EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr P Jones	**v**	**Flylight Airsports Limited**

Heard at: Cambridge (written submissions only - no hearing)

Before: Employment Judge G P Sigsworth

RESERVED COSTS JUDGMENT

1. The Claimant's application for costs is refused.

RESERVED COSTS REASONS

1. Following the Tribunal's decision in favour of the Claimant in his claim for unfair dismissal and notice pay at hearings on 30 April 2018 and 14 May 2018, the Claimant made an application for the costs of his counsel for the hearing. The sum claimed is £2,357.60 plus VAT, and is for the brief fee, refresher and travel expenses of his counsel.

2. The first ground of the Claimant's application is that the Respondent's defence of the claim was misconceived and had no reasonable prospect of success. The Claimant argues that, taking the Respondent's case at its highest and on undisputed facts, there was plainly an oral dismissal on 1 August 2017, and therefore the dismissal was bound to be procedurally unfair. Further, it is said that the decision was substantively unfair in that the Claimant had eleven years' service and no disciplinary record, and the incident on 1 August 2017 involved two parties and a substantial level of provocation. Reliance is placed on the Tribunal's finding that there was only a 25% chance that the Claimant would have been dismissed had a fair procedure been followed.

3. The second ground of the application is that the Respondent acted unreasonably in the conduct of the proceedings, in particular by refusing to accept a reasonable settlement offer which was made by the Claimant. There was offer and counter offer and ultimately, by 11 December 2017, as part of ACAS negotiations, the Claimant offered to settle at a reduced

level of £21,000, said to take into account the contributory fault risk. That offer was rejected by the Respondent and a final counter-offer of £5,000 was repeated. The total sum awarded to the Claimant by the Tribunal was £18,210.77.

4. Insofar as the first ground of the application is concerned, the Respondent's written submission in reply states that, whether or not the Claimant was dismissed on the spot and whether or not the Respondent followed an ACAS compliant procedure, largely rested on the evidence and had to be determined at the hearing. Further, the defence could not be misconceived as the Tribunal made percentage reductions for the Polkey principle and contributory fault, so there was some merit to the Respondent's case. On the second ground of the application, the point made by the Respondent is that the Claimant did not in fact beat the offer that had been made by him of £21,000 in terms of the award made. The award made was nearly £3,000 less than this, and the Respondent argues that the general rule that costs do not follow the event in the Employment Tribunal should be maintained.

The Law

5. Rule 74(1) of the Employment Tribunals Rules of Procedure 2013 provides that "costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party.

Rule 76(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 had no reasonable prospect of success; or
>
> (c) The hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins."

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;"

6. Tribunals have a wide discretion with regard to costs where they consider 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 grounds 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 – see MacPherson v BNP Paribas (London Branch) [2004] ICR 1398, CA; Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78, CA. In Monaghan v Close Thornton Solicitors, UKEAT/0003/01 (unreported) 22 February 2002, the two questions the Tribunal should ask itself are:

> "(a) Is the costs threshold triggered, eg was the conduct of the party against whom costs are sought unreasonable? And if so,
>
> (b) Ought the Tribunal to exercise its discretion in favour of the receiving party having regard to all the circumstances?"

Costs are compensatory and not punitive. A party's means may be taken into account – see rule 84.

Conclusions

7. I conclude that it was necessary to hear full evidence, to determine:

   (1) When the dismissal took place, given the ambiguous words and circumstances; and

   (2) In particular, to test the degree of contributory fault, and whether the Polkey principle applied. The Tribunal found 50% contributory fault and, as the Judge said to the parties, it was really six of one and half a dozen of the other. The Claimant had conceded only 25% contributory fault. Further, the Polkey principle applied, and there was a 25% chance that the Claimant would have been fairly dismissed if a fair procedure had been conducted.

8. Thus, I conclude that the defence was not misconceived and, although it was likely that a procedurally unfair dismissal would be found, complicated issues still had to be determined, such as substantive unfairness, contributory fault and Polkey.

9. Turning to the second ground, the fact is that the Claimant's final offer of £21,000 was not exceeded by the Tribunal's award of £18,210.77, and was nearly £3,000 less than that. It cannot be said, therefore, that the refusal by the Respondent to settle at £21,000 was unreasonable. Thus, I conclude that there was no unreasonable conduct of the proceedings by the Respondent.

10. In all the circumstances, the Claimant's application for costs does not succeed.

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Employment Judge G P Sigsworth

Date: 1 August 2018……
Sent to the parties on: 01.08.18.....

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For the Tribunal Office