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EMPLOYMENT TRIBUNALS

Claimant: **Mr Barrington Brown**

Respondent: **Hewlett-Packard CDS Limited**

Hearing: **no hearing**

Before: **Employment Judge Reid (sitting alone)**

Representation

Claimant: **Clements Solicitors**
Respondent: **Shoosmiths LLP**

Claimant's previous solicitors: ELS Law

JUDGMENT (COSTS)

1. The Respondent's application for a costs order against the Claimant under Rule under Rule 76 of the Tribunal Rules 2013 is allowed and the Tribunal makes a costs order against the Claimant for £2,000, payable to the Respondent.

2. The Respondent's application for wasted costs against the Claimant's previous representative (ELS Law) under Rule 80 of the Tribunal Rules 2013 is dismissed.

REASONS

Costs

1. The Respondent made an application dated 14th September 2018 for costs and/or wasted costs against the Claimant and/or against his former solicitors, ELS Law (ELS). The application was under either or both of Rule 76 (costs against the Claimant) and Rule 80 (wasted costs against his previous representatives, ELS). The Claimant was for the purposes of this application now represented by Clements Solicitors.

2. The Claimant provided a response dated 17th October 2018 to the application and provided a schedule of his means dated 29th November 2018 with attached documents. ELS provided a response to the application dated 22nd October 2018.

3. All parties agreed that the matter could be decided without a hearing. I decided that it was appropriate to decide the matter without a hearing because I had full written representations from all parties and it would have increased costs further to hold a further separate costs hearing, which was not necessary.

Findings relevant to each of the heads of the costs application

Para 12 costs application – obvious that genuine redundancy situation existed and that Regulation 7(3A) TUPE 2006 applied

4. In their letter dated 23rd January 2018 ELS were asking to see the statement of works, said to demonstrate the client's requirement to move the Claimant and his colleague Mr Riyaz to Gatwick. It was not just the Claimant who was affected because Mr Riyaz, the only other Basildon-based employee, was also asked to move to Gatwick (judgment para 6), tending to suggest that the move was wholesale of all Basildon employees to Gatwick because of the change in workplace consequent on the change in contractor. The Claimant and ELS knew from at least the letter dated 16th November 2017 from the Respondent's solicitors (attached to costs application) that Regulation 7(3A) was being relied on. The move to Gatwick as required by the client was the situation whether or not contained as a legally binding obligation in a document or whether just the commercial reality of the situation (judgment para 7). I therefore find that the disclosure of the statement of works at an earlier stage (Claimant's response to costs application para 15) was not a key document the Claimant needed to see to assess whether Regulation 7(3A) applied. What the Claimant was in practice doing was trying to challenge the Respondent's commercial decision that it had to move the two Basildon-based employees to Gatwick. I therefore find that it was clear in November 2017 that the Respondent was relying on Regulation 7(3A) in the context of the factual situation the Claimant had already been aware of since March 2017 (judgment para 6) ie that he and Mr Riyaz's roles were moving to Gatwick after the transfer. The Claimant did not need to see the statement of works to know this as he already knew it was the factual reality of the situation.

Para 12 costs application – obvious that the Respondent had followed an appropriate and fair process

5. I find that if ELS had full instructions from the Claimant as to the sequence of events, the Claimant's request to be made redundant making it clear he was never moving to Gatwick, his failure to engage with the Respondent in the redundancy process and his failure to engage with BUPA (judgment paras 10,12,14-17,19-21, 26) then his claim for 'ordinary' unfair dismissal under s98 ERA 1996 would have appeared considerably weaker. The Claimant's response to the costs application (para 2) says that he brought the facts of his claim to ELS but I find that either he did not, or if he did they did not then fully

analyse what in fact the Claimant could obtain by way of an award even if this claim was successful. Para 21 of his response to the costs application also says he was putting the Respondent to proof but the Claimant already himself had the knowledge about what had in fact happened in the process which should have been factored in.

