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EMPLOYMENT TRIBUNALS

Claimant: **Mr R Taylor**

Respondent: **Clarion Events Limited**

Heard at: **East London Hearing Centre**

On: **14 March 2019**

Before: **Employment Judge Ross**

Representation

Claimant: Did not attend

Respondent: Ms A Reindorf (Counsel)

JUDGMENT

The judgment of the Tribunal is that the Claimant do pay the Respondent costs assessed at £15,000.00.

REASONS

1 By an application dated 24 December 2018 the Respondent applied for its costs of defending the claim. The application was brought under Rule 75(1)(a) and Rule 76(1)(a) - (b) of the Employment Tribunals Constitution and Rules of Procedure Regulations 2013. ("The Rules"). The application was supported by a detailed chronology.

2 The Claimant did not attend this hearing. Notice of Hearing was sent to the Claimant dated 26 February 2019. The Notice included the following:

> "*It is your responsibility to ensure that any relevant witnesses attend the hearing and that you bring sufficient copies of any relevant documents. You may submit written representations for consideration at the hearing*."

3 The Claimant submitted a statement on 12 March 2019, in which the Claimant indicated that he was not attending the hearing. By correspondence, he indicated that he could attend by Skype. Following receipt of emails from the Claimant and the Respondent's solicitor dated 12 March 2019, Employment Judge Foxwell directed as follows:

> "*If the Claimant is asking for a postponement of the hearing on 14 March 2019, he should do so giving full reasons and it be considered (though necessarily granted). If the hearing is not postponed, it will proceed on Thursday whether or not the Claimant attends. The Tribunal will not contact him by Skype*."

4 The Respondent attended today with a bundle of documents; page references in this set of Reasons refer to pages in that bundle.

Background Facts for this Costs Application

5 The Claimant had been employed as a sales manager by the Respondent from 8 July 2015 to 11 August 2017. By a claim presented on 18 January 2018, the Claimant complained of unfair dismissal. His case was set out in a document attached to his ET1. In summary, the Claimant contended that he was "*manipulated out*" of the company and that it was "*obvious… that this was the working of someone with a grudge attempting to avoid being exposed*." The manager whom he held responsible was Tracy Bebbington.

6 By its Response, the Respondent alleged that the Claimant had been made redundant due to a restructure in their Defence department. Their case is summarised at paragraphs 41 – 47 of the Response. In particular:

6.1 The Respondent reviewed the business needs and took the decision that it no longer had a need for sales manager roles and replaced these with event manager roles.

6.2 The Respondent notified the Claimant and other employees affected by the restructure and consulted with them.

6.3 The Claimant did not apply for an event manager role or any other role (including any sales roles).

6.4 The Claimant did not exercise his right of appeal about the redundancy process nor the decision to make him redundant.

6.5 The Claimant did not raise any grievance whilst employed by the Respondent.

7 The claim was listed for a merits hearing on 17 May 2018. Due to lack of judicial resources, the case could not be heard on that date. Regional Judge Taylor held a Preliminary Hearing instead. The case was re-listed for 29 and 30 November 2018.

8 Regional Judge Taylor's Summary records that the Claimant had made 7 applications for disclosure, all of which were refused. This was broadly because the documents sought were not relevant. Moreover, the Regional Employment Judge stated that the Claimant had disregarded the standard directions sent to the parties by order of 18 January 2018, to the extent that at the morning of the hearing, the Claimant was not in a position to serve his witness statement.

9 Regional Employment Judge Taylor varied the Case Management Orders sent on 18 January 2018 (see page 110). This included that the Claimant should disclose their documents by 25 June 2018 and that the parties should exchange witness statements on 30 July 2018.

10 As demonstrated by the Respondent's chronology, and the documents that I was taken to today, the following was apparent:

10.1 The Claimant engaged in a pattern of behaviour alleging that he had documents and proof of his case, as seen in his ET1 (for example page 19). No such documents or evidence was ever produced.

10.2 The Claimant did not comply with numerous Case Management Orders. The Claimant had disclosed only two documents and had never produced a witness statement.

