EMPLOYMENT TRIBUNALS

Claimant: Mr M Storey

Respondent: BT Plc

Held at: Manchester **On:** 13 February 2024
28 February 2024 (In Chambers)

Appearances:

Claimant: Written Representations
Respondent: Mr H Sheehan, Counsel

RESERVED JUDGMENT ON COSTS AND COSTS ASSESSMENT

Employment Tribunals Rules of Procedure 2013
Rules 76 and 78

It is the Order of the Tribunal that:

1.The claimant was in breach of the orders of the Tribunal, and conducted the claims unreasonably, so as to entitle the Tribunal to make an award of costs against him, and it does so.

2.The costs payable by the claimant to the respondent are summarily assessed in the total sum of £20,000, which sum the claimant is ordered to pay the respondent.

REASONS

1.By a claim form presented on 23 October 2018 , by solicitors then acting for him, the claimant brought claims of disability discrimination against his then employer, the respondent.

2. It is a salient feature of this case that the claimant , at the time that he presented this Tribunal claim , had already issued a claim for personal injury arising from an injury that he alleged he sustained in the course of his employment on or about 8 April 2014.

3. In the response to the claims the respondent raised this issue, and sought a stay of any part of the claimant's claims which were for loss of earnings, on the grounds that there would potentially be two claims in which the same relief was being sought proceeding in two different jurisdictions. The interrelationship between the two sets

of proceedings, and the Tribunal's treatment of them in respect of any stay , will be discussed further below.

4. The claims were subsequently case managed at a number of preliminary hearings, which will also be discussed further below. After some delay, the final hearing was listed for 5 February 2024, for 7 days. That hearing date was first set by the Tribunal at a preliminary hearing on 19 April 2022 (the Orders being sent to the provided to the parties on 9 May 2022,) and, again , was confirmed in a Notice of Hearing dated 18 June 2023.

5. On 4 January 2024 the claimant applied for a stay of the proceedings, which application was rejected by the Tribunal on 11 January 2024. That application was renewed on 17 January 2024, and again was refused on 26 January 2024. Having stated in an email on 31 January 2024 that he would not be attending the hearing on 5 February 2024, at 8.33 on 5 February 2024 the claimant sent an email to the Tribunal withdrawing his claims. He did not attend the hearing, although the respondent did, at which Employment Judge Slater issued a judgment dismissing the claims upon withdrawal by the claimant . This was sent to the parties on 13 February 2024.

6. The respondent , attending the final hearing by counsel, indicated that it would make an application for costs. Employment Judge Slater accordingly listed the hearing of that application on what would have been the last day of the hearing. Whilst it was intended that she would hear it, she was not available to do so, so Employment Judge Holmes, who has some familiarity with the case having dealt with the claimant's applications in early 2024, heard it.

7. The claimant indicated that he did not intend to attend in person, or by CVP, and instead sent in written representations. The respondent attended by counsel, Mr Sheehan.

8. The Tribunal had before it, in addition to the hearing bundle prepared for the final hearing:

The respondent's Application for Costs (undated)

The respondent's Statement of Costs – dated 5 February 2024

The respondent's skeleton Argument - dated 12 February 2024

The claimant's Response to BT's Application for Costs – dated 10 February 2024

The claimant's Skeleton Argument for Hearing dated 13th February 2024 – dated 12 February 2024

A Supplemental Bundle of correspondence for this hearing

9. References in Mr Sheehan's Skeleton to the respondent's Application are in the format "**CA**….", to the final hearing bundle are in the format "**CB**….."and to the Supplemental Bundle are in the format "**AB**……." The Tribunal intends to adopt a similar approach to the claimant's documents, referring to his Response document in the format "**CR**……." and his Skeleton as "**CS**….."

10. The costs hearing was held on 13 February 2024 , the claimant not attending or participating in person, but relying upon his written representations, with the respondent appearing by counsel. Subsequently, following enquiries raised by the Employment Judge, the hearing was not concluded, but judgment was reserved to 28 February 2024, and the respondent was required to provide a further breakdown of its costs for a specific period, which it duly did on 16 February 2024. This was provided to the claimant for any further comment. His response the same day suggests that he may have been confused by the issuing of the dismissal on withdrawal judgment into thinking that the costs application had been concluded, when it had not. That was explained to him, but he has made no further comment upon the further documents provided by the respondent.

11. The Employment Judge accordingly has considered the application in Chambers, and now gives this reserved judgment.

A.The respondent's application.

12. Mr Sheehan took the Tribunal through the salient parts of the chronology, starting with the second case management hearing, which took place before Employment Judge Allen on 19 April 2022 [**CB**/58]. He records that "a considerable amount of time was spent in the preliminary hearing discussing the stay" and sets out the reasons why it was not considered appropriate to stay the claim for a further period. He considered that the overlap between the proceedings would be minimal [**CB**/61].

13. The fourth case management hearing took place before Employment Judge Leach on 9 June 2023 [**CB**/93]. This hearing was listed because of concerns that the matter was not progressing and that the claimant was not complying with directions regarding medical evidence. At that hearing, the claimant was critical of Employment Judge Leach, and suggested that the respondent was able to control judges. The Employment Judge described the claimant's conduct at the hearing as 'unacceptable' [**CB**/95]. An Unless order was made in relation to the claimant's medical evidence and impact statement [**CB**/99]. The Tribunal made directions to progress the matter to trial, including directions for disclosure and exchange of witness statements [**CB**/99-104]. The claimant's non-compliance with those directions is relied upon for the purpose of the application.

14. The Notice of Hearing for the full merits hearing was sent on 18 June 2023 [**CB**/111], although it had previously been directed by Employment Judge Allen on 19 April 2022 [**CB**/59] (at para 1). The claimant therefore had notice of the date of the full merits hearing since early 2022.

15. On 19 October 2023, the respondent wrote to the Claimant, apologising that its disclosure had been delayed due to illness. The claimant agreed that the respondent could disclose its documents one week later than directed [**AB**/7]. The respondent effected disclosure on 27 October 2023 [**AB**/9]. On the same day he also wrote to the Tribunal [**AB**/2] informing the Tribunal that his personal injury claim had been listed for trial on 8 July 2024. In this email he said "I understand that the personal injury case has to be finalised before the commencement of this case".

16. On 8 November 2023, the claimant wrote to the Tribunal asking, in summary, "[w]hat is happening with my case" [**AB**/3]. In that email he confirmed that he had "not opened the contents of DAB [sic] Beachcroft email regarding the disclosures"

and asked "is the tribunal still expecting me to submit all the disclosures for this case by the 10.11.2023?". The claimant was, at this time, aware of the directions for disclosure, and was asking if he needed to comply with them.

17. On 8 December 2023, the Tribunal not having responded to an email from the claimant on 6 December 2023, the respondent wrote to the claimant [**AB**/16]. Explaining that the claimant's Employment Tribunal and County Court claims were to run concurrently, Ms Lomas Fletcher, wrote:

"Whilst I appreciate that in the past, your Employment Tribunal claim was managed with a view to the final hearing taking place after your personal injury claim; my understanding is that now the final hearing in your Employment Tribunal claim is in fact listed to take place on 05.02.2024 – 13.02.2024 but will only decide issues about liability and not remedy (compensation) which will be heard at a later date if you succeed in your claim.

With that in mind, please send me your documents as soon as possible so that we may put together a joint hearing bundle as soon as possible (the deadline of 01.12.2023 having already passed for preparation of that bundle).

We are due to exchange witness statements on 12 January 2024 and we are working towards that date."

18. The claimant , it was submitted, understood the procedural position from at least 8 December 2023, because it was explained to him by the respondent.

19. On 4 January 2024, the claimant applied for a stay of these proceedings, because of the overlap with his claims in the County Court. In that email he wrote, "*…BT have sent in their disclosures for this case which I still have not opened, read forwarded or seen"* [**AB**/10].

20. As directed, the respondent wrote to the Tribunal setting out its position in opposition to the stay [**AB**/21]. On the same day the claimant replied with further submissions in support of his application for a stay [**AB**/19].

21. On 11 January 2024, Employment Judge Holmes directed the Tribunal to write to the claimant, dismissing the application for a stay [**AB**/38-39]. After providing his reasons, he noted that case management steps had not been complied with and said that if it was not possible for the claimant to comply with those orders then he should be clear that is what he is saying [**AB**/39]. The claimant was specifically invited to make an application to adjourn if appropriate.

22. On 17 January 2024, the claimant emailed the Tribunal [**AB**/24], attaching a letter dated 16 January 2024 renewing his application to stay the proceedings [**AB**/26]. Again, the basis of his application was the overlap between the ET claim and the civil claim, and he repeated the statement that, *"I have not viewed, forwarded, copied or read any of the defendants* [sic] *disclosures in relation to this case"*. The renewed application was accompanied by a witness statement from the claimant's mother [**AB**/29-37].

