EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr P Britton	**v**	Parkwood Community Leisure **(R1)** Mr Joel Hoyte **(R2)** Mr Ben Mitchell **(R3)** Mr Graham Ashby **(R4)**

Heard at: Reading in Chambers **On:** 22 July 2016

Before: Employment Judge Hill
Members: Mr C Morley and Ms J Nicholas

JUDGMENT
ON APPLICATION FOR COSTS BY THE RESPONDENT

1. The respondent's application for costs succeeds on the basis that the claimant's conduct of the proceedings was unreasonable.

2. The claimant is ordered to pay to the respondent a contribution to their costs in the sum of £2,000.00

REASONS

1. On 10 October 2015, the judgment was promulgated in relation to the claimant's claims that he had been the subject of constructive unfair dismissal, direct discrimination in relation to his sexual orientation, harassment, and victimisation on the grounds of sexual orientation. The claims failed.

2. On 1 May 2015, the respondents made application for their costs. It is that application which we are considering today. The reason for the delay is the claimant applied for a reconsideration. The judgment on that matter was promulgated on 7 October 2015. The claimant has also appealed to the Employment Appeal Tribunal. That appeal was rejected as it was presented out of time. The appeal against that rejection was turned down by the Court of Appeal.

3. It was agreed at the conclusion of the reconsideration hearing that the application for costs would be addressed by the written submissions only. The tribunal had before it for today's hearing the following documents:
   - A submission by the respondents summarising their position and drawing our attention to the letter of 1 May 2015 and its accompanying schedule.
   - The claimant had submitted a response on 8 March 2016 to the application for costs. No further correspondence has been received from the claimant in this regard.
   - Accompanying the respondents' submissions were a schedule of costs and a breakdown as to how that schedule had been incurred. There were also three cases attached to which the respondents referred in their written submissions.

4. The application for costs was based on the grounds that the claimant's claim was misconceived; that in bringing the proceedings, he had acted in a way that was vexatious and/or unreasonable; in his conduct of the proceedings, his behaviour was vexatious and/or unreasonable.

5. The tribunal reminded itself that any order for costs must fall within the definition in rule 76 of the Employment Tribunals Procedure Regulations 2013. It is a two stage process. We must first consider whether the hurdle of misconceived/unreasonable or vexatious behaviour has been made out. If any of them has, we should then consider whether it would be appropriate to make an order for costs. In considering that, we may look at the conduct of both parties and may consider the means of the paying party – in this case, the claimant.

<u>Was all or part of the claim misconceived?</u>

6. With the exception of the assertion relating to hair loss which is a gender-related topic of conversation not one that relates to sexual orientation, we did not consider that any part of the claim was misconceived per se. We found against the claimant but that was after lengthy consideration of the evidence. The fact that we took over two days in our consideration of the claims suggests that the claims were not misconceived. It was merely that we did not accept the way the claimant put the case. We do not feel that the respondents' application for costs on that basis can succeed.

<u>Was the bringing of the proceedings unreasonable and/or vexatious?</u>

7. The tribunal does not consider the respondents can succeed in an application on that basis. The fact that we spent so long in considering the case demonstrates that there was an arguable case by the claimant that needed lengthy consideration. It was not unreasonable or vexatious to commence the proceedings.

Was the claimant's conduct of the proceedings unreasonable or otherwise vexatious?

8. The respondents in their letter of 1 May cite 18 examples that they wish us to look at. We have considered these. We have considered the way in which both sides conducted the litigation. It is clear that there were some delays on the side of the respondents. There was some peremptory and somewhat confrontational correspondence from the claimant. We note that, although a trainee solicitor, the claimant was for the purposes of these proceedings mostly acting as a litigant in person or via his colleague, Mr Jones – also a lay person. We take on board that a litigant in person may not always conduct litigation in the dispassionate way a lawyer would be expected to do.

9. The claimant does not have an easy style in his correspondence and we have noted that he did not have a comfortable style before us in the tribunal. We found it to be very confrontational. That however does not mean that it is unreasonable or vexatious.

10. The respondents made an offer to the claimant to settle the claim on 16 September 2014. The offer was for £4,000.00. If this were just a claim of unfair dismissal, it was a generous offer given the annual income of the claimant. The claimant was also pursuing claims of sexual orientation. £4,000.00 is in the mid part of the first range of the Vento injury to feelings awards. The claimant did not accept it. It is not unreasonable for him not to accept that offer given that the potential for injury to feelings, if he were successful, would be greater. We cannot draw the view that to fail to accept that offer is in any way unreasonable.

