EMPLOYMENT TRIBUNALS

Claimant: Mr Paul Newton

Respondent: Weaver Vale Housing Trust

HELD AT: Liverpool **ON:** 5 August 2020

BEFORE: Employment Judge Shotter

REPRESENTATION:

Claimants: In person
Respondent: Mr Rogers, solicitor

JUDGMENT

The judgment of the Tribunal is that;

The respondent's application for costs against the claimant is successful and the claimant is ordered to pay to the respondent a contribution towards costs in the sum of £7,000 inclusive of the £500 deposit order.

REASONS

1. The respondent made a costs application following oral judgment and reasons being given at the liability hearing on the 5 December 2019, in a letter dated 23 January 2020.

2. I have today heard evidence under oath from the claimant as to his means together with submissions made by both parties and have been taken to various documents in the agreed bundle, which have been taken into account.

3. Due to COVID 19 pandemic it was agreed with the parties that rather than them wait in the public waiting rooms for judgment and reasons to be given

orally, it was preferable for a reserved judgment to be sent to them as soon as possible.

The outcome of the liability hearing

4. Judgment and reasons following a 5-day liability hearing which completed on day 4, were promulgated on the 28 January 2020. The claimant failed in his claim of unfair dismissal and automatic unfair dismissal brought under section 103A of the Employment Rights Act 1996.

The respondent's application for costs and oral submissions made by Mr Rogers.

5. In the 23 January 2020 costs application letter reference was made to rule 39(5) of Schedule 1 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("Employment Tribunal Rules 2013"), rule 75(2) and 76(1)(a) and (b) in that the claimant had acted unreasonably in both bringing the proceedings and the way in which the proceedings were conducted.

6. Mr Rogers made the following submissions upon which I have commented as set out below:

   6.1 The claimant's claims were misconceived and had no reasonable prospects of success from the outset.

   6.2 The respondent relied upon two independent handwriting expert reports, the claimant was not an expert in handwriting and yet he sought to argue the reports prepared by James McNally were qualified rather than conclusive when this was clearly not the case as found by the Tribunal at liability stage. The claimant also sought to deconstruct Susan Ord's report despite her credentials as an independent expert, making serious allegations that she had conspired with the respondent which were entirely unreasonable and had no prospects of success. The Tribunal accepts the validity of Mr Rogers' submissions in regard to the unfair dismissal complaint which was misconceived and had no reasonable prospects of success from the outset given the existence of a number of independent expert reports which conclusively found the claimant had written the anonymous letter.

   6.3 There was no causative link between the protected disclosure and the decision made by the appeal officer who had reached his decision regarding the claimant's appeal before the disclosures had taken place, as found by the Tribunal. The Tribunal took the view that it was unlikely the claimant would have known the appeal officer had made up his mind before the claimant instructed Chris Dunwoodie to make a counter-offer and threaten to make disclosures to the press and MP's as "leverage" for increasing the offer, negotiations breaking down and Wayne Gales upholding the decision to dismiss. The Tribunal took the view that whistleblowing allegations are often fact sensitive, and despite the fact

the claimant's evidence was inconsistent as to what disclosures were actually made, it was only after hearing the evidence that the Tribunal was in a position to conclude there was no causative link even had a disclosure been made to the effect that an unnamed unqualified electrician had carried out electrical work and in so doing, the respondent had failed to comply with its legal obligations to employ qualified electricians. It was an important factor in this case for the Tribunal to decide whether the claimant in threatening to make a disclosure (as opposed to making a disclosure) fell within the legal definition set out in S.43(B)(1) of the ERA, finding the claimant had not met the test including the requisite public interest. On balance, the Tribunal took the view that the claimant had acted unreasonably in bringing the claim of automatic unfair dismissal because of his conduct; he knew, despite his protestations to the contrary today, that the disclosure was threatened at his request as part of the settlement, in effect, blackmailing the respondent to pay him more otherwise he would report them to the press and MP.

6.4 In oral submissions Mr Rogers reminded the Tribunal that the claimant, at the liability hearing, alleged his trade union representative had threatened the respondent without the claimant's knowledge, and failed to call witness evidence to support this serious allegation. In its judgment the Tribunal did not find the claimant's evidence on this point credible, for the reasons given which it does not intend to repeat. It does however reflect the claimant was prepared to make wild accusations to strengthen his case, and this was part and parcel of his unreasonable behaviour. A further example, which was dealt with in the Reasons, related to the claimant's unsubstantiated allegation that Ms Ord, an independent hand-writing expert, had colluded with the respondent's HR department to produce a report unfavourable to the claimant which had no basis.

