EMPLOYMENT TRIBUNALS

Claimant: Mr P Broadley

Respondent: Wren Kitchens Limited

Heard at: Manchester **On:** 22 June 2020

Before: Employment Judge Leach

REPRESENTATION:

Claimant: In person

Respondent: Adam Willoughby (Counsel)

JUDGMENT – RESPONDENT'S APPLICATION FOR COSTS.

The respondent's application for costs is, in part, successful.

The claimant is ordered to pay £1000 as a contribution to the respondent's costs

REASONS

Introduction

1. The claimant brought a claim of unfair (constructive) dismissal following his resignation from the respondent on 25 July 2018. He also brought claims of unlawful deductions from wages (contrary to sections 13-23 Employment Rights Act 1996 ("ERA")) and breach of the Working Time Regulations 1998 ("WTR").

2. The claimant's claims were heard on 2,3 and 6 November 2019. The claimant withdraw his claims under WTR at the beginning of that hearing but continued with his other 2 claims. All evidence and submissions were heard at that hearing and I reserved my judgment.

3. My written judgment is dated 3 January 2020 and was sent to the parties on 7 January 2020 ("ET Judgment"). I decided that (1) the claimant had not been constructively dismissed for the reasons set out in the ET Judgment (2) that there had been no unlawful deductions from wages.

4. By email dated 13 January 2020 the respondent applied for costs. The basis of the costs application is set out below.

Application for costs

5. The respondent applied for costs under rule 76 of the Employment Tribunal rules of Procedure 2013 ("Rules") on the basis that (1) the claimant's claims had no reasonable prospects of success (Rule 76(1)(b) and (2) that the claimant acted unreasonably in continuing with the proceedings following receipt of a "costs warning" letter dated 11 June 2019 (Rule 76(1)(a).

6. The legal costs claimed are those legal costs incurred by the respondent, following the costs warning letter of 11 June 2019 ("Costs Warning Letter"). A detailed breakdown has been provided by the respondent claiming solicitors' costs of £12866.70 plus VAT and counsel's fees of £4650 plus VAT. The total claimed therefore is £17,516.70 plus VAT.

Hearing – costs.

7. I heard the respondent's costs application on 22 June 2020. It was originally listed as an in person hearing but this was not possible due to the COVID-19 pandemic.

8. The parties were provided with the option of a "remote" hearing or of a postponement. The claimant made clear that he wanted the matter to be heard and determined as soon as possible. The respondent was willing to engage in a remote hearing and the matter was listed and heard in the Manchester Employment Tribunals with the parties attending remotely (by telephone). The

Code A at the top of this Judgment confirms that this was a telephone hearing. . .

9. I explained to the parties that I would consider the costs application in 3 stages:-

    a. Firstly I would consider whether the claims (or any of them) had no reasonable prospects of success and/or whether the claimant behaved unreasonably in continuing with his claims following receipt of the Costs Warning letter. Only if I decided that one or both of these requirements had been met, would I deal with the other 2 stages:

    b. The second stage would require me to consider whether I should make a costs order. That stage would require me to exercise my judicial discretion and consider a range of factors.

    c. The third stage would require me to consider how much a costs order should be for if, at the second stage, I had considered that a costs order should be made.

10. I also informed the claimant at the beginning of the hearing and in more detail later in the hearing that in deciding whether to make a costs order and, if so, for how much, I may take in to account the claimant's ability to pay.

11. It was clear to me that the claimant was upset when making his submissions and I have no doubt that these proceedings have been very stressful for him. I was satisfied that the claimant had not known that he may provide evidence about his ability to pay (including bank statements, income and ability to earn). Having heard oral submissions from the claimant and on behalf of the respondent, I decided that it was fair and just to allow the claimant to provide relevant documentary evidence. I informed the claimant that he had 7 days to copy and send to the tribunal and the respondent any documentary evidence that he wanted to provide (so, by 29 June 2020) and I would then allow for the respondent, a further 7 days (until 3 July 2020) to provide any written submissions on those documents that the respondent wanted to provide.

