Case No: 2424171/2017

EMPLOYMENT TRIBUNALS

Claimant: M Bottomley

Respondent: Smart Manufacturing Ltd

Heard at: **Exeter** **On:** **07 September 2018**

Before: **EJ Housego**

Representation

Claimant: Did not attend and was not represented
Respondent: Ms S Hornblower, of Counsel, instructed by Toller Beattie LLP

RESERVED JUDGMENT

1. The respondent's application for costs is allowed.
2. The claimant is ordered to pay to the claimant costs of £9,948.80

REASONS

1.The claimant was dismissed from his employment for gross misconduct. his claim form accepts that this was the reason. the letter of suspension dated 17 August 27(22) stated;

> *"I have been informed by six separate members of staff that they felt intimidated by you to the extent that they were either unable to, or felt uncomfortable, working with you. I have also received a specific allegation that you made threats of violent behaviour towards a member of staff."*

2.The letter stated also:

> *"I formally suspended you yesterday at our meeting at 4:30 PM and informed you that further investigations were taking place. you became extremely agitated using unacceptable language. Members of staff on the floor below heard what you said and were concerned that they may take action. you inferred that if you lost your job over allegations that had been*

made then you would make the person responsible pay and you indicated that you would go after any such person."

3.At a meeting on 22 August 2017 the claimant was dismissed. The minutes record that he understood that he was being dismissed for gross misconduct, but felt it was unfair because, he said, the same sort of incidents had occurred without the same consequence.

4.A letter of the same date (24) recorded that the claimant did not deny the allegations, nor did he deny the report of his behaviour set out in the suspension letter when he was suspended. Both were reasons given for the dismissal. At the meeting on 17 August 2017 the claimant had said *"I am going to knock your block off"* to another member of staff. He had not denied this at the disciplinary hearing. The dismissal letter records that there was no apology or explanation offered by the claimant. The letter stated that there was a 7 day period in which an appeal might be lodged.

5.By email of 15 September 2017 (25) the appellant stated that he was appealing. On 18 September 2017 the respondent replied to say the appeal was 24 days after the letter, far outside the 7 day period. A further 7 day period was allowed for the claimant to provide reasons for the delay and set out grounds of appeal. The claimant did not respond to this email personally, but on 25 September 2017 an email came from a 3rd person setting out the address of the claimant as *"Unit 3c Mobile Home number 3 Clovelly road ind est Bideford N.Devon EX39 3HA".* This stated that the accusations were untrue with unsufficient evidence, that the proper procedure had not been followed (but not what was said to be wrong with it), and that it was unreasonable after 17 years unblemished service. He had not received the letters after the one calling him to the meeting at which he was dismissed, although he said that he had informed the respondent of his new address.

6.The respondent replied on 25 September 2017 stating that they had never been told of a new address and asked who it was that was corresponding with them, stating that after so long, and without adequate explanation there would be no appeal hearing.

7.On 04 October 2017 the claimant responded from his own email account stating that he had been unable to provide deny the allegations because he was not told what they were.

8.On 09 October 2017 the respondent instructed solicitors who wrote to the claimant stating that they would be acting. A full explanation of why the claimant had been dismissed was then sent by the solicitors on 16 October 2017, but to the claimant's previous address. However on 02 November 2017 the claimant responded to the solicitors by email thanking for the letter which (self-evidently) he had received.

9.The claimant then filed this claim, in December 2017. The claim was set out at box 8.2. It gives no indication as to why the dismissal was considered to be unfair. It stated only:

"I was dismissed under unfair dismissal. I was allegedly accused of gross misconduct and provided with no evidence of my wrongdoings. Dismissed on 22 August."

10.The grounds of resistance filed by the respondent set matters out over 3 pages and 23 numbered paragraphs. The reason for dismissal was gross misconduct, both threatening and intimidating behaviour prior to the suspension meeting and the threatening behaviour of the claimant at that suspension meeting directed to the person suspending him.

11.On 20 February 2018 notice of hearing was given for 23 and 24 April 2018 and directions in standard form were made.

12.On 26 March 2018 the respondent's solicitors wrote to give notice that unless the claim was withdrawn they would pursue an application for costs under Rule 76 because the claim had no reasonable prospect of success and the claim was vexatious and unreasonable. This was because evidence of the violent and threatening behaviour was brought to the disciplinary officer, and in front of that person the claimant had threatened to harm witnesses. Their costs to date were about £2500 plus VAT, and further costs might be an additional £2000-£4000 plus VAT.

