EMPLOYMENT TRIBUNALS

Claimant: **Mr M Wharton**

Respondent: **Leeds City Council**

Heard at: **Leeds** **On:** **25 April 2017**

Before: **Employment Judge Bright**
Mr Q Shah
Mr G Hopwood

Representation
Claimant: In person
Respondent: Mr Brown (solicitor)

ORDER FOR COSTS

The Claimant is ordered to pay to the Respondent the sum of £5,000 in respect of the Respondent's costs.

REASONS

Background

1. By a reserved judgment sent to the parties on 15 December 2016, the Claimant's claim for unfair dismissal was unsuccessful. The Respondent applied for an order for costs dated 11 January 2017 on the grounds that the Claimant had acted vexatiously and/or abusively and/or otherwise unreasonably in the way he conducted the proceedings.

Costs hearing

2. At the outset of the costs hearing on 25 April 2017 the Claimant indicated that he did not propose to put forward any defence to the costs application. He explained that he was in the process of appealing the Tribunal's judgment to the Employment Appeal Tribunal ("EAT"), believed that his appeal would be successful and that the costs hearing was "a pantomime". He confirmed that he understood that, if he chose not to defend the application for costs, should the EAT uphold the Tribunal's decision, those costs would stand. Mr Brown, for the Respondent, identified that there was a document in the bundle at pages 122 and 123 prepared by the Claimant. The Claimant confirmed that he wished to rely on that document in defence of the costs application.

3. The Claimant then sought to make enquiries of one of the non-legal members on the Tribunal panel relating to his or his family's membership of the Labour Party. The Employment Judge intervened to explain that the information requested appeared to be irrelevant to the issues to be decided at the costs hearing. The Claimant explained that he considered it to be relevant to the issue of bias. The Employment Judge commenced explaining the principles in **Locabail (UK) Ltd v Bayfield Properties Ltd** [2000] IRLR 96*,* dealing with the circumstances in which a Tribunal panel member might be required to give disclosure of personal or professional information, but was cut off by the Claimant walking out of the hearing at 10.15am.

4. The Tribunal adjourned to see if the Claimant would return, but after ten minutes it became obvious that he had left the building. The Tribunal therefore heard submissions from Mr Brown on the question of whether to go ahead with the costs hearing in the Claimant's absence. The Tribunal concluded that the Claimant had had the opportunity to attend the costs hearing and had chosen to leave. In addition, given that he had indicated he did not intend to make any submissions on the question of costs, other than those at pages 122 and 123, it would be pointless to adjourn to a later date to see if the Claimant would attend. The Tribunal noted the absence of information relating to the Claimant's means. However, the case management orders sent to the parties on 3 April 2017 had required the Claimant to set out his arguments and make disclosure relating to his ability to pay any costs awarded and he had failed to do so by the date for compliance. There was some, minimal, information available to us that the Claimant presently has no income (email dated 17 January 2017) and Mr Brown indicated that he understood that the Claimant had not worked since his dismissal by the Respondent. We therefore considered that there was nothing to be gained by adjourning the costs hearing, as the Claimant would not provide further information on his means in any event, and that it was in the interests of justice for us to proceed in the Claimant's absence.

The evidence

5. The Respondent presented a bundle of documents, to which some pages had recently been added. The Claimant confirmed, prior to his departure, that he was familiar with the whole contents of the bundle. References to page numbers in these reasons are references to the pages in the bundle. The Claimant did not present any evidence, oral or documentary, other than that at page 122-123 of the bundle.

Submissions

6. Mr Brown for the Respondent made detailed oral submissions, which we have considered with care but do not rehearse here in full. In essence, it was submitted that:

    6.1. The Claimant had acted vexatiously and/or abusively and/or otherwise unreasonably in the way he had conducted proceedings by the behaviour cited below (paragraph 8.1) and/or had failed to comply with an order of the Tribunal; and

    6.2. The Claimant should pay a contribution towards the Respondent's costs to reflect those matters, rather than all or a specific proportion of the Respondent's costs.

