Case Number: 3200598/2016

RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr A Zita**

Respondent: **Roundstone Development Management Limited**

Heard at: **East London Hearing Centre**

On: **30 October 2017**

Before: **Employment Judge Brown**

Representation

Claimant: In person

Respondent: Mr D Dumford

COSTS JUDGMENT

The judgment of the Tribunal is that:-

1. **The Claimant's claims against the Respondent had no reasonable prospect of success and the Claimant shall pay the Respondent's preparation time costs in the sum of £1,702.00.**

2. **Mr Neckles, when he was acting for the Claimant in the context of this litigation, was not acting in pursuit of profit with regard to the proceedings and therefore an order for wasted costs cannot be made against him.**

REASONS

Preliminary

1 By an application dated 27 August 2017 the Respondent made an application for a preparation time order against the Claimant and a wasted costs order against his representatives, on the basis that the Claimant and his representative had acted vexatiously, abusively, disruptively and unreasonably in the bringing of the proceedings and that the claim had no reasonable prospect of success. The Respondent sought costs in the sum of £1,702 for 46 hours preparation time, at £37 per hour.

Law

2 The relevant rules are set out in Rules 78, 79 and 80 of the Employment Tribunal Rules of Procedure 2013. The Respondent sought a preparation time order because it sought to recover the cost of time spent in preparation for the hearing by people who were not legally qualified.

3 By *Rule 76 Employment Tribunal Rules of Procedure* a Tribunal may make a preparation time order and shall consider whether to do so, where it considers that:

(a) a party … 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.

4 The amount of preparation time order is governed by *Rule 79 ET Rules of Procedure*.

5 *Rule 80* provides:

"A Tribunal may make a wasted costs order against a representative in favour of any party ("the receiving party") where that party has incurred costs -

(a) as a result of any improper unreasonable or negligent or act or omission on the part of the representative; or

(b) which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay.

Costs so incurred are described as wasted costs.

(2) "Representative" means a party's legal or other representative or any employee of such representative, but it does not include a representative who is not acting in pursuit of profit with regard to the proceedings. A person acting on a contingency or conditional fee arrangement is considered to be acting in pursuit of profit."

6 By *Rule 84 ET Rules of Procedure 2013* it is provided that, 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.

7 With regard to unreasonable conduct, in *Barnsley Metropolitan Borough Council v Yerrakalva [2011] EWCA CIV 1255,* the Court of Appeal said at paragraph 41, "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 if had."

8 With regard to a claim having "no reasonable prospect of success," in *E T Marler v Robertson* [1974] ICR 72, NIRC Sir Hugh Griffiths said: 'Ordinary experience of life frequently teaches us that that which is plain for all to see once the dust of battle has subsided was far from clear to the combatants once they took up arms'. In that case, costs against the claimant were refused notwithstanding that, at the end of a nine-day hearing, he had admitted under cross-examination that the respondents had acted reasonably in dismissing him.

9 However, in deciding whether to award costs on the basis that a claim had no reasonable prospect of success, the ET can take into account what the party knew or ought to have known if 'he had gone about the matter sensibly'. In *Keskar v Governors of All Saints Church of England School* [1991] ICR 493, the EAT said (Knox J): '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'. The fact that there was nothing in the evidence to support the allegations involved an assessment of the reasonableness of bringing the proceedings, and this 'necessarily involved' a consideration of the question whether the claimant ought to have known that there was no such supportive material.

10 Even a legally qualified representative will not constitute a representative if he/she is not acting in pursuit of profit. See *Jackson v Cambridge County Council & Others EAT 0402/2009*.

The Applications for Costs

11 By a claim form dated 7 June 2016 the Claimant brought complaints, amongst other things, of ordinary unfair dismissal, direct race discrimination, victimisation, protected disclosure detriment and/or automatic unfair dismissal for protected disclosure and breach of contract against the Respondent. The claim was heard on 7 – 9 June and 13 June 2017. Judgment was sent to the parties on 3 August 2017. The judgment of the Tribunal decided that all the Claimant's claims failed.

