THE EMPLOYMENT TRIBUNALS

Claimant **Dr Jamal Al-Tarkait**

Respondent **Kuwait Oil Company (K.S.C.)**

HELD AT: **London Central**

ON: **20-21 August 2018**

EMPLOYMENT JUDGE: **Mr J Tayler** **Members: Mrs J Cameron**
Mr I McLaughlin

Appearances

For Claimant: **No Attendance**
For Respondent: **Mr M Duggan, QC**

JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. The Claimant's application for a postponement of the hearing is refused.

2. The Claimant is awarded a compensatory award of £78,335.00 and a basic award, reduced on account of his contributory conduct, of £1,369.20: The total compensation is of £79,724.20. The payment of the award is stayed.

3. The Claimant is awarded costs in respect of the Respondent's failure to disclose documentation attached to the investigation report until an application was made to the tribunal. Otherwise the Claimant's application for costs is dismissed.

4. The Respondent is awarded the costs incurred by reason of the Claimant raising the matters that were dismissed by consent or by decision of the Auerbach tribunal. Those costs are limited to a maximum sum of the compensation awarded to the Claimant added to the costs awarded to the Claimant.

5. If either, or both, parties contend there should be a taxation in respect of the costs award they should write to the Employment Tribunal within 14 days of the date this Judgment was sent to the parties, setting out their reasons why there should be such a taxation.

REASONS

1. This Hearing was fixed to consider the remedy to which the Claimant is entitled by reason of his unfair dismissal and the competing applications for costs made by the Claimant and the Respondent. The hearing was fixed at a Preliminary Hearing for Case Management held before me on 21 June 2013.

2. On 17 August 2018. The Claimant's previous solicitors wrote to the Employment Tribunal in the following terms:

> “We act for the Claimant in the above matter and refer to the Remedy Hearing that is listed to take place on 20 August 2018 with a time estimate of 3 days.
>
> We wish to notify the Tribunal that we have ceased to act for the Claimant in this matter following his failure to provide us with instructions for the hearing next week, until late today.
>
> We have only today received an email from the Claimant notifying us that he requires an adjournment of the hearing that is listed next week on Monday 20th August 2018 with a time estimate of 3 days. The Claimant’s reason for requesting an adjournment is that he is currently in Kuwait where the government has confiscated all passports and therefore he cannot leave the country to attend the hearing next week. The earliest date on which the Claimant can apply for a new passport is 3 September 2018, however the process will take an additional 2-3 weeks before he is issued with a new passport allowing him to leave the country.
>
> Our counsel is no longer instructed to attend the hearing next week and therefore the Claimant will remain unrepresented until further notice.”

3. It was unclear with what authority the Claimant’s former solicitors sought the postponement of the hearing in circumstances in which they had ceased to act. However, they also referred to an email from the Claimant. A copy of the email was provided by the Respondent to us on the first day of the hearing. We treated the email as an application by the Claimant to postpone the hearing on the basis that he did not have a passport as old passports in Kuwait are invalid. He had yet to attend a meeting to obtain a new passport.

4. We refused the application for a postponement as we considered it was made far too late. We were informed that many months ago citizens of Kuwait were informed that old passports would become invalid and that they would need to apply for a new passport. There were two possibilities here: either the Claimant should, acting reasonably, have applied for a passport in time to receive it so as to enable him to attend the hearing, or, if he had realised that was going to be impossible, he should have promptly applied to the tribunal for a postponement. We considered that granting a postponement at this late stage at would cause excessive prejudice to the Respondent who had prepared fully for the hearing and had attended. It would also involve an unacceptable waste of tribunal resources. We refused the application for a

postponement. While we appreciate that going ahead with the hearing in the Claimant's absence will cause him prejudice but we considered that was of his own making as acting reasonably he could have attended or sought a postponement in good time.

5. The Respondent accepted that the Claimant would recover the statutory maximum compensation and accepted the Claimant's calculation of the basic award, subject to the reduction for contributory conduct. There was no dispute as to the sum that should be awarded to the Claimant. We awarded the figures set out in the Judgment above.

