EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr K Farrell	**v**	Docsinnovent Ltd

Heard at: Reading **On:** 8 February 2019

Before: Employment Judge Gumbiti-Zimuto (sitting alone)

Appearances
For the Claimant: Mr T Gillie (Counsel)
For the Respondent: Mrs S Ashiru (Counsel)

JUDGMENT
ON AN APPLICATION FOR COSTS

The application for costs is dismissed

REASONS

1. The Respondent makes an application for costs against the Claimant. The Respondent seeks an order for the costs of defending the claims to be paid by the Claimant. The Respondent relies on rule 76 of the Employment Tribunals Rules of Procedure which provides that:

> (1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that-
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> (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 prospects of success; …
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> (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.

2. In its application dated 14 September 2017, the Respondent's costs (inclusive of Counsel's fees) amounted to £77,408 and was seeking a

detailed assessment of those costs. In the alternative, the Respondent sought an order for costs in such sum as the Tribunal considers just and equitable to adequately compensate the Respondent in respect of the costs reasonably and necessarily incurred as a direct result of the Claimant's conduct of the proceedings. The Respondent sought the reasonably incurred expenses in respect of attendance of its witnesses and the costs in respect of the costs application itself.

3. The Respondent contends that the Claimant's complaint of unfair dismissal had no reasonable prospect of success. The Respondent says that the final list of breaches that the Claimant relied on in support of his constructive dismissal claim were contradicted by documentary evidence and/or the Claimant's own evidence at trial. The Respondent states that the remaining complaints raised by the Claimant are down to a general dissatisfaction with the financial returns and professional prestige he was receiving from the Respondent. The Respondent says that the Claimant was unable to show that there was evidence to support his assertion that the company had been financially mismanaged or that he had been treated otherwise than in accordance with the written contracts that he had signed up to in 2009.

4. The Respondent contends that the Claimant's claims stood no reasonable prospect of success from the outset and should never have been issued. It is said that the Claimant wilfully ignored documentary evidence that did not support his claim up until the second day of his cross-examination of the trial and that he fatally undermined his own claim in his oral evidence.

5. The Respondent states that it pointed out to the Claimant on numerous occasions that his claims had little reasonable prospect of success. The Respondent refers to the unsuccessful application for a deposit at a preliminary hearing before Employment Judge Vowles on 13 March 2017 and costs warnings sent to the Claimant on diverse dates between 18 March 2016 and 20 March 2017.

6. The Respondent asks the Tribunal to consider the number of costs warnings issued and their terms which it is said demonstrate a catalogue of failings and unreasonable conduct on the part of the Claimant as a factor in determining whether to exercise a discretion to make a costs order.

7. The Respondent contends that the Claimant acted unreasonably in his conduct of the proceedings by failing to accept an offer of settlement.

8. The Respondent relies on a number of settlement offers that were made to the Claimant on a 'without prejudice save as to costs' basis between 18 March 2016 and 20 March 2017. It is the Respondent's position that its first offer of £15,000 made to the Claimant on 18 March 2016 was a reasonable offer and that the Claimant had no reasonable expectation of achieving a higher sum at trial. Had the Claimant accepted that offer, the costs of preparing and lodging the ET3 on 31 March 2016 and all

subsequent costs would have been avoided in their entirety. The Respondent contends that the Claimant had behaved in a misconceived and unreasonable manner in turning down that offer.

9. Alternatively, the Respondent asks that it recover its full costs from 9 September 2016 to the end of the trial. What the Respondent says is that from 9 September 2016 onwards, in settlement discussions, it offered sums, at various times, ranging between £50,000 and £23,000 to settle his claims against the Respondent.

10. The Respondent contends that on 14 March 2017 the Claimant requested the sum of £23,000 to settle his claim. He was offered that amount but unreasonably refused to sign the terms of the standard COT3 agreement proposed by the Respondent thereafter. Although the Respondent incorporated amendments to the COT3 wording suggested by the Claimant in March 2017, the Claimant continued to refuse to sign the terms.

