EMPLOYMENT TRIBUNALS

Claimant: Mr J Jones

Respondent: Whitbread Group PLC

Heard at: Manchester **On:** 30 October 2018

Before: Employment Judge Franey
(sitting alone)

REPRESENTATION:

Claimant: Did not attend
Respondent: Mr P Bownes (Solicitor)

JUDGMENT ON COSTS

The claimant is ordered to pay to the respondent the sum of **£4,966.50** in respect of the costs that the respondent has incurred while legally represented in these proceedings.

REASONS

Introduction

1. These proceedings came to an end with a judgment of Employment Judge Howard made on 19 March 2018 dismissing the claim upon withdrawal by the claimant.

2. On 16 April 2018 the respondent applied in writing for a costs order against the claimant in the sum of £4,966.50. The application was copied to the claimant by email. The application was made on two alternative bases. The first was that the claim had had no reasonable prospects of success. The second was that the claimant had acted vexatiously, abusively or unreasonably in the bringing of the proceedings or the way that they were conducted.

3. The Tribunal listed the application to be heard on 17 July 2018. On 15 July 2018 the claimant sought a postponement on health grounds. It was granted and the hearing re-listed for 17 September 2018. The claimant promptly applied for that hearing to be postponed because he was going to be away on holiday at the time. He said he would be available for a hearing from 2 October 2018 onwards. The hearing was postponed and on 2 August 2018 the parties were notified that it would take place on 30 October 2018 at 10.00am.

4. At 10.00am Mr Bownes for the respondent was present but there was no attendance by the claimant. The Tribunal's administrative staff telephoned the claimant at the mobile telephone number on his claim form. The call went to voicemail and a message was left for him. I decided to delay the hearing until 10.15am to see whether he arrived at the Tribunal. He did not, and the hearing went ahead in his absence.

5. I did not consider it appropriate to adjourn the hearing. This was the third date fixed for the costs hearing. There had been no contact from the claimant asking for it to be postponed. If there is a good reason why he was unable to attend the hearing he is free to apply for reconsideration of this judgment. Any such application must be copied to the respondent and will be considered on its merits.

Relevant Legal Framework

6. The power to award costs is contained in the 2013 Rules of Procedure. The definition of costs appears in rule 74(1) and includes fees, charges, disbursements or expenses incurred by or on behalf of the receiving party.

7. Rule 75(1) provides that a costs order includes an order that a party makes a payment to another party "in respect of the costs that the receiving party has incurred while legally represented".

8. The circumstances in which a costs order may be made are set out in rule 76. The relevant provision here was rule 76(1) which provides as follows:

> **"A Tribunal may make a Costs Order or a Preparation Time 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."**

9. The procedure by which the costs application should be considered is set out in rule 77 and the amount which the Tribunal may award is governed by rule 78. In summary rule 78 empowers a Tribunal to make an order in respect of a specified amount not exceeding £20,000, or alternatively to order the paying party to pay the whole or specified part of the costs with the amount to be determined following a detailed assessment.

10. Rule 84 concerns ability to pay and reads as follows:

> **"In deciding whether to make a costs, preparation time or wasted costs order and if so in what amount, the Tribunal may have regard to the paying party's (or where a wasted costs order is made the representative's) ability to pay."**

11. It follows from these rules as to costs that the Tribunal must go through a three stage procedure (see paragraph 25 of **Haydar v Pennine Acute NHS Trust UKEAT 0141/17/BA**). The first stage is to decide whether the power to award costs has arisen, whether by way of unreasonable conduct or otherwise under rule 76; if so, the second stage is to decide whether to make an award; if so, the third stage is to decide how much to award. Ability to pay may be taken into account at the second and/or third stage.

12. The case law on the costs powers (and their predecessors in the 2004 Rules of Procedure) confirms that the award of costs is the exception rather than the rule in Employment Tribunal proceedings; that was acknowledged in **Gee v Shell UK Limited [2003] IRLR 82**.

Findings of Fact

13. This section of these reasons sets out the factual background about these proceedings so as to put my decision into context.

