EMPLOYMENT TRIBUNALS

Claimant: Mr S Chadwick

Respondent: Sainsbury's Supermarkets Ltd

HELD AT: Manchester **ON:** 7 April 2017

BEFORE: Employment Judge Holmes

REPRESENTATION:

Claimant: In person
Respondent: Ms Danvers, Solicitor

JUDGMENT ON COSTS

It is the judgment of the Tribunal that the respondent's application for costs is dismissed.

REASONS

1. The Tribunal has been considering an application made by the respondents, initially in a letter dated 12 October 2016, whereby they applied for costs in relation to the claim as a whole, and further an oral application made today in relation to the costs relating to the reconsideration application that the Tribunal has just determined.

2. In terms of the former, the grounds relied upon in that letter are set out in relation to two limbs of rule 76(1) whereunder:

> "A Tribunal may make a costs order in circumstances where a party has acted vexatiously abusively, disruptively or otherwise unreasonably in the bringing of the proceedings or the way in which the proceedings have been conducted; or
>
> (1)(b) Any claim or response has had no reasonable prospect of success."

3. It is in relation to that second limb, initially and primarily, that the respondents made their application, but they also make application in relation to the fact that an offer was made to the claimant which is contained amongst the papers attached to

that letter in an appendix. This is a letter dated 5 July 2016, in which an offer of £5,000 was made to the claimant to settle his claim.

4. In addition to the grounds set out in that letter, Ms Danvers has today added further submissions in support of the respondents' application. She has pointed out to the Tribunal that the mere fact that the claimant is a litigant in person does not make him immune from an order for costs. The Tribunal should take into account that he is clearly an intelligent and able man, who has been able to make some research, and to make reference to caselaw, and things of that nature in the course of his conduct of this case. He was invited expressly to seek advice upon his position when the offer was made in July 2016, and, indeed, in the offer letter the addresses of two local CAB offices were provided to him. In all those circumstances, the claimant having proceeded and pursued a claim with no reasonable prospects of success, as the Tribunal has now found, should be liable to pay costs as appropriate. Although at this stage the Tribunal is not invited to fix the amount of those costs, it is nonetheless invited to determine that the claimant should be ordered to pay some costs, and it is that decision in principle that the Tribunal is taking first.

5. In relation to the reconsideration application, a further and potentially separate application is made in relation to that as well, the respondents saying that regardless of the position in relation to the claim as a whole they should nonetheless have their costs of resisting, successfully as it turns out, the claimant's application for reconsideration, and saying that in effect the costs of that application should really follow the event. Reference was made to the ***BSM v Fowler EAT 0059/06*** case which the Tribunal has in fact found and read.

6. That, in summary, is the application and the grounds for it. The claimant's response to it is largely set out in a document that he sent to the Tribunal, "comments on the respondent's application for costs", which he sent on 23 November 2016. That is a very full document in which the claimant sets out a number of matters under various headings in relation to the costs application as made then (of course it did not deal with the reconsideration application) but that runs to some 48 paragraphs, and also has appended to it the note of the Case Management Order that was made on 20 July 2016 in the preliminary hearing conducted by Employment Judge Feeney. In particular paragraph 2 of that document has been referred to by Ms Danvers in her application.

7. In summary, because the document is available for all to see in due course, the claimant's opposition is broken down into a number of constituent parts. The first one is under the heading "Employment Tribunals are predominantly a cost free jurisdiction" and he makes reference to that fact, and cases in relation to that. He then goes on to argue under the heading, "The threshold for awarding costs are not met" and he sets out his arguments in relation to that. He then goes on to argue in relation to the offer letter, which he terms a "Calderbank" offer using the terminology, of course, from the Civil Courts, but he sets out there his contentions in relation to that, and indeed refers the Tribunal to probably the most pertinent case on this type of offer which is ***Kopel v Safeway Stores PLC [2003] IRLR 753***. He then goes on to deal with his ability to pay and then deals finally with the actual amount of the costs

claimed, which as I say at the moment is not in issue pending the determination in principle.

8. The claimant then makes reference to an alleged offer on 6 October, but as the respondents have not prayed that offer in aid then I need not concern myself with it.

