EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr N Clewley		**JC Bamford Excavators Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL
COSTS APPLICATION
(RESERVED JUDGMENT)

HELD AT Stoke-on-Trent **ON** 18 November 2019

EMPLOYMENT JUDGE GASKELL

Representation
For the Claimant: **Mr C Murray (Counsel)**
For Respondent: **Mr P Starcevic (Counsel)**

JUDGMENT

The judgment of the tribunal is that:

Pursuant to Rules 74 – 78 and 84 of the Employment Tribunals Rules of Procedure 2013, the claimant is ordered to pay a contribution towards the respondent's costs of this claim summarily assessed in the sum of £1726.55.

REASONS

Introduction

1 The claimant in this case is Mr Nigel Clewley who was employed by the respondent, JC Bamford Excavators Limited, as a Production Specialist from 25 July 2011 until 29 September 2017 when his employment terminated following his written resignation dated 5 September 2017.

2 By a claim form presented to the tribunal on 21 December 2017, the claimant brought a claim for unfair constructive dismissal. The claim form indicated that the claimant had commenced new employment on 2 October 2017 (the next working day after his employment with the respondent terminated). Upon issue of the claim form, the tribunal listed the claim for a substantive Hearing on 23 & 24 July 2018. This date was later changed due to availability of the witnesses and lack of judicial resources. The response to the claim was filed on 6 February 2018; the claim for constructive dismissal was denied. The

respondent denied acting in repudiatory breach of the employment contract – but also placed in issue the question of whether or not the claimant had in fact resigned in response to any of the respondent's conduct or had simply found alternative and preferred employment. The response to the claim was followed up by a letter dated 13 February 2018, expressed to be written "*without prejudice save as to costs*". That letter also very clearly raises the issue as to whether or not the claimant resigned in response to any alleged breaches of contract by the respondent or because he had found a new job.

3 Pursuant to Case Management Orders made by the tribunal on 10 January 2018, the parties mutually disclosed relevant documents on 29 June 2018; and they exchanged witness statements on 15 August 2018.

4 The respondent's evidence was to the effect that, when tendering his resignation on 5 September 2017, the claimant told the respondent's HR department that he would be starting a new job on 2 October 2017 with a competitor firm Finning CAT. The claimant was not required to work is notice; he was placed on garden leave.

5 In his witness statement, the claimant stated that, when he resigned on 5 September 2017, he did not have the offer of new employment. This was inconsistent with the respondent's evidence set out in Paragraph 4 above. This prompted further enquiries from the respondent.

6 During disclosure, the claimant had disclosed an offer letter dated 8 September 2017; he was now asked for specific disclosure of further documents pertaining to the securing of his employment with Finning CAT: the dates of interviews; copies of diary entries; and any other documents. Specific disclosure requests were made on 17, 23, 24 & 28 August 2018.

7 With no substantive disclosure having been made, on 30 August 2018, the respondent approached Finning CAT direct requesting documentation. Unsurprisingly, they indicated that they could not disclose any information without the claimant's consent.

8 On 31 August 2018, the respondent applied to the tribunal for a Specific Disclosure Order. Further documents were eventually disclosed on 27 September 2018.

9 The respondent was of the view that the documents now disclosed were still inconsistent with the claimant's witness statement. There was a threat to make an application to strike-out the claim; and to extend the disclosure application for an Order direct against Finning CAT. The claimant now consented to the respondent approaching Finning CAT direct.

10 The tribunal dealt with the application for further disclosure by a direction that the issues covered in the application should be included in the contents of the claimant's witness statement. In other words, the claimant was to provide in his witness statement full details of when he first applied for his job with Finning CAT; and the entire process leading to the job offer.

11 On 1 November 2018 the respondent requested the claimant to provide such a witness statement.

12 On 14 November 2018, the claimant withdrew the claim in its entirety. On 30 November 2018, the tribunal dismissed the claim on withdrawal.

13 On 11 December 2018, the respondent made this application for costs.

The Law

14 **The Employment Tribunals Rules of Procedure 2013**

Rule 74: Definitions

(1) "Costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing). In Scotland all references to costs (except when used in the expression "wasted costs") shall be read as references to expenses.

Rule 75: Costs orders and preparation time orders

(1) A costs order is an order that a party ("the paying party") make a payment to—

(a) another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative;

Rule 76: When a costs order or a preparation time order may or shall be made

(1) A Tribunal may make a costs order or a preparation time 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) 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.

Rule 77: Procedure

A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.

Rule 78: The amount of a costs order

(1) A costs order may—

(a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;
(b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles; or, in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993, or by an Employment Judge applying the same principles;

(3) For the avoidance of doubt, the amount of a costs order under sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000.

