EMPLOYMENT TRIBUNALS

Claimant ***Respondent***

Mr V Lopes Marques **AND** In-Depth Services (Cleaning) Limited

Heard at: London Central **On**: 28 September 2018
(Costs considered in Chambers on 11 January 2019)

Before: Employment Judge Norris, sitting alone

JUDGMENT AS TO COSTS

The Respondent's application for costs succeeds. The Claimant is ordered to pay the Respondent's costs in the sum of £6,438.41.

WRITTEN REASONS

1. This case came before me on 28 September 2018, at which I gave judgment orally for the Respondent and written judgment was promulgated by email on 15 October. On 29 September, the Claimant had requested written reasons, which I prepared on 19 October, and they were sent to the parties on 6 November.

2. On 18 October 2018, the Respondent made a written application for its costs pursuant to Rule 76(1)(a) and/or (b) (that the Claimant or his representatives acted unreasonably, disruptively or vexatiously in bringing the claim, and/or that the claim had no reasonable prospect of success) and/or Rule 80 ("wasted costs") of Schedule 1, Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("Rules"). It asked that the application be considered on the papers.

3. I caused a letter to be sent to the Claimant's representatives on 5 November, asking for their comments on the application and in particular whether it should be considered on the papers; and if so, requiring them to provide a full response, with such evidence as they relied on, by no later than 19 November 2018.

4. On 9 November, the Tribunal received the Claimant's response, which defended the application on all counts, with accompanying evidence as to the question of whether his representatives were acting in pursuit of profit.

5. I did not have the opportunity to consider the matter until 11 January 2019, when, in line with the parties' agreement, I did so on the papers.

Law

6. So far as is relevant to this application, Rule 76(1)(a) provides that a Tribunal may make a costs order where it considers that a party or its representative has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way in which the proceedings (or part) have been conducted; and under Rule 76(1)(b), a costs order may be made where the claim had no reasonable prospect of success.

7. Under Rule 80, a Tribunal may make a costs order against a representative, where the receiving party has incurred costs as a result of any improper, unreasonable or negligent act or omission on the part of the representative. "Representative" in this context does not include a representative who is not acting in pursuit of profit, such as Citizens' Advice or other voluntary bodies.

8. Case law (e.g. *Gee v Shell UK Limited [2003] IRLR 82 CA)*, confirms that costs in Employment Tribunals remain the exception rather than the rule; but this does not mean that the facts of a case must be "exceptional" for a costs order to be made, where the relevant test is satisfied (*Power v Panasonic (UK) Limited UKEAT/0439/04*) and the Employment Tribunal has a wide and unfettered discretion (*Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78 CA)* provided relevant circumstances pertain and the law is correctly applied. It is for the Respondent to satisfy the Tribunal that a costs award should be made, and not for the Claimant to show why it should not (*Haydar v Pennine Acute NHS Trust UKEAT/0141/17*).

9. The process is a two-stage one; the Tribunal must first consider whether there has been conduct of the sort described at Rule 76(1) and then whether to exercise its discretion to make a costs order (*Criddle v Epcot Leisure Limited UKEAT/0275/05*). In *Yerrakalva*, the Court of Appeal said (at paragraph 41):

   "*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*."

10. "Vexatious" conduct occurs (according to (*ET Marler Ltd v Robertson [1974] ICR 72)* if an employee brings "a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive". "Unreasonable" behaviour is different from "vexatious" behaviour; it <u>may</u> include, for instance, where a party has lied to the Tribunal; where the claim (or response) stood no

reasonable prospect of success; where there has been a failure to comply with an order or practice direction; or in continuing to pursue a claim where there has been an "accurate, straightforward and simple" indication of the way in which a Tribunal will approach a hearing comprising a "fair and sensible warning" of the risk of costs (*Growcott v Glaze Auto Parts Ltd UKEAT/0419/11)*. However, a refusal to accept an offer to "drop hands" is not of itself to be considered unreasonable behaviour (*Lake v Arco Grating (UK) Ltd UKEAT/0511/04*).

