EMPLOYMENT TRIBUNALS

Heard at:	London South	**On:**	2 April 2025
Claimant:	Mr J Atkinson		
Respondent:	SGN Contracting Limited		
Before:	Employment Judge Ramsden		
Representation:			
Claimant	In person		
Respondent	Miss Quigley, Counsel		

RESERVED JUDGMENT ON COSTS

Factual and procedural background

1. The Respondent is a gas distribution company managing the network which distributes natural and green gas to homes and businesses in Scotland and Southern England.
2. The Claimant worked for the Respondent from 3 January 2020 until 29 August 2022.
3. The Claimant commenced a period of sickness absence following a work-related injury on 29 November 2021. He never returned to work for the Respondent, and was:
    a) Paid in full for the period 29 November 2021 to 17 March 2022;
    b) Paid half pay for the period 18 March 2022 to 16 June 2022; and
    c) Paid statutory sick pay only, or no sick pay, for the remaining period of his employment.
4. The Claimant's position, both during his employment with the Respondent and before this Tribunal, is that he should have been paid full pay for up to 12 months of sickness absence in accordance with the Respondent's applicable policy, as he said he had been injured as a result of an assault at work. The Respondent

disagreed with that characterisation, and instead regarded the Claimant's injury as being as a result of an accident. The Respondent paid his sick pay in accordance with the policy applicable to sickness absence due to an accident at work.

5. During his sickness absence, the Claimant refused to engage with the referrals made by the Respondent to Occupational Health. The Respondent made it clear that one reason it wanted to have the benefit of occupational health advice was to explore adjustments that could be made to enable the Claimant to return to work.

6. On 7 March 2022, the Claimant, while submitting statements of fitness for work which said he was unfit for any work, commenced working for another company in the gas industry - Centrica.

7. After a period of ACAS Early Conciliation which began on 24 September and ended on 5 November, both of 2022, the Claimant brought a claim against the Respondent on 5 December 2022 (given case number 2304651/2022). BY that claim the Claimant has complained that:

   a) He was constructively unfairly dismissed by the Respondent;

   b) He was owed pay in lieu of the holiday that he had accrued but not taken on the termination of his employment;

   c) He was wrongfully dismissed and was owed notice pay; and

   d) The Respondent had made unauthorised deductions from his wages, or alternatively breached his contract of employment by the amount he was paid, in respect of the period of sick leave when the Claimant was not paid in full when he says he should have been.

8. The Respondent, in its Response filed on 15 February 2023, brought a counterclaim (given case number 2305010/2023), alleging that:

   a) The Claimant was in fundamental breach of his employment contract with the Respondent from the date he started working for Centrica (7 March 2022), and from that point onwards the Claimant was not entitled to any sick pay from the Respondent. It sought reimbursement of the sick pay it paid to the Claimant from that date onwards (less the sum the Respondent would otherwise have paid the Claimant in lieu of his accrued but untaken holiday on the termination of his employment); and

   b) The Claimant had not returned various items of its property to it, and seeking consequent compensation from him.

9. The Respondent sent the Claimant a letter warning him of the risks that costs could be awarded against him on:

   a) 1 March 2023. This letter commented on the Respondent's assessment of the merits of the Claimant's constructive unfair dismissal complaint, and

expressed the view that the Claimant had acted "*deceitfully*" during his employment with the Respondent and that his claim was untenable. The letter said that the tribunal could order the Claimant to pay some or all of the Respondent's costs; and

b) 29 September 2023. This was a five page letter commenting on the merits, and on the financial value of the Claimant's claims if they were to be successful, given he had commenced new employment with Centrica during his employment with the Respondent. That letter repeated that the Tribunal could make a costs award against the Claimant.

(Those letters were sent on a "without prejudice save as to costs" basis.)

