Case No: 1304659/2015

IN THE EMPLOYMENT TRIBUNAL
SITTING AT HILL STREET, BIRMINGHAM
AT A FINAL MERITS HEARING
ON: 4 FEBRUARY 2019

Before
EMPLOYMENT JUDGE PERRY
(siting alone)

Between
MR THEO MILLWARD

Claimant

and
THE SWIMMING TEACHERS' ASSOCIATION LTD

Respondents

Appearances:
For Mr Millward: **Ms S Garner** (counsel)
For the Respondent: **Mr R Powell** (counsel)

COSTS ORDER

1 The claimant behaved unreasonably in bringing his protected disclosure complaints (s. 103A Employment Rights Act 1996 (as amended)), his breach of contract complaint generally and as to the substantive matters that gave rise to the contribution and *Polkey* arguments raised in relation to heads 1, 2 & 8 of the respondent's grounds of dismissal.

2 The claimant did not behave *vexatiously, abusively, disruptively or otherwise unreasonably* in bringing his complaints that he was unfairly dismissed, in relation to the breach of contract complaint generally, and as to the substantive matters matters that gave rise to the contribution and *Polkey* arguments raised in relation to heads 3 to 7 inclusive of the respondent's grounds for dismissal.

3 When deciding whether to exercise my discretion to award costs I considered matters in the round. I determined that the claimant shall pay to the respondent its costs on the standard basis in relation to the matters I identify in (1) above pursuant to r.76(1)(a) of the Employment Tribunal Rules of Procedure 2013 (the Rules).

4 A methodology was agreed for identifying how those costs should be calculated by the designated costs Judge. It was agreed that I as the Trial Judge identify the fraction of the total costs they made up and that be applied to the assessed costs. I assessed the fraction that the claimant pay to the respondent as 70% of its costs once assessed.

REASONS

1. This is an application by the Respondent for costs, it follows the judgment in this claim that was promulgated on the 2 March 2018 (the Judgment).

2. In the Judgment (references to which are in triangular brackets) I determined that the Claimant had been unfairly dismissed, but in the event that a fair procedure had been followed by the Respondent, he would have been dismissed in any

event by the same date and the compensatory award should be reduced by 100%, I also determined that the Claimant was guilty of culpable and blameworthy conduct and that he contributed to his dismissal. I determined that the basic and compensatory awards should in the alternative be reduced to 100%. I also determined he was not dismissed in breach of contract and that claim was also dismissed. I further held he had not made protected disclosures and his claim for unfair dismissal pursuant to section 103A of the Employment Rights Act was not well founded and was dismissed.

3. The costs application is made pursuant to rule 76(1)(a) of the 2013 Employment Tribunal Constitution & Rules of Procedure :-

> *"**When a costs order or a preparation time order may or shall be made***
>
> *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.*
>
> *(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.*
>
> *(3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if—*
>
> > *(a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and*
> >
> > *(b) the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment."*

4. The respondent if successful confirmed it sought a detailed assessment by a designated costs judge pursuant to the Civil procedure Rules.

5. I canvassed the way in which this application should be addressed. In my view the proper approach is that:-

   (i) I should first consider if the 'threshold' in r.76 for making a costs order has been satisfied,

   (ii) If so, I need to consider if I should exercise my discretion and make such an order. In so doing I am required to consider all the circumstances in doing so *"…the Tribunal may have regard to the claimant's ability to pay"* (r.84).

   (iii) If both of the above are satisfied, I must then determine what the level of those costs should be and again in assessing the same again r.84 gives me a discretion as to I have regard to the claimant's ability to pay.

6. The claimant provided no detail of his means nor did he seek, a specific enquiry having been made by me, that they be taken into account. Given in this case issue (c) will focus upon:-

   (a) if I make an award in relation to all the respondent's costs, and

(b) if so what temporal or other limits I place upon the same.

7. That being so neither party applied to give evidence. I suggested that I would address issues (a) and (b) before going on to address issue (c). That was agreed by the parties.

8. I had before me a bundle (references to which are in square brackets) and skeletons from both counsel who orally elaborated on the same. As the arguments they principally relay are set out therein I merely give a brief summary here.

9. The application is made in the following ways:-

(a) The claimant behaved vexatiously,

(b) The claimant behaved unreasonably,

(c) The claimant's behaviour following a costs warning letter from the respondent dated 11 January 2018.

