EMPLOYMENT TRIBUNALS

Claimant: **Mr N A Mughal**

Respondent: **SD Int Limited**

Heard at: **Leeds** **On: 20 April 2017**

Before: **Employment Judge Little**

Representation
Claimant: **Mrs T Hussain (claimant's wife)**
Respondent: **Mr I Awan, Solicitor (Sigma Law Solicitors)**
Interpreter: **Mr S Khoker**

JUDGMENT having been sent to the parties on **21 April 2017** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1 These reasons are given at the request of the claimant – the request was made in his wife's e-mail of 23 April 2017.

2 **Procedural history of this claim**

2.1 The claim was presented on 26 April 2016. The sole complaint was that the claimant had been unfairly dismissed.

2.2 The claimant is the son-in-law of Mr Najib Hussain. Mr Hussain had sold a business which traded as Manningham Superstore to the respondent.

2.3 The respondent's case as set out in their response was that it had initially engaged the claimant's services on a self employed basis. The claimant had been involved prior to the sale in the business. The respondent required his experience in connection with the fruit and vegetable side of the business.

2.4 The respondent's case continued along the lines that the claimant had only become an employee of the respondent in or about May 2015 with the result that as of the effective date of termination he did not have sufficient length of service to bring an unfair dismissal complaint. In any event the respondent contended that the reason

for the claimant's dismissal had been the claimant's alleged contention of undermining the business in favour of his in-laws and some alleged financial impropriety.

2.5 The Employment Tribunal proceedings had been stayed for a period of time in circumstances where there were proceedings in the County Court concerning the alleged breach of a partnership agreement which the claimant contended for.

2.6 The stay was lifted in October 2016 and on 9 November 2016 Employment Judge Lancaster conducted a preliminary hearing during the course of which a deposit order was made (as to which see below) and case management orders were made in preparation for a hearing of the claim on 15 and 16 February 2017.

2.7 On 3 February 2017 the claimant's wife, Mrs Tasleem Hussain, who had latterly been representing her husband in these proceedings, send an e-mail to the Tribunal stating that the claimant wished to withdraw his claim. By this stage the claimant was in possession of the respondent's witness statements and the reason given for the withdrawal was that the claimant's impression from the witness statements was that "it is evidence that Mr Javid and Ms Marczynski are working in collusion against Mr Mughal and therefore on this basis we do not feel that we can continue with the case." Mr Javid is the Director of the respondent and Ms Marczynski is the respondent's accountant.

2.8 On 6 February 2017 the respondent made the application for costs which has been before me today. That application was by an e-mail of that date from the respondent's solicitors. The basis of the application was that the respondent had throughout made its position clear namely that the Employment Tribunal proceedings were an abuse of process the sole motivation for them being a desire to subject the respondent to unnecessary legal costs. Reference was made to the deposit order which had been made on 9 November 2016. The respondent also disagreed with the claimant's assertion that he had not had the benefit of legal advice in relation to the Employment Tribunal claim. The application referred to the respondent's costs including counsel's fees and VAT as being a total sum of £12,660.

2.9 On 7 February 2017 Employment Judge Burton signed a judgment which dismissed the proceedings on withdrawal and he also made a case management order listing the cost application for today. The respondent was required to serve and lodge a fully particularised schedule of costs. If the claimant wished the Tribunal to take into account his means he was required to serve upon the respondent a witness statement setting out in detail all forms of income available to him, his regular expenditure, any other liabilities and any capital assets he possessed.

2.10 Subsequently the respondent produced a statement of costs and the total amount for costs claimed therein had increased to £19,841.52.

3 **The material before me today**

3.1 Contrary to the order made by Employment Judge Burton, the claimant has not prepared a witness statement. The claimant's written submission opposing the costs application are contained in his letter to the Tribunal of 10 April 2017. That includes some reference to the claimant's means (see page 3 of 5). The claimant had also produced a document entitled "Nadeem Mughal – "disclosure of finances" which purported to set out his income, expenses, assets and liabilities. In support of that disclosure statement the claimant had also produced a statement confirming his wife's receipt of child tax credit; a very brief bank statement for an HSBC account held by his wife; a statement from the claimant's Halifax current account but only for the period from 27 March 2017 to 10 April 2017; a copy of a document from Sky about the claimant's or his wife's subscription to that company and documents about council tax, home insurance, car insurance, mobile telephone account and a student loan statement in respect of his wife. There was also a statement of account from the claimant's solicitors, Slater and Gordon, showing a debit balance of £2,493 owing to those solicitors.