11. At one point there was possibility of judicial mediation taking place, but the Respondent says that the Claimant's refusal to engage sensibly in considering the terms of the COT3 agreement was one of the reasons why judicial mediation did not take place.

12. The Respondent's offer to mediate on 18 October 2016 was declined by the claimant.

13. The Respondent specifically refers to its costs warning sent on 10 November 2016 made in the following terms:

"It is our submission that the offer, which will remain on the table for acceptance that being an ex gratia payment of £35,000 in full and final settlement of all claims, save for any claims relating to your shareholding (without admission of liability on our Client's part), is a reasonable offer and the original wording of the COT3 is neither unduly onerous nor unclear. It is therefore our submission that any continuation of the current employment proceedings by you is both unreasonable and vexatious behaviour, which will incur significant on-going costs for our Client, as well as waste unnecessary time at Tribunal in March 2017."

14. It is said that the costs warning in this context must be read together with other costs warnings between 18 March 2016 and 20 March 2017. The Respondent contends that the Claimant's refusal to engage with these warnings in the context of the substantial offers made to him by the Respondent was unreasonable behaviour.

15. The Respondent further contends that there was a fabrication of allegations. The Respondent states that two of the allegations made by the Claimant were that he was forced to sign up to a new service agreement by the Respondent and there was a further allegation to the effect that the shareholder agreements contained new restrictive covenants that were

unduly onerous. The Respondent states that these were fabrications which were repeated by the Claimant in many documents up to the trial and that the Claimant had to admit that he was wrong about them in cross-examination. The Respondent says that these were at the core of the Claimant's claim and as a result it must be held that the Claimant had acted unreasonably in pursuing his claim.

16. The Respondent also relies on a contention that the Claimant failed to comply with Tribunal orders and delay. It is said that the Claimant failed to comply with an order made by Employment Judge Vowles to point to events that he was relying on to show that the Respondent had acted in breach of his service agreement. As a result, it was necessary for the Tribunal to list a second preliminary hearing to deal with clarification of the alleged conduct of the Respondent which was amounting to a breach of contract. The hearing took half a day and required the Respondent's attendance. It is said that the final list of breaches the Claimant was relying on was only produced on 14 March 2017 and the final hearing commenced two weeks later on 27 March. It is said that these events put the Respondent to significant additional cost and delayed the preparation of witness statements. It is said that the failure to comply with the order made by Judge Vowles on 25 August 2016 was therefore unreasonable conduct of the proceedings.

17. The Respondent complains about the way that the Claimant dealt with the disclosure. The Respondent provided the Claimant with a disclosure list on 14 April 2016. The Claimant sent a disclosure list to the Respondent on 27 October 2016 accompanied by a request for specific disclosure. The Claimant was asked to explain why he was asking for specific disclosure but did not respond to the Respondent's enquiry. On 13 March 2017, Employment Judge Vowles considered the Claimant's specific disclosure application and required the Claimant to explain why the documents were relevant. The Respondent says that the Claimant failed to do that, and the renewed the same application for specific disclosure on Day 1 of the trial. The Respondent was asked by the Tribunal to supply the documents to the Claimant, this resulted in considerable time and cost being spent by the Respondent in gathering the documents. Ultimately, the Claimant did not refer to any of the documents he had requested during the week-long hearing. The Respondent says that this shows that the request was irrelevant as had been earlier explained by the Respondent. The Respondent says that had the Claimant complied with Judge Vowles' order of 13 March 2017 to explain why the documents were relevant, they could have understood his position and made meaningful submissions to demonstrate their relevance on the first day of the hearing and it would not have had to waste its time and cost in producing irrelevant material.