10.3 On 30 August 2018, the Claimant had served his particulars of claim, which was not a witness statement, and had served no witness statement. The Claimant did nothing to prepare for trial. The Claimant did not produce any evidence of fact which contradicted the Respondent's case that there was a redundancy situation and that the decision to dismiss was procedurally and substantively fair.

10.4 The Claimant had made numerous requests for documents coupled with threats of action. This was relied on by the Claimant as his reason for not complying with the directions of the Employment Tribunal.

10.5 The Respondent gave costs warnings to the Claimant. The principal warning was given on 14 March 2018 (page 58) this explained that the costs of the hearing were likely to be £20,000 - £25,000. This warning proposed a possible "drop hands" settlement if the Claimant withdrew his claim. This costs warning was repeated by a letter dated 10 May 2018 (page 88 - 89), but the issue of the Claimant incurring costs unnecessarily was raised on other occasions (including 19 October 2018 and 5 November 2018).

10.6 On 30 July 2018, the Claimant made a new application for specific disclosure concerning the exit interviews of other staff. On 24 October 2018, the Claimant repeated this application (page 129D). On 19 November 2018, the Claimant wrote to the Employment Tribunal insisting on this specific disclosure. On 28 November 2018, the Claimant "insisted" on a postponement of the full merits hearing. At 16.33 on 28 November

2018, the Claimant wrote to the Tribunal stating that he was withdrawing his claim with immediate effect. At 17.01, the Employment Tribunal responded stating that the case would proceed unless the Claimant's withdrawal was unequivocal. The Claimant took that unequivocal step by his email sent at 17.14 (page 38) alleging that he was "*outraged by the handling of this matter*" by the Employment Tribunal.

11 The Respondent's case before me was that the Claimant's claim was vexatious and unreasonable, and that it lacked any reasonable prospect of success. The Respondent argued that the Claimant's approach was not due to him being a litigant in person, but was cynical, design to harass and exposed the Respondent to expense in order to force it to pay a settlement sum where the merits of the case did not justify this.

The reason for the non-attendance and the Claimant's response to the application

12 The Claimant filed and served a "final statement" on 12 March 2019 (page 162) I have taken the contents of this statement into account, but reminded myself that the Claimant was not present to verify the witness statement as true on oath or on affirmation, and was not present for cross-examination. In particular, this statement explains that the Claimant is unemployed and claiming Universal Credit. Also, it states that the Claimant has debts: a bank loan, two credit cards which had been increased, and three smaller short-term loans. I noted that no documents were produced to support any of these alleged debts nor that he was in receipt of benefits, despite the warning in the Notice of Hearing that relevant documents should be provided.

13 The Claimant stated that the stress of the application alone was almost killing him, which I find to be an exaggeration, given that there was no medical or other evidence to support such a claim. The Claimant explained that he was looking after a long-term family issue regarding his mother's full-time care. He states "*this is where I will be this week, however, I can be contacted by Skype*". No notice of a hearing in the Court of Protection was provided but the Claimant attached a draft witness statement prepared by him apparently in February 2018. It was not possible to understand what the Court of Protection process was about and impossible to understand why this was connected to his non-attendance at this hearing given that he had notice of the hearing. If he intended to mean that he was a carer, alternative care could have been arranged, on the face of the evidence.

The Law

14 Rule 76 of the Employment Tribunal's 2013 Rules of Procedure provide that a costs or time preparation order may be made and a tribunal 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.

15 The procedure for making a costs application is set out at rule 77. As for the amount of costs that the Tribunal may order should be paid, rule 78 provides that the Tribunal 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;"*

16 Rule 84 provides that the Tribunal may have regard to the paying party's ability to pay. It is put as follows:

> *"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."*

17 In *Gee –v- Shell UK Limited* [2003] IRLR 82, Sedley LJ said:

> *"It is nevertheless a very important feature of the employment jurisdiction that it is designed to be accessible to ordinary people without the need of lawyers and that in sharp distinction for ordinary litigation in the United Kingdom losing does not ordinarily mean paying the other side's costs".*

18 Costs remain the exception rather than the rule in the Employment Tribunal.

19 On the other hand, employers should not be subject to expensive, time consuming, resource draining claims that are without merit. The Rules provide that a Tribunal may order costs in the circumstances set out in Rule 76 set out above. If the conduct of the litigant meets that definition, the Tribunal has a discretion to order costs.

