management hearing was re-listed for 14 September 2023, that he had not, in fact, withdrawn his claim.

29. In the bundle for the hearing on 2 November 2023, the respondent submitted correspondence from the claimant with the respondent prior to the issuing of proceedings to demonstrate that the claimant was only ever interested in a financial settlement of his claim. As explained at the hearing, the Tribunal regarded this correspondence as inadmissible as privileged. Although the correspondence related to settlement was not marked "without prejudice", the nature of it suggested that it was. The respondent has not suggested that one of the exceptions to the protection which attaches to such correspondence applies (such as unambiguous impropriety). The Tribunal has therefore excluded the contents of the settlement negotiations between the parties from its decision.

30. The respondent has also provided a bundle of additional email correspondence between the parties, which pre-dated the presentation of the claim. This correspondence largely deals with the claimant's internal complaint about his treatment and the respondent's attempts to resolve it. This does not appear to have been without prejudice correspondence. Emails sent by the claimant included threats to publish the contents of recordings of the claimant's calls with the respondent and more general threats to go to the press. In this correspondence the claimant described himself as variously a Senior Advanced Clinical Practitioner and EDI/Human Rights Consultant or a Head of People Services. It is the respondent's understanding that the claimant remains in employment in this field.

Submissions

31. In addition to the claimant's conduct in failing to attend hearings or comply with the Tribunal's orders, the respondent relies on his pre-claim conduct. In particular, that the claimant, as a specialist in the area of EDI, would have been

well aware of the duty to make reasonable adjustments for disability, but he failed to tick a box to indicate that he needed reasonable adjustments made to his application. Whilst the claimant described himself as a man "with a disability", he did not specify the nature of that disability. It is the respondent's submission that the failure to request reasonable adjustments was deliberate, intended to ""trap" it into settlement negotiations should the claimant fail to be shortlisted."

32. The respondent suggests that the claimant never had any intention of pursuing the claim to a final hearing and that his only interest was in extracting a settlement from the respondent. The claimant's pre-claim conduct taken together with the claimant's conduct after he lodged his claim was "patently unreasonable". Reliance is placed on the claimant's abusive tone in some of the correspondence, threats to go to the press, his practice of copying into emails multiple senior members of the respondent's staff, threats to publish recordings and to lodge complaints with regulatory bodies (both in relation to the HR professionals at the respondent and a solicitor with conduct of the case).

33. The claimant has provided a very limited response to the respondent's application for costs. He has not provided any evidence of his financial circumstances or medical evidence concerning the mental health issue to which he alluded in his email or the effect that might have had on his ability to work (or otherwise satisfy a costs order). The claimant implies that he was unaware of the respondent's application for costs, however, both of the respondent's applications for costs were copied to him and the written skeleton argument of Mr Santy was copied to him prior to the 2 November 2023 hearing. The claimant maintains that the reason for his lack of engagement with these proceedings was the data breach on the part of the respondent's solicitors.

Conclusions

34. The Tribunal is satisfied that the claimant has had notice of the Tribunal's orders dated 14 September 2023 (to provide further information about his claim by 13 October and an impact statement) sent to the same email address as the order of 2 November 2023 (to which he has responded). A failure to comply with an order of the Tribunal can also constitute unreasonable conduct of the proceedings. The respondent incurred additional costs in correspondence in chasing the claimant's further information.

35. The Tribunal has already determined (in the context of the strike out order), that the claimant's conduct in failing to comply with the order of the Tribunal of 14 September or to attend any of the three hearings listed amounts to unreasonable conduct of the proceedings for the purposes of section 37 of the 2013 Rules. As the Tribunal explained at the hearing on 2 November 2023, the claimant's failure to attend the first case management hearing in isolation would not have sufficed to pass this threshold. The claimant was a litigant in person and the hearing was close in time to the data breach which occurred. Ideally, the claimant would have still attended the (private) hearing and made his concerns known to the Judge. Alternatively, he could have informed the

Tribunal directly in advance of the hearing that he was not planning to attend and the reasons why. When the claimant's absence from the hearing of the 22 August 2023 is viewed in the context of his history of failing to prosecute other claims or attend hearings, together with his decision to compound the data breach, the Tribunal is satisfied that the claimant's failure to attend all three hearings amounted to unreasonable conduct of the proceedings. The data breach provided a convenient excuse for the claimant's non-attendance at the hearing on the 22 August 2023, but it was not the operative reason for his absence from that or any other hearing.

36. There is an emerging pattern of the claimant's issuing claims in the Employment Tribunal related to job applications, which he does not then see through. This causes respondents to incur the substantial costs of defending proceedings (as well wasting the Tribunal's judicial and administrative resources). There is currently insufficient evidence for the Tribunal to determine that the claimant is abusing the Employment Tribunal system by deliberately engineering the rejection of job applications in order to obtain settlements, but the Tribunal is satisfied that the claimant had no intention of having this claim judicially determined.

