EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr Andrew Day		Compton Fundraising Consultants Limited

HELD AT Birmingham **ON** 27th November 2018

EMPLOYMENT JUDGE Choudry

Representation:

For the claimant: Mr P Starcevic - Counsel

For the respondent: Mr J Meichen - Counsel

RESERVED JUDGMENT ON COSTS

The claimant's application for costs is refused.

REASONS

Background

1. The claimant brought a claim for unfair dismissal following the termination of his contract of employment by the respondent on 23rd November 2016 by reason of redundancy.

2. By an oral judgment given to the parties on 28th September 2017 and a written judgment dated 30th October 2017 the claimant

succeeded in his claim for unfair dismissal. The matter was listed for a remedy hearing before me on 31st October 2017.

3. Following a remedy judgment dated 28th January 2018 which was sent to the parties on 29th January 2018, on 23rd February 2018 the claimant's solicitors made an application for a Costs Order pursuant to rule 76 (1) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("Employment Tribunal Rules"). The claimant further invited the Tribunal to determine the amount of costs by way of detailed assessment pursuant to rule 78 of the Employment Tribunal Rules. By an email dated 6th March 2018 the respondent objected to the claimant's application. As such the matter was listed before me today.

Evidence and documents in relation to costs

4. I was presented with an agreed bundle of documents consisting of 57 pages, a skeleton argument on behalf of the claimant and a skeleton argument and accompanying authorities for the respondent. I heard no witness evidence. Instead, counsel for both parties led me through their very helpful skeletons arguments.

Issues

5. The issues for me to determine were :

5.1 Has the respondent acted vexatiously, abusively, disruptively or otherwise unreasonably in the way that the proceeding (or part) have been conducted?

5.2 If so, should the employment tribunal exercise its discretion to make a costs order?

5.3 If so, in what amount ?

Applicable law

6. Rule 76(1) of the Employment Tribunal Rules provides that a tribunal may make a costs order and shall consider whether to do so where it considers that:

"(a) a party or that party's representative) has acted vexatiously, abusively, distruptively or otherwise unreasonably in the either bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
(b) any claim or response has no reasonable prospects of success;…

7. Rule 74 defines costs as any *"fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with attendance at a Tribunal hearing)".*

8. Rule 78 (1) provides that a costs order may :

"(a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000 in respect of 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….."

9. Rule 84 provides:

"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…ability to pay.

Submissions on behalf of the claimant

10. Mr Starcevic, for the claimant, indicated that he was relying on Rule 76(1)(a). Mr Starcevic also indicated that if the claimant's application for costs was successful then he would be seeking detailed assessment in the county court.

11. Mr Starcevic reminded me that the issue of costs was a two stage process as Mummery LJ indicated in **Khan –v- Kirklees [2007] EWCA Civ 1342** :

"*it is apparent from the regulations themselves, and from the authorities on it, that a two stage test is applied. The first poses the question, broadly: was the conduct of the party against whom costs is sought unreasonable? The second stage of the test is: if it is unreasonable, should the Employment Tribunal exercise its discretion to make a costs order, having regard to all the relevant circumstances?"*

12. Mr Starcevic indicated that if I was satisfied that any of the threshold circumstances in Rule 76(1) were satisfied then I was obliged to consider making a costs order. Furthermore, that the making of a costs order was discretionary and not obligatory and could only be made if the Tribunal considered it appropriate to do so.

13. As Mr Starcevic pointed out there is no prescription as to what is or is not vexatious, abusive, disruptive or otherwise unreasonable conduct.

Furthermore, lying or mounting a deliberately false case was not necessarily such conduct. As Rimmer LJ indicated in **Arrowsmith-v-Nottingham Trent [2011] EWCA Civ 797:**

"Where, in some cases, a central allegation is found to be a lie, that may support an application for costs, but it does not mean that, on every occasion that a claimant fails to establish a central plank of the claim, a award of costs must follow".

14. I was also referred to the wise words of the Employment Appeal Tribunal in the case of **ET Marler –v- Robertson [1974] ICR 72** *:*

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

15. I was also reminded by Mr Starcevic that in exercising my discretion as to whether or not to make a costs order the Tribunal should have regard to all the relevant circumstances as per **Khan-v- Kirklees [2007] EWCA 1324**. Furthermore, that I should have regard to the nature, gravity and effect of any unreasonable conduct. Finally, that the threshold conduct related to the litigation and not the conduct out of which the employment dispute arose.

16. Mr Starcevic submitted that the claimant's case from the beginning was that the respondent's redundancy exercise was a sham, not genuine and a device to oust him out of the business. I was referred to paragraphs 14, 16 and 24 of the liability judgment and my findings at paragraph 24 where I indicated that :

"However, I am satisfied that when those negotiations broke down the respondent engineered a redundancy situation in order to procure the removal of the claimant and that the redundancy process was predetermined".

