EMPLOYMENT TRIBUNALS

Claimant: Mr J Sime

Respondent: AMF Precision Engineering Limited

Before: Employment Judge Barker

JUDGMENT

The respondent is hereby ordered to pay the claimant's costs in the sum of £1,190 plus VAT on the grounds that the respondent acted unreasonably in the bringing of part of the proceedings and that the response had no reasonable prospect of success, as per Rules 76(1)(a) and (b) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1.

REASONS

1. The claimant brought complaints against the respondent of unfair dismissal, which were determined in the claimant's favour at a hearing on 26 February 2018. He was awarded the sum of £6408.09 by way of damages which included an uplift of 25% to the compensatory award for the respondent's failure to follow the ACAS code of practice on disciplinary and grievance procedures in dismissing him.

2. At the conclusion of the hearing on the 26 February, the claimant's representative made an application for the claimant's costs to be paid by the respondent on the grounds of the respondent's unreasonable conduct in the bringing of the proceedings under Rule 76(1)(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1 (hereafter "the Tribunal Rules") or in the alternative on the grounds that the response had no reasonable prospect of success as per Rule 76 (1)(b) of the Tribunal Rules.

3. The tribunal had no time to consider the claimant's application for costs at the conclusion of the hearing itself and so the parties were ordered to make sequential submissions on the issue in writing, with the claimant's submissions to be made first. This judgement is the Tribunal's findings in relation to those submissions, the Tribunal considering that it was not necessary for the matter to be dealt with at a hearing, the paying party having had a reasonable opportunity to

make representations as required by Rule 77 of the Tribunal Rules.

4. The claimant's written application for costs was made on 8 March 2018. In it, the claimant's solicitors provided details of a letter sent by them to the respondent on 7 February 2018 following the exchange of witness statements. In this letter, the respondent was told that the response had no reasonable prospect of success. This was said to be because both the ET3 response form and the respondent's witness statements included pleadings and evidence that the respondent had not followed any procedure in dismissing the claimant for gross misconduct. The respondent was asked in the letter of 8 March to concede that, even taking its case at its highest, its dismissal of the claimant would be considered by a Tribunal to be procedurally unfair.

5. The respondent was asked to consider conceding the point and agreeing to convert the liability hearing to a remedy hearing at which matters such as the claimant's contributory conduct and the application of the rule in *Polkey* could be contested. The respondent was warned in this letter that in the event that it did not concede that the dismissal was procedurally unfair, an adverse costs order would be sought at the liability hearing.

6. The respondent's representatives refused to concede the issue. The respondent's representatives have also provided written representations to the Tribunal in connection with the costs application dated 19 March 2018 in which, *inter alia*, the respondent argues that a full liability hearing was necessary, that the evidence on both liability and remedy was "*substantially the same*" therefore substantially the same evidence would have been required to be heard to consider the matter of liability in any event. The letter also states

> "*the respondent is under no obligation to concede liability and has the right to assert its case*"; and
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> that the claimant's representative "*failed to file a costs schedule accompanying the costs warning letter*."

7. The Tribunal notes the following matters from the Tribunal Rules. Rules 74 to 78 provide for a two-stage test to be applied by Tribunals in considering costs applications under Rule 76. Furthermore, when making a decision as to costs, a Tribunal needs to identify the unreasonable conduct and its effect, as per the cases of ***Yerrakalva v Barnsley Metropolitan Borough Council and another (2012 ICR 420, CA)*** and ***Sud v Ealing London Borough Council (2013 ICR D39, CA),*** and Tribunals are to undertake a broad assessment of the unreasonable conduct and its effect in the circumstances of the case.

8. The first stage is for the Tribunal to consider whether the ground or grounds for costs put forward by the receiving party are made out. In relation to Rule 76(1)(b) and reasonable prospects of success, it was clear even on the respondent's case at its highest, that it had carried out no procedure in relation to its dismissal of the claimant for misconduct. Therefore, it was clear that the response had no reasonable prospect of success in relation to the procedural fairness of the dismissal at liability stage.

