EMPLOYMENT TRIBUNALS

Claimant: **Mr Paul Dacey**

Respondent: **Commissioners for HM Revenue & Customs**

Heard at: **East London Hearing Centre**

On: **3 June 2020 and 19 June 2020**

Before: **Employment Judge Tobin**

Members: **Mr T Burrows**
Dr J Ukemenam

Appearances
For the claimant: In person
For the respondent: Mr M Humphreys (counsel)

RESERVED JUDGMENT ON COSTS

It is the unanimous decision of the Tribunal that the claimant do pay the respondent a contribution of £5,000 towards their costs.

REASONS

The hearing

1. This has been a remote hearing which has not been objected to by the claimant and the respondent. The form of remote hearing was a telephone hearing and all the participants were remote (i.e. no-one was physically at the hearing

centre). A face-to-face hearing was not held because it was not practicable in the light of the coronavirus pandemic and the Government's restrictions. All of the outstanding issues in this case could be determined in this remote hearing (as scheduled) and following the deliberation hearing (see paragraph 3 below).

2. The respondent made an application to reimburse of all their legal costs on 31 July 2019. The application was detailed and enclosed copies of: (1) the respondent's Costs to Date Summary totalling £213,277.03; and (2) a costs warning letter send to the claimant on 8 February 2018.

3. This hearing was scheduled for 3 June 2020 following the claimant inability to fully participate at the hearing of 22 October 2019 and the claimant's non-attendance at the hearing of 10 February 2020. As set out in the Costs Hearing Summary of 3 June 2020 the Tribunal reserved its decisions to allow extra time for the claimant to submit documents in respect of his financial means. The Tribunal listed the case for a deliberation hearing for 19 June 2020 and gave Case Management Orders. The claimant then provided 11 financial documents and his submission on 10 June 2020 and the respondent provided its reply submissions within the additional time permitted.

4. Neither party had prepared witness statements. The claimant was asked at the 3 June 2020 hearing if he wanted to give evidence and he chose to provide submissions only for the reconvened deliberations hearing. Mr Humphreys, on behalf of the respondent, confirmed that he had no oral evidence to adduce and said he would likewise rely on written submissions only.

The case

5. This hearing was convened to hear and determine the respondent's application for costs which was set out in detail by Mr Humphreys on 31 July 2019. This hearing summary should be read in conjunction with the case management orders of 28 August 2019 and the case management hearing summaries and orders of 22 October 2019 and 10 February 2020.

6. By a decision promulgated on 5 July 2019, the claimant's following claims were rejected and dismissed:

a) underpayment of wages, contrary to s13 Employment Rights Act 1996 ("ERA")

b) discrimination against the claimant on the grounds of his sex, in breach of s13 Equality Act 2010 ("EqA"); this claim was also time-barred pursuant to s123 EqA

c) various detriments on the grounds of making protected disclosures, in contravention of s43B ERA; some of these claims were also time-barred pursuant to s48 ERA

d) automatic unfair dismissal, in breach of s103A ERA

e) ordinary unfairly dismissal, in breach of section s94 ERA;

f) harassment, pursuant to s26 Equality Act 2010, on the basis of his disability;

g) discrimination on the grounds of his disability by the respondent failing to make any reasonable adjustments in breach of ss20 and 21 EqA

7. The case concerned 2 sets of proceedings, in respect of allegations of various types of prohibited conduct based on 2 different protected characteristics. The claims included allegations in respect of wages shortfalls, whistleblowing detriments and dismissal. There were 8 Preliminary Hearings and the case was heard over 14 days, with 2 additional days of deliberations. The Tribunal heard from the claimant plus 15 respondent witnesses. A large part of the first day's hearing was taken with additional case management in revising the list of issues (which ran to 10 pages). The hearing Judge was able to reduce the respondent's witnesses by 3 (from 18). The hearing bundle consisted of 13 lever-arch files and documents in excess of 4,500 pages. The documents were so extensive because of the claimant's insistence that irrelevant documentation ought to be included in the hearing bundle. At various stages throughout the hearing, the claimant applied to add more documents, most of which were wholly irrelevant. By the time that the respondent had closed its case, the claimant had provided 2 additional statements during the course of the hearing. The respondent was required to proffer so many witnesses because of the wide ranging and ill-defined nature of the complaints against them. The Tribunal's Judgment ran to 67 pages, including appendixes.

