EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr S Jones	**v**	GE Aviation Systems Limited

Heard at: **Southampton** **On: 5 July 2019**

Before: **Employment Judge C H O'Rourke**

Appearances
For the Claimant: Mr I Green – Claimant's father-in-law
For the Respondent: Ms Norval - Solicitor

COSTS JUDGMENT

The Claimant is ordered to pay the Respondent's costs, in the sum of £7141.39.

REASONS

1. By a judgment dated 4 January 2019, the Claimant's claim for unfair dismissal was dismissed.

Respondent's Application

2. Following delivery of Judgment, the Respondent applied on 22 January 2019 for an order for costs, in the sum of £17,351.12, subject to Rule 76(1) of the Employment Tribunal's Rules of Procedure 2013, in that the Claimant's claim had no reasonable prospects of success and/or it was unreasonable of him to raise and pursue it [C10 (references are to 'flags' in the Claimant's bundle)].

3. The Application referred to a 'costs warning' letter sent to the Claimant on 28 September 2018, in which, it was asserted, the basis upon which the Respondent believed that the claim had no reasonable prospects of success was set out and offering not to pursue costs, if the claim was withdrawn [C3]. It said that it estimated likely costs to be in the region of £20,000.

4. They also advised the Claimant that he should seek independent legal advice on the terms of the letter [C5].

5. The Respondent referred to an email from the Tribunal, of 12 December 2018, in response to a witness order application from the Claimant which stated, in refusing the application that '*At the hearing, the Tribunal will not be 're-*

hearing' the disciplinary process, but will be deciding, based on the evidence before the disciplinary panel at the time, whether the decision to dismiss was within the range of reasonable responses available to a reasonable employer, based on the evidence before them.' The Respondent considered that this re-iterated the contents of their costs-warning letter, on this issue.

6. The Claimant admitted, from the outset of the disciplinary proceedings that he had to said to a female colleague, of Indian ethnicity and who was approximately thirty years younger than him, '*Fuck off, you black cunt'*. The Respondent considered that for the Claimant to assert, in the Tribunal hearing that this was merely 'banter' and that such highly inappropriate offensive and racist behaviour should not warrant his dismissal was unreasonable.

7. The Respondent sought its costs from the outset of this matter, or, in the alternative, from the date of the costs-warning letter (28 September 2018), to the date of the Hearing.

Claimant's Response

8. The Claimant provided both written and oral representations [C1].

9. The Claimant stated that he was not professionally legally represented and therefore, bearing in mind the Overriding Objective (Rule 2), it was not possible for him to be on 'an equal footing' with the Respondent. His representative stated that his background as a business consultant and HR manager tended towards resolution of disputes in the workplace, rather than in Tribunal. The Claimant and his advisor did consider legal representation, but were deterred by its '*prohibitive'* cost.

10. He was advised that an award of costs were relatively rare and are the exception rather than the rule.

11. The Claimant had various contentions as to the merits, or otherwise, of hearings being conducted, or decisions being made, by a judge sitting alone, as opposed to by a tribunal panel, but which I consider to be irrelevant to my considerations.

12. He pointed out that the **Growcott** case (referred to below and as relied upon by the Respondent) predated the 2013 Tribunal Rules, which introduced what he referred to as a 'sift' stage, when claims are first received by the Tribunal (Rule 27). He considered that as his claim passed that stage and was not put on notice of dismissal by the Tribunal, it did, by implication, have merit.

13. The Claimant responded to the costs-warning letter at some point between 28 September and 4 October 2018 [C4]. His representative stated that the costs-warning letter had '*without doubt been written, as is standard practice today, with the sole intention of 'scaring off' the Claimant, particularly where the Claimant is not legally represented.'* He quoted from an 'Employers' Bulletin' that '*Tribunals often take unkindly to overly aggressive costs letters against unrepresented claimants.'* He did not agree that the letter constituted a genuine attempt to settle the dispute, as, implicitly, it contained no offer of financial payment to the Claimant, merely an offer not to pursue costs. He

said that '*it would appear that you have just chosen to send a 'cut and paste' of your employment law pro-forma/template re standard recognised procedures which I find patronising and insulting but recognise it has been done again as a scare tactic'.* He also considered that the Respondent's reference to judgments being available to the public on-line, with the inference that the Claimant would be embarrassed by its contents was actually more applicable to the Respondent's conduct in this matter. He concluded with the belief that the claim did have a reasonable prospect of success.