11. A costs order may be made of up to £20,000 in respect of costs incurred by the receiving party without the need for detailed assessment to be conducted. If a costs order is made, the Tribunal may take into account the paying party's ability to pay (including their likely future financial position) in setting the amount; indeed, it may also take ability to pay into account when considering whether to make the order at all. This should not however be taken as a suggestion that:

    "*poor litigants may misbehave with impunity and without fearing that any significant costs order will be made against them, whereas wealthy ones must behave themselves because otherwise an order will be made*"

    (*Kovacs v Queen Mary and Westfield College and another [2002] EWCA Civ 352*).

Application for costs

12. The Respondent claims (in summary) that the Claimant's version of events was unsustainable when considered in light of the CCTV footage showing the incident which led to his dismissal. He appeared not to acknowledge the correct legal test, either prior to the hearing or during the giving of evidence, notwithstanding the Respondent's efforts to set it out in correspondence (and my own directions during the Hearing itself). A transcript of a covert recording had been disclosed extremely late. The Claimant gave inconsistent indications of whether he was pursuing his unlawful deductions claim, resulting in wasted preparation by the Respondent. His witness Mr Durango, who had been his trade union representative and is the General Secretary of CAIWU (Cleaners' and Allied Independent Workers' Union), was untruthful in his description of events on the day of the disciplinary hearing.

13. The Respondent further asserts that CAIWU were acting for the Claimant in pursuit of profit and makes an application under Rule 80 accordingly.

14. The total sought is £6,438.41, apportioned as appropriate if CAIWU is acting in pursuit of profit; or entirely against the Claimant if not.

The Claimant's response

15. The Claimant asserts through his representative that the application for costs is misconceived. Again in summary, he says that the test of unreasonable behaviour is not met where a claimant fails to recognise that a respondent "could" have acted reasonably in an unfair dismissal claim;

that is the point of the *Burchell* test. The reasons did not suggest that the claim was unreasonably brought or misconceived. A failure by a litigant and/or lay representatives to grasp the correct legal test should not equate to vexatious, abusive or unreasonable behaviour. Neither the Claimant himself nor Mr Traynor on his behalf should be held to the standards of a professional advocate. The transcript was disclosed as soon as Mr Durango (who was neither a party nor the representative) remembered there was a recording and it would be perverse to penalise the Claimant for complying with the duty of disclosure. Similarly, it is reasonable to withdraw a complaint which cannot be articulated. Costs should not be used punitively against the Claimant for Mr Durango's conduct.

16. As to the Rule 80 application, this is similarly misconceived; the CAIWU Annual Return shows that it is not run in pursuit of profit, as confirmed by the Terms of Engagement. It acted *pro bono* for the Claimant. Use of the word "cost" should not be conflated with the notion of "profit".

Findings

17. I deal first with the question of whether the Claimant's representatives were acting "in pursuit of profit" as is required before any costs award could be made pursuant to Rule 80.

18. I have seen a blank copy of the Terms of Engagement said to be used by CAIWU in its dealings with members who appoint the union to provide advice or services. The final page is headed "Disclaimer" and has a space for a signature and date, which has not been completed in this instance. However, I am satisfied in the absence of any evidence to the contrary that this is the basis on which the Claimant engaged CAIWU. The Disclaimer provides:

"*Prior to entering into this agreement, you must consider and accept the following, in addition to the Terms of Engagement set out above:*

a. TU Representatives are not qualified English lawyers.
b. This assistance is provided pro bono at no charge to you.
c. You have been fully advised that CAIWU and the TU Representatives assisting you do not carry professional indemnity insurance of any kind. Assistance is provided strictly without liability as regards CAIWU or the TU Representative assisting you.
d. …
e. …
f. …

These terms are governed by and construed in accordance with the laws of England and Wales".

19. In addition, I have seen Form AR21, the CAIWU Annual Return, for the year ended 31 December 2017. This shows total income for the year of £78,360 (almost wholly derived from members' subscriptions) and expenditure of £80,572, i.e. a deficit for the year of £2,212. Of the

expenditure, "legal fees" accounts for £12,611, "consultancy" for £8,593 and "cost awarded" [sic] for £350. In terms of the "Administrative Expenses", the most significant outgoing is £32,070 on "remuneration and expenses of staff".

20. I accept the Claimant's point that the fact cost has been incurred does not necessarily indicate that CAIWU acts in pursuit of profit. I note that, for instance, it is not beyond the realms of possibility that CAIWU have reimbursed a member for costs awarded against the member personally in a matter where CAIWU has been acting, notwithstanding point c) of the Disclaimer in the Terms of Engagement, set out above.

