THE INDUSTRIAL TRIBUNALS

CASE REF: 17412/18IT

CLAIMANT: **Nevin McEldowney**

RESPONDENT: **Randox Farming Limited trading as Cherryvalley Farms**

JUDGMENT ON COSTS

The unanimous judgment of the tribunal is that the claimant's application for costs is refused.

CONSTITUTION OF TRIBUNAL:

Employment Judge: **Employment Judge Gamble**

Members: **Mrs C Stewart**
Mr B Heaney

APPEARANCES:

The claimant was represented by Ms E McIlveen Barrister-at-Law, instructed by John J McNally Solicitors.

The respondent was represented by Mr J Algazy QC, instructed by the respondent's in-house legal department.

BACKGROUND

1. The tribunal issued its judgment to the parties on 26 March 2021 in which it held that the claimant had been unfairly dismissed.

2. The claimant's representative pursued an application for costs under Rule 73 of The Industrial Tribunals and Fair Employment Tribunal (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2020 by email dated 22 April 2021. The application set out the relevant law and the grounds on which the costs order was sought. At that time, the maximum costs award of £10,000 was sought.

3. The respondent's representative opposed the application for costs.

4. The costs application was case managed at a Case Management Preliminary Hearing conducted on 24 May 2021, following which the claimant's representative confirmed that the claimant wished the application to be considered at a hearing. Written submissions in support of the application were served by the claimant's

representative on 13 August 2021 and written submissions resisting the application were served by the respondent's representative on 10 September 2021.

5. By agreement of the parties, the costs hearing was conducted by WebEx video conferencing software.

6. The tribunal considered the respective written submissions of the parties, as supplemented and refined in the oral submissions made at the hearing. The tribunal was furnished with an agreed bundle of relevant documents which the tribunal took into consideration.

7. At the outset of the hearing, the claimant's representative confirmed that the amount of costs was limited to £5250, inclusive of VAT and outlay (which included the cost of the report of Dr Eakin). She informed the tribunal that this was because the claimant's legal team and the claimant had agreed a "costs cap" in respect of the costs of the hearing.

RELEVANT LAW

8. **THE INDUSTRIAL TRIBUNALS AND FAIR EMPLOYMENT TRIBUNAL RULES OF PROCEDURE 2020**

PART 13 COSTS, PREPARATION TIME AND WASTED COSTS ORDERS

Definitions

71.—(1) "Costs" means fees, charges, disbursements or expenses (other than expenses that witnesses incur for the purpose of, or in connection with, attendance at a tribunal hearing) incurred by or on behalf of a party ("the receiving party").
(2) "Legally represented" means having the assistance of a person (including where that person is the receiving party's employee) who—
(a)is a member of the Bar of Northern Ireland or a solicitor of the Court of Judicature of Northern Ireland;
(b)has a right of audience in relation to any class of proceedings in any part of the Senior Courts of England and Wales, or all proceedings in county courts or magistrates' courts; ……

Costs orders and preparation time orders

72.—(1) A costs order is an order that a party ("the paying party") make a payment to the receiving party in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative.

…..

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

73.—(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) all or part of any claim or response had no reasonable prospect of success.

…..

Procedure

74. 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.

….

RELEVANT LAW

9. The parties' representatives lodged an agreed bundle of authorities which have been considered by the tribunal in so far as they were relied upon and referred to in the written submissions and at the hearing. The parties' representatives were in agreement that orders for costs in employment tribunals are the exception, not the rule (**Gee v Shell UK Ltd [2002 EWCA Civ 1479**). The facts of a case need not be exceptional for a costs order to be made. The question is whether the relevant test is satisfied.

