EMPLOYMENT TRIBUNALS

Claimant: **Mr M Paternico**

Respondent: **Solihull Metropolitan Borough Council**

DECISION ON COSTS APPLICATION

Heard at: Birmingham **On: 28 February 2020 & 20 April 2020 (in chambers)**

Before: Employment Judge Flood

Appearance:

For the Claimant: **In person**

For the Respondent: **Mr Brown - Counsel**

The respondent's application for costs is dismissed

REASONS

Background

1. The claimant brought a complaint of unfair dismissal contrary to **section 94 of the Employment Rights Act 1996 ("ERA") having presented his complaint on 12 May 2019**. The respondent submitted its response on 17 July 2019 disputing the claim and contending that it dismissed the claimant fairly on the grounds of redundancy.

2. The claimant's claim was dismissed by an oral judgment given by me at the end of a two-day hearing held on 27 & 28 February 2020. Mr Brown made an application for costs at the hearing against the claimant under rules 76 (1) (a) and (b) Employment Tribunals (Rules of Procedure) 2013 ("ET Rules"). The respondent seeks Orders for Costs to recover Counsel's costs in attending the hearing which amounted to £1,500 plus VAT but does not seek recovery of any additional legal costs which have been incurred.

3. The claimant was a litigant in person and was not able to respond to the application for costs at the hearing and had not provided any information about his means/ability to pay. I heard the respondent's application but decided to give the claimant the opportunity to provide information on means (and the respondent to provide a further breakdown of the costs claimed) within 21 days. I also decided that it was in the interests of justice for both parties to be given an

opportunity to make submissions on the information provided within a further 14 days.

4. The claimant provided submissions in relation to costs on 2 April 2020 together with information on his current financial situation.

5. The respondent provided a copy of the fee note of Mr Brown for attending the hearing to the claimant on 3 March 2020 and sent a copy to the Tribunal on 16 April 2020.

6. The matter was listed before me on 20 April 2020 for a reserved decision to be made based on the application and oral submissions heard on 28 February 2020 and on the following documents:

   6.1. Bundle of Documents for Final Hearing together with additional documents and witness statements.
   6.2. Document headed Claimant's submission in relation to costs.
   6.3. Supporting documentation on means provided by the claimant on 2 April 2020.
   6.4. Fee Note of Mr D Brown (Counsel) dated 2 March 2020.

The Issues

7. The remaining issues between the parties which potentially fall to be determined by the Tribunal are as follows:

   7.1. Has the claimant acted "otherwise unreasonably" in the bringing of the proceedings (within rule 76 (1) (a) ET Rules)?
   7.2. Did the claim against the respondent have no reasonable prospects of success (within rule 76 (1) (b) ET Rules)?
   7.3. Should, in the Tribunal's discretion, a costs order be made against the claimant?
   7.4. If so, how much should be awarded?

The relevant law

8. **Regulation 76, Schedule 1 of the ET Rules** states:

   (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.

9. This is a two-stage test initially: a Tribunal must ask whether a party's conduct falls within rule 76(1)(a) or (b) as applicable. If so, the Tribunal must then go onto

ask whether it is appropriate to exercise the discretion in favour of awarding costs against that party. It is only when these two stages have been completed that the tribunal may proceed to the third stage, which is to consider the amount of any award payable

10. **Gee v Shell UK Limited [2003] IRLR 82.** The Court of Appeal confirmed that it is a fundamental principle that costs are the exception rather than the rule and that costs do not follow the event in Employment Tribunals.

11. **McPherson v BNP Paribas [2004] ICR 1398**. In determining whether to make an order under the ground of unreasonable conduct, a Tribunal should take into account the "nature, gravity and effect" of a party's unreasonable conduct.

12. **Barnsley Metropolitan Borough Council v Yerrakalva [2012] ICR 420**. The vital point in exercising the discretion to order costs is to look at the whole picture. The Tribunal has to ask whether there has been unreasonable conduct by the paying party in bringing, defending or conducting the case, and, in doing so, identify the conduct, what was unreasonable about it, and what effect it had.