6.5 In a "without prejudice save as to costs" letter dated 8 March 2019 the respondent explained why it considered the claimant's claims to be misconceived in some detail. The letter ran to 6-pages which included various references to the claimant's unreasonable conduct, warning the claimant that the letter could be brought to the Tribunal's attention when costs were considered and referencing the EAT decision in <u>Peat and Others v Birmingham City Council</u> UKEAT/0503/11/CEA. Reasons were provided as to why the respondent considered the claims to be misconceived and have no reasonable prospects of success which included the existence of the dismissing manager's genuine belief in the claimant's guilt based on the expert reports, the contents of which were explored, and the legal tests to be applied by the Tribunal were set out. Reference was made to <u>Iceland Frozen Foods V Jones</u> [1982] IRLR 439 the respondent concluding "We therefore so not consider that the Tribunal will find that no reasonable employer would have dismissed you."

6.6 In the 8 March 2018 letter reference was also made to the claim of automatic unfair dismissal, detailing what the claimant was required to

establish in law and causation. Mr Rogers wrote “Even if, which is not accepted, you made a qualifying disclosure prior to the decision being taken by Andrew White…for the reasons outlined above, it is absolutely clear that you were dismissed because he had a reasonable belief you were the author of the anonymous letter and not for any other reason whatsoever.” The claimant was informed the estimate of the respondent’s costs was £10,000 plus Vat and he was invited to obtain legal advice and/or consult with ACAS and withdraw. At today’s cost hearing the claiming indicated he had taken advice and yet there was no evidence before the Tribunal that he had engaged with the cost warning letter in any way, which was unreasonable conduct on his part given the points raised were valid and ultimately found to be the case following the liability hearing. In short, the claimant appears not to have addressed the weaknesses in his case throughout this litigation, and had blindly proceeded to trial when he was found to have given less than credible evidence. The claimant is a litigant is person and whilst he does not have the legal expertise of Mr Rogers, he is intellectually capable of appreciating the strengths and weaknesses of his claim but chose not to address his mind in this way and in failing to recognise the key weaknesses in his case acted unreasonably.

6.7 At the strike-out preliminary hearing held on the 12 April 2019 the claimant indicated he believed other employees had been treated differently when allegations of similar misconduct had been made, an argument abandoned on the first day of the liability hearing.

6.8 The claimant disclosed approximately 478 documents which had to be reviewed by the respondent and a “significant proportion” were irrelevant. The claimant made a disclosure application at the 14 November 2019 hearing together with an application for 4 witness summons which was refused. The applications were refused with the exception of one document, with the witness summons application being withdrawn by the claimant on the basis that the witnesses were not relevant.

6.9 Following the liability hearing the claimant was found to be a less than credible witness and to have written the statement of Joanne Newton, who could not recall any of the evidence.

6.10 Finally, in oral submissions Mr Rogers pointed out that the respondent was a provider of social housing who had incurred substantial costs that would have been better spent servicing the needs of tenants. It had made an offer to pay the claimant 3-months pay which had been refused and resulted in the threat made by the claimant’s union representative. Mr Rogers submitted that from the very beginning of this litigation the claimant’s claims were misconceived. He took the view that the fact the claimant obtained legal advice was not a shield to a cost order being made. The Tribunal agreed,

The respondent's cost schedule.

7. Mr Roger's explained that the initial cost estimate of £10,000 plus VAT had been exceed by over 50% as a result of the 11 March 2019 preliminary hearing, deposit hearing on 12 April 2020 and preliminary hearing (case management) on 14 November 2020 plus a liability hearing listed for 5-days which was concluded on day 4.

8. Mr Rogers confirmed the applicable hourly rate was £180 per hour plus VAT for a senior associate, a rate well within the HMCTS guidelines for a senior/associate solicitor.

9. The amount of costs sought is £20,000, the total costs incurred £21, 846 plus VAT. Since the deadline for the claimant withdrawing his claim expired a total of £17,424.00 plus VAT has been incurred. The Tribunal has considered the breakdown provided and has assessed costs on a broad-brush basis taking into the account the arguments put forward by Mr Rogers, who referred it to the Court of Appeal decision in Kovacs V Queen Mary and Westfield College and another [2002] EWCA Civ 352 that although an Employment Tribunal may take means into account this does not mean "poor litigants may misbehave with impunity and without fearing that any significant costs orders will be made against them, whereas wealthy ones must behave themselves otherwise an award will be made."

