



EMPLOYMENT TRIBUNALS

Claimant: Mr Shahid Hussain

Respondent: JCT600 Limited

Heard at: Leeds

On: 10 February 2020

Before: Employment Judge Maidment

Representation

Claimant: Mr S Anderson, Counsel

Respondent: Mr P Wilson, Counsel

JUDGMENT AS TO COSTS

1. The Respondent's application for costs is refused.
2. The Claimant's application for costs is refused.

REASONS

The applications and claims

1. The Respondent applies for an award of costs on the basis that the Claimant was unreasonable in pursuing his claims and that they had no reasonable prospect of success. The Claimant makes a counter application for his own costs arising out of the Respondent's failure to agree terms for the Claimant's withdrawal of his complaints and instead pursuing this application for costs.
2. The Claimant brought various complaints arising out of his dismissal on 30 November 2018. The Respondent's position was that the Claimant was dismissed because of redundancy, a situation which arose out of the Respondent's decision to close the Shipley car dealership at which the Claimant worked and where there was no suitable alternative employment for him. The Claimant was said to be in a unique position. The Claimant's case is

that there was suitable employment available as a service manager at the Respondent's Menston site. The Claimant maintained that he was offered this alternative but it was withdrawn upon the Respondent anticipating further ill-health absences attributable to the Claimant's mental health disability. The Respondent's case was that no offer had been made to the Claimant capable of being accepted. At most there had simply been discussions about the possibility of the Claimant taking the position at Menston.

3. Therefore, as well as claiming that his dismissal unfair, the Claimant, amongst other things, maintained that his dismissal was because of disability and/or an aspect of unfavourable treatment for something arising in consequence of disability.

The proceedings

4. The Respondent sent to the Claimant a proposed statement of agreed facts and audio recordings (with transcripts) of redundancy consultation meetings on 27 September 2019. A costs warning letter was sent on the same day drawing the Claimant's attention to difficulties with his case and, in particular, asserting that the transcripts of the meetings did not support the Claimant's version of events. On 20 November, a hearing bundle containing the meeting transcripts was sent to the Claimant's solicitors. Witness statements were exchanged on 3 December, the Claimant's being dated 29 November 2019. Within his statement he continued to maintain that he had been offered and accepted the role at the Menston branch, but that this was then withdrawn. He said he was told that the reason for withdrawing the offer was that the role was too far away from his home, yet that he had pointed out to the Respondent that he owned several properties, including one which is located only 2 miles away from the Menston site.
5. The Claimant's solicitors then emailed the Respondent's solicitors stating that the Claimant recollected that the redundancy consultation meetings had been recorded and asking for a copy of the audio from those meetings together with the transcripts. The Respondent's solicitors reverted that, as referred to above, the transcripts had already been sent and were in the hearing bundle.
6. The final hearing was due to commence on Monday 16 December 2019. On 12 December the Claimant's solicitors sought a postponement referring to the Claimant's father having had a heart attack. This application was opposed, but then repeated on behalf of the Claimant. The Tribunal reverted to say that the application would be considered on the submission by the Claimant of medical evidence to support the basis of his application. Finally, on that day the Claimant's solicitor proposed a settlement involving the Claimant's withdrawal of his complaints on the Respondent's confirmation that it would make no application for costs.
7. On 13 December, the Claimant's solicitors emailed the Respondent's solicitors to advising that the Claimant was withdrawing his claim because he was not "emotionally resilient enough" to participate given his current circumstances and offering to withdraw the claims on terms that there be no order for costs.

This offer was not accepted and at 4:06pm the Claimant's solicitors emailed the Tribunal withdrawing the claims and repeating the Claimant's contention regarding a lack of emotional resilience.

Submissions and arguments

8. It is put forward on behalf of the Respondent that the Claimant's case was founded on lies. It is said that the recordings of the consultation meetings showed that the Respondent did not offer the Menston role to the Claimant, the Claimant did not accept that role, he did not refer to owning properties in the locality and the Respondent did not subsequently withdraw any offer. It is suggested that the Claimant's version of events cannot be explained by any failings in his memory or misinterpretation. The Respondent's case is said to have been clear throughout. At the very least, the Claimant ought to have taken stock and reconsidered the assertions made in his grounds of complaint.
9. On behalf of the Claimant, Mr Anderson lodged with the Tribunal a written witness statement of the Claimant dealing with his understanding of events and how they might be reconciled with the transcriptions of the audio recordings. The Claimant was not present at the Tribunal hearing, but the Tribunal confirmed in any event that it was not ever anticipating that it would hear any live evidence and, in particular, was not going to conduct a mini hearing in order to find facts as might have been found had the final hearing proceeded.
10. Mr Wilson submitted that the Claimant was now, in this witness statement, submitting a different/new argument that it was his interpretation that he had an opportunity to apply for the role and that this, in his mind, constituted an offer. He seemed to be saying that, because he had an opportunity to apply, then it was to be taken as read, in the context of the Respondent's business, that he would be successful and therefore in that sense he had accepted a new role. In actual fact, Mr Jason Smith of the Respondent had spent time in the consultation meetings explaining to the Claimant why he did not see that Menston was 'a fit' for the Claimant in circumstances where he would have to look after 3 different brands and a significant number of people under him. Mr Wilson described it as astonishing, that the Respondent had only received this 'spin on the facts' at the last minute before a costs application, which 'very conveniently' the Claimant was unable to attend. The Claimant was said to be latching onto a telephone call on 27 November (coincidentally the only conversation not recorded) as the point in time when he allegedly told Mr Smith about his ownership of nearby properties. The Tribunal was asked to be sceptical of the Claimant's protestations of current lack of means in circumstances where it was said that he owned a property development business.
11. It is said further that the Claimant made other false statements, including in repeated claims that the Respondent did not inform him of the redundancy situation at the same time as other staff or indeed before a local newspaper had published an article on the site closure. Whilst the Respondent accepted that those statements were more peripheral to his case, there are a further example, it is said, of dishonesty.

12. Reliance was also placed on the Respondent having to seek unless orders to ensure compliance with the Tribunal's directions as further demonstrations of unreasonable conduct in the pursuit of these claims.
13. Alternatively, it was submitted that the Claimant's claims had no reasonable prospect of success, not least in circumstances where the claims were based on false assertions. The claims, it was said, were bound to fail given that the entire outcome of the unfair dismissal and disability discrimination claims rested upon statements which were completely untrue.
14. Mr Anderson, on behalf of the Claimant, suggested that the legal concepts of offer, acceptance and withdrawal would not coincide with a layperson's interpretation.
15. He referred to the originating application and grounds of complaint within it being patently drafted in error by the Claimant's representative at a time when he had not had the benefit of reading the transcripts or hearing the audio recordings. In any event, the Claimant's argument was that he was unfairly dismissed, regardless of whether there had been a concluded agreement in respect of the alternative Menston role.
16. Mr Anderson suggested it was commonplace for witnesses to make honest mistakes in recollecting events and, in this case, it was clear that the Claimant had failed to consult the transcripts and that it would have been 'daft beyond belief' for the Claimant to misrepresent the facts in the face of unassailable evidence. He suggested that, rather than any dishonesty, the evidence points to straightforward error and an oversight in the statements in the transcripts not having been spotted and reviewed by the Claimant and those who represented him. As regards how he was informed of the site closure, it was said that the Respondent attributes possible failings of the Claimant's memory to malice when there is no evidence of such.
17. It was denied, as suggested by the Respondent, that there was any inconsistency in the postponement application between the reliance on the Claimant's father's heart attack and the Claimant's lack of emotional resilience.
18. Mr Anderson's position was that the claims, at all stages, did not have the poor prospects argued on behalf of the Respondent. The chief reason why the Claimant was not offered the Menston role was the travel distance in circumstances where the Claimant had already for some considerable time been making the journey from the Manchester area to the Respondent's Shipley site and a move to Menston would have involved a relatively short additional journey. It was noted that the Claimant was also told that the Menston role was too much of a step up for him, whereas the role ultimately went to an individual with less experience than the Claimant in circumstances where all of the Claimant's non-disabled colleagues who wished to stay with the Respondent were successfully redeployed. The Claimant could have succeeded in a complaint of unfair dismissal and direct disability discrimination.

19. Whilst the Respondent contended that the Claimant was not a disabled person, there was said to be evidence from the Claimant's GP records that he had symptoms of a recurrent depressive disorder.
20. On behalf of the Claimant, a counter-application for the cost was made with reference to the Respondent acting unreasonably in not accepting the 'drop hands' offers before the date of the final hearing and unreasonably pursuing this costs application.

Applicable law

21. The Tribunal has power to make an award of costs by virtue of Rules 76 and 84 of the Employment Tribunals Rules of Procedure 2013, which provide, so far as material, as follows:

"76 When a costs order or a preparation time order may or shall be made
(1) A Tribunal may make a costs order ..., and shall consider whether to do so, where it considers that –
(a) a party (or that party's representative) has acted vexatiously, abusively, 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 or response had no reasonable prospect of success.
(2) ...
(3) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

84 Ability to pay

In deciding whether to make a costs ... order, and if so in what amount, the Tribunal may have regard to the paying party's ... ability to pay."