3.2 The respondent had prepared a bundle which essentially comprised copies of numerous letters which the respondent's solicitors had written to the claimant throughout the proceedings expressing the view that the proceedings were vexatious, without merit and solely designed to gain what was described as litigation advantage with regards to the other dispute in the County Court.

4 **Evidence**

The claimant has given evidence and linguistically has been assisted by the Tribunal appointed interpreter Mr Khoker. During the course of the claimant's cross-examination by Mr Awan further information as to the claimant's means was elicited. Mr Awan challenged the claimant as to whether there was the alleged loan of £25,000 referred to in the disclosure document. Mr Awan sought to cast doubt on the way that that had been documented. During the course of the hearing further documents were provided by the claimant showing, or purporting to show, that various friends had between them lent him the total amount of £25,000. In any event the claimant confirmed that the debt of £25,000 was not secured against his property and the only secured loan against the property was the mortgage of £35,000. The claimant explained that his income by way of pay (£690 per month) was a payment in cash and there were no payslips.

5 **The parties' submissions**

5.1 **The claimant's submissions**

Mrs Hussain said that her husband had hoped to resolve the matters of dispute through mediation. The decision to take Employment Tribunal proceedings had not been taken lightly. In relation to the merits of the now withdrawn claim, Mrs Hussain mentioned, for the first time as far as I am aware, that her husband

may have had sufficient qualifying employment because of a transfer of undertakings – that is to say the effect of the Transfer of Undertakings (Protection of Employment) Regulations 2006. Mrs Hussain explained the reason for the withdrawal was because her husband and herself got nervous. She contended that in relation to the Employment Tribunal proceedings her husband had received no legal advice. Legal advice had only been obtained in relation to the County Court partnership dispute.

5.2 **The respondent's submissions**

Mr Awan contended that the Employment Tribunal proceedings had never been the correct avenue and the claimant had been opportunistic. I was reminded of the deposit order made by Employment Judge Lancaster. It was contended by the respondent that the claimant did have the benefit of legal advice. There had been a calculated move by the claimant to cause the respondent distress and expense. The dispute should have remained in the County Court and the respondent had not agreed to the stay of the Employment Tribunal proceedings being lifted. Mr Awan reviewed the solicitors' or other professional advisors which he believed had been assisting the claimant in relation to the Employment Tribunal claim. He contended that those solicitors or representatives had not gone on record on purpose so as to give the impression that the claimant was a litigant in person. The Employment Tribunal proceedings he repeated had simply been to bully and put pressure on the respondent and to use up its limited resources. The claimant was using the Tribunal to get leverage. The claimant had known that he was not an employee until April 2015 at the earliest and so did not have continuity of service. Mr Awan was dubious about the reasons which the claimant had given for delaying witness statements exchange. The result had been that the claimant had had sight of the respondent's witness statements and had never reciprocated. Mr Awan then went through the schedule of costs. He contended that it had been necessary to spend 17 hours attendance on Mr Javid because of language difficulties. Whilst Mr Awan spoke Punjabi Mr Javid only spoke Urdu so it took a long time to get instructions. There had not been duplication of work between the two sets of proceedings.

5.3 During the course of the submissions I asked Mr Awan to explain why it had taken apparently four hours to complete the ET3 which was in fact a fairly modest document – the grounds of resistance ran to little more than one page. Mr Awan explained that it had been necessary to look at a number of documents in order to prepare the response. I also asked Mr Awan to explain the increase in the amount sought for costs as between the initial application and the subsequent costs statement. Mr Awan said that the lower figure had not included work undertaken prior to the stay. I also asked Mr Awan to explain why it had taken 12 hours to complete the two witness statements which the respondent had serviced within these proceedings. I had sight of those and noted that Mr Javid's statement ran to 12 pages and Ms Marczynski's to

four pages. Mr Awan said that there had been two other witness statements prepared that were not served. I have not seen those.

6 **The relevant law**

The Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, schedule 1 set out the Tribunal's jurisdiction to make costs orders – see rules 74 to 84.

Rule 76 provides (insofar as relevant):-

> "(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".

7 Rule 84 provides:-

> "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 … ability to pay."

