EMPLOYMENT TRIBUNALS

Claimant: **Mr L Anderson**

Respondent: **Manpower UK Limited**

Heard at: **On: 31 March 2017**

Before: **Employment Judge Britton (sitting alone)**

JUDGMENT ON COSTS

The application by the Respondent that the Claimant should pay all or part of its costs in relation to the dismissal of this claim by way of my judgment of 10 November 2016, promulgated on 17 November 2016, is dismissed.

REASONS

Background

1. On 24 October 2016 I heard the Claimant's claim of constructive unfair dismissal. I dismissed that claim, giving my reasons extempore which were then faired up and signed off by me on 10 November 2016 and promulgated to the parties on the 17th.

2. On 21 November 2016 the Respondent's legal advisers, Navigator Employment Law Limited, by letter of that date made application to the Tribunal that I should consider making an award of costs in favour of the Respondent. The grounds for the application were fully set out in what was a comprehensive submission. There was an attached schedule of costs. The amount sought was a maximum of £3,966 plus VAT.

3. Essentially the ground for the application was that this claim never had any reasonable prospect of success. Focus in particular was made in the letter on that the pleaded claim in itself was misconceived, and reasons were given for that assertion; also that the claim would have been even more obviously hopeless once the response was received. Further grounds were set out in the application but that essentially was the thrust of it.

4. On the 25 November 2016 via his solicitor the Claimant made plain that he opposed the application and again the reasons are set out. Essentially it would be that the claim itself did not show, certainly on the factual matrix, that it was misconceived. Second that the Respondent had never in its response or otherwise pleaded that the claim was misconceived; and inter alia it hadn't

therefore asked for any preliminary adjudication on strike out or in the alternative that a deposit order should be made. Also that the claim was in itself misconceived was not something pleaded in the opening written skeleton argument of Mr Maxwell, Counsel for the Respondent, for the purposes of the hearing before me.

5. Having considered the costs application and the rejoinder thereto, I invited the parties to inform me as to whether or not they wished to have a live hearing on the costs application as it seemed that they were content for it to be dealt with by way of the submissions. Both sides then confirmed to the Tribunal that they were content for the matter to be dealt with by way of this Judge sitting without the parties present to determine the application, taking account of the submissions and of course the costs rules to which I shall refer and any jurisprudence that assisted. I invited the parties to put in any additional submissions that they wished to. The Respondent made plain it did not wish to. I also invited the Claimant's solicitor to give me details of the Claimant's means if I was to reach the conclusion that he ought to pay all or some of the costs. I was provided with that by the Claimant's solicitor's letter of 27 February which made some more submissions on why the costs threshold had not in any event been reached. The Claimant also made plain it was content for me to deal with the application without a Hearing.

6. Neither party has provided me with any additional submissions and interalia by reference to any jurisprudence, save that the Respondent referred in terms of the exercise of the discretion to the well known guidance of the Court of Appeal in **Yerrakalva v Barnsley Metropolitan Borough Council v [2011] EWCA civ 1255**:

> *"The vital point in exercising discretion to order costs is to look at the whole picture. The tribunal has to ask whether there has been unreasonable conduct by the paying party in bringing,.. , or conducting the case and, in so doing so, identify the conduct, what was unreasonable about it, and what effect it had."*

7. The application made before me is of course pursuant to the 2013 Rules of Procedure which **Yerrakalva** predates. Thus first Rule 76 of the Employment Tribunal (Constitution and Rules of Procedure) Regulation 2013 applies:-

> *(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 the proceedings (or part) have been conducted;*
> >
> > *(b) Any claim or response had no reasonable prospect of success…"*

8. As to ability to pay and the import of Rule 84, of course that is irrelevant unless and until I decide that the Claimant has fallen foul of Rule 76 and if so as to whether I exercise my discretion to thence make a costs order; and I remind the Respondent that its application is very much focussed on whether "the Claimant's claim had no reasonable prospect of success".