20 In *Millan v Capsticks Solicitors LLP & Others* UKEAT/0093/14/RN, the EAT (Langstaff P) described the exercise to be undertaken by the Tribunal as a three stage exercise, which I would paraphrase as follows:

> 20.1 Has the putative paying party behaved in the manner proscribed by the rules?
>
> 20.2 If so, the Tribunal must then exercise its discretion as to whether or not it is appropriate to make a costs order, (it may take into account ability to pay in making that decision).

20.3 If the Tribunal decides that a costs order should be made, it must decide what amount should be paid or whether the matter should be referred for assessment, (again the Tribunal may take into account the paying party's ability to pay).

21 In *Power –v- Panasonic UK Limited* UKEAT 0439/04 His Honour Judge Clarke made it clear that the principles of the Civil Jurisdiction case known as *Calderbank v Calderbank* has no place in Employment Tribunals. In other words, the Tribunal should not simply award costs just because a litigant has failed to beat an offer that has been made. However, unreasonably pressing for a higher award than one could reasonably hope to achieve or that does not reflect one's prospects of success, could amount to unreasonable conduct.

22 Whilst the threshold test is the same, whether a party has been represented or not, the exercise of discretion should take into account whether the party in question has been professionally represented. Litigants in person should not be judged by the same standards as a professional representative; the self-representing may lack the objectivity of law and practice that a professional representative will, (or ought to) bring to bear. (See *AQ Ltd v Holden* [2012] IRLR 648 and *Vaughan v London Borough of Lewisham*). HHJ Richardson said in *AQ Ltd v Holden*:

> *"…lay people are likely to lack the objectivity and knowledge of law and practice brought by a professional legal adviser. Tribunals must bear this in mind when assessing the threshold tests in rule 40(3).*"

23 I have explained that the Tribunal has a discretion, not an obligation, to take into account means to pay. This was considered in the case of *Jilling –v- Birmingham Solihull Mental Health NHS Trust* EAT 0584/06. If the Tribunal decides not to take into account the party's means to pay, it should explain why, and if it decides to do so, it should set out findings about the ability to pay, what impact that has had on the decision whether to award costs and if so, what impact means had on the decision as to how much those costs should be. This must, of course, be seen in the light of the subsequent guidance in *Vaughan*, at paragraph 29: affordability is not as such the sole criterion for the exercise of discretion and a nice estimate of what can be afforded is not required.

24 In *Howman v Queen Elizabeth Hospital* UKEAT 0509/12/JOJ, the EAT held that an employment tribunal had been wrong when in making a costs order, it had failed to take into account the effect of the order. The EAT also indicated, (at paragraphs 17 and 18) that it was relevant to have regard to the County Court's powers to take into account a debtor's means when considering enforcement action of a debt, but that employment tribunal's view on that would be relevant to the County Court and ought to be expressed.

25 In *McPherson v BNP Paribas* [2004] ICR 1398 CA it was suggested that in deciding whether to make an order for costs, an Employment Tribunal should take into account the "nature, gravity and effect" of the putative paying party's unreasonable conduct.

26 On the other hand, in *Yerrakalva v Barnsley Metropolitan Borough Council* [2012] ICR 420 (paragraphs 39 – 41) it was emphasised that the tribunal has a broad discretion, and it should avoid adopting an over-analytical approach, for instance by dissecting the case in detail or attempting to compartmentalise the relevant conduct under separate

headings such as "nature", "gravity" and "effect". The words of the rule should be followed and the tribunal should

> *"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*".

27 The Court of Appeal in *Yerrakalva* made it clear that although causation was undoubtedly a relevant factor, it was not necessary for the tribunal to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. Furthermore, the circumstances do not need to be separated into sections, each of which in turn forms the subject of individual analysis, risking the court losing sight of the totality of the relevant circumstances.

28 If the threshold conditions for an award of costs are met, I reminded myself that costs orders do not need to be confined to sums the parties could pay as it may well be that their circumstances improve in the future: see *Arrowsmith v Nottingham Trent University* [2011] EWCA Civ. 797.

29 When considering whether an award of costs should be made against a claimant who withdraws his claim, the crucial question is whether he has acted unreasonably in the conduct of the proceedings, not whether the withdrawal of the claim is itself unreasonable: *McPherson v BNP Paribas (London Branch)*.

30 As was pointed out in *McPherson*, there is no provision in what is now r 76 comparable to that in CPR r 38.6, whereby a claimant who discontinues proceedings in the civil courts is liable to pay the costs incurred by the defendant prior to the notice of discontinuance. So the mere act of withdrawal is not in itself to be equated with unreasonableness. According to the Court, it would be wrong if tribunals were to adopt practices which had the effect either of deterring claimants from making 'sensible litigation decisions' for fear of having a costs order made against them, or, conversely, of encouraging the making of speculative claims in the hope that they would produce an offer of settlement, safe in the knowledge that, if this failed, the claims could be withdrawn with no risk of a costs sanction. Therefore, before an order for costs can be made, it must be shown in the individual case that the claimant's conduct of the proceedings has been unreasonable. This is determined by looking at the conduct overall. If it is adjudged to have been unreasonable, then costs can be awarded but only in respect of the period *after* the conduct became unreasonable.

Conclusions

31 I have taken into account all the evidence before me, including that received from the Claimant, and the relevant law. In addition, I have considered the submissions of Ms. Reindorf and points made by the Claimant in correspondence.

Stage 1: Whether the threshold conditions are made out

No reasonable prospect of success

32 It can be more difficult to establish that the Claimant had no reasonable prospect of success when no hearing took place, and the evidence was never considered. In this case, however, I am satisfied that the claim had no reasonable prospect of success for the following reasons.

32.1 The Claimant provided no evidential basis for his claim, which was confirmed before Regional Employment Judge Taylor on 17 May 2018 to be that the redundancy process was a sham and that Ms Bebbington was guilty of manipulation.

32.2 The Claimant failed to produce any witness statement evidence which could have undermined the Respondent's case that the reason for dismissal was redundancy.

32.3 The Claimant did not apply for the suitable alternative role of events manager nor any role in the Respondent company, despite being given the opportunity. In the light of that, the evidential burden on the Respondent would probably be lighter than in many redundancy cases. The Respondent would need to show a genuine redundancy situation and fair procedural steps.

32.4 The Claimant has not produced any body of documentary evidence to undermine the Respondent's case. There is no evidence of any "smoking gun" type of document which might lead to the inference that the redundancy process was a sham.

Unreasonable conduct in the bringing or conducting of the proceedings

33 The Respondent alleged the whole claim by the Claimant was a cynical attempt to manipulate the Respondent into a settlement. This is a serious allegation of dishonesty which would require cogent evidence to prove it. I am not satisfied that the evidence in this case is cogent enough for such a finding. However, I am satisfied that the Claimant conducted these proceedings in an unreasonable way. My reasons are as follows:

33.1 The withdrawal of the claim at such a late stage was extremely unreasonable given the warnings that the claim lacked merit and the Claimant's failure to obtain documents (by application to the Employment Tribunal) to support his case of a sham. In particular, the Respondent asked the Claimant on 19 October 2018 if he was pursuing his claim, due to unanswered correspondence. The Claimant stated that he was. Thereafter, the Claimant then had no real trigger to cause the withdrawal. He blamed the Employment Tribunal and the disclosure application that was not dealt with; but (as explained to him by Employment Judge Gilbert in correspondence) this application could have been dealt with at the start of the hearing on 28 November 2018; if it had any merit, it could have

succeeded. The Claimant waited to the last possible time to withdraw, which ensured that the Respondent had incurred maximum costs.

