Case No: 3327928/2017

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr C Jethalal	**v**	**Metroline West Limited**

Heard at: Watford **On:** 19 June 2018

Before: Employment Judge Bedeau

Appearances:

For the Claimant: Did not attend, on the papers
For the Respondent: Did not attend, on the papers

JUDGMENT ON COSTS

The claimant is ordered to pay the respondent's costs in the sum of £800.00.

REASONS

1. After giving judgment on 15 January 2018, the respondent applied on 29 January 2018, for its costs to be paid by the claimant and that the application be considered "on the papers".

2. The claimant claimed against the respondent that he was unfairly and wrongfully dismissed and that there had been unauthorised deductions from his wages. He was employed as a bus driver from 6 September 2004 until he was summarily dismissed on 27 June 2017. His claims were denied by the respondent.

3. Ms Norris, solicitor on behalf of the respondent, referred to a "without prejudice save as to costs" email sent to the claimant dated 28 December 2017 in which she asserted that the claimant's claims were misconceived and that the respondent would be seeking costs of between £1,110 and £1,700 should the claimant proceed with his claims to a hearing and was unsuccessful.

4. On the 1 January 2018, the claimant stated that he would be proceeding with his claims to a final hearing.

5. The claims having been dismissed, the respondent made its application for

costs to be paid by the claimant.

6. Ms Norris stated that she had spent 26 hours and 42 minutes preparing for the hearing and in attending at the tribunal. At the lowest rate an hour of £110, it equates to £2,937 but applying her usual rate the figure comes to £8,010. The respondent, however, limits its cost to £1,650.

7. Ms Norris submitted that the claimant had ample opportunities to prevent the collision from occurring, such as, checking his blood sugar levels; use of the air conditioning on his bus; stop driving when he felt drowsy; and could have removed his tie.

8. On 28 February 2018, I ordered that the respondent's costs application should be responded to by the claimant by not later than 14 March 2018.

9. The claimant replied on 13 March 2018 stating the following:

> "I acknowledge your letter dated 28 February 2018. On 15 February 2018 my PVC Driving License was revoked due to road traffic collision with Metroline Bus on 20 June 2017. I was banned from driving for three months. Currently I am living in rented accommodation. I own my old car worth £100 having no savings. Due to my unforeseen circumstance could you please strike off any applications for costs of Metroline Travel."

10. He attached notice of disqualification from driving sent in by North West London Magistrates Court confirming that he had been disqualified from driving for three months from 15 February 2018.

The law

11. The costs provisions are in rules 74 to 84, schedule 1, Employment Tribunals (Constitution and Rules of Procedure) regulations 2013, as amended. "Costs" includes any fees, charges, disbursements or expenses including witness expenses incurred by or on behalf of the receiving party, rule 74(1).

12. The power to make a costs order is contained in rule 76. Rule 76(1) provides,

> "A tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that –
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> (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
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> (b) any claim or response had no reasonable prospect of success."

13. In deciding whether to make a costs order the Tribunal may have regard to the paying party's ability to pay, rule 84.

14. In the case of Vaughan v London Borough of Lewisham UKEAT/0533/12/SM, the Employment Appeal Tribunal held that there was no error of law when the employment tribunal in awarding costs took into

account whether there was a reasonable prospect of the claimant being able, in due course, to return to well-paid employment and be in a position to pay costs. Also in that case it was held that the failure on behalf of the respondent to apply for a deposit order is not necessarily an acknowledgement that a claim has a reasonable prospect of success as there are a variety of reasons why such a course of action may not be adopted, such as additional costs involved in having the matter considered at a preliminary hearing and which may not deter the claimant.

15. The tribunal have to consider, once the claims have been brought, whether they were properly pursued, Npower Yorkshire Ltd v Daly UKEAT/0842/04.

