EMPLOYMENT TRIBUNALS

Claimant: Mr A Capper

Respondent: Kingspan Limited

HELD AT: Hull **ON:** 7 February 2018

BEFORE: Employment Judge Smith

REPRESENTATION:

Claimant: Mr A Mugliston of Counsel
Respondent: Mr A Weiss of Counsel

JUDGMENT

The claimant is ordered to pay the respondents in the sum of £3099.32 inclusive of VAT.

REASONS

Background

1. Following a hearing on 10 October 2017 at the Hull Employment Tribunal to determine the claimant's complaints of unfair dismissal and wrongful dismissal I gave a Reserved Decision ("The Judgment") which was sent to the parties on 16 November 2017 dismissing the claimant's complaints.
2. On 12 December 2017 the respondent's solicitors made an application for costs under Rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("The Regulations"). The respondent asked for its cost application to be dealt with on the papers.

3. By an email dated 14 December 2017 the claimant's solicitors indicated the application was opposed and would file full details of the reasons for objection.
4. On 19 December 2017 the claimant filed a six page letter of objection.
5. The papers came before me on 3 January 2018 and I decided that it would be inappropriate to deal with matters on the papers and arranged for a hearing to be convened.

Documentation

6. The claimant produced a bundle of documents consisting of 62 pages duly indexed. In addition the claimant produced a short letter, of approximately a page briefly setting out the claimant's finances supported by bank statements and one credit card statement.
7. The respondent submitted a bundle consisting of an extract from the original trial bundle. The pages started at page 54 and terminated at page 89.
8. The respondent also submitted a transcript of the decision of the Employment Appeal Tribunal in **Millin** v **Capsticks Solicitors LLP** UK EAT/0093/14/RN.
9. The claimant did not appear. No evidence was given.

Findings of facts

10. I made extensive findings of fact in the Judgment at paragraphs 3.1 to 3.64 and also in my conclusions found at paragraph 5.1 to 5.21 inclusive. A copy of the Judgment is found in the claimant's bundle at pages 43 to 55.
11. Those findings of fact and conclusions should be treated as if they were set out, in full in this Judgment.
12. In addition to the findings of fact and conclusion I made in the Judgment I made the following additional findings of fact.
13. The respondent's solicitors wrote to the claimant's solicitors on 8 August 2017 by email. A copy of the email appears in the claimant's bundle at page 59. The email was not marked "without prejudice". The email stated that a cost warning was being issued to the claimant on the following basis:-

    > "The claimant's claim being entirely misconceived, given the number of honest reports made by the claimant in respect of the alleged incident, it would be difficult for a Tribunal not to conclude that the respondent's actions were reasonable in the circumstances.
    >
    > Given the claimant's blatant dishonesty regarding the alleged incident, the breach of trust and confidence is clear."

14. The email made it clear that if the claimant was unsuccessful the email would be produced to the Tribunal's attention and then concluded:-

    > "Given the significant difficulties your client faces with this matter and the above costs warning, our client is offering your client the opportunity to withdraw his matter from the Tribunal at this point and before 11 August 2017, before further costs are incurred defending a matter which your client was entirely and reasonable in issuing."

15. No response was received to that offer.
16. No application was made by the claimant's solicitors for an extension of time.

17. No evidence was placed before me as to the claimant's thought processes when he received a copy of that costs warning.

18. The cost warning was made after disclosure by list had taken place but before witness statements had been exchanged.

19. At no stage did the respondent apply for a deposit order.

20. According to the statements submitted by the claimant he lives with his wife in private accommodation with a mortgage. The equity in the property was not stated.

21. The claimant apparently has two children.

22. It would appear that the claimant's wife earns approximately £728.04 per month net. The claimant is paid weekly and his salary is subject to fluctuation. From the bank statements before me it appeared he received £324.95 to £503.11 net per week.

23. The claimant said that he had no other savings accounts or means of income. However on examining the bank statements transfers were made to an account in the name of "A Capper" under reference 00860050 and also to an account number 00879159. The payments were relatively regular.

