



EMPLOYMENT TRIBUNALS

Claimant: Mr A W Parker

Respondent: BEW Electrical Distributors Limited

Heard at: Nottingham **On:** Friday 13 April 2018

Before: Employment Judge Hutchinson (sitting alone)

Representatives

Claimant: None

Respondent: None

JUDGMENT

The Employment Judge gave judgment as follows: -

The Claimant is ordered to pay to the Respondent's their reasonable costs.

REASONS

Background and Issues

1. The Claimant had presented his claim to the Tribunal on 26 August 2016 following his dismissal on 6 June 2016 for gross misconduct. The gross misconduct complained of was: -

- Exposing the company to VAT fraud
- Falsifying claims for personal gains

2. The Claimant was advised throughout by solicitors and he had instructed Counsel to represent him at an early stage. His claim was that the reason for the dismissal was a sham and to avoid making payment to him of a severance payment that he said he was entitled to. Alternatively it was said that if it was not a sham and the Respondents were able to establish a fair reason for dismissal it was said that the Respondent's: -

- Did not have a reasonable belief of his guilt and;
- There was no reasonable investigation
- It was perverse and out with the reasonable range of responses

3. The Respondent were also legally represented throughout and instructed Counsel at an early stage. They denied the allegation of unfair dismissal saying the Claimant had been dismissed for conduct. They had carried out a reasonable investigation and had a genuine belief on reasonable grounds that the Claimant had committed the acts complained of. They said dismissal was within the band of reasonable responses.

4. On 21 February 2017 at a very late stage the Claimant raised the issue of dishonesty by the Respondents claiming that they had been involved themselves in VAT, fraud and irregularities.

The Hearing

5. Both parties were represented by senior Counsel at the hearing. The first day was a reading day and there were then 3 hearing days. The evidence was concluded on 11 May 2017 and I reserved judgment and considered my judgment on 15 May 2017.

6. The Respondent's called before me 6 witnesses and there were 3 other witnesses who it was agreed were not relevant to the issues I had to determine. The Claimant gave evidence himself and was to call 2 witnesses and again it was agreed that those witnesses' evidence would not be relevant to my considerations.

7. As can be seen from the judgment I described the Claimant as being "not a reliable witness". As mentioned in paragraph 98 of my judgment:

"He accepted to me that the way he had been conducted business by running his shooting syndicate in the way that he did amounted to a fraud on the Inland Revenue and Customs and Excise in respect of the VAT. He accepted to me that he had bribed executives and middle management of clients by providing them with gifts and free days out to obtain their business."

My Conclusions

8. I was satisfied that the Respondents had established that the reason for his dismissal was his conduct. He had: -

- Falsified a company document for his own personal gain
- Seriously and wilfully misused company property
- Committed a potential VAT fraud when using company property to risk bringing the company into disrepute as a criminal act

9. I was satisfied for the reasons I set out at paragraph 91 of the reasons I considered several factors in determining that the dismissal was not a sham.

10. I was satisfied that the Respondents had carried out a reasonable investigation and at the time of the dismissal had a genuine belief on reasonable grounds that he had committed the misconduct complained of.

11. I was satisfied that the Claimant had been a co-owner and Director of AMP Electricals and he and his father had sold the business to the Respondents for £1,400,000.00 in November 2014. Thereafter he was appointed as a Sales Director of the Respondents. He was in a senior position, therefore on 5-year fixed term contract. I was satisfied therefore that dismissal fell “well within the band of reasonable responses”.

12. My judgment and reasons were sent to the parties on 15 July 2017 and on 4 August 2017 the Respondents made an application for costs. The grounds for that application were as follows: -

12.1 That the Claimant acted unreasonable in bringing the proceedings.

12.2 The Claimant was disruptive in the manner that he conducted proceedings especially in raising new issues by letter dated 21 February 2017.

12.3 In the alternative the Claimant’s claim had no reasonable prospect of success.

13. On 18 August the Claimant’s solicitor responded to this. The Claimant still maintained that the reason for the dismissal given by the Respondents was a sham and that it was appropriate for the evidence of the Respondents to be tested before the Employment Tribunal.

14. They said that the additional allegations were raised on 21 February 2017 and these related to the credibility of the Respondents. There was no adequate explanation as to why this allegation was made so late in the proceedings.

15. It was said on behalf of the Claimant that he had acted reasonably in bringing the proceedings and he genuinely and reasonably believed he was unfairly dismissed. He was entitled to pursue his claim and had genuine concerns over the fairness of the dismissal.

16. In respect of the “no reasonable prospect of success” it was said that although the judgment went against the Claimant it was only after the evidence was tested at the hearing. It was said:

“It would be wrong to suggest that the case put forward by the Claimant had no reasonable prospect of success.”