13.The claimant did not respond to that letter, or deal with the directions. The respondent's solicitor wrote to the Tribunal on 05 April 2018 stating that no written calculation of the claim had been filed as required by the case management order of 20 February 2018 despite a reminder of 26 March 2018 from the solicitors. Nor had the claimant send any documents upon which he relied, as required by that order, and which were also requested in the letter of 26 March 2018. Witness statements were due to be exchanged on 09 April 2018 and the solicitors thought this was unlikely to occur. An order striking out the case for want of prosecution was requested or such other order as the Tribunal thought fit.

14.On 09 April 2018 the solicitors for the respondent supplied their witness statement by email to mike.bottomley@hotmail.co.uk . They reported that they used the address given on the ET1 form for correspondence (2 Clovelly Rd, Bideford Devon EX39 3HN.The ET1 also gave the claimant's email address as mike.bottomley@hotmail.co.uk).

15.By email sent from that email address to the respondent's solicitor (in reply to the email sending the witness statement) the claimant said that correspondence was going to the wrong address. He said he now made an appointment with his legal representative and was going there on 16 April 2018.

16.On 13 April 2018 the respondent's solicitors wrote to the Tribunal for a second time asking that the claim be struck out on the basis that the claimant was acting unreasonably in the conduct of the litigation and asking for a costs order of £2814 plus VAT. This was sent by post and to the email address above.

17.On 13 April 2018 the solicitors also wrote by email to the claimant reminding him that he was still in breach of the Tribunal's order of 20 February 2018 in that he failed to send a calculation of his claim, failed to take any step to agree relevant documents and failed to provide his witness statement.

18.On 14 April 2018 the Tribunal wrote to the claimant stating that a judge was considering striking out the claim as not being actively pursued and requiring reasons to be given why this should not occur, by 23 April 2018.

19.On 20 April 2018 the hearing of 23/24 April was postponed due to lack of judicial resource.

20.On 26 April 2018 the respondent's solicitors wrote to the Tribunal asking for their strike out applications of 05 and 13 April be dealt with separately from a full hearing.

21.On 14 May 2018 the Tribunal listed hearing the 22/23 August 2018, but did not deal with the strike out application.

22.On 15 May 2018 the respondent's solicitors referred to the letters of 05, 13 and 26 April asking for the claim to be struck out, and stating that the claimant had made no effort in response to any of those letters to comply with the directions and asking for the strike out application to be heard.

23.On 11 June 2018 a second letter was sent by the Tribunal stating that the claim was being considered for strike out as not being actively pursued and requiring an answer by 18 June 2018.

24.On 11 June 2018 the claimant wrote to the respondent's solicitor and to the Tribunal asking for information from the respomdent and stating that his address was Caravan 2, Clovelly Road Industrial Est. Bideford EX39 3HN, not 2 Clovelly Road had a postcode of EX39 3DF. He stated that he had attached a letter of 04 December 2017.

25.On 18 June 2018 the respondent's solicitor wrote by email to the claimant stating that there was no attachment to the email and that there was no letter of 04 December 2017 received earlier.

26.Later on 18 June 2018 the claimant wrote to the solicitor from mike.bottomley@icloud.com stating that there was no investigation report and that the same person investigated and decided the disciplinary hearing and that this was unfair. In a further email on the same date he requested documents.

27.On 28 June 2018 the Tribunal wrote to the claimant and the respondent to say, without giving reasons, that the claim was not struck out, that the parties were obliged to cooperate to comply with orders.

28.On 03 July 2018 the respondent wrote again to the Tribunal to say there had been no response from the claimant in respect of the strike out warning letters, and stating that they had complied with all directions even though the claimant had not.

29.On 21 July 20181/3 letter from the Tribunal was sent as a strike out warning in similar terms to the letters of 14 April 2018 and 11 June 2018.

30.On 23 July 2018 a CAB adviser sent in a schedule of loss and stated they were advising but not acting as his representative for the claimant. It was stated that the claimant did respond to the strike out warning but the CAB adviser had not seen a copy of it.

31.On 25 July 2018 the claimant CAB adviser wrote to the solicitor for the respondent stating that the claimant's email address was now

mike.bottomley@icloud.com , that he had a forward function on his old Hotmail address but did not know that it worked.

