# EMPLOYMENT TRIBUNALS

**Claimant:** Mr J E Chaney

**Respondents:** 1. Leicestershire Action for Mental Health Project
2. The Richmond Fellowship

**Heard at:** Nottingham

**On:** Tuesday 11 December 2018

**Before:** Employment Judge Legard (sitting alone in Chambers)

**Representation**
**Claimant:** Written representations
**Respondent:** Written representations

# RESERVED JUDGMENT

The Second Respondent's application that the First Respondent pays its costs of and occasioned by the claim is refused.

# REASONS

1. On 30 May 2018, this matter came before me for a preliminary hearing where the issued to be determined was whether or not a TUPE transfer had taken place as between the Second Respondent ("RF") and the First Respondent ("LAMP").

2. By a reserved judgment with written reasons being sent out to the parties on 30 July 2018, I found that no such transfer had taken place. The judgment runs to 24 pages and contains, amongst other things, detailed findings of fact and a summary of the relevant law. I do not propose to rehearse the contents of that judgment within the context of this one, save

to say that the principal conclusion to which I came was that the activities that underpinned the Genesis Project and the Wellbeing and Recovery Service were fundamentally different.

3. In arriving at that view, I made clear, amongst other things, that all three witnesses had done their best to give truthful and careful evidence in the case but, where there were differences in recollection or interpretation, that I unhesitatingly preferred the evidence given by both the Claimant and Mrs Lawrence. Mrs Lawrence was of course the Locality Manager for RF (see paras 4.2, 4.3).

4. By an email dated 24 August 2018, RF applied for an order that LAMP pay its costs of these proceedings. It did so on the basis that LAMP had acted unreasonably in either the bringing of the proceedings or the way the proceedings had been conducted alternatively on the basis that LAMP's defence had had no reasonable prospect of success.

5. By an email dated 28 September 2018, the Claimant also applied for its costs against LAMP on a similar basis. However, following settlement of his claim on or about 9 November 2018, the Claimant subsequently withdrew both his claim and costs application. Subsequently, RF also withdrew its separate claim against LAMP (claim number: 2600113/18).

6. It therefore followed that the only matter that remains in issue between the parties is RF's costs application against LAMP. The parties had previously given their consent for this application to be determined on paper and both have provided me with written representations in support of their respective positions.

**Relevant law**

7. Regulation 76(1) of the 2013 Regulations provides as follows:

"*76.—(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—*

*(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or*

*(b) any claim or response had no reasonable prospect of success.*

…"

Caselaw

8. The general rule and underlying principle is that an award of costs in the Employment Tribunal is the exception rather than the rule (see *Gee v Shell UK Ltd [2003] IRLR 82).* Nevertheless, the employment tribunal has a discretion to award costs if persuaded that a party has behaved unreasonably or that its claim or defence, as the case may be, has no reasonable prospect of success.

9. It may be a factor relevant to the exercise of the tribunal's discretion that the tribunal has warned a party concerned that it is at risk of a costs order or that a receiving party has put the paying party on notice that there may be an application for costs (see *Millin v Capsticks Solicitors LLP [2014] All ER (D) 12**).***

Unreasonable conduct

10. When considering whether to award costs in respect of a party's conduct in bringing or pursuing a case that is subsequently held to have lacked merit, the type of conduct that will be considered unreasonable by a Tribunal will obviously depend on the facts of the individual case, and there can be no hard-and-fast principle applicable to every situation. In general, however, it would seem that the party must at least know or be taken to have known that his case is unmeritorious.

11. Even this needs to be applied with considerable caution, otherwise parties could end up being penalised for not assessing the case at the outset in the same way as a Tribunal may do following a hearing and evidence. As Sir Hugh Griffiths stated in *E T Marler v Robertson [1974] ICR 72, NIRC*:

*'Ordinary experience of life frequently teaches us that which is plain for all to see once the dust of battle has subsided was far from clear to the combatants once they took up arms'*.

In that case costs against the claimant were refused notwithstanding that, at the end of a nine-day hearing, he had admitted under cross-examination that the respondents had acted reasonably in dismissing him. Similarly, in *Lothian Health Board v Johnstone [1981] IRLR 321* the EAT (overruling an employment tribunal) held that it was a wrong exercise of discretion to award costs against the Respondents on the basis that they 'should have thrown in the towel' after the second day of a four-day hearing, as it had then become obvious that they were not going to establish their stated reason for the dismissal.

