



EMPLOYMENT TRIBUNALS

Claimant
Mr J Kit

Respondent
Banana UK Property Investment &
Management Company Ltd

Application in writing

COSTS JUDGMENT

1. The Claimant's application for costs against the Respondent is successful and the Respondent is ordered to pay to the Claimant a contribution towards costs in the sum of **£4502** (four thousand, five hundred and two pounds), (inclusive of VAT).
2. The Claimant's application for a wasted costs order against the Respondent's representative Mr Man is dismissed.

REASONS

Introduction

1. A costs application was made by the Claimant following the Claimant's successful claims against his former employer Banana UK Property Investment & Management Company Ltd for unfair dismissal, wrongful dismissal, and for non-payment of accrued but untaken holiday leave. In relation to his claim for unfair dismissal the Tribunal held that it was 'just and equitable' to award an uplift of 25% for the Respondent's unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance procedures ("the ACAS uplift").
2. The Respondent did not attend the hearing on liability and remedy. Following Rule 47 the hearing took place in the absence of the Respondent.
3. Mr Man, the Director of the Respondent had previously contacted the Tribunal by email dated 9 June 2023 to inform it that he would be outside the jurisdiction on the date of the hearing. By letter dated 21 June 2023 EJ Rogerson directed that the hearing remained listed for 6 July 2023, and that if the Respondent

wished to make an application for postponement that the application must provide the grounds for the postponement, evidence supporting this reason, and the estimated length of the postponement.

4. In correspondence Mr Man confirmed that the Respondent was not applying for a postponement of the hearing. EJ Rogerson noting in her order dated 27 June 2023 that the Respondent had not applied for a postponement of the hearing, and that it had not applied for the relevant permission from the local authorities for Mr Man to give evidence abroad from Hong Kong, having had fair opportunity to do so. The Respondent was informed by EJ James during the preliminary hearing on 25 April 2023, that Mr Man would need permission from the local authorities in Hong Kong to be able to give evidence remotely if he was in Hong Kong at the date of the hearing. There was however no indication that the Respondent would not be attending the hearing of 6 July 2023 prior to the hearing.
5. On the date of the hearing reasonable attempts were made to contact the Respondent including emails and phone calls to officials of the Respondent, including Mr Man. The Tribunal staff contacted the address and numbers used by the Respondent in correspondence to the Tribunal and also additional email addresses and telephone numbers provided to the Tribunal by Mr Kit. Whilst the Tribunal staff were ultimately able to contact Ms Wong a senior official of the Respondent, Ms Wong notwithstanding her assurance to the Tribunal that she would seek instruction from senior management, and contact the Tribunal to update it, failed to do so, and she ignored all subsequent attempts by the Tribunal staff to contact her thereafter. Mr Man, the Respondent's Director, who had previously attended a hearing on behalf of the Respondent, and who had made serious allegations about Mr Kit, having absented himself from the jurisdiction prior to the hearing. The Tribunal therefore proceeded with the hearing in the absence of the Respondent. Judgment was given on the day, and subsequently written reasons were produced on the request of the Claimant. The findings of fact are set out in the judgment, and there is no need for this judgment on costs to repeat them.
6. Of material significance, it was not until the proceedings were started that Mr Kit was given any substantive reason for his dismissal. Initially in the ET3 the Respondent sought to defend the case on the grounds that Mr Kit was not an employee, and/or he had not worked for the Respondent for two years. At the preliminary hearing of 25 April 2023 (which was converted from a hearing on liability to a preliminary hearing by order of EJ Wade following the Respondent's request for a postponement dated 24 March 2023) before EJ James the Respondent accepted that the Claimant was an employee. The Respondent also accepted that Section 97(2) of the Employment Rights Act 1996 extended the date of termination for the purposes of an unfair dismissal claim by the Claimant by the statutory notice period of one week, meaning that Mr Kit had the two years' service required to allow him to bring his claim. During this preliminary hearing the Respondent then alleged that the reason for Mr Kit's dismissal was conduct, capability or some other substantial reason, appearing to advance allegations of untrustworthiness, unauthorised access of company funds and/or payment of an unauthorised bonus, and/or stolen money. No procedural steps were followed whatsoever relating to Mr Kit's dismissal and

this was subsequently accepted by the Respondent in its letter of 24 March 2023, and in the preliminary hearing. The Claimant put the Respondent on notice of costs, and of the rules on costs by email dated 22 May 2023.