10. The claimant's representative relied upon commentary in **Harvey on Industrial relations and Employment Law** at paragraphs [1064] to [1065], [1077] and [1088], which is set out below:

> ***"Unreasonable conduct***
>
> *(i) Generally*
> *[1064]*
> *Tribunals have a wide discretion to award costs where they consider that there has been unreasonable conduct in the bringing or conducting of proceedings. Every aspect of the proceedings is covered, from the inception of the claim or defence, through the interim stages of the proceedings, to the conduct of the parties at the substantive hearing. Unreasonable conduct includes conduct that is vexatious, abusive or disruptive. When making a costs order on the ground of unreasonable conduct, the discretion of the tribunal is not fettered by any requirement to link the award causally to particular costs which have been incurred as a result of specific conduct that has been identified as unreasonable (McPherson v BNP Paribas (London Branch) [2004] EWCA Civ 569, [2004] ICR 1398; Salinas v Bear Stearns International Holdings Inc [2005] ICR 1117, EAT).*
>
> *In McPherson, Mummery LJ stated (at para 40): '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 [the receiving party] to prove that specific unreasonable conduct by [the paying party] caused particular costs to be incurred' (for the facts of this case, see para [1078] below). In a subsequent case, Mummery LJ stressed that this passage in McPherson was never intended to be interpreted as meaning either that questions of causation are to be disregarded or that tribunals must 'dissect a case in detail and compartmentalise the relevant conduct under separate headings, such as "nature" "gravity" and "effect"' (Barnsley Metropolitan Borough Council v Yerrakalva [2011] EWCA Civ 1255, [2012] IRLR 78, at para 40). In Yerrakalva his Lordship stated (at para 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 if had'.

[1065]
When considering whether costs should be awarded on the ground of unreasonable conduct, it is the conduct of a party in bringing or defending a claim, or continuing to pursue the claim or defence, that can give rise to an award, and not conduct occurring before the institution of proceedings *(see Davidson v John Calder (Publishers) Ltd and Calder Educational Trust Ltd [1985] IRLR 97, [1985] ICR 143, EAT). Prior conduct can, of course, be relevant to an assessment of whether it was reasonable to bring or defend the claim, but it cannot be treated as the act of vexatiousness or unreasonableness upon which an award of costs can be founded.*

…

(v) Refusal of an offer to settle

[1077]
Where a party makes an offer to settle a case, which is refused by the other side, costs can be awarded if the tribunal considers that the party refusing the offer has thereby acted unreasonably *(Kopel v Safeway Stores plc [2003] IRLR 753, EAT). It is important to recognise, however, that the principle applicable in matrimonial proceedings by virtue of the decision in Calderbank v Calderbank [1975] 3 All ER 333, CA—viz, that a party can protect himself against costs in a case involving a money claim by making an offer marked 'without prejudice save as to costs', with the result that a failure by the other side to beat the offer will normally mean that an award of costs will be made against that party—does not apply as such in proceedings before employment tribunals. As Mitting J pointed out in Kopel, not only must a true Calderbank offer be accompanied by a payment into court, as to which there is no provision in the tribunal procedure, but (citing Lindsay J in Monaghan v Close Thornton Solicitors EAT/3/01, [2002] All ER (D) 288 (Feb) if the Calderbank principle became widely applied, it would run counter to the whole legislative basis for awarding costs in tribunals.*

In employment tribunals, therefore, it does not follow that a failure by a party to beat a Calderbank offer will, by itself, result in an award of costs against

him. In Kopel, Mitting J stated that the tribunal 'must first conclude that the conduct of an appellant in rejecting the offer was unreasonable before the rejection becomes a relevant factor in the exercise of its discretion under [r 76(1)(a) of the 2013 Rules]' (see also Anderson v Cheltenham & Gloucester plc UKEAT/0221/13 (5 December 2013, unreported). On the facts of that case, the EAT upheld a tribunal's award of £5,000 costs against the claimant where she had failed in her unfair dismissal and sex discrimination claims, and had not only turned down a 'generous' offer to settle the case but had persisted in alleging breaches of the provisions of the Human Rights Convention prohibiting torture and slavery, which the tribunal categorised as 'frankly ludicrous' and 'seriously misconceived'. In the circumstances, the EAT held that the tribunal was entitled to find that the rejection of the offer was unreasonable conduct of the proceedings justifying the award of costs that was made.

