



EMPLOYMENT TRIBUNALS

Claimant
Mr A E Lagha

v

Respondent
Smart Systems Limited

Heard at: Bristol **On: 23 September 2019**

Before: Employment Judge O'Rourke
Mr Howard
Ms Luscombe-Watts

Appearances

For the Claimant: In person
For the Respondent: Mr Roberts - Counsel

COSTS REASONS

(Having been requested, subject to Rule 62(3) of the Employment Tribunal Regulations 2013)

1. By a judgment dated 23 September 2019, the Claimant's claim for automatic unfair dismissal was dismissed.

Respondent's Application

2. Immediately following delivery of the Judgment, the Respondent applied for an order for costs, in the sum of £9,080, subject, firstly, 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 and secondly, also, Rule 76(2), due to the Claimant's non-compliance with Tribunal orders. In respect of the latter point, it was stated that:
 - a. The Claimant had failed to meet the deadline for disclosure of documents, of 8 July 2019, not doing so until 2 August.
 - b. He had refused to exchange his witness statement, despite having already received the Respondent's, only providing a statement at the outset of this Hearing.
 - c. Despite being warned, in writing, against doing so by the Respondent's solicitor, he introduced privileged content into his statement (as to

offers made by the Respondent), having previously also done so in correspondence to the Tribunal.

3. Mr Roberts referred to an offer and 'costs warning' letter sent to the Claimant on 12 August 2019, 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prospects of success was set out and offering £2000, by way of pragmatic resolution of the matter, if the claim was withdrawn. It gave a reasonable estimate, at the time, as to likely future costs. The letter also advised the Claimant that he should seek independent legal advice on the terms of the letter.
4. The Claimant responded shortly afterwards, rejecting the offer and counter-offering for an approximate sum of £60,000, stating that he '*had nothing to lose*' in continuing the proceedings.
5. In this Hearing, he, for the first time, made entirely unsupported allegations about some of the Respondent's documents being fabricated.

Claimant's Response

6. The Claimant said that he had not been in UK all the time, thus reducing his ability to deal with this claim and medically '*was in a very bad situation*', suffering from depression.
7. He had been unable to get legal advice.
8. He took this claim to stop the Respondent Company '*abusing me and others*'.

The Law

9. 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 his 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.*'
10. **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.

11. **Growcott v Glaze Auto Parts Limited [2012] UKEAT/0419/11/SM**, which 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 EAT referred 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.*'

Reasons for Costs Order

12. 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. Mr Roberts confirmed that costs since that date amounted to £7,855, not including VAT.
13. We found the Claimant not to have been a credible witness, on the core issue in this case, whether or not he had been instructed by Mr Jeffrey to operate the Biesse machine. The Claimant appeared to us willing to say whatever was necessary in this Hearing, regardless of truth, to support his case. He will have known, from sight of the Response, over a year ago that the Respondent (in the person of Mr Jeffrey) was going to firmly deny any such instruction to him and that he had, otherwise, no corroborative evidence whatsoever to support such assertion, but continued nonetheless. His belated allegations about the Respondent's documents being fabricated further damaged his credibility.
14. The Claimant's response to the costs-warning letter was dismissive, in particular his use of the phrase that he '*had nothing to lose*' by refusing the offer and carrying on, when the letter clearly indicated that he indeed might have 'something' to lose. He is a well-educated and clearly intelligent man, but he failed, unreasonably, to heed the detail set out in that carefully-worded letter, which was, we find, written in similar terms to that approved by EAT in **Growcott**. Had he given the letter proper consideration and accepted the offer (or made a more realistic counter-offer than he did), his claim may well have been settled, avoiding the need for further preparation for and attendance at this Hearing.
15. The Claimant had failed to comply with several Tribunal orders, as follows:
- a. He failed to attend the first telephone case management hearing in this matter, on 31 October 2018, stating that he had misread the clear instructions on the notice of hearing, as to telephoning in at the appropriate time, thus resulting in the necessity for another case management hearing, heard on 28 May 2019, incurring additional work

by both the Tribunal and the Respondent and delaying the final hearing of this matter.

- b. At that second hearing, despite agreeing today's hearing date, he created uncertainty for both the Tribunal and the Respondent, by stating that he was unsure if he would in fact attend.
 - c. As stated by Mr Roberts, he failed to comply with the order for disclosure, without good reason (and indeed, despite that brought along a sheaf of documents to today's hearing, which he asserted, without knowing whether it was in fact the case or not that they were not included in the bundle, thus wasting time at this Hearing.) He disobeyed the order as to exchange of witness statements, again, without reasonable explanation, only providing his statement today, again wasting time at this Hearing.
16. Noting our views as to his credibility, generally, the Claimant provided no corroborative evidence as to his medical condition, or why it would have prevented him from progressing this case, or more reasonably responding to offers and costs warning letters. Nor did he provide corroborative evidence of any time spent outside the UK, but, in any event, with modern digital communications that factor should have not have prevented him from attending telephone hearings, or complying with Tribunal orders.

Amount of Costs Order

17. We had no reason to doubt Mr Roberts' statement that his client's costs, from the date of the costs warning letter, amounted to £7885. His own brief fee would easily run to a third of that amount and from our own experience (in particular that of the Employment Judge), solicitor's costs for preparation for the hearing, to include preparing of a bundle (to include a separate costs bundle), drafting and redrafting of witness statements, briefing counsel and dealing with queries from counsel and client would routinely amount to the balance.
18. In respect of that sum, we went on to consider the Claimant's ability to pay it. The Claimant said that he was currently unemployed and applying for positions and owned no property. He said that he was 'homeless' and while he was vague on this point and would not give any information about his current address, we gained the impression that he may be staying with friends. Applying **Arrowsmith**, we came to the conclusion that the Claimant will, if not now, in the future, have the ability to pay costs in the sum of £7,855, for the following reasons:
- a. He is a well-educated and skilled individual, 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 (in the region of plus of £30,000 p.a.).
 - b. 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.

19. Conclusion. We conclude, therefore, for the reasons set out above that the Claimant is ordered to pay the Respondent's costs, in the sum of £7855.00.

Employment Judge O'Rourke

Dated 1 October 2019