6. There were competing costs applications from the Claimant and the Respondent. The Claimant and Respondent both sought the costs incurred as a result of the adjournment of the Auerbach tribunal. The Claimant in addition sought costs incurred in respect of applications to postpone that hearing and in respect of the Respondent's conduct in failing to disclose relevant documents; in particular the documents that supported the investigation report into the Claimant's conduct that resulted in his dismissal. Employment Judge Grewal stated in a letter dated 5 January 2017:

> "The documents relating to the investigation that took place between November 2015 and February 2016 and to the decision to suspend and dismiss the Claimant are clearly relevant and should have been disclosed. If they have not already been disclosed, the Respondent should disclosed them now."

7. We agree with Employment Judge Grewal's analysis.

8. The Respondent made three claims for costs. In the most recent it is contended that the proceedings as a whole were misconceived, in the sense of having no reasonable prospect of success and that the Claimant acted unreasonably in his conduct of the proceedings. The Respondent contends that they should be awarded their costs of the entire proceedings. The Respondent made an earlier application for costs of the postponement of the Auerbach hearing on two grounds. Firstly, they seek the costs incurred by reason of the postponement. Secondly they seek the costs incurred by reason of the Claimant having introduced a series of historical allegations in further particulars and his witness statement. They contend that involved incurring costs in investigating complaints and in applying to have them excluded. Some of those allegations were excluded with the Claimant's consent and some by order of the Auerbach tribunal.

9. The power to award of costs is set out in rule 76 of the Employment Tribunal Rules 2013.

10. There is a discretion to award costs where a party has acted at vexatiously, abusively, disruptively or otherwise unreasonably and where a claim or response had no reasonable prospect of success, and where a hearing has been postponed or adjourned on the application of a party made less than seven days before the date on which the relevant hearing begins.

11. We accept the contention of the Respondent at that rule 76(1)(e) that provides for costs on an adjournment is a separate limb of the cost rule. It does not require it to be established that the party has acted unreasonably. That being said there has to be an investigation into the reason why the adjournment was necessitated. In exercising the discretion to award costs the tribunal may consider the conduct of both parties and the reason for, and necessity of there being, such a postponement.

12. Cost awards in the employment tribunal remain the exception rather than the rule: **Gee v Shell UK Ltd** [2003] IRLR 82 at paras 22, 35 and **McPherson v BNP Paribas** (London Branch) [2004] EWCA Civ 569, [2004] ICR 1398. The Employment Tribunal is a venue that is designed for parties to litigate their disputes in a generally cost free environment. The tribunal must take particular care in considering cost applications in discrimination claims. The determination of discrimination complaint is of particular importance in a pluralistic society: **Anyanwu v South Bank Students' Union** [2001] IRLR 305. It is important that the generally cost free nature of the jurisdiction should not be undermined so that people become afraid to bring meritorious claims.

13. Determining discrimination claims usually necessitates the consideration of substantial amounts of background evidence. It may only be at a hearing when it becomes clear what is relevant background and what is irrelevant to the dispute.

14. Findings of fact are made on balance of probabilities. Sometimes the balance is fine and differing factual finding would have had a very substantial effect on the outcome. Alternative findings of fact could have led to an inference being drawn.

15. In a complaint of discrimination it is only necessary for the tribunal to conclude that the protected characteristic was a material factor in a decision for it to be found to have been discriminatory.

16. In considering whether a complaint had no reasonable prospect of success the tribunal is, in effect, applying the same test as applied when a strike out is sought. As stated in **Balls v Downham Market High School & College** [2011] IRLR 217 “no” means “no”. The test for establishing that a claim had no reasonable prospect of success is a high one. That being said, that does not mean that a claim that was merely fanciful should not be subject to a costs award where it can truly be said that it had no reasonable prospect of success.