9. I then remind the parties as per **Yerrakalva** and as to which see p1077 in the latest IDS Handbook Employment Tribunals Practice and Procedure that:

> *"Costs in the Employment Tribunal are still the exception rather than the rule… The Tribunal's power to order costs is more sparingly exercised and is more circumscribed than that of the ordinary courts, where the general rule is that the costs follow the event and the unsuccessful litigant normally has to foot the legal bill for the litigation. In the Employment Tribunal, by contrast, costs orders are the exception rather than the rule. In most cases the Employment Tribunal does not make any order for costs. If it does, it must act within rules that expressly confine the Tribunal's power to specified circumstances, noticeably unreasonableness in the bringing or conduct of the proceedings. The Tribunal manages, hears and decides the case and is normally the best Judge of how to exercise its discretion."*

10. I have carefully considered the application and the response thereto. Suffice it to say that the parties are reminded of my reasons to my judgment, covering as they do some ten pages. It is not suggested, and if it were I would have found to the contrary, that the Claimant in bringing this claim was acting as per Rule 76(1), that is to say vexatiously, abusively, disruptively or otherwise unreasonably. The same applies to his conduct of the hearing before me via Mr Anastasiades his advocate; and indeed the demeanour of the Claimant throughout the case was respectful. So the real focus in this case is on whether the claim had no reasonable prospect of success. The Respondent argues that this was plain from the very start, would have been plainer when the response was submitted and even clearer when its witness statements were served upon the Claimant.

11. However I make the following points:-

11.1 I accept that the claim (ET1) was muddled. Was this a claim for direct dismissal or one of constructive unfair dismissal? I dealt with this in the hearing before me. Put at its simplest however it became plain to me that the ultimate reason why it was brought as a constructive unfair dismissal claim and as to which see the Claimant's resignation letter of 24 March 2016 (bundle page 60) is that he did not accept that his employment had not been terminated in terms of the scenario which I dealt with and therefore that the Respondent in saying that it hadn't been therefore had done something "plainly untrue". Thus he couldn't trust it and therefore he resigned.

11.2 The second principle point to make and which goes to the Claimant's submissions is the fact that the Respondent did not make an application for strike out. But I must factor in that this is not in usual circumstances relevant to the question of whether the claim did not have reasonable prospect of success: see **Herry v Dudley Metropolitan Council UK EAT/0100/16 LA**. But on the other hand I do note that in the case before me that there was no submission in the response that the case was hopeless or any

request by the Respondent that there should be a case management discussion (CMD) before the actual hearing. And of course the value of a CMD is that an initial observation could have been invited of the judge and a deposit order might thus have followed on from which there are of course cost consequences should a claim fail. As it is the directions in this case were auto generated by way of standard directions when the claim was served out.

12. Having so observed I then take into account the closing remarks of Mr Maxwell for the Respondent, and in particular that I had to resolve a particularly material conflict on the evidence and that was as to whether or not Ms Virk did actually dismiss the Claimant by telling him that she was "letting him go" or not . That of course required me to assess the evidence both by way of testimony and the documentation that was before me.

13. Thus it is not totally inconceivable that another Judge might have preferred the evidence of the Claimant. I think it's difficult to foresee that he might have done but I cannot rule out that it might have happened and because this is the classic Employment Tribunal case where the fundamental weaknesses of the claim in terms of vital forensic issues only become apparent once the case has been fully explored before the Judge and thus he is able to make findings of fact.

Conclusion

14. It follows that I am not persuaded reminding myself of **Yerrakalva** that I can conclude that the claim had no reasonable prospect of success such that it meant that it was unreasonable to bring it or pursue it. Therefore I refuse the application for costs.

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Employment Judge Britton

Date 1 May 2017

JUDGMENT SENT TO THE PARTIES ON

6 May 2017

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FOR THE TRIBUNAL OFFICE