



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr T Jordansen

v

Check4cancer Ltd

Heard at: Bury St Edmunds

On: 13 April 2018
(Written submissions only - no attendance by the parties required)

Before: Employment Judge Laidler

JUDGMENT ON THE RESPONDENT'S COSTS APPLICATION

1. The tribunal is satisfied that the claimant acted unreasonably and/or the proceedings had no reasonable prospects of success such as to entitle the tribunal to consider the respondent's costs application within the meaning of rule 76 of the Employment Tribunals Rules 2013.
2. The tribunal has determined that the claimant should pay the sum of £10,000 towards the respondent's costs incurred.

REASONS

1. The reserved judgment with reasons was sent to the parties on 6 November 2017. The claimant was unsuccessful in all the claims brought.
2. By letter of 16 November 2017 the respondent made a costs application. It submitted that there had been unreasonable and disruptive conduct, and that the claims had no reasonable prospects of success. It set out in a

schedule of costs totalling £29,235.35 plus VAT, plus anticipated costs of a costs hearing of £7,155.

3. The claimant submitted his written response to the costs application by email of 24 November 2017. Having considered those, the tribunal wrote to the respondent asking whether it was seeking a detailed assessment or limiting its claim to the £20,000 that the tribunal could award summarily. By letter of 5 January 2018 it confirmed that its claim was limited to £20,000.
4. Having received that letter on a further consideration of the papers and the claimant's submissions the Judge instructed a further letter seeking more detailed clarification to be sent to the parties and this was sent on 2 March 2018. This stated as follows: -

“Dear Sir / Madam,

**ACKNOWLEDGEMENT OF CORRESPONDENCE
Employment Tribunals Rules of Procedure 2013**

The Respondent's letter of the 5 January 2018 has only just been seen by the Judge in relation to the Respondent's costs application. It is noted that it limits its claim to £20,000. E J Laidler has some questions with regard to the application which she requires to be answered by the Respondent as follows:

1. In addition to legal costs the costs of 'lay representation' have been claimed of Steve Ward, HR Consultant. This is to cover 'tribunal case preparation' and various invoices are attached to the cost schedule. They itemised 'tribunal response drafting and submission' and case preparation. It is noted the ET3 was filed by solicitors. Please clarify:
 - a. The basis on which these costs are claimed in addition to the solicitors costs.
 - b. How the provisions of Rule 75(3) would apply in the circumstances?
2. The witness expense of Professor Wishart. What evidence is there that fees of £1500 were lost for attending the tribunal hearing when presumably the relevant clinic was rescheduled?
3. The witness expenses of Lorraine Lander – again what evidence is there of the loss of earnings and that 21 hours was spent in attending and preparing?
4. In relation to both witnesses confirmation that the exact amounts claimed have been paid by the Respondent to the witnesses.
5. Does the Respondent accept that as it can recover VAT that should not form part of the cost application?
6. The Respondent has produced various letters putting the Claimant on notice as to costs. These appear to state various amounts as to the likely costs that would be incurred by the Respondent and the judge seeks the Respondents comments on these:

- a. 9 February 2017 the Claimant is advised that the costs are likely to be £15,000 + VAT, but that previous solicitors have already incurred £35,000 + VAT and Steve Ward costs in the region of £25,000 + VAT. Neither the earlier solicitors or costs of Steve Ward in that sum have been claimed in the application.
- b. 10 May 2017 the Claimant was again warned about costs. The anticipated costs were now said to be in the region of £120,500. The total now claimed (although capped at £20,000) is £3,658.42.

The Respondent's comments are required within 14 days of the date of this letter. In the event that the judge feels it is proportionate to do so a costs hearing may be necessary.

Yours faithfully,

K MASTERS
For the Tribunal Office"

5. The respondent's solicitors sent their letter in response on 9 March 2018. They clarified that the fees of Steven Ward had been incurred in representing the respondent. There was no overlap as the fees incurred by way of legal representation were incurred after those of the lay representative.
6. With regard to Professor Wishart, it was stated that his patients had had to be seen by other surgeons and appointments were not re-arranged, and he therefore did incur a loss of income of £1,500 plus VAT each day for attending the tribunal hearing.
7. Ms Lander had invoiced her time directly for attending the tribunal hearing and dealing with the claim. In view of cash flow difficulties Professor Wishart's claim had not been reimbursed but Ms Lander's had been.
8. The respondent accepted that as it was VAT registered it was able to recover the VAT element and that did not form part of the claim.
9. With regard to the letters that were sent to the claimant marked 'Without prejudice save as to costs', the respondent submitted that it wanted the claimant to be "mindful of the amount of time and costs incurred in not only managing his dismissal but also in respect of defending the subsequent claim brought by him". The previous legal fees which were incurred during the management of the dismissal process were not part of the costs application. After the preliminary hearing the respondent's costs continued to rise and the claimant was informed that the legal fees, advising and representing the respondent would be in the region of £22,000 plus VAT, and it is those that form part of the respondent's application. They confirmed that they were prepared to cap the claim at £20,000.

10. The tribunal had some concerns about that response, particularly with regard to the without prejudice letter save as to costs which was dated 10 May 2017. In that the claimant was warned:

“We therefore put you on notice that should you continue to pursue your claim, our client reserves their rights to make an application for costs against you, should they be successful, which we believe on the law and evidence they will be. Please note that our costs include:

- my costs to the hearing in September in the region of £22,000 + VAT;
- Messrs Dixon Minto’s fees, in relation to taking legal advice throughout the dismissal and appeal process with you and these are in the region of £35,000 + VAT;
- HR consultancy costs from Mr Steve Ward in the region of £25,000 + VAT;
- Mr Gore, Ms Lander and Mr Wishart’s fees in dealing with this matter at a rate of £2,500 per day. The date:
 - Mr Gore has incurred two days’ worth of fees at a total of £5,000 + VAT;
 - Ms Lander has incurred one days’ worth of fees at a total of £2,500 + VAT; and
 - Mr Wishart has incurred three days’ worth of fees at a total of £7,500 + VAT.
- Further fees to be incurred by Messrs Gore, Wishart and Ward and Ms Lander of:
 - Mr Gore will incur one days’ worth of fees at a total of £2,500 + VAT;
 - Ms Lander will incur two days’ worth of fees of preparation for the hearing and two days for attendance at the hearing at a total of £10,000 + VAT;
 - Mr Wishart will incur two days’ worth of fees of preparation for the hearing and two days for attendance at the hearing at a total of £10,000 + VAT; and
 - Mr Ward will incur one days’ worth of fees of preparation for the hearing and two days for attendance at the hearing at a rate of £350 + VAT per day, which is a total of £1,050 + VAT.

It is anticipated that costs in this matter will therefore be in the region of £120,550.00.

If you continue to pursue your case then we reserve our rights to make a cost application against you at the end of the Hearing for our client’s costs in this matter. We trust that this will not be necessary and urge you to take independent legal advice.”

11. A reader of that letter could have taken that to mean that the respondent’s costs application would be for costs in the region of £120,000 which is not and was never going to be the case. This is something that the claimant has drawn to the tribunal’s attention in his response to this application.

12. The tribunal must however under the Rules consider whether the claimant has acted unreasonably and/or the claims have been misconceived, and the tribunal is satisfied those two grounds are met. It is clear from the tribunal's decision that the claimant had solicitors certainly advising him at the time of his dismissal. His evidence changed at the hearing from what he said at the time and this is noted in particular at paragraphs 38-40 of the reasons. At paragraph 42 it is noted the claimant accepted he had been "careless" in the preparation of the invoice.
13. The claimant advised his son not to speak to those at the respondent about the machine, and again gave evidence for the first time noted at paragraph 46.
14. The mobile phone issue also shed some doubt on the voracity of the claimant's evidence.
15. As noted at paragraph 121 of the reasons, the claimant admitted creating an invoice with his own bank account details on it, and that this conduct led to the disciplinary proceedings.
16. The tribunal also found that if it were wrong in any of its findings on the fairness of the dismissal and it were found to have been procedurally unfair, it would have made findings that the claimant had wholly contributed to his own dismissal which would have resulted in no award being made to him.
17. Whilst the claimant refers in his submissions to the fact that the evidence needed to be heard, the tribunal has concluded that from its own findings it is clear that the claim of unfair dismissal in these circumstances had no reasonable prospects. The claimant acted unreasonably in pursuing it.
18. The tribunal has however had to take into account that at the hearing before Employment Judge Moore on 5 May 2017 the respondent's application for its costs of that hearing was refused. That has therefore been adjudicated upon and this tribunal is not going to seek to award costs for that hearing.
19. The tribunal in exercising its discretion has determined that the costs should be awarded for this hearing alone. The claimant would have had the opportunity upon full disclosure and the exchange of witness statements to reconsider his position and this would have given him an opportunity to withdraw his claim and to avoid the costs of the full merits hearing.

The claimant's means

20. A letter was sent to the Claimant on the 16 April 2018 giving him a further opportunity to give evidence as to his means. There has been no reply to that letter. In a remedy statement prior to the hearing the Claimant stated he was supported by friends and family and the sale of assets having no

income. He referred to work for Glycostem but on an expenses only basis his Chairman's fee having stopped in July 2016 due to lack of funds.

21. Having taken all these matters into account the tribunal is therefore satisfied that the award that should be made is that the claimant pay £10,000 to the respondent towards its legal and witness costs for the hearing.

Employment Judge Laidler

Date: 4 May 2018

Sent to the parties on:

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For the Tribunal Office