17. This case is an example of how this jurisdiction, which is designed for relatively swift determination of employment disputes, can involve consideration of evidence that expands beyond a reasonable scope. There is a tendency in hard fought litigation involving highly paid employees for there to be at proliferation of issues and insufficient focus on core issues of dispute, with excessive costs being incurred. We are told that the total costs incurred by the Respondent in this matter are in the order of £1.2 million. We are very disturbed that a relatively straightforward cases resulted in such enormous costs being incurred. The costs are out of proportion to the complexity of the issues even takin account of the theoretically high value of the claim if the Claimant had succeeded in his discrimination complaints.

18. The original particulars attached to the Claim Form were 6 pages long and set out a relatively simple claim. The Claimant contended that since he had become a wheelchair user there had been a change in attitude towards him, that there had been a failure to make reasonable adjustments and that his investigation for alleged misconduct had been used by the Respondent as an opportunity to dismiss him because of his disability.

19. The Respondent made a request for further particulars that resulted in very substantial further information being provided by the Claimant. In addition to answering the many questions asked by the Respondent, the Claimant provided, purportedly as voluntary particulars, a much expanded claim, alleging that while there had been a change in attitude to him once he became a wheelchair user, that was an extension of negative treatment resulting from his disability that went back over a period in excess of 10 years, involving matters such as inadequate consideration for promotion, insufficient pay increases and various comments being made that were of a potentially harassing nature. The Respondent challenged the further particulars. As the matter proceeded towards the hearing the Claimant provided his witness statement in which he expanded still further on the allegations and added extensive background material without setting out a clear causal connection to his complaint that there had been a failure to make reasonable adjustments once he became wheelchair user and that a an effective cause of his dismissal was the Respondent’s alleged wish to be rid of him because of his disability.

20. During the course of preparation for the hearing the Claimant complained that on disclosure he had been provided with an investigating report, but not the supporting documents. We agree with the conclusion of Employment Judge Grewal that they were obviously disclosable documents. They should have been disclosed to the Claimant. It was unreasonable conduct of the Respondent to fail to disclose them. That put the Claimant to costs in seeking their disclosure. We consider that that is unreasonable conduct and that it is appropriate for us to exercise our discretion to award the Claimant the costs that were thrown away. The sum wasted should, if necessary, be determined if there is a taxation of costs.

21. After the receipt of the Claimant's witness statement, the Respondent provided a commentary upon it, setting out what they contended were new allegations and stating which matters they contended should not be before the tribunal. They asked that the matter be dealt with as a preliminary issue. In light of the fast approaching hearing Employment judge Grewal decided that the issue should be addressed at the outset of the hearing. She also noted that the claims and issues to be determined were limited and had been clearly defined at the Preliminary Hearing she had held on 27 September 2016. The matter came on before the Auerbach tribunal from 9 to 12 January 2017. The Respondent applied for evidence relating to historic matters be excluded on the basis that it was not sufficiently relevant to the tribunal's consideration and on the basis that if historical background is to be relied it should be pleaded. The Auerbach tribunal accepted those submissions and dismissed a number of the historical allegations on the basis that they were insufficiently relevant and would require pleading. The Auerbach tribunal refused permission to the Claimant to amend holding that it was made too late.

22. After that issue had been determined another matter arose. The Claimant's counsel informed the tribunal that the Claimant realised that he had made an mistake in stating he became a wheelchair in May 2014. He became a wheelchair user about a year earlier in 2013. We accept that that was a genuine mistake. People get confused about dates. However, it is a matter about which the Claimant should have taken much greater care. Instructions were taken from the Respondent's witnesses. They accepted that the Claimant became a wheelchair user in 2013 rather than 2014. This was a matter that Mr Al-Ali was asked about in his evidence to our tribunal. Mr Al-Ali was asked whether the Claimant was a wheelchair user when Mr Ali arrived in London in September 2013. Mr Ali said that he was. The Claimant's counsel asked Mr Al-Ali whether he had seen the Claimant's Claim Form when it was sent by the Employment Tribunal. Mr Al-Ali said that he had. It was put to Mr Al-Ali that as the Claimant's manager he had known that the Claimant was in a wheelchair 2013. Mr Al-Ali said that was correct as he had arrived in September 2013 and the Claimant was a wheelchair user then. It was put to Mr Al-Ali that he knew that the Claimant had given an incorrect date. Mr Al-Ali said that he did. Mr Al-Ali was asked who he told. He said he had told the legal department, if he was not mistaken. We conclude that Mr Al-Ali appreciated that the Claimant had made a mistake about date when he became a wheelchair user and that either he informed the legal team, or he should have informed the legal department about this error.