23. The Tribunal responded, again with a reply from Employment Judge Holmes, on 26 January 2024 [**AB**/53-56]. The renewed application for a stay was dismissed. Employment Judge Holmes stated :

"the Claimant should do his best to comply with the outstanding case management orders, and to the extent that he is unable to do so, he should explain to the Tribunal why he has been unable to do so, and how long he is likely to require to do so, if he has not managed to by 5 February 2024".

The Employment Judge also indicated his optimism that the claimant had been preparing his case since 11 January 2024, when the likely response to an application for a stay had been indicated.

24. On 31 January 2024, the claimant wrote to the Tribunal saying that because of the Tribunal's response to his application for a stay, "*I am therefore not attending the hearing dated 5 February 2024"* [**AB**/59-60]. Once again, the claimant repeated his statement *"I have not read, opened, forwarded, seen or printed any of the defendants* [sic] *disclosures in relation to this case"*.

25. On 1 February 2024, Employment Judge Holmes replied to the claimant's letter encouraging him to attend the hearing, even if only to renew his application orally [**AB**/66]. He warned the claimant that the claim would likely be dismissed if he did not attend.

26. On 1 February 2024, the respondent also wrote to the claimant setting out the applications that it proposed to make were the claimant not to attend the hearing, outlining an application for dismissal under r.47 , and strike out under r.37 of the rules.

27. The claimant did not attend the full merits hearing on 5 February 2024. Instead he wrote to the Tribunal at 8.33am on the morning of the hearing to withdraw the claim.

28. Mr Sheehan submitted that the claimant's conduct has been unreasonable, within the meaning of r.76(1)(a) in the following respects:

a) He did not comply with any of the Tribunal's case management orders. In particular he failed:

i) To disclose any documents relevant to the issues in the proceedings,

ii) To produce any witness statements, and

iii) To attend for the final merits hearing.

These were breaches of paragraphs 4.2, 6.1 and 7.2 of Employment Judge Leach's case management orders, and the order of Employment Judge Allen to attend the final merits hearing. In this respect , rule 76(2) is relied upon.

b) The claimant did not comply with the guidance provided by Employment Judge Holmes in correspondence on 11 January 2024, 26 January 2024 and 1 February 2024.

29. The respondent also says that the claimant's conduct as set out above was abusive and disruptive within the meaning of r.76(1)(a).

30. Further, the respondent says that the claimant's conduct has been vexatious within the meaning of r.76(1)(a). The claimant's only interest , it was submitted, was

in his concurrent claim in the County Court, and in putting the respondent to inconvenience.

The Claimant unreasonably failed to comply with any of the Tribunal's case management orders

31. The claimant never disclosed any evidence in respect of liability. Nor has the claimant produced any witness statement relevant to liability. The claimant did not attend at the full merits hearing. His conduct in each of these respects was in breach of the Tribunal's directions.

32. The claimant corresponded with the respondent regarding its disclosure on 19 October 2023 [**AB/**7] and received that disclosure on 27 October 2023 [**AB**/9]. The claimant cannot reasonably have been in any doubt that he was required to comply with his disclosure obligations because he was aware the respondent was complying with its.

33. Although the claimant wrote to the Tribunal to clarify the situation on 8 November 2023 [**AB**/3], the respondent went on to (Mr Sheehan says "had already", but that cannot be right) explain it to him on 6 December 2023 [**AB**/16].

34. The claimant applied for a stay on 4 January 2024, but that application was dismissed on 11 January 2024 [**AB**/38]. Employment Judge Holmes in that letter went so far as expressly to note that case management orders had not been complied with. There was no possibility of confusion at this stage.

35. The respondent repeatedly wrote to the claimant about the exchange of witness statements [**AB**/48, 49 & 51]. The claimant never engaged with the respondent in respect of witness evidence.

36. The claimant simply ignored the Tribunal's case management orders. That was unreasonable conduct. The respondent should not have been put to the cost of complying with those case management orders, preparing the 'joint' hearing bundle and 5 detailed witness statements, when the claimant had no intention of complying with the Tribunal's orders as they applied to him, or even attending the full merits hearing.

The Claimant failed to comply with the guidance of EJ Holmes

37. Employment Judge Holmes wrote to the claimant on 3 occasions: 11 January, 26 January and 1 February 2024. Whilst the Employment Judge communicated his decision in relation to the applications for a stay in some detail, it is accepted by the respondent that he did not formally make directions or orders. Nonetheless, he provided clear guidance to the claimant, which the claimant unreasonably failed to heed.

38. In his letter of 11 January 2024, after noting the non-compliance with the Tribunal's directions, Employment Judge Holmes wrote as follows:

"The claimant's first email of 10 January 2024 may be suggesting that the claimant has not complied, and will not be in a position to comply, with the Tribunal's orders because he has been focussing his attention on the personal injury claim. ***If that is what he is saying, he should be clear. If that is the position, his application is***

being made not on the basis that there should be any further stay, but because he is not ready for the final hearing. If he is not, he should say so, and to the extent that he may need more time, he should say how much more time he will need. Further, he will need to explain when he first realised that this would be the case, and why he made no earlier application for this postponement.

The position therefore is that the claimant's application is refused, and the hearing listed for 5 February 2024 will proceed. If the claimant wishes to pursue an application on the basis that he is not, and cannot be, ready for such a hearing, he must do so within 7 days, and provide full details of why he cannot, with suitable adjustments to the case management timetable, be ready for this hearing."

(emphasis added) [**AB**/39]

39. In the section marked in bold, Employment Judge Holmes is clearly highlighting the possibility that the claimant, if he has been unable to prepare for the full merits hearing, should apply to adjourn. He clearly sets out what such an application should contain.

40. The claimant did not apply to adjourn on that basis, or otherwise. He renewed his application for a stay on substantially the same basis.

41. The Tribunal wrote to the claimant again on 27 January 2024. After having dismissed the claimant's renewed application, he said the following about preparation for the full merits hearing, which bears quoting at length:

That leaves the question of whether there is any other reason to postpone. The claimant has suggested, but still not openly stated, that he may not be ready for the hearing to start on 5 February 2024. The suggestion is that the need for him to concentrate upon the personal injury claim, and the institution of a further appeal as recently as 4 January 2024, have hampered his ability to prepare for the Tribunal hearing. This is implied, but not openly said. ***That may be so to some extent, but the claimant has been on notice since June 2023 of the case management timetable. That was fairly relaxed, in that it allowed for the bundle to be prepared as late as 1 December 2023, with witness statements not due until 12 January 2024****. It seems that the claimant may not have complied with those dates, but* ***the Tribunal is troubled by his assertion that he has not viewed, forwarded, copied or read any of the respondent's disclosures in relation to this case. Whatever the position in relation to the appeal that matter appears to have been dealt with for now, seemingly leaving him free to continue his preparation for this hearing.*** *The Employment Judge is unaware of the claimant's current employment situation but notes that he was dismissed by the respondent in 2019. If he is not working, he should have the time necessary to prepare for the hearing. If he is working, then he needs to say so, and what availability he has outside working hours.*

It is also to be noted that he clearly has the assistance of his mother, who has been able, at short notice, to draft an 8-page witness statement in support of this application. As she is effectively his representative, why can she not take, or assist the claimant to take, any necessary steps to finalise the preparation for the hearing?

Given what is said about the claimant's witnesses, they have presumably made witness statements, or given a good indication of what their evidence

will be, so finalisation of their statements for the Tribunal claims should not be too difficult.

The Employment Judge's view therefore remains that this hearing must remain listed for 5 February 2024. ***If the claimant cannot, for good reason, be ready for that day, the Tribunal may consider delaying the start of the hearing to enable him to catch up with any outstanding matters.*** *That may, it is appreciated, have the result of the case going part - heard, but that would be preferable to the Tribunal postponing completely.*

Finally, it is noted, and regretted that the claimant's attempts to communicate with the Tribunal were met with a lack of response, but, ***in the absence of any positive response the claimant should have assumed that the hearing would go ahead and have continued to prepare as best he could. Hopefully he has been doing so since the Tribunal indicated on 11 January 2024, now 14 days ago, what its response to his application was likely to be.***

The hearing will remain listed, and ***any further application should be made to the Panel on the first day of the hearing. The claimant should do his best to comply with the outstanding case management orders****, and to the extent that he is unable to do so, he should explain to the Tribunal why he has been unable to do so, and how long he is likely to require to do so, if he has not managed to by 5 February 2024.*

(emphasis added [**AB**/55-56])

42. The following, the respondent submits, arises from Employment Judge Holmes' letter:

a) He correctly noted that the claimant had been on notice of the relaxed case management timetable for some time. There had been no pressure on him to prepare his claim at short notice.

b) The claimant's witnesses have previously provided witness statements, which he has relied upon in these proceedings as annexed to his impact statement [**CB**/190-202]. The respondent repeats Employment Judge Holmes' observation that finalisation of their statements should not have been too great a task.

c) Employment Judge Holmes had expressly raised the option of the hearing beginning and discussing what adjustments to the timetable would be needed to allow the claimant to prepare, even if that would involve the hearing going part heard.

d) The claimant was told in express terms:

i) That he should have prepared as though the hearing would proceed since 11 January 2024,

ii) That he should now prepare as best he can, and that

iii) Further applications should be made at the full merits hearing.