7. The Claimant made no oral submissions. In his document at page 122 – 123 he indicated that he considered the Tribunal's reserved judgment to have been flawed and the Tribunal biased and that he was appealing the decision. In his email dated 17 January 2017 he stated that there was nothing unreasonable about the manner in which he had brought or conducted the proceedings.

The issues

8. The issues to be decided are:

    8.1. Has the Claimant acted vexatiously and/or abusively and/or otherwise unreasonably in the way he conducted the proceedings, in:
        8.1.1. Making numerous requests for the inclusion in the hearing bundle of various documentation that was either of no relevance to the issues to be determined by the Tribunal or which was already contained in the bundle;
        8.1.2. Using the proceedings as one of many methods of pursuing his own campaign or vendetta against the Respondent and/or a number of individual employees;
        8.1.3. Refusing to accept responsibility until the final hearing for offensive and/or threatening and/or intimidating communications sent to elected members, employees and partner organisations;
        8.1.4. Delaying service of his witness statement until after receipt of the Respondent's witness statements and requiring an application for a specific order to be made;
        8.1.5. Seeking to ridicule, humiliate or cause embarrassment to one of the Respondent's witnesses during cross examination;

8.2. Has the Claimant been in breach of any order of the Tribunal?

8.3. If yes to 8.1 or 8.2, what effect did the Claimant's behaviour have?

8.4. Does the Tribunal exercise its discretion to make an order for costs?

8.5. If so, for how much?

Facts

9. We consider below each of the instances of behaviour cited by the Respondent in its application.

Documents/bundle

10. We are acutely conscious that litigants in person frequently misunderstand tribunal orders, the issues in the case and questions of relevance. Latitude should almost always be given for lack of representation. However, the Claimant clearly has experience of conducting litigation in the course of a variety of other legal proceedings including his judicial review applications, proceedings in the first tier tribunal, EAT and upper tier tribunal. The issues in the claim were identified by Employment Judges Maidment and Burton as far back as 2013 and again by Regional Employment Judge Lee on 7 April 2016 (page 4). The Claimant was required, for the purposes of his unfair dismissal claim, to show that he had a reasonable belief that his disclosure tended to show one of the types of wrongdoing described in section 43B of the Employment Rights Act 1996. He was not required to show that the Respondent was actually engaged in wrongdoing. That distinction was explained to the Claimant by the Tribunal and the Respondent.

11. The Claimant is intelligent, articulate and educated. He understood what he was required to do and what the issues were in his claim. We consider that it was apparent to him what documents would be relevant. However, he persisted in seeking disclosure and the inclusion in the bundle of a large number of irrelevant documents and made repeated applications and complaints to the Tribunal in that regard. He sought to include: documents relating to his judicial review application; documents which post-dated his dismissal; complete sets of a large number of documents disclosed in response to freedom of information ("FOI") and subject access requests ("SAR"s); and, all the equality impact assessments completed by John Roles of the Respondent since 2011. In our judgment, those documents were irrelevant to the issues to be decided in the Claimant's employment tribunal claim, although they may have related to proceedings in other courts and tribunals.

12. In response to the Claimant's repeated requests, Mr Brown invited the Claimant to provide copies of any documents which had been disclosed in the course of his FOI/SARs which were not already in the bundle. Shortly before the final hearing, the Claimant sent over a large volume of documents, which subsequently formed the supplemental bundle for these proceedings. The Claimant appeared to have forwarded all documents received in response to his FOI/SARs to Mr Brown for inclusion in the bundle, without assessing their relevance to the tribunal proceedings.

13. Mr Brown submitted that the Claimant appeared to have embarked on an effort to trawl all the documents he was able to obtain by way of his multiple FOI and SARs, to find evidence which he could misuse, misquote, or use out of context to try to discredit or damage the Respondent and its employees, in particular Mr MacPherson. It is certainly clear to us, from the correspondence in the bundle and the history of these proceedings, that the documents the Claimant sought formed part of a wider campaign against the Respondent. His motives for seeking disclosure and inclusion of those documents in the bundle was not to assist the Tribunal to resolve the issues in the claim.