11. Equally, when the respondents invited the claimant to withdraw but the respondents would make no application for costs on a date close to the full merits hearing, that presents as the normal to-ing and fro-ing before a full merits hearing and we cannot draw any conclusions from the claimant's refusal to accept that offer.

12. We note that the claimant says that there were considerable delays in the preparation of the bundle to the extent they had to seek an Unless Order. The impression the tribunal has gained from reading the correspondence in the file and that produced by the parties is neither side covered themselves in glory in the preparation of this case and that we should not look at the written exchanges before the hearing as a way to decide if costs should be awarded.

13. The claimant disputes many of the findings of fact that the tribunal has made in its judgment, particularly as regards the conduct of the litigation. In the reconsideration application, issue was taken by the claimant about conclusions we had reached regarding his late attendance on the first day of the hearing and the issue relating to documentation. In that reconsideration hearing, we did not accept the claimant's version of

events. The reason we did not accept that is it contradicted our clear notes of the events at the time.

14. The claimant was late on the first day of hearing. He only arrived in the afternoon because the tribunal insisted that the hearing would proceed on the afternoon. Otherwise the claimant did not intend to come on the first day of the hearing. When he arrived, his attitude towards the tribunal was to say that we the tribunal were wrong and he was right. It was only when the employment judge said a simple apology would be in order that he did apologise for his failure to attend or appreciate that the order was correct. We note that the claimant did not attend of his own volition on that date but only on the insistence of the tribunal. His failure to read the order and attend when expected we do consider was unreasonable conduct.

15. The failure of the claimant to disclose documents as soon as it was ascertained that he held one is a breach of the duty of disclosure. We therefore find it was reprehensible not to disclose the Lisa Lee text as soon as he had the copy. We have noted this in the original judgment and we consider his behaviour in this regard to be unreasonable.

16. We have throughout the judgment noted where the claimant has added additional information in the witness statement; in particular in relation to the requirement for him to change in the disabled toilets. We consider that aspect of the preparation of the witness statement to be unreasonable.

17. We also found the way in which the claimant presented the case and manipulated the evidence in relation to blind copies and adding in extra events to be unreasonable and we have found that he was not telling the truth.

18. Within our judgment, we found the claimant in his behaviour to be difficult and confrontational. What we have not doubted is that the claimant believed and clearly, looking at the number of appeals he has endeavoured to pursue, still believes that he had the right of the case.

19. We also found that he behaved in a way before us that we found was not easy to deal with. On occasions it was not appropriate, such that it would fall to be unreasonable conduct. (see paras 14-17 above) On that basis, we consider that the hurdle of considering whether to make an order for costs is passed.

20. But should we make an order for costs? Costs do not follow the event in Employment Tribunals. They remain the exception not the rule.

21. The claimant is convinced that he has been wronged such that he should pursue a claim of constructive unfair dismissal and/or discrimination on the grounds of sexual orientation. Those claims were always going to be the subject of a lengthy hearing. The outcome was not obvious from the outset. We are not clear that the respondents' costs which they were bound to incur in defending the claims have been greatly increased by the

unreasonable behaviour of the claimant. The respondents seek the maximum we can award of £20,000.00. They have produced a schedule of costs which exceeds that.

22. The claimant has produced his financial position which demonstrates he would have difficulty in meeting that sort of award.

23. We do not consider that that sort of award would be appropriate. We think that the way in which the claimant behaved and the highly adversarial manner in which he pursued the case was unreasonable and generated more correspondence than was strictly necessary. We are concerned the manner in which in particular the endeavours to mislead the tribunal have continued through the reconsideration application. We cannot take into account what was said in the Employment Appeal Tribunal or before the Court of Appeal. Those are not issues of costs we are addressing but we note that the inappropriate behaviour continued. We refer to the false assertions made at the reconsideration hearing about the non attendance of the claimant on Day 1 of the full merits hearing. We were present at that hearing; we know what happened. It was unreasonable conduct to seek to present those events in an incorrect light later. This suggests to us that some of the correspondence leading up to the full merits hearing was similarly misleading and generated additional correspondence. The claimant's attitude in the hearing made it longer than it might otherwise have been.

24. In those circumstances we do think that the unreasonable behaviour should lead to an order for costs but only in the sum of £2,000.00 as a contribution to the respondents' costs.

25. We sincerely hope that this order is now the last that all those involved in this litigation will have to address and there can be closure on this matter.

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Employment Judge Hill

Date: 01/08/2016

Judgment and Reasons

Sent to the parties on: .....

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For the Tribunal Office