43. On 31 January 2024, the claimant wrote to the Tribunal, unilaterally announcing that "I am therefore not attending the hearing dated 5 February 2024" [**AB**/59]. He did not make an application to adjourn. He did not propose to make any application on the first day of the full merits hearing. He did not, at that stage, withdraw his claim.

44. On 1 February 2024, Employment Judge Holmes replied to the claimant in the following terms:

"It is noted that the claimant has said he does not intend to appear at the final hearing listed for 5 February 2024, having failed to obtain a postponement or stay of the claims pending the hearing of his personal injury claim. Whilst this is a matter for him, ***the Employment Judge would strongly advise against such a course.*** *Non - attendance is likely to lead to the claim being dismissed under rule 47,* ***and there may be other consequences. It is regrettable that the claimant even now has not opened any of the evidence and documents sent to him for the hearing, and he seems set upon refusing to even attempt to be in a position to start the hearing, even after a delay to enable him to "catch – up" with the necessary preparation.*** *It is noted that the claimant works full time, and may have good reason why he is not ready for the hearing. The decision taken thus far has been that the existence of the other personal injury claim, which is still to be heard, is not a good enough reason to postpone the hearing in the circumstances.* ***The claimant, however, is still entitled to seek a postponement on the grounds that he is not ready for the hearing.***

He is urged therefore at least to attend to renew his application before the Tribunal listed to hear the claims."

(emphasis added, [**AB**/66])

45. The respondent submits that following arises from this further correspondence:

a) The claimant was strongly advised against simply not attending the full merits hearing.

b) He was warned that there may be 'other consequences' in addition to dismissal. It is submitted that Employment Judge Holmes was warning the claimant of the possibility of an order for costs. The claimant was already aware of the power of the Tribunal to make such an order, and the circumstances in which such an order will be made. This had been addressed in the hearing before Employment Judge Allen [**CB**/58] (see paragraph 33 at [**CB**/63]).

c) Employment Judge Holmes rightly identified that the claimant was "set upon refusing to even attempt to be in a position to start the hearing".

d) Once again, the possibility was raised of the claimant being permitted to 'catch-up' during the full merits hearing.

e) The possibility of applying to postpone was, again, raised to the claimant.

f) The claimant was expressly urged to attend at least to renew his application to stay the claim.

46. The respondent followed the Tribunal's email with a letter dated 1 February 2024 which set out, in detail, the applications for dismissal and/or strike out that the Respondent would make if the claimant did not attend for the first day of the full merits hearing.

47. In his correspondence, Employment Judge Holmes told the claimant exactly what he should do:

a) Firstly, he told the claimant that if he had been unable to prepare then he should apply to postpone and gave clear guidance about what such an application should involve.

b) Secondly, he told the claimant that he should do his best to prepare for the hearing in the time available before it began.

c) Thirdly, he told the claimant that he should attend, either to apply to postpone or to apply to renew his application for a stay orally and that he should not fail to attend for the full merits hearing.

48. Further, Employment Judge Holmes went over and above by expressly raising the possibility that the hearing may go part-heard or that the claimant may be permitted to prepare during the course of the full merits hearing. Both of which are unusual indulgences to be offered to a litigant.

49. The claimant acted unreasonably by ignoring the guidance of Employment Judge Holmes and acting against it.

The Claimant unreasonably withdrew the claim as late as possible without attending the full merits hearing

50. The claimant's withdrawal letter is dated 3 February 2024, which was the Saturday before the hearing was due to start, but it was sent by email dated 5 February at 8.33am. It was sent at the 59th minute of the 11th hour, as late as possible before the full merits hearing began.

51. The effect of withdrawing the claim so late was the respondent had already incurred all of the costs of preparing for trial:

a) The bundle was prepared, including the 5 copies that had been sent to the Tribunal,

b) The witness statements had been prepared for all 5 of the respondent's witnesses,

c) Counsel's full brief fee had been incurred, with no possibility of any reduction, and

d) The respondent's legal representatives and witnesses had travelled to Manchester to attend the hearing.

52. The withdrawal, the respondent submits, indicates that the claimant had no real intention of pursuing his claim in the Employment Tribunal. Even if the claimant could not possibly be prepared in time, Employment Judge Holmes had offered the alternative possibilities of seeking an adjournment or preparing during the listing

window even if that meant going part heard. The claimant appears to have given no thought to these options.

53. The claimant knew that his Tribunal claim would not be stayed on 11 January 2024, and this was only reiterated on 26 January 2024. If he had withdrawn his claim after either of Employment Judge Holmes' letters rejecting his application, then there would have been a substantial saving in the costs of preparing for trial.

54. The claimant indicated his intention not to attend the hearing on 31 January 2024. At this time, it was plain that he had no intention of continuing with his claim. On 1 February 2024, the respondent confirmed that it would seek dismissal and/or strike out, and Employment Judge Holmes informed the claimant that dismissal would be the likely outcome. The claimant still waited another 5 days before withdrawing his claim.

55. The claimant's letter declaring that he would not attend the hearing was, it was submitted, in any event, nothing more than a petulant attempt to force the Tribunal to stay the claim by reason of his absence. At that stage he was no longer genuinely engaging with these proceedings.

56. Mr Sheehan submitted that the claimant waited until the very last minute to cause as much disruption to the respondent as possible. Even going so far as to write his withdrawal letter on 3 February, but not send it for another 2 days.

The claimant's conduct of the proceedings has been vexatious and motivated by matters other than a desire genuinely to progress his claim in the Tribunal

57. By email dated 12 December 2018, the claimant withdrew his claim for loss of earnings in the Employment Tribunal proceedings and confirmed that that claim is only pursued in the County Court [**CB**/41]]. This was discussed and confirmed before Employment Judge Leach on 9 June 2023 [**CB**/93] at paragraph 28 [**CB**/98].

58. Prior to dismissal upon withdrawal, the claimant's remedy in the Employment Tribunal proceedings was therefore likely to be limited to a ***Vento*** award for injury to feelings. This claim was issued in October 2018 and so a claim at the top of the middle band would be £25,700 and at the top of the top band would be £42,900. By contrast, the schedule of loss of earnings that the claimant has prepared for his civil claim calculates a loss of earnings of £368,559.29 [**CB**/69] which sum does not include any other head of loss. In the claimant's mind, his Civil Claim is worth more than 7 times as much as his Employment Tribunal claim could be.

59. The respondent submitted that the claimant had no interest in progressing his Employment Tribunal claim because, by comparison to his Civil Claim, it was worth very little to him. The reason that the claimant had not taken any steps to progress the Employment Tribunal proceedings was simply that he did not care about succeeding at trial.

60. Further or in the alternative, the claimant has used these proceedings as a means to inconvenience the respondent. This has been most clear from the late withdrawal of the claim.

61. Mr Sheehan also submitted that the claimant had used these Employment Tribunal proceedings as a fishing expedition to obtain documentation to assist him in

his Civil Claim. By allowing the claim to progress to this stage the claimant now has the benefit of all of the documents that were disclosed by the respondent in compliance with the Tribunal's orders.

62. The claimant's conduct of the claim has, therefore, been vexatious within the meaning of r.76(1)(a).

B.The claimant's objections.

a).The documents submitted by the claimant .

63. The claimant made his submissions in two documents. The first is his Response to BT's Application for Costs – dated 10 February 2024, and the second his Skeleton Argument for Hearing dated 13th February 2024 – dated 12 February 2024.

64. As with the respondent's application and Skeleton there is some duplication, so the Tribunal will start with the claimant's Response document.

65. The claimant is not legally represented , and not a lawyer, so the Tribunal will bear that in mind when evaluating his submissions, but it must be observed that the claimant has been very comprehensive in this representations to the Tribunal.