8 The question of what is vexatious conduct was considered in the case of **ET Marler Limited v Robertson [1974] ICR 72** where it was defined as follows:-

> "If an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive, he acts vexatiously."

9 This definition was refined in the case of **Attorney General v Barker [2000] 1FLR759** in the judgment of Lord Bingham in that case:-

> "The hallmark of a vexatious proceeding is … that it has little or no basis in law (or at least no discernable basis); that whatever the intention of the proceedings may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion any gain likely to accrue to the claimant, and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from ordinary and proper use of the court process."

10 **My conclusions**

10.1 The main thrust of the respondent's application before me is that the claimant has acted vexatiously in bringing and continuing these proceedings. However the respondent also contends that the proceedings have been brought unreasonably and that the claim had no reasonable prospect of success.

10.2 With regard to the question of prospects of success, there will now obviously never be a determination of the merits because the claimant withdrew his claim before it could be adjudicated upon. Nevertheless I bear in mind that a deposit order was made on 9 November 2016. The reasons given by Employment Judge Lancaster for making that order can be summarised as follows:-

- Little reasonable prospect of the claimant being able to establish that he had been employed for no less than two years;
- Little reasonable prospect of the claimant being able to establish that it was the respondent rather than the claimant himself who terminated the employment;
- Little reasonable prospect of success that any dismissal found would have been held to have been an unfair dismissal;
- Little reasonable prospect of the claimant establishing that the Tribunal had jurisdiction to hear the claim because of time of presentation.

10.3 The latter point arose because the claimant had initially commenced the proceedings against the wrong respondent and when the current proceedings were commenced it was 14 days out of time. Employment Judge Lancaster described that defect, that is to say commencing against the wrong respondent, as being entirely the fault of the claimant. Employment Judge Lancaster considered that there was then little reasonable prospect of it being held that it had not been reasonably practicable for the claimant to have presented the claim in time.

10.4 Whilst, for the reasons I have explained, none of the points set out above have been or will ever be resolved. The views expressed by Employment Judge Lancaster lend support to the vexatious claim contention as they portray the claim as being a hopeless one and one that has little or no basis in law.

10.5 I accept that, again because withdrawal took place before adjudication, rule 39(5) of the Tribunals' procedure rules cannot apply – unreasonable conduct to be deemed where the claim fails on the same or similar grounds to those on which the deposit order was made.

10.6 Returning to the issue of vexatious conduct, if the **Attorney General v Barker** test is applied then all that is further necessary to determine is that the effect of the proceedings was to subject this respondent to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant. It is self-evident that defending this claim has inconvenienced the respondent and put it to significant expense in terms of its lawyers' fees. Insofar as these proceedings have distracted or sought to distract the respondent from the defence of the County Court proceedings then I consider that it comes within the definition of harassment in this context.

10.7 If however the **Marler** test is applied then it would be necessary to determine what the claimant's intention was in bringing these proceedings. Clearly no employee is likely to admit that they have pursued a claim simply to harass their employer. In those circumstances it is necessary to make this assessment by inference. Here I find that the existence of the County Court proceedings were a significant factor which renders it plausible that the Employment Tribunal proceedings were intended as a costly diversion – a bargaining tool within the wider dispute.

10.8 I must also take into account the extremely late withdrawal. In the case of **McPherson v BNP Paribas (London Branch) [2004] ICR 1398** the Court of Appeal pointed out that withdrawals could lead to a saving of costs and so it would be unfortunate if claimant's were deterred from dropping claims by the prospect of an order for costs upon withdrawal. Accordingly before an order for costs was made in those circumstances it was necessary to look at conduct overall. The circumstances of the case before me are that the claim was withdrawn 12 days before the hearing. I have quoted the reasons given at the time by the claimant for that withdrawal. They had, by accident or design, had sight of the respondent's evidence before they had served their own. Naturally the respondent's evidence was going to give a different account to the claimant's case and it would oppose the claimant's case. It is hardly surprising that the external accountant for the respondent was giving evidence presumably would have favoured the respondent's case. Without suggesting that that was simply because they were supporting their client, why else would a witness be giving evidence for a respondent if not to support the respondent's case? Viewed in that light the claimant's contention that the two respondent witnesses were "working in collusion against (the claimant)" has no merit. It seems on the balance of probabilities far more likely that the claimant was simply waiting until the last possible moment to withdraw a claim that he must have realised had no real prospect of success. The later the withdrawal the greater the inconvenience to the respondent is the thinking which I infer to the claimant in this regard.