6. It was clear that the 'nuts and bolts' of a fair redundancy process in accordance with the Respondent's own procedure had been followed (judgment para 25) despite the Claimant's lack of interest in it. Had the Claimant given ELS a full picture (see findings above) or had ELS analysed a full picture if given by the Claimant to them, it would have been clear that as regards the procedure in fact followed, there had been consultation as regards alternative roles, despite the Claimant maintaining a lack of interest in staying, rather than in going. See separate findings below as regards the Citibank job which came up during the appeal process. I therefore do not accept paras 23-30 of the Claimant's response to the costs application because the Claimant's own actions had not been factored into the analysis. In addition the Citibank role was the only one the Claimant said he would have applied for and carried out (judgment para 23); this means that on the Claimant's own case there had not been a failure in relation to any other roles arising before this one, it being accepted that he had been told about/had access to the other available vacancies arising before this one.

7. As regards the Citibank role which became vacant during the appeal process, I found that this was not notified to the Claimant (as other vacancies had been) (judgment para 23). Despite saying that he would have applied for this role had he known about it (judgment para 23) his oral evidence was that the job was unsuitable, as below his skills set and too physical (judgment para 37). In the light of this it was clear that even if he should have been alerted to it by the Respondent, he would not have been likely to have taken it (judgment para 37) which would have resulted in a substantial *Polkey* deduction to any compensatory award. If that was his case then he was unlikely to be made an award for unfair dismissal in any event (or only a very small award), his basic award being already covered by his statutory redundancy payment. Pursuing the argument that the Citibank role was the thing that made the dismissal unfair was therefore ultimately of very limited concrete value to the Claimant, on his own case. I therefore do not accept para 32 of the Claimant's response to the costs application on this issue because the Claimant's own case was likely to result in an outcome at the least of a significant *Polkey* deduction, even if there had been an unreasonable failure to notify the Claimant about the Citibank role. I also do not accept that on a proper analysis of the sequence of events and the Claimant's actions prior to dismissal that it was not possible for the Claimant (and ELS) to have predicted the findings, as claimed in para 32 of the Claimant's response to the costs application.

8. The Claimant's claim for ordinary unfair dismissal under s98 ERA 1996 was therefore weak and even if successful unlikely to result in an award of any compensation or at best a very small award. It was not however so weak as to be doomed to failure.

Paras 20-21 costs application – claims under s103A ERA 1996 (protected disclosure) and 104 ERA 1996 (assertion of a statutory right) – should not have been brought

9. I find that whether or not the dismissal was unfair under s98 ERA 1996, it was clear that the reason for the Claimant's dismissal was the move to Gatwick – see findings above. The Claimant had asked to be made redundant because he did not want to move to Gatwick. He knew Mr Riyaz, the only other Basildon-based employee, was also being asked to move. These two alternative claims were based on an unfounded suspicion (Claimant's response to costs application para 35) that because he had complained about non-payment of his wages the situation was not a genuine redundancy situation and that there was another reason for dismissal. The Claimant had been aware for some time about the move to Gatwick (judgment para 6) and had said he did not want to move (judgment para 10) and it was therefore unlikely that suddenly another reason would motivate the Respondent to dismiss the Claimant when it was in the middle of a process about something entirely different and had been exploring with the Claimant about how to keep him, such as help with travel expenses and any short-term adjustments might be needed following his foot surgery. I therefore find that these two claims should have reasonably been withdrawn much earlier than they were. However I find that they did not involve significant extra work for the Respondent as its response focused on the transfer and redundancy process ie it was already putting these matters forward factually as its positive case.

Para 13 costs application – obvious insufficient dismissed employees for s189 TULR(C)A 1992 claim

10. It was made clear in the letter dated 16th November 2017 from the Respondent's solicitors that the numbers of redundancies were insufficient to meet the threshold. It was not suggested in the Claimant's response to the costs application (paras 42-48) that prior to the withdrawal of this claim the numbers issue was pursued because the Claimant did not believe the Respondent, for example by seeking further disclosure. I therefore find that this claim should reasonably have been withdrawn by the time ELS wrote the letter dated 23rd January 2018 asking for disclosure in relation to other matters.