(c) Bringing or pursuing unmeritorious cases

….Where a respondent is minded to seek an order for costs on the ground that the claim is misconceived, it is usually advisable for him to send a costs warning letter to the claimant pointing out the deficiencies in the claim and giving him the opportunity to take stock of his position and withdraw the claim before any further costs are incurred, failing which the respondents will apply for costs should they succeed at the end of the case. *This is a particularly important step to take in the case of an unrepresented claimant, as the failure to do so might result in no costs being awarded where otherwise they would have been. An example of this is Rogers v Dorothy Barley School UKEAT/0013/12 (14 March 2012, unreported), where the EAT refused to award costs against the appellant, who was unrepresented and who refused to accept that his claim was wholly misconceived, on the grounds that the respondent employers had at no stage given him a warning that they would seek costs nor given him any notice of the amount of such costs, with the result that he had no opportunity to consider his position.*

….

[1088]
A costs warning letter will not of course necessarily result in an order for costs being made even where the party giving the warning is ultimately successful in obtaining a judgment in his favour. (Tribunal's emphasis.) Whether it will do so will depend on the facts. But if a well-argued warning letter is sent, a failure by the claimant to engage properly with the points raised in it can amount to unreasonable conduct if the case proceeds to a hearing and the respondents are successful for substantially the reasons that were contained in the letter. A good example of this is Peat v Birmingham City Council UKEAT/0503/11 (10 April 2012, unreported). This case involved ten test claims for unfair dismissal following the implementation of a Single Status Agreement. Although there had been extensive collective consultation with the unions, some of the employees involved objected to the new terms on which they were re-engaged and argued that there had been a lack of individual consultation, which rendered their dismissals unfair. The claimants were legally represented and supported by their unions. The costs warning

letter, which was sent a month before the hearing, pointed out that the claims were destined to fail because of the extensive consultation that had taken place and the fact that any further individual consultation would be pointless, and alluded to the fact that other unions had withdrawn funding for their members in respect of the same litigation. When the claims were dismissed following the hearing, the tribunal awarded costs against the claimants. The orders were approved by the EAT on the grounds that the claimants' solicitors acted unreasonably in failing to address their minds to the nature and extent of the collective consultation and that if they had done so, they would have been likely to have appreciated that the prospect of success 'was so thin, that it was not worth going on with the hearing' (para 28, per Supperstone J). This failure was held to be unreasonable conduct under what is now r 76(1)(a) of the 2013 Rules, which meant that it was unnecessary for the respondents to go on to satisfy the tribunal that the arguments based on individual consultation had no reasonable prospect of success (see para 29)."

11. In **Haydar v Pennine Acute NHS Trust UKEAT/0141/17,** Simler J, as she then was, set out the approach to be adopted by the tribunal in deciding whether to exercise its discretion in respect of costs:

> *"25.The words of the Rules are clear and require no gloss as the Court of Appeal has emphasised. They make clear (as is common ground) that there is, in effect, a three-stage process to awarding costs. The first stage - stage one - is to ask whether the trigger for making a costs order has been established either because a party or his representative has behaved unreasonably, abusively, disruptively or vexatiously in bringing or conducting the proceedings or part of them, or because the claim had no reasonable prospects of success. The trigger, if it is satisfied, is a necessary but not sufficient condition for an award of costs. Simply because the costs jurisdiction is engaged, does not mean that costs will automatically follow. This is because, at the second stage - stage two - the tribunal must consider whether to exercise its discretion to make an award of costs. The discretion is broad and unfettered. The third stage - stage three - only arises if the tribunal decides to exercise its discretion to make an award of costs, and involves assessing the amount of costs to be ordered in accordance with Rule 78"*

THE SUBMISSIONS OF THE PARTIES

12. **The claimant's representative:**

12.1 The claimant's representative relied on her written submission, and having reviewed that submission emphasised two particular points as the basis for the application, namely:

a. the respondent's failure to engage in any sensible settlement discussion; and
b. the decision by the respondent to continue to defend the claim following receipt of the report of Dr Eakin and the claimant's proposed submissions on 7 January 2020.

