EMPLOYMENT TRIBUNALS

Claimant: Dr D Duke
Respondent: The City of Liverpool College

HELD AT: Liverpool **ON:** 7 March 2018

BEFORE: Employment Judge Shotter
Ms H D Price
Mr Partington

REPRESENTATION:

Claimant: In person
Respondent: Written submissions

JUDGMENT

The unanimous judgment of the Tribunal:

1. The claimant is ordered to pay to the claimant a contribution towards costs in the sum of £5,000. The claimant will pay to the respondent the sum of £5000.00.

2. The claimant's application for a costs order against the respondent had no merit and is dismissed.

REASONS

Preamble

1. This is a costs hearing following promulgation of the Reserved Judgment and Reasons ("the promulgated judgment") on 15 August 2017.

2. The Tribunal heard oral evidence from the claimant and considered the documents produced by the parties, including the respondent's application dated 19 October 2017 and supporting inter-parties correspondence, the claimant's written resistance to the respondent's application together with supporting documents including the claimant's letters of 12 and 23 May 2016.

3. The respondent, in a letter dated 19 October 2017, has made an application that the claimant is ordered to pay costs totalling £27,150 in respect of the liability hearing and £4,200 in respect of the reconsideration hearing, both excluding VAT. The claimant has taken an exception to this application, and has set out his response in a letter dated 5 November 2017. The Tribunal has taken into account all the documents produced by the parties.

4. The grounds relied upon by the respondent are varied, and include:

4.1 The claimant had acted vexatious or unreasonably in bringing the proceedings, and in the manner of conducting the litigation. It is maintained the claimant sought to harass the respondent by threatening legal action, and the Tribunal was referred to the relevant pages in the bundle that referred to threats to bring civil proceedings for negligence, defamation and other alleged breaches. In addition, the claimant raised serious and unsubstantiated serious allegations against Elaine Bowker, and a campaign was "pushed by the local UCU" that the claimant had knowledge of, which he could have influenced and stopped.

4.2 The claimant had acted unreasonably; there was a considerable amount of evidence given by the claimant not accepted by the Tribunal.

4.3 The claimant raised issues with no foundation and made the bundle of documents voluminous.

4.4 The claimant continually distorted the evidence given, including his summing up.

4.5 The claimant was dishonest with regards to the effective date of termination.

4.6 The claimant relied on legal arguments that had no merit or were irrelevant.

4.7 The respondent also seeks a cost order on the grounds that the claimant, who had access to legal advice from the outset through union solicitors Thompsons, would have been aware that his claims had no reasonable prospect of success.

5. The claimant submitted that his case must have had merit because (a) the respondent did not seek to strike them out and (b) the Tribunal on its own volition did to seek to strike his claims or require a deposit to be paid, at any stage of the process including preliminary hearings and case management. The claimant maintained judges at a preliminary hearings and the Tribunal on sift took the view his claims were meritorious and had a reasonable prospect of success, evidenced by the fact the claim was listed for a 10-day hearing and a 2-day reconsideration hearing.

6. The Tribunal did not accept the claimant's arguments. There was no judicial consideration of whether the claimant's claims had a reasonable prospect of success and it cannot be inferred by the length of the listings that they were meritorious and had a reasonable prospect of success as submitted by the claimant. The length of the hearings reflects the amount of time it took for the parties to deal with issues, the claimant in particularly, as he forwards his case and arguments in great detail.

7. The claimant submitted he had initiated a settlement proposal in April/May 2016 on the basis that each party walks away bearing their own costs. The claimant was represented by Thompsons, who came off record with the Tribunal on 30 March 2016 and by 12 May 2016 Thompsons did not represent the claimant in any capacity. In an email sent 4 May 2016 the claimant was given one of two options to chose from with regards to a proposed public statement; he chose neither. The respondent sought the agreement to a condition of a joint statement as a term of the settlement. Statement option number one was: "Gary Duke has withdrawn his employment tribunal claim against the College. The matter is now at an end."

