



EMPLOYMENT TRIBUNALS

Claimant: Mr Nicholas Elgey

Respondent: Cumberland Estate Agents Limited

Heard at: Manchester

On: 30 April 2018
1 June 2018
(in Chambers)

Before: Employment Judge Hill

REPRESENTATION:

Claimant: In person

Respondent: Ms Amy Smith, Counsel

RESERVED JUDGMENT ON COSTS

The judgment of the Tribunal is that the Claimant shall pay the Respondent the sum of £4,439.10 in respect of costs incurred in bringing his claim for constructive unfair dismissal.

REASONS

1. The Respondent made an application for costs and provided a detailed Statement of Costs along with a written skeleton argument that included reference to 13 authorities.
2. The Claimant did not provide a witness statement nor did he provide a statement of his means. Prior to the hearing there had been correspondence between the parties regarding the completion of form EX140 and both parties had sought guidance from the Tribunal. However, through some administrative error unfortunately a response from the Tribunal was not sent to the parties.
3. It was agreed at the beginning of the hearing in order to avoid further costs or wasted time that the Claimant would prepare a statement of his means including assets and liabilities and that the Claimant would give evidence verbally in respect of

his means and Ms Smith would be able to cross-examine the Claimant. The claimant was given time to prepare his statement.

4. The Claimant had brought a claim for Constructive Unfair dismissal with a liability hearing being held over 5 days, 26-29 September 2017 where the Claimant's claim failed and was dismissed.

The Costs Application

5. On 19 January 2018 the Respondent made an application for costs under Rules 75(1)(a) and 76(1)(b). The Respondent argued that the Claimant had no reasonable prospect of success and that the Claimant had acted vexatiously, abusively, disruptively and or unreasonably both in bringing the proceedings and in the way in which he conducted the proceedings.

6. The Respondent set out the grounds upon which the application was made in their letter to the Tribunal dated 19 January 2018:

- (1) The Claimant included in his evidence potentially damaging evidence against the Respondent's Deputy Chief Executive, Peter Temple, whilst being fully aware that the matter had been investigated and concluded that Mr Temple had been found not guilty of any wrong doing.
- (2) The Claimant confirmed in evidence that his motivation for bringing the proceedings was to damage the reputation of Mr Temple and to "bring down" the Respondent's Chief Executive, Kevin Parr. In the liability Judgment the Employment Judge found that this conduct was a deliberate attempt to mislead the Tribunal by giving evidence the Claimant knew was untruthful.
- (3) During the course of cross-examination, the Claimant admitted that a number of allegations which he had made in support of his claim of constructive unfair dismissal were untrue.
- (4) The Claimant alleged that records of meetings that had been prepared by Nyree Legge of the Respondent were false. However, the Claimant then admitted in cross-examination that he had not even read the document/s in question.
- (5) By letter dated 7 July 2017 the Respondent made an offer to settle in the sum of £10,000.

7. The Respondent's cost application amounted to £99,927.15 as at 26 April 2018.

8. The Claimant responded by way of a letter dated 1 February 2018 in which he stated:

- (1) That he did not reject an offer to settle his claim for constructive dismissal but that the Respondent would not engage with him in settlement discussions. The Claimant accepted that the Respondent had made an offer to settle for £15,000 but that it was to include any

other future claims in addition to his constructive dismissal claim and he was not prepared to compromise future claims, in particular personal injury.

- (2) The Claimant argued that at a Preliminary hearing on 18 January 2017 the Respondent had an opportunity to seek a deposit order and or make an application for Strike out but did not do so.
- (3) That he was a litigant in person.
- (4) The Claimant argued that he had reported his concerns regarding Mr Temple but was not informed of the outcome of the investigation until 3 July 2017 and that he had finalised his witness statement in June 2017. He accepted that he should have removed the paragraph in respect of the allegation against Mr Temple but that he was still hoping that settlement could be reached.
- (5) The Claimant stated that his meeting with Ms Legge occurred at a Polish beer festival whilst he was enjoying drinks with his family and that Ms Legge approached him while he was 'off guard'. The Claimant stated that his comments to Ms Legge should not override his genuine perceived grounds for making a claim for constructive unfair dismissal.
- (6) The Respondent's cost schedule is grossly disproportionate to the amount of the claim.

Ability to Pay - Evidence – Claimant

9. The Claimant gave oral evidence in respect of his means and provided the Tribunal with a Monthly Income and Expenditure sheet that showed that he had a disposable income of nil. (This took into account his credit card payments).

10. The Claimant also provided an assets and liabilities sheet showing that the Claimant had net assets of £11,000.

11. The Respondent cross examined the claimant in respect of both his income and expenses and his assets and liabilities and accepted that the Claimant did not have any disposable income but argued that he had assets of £62,500. The Respondent accepted that the family home was worth £380,000 and that there was a mortgage of £190,000 and second charge of £65,000 leaving net equity of £125,000. As the property is jointly owned the Claimant's share would be £62,500.