14. In response to a separate letter advising the Claimant to seek professional legal advice [C5], his advisor wrote on 5 October 2018 [C6] that:

'*In response to your recommendation to seek legal advice can I inform you that despite not holding a legal qualification my competency to represent the Claimant is not in doubt. I believe that as a business consultant for many years acting for multi-national corporations and SMEs worldwide in addition to which operating as a HR manager for a global company more than qualifies me to provide representation. In conclusion I did state in my previous email 'regardless of my limited legal expertise I should not be considered naïve so of course I have discussed the case with some of my solicitor colleagues before proceeding.'"*

15. The Claimant believed that the refusal of a subsequent application by the Respondent, on 23 October 2018, for a strike out/deposit order preliminary hearing further indicated the merits of his claim [C7 & 9]. The Claimant's response to that application [C8] set out the following points of relevance:

    a. He referred to the case law relating to the range of reasonable responses test (**Foley/Hitt** etc.) stating that '*Employment tribunals have to avoid substituting themselves for the employer … - this also applies to the Employer's management team'*.

    b. He contended that the Respondent had failed to give sufficient consideration to circumstances mitigating against dismissal, such as his long service and previous good conduct. In a separate response to the initial costs application, the Claimant said that '*Employment Judge O'Rourke agreed that there were significant mitigating circumstances … that could have influenced the decision and the Respondent should have taken into account. However, Employment Judge O'Rourke believed that the age difference between the Claimant and the colleague outweighed the mitigating circumstances.'* [C11].

    c. He stated that the Respondent's disciplinary policy did not list '*racist comments/offensive language'* as potential gross misconduct.

    d. He set out various alleged failures of procedure, one of which was pursued at the Hearing – namely the fact that the affected colleague had been interviewed with her manager present, which was asserted to '*promote(s) intimidation'*.

    e. That the sanction was excessive, when compared to other similar cases.

f. That the comment made by the Claimant was 'banter' '*on the basis that those participating do so willingly and on an equal level'* and therefore should not have been treated as gross misconduct. At C11, the Claimant said that '*Although Employment Judge O'Rourke stated that it was quite evidently not banter when viewing the comment by itself, but he further clarified it by confirming the female colleague was not offended by it or harassed.'* [C11]

g. That his representative believed that '*… as a business consultant to a number of companies and previously a senior HR manager in a multinational company that I am qualified to comment on the development of positive culture, the effective implementation of man management and procedural control.'* He contended that 'offensive' language was commonplace on the shop floor, including management and that this incident should have been taken as '*an opportunity … as the catalyst to embark on culture improvement …'*.

16. He asserted, in the same letter that '*Judge Harper* (who refused the application for the preliminary hearing) *was aware that the Respondent would be seeking in the region of recovering £20,000 if the case went ahead and yet he believed it still warranted a hearing.'*

17. He stressed that costs should not be awarded just to punish an individual for bringing a claim. Merely losing the case did not justify the accusation of it having no reasonable prospects of success.

18. The Claimant would be unable to pay any costs order, due to his lower salary since dismissal (circa £21,000, as opposed to £32,000 with the Respondent). He is unable to meet his current commitments, without his wife's financial support from her part-time employment, which was previously used for funding holidays [C12].