Para 14 costs application – claim for breach of Regulation 15 of TUPE brought as an after thought

11. I decided that this claim was brought out of time.

Para 16-19 costs application – unreasonable conduct of settlement negotiations

12. I have found that the Claimant did not want to stay with the Respondent in any event and that he would not have taken the Citibank job even if alerted to it such that a 100% deduction to his compensatory award for *Polkey* would have been made even if he had won his claim. The Respondent's case was that it offered the Claimant around 5 months' pay (£15,000) on 26th February 2018 (costs application para 17) having given the Claimant a costs warning (email dated 14th February 2018). Whilst the Claimant's counter offer of £25,000 was a significant drop from what he claimed in his schedule of loss (£75,894)

(Claimant's response to costs application para 65) it was not a significant drop from what his previous offer had been (£28,000). I find that whilst the Claimant was being very unrealistic as to what he might achieve in his 'ordinary' unfair dismissal claim taking into account the above findings and that the £15,000 was a good offer at this stage which largely encompassed all his loss of earnings to that point, I do not find that the conduct of the settlement negotiations was so unreasonable that it amounted to unreasonable conduct of the negotiations.

Paras 20 and 21 of costs application - withdrawal of claims at hearing

13. Taking the above findings into account I find that the claims under s189 TULR(C)A 1992, s103A ERA 1996 and s104 ERA 1996 should reasonably have been withdrawn prior to the hearing. Their inclusion in the claim meant that the hearing was listed for two days, rather than likely for one day. I find that some extra costs were incurred by the Respondent in relation to these particular claims because they had to be dealt with and responded to even if ultimately the focus was on the redundancy process, which the Respondent was going to have to deal with anyway. The Claimant conceded during the hearing that no wages for April 2017 were payable to him and this is something that he could have checked and conceded earlier than this. However the wages claim did not add materially to the Respondent's costs because the Respondent had been clear it was an admin error at that time and did not have to for example undertake lengthy investigations into the claimed non-payment.

Relevant law

14. The relevant Tribunal Rules are Rules 74-84 Tribunal Rules 2013, specifically Rule 76 (costs order against a party), Rule 80 (wasted costs order against a representative) and Rule 84 (ability to pay). I am aware that there is a high threshold for the making of a costs order and that it involves the exercise of a discretion.

15. I considered *Beat v Devon County Council and anor EAT 0534/05* and the need not to go straight from deciding that a claim was misconceived to awarding costs, without first considering whether the costs discretion should be exercised, standing back and looking at all the factors to decide whether the costs discretion should be exercised. I also considered *Anderson v Cheltenham and Gloucester plc EAT 0221/13* which decided that a failure to recover a higher amount than an offer of settlement did not of itself justify an order for costs. *McPherson v BNP Paribas [2004] ICR 1398* decided that what has to be considered as regards conduct is the nature, gravity and effect of the conduct and that it is not necessary to show a link between specific conduct and the costs awarded, although causation is relevant to determining the overall level of any costs awarded. It also decided that withdrawal per se did not amount to unreasonable conduct; the issue is whether the claimant withdrawing the claim has conducted the proceedings unreasonably, not whether the withdrawal itself was unreasonable.

16. As regards the application under Rule 80 against ELS I considered the 3 stage test in *Ridehalgh v Horsefield [1994] 3 All ER 848.* It also decided that a legal representative should not be found to have acted improperly, unreasonably or

negligently just because a claim is doomed to fail. I have taken into account that ELS are bound by legal professional privilege (ELS response to costs application, para 12).

17. I also considered the cases identified on behalf of the Respondent (Respondent's costs application para 20) and by ELS (ELS response to costs application para 7).