The Costs hearing

17. I had set this matter down for a hearing which was to take place on 9 February 2018. However, at a case management Preliminary Hearing held by me on 2 February 2018 it was agreed that the matter could be dealt with by written submissions and it did not need an attended hearing. This would save the parties costs.

18. I was going to deal with this hearing on Monday 12 March 2018 but because of other commitments I had to postpone that case and eventually considered the matter today.

19. I have now had the benefit of further submissions. I have submissions from the Respondent's Counsel, Ms Ibrahim and from the Claimant's solicitors. I have also received comments from both parties on their original submissions.

The Law

20. The Respondent's application is made under Rule 76(1)(a) and (b) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ("ET Rules"). That says: -

"(1) A Tribunal may make a costs order or a preparation time 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) had been conducted; or

(b) any claim or response had no reasonable prospect of success."

21. I was referred by Ms Ibrahim to the following cases: -

- **Barnsley Metropolitan Borough Council v Yerraclava** [2011] EWCA civ 1255
- **Herry v Dudley Metropolitan Council** [2017] ICR 610
- **Nicholson Highland Ware Limited v Gordon Nicholson** UK EATS/0058/09/BI

22. The Claimant's solicitor referred me to: -

- **Kazakhstan Kagarzy Plc v Zhunus** [2015] EWHC 404

This refers to the amount of the costs that ought to be awarded.

23. Rule 76 of the ET rules involves a two-stage process. First, I have to decide whether the Claimant acted unreasonably in the bringing of the proceedings or the way that the proceedings have been conducted or that the claim had no reasonable prospect of success or whether the Claimant acted disruptively in bringing some of his allegations at a late stage. Only if I am satisfied of this do I then go on to decide whether I should exercise my discretion and make an order for costs.

24. The amount of the order of costs if I decide that an order should be made is governed by Rule 78 ET rules which provides: -

"(1) 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 a specified part of the costs of the receiving party, with the amount to be paid being determined in England and Wales 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...”

My Conclusions

25. I am satisfied in this case that the claim, at no stage, had any reasonable prospect of success and that the Claimant acted unreasonably in bringing the proceedings and in the conduct of them. As I found in my judgment the Claimant had been a statutory Director of AMP and should have been aware of his obligations as a Director. He admitted during the proceedings that he had been running his shooting syndicate in a way that amounted to a fraud on the Inland Revenue and Customs and Exercise in respect of VAT. He also accepted that he had run his business by bribing executives and middle management of clients by providing them with gifts and free days out to obtain their business. I was satisfied that he had carried on conducting business in this way after he had sold his business to the Respondents who I was satisfied had not condoned or encouraged the Claimant’s behaviour in any way.

26. I am not satisfied that the way he raised new issues by letter dated 21 February 2017 amounted additionally to disruptive behaviour. I am satisfied that it was a desperate attempt to discredit the Respondents and there was no foundation to his allegations. It was another example simply of his unreasonable conduct of the proceedings.

27. Having decided that the Claimant had acted unreasonably in bringing the proceedings and in his conduct of the proceedings and that his claims had no reasonable prospect of success, I must go on to consider whether I should exercise my discretion and make an award of costs. As is said by the Respondent the bar is set high in respect of whether I should make an award of costs because in the Employment Tribunal costs do not follow the cause.

28. As pointed out by the Respondent’s solicitors no costs warning letter has been issued or any application made for a deposit or a strike out of the Claimant’s claims. In my view that makes no difference to the position presented to me.

29. I am satisfied that this is an exceptional case and that I should make an award of costs against the Claimant and exercise my discretion. I am satisfied that the Claimant was aware of what he was doing. That it was wrong. It amounted to fraud, bribery and corruption.

30. He was advised throughout by solicitors and instructed Counsel at an early stage. He must have known that his claim had no reasonable prospect of success and should not have been brought. He then continued to prosecute these proceedings when he must have known he could not win them. The Respondents have been put to considerable expense and in my view, it is appropriate to make an award of costs in this case.

The Amount of the Costs

31. As both parties are aware I can make an order of costs without any assessment of up to £20,000. I note that the Respondent's claim for costs amount to a sum more than £68,000. That sum is a huge figure for a claim of unfair dismissal which was conducted over 3 days of hearing.

32. I had indicated to the parties at the case management Preliminary Hearing that I would be prepared to carry out the exercise required under Rule 78(1)(b) of the ET Rules but after further reflection I am not satisfied that I am able to do so. My options to the parties are therefore to make an award of costs in the sum of £20,000 against the Claimant or to refer the matter for detailed assessment to be carried out at the County Court in accordance with the Civil Procedure Rules of 1998.

33. I would invite representations from the representatives about whether they would wish me to make an order for costs in the sum of £20,000 or indeed refer the matter.

34. The amount of the costs awarded therefore is deferred pending receipt of those representations.

Date 11 June 2018

JUDGMENT SENT TO THE PARTIES ON

15 June 2018

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FOR THE TRIBUNAL OFFICE