Case Number: 2600579/2024

EMPLOYMENT TRIBUNALS

Claimant: Mr K Law

Respondent: Boneham & Turner Limited

Heard at: Nottingham, on papers

On: Tuesday 6 May & 4 July 2025

Before: Employment Judge Clark (sitting alone)

JUDGMENT

1. The respondent's application for a costs order **succeeds**.

2. The claimant shall pay a contribution to the respondent's costs of and incidental to the Preliminary Hearing listed for 6 & 7 January 2025 assessed under rule76(1)(a) of the rules in the sum of **£3,519.30**.

REASONS

1 Introduction

1.1 This is the respondent's application for an order that the claimant pay its costs.

1.2 The hearing has been conducted on the papers, both parties giving their consent to it being determined in this way and relying on their respective written submissions in accordance with rule 42 of the Employment Tribunal Procedure Rules 2024 ("the rules"). Due to the various pressures on judicial resources, I was unable to complete the determination in the time originally allocated in May. I apologise for the further delay this has caused to the parties learning of the outcome.

1.3 In summary, this application relates to unreasonable conduct of the claim by the claimant or his representative. Specifically, the failure to attend the hearing listed over two days commencing on 6 January 2025, and the notice of withdrawal of the claim being sent later that day.

2 Procedural Background

2.1 On 5 April 2024 the claimant presented an ET1 claim alleging unfair dismissal, age discrimination, disability discrimination, sex discrimination, and unpaid holiday pay. The claim centred on the termination of the claimant's employment as a sales administrator, after about 8 months' employment. The claimant was represented by Cheryl Brown. As I understand it, she has some family connection to the claimant, is acting as a lay representative, is not a professional representative or lawyer, although appears to have some experience of HR related matters.

2.2 The claims of disability age and sex discrimination were unparticularised.

2.3 On 24 May 2024 Legal Officer Skinner directed the claimant to provide information setting out full details of the discrimination claims by no later than 31 May 2024. The claim was served on the respondent and orders made listing a preliminary hearing, the final hearing and giving standard case management directions.

2.4 On 19 June 2024 Judge Heap chased the claimant restating the directions of the legal officer and requiring the claimant to respond by no later than 26 June 2024.

2.5 On 21 June 2024 the respondent presented its ET3 response. It denied the claims. Specifically, it raised the fact that the claimant had insufficient service to bring a claim of unfair dismissal, that the question of time limits was a live issue for any allegation of discrimination, it set out the basis on which it had sought to manage the claimant's capability which had ultimately resulted in its decision to terminate the claimant's employment. It denied the claimant was disabled at the material time and referred to the lack of particulars of the discrimination claims generally. In that regard, it requested further and better particulars. At this time, it was not aware of the Tribunal's further order and sought an unless order.

2.6 The claimant's representative provided a response to Judge Heap's order on 25 June 2024. This set out three acts said to amount to age discrimination and four acts set to amount to sex discrimination. It still did not provide details of when the acts short of dismissal were said to have occurred. An actual comparator was provided for some aspects of the allegations of discrimination.

2.7 On 18 July 2020 for the respondent chased for a response to the further particulars. It asked the claimant to provide that voluntarily failing which it applied for an order for him to do so. On 9 August 2024 Ms Brown responded. She set out: -

a) In response to the request at paragraph 9.2 of the ET3, an alleged protected disclosure was made on 15 November 2023.

b) In response to the request at paragraph 9.3 of the ET3, that the dismissal was said to be for the reason that he had made that alleged protected disclosure. It also asserted the dismissal was discriminatory.

c) In response to the request at paragraph 9.4 of the ET3 (Failure to provide a safe working environment), that the respondent's failure to deal with the claimant's initial complaint about his team leader had a detrimental impact on his mental health.

d) In response to the request at paragraph 9.5 of the ET3 (holiday pay), that terminating summarily and paying in lieu of notice subjected the claimant to a detriment because it deprived him of the ability to accrue additional annual leave.

2.8 Her reply did not address the respondent's request at paragraph 9.1 of the ET3 to precisely state the nature of the discrimination claims. The most that can be said is that within the body of the reply, the claimant referred to "sex & age - as detailed in the response letter dated 22 June 2024".

2.9 The telephone preliminary hearing was held on 2 September 2024. The claimant prepared a schedule of loss. The respondent prepared a draft list of issues and a joint agenda. Once again that identified gaps in the necessary factual and legal bases of the claims.