12. Under the old (but analogous) rules ‘frivolous' conduct was interpreted narrowly, justifying an award of costs only if the party knew that his case lacked any substance, or if it was 'on the face of it so manifestly misconceived' that it could have no prospect of success at all (see *E T Marler - supra*), and, in this context, unreasonable conduct is to be construed in much the same way.

13. There is no general principle that an award of costs must follow when a party fails to establish a central allegation in their case – *HCA International Ltd v May-Bheemul [2009] All ER (D) 154 (Jun).*

14. Giving false evidence is not, automatically, unreasonable conduct warranting a costs order – *Kapoor v Governing Body of Barnhill Community School UKEAT/0352/13.*

15. In *Beynon v Scadden [1999] IRLR* Lindsay J stated*:*

*"A party who, despite having had an apparently conclusive opposition to his case made plain to him, persists with the case down to the hearing in the 'Micawberish' hope that something might turn up and yet who does not even take such steps open to him to see whether anything is likely to turn up, runs a risk, when nothing does turn up, that he will be regarded as having been at least unreasonable in his conduct of his litigation."*

*Beynon* was a case where an employment tribunal categorised a union's behaviour as vexatious and unreasonable on the ground that its pursuit of a case on behalf of the claimants was both without merit and done with the collateral purpose of achieving union recognition from the Respondent.

16. When making a costs order on the ground of unreasonable conduct, the discretion of the tribunal is not fettered by any requirement to link the award causally to particular costs which have been incurred as a result of specific conduct that has been identified as unreasonable (*McPherson v BNP Paribas*).

17. However, In *Barnsley MBC v Yerrakalva [2012] IRLR 78*, Mummery LJ stressed that *McPherson* was never intended to be interpreted as meaning either that questions of causation are to be disregarded or that tribunals must 'dissect a case in detail and compartmentalise the relevant conduct under separate headings, such as “nature” “gravity” and “effect.' In *Yerrakalva* his Lordship stated (at para 41):

*'The vital point in exercising the discretion to order costs is to look at the 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 if had'.*

18. In concluding that there had been no relevant transfer, I made a wide range of findings of fact, none of which would have been possible without detailed analysis of the evidence, both oral and documentary. Critical in determining whether a transfer had taken place was an understanding of the services actually provided by both Respondents and indeed the part played by the Claimant within the wider enterprise known as The Genesis Project.

19. None of that would have been remotely possible without consideration of oral evidence, commentary upon documentation and without listening to detailed legal submissions. It is simply impossible to determine such a fact sensitive case as this by reference to papers alone.

20. To that end, I reject any suggestion that LAMP ought reasonably to have accepted without challenge RF's assertions, whether they be pleaded assertions or contained within correspondence, regarding the TUPE question. Under no circumstances could LAMP be considered to have acted unreasonably by failing or refusing to throw in the towel at the disclosure or exchange of witness statement stages. If ever there was a case crying out for an oral hearing where the evidence could be fairly tested and cross-examined, it was this.

21. In its application for costs, RF sets out in 8 numbered paragraphs a summary of the Claimant's oral testimony and, in doing so, seeks to argue that such evidence, either by itself or in conjunction with the documents in the case, should have led to the inevitable conclusion that no transfer had taken place and that LAMP ought reasonably therefore to have conceded the point in the interim period between the hearing and judgment being promulgated.

22. I reject this proposition. A refusal to concede a key point between an oral hearing and a reserved judgment being issued cannot, on any objective view, be considered unreasonable conduct unless there are exceptional circumstances in play, which in this case there were none. LAMP was

entitled to have its defence fairly adjudicated upon and await determination of it in due course.

15. This was in all other respects a classic *Marler* case where neither party could have known the outcome until the dust of battle had truly subsided. I also take into account that TUPE cases are of themselves highly fact sensitive – a matter to which I have alluded at paragraphs 6.2 to 6.9 of the substantive judgment. One of the consistent principles enunciated by successive appellate authorities is that TUPE question (specifically the question as to whether or not services are essentially the same pre and post putative transfer) is a highly fact sensitive matter for a tribunal to determine and can only be properly and fairly determined following a detailed analysis of the evidence.

16. I therefore do not consider LAMP to have acted unreasonably or that its defence was misconceived or lacked any reasonable prospect of success. LAMP lost on the facts and in my judgement RF's application for costs falls well short of the thresholds set out in rule 76(1)(a) or (b). Accordingly its application is refused.

Employment Judge Legard
Date 9th January 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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