EMPLOYMENT TRIBUNALS

Claimant: Mr K Marsh

Respondent: Here For You Hospitality Limited

HELD AT: Manchester **ON:** 23 February 2017

BEFORE: Employment Judge T Ryan

REPRESENTATION:

Claimant: In person
Respondent: Ms J Hill, Solicitor

JUDGMENT having been sent to the parties on 28 February 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. This is an application by the respondent for the costs of the proceedings commenced by the claimant in relation to his employment with Here For You Hospitality Limited. I can summarise the material facts as follows.

2. The claimant brought a claim alleging constructive unfair dismissal having been detected by his employers as they then believed and has subsequently turned out to be the case in using his own credit or bank card on which to place refund payments that were due to the customers or clients of the respondent. He happened to be observed doing this. The World Pay accounting system revealed what had been done and the respondent suspended the claimant and proposed to discipline him in respect of allegations of fraud. The claimant resigned.

3. He then brought a claim of constructive unfair dismissal alleging that the respondent was in breach of contract and, at least by implication both in his claim and in correspondence from his solicitors effectively asserted that he had not been guilty of theft.

4. The claimant knew very well that he was guilty of theft because as events turned out in the course of the proceedings the claimant was interviewed by the police and on 15 November 2016 Police Constable Willens of Greater Manchester Police wrote an email (page 18 of the bundle) to Carole Clarke, the HR Manager at the respondent, saying that he had just finished interviewing the claimant and he said this:

> "Much to my surprise he fully admitted the offence of theft and taking company money. Each transaction was put to him and he admitted each and every one. Furthermore he has stated that he will be withdrawing his claim against the company. He said that he was depressed and had a gambling addiction".

5. Part of the claimant's case was based upon the fact that the respondent had suspended the claimant without pay for a couple of days before he resigned, and thereafter had stopped out of his wages the money that he had taken, and there is no doubt some £1,517 was recovered in that way.

6. The claimant had been represented by Unite solicitors and they had written to the respondent's solicitors in vehement and emphatic terms. They said, for example, on 13 June 2016, "It still has not been proven that Mr Marsh committed theft". This was written in the context of numerous cost warnings letters written by the respondent's solicitors to the claimant's then solicitors. In a letter at page 32 of 4 November 2016 they wrote:

> "You've pleaded a Polkey and contributory fault reduction. You cannot prove that your client would have fairly dismissed had the claimant been subject to a fair process, nor can you prove that our client was guilty of blameworthy conduct. As you will see from the enclosed letter of HSBC it is categorically proven beyond any reasonable doubt that the card number in question, namely the one ending 9231, is nothing to do with our client. Shamefully for your client they would have found this out had they undertaken a reasonable investigation."

7. Those assertions were clearly without foundation, and the claimant before me today has acknowledged that they were untrue. They are of course his assertions to the extent that the solicitors are taken to be writing on his behalf and on his instructions.

8. At page 28 of the bundle on 9 November Mr Clements of Unite's solicitors refers to "suspicion of our client using in commission of the alleged crime that your client accused him of. He also said, "An email proves that the claimant was guilty of no blameworthy conduct" and he said particularly that the defence relied solely, if not almost exclusively, on the contention that the claimant was guilty of fraud. He continued:

> "The issue of whether our client was guilty is relevant in relation to your argument. If our client is not guilty your client cannot stop his wages to reimburse themselves. We put you on notice to admit that there is no evidence to suggest our client was guilty of fraud. Inference will be drawn from silence or evasive responses and in similar vein."

9. What happened was that very shortly after that on 18 November 2016 the claimant's solicitors wrote to the Tribunal saying:

> "We write to notify you of the ending of our retainer with the claimant and request to be removed from the record as acting. The claimant now is acting in person."

10. On 23 November the claimant withdrew the claim without condition and on 1 December 2016 this application for costs was intimated. The claimant responded to it by an email of 14 December 2016 saying, in respect of the costs sought by the respondent:

> "I didn't send them an offer as I feel I am on very good grounds on cancelling the Tribunal due to good reasons."

He also said:

> "Myself and my acting solicitor thought I had a very good case that Hospitality had breached my contract and withheld money from myself and was against the employment law in my contract."