18. The Claimant resists the Respondent's application for costs.

19. In reply to the Respondent's application, the Claimant states that the fact that the Tribunal found against him does not mean that the claim had no prospects. It is pointed out that the Respondent did not apply to strike out

any part of the Claimant's claims prior to the hearing on the grounds that they had no reasonable prospect of success nor were they successful in the deposit application on the grounds that they had little prospects of success.

20. At the preliminary hearing, the Claimant was asked to specify the allegations he alleged amounted to a breach of the implied term of trust and confidence. The Claimant says that the Respondent has selected some of those allegations (omitting to mention others) and argues that they were clearly contradicted by the documentary evidence and by the Claimant's own evidence at trial. The Claimant says that the Respondent's has omission of any reference to allegations 1, 2 and 9 must be considered as the Respondent conceding that the allegations had reasonable prospects of success.

21. It is said on behalf of the Claimant that the preparation for the hearing by the Claimant, who was acting in person, was hindered by the fact that the Respondent providing the Claimant with unpaginated bundles late. It is said that some of the Claimant's answers to cross-examination have been misinterpreted by the Respondent. As the Claimant was unrepresented at the hearing, he has no notes of the questions and answers. The Claimant submits that if he did say something along the lines which is relied upon by the Respondent (in respect of the services agreements), he was referring to the fact that the Respondent had not put the service agreements in the bundle.

22. The Claimant contends that the service contracts, shareholders' contracts and licencing agreement were part of a family of contracts for the restructuring of the company, they co-existed and impacted upon each other. The point being that the Claimant may not have been entirely precise in the answer that he gave to questions, but the substance of his claim is maintained.

23. It is also submitted that whilst the Tribunal may have found that it was unable to accept the Claimant's version of some of the events, this does not mean that the Claimant's allegation had no prospects. It is said that harassment as legally defined in section 26 of the Equality Act 2010 involves an individual's perception of events and that the Claimant perceived that he had been harassed and therefore had prospects with the allegation.

24. The written submissions submitted on behalf of the Claimant make detailed answers to a number of the points which are made by the Respondent. The Claimant relies on the fact that Employment Judge Vowles refused to order a deposit in the Claimant's case and that there was no costs warning reflected in the order made by Judge Vowles on 13 March 2018. The Claimant pointed out that represented parties routinely make numerous costs warnings without prejudice letters as the pro forma final paragraph. In this case there was a large amount of without prejudice correspondence because the parties were very close to settlement hence

the large amount of costs warnings and it is said that costs warnings do not automatically lead to costs orders.

25. In summary, the Claimant states that the claim for constructive unfair dismissal was advanced upon nine factual allegations amounting to a breach of trust and confidence which had prospects and the Claimant's claim was permitted to advance through two preliminary hearings before Employment Judge Vowles on 25 August 2018 and 3 March 2018 and no deposit order was made or costs warnings given. Further, while settlement offers are often made for commercial reasons and may not reflect a recognition of risk, the Respondent was keen to settle this case and did make a further number of offers.

26. As regards the Respondent's complaint that the Claimant acted unreasonably in the conduct of the proceedings by refusing settlement of this, the Claimant states that the starting point is that the Claimant is entitled to reject offers for compensation to obtain a declaration and that in this case was that he had been unfairly dismissed.

27. The Claimant says that whilst the parties were close in terms of the financial amount in relation to settlement, they were far apart in respect of the terms of the agreement. The parties in this case it is said were business partners operating in a niche business world and that in this case it was not a standard employer/employee COT3 terms case. There were involved in this case business interests, shareholdings, post-termination restrictive covenants and intellectual property issues that needed to be agreed by the parties. The Claimant was not assisted by lawyers but was using the services of ACAS. In all the circumstances of the case it is said that it was not unreasonable for the Claimant to refuse the terms on which the final offer was premised which had a number of stumbling blocks including undertakings by the Claimant's wife as to confidentiality, considerations about a restraint of trade.