The Law

19. The Tribunal reminded itself of the case of **Kovacs v Queen Mary and Westfield College [2002] EWCA Civ 352** which indicated that ability to pay is not a factor which an employment tribunal is required or entitled to take into account when deciding whether or not to make a costs order. **Yerrakalva v Barnsley Metropolitan Borough Council [2012] ICR 420 EWCA** indicates that a tribunal has a broad discretion in such matters and in exercising that discretion should look at the 'whole picture' and ask whether there has been unreasonable conduct by the Claimant in bringing or conducting her claim and in doing so, to identify the conduct, what was unreasonable about it and what effects it had. While ability to pay is a factor that a tribunal may take into account, it is not determinative as to the amount of costs ordered. **Arrowsmith v Nottingham Trent University [2011] EWCA Civ 797** states that (paragraph 37) '*The fact that her ability to pay was so limited did not, however, require the ET to assess a sum that was confined to an amount that she could pay. Her circumstances may well improve and no doubt she hopes that they will.*'

20. **Kovacs v Queen Mary and Westfield College [2002] EWCA Civ 352** is also authority for the principle that rejection of an offer to settle can be unreasonable conduct.

21. The Respondent relied on the case of **Growcott v Glaze Auto Parts Limited [2012] UKEAT/0419/11/SM**, which also concerned a costs order following a costs-warning letter and a subsequent failed unfair dismissal claim. The EAT held that whether or not it was unreasonable for the Claimant in that case to pursue her claim, following receipt of a costs-warning letter was a question of fact and discretion for the Tribunal hearing the costs application. The Respondent also contended that the EAT's reference to the costs-warning letter sent in that case, as being set out in '*accurate, straightforward and simple terms …* (and that) *it was wholly suitable to convey to any litigant the way in which the Employment Tribunal was bound to approach the forthcoming hearing … as being a fair and sensible warning to Mrs Growcott … that, if she continued to proceed with her claim, she would be running a risk as to an award of costs.'* similarly applied to their costs-warning letter in this case.

Reasons for Costs Order

22. It is the Tribunal's decision that it is appropriate, from the point at which the Claimant saw the costs-warning letter, to make a costs order in this case, for the reasons set out below.

23. It should have been self-evident to the Claimant and his representative that his statement to his colleague constituted gross misconduct and that therefore the likelihood of dismissal fell squarely within the range of reasonable responses test: as he said, at the time, to the colleague '*thanks for putting me out of a job'* [paragraph 11 Reasons]. That test was explained to him, both by the Respondent in its costs-warning letter and by the Tribunal in its email in response to his application for a witness order. However, I consider that the Claimant willfully and unreasonably chose to gloss over the true nature of his grossly abusive statement, by labelling it as 'banter' between two willing participants, on an equal level. But, it should have been apparent to him that as somebody with much greater work and life experience (even purely by virtue of the age difference) than his colleague, they were not on 'an equal level'. The colleague is approximately thirty years younger than him; a woman, in a no-doubt male-dominated workplace and a member of an ethnic minority, in, again, a no-doubt predominantly white workforce and therefore, even applying a commonsense, man-in-the-street approach, cannot, even in the Claimant's mind, have been on an equal level. For his representative to consider that somehow, such event should be considered as a 'learning experience' for the Respondent, to act as a 'catalyst' for workplace culture improvement is both offensive and a further indication of the blinkered unreasonable approach taken to this case. Even, however, if that conclusion were incorrect, the Claimant was on notice, from the point of the disciplinary/appeal hearing, as to his colleague's true perception of his behaviour, namely that '*the work banter is normal, but not normally as severe as today … Stan realised he crossed a boundary today … she tends to walk off, or say 'don't want to listen to it' … she has told Stan 'piss off' a couple of times when Stan got annoying … she has heard comments all her life and*

realises some people won't change, as that's how some people are built and minded … she knows it's not right to let it go, but she lets it go over her head, as she's had it all her life' [57&59 of hearing bundle, relating to colleague's statement at the time]. While, subsequently, she may have regretted the consequences for the Claimant, it is clear to me that his behaviour was not always welcome and was on this occasion, 'severe'.' [Paragraph 8.2 Reasons]. Whether or not, at the time, or now, the Claimant agrees with what his colleague said in her statement/interview notes at the time that is the evidence that was before his employer, when they made their decision to dismiss him and of which he was aware and which clearly indicated that she was not a '*willing participant'*. It is not the case, as he now asserts that '*Employment Judge O'Rourke stated that it was quite evidently not banter when viewing the comment by itself, but he further clarified it by confirming the female colleague was not offended by it or harassed.'* I came to no such conclusions, instead referring to the extract above from the colleague's statement, indicating the opposite.

