



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant **Respondent**
Mr A Mitchell AND South Western Ambulance Service NHS foundation Trust

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bodmin **ON** 30 June 2017

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: In person
For the Respondent: Mr N Caiden of Counsel

JUDGMENT ON COSTS APPLICATION

The claimant is ordered to pay the respondent's costs in the sum of £18,750.00.

REASONS

1. This judgment is to be read in conjunction with the Judgment dated 30 June 2017 which was read to the parties this morning and in which the claimant's unfair dismissal claim against the respondent was dismissed ("the Judgment"). The respondent has now made an application for payment by the claimant of some of its costs of successfully defending this action.
2. Findings of Fact Relevant to the Costs Application
3. The full background and circumstances of this claim are set out in the Judgment. In short, the claimant brought a claim for unfair dismissal against the respondent following his dismissal for gross misconduct. The claimant had always accepted that he had committed the gross misconduct for which he was dismissed: first, crossing professional boundaries and engaging in a personal relationship with a vulnerable patient, and secondly lying about the background against which he initiated a "Running Red" call to divert his ambulance. Despite his effective admission of gross misconduct he has repeatedly made a considerable number of allegations of unfairness with regard to procedure, all of which were rejected, but not before the respondent was required to defend its position during a lengthy hearing. In addition the claimant persisted in a serious and unfounded allegation that the respondent's managers had dishonestly attempted to distort the investigation process to his detriment.
4. By letter dated 24 January 2017 the respondent sent the claimant a detailed costs warning. It explained the weaknesses in the claimant's case, and explained the legal test to be applied, and why the Tribunal would reject the claim. The claimant was able to obtain professional advice on that letter. The claim was subsequently dismissed by the

- Judgment and the reasons were effectively the same reasons which had been explained to the claimant. The claimant was offered a settlement whereby he could withdraw his claim with no resulting application for costs, but warned that if he continued then the respondent, which is a public body, would make a costs application to recover its costs. The claimant refused to withdraw. He was approached again through ACAS during the week before the hearing, but again refused to withdraw his claim with no order as to costs. As a result the respondent has been put to considerable time and expense over many days in defending the claim.
5. The Application for Costs
 6. The respondent makes an application for its costs on the basis that the claimant has acted unreasonably in the way in which the proceedings have been brought and conducted, and also because the claim had no reasonable prospect of success. The claimant resists the application.
 7. The Rules
 8. The relevant rules are the Employment Tribunals Rules of Procedure 2013 ("the Rules"). 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 – (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.
 9. Under Rule 77 a party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.
 10. Under Rule 78(1) a costs order may – (a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party; (b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles ..."
 11. Under Rule 84, 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 (or, where a wasted costs order is made, the representative's) ability to pay.
 12. The Relevant Case Law
 13. I have considered the following cases: Gee v Shell Ltd [2003] [2003] IRLR 82 CA; McPherson v BNP Paribas [2004] ICR 1398 CA; Monaghan v Close Thornton [2002] EAT/0003/01; NPower Yorkshire Ltd v Daley EAT/0842/04; Kapoor v Governing Body of Barnhill Community High School UKEAT/0352/13; Nicholson Highland Wear v Nicholson [2010] IRLR 859; Barnsley BC v Yerrakalva [2012] IRLR 78 CA; Topic v Hollyland Pitta Bakery & Ors UKEAT/0523/11/MAA; Shield Automotive Ltd v Greig UKEATS/0024/10; Jilley v Birmingham and Solihull Mental Health NHS Trust [2008] UKEAT/0584/06; Single Homeless Project v Abu [2013] UKEAT/0519/12; Vaughan v LB of Newham [2013] IRLR 713; Raggett v John Lewis plc [2012] IRLR 906 EAT.
 14. The Relevant Legal Principles
 15. The correct starting position is that an award of costs is the exception rather than the rule. As Sedley LJ stated at para 35 of his judgment in Gee v Shell Ltd "It is nevertheless a very important feature of the employment jurisdiction that it is designed to be accessible to people without the need of lawyers, and that in sharp distinction from ordinary litigation in the UK, losing does not ordinarily mean paying the other side's costs ..." Nonetheless, an Employment Tribunal must consider, after the claims were brought, whether they were properly pursued, see for instance NPower Yorkshire Ltd v Daley. If not, then that may amount to unreasonable conduct. In addition, the Employment Tribunal has a wide discretion where an application for costs is made under Rule 76(1)(a). As per Mummery LJ at para 41 in Barnsley BC v Yerrakalva "The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask 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 effects it had." However, the Tribunal should look at the matter in the round rather than dissecting various parts of the claim and the costs application, and compartmentalising it. There is no need for the tribunal to find a causative link between the costs incurred by the party making the application for costs and the event or events that are found to be unreasonable, see McPherson v BNP Paribas, and also Kapoor v Governing Body of Barnhill Community High School in which Singh J held that the receiving party does not have to prove that any specific unreasonable conduct by the paying party caused any particular costs to be incurred.
16. When considering an application for costs the Tribunal should have regard to the two-stage process outlined in Monaghan v Close Thornton by Lindsay J at paragraph 22: "Is the cost threshold triggered, e.g. was the conduct of the party against whom costs is sought unreasonable? And if so, ought the Tribunal to exercise its discretion in favour of the receiving party, having regard to all the circumstances?"
 17. With regard to the paying party's ability to pay, Rule 84 allows the tribunal to have regard to the paying party's ability to pay, but it does not have to, see Jilley v Birmingham and Solihull Mental Health NHS Trust and Single Homeless Project v Abu. One reason for not taking means into account is the failure of the paying party to provide sufficient and/or credible evidence of his or her means. The authorities also make it clear that the amount which the paying party may be made to pay after assessment does not need to be a sum which he or she could pay outright from savings or current earnings. In Vaughan v LB of Newham the paying party was out of work and had no liquid or capital assets and a costs order was made which was more than twice her gross earnings at the date of dismissal. Underhill LJ declined to overturn that order on appeal because despite her limited financial circumstances, there was evidence that she would be successful in obtaining some further employment. Insofar as it does have regard to the paying party's ability to pay, the tribunal should have regard to the whole means of that party's ability to pay, see Shield Automotive Ltd v Greig (per Lady Smith obiter). This includes considering capital within a person's means, which will often be represented by property or other investments which are not as flexible as cash, but which should not be ignored.
 18. Under Rule 78(1)(a) a costs order may order the paying party to pay the receiving party a specified amount not exceeding £20,000. Under Rule 78(1)(b) a costs order may order the paying party to pay an amount to be determined by way of detailed assessment, carried out either by the County Court or by an Employment Judge applying the principles of the Civil Procedure Rules 1998.
 19. The Amount of the Application and VAT
 20. The respondent seeks its costs from the costs warning letter at the end of January 2017 through to the end of these proceedings. It does not seek its costs of some £7,000 or so prior to that date. It does not seek recovery of VAT because it is able to recover the VAT, (see Raggett v John Lewis plc which reflects the CPR Costs Practice Direction (44PD)).
 21. The respondent has prepared a schedule of the costs claimed by the respondent from the date of the costs warning letter. The solicitors' costs are claimed at a variety of hourly rates depending upon the seniority of the fee-earner in question. These range from £40 per hour to £175 per hour and seem to be well within the approved County Court rates and therefore reasonable. Different aspects of the work have been undertaken by different fee-earners depending on the nature of the work, which again is a reasonable approach. The claim is for a total of £20,099.00, plus counsel's fees of £5,250, and travelling expenses of £498.87. No VAT is claimed, and the amount claimed is limited to £20,000 so as not exceed the limit set out in Rule 78(1).
 22. The claimant has made a number of observations about the excessive nature of some of the time incurred. I agree that a total of about 55 hours in preparing and amending witness statements (charged in excess of £7,000) seems excessive (there were four of them). I disagree that 20 hours was excessive for preparing the agreed bundle, particularly as the content was largely driven by the claimant's unreasonable approach to the relevant issues. I do agree with the claimant's objection to the 28 hours charged at £4,452 for the respondent's solicitor to attend the hearing when Counsel had been briefed and attended. An element of assistance in meeting with the respondent and ensuring that the response is under way is appropriate, but more than this seems to be unnecessary duplication. After consideration I consider that the following costs are