22. The Tribunal had regard to principles derived from the authorities referred to on behalf of the parties. In particular, the Tribunal must identify the unreasonable conduct, say what was unreasonable about it and say what its effect was: see ***Yerrakalva v Barnsley MBC [2012] ICR 420 CA***. A tension arises when claims are withdrawn late. On the one hand the Tribunal must not operate the costs regime so as to deter litigants from withdrawing their claims for fear of being pursued for costs, but, on the other hand, the Tribunal must not operate it so as to encourage speculative claims. What the Tribunal has to consider is whether the conduct of the claim has been unreasonable, not whether the withdrawal was unreasonable. Further, there does not have to be a direct causal link between the unreasonable conduct and the costs awarded: see ***Macpherson v BNP Paribas [2004] ICR 1398 CA***.

Conclusions

23. Costs in the Employment Tribunal are not automatic. In fact, they are far from automatic. If they are to be considered, unreasonable behaviour, amongst other things, must be shown or that a claim has no reasonable prospects of success.
24. The primary basis for this application is that the position the Claimant took at the outset, as to the issue of alternative employment, was dishonest.
25. The difficulty in this application is, however, that the Employment Tribunal has not heard any evidence, made any findings of fact or come to any conclusion as to the credibility and veracity of any witness.
26. What the Respondent can say is that the Claimant's account was unlikely to have been accepted by the Tribunal. There is convincing evidence from transcripts that the Claimant was never offered or accepted a role at Menston (and therefore such offer could never have been withdrawn).
27. At the final hearing, the Claimant might have accepted that state of affairs early in cross examination, when the transcripts were put to him. Whether he did so or did not, however, it would not inevitably follow that the Tribunal would have found him to have lied in the way he previously put his case. The Claimant might have said (as submitted by Mr Anderson) that he was giving his recollection of conversations (albeit ultimately a flawed recollection), a recollection without the benefit of notes. Alternatively, any difference arose out of his misunderstanding of what was said and that it should be borne in mind that, at the time of the conversations, he was absent due to a stress-related condition. Alternatively, he might have said that he was not appreciative of the strictness with which words used in the grounds of complaint and witness statement are interpreted. The Tribunal simply does not know. Neither the Claimant, not his solicitor appear to have read the transcripts when they were provided. Certainly, the Tribunal is not in a position to conclude that the Claimant has lied. In many Tribunal cases, a party's version is rejected without dishonesty being the explanation.
28. Further, the Claimant's case is not dependent on the assertions which the Respondent characterises as lies. The Tribunal, in a claim of unfair dismissal based on redundancy, would have, for itself, sought to consider whether the Respondent had acted reasonably in looking for alternative employment for the Claimant.
29. The Respondent might have had sound reasons for considering that the Menston role was too big for the Claimant, but give his length of service and experience, those would have required some explanation.
30. Travel distance, from the transcript of the final consultation meeting, does appear to have been a material consideration for the Respondent. However, the Respondent's concern is not obvious in the context of an employee already travelling from Cheshire and a relatively short distance between the branch which was closing and the Menston site which offered the possibility of

alternative employment. That is indeed regardless of whether or not the Claimant indicated that he might have access to a property nearby.

31. That indeed feeds into the issue of the Claimant's prospects of success in these complaints. The Tribunal cannot say that this case had no reasonable prospects, even if the Claimant's account was disbelieved. Classically, in redundancy cases the question of reasonableness comes down to what the Respondent considered. There was a vacant position involving work of a similar nature to that which the Claimant undertook. The Claimant appears at the final consultation meeting to be resigned to his fate (believing that his employer's mind was made up) rather than accepting of the Respondent's position. Ultimately, someone with arguably less experience and junior to the Claimant was given the opportunity. The question of why the Claimant did not get the opportunity would have been a live one and where, at the very least, the Claimant may have had some reasonable prospect of inviting the Tribunal to draw an adverse inference in terms of his disability being a factor, even if just one factor, in the Respondent's mind.
32. The Tribunal cannot conclude that this claim had no reasonable prospects of success. Nor is this a case where it can conclude that the Claimant acted unreasonably in bringing proceedings so as to cause the Tribunal to consider the award of costs.
33. The Claimant has not been shown to be dishonest in his postponement application. The convenient coincidence (from the point of view of a postponement application) and lack of evidence of the nature of his father's illness is insufficient for that conclusion to be reached. The failures to comply with the Tribunal's directions in the proceedings are regrettable, but insufficient to trigger consideration of an award of costs in all the circumstances.
34. The Respondent's application for costs is refused.
35. The Claimant's counter application for costs is also refused. The Respondent was not unreasonable in not accepting the Claimant's very late offer of an effective settlement of the proceedings. It was not unreasonable in pursuing this costs application. Mr Wilson advanced cogent and potentially valid grounds for the award of costs, albeit in this case they are not viewed as sufficient to traverse what may be correctly viewed as a relatively high hurdle for the award of costs in Employment Tribunal proceedings.

Employment Judge Maidment

Date 21 February 2020

FOR THE TRIBUNAL OFFICE