11. The difficulty with that is that the claimant knew, as I say, throughout that he was guilty of theft. Not only did he admit it to the police, he was in court on 4 January 2017 before the Justices in Wigan, pleaded guilty to theft and was sentenced to a community work order and ordered to pay £170 costs and victim surcharge in the round. Since then he has been performing on his day off each week 100 hours of community service.

12. The claimant obviously lost his job at Here For You Hospitality. Not long after he got a job with a trampoline park business in Wigan and fortunately, and perhaps somewhat surprisingly, he has retained that job at the Velocity Trampoline Park where he is now earning £25,000 per year. He gave me information about his circumstances and means which, although not given on oath, was not challenged by Ms Hill.

13. He lives with his partner and child of four. His partner works part-time as a sandwich shop assistant 24 hours a week. He works 47½ hours. He is required to have a car for his work because he has to attend meetings in Widnes and matters of that sort. He is the General Manager of the trampoline park and he tells me that he takes home roughly £1,680 per month net. However, his finance agreement on his car is about to end. He needs car finance and is not sure at this point whether he will get it or not and without it he will have to give up that job and get another one. He is 29 years old and he has always worked since leaving school. Prior to working for the respondent he worked in the leisure industry as assistant manager of a leisure centre for a company called Life Leisure. He was with the respondent for four years. He says his job description with the current employer says he has got to have a car. He has not produced that to me. They live in rented accommodation and he has no other properly. His rent is £500 a month. He has debts of £5,000 to HSBC payable at £118 a month, in respect of a loan he took out about a year ago. He has a £1,000 debt to a company called Rainsetter which he pays off at £100 a month and that is due to be cleared in May 2017. On another credit card he owes £1,250. It is maxed

out and he pays £50 a month on that. He has another credit card to Vanquis of £1,200 which he pays at £100 a month, and the total of his payments, as I have added them up, including £164 a month for car and £60 for insurance comes to about £1,100. He clearly has some means and the question for me is whether I should take his means into account.

14. In considering the application I have been reminded of the provisions of the Employment Tribunals Rules of Procedure 2013. I can summarise the effect of the rules in this way. Orders in respect of costs are governed by rules 74 - 84. A judge or tribunal is required to consider making an order for costs, in a case where the receiving party has been legally represented at the hearing, in the circumstances set out in rule 76(1) which include unreasonable conduct of the proceedings. If it is decided that any of the circumstances apply then there is discretion to make an order of costs. The order may be for a specified sum not exceeding £20,000, for an agreed sum or for the whole or part of an amount determined by a detailed assessment in either the tribunal or a County Court. Regard may be had to the ability of the paying party to pay in deciding whether to make an order or how much that order should be.

15. I have had my attention drawn to a number of cases. I will deal with them in terms of principles briefly.

16. The first case to which I was referred is the case of **Gillian v Birmingham Solihull Mental Health NHS Trust [2007] UKEAT/0584/0621/11**. In paragraph 20 of the judgment of the Employment Appeal Tribunal attention was drawn to an Employment Tribunal reasoning that the claimant had behaved at least unreasonably and it is just, fair and proportionate that the claimant should pay the costs of and occasioned by a strike out application. In paragraph 27 the EAT recorded that the Tribunal had found that some of the allegations raised by the claimant in that case were malicious and fabricated. The Tribunal's reasoning was upheld. The Tribunal directed itself to the correct statutory provisions, found that the threshold was crossed and found that an order for costs was entirely appropriate. Those were conclusions the Tribunal was entitled to reach.

17. In the case of **Daleside Nursing Home Limited v Matthew [2009] UKEAT/0519/08/1802**, the case there was that a central allegation by the claimant was an untruth. The summary of that case was that where at the heart of the claim is an explicit lie alleging racial abuse. The Tribunal was in error in failing to find the claimant had acted unreasonably in bringing or conducting the claim and should have made an order for costs against her. The relevant paragraphs are 20 and 22. In paragraph 20:

> "In a case such as this where there is such a clear cut finding that the central allegation of racial abuse was a lie it is perverse for the Tribunal to fail to conclude that the making of such a false allegation at the heart of the claim does not constitute a person acting unreasonably."