2.10 Judge Ahmed conducted the hearing and noted that the claims remained largely unparticularised despite attempts by the tribunal and the respondent to ascertain key information as to what the complaints are about. He noted that the actual comparator relied on for the age discrimination claim was inappropriate, as they were of a similar age to the claimant. He noted the disability complaints remained unparticularised. He directed the respondent to send a detailed request for further particulars. He noted the claimant relied on stress and anxiety as a disability which at this stage was not conceded. Judge Ahmed did not explicitly note the claimant's concession that he did not raise his alleged disability with the employer in his case management summary (which the respondent would later refer back to) but he did record that knowledge of disability was likely to be an issue. He: -

a) Ordered the respondent to send to the claimant a request for further and better particulars by no later than 16 September 2024.

b) Ordered the claimant to reply "in detail and as fully as possible" by no later than 11 November 2024.

c) Gave permission for the respondent to file an amended grounds of resistance by no later than 25 November 2024.

d) Ordered that the claimant provide the respondent with all medical evidence intended to be relied on to establish the impairment of stress and

anxiety as well as a written disability impact statement explaining how the impairments affect the claimant's ability to carry out normal day-to-day activities. He referred the claimant to various guidance on that question.

2.11 Judge Ahmed listed the January preliminary hearing with a lengthy time estimate of 2 days to decide the following issues:-

a) whether the claimant was a disabled person at the relevant time

b) whether any of the complaints or allegations or arguments should be struck out.

c) whether the claimant should be ordered to pay a financial deposit as a condition of continuing with any or all of the complaints.

d) To identify the issues and make such case management orders as are necessary.

2.12 The respondent set out its request for information as ordered. The claimant provided a partial response by the due date. He did not provide any medical evidence. On 25 November 2024 the respondent wrote to the tribunal copying in the claimant raising the following matters: -

a) Giving notice that it did not accept the claim it was disabled by reason of depression and anxiety at the relevant time. It noted the claimant had failed to provide any supporting evidence and, further, maintained its position on lack of knowledge in any event.

b) Seeking an extension of time to file its amended response due to the deficiencies in the claimant's earlier response to the request for further and better particulars. It referred to the continuing "lack of clarity which prevents the respondent from understanding the case that has been brought against it". Hence the need to extend time for the amended ET3 until after the preliminary hearing after which the claims remaining would hopefully have been clarified.

2.13 That application came before Judge Swann on 26 November 2024. He directed time for the claimant to provide comments. By 3 December no comments had been made but I cannot see that any order was then made beyond a direction to leave things as listed for the preliminary hearing on 6 and 7 January 2025.

2.14 On 30 December 2024 the respondent filed its skeleton argument for the preliminary hearing as ordered. The claimant did not, which may have simply been because he did not seek to rely on one. However, it is significant for what then happened that the respondent's skeleton argument was copied to the claimant's representative making clear it was in respect of the hearing taking place on the Monay and Tuesday the following week. A hard copy of the hearing bundle was delivered and signed for by Ms Brown.

3 The 6 January 2025 Hearing

3.1 Neither the claimant nor his representative attended the hearing. In the brief reasons to my Judgement dismissing the claim, I set out what happened that

morning including the attempts to make contact with the claimant and his representative. by telephone and e-mail. There was no answer to telephone enquiries. At 11:23 the clerk emailed the claimant's representative stating: -

> ***"We were expecting you for a hearing in Nottingham for the above case. It was due to start at 11.00, but neither yourself or Mr Law have attended. We have tried to contact you by telephone, but there was no answer. Please, as a matter of urgency, contact the tribunal and state whether you and Mr Law are attending the hearing."***

3.2 No response was received before the case was called on and dealt with.

3.3 In an e-mail sent at 15:18 that same day to the tribunal and copied the respondent, Ms Brown replied in the following terms: -

> ***I sincerely apologise for not attending today, I have been ill since the new year and have had family members in hospital. With everything that has been happening we lost track of dates and thought the hearing was Thursday.***
>
> ***I have been speaking with Mr Law and he has taken the decision to withdraw the tribunal complaint, it is something that I asked him to consider over the Christmas break, which he has done.***
>
> ***We do still feel that the respondent could have dealt with Mr law in an open and transparent manner and followed the ACAS code of practise, so that his dismissal would not have come as such a shock, but we now accept that the case does not meet the legal test due to his length of service, therefore, please take this e-mail as notification of withdrawal of this claim. I do sincerely apologise about the mix up on dates today.***

3.4 Nothing further was provided to support Ms Brown's ill health or to explain why the claimant himself had not attended for this hearing or support the mistake asserted that she thought it was on Thursday.

