EMPLOYMENT TRIBUNALS

Claimant: Mr A M Choudhry

Respondent: DL Insurance Services Ltd

Heard at: Manchester (by CVP) **On:** 22 September 2022 and 15 November 2022 (in Chambers)

Before: Employment Judge McDonald
Mr S Anslow
Ms K Fulton

REPRESENTATION:

Claimant: In person
Respondent: Miss H Gardiner (Counsel)

RESERVED JUDGMENT ON A COSTS APPLICATION

The unanimous judgment of the Tribunal is that the claimant is ordered to pay a contribution of £10,200 towards the respondent's costs.

REASONS

Introduction

1. The respondent applies for an order for costs against the claimant in relation to the claim he presented against it on 24 May 2018. The claimant said that the respondent had discriminated against him in various ways related to his disability and had failed to pay him overtime pay and accrued holiday pay. The respondent during the proceedings conceded that the claimant was a disabled person by reason of anxiety and depression and body dysmorphic disorder.

2. The costs hearing took place over two days. On the 22 September 2022 the Tribunal heard evidence from the claimant and submissions from both parties. On 15 November 2022, the Tribunal met in chambers to deliberate and make its decision.

3. The costs hearing was initially scheduled to take place on 11 October 2021. It was postponed at the claimant's request on the grant of his request for an extension of time to respond to the respondent's costs application. The hearing was relisted for 15 February 2022 but that hearing was then postponed following the unavailability of a panel member. The hearing was then listed for 22 September 2022. The claimant's application dated 5 September 2022 to postpone the hearing because he had started a new job and could not get time off was refused.

4. At the hearing on 22 September 2022, the claimant represented himself and the respondent was represented by Miss Gardiner of Counsel. The parties had agreed a bundle of documents consisting of 209 pages. In this judgment we refer to that as "the Bundle". References to page numbers in this document are references to pages in the Bundle.

5. The Bundle included the respondent's written costs application and the claimant's response to that application (pp.1-17 and 18-23 respectively). It also included the respondent's Schedule of Costs (p.11) which set out the costs and counsel's fees incurred by the respondent in defending the claim (i) from the start of the claim (ii) from 9 April 2021.

6. During the hearing on 22 September 2022, we requested and were provided with:

   a. a detailed breakdown of the respondent's costs.

   b. copies of an email exchange between the parties relating to the claimant's proposed "drop hands" settlement offer on 19 April 2021

   c. information about the mortgage on the claimant's home.

7. We decided that the best way of the claimant providing evidence about his financial situation was for him to complete court form EX140 (Record of examination of an individual). He did so during the extended lunch hour at the 22 September 2022 hearing. In this judgment we refer to that as "the Form 140".

8. At the end of the 22 September 2022 hearing we directed that:

   a. the claimant must by 29 September 2022 send to the Tribunal and the respondent any further written submissions he wanted to make and any evidence he wanted to submit to substantiate his evidence that there was currently a mortgage on his house.

   b. the respondent must by 6 October 2022 send any written submissions in reply to the claimant and the Tribunal.

9. Both parties complied, albeit the claimant was late in doing so, sending his submissions and evidence in on 3 October 2022. The respondent sent its reply on 6

October 2022. On 15 November 2022 the Tribunal met in chambers to make its decision.

Background to the costs application

10. The claimant's substantive case was first due to be heard on 17-21 June 2019 ("the first final hearing"). That hearing was before a Tribunal panel chaired by Employment Judge Batten. It was adjourned part-heard because the claimant became unwell during the hearing. It was not possible to reconvene the same Tribunal panel because of the retirement of one of the non-legal members. The claimant did not consent to the case being heard by a panel of 2 so the case was relisted before the current Tribunal panel on 12-16 April 2021 ("the second final hearing").

11. On 18 March 2021, Employment Judge McDonald directed that the second final hearing take place as a remote hearing by CVP. That followed a case management preliminary hearing on 22 January 2021 and the provision of further evidence by the claimant about his ability to take part in the second final hearing given his ill-health at the first final hearing. At that January 2021 hearing the claimant confirmed that he had a support worker provided by Rochdale Adult Care Services who would be able to attend the whole of the final hearing with him. The Case Management Summary and Orders from that hearing were at pp.82-88 of the Bundle. In this judgment we refer to that hearing as "the January 2021 hearing".

12. The second final hearing did not proceed as a final hearing. We have set out the full details of what happened in our Case Management Order dated 22 April 2021. We set out our findings on disputed facts at paras 44-57 below.

13. In summary, the claimant attended the hearing by CVP videolink from his brother's house. He did so because he no longer had internet at his house. At the start of the hearing on 12 April 2021, he applied to make amendments to his claim. That included adding a claim for notice pay and a claim of direct disability discrimination. The Tribunal decided to consider those amendments after it had read the papers in the case.