12. I thank Mr Willoughby for his agreement to this approach.

Submissions

13. The respondent's submissions were contained in the application and by reference to the Costs Warning Letter and relevant passages from the ET Judgment. These were supplemented by Mr Willoughby's oral submissions.

14. I summarise the Respondent's submissions below:-

a. The Costs Warning letter addressed each and every claim in significant detail. That detail informed the claimant of difficulties with his claims.
b. The final points raised in relation to the constructive dismissal claim noted (1) that the constructive dismissal claim would fail but also (2) the strength of evidence supporting the respondent's secondary argument that the claimant would have been dismissed anyway (i.e. their argument for a 100% Polkey reduction).
c. The Costs Warning Letter also warned the claimant about the weakness of his other 2 claims
d. Whilst the claimant abandoned his claim under WTR, this was not until the beginning of the final hearing, by which time the respondent had undertaken work in relation to the claim
e. Whilst the WTR claim was dropped, the claimant continued with the constructive unfair dismissal and unlawful deductions claims.
f. The ET judgment in relation to constructive dismissal, reflects almost identically the terms of the costs warning letter. Mr Willoughby drew my attention particularly to paragraphs 101 and 102 of the ET Judgment where I explained why I did not consider there to have been a repudiatory breach.
g. Mr Willoughby also directed me to paragraph 85a of the ET Judgment and my finding that the use of third party fitters was not commonplace as the claimant had alleged.
h. In relation to the "Polkey" argument, Mr Willoughby referenced paragraph 107 of the ET Judgment and noted the similarity between this and the costs warning letter.
i. That the claimant had been specifically instructed to sell kitchen fittings but, following this instruction, had not done so and as shown by the mystery shopper footage, had been derogatory about the respondent's kitchen fitting service and had promoted alternative fitting services.
j. That the claimant had admitted he had sold electrical equipment to a customer.
k. That the overwhelming weight of evidence was in favour of the respondent in relation to the constructive dismissal claim and this was a case that should never have been pursued.
l. As for the unlawful deductions claim, there was no evidence of any deductions being made and it was clarified during the final hearing, that the claimant's claim was not about any deductions but about a commission review process that the respondent had introduced.
m. It was unreasonable conduct on the part of the claimant to continue with the claims following receipt of the costs warning letter, particularly when he had accepted serious wrongdoing on his part (the sale of white goods to a customer).

15. The claimant also made a number of points by way of submission. I summarise these below:-

    a. That he accepts the decision of the tribunal
    b. He brought the claim because he felt that he had no chance of matters being properly investigated internally by the respondent
    c. Customers were told that the claimant had left the business.
    d. His performance reviews were doctored
    e. There was evidence that third party fitters were used.
    f. The legal advice provided to him at the time was to resign and the proceedings following this have been the single most stressful experience for him.
    g. Throughout the litigation process he has been respectful to the respondent/representatives
    h. As a result of this case, the respondent will undoubtedly change its procedures
    i. The case turned on the factual evidence
    j. he took on the largest kitchen company in the country and their legal team and could not afford to engage a solicitor, and he acted in person to the best of his ability.
    k. He was truly devastated with the outcome but has no bitterness about it
    l. He did not drag the proceedings out and wanted the case to be heard and decided as soon as possible for the benefit of both sides.
    m. Whilst he was not successful, both sides have hopefully learned from the case.

16. I also invited the claimant to provide further details in relation to his ability to pay including any evidence in relation to his health and the impact that the Pandemic may have on his ability to earn an income.

