EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Farish Ramjan	**v**	**Tesco Stores Limited**

Heard at: Watford **On**: 13 June 2017

Before: Employment Judge Bedeau

Appearances

For the Claimant: Ms R Hayles, Workplace representative
For the Respondent: Mr J Newman, Counsel

JUDGMENT ON COSTS

The claimant is ordered to pay the respondent's costs in the sum of £1,500.

REASONS

1. On 6 Febuary 2017, I promulgated my judgment on liability after a hearing on 4 and 5 January 2017. I concluded that the claimant's unfair dismissal and unauthorised deductions from wages claims were not well-founded and were dismissed. I also came to the conclusion that the claimant's wrongful dismissal claim had not been proved and was dismissed.

2. On 1 February 2017, the respondent's representatives applied to the Tribunal for a costs order under rule 76(1)(b), schedule 1, Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended. Their application is on the basis that the claims had no reasonable prospect of success. In support, they referred to the fact that the claimant had initially included a claim of discrimination because of sexual orientation citing named individuals but it was struck out at a preliminary hearing held on 4 August 2016 as being out of time and dismissed against the named individual respondents.

3. On 13 April, 6 July and 30 December 2016, the respondent's representatives wrote to the claimant stating that his claims had no

reasonable prospects of success and if he was unsuccessful at the liability hearing an application would be made for costs. He was given time to withdraw his claims but did not do so.

4. In their application for costs they referred to my findings and conclusions, namely that the respondent had reasonable grounds for believing in the claimant's guilt, in that he had damaged a door, was rude to his managers and had behaved in an aggressive manner. A fair procedure had been followed and dismissal fell within the range of reasonable responses. His conduct was such that the respondent was entitled to summarily dismiss him. Further, there was no evidence that he regularly worked 30 hours overtime and there was no contractual right to overtime.

5. For all of the above reasons, it is submitted that the claims had no reasonable prospect of success and that an order should be made for the respondent's legal costs unnecessarily incurred. In their schedule of costs the grand total including attendance, preparation and representation at the hearings is £8,033.26.

6. In the claimant's response dated 21 March 2017, Ms Hayles submitted that there was a reasonable prospect of the claims of unfair dismissal, wrongful dismissal and unauthorised deductions from wages succeeding once they were allowed to proceed to a final hearing at the preliminary hearing stage. The claim of discrimination because of sexual orientation was not pursued as the claimant accepted that it had been struck out and did not seek to challenge that judgment. At the final hearing he was entitled to rely on the assertions that the respondent's policies were not adhered to; the investigation, dismissal and appeal procedures were not properly followed; his grievance was not properly investigated; and dismissal was outside the range of reasonable responses.

7. Ms Hayles further submitted that I should take into account her lack of legal knowledge and experience which might have played a part in my judgment. The respondent's costs claim is excessive as too many professionals were engaged.

8. As for the claimant's means, he is currently unemployed, has no savings and his housing circumstances are insecure. He, therefore, does not have the means to pay a costs order.

9. The thrust of the response is that I have to consider to all of the evidence, the oral and documentary evidence as well as the pleadings, before awarding costs, therefore, it could not be said that the claimant claims had no reasonable prospect of success.

The evidence

10. I did not hear evidence but both parties are agreed that I should deal with the application on the papers to save costs. The respondent submitted a bundle of relevant documents for me to take into account.

Submissions

11. I have taken into account the submissions of Ms Hayles, on behalf of the claimant and of the respondent's legal representatives. I have outlined their arguments above and do not propose to repeat their detailed submissions herein having regard to rule 62(5) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended.

The Law

12. The costs provisions are in rules 74 to 84, schedule 1, Employment Tribunals (Constitution and Rules of Procedure) regulations 2013, as amended. "Costs" includes any fees, charges, disbursements or expenses including witness expenses incurred by or on behalf of the receiving party, rule 74(1).

13. The power to make a costs order is contained in rule 76. Rule 76(1) provides,

> "A tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that –
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> (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."

14. In deciding whether to make a costs order the Tribunal may have regard to the paying party's ability to pay, rule 84.

15. In the case of Yerrakalva v Barnsley Metropolitan Borough Council [2011] EWCA Civ 1255, the Employment Judge in the case awarded the respondent 100% of its costs based on the claimant's lies prior to her decision to withdraw. On appeal the EAT said that it was unable to see how the lies told at the prehearing review caused the respondent any loss at all from which they were entitled to be compensated. She succeeded in her appeal. On appeal to the court of Appeal, Mummery LJ giving the leading judgment held:

> "The vital point in exercising their discretion to order costs is to look at the whole picture of what happened in the case and asked whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what affects it at that. The main thrust of the passages cited above from my judgement in McPherson's case was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the employment tribunal had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs the claimant. In rejecting

> that submission I have no intention of giving birth to erroneous notions, such as that causation was irrelevant or the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances….
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> 52 In my judgement, although the employment tribunal had jurisdiction to make a costs order, it erred in law in the exercise of its discretion. If, as should have been done, the criticisms of the council's litigation conduct had been factored into the picture as a whole, the employment tribunal would have seen that the claimant's unreasonable conduct was not the only relevant factor in the exercise of the discretion. The claimant's conduct and its effect on the costs should not be considered in isolation from the rest of the case, including the council's conduct and its likely effect on the length and costs of the prehearing review."

16. In the case of Vaughan v London Borough of Lewisham UKEAT/0533/12/SM, the Employment Appeal Tribunal held that there was no error of law when the employment tribunal in awarding costs took into account whether there was a reasonable prospect of the claimant being able, in due course, to return to well-paid employment and be in a position to pay costs. Also in that case, it was held that the failure on behalf of the respondent to apply for a deposit order is not necessarily an acknowledgement that a claim has a reasonable prospect of success as there are a variety of reasons why such a course of action may not be adopted, such as additional costs involved in having the matter considered at a preliminary hearing and which may not deter the claimant.