13. **Oliver Salinas v Bear Stearns International Holdings UKEAT/0596/04/ DM.** The question of whether a costs order was exceptional or unusual was not significant, so long as the proper statutory tests were applied.

The relevant facts

14. The facts relevant to this costs application, are briefly as follows:

    14.1. The claimant commenced employment with the respondent as Site Manager at Ulverley Primary School ("the School") on 1 September 2010. The respondent borough council operated the School until early 2020 when it became an academy as part of the Robin Hood Multi Academy Trust. On 1 April 2013, the claimant entered into a second contract of employment with the respondent ("Contract 2"). This related to the role of Site Manager for a Children's Centre that had opened and was operating on a building on the School site. This Children's Centre was run separately and independently from the school.

    14.2. In March 2015 a decision was made by the respondent that it would no longer operate the Children's Centre. There was no longer a separate and independent Childrens' Centre being run from the building from 31 March 2015 onwards. The respondent did not discuss the closure of the Children's Centre as an enterprise or what effect this would have on the claimant with the claimant at this time and the claimant continued to be paid the salary under Contract 2 after the Children's Centre had ceased to operate for a further 3 years. The respondent accepted that this was an oversight and Ms Leonard gave frank evidence that this was due to poor management.

    14.3. In September 2018 it was discovered by the respondent that the claimant was still being paid under Contract 2. The claimant was informed of the decision to terminate his employment under Contract 2 by a letter dated 29 January 2019. He remains employed under Contract 1 which has transferred in 2020 to the Robin Hood Academy.

14.4. The main issue in dispute was whether the fact that the claimant continued to carry out site management duties for the building that formerly housed the Children's Centre after it closed, meant that the respondent still had a requirement for employees to carry out work of the particular kind the claimant was employed to do under Contract 2. The claimant's position was because he was doing broadly the same duties as before the Children's Centre closed in respect of the building, he could not see how there could be a redundancy situation. The respondent's position was that the redundancy situation arose because the respondent no longer operated a Children's Centre from the Ulverley primary school and had not done so since March 2015.

14.5. I heard and considered evidence from the claimant and the respondent's witnesses and considered documentary evidence on this issue. I concluded on the facts found (which were detailed) that the respondent no longer carried on the activity of a children's centre at the Ulverley school site from 31 March 2015. The building remained in use (by the school) but the business operated by the respondent here had ceased and did not transfer. The tasks the claimant continued to perform were no longer being carried out under Contract 2 which is a contract for the provision of services to the business of the Children's Centre. This no longer existed. I went on to conclude the claimant's dismissal under Contract 2 was caused wholly or mainly by this situation. I found that the claimant had conflated and confused the tasks that are required to be carried out in order to site manage the physical area in question to what the Tribunal had to consider which is the requirements of the employer and whether it has ceased or intends to cease to carry on the business for the purposes of which the employee was employed. I went on to note that in my view the failure of the respondent to deal with this matter at the time of the closure of the Children's Centre in 2015 was not helpful and may have contributed to confusion as to the claimant's status.

14.6. I then concluded that the respondent had warned and consulted about the proposed redundancy; selected fairly and took such steps as were reasonable to avoid or minimise redundancy by redeployment. The claim was therefore unsuccessful and dismissed.

14.7. The costs application was made at the conclusion of the hearing.

Conclusion

15. Mr Brown submitted that this was a claim that was unreasonable for the claimant to have brought given the findings of fact made as part of the Tribunal's decision that the Children's Centre ceased to exist from 31 March 2015. He submitted that this was a fact known to the claimant since then and he should have been made redundant at this time but was not. He submits that the claimant has received almost 4 years of pay that he should not have done, and this was paid as an oversight. He contends that the respondent behaved reasonably in not seeking to recover these monies and took a fair approach to handling the claimant's redundancy under Contract 2, as determined by the Tribunal in its judgment. In those circumstances he submits that bringing the proceedings amounted to unreasonable conduct on the claimant's behalf.