24. The Claimant's response to the costs-warning letter was peremptory and dismissive, viewing it purely as a 'lawyer's tactic' to intimidate him. He failed, unreasonably, to heed the detail set out in that carefully-worded letter, in particular that the case would stand or fall on whether or not dismissal, in the circumstances of this case, fell within the range of reasonable responses test. This was a letter, I find, written in similar terms to that approved by EAT in **Growcott**. His advisor is clearly perfectly capable of carrying out legal research (as evidenced by his references to such in his response to this application and to legal references in the substantive hearing) and a modicum of clear-eyed, unbiased such research would have revealed to him the broad nature of the test and therefore put him in real doubt, in the relatively extreme circumstances of the Claimant's case that he could exclude himself from that test.

25. The Claimant now seeks to assert that the Tribunal considered that there were significant mitigating circumstances not taken into account by the Respondent in reaching its decision to dismiss, but that the Tribunal considered this failure somehow outweighed by its own view as to age disparity between the Claimant and his colleague. This is a willful misreading of the Tribunal's reasons in this case, which accepted that the Respondent's decision-makers had taken such circumstances into account, but did not consider they outweighed the gravity of his misconduct [paragraphs 15-17 Reasons].

26. While it is the case that the Claimant was not professionally represented in this matter, such lack of representation does not, of itself, excuse him from the accusation of pursuing a claim with no reasonable prospect of success. At this Hearing, his representative attempted to rely on this factor, pleading his lack of legal expertise and knowledge, but that is not how he represented himself during the conduct of the case, with particular reference to the quoted passage above from his response to the Respondent's suggestion that the Claimant seek legal advice. That response was, I find, somewhat arrogant and dismissive and indicated to me the blinkered approach being taken by the Claimant (no doubt under the considerable influence of his father-in-law), in pursuing this claim and failing to take due heed of the costs-warning letter.

Also, the Claimant's representative makes reference to his ability to access legal advice from solicitor colleagues. Were this a case of an unrepresented, uneducated, unsophisticated claimant, I would have considerably greater sympathy for the stance he took, but these are not the circumstances before me in this case: the Claimant was represented by somebody who put themselves forward as knowledgeable, '*more than qualified to provide representation'* and relying on their considerable management and HR expertise and access to legal advice.

27. In respect of the Claimant's assertions as to his reliance on both Rule 27 not being applied to his case and the refusal of the Respondent's application for a preliminary hearing, to justify his views as to the merits of his case, this is again, I find, a misreading (willful or otherwise) of these decisions. Rule 27 indicates that an employment judge can, if they consider that a claim has no reasonable prospects of success, put the parties on notice of such view and the reasons for it and invite written representations in respect of it. At the point of such consideration, however, the Judge would have only had sight of the claim form and the response, with, in this case, the Claimant asserting that he'd been unfairly dismissed, for a range of factors and the Respondent denying such. It would be a rare circumstance indeed, without hearing any evidence that a judge would dismiss such a case, at that point, as having no reasonable prospects of success. The Judge would not, for example, have had sight of the colleague's interview notes/statement, the dismissal decision and appeal finding, or heard evidence from any witness and therefore, for the Claimant to seek to rely on this Rule, particularly if he had access to advice from his advisor's solicitor colleagues, is misplaced. In respect of the Tribunal's refusal to list for a preliminary hearing the Respondent's application for strike out/a deposit order, this is definitely a misreading by the Claimant of that decision. The Claimant represents it as indicating that he '*could not be accused of pursuing a claim that was 'vexatious or has no reasonable prospect of success', otherwise Judge R Harper would have agreed to strike it out.'* However, as is clear from his email [C9] this is precisely <u>not</u> what the Judge was doing. He was simply refusing to list it for a preliminary hearing, as evidence would need to be heard and that evidence could as readily be heard at the final hearing, as in any preliminary hearing. He was <u>not</u> agreeing not to strike it out. Such a preliminary hearing could have taken a day, when the substantive hearing was listed for only two days (and indeed all the evidence was heard on the first day). Nor was the Judge aware, as is now asserted by the Claimant, as to any previous costs warning by the Respondent, or of the likely level of their eventual costs, such correspondence being confidential between the parties, at that stage. As at the Rule 27 stage, the Judge had no more evidence before him when refusing the application than available at that prior point. Again, a more attentive reading of the Tribunal's letter and some cursory advice from the Claimant's representative's solicitor colleagues could have disabused him from that belief.