14. We reconvened at 1.30 p.m. to consider the application to amend. At that point the claimant told us for the first time that he had been ill with COVID symptoms over the weekend; that he was awaiting a PCR test which he had ordered online and that his brother was now saying that he could not attend the hearing from his house. That was in part because the claimant's brother cared for their grandmother who was a vulnerable person and so significantly at risk if she contracted COVID. We discussed ways of the claimant getting a COVID test done that day or overnight. As we recorded at paragraph 26 of our case management order dated 26 April 2021, we found the claimant's approach to those discussions unhelpful. The respondent indicated it would be making an application to strike out the claimant's claim on the basis he had conducted it unreasonably.

15. We adjourned the hearing until Tuesday 13 April 2021 (what would have been the second day of the second final hearing) and made directions requiring the claimant to provide further information and documentation to substantiate his version of events. On 13 April 2021 the claimant joined the hearing by phone from home. We

decided to grant his application to adjourn the hearing until Friday 16th April 2021. By then, he was due to have received the result of his COVID test. If it was negative, he would be able to attend at his brother's house or the Tribunal to give evidence by CVP videolink and we would then hear his application to amend and the respondent's application to strike out the claim. If he was positive, those applications would be heard on 7 June 2021. We postponed the final hearing of the claim to 4-8 October 2021. We directed that the parties set out the grounds for their applications in writing.

16. By Friday 16 April 2021 the claimant had received a negative COVID test result. He joined the hearing on that day by videolink from his brother's house. We were due to hear his application to amend and the respondent's application to strike out his claim. He withdrew his application to amend to add the direct discrimination claim and instead applied to amend to add a different direct discrimination claim and new claims of disability related harassment, failure to make reasonable adjustments and a breach of s.15 of the Equality Act 2010.

17. In the steps leading up to the second final hearing it had been agreed that the claimant should be accompanied at the second final hearing by a companion to ensure that his mental health issues did not cause him distress. At the January 2021 hearing the expectation was that the claimant would be supported at the second final hearing by his support worker from Rochdale Adult Social Care. When it came time for the claimant to give evidence on 16 April 2021 we therefore asked the claimant's brother, who was present with him to provide that support, to appear onscreen during the evidence so that the Tribunal could be confident that the claimant's evidence was not being influenced or interfered with by his brother The claimant having affirmed started to give evidence. However, some 5-10 minutes into the evidence, his brother left and was no longer on screen. Despite adjourning to enable the claimant to ask his brother to return, the claimant was unable to find him.

18. After taking time to deliberate the Tribunal decided that a fair hearing was not possible with the claimant giving evidence form his brother's house unsupoprted. We decided the appropriate course of action was to adjourn the hearing of the application to amend and the application for a strike out until 7 June 2021, the date already set aside as a reserve day for hearing the applications if the claimant's COVID test had proven positive.

19. However, we decided it was in accordance with the overriding objective to make an Unless Order, stating that unless the claimant attend at the Manchester Employment Tribunal for the hearing on 7 June 2021 with a companion who could stay with him throughout the hearing his case should be struck out. We were very mindful that an Unless Order is a draconian sanction but were satisfied that a fair hearing would not be possible unless those terms were complied with. The full reasons for our decisions are set out at para 58 of the case management order dated 22 April 2021.

20. On 15 April 2021, during the second final hearing, the respondent conceded that the claimant had not been paid appropriate holiday pay and that claim was withdrawn by the claimant.

21. At the second final hearing the respondent also accepted it had not paid the one week's notice pay to which the claimant was entitled. Although that was not currently part of the claimant's claim (there was due to be an application to amend to include it), there was no need to do so given that the respondent paid it without need for order or Judgment.

22. On the 2 June 2021 the claimant withdrew his claim against the respodnent (p.157).

23. The end result is that there has never been a final Judgment on liability in this case. The current Tribunal have no knowledge of what happened at the first final hearing beyond what the parties have told them. The second final hearing did not progress as far as hearing any oral evidence.

24. On 7 June 2021 the respondent made an application for costs. It sought the whole of its costs from the start of the claim on the basis that the claim lacked any reasonable prospects of success and the claimant's conduct throughout had been scandalous, vexatious and unreasonable. It puts those costs at £46,238.10 plus VAT but limited the costs order sought to £20,000 to enable a summary costs order to be made by the Tribunal under rule 75(1)(a) rather than requiring a detailed assessment under rule 75(1)(b).

25. Alternatively, it sought recovery of the costs incurred since 9 April 2021 (£8867.42 plus VAT) on the basis that the claimant was warned about costs through correspondence on 7 April 2021 and the claimant's subsequent conduct was scandalous, vexatious and unreasonable.