66. The Response document takes the form of a 21 page witness statement from the claimant signed and dated 10 February 2024, to which the claimant has attached some 7 Appendices. They are:

Appendix 1;

This comprises of 17 pages , and relates to the claimant's successful appeal to the Court of Appeal in his personal injury claim, in which the Court of Appeal overturned a judgment striking out the claimant's claim, and was critical of the evidence that had been adduced on behalf of the respondent (the defendant in that claim).

Appendix 2:

This comprises of 1 page, and is the claimant's letter to the Tribunal dated 31 January 2024 , and is a response to the Tribunal's letter of 26 January 2024.

Appendix 3:

This comprises of 14 pages, the first two being the claimant's letter to the Tribunal of 16 January 2024, to which was appended as Appendix 1 a witness statement from the claimant's mother and McKenzie Friend, Shirley Storey . The remainder of this Appendix (i.e to the claimant's witness statement in opposition to the costs application) is the Tribunal's letter of 11 January 2024 in which the claimant's application for a further stay was refused.

Appendix 4:

This comprises of 11 pages, the first two of which are another copy of the claimant's letter to the Tribunal of 31 January 2024, to which is appended , as the next 4 pages, a letter dated 31 January 2024 from Shirley Storey, and the last 5 pages are a copy of the Tribunal's letter of 26 January 2024.

Appendix 5:

This is a 2 page e-mail exchange between the claimant and Jane Smith of the respondent on 24 December 2017.

Appendix 6:

This is a 2 page email exchange between the claimant and Jane Smith, on 23 and 24 December 2017, which appear to pre-date the one at Appendix 5. The third page is a picture of an envelope hand delivered to the claimant.

Appendix 7:

This is a one page summary entitled “Court costs” in which the claimant sets out his outgoings and average monthly income.

67. The claimant’s Skeleton Argument document is not in the form of a witness statement, and runs to some 16 pages. That too has Appendices, 5 in total. In some instances , however, the claimant has appended a document, but has also replicated it in full in the Skeleton. Those Appendices are:

Appendix 1:

An email exchange between the claimant and Tribunal between 14 September 2023 and 19 October 2023 in which the claimant informed the Tribunal (enclosing a Notice of Trial Date) of the listing of his personal injury claim in Preston County Court on 8 July 2024 for 7 days.

Appendix 2:

This is one page of an email exchange between the Tribunal and the claimant on 8 November 2023 in which the claimant was seeking clarity on his case, and was told that the Tribunal would reply once a Judge had reviewed the file.

Appendix 3:

This is a one page email exchange between the claimant and the Tribunal on 10 and 13 November 2023.

Appendix 4:

This is a further one page of the claimant following up his email to the Tribunal of 13 November 2023 (Appendix 5) on 6 December 2023.

Appendix 5:

This comprises of two parts. The first, in two pages, is the continuation of the claimant’s email exchanges with the Tribunal from 6 December 2023 to 14 December 2023. The second, some 7 pages, are copies of Bills and breakdowns of legal costs incurred by and paid by the claimant in connection with his personal injury claim.

b).The claimant’s submissions.

68. Summarising the claimant's submissions, his arguments were as follows (the sources being identified by reference to **CR/CS**).

69. Some matters are uncontroversial. The first is that the claimant is representing himself. Whilst he started these claims with solicitors, he has for some time, and certainly during 2023, been acting in person, albeit, as it turns out , with some assistance from his mother, who he describes as his McKenzie Friend. She, however, is elderly, and the claimant is her carer, as she has disabilities. The claimant , and indeed, his mother, have made it quite clear that the amount of assistance and support she has been able to provide has been very limited, which s no criticism, but an acknowledgement that the claimant has been, largely, "on his own".

70. Secondly ,the claimant does indeed have an ongoing personal injury claim, which he had commenced before he started these proceedings. Again, whilst he has been represented previously, he has latterly been acting in person, and certainly was when he successfully appealed to the Court of Appeal in 2022.

71. Thirdly, whilst it was expected that the personal injury claim would be heard in 2020, the striking out of the claim, and the claimant's appeal against that judgment to the Court of Appeal, have delayed it. The Court of Appeal judgment was on or about 5 May 2022.

i) The claimant believed that the Personal Injury claim would be heard before the Tribunal proceedings.

72. This is a central theme of the claimant's case, and was the basis for his application for a stay. He considers that there is an overlap between the two cases. He sets out his case in :

CR: para. 23 , para. 41 , para. 48, para. 77, para. 84 and para. 96.

CS: paras. 6 to 10 , para. 36 , para. 39, para. 44, para. 47 , para. 52

73. In these paragraphs the claimant variously says that says that he was "always under the impression," "always understood", "always assumed" that the Tribunal claim was due to be heard after the personal injury claim, and that it was absolutely clear that a direction was given by Employment Judge Sharkett on 28 July 2021 that this case would be heard after the personal injury claim. He says that this was "addressed and determined by EJ Sharkett".

ii) The claimant , having been notified of the trial date for the personal injury claim, notified the Tribunal and sought guidance upon the effect upon his Tribunal claim.

74. The claimant sets out in both documents and the Appendices, this chronology:

19 October 2023 – the claimant emails the Tribunal to inform it that his PI claim has been listed for 7 days on 8 July 2024 saying that he understood that the personal injury claim has to be finalised before the commencement of the Tribunal case.

8 November 2023 – not having had a response, the claimant emails the Tribunal again, (this time copying in the respondent, which he had not done in his previous

email) , repeating that the Tribunal hearing is due to be heard after the personal injury claim, explaining the position and how he was being pressed for disclosure by the respondent, asking what is happening with the case, and whether the hearing date was going to be changed.

8 November 2023 – the Tribunal replied to the claimant saying that the Tribunal would reply once a Judge had reviewed the file.

10 November 2023 – the claimant sent a further email to the Tribunal enclosing correspondence about disclosure from the respondent's solicitor, stating that he had not opened , and did not intend to , any of the documents sent to him by the respondent. He asked for a response to the email he had sent on 8 November 2023.

13 November 2023 – the claimant sent a further email to the Tribunal (with 20 attachments) copied to the respondent, referring back to his email of 19 October 2023, an asking for a response as to the "next steps".

6 December 2023 – having had no response the claimant sent a further email to the Tribunal on 6 December 2023, in which he referred to his previous email, and asked for "a prompt response".

14 December 2023 – the Tribunal responds to the claimant , confirming that the claimant's email of 13 November 2023 had been passed to an Employment Judge for consideration, but due to a significant backlog of work a response had not been received. An update was promised as soon as possible.

4 January 2024 – the claimant emails the Tribunal seeking a stay of the proceedings pending the trial of his personal injury claim.

75. The claimant's main argument in opposition to the respondent's application is that the did not act unreasonably (still less vexatiously) in that he was acting reasonably in the light of his belief that the Tribunal claims would not be heard before the personal injury claim. He cites the basis for the belief as being the preliminary hearing before Employment Judge Sharkett on 28 July 2021 , and the subsequent history of the matter before the Tribunal. He relies heavily upon having notified the Tribunal of the hearing date for the personal injury claim.

76. He also has provided the Tribunal will some information as to his ability to pay any award of costs, to which the Tribunal will return in due course.

77. Finally, the claimant has made a number of references to his status as a litigant in person, which is a valid point, and to the fact that he is a person with a disability. That disability is tinnitus, but the claimant has given no explanation of how this condition has impacted , if it has, upon either his ability to comply with the Tribunal's orders, or upon his conduct of the proceedings in general.

C.The respondent's response.

78. Mr Sheehan for the respondent responded to the claimant's submissions in his Skeleton. In relation to the claimant's ability to pay, he pointed out that the claimant had provided only scant details of his means, with no supporting documents. He also drew the Tribunal's attention to the fact that the claimant had been legally

represented in the personal injury proceedings, but has not explained how he was able to fund this.

Discussion and findings.

a).The Tribunal's power to award costs : the relevant rules

79. Costs are the exception in the Employment Tribunal. The rules provide as follows:

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; or*
>
> *(b) any claim or response had no reasonable prospect of success; [or*
>
> *(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.]*

(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.

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.

b.) Should a costs order be made?

80. The first issue is whether the respondent has shown that the claimant had behaved in a manner that triggers the entitlement of the Tribunal under rule 76 to consider making an award of costs. There are several bases put forward for making an award of costs, and they will be considered separately.

i). Breach of Tribunal orders – rule 76(2).

81. This is quite straightforward. The claimant has breached the Tribunal's orders. He was ordered (at the fourth preliminary hearing on 9 June 2023, sent to the parties on 18 June 2023) to :

Disclose documents by 20 October 2023

Agree a bundle by 10 November 2023

Exchange witness statements by 12 January 2024

There was, it is true , some slippage in respect of the first two, but the respondent did disclose its documents, and sought disclosure from the claimant , which he did not provide. Further, he did not exchange witness statements by 12 January 2024, or at all.