7. For the reasons set out in the judgment on liability the Tribunal held that these allegations of untrustworthiness, unauthorised access of company funds and/or payment of an unauthorised bonus, and/or stolen money were not the reason for Mr Kit's dismissal, that they were untrue, and that they were manufactured by the Respondent after the dismissal in order to justify the dismissal. The Tribunal held on the balance of probabilities that Mr Kit was in fact dismissed due to him going for a drink with an individual which Mr Man wished to be romantically involved with and the anger of Mr Man that followed from this. He was not dismissed for reasons of dishonesty. The Tribunal also holds on the balance of probabilities that the reasons subsequently advanced by Mr Man on behalf of the Respondent at the hearing of 25 April 2023, and subsequently contained in Mr Man's witness statement which was submitted for the liability hearing, were manufactured in order to extend the duration of proceedings, and in order to put pressure on the Claimant.
8. At the end of the hearing the Claimant's solicitor indicated to the Judge that given the Respondent's behaviour the Claimant wished to make an application for costs. Since the Respondent was not in attendance, and in order to provide notice to the Respondent of this application, to ensure that the Respondent was able to rebut any allegations concerning its conduct of the proceedings and to make submissions on the costs application, and/or apply for the application to be dealt with at a hearing, the Tribunal requested that the Claimant make this application for costs in writing.
9. The Claimant's written application was received by the Tribunal and the Respondent within the time period under the Rules. The Claimant's application is for a costs order against the Respondent, and/or Mr Man. In order that the Respondent and Mr Man were aware of the evidence which was given at the hearing, and the Tribunal's findings, written reasons were produced and sent to the parties. The parties received the reasons in writing for the judgment in favour of the Claimant.
10. Since there was no reply by the Respondent (or from Mr Man) to the Claimant's application, in order to provide the Respondent and Mr Man with a fair and reasonable opportunity to make representations on the Claimant's application for costs, the Tribunal sent a subsequent order to the parties dated 2 November 2023 directing that if the Respondent wished to reply to the Claimant's application for costs it must provide any representations that it wished to make to the Tribunal in response to the Claimant's application, in writing, to be received by the Tribunal (copying the Claimant's legal representative) by 4pm 15 November 2023.
11. No representations or any other communication has been received by the Tribunal from the Respondent, and/or Mr Man.

