EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Q Qu	**v**	**Landis and Gyr**

Heard at: Cambridge

On: 12 April 2018
29 May 2018 (Discussion day – no parties in attendance)

Before: Employment Judge G P Sigsworth

Members: Ms A Carvell and Mr G Briggs

Appearances
For the Claimant:
For the Respondent:

RESERVED COSTS JUDGMENT

The unanimous decision of the Tribunal is that:

1. The claimant is entitled to be paid 80% of his costs of the Tribunal proceedings against by the respondent, including legal costs, and recoverable expenses and dispersements.

2. The claimant's costs will be assessed by an Employment Judge at an assessment hearing, and that assessment will be on the standard basis.

3. The respondent's application for costs is dismissed.

RESERVED COSTS REASONS

1. Both parties made costs applications. The claimant's claim for costs is for legal costs of the proceedings, and expenses and dispersements, both on the basis of unreasonable conduct of the proceedings by the respondent and the response or defence had no reasonable prospect of success.

The respondent's application for costs is made on the basis of the claimant's alleged unreasonable conduct of proceedings after the liability judgment, when he substantially increased his value of the claim in the third schedule, making settlement impossible.

The Law

2. Rule 74(1) of Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides that "Costs" means fees, charges, dispersements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing).

   Rule 26(1) provides that a Tribunal may make a costs order ….., and shall consider whether to do so, where it considers that -

   "(a) A party (or that party's 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) have been conducted; or

   (b) Any claim or response has no reasonable prospect of success."

   Rule 78(1) provides that a costs order may -

   "(a) Order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;

   (b) Order the paying party to pay the receiving party the whole or specified part of the costs to the receiving party, with the amount to be paid being determined by way of a detailed assessment carried out either by a County Court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles."

3. Tribunals have a wide discretion towards costs where they consider that there has been unreasonable conduct in the bringing or conducting of proceedings. Every aspect of the proceedings is covered, from the inception of the claim or defence, through the interim stages of the proceedings, to the conduct of the parties at the substantive hearing. Unreasonable conduct includes conduct that is vexatious, abusive or disruptive. When making a costs order on the ground of unreasonable conduct, the discretion of the Tribunal is not fettered by any requirement to link the award causally to particular costs which have been incurred as a result of specific conduct that has been identified as unreasonable (MacPherson v BNP Paribas (London Branch) [2004] ICR 1398). In that case Mummery LJ stated that:

> "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 receiving party] to prove that specific unreasonable conduct by [the paying party] caused particular costs to be incurred."

In Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78, the same Judge stated:

> "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 reasonable conduct by the claimant (or respondent) in bringing and conducting the case, and in so doing so, to identify the conduct, what was unreasonable about it and what effects it had."

When considering whether costs should be awarded on the ground of unreasonable conduct, it is the conduct of a party in bringing or defending a claim, or continuing to pursue the claim or defence, can give rise to an award, and not conduct occurring before the institution of proceedings – see Davidson v John Calder (Publishers) Limited & Another [1985] IRLR 97, EAT. Prior conduct can, of course, be relevant to an assessment of whether it was reasonable to bring or defend the claim, but it cannot be treated as an act of vexatiousness or unreasonableness upon which an award of costs can be founded.

There may be cases where the conduct is so manifestly unreasonable the refusal of a Tribunal to award costs will be held to be perverse. For example, in Daleside Nursing Home Ltd v Mathew, UKEAT/0519/08, a race discrimination case, the claimant alleged that a manager had made an explicit and highly offensive racial remark to her which, if true, would have influenced the way in which the Tribunal would have reviewed a series of incidents which were otherwise racially neutral. The Tribunal found as a fact the remark had never been made and dismissed the claims. It declined, however, to award costs on the ground that the claimant had a husband, who represented her, had a genuine belief that the claim had merit "but were merely wrong and they lost", and had not acted unreasonably in bringing or conducting the proceedings. The EAT disagreed and held the costs ruling to be perverse. They categorised the alleged offensive racial remark as a "deliberate and, to an extent, cynical lie" which was central to the claim of race discrimination. The EAT stated that 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 have failed to conclude that making of such a false allegation at the heart of the claim does not constitute a person acting unreasonably. The case was duly remitted to the Tribunal to determine the amount of costs that should be awarded to the respondent.

