EMPLOYMENT TRIBUNALS

Claimant: **Mr M Dolphin**

Respondent: **The Brunswick Centre**

Heard at: **Leeds** **On:** **21 February 2020**

Before: **Employment Judge Rogerson**
Members: **Mr D Wilks**
Mr I Taylor

Representation: **No attendance, written representations provided by both parties.**

JUDGMENT ON RECONSIDERATION

The costs order made at the hearing on the 4th July 2019, ordering the claimant to pay the respondent costs in the sum of £1,000, is confirmed.

REASONS

1. Judgment and reasons including the reasons for making a costs order, were given to the parties orally on 4 July 2019.

2. On 31 July 2019, the claimant made an application for reconsideration of the costs order. In that application he suggests he was 'ambushed' by the costs application that the tribunal reasons were 'false' because he had not agreed to the respondent's costs application being dealt with at the hearing.

3. On 27 September 2019, the written reasons were sent to the parties. Pages 16 – 19 (paragraphs 90 – 102) of the written reasons deal with the application for costs, the representations made, the applicable law and the reasons why a costs order was made in the sum of £1000.

4. On 30 September 2019, Employment Judge Rogerson requested that by reference to those written reasons, the claimant should identify his grounds for reconsideration of the costs order. It was hoped that by doing that it would help him focus on those reasons in his written representations.

<u>Reconsideration Application</u>

5. The claimant has provided written representations for his application by letters dated 31 July 2019, 11 October and 21 January 2020.

6. On 14 February 2020, the respondent provided written representations in response to the application with supporting documents to show the actual costs incurred by the respondent.

7. Both parties agreed to the reconsideration application being dealt with by way of written representations only.

8. Rule 70 provides that a tribunal may reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration the original decision may be confirmed varied or revoked.

The claimant's grounds for reconsideration

9. Unfortunately, the claimant has not used the further time given and that guidance to present focussed representations based on the written reasons. He complains that this meant he had to waste his "valuable time" submitting again an almost identical reconsideration application as the one submitted on 31 July 2019 (see paragraph 5 of his application on 11 October 2019).

10. Furthermore, his assertion that the reasons are 'false' and he had not agreed to the costs application being dealt with at the hearing are wrong. The panel at this hearing have checked their notes and can confirm that the claimant did agree and the reasons are correct. The claimant wanted the respondent's application for costs to be dealt with at the hearing for his own convenience, to avoid another hearing.

11. Despite that agreement, and to ensure fairness the reconsideration hearing was listed and the claimant was given a further opportunity to put forward further representations.

Unreasonable conduct by the claimant

12. Two examples of the claimant's unreasonable conduct were relied upon by the respondent to support the costs application made at the hearing.

    (1) Allegation 9.3: on 3 July 2013 Ms Keiler sent the claimant a letter inviting him to a hearing that was headed "written warning/improvement notice appeal" and making reference to an appeal against the decision to issue him with a written warning/improvement notice, when he had not in fact been issued with such a warning or notice (the complaint subject to a deposit order).

    (2) Allegation 9:10 on 27 August 2013, Mr Stephen Bond gave the claimant only one day's notice of a disciplinary hearing leaving him no time to prepare, accommodate his other work commitments, or arrange for trade union representation or colleague to attend with him (the complaint withdrawn at the hearing)

13. The claimant's representations in relation to allegation 9:3 (the deposit order complaint) are set out at paragraphs 6 – 28 of his written representations. The claimant's focus is on the history of the deposit order.

None of that history changes the fact, that a deposit order was made in 2018, because Employment Judge Cox had assessed the merits of that allegation/argument as having "little reasonable prospect of success". This was because the claimant accepted the heading and reference were typing errors made by Ms Keiher who immediately rectified and apologised for that mistake (see paragraph 4 of the reasons). The claimant knew there were little prospects of successfully arguing that a typing error was a detriment he was subjected to on the grounds of whistleblowing. Instead of withdrawing that allegation or not paying the deposit, the claimant chose to pay the deposit of £25 and continue. The claimant made an informed decision to continue despite the costs warning.

14. He was expressly warned that a consequence of continuing with that complaint and losing was that he "shall be treated as having acted unreasonably in pursuing that argument for the purposes of a rule 76, unless the contrary is shown". All the applicable rules were set out in the written reasons provided to the claimant, so that he could use his 'valuable time' to address those matters in his application.

15. Not only has the claimant failed to address those reasons he has also failed to present any argument or evidence to rebut the presumption of unreasonable conduct. The claimant knew this allegation was based on a typing error. He knew that fact in 2013, when the letter was sent and rectified, he knew that in 2018, when the deposit order was made and he knew that at the final hearing. To continue to pursue this allegation in those circumstances was unreasonable conduct by the claimant. The Tribunal's conclusions on that finding of unreasonable conduct are clearly set out in paragraph 98 of the Judgment and those reasons stand.