9. As to whether the respondent's conduct in continuing the proceedings to a liability hearing was unreasonable, as well as failing to acknowledge the procedural

unfairness of its dismissal, the respondent made two key evidential assertions that the Tribunal rejected. The respondent's dismissing officer Mr Kirkman belatedly introduced evidence that he believed that he had given the claimant a final written warning on a previous occasion that entitled him to dismiss summarily on this occasion. The Tribunal did not accept his evidence in this regard. It was found that it was not raised with the claimant at the time of dismissal, there was no contemporaneous written evidence of a written warning being issued, it was not relied on in the respondent's grounds of response and was only introduced in Mr Kirkman's witness evidence.

10. Secondly, Mr Kirkman alleged that the claimant had been aggressive towards him in a key telephone conversation on the 1st of June 2017, and that this had contributed to the decision to dismiss him summarily. In particular Mr Kirkman alleged that the claimant angrily told him that he "*had the fucking shits*". The Tribunal did not accept Mr Kirkman's evidence in this regard and found on the balance of probabilities that the claimant had not said this. The Tribunal found that Mr Kirkman was not a reliable witness, in contrast with the claimant.

11. On balance, therefore, the Tribunal considers that the grounds for costs to be awarded against the respondent are made out. The respondent has acted unreasonably as per Rule 76(1)(a) and (b) in continuing these proceedings past the point of the costs warning letter issued by the claimant's solicitors, when it was apparent from the respondent's own pleadings and witness evidence that the response had no reasonable prospect of success at liability stage. The effect of this unreasonable conduct is to have prolonged the proceedings and caused the claimant to incur unnecessary costs. Furthermore, the claimant was required to respond in open proceedings to an accusation of having used aggressive and highly unpleasant language to his manager over the telephone, which conversation the Tribunal found did not take place.

12. The second stage of the Tribunal's process in relation to an award of costs is to consider whether to exercise its discretion to make an award, and if so, how much. Although the Tribunal notes the respondent's complaint that no costs schedule has been produced, as per Rule 78(1)(a), there is no need for a detailed assessment of costs to be produced in the Employment Tribunal and it is possible if the costs sought are less than £20,000 to award unassessed costs.

13. The Tribunal must consider the loss caused to the receiving party in relation to costs reasonably and necessarily incurred. There is no obligation on the part of the Tribunal or a receiving party to establish a direct link between the unreasonable conduct and the costs incurred. However, it is clear that in this case had the respondent carried out a realistic assessment of the prospects of success of the response, that it would have accepted liability and proceeded to a remedy hearing and that the claimant's costs would have been reduced accordingly.

14. It was the claimant's solicitor's evidence that costs incurred since the respondent refused to accept liability on 14 February 2018 were a total of £2,377 plus VAT. The claimant's representative suggests that had the respondent accepted liability and agreed to convert the liability hearing to a remedy hearing, that the matter could have been dealt with by the tribunal in 3 hours rather than 1 day. The tribunal agrees with the claimant's representative's assessment of the estimated duration of a remedy hearing in this matter.

15. Taking an appropriately broad approach to the issue of costs incurred from 14 February 2018 onwards, including that the estimated duration of the hearing would have been half that which took place had liability been accepted, it is appropriate that the respondent pay for half of the time incurred by the claimant's solicitors from that date to the date of the hearing.

16. The time incurred from 14 February 2018 onwards is £2,377 plus VAT. Therefore, it is appropriate for the respondent to pay the claimant's costs of 50% of that sum, this being £1,190 plus VAT.

17. The respondent's solicitors have stated that a full liability hearing was necessary and also that "*it is nonsense to suggest that the respondent acted unreasonably because the tribunal preferred the evidence offered by the claimant.*" It is respectfully noted that this is an oversimplification of the matter. Giving evidence that the Tribunal finds to be not credible can be a factor that a Tribunal can take into account in finding that a party has acted unreasonably. That factor was taken into account in the findings made in this decision.

18. It is also an oversimplification to assert, as the respondent does, that "*the respondent is under no obligation to concede liability and has the right to assert its case.*" The respondent had the benefit of a professional representative. Taking a measured and appropriately critical approach to the pleaded case, the respondent and its representative ought reasonably to have concluded that that case had no reasonable prospect of success and that the continuing of the proceedings to a liability hearing amounted to unreasonable conduct. Costs are awarded against the respondent accordingly.

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Employment Judge Barker

Date 21 May 2018
JUDGMENT SENT TO THE PARTIES ON

12 June 2018

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FOR THE TRIBUNAL OFFICE

Note
Written reasons will not be provided unless a written request is presented by either party within 14 days of the sending of this written record of the decision.

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