3.5 On the balance of probabilities, I make the following finding of fact. Over the Christmas period the claimant decided to withdraw his claim and neither he nor Miss Brown then took any steps at all to notify the Tribunal and the respondent of that decision. I reach that conclusion having regard to the background generally, the previous difficulties in articulating a claim and the explicit reference made by Miss Brown to her inviting Mr Law to consider doing so over the Christmas period. Of course, the fact that both the claimant and Miss Brown failed to attend the hearing could be supportive of the fact of their genuine mistake in the actual date for the hearing. Against that, is the fact that the date was given in the orders of Judge Ahmed. I can be certain the claimant and Miss Brown received that because they complied, at least in part, with aspects of the orders. More particularly, there had been correspondence on a number of occasions from the respondent, most recently on 30 December 2024, which explicitly referred to the date of the hearing the following week. All of that was before Miss Brown says she fell ill. That should have alerted her to the correct date of the hearing. If she was then ill, any reasonable party or representative would contact the tribunal. If not her, then Mr Law. I am not persuaded by the claimant or Miss Brown's explanation on the events up to that point, my conclusion is reinforced by the immediate withdrawal that accompanied the

explanation of non-attendance. It seems to me less likely than more likely that this decision followed any meaningful discussion between the two in the short time available, particularly as Miss Brown was either busy at work or unwell. It is astonishing that, if, having reflected on the claim over the Christmas period and genuinely decided to ***continue*** with it, it would then immediately be withdrawn when, on Miss Brown's case, they were simply mistaken about the date of the hearing.

3.6 Additionally, Ms Brown was dealing with this claim on behalf of her family member whilst working full time. Nothing has been produced to demonstrate a booking of annual leave for Thursday 9 and Friday 10 January, or other means of attending the two-day hearing if indeed there was a mistake about the date. In any event, the very fact of not accurately recording the date of the hearing would itself be unreasonable at least where no other explanation is provided for such a mistake.

4 The Costs Application

4.1 On 3 February 2025, the respondent applied for an order that the claimant pay its costs. The application was copied to the claimant in compliance with rules 90 and 31.

4.2 The application was limited in time to the period between 19 December 2024 and 6 January 2025. In other words, it does not seek its costs in dealing with the claim prior to 19 December 2024 and is focused on costs of and incidental to the preliminary hearing itself.

4.3 The legal basis of the claim for costs relied on the old rule 76(1)(a) (what is now rule 74(2)(a)), that is that: -

> ***"a party (or that part'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,".***

4.4 The application set out particulars relied on. They are: -

a) At the preliminary hearing on 2 September 2024 the Judge had commented that the whistle blowing claim appeared to be "pretty hopeless on the face of it" and expressed concerns about the prospects of success of the claimant's claims. That, in part at least, prompted the two-day preliminary hearing.

b) On 17 September 2024, the respondent had written to the claimant to invite him to withdraw his claims on the basis that they had no reasonable prospects of success and reserving its position in respect of costs. On 7 October 2024 Ms Brown replied to confirm that her client intended to continue to pursue his claims.

c) On 2 December 2024, the respondent had sought to agree the preliminary hearing bundle with the claimant. Ms Brown responded on 19 December saying the claimed had not provided any documents to add.

d) On 2 January 2024 the respondent provided a copy of its skeleton argument and informed her that a hard copy had been sent to her in the post ready for the hearing on 6 & 7 January. The respondent relied on a confirmation of delivery from the courier which noted that the documents were signed for by “Brown”.

e) The respondent had instructed Counsel to attend the two-day hearing. Neither the claimant nor his representative attended despite the date for the hearing being set down in the previous case management order and the subsequent reminders from the respondent.

4.5 The respondent’s position is that in that context, the claimant’s decision not to provide any documentation for the preliminary hearing on 19 December indicated he had no intention of pursuing claim to the final hearing. The unsatisfactory failure to engage thereafter has led to the respondent incurring unnecessary costs. At that stage it set out its costs as being £2,000 plus VAT for solicitor’s cost for preparing for the preliminary hearing and £2,499.30 plus VAT in respect of Counsel’s fee for the hearing. Those costs were not in any recognisable schedule.