37. The Tribunal draws a distinction between the issuing of proceedings, which requires a respondent to file a response form addressing the claims made, with the claimant's failure to prosecute his claim beyond the presentation of it. In general terms, a claimant is entitled to require a respondent to set out in a formal legal document its answer to an arguable claim. In this case, the claimant applied for a role for which he was not shortlisted (by the respondent's admission) partly for reasons related to the claimant's spelling and grammar in his application. It appears to be common ground that the claimant identified himself as disabled and submitted a CV containing spelling and grammatical mistakes. Whether this gave the respondent constructive knowledge of the claimed disability is moot, but on the basis of these undisputed facts, the Tribunal is not satisfied the claim itself was misconceived. Further, the Tribunal does not have sufficient evidence to conclude that it was a vexatious claim (for instance, one which was brought purely to harass the respondent or a manufactured claim as outlined above).

38. The Tribunal encourages the parties to negotiate to settle claims at the earliest opportunity, so a claimant should not be penalised in costs merely for requiring a respondent to set out a defence to an arguable claim in a response form. The fact of bringing the claim cannot, therefore, be said to be unreasonable in this case. For the avoidance of doubt, any conduct displayed by the claimant in correspondence between the parties prior to the issue of proceedings cannot amount to "conduct of the proceedings" for the purposes of rule 76(1)(a).

39. Notwithstanding the above, the claimant's failure to attend all three hearings and his failure to comply with the Tribunal's order of the 14 September constituted unreasonable conduct of the proceedings so the threshold for the making of a costs order set out in section 76 is reached. The costs incurred by the respondent in defending the claim after the filing of the response form are all potentially recoverable from the claimant. The Tribunal, therefore, turns to

consider whether, in the exercise of its broad discretion, a costs order should be made and, if so, in what amount.

40. Whilst costs orders in the Employment Tribunal are the exception rather than the rule, the claimant's conduct in earlier proceedings taken together with his failure to comply with orders of the Tribunal or attend hearings, demonstrates that he had no intention of prosecuting this claim to a final hearing, let alone clarifying it sufficiently so that it could be fairly determined. The claimant's failures to attend the second and third hearings were more serious than his failure to attend the first. As a litigant in person, it is conceivable that the claimant thought the data breach might have given him a justifiable excuse to fail to attend the first case management hearing or, similarly, his copying in the Tribunal to an email to a third party suggesting that he wanted the hearing cancelled whilst Mills & Reeve were representing.

41. Given the claimant's experience in litigation and demonstrated ability to communicate effectively in writing, his stated disability is not a reason to modify the expectation that written orders will be complied with (to the extent of the claimant's capabilities). The claimant could reasonably have been expected to withdraw his claim once it was clear to him that the data breach had not somehow provided a reason for the proceedings to be halted whilst the respondent was represented by Mills & Reeve (when the case management hearing was relisted for 14 September 2023). The claimant allowed the proceedings to continue without him until the inevitable happened and his claim was struck out. This resulted in the respondent's incurring considerable unnecessary costs and was unarguably unreasonable conduct of the proceedings on the claimant's part.

42. The Tribunal has no hesitation in concluding that the claimant should pay the majority of the respondent's costs of defending these proceedings after the filing of the response form. A respondent should not have to bear all the cost burden of defending proceedings which a claimant had no intention of prosecuting. Taking a broad brush approach, £2,000 should be deducted from the overall figure claimed to take account of £1,639.50 allocated to the drafting of the response form and part of the £555 allocated to consideration of strategy and file management, some of which will have taken place at the beginning of proceedings. This reduces the costs claimed by the respondent to £13,156.50.

43. The Tribunal has been unable to take account of the claimant's actual financial circumstances in exercising its discretion concerning costs, as the claimant has not furnished it with any information beyond a statement that he is disabled, lives alone and cannot pay any costs order. The claimant has not addressed his employment status in his email of 16 November 2023. Were the claimant unemployed or in receipt of income related state benefits, the Tribunal assumes he would have set that out in his email. The respondent's understanding that the claimant remains in employment appears, therefore, to be correct. However, the Tribunal does take judicial notice of the fact that relatively few individual litigants are able to pay a costs order running to many thousands of pounds without difficulty (or have the resources to a Solicitor to conduct Employment Tribunal proceedings on their behalf).

44. As to the costs claimed, no criticism is made of the respondent's choice of solicitors or decisions made about the conduct of the litigation, however, it is not necessarily fair or proportionate to expect a litigant in person to pay for the level of legal services which the respondent has chosen and is generally better able to afford. For instance, whilst the Tribunal understands why Mills & Reeve might wish to protect the solicitor involved in the data breach from the risk of a confrontation with the claimant (even online), the hearings on 14 September and 2 November 2023 could have been conducted by a more junior solicitor, rather than a Partner, as they were. The prospects of the claimant's attending the hearing on the 2 November 2023, in particular, were extremely low. The Tribunal considers that the disparity in the respective parties' assumed abilities to pay for representation should be taken into account in the order made. In the Tribunal's judgment, the sum of £10,000 would be a proportionate amount to require the claimant to pay in all the circumstances. It substantially compensates the respondent for having to defend a claim which should have been withdrawn by the claimant in August 2023.

_____

Employment Judge H Clark

Date: 8 January 2024

ORDER SENT TO THE PARTIES ON

11 Janaury 2024

.....

.....

FOR THE TRIBUNAL OFFICE