12 With regard to the Claimant's unfair dismissal claim, Mr Neckles, his representative, made an application to bring the unfair dismissal claim under *Article 30 Charter of Fundamental Rights of European Union*. The Claimant did not have the two years service required under UK law to bring a complaint of ordinary unfair dismissal.

13 Employment Judge Prichard explained the relevant law in the ET Judgment. He quoted *Article 30* of the *Charter,* which said, "Every worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices." Employment Judge Prichard set out Protocol Number 30, which detailed an Opt Out from the Charter for the UK. Article 2 of Protocol 30 says, "To the extent that a provision of the Charter refers to national laws practices it should only apply to … the UK to the extent that the rights or principles it contains are recognised in the law or practices … of the UK."

14 The Pritchard Tribunal decided, therefore, that *Article 30 Charter of Fundamental Rights of European Union* did not have horizontal effect. The terms of *Article 30* made

plain that the UK was able to opt out of the Charter and the Charter rights only applied to the extent that the rights or principles it contained were recognised by law or practice of the UK. The relevant law to be applied to claims of unfair dismissal was the law of the UK. The Claimant did not have the two years required to bring an ordinary unfair dismissal claim under UK law.

15 On the findings of the Employment Tribunal, both the protected act in the victimisation complaint, and the protected disclosure in the protected disclosure detriment and/or automatic unfair dismissal complaint, were done after the Respondent had commenced a disciplinary investigation into conduct and competence matters against the Claimant.

16 On the Tribunal's findings of fact, the Respondent relied on numerous allegations of lateness against the Claimant in dismissing him; but the Claimant's explanations for lateness at the Tribunal were not accepted. The Tribunal specifically found that the Claimant did not answer the allegations of lateness and/or that the Claimant's account did not add up at the Tribunal, paragraphs 45 and 60. The Tribunal found, at paragraph 102 of its Judgment, that the evidence against the Claimant appeared overwhelming on the performance issues, let alone the time keeping and attendance issues against him.

17 Furthermore, with regard to the race discrimination complaint, the Claimant relied on his Italian and/or Brazilian nationality and/or national origin. However, on the Tribunal's findings of fact, he was part of a multicultural team and the strength of the case against the Claimant regarding disciplinary and performance issues was overwhelming.

18 With regard to the Claimant's claim that he had been subjected to a detriment for asserting the right to be represented, the Tribunal found, at paragraph 112 of the Judgment, that the momentum towards termination had been established prior to any alleged protected act and a long way prior to the Claimant's assertion of the right to be represented.

19 With regard to the Claimant's victimisation complaint, at paragraph 113 and 114 of the Judgment, the Tribunal said that, as far as the direct race discrimination and victimisation complaints were concerned, given the make up of the team and members of the company, and the strength of the case against the Claimant, the fact that the Claimant was from Brazil and had an Italian passport could have absolutely nothing whatsoever to do with the Respondent's view of him. The Tribunal found particularly, ".. the Claimant can suggest no particular reason why it could have".

20 The Tribunal found, at paragraph 114, that the victimisation claim under *s27 Equality Act* was subject to timing problems for the Claimant, given that the Claimant only asserted, as the Tribunal found elsewhere in its judgment, that he had been subjected to discrimination after the Respondent had commenced disciplinary proceedings against him.

21 Regarding the public interest disclosure detriment claim, the Tribunal found, at paragraph 116, "Given our views of the extant direct discrimination complaint, the vanishing unlikelihood of it being an infinitesimal influence on the decision making processes of the Respondent, and the extreme lateness of it being raised, the Tribunal considers it a hopeless claim."

22 Having read the Judgment of the Pritchard Tribunal and, particularly, its findings of fact, I decided that it was plain that the Tribunal had decided that there were numerous matters of competence and misconduct on which the Respondent relied in dismissing the Claimant.

23 At today's hearing, the Claimant told me that he believed in his claims and that he referred to documents during the hearing to support his claims. On the Tribunal's findings of fact, however, the Claimant did not provide any credible or comprehensible explanation, for example, for his lateness, on which the Respondent relied in dismissing him.