The Relevant Law

26. The power to award costs is contained in the 2013 Rules of Procedure. The definition of costs appears in rule 74(1) and includes fees, charges, disbursements or expenses incurred by or on behalf of the receiving party.

27. Rule 75(1) provides that a Costs Order includes an order that a party makes a payment to another party "in respect of the costs that the receiving party has incurred while legally represented".

28. The circumstances in which a Costs Order may be made are set out in rule 76. The relevant provision here was rule 76(1) which provides as follows:

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

29. The procedure by which the costs application should be considered is set out in rule 77 and the amount which the Tribunal may award is governed by rule 78. In summary rule 78 empowers a Tribunal to make an order in respect of a specified

amount not exceeding £20,000, or alternatively to order the paying party to pay the whole or specified part of the costs with the amount to be determined following a detailed assessment.

30. Rule 84 concerns ability to pay and reads as follows:

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

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

32. The case law on the costs powers (and their predecessors in the 2004 Rules of Procedure) include confirmation that the award of costs is the exception rather than the rule in Employment Tribunal proceedings; that was acknowledged in **Gee v Shell UK Limited [2003] IRLR 82**.

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

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

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

35. In determining whether to make an order on the ground that a party has conducted proceedings unreasonably, a Tribunal should take into account the 'nature, gravity and effect' of a party's unreasonable conduct — **McPherson v BNP Paribas (London Branch) 2004 ICR 1398, CA**. However, this does not mean that the circumstances of a case have to be separated into sections such as 'nature', 'gravity' and 'effect', with each section being analysed separately. The vital point in exercising the discretion to order costs is to look at the whole picture. The Tribunal has to ask whether there has been unreasonable conduct by the paying party in bringing, defending or conducting the case and, in doing so, identify the conduct, what was unreasonable about it, and what effect it had. This process does not entail a detailed or minute assessment. Instead the Tribunal should adopt a broad-brush approach, against the background of all the relevant circumstances: **Yerrakalva v Barnsley Metropolitan Borough Council and anor 2012 ICR 420, CA**.

36. In assessing the conduct of a party, it is appropriate for a litigant in person to be judged less harshly in terms of his or her conduct than a litigant who is professionally represented. An employment tribunal cannot, and should not, judge a

litigant in person by the standards of a professional representative: **AQ Ltd v Holden 2012 IRLR 648, EAT**. That does not mean that that lay people are immune from orders for costs: a litigant in person can be found to have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity.

37. It is not unreasonable conduct per se for a claimant to withdraw a claim before it proceeds to a final hearing: **McPherson v BNP Paribas**. The critical question is whether the claimant withdrawing the claim has conducted the proceedings unreasonably, not whether the withdrawal of the claim is in itself unreasonable. The same applies where there is a late withdrawal of a claim. It is not necessarily unreasonable conduct to withdraw a claim at a late stage in proceedings.

38. In this case although we read the witness statements we made no heard no oral evidence and made no findings of fact or determination of the substantive issues in the case. When it comes to a finding that a claim has "no reasonable prospects of success", we found the authorities on strike out applications under rule 37 of the ET Rules helpful.

39. In **Abertawe Bro Morgannwg University Health Board v Ferguson [2013] I.C.R. 1108** the EAT acknowledged that applications for strike-out may in a proper case succeed but warned that "in a case which is always likely to be heavily fact sensitive, such as one involving discrimination or the closely allied ground of public interest disclosure, the circumstances in which it will be possible to strike out a claim are likely to be rare. In general it is better to proceed to determine a case on the evidence in light of all the facts. At the conclusion of the evidence gathering it is likely to be much clearer whether there is truly a point of law in issue or not."

40. In **Mbuisa v Cygnet Healthcare Ltd UKEAT/0119/18/BA** the EAT said that it is only in an exceptional case that it would be appropriate to strike out a claim on the ground it has no reasonable prospect of success where the issue to be decided is dependent on conflicting evidence. However,

> "20. Such an exceptional case might arise where it is instantly demonstrable that the central facts in the claim are untrue or there is no real substance in the factual assertions being made, but the ET should take the Claimant's case, as it is set out in the claim, at its highest, unless contradicted by plainly inconsistent documents……
>
> 21. … An ET should not, of course, be deterred from striking out a claim where it is appropriate to do so but real caution should always be exercised, in particular where there is some confusion as to how a case is being put by a litigant in person; all the more so where - as Langstaff J observed in **Hassan v Tesco Stores Ltd UKEAT/0098/16**- the litigant's first language is not English or, I would suggest, where the litigant does not come from a background such that they would be familiar with having to articulate complex arguments in written form."