Applications and Submissions

12. The Claimant's application is made pursuant to Rules 74-84, both for costs against the Respondent, and also for a wasted costs order against Mr Man. The costs claimed are 'unassessed' since they are for an amount less than £20,000.
13. The Claimant states that the Respondent's conduct, and in particular Mr Man's conduct has caused the Claimant to incur significantly more costs than necessary. The Claimant states that the costs incurred are £5,954.60 (including VAT), and requests that in order to minimise further costs that the Tribunal take a broad-brush approach. Given the Claimant's shortage of funds the Claimant's Solicitors have continued to act pro-bono for the Claimant and did not bill the Claimant for the Tribunal hearing (which would ordinarily equate to £2,058.00 including VAT), and/or the last two weeks of work before the hearing.
14. The Claimant advances that the Respondent (or their Representative) has met the criteria under both Rule 76(1)(a) and/or (b), namely that they have 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, and/or that the response had no reasonable prospect of success.
15. Regarding conduct, the Claimant states that the Respondent, and/or Mr Man (a) failed to initially give a reason as to why the Claimant was dismissed, (b) then attempted to give a reason but failed to elaborate on it to a point where it can be understood, leaving the Claimant in the dark throughout as to what it might be, (c) failed to ensure everything was translated following his request for a translator. Mr Man continued to file documents in English, (d) was dishonest as to the reason as to why the Claimant was dismissed (he was in fact dismissed because the Claimant had gone for a drink with a female Mr Man seemingly had an interest in), (e) failed to ensure that Mr Man sought permission from the Chinese government to give evidence despite being told this is what he would need to do by a Judge at the preliminary hearing if he went back to Hong Kong, (f) failed to provide any evidence in support of the Respondent's liability defence despite requests to do so by the Claimant's solicitors, and failed to engage at any point, (g) failed to accept that they had no liability defence and therefore forced the Claimant to fully prepare for Trial to ensure all points were covered, (h) failed to attend the final hearing to give submissions and also failed to advise they would not be in attendance, (i) attempted to prevaricate and force the Claimant to incur unnecessary costs at every single stage of the proceedings, despite having no good reason to defend, (j) attempted to force the Claimant, as a 50% shareholder of the Company, to invest money into the failing Company in order to rescue the Company because Mr Man had purposefully run it into the ground. This is despite it being a company with over 30 employees turning over more than £1m per annum, (k) Mr Man failed in his duties to make collective decisions and properly involve the Claimant as a shareholder and director, (l) Attempted to derail the employment claim by winding the Company down and worrying the Claimant into having to invest money into the Company, and (m) that Mr

Man changed his position several times in order to drag matters out until the very end.

16. The Claimant further submits that Mr Man is dishonest and by his conduct has demonstrated that he is prepared to flout both company law and employment law in order to get what he wants.
17. In relation to Rule 76(1)(b) the Claimant submits that at no point did the Respondent's claim have any prospect of success, since the Claimant was dismissed by text message because Mr Man did not like the fact the Claimant went for a drink with a female Mr Man was attracted to. The Claimant was then given no reason for his dismissal and throughout the proceedings, Mr Man changed his position several times in order to drag matters out. The Claimant submits that Mr Man acted dishonestly.
18. The Claimant further submits that a wasted costs order should be made against Mr Man personally since it was Mr Man as a Director who acted as the representative of the Respondent throughout the legal proceedings, and it is his conduct which has put the Claimant to the cost of bringing these proceedings and seeing them through to Trial. The Claimant submits that Mr Man acted as a Director and representative of the Respondent throughout the legal proceedings and not as an employee.
19. No submissions have been received in response to the Claimant's submissions from the Respondent and/or Mr Man.

Legal Principles

20. It is a fundamental principle that costs awards in Employment Tribunals are the exception not the rule (*Yerrakalva v Barnsley Metropolitan Borough Council and anor* [2011] EWCA Civ 1255, [2012] ICR 420; Presidential Guidance on General Case Management for England and Wales). The Rules set out a high hurdle that a party making an application for costs must surmount (*Salinas v Bear Stearns International Holdings Inc and anor* [2005] ICR 1117, EAT). The burden on establishing that the costs jurisdiction is engaged is on the party seeking costs, in this case the Claimant (*Haydar v Pennine Acute NHS Trust* EAT 0141/17).
21. Costs are defined in Rule 74(1) of The Employment Tribunals Rules of Procedure 2013:

"74. (1) "Costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing)..."

22. The relevant grounds for making a costs order are to be found in Rule 76:

“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;...”

23. Under Rule 76(1)(a) both the conduct of a party, and its representative are relevant. Under Rule 38(6) of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 such costs can only be awarded against a party to the proceedings, and not its representative. Such an order concerns the costs that the receiving party incurred whilst legally represented or represented by a lay representative (Rule 75(1)). The costs must be incurred by or on behalf of the receiving party. This therefore does not include any pro-bono costs, where a Claimant is represented pro-bono for any part of the proceedings. These are provided for by Section 194A of the Legal Services Act 2007. An application for pro-bono costs is a separate application, the costs being awarded to the prescribed charity only (Section 194A(4)), and not to the Claimant or his legal representatives. No such application for pro-bono costs to be paid to the prescribed charity has been made in this case.

24. Vexatious conduct includes mounting a hopeless defence to spite or harass a claimant, or for some improper motive (*ET Marler Ltd v Robertson* [1974] ICR 72, NIRC), or subjecting the claimant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the Respondent, thus abusing the Tribunal’s process (*Scott v Russell* [2013] EWCA Civ 1432). Highly personal and damaging allegations made entirely without substance, and without belief in their genuineness may be considered vexatious (*Sawers v British Railways Board* ET Case No.S/2648/88).

25. Unreasonable conduct is to be given its ordinary meaning, and is not to be treated as the same as vexatious, (*Dyer v Secretary of State for Employment* EAT 183/83). For instance serious and unsubstantiated allegations may be capable of amounting to unreasonable conduct (*Ghosh v Nokia Siemens Networks UK Ltd* EAT 0125/12), but false evidence itself is not automatically unreasonable conduct (*Kapoor v Governing Body of Barnhill Community High School* EAT 0352/13). A party does not have to lie for its response to be misconceived and unreasonable (*Topic v Hollyland Pitta Bakery and ors* EAT 0523/11). A party who unduly protracts proceedings may also be acting unreasonably. A Tribunal may also consider a party’s conduct as a whole in making the determination of whether their conduct was unreasonable (*Sahota v Dudley Metropolitan Borough Council* EAT 0821/03).

26. The discretion to make an order under Rule 76(1)(a) concerns the bringing or conduct of proceedings. A party’s conduct prior to proceedings cannot found

an award of costs (*Health Development Agency v Parish* [2004] IRLR 550, EAT).

27. The Tribunal only has power under Rule 76(1)(b) of the Tribunal Rules 2013 to make a costs award in respect of a claim or response that has no reasonable prospect of success, the focus simply being on the claim or response itself. Even if the Respondent's conduct meets the criteria in Rule 76(1) (a) or (b) an award of costs is nevertheless discretionary.
28. In considering an application under Rule 76(1)(a) or Rule 76(1)(b) there are three stages that a Tribunal must consider in determining the application. Firstly, whether a party's conduct falls within Rule 76(1)(a) or Rule 76(1)(b), if so, secondly, whether it is appropriate to exercise the Tribunal's jurisdiction to award costs against that party, if so, thirdly, to determine the amount of any award (*Daly v Newcastle Upon Tyne Hospitals NHS Foundation Trust* EAT 0107/18; *Monaghan v Close Thornton Solicitors* EAT 0003/01).
29. Once a Tribunal has identified conduct which triggers the costs rules, in exercising the discretion (stage 2) the totality of the circumstances must be considered (*Yerrakalva v Barnsley Metropolitan Borough Council and anor* [2011] EWCA Civ 1255, [2012] ICR 420), including the nature, gravity and effect of a party's conduct (*McPherson v BNP Paribas (London Branch)* [2004] EWCA Civ 569, [2004] ICR 1398). In considering this discretion a Tribunal may take into account the fact that a party has made a false allegation, but dishonesty by itself is not enough and the Tribunal must consider the nature, gravity, and effect of the dishonesty (*Daleside Nursing Home Ltd v Mathew* EAT 0519/08, *HCA International Ltd v May-Bheemul* EAT 0477/10; *Arrowsmith v Nottingham Trent University* [2011] EWCA Civ 797, [2012] ICR 159).
30. The purpose of an award of costs is compensatory. A Tribunal may consider what losses have been caused by the Respondent's conduct. Questions of punishment are not relevant to the exercise of the Tribunal's discretion (or to quantification) (*Lodwick v Southwark London Borough Council* [2004] EWCA Civ 306, [2004] ICR 884).
31. In exercising its discretion under Rule 76(1)(b), in relation to a response a Tribunal should consider firstly, whether the response had no reasonable prospect of success when submitted, or whether it subsequently reached a stage where it had no reasonable prospect, secondly, at the stage when the response had no reasonable prospect of success, whether the Respondent knew this was the case, thirdly, if not, whether the Respondent should have known? (*Opalkova v Acquire Care Ltd* EAT 0056/21). A Tribunal can take into consideration the fact that an employer knows that its defence is unmeritorious or untrue (*Meadowstone (Derbyshire) Ltd v Kirk and anor* EAT 0529/05).
32. In exercising the discretion under both sub-sections representation is relevant – although awards may be made against unrepresented parties, a party which is not professionally represented should not be judged by the same standard as a party who is professionally represented (*AQ Ltd v Holden* [2012] IRLR 648, EAT; *Liddington v 2gether NHS Foundation Trust* EAT 0002/16), the inexperience of a representative is also relevant, and a Tribunal should provide

