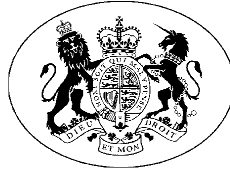

EMPLOYMENT TRIBUNALS

Claimant:	**Mr D Davis**
Respondent:	**Clarion Housing Group Limited**
Heard at:	**Ashford**
On:	**23 October 2020**
Before:	**Employment Judge Pritchard** **Mr G Anderson** **Mr D Newlyn**

Representation
Claimant: **In person**
Respondent: **Mr D Dyal, counsel**

RESERVED JUDGMENT

The Respondent's application for costs succeeds to the extent that the Claimant is ordered to pay costs to the Respondent in the sum of £3,600.

REASONS

Issues

1. The Respondent seeks costs in the sum of £20,000. The Tribunal was required to consider whether the Claimant acted unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) had been conducted and/or whether his claim had no reasonable prospects of success. If so, the Tribunal was required to consider whether it would be appropriate to exercise its discretion to make a costs order and, if so, in what amount.

Findings of fact

2. The Claimant claimed direct discrimination, unfair dismissal, whistleblowing, and holiday pay.

3. By email dated 29 December 2017, having considered the Claimant's claim, the Respondent's solicitors wrote to the Claimant marking their attached letter "without prejudice save as to costs". They informed the Claimant:

We have read and considered your claim and we write to confirm that we do not believe that your Employment Tribunal claim has reasonable prospects of success and that it is unreasonable for you to pursue it.

You have failed to particularise your Employment Tribunal claim properly as noted in the ET3 response, and we will require further particulars from you. On the basis of the information you have and the Respondent's knowledge of your employment and its termination, we believe that your Tribunal claim will not succeed. There was clear evidence of your unacceptable behaviour such that it was reasonable for the Respondent to find you had committed acts of misconduct which justified your dismissal. In contrast, there is no evidence that supports any claim of discrimination or whistleblowing.

It is also clear that your Employment Tribunal claim and your sixth County Court claim against Clarion overlap. It is not reasonable for you to bring the same claims in both forums, seeking to recover your losses twice, and putting the Respondent to duplicate legal costs.

Clarion will be robustly defending your Employment Tribunal claim and intends to apply for costs against you in the event that you proceed with your claim. We are inviting you to withdraw your Employment Tribunal claim by 4 pm on 5 January 2018. If you do, Clarion will agree not to apply for costs against you in relation to your Employment Tribunal claim.

…

If you have not already done so, we strongly recommend that you seek independent legal advice on the merits of your case, your schedule of loss and the Employment Tribunal's power to award costs. Clarion is a charity and takes a robust approach to claiming costs. … You may wish to approach a solicitor, or you may be able to obtain advice from a local law centre or the Citizen's Advice Bureau.

4. The Claimant was informed that to date the Respondent's costs had exceeded £3,000 plus VAT and disbursements and that costs to conclusion of the case were likely to exceed £25,000 plus VAT and disbursements.

5. By email dated 30 December 2017, the Claimant wrote to the Respondent's solicitor as follows:

Dear Miss Ihnatowicz

It is quite clear that you have no knowledge of the law, because if you did then you would not be writing me such stupid and facetious letters and I suggest that it is you that needs legal advice and I suggest that you obtain proper legal advice from another law firm.

Do not write me anymore stupid and facetious letter again, otherwise I will not be responsible for my actions.

All my claims against clarion housing group will be pursued vigorously until I win all my claims, and it does not matter how many years they will

take, even to the European courts of Human Rights, and to their appeal court.

I hope all the above are quite clear.

6. By email dated 3 January 2018, the Respondent's solicitor sent an email to the Claimant as follows:

   Your email … could be perceived as threatening and we ask that you please engage professionally with us, as we will with you.

   You now have a copy of the Respondent's ET3 response to consider. As set out in our letter, we strongly recommend you take independent legal advice on the contents of our letter and, in particular, the Tribunal's ability to award costs if you proceed with your claim.

   Clarion is prepared to extend the deadline set out in our letter of 29 December to 4 pm on Monday 8 January 2018.

7. By email of the same date the Claimant replied:

   I suggest you read my email again, because clearly you are not taking me seriously enough

8. The Claimant's claims were identified at a preliminary hearing held on 30 January 2018 and set out, together with the issues, in a case management order which was sent to the parties. The Respondent presented an amended response. By letter dated 20 March 2018, the Respondent's solicitors again wrote to the Claimant with a letter marked "without prejudice save as to costs". The letter included the following:

   As stated previously, there was clear evidence of your unacceptable behaviour such that it was reasonable for the Respondent to find you had committed acts of misconduct which justified your dismissal. It is not credible that your dismissal was an act of race discrimination or related in any way to the Accident Report Form that you completed in October 2017, which the Respondent disputes constituted a protected disclosure. There is no evidence that you were subject to any other less favourable treatment because of your race; the acts of less favourable treatment that you cite either did not take place or were based on objective reasons unrelated to your race.