The Respondent's Application

41. In summary, the grounds for the respondent's application were that

(1) The claimant acted unreasonably in conducting the proceedings (rule 76(1)(a) by:

a. Waiting until the first day of the first final hearing to make an application to amend his claim

b. Failing to disclose relevant documents until part way through cross examination on day 2 of the first final hearing

c. Making a series of abusive and threatening phone calls from a withheld number to one of the respondent's witnesses on the morning of the first day of the first final hearing.

d. Misleading the Tribunal at the second final hearing about having COVID.

e. Failing to apply to postpone the second final hearing at any point between when he claimed be became COVID symptomatic on the 9 April 2021 and the afternoon of the first day of that hearing.

f. Failing to inform the Tribunal he had no internet at home or making arrangements to have internet at home for the second final hearing.

g. Non-covid related unreasonable conduct:

i. Bombarding the respondent with emails on 9 April 2021, the last working day before the second final hearing;

ii. Pursuing amendment applications about completely new claims on 15 April 2021;

iii. Having the television on during the second final hearing and failing to turn it off when requested to do so by the Judge;

iv. Making inadequate arrangements to attend the second final hearing from his brother's house.

h. Withdrawing the claim less than 7 days before the preliminary hearing on 7 June 2021 at which the Tribunal was due to consider the applications to amend and to strike out.

i. Making several other Tribunal claims against a number of employers none of which reached a substantive hearing, suggesting the claimant is a serial litigant.

(2) The claimant's claims having no reasonable prospects of success (rule 76(1)(b). The respondent submitted that:

a. it made reasonable adjustments to take into account the claimant's disabilities;

b. that his dismissal was for persistent lateness/absence. He worked for the respondent for just over 2 months;

c. that his claim of harassment had no reasonable prospect of success as any conduct was unrelated to his disability;

d. his claim for an unauthorised deduction of wages by failing to pay him overtime for working 15 minutes after his shift had no reasonable prospects of success because he never stayed 15 minutes after his shift;

e. although the respondent accepted that the claimant was owed holiday, that was a minor part of his claim an had he quantified it at the outset rather than shortly before the second final hearing, that would have been resolved within a matter of months and without the need for the respondent incurring additional costs.

(3) On 7 April 2021 the respondent had sent the claimant a costs warning letter, inviting him to withdraw his claim on the basis it had no reasonable prospect of success and that should he continue to pursue it, the respondent would seek to recover its legal costs.

42. We have not set out the parties' written and oral submissions in full but have taken them into account in reaching our decision. We have referred to specific submissions where relevant below.

Issues to be determined

43. The issues to be determined by the Tribunal in relation to the respondent's application were:

(1) Whether the claimant had acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing of the proceedings (or part) or the way that the proceedings (or part) had been conducted (Rule 76(1)(a)); or

(2) Whether the claimant's claim had no reasonable prospect of success (Rule 76(1)(b));

(3) If the answer to (1) or (2) above is yes, whether in all the circumstances it would be appropriate to make an order for costs against the claimant; and

(4) If so, what amount of costs should be awarded?

Findings on disputed factual matters

44. There were a number of points on which there was no factual dispute, the issue being whether the claimant's conduct was unreasonable. The key factual disputes were:

a. Whether the claimant made a series of abusive and threatening phone calls from a withheld number to one of the respondent's witnesses on the morning of the first day of the first final hearing.

b. Whether the claimant did suffer from COVID on the weekend of 10-11 April 2021.

c. Whether the claimant failed to ensure the television in his brother's house was turned off during the hearing on 12 April 2021 when the Judge asked him to do so.

d. What the claimant's position was vis-a vis internet access at home and support for him at the second final hearing.

The abusive phonecalls

45. The respondent's case was that on the morning of the 19 June 2019 (day 1 of the first final hearing), Lee Berry, one of the respondent's witnesses, had received a series of calls from a withheld number which were threatening in nature. The claimant denied making those calls and denied that he had the telephone number for any of the witnesses.

46. We did not hear any witness evidence from the respondent on this issue. A series of emails between employees of the respondent from 19 June 2019 at pp.71-72 in the bundle referred to the calls. In those emails the respondent's employees accepted that the calls were from a withheld number; that the claimant did not have mobile contact number for all of the witnesses and that "the numbers have since changed". The respondent accepted that it had not raised the matter with the Tribunal hearing the first final hearing despite the seriousness of the incident.

47. We took into account the coincidence in time of the calls with the start of the hearing. However, we decided that there was insufficient evidence for us to find on the balance of probabilities that the calls had been made by the claimant.

Whether the claimant did suffer from COVID on the weekend of 10-11 April 2021.