12. The claimant had included in his assets and liabilities half the outstanding balance on a loan and credit cards totalling £19,000. (£38,000 shared with his wife) and argued that these should be included for the purposes of calculating his net assets.

The Law

13. Rule 76 sets out when a tribunal has the power to make a costs order:

“76(1) 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 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 has no reasonable prospect of success

14. Rule 78 sets out the amount of a cost order:

“7 (1) A cost 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;
 - (b) Order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by County Court in accordance with the Civil Procedure Rules 1998 or by an Employment Judge applying the same principles.....
 - (e) If the payment party and the receiving party agree as to the amount payable, be made in that amount
- (3) For the avoidance of doubt the amount of a cost order under subparagraphs (b) to (e) of paragraph (1) may exceed £20,000.

15. Rule 84 covers ability to pay –

“84. In deciding whether to make a cost order, and if so, in what amount, the Tribunal may have regard to the paying party's....ability to pay.

Consideration

16. The Tribunal considered the general principles in making a cost award and that costs are the exception, not the rule; that they are designed to compensate the receiving party for costs unreasonably incurred, not to punish the paying party and that the Tribunal should follow a three stage approach when considering making a cost award.

17. Firstly the Tribunal should determine whether the threshold has been crossed, that is, whether a party has acted vexatiously, abusively, disruptively, or otherwise unreasonably in either bringing or conducting of all or part of the case or whether the claim had no reasonable prospect of success. In this case the respondent relies upon unreasonable conduct and that the claim had no reasonable prospect of success.

18. Secondly the Tribunal should, if it finds the threshold has been crossed, go on to exercise its discretion as to whether that conduct merits a cost order and that it is

not automatic just because it has the power it should be exercised. Thirdly if it decides that a cost order should be made it should consider the appropriate amount of costs to award and if less than £20,000 a summary award could be made, making the assessment in broad terms and ordering the Claimant to pay it.

19. Alternatively the Tribunal could if appropriate order a detailed assessment of costs to be made either in the County Court or by an Employment Judge. In determining the amount of the order a Tribunal may consider the claimant's ability to pay.

Has the threshold been met (the Threshold test)?

20. The Respondent set out four grounds:

- (1) The Claimant included in his evidence potentially damaging evidence against the Respondent's Deputy Chief Executive, Peter Temple, whilst being fully aware that the matter had been investigated and concluded that Mr Temple had been found not guilty of any wrong doing.

21. It is clear that the claimant sought to include allegations against Mr Temple that he knew to be untrue. The Claimant accepted this at the liability hearing. I consider that by including the allegation against Mr Temple the Claimant conduct was unreasonable and the threshold has been crossed in respect of unreasonably conduct.

- (2) The Claimant confirmed in evidence that his motivation for bringing the proceedings was to damage the reputation of Mr Temple and to "bring down" the Respondent's Chief Executive, Kevin Parr. In the liability Judgment the Employment Judge found that this conduct was a deliberate attempt to mislead the Tribunal by giving evidence the Claimant knew was untruthful.

22. It is also clear that the Claimant said to Ms Legge at the Polish beer festival that his motivation for bring the proceedings was to damage the reputation of Mr Temple and to 'bring down' Mr Parr. The Claimant confirmed this in his evidence to the Tribunal at the liability hearing and also confirmed at this hearing that he did say this.

23. However, the Tribunal finds that the comments made by the Claimant to Ms Legge at the beer festival do not, in themselves, demonstrate that the whole proceedings were vexatiously brought. The Tribunal found that the Claimant had *said* to Ms Legge that his motivation was to damage the reputation of Mr Temple and to bring down Mr Parr but not that the Tribunal found this to be the case.

24. The Respondent argues that the fact that the claimant included unfounded allegations regarding Mr Temple and the comments he made to Ms Legge show that his 'motivation' for bring his claim for constructive unfair dismissal and was 'to get back at Mr Temple' and the whole case was tainted with spite and was vexatious.

25. The Respondent relied upon comments made by me at para 67 of the liability judgment. Whilst I accept that the allegations raised by the claimant about Mr Temple were made some 9 years after the circumstances surrounding those

allegations had occurred and I agree that it is likely that the reason those allegations were included in the claim was because the Claimant was annoyed at the way he perceived he had been treated by the respondent, I do not find that the reason he brought these proceedings was out of spite but that he included an allegation out of spite.

- (3) During the course of cross-examination, the Claimant admitted that a number of allegations which he had made in support of his claim of constructive unfair dismissal were untrue.