9. But in essence, and from what he has written in that document and what he said today, his position is, as one would expect, firstly, that costs are the exception rather than the rule and the Tribunal should be a costs free jurisdiction; that if the Tribunal is to consider awarding costs the threshold, particularly in relation to unreasonable behaviour, has not been met; that if the Tribunal is being asked to consider the effect of a Calderbank type offer then the Tribunal should be reluctant to do so because such offers do not have a proper place in the Employment Tribunal or if they do, this is not a case where an offer should have any effect in terms of costs; and finally, of course, his ability to pay which is has elaborated upon to some extent without giving full details , and documents in relation to his actual means, but he has provided further information today in his submissions about his current financial position.

10. So, in summary, that is the claim for costs , and the response to it by the claimant, and the Tribunal has been considering whether or not any award of costs should be made either in relation to the claim as a whole or in relation to the reconsideration application.

11. Dealing with the claim as a whole, the Tribunal appreciates of course that the respondents' primary application is based on the second limb of rule 76(1), that being rule 1(b) "any claim or response has had no reasonable prospect of success", because, of course, that is the finding the Tribunal made, which has not been varied or revoked on reconsideration. So that is the primary basis for the application, and to the extent that that threshold has been satisfied, of course, it clearly has, and the claimant cannot argue to the contrary in the light of the Tribunal's previous ruling.

12. In relation to other aspects of the application, however, it seems to the Tribunal that there the respondents would also be relying upon 1(a) in terms of the claimant's unreasonable conduct, insofar as they say effectively that he "unreasonably" refused the offer that was made to him in July 2016, and has "unreasonably" continued with the claim when he should not have done, and indeed, as has turned out, when it had no reasonable prospect of success.

13. Dealing with the first of those limbs in terms of order of priority, obviously the first would be the ground that the claim had no reasonable prospect of success, so that threshold is, I am clear, satisfied. That then gives rise to the Tribunal's entitlement to consider making a costs order, in respect of which it has a discretion. In terms of whether it should exercise the discretion in relation to ground 76(1)(b), the Tribunal thinks it should also however take into account those factors which are relied upon by the respondent under rule 76(1)(a) as well; in other words the claimant's conduct of the claim as a whole, because it seems to me that these things must all be taken into consideration in the exercise of the discretion under rule 76(1)(b) in any event, so they are bound to overlap and it seems only appropriate that the Tribunal considers them all together in deciding, in relation to 1(a), whether

that threshold is met, and in any event whether in all those circumstances it should exercise its discretion under 1(b).

14. In terms of those other matters, of course, primarily the respondents say, while the claim was found to have no reasonable prospect of success , that is a matter that was pleaded in the response, and indeed in paragraph 4 of the response it was stated to be the case by the respondents and, indeed, the respondents invited the Tribunal to consider striking out the claim or to pay a deposit at that time, but no applications were subsequently made for orders of that nature. The Tribunal takes Ms Danvers' point that when considering the conduct of the claimant this is irrelevant, but the Tribunal nonetheless does note that this contention has been made in the response, and also notes it is a contention made in many responses, but in terms of whether it is pursued , in this instance it has not been, taking the point that the respondents may have tactical reasons for not pursuing those matters, but they did not and the claimant, as it were, continued with the claim through a preliminary hearing , and onto a full hearing, and this hearing.

15. It is appreciated, of course, that the claimant has failed, and failed for the reason that his claim was found to have no reasonable prospects of success entitling the Tribunal to consider making the award. In terms of the claimant's conduct, however, the respondents having in their offer letter suggested that he seek advice and giving him addresses where he could so, the claimant in fact did do so, and he sets out, in his grounds of opposition to the application, the steps he took to get advice, and indeed what (without waiving privilege) that advice was, and they are set out at paragraphs 13 and 14 of his document in opposition. He took the offer letter, in fact, to a Citizens Advice Bureau and received advice in relation to it, but the upshot of that was that he was of the view that his claims had reasonable prospects of success, and that the offer was not acceptable and he rejected it on that basis.