24. There was also evidence of larger payments into the account from "Scarborough". For example on 5 October 2017 £1,547.80 was paid in, 12 October 2017 £1,779.60 and on 19 October 2017 £1,998.00.

25. There may be a perfectly innocent explanation as to the transfers and the payments in from "Scarborough". However the claimant was not present to offer an satisfactory explanation.

26. In addition the claimant had not produced a schedule of the household outgoings. I simply had a number of bank statements.

27. The claimant had not completed form EX140.

28. I had no documentary evidence of the equity within the matrimonial home.

29. The respondent had produced a schedule of costs (claimant's bundle page R61) which was in the modest sum of £4,300.93 inclusive of VAT and counsel's fees.

30. The matter was conducted by a three year qualified solicitor charging £130 per hour plus VAT. I am satisfied that the costs set out in the document at page 61 were the costs that were charged to the respondent. I was assured that there was no form of policy of insurance in operation.

31. The schedule of costs found at page 61 did not break down the work undertaken by date. It was summarised in a number of bullet points. It was not possible, for example, to discern what correspondence was sent before and what correspondence was sent after the cost warning was issued.

Submissions

32. Mr Weiss relied upon Rule 76(1)(a) or in the alternative Rule 76(1)(b) of The Regulations.

33. Mr Weiss carefully took me through the Judgment pointing out what he regarded as significant findings of fact.

34. He stressed that at the date of the costs warning, other than witness statements the claimant had full details of the case he had to meet including the documentation.

35. He stressed that the claimant accepted that he had not fallen over as he had claimed given various differing explanations for his previous inconsistent accounts. He drew to my attention that the claimant's own union officer accepted that the claimant's evidence in the course of the disciplinary proceedings was "shady".

36. Mr Weiss stressed it must have been self evident to the claimant, certainly by the time that he received the costs warning that his claim had no reasonable prospect of success. The incident that had led to the disciplinary proceedings had been recorded on CCTV and the claimant had had the opportunity of viewing the same. He knew his account that he had put forward to the respondents was false. At the heart of the case, Mr Weiss submitted, was a claimant who admitted he had given various false accounts to his employer. No evidence had been adduced by the claimant or on his behalf to explain his thought processes when he received the cost warning letter.

37. Mr Weiss contended that if, as was now argued at the time for a decision from the claimant had been too short an explanation for an extension of time could have been made. None was.

38. He contended that the threshold was met and then submitted it was within my discretion whether to make a costs order and that I might but did not have to take into account the claimant's means. He then made representations as regards the inadequacy of the statement of means and also emphasised a number of deposits and transfers which required an explanation.

Mr Mugliston

39. Mr Mugliston asked me to look at this case through the eyes of the claimant.

40. The claimant had been accused of making a false claim for an injury and he had never made such a false claim.

41. The claimant had contended at Tribunal that he had injured himself and the respondent never investigated that aspect of the claim. In essence the claimant was dismissed for making differing accounts he gave as to his injury which did not correspondent with the CCTV footage.

42. At the time the cost warning was given statements had not been exchanged and the claimant did not fully understand the case he had to meet. At Tribunal the case he ended up meeting was different from the one the claimant anticipated he would be expected to answer.

43. The claimant had not tried to mislead the Tribunal. He accepted he had given differing accounts to the respondent during the internal disciplinary proceedings.

44. He stressed giving the claimant only three days to give a costs warning was too short.

45. Finally Mr Mugliston criticised the lack of detail in the respondent's schedule of costs. It was not clear what costs related to work undertaken prior to the costs warning and post the cost warning.

Conclusion

46. I start with all 76 which states as follows:-

> "76(1) A Tribunal may make a costs order … and shall consider whether to do so, where it considers that –
>
> (a) a party (or that parties' 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) had been conducted; or
>
> (b) any claim or response had no reasonable prospect of success …"

47. Regulation 78 sets out the amount of a costs order and Regulation 84 deals with the ability to pay.

48. Regulation 84 states:-

> "In deciding whether to make a costs … order, and if so in what amount, the Tribunal may have regard to the paying parties … ability to pay".