82. Whatever the claimant's belief, by 4 January 2024 he knew that the hearing remained listed, and was likely to remain so. He did not seek any extension of time to comply with the Tribunal's orders, and he did not comply with them. Whilst the respondent has, in the application referred to the claimant "unreasonably" failing to comply with the Tribunal's orders, that word does not appear in rule 76(2). A party either complies with the Tribunal's orders or does not, and one who does not is liable to face an award of costs. The claimant has not really addressed this ground in his written representations. He does not dispute that he was in breach of the Tribunal's orders. To the extent that he has sought to explain or excuse this , he appears to rely upon his fundamental premise that he was under the impression that the personal injury claim would be heard first. That will be examined further below, but this ground for awarding costs is clearly made out.

83. The Tribunal would add this. Whilst the claimant has suggested that his involvement in the submission of an appeal in his personal injury claim, where he says he had a deadline of 4 January 2024 to submit something, has prevented or impeded him from complying with the Tribunal's orders, he has not previously , in terms, said that he was unable to comply with them. Such an assertion is significantly absent from his email communications to the Tribunal and the respondent between October 2023 and January 2024. Indeed, whilst asking for a "prompt" response, these emails lack any sense of urgency, and the claimant does not suggest in them for one moment that, if the Tribunal hearing is not put back to await the trial of his personal injury claim , he will be at risk of not being able to comply with the Tribunal's orders. Whilst stating that he would not open the respondent's disclosure , he made no comment at all as to whether and when he would be able to provide his own disclosure, or take any other steps to comply with the Tribunal's orders. In short, the claimant , the Tribunal is quite satisfied, put all his eggs in the "personal injury claim to be heard first" basket, and said nothing about any alleged problems he would have in complying with the Tribunal's orders if the application for a stay was refused.

84. That the claimant still has not clearly stated that he could not have (albeit perhaps late) complied with the Tribunal's orders is evident from para.63 of his Skeleton Argument, where he says:

"It has always been my intention to see my disability case out to conclusion, however to continue on the pathway that has been described, potentially placing both my cases at risk, my decision to withdraw at a very late stage was predominantly an internal struggle of my own as I was resistant to wanting to give this case up, but due to a time factor, a decision had to me (sic) *made which fundamentally in the end I was forced to make because I could not let go of this but I could also not give the best of myself in terms of preparing or attending court under these circumstances."*

85. It will be seen that the claimant says that he withdrew because he "could not give the best" of himself. That is way short of saying he could not comply with the Tribunal's orders. The Tribunal also fails to understand (and the claimant has not

made himself available to explain) how continuing on the "pathway" he refers to would potentially place both cases at risk.

ii)Unreasonable conduct of the proceedings – rule 76(1)(a).

86. The respondent relies upon a number of matters in support of this ground. The first is that the claimant's breach of the Tribunal's orders was more than a technical breach, it was in itself unreasonable conduct. The Tribunal agrees, for the reasons given above.

87. That is not the only ground relied upon. The respondent relies also upon the late withdrawal, and the claimant's failure to follow the guidance from the Tribunal as to the steps that he should take in the event (as was likely, and in fact occurred) that his application for a stay was unsuccessful. As to the first of these, the late withdrawal, it may seem odd that a Tribunal can be invited to hold that withdrawal, usually a sensible and appropriate step for a clamant to take, which should generally be encouraged , was nonetheless unreasonable. That is so, but it is not the fact of the withdrawal that is alleged to be unreasonable, it is its timing. Here the claimant left it as late as possible, communicating his withdrawal only at 08.33 on the morning that the hearing was due to start, 5 February 2024. As is observed, whilst is email was sent to the Tribunal and the respondent at that time on that date, the attached letter was actually dated 3 February 2024, i.e the Saturday before that Monday. Whilst that would not be a normal working day, the respondent points out that having made that decision the claimant could have sought to communicate it as soon as possible, and alert the respondent to the fact he was withdrawing his claims, so as to potentially save some time and cost in witnesses travelling to the hearing unnecessarily.

88. The claimant's Response and Skeleton do not really address this issue at all. It is to be noted that having been written to by the Tribunal on 26 January 2024 [**AB**/53 – 56] , and encouraged to attend the hearing, and make any application he then needed to if unable to comply with the Tribunal's orders, on 31 January 2024 the claimant wrote back [**AB**/59 - 60] saying he was not attending the hearing on 5 February 2024. That was followed almost immediately by a response from the Tribunal on 1 February 2024 [**AB**/66] encouraging the claimant to attend and warning of the possible consequences if he did not.

89. The claimant does not, anywhere in his representations, explain when he decided not only not to attend the hearing, but also to withdraw his claims. He does not explain, other than in para. 63 cited above why he did so, or precisely when he made that decision. The Tribunal considers that it is a decision that he made, or ought to have made by 1 February 2024 at the latest. Had he withdrawn then, some 4 days before the hearing, much time and cost could have been avoided. The Tribunal is quite satisfied that the claimant's late withdrawal was unreasonable conduct on the part of the claimant.

90. As to the other aspects relied upon by the respondent , the Tribunal considers that they do not add much. They are merely facets and consequences of the unreasonable stance that the claimant took in relation to complying with the Tribunal's orders, and relying upon the Tribunal staying the Tribunal claim pending trial of the personal injury claim, when no such stay was in place, and the Tribunal hearing had been listed for many months. At the time that Employment Judge Leach held the last preliminary hearing on 9 June 2023, it was known that the claimant's

appeal had succeeded in May 2022, and that the personal injury claim was going to proceed. What was not known was when it would be heard, but given that the Tribunal hearing was listed only some 8 months after that preliminary hearing, the likelihood was that it would not be heard before the Tribunal hearing.

91. The previous stay, and its removal were expressly discussed in that hearing. No application was made by the claimant for a further stay.

92. The Tribunal is quite satisfied that the claimant , who understandably considers his far more valuable personal injury claim is more important than these Tribunal proceedings, and has always wanted that claim heard first, took a conscious decision not to engage any further with the Tribunal process, expecting the Tribunal to accede to his application for a further stay.

93. The Tribunal accepts that between October 2023 and 4 January 2024 the claimant was asking the Tribunal what the position was, without an answer. It has to be acknowledged that the Tribunal has not served the parties well. It should not have taken from 19 October 2023 to 4 January 2024 for the Tribunal to ensure that an Employment Judge responded to the claimant's emails about his claim. That said, the claimant did not help himself by using (anywhere in the emails, but particularly in the "subject matter" box) the word "Urgent", nor did he refer to the hearing date in that box which might have had the effect of the Tribunal administration treating the claimant's enquiry as urgent. That, however, does not amount to unreasonable conduct, it is merely unfortunate. It is, however, somewhat indicative of the claimant taking a low key approach to this issue, giving no hint of having any difficulties in preparing for the listed Tribunal hearing, or needing a postponement. Whilst that was unfortunate, by its letter of 6 December 2023 [**AB**/16] the respondent explained the position, and , more importantly, by the Tribunal's letter of 4 January 2024, so did the Tribunal. The letter itself does not appear in the bundle, but the email from the Tribunal to which it was attached at 14.05 on 4 January 2024 is , at [**AB**/16].

94. This letter has not been referred to by the claimant in his representations. It was sent to the respondent, inviting its comments upon the claimant's application, but also to the claimant . It contained the following , addressed specifically to the claimant :

"The claimant must not assume that the Employment Tribunal proceedings will be stayed (until or unless a further stay is granted). He should take any outstanding steps required to ensure that the Employment Tribunal claim is prepared and ready for hearing on the dates currently listed (until a stay is granted, if one is to be granted)."

95. The claimant did not respond to this email by indicating (to either the Tribunal or the respondent) that he would be unable to prepare for the Tribunal hearing which was still some 4 weeks away. Indeed, the date for exchange of witness statements , 12 January 2024, had not passed. The claimant gave no indication whatsoever of any difficulties he may have in preparing for the Tribunal hearing if his application for a stay of proceedings was unsuccessful.

96. Had the claimant , as he was encouraged to by the Tribunal, made any serious attempts to prepare for the Tribunal hearing, even if he were unsuccessful in doing so completely , the Tribunal could have concluded that he was labouring under a genuine misapprehension as to the effect of the personal injury claim, which he did

not fully appreciate until 4 January 2024. That may have explained, or excused , to some extent his failure to prepare for the Tribunal hearing up until that point. There would still, however, have remained time for the claimant to attempt to put matters right.

