Case: 1810980/2018

EMPLOYMENT TRIBUNALS

Claimant: **Mr A Dunhill**
Respondent: **Robinson Contract Services Limited**

AT A COSTS HEARING CONDUCTED ON THE PAPERS

Heard at: **Leeds (by telephone conference call)** **On: 27th March 2020**
Before: **Employment Judge Lancaster**
Members: **Mr M Weller JP**
Mr K Smith

Representation
Claimant: No attendance required
Respondent: No attendance required

Rules 74 to 84 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013

JUDGMENT

1. The time for the Claimant to present an application for a preparation time order is extended to 2nd October 2019.

2. Both the Respondent's application for costs and the Claimant's counter-application for a preparation time order are refused.

REASONS

Background

1. The final hearing in this case took place on 20th and 21st August 2019.

2. The decision was announced orally at the conclusion of the case and the Judgment was sent out on 2nd September 2019.

3. Written reasons were then requested and were provided on 19th September 2019.

4. On 27th September 2019 the Respondent applied for costs limited to £2,500.00 in respect of its successful defence of the complaints of automatically unfair dismissal and of being subjected to a detriment on the grounds of having made a protected qualifying disclosure.

5. The Claimant then made a counter application on 2nd October 2019 in respect of his successful claim for wrongful dismissal. This was initially described as an application for "costs" in the sum of £1500.00. In further information provided on 10th November 2019 it was subsequently clarified to be an application for a preparation time order on behalf of the Claimant's lay representative in respect of 82 hours, and quantified at £3116.00

6. It was directed that the case be dealt with on the papers after affording the opportunity for written representations and responses.

7. As (under rule 77) any application for costs is to made up to 28 days after the date of the final judgment was sent to the parties, the application by the Claimant made on 2nd October 2019 is marginally out of time.

8. Time may, however, be extended under rule 4 and we are satisfied that it is in accordance with the overriding objective in these circumstances to allow an extension so that the application and counter application in respect to "costs" may be dealt with together.

The Claimant's application

9. The Claimant was dismissed for a reason or reasons related to his conduct. Whilst we held that this conduct was not so serious that it justified summary dismissal, so that the claim for breach of contract succeeded, that was decision which had to be taken after consideration of the evidence.

10. This was not a case where the defence to the wrongful dismissal claim could be said to have had no reasonable prospect of success from the outset, nor is it one where the Respondent acted unreasonably in seeking to argue that the proven misconduct was sufficiently serious to warrant immediate dismissal.

11. The peripheral issues which the Claimant seeks to raise regarding the non-mediation of the entire claim or the breach of the ACAS code of practice are not relevant to the substantive argument of whether or not what the Claimant did this may have been held to constitute gross misconduct.

12. In any event, as the Respondent points out, the claim for 82 hours preparation, [notwithstanding that a preparation time order cannot in fact encompass time spent at a final hearing (rule 75 (2)) and that time spent in ACAS early conciliation necessarily lies outside of the ambit of the actual tribunal claim], does not seek to apportion any time as between the claim for wrongful dismissal and the other much more significant but wholly unsuccessful complaints. It would not be proportionate to order 60 hours preparation in the context of the claim being only successful to a very limited extent.

The Respondent's application

13. Because the Claimant had less that 2 years' service the burden was on him to show that the reason for dismissal was an automatically unfair one. That is why in our original decision we said, by way of summary, that:
"The short answer to this claim of unfair dismissal is that the claimant has, we are afraid, got nowhere near establishing that the principle reason was anything other than that stated in the termination letter."
This did, however, as was set out in the expanded reasons, require us to make findings of fact on dispute issues, and was to be set against a background of unquestionably procedural unfairness in the Respondent dealing with its stated reasons for dismissal.

14. In particular the claim turned to a large extent upon whether or not the Claimant had in fact made a protected qualifying disclosure to Sean Smith on 31st July 2018. Whilst we held that he had not in fact done so there was certainly a conversation about the failure to provide proper respiratory masks when both the Claimant and Mr Smith were present.

15. The Claimant and also a witness called on his behalf gave evidence in support of his version of events. Whilst in the event we did not accept that evidence but preferred Mr Smith's account, this was not a contention put forward by the Claimant that could properly be said to have had no reasonable prospect of success.

16. There was also a close coincidence in time between the date of the alleged disclosure (31st July) and the date of termination (2nd August). Whilst, as we pointed out, the reasons given for dismissal in relation to the live warning issued in respect of Humber Bridge driving incident and the very recent Beverley Road driving incident are unconnected to the conversation on 31st July, that immediate proximity in time at least gave rise to a good potential argument that there was a causal connection.

17. That key conclusion on proximity is unaffected by the fact that we found that the arguments advanced by Mr Skillen at the hearing in further support of causation were "ludicrous".

18. Nor does the Claimant's clearly incorrect evidence as it eventually came out at the hearing in relation to the Humber Bridge incident mean that he was necessarily acting unreasonably in pursuing his claim of automatically unfair dismissal, following the events of 31st July. This was one element of a whole package of evidence regarding the three alleged incidents of misconduct which fell to be considered, and conversely there was a lack of positive confirmation from the Respondent that a written warning was in fact issued on this occasion.

19. Although the detriment claim also failed it was a relatively minor part of the case and it too required consideration of the evidence before the point could properly be decided.

20. On balance, therefore, we are not persuaded that the preconditions for making a costs award in favour of the Respondent are satisfied, nor that, if they were, we should exercise our discretion in favour of making one.

21. Had we granted the Respondent's application an award limited to £2500.00 out of the total costs incurred in defending this claim would clearly have been proportionate. Particularly where the Claimant had declined to make any representations as to his ability or otherwise, to pay.

EMPLOYMENT JU DGE LANCASTER

DATE 27th March 2020