18. That case was remitted for the Tribunal then to consider the order that should be made.

19. Perhaps the most important case to which my attention has been drawn is that of **Yerrakalva v Barnsley Metropolitan Borough Council and The Governing Body of Dern Carfield Primary School** [2010] EAT 0231/10/08/12, the decision of the President, Underhill J as he was, sitting alone. A discrimination claim had been withdrawn. What had happened was that the Judge in the first instance had awarded 100% of the costs, not because the claim was treated as being misconceived or unreasonably pursued but because he held that the claimant had lied in two specific requests. He had then gone on to order that the costs should be subject to a detailed assessment in the County Court. In paragraphs 16 and 17 the EAT sets out its reasoning. The EAT assumed that the claimant had lied at the pre-hearing review in the two ways identified by the Judge. "It was necessary", said the EAT, "for the Judge in deciding whether to make an award and if so what the amount should be to take into account the nature, gravity and effect of that conduct" (see the passage below from Lord Justice Mummery in **McPherson v BNP Paribas**). The quotation at paragraph 40 of that case, **[2004] ICR 1398**, is this:

> "In my judgment the rule does not impose any such causal requirement in the exercise of the discretion. The principle of relevance means that the Tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion but that is not the same as requiring the party claiming costs to prove that specific unreasonable conduct by the potential paying party caused particular costs to be incurred."

20. Underhill J said: "that the award of costs must at least broadly reflect the effect of the conduct in question", and noting that it might have been different, that is to pay 100% of the costs, if the effect of the lies had been to establish that the claim was misconceived from the start.

21. I should say that the authorities produced by Ms Hill also remind me that it is a matter of discretion for the Tribunal whether to take into account the claimant's means. In its discretion the Tribunal may decide not to do so, but if it decides not to do so it should say why it is not doing so.

22. Ms Hill's argument in this case is that the Tribunal should not take into account the claimant's means because the nature of the case is based upon the fundamental assertion, whether explicit or implicit by the claimant, that he was not guilty of the fraud which he was being investigated for when he resigned.

23. I notice that the claimant has not pursued this case to trial. He has not repeated a lie on oath and he had, even before admitting in public in the Magistrates Court that he was guilty of the theft, withdrawn his case.

24. Whilst I accept, as the claimant does, that my discretion to make an award of costs is triggered, the claimant did not for a moment say before me that no order should be made, and therefore I do not have to consider his means in relation to the question whether I should make an order or not. By his concession the claimant admits that his claim was misconceived and/or the conduct of the proceedings was unreasonable (in my judgment both those are amply demonstrated by the facts I have recited anyway), and does not say that his means are a ground for saying that no order for costs should be made.

25. The claimant began his submissions by saying that some order should be made but it should be limited.

26. I think that given that concession and in any event given his financial circumstances it would not be just and equitable to ignore his means in deciding the amount of the order. The claimant obviously has been industrious. He has no previous convictions, but now has. He has brought this upon himself, and it seems to me that to simply ignore what are material and to some extent difficult financial circumstances, notwithstanding the nature of the circumstances which give rise to the order for costs in the first place, would not be just.

27. That said, turning to his means, although they are limited this is a man who, like many, spends some or all of his life in debt and this will be a further debt. How the respondents choose to enforce the award that I make is a matter for them. It may be open to the parties to reach agreement in respect of the award.

28. The claimant suggested that he could pay £100 a month in respect of any order that I made, and I take that into account. The sum claimed in the first instance was £10,000. The cost of the application according to Ms Hill, that is of preparing the application and her attendance today, have added £2,000 to that. I have not asked her about that. It seems to be a slightly high figure and I think the appropriate starting point in this case would have been to have made an award of £10,000 if I had not taken into account the claimant's means.

29. Were this a case in which the claimant had simply not engaged with the weakness of his claim and had been found nonetheless to have pursued a misconceived claim, then I would probably have awarded a sum in the order of £3,000 or £4,000. It seems to me that whilst it is right to take the claimant's means into account the circumstances in this case mean that they are to be taken into account in such a way as reflects both his financial position and the fact that his unmeritorious conduct of the proceedings has caused significant cost to the respondent that it should not otherwise have to bear.

30. Balancing these factors and doing the best I can I consider it just to order that the claimant pay a contribution to the respondent’s costs in the sum of £7,500.

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Employment Judge 6 June 2017

REASONS SENT TO THE PARTIES ON
14 June 2017

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FOR THE TRIBUNAL OFFICE