23. At the Auerbach tribunal the Respondent contended that the change to the date when the Claimant became a wheelchair user was of such significance that they would need to take detailed further instructions and that the hearing should be postponed. The Auerbach tribunal agreed with this submission and postponed the hearing on the basis that there had been a significant change in focus in the way in which the dispute was put. The Auerbach tribunal described this as a change in the centre of gravity of the case. An application for costs was made but it was decided that it should be determined at the full hearing. The order states that that oral reasons were given for the decision. Written reasons were not requested. However, it is self-evident that a significant reason for putting off consideration costs was that the tribunal determining the matter at the full hearing would have the benefit of having considered the totality of the evidence and would be in a better place to consider how significant the shift to the centre of gravity really was.

24. At the final healing we determined that the Claimant had been unfairly dismissed, that he had not been subject to discrimination because of disability contrary to section 13 EQA or because of something arising in consequence of disability contrary to section 15 EQA and that there had not been a failure to make reasonable adjustments. While we found that the dismissal was unfair we concluded that the Claimant would at inevitably have been dismissed within three months of the date on which he was dismissed and that the basic award should be reduced by 80% for contributory conduct.

25. We consider it is most logical to start with the third of the Respondent's application, namely its application that they should recover the costs of the entirety of the proceedings on the basis that the claim of disability discrimination and failure to make reasonable adjustments had no reasonable

prospects of success from outset and the manner in which the proceedings were conducted were unreasonable. We do not accept that is the case. The claims under section 13 and section 15 were essentially slightly different manners of putting the same claim; the Claimant's primary contention that there had been a shift in attitude to him when he became a wheelchair user that could be because of antipathy towards because he used a wheelchair, being something that arose in consequence of his disability, or because the wheelchair was a manifestation of the extent to which he was disabled. While the section 15 claim was added at the Auerbach tribunal we do not consider that it involved any significant additional factual investigation by the Respondent. We found against the Claimant on numerous factual allegations on balance of probabilities. We concluded that the Claimant was guilty of gross misconduct that entitled the Respondent to dismiss him. That did not preclude a finding that an operative reason, or indeed the main reason for dismissal was that the Respondent took advantage of that misconduct to dismiss an employee they wished to be rid of because of his disability. That was an arguable case. We noted at that there were factors that might be relevant to shifting the burden of proof. We noted at paragraph 134 that the Respondent's detailed personnel manual made no reference to disability, that staff in the London office had no training in disability issues, that Mr Al-Ali adopted the approach that the Claimant should ask for anything that he needed to assist him, but there was no a proactive attempt to consider his needs. We consider that it was arguable that the Claimant was put at a disadvantage by the various features of the office that we referred to in the judgement. Furthermore, the Respondent dealt with the disciplinary process in an opaque and unfair manner. While an inference of discrimination cannot be drawn merely from unfair treatment, unexplained unfair treatment can lead to the drawing of an inference. That was a matter that had to be considered at the full hearing.