8. The respondent clarified in the 9 May 2016 email "If this option 1 statement is the statement we go with then a term of settlement is that Gary is prevented from making any other statements in respect of his ET claim and from repeating the allegations made against the College. This would be a joint statement sent to all staff, UCU and/or added as a final statement to the change.org web page. Gary must notify his local UCU reps of the detail of this settlement and the obligation not to make further statements regarding this matter including on social media."

9. The claimant responded on 12 May 2016 as follows: I cannot agree…I have …come up with an alternative statement which…best sums up your client's attitude…'Dr Duke has agreed to withdraw his proceedings against the College because of the College's repeated intimidatory threats of costs against him and his family.'"

10. The negotiations broke down, and the claimant was well aware he was at risk of costs thereon in. The fact the respondent failed to notify him of the amount of costs actually incurred as at the 12 May 2016 does not undermine the fact he was warned of costs. This cost application has therefore not taken the claimant by surprise, the claimant having initiated the settlement exchange on the basis that he would not have to pay the respondent's costs. It is common knowledge negotiations during the litigation process may lead to COT3, confidentiality clauses and agreement reached between parties as to the minutia underlining the settlement. This is common occurrence in employment cases, and the claimant's argument raised at this cost hearing that the options offered were against his right to freedom of speech under the Human Rights Act was unpersuasive.

11. The claimant sought to persuade the Tribunal, despite not having made any previous formal application and put the respondent on notice of this application, to order costs against the respondent because of adjournments in the past and Mrs Skeaping's email received this morning. The claimant also referred to the respondent's failure to comply with case management orders late.

12. The Tribunal struggled to see how this would affect the respondent's claim for costs, and it was satisfied Mrs Skipping whose absence resulted from her undergoing tests for a lump in her breast, cannot be criticised in any way for not appearing today. She informed the Tribunal as soon as it was not possible, and gave it the opportunity to deal with the application based on written submissions. Mrs Skeaping's non-appearance did not prejudice the claimant, in fact it advantaged him because Mrs Skeaping was unable to clarify the relevance of the EAT decision in Mr C Mardner v C Gardner, Mr W Ali, Ms M Press UKEAT/0483/13/DA and nor did she produce evidence relating to the valuation of the matrimonial home. Instead, Mrs Skipping invited the Tribunal to proceed on the basis of her written representations and when the claimant was given the option of adjourning or proceedings with today's hearing, his decision was to proceed.

13. The claimant's application for a costs order against the respondent had no merit and is dismissed.

Law

14. The relevant Employment Tribunal Regulation is 74-76. Rule 76(1)(a) provides that: "A Tribunal must consider whether to make a costs order against a party where he or she has acted unreasonably in the bringing or conducting of proceedings". Rule 76 of the Tribunal Rules 2013 imposes a two stage exercise for a Tribunal in determining whether to award costs. First, the Tribunal must decide whether the paying party (and not the party who is seeking a costs order) has acted unreasonably, such that it has jurisdiction to make a costs order. If satisfied that there has been unreasonable conduct, the Tribunal is required to consider making a costs order and has discretion whether or not to do so. Fees for this purpose means fees, charges, disbursements or expenses incurred – rule 74(1) Tribunal Rules 2013. In Employment Tribunal proceedings costs do not ordinarily follow the event, unlike County Court and High Court actions.

15. On behalf of the respondent the Tribunal was referred to the Eat judgment in Mr C Mardner v Mr C Gardner and Others UKEAT/0483/13/DA. However its relevance was not explained and was not easily apparent to the claimant or Tribunal. The Tribunal however notes the relevant legal principles set out from paragraph 12 onwards, particularly the requirement for the Tribunal to address the question whether it is appropriate to exercise the discretion to award costs even if a claim is found to have misconceived or there is unreasonable conduct.