8. Save as to the claimant's unfair dismissal complaint (see paragraph 6(e) above), which had some arguable points, the claimant's case was wholly without merit. Our decision was clear and robust; indeed, such was the claimant's poor behaviour both during the events under scrutiny and in the pursuit of these proceedings, that it would not have done justice to the situation by minifying our findings. Allegations of whistleblowing detriments and/or discrimination were made against 16 of the claimant's colleagues and very serious, potentially job-threating and possibly career-threatening, allegations were made against the claimant's 3 line-managers. The claimant pursued claims that we variously described as without merit, speculative and fundamentally misconceived. We went so far as to say that part of the claimant's claim was a waste of the Tribunal's time.

The relevant law

9. Rule 75(1)(a) of the Employment Tribunal Rules of Procedure[1] – coupled with Rule 76 – gives the employment tribunal's power to make a cost award against one party to the proceedings ("the paying party") to pay the costs incurred by another party ("the receiving party") on a number of different grounds. These grounds include circumstances where:

[1]Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (SI 2013/1237)

a. A party has acted vexatiously, abusively, disruptively or otherwise unreasonably in bringing or conducting of proceedings (or part thereof) – Rule 76(1)(a).

b. A claim had no reasonable prospects of success – Rule 76(1)(b).

10. Costs" for these purposes mean "fees, charges, disbursements and expenses incurred by or on behalf of the receiving party "including expenses that witnesses incurred for the purposes of, or in connection with, attendance at the tribunal hearing" – see Rule 74(1).

11. The respondent pursued its application on the basis of both Rule 76(1)(a) and Rule 76(1)(b).

12. Rule 78(1) of the Tribunal Rules provides that a cost order can be made for:

a. costs assessed by the Tribunal, which cannot exceed £20,000; or

b. a detailed assessment of costs in accordance with the Civil Procedure Rules of the County Court (for award that may exceed £20,000); or

c. an amount of cost which has been agreed between the parties.

13. Rule 84 provides that we (i.e. the Tribunal) *may* have regard to the paying party's ability to pay.

Our determination

14. We accept that the respondent has incurred substantial costs in responding to these proceedings. Whilst the amounts quoted in the Costs to Date Summary may represent an accurate picture of the costs actually incurred for all claims, we note that this does necessarily record cost which might be deemed potentially recoverable from the other party should the claim be subject to detailed assessment. In any event, the respondent has been clear, they do not seek to recover costs in respect of the unfair dismissal claim (paragraph 6(e) above) and, indeed, they have limited their costs application to £20,000 which is a small fraction of the costs for the wages, whistleblowing and discrimination claims (as identified in paragraphs 6(a) to (d) and paragraph 6(f) and (g). The unfair dismissal claim was a discrete claim which involved a straightforward review of the decisions made by the dismissing officer and appeal officer. The statutory test is different, so the Tribunal's fact-finding is limited in comparison to the other claims. Even the most complex of unfair dismissal cases (which this was not) could be heard within a 3-day hearing allocation. So, whilst we accept that the respondent has incurred the costs claimed, the amount of costs attributed to claim 6(e) would be a significantly small proportion of the total bill. Even allowing for a reduction on the amount of costs recoverable under the Civil Procedure Rules, we are satisfied that the £20,000 claimed is a small fraction of what could be properly incurred for claims 6(a) to (d) and 6(f) and (g).

Costs in principle

15. Mr Humphreys provided a detailed and compelling application and submission. We will not rehearse the respondent's arguments other than to say that these were relevant and persuasive. We accept his contention that this is a clear case for the award of costs for the reasons stated in his submission.

16. It is disappointing to read in the claimant's submission that the claimant accuses again the respondent of failing to comply with their disclosure requirements. We fail to see the relevance of this to this application. That said, the claimant had held onto documents (some in the often referred to "suitcase"), he refused disclosure, and he consistently sought the disclosure of unrelated, irrelevant material throughout proceedings and even at the final hearing. Mr Humphreys response was that it was easier to let him have the material than argue about it. The claimant had no sense of proportionality. He appeared to thrive on dispute and conflict. If there was delay on the provision of documents then this was because the claimant's requests were late, his descriptions vague or the documents were irrelevant.

