Case Number: 2502334/2019

THE EMPLOYMENT TRIBUNALS

Claimant: **Mr A Chind**

Respondents: **Working on Wellbeing Limited (First Respondent)**
Chief Constable of Northumbria Police (Second Respondent)

JUDGMENT ON APPLICATION FOR COSTS

1. The first respondent's application for costs against the claimant is well-founded and succeeds. The claimant is ordered to pay to the first respondent the sum of £4,000 in respect of the first respondent's costs.

REASONS

1. By judgment promulgated on 17th January 2020, following a public preliminary hearing on 9th January 2020, the Tribunal struck out the claimant's claims of automatic unfair dismissal for making protected disclosures and being subjected to detriments because he had made protected disclosures, on the grounds that they had no reasonable prospect of success.

2. By letter dated 24th February 2020, solicitors for the first respondent submitted an application for its costs to be paid by the claimant, pursuant to Rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, on the grounds that the claims had no reasonable prospect of success and on the basis that the claimant had acted disruptively and/or otherwise unreasonably in the conduct of his claim. That application was accompanied by a costs schedule in the total sum of £26,370, exclusive of VAT. The application was copied to the claimant.

3. By letter date 16th March 2020, the claimant set out his grounds for opposing the application for costs. Attached to that letter are details of the claimant's current financial position.

4. The first respondent and the claimant have both confirmed in writing that they are content for the Tribunal to consider the costs application "on paper" and without the need for a hearing.

5. Unlike other civil litigation, costs do not follow the event in Employment Tribunal proceedings, at least not as a general principle. Traditionally, the Employment Tribunal was always a relatively costs-free zone. An award of costs remains the exception rather than the rule. However, there are specific provisions in the Employment Tribunal's (Constitution and Rules of Procedure) Regulations 2013 which do contain specific provisions for the award of costs in certain circumstances. Those circumstances include those where a claim had no reasonable prospect of success or where the paying party has acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing of the proceedings or in the way that the proceedings or part of them have been conducted. The first respondent's application to the Tribunal was based upon two grounds:-

   (i) that the claims had no reasonable prospect of success;

   (ii) in continuing to pursue those claims, the claimant acted unreasonably.

6. It is clear from the detailed reasons which accompanied the judgment promulgated on 17th January 2020, that the claims had no reasonable prospect of success. The Tribunal found that the words allegedly used by claimant on two different occasions could not and did not amount to a disclosure of "information" as required by Section 43B of the Employment Rights Act 1996. The words allegedly used by the claimant were "They are being dishonest" and "You can't have a contract to give fake reports to the police".

7. At a preliminary hearing on 30 September 2019, Employment Judge Sweeney made detailed case management orders and went into some detail to explain to the claimant what was meant by "information." The claimant was ordered to provide further information about his allegations that he had made protected disclosures. He was ordered to set out exactly what he had said and how that was a qualifying disclosure in S43B of the Employment Rights Act 1996. The claimant has never sought to argue that he did not know or understand what was required of him when those orders were made. The claimant provided his further information on 28th October 2019. The claimant accepted the words he had used on each occasion were accurately set out by Employment Judge Sweeney. As is set out in its reasons striking out the claims, the Tribunal was satisfied that the claimant had not disclosed any "information" to the first respondent which could possibly satisfy the statutory requirements of Section 43B.

8. Upon receipt of the claimant's further information, the respondent submitted an application on 18th December 2019, inviting the Tribunal to strike out the claims on the grounds that they had no reasonable prospect of success, or alternatively that the claimant should be ordered to pay a deposit as a condition of being allowed to continue, on the grounds that the claims had little reasonable prospect of success. That application was served upon the claimant on 18th December

2019. The claimant's response was to lodge his own application to strike out the response, due to the first respondent's alleged non-disclosure of documents.

9. There is no mention in the first respondent's application for costs, of any "costs warning letter" sent by it to the claimant. The Tribunal presumes that no such costs warning letter was sent. That of course does not necessarily militate against the making of a costs order. I am satisfied that the claimant was put on notice as to the first respondent's view of the merits of his claims by both the grounds of response and the strike-out application dated 18th December.

10. I am satisfied from the claimant's own strike out application relating to the first respondent's alleged failure to disclose documents, that he was acquainted with the 2013 Rules, including those relating to costs. I am satisfied that by the time he received the strike out letter dated 18th December, the claimant was fully aware that his claim may be struck out on the grounds that they had no reasonable prospect of success, and that he may then be liable for an order for costs. That position is reinforced by subsequent correspondence between the claimant, the Tribunal and the first respondent's representative, in particular the claimant's letter of 20th December 2019 by way of reply to the first respondent's application.