Reasons

18. Taking into account the above findings I make a costs award against the Claimant under Rule 76 in the sum of £2,000 for the following reasons and looking at the situation in the round. The claim under s189 TULR(C)A 1992 was unreasonably pursued and then withdrawn at the last moment at the beginning of the hearing after it was made clear by the Respondent in November 2017 that the threshold for redundancy consultation was not reached and which the Claimant did not then pursue as an issue. The claims under s103A ERA 1996 and s104 ERA 1996 were, in the absence of a proper analysis of the events, unreasonably pursued and then withdrawn at the last moment. The claim for unpaid wages was withdrawn even later, during the hearing. Taking into account the above findings, the Respondent was not put to significant extra cost in defending these claims until they were dropped but incurred some additional costs in dealing with these claims at the time made and in the run up to the hearing. The effect was also that a case which would probably have only been listed for one day (in essence an ordinary unfair dismissal claim, albeit a weak one given the above findings) was in fact listed for two days. It is the late withdrawal of these claims on the first day without good reason which in all the circumstances and looking at the Claimant's conduct overall amounts to the unreasonable conduct of part of the proceedings by the Claimant (or by ELS) given they were on notice from November 2017 that these claims were denied and the Claimant had enough information to know at that stage that the real factual context of the Claimant's situation was the move of his and a colleague's job to Gatwick because of the change in contractor. If the Claimant was prepared to withdraw these claims at the beginning of the hearing it is likely that he would have been able to do so at least several weeks before the hearing (if not before) which could have meant the hearing length could have been adjusted (with a consequent reduction in Counsel's fees, no refresher being needed) and less preparation needed in the weeks running up to the hearing. In addition, the claim under s189 TULR(C)A 1992 had no reasonable prospect of success due to the numbers involved. Applying *Koppel v Safeway Stores [2003] IRLR 753* the refusal of the offer of £15,000 to settle, whilst a factor to consider, was not one I have taken into account; the Claimant although misguided and very unrealistic, was not being 'intransigent' as had been the case in *Power v Panasonic UKEAT 0439/04*.

19. I have taken into account the Claimant's ability to pay under Rule 84 in deciding whether to make a costs order against the Claimant but although he has a limited income and is not currently working but on Universal Credit, he does have some assets in the form of his car and savings account. I have also taken into account his ability to pay in assessing the amount.

20. Taking into account the above findings I do not make a wasted costs award against ELS under Rule 80. Applying the three stage test, it is not clear whether what caused the pursuit of the withdrawn claims (which was what caused the hearing to be listed for longer than it needed to be and a degree of additional work dealing with these claims) was the Claimant failing to give a complete account of what had happened to ELS at an early stage or the failure of ELS to analyse what had in fact happened to the Claimant (assuming they had full information) and instead to plunge in with and then pursue a rather scattergun approach to the day of the hearing. In essence the Claimant said he had told ELS all relevant information (response to costs application paras 2,4,5,6,7) and said had relied on their advice. In turn ELS said that they were unable due to legal professional privilege to tell the full story (ELS response to costs application para 12). I therefore conclude that the first stage of the test is not met because whilst the withdrawn claims should have been withdrawn much earlier and the scope and length of the claim and hearing thereby reduced, the fact that the Claimant would not withdraw them even just prior to the hearing (Respondent's costs application para 16, final entry) and had not accepted a good offer, suggested that it was probably the Claimant who had driven the pursuit of these subsequently withdrawn claims to keep up the pressure to settle. The ordinary unfair dismissal claim was weak in the light of the above findings but even if doomed to fail that would be insufficient to justify a wasted costs order under Rule 80. I am therefore not satisfied that ELS acted improperly, unreasonably or negligently because whilst the claim under s189 TULR(C)A 1992 was doomed to fail on numbers alone and the claims under s103A and s104 ERA 1996 were claims which an earlier analysis would have been shown to have no reasonable prospect of success given the pre-existing clear change of workplace/redundancy situation, there was not by ELS an abuse of process (*Mitchell Solicitors v Funkiness Information Technologies EAT 0541/07*). Applying *Medcalf v Mardell [2003] 1 AC 120,* I am not satisfied that if not bound by legal professional privilege ELS would have no defence to the making of an order.

Employment Judge Reid

21 December 2018