



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr S. Mighall

**Respondent:** Cammell Laird Shipbuilders and Shiprepairers Ltd

**HELD AT:** Liverpool

**ON:** 21<sup>st</sup> February 2020

**BEFORE:** Employment Judge T. Vincent Ryan

## REPRESENTATION:

**Claimant:** Mr R. Rixon, Solicitor

**Respondent:** N. Siddall QC

## Decision on Costs Order application - Reasons

The unanimous decision of the Tribunal in relation to the respondent's costs application is:

1. The claimant did not act unreasonably in the conduct of his claim that he was unfairly dismissed and the respondent's application for a Costs Order in relation to this claim is dismissed;
2. The claimant acted unreasonably in the conduct of his claim that he was dismissed on grounds related to union membership or activities;
3. The successful part of the respondent's application for a Costs Order will be determined by summary assessment. The respondents' application for a detailed assessment was refused and is dismissed.

## REASONS

### 1. The Issues:

- 1.1. Did the claimant (C) act unreasonably in either bringing these proceedings (knowing that they had no reasonable prospect of success or otherwise) or in the way the proceedings were conducted?
- 1.2. Did the claimant's claims have no reasonable prospect of success?

### 2. Our Considerations:

- 2.1. The facts and findings of the tribunal in respect of the claimant's claims were set out in a Reserved Judgment that was sent to the parties on 30<sup>th</sup> May 2019. The tribunal relies on those facts and findings. We also note:
  - 2.1.1. The claimant's assertion that he was singled out for detrimental disciplinary treatment and dismissal for his part in industrial action as a shop steward despite evidence known to him from the outset that the original complaint about his putative misconduct came from a colleague Union representative in respect of a fellow member;
  - 2.1.2. It was known to the claimant throughout that no other Union representatives or officials, including those actively involved in the said industrial action, were subjected to disciplinary action and dismissed;
  - 2.1.3. There was no evidence that the claimant was the prime mover behind the industrial action, was perceived to be such or was ever held accountable by management for it.
  - 2.1.4. The claimant was responsible for the graffiti complained about and its words and implications were clear;
  - 2.1.5. A colleague complained that he felt intimidated by it and that he had been subjected to bullying.
  - 2.1.6. The claimant was unable to advance any evidence to support or corroborate his claim that the disciplinary action and dismissal was in any way related to industrial action taken or any other trade union activity in which he was involved; there was no evidence from which such an inference could be drawn other than the fact that there had been industrial action prior to the dismissal and C was one of many people involved in it and one of several trade unions officials at the affected site.
  - 2.1.7. The claimant had arguments to put forward in mitigation of sanction, including the working environment. He raised the fact for consideration that the complainant, when aware of the perpetrator (the claimant) sought to withdraw his complaint (which could have either meant he was satisfied to drop it or that he felt intimidated but either way these were matters to be considered by the tribunal). The claimant raised valid questions about the investigation (albeit he was clearly responsible for

the graffiti), and whether dismissal fell within the range of reasonable responses to his conduct.

2.1.8. The hearing took two days and judgment was reserved. Whereas the Unfair Dismissal was not entirely straightforward the Trade Union related claim, lacking any evidence, was straightforward.

2.1.9. The claimant was legally represented throughout the proceedings. The parties, as is usual, made disclosure of evidence in good time before the final hearing and exchanged witness statements prior to the final hearing.

2.1.10. The respondent chose to be represented by Queen's Counsel which is its prerogative. Considerable costs were incurred by the respondent both as to solicitors' fees and counsel's fees. That said, the tribunal considered the proportionality of the costs claimed against C. For many reasons the outcome of this case would be important for both parties but in terms of the allocation of resources and proportionality to the legal questions to be decided we found that the costs claimed (£41,463.66) far exceeded the sum we were likely to award, which would not exceed £20,000.

3. **The Law:** The tribunal considered that Mr Siddall's written summary of the applicable law ("Respondent's Application for Costs", Section III Paras 5 – 9, 11 – 28) is comprehensive and unquestionable, as also graciously accepted by Mr Rixon. In those circumstances we endorse the summary without repeating it. By the same token we accepted the summary of the law in "The Claimant's Costs Hearing Submission" at para 5 and references at paras 24, 25 and 36. We considered the full written submissions and took account of both oral submissions. Suffice to say that we had to consider the reasonableness of C presenting and pursuing his claims, up to and including through a two-day final hearing, and whether either of them had reasonable prospects of success, guided by the authorities cited.