10. The Tribunal gave oral judgment on both these cases on 2 April 2025, dismissing each of the Claimant's complaints and upholding both of the Respondent's complaints in its counterclaim (albeit that the value of the first counterclaim complaint upheld by the Tribunal – for reimbursement of sick pay - was less than the sum claimed by the Respondent). The Tribunal was critical of the Claimant's conduct and honesty when giving that judgment, including:

a) *Observing that it was plain that some of the Claimant's allegations were not made out*, such as the complaint he made that he requests for support in relation to his requests for his pay issues to be resolved had been ignored by HR and the managers in question. The Tribunal found that both HR and the Claimant's manager had gone to some trouble to respond to his pay issues, and that it was in fact the Claimant who had not responded to communications from them;

b) Observing that *the Claimant had misrepresented the true position on some matters to the Tribunal* - for example, he asserted that the Respondent withheld pay from him, whereas the Tribunal found that the Claimant "*knowingly acted against a management instruction*" by working the shift in question, and that the Respondent ultimately authorised payment when the Claimant provided the relevant manager with the information that manager needed so as to do so;

c) Finding that *the Claimant was in obvious and fundamental breach of contract* when he commenced work for Centrica whilst still employed by the Respondent, as:

(i) This breached his duty of fidelity;

(ii) This breached the clear term in his written contract of employment that he was to be available for shift work with the Respondent between the hours of 8am and 8pm six days a week, as his Centrica role was from 9am to 3:30pm Monday to Friday; and

(iii) He patently was fit for some work if he was working for Centrica, and so the position he represented to the Respondent that he was unfit for *any* work was fraudulent,

and he was aware of that fact, given:

i. He told the Tribunal he checked the terms of his contract of employment with the Respondent before accepting the Centrica role;

ii. The Tribunal considered that the Claimant's refusal to engage with occupational health, or to meet with Ms Baldwin and Mr Shaw (from the Respondent's HR and management teams respectively) was because (I) he was already undertaking work for another organisation and he was concerned that occupational health would see his ability to do so, and (II) attending those appointments were incompatible with his commitments to his new employer; and

iii. The Claimant is an intelligent man and knew what he was doing;

d) Finding (in consequence of the previous point) that *the Claimant had unashamedly attempted to mislead the Tribunal* about these matters by the arguments he made in support of his Claim; and

e) *Finding that the Claimant had been dishonest about returning the Respondent's property*.

11. In relation to the conduct of the hearing, the Claimant made some allegations in support of his application to strike-out the Respondent's Response (and its counterclaim) that were evidently unsupportable, e.g.:

a) *That the Respondent had failed to actively pursue its Response and the counterclaim*. There seemed to be no basis whatsoever for this assertion; and

b) *That the counterclaim was vexatious and had no reasonable prospects of success*. While the Claimant may not have understood the meaning of "vexatious", he would have understood that its prospects would depend on evidence, and he knew that he had admitted commencing employment with Centrica while claiming and receiving sick pay from the Respondent, and that he had no proof of returning the Respondent's property to it and so there was some real prospect of the Respondent succeeding in that aspect of the counterclaim.

12. Also as part of that strike-out application the Claimant was highly critical of the Respondent's disclosure process, and made those criticisms by himself disclosing material that he had apparently not been able to access until a few days prior to the commencement of the Final Hearing. The Claimant's explanation was that, when in possession of his work mobile telephone he had forwarded certain text messages and emails to his personal number and email account, and that his personal mobile telephone had subsequently become

water-damaged. He said that, due to plugging that water-damaged mobile telephone into a computer (only a few days ahead of the hearing, apparently not having thought to do so previously), he was then able to retrieve messages that he said the Respondent would have had in its possession and should have disclosed to him. This was a highly doubtful account, and it did not show that the Respondent had those messages in its possession or control (as Mr Jackson, for instance, explained that his work mobile phone had been replaced and he did not have any text or WhatsApp messages from the time with which the complaints were concerned). On the contrary, this showed that the Claimant had those messages and had failed to disclose them himself.

13. Following delivery of that oral judgment, the Respondent applied for an Order to be made in its favour for costs against the Claimant. The Claimant made oral representations resisting that application.

14. The Tribunal reserved its decision on that Application, and Ordered that the Claimant provide the Tribunal with a written statement of means (with a copy to be given to the Respondent).

15. The Claimant provided a written statement of means on 15 April 2025.

The costs application

16. The Respondent's application is made on the bases that:

    a) The Claimant acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing of the proceedings and the way in which the proceedings have been conducted, pursuant to Rule 74(2)(a) of the Employment Tribunal Procedure Rules 2024 (the **ET Rules**); and

    b) The Claimant's claim had no reasonable prospect of success, pursuant to Rule 74(2)(b) of the ET Rules.

17. In support of its application the Respondent submitted an invoice list from the Respondent's firm of solicitors, listing various invoices it sent to the Respondent in connection with this case, for an aggregate sum of £91,750.25. The Respondent seeks an award for costs on a summary basis, in the amount of £20,000.