4.6 On 4 February 2025, the claimant’s representative provided an objection to the costs order. She made the following points.

a) Confirming that Judge Ahmed made a number of comments at the hearing which she found helpful but then questioned rhetorically why, if the claim was pretty hopeless, a further hearing was scheduled instead of simply dismissing it at that point. That it was not unreasonable to pursue a weak claim with low prospects of being successful.

b) That she found the cost warning to be aggressive confrontational and threatening and that the respondent should have engaged with the ACAS conciliation to mitigate its costs. Its failure to do so meant that their costs were its responsibility alone.

c) That the correspondence in December asked for any *additions* to the bundle of which there were none.

d) That she had been ill after the new year with something similar to COVID, that she was not on top of her emails and not functioning normally. That she was a family member who worked in HR and doing her best to support the claimant whilst working full time.

e) That she genuinely mistook the hearing date.

4.7 She concluded that costs would be disproportionate as the claimant was not currently working and has no means to pay. That they responded continued incurring costs despite the claimant's attempts to resolve the matter via ACAS conciliation. That costs would undermine the purpose of the employment tribunal as a judicial body responsible for workplace justice. She referred to the tribunal removing the cost of making claims in 2017 to ensure access to justice

for those who need it. She then set out some matters relevant to the substance of the claim restating that Mr Law was not treated with dignity or respect while working for the respondent.

5 Preparation for this Hearing

5.1 On 19 February 2025 I made directions in preparation to determine the application. I gave the parties the option of listing an attended hearing or it being decided on the papers. I also directed the respondent to file a costs schedule substantially following the form of county court form N260. I also provided for the claimant to file any further submissions and evidence supporting his objection which may include evidence of financial means income and expenditure and capital that he wished to be taken into account.

5.2 On 27 February 2025 the respondent provided the updated schedule, confirmed it was content for the matter to be dealt with on the papers and did not propose to provide further submissions relying on its original application. The updated schedule now provides more details of the items of costs incurred.

5.3 On 18 March 2025 the claimant also confirmed he was content that the application should be dealt with on the papers and provided a brief income and expenditure statement.

6 The Law

6.1 The recovery of legal costs incurred in defending or pursuing claims in the employment tribunal do not follow the event. They are the exception not the rule, but they can be made in appropriate cases. The power to make an order for costs is set out in what is now part 13 of the Rules.

6.2 So far as relevant to this application, the following rules guide out determination of the application: -

> ***73.—(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.***
>
> ***74.—(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,***
>
> ***82— In deciding whether to make a costs order…., and if so the amount of any such order, the Tribunal may have regard to the paying party's …. ability to pay.***

6.3 As with the interpretation and application of all rules, the overriding objective is engaged. It provides: -

> ***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.***
>
> ***(3) The Tribunal must seek to give effect to the overriding objective when it—***
>
> ***(a) exercises any power under these Rules, or***
>
> ***(b) interprets any rule or practice direction.***

6.4 The claimant in this case was not acting in person but his representative was a lay representative. I consider it is still useful to remined myself of the approach to costs against a party acting in person. In **AQ Ltd v Holden [2012] IRLR 648, EAT [32**], the EAT said:

> ***A tribunal cannot and should not judge a litigant in person by the standards of a professional representative. Lay people are entitled to represent themselves in tribunals; and, since legal aid is not available and they will not usually recover costs if they are successful, it is inevitable that many lay people will represent themselves. Justice requires that tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life. As [counsel for the claimant] submitted, lay people are likely to lack the objectivity and knowledge of law and practice brought by a professional adviser. Tribunals must bear this in mind when assessing the threshold tests … . Further, even if the threshold tests for an order of costs are met, the tribunal has discretion whether to make an order. This discretion will be exercised having regard to all the circumstances. It is not irrelevant that a lay person may have brought proceedings with little or no access to specialist help and advice.***

6.5 When assessing conduct, I must be able to identify the conduct said to be unreasonable and then look globally at the totality of the "nature, gravity and effect" of the conduct. (**McPherson v BNP Paribas [2004] ICR 1398 CA; Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78 CA**.)

6.6 "Unreasonable" has an ordinary, everyday, objective, meaning: **Dyer v Secretary of State for Employment EAT 183/73**.

