Case Number: 2500246/2017

THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		***Respondent***
Mr B Davies	**AND**	**Healthcare Environmental Services Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: **North Shields** **On: 15 December 2017**

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

Appearances

For the Claimant: **Ms K Jeram of Counsel**
For the Respondent: **Mr C Edward of Counsel**

JUDGMENT ON COSTS APPLICATION

1 The respondent's application for me to recuse myself from hearing the claimant's costs application is refused.

2 The claimant's application for costs of the main proceedings is well-founded and succeeds. The respondent is ordered to pay to the claimant costs summarily assessed in the sum of £8,400.

3 The respondent's application for costs in the costs proceedings is not well-founded and is dismissed.

4 The claimant's application for costs in the costs proceedings is not well-founded and is dismissed.

REASONS

1 This matter came before me this morning for consideration of the claimant's application for costs following a two day hearing on 7 and 8 August 2017, at the

end of which judgment was entered in favour of the claimant on his complaint of unfair dismissal, with compensation to be paid in the sum of £6,931.25.

2 The claimant was again represented today by Ms Jeram of counsel and the respondent by Mr Edward of counsel.

3 There were effectively three separate applications for costs before me today. Ms Jeram submitted a claim for costs in what I refer to as the main proceedings, namely those up to and including the liability hearing on 7 and 8 August. Mr Edward submitted a claim for costs in what I refer to as the "costs proceedings" and Ms Jeram submitted a counter-application for costs in the costs proceedings. I was presented with a bundle of documents marked "Costs Application A" relating to the claimant's claim for costs in the main proceedings and a second bundle marked "Costs Application B" relating to the costs applications for costs in the costs proceedings. No oral evidence was called by either side. Mr Edward for the respondent produced a bundle which I marked R1, containing his submissions and authorities.

4 The claimant's claim for costs in the main proceedings was originally made at the conclusion of the hearing on 8 August. The basis of the application was that the respondent had pursued a defence which had no reasonable prospect of success because the respondent knew throughout that its real reason for dismissing the claimant was not for a reason relating to his conduct but was for a reason related to a TUPE transfer. Ms Jeram also pursued the application for costs on the basis that it was unreasonable conduct for the respondent to pursue that defence, knowing that it was false. Ms Jeram on that occasion submitted a schedule of costs totalling some £22,000 and invited the Tribunal to undertake a summary assessment of those costs. Mr Edward on that occasion objected to the costs application being dealt with at such short notice, particularly due to the sum involved and the lack of a detailed breakdown of those costs.

5 On that occasion I expressed surprise at the amount of costs being claimed by the claimant. This had always been a relatively straightforward "misconduct unfair dismissal" in which the claimant had allegedly been dismissed for smoking in breach of the respondent's smoking policy. Ordinarily that would have been dealt with at a one day hearing. This one had been listed for two days simply because the claimant's case had been combined with that of another employee dismissed in similar circumstances, Mr K Richardson. I indicated on that occasion that the basic "rule of thumb" in such cases would be for the Tribunal to allow two days of preparation for every day of hearing. If each hearing day was allowed 7 hours, then this case would involve 14 hours for hearing and thus 28 hours for preparation. That would be 42 hours in all which, on the hourly rates applicable, would amount to approximately £8,000 worth of costs. My initial indication to the parties was that if the claimant were to satisfy the Tribunal that there had been a pursuit of a defence which had no reasonable prospect of success and/or unreasonable conduct in the proceedings, then that would be a proportionate sum _____ of costs. I indicated to Ms Jeram that if the claimant wished to pursue costs in excess of that amount then I would have to postpone the costs application to a later date. I gave Ms Jeram and Mr Edward

time to consider my initial view, after which both asked that the costs application be postponed.

6 The claimant then submitted a detailed application for costs by letter dated 25 August 2017, a copy of which appears in bundle A. The claimant seeks a sum "not exceeding £20,000" and was accompanied by a detailed schedule of costs totalling £25,683.16. The application was on the following grounds:-

6.1 Pursuant to rule 76(1)(a) that the respondent had acted unreasonably in the way that the proceedings had been conducted.