17. The claimant provided the following information:-

    a. The claimant confirmed, in response to a question from me, that he has Parkinson's Disease (a matter that I recalled from the hearing in November 2019)
    b. That this underlying illness means he needs to isolate much more during the pandemic. He received correspondence from the NHS at the commencement of the country's period of lockdown which recommended self-isolation for 12 weeks. The claimant has provided a copy of a letter from East Lancashire Hospitals NHS Trust, dated 8 April 2020, confirming this to be the case.
    c. Before the pandemic, the claimant was in the process of setting up a new business and had taken out a loan of £25,000. He had set up a kitchen business before then but running it from his

house. The aim was to set up a kitchen showroom and operate from there.

d. He has not been earning an income since January 2020.
e. His loan has all been used up including on living costs. In fact, he has borrowed a further £12000 from a friend on a short term basis. He will need to repay this at the end of the year.
f. He currently has £4000 in the bank. His monthly outgoings are £2500

18. I note from the statements provided that the claimants bank balance is generally much less than £4000 although the injection of £12000 loan has improved the balance.

The Law

19. Unlike the general procedure in Civil Courts, costs do not "follow the event" in Employment Tribunals. Traditionally, Employment Tribunals have allowed employees to challenge the fairness of dismissals (or other matters within the jurisdiction of Employment Tribunals) without a threat of costs in the event that a claim is unsuccessful and also for employers to respond to claims, without a threat as to costs in the event that a claimant is successful.

20. The Tribunal Rules provide Tribunals with a power to award costs in the circumstances set out in those Rules.

21. The Rules which are relevant to the respondent's costs application state as follows:

> "*76. When a Costs Order or Preparation Time Order may or shall be made*
>
> *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 has no reasonable prospect of success….*
>
> ……
>
> 77. *Procedure*

> *A party may apply for a Costs Order or a Preparation Time Order at any stage up to 28 days after the date on which the Judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.*
>
> *78. The amount of a Costs Order*
>
> (1) *A Costs Order may –*
>
> *(a) Order the paying party to pay the receiving party a specified amount not exceeding £20,000 in respect of the costs of the receiving party;*
>
> *(b) Order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of a detailed assessment carried out either by a County Court in accordance with the Civil Procedure Rules 1998 or by an Employment Judge applying the same principles."*
>
> *……..*
>
> *84. Ability to Pay*
>
> *In deciding whether to make a costs …….order and if so in what amount, the Tribunal may have regard to the paying party's….ability to pay."*

22. In relation to an application under rule 76(1)(b) (no reasonable prospect of success), this test should be considered on the basis of the information that was known or reasonably available at the start of proceedings (see paragraph 67 of the decision in Radia v Jefferies International Limited [UKEAT/007/18/JOJ] ("Radia"):

> *"Where the Tribunal is considering a costs application at the end of, or after, a trial it has to decide whether the claims 'had' no reasonable prospect of success judged on the basis of the information that was known or reasonably available at the start, and considering how at that earlier point the prospects of success in a trial that was yet to take place would have looked. But the Tribunal is making that decision at a later point in time, when it has much more information and evidence available to it, following the trial having in fact taken place. As long as it maintains its focus on the question of how things would have looked at the time when the*

> *claim began, it may and should take account of any information it has gained and evidence it has seen by virtue of having heard the case, that may properly cast light back on that question. But it should not have regard to information or evidence which would not have been available at that earlier time."*

23. Where a party seeking costs makes out one or more of the grounds for costs to be awarded, then the Tribunal must consider whether to award costs. This consideration requires the Tribunal to exercise a discretion. There is no finite list of matters that Tribunals must take into account when exercising this discretion, and the relevant importance of various factors will depend on the particular circumstances of the case. In the case of Barnsley MBC v. Yerrakalva [2011] EWCA Civ 1255 the Court of Appeal provided some guidance to Tribunals when considering costs applications:-

> *"On matters of discretion an earlier case only stands as authority for what are or what are not the principles governing the discretion and serving only as a broad steer on the factors covered by the paramount principle of relevance. A costs decision in one case will not in most cases predetermine the outcome of a costs application in another case: the facts of the cases will be different as will be the interaction of the relevant factors with one another and the varying weight to be attached to them."*

24. In the 2012 case of AQ Limited v. Mr A J Holden [2012] UKEAT/0021/12 ("AQ Limited") the Employment Appeal Tribunal noted the following in relation to costs applications against litigants in person:-