Rule 84: Ability to pay

In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.

15 **Decided Cases**

Beynon & others –v- Scadden & others **[1999] IRLR 700 (EAT)**
Gee –v- Shell UK Ltd. **[2003] IRLR 82 (CA)**
An award of costs in the employment tribunal is the exception rather than the rule. Costs are compensatory not punative.

Salinas –v- Bear Stearns International Holdings Inc. & another
[2005] ICR 1117 (EAT)
The reason why costs orders are not made in the vast majority of employment tribunal cases is that the high hurdle has to be overcome for a costs order to be made has not, in fact, been overcome.

Beynon & others –v- Scadden & others **[1999] IRLR 700 (EAT)**
Monaghan –v- Close Thornton Solicitors **UKEAT/0003/01**
Beat –v- Devon County Council & another **UKEAT/0534/05**
Lewald-Jezierska –v- Solicitors in Law Ltd. & others **UKEAT/0165/06**
The tribunal must not move straight from a finding that conduct was vexatious, abusive, disruptive, unreasonable or misconceived to the making of a costs order without first considering whether it should exercise its discretion, to do so.

Yerrakalva –v- Barnsley MBC **UKEAT/0231/10**
There is no general rule that withdrawing a claim is tantamount to an admission that it is misconceived. There is no requirement for a direct causative link between the unreasonable conduct and the costs incurred but there should be some connection.

Dyer –v- Secretary of State for Employment **UKEAT/0183/83**
Whether conduct is unreasonable is a matter of fact for the tribunal to decide. Unreasonableness has its ordinary meaning.

McPherson –v- BNP Paribas **[2004] ICR 1398**
The late withdrawal of proceedings is not of itself evidence of unreasonable conduct. The claimant's conduct overall must be considered. But a late withdrawal is a factor in a case where the claimant might reasonably have been expected to withdraw earlier.

Keskar –v- Governors of All Saints Church of England School
[1991] ICR 493
A tribunal is entitled to take account of whether a claimant ought to have known his claim had no reasonable prospect of success.

Kaur –v- John Brierley Ltd. **UKEAT/0783/00**
An award of costs against the claimant was upheld in a case where the claimant had failed, despite several requests, to properly set out her claim. She proceeded with the claim only to withdraw at the commencement of the trial.

Vaughan –v- Lewisham LBC (No 2) **[2013] IRLR 713 (EAT)**
There is no requirement for the receiving party to have written a costs warning letter. It is not wrong in principle for an employment tribunal to make an award of costs against a party which that party is unable to pay immediately in circumstances where the tribunal considers that the party may be able to meet the liability in due course.

The Evidence

16 I heard no formal evidence. The parties invited me to determine the application on consideration of the papers and oral submissions. I had the tribunal file; the claimant's schedule of loss; the claimant's witness statement prepared for the substantive Hearing; an agreed bundle running to some 207 pages; together with written and oral submissions from both parties. I also had the respondent's schedule of costs and the claimant's comments thereon.

The Basis of the Application

17 The respondent's principal submission is that this was a dishonest claim from the outset; that the claimant knew that he had not resigned in response to any alleged breaches by the respondent. And, had he been full and frank in his disclosure, and to his legal representatives, he would have been given appropriate advice at a much earlier stage and the claim would either never have been commenced or would have been withdrawn following the respondent's letter of 13 February 2018. Pursuing a fundamentally dishonest claim is said to be unreasonable conduct.

18 The respondent's alternative submission is that, as a very minimum, the claimant should pay the costs involved in pursuing the specific disclosure applications. The respondent was entitled to full and frank disclosure from the outset; the claimant appears to have attempted to hide the true position; and only when forced into full disclosure chose to withdraw the claim.

The Claimant's Submissions

19 Essentially the claimant's case is that the fact of having secured alternative employment in advance of his resignation does not in any way present an obstacle to successful constructive dismissal claim. Subject to arguments about waiver, the fact that a claimant may have sought and obtained

alternative employment because of his employer's behaviour does not in any way mean that the reason for the resignation is unrelated to the behaviour.

20 So far as disclosure is concerned, the obligation is to disclose documents; and the simple fact is that the only document which the claimant had available and indeed the only document ultimately obtained from Finning CAT was the offer of employment which post-dated the claimant's resignation.

21 The claimant had never sought to high the fact that he had started fresh employment on 2 October 2017. His schedule of loss was calculated on precisely that basis.

22 Accordingly, the claimant denies unreasonable conduct. And, for what it is worth, resists any proposition that the claim was misconceived or without reasonable prospect of success.