However, the Court of Appeal has emphasised that a lie will not necessarily, of itself, be sufficient to found an order for costs – see HCA International Ltd v May-Bheemul UKEAT/0477/10. The case held that neither Daleside or any other case established a point of principle of general application that lying even in the respect of allegations in the case, must inevitably result in an award of costs, and that "it will always be necessary for the Tribunal to examine the context, and to look at the nature, gravity and effect of the lie in determining the unreasonableness of the conduct". See also the case of Kapoor v Governing Body of Barnhill Community High School [2014] ALLER 261. That case indicated that a Tribunal must consider all the circumstances of the case, including the procedural history and the extent to which the claimant's lies had made a material impact on its actual findings.

4. Where a party makes an offer to settle the case, which is refused by the other side, costs can be awarded if the Tribunal considers that the party refusing the offer has therefore acted unreasonably – see Kopel v Safeways Stores Ltd [2003] IRLR 753, EAT.

In considering whether to award costs in respect of a parties conduct in bringing or pursuing a case that is subsequently held to have lacked merit, the type of conduct that will be considered unreasonable by the Tribunal will obviously depend on the facts of the individual case, and there can be no hard and fast principle applicable to every situation. General, however, it would seem that the party must at least know or be taken to have known that his case is meritorious.

Parties should not be penalised for not assessing the case at the outset in the same way that the Tribunal may do following a hearing and evidence. ET Marler v Robertson [1974] ICR 72, NILC, the court held that ordinary experience of life frequently teaches us that which is painful or to see once the dust of battle has subsided was far from clear to the competence once they took arms.

On the other hand, in an appropriate case, it may well be reasonable to have regard to what the parties knew or ought to have known if he had gone about the matter sensibly. See Keskar v Governors of All Saints Church of England School [1991] ICR 493, EAT.

In Kovacs v Queen Mary and Westfield College [2002] IRLR 414, CA, it was held that summary assessment of costs is appropriate where the Tribunal feels able to make it, and is satisfied that it would properly compensate the receiving party for the costs attributable to the unreasonable conduct etc which lead to the decision to make the order.

If the threshold tests in rule 76(1)(a) and (b) are met the Tribunal must still consider whether it is appropriate to make a costs order in all the circumstances, in the exercise of its discretion. Costs are compensatory and not punitive. A party's means can be taken into account – see rule 84.

The claimant's application

5. One aspect of the claimant's claim for costs is based on an assertion that the respondent's response/defence had no reasonable prospect of success. It relies on our liability judgment, and in particular our conclusions at paragraph 6. In that paragraph, we go through the capability process that was undergone and the performance improvement plan (PIP) stages that were gone through by the claimant, and point out that all the deficiencies there were in that process. In particular, we found that the claimant was improving his performance when he was then dismissed and had improved it all the way through the process. The appeals to Mr Knight and Mr Whittaker did not consider the relevant factors but simply looked at that process, ignored the claimant's contention that Mr Lee's conduct was essentially victimisation of him. Further, the respondent did not give consideration to actions short of dismissal, such as redeployment, demotion, re-assignment and so on which were all part of its own process. We also concluded that Mr Lee did not honestly believe the claimant was sufficiently incapable or incompetent as to justify dismissal for lack of capability. Nor did the respondent have reasonable grounds for believing it. Appeal against dismissal to Mr Bennett was also flawed, as Mr Bennett added new allegations of late completion of work to the existing list, and made no independent investigation of the matter and was simply acting on what Mr Lee and Mr Radford told him. Mr Bennett also failed to consider the possibility of re-deployment as an alternative to dismissal. There, we concluded that it should have been abundantly obvious to the respondent at the material time the whole dismissal process was fundamentally flawed, unfair and quite possibly discriminatory. It was not clear to the respondent's themselves, the respondent's manager line manager to themselves, it should have been clear to their HR department, in this large well-resourced company, or their professional lawyers that the defence to unfair dismissal had no reasonable prospect of succeeding. Because the respondent could not justify the unfair dismissal defence, by a side wind this means they could not have thought of the real reason – likely to be the victimisation by Mr Lee. Proper investigation into PIP process and Mr Whittaker, Mr Knight and Mr Bennett would have enabled them to draw the inference that Mr Lee was victimising the claimant because of his earlier complaints against him. The respondent's managers refused to look at this, assuming that it had already been dealt with and overlooking the fact that it could arise again in the PIP process. It would not have been surprising if Mr Lee had simply found the claimant difficult to line manage, but the respondent simply did not investigate.