- potentially allowed: solicitors' costs of about £13,000; Counsel's fees of £5,250.00, and travelling expenses of £498.87. That is a total of about £18,750.00
23. The Claimant's Means The claimant owns a share in a property which is subject to mortgage. Otherwise he has now exhausted previous earnings on retraining and trying to establish a teaching service and module relating to offshore sailing. He has savings of about £500 and no regular income, but hopes to develop his teaching business imminently, which will generate some income.
 24. Conclusion
 25. First I conclude that the costs threshold is triggered. Having effectively admitted the gross misconduct for which he was dismissed, and with no apparent unfairness with regard to the procedure adopted, the claimant's claim had no reasonable prospect of success. In addition, having been informed in detail in the costs warning letter why his claim was likely to fail, an explanation which was wholly justified and which came to fruition, the claimant's conduct was unreasonable in the way in which he continued to conduct these proceedings. In addition he continued to pursue a serious and unfounded allegation of misconduct against the respondent's managers. That was also unreasonable conduct which had to be defended by the respondent through to the conclusion of the main hearing. In short the respondent, which is a public body with limited resources, was unnecessarily and unreasonably put to considerable expense in defending this claim.
 26. Secondly, having regard to all of these circumstances I consider it appropriate to exercise my discretion to make an order that the claimant pays the respondent's costs. The reasons include: (i) the clear costs warning; (ii) the serious and unfounded allegations pursued against the respondent's managers; (iii) the claim was dismissed for essentially the same reasons set out in the costs letter; (iv) this case was inherently very weak from the outset; and (v) the respondent is a public body with limited and stretched resources.
 27. Thirdly, I consider that the amount of costs claimed as now reduced to the sum of £18,750.00 is a reasonable amount to award in these circumstances.
 28. Finally I consider the claimant's means. Although the claimant has limited financial circumstances at the moment, he does own a share in a property and is likely to generate income in the near future. Bearing all of this in mind I therefore order the claimant to pay the respondent's costs in the sum of £18,750.00.

Employment Judge N J Roper

Dated:- 30 June 2017

Judgment sent to Parties on

29th July 2017