Conclusion

16. With reference to the respondent's ground 4.1 above, without further evidence of costs, the Tribunal is not satisfied the claimant's behaviour was sufficiently unreasonable so as to attract a cost order for events that occurred prior to the ET1 being filed. There are no costs within the schedule before the Tribunal for this period, the first trenche of costs relate to reviewing the ET1 and its aftermath. The Tribunal is aware of the fact the respondent was legally represented throughout until March 2016, and received legal advice concerning the claimant's during this time.

17. The claimant made a valid point in oral submissions that the letter dated October 2016 from Robert Halfon MP to the chair of the respondent's board following a 'Further Education Stock Take Assessment' should be taken into account. The Tribunal reviewed the letter again as requested. In the letter reference was made to "financial mismanagement" and incurring lawyer's fees to challenge the process. The Tribunal in its promulgated judgment at paragraph 32 found the specific allegations raised against Elaine Bowker had no foundation, and the claimant's explanation now to the effect that Elaine Bowker was in her capacity as principal of the respondent liable because the "buck stops with her" has little merit. The nature of the claimant's cross-examination at the liability hearing was a personal criticism of Elaine Bowker i.e. she personally mismanaging funds intentionally, and the Tribunal accepts submissions made on behalf of the respondent that the claimant raised serious and unsubstantiated serious allegations against Elaine Bowker. It is notable time was spent on these allegations at the liability hearing, given the claimant's case that a conspiracy had taken place by Elaine Bowker and other senior members of the management team against him. The claimant's actions in this regard were unreasonable.

18. Turning to the claimant's influence of the Campaign pushed by the local UCU an alleged on behalf of the respondent, the Tribunal found it was very difficult to disentangle the claimant's involvement with that of other people in the UCU. Whatever the claimant's role, he cannot be accountable for the actions of others. It is not just and equitable to order costs on this basis, almost as a punishment for the claimant being part of this Campaign, especially bearing in mind union detriment is a serous issue going to the heart of union activities and industrial relations. The respondent acknowledged it was a fundamental protection for union members, and this must by definition, extend to the local UCU campaign whatever the claimant's influence on it.

19. With reference to ground 4.2 above, the Tribunal was of the view evidence needed to be given and tested in relation to the alleged union detriment (and not the Salford dismissal where it was self-evident the claimant was less than truthful) at a liability hearing before a full panel, and it was only after all the evidence had been heard and tested was the Tribunal in a position to reach the conclusions it did.

20. With reference to ground 4.3 and 4.6 above, the Tribunal repeats it observation given in relation to ground 4.2 above. It was of the view that it would be difficult to separate out documents such as Face Book incident and Lex 57 given the claimant was arguing union victimisation over a long period of time, alleging other union officials had been previously dismissed. This evidence needed to be tested in order that a conclusion could be arrived at. The Face Book incident and Lex 57 were not irrelevant; the Tribunal was required to consider the evidence before it to ascertain whether a conspiracy had taken place, as alleged by the claimant, which culminated in his "partial suspension" for which there was no procedure. The Tribunal took into account the explanations given on behalf of the respondent, which it found were untainted by any union detriment motivation.

21. The Tribunal found it was the case the claimant raised issues with no foundation and made the bundle of documents voluminous. The claimant was a

litigant in person as from 30 March 2016, Thompsons having come off the record as acting on his behalf, and some leeway needs to be given. Not a great dealt of time was spent on the cases cited by the claimant that had no relevance, although a considerable amount of time was spent hearing and dealing with the claimant's unmeritorious legal arguments on the Salford contract which the Tribunal has dealt with below.