49. I start my conclusion with a number of general observations. In the Employment Tribunal costs are the exception rather than the rule and do not necessarily follow the event, see **Gee** v **Shell (UK) Limited** [2003] IRLR 82 at paragraph 22. I remind myself that Gee was decided before the introduction of the 2004 and 2013 Regulations which have broadened an Employment Tribunal's powers in relation to costs.

50. Just because costs are the exception rather than the rule it does not mean that the facts have to be exceptional for the Employment Tribunal to make an award of costs, see **Power** v **Panasonic (UK) Limited** EAT/0431/04.

51. The purpose of costs is to be compensatory and not to be punitive towards the losing party, see **Lodwick v Southwark London Borough Council** [2004] IRLR 544.

52. In this case part of the respondent's claim is that the claimant was acting unreasonably within the meaning of Rule 76(1)(a) of the Regulations. No definition is given in the regulations of unreasonableness. In **Dyer v Secretary of State for Employment** UK EAT/183/83 it was held that the word was meant to convey its ordinary meaning.

53. In examining the costs application I direct myself from the authorities that there is a two fold test. Firstly I must decide whether there was unreasonable conduct. Secondly if I do find there was unreasonable conduct I then must decide whether to exercise my discretion to make an award of costs and if so in what amount or what proportion of the costs claimed.

54. In looking at the issue of the reasonableness of conduct and costs whilst there is no need to establish a precise causal link between the conduct and the cost claimed I must have regard to the nature, gravity and effect of the alleged unreasonable conduct, see **McPherson v BNP Parabis** [2004] IRLR 558 and **Yerrakalva v Barnsley MBC** [2001] EWCA Civ 1255. I remind myself I must stand back and look at the whole picture and any costs awarded must be proportionate to the loss incurred by the other party.

55. In this case the claimant gave differing accounts as to what occurred at approximately 5.20pm on 5 December 2016 in the respondent's car park. The claimant was a shop steward, first aider and safety representative and completed

a document entitled "injury and accident investigation report". The claimant then gave four different contradictory accounts as to the alleged injury.

56. By the time of the disciplinary hearing on 20 December 2016 the claimant had viewed the CCTV footage. He had seen the investigating officer's report. It must have been clear to the claimant having viewed the CCTV footage that his various accounts were inaccurate. The claimant himself accepted at the disciplinary hearing that he had given the respondent differing accounts as to his alleged accident. The claimant's own union representative accepted that the claimant's evidence looked "shady".

57. The claimant subsequently appealed and an appeal hearing was held on 11 January 2017. The claimant was left in no doubt as to why he had been dismissed in the appeal outcome letter of 16 January 2017 (respondent's bundle page 89). The letter stated:-

> "You have been advised that your conduct was considered as serious misconduct under the company's disciplinary procedure in that you made a false claim of an injury and this alongside the dishonest behaviour displayed, has compromised the fundamental employer/employee relationship of mutual trust. Having viewed all the relevant information including the evidence you offered in mitigation, it was decided that the sanction of dismissal was appropriate in all the circumstances."

58. The claimant subsequently submitted a claim form to the Employment Tribunal with complaints of unfair dismissal and wrongful dismissal. The claim form was submitted by the claimant's union solicitors. It follows there must have been a discussion between the claimant and his solicitors as regards the merits, or otherwise of his claim. Part of the claim form asserted that the claimant had suffered a form of injury and had not made a "claim" for injury but had informed the respondent of what had taken place.

59. The claimant was left in no doubt as to the position of the respondent in its grounds of resistance filed on 17 July 2017.

60. By the date of the costs warning letter the claimant had been receiving advice and disclosure by list had taken place. In any event the claimant would have had documents direct from the respondent. The claimant knew he had given four contradictory and differing accounts of what occurred on 5 December 2016. Whilst the claimant had not made a personal injury claim it was, or should have been, perfectly clear to the respondent and his legal advisors that having looked at the notes of evidence of the disciplinary hearing and the appeal and the subsequent letters as to why the claimant was dismissed. The claimant himself had accepted in the internal proceedings that his previous accounts of the incident on 5 December were false.