48. In relation to the claimant's allegedly suffering from COVID-19, we referred to our detailed record of what happened in our Case Management Order dated 22 April 2021. The claimant's case was that he had started suffering from COVID symptoms on Friday evening and was bed-ridden by Saturday night. We find that the claimant had been able to send the respondent's representatives a series of around ten emails relating to the case on the afternoon of Friday 9 April 2021. The last was sent at 14.49 (p.113). That email involved the claimant consolidating his previous emails into one email at the respondent's representative's request. He gave no indication in that email that he was feeling unwell or experiencing COVID symptoms. The email at 11.47 (p.92) requested that the claimant be allowed to visit the respondent's premises to refresh his memory of the office layout on the retentions floor and the customer service floor. That seems to us to contradict any suggestion that at lunchtime/early afternoon on 9 April 2021 he was feeling any symptoms of COVID-19. We find that as late as 14.47 the claimant was not suffering from COVID symptoms - certainly not to the extent that he suggested he was by a few hours later.

49. We find the claimant's claim that by Saturday he was bedridden and very ill with COVID implausible in light of the claimant's subsequent actions. He was well enough to order a COVID-19 PCR testing kit on Sunday 11 April. He then attended at his brother's house for the CVP hearing on the morning of Monday 12 April despite, on his own account, having been bedridden with COVID over the weekend and being unsure whether he was COVID positive because he was still waiting for his PCR test to arrive in the post. He did not mention the fact that he had COVID and was waiting for a test to his brother despite knowing that his brother cared for their grandmother who is a vulnerable adult. We find it implausible that had the claimant been as ill as he was with COVID-19 that he would have attended at his brother's flat in those circumstances.

50. Furthermore, we find it implausible that had the claimant been so ill with COVID over the weekend he would have failed to mention that at the start of the second final hearing. By the time he attended the hearing on Monday 12 April 2021 he appeared to be symptom free and certainly did not suggest to the Tribunal that he was unwell and unable to continue. In fact the claimant did not refer to his having COVID-19 until the afternoon of the first day of the second final hearing. There had been opportunities for the claimant to mention that as there had been fairly extensive discussions between the Tribunal and the parties about reasonable adjustments to the Tribunal process at the hearing and the proposed amendments which the claimant sought to make on the morning of that first final hearing.

51. Taking all that into account, we find that the claimant did not as he alleged suffer from COVID-19 over the weekend of 10 and 11 April 2021. We find that he attempted to mislead the Tribunal by asserting that that was the case.

52. We also find that Royal Mail tracker information showed that the PCR test ordered by the claimant was delivered to his home by 9.55 a.m. on Monday 12 April 2021 (p.4 of the Bundle). The test would therefore have been waiting for the claimant when he returned home after the hearing on 12 April 2021 which was adjourned at 3.30 p.m. Despite that, he did not post it until Tuesday 13 April 2021, delaying the result by a further day.

Whether the claimant failed to ensure the television in his brother's house was turned off during the hearing on 12 April 2021 when the Judge asked him to do so.

53. As we recorded at para 34 of our in our case management summary dated 22 April 2021 the Tribunal was concerned to note that on two occasions during the hearing on 12 April 2021, when the claimant panned around the room he was in with the camera on his laptop it was apparent that a large screen television was on in the room. That was despite the Tribunal having warned the claimant that that was not appropriate on the first occasion.

54. The claimant in his response to the costs order (3rd bullet point of p.20 of the Bundle) suggested that the television was switched off as requested by the judge and that what was on was the CCTV above the television which could not be switched off. The Tribunal's clear recollection is that it was the same television that was on the second time.

The claimant's position vis-a vis internet access at home and support for him at the second final hearing

55. We find that at the January 2021 hearing and in subsequent correspondence the claimant clearly gave the impression to the respondent and the Tribunal that he would have access to internet and would therefore be in a position to conduct the final hearing by CVP. He also confirmed (as recorded at para 18 of the case management order form the January 2021 hearing) that he had a support worker provided by Rochdale Adult Care Services who would be able to attend the whole of the final hearing with him.

56. We find as a fact that the claimant's home internet was disconnected by 16 July 2020, some 6 months before the January 2021 hearing (p.204). The claimant made no mention of that at that hearing or in the subsequent correspondence about the case with the Tribunal leading to the decision to hold the hearing by CVP on 18 March 2021.

57. We also find (based on what the claimant told us on 16 April 2021 as recorded at para 56 of our case management 22 April 2021) that in fact the process of appointing a support worker by Rochdale Adult Care had never been concluded and that the claimant's brother was his carer. That contradicts what the claimant told the Tribunal at the January 2021 hearing. Although the claimant suggested he was entitled to assume that he would be able to conduct the second final hearing from his brother's house with his brother's support, we find he had not taken adequate steps to ensure that was so, as evidenced by his brother leaving the hearing part way through the claimant's evidence on 16 April 2021.

Findings about the claimant's financial situation

58. Based on the Form 140 completed by the claimant, we find that at the time of the hearing he had a net monthly income of £971.33 from employment. He also received £250 per month Working Tax Credit and PIP of £369.90 per month. Taking into account his outgoings, the respondent accepted that the claimant was "of limited means in terms of his income". We agree with that.

