Reserved judgment

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondent**
	AND
Mr K Wilson	Luxury for Less Limited

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham **ON** 11th October 2018

EMPLOYMENT JUDGE Coaster

Representation
For the Claimant: in person
For the Respondent: Mr S Omeri, Counsel

JUDGMENT

The judgment of the Tribunal is that

The claimant shall pay costs in the sum of £4,000 to the respondent.

REASONS

Issue

1. The respondent brings a claim for costs under Rule 76(1)(a) and (b) of the Tribunal procedural rules in the sum of £16,343.35 following the dismissal of the claimant's claims for breach of contract and wrongful dismissal. The application is opposed by the claimant.

Background

2. The claimant brought a claim for wrongful dismissal and breach of contract claiming notice pay and breach of contract for the manner of the dismissal, later claiming that it was a breach of contract of the implied term of mutual trust and confidence.

3. The first claim in relation to notice pay had no basis because the claimant had received his notice pay. His employment contract included a clause

entitling the respondent to terminate employment and pay in lieu of notice.

4. The claim relating to the manner of dismissal was entirely hopeless and misconceived. The claimant had insufficient continuity of service. The manner of dismissal is therefore an irrelevance – it is trite law that there can be no damages for the manner of dismissal. Accordingly the claimant's claims were dismissed at the final hearing on 24th May 2018

5. The claimant had confirmed prior to the final hearing that he did not pursue a claim of unfair dismissal as he was aware that he had insufficient continuity of service. He had difficulty in completing the complaint form on-line and had not intended to indicate a claim unfair dismissal. I make no further reference to unfair dismissal.

6. I was provided with documentation by both parties in support of their respective position on the application for costs. At the commencement of the hearing the claimant was given 30 minutes to read the documents provided by the respondent. He confirmed that although surprised to receive them just before the commencement of the hearing, he had all of the documents before.

7. I heard submissions from both parties of which I took a note and to which I have referred in reaching my decision on the costs application.

Findings of fact

8. The respondent brings a claim for costs on the following basis:

In the response form ET3 filed on 22nd December 2017 the respondent set out the following facts:

- the claimant was paid in lieu of his contractual notice period;
- the respondent had no contractual obligation to follow its disciplinary procedure.

9. The claimant does not dispute that he was paid salary up to the termination date and a payment in lieu of notice.

10. On 5th January 2018 the respondent wrote to the tribunal copied to the claimant requesting the full merits hearing listed for 24th – 25th May 2018 to be converted to a half day preliminary hearing to consider striking out the claim in its entirety on the grounds that it has no reasonable prospects of success. Full reasons were given again as set out in paragraphs 2-4 above.

11. The email was acknowledged by the claimant who submitted a response to it informing the tribunal that he strongly objected to a preliminary hearing being listed and that he intended to prove that he was dismissed by a manager in an unprofessional way.

12. On 2nd March 2018 the respondent applied to the tribunal, copied to the claimant, renewing their application for a preliminary hearing to consider whether the claimant's claims of breach of contract and wrongful dismissal should be struck out because they had no reasonable prospect of success.

13. The claimant replied to respondent and the tribunal acknowledging that the tribunal had listed the hearing for one day on 24th ay 2018 and confirmed that he was complying with the case management orders.

14. On 29th March 2018 the respondent wrote to the claimant on a Without Prejudice Save as to Costs basis. The respondent set out their views yet again - that the claimant's claims had no reasonable prospects of success for reasons, as already stated in the application to the tribunal of 5th January 2018.

15. The respondent additionally stated that as proceeding to a hearing on 24th May would involve the parties in further costs, the respondent offered to settle the matter on a full and final basis without admission of liability for an agreed basic reference. The offer was made on the basis that the claimant's claim had no reasonable prospects of success and/or in rejecting the offer now made, the claimant acted unreasonably in the conduct of the proceedings. The respondent reserved the right to bring the email to the attention of the tribunal on an application for costs. The claimant was informed that the respondent's costs were at that stage about £12,000.

