EMPLOYMENT TRIBUNALS

Claimant: **Mr J. Halsall**

Respondent: **Zest Food Ltd**

London Central **5 December 2017**

Before: **Employment Judge Goodman**

COSTS JUDGMENT

REASONS

1. On 21st of August 2017 there was a hearing of the claim for damages for wrongful dismissal. Judgement was given with oral reasons that respondent should pay the equivalent of 6 weeks pay for the notice period, and a further payment for failure to provide written particulars of contract terms.

2. The claimant did not succeed in showing that the contractual notice period was 3 months, nor that there was a breach of the ACAS code which should lead to an uplift in the award. The respondent did not succeed in an argument that the claimant gave notice, or that no payment was due as the employment was subject to a 12 month probationary period.

3. The judgement was sent to the parties on 22 August. Neither side has asked for written reasons.

4. It was part of the judgement that the claimant could make an application for costs, and the parties agreed that this would be decided on papers, without a further hearing. The claimant made an application by his solicitors on 4 September 2017.

Relevant Law

5. In the Employment Tribunal costs do not follow the event. Instead, by rule 76 of the employment tribunal procedure rules :

> "a Tribunal may make a costs order… and shall consider whether to do so, where it considers that –
>
> (a) a party (or party's representative) acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) been conducted; or
>
> (b) any claim or response had no reasonable prospect of success

6. A costs order is limited on summary assessment to £20,000, although the tribunal has power to order detailed assessment and carry out such assessment.

7. Under rule 84 the Tribunal may have regard to the paying party's ability to pay whether in the deciding to make an order, or the amount payable.

8. The amount of costs ordered must relate to the unreasonable conduct identified, but it does not have to be shown that specific unreasonable conduct caused particular costs to be incurred – **MacPherson v BNP Paribas (London Branch) (2004) ICR 1398.** The Tribunal must however identify what conduct was unreasonable, and what effects it had **–Barnsley Metropolitan Borough Council v Yerrakalva (2012) IRLR 78.**

9. Making a false allegation involving an explicit live which goes to the heart of the claim can be unreasonable conduct - **Daleside Nursing Home Ltd v Matthew (2009) UKEAT 0519/08.** Specific findings made contrary to assertions by a party indicate unreasonable conduct **– Dunedin Canmore Housing Association Ltd the Donaldson (2009) UKEAT 0014/09.**

Claimant's Grounds

10. The application contends that there was a claim for 6 weeks notice which was successful, though does not mention that there was in fact a claim for 3 months notice which was not successful, but it is principally contended that respondent acted unreasonably in its conduct of the claim. These related to findings, firstly on the dispute of fact as to what happened on 21st of November 2016 when the claimant and respondent discussed termination of employment and the terms of that, the respondent contending that the claimant produced resignation letter giving six-month notice, and the claimants evidence that the respondent produced a letter giving him 4 weeks notice and a reference; secondly, that the tribunal had not upheld the respondent session it provided a written contract at the outset, calling on a dispute of fact, in the bundle that purported to be this contract had never been sent.

11. The claimant contends that the respondent in their response and in evidence advanced false facts in relation to the discussion on 21 November 2016, and as to the text of an employment contract. It was also said to be unreasonable that the electronic copy of the purported employment contract was requested on 16 August 2017 (when the respondent said it had been provided for

forensic expert) but not provided until the evening of 18 August, the last working day before the hearing.

12. The claimant also submits that as an employee on a substantial salary, the operations director, the claim that he had no right to notice at all, or beyond the statutory one week, had no reasonable prospect of success.

13. Finally, the claimant says that it was unreasonable not to pay outstanding holiday until after the claimant had engaged solicitors. The holiday pay claim had been resolved before proceedings were issued.

Respondent's reply

14. The respondent replied on 15 September 2017. It was pointed out that the claim was for 3 months notice, not the 6 weeks ordered. The claimant had asserted he been sent an email confirming a 3 month notice period, which was not upheld. As both parties have had adverse findings against them on documentary issues, it was not fair to make an order for costs against one of them . The respondent also relies on no explicit finding being made that either party had given false information to the tribunal had otherwise acted dishonestly.

15. The respondent also points to settlement negotiations: on 15 August the claimant offered to settle for £28,656.66; the respondent says had the claimant offered to settle for 6 weeks notice it is likely been settled on that basis. The respondent adds that on the morning of the hearing he made an offer to settle the £13,500, to which the claimant countered with £15,000. (The Tribunal judgment totalled just under £10,700).The respondent points out that overall the claimant recovered less than a third of what he had claimed.

16. As for the late provision of the employment contract on which the respondent relied, the respondent says that the claimant himself served an addendum witness statement on the day of trial with a large number of emails not previously disclosed. Respondent also says that the claimant acted unreasonably in offering settle for 4 weeks contractual pay for failure to provide a contract of employment, instead as a sum limited to the statutory cap on a week's pay.

Discussion and Conclusion

17. On the core factual issue, the tribunal did not uphold the claimant who maintained that 3 months have been agreed at commencement, nor the respondent, which maintained there was no agreement about notice at all. Instead it was found that the parties had agreed to vary the term as to notice to provide 6 weeks at the time the termination occurred. This must have been known to both parties.

18. On settlement negotiations, it is disappointing that if respondent considered he would settle for 6 weeks notice, he did not make a without prejudice offer on this basis. It is also disappointing that in negotiations the claimant should misrepresent the amount of the award for failing to provide written terms, especially as he was legally represented, and the respondent was not, and so may not have identified this error. However, the respondent made no offer at all until the morning of the hearing, when all the costs had been incurred, other than the attendance of solicitors on counsel for the remainder of the day. What would have happened, had he made this offer a few days before - it seems it would have been rejected, as it was on the day.

19. On the documents, it was of great concern to the tribunal that the respondent provided a contract document which on its finding had never been sent to the claimant, as the respondent could not establish any written or electronic evidence that it had. As respondent says, it may be that on this point alone to order costs would be unfair, as the claimant also relied on an email about 3 months notice which he could not show had been sent or existed in more than draft.

20. This is a case the core disputed facts neither side emerges with much credit. Both must have known about the eventual 6 weeks, but each maintained a more extreme view. Both sides relied on documents they could not establish, and although there must be a suspicion that the respondent had constructed a contract of employment which he knew not to be contemporary or even sent to the claimant, there was no such finding. As the settlement negotiations, if either side had entered discussion on the basis of 6 weeks notice, and something for the failure to provide contract terms which was based on what the Employment Rights Act provides, namely a week's pay subject to statutory cap, rather than contractual pay which in this case was far higher, there was a good likelihood that this case would not have come to a hearing.

21. In the circumstances, while it might be said that the respondent acted unreasonably in the approach negotiation, and a reluctance to disclose the contract which was

Employment Judge Goodman on 5 December 2017