



EMPLOYMENT TRIBUNALS

Claimant: N Beresford

Respondent: J & J Denholm Ltd

Heard at: Exeter (in chambers) **On:** 06 September 2018

Before: Employment Judge Housego

Representation

Claimant: Written submissions only

Respondent: Written submissions only

JUDGMENT

The respondent's application for costs is dismissed.

REASONS

1. The claimant brought a claim for unfair dismissal, which I heard on 01 August 2018. The claim was dismissed, and I gave a full extempore decision. I have promulgated a decision setting out those reasons in full.
2. By email of 10 August 2018 the respondent emailed the Tribunal, and the claimant, applying for costs under Rule 76(1)(b) (somewhat confusingly describing this as an application for an "Expenses Order"). The application is set out in nine paragraphs on two pages and seeks legal fees of £13,748 plus VAT and travel expenses and accommodation of £1865.92.
3. Rule 76(1)(b) in the Schedule 1 to The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 states:

*"76.(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—
(a)...
(b)any claim ... had no reasonable prospect of success."*

4. The application sets paragraph 19 of the response filed by the Respondent, which said:

"The claimant's claim has no reasonable prospect of success and should accordingly be dismissed. If the claimant persists with this claim, he will, in the opinion of the respondent, be acting unreasonably. The respondent therefore reserves its right to seek expenses from the claimant if he persists with his claim."

5. On 19 April 2018 the respondent sent to the claimant a proposed list of issues and asked the claimant:

"I would be grateful for your comments and particularly your input regarding the further specification that is sought in relation to the implied and express terms that you say have been breached".

Later: *"Mr Beresford – there is no express determine the offer letter or in the contract of employment – please confirm where the express term is made regarding accommodation/BIK" ("benefit in kind") and*

"Mr Beresford – please confirm where/how the implied term arises".

The claimant did not respond to this request.

6. On 18 May 2018 a letter was sent to the claimant, without prejudice save as to costs in which the respondent offered to pay £2,400 to the claimant to settle the claim, stating that this was the extra tax paid by the claimant on the benefit in kind. The email added:

"In the event that you reject this offer, and failed to recover some equal to or greater than £2400 in these proceedings, I may be instructed to refer to this email, and to my previous emails addressing the merits of this claim, in support of an application for expenses."

7. On 05 June 2018 that offer was repeated, with the same warning.
8. The application then (correctly) states that at the hearing the claimant was unable to identify an implied or express term of the contract to justify his claim.
9. The claimant responded to the application for costs in an email of 15 August 2018. He stated that he had spent the last 12 months dealing with this case and attempting to rebuild his career following what he described as his forced departure from the respondent. The real costs of the tax on the BIK was not £2400 but in the region of £6000 as set out in the preliminary hearing decision (which records that this was what the claimant said at that hearing). He had taken comfort from the observations of Judge Livesey in the section of the decision dealing with deposit or strike out orders. Further the respondent had intended to call two witnesses closely involved in the actions leading to his resignation, Messrs Jenkins and Hill, but after exchanging witness statements they replaced them with the finance manager who knew nothing about the particular circumstances. This was nothing more than a continuation of harassment.
10. The substantive decision in this case (which I prepared on the day of the hearing in case full reasons were requested) contains my finding that the claimant was properly taxed on his BIK of accommodation. He had not been taxed on it before. He was not promised tax free accommodation. There was an assumption by him that this would be the case, and he was not happy about the consequent reduction in his net pay, but there was no contractual term or legitimate expectation that he would have tax free accommodation, any more than that he might have tax free income. This was no more and no less than the application of taxation lawfully due to the state.
11. The respondent is correct in stating that the claim always had no reasonable prospect of success. Rule 76(1) therefore obliges me to consider making a costs order.
12. The claimant resigned and obtained new employment immediately. He resigned because he felt that the tax on his accommodation made his job economically unattractive (that was his evidence to me). He has means to pay a costs order.
13. The claimant asserted that it was wished to remove him, but provided no reason for so thinking, and no evidence in support.
14. The weakness of the case heard by me, and the documentary evidence from the respondent (set out above) are indicators that a costs order should be made. On the other hand, the issue was addressed at the case management hearing on 16 February 2018 and Judge Livesey declined to make an order for a deposit or to strike out the claim. Plainly, and not unusually, the matter looked different when the entire case was heard. The claimant was entitled to rely on the decision by Judge Livesey that his case was not one with little reasonable prospect of success. Nothing of significance changed after that

case management hearing. In these circumstances I decide not to make a costs order against the claimant.

15. Had I decided to do so, it would have been of a limited amount, for the respondent asked only for a figure and provided no breakdown of how it was calculated, nor did they provide any evidence of the expenses sought to be recovered from the claimant.

Employment Judge Housego

Date 06 September 2018