The claimant's response to the costs application and oral submissions made

10. The claimant produced an undated written response. He raised the following points which have also been dealt with below:

    10.1 The claimant had remained professional, open-minded and reasonable throughout the proceedings. The Tribunal did not agree with this analysis; he was blinkered and refused to accept that both claims were weak for the reasons explored above. In addition, it was not reasonable for the claimant to make the wild allegations he did in oral evidence, and he did not adhere to all case management orders despite protestations today that the Case Management Orders following the preliminary hearing which took place on the 11 March 2019 were not sent to him in writing. The Tribunal agreed with the claimant that he should have been sent the written Orders and it appears that he was not until August 2019. There is no explanation for this on the Tribunal file. Nevertheless, it is undisputed the claimant attended the preliminary hearing, the issues to be decided by the Tribunal were determined and agreed including at paragraph 8 when the protected disclosures relied upon were set out. At paragraph 10 it was recorded the case management orders were made by consent and the first case management order required the claimant to clarify the protected disclosure(s) he was relying upon. The claimant maintains today that he did not provide the information before the strike out application when the deposit order was made because the Case Management Order was not sent to him, he was disadvantaged and had he responded a deposit order would not have been made. The claimant's

submission was not accepted by the Tribunal. It is unfortunate that he did not receive the Case Management Order in time for the strike out hearing; however, the claimant (who takes notes) had agreed to provide the information and it cannot be said that he was disadvantaged in any way. Contrary to the claimant's argument that he was unable to provide the further information the Tribunal took the view that had he addressed his mind to the agreement reached at case management when it was made clear what information was sought, it could have been provided with no difficulty even taking into account the fact the claimant was representing himself. It is clear from the content of the Deposit Order and reasons, the claimant's claims were explored including the claimant's allegations of pre-determination, lack of objectivity and the automatic unfair dismissal claim.

10.2 The respondent refused to agree to judicial mediation. The Tribunal took the view that this has no bearing on the reasonableness or otherwise of the claimant's actions.

10.3 The claimant argued that a number of documents he had disclosed and been told by Mr Rogers were irrelevant in his case, were relevant and had they been available at the final hearing they would have assisted him in his representation. There was no evidence to this effect. At the final hearing I granted the claimant leave to submit a number of documents which at first blush appeared to be irrelevant on the basis that he is a litigant in person and some leeway should be given. There were no additional documents put forward by the claimant to the effect that they were relevant and assisted his claim, over and above those admitted at his request. The Tribunal does not accept the claimant's arguments that unamend documents had been disclosed, relevant to his claim but not included in the final bundle on the basis that Mr Rogers deemed them irrelevant. It is notable on the 23 September 2019 the claimant sent a production order for a number of documents and an application for 4 witness orders (that did not include the trade union representative who made the disclosure). The application was dealt with on the 14 November 2019 at a preliminary hearing following which the Case Management Summary was sent to the parties on the 14 November 2019. Only one document relating to the claimant's protected pay rights was ordered to be disclosed.

10.4 The claimant argued that he had prepared Mrs Newton's witness statement in much the same way as Mr Rogers had spent 16-hours preparing and drafting witness statements for the respondent, and Mrs Newton was unable to recall her evidence because she was distressed and worrying about their son's mental health as he had attempted to self-harm the previous night. The Tribunal dealt with Mrs Newton's credibility in its Reasons, which it does not intend to repeat. To be clear, the fact the claimant put words in Mrs Newton's mouth via her witness statement is unreasonable conduct, but it would be naïve for the Tribunal to recognise this to be an unusual occurrence when parties in preparation for a final hearing, from both sides, prepare their witness statements.

That is not to say there was any hint of Mr Rogers writing the witness statements as opposed to taking witness evidence and putting it into a form suitable for a trial. Unlike Mrs Newton, the respondent's witnesses could recall exactly what happened and gave the impression they had individually written their statements, which in any event was not questioned by the claimant in cross-examination.

10.5 In oral submissions the claimant stated when he took legal advice from the CAB he was told his case had good prospects, and he refused the 3-month salary offer on the basis that he did not know the outcome of the appeal at the time. The claimant argued (despite failing to deal with the points raised in the respondent's cost warning letter) that any costs before the 8 April 2019 should not be ordered.

10.6 The claimant claimed that he took guidance from the judges and did not behave unreasonably during the proceedings, clearly referring to his personal attitude at the Tribunal which I accept, at least before me, was always polite and helpful.

10.7 The claimant questioned why, after the final hearing, I deliberated for the day, the inference being that the claims must have had some prospect of success. The claimant also reminded me that I had said I felt sorry for him, and that indeed remains the case given his personal situation, and mental health problems of both himself, Mrs Newton and one of his sons. I felt it was encumberant on me to thoroughly look at the evidence and leave no stone unturned, bearing in mind the claimant was representing himself and there was a considerable amount of documentary evidence. The Reasons which resulted from my deliberations are detailed, and reflect the facts as found before the law was applied to them. The claimant was an employee with a long service record; the case was important to both parties, and I felt it merited the time to explore the myriad of issues and evidence thoroughly before coming to a decision.

