EMPLOYMENT TRIBUNALS

Claimant: Mr S Dillon

Respondent: The Methodist Independent Schools Trust

Heard at: Manchester **On:** 24 June 2019

Before: Employment Judge Ross
Ms J K Williamson
Ms V Worthington

REPRESENTATION:

Claimant: Ms S King of Counsel
Respondent: Miss R Wedderspoon of Counsel

JUDGMENT ON APPLICATION FOR COSTS

The respondent's application for costs order pursuant to rule 76(1)(a) and (b) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 does not succeed.

REASONS

1. The claimant brought a claim to this Tribunal for unfair dismissal pursuant to the Employment Rights Act 1996, wrongful dismissal and a claim for disability discrimination pursuant to section 13 and section 15 Equality Act 2010. The allegation of unfavourable treatment because of something arising in consequence of his disability related to his dismissal, as did his section 13 claim.

2. The Tribunal reminded itself that consideration of a costs order is a two stage process. Firstly, we must consider whether either of the grounds in rule 76)1) Employment Tribunals Rules of Procedure are met, and/or whether the claims had no reasonable prospect of success pursuant to rule 76(1)(b). If the respondent satisfies us that any of those grounds are met we must then go on to consider whether to exercise our discretion to make a costs order. In doing so we should have regard to the paying party's ability to pay (pursuant to rule 84 Employment Tribunals

Rules of Procedure) and how much the paying party should pay (pursuant to rule 78 Employment Tribunals Rules of Procedure).

3. In hearing this costs application we had the benefit of skeleton submissions from both the respondent and the claimant. There was a joint bundle of documents, a witness statement from the claimant and a bundle of cases.

4. The cases referred to by the parties were as follows:

- Ms S C Hall v Chief Constable of West Yorkshire [2015] WL 5202319 (2015);
- John Lewis PLC v Coyne [2000] WL 1841682 (2000);
- Ms Arrowsmith v Nottingham Trent University [2011] WL 2039891 (2011);
- Merseyrail Electrics (2002) Limited v Ms N Taylor [2007] WL 2817965;
- Davidson v John Calder (Publishers) Limited [1985] ICR 143;
- Salford Royal NHS Foundation Trust v Roldan [2010] WL 1649032 (2010);
- Barnsley Metropolitan Borough Council v Yerrakalva [2011] EWCA Civ 1255;
- AQ Limited v Holden UKEAT/0021/12;
- Daleside Nursing Home Limited v Mathew UKEAT/0519/08;
- Dunedin Canmore Housing Association Limited v Mrs Donaldson UKEAT/0014/09;
- Doyle v North West London Hospitals NHS Trust UKEAT/0271/11;
- Raggett v John Lewis PLC UKEAT/0082/12;
- Haydar v Pennine Acute NHS Trust UKEAT/0141.

Whether the claimant's claims had "no reasonable prospect of success" pursuant to rule 76(1)(b).

5. The Tribunal turned first to consider whether the claimant's claims had "no reasonable prospect of success" pursuant to rule 76(1)(b).

6. The Tribunal found that the claimant's claims of discrimination pursuant to section 13 and section 15 Equality Act 2010 failed. We made that finding after hearing all the evidence in the case. The claimant's claim for section 15 was that the "unfavourable treatment" was his dismissal. The "something" arising in consequence

of disability was his absence from work on sick leave. By the time of the hearing there was no dispute that the claimant was a disabled person within the meaning of the Equality Act 2010 and this had been conceded by the respondent. Knowledge was an issue.

7. It was the claimant's case that relying on **Hall v Chief Constable of West Yorkshire Police**, the loosened causal connection required between the claimant's disability and any unfavourable treatment was relevant. That case is authority to suggest that if disability was a significant influence on the unfavourable treatment, the claimant could have succeeded. For the claimant it was argued at the original hearing that the claimant's sickness absence was clearly a significant influence or an effective cause of the claimant's dismissal.

8. The claimant also argued that any dismissal was not a proportionate means of achieving a legitimate aim.

9. Although the claimant's arguments failed at hearing because the Tribunal and was impressed by the evidence of the respondent and found the claimant to be an unimpressive witness, that is not the same as finding the claimant's disability discrimination claim had "no reasonable prospect of success". The Tribunal should not judge the merits of the case with the hindsight it has now, having heard the case.

10. At the hearing, the Tribunal was entirely persuaded by the respondent's evidence that the unfavourable treatment was not because of the claimant's sickness absence. The Tribunal found the unfavourable treatment, namely the dismissal, was because the claimant was untruthful to the respondent. The Tribunal did not find the claimant's absence from work on sick leave was a factor in the decision to dismiss.

11. The claimant's claim had little reasonable prospect of success given the evidence of the claimant to the respondent that he was unable to drive when video film showed he could. However, given that in a discrimination claim the Tribunal is scrutinising the decision making process of the respondent, the Tribunal is not satisfied that this was a case with "no reasonable prospect of success". Taken at its highest, even where there was evidence that the claimant had been untruthful with the respondent about his ability to drive, there was a possibility that a different Tribunal might have found his dismissal was related to his sickness absence, particularly as there was reference to sick pay in the decision outcome letter. If that had been so, it would then have been for the respondent to justify that dismissal was a proportionate means of achieving a legitimate aim. Another Tribunal may have found a lesser sanction such as a final written warning was a proportionate means of achieving a legitimate aim.

