# EMPLOYMENT TRIBUNALS

**Claimant:** **N Champion**

**Respondent:** **WFL (UK) Limited**

# JUDGMENT ON APPLICATION FOR COSTS

**The judgment of the Tribunal is that:-**

1. **The Respondent's claim for costs is dismissed.**

# REASONS

## Background

1. A two day full merits hearing was held at the East London Employment Tribunal on 14 and 15 November 2019. The Claimant's complaint of unfair constructive dismissal failed and was dismissed. Reasons for the judgment were reserved and given in writing with written reasons sent to the parties on 6 December 2019.

2. By letter dated 9 January 2020, the Respondent made a written application for costs against the Claimant in accordance with rule 75 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 Schedule 1 ("the Rules").

3. In the Respondent's letter of 9 January 2020, the Respondent submitted that the Claimant's claim for unfair constructive dismissal had no reasonable prospects of success pursuant to rule 76 (1) (b) of the Rules in their entirety. The Respondent submitted that the Claimant had behaved in an unreasonable manner in bringing proceedings against the Respondent pursuant to rule 76 (1) (a) of the rules. As a consequence, the Respondent requested that the Employment Tribunal order the Claimant to pay the entirety of the Respondent's costs of £17, 040 plus VAT which the Respondent broke down in a cost schedule attached to the letter.

4. The Respondents relied on a number of grounds in support of this application. It was argued that the Respondent had been put to considerable unnecessary cost in the proceedings. It was submitted by the Respondent that the Claimant had been advised from the outset of his claim as early as 29 April 2019 by a direct access barrister who had

represented him at the hearing. Further, the Claimant was represented throughout the proceedings by his wife who was a human resources practitioner.

5. All aspects of the claims were found in favour of Respondent namely that there was no breach of the implied duty of trust and confidence in the contract of employment and the Respondent had legitimate concerns relating to the Claimant's conduct in particular his failure to comply with fuel delivery standards. The investigation meeting was conducted properly and the Respondent had legitimate concerns which needed to be addressed at the disciplinary meeting which was properly constituted. It was submitted that the Respondent gave the Claimant a reasonable opportunity to put his case and it was found by the Tribunal that he had "jumped ship' too soon. The Tribunal found that one of the main requirements for an employer was to follow a disciplinary procedure to give an employee an opportunity to put his case so that it could be properly investigated and this was what had happened in this case and that the Claimant was provided with the fuel delivery standards on 30 April 2018. The tribunal also found a six week delay between the investigation meeting and the disciplinary meeting did not constitute a breach of the implied term of trust and confidence bearing in mind the intervention of the festive season.

6. The Respondent argued in the costs application that as the Tribunal had ruled that the Claimant did receive a copy of the fuel delivery standards it was unreasonable for the Claimant to suggest otherwise and this misled the Respondent and the Tribunal. It was argued that the Claimant had effectively lied in his evidence and this was unreasonable behaviour in that the Claimant provided false information leading to unnecessary legal costs to defend the proceedings. The Respondent argued that the Tribunal did not uphold any of the Claimant's allegations and found that the Respondent acted reasonably throughout the investigation and disciplinary process. On this basis, the Respondent asked the Tribunal to order the Claimant to pay all of its costs set out in the cost schedule.

7. The written application was made on 9 January 2020 but due to administrative error and the intervening delay of the pandemic it did not find its way to the Tribunal until 20 September 2020. The Respondent indicated in the letter making the costs application that the Claimant was copied into the application. The Claimant's response was not provided to the Tribunal prior to its determination of it.

## Law

8. Rule 76 (one) – a tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that

> "A party (or that parties 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
>
> Any claim or response had no reasonable prospect of success."

9. The Tribunal rules imposed a two stage test. First the Tribunal must ask whether parties conduct falls within Rule 76 (1) (a) or (b). If so, the Tribunal must then go on to ask whether it is appropriate to exercise their discretion in favour of awarding costs against a party.

10. G v Shell UK Limited (2003) IRLR 82. The Court of Appeal confirmed that it is a fundamental principle that costs are the exception rather than the rule and that costs do not follow the event in employment tribunals.

11. MacPherson v BNP Paribas (2004) ICR 1398. In determining whether to make an order under the grounds of unreasonable conduct, the tribunal should take into account the "nature, gravity and effect of a party's unreasonable conduct.

12. Barnsley Metropolitan Borough Council v Yerrakalva (2012) ICR 420. The vital point in exercising discretion to order cost is to look at the whole picture. The tribunal has to ask whether there has been unreasonable conduct by the paying party in bringing, defending or conducting the case and in doing so, identify the conduct, what was unreasonable about it and what effect it had.

**Tribunals Conclusions**

13. The written application was made on 9 January 2020 but due to administrative error and the intervening delay of the pandemic it did not find its way to the Tribunal until 20 September 2020. The Respondent indicated in the letter making the costs application that the Claimant was copied into the application. The Claimant's response was not provided to the Tribunal prior to its determination of it. In the interests of justice and to comply with the overriding objective of the Tribunal given the delay that had already occurred, the Tribunal determined that there was no need to consider the Claimant's response in determining the respondent's application for costs.

14. It appeared to the Tribunal that the grounds in support of the application were in effect repeating the reasons for why the Tribunal determined that the Claimant's claim for constructive dismissal was unfounded and was dismissed. However, it seemed to the Tribunal that the Claimant had a legitimate argument to assert that there was a fundamental breach of his contract of employment. His argument was that when looked at objectively the Respondent's conduct was likely to destroy or seriously damage the degree of trust and confidence he was reasonably entitled to have in his employer. This was set out in the Claimant's letter of resignation sent under cover of an email dated 31 January 2019 and was clarified by the Claimant's counsel at the Tribunal hearing. The Claimant raised 12 matters which were set out in the liability judgement at paragraph 2 in support of his argument that there was a fundamental breach of contract entitling him to resign from his employment due to his constructive dismissal. These matters had to be determined by the Tribunal after hearing all of the evidence to reach a determination in the claim.

15. The Tribunal had to hear evidence from the Claimant and his two witnesses along with the three witnesses called by the Respondent to make a determination upon the facts and legal issues as agreed between the parties and set out by the Tribunal in its liability judgment.

16. The fact that the Tribunal found that the Claimant did not make out his claim for constructive dismissal after hearing all of the relevant evidence did not amount to unreasonable conduct on the part of the Claimant. The Tribunal noted that the Court of Appeal in G v Shell UK Limited cited above confirmed that it is a fundamental principle that costs are the exception rather than the rule and that costs to not follow the event in employment tribunals. The fact that the Employment Tribunal found in favour of the Respondent in this case after hearing all of the relevant evidence did not mean that the

Respondent was automatically entitled to its costs. Furthermore, the Tribunal did not find that the Claimant acted unreasonably in pursuing this case and his right to have it determined at a Tribunal hearing. As a consequence, this application for costs is dismissed.

**Employment Judge Hallen**
**Date: 23 September 2020**