28. The assertion that as the Respondent's disciplinary policy did not list '*racist comments/offensive language'* as potential gross misconduct, this somehow excused the Claimant from dismissal is, I consider, evidently wrong. I reiterate that at the time, he knew dismissal was likely ('*thanks for putting me out of a job'*); the disciplinary policy does, in fact, include harassment and abusive behaviour as gross misconduct and in any event, even if it didn't, it

would be blindingly obvious to any person that to racially abuse a colleague would of course be gross misconduct and attract the possibility of dismissal.

29. It is of course the case that costs should not be awarded to 'punish' a losing claimant and this is not the case here. The Respondent has incurred costs plus of £17,000 in resisting this claim and is entitled, if, as I find here, the claim had no reasonable prospects of success and certainly should have been withdrawn on receipt of the costs-warning letter, to recompense for at least some of those fees, which they would not otherwise have incurred, a large amount of them relating to preparation for and attendance at the Hearing.

30. I carried out a summary assessment of the Respondent's detailed schedule of costs and determined that the amount that was legitimately recoverable was £7141.39, for the following reasons:

    a. I consider that liability for costs only applied from the date of the costs-warning letter.

    b. The work was carried out by a qualified solicitor at an appropriate hourly rate (£160).

    c. I disallowed any time recorded for supervision of that solicitor, on the basis that a qualified solicitor should be able to deal on his or her own with a relatively straightforward unfair dismissal claim such as this.

    d. I considered overall preparation time for the hearing to be excessive, limiting it to a day's work (seven chargeable hours).

    e. I excluded any work done on the strike-out hearing application, as such application was, I consider, in the circumstances of an already-listed two-day final hearing, pointless.

    f. I limited travel costs and travel time to the hearing to that equivalent to instructing a solicitor local to Southampton. The Respondent is entitled to instruct whatever solicitor they wish, but not to hold the Claimant responsible for the costs of travel of a solicitor based in Edinburgh.

    g. As the Respondent company will be registered for VAT and can therefore recover such costs from their legal bills, such sums are not recoverable from the Claimant.

31. In respect of that £7141.39, I went on to consider the Claimant's ability to pay such a sum. Despite notice of this hearing and his preparation of a 'financial details' summary [C12], the Claimant had no corroborative evidence with him to support his claimed earnings and outgoings, nor that of the family income from his wife. He said that he had much of this detail on his phone, to include pay slips and bank statements and a short adjournment was granted to permit him, with the Tribunal's assistance, to download and print off such documents. Despite this, however, he was unable to provide bank statements in any readable form, or any detail of his wife's earnings. He was able to provide some pay slips from his current employer and I therefore accept that his

average monthly income is around the £1700 mark (dependent on levels of overtime). I came to the conclusion that the Claimant will, if not now, in the future, have the ability to pay costs in the sum of £7141.39, for the following reasons:

a. While, allowing for the absence of corroborative evidence of the family income and outgoings, he *may* not now have much disposable income, he has been a skilled worker for much of his working life, is still very much of working age and can, therefore, if not now, in due course, expect to return to a similar income as before.

b. He owns his home, albeit that it subject to a mortgage.

c. It is the case that no matter what order is made by this Tribunal, the Respondent will be unable to 'get blood from a stone': if the Claimant genuinely does not have the funds, then he cannot be forced to pay. In that event, it will then be open to the Respondent to consider enforcement through the County Court, in which process the Court can order him to attend, with documents, to satisfy itself as to his means and to then make a repayment order, taking into account his genuine ability to pay.

32. Conclusion. I conclude, therefore, for the reasons set out above that the Claimant is ordered to pay the Respondent's costs, in the sum of £7141.39.

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Employment Judge O'Rourke

Dated 9 July 2019