17. Throughout the hearing, in an effort to assist the claimant and in accordance with the overriding objective, the Employment Judge attempted to re-focus upon the salient issues and also to re-orientate the claimant to concentrate on his more arguable claim. These efforts were resisted by the claimant. In order to assist the claimant, and to help explain the point, the Judge described the unfair dismissal claim as having "legs" (in contrast to the other claims). Notwithstanding that one claim pursued by the claimant had "legs", it did not run far, as set out in our determination. Although it is not necessary that a party give a prior warning about costs before it can pursue a cost application, we accept that the claimant was warned by the respondent's representatives about the consequences of pursuing such unmeritorious proceedings. The costs warning of 8 February 2018 was very clear.

18. We accept the claimant's contention that he genuinely thought that he was entitled to the CIDAA claimed. However, given that the loss of this allowance came from the claimant's previous dismissal for dishonesty and the terms of his re-instatement were clear, we determined that there was no merit in the pursuit of this allowance and also in the claimant's method of pursuit.

19. The claimant referred to without prejudice communications as an indication that he conducted proceedings reasonably. We accept Mr Humphries reply that there is no evidence to support the claimant's assertion that he engaged in a reasonable and sensible dialogue. Having heard the claim in its entirety, we were convinced that the claimant was dishonest throughout the conduct of these proceeding and we have significant difficulties in believing anything he says. We regret such a blunt expression but feel compelled to state the obvious, as the claimant has no insight into his behaviour. We say this because of the claimant's original dismissal for dishonesty, his conduct following reinstatement through to his second dismissal and his conduct throughout proceedings even up to his late disclosure of his financial affairs.

20. The claimant put some emphasis upon his contention that he was up against a large body of lawyers in the government's legal team and that he did not obtain legal support. As the claimant was a litigant in person it is appropriate for him to be judged less harshly in terms of his conduct than a litigant who was professionally represented. Justice requires that Tribunals do not apply professional standards to laypeople who may well be embroiled in legal proceedings for the first time in their lives – see *AQ Limited v Holden*[2]. Laypeople are likely to lack the objectivity and knowledge of the law and practice, which a professional legal adviser can bring. However, the claimant was dysfunctional. Anyone who would not accept his CIDAA claim was treated as an enemy and he went to extraordinary lengths to attack or undermine work colleagues, such as falsifying documents in the cases of Mr Madigan and Ms Taylor.

21. "If an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harasses his employers or for some other improper motive, he acts vexatiously"; see *ET Marler Limited v Robertson*[3]. Simply being "misguided" is not sufficient to establish vexatious conduct: *AQ Limited v Holden.* We are satisfied that, save as to the wages claim and the unfair dismissal claim, the claimant brought his claim against his former managers and some HR officers out of spite in order to harass them. The claimant conducted these in a vexatious manner. The wages claim, though not vexatious was "unreasonable" as set out above. In any event, in addition, the claimant's conduct of these proceedings exceeded the threshold such that we regard this as "unreasonable".

22. Even where the threshold tests are met, to Tribunal still has a discretion whether or not to make an order. That discretion should be exercised having regard to all the circumstances. We note that, in the Employment Tribunal's jurisdiction, cost orders are very much the exception and not the rule: see *Gee v Shell UK Limited*[4] and *McPherson v BMP Paribas*[5].

23. As Sedley LJ said in *Gee v Shell UK Limited*:

> It is nevertheless a very important feature of the employment jurisdiction that it is designed to be accessible to ordinary people without the need of lawyers and that in sharp distinction for ordinary litigation in the United Kingdom losing does not ordinarily mean paying the other site's costs.

24. What this means is that people are entitled to come to an Employment Tribunal to say, without fear of punishment in the form of a costs order, "*this is what has happened to me, I think it is unfair, I think it is unreasonable, I think it amounts to whistleblowing detriments and/or discrimination, what do you think?*" Costs remain the exception rather than the rule in such proceedings. That said, in contrast, employers should not be subject to expensive, time-consuming, resource draining claims that are without merit. The Employment Tribunal Rules say that we may order costs in the circumstances set out in Rule 76 and if the conduct of a litigant meets that definition then we have a discretion to order costs.