10.8 The claimant relied on the medical report provided by Dr Burgess on 6 February 2020 referencing the fact that the claimant at the end of October 2019 was "still very stressed and upset" with his work-related issues and had been prescribed sertraline, an ongoing medication. Dr Burgess invited me to "take into consideration this cost application very carefully as there would be potential for significant deterioration of this gentleman's mental health if further financial pressures are placed on him." I accept that a costs order can adversely affect any party subjected to one, and this can exacerbate any mental health problems and was mindful of this, coupled with the claimant's means, when assessing whether to order additional costs over and above the deposit order and the amount of total costs to be ordered. I do not accept that mental health issues can be used as a shield against a cost order being made.

10.9 Finally, in oral evidence under cross-examination (and again in oral submissions) the claimant referred to the respondent as a social landlord bringing in £31 million per annum turnover when the bulk of their clients

lived in "economically deprived Winsford". The claimant pointed out that a number of tenants attended the youth football club coached by the claimant, who would be bemused by the fact that the respondent had paid off an electrician to the tune of £20,000 so he would not go to the press. The claimant confirmed this was not a threat, and the Tribunal accepted his assurance at face value. However, turning the claimant's argument around, it may be the case that those same tenants of the respondent would be equally "bemused" by the prospect of an employee dismissed for gross-misconduct who went on to behave unreasonably in bringing and continuing with employment litigation, if that employee was not being ordered to pay all or some of the legal costs incurred. The Tribunal is mindful of the fact that the respondent is a social landlord, however, the real issue in this case rests with the claimant's unreasonable behaviour in bringing claims that had no reasonable prospect of success and continuing with those claims after a detailed cost warning letter and deposit order.

<u>The claimant's means</u>

11. The claimant gave oral evidence under oath as to his means and took the Tribunal to a number of documents including various bank statements, mortgage information, budgets and car valuations which I do not intend to repeat.

12. Dr Burgess in his report referred to the claimant being placed under further financial pressure, which was a reference to the fact that the claimant is in debt, and gradually paying the debts off via a direct debit Within the bundle there is a Step Change online budget from February 2020 which is largely unchanged, albeit the debts have been reduced and the claimant salary increased by £20 net per month. The budget is not entirely correct as the claimant has failed to disclosure the fact he receives a substantial contribution towards his Sky TV and BT sport package, described by him as one of the few luxuries he enjoys. The contribution is paid by his adult children, who are all working (albeit one child may be facing redundancy) and pay rent. Emergency funds have been put aside for the claimant, Mrs Newton and their adult children which makes no sense since everybody is earning a wage and living in the same house. The same point applies to the claimant driving his son (who does not have a licence) to and from work daily and recording in the budget the petrol used when the son is earning a wage, and the claimant has a company car with a fuel card to use the rest of the time. In short, there are anomalies with the budget which are difficult to get to the bottom of, and it is more likely than not the claimant has disposable income undeclared to his creditors that could be used to pay some of the respondent's costs. It is likely that any costs order will result in the respondent getting in line with other creditors, and receiving a monthly contribution towards those costs. The claimant pointed out that were a costs order to be made, it would take additional years for all his debts to be paid off and credit i.e. a credit card/loan would not be made available for him to, for example, purchase a new car as both he and Mrs Newton were driving around in old cars.

13. The claimant has equity in 12 Wilmer Place at Winsford of approximately £70,000 once the outstanding mortgage of approximately £60,000 has been paid. He has no investments or savings and on a monthly basis total income and rent/board amounts to £3271.00 before outgoings and debts are paid. I took the view that the claimant could afford to make a contribution towards the respondent's costs over and above the £500 deposit paid.

    The deposit order dated

14. This costs application follows two deposit orders made in respect of the claimant in the sum of £250 totalling £500. EJ Buzzard concluded following an open preliminary hearing that the claimant's claims had little reasonable prospects of succeeding in his claim of unfair dismissal, the respondent having decided after a reasonable investigation the it was more likely than not the claimant had sent it an anonymous letter alleging misconduct of a colleague of the claimant's and there was a potentially fair reason for dismissal. The respondent relied upon two independent experts who concluded the claimant was the author of the letter, guilty of misconduct and dismissal was the appropriate sanction.