18. The Claimant resisted that application on the basis that:

    a) *He did not act vexatiously, abusively, disruptively or otherwise unreasonably in the bringing of the proceedings*. He says his only reason for bringing the claim to the Tribunal was the significant breaches of health and safety legislation by the Respondent, and the injury which he sustained in the course of working for the Respondent, which was the only reason he was absent from work; and

    b) *His claim did have reasonable prospects of success*. In relation to this, the Claimant says that:

(i) He took legal advice from two different sources which confirmed that he could take a second job in the gas industry where the second job did not involve him undertaking gas work in people's houses;

(ii) The Respondent was the first party to fundamentally breach the contract of employment between them by its failure to ensure a safe place of work for him to return to after his sickness absence began;

(iii) The Tribunal has failed to acknowledge that the heart of his claim was that the Respondent was in breach of sections 44 and 47B of the Employment Rights Act 1996 (the **1996 Act**) (that he was subjected to detriments on health and safety grounds, and on the grounds that he had made protected disclosures), and those complaints had very good prospects of success; and

(iv) He is a litigant-in-person.

19. In relation to his financial circumstances, he said that:

a) He has ceased employment with Centrica in December 2024, and he has no income;

b) His partner is being made redundant in May 2025;

c) They have two young children; and

d) He does not have any assets of significant value – he does not own a house, he owns a car but not a valuable one, and he has a bank account with around £200 in it.

20. He has also cited his poor mental health.

21. On the issue of the Claimant's means, the Respondent replied that the Tribunal should also take into account his what his means will be within the reasonably foreseeable future, and posited that the Claimant's prospects are good given he has a niche set of skills and has been in gainful employment until relatively recently. Miss Quigley said that the Tribunal can be confident that the Claimant could get a new job within that reasonably foreseeable future. She also asks the Tribunal to note that the Respondent's application has seen it reasonably cap its costs – the costs it has in fact incurred are significantly higher than those sought in its application.

22. The Claimant disagreed about his prospects. While he acknowledged that he has a niche set of skills, he said he works in a niche and small industry, and "word gets around". He says that he has challenged the Respondent about something it did wrong, and employers want "yes men". He also considers that, because he wishes to appeal the liability judgment, publication of those written reasons will damage his employment prospects. Overall he says that his prospects of re-employment are extremely limited, and if he wishes to commence self-

employment he would need to invest around £15,000 in order to do so, and he does not have the means to do that.

The hearing

23. At the end of liability judgment given orally, the Employment Judge noted that she would be considering whether an award of costs against the Claimant was appropriate. The Respondent was represented in that hearing by Miss Quigley, Counsel. The Claimant represented himself. The Employment Judge directed the Claimant to look at the relevant Rules, and informed him of the three questions she would be considering. A break of 1 hour 40 minutes was taken, so as to give the Claimant the opportunity to look at the relevant rules and consider what he wanted to say about the relevant questions. Upon the parties' return, the Claimant said that he had looked at Rule 74 over the break.

24. The Respondent made its application and the Claimant responded to it in submissions, and each had the right of reply to the other's arguments, which each took. At the end of that exchange, the Claimant confirmed he had said all he needed to say in response to the Respondent's application.

25. No oral evidence was heard from the Claimant, but instead he was instructed to provide a written statement as to means, which he did. No further representation was invited from the Respondent on that statement, and nor was any provided.

26. The Tribunal reserved its decision on the Respondent's application, and decided that application on the basis of the parties' representations and the Claimant's written evidence.

Law

27. Unlike in the civil courts, costs do not 'follow the event' in the Employment Tribunal, and an award of costs remains the exception rather than the rule (*Yerrakalva v Barnsley Metropolitan Borough Council* [2012] ICR 420). This does not mean, however, that in order for a costs application to succeed the facts of the case have to be exceptional – all that is needed is for the relevant test to be satisfied (*Power v Panasonic (UK) Ltd* UKEAT/0439/04).

28. The Tribunal's power to order costs is set out in Rule 74 of the ET Rules:

"*(1) The Tribunal may make a costs order or a preparation time order (as appropriate) on its own initiative or on the application of a party or, in respect of a costs order under rule 73(1)(b), a witness who has attended or has been ordered to attend to give oral evidence at a hearing.*

(2) The 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 of it, or the way that the proceedings, or part of it, have been conducted,

(b) any claim, response or reply had no reasonable prospect of success, or

(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which that hearing begins.