24 Furthermore, it is quite clear that the claim of unfair dismissal was misconceived for the legal reasons explained by Employment Judge Prichard. Therefore, in order to succeed in any claim for compensation arising out of his dismissal, the Tribunal would have to have found that, for example, the dismissal was an act of race discrimination, or an act of victimisation. On the Tribunal's findings of fact, however, there was overwhelming evidence against the Claimant regarding his timekeeping and attendance.

25 It seems to me that, in the Claimant's claim, he asserted nothing more than a difference in treatment and a difference in protected status (or the fact that the Claimant had done a protected act). It is quite clear that the burden of proof did not shift to the Respondent in either the race discrimination claim, or the victimisation claim. On that basis, the Claimant clearly had no reasonable prospect of success in either the victimisation or the race discrimination complaints. It is also clear that there was little or no evidence to support any finding that the dismissal, or other alleged unlawful acts, were in any way related to a protected disclosure, or the Claimant's assertion of a right to be accompanied.

26 I therefore conclude that it this a case in which it can be said that, if the Claimant had gone about the matter sensibly, he ought to have known - or he did know - that he had no reasonable prospect of success in any of his claims. Nevertheless, the Claimant brought those claims and persisted in the claims against the Respondent, when he did not have the two years service required in order to bring a claim of unfair dismissal and when the alternative claims formulated regarding his dismissal and the Respondent's unlawful acts had almost no factual basis. They were insufficient, at least the case of the victimisation and the race discrimination complaints, to shift the burden of proof to the Respondent.

27 The threshold has been crossed for the Tribunal to make an order for preparation costs against the Claimant. I consider that there is a public interest in discouraging fanciful claims, which costs time and money to Respondents and to the Employment Tribunal Service, by awarding preparation time costs against the Claimant.

28 With regard to the amount of preparation time costs; the Claimant told me that he is in work and was in receipt of salary of £2,000 net a month. He has £1,000 expenses by way of rent and other associated expenses and £200 expenses with regard to his motorbike. The Respondent claims £1,702 for 46 hours' preparation time, at £37 an hour. That is a small fraction, in fact, of the Respondent's preparation time and other costs, which amounted, in total, to £6,202.12 representation costs, plus £3,206 of its own staff time costs. I consider that the Respondent makes a modest claim for preparation time costs, based on a modest hourly rate of £37. I consider that the Claimant can afford to

pay those costs. He has £800 extra each month after he is paid expenses. He could obtain a small loan to pay the preparation time costs. I therefore make an order for preparation time costs against the Claimant, in the sum of £1,702.

29 With regard to Mr Neckles, Mr Neckles represented the Claimant throughout the proceedings, including at the Final Hearing. At today's hearing, both Mr Neckles and the Claimant told the Tribunal that Mr Neckles was not acting for profit when he represented the Claimant. Both the Claimant and Mr Neckles told me that the Claimant was a member of a union called PTSC and that Mr Neckles was acting as a Union representative during the proceedings.

30 The Claimant told me that he had made what he described as a "£1000 voluntary contribution" to the Union, on account of its representation to him. I considered that making such a donation was highly unusual conduct. It is unusual for a Union to accept such a donation when it is representing a member in Employment Tribunal proceedings. While I was sceptical about the Claimant's and Mr Neckles' assertion that Mr Neckles was truly acting "not for profit" in these proceedings, ultimately I accepted the Claimant's and Mr Neckles' assertions.

31 That being so, Mr Neckles could not be the subject of a wasted costs order, despite it being quite plain, from the nature of the case brought that, that it was Mr Neckles who advanced the case of unfair dismissal based on *Article 30* of the *Charter of Fundamental Rights of the European Union*, which was plainly misconceived. I therefore do not make any order for wasted costs against Mr Neckles, because I am not able to.

32 A copy of this judgment shall be sent separately to Mr Neckles and to the Claimant.

Employment Judge Brown

15 November 2017