EMPLOYMENT TRIBUNALS

Claimant: Mr Mark Grogan

Respondent: The Council of the Borough and County of the town of Poole

Heard at: Southampton On: 12 December 2018

Before: Employment Judge Gardiner

Representation:

Claimant: In person
Respondent: Mr Daniel Piddington, Counsel

JUDGMENT on costs having been sent to the parties on 18 January 2019, the Claimant has emailed the Tribunal on 4 February 2019 challenging the costs decision and this has been treated as a request for written reasons. Accordingly, written reasons are provided as follows.

REASONS

1. This is an application for costs made by the Respondent. At the conclusion of a two-day hearing heard in July 2018, I dismissed the Claimant's unfair dismissal claim for reasons given at the time. Subsequently the parties were sent written reasons for the decision.

2. The Respondent's application for costs is made under Rule 76(1)(a) and (b) of the ET Rules 2013. In summary, the Respondent argues that it would be appropriate to make a costs order here on the following two bases :

   (1) That the claim had no reasonable prospect of success.
   (2) That the Claimant acted vexatiously or otherwise unreasonably in the way that the claim was conducted.

3. In support of the written application, Daniel Piddington, Counsel, has prepared a skeleton argument. That refers to a number of legal authorities, to which I have had regard, and cross-refers to a bundle of documents. At the outset of the hearing it was agreed that this bundle contains the documents relevant to the costs application. In addition, I was referred to the Claimant's Schedule of Loss in the original hearing bundle. The Claimant gave oral evidence and was cross-examined. Both parties made oral closing submissions.

4. The relevant sections of the ET Rules 2013 are as follows :

> **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.
>
> **The amount of a costs order**
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> **78.**—(1) A costs order may—
>
> (a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;
>
> (b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles; or, in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993, or by an Employment Judge applying the same principles;
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> (c) order the paying party to pay the receiving party a specified amount as reimbursement of all or part of a Tribunal fee paid by the receiving party;
>
> (d) order the paying party to pay another party or a witness, as appropriate, a specified amount in respect of necessary and reasonably incurred expenses (of the kind described in rule 75(1)(c)); or
>
> (e) if the paying party and the receiving party agree as to the amount payable, be made in that amount.
>
> (2) Where the costs order includes an amount in respect of fees charged by a lay representative, for the purposes of the calculation of the order, the hourly rate applicable for the fees of the lay representative shall be no higher than the rate under rule 79(2).
>
> (3) For the avoidance of doubt, the amount of a costs order under sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000.
>
> **Ability to pay**
>
> **84.** In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.

5. The issues that the Tribunal must consider are as follows :

   (1) Does ET have jurisdiction to make a costs order ? In order to have the jurisdiction to make a costs order against the Claimant, the Tribunal must find that the case had no reasonable prospect of success, or that the Claimant has acted unreasonably in the way in which the case has been conducted.

   (2) If so, then should the Tribunal exercise its discretion to make a costs order ?

   (3) If so, then how much should the Claimant be ordered to pay ?

(1) Jurisdiction

No reasonable prospect of success

6. In my judgment this was a claim that never had reasonable prospects of success. It was a constructive unfair dismissal claim. The Claimant needed to show that there was a fundamental breach of contract entitling him to resign and that he had resigned in response to the breach, rather than for some other reason. I have found that he resigned because he did not want to give notice to his new employers, which he would have had to do in order to return to work for the Council. He did not want to cut verges and shrub borders, as he reiterated in his closing submissions today.

7. In addition, there was no merit in the three respects in which he claimed that there was a fundamental breach of his contract. His job description specified that he could be rotated to other areas to take a lead responsibility for those areas. It did not restrict him to the role at Poole Park. He ought to have checked this document before alleging that it was a fundamental breach of his employment contract to rotate him to another team away from Poole Park. It was fanciful for him to suggest that, by way of outcome to the appeal, an elected Counsellor was prescribing that he would return to his position at Poole Park, when this was clearly an operational matter that would not be considered by an elected Counsellor. Whilst he alleged a breach of confidentiality in what was communicated to those working at Poole Park about the outcome of the investigation into his conduct, this was not a matter he had chosen to include in his resignation letter. Nor did he call any oral evidence as to what was said in that conversation, given that he was not present himself. Therefore, aside from a witness statement from someone who did not give oral evidence before the Tribunal, there was no evidence to contradict what the Respondent's witness was saying.

8. If the lack of merit was not clear to him at the outset, then this ought to have been appreciated on receipt of a very full Grounds of Resistance. Thereafter he was warned about the lack of merit in without prejudice correspondence, with reasons, and encouraged to seek advice. Whilst, on the balance of probabilities, he did not receive any legal advice from his household insurers, he did seek advice from the Citizens Advice Bureau.