10. Having heard from the parties in relation to (i) and (ii) we had reached the lunch adjournment. I indicated my concern that if I gave a fully reasoned judgment there may not be time for me to address (iii). It already being twelve months since the hearing. I suggested I would thus give a rationale to enable the parties to address me on (iii) but no more, they could use the lunch adjournment to deliberate and identify any points that on reflection required further elaboration. They were agreeable. That was with hindsight fortuitous because the hearing did not in any event conclude until 5:00pm.

The threshold.

11. Essentially the respondent argues that in bringing the claim the claimant knew what had occurred and why he had done what he had done, because that was part of his personal mindset and an honest person would not have brought the claims he did. Had he been candid, he would not have brought the claims for breach of contract and protected disclosures and not sought a substantive award for unfair dismissal. Him doing so informs the issue of unreasonableness and the exercise of my discretion. They were not the actions of someone well-intentioned but confused.

12. The claimant asserts as to protected disclosures complaint his grievances that related to the dismissal merged into them and as to the ***Polkey***, contribution and breach of contract heads the facts merge with the unfair dismissal; all the issues were live and thus any addition to the claim was nominal and not unreasonable in the absence of a determination form the Charity Commission and the disclosure from the respondent he sought as part of the investigation of what it was aware of. It was not unreasonable for him to pursue a claim he had been treated unfairly.

13. The traditional definition of unreasonable is defined albeit in the context of wasted costs in ***Ridehalgh v Horsefield*** [1] to be

> *"… conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable."*

14. The meaning of vexatious adopted in *Attorney General v Barker* [2] (more recently

approved by (CA) in *Scott v Russell* [3])

> *"19. … The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process. …"*

15. I am mindful the Claimant succeeded in relation to his claim that he was unfairly dismissed. In the absence of the respondent conceding that point and the consequent declaration he was entitled to (either in advance of or at the hearing) he was pursue the claim on that basis irrespective. The respondent made no such concession.

16. However, I found as to the re-organisation that lay at the heart of the claimant's claim that it was simply not credible for Mr Millward as the Chief Executive to maintain, as he persisted in doing before me, that the Trustees had received both legal and accounting advice on the merits of the reorganisation when the documents expressly stated otherwise <204 & 307.3>.

17. I found given the advice the respondent and Mr Millward had received and the conflict of interest Mr Millward was in, as one who stood to personally gain from the re-organisation, that when challenges were made about the adequacy of the consideration him refuting those matters was not a mistaken one but instead they were deliberate and not one a Chief Executive would reasonably have made <210>. I found he misled the trustees about Mr Tanfield's view on the re-organisation and also when and if the re-organisation would go ahead <307.1>

18. Those matters (amongst many, I do not intend to list them all here) go to the substance of whether he was guilty of misconduct and if it was reasonable for him to pursue a substantive (as opposed to nominal) claim for declaratory relief.

19. I also found he was prepared to make assertions eg. breach of the Trustee Act when he had not read that Act and as Chief Executive he should reasonably be expected to have known or found out what those duties were before making that statement. I found that his belief was not reasonable <220>. I found he was prepared to say whatever he felt he needed to be said in the circumstances to suit his case <308>. I made numerous findings about his credibility <204 & 307>. Those matters go to the unreasonableness with which he conducted the litigation and events leading to it.

20. As to the protected disclosure complaints I found the claimant did not hold a reasonable belief in the truth of the assertion that underlay the first alleged disclosure <205> and it was not genuinely held <212>. I found that the dominant purpose of Mr Millward making the first <213> and second <224> alleged disclosures was to defend the charges laid against him. I find that also was unreasonable.

21. When considering whether the pursuit of a claim is misconceived the Tribunal has to consider whether the claimant had reasonable grounds for thinking s/he was right [4]. When assessing if the threshold tests are met, I am reminded by Mr Powell that the tribunal should not apply the standards of a professional representative to a lay person (who is likely to lack the objectivity and knowledge of law and practice of a professional legal adviser) [5].

22. Whilst I note at the trial the claimant was unrepresented, he was represented before me today and has been at various points throughout this claim. He makes

no assertion that he could not afford to obtain legal advice.

23. In my judgment the claimant knew or should have known as the chief executive of a charity and educated man that what he did was misconduct that entitled the respondent to dismiss him. His conduct in pursuing the parts of claim that flow from that, in my judgment do "*not permit a reasonable explanation"*

24. Further, his conduct in pursuing the claim in the ways I describe above goes beyond a mere *"unsuccessful result or because other more cautious legal representatives would have acted differently.".* As a result, I conclude the claimant behaved unreasonably.

25. The parts of the claim to which that determination relates are the substantive claims for unfair dismissal that he failed to succeed upon (heads, 1, 2 and 8 of the Respondents grounds for dismissal), the breach of contract, ***Polkey*** and contribution awards.