> *32. The threshold tests in rule 40(3) are the same whether a litigant is or is not professionally represented. The application of those tests may, however, must take into account whether a litigant is professionally represented. A tribunal cannot and should not judge a litigant in person by the standards of a professional representative. Lay people are entitled to represent themselves in tribunals; and, since legal aid is not available and they will not usually recover costs if they are successful, it is inevitable that many lay people will represent themselves. Justice requires that tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life. As Mr Davies submitted, lay people are likely to lack the objectivity and knowledge of law and practice brought by a professional legal adviser. Tribunals must bear this in mind when assessing the*

> *threshold tests in rule 40(3). Further, even if the threshold tests for an order for costs are met, the Tribunal has discretion whether to make an order. This discretion will be exercised having regard to all the circumstances. It is not irrelevant that a lay person may have brought proceedings with little or no access to specialist help and advice.*
>
> *33. This is not to say that lay people are immune from orders for costs: far from it, as the cases make clear. Some litigants in person are found to have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity.*

25. That judgment considered an employment tribunal's refusal to make a costs order under the previous version of the Tribunal rules (2004) which is why there is a reference to rule 40(3) rather than rule 76. However the principles noted in the extract above in relation to litigants in person remain relevant.

26. When considering whether a claim had any reasonable prospects of success (for the purposes of Rule 76(1)(b)) it is clear that Tribunals are required to assess this objectively (see for example Hamilton-Jones v. Black EATS/0047/04) Where a claim, assessed objectively, has no reasonable prospects of success, it is irrelevant (for the purposes of rule 76(1)(b)) that the claim has been brought by a litigant in person. However, and as made clear by the AQ Limited case, the fact that the claim was brought by a litigant in person may be relevant when the tribunal goes on to consider whether to make a costs order once the threshold of 76(1)(b) has been met.

Analysis and Conclusion

Did the claims have no reasonable prospects of success?

27. The unlawful deductions and WTR claims

    a. I have decided that neither of these 2 claims had a reasonable prospect of success.

    b. The unlawful deductions claim was discussed at length at the final hearing and it eventually became clear that there were in fact no deductions that the claimant was claiming as unlawful. (see ET Judgment at 16-25).

    c. The claim under WTR appeared to be based on a claim that the claimant was working more than the 30 hours which he was contracted to work every week but was not that the maximum working week of 48 hours had been breached. Sensibly the

claimant dropped this claim at the beginning of the hearing in November 2019.

d. In making my decision, I have applied the "no reasonable prospects" test objectively – see paragraph 25 above.

28. The constructive dismissal claim:-

a. The application of the "no reasonable prospects" test is far less straightforward in relation to the constructive dismissal claim. The main complicating feature is the interplay between the 4 components of the respondent's offering (see the introduction section of the ET Judgment). The test requires consideration of the position that was known or should reasonably have been known at the start of proceedings (see Radia – above)
b. Ordinarily, where an employing business sells particular goods, it would be against the interests of that employer if an employee did not promote the sale of those particular goods. A business selling cars would expect its employees to promote the sale of its cars and not to send a potential customer to a rival car dealer company.
c. The claimant's position was that he sold the respondent's kitchens and did so with some success (not denied by the respondent) but that in order to do so, he had to provide potential customers with an alternative fitting service as he regarded the respondent's fitting service to be expensive and of poor quality. Further, the claimant's success in selling the respondent's kitchens was something that benefited the respondent.
d. I made a finding that the use of third party fitting services by the respondent's sales staff was not common place. That finding of course went against the claimant and in favour of the respondent. However on the same issue I note the following:-
    i. That the claimant had hardly sold any fittings during his employment with the respondent and yet the respondent had not tackled this until earlier in 2018
    ii. Witnesses called by the respondent stated that they were aware of rumours that the claimant was using third party fitters but nothing appears to have been done. For example, there was no evidence of instruction provided to the claimant at the stage that rumours were circulating (or any other time) that recommending a third-party fitter would be an act of potential gross misconduct.
    iii. the claimant did not attempt to hide his dissatisfaction with the respondent's fitting service and his policy to recommend customers use different fitting services.
e. I also made a finding that the claimant had been told that he was to sell Wren Kitchen fittings – but even here, the target that he

had been provided of selling 3 a month (see ET Judgment at paragraph 61) was not, in itself, one giving a message that the Wren service was exclusive.