12.2 The claimant's representative referred the tribunal to intraparty correspondence marked "without prejudice save as to costs" and in particular to an email dated 10 October 2019 at 21:47 sent by the claimant's representative in advance of the scheduled hearing dates (15 to 18 October 2019). (This email was in response to an email from the respondent representative sent on 10 October 2019 at 17:03 which set out the following offer:

> *"Offer: Claimant withdraws claim in its entirety and the respondent does not pursue your client for costs. Please note this offer is the only offer that the respondent will be making.")*

The claimant's representative's email of 10 October 2019 21:47 stated:

> *"**Without prejudice save as to costs***
> *Thank you for your email. We have now received instructions from our client. He has refused the offer.*
> *At this stage in the proceedings, there would really need to be a financial offer before we would seriously consider settlement. We would point out the following;*
>
> 1. *This is a straightforward unfair dismissal case. We have confirmed several times that we are not pursuing religious discrimination claims and that references to the grievance process was by way of background only.*
> 2. *I am of the view that the case can be done in 3 days. The key witnesses from our perspective are Pauline Bradley, Charles McGonagle and Susan Hammond. We will be notifying the Judge of this on Monday.*
> 3. *The total loss in this case is in or around £8,500. The legal costs of running it are disproportionate. Despite this, you are unwilling to enter into sensible negotiations.*
> 4. *Our client is a private payer.*
> 5. *We believe we have a reasonable prospect of successful (sic) due to the following reasons:*
>   - *The claimant did not remove the lamb from the premises and therefore is not guilty of theft*
>   - *It is unclear what specific legislation the claimant is alleged to have breached*
>   - *The claimant's line manager was involved in the lamb incident and did not stop the claimant from doing what he did*
>   - *Prior to the lamb incident, the claimant had a clean disciplinary record*
>   - *The lamb did not enter the food chain*
>   - *No other meat was contaminated as a result of the claimant's actions.*
>   - *The company did not suffer any loss or damage.*
>   - *The claimant's actions are not uncommon on farms in Northern Ireland*

Please note that if the case does run for five days and our client a successful, we will be making a costs application against your client and we reserve the right to use this correspondence in respect of same."

12.3 The claimant's representative referred to an email dated 4 November 2019 at page 12 of the bundle which informed the respondent's representative of the cost of Dr Eakin's report and stated *"in the event that our client has to proceed with the claim and if successful, we shall be seeking to recover the costs of same from the respondent. Use of this correspondence shall be made if required."* In the claimant's representative's submission, she stated that at the time this correspondence was sent (4 November 2019) the respondent's evidence had been given in full and the parties were aware of the points that could be made.

12.4 The claimant's representative referred the tribunal to an email dated 7 January 2020 at page 13 of the bundle which stated

> *"…Given the circumstances in which we find ourselves in, we again ask you to consider the prospect of settlement of this matter. Indeed, on the basis of the evidence given by your clients, we are of the view that we will be successful in our claim for unfair dismissal. In this regard, please find attached written submission which details the points we will make in relation to your evidence.*
>
> *… Please note that if this case is not settled and we ultimately win this case, we intend to make an application for costs against your client.*
>
> *As a result, we again urge you to give serious consideration to settling this matter."* (The tribunal notes that the written submission referred to was not included in the bundle for this hearing.)

12.5 By way of comment on the respondent's representative's written submission, the claimant's representative submitted that whilst the claimant accepted that costs are the exception, not the rule, this case met the relevant test set out in ***Power v Panasonic (UK) Ltd UKEAT/0439/04.*** This test is *"has the paying party acted unreasonably".* If answered in the affirmative, the tribunal must ask itself whether to exercise its discretion in favour of awarding costs against that party.