6. The claimant failed to establish his allegations of harassment and direct discrimination, and clearly the respondent was entitled to defend these. However, the majority of the claimant's complaints concerned the PIP process and the dismissal, his lack of pay rise, and his reduced bonus. This was the 'money' part of the claim, which led to the substantial award of compensation for loss of earnings etc. Only if we are charitable to the respondent, and assume that they were also reasonable in defending the

victimisation claim, in that the claimant had to as we decided on the burden of proof, and the claimant's requirement to establish a primae facie case first, the majority of the case was and the evidence and so on was devoted to the dismissal aspect. So, although it is right that many of the allegations in the Scott schedule were not successful, the important ones were.

7. We find that there was no unreasonable conduct of the proceedings by the respondent, which is the other limb relied upon by the claimant. Although Mr Lee's conduct at the start of the hearing was vexatious and disruptive, he was by then no longer an employee of the respondent and had been brought to the Tribunal on a witness order. Further, his conduct did not adversely affect the proceedings, and did not really add to its length. The other aspect relied upon by the claimant here is the lengthy cross examination of the claimant, over several days. We find that there was fault on both sides here, in the context of the length of the cross examination, and the claimant's answers were lengthy and prolix in the extreme. It did not stop the cross examination, so it cannot be said to have been irrelevant.

8. We therefore have to consider whether it is appropriate to make an award of costs. We believe that we should. The respondent is a large company with substantial resources, and it should have been clear to them, with proper advice which they had access to, the defence to the unfair dismissal complaint had no reasonable prospects of succeeding. Looking at the PIP documentation and so on it should have been clear from this, and the complete failure to consider the alternatives to dismissal. So, by not being able to justify the unfair dismissal defence, they failed to appreciate that Mr Lee might have victimised the claimant. We are not prepared to award the full amount of relevant legal costs, expenses and dispersements of the proceedings, only the majority, which we assess at 80% in this case. Clearly, the respondent was entitled to defend the direct discrimination and harassment aspects of the case.

<u>The respondent's application for costs</u>

9. The essential complaint of the respondent is that after the liability decision, there was an opportunistic ramping up (as we found) of the claimant's schedule of loss, and a huge increase between the second and the third schedules. However, there is no evidence of any offers being made for the third schedule and after the liability judgment, between April 2016 and 27 February 2017. There were no settlement negotiations in this period. We wonder why the respondent did not make an offer of settlement based on the second schedule of loss after the liability decision received in August 2016. Further, from the date of the remedy hearing, sent to the parties on 6 June 2017, the respondent could have made a sensible offer at that point, on the basis of our findings. There is no evidence they did so. I have seen the settlement negotiations correspondence, but this ended on the face of it in May 2016.

10. We conclude that settlement was not impossible, even in the light of the claimant's later very substantial schedules of loss. In the early part of 2016, the parties appeared to have got relatively close to settling the case, and had an ideal opportunity to do so after the liability hearing result and before the remedy hearing, and the third schedule. As the respondent makes no application on any other basis, their application for costs before the Tribunal is not successful. I cannot find that the claimant was unreasonable, etc in the conduct of the proceedings. He is entitled to his claim a he sees fit, and that is what he did. It does not appear that his extremely large third and fourth schedules of loss in fact were a hamper to the settlement of the proceedings, because no appropriate offers were made at the material times.

Assessment

11. I do not consider that we can do justice to the claimant's application by awarding him the maximum we can award of £20,000. It is entirely appropriate that the matter go off for assessment by an Employment Judge, pursuant to rule 78(1)(b) of the Rules. The assessment will be at 80% of the claimant's estimated legal costs and expenses as appropriately identified as recoverable and supported by documentary evidence, will be on the standard basis.

_____
Employment Judge G P Sigsworth

Date: 18 June 2018……

Sent to the parties on: .....

.....
For the Tribunal Office