59. At the hearing on 22 September 2022 there was an element of dispute about the equity in the claimant's home. He owns the property, having bought it from his father. In the Form 140 he valued the property at £50,000 and said that the equity was reduced by a mortgage on the property. The respondent at that hearing questioned whether there was a mortgage attaching to the property given that the Land Registry entry showed no charge registered against it (pp.206-209). Based on the documents subsequently provided by the claimant, however, the respondent in its Reply dated 6 October 2022 accepted that there was a mortgage on the property. A screenshot as at 22 September 2022 showed a mortgage account balance of £29,978.82. The certificate of interest showed a slightly higher balance of £32,754.81.

60. The respondent disputed the claimant's valuation of the property at £50,000. The Land Registry Entry (p.206) showed that the claimant had purchased the property for £47,000 in April 2018 from his father. With its Reply the respondent produced screen shots from Zoopla which estimated the current value of the

property at £125,000 (with a lower estimate of £102,000 and a higher estimate of £152,000). Even allowing for the impact of recent economic events on house values, we accept the respondent's submission that on the balance of probabilities the equity in the claimant's home is well in excess of the £20,000 being claimed for costs. That is particularly given that the £47,000 the claimant paid for the house over 14 years' ago was not an open market full value transaction representing the full value of the property.

61. The claimant told us that he had gambling debts of around £25,000 which he had owed to loan sharks. There was no documentary evidence to support this. He suggested that his life had been threatened. There was evidence supplied by the claimant with his written submissions dated 3 October 2022 which supported his contention that he had had treatment for gambling addiction through a course provided by Beacon Counselling Trust from 5 June 2020. By 11 March 2021 the claimant was writing to Skybet to say that he had had mental health problems some 9 months earlier but was now better able to control himself having had treatment in the form of counselling. The claimant did not suggest that he had recently recommenced gambling in a way which was problematic.

Discussion and Conclusion

Whether the claimant had acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing of the proceedings (or part) or the way that the proceedings (or part) had been conducted (Rule 76(1)(a)); or

Whether the claimant's claim had no reasonable prospect of success (Rule 76(1)(b));

First final hearing – unreasonable conduct

62. The current Tribunal was at a disadvantage in assessing the claimant's conduct at the first final hearing, having not been present. The respondent's counsel at the costs hearing had also not been present.

63. As we have already recorded above, we did not find sufficient evidence for finding that the claimant was responsible for making threatening calls to one of the respondent's witnesses on the first day of the first final hearing.

64. In relation to the application to amend made at the start of that first final hearing, we did not have full details of the extent of the proposed amendment or the circumstances in which the proposal to make it was made. From the Tribunal's experience it is not uncommon for claimants (particularly litigants in person) to realise at a late stage that their claim needs amending. That is the so even where the issues have ostensibly been clarified at a preliminary hearing as they had in this case.

65. The same point related to the documents produced by the claimant partway through his cross examination. The Tribunal's experience is that it is not uncommon for the relevance of documents to become apparent to a witness partway through cross examination, particularly where a witness is also a litigant in person.

66. In relation to the first final hearing, therefore, our conclusion is that it has not been established that the claimant conducted proceedings unreasonably. In case we

are wrong about that, we have considered what the effect of the conduct now complained of was. There was no suggestion by the respondent that it had raised the question of the claimant's conduct being unreasonable in relation to either of these matters at the first final hearing. As we understand it, the first final hearing continued until the claimant's ill-health caused it to be adjourned part-heard. There was as we understood it no suggestion that the respondent had needed to apply to adjourn the first final hearing as a result of the proposed amendment or late disclosure. Nor had there been an application for costs arising from that first final hearing. We acknowledge that the absence of a costs application at the time does not prevent a later costs application being made. However, it seems to us to support a finding that even if there was unreasonable conduct at the first final hearing, its effect was not to significantly increase the respondent's costs, if at all.

Second final hearing – unreasonable conduct

67. When it comes to the second final hearing, we have found that the claimant attempted to mislead the Tribunal by asserting that he had COVID when he did not. We find that that was unreasonable conduct of the proceedings (and arguably scandalous conduct) on the part of the claimant. That, combined with the claimant's failing to make clear to the Tribunal (at the January 2021 hearing and subsequently) that he no longer had internet at home so could not conduct the CVP hearing from home meant that it was not possible to proceed with the second final hearing on 12-16 April 2021.

68. If we are wrong, and the claimant did indeed have COVID-19 over the weekend, then we would still have found his conduct to be unreasonable. The reason for that is that had he indeed been seriously ill with COVID we find it unreasonable of the claimant to have not mentioned that fact and sought to apply for a postponement of the final hearing over the weekend or at the very latest first thing on the morning of the first day of the second final hearing. Had he done so, then the costs incurred by the respondent during the hearing on the week of 12-15 April 2021 would not have been incurred beyond the costs of dealing with the resulting postponement of the hearing.