12.6 The claimant's representative submitted that the respondent's behaviour crossed the threshold of unreasonableness because (i) the respondent failed to engage in settlement discussions and (ii) the respondent continued to defend the case even after it received Dr Eakin's report and the claimant's representative's draft final submissions, which put the respondent on notice of the claimant's particular difficulties as well as the weaknesses in the respondent's case.

12.7 The claimant's representative submitted that the tribunal's discretion to make an award of costs was broad and unfettered and that this was a case where

that discretion should be exercised on grounds of proportionality, namely that the respondent's representatives knew how much running the case would cost and should have seriously considered settlement from the outset. This was particularly so as the claimant was funding the case himself whereas the respondent had significant resources and was using this inequality to keep pressure on the claimant to withdraw his claim.

12.8 In respect of assessing the amount of costs, the claimant's representative submitted that the costs sought were fair and conservative and supported by appropriate vouching documentation.

13. **The respondent's representative:**

13.1 The respondent's representative had lodged a written submission, replying to the claimant's written submission. Following the reliance by the claimant's representative, in particular, on (i) failing to settle and (ii) continuing to defend the claim, he focused his oral submissions on those matters.

13.2 The respondent's representative referred the tribunal to its particular findings in respect of the case as set out in its judgement and, for ease of reference, below:

(i) *"The tribunal acknowledges that the claimant's conduct was more than trivial misconduct. The tribunal notes that although the process for the disposal of fallen animals was not written, the claimant was familiar with it and had followed it throughout his time with the respondent. The tribunal notes from the evidence of Ms Bradley that the actions of the claimant occurred in the context of the respondent's imminent launch of its food business at the Antrim Show. Disregarding the fact that the lamb had not been home slaughtered as a live animal, but was fallen stock, if it had been eaten by anyone other than the owner's family, this would have been unlawful and in breach of the regulatory requirements governing the farm." - Para 16.4*

(ii) *"… the tribunal finds that last (sic) [whilst] the claimant's actions were misconduct, they did not amount to gross misconduct, as they were not wilful disobedience or a deliberate flouting of the essential contractual conditions…" – Para 14.5.1*

(iii) *" ... The tribunal finds that when noted as a whole the investigation carried out by Ms Bradley was a reasonable investigation per Sainsbury's Supermarkets Limited V Hitt…" – Para 14.7(vii)*

(iv) *"The tribunal finds that the disciplinary process which the claimant was subject to, ending in his dismissal, complied with the minimum requirements set out in statutory disciplinary and dismissal procedures." - Para 14.6.6*

13.3 In the respondent's representative's submission, there was nothing exceptional about this case, either at the outset or during the course of the hearing. In his submission, the consideration of stage 2 of the test set out in

Haydar would be significant. He referred to the fact that the respondent had to investigate and defend serious allegations of religious discrimination which subsisted for almost a year, before their withdrawal in the mouth of the hearing. He referred the tribunal to the discussion at hearing as to whether the claimant's witness statement ought to have been further edited, pointing to the need for additional witnesses to be called by the respondent to answer allegations which were not withdrawn. He also referred the tribunal to paragraph 9.6 of its judgement which recorded further narrowing of the issues during the reconvened hearing. He did not agree that the claimant had properly narrowed the issues in advance of the hearing.

13.4 The respondent's representative further submitted that the additional hearing time which had been required in light of the adjustments for the claimant's difficulties were not the responsibility of the respondent, who had no inkling in advance of the hearing of these matters. In his submission, the respondent was required to absorb the time and expense of two additional days of hearing and the considerable additional effort needed to prepare for this hearing in light of the adjustments which had been put in place.

13.5 In his submission, these were matters which, taken in the round, ought to dissuade the tribunal from exercising its discretion in respect of costs.