6.7 The question is whether the approach was objectively unreasonable. There will often be many different approaches available, all which are reasonable. It is only if the conduct identified itself falls outside that objective range that claimant or his representative's conduct will be unreasonable: **Vaughan v Lewisham LBC [2013] IRLR 713 EAT at [25]. Solomon v University of Hertfordshire UKEAT/0258/18EAT.**

6.8 Rule 76 governs how costs orders are assessed by the tribunal. That is, how the amount to be paid is quantified. In this case the rule engaged is rule 76(1)(a), a sum under £20,000 for the tribunal to specify.

6.9 Case law on these rules, and their predecessors, has made clear that the approach to making a costs order should be in stages. In its simplest terms the decision on whether to make a costs order can be broken down into the following constituent parts:-

a) Whether the power (or in rare cases the duty) to make a costs order at all has been engaged under the rules.

b) If a power has been engaged, whether the discretion to apply that power should be exercised having regard to all the relevant circumstances.

c) If so, the terms of any order that is then just to make in the circumstances of the case.

d) If costs are ordered, the assessment of those costs.

6.10 Similarly, when unreasonable conduct is relied on, as here, the conduct itself must be identified. Whilst it is not necessary for there to be a precise causal connection between the conduct and the costs incurred, some degree of relationship is necessary in the assessment. The tribunal is concerned with evaluation the nature, degree and effect of the conduct on the proceedings and the receiving party's costs.

7 Discussion and conclusion

7.1 Events prior to the period for which costs are claimed are not irrelevant. They include observations made from the very outset by a legal officer that the claim had not been particularised. That in turn led to a series of events in which aspects of the claims continued to be left unparticularised. There were apparently observations made in the course of the preliminary hearing before Judge Ahmed which, whilst not recorded in the order, are accepted by the claimant's representative as having been made and as having been "helpful".

7.2 Turning to the claimant's objections, one objection is that "it is not unreasonable to pursue a weak claim". I don't accept this contention although it seems to be accepted that the claim was a weak claim. In context, it is clear that this referring to a claim which may have little reasonable prospect of successful. There is no general proposition of law to support this contention and the circumstances of any claim may potentially engage the power to make a costs order. Of course, a party has a right to pursue any claim properly presented. A party has a right to do so even after a deposit order has been made but two matters arise from this. Firstly, a party that does so after paying a deposit will be deemed to have acted unreasonably in pursuing the allegation to which the deposit related. Secondly, this hearing was itself set down to determine whether to make such a deposit order amongst other things. That no order was made is explained only by the claimant and his representative's failure to attend that hearing.

7.3 It is also asserted that the cost warning was aggressive. I do not accept that that is made out. Firstly, I should record neither party has produced to me the

actual costs letter. Both have, however, made reference to its content. Nothing I have seen suggest this was anything other than an appropriate matter to deal with in inter parties, without prejudice correspondence. The fact that there is a cost warning as long ago as 17 September 2024 is itself a relevant factor to consider in understanding why the claim continued to an aborted hearing. In addition, I do not accept the claimant's contention that the respondent's failure to engage in ACAS conciliation means any costs incurred by the respondent are their responsibility alone. If the claimant is suggesting the respondent should have paid some settlement, he is wrong. The respondent was entitled to defend the claim and particularly in the circumstances of this case. If, alternatively, the claimant is suggesting the respondent should have raised the weaknesses in the claimants claim through ACAS conciliation, he has not explained why that would have led to an earlier withdrawal whereas all the other points at which the difficulties with the claim were raised did not have that result. The costs warning is relevant to the background leading up to the withdrawal decision, it is not directly related to the circumstances of the aborted hearing.

7.4 The claimant notes that the bundle preparation correspondence asked only for additional documents and says simply which they were no additional documents. I accept this point. Neither party has shown me the actual correspondence. If it was put in terms of seeking additional documents, the claimant's response was not in itself either unreasonable or indicative of any other conclusion beyond the fact he did not have any additional documents to rely on. The respondent suggests the absence of documents shows the claimant had already disengaged from prosecuting his claim. Whilst I see the basis of the respondent's suspicion, I cannot reach that conclusion. The timing is a little before the Christmas period over which I found the decision was then made. I accept it may form part of the background, but it is entirely possible there were no documents provided simply because there were no documents and that in turn may have informed the decision to withdraw the claims.