(3) The Tribunal may also make a costs order or a preparation time order (as appropriate) on the application of a party where a party has been in breach of any order, rule or practice direction or where a hearing has been postponed or adjourned.

29. Such an application may be made "*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)).

30. As described in the case of *Daly v Newcastle Upon Tune Hospitals NHS Foundation Trust* EAT/0107/18, there are three stages to a Tribunal considering a costs application:

a) Does it have jurisdiction to award costs?

b) If the Tribunal does have discretion to award costs, should it do so?

c) If the answer to the previous question is 'yes', what is the appropriate amount?

(i) Does the Tribunal have jurisdiction to award costs?

31. The burden of establishing that the tribunal has jurisdiction to make an award of costs sits with the applicant (*Haydar v Pennine Acute NHS Trust* EAT/0141/17).

32. The Tribunal may not make an award of costs unless the paying party "*has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order)*" (Rule 75(2)).

No reasonable prospect of success

33. Whether there was no reasonable prospect of the claimant's claim, or the respondent's response (as appropriate), succeeding is assessed on the basis of the information that was known or reasonably available at the time the claim was brought, or the response presented (as appropriate), or the other time at which the party applying for costs says the other party should have acted so as to withdraw the claim or response (*Radia v Jefferies International Ltd* EAT/0007/18).

34. The meaning of "*claim*" or "*response*" in this context is a reference to the bringing or resisting of each legal complaint in that claim or response (*Opalkova v Acquire Care Ltd* EA-2020-000345-RN).

35. The tribunal should consider:

a) Whether, objectively, when the claim was presented or the response submitted (as appropriate), did it have no reasonable prospect of success, or did that become the case at a later stage when more evidence was available?

b) At the stage that the claim or response had no reasonable prospect of success, did the relevant party know that was the case?

c) If the relevant party did not know that the claim or response had no reasonable prospect of success, should they have known? This assessment is likely to be more rigorous where the party is legally-represented

(*Opalkova*).

Acted vexatiously

36. As Lord Bingham put it in *Attorney General v Barker* [2000] 1 FLR 759, "*the hallmark of a vexatious proceeding is… that it has little or no basis in law… 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, and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process*".

37. The concept of vexatiousness "*implies the doing of something over and above that which is necessary for the conduct of the litigation, and suggests the existence of some spite or desire to harass the other side to the litigation, or the existence of some other improper motive*" (*Cartiers Superfoods Ltd v Laws* [1978] IRLR 315).

Acted unreasonably

38. The word "*unreasonable*" has its ordinary English meaning, and is not to be interpreted as if it means something similar to vexatious (*Dyer v Secretary of State for Employment* [1983] 10 WLUK 154).

39. A finding by a tribunal that a party has lied does not automatically mean that party conducted the proceedings unreasonably. The whole circumstances of the case should be considered, including the procedural history (such as unsuccessful applications delaying the conclusion of the case) and the extent to which the lie made a material impact on the case (i.e., the matters about which the party lied may, or may not, have been material to the reasons the complaints did or did not succeed) (*Kapoor v The Governing Body of Barnhill Community High School* UKEAT/0352/13).

40. "*A lie on its own will not necessarily be sufficient to found an award of costs. It will always be necessary for the tribunal to examine the context and to look at the*

*nature, gravity and effect of the lie in determining the unreasonableness of the alleged conduc*t" (*Arrowsmith v Nottingham Trent University* [2012] ICR 159).

41. The relevance of the lie to the question of unreasonable conduct will depend on whether the case advanced by that party was materially dependent on them advancing the lie (*Arrowsmith* [2011]).

(ii) Should the Tribunal exercise its discretion to make an award for costs?

42. There is no obligation on a Tribunal to make a costs award when the jurisdiction to do so is engaged (save in the circumstances described in Rule 74(4), which do not apply here) – it remains a matter of discretion as to whether to do so – but it is obliged *to consider whether to do so*.

43. The tribunal should adopt a broad-brush approach to identifying the conduct which engages the costs jurisdiction and its effect (*Sud v Ealing London Borough Council* [2013] ICR D39.

44. The principle of relevance means that the Tribunal must have regard to the nature, gravity and effect of the unreasonable conduct (or other matter which gives rise to the costs jurisdiction) when considering whether to exercise the discretion to make an award of costs (*McPherson v BNP Paribas* [2004] EWCA Civ 569). The purpose of an award of costs is to compensate, not to punish.