13.6 In respect of the argument around proportionality/commerciality, the respondent's representative made the following submissions:

a. the respondent did not start the case, but felt obliged to defend itself in respect of a dismissal, where an investigation had been carried out, senior individuals and the organisation had taken the relevant decisions and where this was supported by considerable documentation. In his submission, the respondent was brought unwillingly to the litigation and was entitled to defend itself;

b. commerciality cuts both ways and that the respondent has a broad commercial interest in fending off claims by resisting claims which are considered unjustified; and

c. in this case the respondent was entitled to take the view that it had done all it could in respect of the investigation, the disciplinary hearing and the appeal and was therefore entitled to defend the claim brought by the claimant.

13.7 The respondent's representative submitted he was bewildered by the suggestion that the claimant's difficulties ought to have altered the respondent's position in respect of the defence of the claim and have caused the respondent to have "thrown in the towel". In his submission the respondent reacted in an appropriate way, in particular, the respondent did not object to the adjournment and cooperated with the "stringent requirements" of the reasonable adjustments put in place to secure the claimant's effective participation.

13.8 The respondent's representative submitted that the tribunal had not adopted the submissions of the claimant and in particular had found that there was no breach of the statutory procedures. He referred the tribunal to its judgement at pages 45 to 47, noting that the submissions on behalf of the claimant referred to at that section were almost unanimously not upheld by the tribunal.

13.9 In the respondent's representative submission, the respondent considered, but was found to be wrong following a detailed analysis of all of the evidence before the tribunal, that the dismissal was fair and that there was nothing exceptional, nor inherently unreasonable, about the claimant wishing for a settlement and the respondent wishing to defend a claim.

13.10 The respondent's representative also stated that its confidence about successfully defending the claim was based on answers given by the claimant during the initial aborted cross examination.

13.11 The respondent's representative submitted that he did not understand the relevance of the claimant's status as a private payer to the issue of costs in this jurisdiction.

DECISION AND REASONS

14. The tribunal, having carefully considered the competing submissions of the parties, declines to exercise its discretion to order costs against the respondent. This is because it is not satisfied that the conduct identified by the claimant's representative was "unreasonable" and therefore the stage 1 test in ***Haydar*** is not met.

15. The tribunal agrees with the respondent's representative's submission that there was nothing inherently unreasonable in defending the claimant's claim at a full hearing. The tribunal distinguishes ***Peat,*** given the particular complexities of and competing submissions made upon the evidence, and finds that it was not unreasonable for the respondent to continue to defend the case. This was not a case where it could be said that the respondent ought to have appreciated that the prospect of success 'was so thin, that it was not worth going on with the hearing'. The tribunal finds that given its earlier finding that the "*claimant's conduct was more than trivial misconduct*" the conduct of the respondent in continuing to resist the claim does not cross the threshold of unreasonableness. The tribunal recognises that the respondent was entitled to take a different view of the prospects of successfully defending the case, including advancing the arguments on contributory conduct, so that its continued defence of the claim was not unreasonable.

16. The tribunal does not agree there was any basis for suggesting that the respondent ought to have borne the costs of obtaining Dr Eakin's report. This report was obtained to inform the reasonable adjustments necessary to ensure the claimant's effective participation.

17. Even if the tribunal has erred in finding that stage 1 of the test in ***Haydar*** has not been met, in the particular circumstances of this case considered in the round, where the respondent also incurred additional costs arising from the hearing having

to be reconvened due to issues relating to the claimant's effective participation only coming to light during the hearing, the tribunal would have declined to order costs against the respondent.

18. The tribunal recognises that as a matter of general policy, Rule 3 requires the tribunal, wherever practicable and appropriate, to encourage the use of conciliation or other means of resolving disputes by agreement. However, conciliation and alternative dispute resolution are voluntary between the parties and both represented parties incur costs as a result of not achieving an early settlement.

19. The tribunal has sympathy for the claimant in this case where the costs of pursuing his claim have been significant compared to the value of that claim. However, that sympathy does not translate into a finding that the respondent's refusal to settle the claim was "unreasonable".

Employment Judge:

Date and place of hearing: 29 November 2021, Belfast.

This judgment was entered in the register and issued to the parties on: