EMPLOYMENT TRIBUNALS

Claimant	Respondent
Mrs A C Blagden	**The Coniston Hotel Limited**
Heard at: Leeds	**On: 22 July 2019**
Before:	**Employment Judge Rogerson**

COSTS ORDER

The claimant is ordered to pay the respondent costs in the sum of £10,000,pursuant to Rule 76 of the Rules of Procedure.

REASONS

1. Both parties agreed that the respondent's application for costs could be dealt with without a hearing by way of written representations.
2. The respondent provided its costs application and a costs schedule on 3 May 2019. Although the schedule identified costs just short of £80,000 the respondent confirmed that it limited the sum claimed to £20,000, so that the application could be dealt with, without a detailed assessment, in accordance with Rule 78(b) of the Rules of Procedure.
3. The claimant provided her response to the application on 21 May 2019 with a schedule of the costs she had incurred in bringing these proceedings of £20,505.60 comprising £10,905.60 solicitor's costs and £9,600 counsel's fees for the hearing in March 2019.
4. Further representations were received from the respondent on 17 June confirming that the respondent had been compelled to meet the entirety of those costs from its own resources, and not as the claimant believed, through insurance cover. The claimant by an email dated 16 June 2019, confirmed that she had provided all the information about her ability to pay which she wanted the Tribunal to consider, in her email of 22 May 2019.
5. The respondent relies upon Rule 76(1) and grounds (a) and (b) for making a costs order which provides that:

   "76(1). A Tribunal may make a costs order and shall consider whether to do so, where it considers that

   (a) a party (or a party's representative has acted vexatiously, 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 had no reasonable prospect of success

6. In support of that application the respondent relies upon the 'unreasonable conduct' of these proceedings by the claimant in particular her lying and changing her case. They refer to 17 paragraphs of the judgment and reasons reciting the findings of fact made that support a finding of unreasonable conduct by the claimant. The respondent contends that the claimant's lies were 'crucial' to the claims she pursued, she knew her evidence was untrue or based on untruths. The fact that there are so many examples to recite from the tribunal's reasons serves to highlight the extent of that unreasonable conduct and the effect of that conduct on the case and its outcome.

7. The respondent points to the guidance given by the Court of Appeal in **Arrowsmith v Nottingham Trent University [2011] EWCA** that where a party has been found to lie, it will always be necessary for the Tribunal to examine the context and to look at the nature, gravity and effect of the lie in determining the unreasonableness of the alleged conduct. 'Reasonableness' in this context is a matter of fact for the Employment Tribunal to decide. Rule 76(1) imposes a 'two' stage test: first, a Tribunal must ask itself whether a party's conduct falls within 76(1)(a), if so, it must go on to ask itself whether it is appropriate to exercise its discretion in favour of awarding costs against the party and then to determine the amount of costs.

8. The Tribunal reviewed the written reasons and we agreed with the respondent's recital of the findings made. Unusually, there were a significant number of occasions when untruthful evidence was given by the claimant and an unreasonable position was adopted by her in the conduct of these proceedings. This was a case where the context gravity and effect of the claimant's lies were substantial and crucial to the case pursued.

9. Even when the claimant had the opportunity to reflect upon her position and the consequences of that at this hearing, that did not lead to any change in her conduct.

10. In the claimant's written representations, she refers to a discussion with her counsel about costs on 3 May 2018, when she says she was left with 'an understanding' that her claim could be successful. That 'understanding' does not reflect the discussion the Tribunal had with the claimant at the beginning of her case when the list of issues was discussed. She appeared to take her own counsel by surprise, when she changed the basis of the case she was making from that previously agreed one of 'admitted' misconduct. She then changed her position again during her evidence/cross examination and for a third time at the end of the case. Her case went from a complaint of unfair dismissal based on admitted misconduct to a qualified admission of misconduct during evidence to no admission of misconduct in closing submissions (see paragraph 5 of the reasons). Her discrimination arising from disability complaint was also affected by the change in position because that complaint was also based on admitted misconduct, relying on a connection between her disability and the conduct, to explain that misconduct. The decision to change her case before the Tribunal was a decision made by the claimant not by her counsel. Therefore, any blame for the consequences of that decision, rests entirely with the claimant.

11. While a position adopted by a party might reasonably change during the course of a hearing because evidence arises which that party might not have anticipated or considered previously, that was not the case here. The claimant knew from the

outset of this case that her dismissal was about alleged misconduct arising from her drinking and associated behaviour. Her evidence at the time of the disciplinary process was that she could not recall the behaviour but witnesses for the respondent could recall it. She knew from disclosure and witness statement exchange, exactly what the respondent's case was. Their defence to the claim never changed. The finding made that the claimant was an untruthful witness, was a serious finding to make and one which the Tribunal did not make lightly. We set out in paragraph 9 how we arrived at our conclusion based on the evidence we saw and heard, after discounting the possibility that the claimant may have been confused or may have misunderstood the position. She had deliberately lied and those lies had a substantial impact on the case from start to finish particularly in relation to the way she pursued her complaints of unfair dismissal and discrimination.

12. Surprisingly, the claimant has not responded to any of the 17 points made by the respondent to support a costs order. She has not sought to persuade us that the grounds relied upon are not made out, by reference to the decision made by the Tribunal. For those reasons the Tribunal was satisfied that the grounds relied upon are made out by the respondent in their application for costs.

13. The next stage having found that there are grounds for a costs order to be made is to decide whether the Tribunal should exercise its discretion to award costs. The claimant is an experienced 'HR' practitioner, familiar with employment law and procedure. She instructed solicitors prior to the hearing and counsel at the hearing costing her more than £20,000. She refers to parties being liable for their own 'costs' and identifies and refers to Rule 37 which deals with costs but she does not deal with costs where 'unreasonable conduct' is found which is the application she faces here.

14. She refers to a case at first instance of Ms T Pickin -v- The London General Transport Services which appears to be an Employment Tribunal case referring to costs 'after the event'. The Tribunal do not know what findings of fact were made in that case and must decide this application for costs based on the findings made by this Tribunal and the rules.

15. As to the level of costs claimed the claimant has confirmed that her solicitor's costs were at the same level claimed by the respondent. She relies upon the fact no costs warning was given by the respondent. A costs warning is not a prerequisite to the making of a costs order. The respondent could not have warned the claimant about her unreasonable conduct at the hearing because they did not/could not know it would occur. What is required is 'unreasonable conduct' by the claimant, which is what we have found in this case.

16. The claimant refers to her current inability to work and to her application to the Department for Work and Pensions for a 'capability for work assessment' which was due to take place in June 2019. She has chosen not to provide any further information about her ability to pay by providing any other details of any savings or assets she has/has an interest in (property etc). She has not referred to the substantial payment received from the respondent in settlement of her wages complaint. She was reminded to provide any information about her ability to pay prior to this hearing but has chosen not to do so.

17. We decided it was appropriate to exercise our discretion by making a costs order. The costs claimed by the respondent are limited to £20,000. In our view £10,000 was a reasonable sum to award in the circumstances. Although this is

only half of the costs claimed and approximately 1/8 of the total costs incurred by the respondent, and will not recompense the respondent in full, that amount was in our view a reasonable amount to award to reflect the claimant's unreasonable conduct, particularly at the hearing of her claim.

Employment Judge Rogerson

23 July 2019