16. In terms of the merits of the offer, of course, it was said to be and clearly is on a commercial basis, being in the sum of some £5,000. The claim, of course, potentially as put by the claimant was in the order of £30,000 compensatory award and I think some £10,000 basic award , subject to any appropriate caps, but the total value was in that order, so in terms of the offer in relation to the claim, it was clearly a commercial offer as opposed to one based on any, as it were, percentage prospect of success, as indeed respondents are entitled to make. Indeed one could observe that that is probably the only way in which a respondent can seek to protect itself in costs these days, and that by at least making such offers in those terms respondents put themselves, or seek it, in the position where if successful they at least have an argument in relation to costs, and one can well understand why that was done.

17. The claimant, of course, did seek advice and in the light of that advice did continue the claims. The claims, when they came to the preliminary hearing, were referred to in relation to paragraph 2 of the note of that hearing in relation to constructive dismissal as being "based on a number of incidents forming a course of conduct with a last straw and/or some of the incidents may be sufficient by themselves to be fundamental breaches of contract entitling the claimant to resign and claim constructive unfair dismissal". Pausing there, whilst a last straw is referred to at that point, which was July 2016, the claims were not necessarily identified as being those which resulted in a last straw claim and there was a possibility, at least,

or an argument that some of the incidents might have been sufficient in themselves to justify a fundamental breach of contract, but that was not ultimately the way in which the claim was put by the claimant , and it was ultimately put as a last straw case . It was because that last straw was wanting that the claim was ultimately unsuccessful, for the reasons given in the previous judgment.

18. So in terms of last straw at that point it is there, but it is not identified as being necessarily a last straw any more than in the response that was filed, which was a substantial document which dealt with the allegations, was any specific point taken on last straw, possibly because the claim at that point had not been pleaded in that way. But to the extent that the claimant is being criticised for not appreciating this much earlier than he did, (if indeed he does) in terms of identification of that as an issue it is not as apparent, and not as paramount as obviously it has since become.

19. That has some relevance, the Tribunal considers, because when considering in overall terms his conduct, and whether it was unreasonable and in terms of the discretion that does arise in any event under 76(1)(b), that seems a relevant and pertinent consideration. This is not a case where the claimant has said from day one “this is my last straw” and the respondent has responded by saying “no it wasn’t and it can’t be”, nor has the Tribunal identified in a previous preliminary hearing that that was necessarily the case.

20. It is indeed a highly significant feature, the Tribunal considers, that the way in which the claim has ended for the claimant has been firstly of the Tribunal’s own motion, and secondly in relation to what could be considered as a very discrete and somewhat nuanced point. It is a point that arose ultimately on the precise terms of the evidence the claimant gave to the Tribunal. The reason why the Tribunal struck out the claims is set out in the judgments that are already before the Tribunal, but it will be clear from those, and indeed the circumstances of the case as a whole that not only was this a highly unusual step for the Tribunal to take but it was one that only arose at the end of the claimant's evidence and on the basis of the precise details of that evidence. An answer of a different nature on any particular question might have produced a different result, and it was something that would be not, the Tribunal is quite satisfied, immediately apparently to anybody. It certainly was not, it has to be said, apparent to the respondents at the end of the claimant's claim in terms of his evidence, because no application was made at that time. It was identified by the Tribunal and then, as it were, supported by the respondents once the Tribunal had raised the matter, but in terms of the obviousness of the point, and this is no claim by the Tribunal to any great insight or subtlety, but it does remain a fact that this particular basis for the claim being struck out was a discrete and narrow one which arose solely out of the precise terms of the evidence the claimant ultimately gave in the Tribunal.

21. To that extent it seems to the Tribunal that to criticise the claimant, and particularly to seek costs from him on the basis that this is something of which he should have been aware much earlier, and was an obvious point and which means that he proceeded with a case which he should have been aware had no reasonable prospect of success, is not a terribly strong argument. This is not a case where the claimant's claim has been struck out because the Tribunal has rejected his evidence as being wholly improbable and unreliable. It is not a case where something has

been concealed by him which has come out in the course of his evidence which has fundamentally undermined his claim, or anything of that nature. It is something where giving evidence which the Tribunal has accepted at face value and indeed has not really been challenged in terms of its veracity, has ultimately, on an analysis particularly of ***Omilaju***, resulted in the Tribunal finding, reluctantly it has to be said appreciating the difficulty the claimant had, that the claim ultimately could not proceed any further. But that is a very unusual set of circumstances and is a long way off a claimant pursuing a claim which he either knew, or could reasonably have been expected to have known, had no reasonable prospect of success.