15. Turning to the automatic unfair dismissal claim for making protected disclosures, EJ Buzzard found that although "it appears very unlikely" it was possible the claimant could establish there had been a shift in the respondent's attitude towards his appeal against dismissal, "which coincided with his alleged disclosures." Reference was made to a difficulty faced by the claimant that an attempt to settle his potential claims does not amount willingness to reverse to reverse the sanction of dismissal.

16. In a note accompanying the deposit order the claimant were warned "if the Tribunal later decides the specific allegation or argument against the party which paid the deposit for substantially the reasons given in the deposit order, that party shall be treated as having acted unreasonably, unless the contrary is shown…"

17. The deposits were paid and the liability hearing went ahead on 2, 3, 4 and 5 December 2019 during which the Tribunal heard from a number of witnesses including the claimant, his wife Joanne Newton and James Raffo. The Reasons run to 27-pages and 125 paragraphs revisited by the Tribunal for the purpose of this cost application.

Conclusion

18. Rule 39 of the Tribunal Rules deals with deposit orders. If at any stage following the making of a deposit order the Tribunal decides against the paying party in relation to that specific allegation or argument for substantially the same reasons as those it relied on when making the deposit order, that party is automatically treated as having acted unreasonably in pursuing that specific allegation or argument for the purposes of rule 76 (unless the contrary is shown) — rule 39(5)(a). This means that the Tribunal will be required to consider whether to make a costs order against that party under rule 76(1).

19. As set out above, on a comparison between the reasons for making the deposit order at the preliminary hearing heard by EJ Buzzard and the Reasons reached following the liability hearing leading to the findings against the claimant were substantially the same and it is open to the Tribunal to make a costs award where the claimant was unreasonable in persisting in having his case determined at a full hearing.

20. Rule 39(6) provides that if a deposit has been paid to a party under rule 39(5)(b), the amount of the deposit shall count towards the settlement of any costs order made in favour of the same party. Regardless of whether or not I decided to make a costs order, the deposit will still be paid to the respondent under rule 39(5)(b).

21. The arguments put forward by the claimant today and in his written response to the Respondent's grounds for application for costs (undated) and the medical evidence dated 6 February 2020, did not assist in reversing the presumption under rule 39(5)(a) that the claimant will be presumed to have acted unreasonably in pursuing the unfair dismissal/automatic unfair dismissal allegations for the purpose of a costs application. Unreasonable conduct has been made out under rule 76(1)(a) and the next step for the Tribunal is to consider whether to make the costs order —asking itself whether it is appropriate to exercise its discretion in favour of awarding costs against the claimant in favour of the respondent and concluding that it was proportionate and appropriate in all the circumstances of this case.

22. In conclusion, under rule 39(5)(a) the claimant will be presumed to have acted unreasonably in pursuing the specific allegation or argument for the purpose of a costs order and unless he can prove the contrary, unreasonable conduct will be made out under rule 76(1)(a) and the Employment Tribunal must consider whether to make a costs order. This is referred to as the presumption of unreasonableness. The presumption of unreasonableness does not mean that the Tribunal will automatically make a cost order: under rule 76(1) as it must still ask itself whether it is appropriate to exercise its discretion in favour of awarding costs against that party. In other words, I must ask myself whether, despite the claimant's unreasonable behaviour, was it appropriate and proportionate to make a costs order having regard to all the circumstances of the case. In considering whether or not to use that discretion in favour of the respondent I took into account the analysis of the claimant's unreasonable behaviour as set out above, together with the case law referenced by Mr Rogers before concluding that in all the circumstances of this case, it was just and equitable for the claimant to pay a contribution towards the respondent's costs taking into account his means and recognising that the fact the claimant has a number of debts which he is slowly paying off, does not shield him from a costs order. The claimant has equity in the matrimonial home and any debt arising out of the costs order in favour of the respondent can be met, albeit when other payments are made to creditors, over a period of time.

23. The Tribunal is aware that it is "rare" for costs orders to be appropriate in Employment Tribunal proceedings; they do not follow the event as in the ordinary course of litigation. The Tribunal considered the claimant's individual means confirmed under oath, and taking this into account it is just and equitable for the Tribunal to use its discretion in favour of the respondent, a not for profit organisation who has incurred substantial legal costs in defending a claim up to and including the liability hearing, which had attracted deposit orders as a condition of them continuing.

24. In conclusion, taking into account means the claimant is ordered to pay to the respondent a contribution towards the respondent's costs in the sum of £7000.00.

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3.8.2020
Employment Judge Shotter

Date

JUDGMENT SENT TO THE PARTIES ON

20 August 2020

FOR THE TRIBUNAL OFFICE

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