26. Given my findings as to unreasonableness it follows that that the claimant should have known that the claim had little or no basis in law and thus its effect would be to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant.

27. Mr Powell orally accepted that any finding of vexatious in this case, requires as a prerequisite a finding of unreasonableness and that here vexatious conduct requires something more, *"an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process"*. He argues that if found that is an aggravating factor that will inform (but not determine) the exercise of my discretion at stage (ii).

28. This is argued on the basis the respondent asserts the claimant brought the claim for an ulterior motive and as a tactic. That however was not expressly put to him or if it was, I was not referred to the same and any findings to that effect.

29. In the absence of those specific findings in my judgment whilst the actions of the claimant came very close to vexatious conduct they were more akin to unreasonableness. A substantial factor in my forming that view is that the claimant was unfairly dismissed and was thus entitled to entitled to a declaration, the absence of the specific findings I refer to above.

30. Accordingly, I determine that the Claimant behaved unreasonably, but not vexatiously (in the way it was argued by the respondent) in bringing the complaints for

    (a) protective disclosure under Section 103A,

    (b) breach of contract and

    (c) the substantive matters that gave rise to the contribution and ***Polkey*** arguments, those three heads namely, breach of contract, contribution and ***Polkey*** all emanate out the three substantive heads, 1, 2 and 8 of the Respondents grounds for dismissal.

31. I determined that the Claimant did not behave unreasonably (or vexatiously in the way it was argued by the respondent)

    (a) in bringing his claim that he was unfairly dismissed, and

    (b) in relation to the breach of contract complaints, contribution and ***Polkey*** arguments raised in relation to Heads 3 – 7 inclusive

The respondent's costs warning letter

32. Having identified that the threshold was met, I sought to identify with the parties if

the alternative argument advanced by the Respondent, namely in relation to the respondent's solicitor's letter of 11 January 2018 [134-136] (the *Costs Letter*) required further analysis, it transpires subsequently that both parties did so.

33. In my judgment the *Costs Letter* sent a few weeks before trial was merely a warning to a litigant in person that his claim had no prospects of success and to act as a costs warning.

34. The *Costs Letter* made no concession in relation to the elements the respondent failed upon at trial. Had it done so and had the claimant then pursued those elements in my judgment it may have entitled the respondent to pursue costs in relation to those heads conceded. It did not. In my judgment it adds little to where the threshold was met.

My discretion

35. In the Tribunal the power to award costs is a discretionary one and the tribunal needs to be satisfied that it would be appropriate to make an award of costs [6]. In *McPherson v BNP Paribas* [7] Mummery LJ summarised the general position on costs, albeit in relation to a predecessor provision to rule 76.

> *"25. Although Employment Tribunals are under a duty to consider making an order for costs in the circumstances specified … , in practice they do not normally make orders for costs against unsuccessful applicants. Their power to make costs orders is not only more restricted than the power of the ordinary courts under the Civil Procedure Rules, it has also for long been generally accepted that the costs regime in ordinary litigation does not fit the particular function and special procedures of Employment Tribunals."*

36. As to the exercise of the discretion in *Barnsley Metropolitan Borough Council v Yerrakalva* [8] Mummery LJ clarified some confusion that had emanated from his earlier Judgment in *McPherson* stating this:-

> *"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. ..."*

37. I remind myself that costs do not follow the event [9], and that I am required to take all matters in the round including the nature, gravity and effect of the conduct. Having expressly clarified with Miss Garner if the Claimant wished me to take into his account his means, he chose not to ask me to do so. The *Costs Letter* in my view takes matters little further forward in that it was drawn as a warning to the claimant as a layperson and does not substantively engage with the respondent's failures, although I should record again, the claimant has had access to advice.

38. In my judgment the claimant's behaviour was not merely a pursual of allied or associated points to his unfair dismissal claim as Ms Garner suggested but instead went beyond that; the claimant pursued claims that for the reasons I state above, he knew or should have known constituted misconduct that entitled the respondent to dismiss him.

39. Whilst costs are also not intended to be punitive for the reasons I gave above in pursuing the parts of the claim that I refer to at (30) the claimant's conduct went beyond a mere *"unsuccessful result or because other more cautious legal representatives would have acted differently".*

40. I found amongst other matters that he pursued the first protected disclosure complaint without a reasonable belief in the truth of the assertion that underlay it and made the first and second alleged disclosures to defend the charges laid against him. Further, I should record he was prepared to say whatever he felt he

needed to be said in the circumstances to suit his case and I made numerous adverse findings about his credibility.