22. With reference to 4.4 above the Tribunal agreed with this observation; the claimant distorted evidence given by the respondent's witnesses on cross-examination, and on occasions, the Tribunal's findings with the result that unnecessary time was spent clarifying the evidence, as opposed to the slant given by the claimant. The Tribunal dealt with this in its promulgated judgments. A case in point was the Preliminary Hearing strike out application, the claimant alleging without any evidence whatsoever, Carol Cody was being intimidated into not giving evidence at his trial. When the Tribunal investigated this and explored the issue with Carol Cody, it was clearly not the case she was being intimidated and she was in a position to give evidence. Carol Cody's objection was that she wanted to be paid for the entire time she was present at the Tribunal, whether or not she was giving evidence. Paragraph 18 of the promulgated judgment relates, and the Tribunal accepts the respondent's argument that the claimant's strike out application was frivolous and vexatious. The strike out application, on the face of it, was a serious allegation of witness intimidation, which was in reality was an issue about Carol Cody's pay.

23. With reference to 4.5 above the Tribunal refers to its promulgated judgment, which the claimant appears to "misunderstand" despite the reconsideration judgment. The claimant yet again, denies he was dishonest maintaining as his appeal had accepted by the EAT suggesting the points of law have merit and were meritorious. In its promulgated judgment at paragraph 34 the Tribunal found the claimant would not have been under any illusion about the date and reasons for the termination of his contract by Salford University, and he would have known beyond doubt that his employment had not been brought to an end as a result of the expiry of a fixed term contract. He continued with his less than truthful account of the Salford University dismissal throughout the disciplinary process instigated by the respondent, who was entitled to find he had fundamentally breached his contract of employment entitling it to summarily dismiss.

24. It follows that the claimant's application for unfair dismissal, given the information before the respondent at the time, had no prospect of success. There was no evidence whatsoever of a connection between the claimants's trade union activities and his dismissal. Any reasonable employee objectively considering the information before them would have appreciated he/she was facing serious gross misconduct allegations and the resulting dismissal was causally linked to their own misconduct. In accordance with Rule 76(1)(a) the claimant had acted unreasonably in the bringing or conducting of the unfair dismissal claim such that the Tribunal has jurisdiction to make a costs order. Having satisfied itself that there has been unreasonable conduct, the Tribunal is required to consider making a costs order and has discretion whether or not to do so, taking into account the claimant's means which it has done below.

25. Finally, with reference to 4.7 above, the claimant submitted that the legal advice he received advice was privileged, and the respondent would not have known whether he had been informed his claims had little or no reasonable prospect of success. On behalf of the respondent it was submitted that in a case of union detriment the union "would have thrown its support and funds behind taking action…they would not cease to act ordinarily in a case which they considered to have reasonable prospects of success". This is a matter of opinion, and whilst the argument may have a ring of truth to it, one cannot be certain the claimant was advised of the weaknesses in his case; accordingly the Tribunal has not taken this into account.

26. The Tribunal took into account the claimant's unreasonable rejection of the respondent's condition for accepting his offer to bring the litigation to an end on a no cost basis, the claimant's response on 12 May 2016 referring to the respondent's "repeated intimidatory threats of costs against him and his family" being inflammatory within the litigation. The claimant was under no misapprehension as early as April 2016 that costs were going to be an issue, and yet he proceeded with the litigation despite making the first move to settle on the basis of the cost risk.

27. The Tribunal is aware that it is "rare" for costs orders to be appropriate in Employment Tribunal proceedings; they do not follow the event as in the ordinary course of litigation. The claimant had two causes of action, the automatic unfair dismissal and trade union detriment which he argued overlapped in that his dismissal was causally linked to trade union detriment. The Tribunal took the view that the claimant's unreasonable conduct lay with him bringing the claim of automatic unfair dismissal, which had no prospect of ever succeeding for the reasons already given. In short, the automatic unfair dismissal complaint was one which had been conducted unreasonably, was misconceived and it resulted in the hearing taking longer than it should have had the claims been limited to union detriment**.** Having regard to the nature, gravity and effect of the unreasonable conduct as identified by the Tribunal, factors relevant to the exercise of the discretion, and bearing in mind the claimant had also behaved unreasonably in the manner set out above, it is just and equitable to make a cost award taking into account the claimant's means.