6.2 Pursuant to rule 76(1)(b) that the defence had no reasonable prospects of success.

7 He reminded me of the respondent's form ET3 which, at paragraph 3, states;

> "It is denied that the respondent unfairly dismissed the claimant and that the respondent failed to pay outstanding wages as alleged or at all".

Ms Jeram drew my attention to the assertions contained in paragraphs 14, 18, 19, 20 and 21 of that response to the effect that the respondent genuinely believed after a reasonable investigation that the claimant had committed an act or acts of gross misconduct by smoking in an area not designated for smoking. That defence was maintained throughout the main hearing and in the statements of the two witnesses for the respondent, Mr Alan Gartside and Ms Donna Field. Mr Gartside was the dismissing officer and Ms Field the appeal officer. Both of those statements contain the Civil Procedure Rules "statement of truth", stating, "The facts in this witness statement are true to the best of my knowledge and belief".

8 The judgment in the main proceedings, promulgated on 15 August, states as follows:-

> "1 The claimant's complaint of unfair dismissal is well-founded and succeeds.
>
> 2 The respondent's real reason for dismissing the claimant was a reason related to the TUPE transfer of the claimant's employment from SRCL Limited to the respondent on 1 October 2015.
>
> 3 The respondent is ordered to pay to the claimant compensation for unfair dismissal in the sum of £6,931.25."

9 That judgment records the precise terms of an agreement reached between the claimant and respondent following negotiations which took place as a result of evidence given to the Tribunal by Mr Gartside whilst he was being cross-examined by Ms Jeram. Mr Gartside's evidence to the Tribunal began on the morning of the first day of the hearing and continued following the lunch break. During some probing and dogged cross-examination by Ms Jeram, Mr Gartside conceded that he had been pressurised by the respondent's general manager Mr

Keith Crosier into dismissing both Mr Davies and his colleague Mr Richardson. Mr Gartside's evidence to the Tribunal was:-

> "Keith Crosier put me under pressure. He threatened me with my livelihood. He threatened he would sack me if I didn't dismiss both of them."

When asked by Ms Jeram, "What did he say?", Mr Gartside replied:-

> "They had been caught smoking and the sanction is dismissal, whether you agree or not and if you don't like it you know where the door is."

10 My notes following this exchange between Ms Jeram and Mr Gartside show that the case was stood down from 3.05pm to 3.30pm to enable the respondent to take instructions, following Mr Gartside's evidence. The note states:-

> "Employment Judge invites respondent to consider whether there is to be any challenge to this witness's evidence on this point. Mr Edward's asked for 20 minutes to obtain instructions."

By 4.30pm Mr Edward had been unable to obtain instructions and it was agreed that the case would be adjourned to the following day.

11 On the Tuesday morning at 9.30am Mr Edward asked for additional time, having informed me that he did not have the witness statement from Mr Crosier, nor would Mr Crosier be attending that day to give evidence. Mr Edward nevertheless stated that the respondent did wish to challenge Mr Gartside's evidence about having been pressurised by Mr Crosier into dismissing the claimant and Mr Richardson. No explanation was given to me as to why the respondent had not been able to obtain a statement from Mr Crosier overnight or for Mr Crosier's inability to attend to give evidence on the Tuesday. I suggested to Mr Edward that the respondent would have to be saying that Mr Gartside was effectively telling an outright lie when he says he had been pressurised and/or threatened by Mr Crosier into dismissing the claimant. Mr Edward's reply was, "Yes – we do say that."

12 Ms Jeram queried if the respondent would thereafter be able to deal with Mr Gartside. Ms Jeram indicated that the respondent would have to treat him as a "hostile witness" under the Civil Procedure Rules, yet did not have any contradictory evidence to put to him. Mr Edward indicated that the respondent may wish to call Mr Crosier to give evidence to rebut that given under cross-examination by Mr Gartside, but would not be able to do so that day. I enquired of Mr Edward as to why I should permit the respondent to do that, if Mr Crosier had not been prepared to attend to give evidence that day or even to prepare a witness statement overnight, to contradict what had been said by Mr Gartside. I pointed out to Mr Edward that the respondent must be saying that Mr Gartside was telling outright lies when he said he was pressurised and/or threatened by Mr Crosier. Mr Edward's response was, "Yes we do say that."