21. That said, it would have been useful to have an explanation for the entry of £350 for "Cost awarded"; and the fact that no profit has been made, or a small deficit sustained, does not necessarily imply that there was no **pursuit** of profit. However, I am satisfied on the limited evidence before me that CAIWU represented the Claimant in this matter otherwise than in pursuit of profit and that accordingly, the Tribunal would not have jurisdiction to make a costs award against CAIWU pursuant to Rule 80.

22. I then look at whether there was conduct by the Claimant that can properly be seen to fall within any part of the definition at Rule 76(1)(a) or (b); and if there was, whether to exercise my discretion to make a costs award, bearing in mind always that costs awards are the exception and not the rule in proceedings.

23. The chronology of the correspondence is that on 19 April 2018 (before the ET3 was lodged), the Respondent's representatives Chambers O'Neill wrote to Mr Traynor. They asserted that the unfair dismissal complaint had no reasonable prospects of success; that the unlawful deductions complaint was out of time and should be withdrawn and that there were no particulars of the holiday pay complaint. So far as the unfair dismissal complaint was concerned, it was their view that the focus was wrongly on the procedure, despite the Claimant having conceded in the appeal (at which he had been represented by Mr Traynor) that "confusion" over the agreed time was down to a miscommunication by Mr Durango, for whom (like the Claimant) English is not his first language.

24. They continued that there was a potentially fair reason to dismiss – the Claimant, on any interpretation, having accepted that he had challenged his colleague over reporting the Claimant for use of his mobile phone; it was in the band of reasonable responses to dismiss him on the findings of the disciplinary and appeal hearings. They referred to the witness statement which the Claimant had drafted with the help of CAIWU in which he confirmed he was upset and stated to Mr Martinez that he would complicate the situation because Mr Martinez had said the Claimant was using the phone; as the Claimant was walking away, he told Mr Martinez "don't say anything more the manager" [sic]. This latter point was reported by Mr Martinez to be the warning to "watch his back". The Respondent reasonably found this to be a threat. The Claimant knew the case against

him, had the opportunity to respond and did so fully and with representation at the appeal.

25. Chambers O'Neill gave the Claimant until 27 April 2018 to withdraw, whereupon they said they would take a view on costs incurred to date. It appears no communication was received in response. On 25 April 2018, they wrote again, in a letter headed "Costs Warning and Invitation to Withdraw". They enclosed a copy of the CCTV and drew the Claimant's representative's attention to the salient points where the Claimant can be seen raising his hand, pointing and waving his forefinger at Mr Martinez, in a "confrontation" lasting over 30 seconds. They repeated the 27 April deadline. It appears there was no response to that letter either.

26. In August and September 2018, there were emails passing between Mr O'Neill for the Respondent and Mr Traynor for the Claimant. The question of costs was again raised on behalf of the Respondent. Mr Traynor replied that the Claimant would not be withdrawing his claim. On 13 September there was an email exchange in which Mr O'Neill repeated the costs warning and raised the issue of the unlawful deductions complaint; Mr Traynor first replied saying that such a complaint was not being pursued separately and had only been mentioned as background, but then eight minutes later emailed and said that it **was** being pursued as a complaint. Mr O'Neill immediately asked for particulars of the amount, noting it was not dealt with in the Claimant's statement. It does not appear that he received a response. I have noted in my written reasons that before me, both the unlawful deductions and holiday pay complaints were withdrawn at the beginning of the Hearing.

27. At 08.35 on 28 September, the morning of the Hearing, Mr Traynor wrote disclosing a transcript of a covert recording made by Mr Durango of his conversation with Ms Whitlow. I noted in my written reasons that Mr Traynor told me at the Hearing that there would be an explanation for why that transcript flatly contradicted Mr Durango's evidence in his witness statement. In the event, there was none.

28. Mr O'Neill sent two emails during the Hearing, warning Mr Traynor again about the issue of costs in relation to what he described as "clearly further evidence of unreasonable misconduct". He repeated this shortly after the Hearing, on the basis now advanced in the Respondent's costs application. CAIWU replied on 4 October rejecting the Rule 80 element on the basis (as I have found) that they were not acting for profit, and stating that the Claimant is of "limited means".