16. The deadline for accepting the offer was 4th April 2018.

17. The claimant replied on 29th March 2018 stating that he had taken *"legal advice several times during this process and that [I'm] aware of how often costs are awarded to the respondent, especially against an ex-employee they have dismissed".* He rejected the offer.

18. On 5th April 2018 the claimant was informed by the respondent that having been provided with a payslip, there could be no dispute that the claimant had not received his pay in lieu of notice. The respondent informed the claimant that should he proceed with his claim for wrongful dismissal and lose, the respondent reserved its right to draw the email to the attention of the tribunal on the issue of costs on the basis that (a) the claimant's claim had no prospects of success; and/or (b) in failing to withdraw his claim, the claimant had acted unreasonably in the conduct of the proceedings. The

claimant confirmed to the respondent that he had received pay in lieu of notice.

19. On 24th May 2018 the claimant's claims for wrongful dismissal and breach of contract were dismissed by the tribunal for the reasons stated above in paragraphs 2 - 4.

20. On 6th June 2018 a costs application was filed by the respondent. The total costs claim amount to £16,343.35. The hourly rate charged for solicitors' legal services was £170 irrespective of the seniority of the fee earner engaged on the file, graded between Grade A being a partner, and Grade D being a costs draftsperson. Costs of counsel were also included for two hearings on 11th October 2018 and the final hearing on 24th May 2018.

Claimant's Means

21. I was provided with a breakdown of the claimant's income which I have considered and taken into account in this judgment.

Submissions

22. At the hearing the respondent's submissions can be summarised as follows:

22.1 That the claimant must have known his claims had no reasonable prospect of success because he had been repeatedly so informed by the respondent.

22.2 The claimant had taken legal advice as evidenced by an email on 29th March 2018. Despite having taken legal advice he pursued his claims.

22.3 If the claimant was given inadequate advice, then he is fixed with the failure of his adviser(s).

22.4 Despite claiming to have taken legal advice the claimant made an unreasonable request for extensive disclosure, knowingly requesting disclosure of documents which he knew did not exist. This amounts to unreasonable conduct and can be categorised as vexatious and disruptive.

22.5 Despite having been clearly informed that his claims had no reasonable prospect of success and despite having taken legal advice the claimant turned down two reasonable offers by the respondent that costs would not be pursued if he withdrew his claims. This is also unreasonable conduct.

23. The claimant's submissions can be summarised as follows:

23.1 He had conferred with ACAS before submitting his ET1 and believed that there was no issue on continuity of service for a breach of contract, in particular with reference to the breach of the implied term

of mutual trust and confidence there is no time limit.

23.2 He believed his claim had passed the "filtering stage" twice. The tribunal had changed the two day listing for the substantive hearing to a one day hearing.

23.3 He understood from the Gov. UK and the CAB websites that as long as he did not act unreasonably and did not break the rules would not be liable for costs.

23.4 He is a litigant in person and had obeyed all instructions and as long as he conducted himself honestly he had a right to submit a claim.

23.5 He had conducted himself at all times in good faith.

23.6 He had never paid for legal advice. Legal advice had been researching on legal websites such as ACAS and CAB.

23.7 The Employment Tribunals are set up to enable a non-legally educated person to bring a case to the tribunal.

23.8 The CAB website said that there was a slight chance that a party may incur costs if the judge believed that the party had behaved dishonestly. There has been no allegation that he had lied.

23.9 His request for disclosure of documents which did not exist was because the respondent had relied on what the claimant believed were fictitious written complaints from his former work colleagues to justify the actions of the dismissing manager. The claimant therefore asked for documents which he knew did not exist because he had been trying to make that very point - to expose the respondent's conduct of making bogus allegations.

23.10 The CAB had informed the claimant that the costs warnings from the respondent were a standard response from respondents' solicitors to try and bully a claimant.