45. The nature of the conduct of the party in question involves considering, at the stage that it took place:

    a) Whether the relevant party knew that it was unreasonable, vexatious, had no reasonable prospect of success (etc. – did they appreciate the matter that forms the jurisdictional basis for the costs award); and

    b) If not, whether they should have known

    (*Opalkova v Acquire Care Ltd* UKEAT/0209/20/RN).

46. A litigant in person should be judged less harshly than one who is professionally represented (*AQ Ltd v Holden* [2012] IRLR 638). The Tribunal may wish to take account of any imbalance in legal representation between the parties (*Gee v Shell UK Ltd* [2002] EWCA Civ 1479).

47. As regards "effect", as per *Yerrakalva*, any causal link between the jurisdictional basis for the award of costs and the costs incurred by the applicant is a relevant, though not a constricting factor, to considering whether a costs award should be made.

48. While individual considerations are important (such as, for example, whether a party was dishonest), it is also vital to look at the whole picture, and not to lose sight of the totality of the circumstances (*Yerrakalva*). This will include consideration of the conduct of the applicant, and the likely effect of the applicant's conduct on the costs incurred.

Costs warnings – or their absence

49. One aspect of the applicant's conduct that may be relevant is whether they warned the paying party of the risk of a costs award, and if so, how that was communicated: for example, if it was done in a threatening manner, if it explained the weakness of the other side's position in a straightforward manner case, if it quantified the costs it would or may seek – *Rogers v Dorothy Barley School* UKEAT/0013/12.

50. There is no general principle that there *should* be a costs warning letter in advance of a costs application (*Vaughan v London Borough of Lewisham* UKEAT/0533/12), but a failure to engage with arguments in the costs warning letter can be a factor to weigh in the balance as to whether an award of costs should be made (*Peat and others v Birmingham City Council* UKEAT/0503/11). The costs warning letter in that case had enhanced the prospects of an award of costs being made.

Ability to pay

51. The tribunal *may* also have regard to the paying party's ability to pay (Rule 82 of the ET Rules) (as Mr Recorder Luba QC put it in *Mirike v Wilson & Co Solicitors* UKEAT/0025/11, the discretion to take account of the paying party's means or not is a "*discretion within a discretion*"). This does not mean that "*poor litigants may misbehave with impunity and without fearing that any significant costs order will be made against them, whereas wealthy ones must behave themselves because otherwise an order will be made*" (*Kovacs v Queen Mary and Westfield College* [2002] EWCA Civ 352).

52. Any assessment as to means must be based on *evidence*.

53. Where the tribunal is asked to take this into account, it should state both *whether* it has done so, and if it has, *how* that has been done (*Jilley v Birmingham and Solihull Mental Health NHS Trust* [2007] 11 WLUK 517).

54. "*It is likewise not capable of dispute that unreasonableness of the paying party's conduct may weigh in the exercise of the discretion on whether to have regard to their means or ability to pay. Where, as here, the non-attendance by the party is treated by the Employment Tribunal as another instance of unreasonable behaviour, it cannot be irrelevant to the exercise of the discretion whether to have regard to the means of the non-attending party.*" (*Mirike*).

55. The weight to be given to a relevant consideration is a matter for the tribunal, unless it amounts to an error of law (*Mirikwe*).

56. A tribunal may take account of the paying party's reasonable financial prospects, including future earning potential, when deciding whether to make a costs order against them (*Arrowsmith v Nottingham Trent University* [2011] EWCA Civ 797 and *Vaughan v Lewisham LBC* [2013] IRLR 713).

57. Considering ability to pay involves consideration of both income and capital and savings (*Shields Automotive ltd v Grieg* UKEAT/0024/10), and can involve consideration of the party's spouse or partner's means (*Abaya v Leeds Teaching Hospital NHS Trust* EAT/0258/16).

(iii) What is the appropriate value for the costs order?

58. Cost awards are compensatory, not punitive (e.g., *Lodwick v Southwark London Borough Council* [2004] ICR 884).

59. Any award of costs should be limited to costs reasonably and necessarily incurred, but it is not necessary to establish a precise causal link between the costs incurred and the basis for the jurisdiction (e.g., unreasonable conduct) (*Yerrakalva*). However, that does not mean that where, for example, there has been some unreasonable conduct it is necessarily appropriate to make an award for the other party's costs for the whole of the proceedings (*McPherson*).