more latitude in exercising its discretion where a party is represented by an inexperienced representative (*Francois v Castle Rock Properties Ltd* (t/a Electric Ballroom) EAT 0260/10).

33. Further whether or not a costs warning has been given is a factor a Tribunal may take into account in exercising its discretion (*Lake v Arco Grating (UK) Ltd* EAT 0511/04, *Rogers v Dorothy Barley School* EAT 0013/12). A Tribunal may also consider the means of the parties (*Howman v Queen Elizabeth Hospital Kings Lynn* EAT 0509/12), and the paying party's ability to pay (Rule 84).
34. Once a Tribunal has decided to exercise its discretion to award costs, in determining how much the Tribunal should award, a Tribunal should consider what loss has been caused to the receiving party, and whether these costs are reasonable and proportionate (*Yerrakalva v Barnsley Metropolitan Borough Council and anor* [2011] EWCA Civ 1255, [2012] ICR 420), the Tribunal may take into consideration factors such as the conduct of the parties, and a party's ability to pay.
35. In determining the amount of any award costs are not limited to those attributable to specific instances of unreasonable or vexatious conduct, but the determination should be broad brush and take into account the nature, gravity, and effect of the conduct as factors relevant to the discretion (*McPherson v BNP Paribas (London Branch)* [2004] EWCA Civ 569, [2004] ICR 1398; *Yerrakalva v Barnsley Metropolitan Borough Council and anor* [2011] EWCA Civ 1255, [2012] ICR 420; *Sud v Ealing London Borough Council* [2013] EWCA Civ 949, [2013] ICR D39). There is no need for a direct causal link between the conduct and the costs (*D'Silva v NATFHE (now known as University and College Union) and ors* EAT 0126/09).
36. Under Rule 78(1)(a) a Tribunal may 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. A wide discretion is provided to the Tribunal (*Sumukan (UK) Ltd and anor v Raghavan* EAT 0087/09). An award of costs may include VAT where the receiving party is not VAT registered (*Raggett v John Lewis plc* [2013] ICR D1, EAT). Mr Kit is not VAT registered.
37. Rule 80 sets out when a wasted costs order may be made against a representative:

“80. (1) A Tribunal may make a wasted costs order against a representative in favour of any party (“the receiving party”) where that party has incurred costs—

 - (a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative; or
 - (b) which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay. Costs so incurred are described as “wasted costs”.

(2) “Representative” means a party's legal or other representative or any employee of such representative, but it does not include a representative who is not acting in pursuit of profit with regard to the proceedings. A person acting

on a contingency or conditional fee arrangement is considered to be acting in pursuit of profit.