14. Our attention was drawn by Mr Brown to paragraph 9 of the written reasons sent to the parties on 10 April 2017, relating to the rejection of the Claimant's applications made at the final hearing. We agreed with Mr Brown's submission that that paragraph expressed our assessment of the behaviour of the Respondent's representatives (in the context of an application by the Claimant for the defence to be struck out), and not an assessment of the Claimant's behaviour. Further, at the time of writing that paragraph, the Tribunal had not seen the full extent of the Claimant's correspondence with the Respondent contained in the bundle presented at the costs hearing. On the information available to us at the costs hearing, we find that the Claimant's behaviour in relation to disclosure and the contents of the bundle went far beyond that of the normal disagreement expected of parties in the course of agreeing the contents of a bundle.

15. For these reasons, even allowing latitude for the fact the Claimant was unrepresented, in our judgment the Claimant's conduct of proceedings in relation to disclosure and the bundle was vexatious, abusive and unreasonable.

16. We accepted the Respondent's schedule of its costs and the rates charged by its in-house legal advisors. It was clear to us that the Claimant's unreasonable and vexatious behaviour must have put the Respondent to considerable extra expense, albeit that the specific additional expense of, for example, responding to a particular letter, email or application is not identified. The amount of additional work required as a result of the Claimant's actions was clearly unnecessary and disproportionate.

Vendetta/campaign

17. Mr Brown submitted that many of the requests made by the Claimant for disclosure or inclusion of documents in the bundle were motivated by what appeared to be a vendetta against Mr MacPherson, other employees and the Respondent in general. Mr Brown referred to the Claimant's other complaints to Arts Council England, their auditors, the Respondent's auditors, the Information Commissioners Office, the National Audit Office and the Department for Sport and Culture, 12 freedom of information requests, two judicial review applications and appeals to the first tier tribunal and upper tribunal. While the Claimant's claims to other bodies are of no relevance to our assessment of his conduct of these proceedings, that context supports Mr Brown's submission that the Claimant was embarked on a wider campaign against the Respondent. We were reminded that, in the final hearing, when

asked in cross examination if it had become an obsession, the Claimant responded "yes, an unpleasant one".

18. At paragraph 38 of our written reasons sent to the parties on 15 December 2016 we recorded that the Claimant had sent an email (page 11A – 11C of the costs bundle) to a large number of people known to Mr MacPherson, the appeal officer. That email, dated 13 January 2016, was highly derogatory and offensive and was written by the Claimant purporting to be Mr MacPherson and was sent from a bogus email account, also purporting to belong to Mr MacPherson. We also recorded at paragraph 38 that we formed the clear impression at the final hearing that the Claimant asked Mr MacPherson to read out that email with the sole purpose of humiliating him in front of his colleagues and/or the Tribunal. The Claimant admitted during the final hearing that he had been responsible for sending various threatening and unpleasant emails from a number of bogus email accounts. When a particular bogus email account was blocked by the Respondent, the Claimant set up a new one from which to send further emails. Despite being warned by Regional Employment Judge Lee on 7 April 2016 (page 1) of the possible costs consequences of unreasonable conduct of proceedings in relation to these emails, the Claimant repeatedly refused to acknowledge that he was the author until under oath at the final hearing. He also sent emails to individuals accusing them of perjury arising from their evidence at the final hearing (pages 114 – 116). In addition, he sent correspondence to Mr MacPherson's teenage daughter seeking to discredit her father. We did not accept the Claimant's characterisation of those emails at the final hearing as "socially useful satire" or "quite funny". We found that they were offensive and intimidating.

19. Mr Brown also drew our attention to the Claimant's latest correspondence in the bundle dated 18 April 2017 (pages 117 to 123), which was sent to a large number of recipients including members of parliament, media outlets, elected counsellors and others. The email enclosed the Claimant's statement for this costs hearing (pages 122 – 123), despite those recipients having no involvement in these proceedings.