Conclusions

29. I do not find that the Claimant's pursuit of the claim was vexatious, but I consider that it was unreasonable for him to bring this claim since it stood no prospect of success, and further that his conduct of the case was similarly unreasonable. The Respondent's application therefore succeeds on the basis of Rule 76(1)(a) and/or (b).

30. I make allowances for two things: that the Claimant was not "professionally" represented, in the sense that he did not have legal representation, and that English is neither his nor Mr Durango's first language. Nonetheless, the Claimant had the advantage of having consistency in both Mr Durango and Mr Traynor. They were both well-placed as union officials to be able to advise him on what is legally a comparatively simple test for unfair dismissal. If they had been in any doubt, notwithstanding the attempts by Chambers O'Neill to assist them, they could have searched on the internet. Instead Mr Traynor approached the case both internally and before the Tribunal in an inappropriately legalistic fashion (apparently seeking a technicality on which the case might be dismissed) and ignored the facts of the matter, while Mr Durango lied to the Respondent and later to the Tribunal, as did the Claimant.

31. There was no or no adequate explanation for the covert recording by Mr Durango of his conversation with Ms Whitlow. There is no explanation for why, having agreed to return at midday for the disciplinary hearing which was scheduled, the Claimant and Mr Durango failed to do so. I found in my Reasons that Mr Durango was untruthful when he said he had another disciplinary hearing due to start at midday, because he was the person who suggested that as the start time for the disciplinary hearing in this case.

32. The preparation by the Claimant and Mr Durango for the hearing (in their failure to collect and watch the CCTV footage) was poor, and as I indicated in my Reasons I found on the balance of probability that though he denied it, Mr Durango did see that email/letter inviting the Claimant to collect the footage, as of course did the Claimant himself. The Claimant would have known this was a lie. Further, the email sent by Mr Durango at 11.54 on the morning of the disciplinary hearing contained further lies which were flatly contradicted by the transcript produced on the eve of the Tribunal.

33. Mr Durango nonetheless sought to rely on his witness statement, which repeated those lies, having initially said that he would change it. He did not do so. While it is to Mr Traynor's credit that he disclosed the transcript to the Respondent and to the Tribunal even though it went against the Claimant's version of events, that is no more than his duty to the Tribunal. He failed to see that the existence and content of the transcript meant Mr Durango's evidence was wholly unreliable.

34. The Claimant was also untruthful in what he said at the investigation and appeal hearing and before me, as I found in my Reasons, changing his evidence in cross-examination of the reason for the "flat hand" raised towards Mr Martinez that can be seen in the footage. His claim form also, as I found, contradicted what he said in the investigation as to whether he had even mentioned the phone to Mr Martinez.

35. Therefore, even making allowances for a lack of legal representation and for possible language difficulties, the fact remains that the core of the

Claimant's case is based on lies told by him and by Mr Durango, and a failure to acknowledge the impact of those lies on the prospects of the case, notwithstanding repeated opportunities starting at a very early stage, when costs would have been minimal, to do so.

36. I accept the submission for the Claimant that the test for making a costs order is not simply whether the Respondent's belief in misconduct "could" be genuinely held, since potentially that would lead to the outcome that all failed unfair dismissal claims would lead to orders for costs against a losing claimant. In this case however, even Mr Traynor accepted that it was reasonable to conclude from the footage that the Claimant was behaving aggressively. That being so, it would be very hard indeed to imagine that a Tribunal would find any differently, particularly given the other discrepancies and outright falsehoods of which the Claimant cannot have failed to be aware.

37. While I do not criticise the Claimant or his representatives for a lack of understanding of the legal process (though I do add that Mr Traynor's evident misunderstanding of the law as it relates to unfair dismissal should mean he is cautious about both writing lengthy legalistic submissions for internal hearings and representing people in Tribunal, even pro bono,), I can and do criticise him and Mr Durango for their failure to tell the truth, not only in the meetings with the Respondent but also on oath before the Tribunal. The Claimant used the services of the interpreter before me. He cannot have misunderstood his duty to the Tribunal, nor can his own or Mr Durango's evidence have been so confused by not having English as their first language that they were unable to tell the truth. The Claimant sought to rely on Mr Durango's evidence, despite knowing that it was untrue.