(3) A wasted costs order may be made in favour of a party whether or not that party is legally represented and may also be made in favour of a representative's own client. A wasted costs order may not be made against a representative where that representative is representing a party in his or her capacity as an employee of that party."

38. Within the Employment Tribunal wasted costs orders are discretionary and a 'very rare event' (Presidential Guidance on General Case Management for England and Wales). The requirements are more stringent than with costs orders, requiring an abuse of process. In exercising the discretion the factors listed above may also be taken into account. With wasted costs orders there must be a causative link between the conduct, and the amount of wasted costs (*Casqueiro v Barclays Bank plc* [2012] ICR D37, EAT).
39. In considering the question of wasted costs the Tribunal should consider whether the representative has acted (1) improperly, unreasonably or negligently, (2) if so, did such conduct cause the applicant to incur unnecessary costs, and (3) if so, is it just in the circumstances to order the representative to compensate the applicant for the whole or any part of the relevant costs (*Ridehalgh v Horsefield and ors* [1994] 3 All ER 848; *Medcalf v Mardell and ors* [2002] UKHL 27, [2003] 1 AC 120).

Application of the Law to the Facts

40. For the purposes of the costs jurisdiction under Rule 76(1)(a) the conduct of the Respondent, and/or Mr Man prior to the proceedings being commenced is irrelevant. The procedure followed during his dismissal, and the failure to inform him of the reason for his dismissal were relevant to the ACAS uplift which was awarded to the Claimant, but are not relevant to the costs jurisdiction.
41. The Respondent's failure to provide translations to documents, filing the documents in English, and not translating them following the request of the Claimant cannot be said to be vexatious, abusive, disruptive, or otherwise unreasonable. Translation carries a cost, and the bundle demonstrates that Mr Kit and Mr Man regularly communicated via WhatsApp in English. Mr Kit's contract of employment was in English, and his communications with the company contained within the bundle are also in English. The company documentation provided in the bundle was also in English. Mr Kit is a British citizen, a long term resident of the UK, and an English speaker.
42. Mr Kit's employment dispute with the Respondent is also in the context of a broader corporate law dispute. Any dispute in relation to shareholding, collective decisions, the need to invest money into the company, or the running of the company into the ground, and potential winding up, is outside the jurisdiction of this Tribunal, and is properly within the jurisdiction of the Courts. The Tribunal therefore cannot make a determination on this issue, and it is not

relevant to the conduct of these Employment Tribunal proceedings, and the cost jurisdiction within Rule 76, which focuses on the conduct of the Employment Tribunal proceedings (or part of them).

43. Whilst the Respondent did not attend the final hearing, a party is entitled not to attend a hearing, and to have a dispute determined in its absence. It is not vexatious or unreasonable to do so. Whilst discourteous to the Tribunal and the Claimant not to inform it or the Claimant that it would not be attending the hearing, this combined with Ms Wong's failure to revert to the Tribunal does not reach the threshold of vexatious, further by itself, it does not reach the threshold of unreasonable (but it does once the conduct is considered in the totality and combined with the fact that knowingly false allegations were advanced to defend the claim, and the non-attendance of the Respondent was connected with this). The Respondent's failure to obtain permission for Mr Man to give evidence abroad (notwithstanding being informed that this was needed if Mr Man was to give evidence), by itself, did not subject the Claimant to inconvenience since the hearing was able to go ahead in the absence of this evidence, and in the Respondent's absence. However, it is relevant to a wholistic determination of unreasonableness given that it is again connected with the advancing of knowingly false allegations in relation to the Claimant. The Tribunal notes that the effect of this failure meant that Mr Man did not advance false evidence at the hearing.
44. The Respondent acted both vexatiously and unreasonably such as to engage the jurisdiction of Rule 76(1)(a). Although the Respondent initially advanced a defence to the claim which it (and Mr Man) believed to be meritorious, namely that Mr Kit did not have the requisite two years' service, and that he was not an employee, at the preliminary hearing the Respondent on correctly recognising, and conceding that Mr Kit was in fact an employee and had sufficient service to bring a claim in unfair dismissal, the Respondent, through Mr Man, advanced fabricated reasons for his dismissal, including serious allegations of dishonesty, knowing that the real reason for his dismissal was in fact different. This response was advanced in order to delay the case by protracting the proceedings, and in order to harass the Claimant. These were highly personal and damaging allegations as to Mr Kit's honesty which made without any evidential foundation, and without belief in their substance. The need to rebut these allegations subjected the Claimant to significant inconvenience and expense, and as a result the Respondent abused the Tribunal's process.
45. The Tribunal's jurisdiction under Rule 76(1)(b) is also triggered since the Respondent's response which was based on Mr Kit's alleged dishonesty had no reasonable prospect of success.
46. Given that the costs jurisdiction is triggered, the Tribunal must consider its discretion. In exercising this discretion in favour of the Claimant to award costs the Tribunal takes into account, the fact that the Respondent made unfounded, false, and knowingly manufactured allegations of fraud against the Claimant, and that the effect of these allegations was to cause additional expense to the Claimant. The allegations were a factor in the postponement of the liability hearing as originally listed and the need for a preliminary hearing. They also required significant additional work by the Claimant's solicitors in order to rebut