33.2 The Respondent's position is set out clearly, explaining why the claim would fail, on 16 February 2018 (without prejudice save as to costs correspondence) and 14 March 2018 (a costs warning letter).

33.3 The Claimant failed to heed a number of costs warnings. These are not intimidating but measured and appropriate in the circumstances. A costs warning was given on 14 March 2018 and then repeated. It is significant that having received the Respondent's disclosure, and in the absence of having obtained any helpful documents for his case or witness evidence, it was part of the unreasonable behaviour of the Claimant to continue in the face of these warnings.

33.4 The Claimant's failure at any time to prepare or obtain any witness statement evidence was most unreasonable conduct, especially after the words of the Regional Employment Judge at the Preliminary Hearing on 17 May 2018.

33.5 The Claimant's repeated failure to comply with Case Management Directions was unreasonable. These included orders in relation to the schedule of loss, disclosure and witness statement evidence.

33.6 The Claimant's conduct was unreasonable in the applications that he made including:

33.6.1 repeated applications for disclosure (none of which succeeded);

33.6.2 unwarranted applications for postponements, such as on 28 November 2018 in which he sought to have the hearing postponed "*in order to seek legal advice*";

33.6.3 the Claimant produced no evidence relevant to the issues.

Stage 2: Whether the discretion to award costs should be exercised

34 I have taken into account all relevant factors. I have decided to exercise my discretion to award costs for the following reasons.

The Claimant's ability to pay

35 The Claimant was employed by the Respondent as a sales manager. After resignation the Claimant obtained another job with roughly the same salary. The figures at Section 7 of the ET1 (page 11) showed that he was employed from 16 October 2017 at £2,800 per month. His earning capacity on the evidence before me appeared to be in the region of £33,000 - £36,000 per annum. His statement suggests he intends to work again in this field soon and it fails to indicate what applications he had made or interviews he

has lined up. I do not accept that this Claimant with his experience as a sales manager cannot find work at the same or similar level to that indicated by the ET1.

36 Whereas the Claimant states that he is on universal credit and has debt, he has not particularised when he commenced on Universal Credit nor his debts, nor whether he has any savings. I find that he has voluntarily absented himself from this hearing to avoid answering difficult questions such as what he could afford to pay in costs. I infer from this that he has the capacity to pay a costs order albeit that this may have been interrupted by a period of unemployment. I have no doubt that his earning capacity remains undimmed. This is a factor that weighs in favour of an order for costs being made.

The Claimant as a lay person

37 I take into account that the Claimant has represented himself. I found that this is a weak factor in this case against the award of costs because the Claimant is an intelligent person who is articulate. This is demonstrated by correspondence and supported by his ET1. I note also he was a valued member of staff. The Claimant received warnings from the Respondent setting out why his claim would fail. The Claimant was capable of understanding that his claim had no reasonable prospect of success particularly after disclosure, which apparently disclosed little or no documents to assist him (because he sought specific disclosure, and no actual documents are referred to by him in his witness statement for today as justifying his claim, only relying on documents that on the face of them do not appear to be relevant to his case).

38 Regional Employment Judge Taylor explained at the Preliminary Hearing that he had made several applications for disclosure which were broadly in respect of documents that were not relevant.

39 The Claimant was intelligent enough and sufficiently well-resourced to access legal advice whether a free source of advice or a paid source if he had any doubts over the merits of his case. The Claimant obviously anticipated obtaining legal advice when the claim was issued: see the attached particulars of claim to the ET1 (page 19).

Costs warnings

40 The Claimant was given reasonable and appropriate costs warnings. He was given a proposal of the chance to walk away with no costs consequences on 14 March 2018 (page 58).

41 I bear in mind there is no principle that a costs order must follow where a costs warning is given. In this case, however, the Claimant was capable of considering the merits of the case or of obtaining advice to do so. This is a factor weighing in the discretion to make a costs order.