13 At 11.20am I informed Mr Edward that I would give him until 12.30 to decide how he wished to proceed, failing which I intended to finish Mr Gartside's evidence by continuing Mr Jeram's cross-examination and then allowing Mr Edward to re-examine Mr Gartside. At 12.15 I was informed that the case had settled in terms which are set out in the promulgated judgment.

THE APPLICATION FOR RECUSAL

14 I have set out the above facts as they form a crucial part of my consideration of Mr Edward's application that I should recuse myself from hearing the claimant's application for costs. Ms Jeram's submissions were that the respondent's defence was doomed from the outset as the respondent never genuinely believed that the claimant had committed an act or acts of gross misconduct justifying dismissal. It is clear from the terms of the agreed judgment. Ms Jeram's case was that the respondent was aware throughout these proceedings that their defence was "false" and "untruthful". In particular, Ms Jeram submitted that Mr Gartside was aware throughout that the respondent's real reason for dismissing the claimant was not for smoking in a non smoking area. Ms Jeram described the response as "false and knowingly false".

15 At this stage in Ms Jeram's submissions, I put it to Mr Edward that the respondent must surely accept that, based upon Mr Gartside's evidence in the witness box, that his reason for dismissing the claimant was not the one proffered in the response, but the one set out in the judgment. Mr Edward did not accept this, insisting that Mr Gartside had never said that the real reason was related to an earlier TUPE transfer and that the entirety of Mr Gartside's evidence should be regarded as unreliable as he had not been re-examined by Mr Edward, the respondent had not called any contradictory evidence from Mr Crosier and the respondent had not made any formal closing submissions on Mr Gartside's evidence on cross-examination. In those circumstances, Mr Edward insisted that there was no need for the Employment Tribunal to make any findings of fact, particularly relating to Mr Gartside's evidence, and none were required under the agreed terms of settlement. Mr Edward submitted that I was expressing a clear view that Mr Gartside's evidence was to be believed, when no such concession had been made by the respondent and indeed where the respondent's position was that Mr Gartside was telling an outright lie. Mr Edward submitted that there was no requirement for me to make any finding of fact based upon Mr Gartside's evidence and that, having indicated that Mr Gartside was to be believed, I formed a view which was prejudicial to the respondent and that I should now recuse myself from hearing the claimant's application for costs. I explored his application for recusal with Mr Edward. Mr Edward submitted that there was simply no evidence to support what was being said by Mr Gartside. I reminded Mr Edward that Mr Gartside's oral testimony under oath was itself "evidence" which I was entitled to either accept or reject. That testimony by Mr Gartside had not been challenged by the respondent in any way. Mr Gartside had not been re-examined by Mr Edward, although Mr Edward had been given the opportunity to do so. Mr Crosier had not prepared a witness statement to contradict what was being said by Mr Gartside, despite having been given the opportunity to do so. Similarly, Mr Crosier decided not to attend the second day of the hearing to give oral testimony under oath, himself. I enquired of Mr Edward as to why I was not

entitled to accept as truthful, Mr Gartside's sworn testimony from the witness box. Mr Edward's submission was that I could not and should not do so as I had not been required to do so.

16 Ms Jeram by way of response, submitted that the truth or otherwise of Mr Gartside's testimony was not the basis of the claimant's application. Ms Jeram relies simply upon the difference between the reason for dismissal set out in the Response and that conceded by the respondent in the agreed terms of settlement as embodied in the promulgated judgment. I respectfully pointed out to Ms Jeram that she had specifically submitted that the respondent's defence had been "false and knowingly false" and that this falsehood had become apparent from Mr Gartside's testimony, which had triggered the negotiations which led to the settlement.

17 I remind myself of the basic principles set out by Lord Hope in **Porter v Magill [2002] 2AC357**. I asked whether a fair-minded and informed observer, having considered all of the facts, would conclude that there was a real possibility that the influence of Mr Gartside's evidence would raise a real possibility that I would be biased against the respondent with regard to the costs application. I am satisfied that there would be no such possibility. It is wholly unrealistic to expect Mr Gartside's evidence to be a vacuum. The respondent's falsehood appears in its pleaded defence in its form ET3 and in Mr Gartside's witness statement. The falsehood was corrected under cross-examination with the correction by Mr Gartside (whilst not accepted by Mr Edward in submissions) has not been challenged in any of the ways in which it could have been challenged.

18 I am satisfied that there is no prejudice whatsoever to the respondent in my taking into account (insofar as it is necessary) Mr Gartside's testimony. It is only one of the factors I have to consider in the claimant's costs application. I therefore refuse Mr Edward's application that I should recuse myself.

19 A summary of Ms Jeram's submissions on the claimant's application for costs against the respondent is that:-

19.1 The reason proffered by the respondent in its response was not its real reason for dismissing the claimant.

19.2 The real reason was not misconduct but was TUPE related.

19.3 That concession was made by the respondent after (or during) cross-examination of the respondent's principal witness.

19.4 That the response was "false and knowingly false" and thus had no reasonable prospect of success.

19.5 That the respondent knew of this falsehood throughout the Employment Tribunal proceedings, yet made no concession until the middle of the second day of the final hearing.

19.6 That the respondent's submissions in paragraphs 1-19 of Mr Edward's written submissions were "disingenuous" for following the specific concession made by the respondent in the promulgated judgment.

20 Ms Jeram submitted that the threshold necessary to establish both a response which had no reasonable prospect of success and unreasonable conduct in the course of the proceedings, had both been made out and that in all the circumstances it was appropriate for an order for costs to be made against the respondent.

21 Mr Edward's written submissions are:-

22 Dates at paragraph 3 that, "when considering for the purposes of the costs order whether a party has behaved unreasonably, regard must be had to the whole conduct of the case. It is not the case _____ that costs are awarded simply because a party loses. There are cases in the Tribunals every day where employers fail to show that a dismissal was fair. Costs are not normally awarded in these cases. There must be evidence of unreasonable conduct, rather than simply having run an unsuccessful defence."

23 Mr Edward's goes on in paragraph 4 to state that the Tribunal cannot decide that the respondent behaved unreasonably, based on Mr Gartside's evidence and that it would be "an error for the Tribunal to form a concluded view on an issue without hearing all of the evidence on an issue." Mr Edward pointed out that Mr Gartside had not completed his evidence and that his replies in cross-examination contradicted what had been said in his statement and also "contradicted the evidence of other witnesses".

24 Mr Edward says at paragraph 7:-

> "The Tribunal cannot reach a conclusion that the respondent pursued a false defence based on hearing a part of Mr Gartside's evidence and hearing no witnesses who may contradict that evidence. The claimant has based their application on the respondent pursuing a knowingly false defence. They had brought no evidence of such knowledge. They asked the Tribunal to draw an inference from the incomplete evidence of one witness. The onus is on the claimant to prove dishonesty. The claimant has brought no evidence to prove that."

It is of course not necessary for the claimant to prove dishonesty. It must simply show that the respondent has behaved unreasonably in its conduct of the proceedings. As is set out above with regard to the respondent's application for recusal, it is my view wholly unrealistic to treat Mr Gartside's evidence as having been given in a vacuum. Mr Edward himself accepts that the Tribnal "must have regard to the whole conduct of the case". That must include Mr Gartside's evidence.

25 It is clear beyond conjecture that the response was both false and knowingly false from the outset. This was never a misconduct dismissal. If the respondent concedes in the promulgated judgment that its real reason for dismissing the

claimant was a reason related to a TUPE transfer, how can it be argued that the original response had some reasonable prospect of success? I am satisfied that it could not.

26 Mr Edward says at paragraph 4 of his written submissions that, "The respondent took a decision to try to settle the case for economic reasons. Agreement was reached between the parties that the claim would settle on condition of the order agreed. The respondent settled for an amount owed and claimed for and avoided any further expensive litigation. Such a settlement is not unusual. The terms of settlement do not provide evidence of a previous false defence. The onus was on the claimant to show more than the simple fact of settlement."

27 I am satisfied that terms of settlement do indeed provide evidence of a previous false defence. That was the reason why the judgment recites a specific reason for dismissal. The respondent has accepted that that was the reason for dismissal. It cannot now ask me to go behind those agreed terms. It is of course the difference between the pleaded case in the response and the agreed terms of the judgment, that Ms Jeram relies upon.

28 An approach to an award of costs by the Employment Tribunal on the grounds set out in rule 76(1)(a) and (b) was considered by the Employment Appeal Tribunal in **Power v Panasonic (UK) Limited UKEAT/0439/04**, when two stages in the Employment Tribunal's assessment were identified. First, consideration of the threshold question – do any of the circumstances identified in rule 76(1) apply? If so, secondly, the separate consideration as a matter of discretion, whether it would be appropriate to make an award in the particular circumstances of the case and if so, in what amount? That decision makes it clear that the question as to whether or not it is appropriate to make a costs award in any particular case is a matter of discretion for the Employment Tribunal. In exercising that discretion, I had regard to the guidance given my Mummery LJ in **Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78-CA**:-

> "The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had …".
>
> "In the employment tribunal, costs orders are the exception rather than the rule. In most cases the employment tribunal does not make any order for costs. If it does, it must act within the rules that expressly confine the employment tribunal's power to specified circumstances, notably unreasonableness in the bringing of or conduct of the proceedings. The employment tribunal manages, hears and decides the case and is normally the best judge of how to exercise its discretion."

29 I am satisfied in the present case that the response had no reasonable prospect of success. That response was based upon a falsehood from the start. Misconduct was never the real reason for the respondent's dismissal of the claimant. The respondent has accepted that the real reason was related to an

earlier TUPE transfer. The response therefore had no reasonable prospect of success, if the reason proffered was not the real reason.

30 The respondent was aware from the outset the reason it proffered was untrue. There was never any "genuine belief", there were never any "reasonable grounds" and there was never any "reasonable investigation". Mr Gartside was pressurised and threatened into dismissing the claimant and Mr Richardson. The falsehood was maintained throughout the proceedings. I am satisfied that this amounts to unreasonable conduct in the course of the proceedings. I am satisfied that the threshold under rule 76(1)(a) and (b) is established.

31 I am asked by Ms Jeram to undertake a summery assessment of the costs which are claimed. There is a detailed schedule attached to the letter of 25 August 2017. The claimant has the benefit of DAS insurance. The rates claimed for a senior solicitor are £201 per hour, for a junior solicitor £185 per hour and for a trainee solicitor £120. None of those charging rates are challenged by Mr Edward for the respondent.

32 As is referred to above, I had at the end of the hearing expressed some astonishment at the amount of costs being claimed. Had the claimant's case not been combined with that of Mr Richardson, then it would have been listed (as most misconduct unfair dismissal claims are) for one day. Ordinarily the Tribunal would expect to hear from the investigating officer (if there was a challenge to the investigation), the dismissing officer and the appeal officer. The Tribunal would hear from the claimant and any witnesses he wished to call. A one day hearing would normally involve no more than six hours in court. At £200 per hour, that would amount to £1,200. Any travel and weighting may add another hour or so, giving £1,400 or £1,600 maximum.

33 An Employment Tribunal is allowed to govern its own procedure and is not bound by the strict rules of evidence. The Tribunal system is designed to be relatively quick and accessible means of recourse _____ employees and/or employers. The overriding objective requires the Tribunal to deal with cases in ways which are proportionate to the complexity and importance of the issues. It cannot be proportionate for costs in excess of £20,000 to be run up in what is relatively straightforward, misconduct dismissals. _____ is the key concept. It involves the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party. _____ involves a two stage approach. There has to be a global approach and an item by item approach. The global approach will indicate whether the total sum claimed is or appears to be disproportionate, having particular regard to the matters referred to above. If costs as a whole are not disproportionate according to that test, all that is normally required is that each item should have been reasonably incurred and the cost for that item should be reasonable. If on the other hand the costs as a whole appear disproportionate then the Tribunal must be satisfied that the work in relation to each item was necessary, and if necessary, the cost of the item was reasonable. Disproportionate costs, whether necessarily or reasonably incurred, should not be recoverable from the paying party.

34 I indicated to Ms Jeram and Mr Edward a measure whereby for every day of hearing there would be approximately two days worth of preparation. The claimant's was a two day hearing and thus would produce four days worth of preparation. Of course, in this case, the hearing time was extended due to the consolidation of the claim by Mr Richardson. Mr Richardson's claim has also been compromised, but the claim for costs must only relate to the work carried out on behalf of Mr Davies. In all circumstances of this case, I am satisfied that I should allow for a two day hearing, but only three days worth of preparation. I allow seven hours each day at £200 per hour, that comes to £1,400 per day. For five days in total that comes to £7,000. VAT should be added to that giving a total of £8,400. I am satisfied in all the circumstances of this case, that an order for costs should be made. I am satisfied that costs of £7,000 plus VAT were reasonably and necessarily incurred and, more importantly, are proportionate in a case such as this.

35 I order the respondent to pay to the claimant costs summarily assessed in the sum of £8,400.

36 Mr Edward for the respondent then made a formal application for an order that the claimant should pay the respondent's costs of the costs application. The basis of the application is that the claimant has acted unreasonably in the course of the costs proceedings, by seeking a sum in excess of £20,000 (or up to £20,000 for summary assessment) for what was a relatively straightforward misconduct unfair dismissal case. Mr Edward submitted that, by presenting a grossly inflated figure for costs, the claimant had been guilty of unreasonable conduct in the course of the proceedings.

37 Mr Edward referred to my earlier comments at the main hearing to the effect that I considered something in the region of £8,000 to have been proportionate.

38 Mr Edward also referred to the claimant having the benefit of legal expenses insurance and he queried whether the sums claimed in the schedule of costs were those which would properly be payable by the insurance company. I respectfully reminded Mr Edward that the schedule of costs contains the appropriate certificate to the effect that the schedule does not exceed the costs which the claimant is entitled to recover from his insurers in relation to those costs and that if Mr Edward was challenging that certificate then he should say so in specific terms. Mr Edward declined to do so.

39 Ms Jeram submitted that the claimant's solicitors had a fastidious record of the time spent on dealing with this case and that all of the time had been recorded and set out in the schedule. Ms Jeram conceded that there may be an element of duplication with regard to the work carried out on behalf of both Mr Davies and Mr Richardson, but she was unable to say how much was involved.

40 Both Mr Edward and Ms Jeram conceded that there had been negotiations between the parties relating to the costs application, but settlement had proved impossible.

41 Referring again to the principles set out above, I am not satisfied that the respondent has shown that in its conduct of the costs application, the claimant has behaved unreasonably. Costs may well have been necessarily and/or reasonably incurred, but not proportionate in a case such as this. The claimant has set out all of the costs incurred and has invited the Tribunal to summarily assess them in a sum "up to £20,000". The claimant has recovered £8,400. I am not satisfied that there has been any unreasonable conduct by the claimant in this regard. The respondent's claim for costs in the costs proceedings is therefore dismissed.

42 Ms Jeram then countered with a costs application for costs against the respondent in the costs proceedings. Ms Jeram's submission was that the respondent had in turn acted unreasonably in the costs proceedings by offering the sum of £4,000 towards the claimant's costs in circumstances where there had been an indication at the main hearing that a sum in the region of £8,000 may be proportionate. Ms Jeram submitted that by making an application for costs in the costs proceedings, the respondent had been guilty of unreasonable conduct, which had caused the claimant to incur unnecessary costs.

43 I explained to Ms Jeram that this had the appearance of a "tit-for-tat" application. The undisputed facts are that the claimant has claimed costs limited to £20,000 and has recovered less than half of that at £8,400. Similarly, the respondent has offered less than half of what was eventually recovered by way of costs, having offered £4,000. I fail to see how any party has acted more reasonably or unreasonably than the other with regard to the costs proceedings. For those reasons both applications for costs in the costs proceedings are dismissed.

EMPLOYMENT JUDGE JOHNSON

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
8 January 2018