9. Mr Grogan says that he was encouraged to continue with the claim because at no point did the Employment Tribunal, and specifically, any Employment Judge, state that it lacked merit and was bound to fail. However, the Respondent had never applied to strike the claim out on the grounds that it lacked merit, and therefore the Tribunal had never had to consider whether there was any merit in the claim at any point before the Final Hearing. The Tribunal's silence as to the merits is not a plausible basis for Mr Grogan to allege that the Tribunal encouraged him to continue his case.

Unreasonable conduct

10. In the following respects, I consider that there has been unreasonable conduct on the part of the Claimant :

> (1) Failing to comply with the terms of the Tribunal's orders as to exchange of witness statements. The original directions order was clear that "the claimant and the respondent shall prepare full written statements of the evidence that they and their witnesses intend to give at the hearing" and this was to be done by 27 April 2018. The Order went on to specify the format of the witness statements. It was clear from the wording of the Order that the Claimant was to prepare a statement setting out his own evidence. He could not just rely on the details in his claim form. He failed to do so, although did serve some documents which he claimed were his witness statements. This default led to further correspondence between the Respondent's solicitor and the Claimant in which Mr Richings specified the appropriate format for the witness statement and also referred the Claimant to the Presidential Guidance. This still failed to produce a compliant witness statement. As a result, the Respondent applied to the Tribunal. On 8 June 2018, EJ Kolanko wrote that the Orders made by the Tribunal are mandatory and that witness statements need to be exchanged by return. The Claimant still failed to comply with this further direction. The matter came before EJ O'Rourke on 20 July 2018, who directed that the Claimant should serve a witness statement in appropriate form by 23 July 2018. He specified the format for the witness statement and warned the Claimant that if he did not comply then any further non-compliance could result in the claim being struck out. Although the Claimant did serve a witness statement on 23 July 2018, this was not

in the format required. It was an index of documents and statements by others. It prompted the Respondent to write to the ET asking for the claim to be struck out. Even at that point no compliant witness statement was before the Tribunal. That application was heard on the first morning of the hearing. Although the claim was not struck out, the failure of the Respondent's strike out application does not excuse or explain why the Claimant repeatedly failed to comply with what he was asked to do by the Tribunal.

(2) Serving documents in a format that was unreasonable and unacceptable. On the balance of probabilities, the documents served by the Claimant on 23 July 2018 at the Respondent's offices were soiled with mucus and the envelope contained a blood stain. I find that this was the case for the following reasons :

(a) There is a contemporaneous letter from the Respondent's solicitor to the Employment Tribunal, copied to the Claimant, in which he complained about the state of the envelope and the documents within the envelope. That enclosed photographs about the state of the envelope and the documents inside the envelope;

(b) The documents were inserted by the Claimant into the envelope himself, and were hand delivered by the Claimant to the Respondent's offices. There is limited opportunity for the mucus or the blood to have arrived on the documents by someone else before they arrived at their destination;

(c) Although the Claimant now says that he vigorously disputes this allegation, he did not do so at the time. There was no response from him to this contention.

(3) Acting in a manner which was at times abusive in his correspondence with the Respondent's solicitor : on 27 April 2018 he accused Mr Richings of trying to bully him with threats of court costs – a point repeated on 24 July 2018; on 5 July 2018, he accused Mr Richings of intending to stand in front of the Judge and lie on behalf of Mr Webber and Ms Comper, which he considered a contempt of court.

11. For these cumulative reasons, I consider that the Claimant's conduct has been unreasonable.

(2) Discretion

12. Secondly I turn to whether to exercise the discretion. There is every reason to exercise the discretion here. Mr Grogan was repeatedly warned that the Respondent would be seeking a costs order in the event that his claim failed. The Respondent gave him two opportunities to withdraw the claim to avoid a costs application – firstly with a drop hands offer and secondly with an offer to settle in the sum of £3000. Both were rejected, and no counter offer made.

(3) Amount of costs

13. Finally I consider the amount of costs. The amount claimed by the Respondent is just over £8300, although the total amount of costs incurred is just over £12,500 including VAT. I have had regard to the Claimant's means. He has equity of around £75,000 in his property. He has been earning a full time wage since he resigned from his position with the Council, which gives him monthly disposable income of just under £1300. Although he has significant overheads, he does not have any dependent family for whom he needs to provide financially.

14. I recognise that the Respondent has chosen to limit its costs to 2/3 of the amount which it has incurred. In all the circumstances, in the exercise of my discretion, I consider it would be appropriate to make a costs order of £6,500 inclusive of VAT. In so assessing the amount claimed, I have regard to the fact that there would have been inevitable costs in setting out the Respondent's position in the ET3; that the offers from the Respondent came some months after the proceedings were started; and that Mr Richings attended the hearing alongside Counsel when he could have attended the hearing by himself.

Employment Judge Gardiner

Date: 14th February 2019