32.Also on 25 July 2018 the claimant wrote from mike.bottomley@hotmail.co.uk (not mike.bottomley@icloud.com) to say that he had seen a copy of the letter sent to Caravan 2 but only because the CAB had got it from the respondent's solicitor. He asked for correspondence to be sent to mike.bottomley@icloud.com . He stated that previous failings to respond were due to confusion over his address and post being delivered to the wrong postal address and stated that he was acting on any email correspondence that he had received. He asked some more documentation.

33.On 27 July 2018 the respondent's solicitors repeated their request for a strike out and for costs order, by reason of the vexatious nature of the claim and the failure of the claimant to comply with court directions or actively to pursue the claim despite three strike out warnings from the Tribunal. They sent the letter to all the addresses provided to him by the claimant, and to the two email addresses, as well as to the CAB adviser.

34.On 31 July 2018 the solicitor for the claimant sent an email to the claimant and to the Tribunal asking for the first day of the hearing to deal with their strike out and costs application.

35.Later on 31 July 2018 the claimant sent an email headed *"Objection to respondent's application for costs dated 25th of July 2018"* with 9 points.

36.By letter of 11 August 2018 the Tribunal adjourned the hearing of 22/23 August 2018 and listed this hearing to consider whether the claimant's claim had no reasonable prospect of success and should be struck out pursuant to Rule 37, or whether it had little reasonable prospects of success and pursuant to Rule 39 to make a deposit order, and thirdly to make further case management orders as might be appropriate.

37.The claimant has not corresponded with the Tribunal since then, nor with the respondent's solicitors. He did not attend the hearing on 06 September 2018. He was not represented at the hearing and he sent no further written submissions.

38.I noted that the claim form contained a mobile telephone number for the claimant, but I noted also that the claimant had earlier said that he was having difficulty with his mobile phone and was using somebody else's. I did not consider it appropriate to telephone the number both because it was by no means clear that it was the claimant's telephone number, secondly because it is not the judges function so to do.

39.I noted that the notice of the hearing was sent to the precise address last given by the claimant, Caravan 2 Clovelly Road Industrial Estate Bideford, Devon EX39 3HN.

40.Strike out provisions are in Rule 37:

> ***"Striking out***
> ***37.****—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—*

(a)that it is scandalous or vexatious or has no reasonable prospect of success;
(b)that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
(c)for non-compliance with any of these Rules or with an order of the Tribunal;
(d)that it has not been actively pursued;
(e)that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).
(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.
(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above."

41.This claim has always, and obviously, had little prospect of success. The evidence before the employer, described in the suspension and dismissal letters makes it impossible to consider that a Tribunal could find there was not gross misconduct, or that dismissal was outside the range of responses of the reasonable employer. Mundell v Knoll Pharmaceuticals [1998] UKEAT 811_96_2606 (26 June 1998) sets out provisions for anonymity of witnesses in disciplinary proceedings, citing with approval Linford Cash & Carry v Thomson [1989 IRLR 235.

42.Given that the claimant made threats in the meeting at which he was suspended (reported in the letter suspending him, and not denied by the claimant at any time) the decision to give anonymity to witnesses cannot be impugned. There were 6 such people, which is indicative of the extent of the problem, and from the employer's point of view the likelihood of these being accurate concerns was reinforced by the temper and threat at the suspension meeting. The actions of the claimant at the suspension meeting alone would be sufficient for the reasonable employer to dismiss. Rule 37(1)(a) applies. Given the lack of merit in the claim and the way it has been conducted (above) the other part of that Rule applies – this is a vexatious claim.

43.It has been conducted unreasonably, as the history above makes clear. Rule 37(1)(b) applies.

44.The claimant has complied with no directions since the order of 20 February 2018. Rule 37(1)(c) applies.

45.The claimant has not actively been pursuing his claim. Rule 37(1)(d) applies.

46.There must be a reasonable opportunity for the claimant to explain. There have been many such opportunities, not least this hearing.

47.While I consider it likely that the notice was received by the claimant, even were it not, for the claimant not to have taken any action indicates that he is not actively pursuing the claim. The claimant did not attend on 22 August 2018, so that it is likely that he received the letter which postponed that hearing as well as

listing this hearing. If not, non attendance at what he would have thought the full hearing is not indicative of actively pursuing the claim.