17. Mr Starcevic argued that my unequivocal finding that the redundancy was a sham meant that the case put forward by the respondent in the Response was also a sham and the evidence given by Mrs Sue Linfield to the contrary was not telling the whole truth according to the statement of truth in her statement and her oath when giving evidence. In effect, it was submitted, that Mrs Linfield, a shareholder and senior employee of the respondent had told a lie. Furthermore, that Mrs Linfield and the other controlling shareholders must have decided upon and instructed the respondent's lawyers to defend the claim on a false basis that there was a genuine redundancy situation. It was submitted on behalf of the claimant that presenting a defence on a known false basis amounted to acting abusively, disruptively and unreasonably in the <u>whole</u> way in which proceedings were conducted. Such conduct wasted the claimant's money and the Tribunal's resources, affected the whole of the proceedings from start to finish and therefore, the respondent, it was

submitted, should be ordered to pay the whole of claimant's costs. Furthermore, Mr Starcevic argued that given the fact that there was an issue of credibility costs should be awarded on an indemnity basis.

Submissions on behalf of the respondent

12. Mr Meichen on behalf of the respondent relied on the respondent's initial response to the claimant's application for costs (pages 28 to 32 of the bundle).

13. In the respondent's response the Tribunal was reminded that the costs awards were intended to be compensatory and not punitive (**Lodwick –v- Southwark LBC [2004] IRLR 554**) which meant that costs awarded should be proportionate to the loss caused by the unreasonable conduct (**Barnsley MBC –v- Terrakalva [2012] IRLR 78**). I was also reminded that there were no rules as to what constituted unreasonable conduct (**Arrowsmith –v- Nottingham Trent University [2012] ICR 159**) and that each case depended on its facts. As such, it was a question of fact for the Tribunal to determine whether there had been unreasonable conduct.

14. I was also reminded that the Court of Appeal emphasised in Arrowsmith that there was no rule that if a party had told untruths as part of its case this meant there had been unreasonable conduct. Similarly, in **Kapoor –v- Governing Body of Barnhill Community School UKEAT/0352/13** the EAT confirmed that giving false evidence was not automatically unreasonable conduct warranting a costs order.

15. Mr Meichen submitted that the application for costs was misconceived and should not have been made as the Tribunal rules make it clear that costs do not follow the event in an employment tribunal. It was further submitted that the claimant's application was premised fundamentally on the basis that as the Tribunal had preferred his case over that of the respondent, he should be awarded costs. This was simply wrong – as the claimant's case was preferred he was entitled to compensation which had been paid in the sum of £91,895. However, it did not follow that because his case was preferred he was also entitled to his costs.

16. Furthermore, Mr Meichen argued that the case had been hard fought out and at the end the Tribunal had made its findings on a balance of probabilities. He argued that the claimant's application was erroneous and this was illustrated by the fact that at the remedy stage the claimant had made an application for reinstatement when he knew in advance the respondent's position that reinstatement was not practicable. The Tribunal had agreed with the respondent on this point. However, it did not follow that the respondent was entitled to its costs in defending that aspect of the remedy hearing.

17. Mr Meichen also argued that the respondent did not make any findings of dishonesty against Mrs Linfield and, therefore, the Tribunal was being

invited to make new findings of fact at the costs stage. In any event, the fact that the Tribunal did not find that the respondent did not act fairly and that there was no genuine redundancy situation did not mean that Mrs Linfield came to the Tribunal and lied. In any event, even the Tribunal had found that the respondent had lied it did not, automatically, constitute unreasonable conduct warranting the making of a costs order. I was also pointed to the Tribunal that submissions made by Mr O'Brien, the claimant's counsel for the liability and remedy hearings, the claimant's previous counsel at the end of the liability hearing no suggestion was made that Mrs Linfield was a liar nor were any findings of dishonesty sought. Finally, no costs warning was issued in the case, no application for a strike out nor a deposit order. This reflected the fact that the case was one which could only be determined after the evidence could be filly heard any tested. As such, it was not unreasonable for either party to proceed to hearing. I was invite to dismiss the application.

Conclusions

18. In reaching my conclusions I have considered the liability and remedy judgments in this case, the oral and written submissions made on behalf of both parties (including the cases to which I have been referred) and the costs bundle.

19. The first issue I need to consider is whether the respondent has acted vexatiously, abusively, disruptively or otherwise unreasonably. In doing so I must deal with the issue of whether Mrs Linfield lied or was not telling the whole truth according to the statement of truth in signing her witness statement or her oath. I do not accept this submission of Mr Starcevic. In neither the liability nor remedy judgements did I make any finding that Mrs Linfield lied or did not tell the whole truth. There was no finding of dishonesty against Mrs Linfield and it would be inappropriate for such an inference to be made from the findings of the liability and remedy judgments.

20. The situation was, as described by Mr Meichen, namely that the case had been hard fought out and at the end the Tribunal had made its findings on a balance of probabilities. The case was not clear cut and certainly not one which would have been appropriate for a deposit order (nor was, quite rightly, any application for a deposit order made). The evidence clearly needed to be tested and was not straightforward. Indeed, my decision in relation to liability was reserved as I had wanted time to carefully consider the evidence before making my decision. The fact, that the Tribunal ultimately found that the redundancy situation was engineered so as to procure the claimant's selection is not sufficient to amount to vexatious, abusive, disruptive or otherwise unreasonable conduct. I accept the submission of Mr Meichen that the fact that the claimant has won his claim does not mean he is entitled to his costs.

21. I am not satisfied that the respondent has acted vexatiously, abusively, disruptive or otherwise unreasonably for the reasons set out above.

22. For all of those reasons, the claimant's application for costs is therefore refused.

Signed by Employment Judge Choudry
18th February 2019