23.11 A costs award should not be made against him because he had taken on trust what had been said on the CAB and Gov. UK websites that each party would bear their own costs which he has done, despite having had (at the relevant time) no income.

23.12 He had had only to brief conversations with ACAS.

23.13 He had trusted the tribunal system; he had no legal training.

23.14 ACAS had told him he was unable to pursue unfair dismissal; they had also mentioned mutual trust & confidence.

23.15 When told by respondent that his claims had no prospect of success, he had taken the view that "they would say that wouldn't they".

Additional representations

24. At the preliminary hearing the claimant did not provide copies of the advice he had followed on the gov.uk, CAB or ACAS websites. It is not correct that I requested copies of information he had seen on the websites he had visited. At the conclusion of the claimant's submissions, I informed the claimant that I thought it highly unlikely that the CAB had given the

categoric and narrow advice on costs as he was suggesting and it was more likely that he had not understood the information adequately.

25. Following the preliminary hearing the claimant of his own volition sent further information with the request that it be taken into account in support of his submissions. He referred me to the tribunal rules, rule 26, relating to the initial consideration of a claim form and response by the Employment Tribunals; to websites of commercial organisations who refer to the "sift stage" of the employment tribunals; and to the CAB website relating to costs.

26. I invited and received further comments on the additional submissions from the respondent which I have read and taken into account. The respondent objected to the additional information provided by the claimant.

The Law

27. The law is set out in the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, schedule 1 at Rules 74 – 84.

Rule 76 states:

(1) a Tribunal may make a costs order ….. and shall consider whether to do so, where it considers that –

(a) A party…. 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; or

(c) …..

Rule 84 states:

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.

Conclusions

28. It is right that I do not, and have not, analysed the legal information on which the claimant said he relied, and that is especially the case in respect of websites of commercial law firms. I nevertheless have taken into account the specific reference to the Tribunal Rules at rule 26 and also the references to the CAB website which was provided by the claimant.

29. The claimant relied substantially on his belief that the parties to a tribunal claim, would each bear their own costs unless one party had acted dishonestly in lying or misleading the tribunal. The CAB website does indeed state that it is unlikely that a claimant will have to pay costs if a claimant has properly followed the process for making a claim and that a

costs order is more likely if either the claimant or the employer has lied or misled the tribunal or hasn't cooperated at every stage.

30. The claimant cannot have failed to read in the same section of advice on the CAB website, which goes on to state that the claimant must make sure that he has a reasonable claim. I quote from the website:

> "There must be good grounds for arguing your case. **Check your claim satisfies the legal tests** and that you have evidence to support it." [My emphasis.]

31. The CAB website also informs the claimant reader that even though there is a limit on the amount judges can award in costs although an employer may respond to a claim stating that the claimant has to pay unlimited costs.

32. For the hearing, it is evidence that the claimant cherry picked advice he wanted to rely on and was in effect attempting to blame the CAB website for his failure to recognise the hopelessness of his claims and withdraw them earlier. I find no merit in his explanations for his conduct of proceedings. approach. The claimant should have sought targeted legal advice on receipt of the first costs warning. The CAB website clearly put the onus on the claimant to ascertain that there are good grounds for arguing his case, that the legal tests are satisfied and that there is evidence to support the claim.

33. The claimant relies on the CAB website for his belief that a costs warning is illegitimate pressure by the respondent. He was mistaken. The costs warnings were justified and a proper course of conduct by the respondent because the claimant's claims had no legal basis.

34. Apart from CAB and ACAS, there are also other sources of free professional legal advice which the claimant could have pursued, including the Free Representation Unit and the Bar Pro Bono Unit. Pursuing his claim without having taken legal advice despite his confessed lack of employment law knowledge, in the light of two explicit costs warnings, can only be described as fundamentally reckless and therefore was not reasonable conduct.