60. The tribunal may take into account the paying party's ability to pay when assessing the value of the award, but it is not obliged to do so. The tribunal should say if it has, and if so, how (*Jilley*).

61. The tribunal is not required to confine the sum of an award of costs to an amount that the paying party can pay (*Arrowsmith* [2011] EWCA Civ 797).

62. "*The vital point in exercising the discretion to order costs is to look at the whole picture of what has happened*" (*Yerrakalva*).

63. Pursuant to Rule 76(1), the Tribunal may Order the paying party to pay an amount of costs not exceeding £20,000 by way of unassessed costs. Detailed assessment is required for any Costs Order exceeding £20,000.

Analysis

(i) Does the Tribunal have jurisdiction to award costs?

64. The burden of establishing that the Tribunal has jurisdiction to make an award of costs sits on the Respondent – and it has discharged that burden – it is abundantly clear that the Tribunal does have jurisdiction to make an award of costs in this case.

65. The Respondent's application was made on the date that liability judgment finally determining the proceedings was given in this case (so was well within the period stipulated by Rule 75(1)), and the Claimant has had a reasonable opportunity to make representations in the hearing, after a break post-judgment which he confirmed was sufficient. The Claimant also confirmed, by the end of submissions on the application that he had "*said all [he] needed to say*". Rule 75(2) was therefore satisfied.

66. The Tribunal agrees with the Respondent that it has the power to make an award of costs, for the reasons outlined below.

No reasonable prospect of success

a) The Tribunal has already found in its judgment on the substantive case that the Claimant, by bringing his Claim, had unashamedly attempted to mislead the Tribunal about matters which he clearly knew to be untrue.

(i) His complaint that he was **constructively unfairly dismissed** was premised on five allegations:

I. *That the Respondent did not provide support after he was injured at work in November 2021*. That was patently untrue – the Claimant's line manager, Tom Jackson, did express concern and offered support to the Claimant, as did the Respondent's HR team. The Claimant was the recipient of that support, and so knew it had been provided.

II. *That the Respondent withheld the Claimant's pay in December 2021*. The Tribunal found it did not – the Claimant worked a shift against express instructions, and then pursued payment. When the Respondent decided to authorise payment anyway, the Claimant did not provide the requisite information and thereby delayed his receipt of that sum. Again, the Claimant knew he was working the shift against clear instructions, and he knew at the time of bringing his claim that the delay in paying him was due to a combination of that fact and his own failure to provide details to the Respondent on a timely basis.

III. *That during communications with HR and Mr Jackson's boss, the Claimant felt he was ignored as regards his request for support when he was injured at work, and his requests for his pay issues to be resolved*. The Claimant failed to evidence that allegation.

IV. *That there was delay in communicating with the Claimant over his requests for full pay during sick leave and refusal to engage with the Claimant as regards those issues*. The Tribunal found the factual premise of this assertion to be clearly incorrect – the time it took the Respondent to reply to the Claimant was reasonable, and it did engage with him over this issue. Again, the Claimant knew this when he presented his Claim Form.

V. *That the Respondent halved the Claimant's pay and failed to engage with him when he requested his pay to be reconsidered*. The Claimant's rate of pay halved after 15 weeks of full sick pay (in accordance with the policy the Respondent applied to the Claimant's sick leave), but the Respondent did engage with him over that when he requested that he continue to be paid in full. Again, the Claimant knew this to be the case when he presented his Claim.

(ii) His complaint that the Respondent owed him **compensation for accrued but untaken holiday on the termination of his employment** was again evidently groundless at the time the Claim was presented. The Claimant's contract of employment (which he said he had checked, so as to establish whether he could simultaneously take up employment with Centrica) incorporated the SGNC Joint Agreement, and that collective agreement expressly entitled the Respondent to deduct from sums owed to the Claimant any sums that the Claimant owed to the Respondent. Even if the Claimant had not seen a copy of the SGNC Joint Agreement as he avers, this point was made plain to him by the Respondent in its letter of 31 August 2022, well ahead of the date the Claimant presented his Claim.