the allegations, including a detailed examination of the WhatsApp messages and accounts, that would otherwise not have been required. There was also the need to produce a more lengthy trial bundle dealing with these allegations. The Respondent maintaining these fraud allegations in the face of the evidence, and knowing that the true reason for Mr Kit's dismissal was that he had taken a female out for a drink, towards whom Mr Man had romantic intentions meant that the Claimant incurred significant additional costs. The Tribunal also takes into account (although this factor is of limited weight) the fact that the Respondent received a costs warning from the Claimant's solicitors. In exercising the discretion the Tribunal further takes into account the fact that the Respondent was represented by Mr Man, and not by an experienced legal representative, it does not expect the same standards of conduct from the Respondent as a Respondent which is legally represented, however, notwithstanding the inexperience of the Respondent's representative a knowingly false defence was advanced by the Respondent to the claim, in the knowledge when it was advanced that it did not have reasonable prospects of success, which was combined with a strategy of delay.

47. In exercising its discretion to award costs the Tribunal also takes into consideration the relative means of the parties. The Respondent was, at the material time a company with over 30 employees turning over more than £1 million per annum. Its unaudited financial statement dated 30 June 2022, but produced in February 2023, and signed by Mr Man, prior to the hearing, shows a turnover of £1,104,786, and a gross profit of £484,659, but due to high administrative costs (and significantly growing staff bills) a loss of £288,231 is recorded. Assets of £718,234 are recorded, but with liabilities of £996,225, a total liability of £277,991 is recorded. These figures are disputed by Mr Kit, but given the failure of Mr Man to give evidence at the hearing there is no other evidence as to the Respondent's current financial position before the Tribunal. In the previous year the Respondent had run at a profit and had assets of £1,208,926, and net assets of £10,240. Notwithstanding these recorded losses in the most recent financial year the Tribunal notes that at the material times the Respondent's financial statement records that the Respondent managed to continue a significant property operation, that from 2021 to 2022 it increased its cash in the bank from £39,836 to £80,417, that it significantly increased its staff salaries from £238,234, to £619,454, and that it increased its director's pension payments from £369 to £9118. It also increased its marketing spend from £3484, to £7836, and spent over £2000 in entertaining a year. It is an operation with considerable income and expenditure.
48. The Claimant on the other hand is out of work, but not claiming benefits due to cultural reasons and pride. The Claimant had to borrow money to pay his legal fees, and subsequently his solicitors acted pro-bono due to his inability to pay further legal fees. The relative means of the parties again supports the discretion being exercised in favour of the Claimant.
49. As a result of these proceedings the Claimant incurred four legal bills, which are as follows: 1) dated 7/2/23, of £710.50, plus VAT of £142.10, 2) dated 26/4/23, of £500.00 plus VAT of £100.00, 3) dated 24/5/23, of £1715 plus VAT of £343.00, 4) dated 20/6/23, of £2036.66 plus VAT of £407.34. These bills totalled £4,962.16, plus VAT of £992.44, producing a grand total of £5,954.60.