20. Rule 76 provides that the conduct which may be the subject of a costs order is the way that "the proceedings" have been conducted, i.e. these employment tribunal proceedings. We have considered whether, given our findings above, it can be said that the Claimant's emails and refusal to accept authorship could be said to be conduct of these proceedings. As set out above, we find that the Claimant has been using his employment tribunal claim as a vehicle for part of his wider campaign against the Respondent and individuals such as Mr MacPherson. While the email dated 13 January 2016, the other unpleasant emails and the Claimant's refusal to accept authorship, cannot be said to be conduct of the employment tribunal proceedings in the narrowest sense (i.e. they were not part of the preparation of the claim for hearing), it is clear to us that they should be viewed as part of the Claimant's conduct of the case in the round. The Claimant himself makes a clear link in his emails of 13 January 2016 and 31 January 2016 (page 12). In our judgment the Claimant's emails and refusal to accept authorship was intrinsically linked to his employment tribunal claim and, viewed in context, formed part of his conduct of these proceedings. We find that that behaviour was vexatious, abusive and unreasonable in the circumstances.

21. While Mr Brown has not identified any specific expenses or costs to which the Respondent has been put by the Claimant's behaviour, as set out above, it is clear to us from the correspondence in the bundle, that the Respondent incurred unspecified costs in seeking to identify the author of the emails. Separately, it was plain from the evidence at the final hearing that the Claimant's actions were upsetting to some of the individual employees of the Respondent who had been targeted. While Mr MacPherson acknowledged that, in his position, he was required to have 'broad shoulders', the same could not be said of Ms Hamilton or Mr MacPherson's teenage daughter, for example.

Witness statement exchange

22. Pages 38 – 40 of the bundle record an agreement by the parties to exchange witness statements on a specific date. The parties agreed to vary the date for exchange, but did not apply for variation of the Tribunal's order. The Respondent duly sent copies of its statements to the Claimant on the agreed date, but the Claimant refused to send his witness statement to the Respondent on grounds that the bundle was not finalised. We find that, although the parties were both in breach of the Tribunal's order by failing to comply with the original date for exchange, the agreement to exchange at a later date was reasonable in the circumstances. However, the Claimant's refusal to exchange statements after the Respondent's provision of its own statements was unreasonable. To cite the failure to finalise the bundle as a reason was disingenuous, given that the reason the bundle had not been finalised was the Claimant's own obstructive and unreasonable behaviour. Further, the Respondent having sent its witness statements to the Claimant, there was no good reason why the Claimant could not reciprocate ahead of finalisation of the bundle. The Claimant's refusal to exchange statements necessitated correspondence from Mr Brown to the Claimant and an application to the Employment Tribunal (page 69), resulting in additional cost to the Respondent.

The law

23. Rule 76 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Employment Tribunal Rules of Procedure") provides:

76. When a costs order or a preparation time order may or shall be made

(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; …
(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.

24. In considering whether particular behaviour is unreasonable the Tribunal should consider its nature, gravity and effect.

25. The tribunal should exercise its discretion to make an order for costs judicially. In determining whether to make an order for costs and, if so, the amount, the Tribunal is required to give effect to the overriding objective:

2. Overriding objective

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. 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.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

26. Rule 84 provides

84. Ability to pay

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.

27. The Respondent directed us to the following cases (references are to a previous version of the Rules):

27.1. **Barnsley Metropolitan Borough Council v Yerrakalva** [2012] IRLR 78 (CA), in which it was noted that:

The [Tribunal's] power to order costs is more sparingly exercised and is more circumscribed by the [tribunal] rules than that of the ordinary courts. There the general rule is that costs follow the event and the unsuccessful litigant normally has to foot the legal bill for the litigation. In the [tribunal] costs orders are the exception rather than the rule.

27.2. In that case, Lord Justice Mummery took the opportunity to clarify his words in **McPherson v BNP Paribas (London Branch)** [2004] IRLR 558:

41. 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 the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. The main thrust of the passages cited above from my judgment in McPherson was to reject as erroneous the

submission to the court that, in deciding whether to make a costs order, the ET had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances.