f. I am also mindful of the terms of the letter sent to the respondent's customers concerning the claimant. The letter indicates that the claimant had left the respondent's employment. The respondent itself accepted the use of the chosen wording in the circumstances of the claimant's suspension, was a mistake.
g. The issue that counts against the claimant most strongly in my consideration of this test is the sale of white goods that he admitted he made to one customer. His explanation about this was that it was a mistake but the logic being applied appeared to be the same as for the fitting service – that it helped achieve a sale.

29. Whilst I made a number of findings against the claimant, those were findings made on the basis of the evidence before me. The claimant's position on some of these issues (including the sale of white goods noted above) is weak but I do not find that the constructive dismissal claim falls in to the "no reasonable prospect of success" category.

Did the claimant's continuation of the claims following receipt of the Costs Warning Letter amount to unreasonable conduct?

30. In relation to the WTR and unlawful deductions claims, I have already made findings that the claims had no reasonable prospects of success and it is unnecessary for me to also consider the test under rule 76(1)(a).

31. When considering this "unreasonable conduct" element, it is appropriate to take account of the fact that the claimant was a litigant in person.

32. As for the constructive dismissal claim:-

a. The costs warning letter does set out in detail what the respondents position is. The respondent has succeeded in its resisting the claimant's claim, which enables the respondent to refer to the terms of the letter and say the claimant should have heeded the costs warning and withdrawn at that stage.
b. It is not enough for a successful party to be able to speculate in a costs warning letter on the outcome and reasons and then, in the event that their speculation is correct, to then be able to refer the matter to the Tribunal and claim costs. If this was the position then it would encourage parties to write speculative costs warning letters where there were no grounds for doing so, in the hope that claimants would withdraw their claims.

c. That said, the Costs Warning letter is well drafted and in this case raises valid points. The claimant did not respond to the letter in any significant way.
d. Had the claimant engaged with the Costs Warning Letter then that should have caused him to review his claims under WTR and for unlawful deductions and withdraw them at that stage. Had I not already made a finding that these claims had no reasonable prospects of success, I would have found that his failure to engage in the Costs Warning Letter in relation to those claims, amounted to unreasonable conduct.
e. However I do not find that the claimant's continuation of the Unfair (constructive) dismissal case, following receipt of the Costs Warning letter, amounted to unreasonable conduct. A number of issues relevant (and key) to the claim required determination following presentation and consideration of the evidence. The claimant felt strongly that he had been unfairly treated and was entitled to a judicial determination of his case.

Should a costs order be made?

33. My decision is that it is appropriate to make a costs order in relation to the WTR and unlawful deductions claims. Both claims were flawed. They should not been brought.

34. Further the claimant had the benefit of the Costs Warning letter as well as the information provided in the respondent's response (paragraphs 35-38 of the response sets out the respondent's position clearly).

35. The claimant should have reviewed the basis of his claims of unlawful deductions and under WTR at those stages but particularly when the concerns were highlighted in the costs warning letter. In not doing so the claimant has caused the respondent to incur costs unnecessarily.

How much should a costs order be for?

36. It is clear that the vast majority of the respondent's costs would have been incurred in defending the constructive dismissal claim even had the claimant abandoned his claims under WTR and for unlawful deductions from wages.

37. I am also mindful of the claimant's ability to pay. I accept that his income earning potential has been severely curtailed (hopefully on a temporary basis only) since lockdown and that he has been particularly affected due to his health condition.

38. Taking these matters in to account I order the claimant to make a payment to the respondent of £1000 as contribution to their costs.

Employment Judge Leach
Date: 4 August 2020

RESERVED JUDGMENT AND REASONS

SENT TO THE PARTIES ON
6 August 2020

FOR THE TRIBUNAL OFFICE