7.5 That Ms Brown had been unwell and not functioning normally. There is no medical evidence and no surrounding context. She was able to respond to the tribunal's e-mail within 4 hours of it being sent and there is no other explanation dealing with why e-mails sent by the respondent in the days prior to the preliminary hearing did not prompt her to address the state of the claimant's claim at the time. I note the explanation is that she had mistaken the hearing to be listed on Thursday of that week instead of the Monday and Tuesday, but there was no application to postpone that hearing in view of her apparent ill health, nothing explains why, even if Miss Brown was genuinely been labouring under a mistaken view as to the date of the hearing, she did not make such an application to postpone. Perhaps of greater consequence is that the claimant himself is not said to have been ill or otherwise unavailable for the hearing and as he was due to be giving evidence, I have no explanation as to why he did not attend either or make contact if Ms Brown was unavailable.

7.6 Other aspects of the claimant's objections refer to the notion that making a costs order would undermine the purpose of employment tribunals and restrict access to justice. I don't agree. I do however accept the general proposition that costs do not ordinarily follow the event and approach this application on the legal basis I have set out. In other words that I have no power to make a costs order unless a "gateway" to the discretion to make such an order is engaged, unless it is in the interest of justice to exercise that discretion, and unless the order and its assessment is itself fair and just. Those are the essence of the legal tests set out in the rules and there is no general proposition that costs cannot ever be ordered.

7.7 That the claimant is, effectively, to be treated as a litigant in person has limited relevance. I do consider this even though there is, technically, a representative. However, the gravity, nature of the effect is being assessed against conduct which is no more than common, everyday communication, in respect of which there is no suggestion that any real obstacles existed. Where the nature of the conduct goes to a technical, legal or procedural matter, or assessing prospects of success, I accept that being a litigant in person with no prior experience is going to be a significant factor to weigh. Where, as here, the conduct is simply not informing the tribunal and respondent of a decision not to proceed, the consequences of which should be readily apparent to anyone, it carries little to no weight. It cannot even be said that the respondent being legally represented at the hearing came as a surprise to the claimant, and I am not satisfied that would carry much weight anyway as he would still then have been putting an unrepresented respondent to an unnecessary attendance. But in any event, in this case both he and Miss Brown knew the respondent was legally represented throughout, had already received a costs warning and so were alert to the fact of it incurring, and potentially recovering, costs. They had received counsel's skeleton argument digitally and in hard copy – signed for apparently by Brown or someone in her household. They knew the respondent had prepared for the hearing so knew it had incurred additional costs for that hearing. For that reason, next to no weight applies in this case to the claimant's status or that of Ms Brown as a lay representative.

Is the discretion engaged?

7.8 I have found that the claimant decided to withdraw his claim before the hearing and neither he nor Miss Brown then took any steps to inform the Tribunal and the respondent of that decision. It is compounded by the prompting that must have arisen on receipt of the respondent's skeleton argument.

7.9 Even if the claimant's representative was genuinely mistaken about the date of the hearing, which I do not accept, there was no good reason for not informing the respondent and the tribunal earlier of his decision, especially when prompted by delivery of the respondent's skeleton argument on 30 December and notwithstanding the new hear bank holiday. A brief email was all that was required. It does not sit comfortably with the surrounding circumstance and particularly the terms in which the decision on withdrawal decision was

reached. Even if that were true, it would raise the problem that the notice was being deliberately delayed which anyone would or should realise would have the result of causing cost to the respondent. Whilst costs and disruption to the tribunal is not a factor, it must also have been apparent that it would mean other tribunal users may be deprived of the opportunity of a cast proceeding on those days.

7.10 I am satisfied that the conduct of the claimant or his representative does fall within the ordinary meaning of unreasonable for the purpose of engaging the threshold of this costs gateway.

Is it just to exercise the discretion?

7.11 In considering whether to make a costs order at all, the rules explicitly permit me to have regard to the claimant's ability to pay, rule 82 provides: -

> ***in deciding whether to make a costs order... if so the amount of any such order, the tribunal may have regard to the paying party's…ability to pay.***

7.12 The respondent has limited its costs to the alleged unreasonable conduct. It claims costs only after 19 December 2024 despite the earlier history of the difficulties in articulating the claim and costs incurred in attempting to get clarification. In reality, there are no costs other than those associated with the hearing on 6 & 7 January 2025.