48.Rule 76 contained in Schedule 1 to The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides, as to costs:

> ***"When a costs order or a preparation time order may or shall be made***
>
> ***76.****—(1) 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*
> *.*
> *(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.*
>
> *(3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if—*
> *(a)the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and*
> *(b)the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment.*
>
> *(4) A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer's contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party.*
>
> *(5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing."*

49.The claim falls within Rule 76(1)(b), as having no reasonable prospect of success. That is enough to deal with the application, but in connection with costs the other reasons warrant examination.

50.The claimant falls within Rule 76(1)(a) as well, for the conduct of the proceedings has been unreasonable. He has failed to comply with all the directions of 20 February 2018 despite reminders. He failed to deal with first 2 letters from the Tribunal stating that strike out was to be considered. He failed to respond to correspondence, and then when he did write it was to say that letters had been sent to addresses he had himself provided. He represented that he had sent a letter of 04 December 2018 to the respondent, but although he said he attached it to an email, did not attach it to that email nor supply a copy of it, ever. He told his CAB adviser that he had responded to the strike out letters, but supplied no copy of it even to his own adviser. He has failed to attend this hearing.

51.Rule 76(1)(2) also applies as the claimant has not complied with directions.

52.Accordingly there are three different parts of Rule 76 that warrant the striking out of the claim.

53.The procedure for making a costs order is set out in Rule 77:

> ***"Procedure***
> ***77.*** *A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application."*

54.The respondent made a costs application in accordance with this Rule. The claimant has received it, as he has responded in detail. The notice of this hearing did not list as one of the matters to be dealt with a costs application, but Rule 76 makes it mandatory for such an order to be considered where a claim is struck out, and the only provision about notice is that in Rule 76. The claimant had notice of it, and made representations about it. I next consider those representations, contained in an email of 31 July 2018 (101-102) in reply to that of the respondent to him of 27 July 2018 sending a full costs submission. the email headed "objection to respondent's application for costs dated 25 July 20 stated that he wished to object on the following grounds: –

> *"1.The respondent has not indicated previously that they view the claim as vexatious. If they had viewed the claim as vexatious such a claim should have been made at a much earlier stage. The basic facts of the case are that my dismissal was based on unsubstantiated, anonymous allegations. There was no proper investigation. In dismissing me the accuser, the investigator and the judge with the same person, Mr Sean McQuillan. No evidence has been provided apart from the statement by Mr McWilliam to justify the dismissal. There have been no previous allegations against me and I have an unblemished work record. These facts are sufficient to justify bringing this case to Tribunal. The claim for costs is also objected to."* I have dealt with this above. The respondent has always said that this claim has no merit and from early on that it is vexatious: the evidence of which has steadily increased.
>
> *"2.The delays that have hampered the progress on this case are regrettable. As the Respondent's solicitor correctly identifies the address supplied on the ET1 was incomplete although the postcode was correct. This led to post going to the wrong address. The respondent's solicitor acknowledges that this was realised on April 13th, 2018. The respondent's clients work premises are some 300 metres from my Caravan and he was aware prior to my dismissal that I was living there. I am not aware of any attempt was made to hand deliver any correspondence."* The claimant seeks to excuse his failure to respond by praying in aid his own failure to give a correct address on his own claim form. He changed his email address without telling the respondent or the Tribunal but then continued to use the old address. He claimed not to have received documents sent to the email address he had provided and used. It is entirely the claimant's own fault if there has been any issue with delivery of documents.

"3.During the period following my dismissal I actively sought and secured a new job. I did seek assistance from citizens advice in Bideford. They are unable to provide representation but have offered support. Taking time off to visit Citizens Advice was difficult. As a result, I did miss some appointments with them. Added to that my mobile phone was broken and I was unable to receive emails easily or replace the phone. I have attempted to progress this case as fast as my circumstances have allowed." The appellant prays in aid his own failure to keep appointments with his adviser. There are internet cafés at which to read emails: that his phone broke does not excuse failing to engage with the Tribunal or the respondent.