Ability to Pay

23 The claimant has provided no evidence as to his financial position. Mr Murray has confirmed that the claimant has legal expenses insurance who will indemnify him in respect of any award.

Discussion & Conclusions – the Principle of a Costs Award

24 I agree with the claimant's position that merely having obtained another job in advance of his resignation is not an obstacle to a successful constructive dismissal claim. If the claimant persuaded the tribunal that his employer had acted in fundamental breach of the employment contract and that, because of those breaches, he had looked for and found alternative work then, so long as he has acted sufficiently quickly to avoid arguments around affirmation of the contract, he has a perfectly valid constructive dismissal claim. The fact that he took alternative work straightaway may impact on the value of such claim; but he would still be entitled to a basic award and, in the present case, it appears to be that the alternative employment which the claimant secured was at a lower weekly salary; thus, he did have ongoing losses.

25 The claimant's schedule of loss is dated 6 February 2018. It does not hide the fact that the claimant commenced his new employment on the first working day after the termination of his employment with the respondent.

26 In these circumstances, I am not persuaded that this was a dishonest claim from the outset or that there is any other basis upon which the claimant should be liable for the entirety of the respondent's costs.

27 However, the claimant's witness statement, which is very detailed running to 110 paragraphs over 27 pages, provides no detail as to when he first sought alternative employment; when he was interviewed; when he had any indication that he was to be offered the job; and it does not deal with the matter raised in the response form that on the day of his resignation the claimant was able to tell former colleagues of his new employment and his starting date. These matters had been properly raised in issue by the respondent both in the response form and in the letter of 13 February 2018. It would have been a reasonable expectation for a frank claimant to have engaged with these issues in his witness statement - something which Employment Judge Broughton ultimately ordered him to do.

28 My judgement is that, in failing to deal with these matters in his witness statement, the claimant necessarily invited further enquiry from the respondent to establish the full facts of the claimant having obtained his new job. This incurred costs and my judgement is that these costs were incurred by the claimant's unreasonable conduct in being less than frank from the outset. Accordingly, my judgement is that the threshold requirement of Rule 76(1)(a) is met in regard to the costs incurred in seeking further disclosure.

29 Having determined therefore that the threshold requirement is met, I must consider whether in the circumstances of this case it is in the interests of justice for a costs award to be made. I have concluded that an award is appropriate because the respondent had raised the issue from the outset; the respondent was aware that the answer to its enquiry may not lie in documents; and had therefore awaited the witness statement before seeking anything further. The claimant could have responded promptly with a supplementary witness statement fully explaining the position, but he chose not to do so. The claimant was represented by experienced solicitors throughout. I am therefore minded to make an award of costs in respect of the reasonable costs incurred by the respondent in pursuing additional disclosure and information regarding the claimant's having successfully obtained alternative employment.

The Amount of the Costs Award

30 The respondent's schedule of costs claims a total of £17,157.95 for the total claim and £2685.75 for the costs incurred relating to the specific disclosure application from 17 August 2018 onwards. These costs are calculated on the basis of a Supervising Partner at an hourly rate of £345; the majority of the work being done by a Senior Associate fee earner at an hourly rate varying from £280 - £299; support work was done by a Trainee Solicitor at an hourly rate of £155; a Paralegal at an hourly rate of £137; and Counsel at an hourly rate of £250. In respect of all work, VAT is claimed. But it was conceded this morning that the respondent in this case is clearly registered for VAT purposes and all VAT is therefore recoverable. The costs award should be net of VAT.

31 The respondent's solicitors are a highly regarded Birmingham firm. And Mr Starcevic points out that the respondent is an important client to that firm - and that, accordingly, its most able people would be assigned to the work.

32 But, the guiding principle for the assessment of costs under the Civil Procedure Rules is that the costs awarded must be proportionate to the issues involved. This was a simple claim for constructive dismissal - the claimant's claim came to less than £15,000. In my judgement it did not justify the assignment of fee earning personnel charging at £345 or even £280 per hour. The Guidelines issued by the Association of District Judges for the relevant period would indicate an hourly rate for a Grade A fee earner operating outside London and the major cities (this was a Stoke-on-Trent case) would be £201; and a Grade B fee earner (who should surely be competent to conduct a case such as this) at £177.

33 I have been provided with Schedules of the work done. I am satisfied that the amount of time claimed is acceptable. Using a broad-brush approach which I am required to do in cases of summary assessment; most of this has been charged for at a rate of £280 per hour - I propose to allow £180 per hour. It is on this basis that I calculate my award at £1726.55.

Employment Judge Gaskell
14 April 2020