The Claim 12 June 2017

14. The proceedings began with a claim form presented on 12 June 2017. The claimant had been employed as a Human Resources ("HR") Business Partner by the respondent on a fixed term contract which began in August 2016. The contract was to run until August 2017 but he was dismissed in early March 2017. He brought complaints of discrimination because of sex, detriment because he was a fixed term employee, and complaints in relation to notice pay and failure to pay him a bonus. The core of his case was that he had been unlawfully excluded from a pool of employees being considered for redundancy, and that as a consequence of that exclusion he had been required to work out part of his notice period rather than receiving a payment in lieu of notice.

The Response 24 July 2017

15. The response form of 24 July 2017 resisted the complaints on their merits. It explained that the claimant had been excluded from the redundancy pool because he had been employed as cover for a seconded employee, and his employment was coming to an end early because the secondment was ending early. He had been required to work to 10 March 2017 (albeit off sick at the time) and had then received a payment in lieu of the balance of his notice period. The response form pointed out that one of his comparators in the redundancy pool was also on a fixed term contract, and that the reason for his exclusion from the pool had nothing to do with his sex. The claimant had received payment of the notice period, and there was no discrimination in the failure to pay him a bonus. The bonus scheme was non-contractual but required the claimant to be in employment at the date the bonus was to be paid.

Case Management August – October 2017

16. The complaints and issues were considered at a preliminary hearing before Employment Judge Feeney on 25 August 2017. She required some further particulars from both parties. Her Case Management Order sent to the parties on 5 September 2017 recorded reservations about the merits of the fixed term complaint, and advised the claimant to consider carefully the respondent's non-discriminatory reason for excluding him from the redundancy pool. Although not recorded in the record of the hearing, Employment Judge Feeney advised the claimant to pay careful attention to any costs warning letters which he might receive from the respondent.

17. The final hearing was fixed for 9 April 2018. In mid-September that hearing date was subsequently changed to 5 March 2018.

18. The written Case Management Order also advised the claimant to consider the Presidential Guidance on General Case Management and provided the link to the website where that guidance can be found.

19. The respondent provided its further particulars on 8 September 2017. Copies of the bonus scheme terms were provided. Clause 3.1 confirmed that no payment would be made to anyone not employed by the company on the date that payments were made. The date for payment of the bonus was 26 May 2017, by which stage the claimant was no longer in employment.

20. The claimant sought to provide his further particulars in an email of 19 September 2017. He confirmed that he did intend to pursue his fixed term complaint. He asserted that a manager, Kate Daines, confirmed that he would be treated differently due to his fixed term status. He complained of a lack of fair process and suggested that there might have been a personal vendetta against him because he is gay.

21. The respondent amended its response form on 6 October 2017. The amended response pointed out that there were no issues as to fairness because the claimant had not been employed for long enough to bring an unfair dismissal complaint, and that no complaint of discrimination because of sexual orientation had been raised. It observed that the claimant was seeking to amend his notice pay claim to cover the full duration of the fixed term contract, and pointed out that one of the comparators he identified in the redundancy selection pool was a man, which contradicted his sex discrimination complaint.

Costs Warning Letters October – December 2017

22. On 10 October 2017 the respondent sent the first of two costs warning letters to the claimant. It warned him of the intention to apply for a costs order at the conclusion of proceedings. It explained why the fixed term and sex discrimination complaints were hopeless given that fixed term employees and male employees were included in the redundancy pool. It also explained that the claimant was excluded because his post was not at risk of redundancy: it would still be needed after the restructuring but would be filled by the employee returning from secondment. Those who received payment in lieu of notice did so pursuant to

settlement agreements, of which the claimant had been aware because of his role in HR. Concerns about the way the claimant was conducting the proceedings were also raised. The letter offered the claimant the opportunity to withdraw his complaint without any application for costs if he did so within the next seven days.

23. The claimant did not take that opportunity. By a letter of 19 December 2017 the respondent gave him a second opportunity to withdraw his claim without a costs order. That letter referred to what Employment Judge Feeney had said at the preliminary hearing in August 2017. The claimant was offered the chance to withdraw his claim by 4.00pm on 1 January 2018 and was warned that if he did not do so an application for costs might be made.

January – March 2018

24. In the meantime the case management timetable ordered by Employment Judge Feeney had not been followed by the claimant. Disclosure was to have been completed by 3 November 2017, a bundle of documents drafted by the respondent to have been agreed by 24 November 2017, and witness statements due to be served by 18 January 2018 prior to a one day final hearing on 9 April 2018. On 19 January 2018 the respondent contacted the Tribunal to say that it had not received contact from the claimant between 19 September and 15 December 2017, and that he was seeking an extension for service of witness statements. The respondent proposed an extension to 12 February 2018 which was approved by Employment Judge Feeney on 8 February 2018.