"4.The respondent has failed to provide information when requested on 3rd December 2017. See page 42 of the Respondent's bundle. The respondent failed to respond to this request. This has limited my ability to prepare a detailed statement as I am still in ignorance of the details of the allegations against me. I have recently asked the Tribunal to order the documents to be disclosed, copies of disciplinary investigations, records of the disciplinary hearing and copies of the allegations made against me. The respondent would have been advised to ensure a record of the disciplinary hearing was undertaken as he was seeking legal advice on 16th August 2017 prior to the disciplinary hearing that led to summary dismissal on 17 August 2017 (see item 1 on the costs schedule submitted by the respondent's solicitor on 27th of July 2018.)" This shows that the claimant has full knowledge of the claim for costs and how it is calculated. The request for documents was made late, and only in response to letters indicating that strike out was being considered. It does not engage with his own failures.

"5.Concerning item 16 of the respondent's solicitor's submission dated 27th July 2018 I should make it clear I have received the respondent's bundle of documents. I have only my statement to add to the documentation that the Tribunal has. No other documents can be supplied as the Respondent failed to provide the documents requested on 3rd December 2017. My request for disclosure of documents dated 25th July 2018 still stands." There is no explanation for not exchanging witness statements on 09 April 2018, and he has still not provided one.

"6. The schedule of costs includes items 1 – 12 which concern advice on disciplinary matters prior to my dismissal. Free advice on disciplinary matters for employers is readily available from ACAS. The respondent chose to use an expensive solicitor and not mitigate his costs." This is a quantum argument. There is no restriction on costs that they must post date issue. Sunova Ltd v Martin [2017] UKEAT 0174/2017, paragraph 19 is authority for that proposition. An employer cannot realistically be criticised for taking advice from a solicitor. I deal with charging rates and amount of time taken later.

"7.My contact details are now clear with the Tribunal and the Respondent's solicitor. I would also ask that all future correspondence is copied to Mr Rex Bird at Bideford Citizens Advice who is supporting me in the preparation of my case. Mr Bird has asked me to explain that

he is not acting as my representative and that he is not legally qualified." This does not engage with the failures to date, or give any reason why costs should not be awarded.

"8.I am also advised to draw your attention to Rule 84 and the Employment Tribunal's Rules of Procedure (2013) which has been confirmed in the judgment Abaya v Leeds Teaching Hospital UKEAT/0258/16/BA. On April 18, 2017. In this case, even though it was decided the claimant's case had no reasonable chance of success, it was held that the Tribunal in awarding costs must still pay heed to rule 84, i.e. the party's ability to pay." The claimant failed to give any indication of an inability to pay, and though he knows of the requirement to consider ability to pay did not offer any information. It is clear from point 3 above that the claimant is employed.

"9. I would ask the Tribunal to strike out this application and progress this matter to a full hearing, as previously indicated in the email dated June 28th, 2018, on the 22rd and 23th August 2018 at 10 am". This does not explain why the claimant did not attend on 22nd August 2018, or today. It deals neither with strike out or costs.

55.Nowhere in the letter is there any objection to the amount of work done or the charging rates. It is clear from the test that the full submissions of the respondent and the costs schedule has been received by the claimant and that he has had advice about it, and been able to make as full representations as he has wished.

56.The schedule of costs is fully itemised. The charging rates for senior solicitors is £210 plus VAT. Paralegals are charged at £110 plus VAT. These are reasonable rates. Scrutiny of the detailed schedule of work done indicates an appropriate division of work between solicitors and paralegals. There is full itemisation in the costs schedule of exactly what work was done, by whom, and how long it took. I satisfied that all the work done was properly done. The amount of Counsel's fees for preparation and attendance is reasonable at £2,450 plus vat.

57. I therefore decide to strike out the claim and to make a costs order in the sum claimed, pursuant to Rule 78, which reads:

The amount of a costs order

78.—(1) A costs order may—

(a)order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;

57.Counsel prepared a very helpful submission. The part relating to costs I adopt, save as altered in the body of this decision, and it is set out in the Schedule to this decision. In the original the numbering of the costs section starts at 23.

Schedule

Costs

1. Whether or not the claim is struck out, there is an application for costs against C. In this case the application for costs is founded upon both limbs of the statutory test, set out in Rule 76(1) of the Employment Tribunals Rules of Procedure 2013, i.e. (a) the Claimant's conduct and (b) that the claim had no real prospect of success in light of all the circumstances of the case as set out above.