97. The claimant has , the Employment Judge considers, sought to rely upon two different issues in opposition to the respondent's claim for costs, in terms of justifying his conduct. The first is his belief that the personal injury claim would be heard first. The second, which has only more recently been advanced, and is not clearly articulated, appears to be a suggestion that his involvement in the preparation of a further appeal in his personal injury claim. He has adduced no evidence that he was unable to prepare for the Tribunal hearing because of his involvement in the preparation of an appeal in his personal injury claim. In any event, that matter , he says , required him to take certain steps by 4 January 2024, which he did. In fact, as shown by the letter that the claimant attached to his letter to the Tribunal of 10 January 2024, which is a letter to the Civil Appeals Registry dated 2 January 2024 [page **AB/**21] , he had completed the task he needed to by 2 January 2024, not 4 January 2024. That task was to provide a core bundle of 299 pages, and a Supplementary Index of some 126 pages. Be that as it may (though it illustrates the claimant's tendency to be less than precise in what he presents to the Tribunal), whilst that would therefore potentially account for any problems up until 2 or at the latest, 4 January 2024, he had dealt with it, and still then had 4 weeks in which to at least attempt to prepare for the Tribunal hearing. He did not do so.

98. That conduct, and everything he has written since October 2023, has led the Tribunal to the inexorable conclusion that the claimant had no intention whatsoever of preparing for the Tribunal hearing if it was going to be heard before his personal injury claim. His language in his email correspondence suggests that he had made that decision. It is to be noted, for example, that in his emails he refers to the respondent having given its disclosure, but that he had not opened it, and he went on to say would not do so. At no time did he indicate that he would be unable to open , and consider , the disclosure provided by the respondent, or that he would be unable to provide his own. He merely stated that he would not do so, and raised the issue of the personal injury claim being heard first.

The interrelationship of the personal injury and Tribunal claims, and whether there was any commitment from the Tribunal that the former would be heard before the latter.

99. On that topic, the Tribunal must correct the claimant's erroneous account of the history of the stay of proceedings. The claimant's claim was presented on 18 October 2018. It appears that the claims were initially stayed , so the first preliminary hearing was held on by Employment Judge Sharkett on 28 July 2021. She noted the position, and that the claimant's personal injury is not claimed to have arisen as a result of any alleged discrimination, but his disability is alleged to have arisen from that personal injury. Causation of disability is irrelevant in disability discrimination claims, so there did not appear to be any potential overlap between the two claims in this respect. Whilst noting that the parties were to keep the Tribunal informed of the progress of the personal injury claim, she did no more that list a further preliminary hearing for 3 December 2021. Her order is, with respect, a little ambiguous as to whether she was granting any stay, but by implication she was, but not beyond the next hearing listed for 3 December 2021.

100. The next preliminary hearing did not, it seems, take place on 3 December 2021, but was held on 22 April 2022 by Employment Judge Allen. He noted as follows:

The stay

(16) A considerable amount of time was spent in the preliminary hearing discussing the stay, the personal injury proceedings, and what should happen next. The claimant was seeking that the stay continue until the personal injury proceedings have been concluded. The respondent had in the past agreed to such a stay, but its position now was that the stay should be lifted, and the Tribunal proceedings should progress.

(17) The matters which are the subject of the Tribunal claim occurred between 2014 and October 2018. It is now some time since the last of those events. Whilst it may have been sensible for the proceedings to have been stayed in the past, there was a potential issue with the delay if the Tribunal proceedings were further stayed pending the outcome of the personal injury proceedings. Whilst neither party was really in a position to know, it appeared likely that it would be at least a year before the personal injury proceedings would be heard and concluded, if the claimant's appeal were to be successful. It was also not entirely clear that the two sets of proceedings over-lapped (to an extent which meant that the Tribunal claims had to be stayed). The personal injury claim was about the cause of the injuries; the disability discrimination claim was about what the respondent should (or should not) have done following the impairments occurring. The two areas of potential overlap were: if the respondent continued to not accept that the impairments were disabilities; and remedy for losses.

(19) Certain preliminary issues were also identified as recorded above. A hearing to determine those preliminary issues was also arranged, for February 2023. That was felt to allow some time for the outcome of the appeal in the personal injury claim to be provided, and for the parties to be better aware of the next steps in those proceedings if the personal injury proceedings are going ahead.

(20) The parties are able to apply for the hearings listed to be postponed if either of them needs to do so because of the personal injury claim and the dates when hearings are listed (if the appeal is successful). Any such application should be copied to the other party and it may be considered based upon what is written, or a further short preliminary hearing may need to be arranged (if the parties don't agree). However, the dates for steps to be undertaken and the date for the next preliminary hearing have deliberately been arranged to provide time for the personal injury matters to progress.

101. It was at that hearing that the claims were listed for a final hearing in February 2024. It is clear that no stay was imposed by the Tribunal. Whilst the listing of the Tribunal claims was far enough ahead for the possibility of the personal injury claim being heard first, there was no order made by the Tribunal that it would be, and it was expressly provided that either party would have to apply for a postponement in the event that the listing of the personal injury claim created any difficulties.

102. A further preliminary hearing was held before Employment Judge Cookson on 16 February 2023. She was to have determined the issue of disability, but , for

various reasons, could not do so, and re-listed a further preliminary hearing for that purpose. Whilst extensive reference was made to the personal injury claim, no application for a stay of these proceedings was made, and the final hearing date remained set for February 2024.

103. A yet further preliminary hearing was held on 9 June 2023 before Employment Judge Leach. Disability remained an outstanding issue, and the purpose of the hearing was to move that issue on, and advance the claims generally, particularly in regard to finalising a List of Issues.

104. In relation to the history of the claims, and the previous stay , he noted this:

(9) This claim was issued as long ago as November 2018. It was stayed for a long period of time, pending an expected outcome to the civil proceedings. That was reviewed in July 2021, the Tribunal becoming concerned about the length of the stay. Both parties expressed reservations at that time about the stay being lifted. It therefore continued.

(10) The case came up for review again in April 2022. A decision was made at that stage to lift the stay. Further complications appeared to have arisen in the civil proceedings leading to expected further delay or possibly a dismissal of those proceedings. On a closer review of the issues it was also apparent that the crossover between the issues in the 2 sets of proceedings was limited.

(11) At a preliminary hearing in April 2022, the case was listed for a final hearing in February 2024. That was the nature of delays in the Employment Tribunals at that time and it was expected that the civil proceedings would have ended in good time before then.

105. It was later noted that the Tribunal hearing would deal with liability only. As any potential overlap between the two sets of proceedings could only conceivably have related to remedy, that would have been a further reason , had the Tribunal actually been invited to consider whether to grant a stay, (which it was not) not to do so.

106. Nothing more then was said in this hearing about a stay, and the claimant did not raise the issue of what would happen if his personal injury claim had not been heard before his Tribunal hearing. At no stage, therefore did the Tribunal gave the claimant any right to expect that his personal injury claim would be heard before the Tribunal claims. Once the stay was lifted, the most that there was was an expectation , from April 2022, that the personal injury claim would have been heard before February 2024.

107. The simple stark facts are that the Tribunal claims were listed from April 2022, for a final hearing in February 2024, and so were a certainty, whereas the personal injury claim was not listed at all, and neither party knew when it would be.

108. It is thus not accurate to say, as the claimant has continually sought to, that the Tribunal (particularly Employment Judge Sharkett who did no more that adjourn the issue of a stay to another hearing) had agreed that the Tribunal hearing would not be held before the trial of his personal injury claim.

109. The Tribunal does not proceed to assess the claimant’s conduct solely upon the

reasonableness or otherwise of his belief that the Tribunal hearing would not proceed before the trial of his personal injury claim, but this is a very significant factor he relies upon in explaining or justifying his conduct . That belief was erroneous, at the very least, and was not a reasonable one. Even if it had been, the Tribunal would still have found that the claimant's conduct from 4 January 2024 at the latest, when the Tribunal's position that a stay was unlikely to be granted, was unreasonable in any event.

110. The Tribunal is thus quite satisfied that the claimant's conduct of the proceedings has been unreasonable on the grounds found above.