22. So on that basis the Tribunal considers that the claimant's conduct in pursuing the claims, as he did up until this very hearing, is not in itself unreasonable, and indeed for those reasons the Tribunal would not exercise its discretion under 76(1)(b), notwithstanding that the claim was found to have no reasonable prospects of success, to make an award of costs.

23. That does not dispose of the matter completely, however, because there is still the issue of whether the claimant, having rejected the respondents' offer of £5,000 in its letter of 5 July 2016, ought nonetheless to be penalised in costs because he acted unreasonably thereafter.

24. In relation to that, the point was made I think perhaps by an adviser, but is well made, that in terms of that settlement offer, again not surprisingly because it was a commercial offer, whilst the respondents said in relation to the merits of the claimant's claim that they did not believe that the Tribunal would view the claim in the same way as the claimant did, no detail was given and no alleged specific weaknesses in the claimant's case were identified in that letter. It was a blanket, what one might call, disparaging of the claimant's claim, and an indication that the respondent took a different view, as was obviously apparent from the response. But in terms of this particular issue of course, that was not relied upon, and in terms of it having no reasonable prospects of success at that stage for any particular reason, nothing was said. So what we have is a perfectly understandable, and not uncommon these days, commercial offer to settle which the claimant rejected and upon which, as requested in the offer, he sought advice. Having got that advice he continued and continued through the Tribunal to the hearing that we have had.

25. In terms of the effect of such letters, the Tribunal, and Ms Danvers I am sure would not demur from what the claimant has said in his submissions, the legal position is indeed as he sets out in relation to the effect of what are called Calderbank offers in other jurisdictions and their place in the Employment Tribunal. As I indicated before, he cites correctly ***Kopel v Safeway Stores*** which is probably the case which has had the greatest effect in relation to this type of offer, but ultimately the position is that whilst Calderbank type offers have no specific place in Employment Tribunal proceedings in the same way they would do in the more cost rooted jurisdictions of the High Court and the County Court, the case law makes clear that they are nonetheless offers that can be taken into account, and therefore a Tribunal is not entitled simply to ignore them, but is entitled to consider them and see what relevance they have , and then whether or not they should persuade the Tribunal either that in rejecting the offer a party has acted unreasonably , and

secondly, if it has, or he has, whether the discretion should be exercised to make an award of costs.

26. In terms of acting unreasonably, then it seems to me that in the light of the commercial, and somewhat blanket nature of the offer, without identification of the precise point upon which the claimant has ultimately gone on to fail, then this offer does not carry with it the same degree of risk of costs that an offer in other circumstances may do. Secondly, in relation to advice, the claimant was told to seek advice and did. That advice, of course, is a matter for him but he did not, as it were, just bury his head in the sand and reject the offer out of hand, he sought advice and then proceeded after getting that advice.

27. But thirdly, and this is a feature of the case as a whole, this was a constructive dismissal claim. It was brought by an employee of several years' standing who set out a number of allegations over a period of time at a time when his employment was clearly unpleasant for him, at a time when he was obviously ill for some of that time, and in which he made allegations which were responded to by the respondents, quite properly, and which raised factual issues. Constructive dismissal is a difficult concept. It is much more difficult than perhaps the general public realise and involves very precise legal analysis, as well as issues of fact. Pursuing a constructive dismissal case in these circumstances whilst not exactly the same as a discrimination case , involves many features similar to discrimination because it does require an examination of conduct of both parties over a period of time. A person who resigns and claims constructive dismissal is probably less able to judge at any stage, let alone an early stage, their prospects of success unlike, say, a person who is actually dismissed, where it is much clearer. Therefore the nature of the claim, it seems to me, is a relevant factor to take into account as well, in terms of whether the claimant acted unreasonably in either pursuing the claim or pursuing it as far as he did.