   The Respondent also disputes that you are owed any holiday pay. Following the termination of your employment you were paid for the two days' holiday that you had accrued but not taken.

9. Again the Claimant was informed that if he withdrew his claims then the Respondent would not apply for costs against him. The Claimant was told that costs had now exceeded £20,000 plus VAT and disbursements and again the Respondent recommended that the Claimant seek independent legal advice from a solicitor, a local law centre or the Citizen's Advice Bureau.

10. The Claimant did not withdraw his claim. Following disclosure and exchange of witness statements, the Respondent's solicitors wrote to the Claimant again on

12 December 2018 marking their letter "without prejudice save as to costs". The letter included the following:

> *We do not seek to repeat the points made in our previous letters about the claims you are pursuing under Tribunal claim number 2303096/2017, but highlight that we remain of the view that your Tribunal claim has no reasonable prospects of success and it is unreasonable for you to pursue it. We have read your witness statement and it does not alter this view. In contrast, Clarion's position is supported by its witness statements and corresponding documents.*

11. Again the Claimant was invited to withdraw his claims and he was informed that if he did so, the Respondent would not apply for costs against him. The Claimant was informed that the Respondent's costs had now exceeded £34,000 plus VAT and that the Respondent likely to incur over £5,000 plus VAT and disbursements to conclusion. As before, the Respondent's solicitors recommended that the Claimant sought independent legal advice on the merits of his case, his schedule of loss and the Employment Tribunal's power to award costs.

12. The Claimant replied as follows:

> *I have told you before do not send me anymore letter of this stupid nature again or I will not be responsible for my actions and your letter without prejudice save as to costs is rejected I have today send you a copy of my jobseeker allowance letter.*
>
> *I hope I make myself quite clear and I do not have to resort to extreme actions so do not send me anymore stupid letter of this kind again.*

13. The Claimant's claims were considered at a final hearing before a full tribunal over four consecutive days in January 2019. Pursuant to its Reserved Judgment with Reasons, sent to the parties on 5 March 2019, the Claimant's claims were dismissed. The Tribunal will not repeat its findings here but will refer to aspects of its judgment below.

14. The Respondent's costs to conclusion (excluding any costs associated with the Respondent's application for costs) amounted to £40,361, plus counsel's fees of £3,500 and disbursements of £300, these sums subject to VAT.

Applicable law

15. Rule 76(1) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 provides that a Tribunal may make a costs 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 the proceedings (or part) have been conducted; or

    (b) any claim or response had no reasonable prospects of success.

16. Thus the Rules provide that a Tribunal must apply a two stage test: firstly, to determine whether the circumstances set out in paragraphs (a) or (b) of Rule 76(1) apply; if so, secondly the Tribunal must exercise its discretion as to whether a costs order should be made and, if so, for how much. See for example Ayoola v St Christopher's Fellowship UKEAT/0508/13.

17. The Court of Appeal stated in Gee v Shell UK Ltd 2003 IRLR 82 that costs in Employment Tribunals are still the exception rather than the rule. This was repeated in Lodwick v Southwark London Borough Council 2004 IRLR 554, Pill LJ noting that "the aim is compensation of the party which has incurred expense in winning the case, not punishment of the losing party". The Tribunal understands that his lordship was not suggesting that costs follow the event but, rather, emphasising that costs are compensatory in nature, not punitive.

18. In Hamilton-Jones v Black EATS/0047/04 it was said that the notion of misconception requires the Tribunal being asked to make a costs order to assess objectively whether the claim had any prospect of success at any time of its existence. Under the Rules applicable at the time, costs could be awarded where the bringing of the proceedings by a party had been misconceived, the term "misconceived" being defined as including "having no reasonable chance of success". In Scott v Commissioners of Inland Revenue [2004] IRLR 713, the Court of Appeal held that the question is not whether the party thought they were in the right, but whether they had reasonable grounds for thinking they were.

19. In Solomon v University of Hertfordshire UKEAT/0258/0066/19 it was held that when determining whether a claimant's conduct was unreasonable, a Tribunal should not substitute its own view but should, rather, ask whether the conduct was within or outside the range of reasonable responses in the circumstances.

20. In Boras Topic v Hollyland Pitta Bakery UKEAT/0523/11, the Employment Appeal Tribunal upheld the decision of the Employment Tribunal to award costs against a claimant said to have a damaged perception of reality.

21. In McPherson v BNP Paribas (London Branch) [2004] IRLR 558 the Court of Appeal held that in exercising its discretion to award costs, a Tribunal must have regard to the nature, gravity and effect of the unreasonable conduct. It was also held in that case that unreasonable conduct is both a precondition of the existence of the power to make a costs order and is also a relevant factor to be taken into account in deciding whether to make a costs order and the form of the order.