12. Therefore although the Tribunal is satisfied that the claim pursuant to s 15 Equality Act was a case with poor prospects of success, it is not satisfied it had no reasonable prospect of success.

13. Likewise, in terms of the direct disability discrimination claim. If the claimant had adduced evidence which could have shifted the burden of proof to the respondent it may that the respondent would not have satisfied a different Tribunal that there was a non discriminatory explanation for the treatment. However, this did not occur. There was no evidence adduced to shift the burden to the respondent.We

consider the s.13 claim had very little prospect of success. However we are not satisfied it had no reasonable prospect of success.

14. The Tribunal turns to the "ordinary" unfair dismissal claim. The test is very different in that claim. It is the **Burchell** test. The respondent always stated they dismissed the claimant for conduct. The test was whether the respondent had a genuine belief based on reasonable grounds following a reasonable investigation of the claimant's conduct. There was clear evidence before the respondent at the time of dismissal that the claimant had been untruthful to the respondent about his ability to drive. It was therefore likely that the **Burchell** test would be made out.

15. The claimant relied primarily on procedural arguments in his unfair dismissal claim pursuant to ERA 1996, particularly in relation to the footage taken by the private investigator. The Tribunal is not satisfied that these arguments had any reasonable prospect of success.

16. Finally, with regard to the wrongful dismissal case the Tribunal is satisfied there was no reasonable prospect of success. The Tribunal had to consider whether there was a repudiatory breach of contract by the claimant. The Tribunal found the claimant had not been truthful. We therefore found such a breach. Another Tribunal may have found no repudiatory breach by the claimant. However the video footage in relation to the claimant's driving in the context of his statement to the respondent he could not do so always made such a finding unlikely.

17. Therefore in conclusion the Tribunal finds that the claimant's "ordinary" unfair dismissal claim pursuant to the Employment Rights Act 1996 and wrongful dismissal claim had no reasonable prospect of success.

Has the claimant has acted unreasonably and/or vexatiously in the way he brought and conducted proceedings -76(1)(a).

18. The Tribunal turns to the other limb: that the claimant has acted unreasonably and/or vexatiously in the way he brought and conducted proceedings. The first basis is that there was "a lie" at the heart of the claimant's claim. We are guided by the case law that a finding of untruthfulness does not inevitably mean unreasonable conduct. We have borne in mind that the claimant had professional advice throughout from his trade union and then from a solicitor and counsel. We have borne in mind that the claimant's dismissal did not refer only to the issue about driving.

19. The respondent also relied on the fact that the claimant had declined offers of compensation as acting unreasonably. The Tribunal is not satisfied that particularly in circumstances where the claimant was professionally represented throughout that an unwillingness to compromise his claim can be described as unreasonable conduct. Many factors can influence a party whether or not to compromise a claim, particularly where, as in this case, the claimant is a teacher and a dismissal for conduct reasons is likely to affect his reputation.

Exercise of our discretion

20. The Tribunal therefore turns to the second element of consideration in relation to making a costs award, and that is the exercise of our discretion.

21. At this point the Tribunal reminds itself that costs remain the exception rather than the rule (see **Yerrakalva v Barnsley Metropolitan Borough Council [2012] ICR 420**). We also reminded ourselves of the guidance in **Salinas v Bear Stearns International Holdings & another [2005] ICR 1117**, that there is a high hurdle to be surmounted in ordering costs.

22. The Tribunal had regard to the claimant's ability to pay. The Tribunal noted the evidence about his means given in the bundle and the information from his counsel that although he was supported by his trade union, NASUWT, it did not indemnify him for costs.

23. The Tribunal bore in mind that there had been numerous costs warnings sent to the claimant (see pages 1, 7, 8, 10 and 12 of the bundle).

24. However, the Tribunal also took into account that a number of these costs warnings related in part to the issue of whether or not the claimant was a disabled person at the relevant time, an issue which the respondent had conceded by the time of the original Tribunal hearing.

25. We reminded ourselves that just because a party to proceedings has issued a costs warning does not mean that costs will be awarded.

26. The Tribunal notes that it is unsurprising that no application to strike out the claim was made because the Tribunal has received guidance from the Higher Courts that in a pluralistic society extreme caution should be exercising by striking out a discrimination claim, particularly where it is fact sensitive. However, the Tribunal notes that in this case no application for a deposit appears to have been made.

27. The Tribunal has also taken into account that the claims which the Tribunal considered to have no reasonable prospect of success were the unfair and wrongful dismissal claims.

28. The Tribunal has reminded itself that given that costs are compensatory it is necessary examine what loss has been caused to the receiving party. The Tribunal is not satisfied that the claimant pursuing the “ordinary” unfair dismissal claim and wrongful dismissal claim caused the respondent to incur identifiable additional cost. If the claimant had not pursued those claims it would led to a very little saving of time in the hearing, if at all, because the relevant evidence was essentially the same as the evidence relevant to the disability discrimination claim. Accordingly, the only additional time spent was in submissions in relation to unfair dismissal/wrongful dismissal and that was minimal.

29. In exercising its discretion the Tribunal also reminded itself that the claimant was represented professionally throughout by a solicitor throughout the legal proceedings and by counsel at the hearing.

30. For all these reasons the Tribunal declines to make an order as to costs.

Employment Judge Ross

Date 26 June 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

17 July 2019

FOR THE TRIBUNAL OFFICE

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