



EMPLOYMENT TRIBUNALS

Claimant 1: Mr L O'Reilly
Claimant 2: Mr A Darlington
Respondent: Liverpool Airport Limited

HELD AT: Liverpool **ON:** 20 January 2020

BEFORE: Employment Judge Shotter

REPRESENTATION:

Claimants: In person
Respondent: Mr Cross, consultant

JUDGMENT

The judgment of the Tribunal is that;

1. The respondent's application for costs against the claimant is successful and the first claimant, Mr L O'Reilly, is ordered to pay to the respondent a contribution towards costs in the sum of £1,000 inclusive of the £250 deposit order.
2. The respondent's application for costs against the claimant is successful and the first claimant, Mr A Darlington, is ordered to pay to the respondent a contribution towards costs in the sum of £1,000 inclusive of the £250 deposit order.

REASONS

1. The respondent made a costs/time preparation order ("TPO") application at the end of the liability hearing on 5 June 2019 when the claimants failed in their claims of unfair dismissal, followed by the email setting out the grounds dated 12 June 2019 from Tim Cross to the Tribunal and copied to both

claimants. Reference was made to the time spent by the advisor was 32 hours, and respondent's employees a total of 56 hours. A time preparation order in the sum of £3,432 was sought at an hourly rate of £39.00. Reference was made to rule 39(5) of Schedule 1 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, rule 75(2) and 76(1)(a).

2. The costs application follows two deposit orders made in respect of each claimant individually in the sum of £250 totalling £500, EJ Wardle concluding both claimants had little reasonable prospects of succeeding in their claims of unfair dismissal, the respondent having decided after a reasonable investigation that it was more likely than not the claimants had stolen cash and there was a potentially fair reason for dismissal.
3. In a note accompanying the deposit order the claimants were warned "if the Tribunal later decides the specific allegation or argument against the party which paid the deposit for substantially the reasons given in the deposit order, that party shall be treated as having acted unreasonably, unless the contrary is shown..."
4. The deposits were paid and the liability hearing went ahead on 3, 4 and 5 June 2019 following which the unfair dismissal claims were dismissed, the Tribunal having found the decision fell within the band of reasonable responses open to a reasonable employer. Oral judgment and reasons were given, and judgment only promulgated on 18 June 2019.

Means: Mr L O'Reilly

5. The first claimant gave evidence under oath at this costs hearing, and he provided documentation confirming that an Individual Voluntary Arrangement ("IVA") had been entered a year ago, and as of today the claimant owed creditors in excess of £20,000. The first claimant, who is employed full-time and earns approximately £22,000 per annum, confirmed he could afford to pay £20 to £30 per month for the duration of the IVA. The Tribunal was satisfied the claimant was in a position to make a small monthly contribution to the respondent's costs on this basis, taking into account the extensive debts and the fact that after all payments out have been made, there is very little left in the claimant's bank account monthly.
6. Mr Cross rightfully criticised the first claimant for not informing him and the Tribunal of the IVA, especially given the correspondence sent to the claimants seeking a contribution towards the TPO in the sum of £1000 each. Had the claimant been more forthcoming with relevant information the costs application in respect of him alone may not have required this hearing. The claimant relied on his inexperience as a litigant in person for the explanation, he was under the impression his attendance was necessary.

Means: Mr A Darlington

7. The second claimant gave evidence under oath as to his means which was less straight forward than the evidence given by the first claimant. The second claimant has two bank accounts, one in his sole name and the other in joint names with his partner. He works full time and earns £26,000 per annum. Wages are paid into the account under his sole name, and from this account he regularly made numerous transfers to the joint account leaving a debit balance on 16 January 2020 of £996.66. There was no satisfactory explanation for all of the debits, and the Tribunal was not satisfied that monies had been transferred into the joint account to deplete the second claimant's sole account for the purpose of this application.
8. The second claimant is sole owner of a property in which he and his partner live, and yet in accordance with the evidence given today he transfers the monthly mortgage payment in smaller varying sums into the joint account and then transferred from the joint account into his partner's account in order that she can pay the mortgage. It is clear the claimant's transfers of money from one account to another has resulted in the regular depletion of monies held in claimant's sole account (into which wages are paid). The Tribunal was not provided with copies of the joint account, and it concludes given the second claimant's salary and equity in property he can afford to contribute towards the respondent's costs. In oral evidence the claimant indicated there was no reason why he could not pay some amount in costs.

Conclusion

9. The Tribunal is satisfied that with reference to the deposit orders, it decided against the paying parties at the liability hearing in relation to specific allegations or arguments for substantially the same reasons as those it relied on when making the deposit order. Having found the respondent had a fair reason for dismissing the first and second claimant, both are automatically treated as having acted unreasonably in pursuing that specific allegation or argument for the purposes of rule 76 (unless the contrary is shown) — rule 39(5)(a). The Tribunal will therefore be required to consider whether to make a costs order or preparation time order (PTO) against that party under rule 76(1). In short, the dismissal was held to be fair, the respondent having established a potentially fair reason for dismissal were substantially the same as those given at the preliminary hearing deposit stage and the Tribunal is satisfied both claimants were unreasonable in persisting in having the matter determined at a full hearing.
10. The arguments put forward by the claimants in oral submissions relating to the length of their employment and enjoyment when working for the respondent, did not assist in reversing the presumption under rule 39(5)(a) that they will be presumed to have acted unreasonably in pursuing the unfair dismissal allegation or argument for the purpose of a PTO. Unreasonable conduct has been made out under rule 76(1)(a) and the next step for the Tribunal is to consider whether to make a PTO — asking itself whether it is

appropriate to exercise its discretion in favour of awarding costs against that party and concluding that it was proportionate and appropriate in all the circumstances of this case.

11. The Tribunal is aware that it is “rare” for costs orders to be appropriate in Employment Tribunal proceedings; they do not follow the event as in the ordinary course of litigation. The Tribunal considered the claimant’s individual means confirmed under oath, and taking this into account it is just and equitable for the Tribunal to use its discretion in favour of the respondent, who has incurred time, including preparation work only carried out by Mr Cross, in defending a claim at the liability hearing which had attracted deposit orders as a condition of them continuing.
12. In conclusion, taking into account means the first claimant is ordered to pay to the respondent a TPO contribution towards the respondent in the sum of £1,000.00. The second claimant is ordered to pay to the respondent a TPO contribution towards the respondent in the sum of £1000.00

20.1.2020
Employment Judge Shotter

JUDGMENT SENT TO THE PARTIES ON
6 February 2020

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.