7.13 I have received an income / expenditure statement from the claimant. I am satisfied he is in receipt of Universal Credit, at least as at the period March to April 2025, in the sum of £348.45 per month. He has disclosed outgoings at £301.00 per month, a modest credit balance of £47.62 per month and modest assets, principally reflecting his 16-year-old car of £1097.62. Other information before me is the claimant's schedule of loss submitted up to 23 August 2024 which showed he had secured alternative employment within about seven weeks of his previous employment ending and which fully mitigated the previous income. I have no information presented to me to explain what happened to that employment beyond the fact that Miss Brown confirmed on 4 February 2025 that the claimant was no longer working and his Universal Credit appointment on 21st February 2025 appears to have been after the cost application was made. There's no challenge to the evidence submitted and I see no reason to go behind what has been put to me.

7.14 The claimant's ability to pay is a factor I can take into account. Having got the evidence before me, I see no reason to ignore it. Having said that, taking it into account does not mean I have to be satisfied he has the means to pay any order made. It is a factor, not a cap on the order that can be made. I also have regard to the fact he was able to find new work quickly and until recently and at a time he was pressing this claim. There must be a real likelihood that, if he hasn't already done so, he will be able to obtain new work of comparable earnings soon.

7.15 Having considered his ability to pay any costs order, whilst I consider his apparent means today is a relevant factor to take into account, I have decided it does not weigh sufficiently heavily to persuade me not to make an order at all.

7.16 In deciding that, I must also consider the other circumstances in the round. This failure is clear and focused. It was unreasonable. Significant costs could have been avoided by a prompt notice of the withdrawal. Doing so was not an onerous task for the claimant or Miss Brown. There were prompts and an opportunity to act throughout the period that notice could have been given which were ignored. There is no convincing explanation for the fact this was not acted on.

7.17 I also reflect on the overriding objective. Many of the explicit aspects of dealing with cases fairly recognise the imbalance between parties. Access to the employment tribunal is free and unfettered by overly legal obligations. In this application the claimant is not being criticised for bringing a claim or even in the difficulties he obviously had to articulate what his claim was. The overriding objective explicitly recognises the need to save expense.

7.18 I consider I would be closing my eyes to the obvious reality of this case if I did not exercise the discretion. I have decided I will go on to make an order.

The nature of the order

7.19 I limit the costs to the costs of and incidental to the hearing on 6 and 7 January 2025. I do not see why the claimant should not be ordered to pay all of the costs falling within that. Subject to assessment.

7.20 The assessment will be on what costs lawyers would call the standard basis. Although the threshold gateways under the rules come close to the sort of situations the Civil Procedure Rules contemplates might engage indemnity costs, I do not consider they are synonymous. The respondent has not sought indemnity costs and I am not satisfied it is appropriate to so order anyway.

8 Assessment

8.1 I assess under rule 76(1)(a). That rule allows the tribunal simply to “specify a sum”. The cases referred to above provide the guiding principles. It is not the same thing as summary assessment under the Civil Procedure Rules, but as it needs to be arrived judicially, with relevance and reason, in substance the process will look very similar. Hence, I have already referred to the standard basis, which is a concept found in the CPR part 44. In any event, I consider that what I am required to do in specifying a sum certainly incorporates the reasonableness of incurring an item of costs, that it is reasonable in amount and that the costs were proportionate to the issues and some broad connection between that cost and the conduct, albeit not necessarily and direct causal link.

8.2 The issues to be argued at the aborted hearing were disability status and determining applications seeking orders striking out the claims or imposing a

deposit. They may be said to arise in the context of the limited evidence the claimant had adduced but that can make conduct of the hearing as difficult.

8.3 My approach to how I arrive at a figure is as follows.

8.4 *Absence of "points of dispute".* Within the context and informality of rule 76(1)(a), and for that matter a "summary assessment" in the county court, there is no precise form of challenge required to a claim for costs. Nevertheless, I record that the claimant has not made any representations on the *quantum* of the costs claimed themselves. The objections are in matters of substance and principle relating to the making of an order, rather than its quantification.

8.5 *Claimant's ability to pay*. This is relevant to revisit at this stage of assessing costs, as well as the earlier stage of whether to make an order at all. I keep in mind the claimant's means are limited at the time the information was provided. I have kept that in mind when assessing the individual items claimed. Although the standard basis means doubt is resolved in favour of the paying party under the civil procedure rules, under the more flexible Employment Tribunal rules, means I can scrutinise even more closely what is claimed. However, for the same reasons as I did not consider his means should prevent the making of an order at all, I do not consider this is a case where I should limit the costs to any maximum figure. Any such figure would be wholly arbitrary as it is not possible to rationalise why one figure that might be chosen over another. Moreover, the nature of the acts or omissions that engage unreasonable conduct may fall somewhere between the claimant and his lay representative. The claimant's ability to pay is better left to consideration of any decisions about enforcement and for the civil courts process in what enforcement steps may be taken at a later stage.