25. On 15 February 2018 the respondent informed the Tribunal that it had received no witness statements from the claimant, and had not heard from him since 19 December 2017. The claimant responded to this on 18 February 2018 saying he had not been able to access his emails. He asks for a postponement of the hearing. The respondent objected, and also raised the possibility of a strike out of the claim because it had no reasonable prospect of success. Employment Judge Horne decided to convert the final hearing to a case management preliminary hearing.

26. Employment Judge Slater dealt with the preliminary hearing on 5 March 2018. She made an unless order striking out the claim unless the claimant served his witness evidence by 12 March 2018. Further directions were made about finalising the bundle and agreeing the List of Issues, and the hearing re-listed for two days at the end of May 2018. The summary of the discussion subsequently issued on 16 March 2018 recorded that the claimant had suffered from a family bereavement at the beginning of December, had been made redundant from his new job, and had not been accessing his emails on his phone even though he had been able to do that.

27. The note also recorded a discussion about the merits of the claims. Employment Judge Slater said that she would have been minded to have struck out the fixed term complaint at a separate preliminary hearing had it been proportionate to do so, but the same evidence would need to be heard in the sex discrimination complaint in any event. Her Case Management Order recorded that she told the claimant that if his claims did not succeed the Tribunal could award costs against him if it considered that the claims had been misconceived.

Withdrawal

28. Before the deadline for service of his witness statements the claimant withdrew his complaints on 11 March 2018 and they were dismissed upon withdrawal by Employment Judge Howard in a judgment of 19 March 2018.

Respondent's Costs Application

29. The costs application was put on two alternative bases.

No reasonable prospect of success

30. The first basis was that the claim had had no reasonable prospect of success.

31. The fixed term complaint was untenable because a person on a fixed term contract had been included in the redundancy pool. That could not have been the reason for the claimant's exclusion.

32. The sex discrimination complaint was hopeless because the claimant knew full well that men were included in the selection pool. The respondent had explained why he was treated as he was: because the secondment of a colleague was ending early.

33. His complaint about notice pay ignored the fact that he had either worked or been paid in lieu of his contractual notice period, and his complaint about bonus was untenable because he had not been in employment at the date the bonus was due to be paid.

Unreasonable conduct

34. The second basis was that the claimant had conducted the proceedings unreasonably.

35. The claimant had failed to comply with Employment Judge Feeney's order to provide further particulars by 8 September 2018. The information he did provide on 19 September raised new issues and did not amount to cogent particulars of his fixed term complaint.

36. There had been no contact from the claimant between 19 September and mid December 2017 when he made unfounded allegations of "sloppy practice" against the respondent.

37. He did not respond to either of the costs warning letters, despite Employment Judge Feeney's observation that he should pay attention to any costs warning letters he received.

38. He failed to comply with the amended deadline for service of witness statements.

39. He asserted that he had been unable to access his emails, but later told Employment Judge Slater that he had been able to access them but had not done so.

40. Effectively he had not engaged at all in case preparation between October 2017 and February 2018.

Claimant's Position

41. The claimant had not provided any objection to the respondent's application either in writing or (because he did not attend) at this hearing. However, it seemed to me that had the claimant been present he would have raised an argument along the following lines.

42. Although he had experience of HR matters he was a litigant in person and not a lawyer. Complaints of sex discrimination and fixed term detriment are complicated legal matters. In the fixed term complaint he relied on a comment made to him by a manager, and in the sex discrimination complaint he was entitled to choose a female comparator in the pool.

43. The respondent had not made any application to strike out his claim when it first lodged its response form.

44. There was no record in the written Case Management Order of any observation as to cost made by Employment Judge Feeney, and he was entitled to regard any costs warnings from the respondent as steps taken in the litigation to put pressure on him.

45. He had difficulties in dealing with the case in late 2017 because of personal issues. However, once Employment Judge Slater spelled out her concerns about costs at the preliminary hearing on 5 March, he acted reasonably by withdrawing his complaint promptly and therefore saving any further unnecessary cost.