111. For completeness, whilst noting the respondent's submissions as to the claimant's motivation, and animosity towards the respondent, the Tribunal would not go so far as to find that the claimant acted unreasonably on the additional grounds relied upon by the respondent in his conduct of the proceedings as vexatious and motivated by matters other than a desire genuinely to progress his claim in the Tribunal. The claimant clearly does have a considerable hostility to the respondent as an organisation. As the respondent points out, the claimant has made extensive reference to the respondent's conduct of the personal injury claim in his submissions in this case. That is understandable, and whilst the defence of the personal injury claim is being conducted by other solicitors (possibly even instructed by insurers), and there may not be any actual co-ordination of the respondent's defence of the two claims, the Tribunal can understand the claimant's perception that there may be. That the respondent's conduct of the defence of the personal injury claim may well be questionable is perhaps revealed by the Court of Appeal's judgment in the claimant's favour, which overturned a decision of a Circuit Judge, and was critical of the evidence that had been put before the Court by the respondent. That does not, however, entitle the claimant in these proceedings to refuse to co-operate in the advancement of his claims, or to insist that the personal injury claim is heard first. The point here, however, is that the Tribunal has no basis for believing that the claimant brought , or has conducted, these proceedings simply to harass the respondent.

112. In conclusion, therefore , the Tribunal is quite satisfied that the grounds for the making of an award of costs against the claimant have been made out under both rules 76(1)(a) and 76(2) of the Tribunal's rules.

113. The Tribunal nonetheless has a discretion was to whether to make an award of costs, and, if so, in what sum. The claimant has, in the view of the Tribunal, advanced no cogent reasons in principle why a costs order should not be made in these circumstances, and the Tribunal's next task is to determine what costs should be awarded against the claimant.

The assessment of the amount of costs payable.

114. The first part of the Tribunal's task is to assess the costs payable in respect of the amounts that have been claimed by the respondent. This can be on a summary, and or a detailed assessment basis. If the former , the Tribunal takes broad brush approach. As observed in ***Ayoola v St Christopher's Fellowship UKEAT/0508/13/BA*** by HHJ Eady QC (para. 51) no particular procedure is laid down by the Tribunal rules for a summary assessment of costs, but the discretion as to the amount must be exercised judicially. She endorsed the view that a Schedule

of Costs was not a requirement, but in this case one has been served. This follows the practice in the civil courts under CPR 44.

115. Consequently the Tribunal has considered the amounts claimed in the Statement of Costs , as it is entitled to, to see if they are reasonable, in terms of the work done, grade of fee earner involved, and proportionate to the matters to which the Tribunal's costs award in principle relates.

116. There is, as the respondent submits, no requirement that the costs awarded should be caused by the unreasonable conduct (***McPherson v BNP Paribas (London Branch) [2004] ICR 1398***), but the Tribunal should look at the whole picture of the case and ask whether there has been unreasonable conduct and identify (1) the conduct, (2) what was unreasonable about it, and (3) what effects it had (***Barnsley MBC v Yerrakalava [2012] IRLR 82*** at [41]).

117. The respondent does not seek all of the costs of its proceedings, but only its costs from 10 November 2024 until 5 February 2024. That sum does, however, exceed £20,000. The respondent therefore seeks an order under r.78(1)(b). If the Tribunal accepts the respondent's application in full, r.78(1)(b) requires its costs to be subject to detailed assessment, either by an Employment Judge or in the County Court. If the Tribunal orders costs below the £20,000 threshold, then the amount payable may be assessed summarily at this hearing.

118. Following the hearing the Employment Judge sought a more detailed breakdown of the respondent's costs, with a view to ascertaining more clearly what costs where incurred when during the period in question. The respondent provided this information on 16 February 2024, and it was copied to the claimant . Apart from expressing some confusion (he thought that the dismissal judgment on withdrawal had concluded all matters) , the claimant has not commented upon the specific information contained in this document.

119. In assessing the costs payable, the Tribunal has considered firstly the period in respect of which costs should be awarded. The respondent seeks costs from 10 November 2023, its rationale for that date being that this was the date by which the claimant was ordered to effect disclosure.

120. Whilst noting that there does not have to be a precise causal correlation between the costs awarded and the unreasonable conduct which has given rise to the making of the order, the Tribunal does not agree that it should consider making an assessment which goes that far back. The claimant was awaiting a response from the Tribunal between 19 October 2023 and 8 December 2023, and, albeit unwisely, he was taking no steps to further the preparation for the hearing until he was told what the position was. The Tribunal does not consider that the respondent's entitlement to an award should be triggered on the first date of non – compliance with the Tribunal's orders in these circumstances. The claimant had, albeit, in a rather unsatisfactory fashion, at least sought guidance from the Tribunal as to whether the listing of his personal injury claim would affect the hearing of his Tribunal claim.

121. The respondent, however, by letter of 6 December 2023 informed him that he should continue to prepare, and the Tribunal by letter of 4 January 2024 also told him to do so. That date, 4 January 2024, is the date by which the Tribunal considers that the claimant was behaving more than unreasonably, he was behaving

recklessly. He still had time to at least attempt to prepare for the hearing, but he chose not to do so.

122. The Employment Judge considers that all of the work that the respondent did up until 4 January 2024 was work that it was required to do in any event. It was under a duty to comply with the Tribunal's orders, and prepare for the final hearing. It was, in the view of the Employment Judge , only after 4 January 2024 that the work that the respondent was then undertaking was pointless, as the claimant was not going to proceed with the final hearing, and was going to withdraw. Whilst this may be erring on the side of generosity to the claimant , there can be doubt that from 4 January 2024 onwards the respondent's preparation for the final hearing was pointless and a waste of costs.

123. The Employment Judge is accordingly minded to base the award of costs on the work done by the respondent after 4 January 2024. The respondent has asked that, if the Tribunal were minded to award in excess of £20,000 (the sums claimed by the respondent being now some £39,000) , the Tribunal either carry out a detailed assessment, or send the matter to the County Court for such an assessment to be carried out .

124. The respondent has not prepared the application on the basis of a detailed assessment being carried out by the Employment Judge. Such an assessment requires Points of Claim, with the claimant being required to respond in Points of Dispute, and the procedure to follow that laid down in the CPR. The Employment Judge, of course, if such a basis of assessment of the costs payable is appropriate , could not proceed any further, but would have to direct that the steps required for a detailed assessment are then taken.

125. Before doing so, however, he considers it appropriate to conduct , in general terms, a summary assessment , and to consider what costs the claimant should in ordered to pay, before considering any further whether a detailed assessment should be carried out.

i)The assessment – general findings.

126. Looking at the sums claimed, the first matter to be determined is hourly rates claimed for the fee earners engaged upon the case. The respondent has instructed solicitors in Newcastle, but as their allowable rates are the same rates as a Manchester firm would be able to charge, this makes no difference.

127. The Employment Judge has to have regard to the published Guideline Rates which are to be used in the assessment of costs. The relevant ones are those issued on 4 January 2024, effective from 1 January 2024. The relevant scale for the respondent's solicitors being based in Newcastle (central) is National 1.

128. The applicable hourly rates as from 1 January 2024 were for a Grade A fee earner £278, for a Grade B £233, for a Grade C £190 and a Grade D £134.

In terms of the fee earners involved, the rates claimed are:

Grade A - £276 , Grade B - £239 (or £207 for Stevi Hoyle), Grade C - 175 and Grade D - £115.

It follows that the rates claimed (save for Fiona Dumolo, a Grade B) are , from 1 January 2024, within the guideline rates.

ii)The work done.

129. The next issue is the work done. The Tribunal has examined the details of the work done, which is set out in detail in the work in progress information provided. As indicated above, the Tribunal considers that only work after 4 January 2024 should be considered as resulting from the claimant's unreasonable conduct of the proceedings and his late withdrawal . The amounts claimed, therefore , before 4 January 2024, will not be allowed.

130. In terms of the work done thereafter, the vast bulk of it has been carried out by Sally Lomas Fletcher, a Grade A fee earner. Her rate of £276 per hour, within the relevant Guideline rate

131. In the totals set out on the last page of the work in progress document, total solicitors' costs of £33,254 are claimed. Of this, some 93.9 hours are claimed for Ms Lomas Fletcher's work, in the sum of £23,846. That, of course, is based upon the hourly rate of £276, but some time has been written off.

132. Ms Lomas Fletcher has some 31.6 hours of time recorded in the period from 13 November 2023 to 4 January 2024. Additionally, some 0.6 hours are (or appear to be , there is a write off, it seems) claimed after 13 February 2024, which are little more than administrative tasks connected with the costs application. Taking these 32.20 hours off the 93.9 hours recorded for Ms Lomas Fletcher reduces her time to 61.7 hours. At the permissible hourly rate of £276 that would give a potential entitlement of 61.7 x £276 - £17,029.20

133. There are grounds for also reducing the amount of time recorded in the period from 13 November 2023 to 4 January 2024 for other fee earners as well, but this will be considerably less than the reduction in respect of Ms Lomas Fletcher. In the relevant period, the vast bulk of the work was done by Ms Lomas Fletcher. Ms George, a partner, and Grade A fee earner, did some work in the relevant period, but her total hours were only some 3.5, so the difference to the total would be minor. Looking at the work done between 4 January and 5 February 2024, the Employment Judge would have some issue with the amount of time that was taken for some of the work , particularly in connection with witness statements. That said, it is unlikely that the costs recoverable would be reduced for this reason by more than 10 hours, and the work of other fee earners would also be recoverable in this period , so that it is inconceivable that the total amount recoverable for solicitors' costs would fall below £14,000 .