28. Insofar as it is said that the Claimant's claims lacked merit, the Claimant repeats arguments made in respect of the contention that the Claimant had little reasonable prospect of success and it is said that the Claimant's case is not one which is equivalent to the type of findings that were made in the 'Daleside Nursing Home' case relied on by the Respondent and that there were no findings by the Tribunal that the Claimant has lied or in any way deliberately misled the Tribunal. It was merely a case where two of the Claimant's nine allegations contained mention of the draft service agreement.

29. In respect of the contention that the Claimant failed to comply with Tribunal orders, the Claimant says that the Respondent's summary is misleading and inaccurate a proper analysis of the events shows that the Claimant did his best to comply with the Tribunal's orders in respect of the provision of particulars of his claim. As to the Respondent's contention that there was non-compliance with Tribunal orders resulting in delay, again, the Claimant contends that the Respondent's characterisation of the events is

inaccurate and misleading. The Claimant sets out correspondence that took place between the parties in relation to disclosure which culminated in the Claimant receiving an unpaginated incomplete hard copy of the bundle following a request made on 17 April 2017 and it is said that the only realistic opportunity for the Claimant to request documents that he considered were missing was on the first day of the hearing and that the Respondent was ordered to provide those by the Judge.

30. As to the failure to refer to the documents, it is said that those documents were provided to the Claimant on the second day of the hearing at the point when he was being cross-examined and so he did not in fact have an opportunity to refer to the documents.

31. It is in addition said that the Claimant as a litigant in person has additional difficulty in navigating a trial bundle and that it is an entirely reasonable and common expectation of a litigant in person to know that the trial judge will read the documents in the bundle even if not specifically taken to them. It is said that the situation relating to the disclosure of documents came about as a result of the Respondent's failure to comply with the Tribunal orders.

32. It is said that the Claimant was a litigant in person seeking to advance a complex case involving extensive documentation including documents with multiple revisions.

33. His position was made more difficult by the fact that the Respondent who was legally represented throughout did not comply with the orders and left him with little time to navigate an unpaginated bundle.

34. It is said that the Claimant was further hampered by his undiagnosed disabilities, namely dyspraxia and advanced glaucoma which made it difficult for the Claimant to see the process and to respond to what was for him the novel and stressful situation of the Employment Tribunal proceedings. The Claimant continues to suffer from anxiety and depression and has a family and a young daughter to support. It is said that it would not be in the interests of justice to make any order for costs against the Claimant.

35. At the hearing, there were further oral submissions made on behalf of the Claimant by Mr Gillie who appeared on behalf of the Claimant. The original written submissions presented for the hearing originally listed to take place on 13 September 2018 were prepared by Counsel previously instructed.

36. Mr Gillie stated that the threshold for making an order for costs in Employment Tribunal proceedings had not been met in this case. Mr Gillie also states it is a relevant fact that the Claimant was a litigant in person and that I should have regard to his lack of knowledge and lack of objectivity when dealing with this case.

37. I am asked to consider whether in the circumstances of this case it is really fair to make a costs order in the region of about £100,000 against a litigant in person.

38. In respect of the submissions that the Claimant had no reasonable grounds for bringing the case, it is said that in this case the Claimant merely lost. It is said that when one considers the costs letters which were written to the Claimant by the Respondent, there is a failure to explain why the Respondent thought that the Claimant's case was weak. The fact that there is documentation that contradicts the claim does not necessarily mean that he does not have a reasonable prospect of success. Skilful cross-examination can bring realities to a litigant in person that he previously maybe did not have. In terms of the Claimant's conduct in respect of a failure to settle, it is said on behalf of the Claimant that it has not been explained to the Claimant why his case is weak the level of costs that he is liable to be exposed to.

39. It is also said that I should view the cost warnings which were made in this case in the context of being threats in negotiations. It is also said that this is a case where the Claimant wanted to settle and the Claimant, a litigant in person, cannot be expected to have the same objectivity and knowledge as a person who is represented by professional lawyers and that requires an appreciation of the legal principles and understanding of the meaning of the COT3 agreement, the approach to the terms of a potential settlement and especially an understanding of the issues surrounding confidentiality.