69. We also accept the respondent's submission that it was unreasonable conduct on the part of the claimant not to raise the fact that he did not have an internet connection at home at the preliminary hearing in January 2021 at which it was agreed that the final hearing would take place by CVP. We accept the submission on the part of the respondent that as recorded in the Case Management Order, the claimant's assertion was that he would be able to proceed with that hearing because he would be able to attend from home accompanied (it was then hoped) by a support worker. At the time when he said that, the claimant was aware that he did not have internet at home. The consequences of that were that the claimant had to attend the CVP hearing from his brother's house. Understandably, at the point where the claimant asserted to his brother that he had had COVID over the weekend his brother asked him to leave, which meant that the hearing could no longer proceed until the claimant's COVID free status was established.

70. We also accept the respondent's submissions that the claimant's conduct leading up to and during the second final hearing was unreasonable. He sent the respondent nine or ten emails seeking specific disclosure and information which he

could have sought at any point prior to the final hearing. It was unreasonable to leave those requests until the last working day before the final hearing. We do not think that the fact that the claimant was a litigant in person or a disabled person has any bearing on his conduct in relation to this.

71. When it comes to the claimant's application to amend on the 15 April 2021, we accept the respondent's submission that the claimant's decision to seek to amend to add "completely different" claims on the 15 April even to those foreshadowed on the 12 April 2021 was unreasonable conduct. There was no satisfactory explanation as to why that application could not have been made earlier, at the very latest at the start of the final hearing. Those late applications caused further disruption to the second final hearing. We do not accept that the claimant's being a litigant in person meant that the conduct was not unreasonable. The Tribunal discussed the claimant's intention to make amendments at the start of the second final hearing. It was made clear that the claimant would need to explain why the amendment was being made so late in the day. In that context, for the claimant to have changed position again and sought to add new claims on the 15 April 2021 was unreasonable even given his litigant in person status.

72. We also accept the respondent's submissions that the claimant's conduct during the second final hearing was unreasonable. We have found that on the 12 April 2021 the television was not turned off as requested by the Tribunal. Given that the Employment Judge had asked for that television to be turned off so that the claimant could concentrate on the Tribunal proceedings, we do consider that it was unreasonable conduct for it not to be turned off. We accept, however, that other than the disrespect shown to the Tribunal, that action in itself did not have a substantive effect on the second final hearing.

73. What did have a substantive effect was the claimant's inability to have made adequate arrangements with his brother for his brother to stay with him during the second final hearing. Our Case Management Order of 22 April 2021 records the detail of what happened. In brief, however, the claimant's brother, at a point during the hearing on 16 April 2021 left the flat and the claimant then could not find him. Given the concerns and the orders made at the preliminary hearing in January 2021, the Tribunal's view was that it was not reasonable for the claimant to continue in the absence of any support. That led to a further delay which meant that the strike out application the respondent was seeking to make had to be relisted for a further date (7 June 2021) rather than being heard then and there. That compounded the claimant's unreasonable conduct in telling the Tribunal at the January 2021 hearing that he had a support worker from Rochdale Adult Social Care who could support him throughout the hearing, only to change his version of events during the hearing to say that no support worker had in fact been appointed.

74. When it comes to the decision to settle and withdraw the claim at the last minute, we accept (as the claimant said) that the respondent did change its position and accept that he had indeed been underpaid for holiday pay. That was contrary to the position it maintained throughout the claim until 15 April 2021. We also note that by an email dated 19 April 2021 the claimant proposed to the respondent that having received his holiday pay and notice pay, he was content to withdraw his claim on a "drop hands" basis, i.e. on the basis the respondent would not seek costs against him. The respondent rejected that proposal. As we set out below, we have

not in this case found grounds for finding that the claimant's claims of discrimination had no reasonable prospects of success. In those circumstances, we do not take the view that the claimant's decision not to withdraw his claim until 2 June 2021 amounted to unreasonable conduct.

75. When it comes to the suggestion that the claimant was a serial vexatious litigant, we took note of the Judgments in the costs hearing bundle. They do indeed show the claimant being involved in other proceedings against other respondents. The Judgments have no reasons attached, however, so we are not in a position to say whether or not the claimant is a vexatious serial litigant as suggested by the respondent.

No reasonable prospects of success

76. We do not accept the respondent's submission that the claimant's case had no reasonable prospects of success.

77. When it comes to the holiday pay claim, the claim did indeed in a sense succeed because the respondent accepted that the claimant was owed holiday pay.

78. When it comes to the overtime claim, we did not hear evidence about that although we accept that that aspect of the case may have had weak prospects of success.