28. Consequently, whilst appreciating the respondents' position and that they can only do so much in terms of protecting themselves as to costs, and considering that their letter in July 2016 was a perfectly proper attempt to take a commercial view to, as it were, settle a claim which was clearly going to incur costs of that order if not more, and not saying for a second that they were unreasonable in doing that, equally the Tribunal cannot find that the claimant acted unreasonably, particularly having taken advice as required to do so, in rejecting that offer at that stage and pursuing the claims thereafter.

29. Consequently, either on the basis that the claimant's behaviour was not unreasonable under 76(1)(a) or by way of the exercise of the discretion which undoubtedly arises under 67(1)(b), and whilst appreciating the respondent's position, the Tribunal in the very unusual circumstances of these claims and the reasons why ultimately they were unsuccessful, does not consider that it would be appropriate to make any award of costs on the claim.

30. I turn now, however, to the reconsideration claim because that is put as a separate application, and indeed Ms Danvers suggested that it would be almost like costs following the event. Some support for that might be derived from the relevant

part of the IDS Handbook on Tribunal Practice and Procedure where at paragraph 15:53 in reconsideration section is says this:

> "Costs Implications
>
> Where a party applies for reconsideration under rule 71 it is likely that the Tribunal will order the costs of any reconsideration to be paid by him or her."

Then it goes on to say:

> "This is particularly so in circumstances where the party wishes to make an application for reconsideration against a judgment that was made in consequence of its own default, for instance where the respondent failed to comply with the requirement to submit a response in time."

31. It goes on then to deal with various instances of that, and indeed also in relation to instances of rule 76 where, of course, power is given to make an award of costs where there has been breach of a Tribunal order or practice direction.

32. The ***BSM v Fowler*** case referred to subsequently was a case in which the costs of an appeal that was held were indeed ordered because the whole reason for the appeal happening in the first place was the default of the other party in the original proceedings giving rise to the need for the appeal. Now with all due respect to the editors of the IDS brief, that initial statement, "where a party applies for reconsideration it is likely the Tribunal will order the costs of any reconsideration hearing to be paid by him or her" is, I would have to observe, something of a slight overstatement, because it seems to ignore the requirements for costs in terms of rule 76 in any event. As I understand it, no special or different considerations apply to reconsideration applications than apply in general. In other words, the threshold requirement still has to be satisfied. Now in this case in terms of the reconsideration there is no suggestion that the claimant was in breach of any Tribunal order or practice direction, and, although the claim was struck out as having no reasonable prospects of success that is not to say that the reconsideration application had that, and , indeed, the fact that the reconsideration application survived rule 72, where of course it is considered by myself initially to see if a hearing should be held. If I was of the view that it had no reasonable prospects of success it would have been rejected at that time, but that was not my finding and a substantive hearing on it has been held. So with all due respect to the IDS authors, I am not convinced that costs should necessarily follow the event, and consequently would have to consider whether there had been any unreasonable behaviour on the part of the claimant in this part of the case so as to entitle me to consider making an award of costs in relation to the reconsideration.

33. I can see no such unreasonable behaviour, and, in fact, none has really been advanced. The respondents have responded to the application as they were entitled to do; the claimant has pursued it. He has failed and the original judgment has been confirmed, but that is as far as it goes. There was no previous application that the Tribunal should not even hear the application, and no contention that it had no prospects of success . If that have happened I would not have so held. It seems to me, particularly in the unique circumstances almost of the original judgment, and the claimant raising as he did a matter which was properly considered by way of

reconsideration and did so within hours of leaving the Tribunal on the last occasion, then this was an application he was entitled to make. It is one he has not succeeded in, but the fact that he has not succeeded does not seem to me to give rise to the right to costs on this occasion either, and I make no ruling in the respondent's favour on that application either. The costs applications are therefore dismissed.

Employment Judge Holmes

Dated: 25 April 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON
3 May 2017

FOR THE TRIBUNAL OFFICE