



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr E Allnutt

and

Respondent

The Nags Head Reading Limited

**Costs Hearing held
at Reading on**

20 April 2018

Representation

Claimant: Ms A MacLennan, counsel
Respondent: Mr R O'Dare, counsel

Employment Judge
Mr S G Vowles

Members: Mrs A Brown
Mr D Gregory

REASONS FOR THE COSTS JUDGMENT SENT TO THE PARTIES ON 30 APRIL 2018 AND REQUESTED BY THE RESPONDENT

BACKGROUND

- 1 A 2 day full merits hearing was held at Reading Employment Tribunals on 31 October and 1 November 2016. The Claimant's complaints of Unfair Dismissal and Direct Age Discrimination failed and were dismissed. The decision was reserved and the unanimous judgment with written reasons was sent to the parties on 6 December 2016.
- 2 On 1 January 2017 the Respondent made an application for a costs order and requested a costs hearing.
- 3 The Claimant challenged the timing and validity of the application and the Tribunal's acceptance of the application. An appeal to the Employment Appeal Tribunal was heard on 8 December 2017 and the appeal was dismissed.

EVIDENCE

- 4 The Tribunal considered the following:

4.1 The Judgment with Reasons sent to the parties on 6 December 2016.

- 4.2 The Respondent's application dated 1 January 2017 for a costs order.
- 4.3 Submissions by Mr O'Dair for the Respondent, both written and oral.
- 4.4 Submissions by Ms MacLennan for the Claimant, both written and oral.
- 4.5 Samuel Oates' witness statement regarding the Claimant's means.
- 4.6 Claimant's witness statement regarding the Claimant's means.

RELEVANT LAW

- 5 References to rules below are to rules under Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.
- 6 *Rule 75(1) - A costs order is an order that a party (the paying party) make a payment to - another party (the receiving party) in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative;*
- 7 *Rule 76(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) have been conducted; or*
 - (b) *any claim or response had no reasonable prospect of success.*
- 8 The Tribunal rules impose a two stage test. First the Tribunal must ask whether a party's conduct falls within rule 76(1)(a) or (b). If so, the Tribunal must then go on to ask whether it is appropriate to exercise the discretion in favour of awarding costs against that party.
- 9 Gee v Shell UK Limited [2003] IRLR 82. The Court of Appeal confirmed that it is a fundamental principle that costs are the exception rather than the rule and that costs do not follow the event in Employment Tribunals.
- 10 McPherson v BNP Paribas [2004] ICR 1398. In determining whether to make an order under the ground of unreasonable conduct, a Tribunal should take into account the "*nature, gravity and effect*" of a party's unreasonable conduct.
- 11 Barnsley Metropolitan Borough Council v Yerrakalva [2012] ICR 420. The vital point in exercising the discretion to order costs is to look at the whole picture. The Tribunal has to ask whether there has been unreasonable conduct by the

paying party in bringing, defending or conducting the case, and, in doing so, identify the conduct, what was unreasonable about it, and what effect it had.

RESPONDENT'S APPLICATION

- 12 The Respondent claimed that its legal costs amounted to £26,744.00 and a detailed statement of legal costs incurred was attached.
- 13 It was claimed that the Claimant's complaints were misconceived (had no reasonable prospect of success) and that the Claimant betrayed repeated confusion between company law and employment law. Also the proceedings were conducted unreasonably, including the conduct of settlement negotiations.

CLAIMANT'S RESPONSE

- 14 The Claimant denied that his claims had no reasonable prospect of success or that he had conducted the proceedings unreasonably.
- 15 It was claimed that the Respondent had also conducted itself unreasonably.

DECISION

No Reasonable Prospect of Success

- 16 In Scott v Inland Revenue Commissioners Development Agency [2004] ICR 1410, the Court of Appeal observed that in considering whether a claim has no reasonable prospect of success, the key question is not whether a party thought he was in the right, but whether he had reasonable grounds for thinking he was.
- 17 In Hamilton-Jones v Black [2014] EAT 0047/04 it was said that an objective assessment is required as to whether the claim had any prospect of success at any time of its existence.

Age Discrimination claim

- 18 The Tribunal took account of the findings and conclusions in the judgment and reasons and paid particular attention to the findings in paragraphs 35-41 of the reasons as follows:

35 The Claimant's representative confirmed that he relied upon Michael Oates as the comparator for his direct age discrimination claim. Later, in response to questions by the Tribunal, the Claimant's representative said that he relied upon a hypothetical comparator and that the Respondent's refusal to allow the Claimant to continue on lighter duties on Saturdays, or at all, amounted to compulsory retirement on grounds of age. However,

during the course of cross-examination, the Claimant himself asserted that Michel Oates was the comparator and he thought he should have been treated the same as him. He said that the nub of his age discrimination claim was that Michael Oates had reached the age of 65 and stopped bar work but did other work and he wanted to do the same.