#### 4. **Conclusion:**

4.1. C was dismissed and felt aggrieved at the decision which he felt was unfair. R had stated its reason which C felt was harsh and left unanswered questions about the investigation, decision making process and the sanction imposed. That much is the basis of many claims heard by the tribunal. The statutory provisions and the legal authorities that guide tribunals provide a path that is well-worn. An employee has a right not to be unfairly dismissed and in the circumstances of graffiti being written, in an environment such as a shipbuilder's yard, the tribunal could understand that C might have felt that dismissal was unfair.

4.2. The tribunal felt that it was reasonable to test the reason for dismissal (albeit there was no real doubt that the claimant, despite some reluctance or prevarication on his part, had been responsible for the graffiti) and for C to ask the tribunal to consider whether, in all the circumstances, the respondent acted reasonably in treating the stated reason as sufficient reason to dismiss.

- 4.3. Such an “ordinary” unfair dismissal claim would have been listed for, and probably taken, one day’s hearing before a judge sitting without non-legal members. It could be anticipated that the respondent would apply proportionate resources to defending such a claim.
- 4.4. In the event C raised the stakes substantially by alleging, without any evidence, that he had been dismissed in connection with his trade union activities. This not only will have had potential further commercial and industrial relations ramifications for the respondent (that are not our concern and did not influence our decision) but required a two-day hearing before a full tribunal panel. C is not being sanctioned in costs for the additional cost to HMCTS but we make the point because the respondent was obliged to allocate more resources to contest the claim than would otherwise have been the case.
- 4.5. The tribunal could understand that, for any number of reasons, C might have thought it was worth accusing the respondent at the outset of victimising him for his union activities. That said, his claim raised serious issues for determination. One would have expected in these circumstances that there was an evidential basis for making such a claim. In claims such as this and unlawful discrimination generally, it can be difficult for a claimant to obtain evidence of unlawful conduct; often inferences have to be drawn. With that in mind we could understand it if C wished to obtain disclosable evidence from the respondent and even to see its witness statements.
- 4.6. At latest by the time of final pre-hearing preparation C was able to discuss with his professional advisers whether there were any grounds, supported by evidence, for maintaining such an important and serious allegation. The only factor that could by then have been taken into account in respect of the likelihood we would draw inferences was that at some time in the not too distant past there had been industrial action at the yard.
- 4.7. There ought to have been a full and careful re-appraisal of the merits of pursuing the trade union claim. There may have been a re-appraisal but we were concerned that in the event C hardly addressed us on it. There was absolutely no evidence or reason for us to find in C’s favour on that claim. The respondent presented us with evidence (all covered in our judgment Reasons) contradicting the likelihood that that the strike was relevant. C knew R’s case well in advance yet did not call any supportive witnesses or adduce any documentary evidence to establish the assertion that union activities were relevant.
- 4.8. The tribunal concluded that C should have taken stock appropriately at the latest following exchange of witness statements. By then it would have been clear to him that he had nothing with which to support his trade union linked assertion. He had discovered nothing relevant. There was to be no supportive evidence. There was to be evidence that his union colleague raised the complaint initially and thought the behaviour reprehensible, there was no evidence that any other official of the union had been penalised following the strike. There was no evidence, even from C, that he was a prominent or significant player in that action either.

4.9. C's trade union claim was merely an unsupported assertion. He was entitled to make it but in the circumstances described above it was unreasonable to pursue it through to a two-day contested final hearing. His conduct was unreasonable and added to the costs incurred by the respondent. The tribunal concluded that he should contribute to those costs.

4.10. The amount of C's contribution is to be assessed. We did not consider that it was likely to be assessed at a figure in excess of £20,000. It will be a contribution only to the respondent's costs and only to reflect additional work from the latter stages of the preparation to conclusion of the hearing. We decided that it would be appropriate for he costs to be summarily assessed in these circumstances.

Employment Judge T.V. Ryan

Date: 26.03.20

JUDGMENT SENT TO THE PARTIES ON  
1 May 2020

FOR THE TRIBUNAL OFFICE