27.3. **Vaughan v London Borough of Lewisham and Ors** UKEAT/0533/12, in which the EAT approved the observations of HH Judge Richardson in the earlier EAT case of **AQ Ltd v Holden** UKEAT/0021/12 that:

41. The threshold tests in r40(3) are the same whether a litigant is or is not professionally represented. The application of those tests should, however, take into account whether a litigant is professionally represented. 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 Mr Davies submitted, lay people are likely to lack the objectivity and knowledge of law and practice brought by a professional legal adviser. Tribunals must bear this in mind when assessing the threshold tests in r40(3). Further, even if the threshold tests for an order for 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 advice.

…

That is not to say that lay people are immune from orders for costs: far from it, as the cases make clear. Some litigants in person are found to have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity.

Determination of the issues

Costs order

28. We conclude that the Claimant's conduct of part of these proceedings has been vexatious, abusive and otherwise unreasonable for the reasons set out in our findings of fact above.

29. Rule 76 therefore requires us to consider whether to make a costs order. In considering whether to exercise our discretion to make an award of costs, we have taken account of the following factors:

29.1. The nature, gravity and effect of the Claimant's conduct set out above. In our judgment, even where the Claimant's behaviour did not affect the preparation time or length of the hearing, the nature of that

conduct was such that it was clearly vindictive, vexatious and unreasonable. The Claimant's actions were intimidating and upsetting to the individual employees of the Respondent who were targeted.

29.2. The fact that the Claimant is a litigant in person and allowances must be made for an unrepresented party who may not understand the law or the Tribunal process. We have taken account of the warning in **Vaughan**. However, as found above, the Claimant is experienced, articulate, educated and able to understand the orders of the Employment Tribunal. He has nevertheless chosen to behave in a vexatious, abusive and unreasonable manner in his conduct of part of these proceedings as part of a wider campaign against the Respondent, Mr MacPherson and others.

29.3. The Claimant's ability to pay any costs ordered. While we do not have detailed information regarding the Claimant's means, owing to his refusal to provide that information, it is clear that he is unemployed and he has stated that he has no income. We have no information about capital or his partner's income. We accepted Mr Brown's submission that it is surprising that the Claimant, a well-educated individual with considerable experience, has not worked since his dismissal by the Respondent on 4 November 2013. The Claimant has had, but refused, the opportunity to provide more detailed information about his ability to pay. While we have taken account of his unemployment, we have therefore not been able to give much weight to his inability to pay, in view of the lack of other information.

30. In our judgment, the nature, gravity and effect of the Claimant's vexatious, abusive and unreasonable conduct and the other circumstances of this case are sufficiently exceptional to justify a costs order against him.

Amount of costs

31. The Respondent has provided a detailed costs schedule recording around £20,000 worth of costs. However, that schedule relates to a limited period of time and we accepted Mr Brown's submission that the Respondent's total costs have been considerably higher and that the schedule was just an indication of the true scale of those costs. Mr Brown did not suggest that there was any link between specific incidents or behaviour of the Claimant and specific items on the schedule. Rather, Mr Brown explained that he was not seeking an order that the Claimant pay all or even a specific proportion of the Respondent's costs, but rather a contribution of a fixed sum of £5,000 or whatever sum the Tribunal considered appropriate in all the circumstances to reflect the matters set out above.

32. We accepted that, following **Yerrakalva**, we are not required to link specific costs to specific conduct, but should look at the whole picture of what happened. Applying the actual words of rule 76(1) we find that the Claimant's vexatious, abusive and otherwise unreasonable conduct of part of the proceedings has caused the Respondent significant additional costs and inconvenience.

33. We have considered the information available to us regarding the Claimant's means and also the fact that, although the Claimant may currently have no

income, as a well-educated man with considerable work experience, it is highly likely that he will obtain employment in the future and therefore become able to pay an award of costs. Taking account of the nature, gravity and effect of the Claimant's conduct and all the other factors discussed above, we consider that £5,000 is an appropriate contribution towards the Respondent's costs, to reflect the Claimant's vexatious, abusive and otherwise unreasonable behaviour. It is neither so low that it minimises the Claimant's conduct, nor so high that it exceeds the Respondent's resulting costs or the Claimant's ability to pay, on the information available to us.

Employment Judge Bright

Date: 2 May 2017