17. The Tribunal have to consider, once the claims have been brought, whether they were properly pursued, Npower Yorkshire Ltd v Daly UKEAT/0842/04.

18. Knox J, in Keskar v Governors of All Saints Church England School and Another [1991] ICR 493, page 500, paragraphs E-G, held,

> "The question whether a person against whom an order for costs is proposed to be made ought to have known that the claims he was making had no substance, is plainly something which is, at the lowest capable of being relevant, and we are quite satisfied from the decision itself, in the paragraph which I have read and need not repeat, that the industrial tribunal did have before it the relevant material, namely that there was virtually nothing to support the allegations that the applicant made, from which they drew the conclusion that he had acted unreasonably in bringing the complaint.
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> That in our view, does involve an assessment of the reasonableness of bringing the proceedings, in the light of the non-existence of any significant material in support of them, and to that extent there is necessarily involved a consideration of the question whether the applicant ought to have known that there was virtually nothing to support his allegations."

19. I have also taken into account the cases of AQ Ltd v Holden [2012] IRLR 648, a judgment of the Employment Appeal Tribunal, E.T Marler v Robertson [19974] ICR 72, a judgment of the National Industrial Relations Court, and Oni v Unison UKEAT/0370/14/LA.

20. In Marler, it was held by Sir Hugh Griffiths under the old "frivolous or vexatious" costs requirements that

> "If the employee knows that there is no substance in his claim and that it is bound to fail, or if the claim is on the face of it so manifestly misconceived that it can have no prospect of success, it may be deemed frivolous and an abuse of the procedure of the tribunal to pursue it. 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, and likewise abuses the procedure. In such cases the tribunal may and doubtless usually will award costs against the employee.", page 76 D-F.

21. In the Oni case, Simler J, President, re-stated the principles, namely that the tribunal has a wide discretion in deciding whether to award costs. It is a two-stage process. The first being, to determine whether the paying party comes within one or more of the parameters set out in rule 76. The second, is if satisfied that one or more of the requirements have been met, whether to make the award of costs. However, costs had to be proportionate and not punitive and reasons must be given.

22. In Arrowsmith v Nottingham Trent University [2011] EWCA Civ 797, a case where the claimant was ordered to pay costs of £3,000 because she had made a case dependent on advancing assertions that were untrue. The Court of Appeal held that under rule 41(2) the tribunal was not obliged to take her means into account although it had done so. The fact that her ability to pay was limited, in that she was unemployed and no longer in receipt of statutory maternity pay, did not require the tribunal to assess a sum limited to an amount she could pay. The amount awarded was properly within the tribunal's discretion.

23. In relation to the exercise of the tribunal's discretion whether to take into account the paying party's ability to pay, under the old rules, HHJ Richardson, in the case of Jilley v Birmingham & Solihull Mental Health NHS Trust (EAT/584/06), held:

> "The first question is whether to take ability to pay into account. The tribunal has no absolute duty to do so. As we have seen, if it does not do so, the County Court may do so at a later stage. In many cases it will be desirable to take means into account before making an order; ability to pay may affect the exercise of an overall discretion, and this course will encourage finality and may avoid lengthy enforcement proceedings. But there may be cases where for good reason ability to pay should not be taken into account: for example, if the paying party has not attended or has given unsatisfactory evidence about means."
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> "If a tribunal decides not to do so, it should say why. If it decides to take into account ability to pay, it should set out its findings about ability to pay, say what impact this has had on its decision whether to award costs or on the amount of costs, and explain why. Lengthy reasons are not required. A succinct statement of how the tribunal has dealt with the matter and why it has done so is generally essential."

Conclusion

24. I have considered the cases of Oni, Keskar, and Marler. I acknowledge that costs in an employment tribunal case does not follow the event and that I have a wide discretion in relation to costs.

25. The respondent's application is on the basis that the claims had no reasonable prospect of success.

26. The claimant was entitled to pursue a direct discrimination claim because of sexual orientation as his manger had referred to him behaving like a girl. After the preliminary hearing, it was struck out and no longer pursued. I do not hold the view that it had no reasonable prospect of success. The evidence in relation to that was not tested at a liability hearing.

27. In relation to the claims at the final hearing, it was clear that the claimant's behaviour towards his managers was aggressive, disrespectful and rude. In temper, he caused damage to an internal fire door. The respondent had conducted a reasonable investigation. Dismissal fell within the range of reasonable responses as there were no mitigating factors. His conduct, in my view, had fallen foul of the two examples of acts of gross misconduct, namely "physical or serious verbal abuse of other employees, managers or customers" and "physical damage to the respondent's property."

28. The respondent had not fundamentally breached the claimant's contract of employment in dismissing him because it was entitled to do so having regard to the seriousness of his conduct.

29. There was no evidence that the claimant was legally entitled to overtime.

30. I accept that the claimant and Ms Hayles are not legally trained but Ms Hayles is a workplace representative and is familiar with the respondent's policies and procedures as she articulated them before me during the hearing and in her written response to the costs application.

31. In my judgment, the respondent has satisfied the first limb of the costs requirements in rule 76(1) that the claims had no reasonable prospect of success.

32. In relation to the claimant's means I do take them into account. The fact that a claimant is unemployed should not preclude me from awarding costs, Arrowsmith. I readily accept that costs do not follow the event. However, the respondent has incurred costs in defending three unmeritorious claims. In my judgment and taking into account the claimant's means, I order that he pays what I consider to be a proportionate amount the respondent's costs, namely the sum of £1,500.

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Employment Judge Bedeau

Date: 13 June 2017

Sent to the parties on: .....

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For the Tribunal Office