(iii) His complaint that he was **wrongfully dismissed** was also presented by the Claimant knowing it was without foundation. The Claimant had commenced employment with Centrica on 7 March 2022, while still bound by the terms of his contract of employment with the Respondent. Those two employments were incompatible, given he had agreed to be available to work for the Respondent for 38.75 hours per week during rostered hours between Monday and Saturday from 8am to 8pm, and then agreed to work for Centrica Monday to Friday from 9 am to 3:30pm. He knew he could not work both of those jobs at the same time, and so entry into his contract of employment with Centrica fundamentally breached his contract of employment with the Respondent. He also fundamentally breached that contract of employment when he presented statements of fitness to work to the Respondent from 7 March 2022 onwards (possibly earlier) saying that he was unfit for *any* work when that was patently untrue, as he was undertaking work for Centrica. He was defrauding the Respondent of that sick pay. The Respondent outlined that analysis when it wrote to him on 31 August 2022. The Claimant knew of that when he presented his Claim to the Tribunal on 5 December 2022.

(iv) His complaint that the Respondent made **unauthorised deductions from his wages** by not continuing to pay him full sick pay from 18 March 2022 until his employment terminated on 29 August 2022 was, again, obviously totally without merit. A good understanding of employment law is not necessary to comprehend that if you are working for on person, saying to another that you are unfit for *any work* is dishonest.

b) The Claim very clearly had no reasonable prospect of success at the time the Claimant presented it (*Radia*), and he knew that and continued to understand that throughout his pursuit of it.

c) Addressing the *Opalkova* questions:

(i) Objectively, each complaint the Claimant made in his Claim Form on 5 December 2022 had no reasonable prospect of success;

(ii) The Claimant knew that at the time of presenting that Claim Form; and

(iii) He should have known that at that time, given he knew the untruthfulness of his assertions on the facts, and the Respondent had explained how the law applied in relation to his complaints regarding holiday pay and notice pay in its 31 August 2022 letter.

d) The Tribunal evidently therefore has jurisdiction to make a costs award against the Claimant pursuant to Rule 74(2)(b).

Acting vexatiously

67. The Claimant knew his Claim was totally without merit, and he brought it in circumstances that amounted to an abuse of process – it was patently obvious to a person acquainted with the true facts as he was that it was not going to succeed. The Claimant brought the Claim in exactly the kind of circumstances described by Lord Bingham in the case of *Barker*, and in the *Cartiers Superfoods* case. The Tribunal's jurisdiction to award costs under Rule 74(2)(a), under the "acted vexatiously" sub-category, is therefore engaged.

Acting unreasonably

68. The Tribunal has already found that the Claimant knowingly misrepresented the true factual position on some matters to the Tribunal in an attempt to mislead it (e.g., when he said that the Respondent refused to engage with his requests for full sick pay), and that he had been dishonest about returning the Respondent's property to it.

69. Given that "*unreasonable*" is to be given its ordinary English meaning (*Dyer*), knowingly misrepresenting the position so as to mislead the Tribunal, and being dishonest, is capable of being unreasonable conduct. The case law also makes it clear that a lie on its own will not necessarily be sufficient to found an award of costs (*Arrowsmith*). Here, though, the misrepresentation and dishonesty was

present from the beginning of the case, and were not about trivial side issues but go to the root of the Claimant's complaints. This is clearly sufficient to engage the Tribunal's jurisdiction to make a costs award under Rule 74(2)(a).

(ii) Should the Tribunal exercise its discretion to make an award for costs?

70. Whilst noting that an award of costs in the Employment Tribunal is an exception rather than the rule (*Yerrakalva*), it is abundantly clear that it is appropriate to do so in this case.

71. Consistent with what has been observed above, the Tribunal considers that:

    a) The Claimant knew his Claim had no reasonable prospect of success before he presented it. He has attempted to present a false narrative to mislead the Tribunal.

    b) He also failed to comply with his disclosure obligations, and only disclosed further material which he said was relevant during the liability hearing when he thought it suited his purposes.

    c) The nature of this unreasonable and vexatious conduct has absorbed considerable Tribunal time, delaying justice in other cases, and even more time and cost to the Respondent in resisting it.

    d) While a causal link between the costs the Respondent incurred and the jurisdictional basis for making a costs award is not required, the existence of such a link is relevant (*Yerrakalva*). Here there is a clear and direct causal link, as the Claim should never have been presented in the first place.

    The nature, gravity and effect of this conduct strongly pushes in favour of exercising the discretion to make an award of costs.