79. When it comes to the discrimination claims, we are very mindful of the case law in relation to striking out discrimination claims, which says that those claims are of their nature fact sensitive and should usually be decided by hearing evidence.

80. Unusually perhaps for a costs application, we had not heard oral evidence in this case and so have not heard evidence about matters central to the various discrimination claims. For example, we have not heard evidence to enable us to decide whether the alleged harassing conduct had a harassing effect or purpose or whether it was disability related. We have also not heard evidence to enable us to decide (as the respondent asserts in its submissions) that it had made all reasonable adjustments in relation to the claimant.

81. Similarly, when it comes to the section 15 claim, we note the respondent's submission that the reason for the claimant's lateness was the fact he was working another job for Capita, but it seems to us that we would need to hear evidence and cannot say that there were no reasonable prospects of the claimant showing that his lateness was something arising from his disability.

82. Having read the witness statements we think that claimant's claim was not a particularly strong one, but that is not the same as saying that that it had no reasonable prospects of success. For the avoidance of doubt, we do not accept the claimant's submission that the respondent's failure to seek a strike out or deposit order at an earlier stage in proceedings equates with it accepting that his claims had some reasonable prospects of success.

83. In summary then, we find that the claimant did conduct proceedings unreasonably in relation to his actions on 9 April 2021 and from 12-16 April 2021. That means that as a Tribunal we may make a costs order under rule 76(1)(a).

If the answer to (1) or (2) above is yes, whether in all the circumstances it would be appropriate to make an order for costs against the claimant

84. In deciding whether to exercise our discretion to make a costs order we have taken into account the fact that the claimant was a litigant in person and a disabled person. We do not, however, think that is a reason for not making an order in this case. As we have made clear above, we did not find that the claimant's claim had no reasonable prospect of success nor that his behaviour in settling the claim late was unreasonable conduct. The conduct we have found to be unreasonable was not unreasonable because of a lack of understanding of legal process or access to legal advice. It involved at its most unreasonable seeking to mislead the Tribunal about the claimant having had COVID when we have found he did not. We do not think that the claimant's conduct in that regard was a consequence of impacted by his disabilities.

85. We have taken into account the claimant's means. We have accepted that his means in terms of income are not at all significant given his outgoings. However, we accept the respondent's submission that we must take into account his capital assets. When the likely equity in the claimant's property is taken into account, we accept the respondent's submission that his inability to pay from income should not prevent us from making a costs order.

86. The claimant submitted that in deciding whether to make a costs order the Tribunal should take into account the respondent's conduct of the case, including its application to postpone the first final hearing and late disclosure on its part in relation to the first final hearing. We do find the respondent's conduct in relation to the first final hearing relevant to our decision. Nor do we consider that its decision late in proceedings to accept the claimant was entitled to holiday pay and notice pay to be sufficient to outweigh the balance in favour of making a costs order.

87. The claimant also submitted that making a costs order risked him being pushed back into gambling. As we have recorded above, the claimant's own position in correspondence with Skybet is that he is now able to control himself. The existence on his case of debts owed to loan sharks has not led to his starting problem gambling. In those circumstances we find the risk of a costs order leading to such behaviour is minimal and not such as to justify us not making the costs order.

88. We find, taking into account all the circumstances, that this is a case where it is appropriate for us to exercise our discretion to make a costs order in the respondent's favour.

If so, what amount of costs should be awarded?

89. We have found that the claimant's unreasonable conduct related to the second final hearing and not the first final hearing. We have not found that the claimant's claim had no reasonable prospect of success. Since costs orders should be compensatory not punitive, we limit our order to the costs incurred by the respondent from 9 April 2021. The total sum claimed by the respondent for that period is £8867.42 plus VAT. We take the view that some of the costs incurred after that date would have been incurred in any event in resolving the holiday pay and notice pay claims. However, the majority of the costs incurred were incurred

unnecessarily because of the claimant's conduct. The case was no further forward by the 16 April 2021 (except in terms of resolving the holiday and notice pay claims) despite the respondent incurring the costs equivalent to that of a full final hearing.

90. Doing our best with the information provided we have decided that claimant should be ordered to make a contribution of £10,200 towards the respondent's costs. That reflects a total of £8,500 plus VAT. The difference between the £8867.42 claimed by the respondent for the period from 9 April 2021 and the £8,500 awarded reflects the costs we find would have been incurred in any event in resolving matters between the parties. Given the equity in the claimant's property we do not find that the amount payable should be reduced further to reflect the claimant's means.

Conclusion

91. The respondent's application for costs succeeds. The claimant is ordered to make a contribution of £10,200 to its costs in these proceedings.

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Employment Judge McDonald

Date: 20 December 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

21 December 2022

FOR THE TRIBUNAL OFFICE