10.9 For these reasons I am satisfied that the conditions contained in rule 76(a) and (b) are satisfied.

10.10 However I then need to go on to consider whether I should exercise my discretion to make a costs order in these circumstances. The first issue I consider is that of legal advice. I do not accept the claimant's plea that he was totally without legal advice as far as the Employment Tribunal proceedings were concerned. The fact that no solicitor or other representative was ever on record as acting for the claimant within the Employment Tribunal proceedings is not the real question. It is common ground that during the course of what could be described as the dispute between the parties the claimant has at various times been represented by and in receipt of evidence from the following: Mr Borchert of Craven Professional Solutions; a

solicitor Mr Desai of YD Solicitors; Sandbrook Solicitors; and latterly and later Gordon Solicitors.

10.11 I accept that it may well be that primarily those various advisors were helping the claimant with the County Court proceedings but there was clearly overlap between the subject matter of those proceedings and the claimant's employment status. In these circumstances it is implausible to suggest that the claimant received no advice about his Employment Tribunal claim which was proceeding in tandem with the County Court case. At best even if the claimant did not obtain such advice he could readily have done so. It is certainly implausible that his advisors would not have been aware of the Employment Tribunal claim.

10.12 The next matter I take into account as a discretionary factor is that the deposit order had been made and so the claimant would clearly have been aware of the provisional view which an Employment Judge had taken of his case and he would have received notification from the Tribunal as to the possible consequences of the claim subsequently failing in terms of how that could effect the question of costs. In addition, as I have now seen, the claimant was throughout the proceedings in receipt of countless letters from the respondent's solicitors telling him that the proceedings were vexatious. I accept that the other side's solicitors merely stating that does not without more make it so but at the least the claimant had been put on notice of the view being taken.

10.13 I also have taken into account the lateness of the withdrawal as a discretionary factor.

10.14 Finally is the question of the claimant's means. Whilst rule 84 says that I may have regard to the paying party's ability to pay I consider it is appropriate that I should have regard in this case. Here as the respondent's solicitor has pointed out the claimant has failed to provide a witness statement as had been ordered. Moreover not all relevant documents have been disclosed. The claimant's statement that he is paid in cash and there are no payslips causes me some unease. Further I have been referred to large amounts of money passing through the HSBC account although I accept that that may have been in relation to the funding of the purchase of the business and could be represented by the £25,000 loan. If the information that the claimant has provided about his income and outgoings is a full picture then I accept that he has modest means. However the claimant has confirmed that his property, that is to say his house, is worth £105,000 and that the mortgage on that property is only £35,000. Accordingly there is an equity of £70,000. In those circumstances I consider that the claimant has the ability to pay albeit that that may well necessitate the respondent obtaining a charging order against the property.

10.15 The next question is the appropriate quantum of the costs order. Under rule 78 I may order a paying party to pay a specified amount not exceeding £20,000. Here the respondent claims a sum a little short of that, namely £19,841.52. I need to make an assessment

as to whether that is a reasonable amount and in turn that requires a consideration of whether the time which has been spent in preparing the case is reasonable. I need to take into account that there may well have been communication problems between the respondent's solicitor and Mr Javid who is the embodiment of the respondent but I need to make the assessment on the basis of the time which a reasonable competent solicitor would have taken in those circumstances to complete the necessary work. I take into account that by the time of the withdrawal the respondent had undertaken all pre trial work.

10.16 Even taking into account the stated language barrier I consider that 17½ hours in attendance on Mr Javid is unreasonable. The corollary of the respondent's contention that the claimant's case had significant flaws – such obvious matters as insufficient length of service for instance – is that the defence of it should have been fairly straightforward. In these circumstances I consider that no more than 8 hours would have been reasonably necessary in attendances on Mr Javid. For similar reasons I consider that 12 hours to prepare one short and one medium length witness statement is excessive. I consider that no more than 6 hours would have been required. Taking into account these modifications to the costs sought the result is that before VAT the amount which the claimant is to pay to the respondent is £13,419.10. Whilst the statement of costs referred to some £3,306.92 as VAT on solicitor's and counsel's fees, the VAT on the solicitor's fees will need to be adjusted pro rata to the reductions I have made to those fees.

Employment Judge Little

Date: 12 May 2017