26. Mr Duggan took us through numerous paragraphs of our decision, in which we found against the Claimant on factual matters. That is the nature of such complaints. If on every occasion matters of fact were determined against a Claimant it was said to establish that the allegation had no reasonable prospects of success most claims would result in an order for costs against one or other party. Costs are limited to those claims which it really can be said were unarguable in the sense of having no reasonable prospect success, rather than a merely fanciful prospect of success. We do not consider that either the claim of direct discrimination, the claim of discrimination because of something arising in consequence of disability, or the claim of failure to make reasonable adjustments were unarguable on a proper consideration of the factual evidence. While we accept that the Claimants case has shifted on how antagonism to his wheelchair use resulted in his dismissal he could not know precisely how the decision to dismiss him was taken and who was involved because of the opaque decision making process as summarised at paragraph 147 of our reasons. It is not surprising that the Claimant was suspicious about the provenance of the investigation report as it was not provided to him before or his dismissal. It was not unarguable or unreasonable for him to contend that is was designed to lead to his dismissal for an ulterior motive related to his dismissal. While we accept that the Claimants outside activities and involvement of colleagues as described in the cost application gave a proper basis for disciplinary action against him and rejected the Claimant's

contentions to the contrary this did not preclude the possibility of his wrongdoing being used as an excuse to dismiss him. He had only to establish that his disability, or something arising on consequence of it, was material factor in the decision was his disability or something arising n consequence of it. While the reasonable adjustment claim in respect of a delay in providing a wheelchair was misconceived we do not consider that it added any significant additional costs. Taking an overview, do not consider that the proceedings were conducted in a manner overall that was unreasonable so as to found an award for costs. Although certain subsidiary allegations proved unfounded as set out in the Respondent's application for costs and the Claimant was too quick to allege dishonesty against the Respondents witnesses; in circumstances in which the main allegation was arguable we do not consider that raising the subsidiary issues should result in an award of costs. The proliferation of subsidiary issues was exacerbated by the Respondent's decision to serve a very detailed request for additional information of the Claim Form rather than seeking to focus on the core issues in dispute form the outset. It is also important to bear in mind that the Claimant succeeded in his claim for unfair dismissal to which the Respondent had not real defence.

27. Next, we consider the Respondents claim in respect of the postponement of the Auerbach hearing and the Claimant's cross claim in respect of the postponement and in respect of the costs of the Respondent applying for postponements before the hearing. There was a postponement made on an request made within seven days of the date of the hearing. We consider the reality of the situation is that both parties were, in broad terms, as much to blame as each other for the fact that that hearing did not go ahead. The Claimant made a genuine mistake in giving an incorrect date when he became a wheelchair user. He should not have done so. Care should have been taken to check the dates in his claim form and his witness statement. We accept that it was unreasonable for him to fail to check the date. That being said, Mr Al-Ali told the tribunal, and we accepted his evidence, that he appreciated immediately that it was an error. It must have been obvious because he knew that the Claimant was a wheelchair user when he arrived in the London office in September 2013. He stated that he told the legal team. While there was some confusion, either they were told, or they should have been told, so they could at a much earlier date have raised the issue and resolve any difficulties that arose from it. Furthermore, with the benefit of hindsight, having conducted the full hearing, we consider that the change of date was of much less significance than it appeared to be at the time of the Auerbach tribunal. While we can understand why The Auerbach tribunal consented to a postponement, so the matter might be further investigated, in the end it was of relatively little significance whether the Claimant become a wheelchair user in 2013 or 2014. We accept that the Respondent was entitled to seek postponement in the run up to the hearing in the light of the Claimant provision of further particulars and do not consider there is any proper basis for them having to pay the costs incurred by the Claimant in dealing with those applications.

28. The Respondent has alleged that a significant factor in their application to postpone was the fact that the first time it became apparent that Mr Jaffar might be subject of criticism was at the hearing before the Auerbach tribunal. We see nothing to support that in the decision of the Auerbach tribunal. We were told that Mr Jaffar was not available to give evidence at the Auerbach

hearing. We find that extremely odd in circumstances in which it was the Respondent's own case that he was, in effect, the decision maker in respect of dismissal. While that may have been by way of agreeing with the recommendation that had been made to him, it seems to us hard to understand how the Respondent could have expected to properly defend the discrimination complaint or the unfair dismissal complaint without the ultimate decision maker giving evidence.

29. In respect of the postponement of the Auerbach Tribunal while both parties acted to an extent unreasonably we do not consider it an appropriate exercise of our discretion to award costs to either party. If either of the parties had taken proper care in preparation for the hearing the postponement could have been avoided. We do not consider that the Claimant was significantly more unreasonable than the Respondent in the conduct that resulted in the postponement. We do not consider it appropriate to award either party costs in respect of the postponement.