61. I do not know the thought process of the claimant when he received the costs warning because he has chosen not to give evidence. A litigant acting reasonably, having the above evidence before them would have withdrawn proceedings certainly as at the date of the costs warning. It was unreasonable to proceed with the proceedings from that date. In the alternative the claimant knew or ought to have known that he had no reasonable prospect of success.

62. In making these findings I am of course conscious matters may look different in the heat of battle to how they looked before an Employment Tribunal when the smoke of conflict has cleared. Here, however I do not accept that the claimant

could have been reasonably labelling under the impression that he had a viable claim. He knew he had told untruths. He had seen the CCTV evidence. His solicitors were aware of the documentation. The case was pursued on a semantic point namely that the claimant had not submitted a personal injury claim. However as I explained in the Judgment the claimant well knew the case he had to face internally and met that case both at the disciplinary hearing and appeal.

63. I have come to the conclusion that at the date of the costs warnings the claimant knew or ought to have known if he had gone about things sensibly that his claim was doomed to failure.

64. I am satisfied there is a causal connection between the costs incurred by the respondent and the claimant continuing to proceed. The respondent had to defend the claim and did so. I have no evidence before me of what advice was given to the claimant. In the circumstances there is nothing to displace my analysis on the information available to me that the claimant acted unreasonably.

65. In the circumstances I found that the claimant acted unreasonably or in the alternative pursued his claim when there was no reasonable prospect of success.

66. I now turn to whether to exercise my discretion to make an award for costs. I am so satisfied this is a case where I should exercise my discretion given my previous findings. This was a case that no reasonable person would have pursued after the costs warning. In looking at the quantum of costs the original application from the respondent was for costs from the date of the costs warning. I have looked carefully at the schedule of costs found in the claimant's bundle at page 61. Fifty five units are claimed for "statement preparations (taking statements of three witnesses), cross-referencing and finalising and review of claimant's statement with advice". Mr Mugliston argued that some of the statement preparation would have been done at an early stage. Opine my judicial experience most statement preparation is done after disclosure so it can be cross-referred to the documents. He also drew to my attention that three witnesses were interviewed but only two produced before the Tribunal. In my judgment it is a matter for the respondent to decide what witnesses to call. I take on board what Mr Mugliston says that some of the work may have been undertaken before disclosure but I think the vast majority was undertaken after disclosure. I therefore allow 40 out of the 55 units.

67. I allow the 11 units claimed for instructing counsel and various liaison with counsel.

68. The response of claim 33 units for correspondence but do not indicate what was pre and what was post the costs warning letter. Doing the best I can I have decided to allow 15 of the 33 units.

69. I allow all the 8 units claimed in relation to perusal of the Tribunal Judgment and discussion with the respondent and I allow five of the 10 units as regards the costs preparation. Ten seems excessive. Counsel's fee for a fully thought one day hearing which went past 5pm and included written skeleton submissions of £1,500 plus VAT and disbursements does not to me seem unreasonable.

70. I therefore allow £1,200.80 as regards solicitors costs which is inclusive of that and £1,898.52 in relation to counsel's fees again inclusive of VAT which produces a total of £3,099.32.

71. I have then considered whether to adjust this figure to take into account the claimant's ability to pay. The figure is not particularly large. I have already indicated there are a number of matters from the information supplied in respect of the claimant's means which are troublesome. I don't know, for example, how much equity the claimant has in his matrimonial home. I do not know the source of the payments from "Scarborough". There is a possibility that other accounts exist from the bank statements although the claimant says they do not. As the claimant was not available for cross-examination the claimant cannot complain a robust line is taken as regards his finances. It was for him to appear before me and give evidence as regards his means.

72. Taking all the above into account I have decided not to adjust the figure of £3,099.32 to take into account the claimant's means.

Employment Judge T R Smith

Date: 16 February 2018