---

[2] [*2012] IRLR 648*
[3] 1974 ICR 72 NIRC
[4] [2003] IRLR 82
[5] [2004] IRLR 558

25. The Employment Appeals Tribunal has reminded us, in the aftermath of a number of cases (including *Daleside Nursing Home Limited v Matthews*[6] and *Dunedin Campbell Housing Association v Donaldson*[7]) which appeared to indicate the contrary, that the mere fact that the claimant may have given false evidence is not reason on its own to automatically order costs against him. We should look at the case as a whole: see *Kapoor v Governing Body of Barnhill School*[8].

26. *Yerrakalva v Barnsley Metropolitan Borough Council*[9] emphasised that the Tribunal has a broad discretion and we should avoid adopting an over analytical approach, for instance by dissecting the case in detail or attempting to compartmentalise the relevant conduct under separate headings.

27. In this respect, it was not irrelevant that a layperson may have brought proceedings with little or no access to specialist help and advice. Laypeople are, of course, not immune from orders for costs as many litigants in person are found to have behaved vexatiously or unreasonably even with proper allowances made for their inexperience and lack of objectivity. However, the claimant's pursuit of this matter was cynical and his behaviour opportunistic as our determination makes this clear. We regard it was appropriate in the circumstances to make a cost award against the claimant.

The amount of our costs award

28. The aim of an order for cost is to compensate the party which has incurred expense in winning the case and not to punish the losing party: see *Lodwick v London Borough of Southwark*[10]. We have a wide discretion which should not be fettered by the case law: the proper test is for us to exercise our powers under the Employment Tribunal Rules "justly": see *Benyon & Others v Scadden & Others*[11]. Proportionality may be a feature, although there could be a substantial disproportionality between the costs incurred and the award given: see *Brash-Hall v Getty Images Limited*[12].

29. At the previous hearings, the claimant emphasised his lack of savings and his impecuniosity. At various stages, the Judge explained in detail to the claimant the financial information that should be produced and we have made clear Orders in this regard. The claimant has not provided the clear financial details that we sought and instead he provided random documents from August 2019 to April 2020. One document related to the claimant's wife's car lease when the claimant told us that he wanted to exclude his wife from his financial picture. This haphazard information was provided so late as to avoid proper scrutiny by the respondent's solicitors. This was deliberate dishonesty as there is no reason why a full financial picture could not have been provided earlier. As the information eventually provided is useless in assessing the claimant's overall financial standing and we largely disregard this.

---

[6] UKEAT20519/08
[7] UKEAT0014/09
[8] UKEAT/0352/2013
[9] [2012] ICR 420
[10] [2004] IRLR 554
[11] [1999] IRLR 700
[12] [2006] EWCA Civ 531

30. Where a party was relying upon limited financial means, we expected to see a detailed breakdown of their finances, supported by bank statements, budget forecasts, copies of bills, etc. This has been provided in the Case Management Orders and explained to the claimant on numerous occasions. So given the limitations of the corroborative evidence we were reluctant to accept that the claimant's finances were as limited as he portrayed. That said, the respondent has not produced any evidence of the claimants means, other than indicating that he has some facilities to borrow money.

31. We do not regard it as just to order the claimant to repay the amount sought by the respondent. A cost order is exceptional, and the claimant's behaviour was, at least, manifestly unreasonable; but we have made this clear in our decisions and as these are public records, the respondent and their witnesses can feel suitably vindicated.

32. We are mindful that this is largely a no-cost regime and we do not wish to deter genuine complainants to the Employment Tribunal. That said, we do feel that a clear message is required and one that will have a significant effect upon the claimant.

33. We are concerned about the effects an award may have on the claimant's mental health. We have no evidence to support any adverse effect that a high cost order would adversely affect the claimant, but we note the claimant's previous mental health problems and we are reluctant to disregard this factor.

34. Therefore, we determine that £5,000 is a just amount to Order the claimant to pay as a contribution towards the respondent's legal costs. Although this is a small proportion of the costs the respondent seeks, this is a significant amount in any event. We are satisfied that this is a sum that the claimant should be able to meet thereby making our costs award enforceable, which is important to the Tribunal. We have no desire to make a high award which would reflect more the costs incurred by the respondent yet may never be enforced or paid. In all of the circumstances we regard this award as just and likely to be paid.

Employment Judge Tobin
Date: 29 June 2020