72. The Tribunal should look at the whole picture and the totality of the relevant circumstances (*Yerrakalva*), and in that regard the Tribunal notes that:

    a) Some of the Respondent's costs have been incurred in its pursuit of the counterclaim, but again, that is attributable to the Claimant's fraudulent (claiming sick pay for being unable to do any work while he was well enough to work for Centrica) and dishonest (not returning the Respondent's property) conduct.

    b) The Respondent's costs are very high – nearly £92,000 – but it has applied for a costs award of the considerably lesser sum of £20,000. Given the procedural history and the numerous applications the Claimant has made, the Tribunal judges that the Respondent's incurring costs exceeding £20,000 for that work is reasonable.

    c) The Respondent made two costs warnings to the Claimant (on 1 March 2023 and 29 September 2023), the latter of which went into some detail of the merits and the value of the Claimant's complaints were he to succeed.

Those letters sent clear messages to the Claimant that the Respondent would be putting a case to the Tribunal that he had acted deceitfully – which is indeed what the Tribunal has ultimately found.

Again, these factors push in favour of the Tribunal exercising its discretion to make a costs award.

73. The Tribunal has also borne in mind that the Claimant is a litigant in person (although he has indicated that he received legal advice from two sources about taking up employment with Centrica while employed by the Respondent), and should be judged less harshly than one who is professionally represented (*Holden*), however the total lack of merit in nearly all of the Claimant's case would have been obvious to anyone, and the Claimant is an intelligent man who has gone to some care to research the law in this area. The one complaint where that may not have been obvious is the complaint for unpaid holiday pay – but the Respondent explained its position in that regard in its 31 August 2022 letter, well ahead of the date when he presented his Claim (5 December 2022). The fact the Claimant is a litigant in person does not, the Tribunal finds, come anywhere near close to overriding the strong "push" factors for the Tribunal's discretion to award costs to be exercised. Nor does the Claimant's poor mental health.

74. The Claimant has presented himself as impecunious, and says that that militates against the exercise of the Tribunal's discretion. The Respondent says that, if the Tribunal does take account of the Claimant's means, it should acknowledge that the Claimant has a niche set of skills and therefore the Tribunal should be confident that he could get a new job at an equivalent rate of pay to his role with the Respondent.

75. As was noted in the *Mirike* case, the "*unreasonableness of the paying party's conduct may weigh in the exercise of the discretion on whether to have regard to their means or ability to pay*". Here, the Claimant has shown himself to be dishonest in a number of ways, and therefore the Tribunal does not feel able to rely on any of his evidence as to his means. The Tribunal has therefore decided to give no consideration to the Claimant's ability to pay as part of its consideration of whether to exercise the discretion to make an award of costs. The Tribunal also does not consider it relevant that the Claimant says the scope of his claim should have been wider – the Tribunal's assessment of his application to amend has no bearing on the reasonableness of his conduct of the case he *did* bring.

76. Weighing those matters up, the Tribunal finds that the interests of justice heavily fall on the side of the discretion to make an award of costs being exercised on the facts here.

(iii) If a costs order should be made, what is an appropriate value of that order?

77. Any award of costs is to compensate the receiving party, not to punish the paying one (*Lodwick*) – but the Tribunal has concluded that, from the very beginning, the Claim was without merit, and that the Claimant understood that fact and acted

vexatiously and unreasonably by pursuing it and resisting a meritorious counterclaim. He could have taken steps to reduce the costs the Respondent was incurring – for example, by returning the Respondent's property the Tribunal has concluded he did not return, or by not making or pursuing an application to strike out the Respondent's Response and counterclaim on bases that were evidently without foundation, and only served to waste the Respondent's time and resources in resisting it. He chose not to do so.

78. While any award of costs should be limited to costs reasonably and properly incurred, the Employment Judge's experience of legal practice informs the Tribunal's assessment that costs exceeding £20,000 would reasonably and properly have been incurred by the Respondent in getting to the conclusion of the case.

79. For the same reasons as set out above, the Tribunal declines to take account of the Claimant's ability to pay in setting the value of the costs award.

80. While costs awards are the exception in the Employment Tribunal, the Claimant's behaviour here renders a costs award appropriate. The whole picture should be examined, and the Claimant's clear understanding of what happened in fact, his steadfast refusal to make reasonable concessions or withdraw his case during its progression, the limited portion of its costs that the Respondent seeks to recover, and the adjudged reasonableness of its having incurred costs in that amount means that a compensatory approach to costs should rightly see a sizeable award ordered.

Conclusions

81. For all of the above reasons, the Respondent's application succeeds, and the Claimant is Ordered to pay to the Respondent the sum of **£20,000** by way of costs pursuant to Rule 76(1)(a).

Employment Judge Ramsden

Date: 3 May 2025

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