- 36 *In the Claimant's representative's skeleton argument, it was said "Not only was the dismissal unfair, it was also discriminatory as he received treatment less favourably than another and this was due to his age. He was compulsorily retired by the company."*
- 37 *The Tribunal found that, despite these changes in the way in which the age discrimination claim was being pleaded, the discrimination complaint involved a comparison between his treatment and the treatment afforded to Michael Oates. This was misconceived. When Michael Oates retired from bar work, he was 65 years of age. When the Claimant retired from bar work, he was (in his own words) "approaching the age of 65".*
- 38 *Accordingly, any difference in treatment between the Claimant and Michael Oates could not be on the grounds of any difference in age. They were almost exactly the same age when they were subject to the respective treatment referred to above.*
- 39 *The claim of being "compulsorily retired" had no factual basis. All the Respondent's witnesses confirmed that age had nothing to do with any decisions made in August/November 2015 or February 2016. The only person who mentioned age at any stage was the Claimant himself.*
- 40 *Insofar as the Claimant's circumstances differed from those of Michael Oates, it was due to their different circumstances and nothing to do with age. Both had retired from bar work at the age of 65. Michael Oates was still living above the pub and was willing and able to take on a range of managerial duties, as he was living there full time. The Claimant, however, was continuing to spend lengthy periods in Thailand and his ultimate aim was to spend 2 months in Thailand and 1 month in the UK on a rotational basis. There was no dispute that when in Thailand he switched off his company mobile phone and could only be contacted by e-mail. He was therefore, for long periods of time, unavailable to carry out any duties, unlike Michael Oates.*
- 41 *The Tribunal found that the Claimant was not treated less favourably than either Michael Oates or a hypothetical comparator because of age. Any difference in treatment was because of the Claimant's personal circumstances which were significantly and substantially different from those of Michael Oates.*

- 19 The Claimant and his representative changed their position on the appropriate comparator during the course of the hearing. See paragraph 35 above.
- 20 The Tribunal found that the age discrimination claim had no reasonable prospect of success. That was what was meant by “misconceived” in paragraph 37 above.
- 21 There was no factual basis for the claim of being “compulsorily retired”. See paragraph 39 above.
- 22 Taking an objective view, the Tribunal found that there never was any reasonable prospect of success at any time of the age discrimination claim being successful.

Unfair Dismissal claim

- 23 The Tribunal took account of the findings and conclusions in the judgment and reasons and paid particular attention to the findings in paragraphs 45-50 of the reasons as follows:

45 The Tribunal found as a fact that the Claimant's employment terminated by agreement in November 2015 when he agreed to be taken off the payroll. It was not in dispute that after 30 August 2015 he did not receive any pay at all. That was by agreement between the parties. Any duties he carried out had to be completed either by e-mail from Thailand or during the relatively short periods of his return to the UK. The agreement not be paid and lengthy periods spent in Thailand were all consistent with an agreement to terminate employment.

46 The Claimant's continuing accommodation rent-free above the pub was consistent with the circumstances of the other shareholders. It was not part of remuneration for any of them, it was simply one of the perks of being a shareholder.

47 Also, the carrying out of a few duties (New Year's Eve tickets and Champagne and accepting deliveries) was also consistent with the Claimant's continuing status as a shareholder acting in the interests of his investment in the Nag's Head pub.

48 The meeting on 9 February 2016 and the votes for the Claimant to resign his directorship were consistent with the Claimant's request to negotiate an exit package by the sale / purchase of his shares. Although there were no minutes, it was clear that the focus of this meeting was on the Claimant's shares, his status as a director under the Companies Act and also the views of the three other shareholders that the Claimant had a conflict of interest due

to his financial involvement with the Butler pub partnership. Everything was focussed on the statutory directorship and shareholding and it was not directed towards his employment status which had ended in November 2015 as set out above.

49 The Tribunal concluded that the Claimant's case confused his status as an employee with his status as a statutory director and a shareholder. The Tribunal found that his employment terminated by agreement in November 2015. His statutory directorship ended with the majority vote to remove him at the meeting on 9 February 2016 and Michael Oates' e-mail of the same date which resulted in his removal from the Companies House register. His shareholding of 10,000 shares remained unaffected by any of the above.

50 Accordingly, as the Claimant was not dismissed, the complaint of unfair dismissal fails.

- 24 The Tribunal found that the unfair dismissal claim had no reasonable prospect of success.
- 25 By 9 February 2016 the Claimant was no longer an employee of the Respondent, though he remained a shareholder. His employment ended by agreement in November 2015. See paragraph 45 – 47 above.
- 26 The Claimant and his representative had pursued the case with a misunderstanding of the Claimant's separate status as a company director and an employee, and asserting a confused combination of company law and employment law. The closing submission on behalf of the Claimant made numerous references to sections of the Companies Act 2006 which were not relevant to the unfair dismissal claim or the issues which the Tribunal had to determine. See paragraph 49 above.
- 27 Taking an objective view, the Tribunal found that there never was any reasonable prospect of success at any time of the unfair dismissal claim being successful.