38. In short, this case was founded on the lies that the Claimant was not aggressive towards Mr Martinez and that the Respondent was so unreasonable in going ahead with the disciplinary hearing in the Claimant's absence as to render the decision to dismiss unfair, the latter however being caused entirely by the Claimant's decision not to return for the appointment that his own representative had scheduled. Both these lies were known to the Claimant, so that despite his own lack of legal knowledge, he could only have hoped to succeed in his claim if they were believed by a judge.

39. There has been no explanation for how Mr Martinez came to remember suddenly, the day before the Hearing, that he had covertly recorded the phone conversation with Ms Whitlow, having allegedly forgotten that he had done so immediately thereafter, ten months earlier. I draw the inference from this that the Claimant was aware of Mr Durango's recording of the conversation, either at the time or once they left the building together. Mr Durango is the General Secretary of the union and his behaviour in this case has been nothing short of disgraceful, but the issue for me is that the Claimant has sought to rely on the lies told by Mr Durango throughout.

40. As I have made it clear above, I do not penalise the Claimant for having complied with his ongoing duty of disclosure, even at the eleventh hour, but I do find it unreasonable to have complied only so late and without adequate explanation for the earlier omission from him or from Mr Durango. Even where the lies and omissions were not the Claimant's personally, he pursued his case when he knew or ought to have known about them and that they would be fatal to his prospects. From the outset, therefore, and despite repeated opportunities to re-consider, he pursued a claim that had no or no reasonable prospects of success. Hence all the Respondent's costs were incurred as a result of that unreasonable pursuit, based, as I have found, on lies.

41. The Claimant also clearly did not put his mind to the question of the holiday pay and unlawful deductions complaints, on the evidence before me, despite the submission on his behalf that "after some effort" he had been unable to particularise it. There were no particulars given at any stage so far as I can see, and the complaints were not addressed in his witness statement. While I accept that withdrawal of misconceived complaints is to be desired, it is not desirable to wait until the morning of a Hearing to do so, particularly when the point has been raised by the Respondent in correspondence well in advance. I also conclude that the Respondent will not have incurred significant amounts in dealing with the issue given the lack of both particulars and evidence; but it is a further example of unreasonable conduct by the Claimant to have maintained it for as long as he did.

42. I have considered whether to take the Claimant's means into account when determining whether to impose a costs order on him. I have not been shown any evidence of his means. I note the submissions on his behalf repeated that his ability to pay will be "very limited (if any)". Even if I accept that, in the absence of any supporting evidence, I do not consider that this can excuse his conduct. Whether the Respondent is able to enforce any award, immediately or in the future, is not a matter for me to take into account when deciding whether to make an award in the first place.

43. I therefore conclude that I should make an award of costs in this matter. I have considered the Respondent's schedule of costs, which it has not been suggested is unreasonable in either scope or amount. I agree that the time spent, of just under 38 hours, is not unreasonable in dealing with the defence of this claim. Mr O'Neill's hourly rate of £165, given his 20 years' post-qualification experience, is similarly reasonable.

44. While I would not normally make any award for travel to London when the Respondent has instructed Manchester-based solicitors, I do so in this case, because it was the Claimant's error in bringing the claim in the Manchester Employment Tribunal that led to Chambers O'Neill's instructions. The amount sought is, correctly, assessed exclusive of VAT because the Respondent can recover that itself. The Claimant was repeatedly put on notice of the Respondent's intention to seek costs, and

the reason for it doing so, which he was given the opportunity to address but failed to respond, save to say he would be interested in settlement. That was never on the table.

45. Again, I consider whether the Claimant's means should be taken into account in the amount of costs to be awarded. I conclude that, absent any evidence thereof, they should not. Even if he is unable to pay now, there was no evidence before me that he would be unable to secure employment in the future to put him in funds to pay, whether in one amount or by instalments. That, it seems to me, is a matter for the parties to agree between them.

46. I therefore make an order for costs against the Claimant in the amount sought, of £6,438.41.

_____

Employment Judge Norris

Dated: 28 January 2019

Reasons sent to the parties on:

5 February 2019

For the Tribunal Office