The gravity and effect of the unreasonable conduct

42 I recognise I have a broad discretion not restricted by labels, but it is important to consider what the gravity of the unreasonable conduct was in this case. I have concluded that the unreasonable conduct in this case was relatively serious. This included:

42.1 A substantial failure to comply with Case Management Orders including for disclosure and a failure to provide any witness evidence. The oral evidence was likely to be critical in this case where the Claimant had contended that he had few documents and in effect alleged a conspiracy against him.

42.2 There were unnecessary and excessive applications for disclosure despite warnings by the Employment Tribunal and solicitors for the Respondent as to the relevance of the documents sought.

42.3 The Claimant ignored the warnings of the Employment Tribunal that he must comply with Case Management Orders and that there may be costs consequences of failing to do so: see, for example, the email letter from the Employment Tribunal to the Claimant of 16 May 2018 (page 100).

42.4 The last minute withdrawal of the claim. There was no good reason why the claim could not have been withdrawn at an earlier point such as when the Respondent gave disclosure, after which the Claimant must have realised that he had no documentary evidence to support his case. The Claimant was provided with a copy of the hearing bundle on 15 March 2018.

Stage 3: What amount of costs should be paid

43 The Respondent contends that it has incurred costs of £52,723.29 excluding VAT. Of this a proportion was due to the original full merits hearing being converted to a Preliminary Hearing in May 2018; this was not due to any action or inaction by the Claimant. I have deducted a proportion of the costs to allow for this, including Counsel's brief of £3,500 plus allowing the same amount of solicitor's costs, both excluding VAT.

44 I have also excluded a proportion of the costs which relate to this costs application on the basis that it is difficult to argue that the Claimant acted unreasonably in respect of this part of the case even if he has not attended at the hearing.

45 The Respondent limits its claim for costs to £20,000 and asked for a summary assessment. In any event, the costs figure claimed in respect of billed solicitors costs and billed counsel's fees was proportionate in terms of amount given the evidence required to be collected and led by the Respondent, the Claimant's multiple disclosure applications, the Claimant's postponement applications, and the Claimant's repeated failures to comply with Case Management Orders.

46 Turning to the reasonableness of the sums claimed, Counsel's brief fee for 28 November 2018 was £3,500 which I find to be in line with what a hypothetical counsel capable of conducting the case effectively, but unable to insist on a higher fee sometimes demanded by Counsel of pre-eminent reputation, would have sought. I have also considered the hourly rate charged by the solicitors and the guideline figures for the summary assessments of costs in CPR48GHR.

47 I have considered the London band guideline rates. The hourly rates claimed by the Respondent's solicitors are broadly consistent with those hourly rates.

48 I have decided to order the Claimant to pay a proportion of the costs incurred from 15 March 2018 to the withdrawal of his claim on 28 November 2018. From 15 March 2018, it must have been obvious to the Claimant that the evidence against him was strong, and he received a costs warning on 14 March 2018, as well as regular correspondence about non-compliance with Case Management Orders. Shortly after 15 March 2018, the Claimant was informed by the Regional Employment Judge that his disclosure applications related to broadly irrelevant documents and warned him to comply with the orders of the Tribunal.

49 The figure of costs that I consider appropriate in this case has been assessed as follows. I have considered the total amount of billed costs excluding VAT being £33,301.89 solicitor's costs and £4,740 counsel fee (which excludes the fees incurred in respect of the May 2018 hearing). I have deducted from these figures, the billed costs incurred prior to 15 March 2018 which were £6,290.36. This produces a total figure of £31,751.53.

50 I have borne in mind the Claimant's ability to pay. I find that he has the ability to pay a costs order, given his earning capacity, even if payment over time will be required.

51 In the exercise of my discretion, I order the Claimant to pay £15,000. I have discounted the amount that I would have awarded of £20,000 to reflect that the Claimant has some debts, contends that he is currently on Universal Credit, and having considered his annual earning capacity.

Employment Judge Ross

24 May 2019