Unreasonable Conduct of the Proceedings

- 28 The Tribunal found that by bringing the claim of age discrimination based upon a comparator of almost the same age, and bringing an unfair dismissal claim based upon company law which was irrelevant, the Claimant acted unreasonably. Both claims were bound to fail for the reasons quoted above. That should have been apparent to the Claimant and his representative from the start of the proceedings.
- 29 This amounted to unreasonable conduct of the proceedings.

- 30 The Tribunal did not find any relevant conduct of the Respondent to be unreasonable.
- 31 The Tribunal did not consider that any part of the pre-hearing settlement negotiations between the parties amounted to unreasonable conduct on either side. The sums offered and counter-offered between the parties were not excessive and were within reasonable bounds. Both parties were keen to settle both the Tribunal case and the High Court case in a global settlement but ultimately, as is not uncommon, they failed to reach agreement.
- 32 There were therefore grounds to make a costs order under Rule 76(1)(a) and (b).

Discretion to Award Costs

- 33 Having found no reasonable prospect of success and unreasonable conduct, the Tribunal went on to consider whether to exercise the discretion to make a costs order.
- 34 The Claimant was legally advised and represented throughout the proceedings.
- 35 By pursuing the unmeritorious claims the Claimant put the Respondent to unnecessary legal expenses. It must have been apparent to the Claimant and his representative that significant costs would be incurred by the Respondent in preparation for, and representation at, a 2 day Tribunal hearing which was also preceded by a preliminary hearing.
- 36 It is appropriate in these circumstances to make an award of costs.

AMOUNT OF COSTS ORDER

- 37 The Claimant has means which would enable him to pay a costs order. He owns the freehold (without a mortgage) of a dwelling house with an apparent value of up to £375,000 and it is currently for sale.
- 38 He owns 10,000 shares in the Respondent company worth, in the Respondent's estimate £36,000 and in his estimate £92,000.
- 39 He owns a substantial share in another Public House, the Butler.
- 40 His representative has produced a snapshot of his internet Lloyds bank account showing credit balances as at 13 April 2018 of £1,681.46.
- 41 However, his statement of means, which is unsigned, makes no mention of his bank accounts and whether he has other accounts or assets.

- 42 The Claimant has failed to attend the hearing today to personally provide evidence of his means as we would have expected him to do. He has also failed to respond to the Respondent's reasonable request dated 9 April 2018 to provide details of his means. We are satisfied that the Claimant does have sufficient means to pay a costs order.
- 43 The Respondent has claimed costs of £26,744 in an itemised statement of costs. Mr O'Dare has, however, made various concessions regarding that sum. He has conceded that the costs of today's hearing should be deducted from that figure. That VAT should be deducted as the Respondent is VAT registered and can reclaim the VAT. And he has conceded that the claim should be limited to our summary powers to award costs up to £20,000 under Rule 78(1)(a).
- 44 The Tribunal is concerned however that attached to the original application for costs dated 1 January 2017 was an itemised statement of costs amounting to £18,792. That figure has been increased in today's statement of costs by approximately £8,000. Mr O'Dare says that was because it needed to be looked at more carefully to disentangle the Tribunal costs from the High Court costs.
- 45 In these circumstances and even given the late concessions by Mr O'Dare, we have little confidence in the accuracy of the calculations produced on either occasion. Even with the concessions, we consider that the costs claimed by the Respondent are excessive and disproportionate to the length and complexity of this two day case. As the decision of the Tribunal has confirmed, it should have been apparent to the Claimant from the start that the claims were bound to fail and it should have equally been apparent to the Respondent and its representatives that it was an unwinnable case and not a difficult or complex case to defend.
- 46 We also take account of the fact that at the end of the first day of the two day hearing, the Respondent offered to forego its legal costs if the Claimant would, even at that late stage, withdraw his claims – what is known as a “drop hands offer”.
- 47 Taking into account all these circumstances and looking at the whole picture, we find that the Respondent's Counsel's fee of £4,250 as adjusted for the two day hearing was reasonable. We consider that on top of that, a sum of £5,000 for solicitor's costs would be appropriate as a reasonable amount for preparation and conduct of what was a relatively straightforward two day tribunal hearing.
- 48 We therefore make an award of costs of £9,250 in favour of the Respondent.

Employment Judge Vowles

22 June 2018

Reasons sent to the parties on

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for the Tribunals Office