134. Turning now to counsel's fees, the Tribunal considers that the brief fee of £6,000 for the seven day hearing was reasonable. The hearing was scheduled for seven days. No separate fee for any Conference with the client has been charged, so that is an inclusive sum. This was a discrimination claim with seriously disputed issues of fact. Further, in addition to the issues on liability , counsel was also then clearly briefed to make, and did make, the application for costs. No separate fee has been sought for the costs application. It was appropriate to brief experienced counsel, and the fees, overall, were reasonable. The Tribunal would not, however, consider that counsel's travel and accommodation expenses are reasonable to include. Firstly, they should be taken into account in fixing the appropriate brief fee,

and secondly, there has been no explanation why London counsel was briefed to conduct a hearing in Manchester by a firm based in Newcastle. The Tribunal would not allow these items on a summary assessment.

135. Looking at the overall picture, once one takes into account the fees recoverable for Ms Lomas Fletcher alone, plus counsel's fees of £6,000, the total payable on a summary assessment would exceed £20,000. By how much is debatable, but it is clear that in addition to discounting some £8,887.20 of Ms Lomas Fletcher's time , the time of other fee earners in the initial period would also be disallowed. The respondent was seeking, on the figures provided, total costs in excess of £39,000. Some £9,000 , or more , of that would be disallowed because it relates to the period pre – 4 January 2024, or in minor administrative matters relating to the costs application, leaving a potential award on detailed assessment of between £22,000 and £30,000.

136. This Tribunal has to decide whether to carry out a detailed assessment (or refer the case to the County Court to do so) , or to carry out a summary assessment, which will limit the amount that can be awarded to £20,000.

137. The Tribunal does not consider it proportionate to proceed to a detailed assessment of these costs. The respondent has not proceeded on that basis thus far, and a detailed assessment will add to the costs, and delay the assessment. Further, in determining the amount payable by the claimant (which is not the same as assessing the costs which the Tribunal finds are recoverable) the Tribunal has a discretion, and can (but not must) take into account the claimant's ability to pay, and it is to that final issue that the Tribunal now turns.

Ability to pay.

138. In relation to the claimant's ability to pay, the Tribunal has no absolute duty to take into account the claimant's ability to pay and there may be cases where for good reason the ability to pay should not be taken into account (***Jilley v Birmingham and Solihull Mental Health NHS Trust and ors (UKEAT/0584/06/DA)*** at [53]). The sum of a costs order does not have to be limited to a sum that the claimant would be able to pay at this time (***Arrowsmith v Nottingham Trent University [2012] ICR 159*** at [37], ***and Vaughan v LB Lewisham [2013] IRLR 719*** at [28]). There is no reason why the question of affordability has to be decided once and for all by reference to the party's means at the time the order falls to be made (***Vaughan***).

139. The respondent urges the Tribunal not to reduce the amount that the claimant is ordered to pay by reason of his lack of means.

140. The claimant has put very little before the Tribunal in terms of his means. All he has done is to set out at Appendix 7 to his document opposing the application , as follows:

£900 payment Rent, Bills, Groceries and CCard payments

£80.07 personal loan

£254.75 Credit card

£9.99 Adobe Acrobat

£8.99 Amazon

Mobil phone ID mobile £5 and £2.99 cloud

BISL Car Insurance £35

Car Tax DVLA £21

Petrol £150 per month

Credit Card Balance £5700 in Debit

Monthly Outgoings in Total. £1470

Income Average

Average Monthly Incoming (12 months) £1740

Available income to claimant is £276 per month.

He has produced no documents in support of these figures.

141. Additionally, the claimant has included at Appendix 4 to his Skeleton Argument the following Bills from Jolliffes, Solicitors:

Dated 31 March 2020 £1,200.00

Dated 30 April 2020 £3,745.00

Dated 30 June 2020 £648.00

142. There are other documents from "Insight Legal" which appear to relate to the legal costs in these bills, but these documents are unexplained. It does appear that the claimant has incurred some £3,000 in solicitors fees in connection with his personal injury claim. To that must be added VAT, as the claimant is not VAT registered (the Tribunal assumes) so he cannot recoup the VAT elements of these bills. It is a little unclear quite why he has included these bills , but from them it is clear that the claimant incurred (and has paid) bills in the total sum of £5,593.00. Some of these, however, include disbursements such as Court fees, and counsel's fees. It is noted that the claimant was refunded a Court fee, but why is not explained, and probably does not matter.

143. Quite how he has funded his legal representation in the personal injury claim is unclear. That he was not instructing his solicitors on a contingency fee basis is clear from the submission of these bills. The respondent invites the Tribunal to find that the claimant could clearly fund this legal representation, so may have (or have had) access to other funds.

144. Another point arises. The claimant successfully appealed the judgment of HHJ Khan, and the order of the Court of Appeal (attached to the respondent's email to the Tribunal of 7 February 2024 , but not in the bundle) provided that the respondent do pay the claimant's costs in these terms:

The Respondent shall pay the Appellant's costs of the appeal to the Court of Appeal and the costs of and occasioned by the Respondent's application to strike out the claim and/or for summary judgment in the County Court (including for the avoidance of doubt his costs of attending court to conduct the case), to be the subject of a detailed assessment pursuant to CPR 46.5 in default of agreement.

145. This means that the claimant will be entitled to recover his costs as a litigant in person, at £19 per hour, but also, to the extent that he incurred legal costs in being represented in the two lower Courts, in respect of those costs as well. Unfortunately the claimant has failed to make it clear what legal costs he incurred in relation to the two Court hearings which led to the appeal, but he has valued his costs entitlement at £70,777, of which he claims £57,000 for his own costs as a litigant in person. That suggests that his other costs were in the region of £20,000.

146. He claims these costs in his Schedule of Loss (also attached to the respondent's email of 7 February 2024) thus:

Postage costs and fees for numerous bundles and copies sent to Lancaster Leeds and London *£1800*

Printing costs, Stationery for Bundles, correspondence between Lancaster Court and High Court Civil appeal office in London. *£1900*

Petrol expenses in court appearances from Heysham via Slyne with Hest to Lancaster, from 05.02.2020. 24.02.2020, 05.03.2020, 13.03.2020 16.03.2020.

£43

Petrol expenses in court appearances at from Heysham via Slyne to Burnley for court hearing with Judge Khan dated 28.01.2021

£43.31

Hotel accommodation in London 09.03.2022 *£133.41*

Travel Train to London 09.03.2022 *£168.25*

Legal Costs and Solicitor fees to Joliffes Solicitors *£7393*

Legal costs as Litigant in person at £19 per hour Total time spent on my case since Feb 2020 is 3000 hours x £19 per hour which works out at *£57,000*

High Court Costs for the appeal against Judge Khans Decision.

- *£528 for the original permission to appeal application.*
- *£1,199 for the Appeal fee*
- *£569 for the ancillary A application.*

Total charges by High court *£2296*

Total Expenses *£70,777*

147. That therefore means that , subject to the claimant's solicitors' bills being reduced on detailed assessment, he will largely be able recoup the legal costs that he incurred in connection with the first two hearings, and the appeal . Thus, he is likely to be in receipt (at some stage) of reimbursement of a good proportion of the legal costs he incurred and has previously paid, which appear to be some £7,393. Additionally, he should recover the £2,296.0 in Court fees that he paid for the appeal. Even without his own costs as a litigant in person, he stands to recover in the region of £10,000, maybe more. The Tribunal considers that this is indeed a highly relevant factor to take into account in assessing the claimant's ability to pay for the purposes of rule 84. That said, the claimant whilst in employment, has outgoings, and has only a modest amount of disposable income. He has some expectation of recouping costs that he has paid out previously, and the possibility of a successful personal injury claim. Any award of costs must be proportionate, and based upon realistic expectations of his ability to meet any such award.

148. For all these reasons, in conclusion, the amount of costs allowed on a summary assessment would be in excess of £20,000, but it would be disproportionate to proceed to a detailed assessment, and, in any event, the Tribunal considers that taking all the circumstances into account, including the claimant's ability to pay, the claimant's liability for costs should not exceed £20,000, and that is the sum that the Tribunal orders him to pay.

Employment Judge Holmes
18 March 2024

RESERVED JUDGMENT SENT TO THE PARTIES ON 27 MARCH 2024

FOR THE TRIBUNAL OFFICE