28. The Tribunal considered the claimant's statement of means dated 16 November 2017 confirmed to be true under oath. An amendment has been made in respect of the claimant's income as his fixed term contract expired 22 December 2017; the claimant has since qualified as a teacher and attracts a higher rate of pay. However, he has found it difficult to obtain permanent employment, and works on an agency basis. The agency contract comes to end Friday this week for which he received net £533.09 per week. The claimant was unable to say when he would be next employed. The claimant has savings of approximately £2000 and whilst the Tribunal has not seen any evidence of the equity in the matrimonial home, the outstanding mortgage is £49,500 approximately and thus there is bound to be some equity in the house.

29. The Tribunal accepted the claimant's evidence given under oath as credible, and having considered his statement of means, it concluded the claimant had

worked under a temporary contract that was terminated on 22 December 2012. Since then, he qualified as a teacher and has been providing cover at Manchester College which finishes Friday. As a result of being dismissed the claimant will find it difficult to obtain permanent employment, and will be relying on agency/cover work for the foreseeable future where he will earn approximately £900 per week gross. Much will depend on whether work through the agency is available.

30. It is more likely than not the claimant will not have any income for a few weeks at least, and his wife's salary will meet the household expenditure including the monthly mortgage payment of £481.75 on a mortgage of £49,592.00. The Tribunal has considered the Nationwide statements showing the mortgage payments. It is likely the household will not cover the total monthly outgoings of approximately £2160.59 (including the mortgage) if the claimant is not working. He has saved £2000 for this eventuality, and the Tribunal took the view the existence of savings merited a costs order, taking into account the likelihood that the claimant will obtain some form of employment, given his qualification as a teacher. The claimant lives at 51 Peel Street, Eccles, and the Tribunal took the view there was sufficient equity to cover any costs order.

31. Employment Tribunals are a cost free jurisdiction, however, the wording of the statute is clear, and it took the view the claimant acted unreasonably in the knowledge that he had been dismissed for gross misconduct The claim for unfair dismissal was totally without merit, and taking into account the claimant's means it is just and equitable for the Tribunal to use its discretion in favour of the respondent, who has incurred substantial costs in defending a meritless claim. This had an effect of increasing the respondent's costs by a broad brush figure of £5,000 given the complexity of the union detriment complaint. In assessing this figure the Tribunal considered respondent's costs schedule and the amounts set out therein.

32. It cannot be said the claimant had acted unreasonably in the bringing or conducting of proceedings in relation to the union detriment complaint, which was clearly in issue and required the Tribunal to consider a complex factual matrix and a number of documents. A considerable proportion of the time and expense was uncured by the respondent defending this complaint. Without a detailed schedule of costs the Tribunal is unable to allocate what costs were incurred in defending the automatic unfair dismissal complaint and those incurred in defending the union detriment claim. It is in accordance with the overriding objective to take a broad brush to the costs, as opposed to a more scientific approach, the Tribunal concluding it was just and equitable to award the respondent a contribution towards its costs in the sum of £5,000. This is an amount the claimant can clearly afford taking his means into account. For the avoidance of doubt the Tribunal has also taken into account the whole picture of what happened in this case, and the fact that a costs award against a party is not a punishment.

33. In exercising its discretion in favour of the respondent the Tribunal took into account that from May 2016 the claimant was a litigant in person and justice requires that Tribunals do not apply professional standards to lay people, like the claimant, who has some experience in the Employment Tribunal but lacked the objectivity and knowledge of law and practice expected of a professional legal adviser. The

respondent has met the threshold tests for an order having regard to all the circumstances, including the fact the claimant was legally represented when he first brought the proceedings for automatic unfair dismissal, and the fact that he has behaved unreasonably, even making an allowance for inexperience and lack of objectivity.

34. In conclusion, the claimant is ordered to pay a contribution towards the respondent's costs in the sum of £5,000 and he will pay to the respondent £5000.00.

Employment Judge Shotter

16 March 2018
RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

16 April 2018

FOR THE TRIBUNAL OFFICE