EMPLOYMENT TRIBUNALS

Claimant: Mr M Warfield

Respondent: GKN Aerospace Services Ltd

JUDGMENT

The Respondent's application for costs is dismissed.

REASONS

Relevant background

1. By a Claim Form dated 10 March 2018, the Claimant brought one complaint of constructive unfair dismissal.

2. He alleged that he been asked to undertake a stressful management role for which he did receive a pay increase which had been promised. He therefore informed his manager that he would relinquish the position and duly did so in November 2015 and dropped down to became an Inspector, working alongside those who he had previously managed. Because he found that uncomfortable, he sought alternative roles without success. He alleged that his manager had wanted to hold on to him because of his usefulness and skills. In 2017, he and other Inspectors raised a group grievance about pay and conditions and he was then informed that his skills and behaviours were less than satisfactory and that he ought to expect a pay freeze. He then resigned with effect from 18 December 2017.

3. The Respondent provided its response on 11 April 2018; it alleged that the Inspectors' group grievance had led to a formal hearing which was attended by the Head of Engineering and representatives of the Inspectors, including a full-time convener of UNITE. In response to the complaint about pay anomalies, the Respondent offered to carry out a comparative evaluation of skills and it was that exercise which resulted in the Claimant and 3 others being assessed as having been in receipt of a higher salary than their skills merited.

4. The Claim was initially listed for hearing over 2 days in August 2018 but it was relisted for 3 days in October 2018 when it became clear how many witnesses the Respondent intended to call. Due to a lack of judicial resources, the tribunal had to vacate the hearing in October and it was relisted to take place between 21 and 23 January 2019.

5. On 18 January, the Claimant wrote to the Respondent and the Tribunal as follows;

> "*Due to the nature of this case and the time that has elapsed, I feel that I no longer wish to pursue this matter. I would like to thank everyone for their time and patience."*

That email was sent 10 minutes before the end of the last working day before the hearing was due to start.

6. A Judgment was issued on 29 January and sent to the parties on 2 February in which the claim was dismissed upon withdrawal. The Respondent had appeared to have been initially accepting of the position in its initial email of 18 January but, on 28 February, an application for costs was made. The Claimant's response was sought and he provided his comments on 18 March and 4 April.

7. The Respondent requested that the matter be dealt with on paper. The Claimant has not suggested otherwise.

Arguments

8. The Respondent has asserted that the late withdrawal of the claim constituted unreasonable conduct within the meaning of rule 76 (1)(a) of the Tribunal's rules. It complains that the Claimant never indicated an intention to withdraw his claim either before the August hearing dates or those in October 2018.

9. On 17 January 2019, the Claimant wrote to the Respondent's representative and stated that the complaint was never about financial reward. He expressed disappointment that the Respondent had never sought to arbitrate the matter (paragraph 10 of the Respondent's application of 28 February). The Respondent considered that that was disingenuous and '*incomprehensible*' given that the Claimant had never moved to discuss settlement or arbitration himself and the fact that there was no chance to do so on the penultimate working day before the hearing.

10. Further, the Respondent has asserted that the Claimant provided no good reason for the withdrawal of his claim. It considers the reality of the situation was "*that the Claimant presented a claim which he knew possessed little or no reasonable prospect of success, and after realising that the Respondent had no interest in settlement, decided to withdraw at the latest possible stage to avoid attendance at trial*." (Paragraph 15 of the application).

11. In response, on 18 March, the Claimant expressed surprise that he was being pursued for costs. He thought that his withdrawal of the claim would have been the end of the matter. He stated that he had withdrawn his complaint "*for health reasons*", although they were not explained. On 4 April, the Claimant further stated that he had not been able to obtain legal representation due to his limited finances. He repeated his assertion that he had decided not to pursue the matter because of his health.

Relevant principles

12. The question which arose here was whether the Claimant's late withdrawal and failure to go through with his claim was '*unreasonable conduct…in the way that proceedings had been conducted*' as defined by rule 76 (1)(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

13. Rule 76 (1) imposed a two-stage test: first, a tribunal had to consider whether the party's conduct fell within the rule 76 (1)(a). If so, had to go on to consider whether it was appropriate to exercise its discretion in favour of awarding costs against that party. As the Court of Appeal reiterated in *Yerrakalva-v-Barnsley Metropolitan Borough Council* [2012] ICR 420, CA, costs in the employment tribunal are still the exception rather than the rule. The tribunal's power to order costs is more sparingly exercised and is more circumscribed than that of the ordinary courts, where the general rule is that costs follow the event and the unsuccessful litigant normally has to foot the legal bill for the litigation. Further, in *AQ Ltd-v-Holden* [2012] IRLR 648, the EAT stated that justice requires that tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life. It was recognised that lay people are likely to lack the objectivity and knowledge of law and practice brought by a professional adviser. A costs order was restorative, not punitive (*Lodwick-v-Southwark London BC* [2004] EWCA Civ 306) and an order ought not to be made simply because a claimant gets something wrong.

Conclusions

14. This did not appear to have been a wholly unmeritorious claim. If it had been, one might reasonably have expected an application under rules 37 and/or 39 to have been made by the Respondent.

15. There are situations in which it can be sensed from the facts that a claimant simply taxes an ex-employer with tribunal proceedings in a vexatious and vindictive manner, with no real intention of running the proceedings to a conclusion. There was nothing within the features of this case which enabled me to draw that inference about this Claimant. Parties' feelings about their claims often change with time. As the Claimant faced a 3 day hearing, it could be understood why his own feelings might have changed, particularly given the fact that he had moved on and obtained other work. It was unfortunate that he came to his decision at the 11th hour. His repeated reference to health issues may have contributed to that decision.

16. I did not consider that the Respondent's complaint within paragraph 14 (iii) of its application was a good one; it was not 'incomprehensible' to consider that parties will not come to terms in the last days, hours or minutes before a hearing starts. That is often the case. The immediacy of the hearing often has a significant effect upon parties and their approach to their litigation.

17. It was unfortunate that the Claimant failed to provide more details of the health concerns which fed into his decision not to continue with the litigation. Nevertheless, there was no reason to consider that what he said it that respect, in two emails, was wrong.

18. The case of *Baah-v-London Voluntary Sector Training Consortium* UKEAT/1109/97 did not dictate that every case involving a late withdrawal ought to result in a costs award being made. Having considered all of the circumstances of this case, I did not consider that it could properly have been said that the Claimant had behaved unreasonably under rule 76 (1)(a) in the absence of any evidence of bad faith or culpable wrongdoing. Even if I have formed a contrary view, I would not have been inclined to make a costs award in any event, essentially for the same reasons.

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Employment Judge Livesey

Date: 12 April 2019