16. In Knox J, in Keskar v Governors of All Saints Church England School and Another [1991] ICR 493, page 500, paragraphs E-G, held,

> "The question whether a person against whom an order for costs is proposed to be made ought to have known that the claims he was making had no substance, is plainly something which is, at the lowest capable of being relevant, and we are quite satisfied from the decision itself, in the paragraph which I have read and need not repeat, that the industrial tribunal did have before it the relevant material, namely that there was virtually nothing to support the allegations that the applicant made, from which they drew the conclusion that he had acted unreasonably in bringing the complaint.
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> That in our view, does involve an assessment of the reasonableness of bringing the proceedings, in the light of the non-existence of any significant material in support of them, and to that extent there is necessarily involved a consideration of the question whether the applicant ought to have known that there was virtually nothing to support his allegations."

17. I have also taken into account the cases of AQ Ltd v Holden [2012] IRLR 648, a judgment of the Employment Appeal Tribunal, E.T Marler v Robertson [19974] ICR 72, a judgment of the National Industrial Relations Court, and Oni v Unison UKEAT/0370/14/LA.

18. In Marler, it was held by Sir Hugh Griffiths under the old "frivolous or vexatious" costs requirements that

> "If the employee knows that there is no substance in his claim and that it is bound to fail, or if the claim is on the face of it so manifestly misconceived that it can have no prospect of success, it may be deemed frivolous and an abuse of the procedure of the tribunal to pursue it. If an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive, he acts vexatiously, and likewise abuses the procedure. In such cases the tribunal may and doubtless usually will award costs against the employee.", page 76 D-F.

19. In the Oni case, Simler J, President, re-stated the principles, namely that the tribunal has a wide discretion in deciding whether to award costs. It is a two-stage process. The first being, to determine whether the paying party comes within one or more of the parameters set out in rule 76. The second, is if satisfied that one or more of the requirements have been met, whether

to make the award of costs. However, costs had to be proportionate and not punitive and reasons must be given.

20. In Arrowsmith v Nottingham Trent University [2011] EWCA Civ 797, a case where the claimant was ordered to pay costs of £3,000 because she had made a case dependent on advancing assertions which were untrue. The Court of Appeal held that under rule 41(2) the tribunal was not obliged to take her means into account although it had done so. The fact that her ability to pay was limited, in that she was unemployed and no longer in receipt of statutory maternity pay, did not require the tribunal to assess a sum limited to an amount she could pay. The amount awarded was properly within the tribunal's discretion.

21. In relation to the exercise of the tribunal's discretion whether to take into account the paying party's ability to pay, under the old rules, HHJ Richardson, in the case of Jilley v Birmingham & Solihull Mental Health NHS Trust (EAT/584/06), held:

> "The first question is whether to take ability to pay into account. The tribunal has no absolute duty to do so. As we have seen, if it does not do so, the County Court may do so at a later stage. In many cases it will be desirable to take means into account before making an order; ability to pay may affect the exercise of an overall discretion, and this course will encourage finality and may avoid lengthy enforcement proceedings. But there may be cases where for good reason ability to pay should not be taken into account: for example, if the paying party has not attended or has given unsatisfactory evidence about means."
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> "If a tribunal decides not to do so, it should say why. If it decides to take into account ability to pay, it should set out its findings about ability to pay, say what impact this has had on its decision whether to award costs or on the amount of costs, and explain why. Lengthy reasons are not required. A succinct statement of how the tribunal has dealt with the matter and why it has done so is generally essential."

Conclusions

22. I have come to the conclusion that the claimant's case had no reasonable prospect of success as he should not have been driving when he felt drowsy and his blood sugar level being high. This led to a collision.

23. He produced no evidence as to his savings, sources of income, and his expenditures. I do, however, take into account that thee remains the prospect of him being able to drive albeit for a different company.

24. The respondent has incurred costs in defending the claims and was successful. It does not seek to recover its full costs. I do take into account the claimant's means and order that he pays the respondent's costs in the sum of £800.

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Employment Judge Bedeau

Date: 07.09.18…….

Judgment sent to the parties on
11.09.18
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For the Tribunal office