Thereafter the Claimant's solicitors worked pro-bono. These costs are reasonable and proportionate to the case.

50. In exercising its discretion in quantifying the award of costs the Tribunal takes a broad brush approach, taking into account the reason for its exercise of the discretion to award costs, in particular the fact that the nature of the conduct was the deliberate advancing of a knowingly false defence, which caused significant additional costs on the part of the Claimant in order to rebut this allegation. During and after the hearing before EJ James on 25 April 2023 the Respondent's defence to the claim, which was set out (but not particularised in the hearing of 25 April 2023) was based on this knowingly false defence. Prior to this point, the Respondent primarily defended the case on additional grounds, and had a genuine (but erroneous) belief in their validity. They were not legally represented, and the Tribunal takes this into account in exercising its discretion in the sum awarded by not awarding any of the costs prior to the hearing of 25 April 2023. Thereafter the costs were primarily the result of the Respondent's vexatious and/or unreasonable conduct. The Tribunal therefore exercises its discretion to award the Claimant the sum of £4502 (inclusive of VAT), representing the total of both the third and fourth bill which covered work from the hearing of the 25 April 2023 onwards. In making this determination the Tribunal also takes into account that the award under the jurisdiction contained in Rule 76 may only be for costs incurred by or on behalf of the Claimant, and may not include pro-bono costs.
51. The Tribunal however refuses the application for a wasted costs order against Mr Man personally, who represented the Respondent. The Claimant has not discharged his burden to establish that the wasted costs jurisdiction is engaged. Under Rule 80(3) a wasted costs order may not be made against a representative where that representative is representing a party in his capacity as an employee of that party. Mr Kit was formerly a co-director and an employee of the company. It is his employee status which has permitted him to bring his claims. There is no evidence before the Tribunal that the legal status of Mr Man was any different to that of Mr Kit. The Tribunal therefore holds that in representing the Respondent Mr Man was acting both as a director and as an employee of the Respondent. A wasted costs order is therefore not available against him.
52. Further, even if contrary to the above Mr Man were potentially subject to the jurisdiction for a wasted costs order the Tribunal notes the exceptional nature of a wasted costs order against a Representative, and that it has a higher threshold than that of a costs award against the Respondent. The authorities make it clear that the threshold for a wasted cost order is high, and that the jurisdiction should only be exercised with great caution, and as a last resort. The Tribunal cannot take the alleged breaches of company law into consideration, since this dispute is outside the jurisdiction of this Tribunal. Whilst Mr Man acted improperly and unreasonably within these Employment Tribunal proceedings, and this conduct did cause the Claimant to incur unnecessary costs, the Tribunal holds that it would not be just in the circumstances to order Mr Man to personally pay costs. In exercising the discretion (if such an award was in fact available) the Tribunal notes that Mr Man was not warned during the proceedings that he might personally be subject to an application for wasted costs, the Claimant's cost warning relating only to

the Respondent. The Tribunal would also take into account the fact that Mr Man is not legally qualified, and was not experienced with employment law. Further whilst Mr Man advanced a fabricated defence on behalf of the Respondent, since he did not attend the final hearing he did not give false evidence under oath. Further, that the Respondent is already liable to pay the Claimant costs under the costs jurisdiction. Thus if the jurisdiction were in fact present, (which it is not in this case), and noting the exceptionality of such an award, this would not be a situation in which the Tribunal would exercise its discretion to make such an order.

Employment Judge P Morgan

Date 1 February 2024

REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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