26. The Tribunal agrees that the Claimant conceded under cross-examination that the evidence did not support some of the allegations he made in support of his claim or that he had not read documents that therefore undermined his allegations. The Tribunal also found that the Claimant lacked credibility. However, the Tribunal's findings came after extensive examination of the facts, looking at each allegation individually and determining whether separately or as a whole any or all of the allegations amounted to a breach of contract. The Tribunal finds that it is not unusual for witnesses to amend or alter their accounts during cross-examination but that it does not automatically lead to a finding of unreasonable conduct or no reasonable prospect of success. In this case I cannot say that the threshold has been made out in this regard.

- (4) The Claimant alleged that records of meetings that had been prepared by Nyree Legge of the Respondent were false. However, the Claimant then admitted in cross-examination that he had not even read the document/s in question.

27. The Tribunal accepts that the Claimant had not read the documents and had made assumptions. However, again I cannot say that this means that the threshold has been made out for unreasonable conduct. The Claimant had formed a view on the accuracy of the documents/meeting notes from his recollection and whilst the Tribunal did not accept his version of events I find that the threshold is not met.

No Reasonable Prospect of success

28. The Tribunal finds that this case was case managed by the Tribunal prior to the liability hearing and that the Respondent was given the opportunity to seek a strike out or deposit order but chose not to pursue an application for either. Whilst the Respondent has set out a number of grounds as to why the claim had no reasonable prospects of success the Tribunal finds that the claimant was not 'put on notice' until 7 July 2017 that the respondent would seek a cost order on the basis that the claim had no reasonable prospect of success.

29. The Claimant was not legally represented and it is clear from the correspondence between the parties that the Claimant tried to agree settlement in respect of his constructive unfair dismissal claim. Whether a party is legally represented is a factor that a tribunal may take into account when assessing the threshold test and whilst it does not mean that a litigant in person is immune from costs it is something that may be considered.

30. The Claimant raised 27 allegations and whilst some of these allegations may not have had a reasonable prospect of success it is not unusual in constructive dismissal cases that individual allegations in themselves do not amount to a fundamental breach but when taken together they may lead a tribunal to conclude that a claim has been made out.

31. The Tribunal finds that it cannot be said that the claim had no reasonable prospect of success and the threshold has not been met.

Is it appropriate to make the order (the discretionary test)?

32. I consider that in view of the findings of fact that the Claimant included serious allegations against the Respondent and in particular Mr Temple and that at the time he knew or ought to have known that they were untrue and further that he persisted with these allegations at the liability hearing that the Claimant's conduct was unreasonable in this regard. However, the allegation was not central to the case brought by the Claimant and that the allegation against Mr Temple was not an allegation that was at the heart of the case.

33. I have found that the conduct of the Claimant was unreasonable.

The Amount of the Award

34. My decision is that the threshold for no reasonable prospects of success has not been met. However, I consider that the threshold for unreasonable conduct has been made out. I have considered the Claimant's ability to pay and find that the claimant has no disposable income and modest net assets. I find it is appropriate to consider the claimant's ability to pay. The Claimant has no readily available cash and has substantial debts. He also has a second charge on his property.

35. I have also considered the effect of the unreasonable conduct and although the amount of costs is not directly related to causation, I should look at the whole picture of what happened in the case and ask what effect the unreasonable conduct had. I find that the effect of the conduct whilst serious for the Respondent and potentially damaging did not have a significant impact in terms of additional time in preparation or the length of the hearing.

36. The effect in this case is that the Respondent had to take further witness evidence from Ms Legge and Mr Temple, collation of documents additional attendances and that this additional work would not, but for the unreasonable conduct by the Claimant, have been required. Looking at the case as a whole and taking a broad-brush view I find that the allegation regarding Mr Temple and the conversation with Ms Legge would account for no more than 10% of the costs in defending this case. Whilst the allegations were serious the effect on the preparation of the hearing and the hearing itself was insubstantial.

37. In view of the fact that the Respondent did not put the claimant on notice of a risk of costs until 7 July 2017 and the allegations referred to above did not occur until after the exchange of witness statements, the Tribunal considers it just and equitable to make an award based on the costs at standard rate as at 7 July 2017 which were £44,391. 10% amounts to £4,439.10.

38. In determining the amount of costs I have given a great deal of thought to proportionality. I have looked at what was at stake in this case. The claimant provided a schedule of loss and sought compensation of a little over £15,000. Indeed the parties had settlement discussions albeit that the Respondent states they made them on a purely commercial basis, the amounts in discussion were similar to the schedule of loss. The legal issues in this case were not complex although there were a large number of allegations. The role of the Tribunal is to ensure that it abides by the overriding objective to deal with matters fairly and justly.

39. In all the circumstances the Tribunal therefore finds that it is reasonable and proportionate to awards costs in the sum of £4,439.10.

Employment Judge Hill

21 June 2018

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

21 June 2018

FOR THE TRIBUNAL OFFICE

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