11. The Tribunal found at the hearing on 9th January 2020, that the words allegedly used by the claimant could not and did not amount to the disclosure of information as required in the statutory provisions. On that basis, the claims were struck out. The first respondent had prepared a bundle of documents, witness statements, and had instructed Mr Sugarman of Counsel to conduct that hearing on its behalf. Mr Sugarman had attended the hearing before Employment Judge Sweeney on 20th September 2019 and the claimant ought to have been aware that the first respondent was likely to instruct Counsel to conduct the strike-out hearing on its behalf.

12. The claimant ought to have been aware that the respondent would be put to considerable time and expense in preparing for the strike-out application.

13. The rules relating to costs are contained in Rule 74 – 78 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

Rule 74

(1) "Costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing). In Scotland all references to costs (except when used in the expression "wasted costs") shall be read as references to expenses.

(2) "Legally represented" means having the assistance of a person (including where that person is the receiving party's employee) who—

(a) has a right of audience in relation to any class of proceedings in any part of the Senior Courts of England and Wales, or all proceedings in county courts or magistrates' courts;

(b) is an advocate or solicitor in Scotland; or

(c) is a member of the Bar of Northern Ireland or a solicitor of the Court of Judicature of Northern Ireland.

(3) "Represented by a lay representative" means having the assistance of a person who does not satisfy any of the criteria in paragraph (2) and who charges for representation in the proceedings.

Rule 75

(1) A costs order is an order that a party ("the paying party") make a payment to—

(a) another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative;

(b) the receiving party in respect of a Tribunal fee paid by the receiving party; or

(c) another party or a witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual's attendance as a witness at the Tribunal.

(2) A preparation time order is an order that a party ("the paying party") make a payment to another party ("the receiving party") in respect of the receiving party's preparation time while not legally represented. "Preparation time" means time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at any final hearing.

(3) A costs order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings. A Tribunal may, if it wishes, decide in the course of the proceedings that a party is entitled to one order or the other but defer until a later stage in the proceedings deciding which kind of order to make.

Rule 76

(1) 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 had no reasonable prospect of success.

(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

(3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if—

(a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and

(b) the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment.

(4) A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer's contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party.

(5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing.

Rule 77

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.

Rule 78

(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 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; or, in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993(23), or by an Employment Judge applying the same principles;

(c) order the paying party to pay the receiving party a specified amount as reimbursement of all or part of a Tribunal fee paid by the receiving party;

(d) order the paying party to pay another party or a witness, as appropriate, a specified amount in respect of necessary and reasonably incurred expenses (of the kind described in rule 75(1)(c)); or

(e) if the paying party and the receiving party agree as to the amount payable, be made in that amount.

(2) Where the costs order includes an amount in respect of fees charged by a lay representative, for the purposes of the calculation of the order, the hourly rate applicable for the fees of the lay representative shall be no higher than the rate under rule 79(2).

(3) For the avoidance of doubt, the amount of a costs order under sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000.

14. It is now well established that the first question for the Tribunal is whether the costs threshold is crossed in the sense that at least one of Rule 76(1) a) or b) is made out. Even if it is, it does not automatically follow that a costs order will be made. The Tribunal **may** make a costs order and **shall consider** whether to do so. That is the second stage and that involves the exercise by the Tribunal of a judicial discretion. If it decides in principle to make a costs order, the Tribunal must then consider the amount in accordance with Rule 78. Rule 84 provides that, in deciding both whether to make a costs order and if so and what amount, the tribunal **may** have regard to ability to pay.

15. With regard to the first stage, it is clear in this case that Rule 76 (1) (b) is fulfilled. The claims had no reasonable prospect of success. Furthermore, Rule 76 (1) (a) is also fulfilled, the Tribunal being satisfied that it was unreasonable for the claimant to continue with the proceedings once he received the respondent's application to strike out, dated 18th December 2019. There is of course an element of overlap between (a) and (b). An allegation that a claim had no reasonable prospect of success relates of course to the position at the time when the proceedings were first presented to the Tribunal, in this case on 20th July 2019. However, it may well be that the claimant did not know that his claims had little or no reasonable prospect of success at that time. There are of course claimants who submit a claim to the Tribunal in the knowledge that the respondent will thus be exposed to potentially substantial legal costs in defending the claim and that this may well encourage the respondent to make some kind of offer of settlement. I am satisfied that this was not the case with this claimant. I am

satisfied that, at the time he presented his complaint, the claimant genuinely believed that there was merit in his allegations and that his appropriate source of remedy was the Employment Tribunal. However, bearing in mind the comments made by Employment Judge Sweeney at the first preliminary hearing and the contents of the strike-out application dated 18th December 2019, I am satisfied that the claimant ought to have realised by the time he received the strike-out application, that he would not be able to persuade the Employment Tribunal that he had ever disclosed any "information" of the type which would satisfy Section 43 (B).