40. The Claimant also states that the Respondent's assertions that it was keen to settle this case should be treated with some caution and the point is taken that if the Respondent had really been as determined to settle the case as it now suggests for the purposes of this costs application, it would have taken up the repeated requests made for judicial mediation by the Claimant or some other mediation process. It is accepted on behalf of the Claimant that he initially refused judicial mediation but then changed his mind and at least twice stated that he wanted to enter into judicial mediation. It is said that this is precisely the sort of case where judicial mediation would have added value because both parties want to settle. One is a legal litigant in person who may not necessarily have a clear understanding of the matters at stake and the intervention of an independent judicial mediator may well have added value and provided assistance.

41. It is also said that it is wrong to simply blame the Claimant for the failure to agree terms; there are two parties in this litigation which arose after the ending of a fraught period of employment.

42. Overall, when viewed fairly and objectively, it is said that the Claimant's conduct of the proceedings as a litigant in person was reasonable.

43. It is said on behalf of the Claimant that this is not a case where there was conduct of the type which is found in the Daleside Nursing Home Limited

case. There are no findings in the liability judgment that would justify a finding comparable to that in Daleside where there was a cynical lie that was central to the claim being considered by the tribunal. There was no clear-cut finding that the central allegation was a lie or anything approaching that.

44. It is accepted on behalf of the Claimant that he has failed to particularise his claim clearly. It is accepted that it was not concise. However, it is said on behalf of the Claimant that the Claimant thought that it was clear and it is again restated that the Claimant as a litigant in person lacks the objectivity of a professional legal adviser and has to be given some latitude when he represents himself.

45. In respect of the points relating to the question of disclosure, the fact that documents were disclosed which the Claimant did not rely upon does not necessarily mean that they were not relevant. It does not follow that the Claimant would necessarily know how he would use documents that we disclosed in the course of litigation. It is said that I must look at the overall picture and that I need to take into account how the Respondent conducted itself in the litigation. This was a case where the Respondent produced the trial bundle late; they produced an unpaginated bundle; they delayed providing witness statements to the Claimant which caused him prejudice and it is in that context which the Claimant's conduct should be seen. It is said that it is unsurprising that a litigant in person is confused about what they have to do and to take a more belligerent attitude in the course of conduct is not, in the context of such a litigant in person, necessarily an unreasonable conduct of the proceedings.

46. It is said that the Claimant should not be punished simply for commencing, continuing and losing the litigation.

47. The Claimant's medical conditions of dyspraxia and depression are relied upon and the Claimant asks me to take into account the possibility that his medical condition affected his presentation of the case. (As an aside, I am not convinced that the evidence that has been produced for the purposes of this costs application enables me to reach such a conclusion and I do not reach that conclusion.) However, it is said that I should have regard to it because it is relevant to the conduct of the Claimant and it is necessary to look at all the circumstances and consider all relevant factors.

48. Finally, it is said that is it just and equitable to make an order for costs and in considering that question I should take into account the Claimant's medical condition as a factor in assessing whether an order for costs ought to be made.

Conclusions

49. In considering whether or not the threshold has been met to make an order for costs in this case, I remind myself of the fundamental principle that costs in employment tribunals are the exception rather than the rule

and that costs do not follow the event in employment tribunals. I have the power to make a costs order and I shall consider whether to do so where I consider that a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings or the way that the proceedings have been conducted or any claim or response has not had any reasonable prospect if success.

50. While the threshold test is the same for a professionally represented party or a litigant, I recognise that the status of a litigant is a matter that I must take into account and I take into account that justice requires that I do not apply professional standards to a litigant in person who may be involved in legal proceedings for the only time in their life. A litigant in person is likely to lack the objectivity and knowledge of the law and practice brought by a professional adviser; a litigant in person may still be found to have behaved unreasonably even when proper allowance is made for their inexperience and lack of objectivity. I also note that it is not irrelevant that there has been no application to strike out the claim on the grounds that the claim is unreasonably brought.