16. He also submitted that it was clear that the claim had no reasonable prospects of success irrespective of any unreasonable conduct and therefore an award should

be made under rule 76 (1) (b). He says it was clear and obvious that the contract in question related to the Children's Centre and that he was aware that this closed in 2015. He suggests that this was not a complex legal question and was clear on the facts. He says that the claimant was provided with a costs warning without prejudice save as to costs in July 2019 where the respondent warned that it was likely to incur costs of £3-4500 in defending the claims, inviting him to withdraw and suggesting he take legal advice. He says this warning was repeated on 25 February 2020.

17. The claimant submits that it was not clear that he was redundant under Contract 2 from March 2015 as was still being paid until 28 February 2019. He says that it was clearly not obvious to him that his contract had ceased to exist as he was not made redundant until 28 February 2019 and at no time prior to this date was he informed of or issued with any form of redundancy. He says that it is unreasonable for him to be expected to pay costs arising from a situation caused by the respondent's "bad practice" in failing to address the situation in a timely manner. The claimant contends that his decision to submit a tribunal application was as a result of an evidence based approach having sought advice provided by independent professional bodies such as the CAB and ACAS. He points out that he suffers from severe anxiety and depression and is on medication. He states that he is not a professional and had no previous legal or Tribunal experience. He also submits that it was by no means a foregone conclusion that his claim would be unsuccessful.

18. The first question I have identified above is whether the claimant acted unreasonably in bringing the proceedings given that the Tribunal found as a fact that his role ceased to exist from 31 March 2015.

19. I have carefully considered the submissions of the parties and my conclusion that the claimant's conduct cannot be considered as being "unreasonable". The claimant had a genuine and honest belief that the role was not redundant. He formed this view from considering and analysing the tasks he was doing, given that he remained employed under Contract 1. He sought advice before instituting Tribunal proceedings, availed of the services of ACAS and always appears to have conducted himself appropriately and professionally in bringing his complaint. This was certainly my impression from the way his case was presented to the Tribunal. I do not accept the contention of Mr Brown that the claimant must have or at least should have known that he was in a redundancy situation as regards Contract 2 from the time the Children's Centre closed in March 2015. I made no findings of that nature at the Tribunal and I do not conclude that this was the case. The claimant was unaware of the fact that he was in a redundancy situation with regards to Contract 2 until he was notified of this in 2019. At that point he disputed the accuracy of the respondent's position during consultation and ultimately pursued this to Tribunal. His conclusions on the matter may have been ultimately incorrect but such conclusions were not assisted by the lack of any communication from the respondent to advise him of the situation at the relevant time.

20. All of this leads me to conclude that there was no unreasonable conduct on the claimant's part by bringing these proceedings.

21. The next question to consider is whether the action against the respondent had no reasonable prospects of success. I have considered the submissions of the parties, but I am not able to conclude that the claim had no reasonable prospects

of success. The main point of the case hinged on the definition as set out in section 139 ERA and the established case law on that position. The claimant perhaps understandably took the view that as he appeared to be carrying out the same tasks as before, he could not be in a redundancy situation. However the legal test requires me to look at the needs or requirements of the employer for the role the claimant was employed to do. This may not be a complex legal question for Mr Brown as experienced counsel, but this is was a question that required a finding of the precise facts in play at the relevant time and an understanding as to what in fact took place in 2015 when the Children's Centre closed. This had to be done in order to understand what the requirements of the respondent were and how they had changed. It was not necessarily clear on the facts from the start but became apparent after hearing evidence. The respondent was ultimately successful, but this is by far from a case which had no reasonable prospects of success.

22. As I have not found any conduct which amounts to unreasonable conduct within the meaning of rule 76 (1) (a), nor have I concluded that the claim had "no reasonable prospects of success" within the meaning of rule 76 (1) (b) then I do not need to go on to consider whether a costs award is appropriate and if so at what level it should be made.

23. The respondent's application for costs is accordingly dismissed.

Employment Judge Flood

30 April 2020