EMPLOYMENT TRIBUNALS

Claimant Mr S Rundell

Respondent: Reach South Sheffield

COSTS JUDGMENT

1. The respondent's application for a costs order against the claimant succeeds.
2. The claimant will pay a contribution towards the respondent's costs in the sum of £3,000 inclusive.

REASONS

1. At a hearing on 17 February 2020 I found that the claim, which comprised complaints of constructive unfair dismissal and constructive wrongful dismissal was not made out and so that claim was dismissed.
2. The respondent made an application for costs on 16 March 2020 and asked that it be dealt with on paper to save further costs. I invited the claimant's representative to comment on this proposal and he did so indicating that he was agreeable to the matter being dealt with in that way.
3. Although the application was expressed to be in terms that the costs should be paid by either the claimant or his representative, I am not treating the application as being for a wasted costs order under Rule 80 – that is an order against a representative on the basis that the representative has behaved improperly, unreasonably or negligently. If it was the respondent's intention to make such an application, no grounds or at least sufficient grounds have been set out to justify making such an order.
4. The main thrust of the costs application is that the claimant had been given a strong indication at a preliminary hearing for case management conducted on 2 January 2020 that his case faced very serious difficulties. The Judge who

conducted that hearing, Employment Judge Rostant, recorded the following in his Order explaining those difficulties –

"*The grievance investigation was bound to overlap with and be submitted* (I think this could mean subsumed*) by a disciplinary investigation given the nature of the allegations. Whilst suspension is not necessarily a neutral step, particularly for a high profile employee such as a CEO, that did not mean that it was not a step open to the respondent if it could show proper cause. If the respondent could establish good grounds for suspension, which seemed likely to me, the fact that there was nothing in the grievance procedure to allow for suspension would not amount to a fundamental breach of contract or of the term of mutual trust and confidence".*

5. Subsequent to that hearing the respondent, I am now informed, sent a costs warning letter to the claimant's representative. The letter proposed that there be a "drop hands" means of ceasing the litigation. Obviously that offer was rejected by the claimant and so the case proceeded to be heard before me.

6. I do not propose to reiterate at length the reasons which I gave (and which are now in the form of written reasons) for concluding that the claim failed. Suffice to say that I found that in the particular circumstances of this case the respondent was entitled to suspend the claimant and so that was not a fundamental breach of the contract of employment entitling the claimant to resign and claim constructive dismissal. It follows that there is a distinct similarity between Employment Judge Rostant's provisional view and my Judgment. I accept that Employment Judge Rostant did not consider it necessary to make a deposit order. However despite Mr Limpert's comment in his 15 April 2020 objection to this application that Employment Judge Rostant had not given a strong indication, I find that it is quite clear that the Judge had.

7. The other substantial point raised by Mr Limpert in his objection is that it was reasonable to proceed to a final hearing because the Tribunal was being asked to determine "a fundamental question of law". Mr Limpert refers to the absence of any authority on the issue of whether an employer can suspend as part of a grievance process, at least in the absence of any specific provision to the effect that it can. The objection goes on to say that it was therefore not unreasonable "to seek the opinion of the Tribunal in a question that had never before been addressed or answered".

8. I do not accept that I was being asked to determine a novel point of employment law. It seems likely that the absence of any authority on the point is because the question is not fundamental or novel but instead an application of general employment relations practice and common sense. If virtually the whole of a relatively small workforce raise a joint grievance against the chief executive officer, which alleges serious misconduct by that individual which, if upheld would lead to disciplinary proceedings then, as I found, suspension is a reasonable step. That is particularly so if the workforce is expressing the view that it can no longer continue to work with and under the leadership of the CEO.

9. The Employment Tribunal's power to make a costs order is contained in Rules 74 to 84 of the Employment Tribunal's (Constitution and Rules of Procedure) Regulations 2013, Schedule 1. Rule 76 provides that a Tribunal may make a costs order where it considers that a party or that parties' 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 if the claim had no reasonable prospect of success.

10. In this case I consider that the claimant acted unreasonably, if not in commencing the proceedings, then certainly in continuing the proceedings after the comments made at the 2 January 2020 hearing. I have taken into account that the claimant has been represented and advised throughout by a professional representative who operates a business known as Employment Law Clinic (Employers) Limited. I do not find any merit in the objections raised on behalf of the claimant.

11. The respondents are seeking costs in the amount of £5,374.44, which they say were incurred after the claimant rejected the 'drop hands' offer. I have been provided with what is described as a costs schedule, but seems to be simply a print out of the computer time sheet for work undertaken by the solicitor in relation to this claim. There are also counsel's fees included which are £2,500 plus VAT. I do not consider it appropriate to simply accept the time sheet/fee record as that would, no doubt, be tempered and trimmed if the client was being billed. In any event I have decided that the correct course is to require the claimant to make a contribution to the costs.

12. Rule 84 provides that in deciding whether to make a costs order and if so in what amount, the Tribunal may have regard to the paying parties' ability to pay. Mr Limpert refers to this very briefly in his letter of 15 April 2020. All that he says is that the claimant has "experienced a significant loss of income since resigning". No information is given of the claimant's actual means in terms of capital, income from other sources or for that matter income from any new employment. In these circumstances I do not have any sensible information before me as to his ability to pay.

13. In all the circumstances I conclude that it would be appropriate for the claimant to make a contribution to the respondent's costs in the amount of £3,000 inclusive.

Employment Judge Little
Date 9th June 2020