35. There is also no merit in the claimant's submission that he relied on getting through "two sifts" by the employment tribunal administration of cases as justification for continuing with a claim which had no substance in law and was inherently misconceived. The tribunal was unaware until late January 2018 that the claimant had received his notice pay. EJ Hughes acting as administration duty judge, did not conduct a 'sift'. The claimant "strongly" objected to the conversion of the final hearing to a preliminary hearing. His objection was accommodated although in late March 2018 the final hearing was reduced to one day. The outcome of the claimant's

case would have been identical whether the claimant attended a one day final hearing or a preliminary strike out application. Strike out of his claims was inevitable.

36. I find that up to the date of the first costs warning in early January 2018, the claimant's pursuit of his claims were misconceived. From the date of the first explicit costs warning, the claimant's conduct of the claim was unreasonable. Complying in a reasonable manner with an earlier case management order does not change the fact that the very pursuit of the claims is unreasonable. A reasonable person would have taken legal advice once they were on notice that their claims could be misconceived.

37. If I am wrong on the earliest date by which the claimant's conduct became unreasonable, which I do not accept, there can be no doubt that from the date of the second costs warning the claimant's pursuit of the case was unreasonable.

38. The respondent's schedule of costs provided a description of work undertaken but failed to provide the dates over which the work was taken. I have estimated that the respondent's costs from commencement of the disclosure exercise in early April 2018 onwards to be in the region of £14,000 including counsel's fees.

39. In assessing an award of costs I take into account the following principles:

39.1 I am not required to identify the precise costs caused by the claimant's conduct, rather I must look at the whole picture of what happened in the case and the effects of such conduct in deciding whether to make and the amount of a costs order.

39.2 the rejection by the claimant of the respondent's settlement offer on no less than two occasions can be taken into account because I have found the claimant to have been unreasonable in rejecting the settlement offer.

39.3 An order for costs is based on the indemnity principle and must compensate, and not penalise.

39.4 I may have regard to the claimant's ability to pay a costs order but I am not obliged to take into account the claimant's ability to pay (lack of disposable income) when deciding the amount of the costs order and that a costs order should not be made if it cannot be complied with.

39.5 The tribunal does not have to limit the amount of costs ordered to a sum that the claimant an afford to pay in the foreseeable future. There

must be a realistic prospect that the claimant might be able to afford to pay at some point in the future.

39.6 VAT is not applicable in a costs award.

39.7 Any enforcement in the County Court, the County Court would have retard to the claimant's means.

40. My assessment of the claimant's conduct is that he was deeply offended by the conduct of the respondent's manager who dismissed him without any procedure. His apparently overwhelming desire to demonstrate to a tribunal judge and the world at large the conduct of the respondent he believed to be so culpable and reprehensible, appears to have utterly blinded him to even considering, let alone reaching, an objective and informed view of the strength of his case.

41. The dismissal from his employment caused the claimant financial loss. However his unreasonable conduct in not taking professional legal advice which was available face to face from pro bono sources, and in pursuing his misconceived claims despite explicit explanations from the respondent as to why his claims were without merit and were bound to fail, something which he could have easily taken advice on, has exposed him to greater financial loss for which he alone bears the responsibility.

42. I am satisfied that there is a statutory basis for making a costs order. I am satisfied and that a costs order should be made. I am required to take into account all the circumstances of the case and under Rule 84 I may have regard to the claimant's ability to pay. I then must consider what level of costs order should be made and exercise my discretion bearing in mind Rule 84.

43. Based on the facts of the case, and bearing in mind the principles at paragraph 39 above, taking into account the overall cost incurred and claimed by the respondent which did not appear to be inflated, and taking into account the claimant's current financial status; the equity in the claimant's property; that although he has debts they are not substantial and overwhelming; that he has little disposable income although that does not a costs award should not be made; that he is in permanent employment although not on a salary commensurate to an experienced professional expectations; that he is an experienced graphic designer and will be able to improve his fortunes through his work, and no doubt will work towards doing so, I award costs in the sum of £4,000.

Employment Judge Coaster
7th November 2018