51. Looking at the whole case: has there been unreasonable conduct by the Claimant in bringing and conducting the case? If so, what is the conduct? What was unreasonable about the conduct and what effect did it have?

Reasonable prospects of success

52. The Respondent did not apply to strike out the claim on the grounds it had no reasonable prospect of success and no deposit application was made until the hearing on 13 March 2017 when the application was refused. While the Claimant was ultimately unsuccessful, the claim concerned; “nine headline allegations” were the number of sub-allegations. This was a fact-sensitive case which could not have been characterised as having no reasonable prospect of success before a factfinding exercise had been completed. I am satisfied that the Claimant had a genuine and honest belief in the case he advanced. I formed the view that at times during the case that the Claimant was out of his depth and lacked a sufficiently clear understanding of the matters in issue before me to present his best possible case. The Claimant’s insistence that he was required to sign a new service agreement with more onerous provisions is an example of this. The Claimant argued an unsustainable position on this – not out of obduracy, but due to what can be referred to as a lack of objectivity and informed legal analysis of the circumstances. That conclusion in my view is the only fair conclusion to come to having regard to all the circumstances of this case. The Claimant’s case in my view while unsuccessful cannot properly be considered as one where the litigant in person with the Claimant’s level of skill and ability can be said to have behaved unreasonably in commencing and continuing the proceedings on the basis that the Claimant did.

Unreasonable conduct of the proceedings

In respect of settlement:-

53. The Claimant's refusal to settle this claim on the terms offered at first sight is difficult to understand. However, on proper consideration of the Claimant's understanding of the issues in dispute, it was in my view understandable even if unwise. The Claimant valued his claim more highly than the Respondent was able to. However, the Claimant and Respondent did eventually hit upon an agreement as to the financial terms of a potential settlement. The potential settlement foundered because of the inability of the Claimant and Respondent to agree on other terms. The Claimant was jealous to protect what he saw as his rights arising from intellectual property, his shareholding, and what he believed to have been agreed with his erstwhile employers and business partners.

54. It was the inability to reach agreement on non-financial matters that led to the dispute not settling and had in large measure caused the breakdown in the relationship which had triggered the proceedings. To view the failure to settle ex post facto viewed simply through the lens of what might have been achieved if successful against what was on offer is to do injustice to the Claimant's view of the dispute he had with the Respondent.

55. I am unable to conclude that the way the Claimant dealt with settlement was unreasonable conduct by the Claimant.

In respect of lack of merit and fabrication:-

56. I do not consider that the Claimant in continuing the case having regard to the merits was unreasonable. I further do not consider that an allegation of fabrication in the sense encapsulated by the Daleside Nursing Home-type case is made out in this particular case.

Non-compliance with Tribunal orders:-

57. The Claimant's failure to comply with Tribunal orders relating to the providing of particulars was not contumelious conduct on the part of the Claimant. The Claimant tried, but failed, to give clear information. Likewise, the Claimant's dealings with disclosure were inadequate due to lack of knowledge and experience of the process. There is no similar explanation available to the Respondent for their shortcomings which contributed to the Claimant's disorganisation.

58. Having regard to all the circumstances of this case, I am not satisfied that the Claimant has been guilty of conduct which justifies a conclusion that the Claimant's conduct reaches the threshold whereby he should be ordered to pay the Respondent's costs pursuant to rule 76.

59. The application for costs is dismissed.

60. As a post script I should state that the hearing of this costs application took place on the 8 February 2019. On the 18 March 2019 I sat in chambers to consider my decision on the costs application when I made the decision and produced the initial draft version of the judgment.

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Employment Judge Gumbiti-Zimuto
Date: 3 May 2019

Judgment and Reasons

Sent to the parties on: ..13.05.19.....

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For the Tribunal Office

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