16. What the claimant thought or knew or could reasonably be expected to have appreciated about the prospects of success, are highly relevant at the second stage of the exercise of the Tribunal's discretion on whether or not to award costs. I am satisfied in this case that what the claimant ought to have known by that date is highly relevant.

17. It was held by the Employment Appeal Tribunal in **Dyer v Secretary of State for Employment [UKEAT/183/83]** that "unreasonableness" has its ordinary meaning and should not be taken by tribunals to be the equivalent of "vexatious". The Court of Appeal provided guidance in **Barnsley Metropolitan Council v Yerrakalva [2012 IRLR78**] about costs when it said:-

> "The vital point in exercising the discretion to award costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct……in conducting the case and in doing so, to identify the conduct, what was unreasonable about it and what effects it had."

18. As is set out above, there is no doubt that the claimant's claims had no reasonable prospect of success. The claimant ought to have been aware that those claims had no reasonable prospect of success by not later than the date when he received the respondent's strike-out application dated 18th December 2019. It is clear from the claimant's letter of 20th December, that he had carefully considered what was set out in the respondent's strike out application, was fully aware of its purpose and potential consequences. The claimant then had to decide whether or not to pursue his claims. The claimant decided that he would do so. The Tribunal found that it was unreasonable for him to do so in all the circumstances of the case. The claims had no reasonable prospect of success. The claimant ought to have known and appreciated that.

19. The Tribunal draws on the evidence it considered at the strike-out application on 9th January 2020 in coming to the above conclusion. The Tribunal finds that this is a case where the claims had no reasonable prospect of success and that after the claimant received the respondent's strike-out application, it was unreasonable for him to pursue those claims.

20. The next stage for the Tribunal to consider is whether it should exercise its discretion and order the claimant to pay or contribute towards the respondent's costs. On the basis that the claimant should have been well aware from 18th December 2019 that his claims had no reasonable prospect of success, the

Tribunal is satisfied that this is a case where it should exercise its discretion to order the claimant to contribute towards the respondent's costs. However, the contribution towards those costs should be limited in this case to the relevant proportion of costs incurred after the claimant received the strike-out application dated 18th December 2019.

21. The total costs claimed by the respondent amount to £26,370 excluding VAT. That includes solicitors` charges of £23,350 and counsel fees of £4,020. Upon first sight and upon close examination, the costs claimed by the first respondent are clearly disproportionate to the original claims. Disproportionate costs, whether necessarily or reasonably incurred, should not be recoverable from the paying party. Their necessity does not render costs proportionate. The aim of a representative to obtain substantive justice for his client, must be tempered by the need for economy and efficiency and above all proportionality. Costs are proportionate if they bear a reasonable relationship to:-

    (a) the sums in issue in the proceedings;

    (b) the value of any non-monetary relief in issue in the proceedings;

    (c) the complexity of the litigation;

    (d) any additional work generated by the conduct of the paying party;

    (e) any wider factors involved in the proceedings, such as reputation or public importance.

22. There is always something of a dichotomy when a respondent submits to the Tribunal that the claimant's case is so bereft of merit that it should be struck out because it has no reasonable prospect of success, and then say on the other hand that it has expended £26,000 in defending that hopeless case! I am satisfied in the present case that the sums claimed by the respondent are entirely disproportionate. Examining the schedule of costs, I am satisfied that costs which are payable by the claimant should be limited to those incurred after he received the strike out application dated 18th December 2019. It was at that stage he ought to have realised that his claims had no prospect of success and that they should have been withdrawn. Had he done so, it is unlikely that any order for costs would have been made. I am satisfied that the claimant should pay a contribution towards the first respondent's costs of that hearing. Costs must be proportionate. Whilst the hearing had originally been listed for two days, it was completed in one day. I am satisfied that the claimant should pay £3,000 in respect of counsel's fees and £1,000 towards the first respondent's solicitor's costs in respect of that hearing.

23. In arriving at that figure, I take into account the contents of the claimant's letter dated 16th March 2020, in which he opposes the application for costs and also sets out details of his personal financial situation. In that letter the claimant specifically invites the Tribunal to take into account his ability to pay any order for costs. The claimant says that his regular monthly earnings are currently £250.00 per month and yet his rental payments are £775.00 per month. In addition, he

pays “other bills by credit card whenever possible”. He says that he is currently a mature student, pursuing an MSC in statistics at the University of Leicester. Once he completes that qualification, he states that his projected earnings as a trainee statistician will be less than one-third of his previous earnings as an occupational health doctor.

24. Taking all those matters into account, I am satisfied that the claimant should contribute the sum of £4,000 towards the costs of the first respondent.

EMPLOYMENT JUDGE JOHNSON

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 21 July 2020