8.6 *VAT Status*. I am not aware of any direct evidence of the respondent's VAT status but it seems to me, on balance, that it must be a VAT registered entity. The consequence of that is that it can offset the VAT element as part of its input VAT account. The claimant will not be ordered to pay VAT.

8.7 *Use and cost of Counsel.* I consider it was reasonable to instruct Counsel. I do not have a fee note but am told the brief fee of £2250 plus VAT for a two-day hearing does not include a refresher**.** There are around 5 hours of actual hearing time to anticipate on day 1, 10 hours in total to prepare for the hearing as a whole, drafting a skeleton argument, travelling and attending to instructing solicitor before, during and after. That very easily rises to around 15 hours of work (up to day 1 and ignoring the refresher that would have been incurred if it had gone into day 2) The figure of £150 per hour that that equates to is less than instructing solicitor would charge to attend themselves. I have decided this is reasonably incurred and reasonable in amount. Counsel was released from day two as a result of the aborted hearing, but that in itself save the apparent refresher being incurred.

8.8 Similarly, I do not have details of the expenses incurred by Counsel. They are put in the sum of £249.30 plus VAT for travel and accommodation. I know from

discussions on the day itself that Counsel had travelled from the Northeast of England and overnight accommodation would be reasonably incurred. There is a limited local employment law bar to Nottingham and instructing other Counsel who may have been able to travel on each day would potentially have incurred a similar cost. I am satisfied this is reasonable to incur and reasonable in amount.

8.9 *Solicitor costs*. The respondent's solicitor chose not to produce the costs on the form N260 Solicitor claim. The solicitor's costs claimed have increased from the £2,000 in the original application to £2,414 plus VAT. The further information provided in the revised schedule still leaves me with some uncertainty about the work undertaken.

a) *Hourly Rate.* The hourly rate claimed throughout is £170. I am not told who the fee earner is and their grade for costs purposes. The guideline Solicitors' hourly rates for Nottingham City (National Group 1) is currently £197 for solicitors and fee earners of equivalent experience under 4 years' experience. The rate claimed therefore falls well within Grade C. In fact, it is not a lot more than the £139 for trainees. I consider it is reasonable grade to work on this claim and the amount claimed is itself reasonable.

b) *Correspondence relating to the preliminary hearing.* I remind myself that the costs claimed are limited to costs incurred after 19 December 2024. I struggle to see how 7.4 hours of time was spent on letters and emails. The tribunal file shows 10 points of correspondence both in and out, many short or of minor significance. Some work may be claimed in revising the schedule attached to one of those and considering the responses. There will also be communications with client and counsel that are not on the Tribunal file. Even then, the nature of the situation leaves me limiting the amount of time reasonably necessary to incur. I allow 3 hours (£510)

c) *Preparing bundle including courier fees.* There are no fees claimed, although I expect they were incurred. The claim is for 5.5 hours at the hourly rate. The bundle was the bundle offered to the claimant prior to 19 December which prompted no additions. There is clearly some reasonable work involved thereafter in finalising and formatting it but, again, 5.5 hours appears unreasonable. Allow 2 hours (£340).

d) *Telephone attendance.* This is said to include liaising with Counsel and chasing claimant's representative regarding non-attendance at the preliminary hearing. 1.3 hours is claimed. I allow one hour for Counsel. I cannot see what role there as for telephone call chasing the claimant after their non-attendance. (£170)

e) The total solicitor costs allowed amount to 6 hours and total £1,020.

8.10 The total summary claim is therefore assessed in the figure of £3,519.30. Having regard to the issues for determination at the hearing, the known and unknown issues in the claim, the state of the claim over its initial months, I

consider the steps taken in respect of preparing for that hearing and the sums assess to be proportionate and recoverable.

EMPLOYMENT JUDGE R Clark

DATE 31 July 2025

JUDGMENT SENT TO THE PARTIES ON

……05 August 2025……..

AND ENTERED IN THE REGISTER

……..

FOR THE TRIBUNALS