46. I anticipated that the claimant would argue that viewed as a whole he had pursued the matter reasonably in the light of those factors.

Has the Power to Award Costs Arisen?

47. I considered each element of the application in turn.

<u>No reasonable prospect of success</u>

48. I was satisfied that the respondent was right to argue that the claim had had no reasonable prospect of success, and indeed it seemed to me likely that the claimant ought to have appreciated this given his senior position in HR. Even if a comment had been made to him by a manager about exclusion because he was on a fixed term contract, he was aware that others included in the pool were themselves on fixed term contracts. That comment could not have been right. Further, he knew from his involvement in the redundancy consultation process that those included in the pool included men. On that basis it was very difficult to see how he could prove facts from which the Tribunal could conclude that he had a prospect of success on the fixed term or sex discrimination cases.

49. Even if he could have shown facts from which a Tribunal could have found in his favour, however, the respondent had a clear non-discriminatory explanation. The claimant was treated differently from his colleagues because he was in a unique position, covering a role whilst another employee was seconded elsewhere. His employment ended when and how it did because that secondment ended. He was paid in accordance with his contractual entitlement. He had no entitlement to notice beyond the contract, and no entitlement to any bonus because he was not in employment at the date for payment.

50. Despite the points which I anticipated the claimant would have made had he attended the hearing, therefore, I concluded that his claim was one which had no reasonable prospect of success, and therefore that the power to award costs under rule 76(1)(b) had arisen.

Unreasonable conduct

51. I was also satisfied that the respondent had established that the claimant had conducted these proceedings unreasonably. It seemed to me that he had behaved reasonably in conducting them up to the end of September 2017, when he sought to provide the further particulars of his fixed term contract claim required by Employment Judge Feeney, but thereafter he had refrained from any conduct with the respondent. I accepted that he had suffered a bereavement in early December but it would still have been possible for him to have made that fact known by way of email and sought an extension to the case management timetable. Nor did he appear to take any action in response to the costs warning letters, both of which seemed to me reasonable and appropriate letters on the part of the respondent's solicitor.

52. I was also concerned by the conflict between his assertion that he had been unable to access emails, and the fact that he told Employment Judge Slater than he could access them on his phone but had not done so.

53. His failure to take any steps to produce a witness statement in accordance with the case management timetable was also unreasonable.

54. I therefore concluded that from the date of the first costs warning letter of 10 October 2017 the claimant had acted unreasonably in the way he conducted the proceedings, and therefore that the power to award costs from that date had arisen under rule 76(1)(a).

Should an Award be Made?

55. I then considered whether to make an award.

56. Costs awards in tribunals are the exception, but where a case with no reasonable prospect of success has been pursued it is appropriate that the claimant be required to pay something towards the legal costs incurred by the respondent in defending a case which should not have been brought.

57. I was conscious that it would be wrong to penalise a litigant for withdrawing a claim rather than allowing it to proceed to a contested hearing, but this was not a

situation where the lack of merit was apparent to the claimant only shortly before he withdrew.

58. The claimant's ability to pay can be taken into account under rule 84. This is made plain in the guidance note about costs which forms part of the Presidential Guidance on General Case Management to which Employment Judge Feeney had directed the claimant. However, the claimant had provided me with no information about his ability to pay. I knew only that he had been in employment until late 2017 and that he had been abroad on holiday in September 2018. I decided not to take his ability to pay into account.

Amount of Award

59. The final question was what amount to award. I was satisfied that the rates and amounts claimed on the schedule attached to the costs application of 16 April 2018 were reasonable. I enquired of Mr Bownes what figure would represent those costs incurred since 10 October 2017. After working it out he said that the sum would be £2,005.50.

60. After considering the matter I decided to make an award of the full amount sought by the respondent. I was satisfied that the claim had no reasonable prospect of success, and that as a senior HR professional the claimant should have known this even though he was not an employment lawyer. That meant that the entirety of the costs incurred by the respondent in defending this case were costs which it should not have incurred. I therefore ordered the claimant to pay the total sum claimed of £4,966.50.

61. Had that order not been appropriate I would have ordered the claimant to have paid the sum of £2,005.50 in respect of his unreasonable conduct of the proceedings after the first costs warning letter of 10 October 2017.

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Employment Judge Franey

30 October 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON
5 November 2018

FOR THE TRIBUNAL OFFICE