2. Although it is not a prerequisite to have provided a costs warning to be awarded costs, in this case, C having had two costs warnings during the litigation, must have had awareness of risk, and the tribunal is entitled to take account of this in considering whether or not a costs application should succeed- of Oko-Jaja v London Borough Lewisham UKEAT/417/00 para 17 and 18. [NB C is incorrect in what he says factually and legally at p.g. 101 para 1).

3. Whilst R recognises that C is not legally qualified, he has, however, acknowledged that he had received legal advice on the merits of his case, and the procedural steps (e.g. p.25) this too must be taken in to account.

4. The Tribunal does have a discretion in terms of costs awards, however in this case it is respectfully submitted by R that it should exercise this discretion because of C's unreasonable conduct in pursuing his claim, particularly when the (lack of) merit of his claim was pointed out to him in detail and with him having been provided with costs warnings, and having been in receipt of legal advice.

5. On the facts set out in the above paragraphs R submits that C has shown a fundamentally unreasonable approach to the litigation and has acted vexatiously throughout, failing to update the Tribunal and R of his address, failing to reply to emails, failing to comply with CMD orders, failing in any way to actively pursue his claim.

6. In the case of Marler v Robertson [1974] ICR 72, at 76E (page 4 bottom para) Sir Hugh Griffiths, presiding, said: '*If an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive, he acts*

vexatiously...' R submits that C used this claim and unreasonably pursued it with no prospect of success of recovery of compensation therefore acting vexatiously. It was an abuse of process.

7. It is therefore submitted that the costs threshold is passed in this case and that an award must be made.

8. The Tribunal will be aware, following McPherson v BNP Paribas [2004] EWCA Civ 569, that R does not need to show a causal connection between the unreasonable conduct and the loss suffered (i.e. the costs). At para 40-41 of the judgment: '*rule 14 (1) does not impose any such causal requirement in the exercise of the discretion. The principle of relevance means that the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion, but that is not the same as requiring BNP Paribas to prove that specific unreasonable conduct by Mr. McPherson caused particular costs to be incurred…'*

9. In the case of Yerrakalva v Barnsley Metropolitan Borough Council [2011] EWCA Civ 1255 at paragraph 41 LJ Mummery stated: '*The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by C in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had…'*

10. R submits that C's unreasonable conduct was from the outset and was an abuse of process. Therefore, R submits that all of its costs, including the costs incurred in pursuing the cost application itself, fall to be paid.

11. The EAT in the recent case of Sunuva Ltd v Martin [2017] UKEAT 0174/17 at para 19 decided that there is no bar to recovering costs pre the issue of an ET1 and the Tribunal's ability to award costs is not limited to costs caused by (or specifically attributable to) the unreasonable conduct.

12. In the circumstances, R seeks an award of its legal costs from the outset of this litigation totaling £8,291 [please see updated schedule not in bundle]. The Solicitor with conduct of these proceedings on behalf of R, is 11 years qualified, a Partner and has a charge out rate of £210 + VAT. It is submitted that the legal costs incurred in this matter are therefore reasonable.

13. In the alternative, R applies to the Tribunal to consider the stages of costs incurred, and asks that the Tribunal awards costs in respect of some or all costs incurred at those stages.

14. The costs schedule submitted by R follows the guidance on the format of such a document found in CPR 43PD, (to which employment tribunals should have regard according to para 44 of the Judgment in Health Development Agency v Parish [2004] IRLR 550, this point still good law despite Sunuva declaring it incompatible with McPherson) as it is specific and contains the level of information required to assist the tribunal in determining whether the amount claimed is fair and reasonable.

15. Regulation 78 of the aforementioned Tribunal Regs states: '*(1) A costs order may- (a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party; (b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles; or, in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993(23), or by an Employment Judge applying the same principles'*.

16. C argues that his ability to pay must be taken in to account as per regulation 84 and the case of Abaya v Leeds Teaching Hospital UKEAT/0258/16/BA, however it is respectfully submitted that this is a misinterpretation of the regulation which says that ability to pay 'may' be taken in to account, and the judgment, which can in any event be distinguished on factual grounds.

17. It is submitted that the tribunal should exercise its discretion and proceed to make a costs award in favour of R in this case for the full amount as sought on the costs schedule.

_____

Employment Judge Housego

_____

Date 10 September 2018

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

.....28 September 2018.....

.....

FOR EMPLOYMENT TRIBUNALS