41. That behaviour goes beyond mere unreasonable conduct and in my judgment viewed as a whole warrants the exercise of my discretion to award costs, where I determined above, the threshold has been met.

Assessment

42. Having made those determinations, pursuant to Tribunal Rule 78(1)(b) the respondent's costs will be the subject of a detailed assessment in accordance with the Civil Procedure Rules. Neither party having sought to argue that assessment be undertaken on the indemnity basis, the assessment shall be undertaken on the standard basis.

43. I thus sought representations on what directions were required and what if any limits be placed on those costs for that assessment to be undertaken. Those directions were substantively agreed and form a separate order.

44. As to the extent of the costs order, I canvassed with the parties that what was the most appropriate way for me to reflect my determinations above. Given the assessment will be undertaken by a Judge other than myself and that the detailed assessment would necessarily have required the costs judge to have identified what part of the hearing involved elements on which the respondent succeeded and those it did not, I suggested that would be a very difficult exercise for the designated costs judge when s/he has not heard the claim. Instead I suggested that I should assess the fraction of the costs that the matters that the Respondent has succeeded upon make-up of the whole and that fraction can be applied once the detailed assessment has been conducted. That would have the benefit of avoiding many of the problems associated with "time" orders or the difficulties and work that will be entailed in identifying which piece of work claimed relates to which head.

45. I gave the parties some time to consider how they wished to proceed. I reminded them, bearing in mind the time that I have to undertake that exercise that I would be constrained to do that in the same way as a summary assessment, namely that would not be a scientific exercise but more based upon my best judgment if the level was correct, taking into account matters that are material, excluding matters that are immaterial and trying to come to a decision that a reasonable decision-maker would come to based on the information that is available to me.

46. Both parties indicated that they were agreeable to the course I suggested.

47. Prior to doing so I indicted one methodology and a very rough one, was to look at how the conclusions in the Judgment addressed those matters. Looking at matters in that way the issues on which the claimant was successful approached just over 20% of the totality. I heard from both parties in that regard.

48. Miss Garner argues that the fraction the heads on which the claimant was successful should be closer to 90% (and thus the respondent should receive 10% of its costs). That at least in part emanates from the fact that the Claimant has principally pursued this as a claim of unfair dismissal.

49. I find that that is not so. This claim was pursued on other matters and substantial parts of it were devoted to those other matters such that a 10% award in favour of the respondent does not accurately reflect the actuality.

50. The partly explains why fraction I refer to above (20%) may at first sight be an odd outcome; much of the evidence and argument I heard focused on the lead up to and what I referred to in my Reasons as the re-organisation, and events giving rise to the disciplinary & appeal process that stemmed from that.

51. Having reflected on the case as a whole I consider, based both upon my recollection and my review of the file, that the matters on which the claimant was successful is not adequately reflected in a mere 20% of the costs incurred, at least in the way that they were put before me at trial. I consider that that is the minimum fraction of the claims on which the Claimant has succeeded.

52. Whilst the investigation, disciplinary and appeal and their failures played more than 20% of the hearing I cannot say with any certainty having considered the file that that was half as much again, that is, it equated to 30% (i.e. the claimant would pay 70% of the respondent's costs). The reason for that is as Mr Powell stated, whilst the respondent did not concede those matters, it directed his focus on the protected disclosures and substance of the conduct matters.

53. In my judgment, the initial analysis that I undertook is more or less correct, in terms of order of magnitude. The 20%, as I say is a minimum, and I consider there are other elements in the conclusions that relate to criticism of the Respondent where the claimant did not succeed, and which informed those unsuccessful elements.

54. Any such assessment is at best a summary one, but short of me carrying out a detailed assessment (and I am not one of the designated costs judges) I conclude the best that can be done in the circumstances is that the Claimant should pay 70% of the respondent's costs once assessed on the standard basis.

Employment Judge Perry
12 February 2019

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[1] *[1994] Ch 205*
[2] *[2000] EWHC 453*
[3] *[2013] EWCA Civ 1432 at [30]*
[4] *Scott v Inland Revenue [2004] EWCA Civ 400 [46]*
[5] *AQ Ltd v Holden [2012] UKEAT/0021/12 [32]*
[6] *Ayoola v St Christopher's Fellowship [2014] ICR D37 EAT*
[7] *[2004] ICR 1398 (CA)*
[8] *[2011] EWCA Civ 1255*
[9] *Nicolson Highlandwear Ltd v Nicolson [2010] IRLR 859,* [2010] UKEAT/0058/09