30. The final matter is the Respondent's application for costs in respect of the historical matters that were either removed by consent or by order of the Auerbach tribunal. We accept that it is often necessary for Tribunals to consider historical background material. There are claims in which it is contended that there has been treatment over numerous years that forms part of a continuing course of treatment, all of which is discriminatory. However, in this case the claim was essentially related to reasonable adjustments after the Claimant became a wheelchair user and dismissal, it being said that the dismissal resulted from a change of attitude after Al-Azmi visited the London office and saw that the Claimant was a wheelchair user. The Claimant did not plead the historical matters in the original Claim Form. Strictly speaking, the consequence of that was that they were not claims before the tribunal. Although an attempt was made to rely upon them as matters of background, as the Auerbach tribunal concluded, that involved a failure on the part of the Claimant to properly consider the issue of causation. Many of the historical allegations involved different people to those against whom the primary allegations were made and no proper basis was put forward as to why the determination of those historical matters would lead to a conclusion that there was failure to make reasonable adjustment or that the Claimant had been dismissed because of disability, or because of something arising in consequence of disability. Answering a request for further particulars is not an opportunity to re-plead the case. We consider that the Claimant's actions in adding such substantial historical material, both in his answer to the request for further particulars, and in his witness statement was unreasonable conduct.

31. The Claimant’s action necessarily put the Respondent to significant expense. That predominately involved having the evidence excluded. The Respondent was entitled to take reasonable steps to prepare some rebuttal evidence in case the Claimant be permitted to rely on those historical matters as background. We consider that the Claimant’s unreasonable conduct in this regard should lead to an award of costs against him. We accept that costs were incurred in seeking the exclusion of that material and it was reasonable to expend some costs on considering rebuttal evidence. However, we are askance at the costs incurred in dealing with this matter. Excluding sums claimed in respect solely of the postponement of the Auerbach hearing the

claim amounts to £228,500. We do not accept that it was reasonable for the Respondent to incur anything like that level of costs in dealing with those historical allegations.

32. We also have had regard to the Claimant's third statement in which he deals with his means. A number of the contentions he makes in respect of sums that have been lent to him by family members and in respect of matters such as a loan from his pension fund were not supported by documentation. This was despite a request from the Respondent. We also note that we do not have a signed statement. However, we consider it is likely that the Claimant has very limited financial resources. The most significant addition to his resources would be the payment of the compensation he is entitled to, by reason of his dismissal being unfair and the limited amount of costs we have awarded in respect of the Respondent's failure to provide the supporting documentation to the investigation report.

33. Pursuant to rule 78 we can award costs in a sum not exceeding £20,000 or to order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party. We consider that provision is drawn widely enough that we may apply a costs limit even if the costs are above the £20,000 limit so would require taxation. Should the parties apply costs will be subject to taxation. However, we urge them to consider the additional cost that would be involved in taxation and the proportionality of such a course of action.

34. We limit the Costs awarded to The Respondent to the sum of the compensation awarded to the Claimant and the costs awarded to the Claimant. We do this on two grounds. The most important reason we make this decision, irrespective of our second ground, is because we do not see how the Respondent should acting reasonably have incurred any costs in excess of that sum in dealing with the additional allegations. While we accept that they were entitled to take steps to have the background allegations removed and to carry out some reasonable investigation into rebuttal evidence they at most were background allegations. We consider that the amount of costs incurred in dealing with this matter was way out of proportion. While we accept those costs were incurred we consider that the costs awarded should be limited to that amounts as a reasonable estimate of costs that could reasonably be incurred in dealing with this issue.

35. In addition, taking account of the Claimant's financial resources, as we are entitled to pursuant to rule 84 of the Employment Tribunal Rules 2013 we consider that is a reasonable level which to set costs.

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Employment Judge Tayler
7 November 2018

Sent to the parties on 9 November 2018