16. For allegation 9:10, the claimant's representations do not explain why the claimant did not withdraw that allegation earlier and why he waited until the 3rd day of the hearing. He knew the allegation on the undisputed facts was not made out yet continued to pursue it. The Tribunal's conclusions on both allegations and the finding of unreasonable conduct are set out in paragraph 98 as follows:

"The claimant has not heeded the guidance given to him on the merits of a part of a claim where a deposit order is made in April 2019 and he has deliberately ignored the evidence he knew of since 2013. The deposit order gave very clear reasons based on the undisputed facts, explaining why allegation 9.3 on those facts had little reasonable prospects of success. The claimant was warned about the potential consequences of not heeding that guidance, and continuing with that part of the claim. His response to the costs application is that the respondent was adding insult to injury by the typing error. His perceived sense of offence may have clouded his judgment but it does not alter his understanding of the facts, it was a typing error. Similarly, for allegation 9.10 he knew it was an investigatory meeting not a disciplinary hearing, yet has chosen to continue to frame his case inaccurately by ignoring the undisputed facts. There may be cases where a document is open to interpretation, a factual dispute exists between the parties that needs to be resolved, and mistakes can be made. That was not the case here. The claimant has chosen to deliberately ignore the evidence,

the undisputed facts and any guidance given to him at/in advance of this hearing.

17. The claimant has not addressed those reasons and the further reasons given at paragraphs 99 – 100. The claimant has not rebutted the presumption of unreasonable conduct for the deposit order for allegation (9.3) or explained why his conduct in relation to allegation (9.10) was not unreasonable conduct.

18. Our conclusions in relation to both allegations stand and we repeat and confirm the conclusion that the claimant had chosen to continue to frame his case "inaccurately by ignoring the undisputed facts". "He had chosen to deliberately ignore the evidence, the undisputed facts and any guidance given to him at/in advance of the hearing".

19. Having confirmed the unreasonable conduct findings and conclusions we considered whether the amount of costs ordered to be paid by the claimant was reasonable in the light of the representations made. The reasons for the award of £1000 are explained at paragraphs 100 – 103 of the decision.

20. The claimant focuses on the content of the witness statement of Mr Bond and states in his written representation (paragraph 33) that *"It was identified at an early stage that he was no longer needed and the particular detriment in question was being withdrawn".*

21. The claimant withdrew that alleged detriment at 12:19 on 3 July 2019, the third day of the hearing before Mr Bond was due to be cross examined. It was not at an 'early stage'. It could have been much earlier because he knew that the undisputed facts did not support the allegation made.

22. The respondent quite rightly points in its written representations to the 'stage' when the claimant could have made it known he was withdrawing that allegation. *"At the preliminary hearing in July 2018 or at any time in correspondence (there was a significant volume) prior to the final hearing".* Had he chosen to do so, the respondent would not have been put to the expense of having to prepare to answer that allegation at the hearing by way of a witness statement, cross examination of the claimant and the attendance of Mr Bond.

23. The claimant's criticisms of the content of the statement of Mr Bond are not relevant to decide whether it was reasonable to award the respondent costs in the amount awarded for the claimant's unreasonable conduct. Had the claimant withdrawn at an earlier stage those costs would not have been incurred.

24. As to the total amount of costs ordered of £1,000, we have seen the respondent's supporting documents providing a printout of time spent by the respondent's solicitors of 274 hours and 25 minutes of £43,904 plus VAT of £8,780.80. With disbursements the total costs are £58,486.82 costs and £11,705.23 VAT. A considerable sum for a charity to pay.

25. The application for costs limited to £1,000 was very reasonable sum to claim in the circumstances. The costs application was specific in scope and

focused on two particular aspects of the claimant's unreasonable conduct. It could have been much wider in scope and of a greater amount.

26. The claimant has not challenged the costs information provided by the respondent and we accepted it accurately reflects the costs incurred in defending these proceedings in which every complaint made failed. The Tribunal reasonably concluded having considered the claimant's ability to pay the sum of £1000 was reasonable. It reminded itself that the purpose of a costs order is to compensate the party in whose favour the order is made, not to punish the claimant. The sum claimed by the respondent of £1,000 was/is a reasonable sum and stands on reconsideration.

27. The deposit order sum of £25 is to be paid to the respondent and an instruction to that effect will now been made. This leaves a balance of £975 which the claimant is ordered to pay to the respondent.

28. The claimant has failed to 'heed' any warnings given to him in these proceedings and should consider very carefully what the respondent has said in its written representations at paragraph 30.

29. It is unfortunate that the claimant has continued to act in the same manner deliberately misconstruing events without any reflection on his own behaviour. One clear example of that is his false assertion that he had not agreed to the respondent's costs application being dealt with at the hearing and his critical response to the tribunal giving him more time and opportunity to consider the written reasons. In response to that he has failed to add anything of relevance to the representations he made at the hearing.

30. He should take up the respondent's offer to come to some arrangement for repayment and finally put some closure on a Tribunal process which based on the merits of the claimant's claim should never have been brought.

Employment Judge Rogerson
26 February 2020