22. In Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78, a case decided in the Court of Appeal, Lord Justice Mummery said that the vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and ask whether there was unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, identify the conduct, what was unreasonable about it and what effects it had. That case also decided that although there was no requirement for the Tribunal to determine whether there is a precise causal link between the unreasonable conduct in question and the specific costs being claimed, that did not mean that causation is irrelevant.

23. It is well recognised that obtaining evidence of discrimination is often difficult and that a claimant will often rely on being able to show, through cross examination of witnesses, that the employer's stated reasons for the treatment complained of were not in fact the true reasons; see London Borough of Lewisham v Oko-Jaja EAT 417/00; also Saka v Fitzroy Robinson Ltd EAT 0241/00.

24. The Tribunal may properly have regard to the fact that the party against whom a costs order is made is a litigant in person. In AQ Ltd v Holden UKEAT/0021/12/CEA His Honour Judge Richardson stated that a Tribunal cannot and should not judge a litigant in person by the standards of a professional representative. 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. Tribunals must bear this in mind when assessing the threshold tests. Even if the threshold tests for an order for costs are met, the Tribunal must exercise its discretion having regard to all the circumstances and it is not irrelevant that a lay person may have brought proceedings with little or no access to specialist help or advice. This does not mean that lay people are immune from costs orders; some litigants in person will be found to have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity.

25. Rule 78 sets out the amount of a costs order that may be made by a Tribunal. Paragraph (2) provides that a Tribunal may have regard to the paying party's ability to pay when considering whether it shall make a costs order or how much that order should be.

26. In Jilley v Birmingham and Solihull Mental Health NHS Trust UKEAT/0584/06/DA, His Honour Judge Richardson said that if a Tribunal decided not to take account of the paying party's ability to pay, it should say why. If it decides to take into account ability to pay, it should set out its findings about ability to pay, say what impact this has had on its decision to award costs or on the amount of costs, and explain why. His Honour Judge Richardson also said that there may be cases where for good reasons ability to pay should not be taken into account: for example, if the paying party has not attended or has given unsatisfactory evidence about means. See also Doyle v North West London Hospitals NHS Trust UKEAT/02271/11/RN in which the Employment Appeal Tribunal suggested that there must be some circumstances (for example where a claimant is completely un-represented) where, in the face of an application for costs, the Tribunal ought to raise the issue of means itself before making an order. In that case it was also stated that a Tribunal should always be cautious of making an order for costs in a large amount against a claimant where such an order will often will be well beyond the means of the paying party and have very serious potential consequences for him or her and it may also act as a disincentive to other claimants bringing legitimate claims. Notwithstanding those rulings, it was held in Arrowsmith v Nottingham Trent University 2011 EWCA Civ 797 that a costs order does not need to be confined to the sums a party could pay as it may well be that their circumstances improve in the future. Also see Herry v Dudley Metropolitan Council [2017] ICR 210.

27. Assessing a person's ability to pay involves consideration of their whole means. Capital is a highly relevant aspect of anyone's means; see Shields Automotive Ltd v Grieg UKEAT/0024/10/B1.

28. In Rodgers v Dorothy Barley School UKEAT0013/12/LA an application for costs of the appeal was refused in circumstances in which the respondent had not given the claimant warning that it would apply for costs and had supplied no schedule of costs in advance of the hearing. However, in Vaughan v London Borough of Lewisham and others UKEAT0533/12/SM the Employment Appeal Tribunal held that whilst a warning might be well relevant, it did not believe that as a matter of law an award of costs can only be made where the party in question had been put on notice.

29. In Kopel v Safeway Stores plc [2003] IRLR 753 it was held that an offer to settle marked "without prejudice save as to costs" is a factor a Tribunal can take into account in deciding to make a costs order.

Conclusion

Did the claims have no reasonable prospects of success?

30. The thrust of the Claimant's unfair dismissal claim was: the written warning which was live at the time of dismissal had been unfairly and improperly imposed; the Respondent failed to follow the ACAS procedure; and that Ms Parker of Human Resources had engaged in a witch-hunt against him. The Tribunal addressed these aspects of the Claimant's claim at paragraphs 113, 114 and115 of its Judgment and concluded that the Claimant's unfair dismissal claim was not well-founded. There was no credible evidence to suggest the written warning was unfairly or improperly imposed. The Tribunal was unable to find any failure on the Respondent's part to follow the ACAS Code of Practice. There was no evidence of a witch-hunt.

31. The Claimant challenged the fairness of his dismissal in these ways without adducing any credible evidence to support his challenges. Had the Claimant read the ACAS Code it would have been obvious to him that it had not been breached in the way he alleged.

32. The Tribunal concludes, objectively considered, that the Claimant's unfair dismissal claim had no reasonable prospect of success at any time of its existence. The Tribunal also concludes that whether or not the Claimant thought he was right, or even whether he might have had a damaged perception of reality, he had no reasonable grounds for thinking that his unfair dismissal had reasonable prospects of success. He was fully aware of the circumstances leading to his dismissal and the allegations that had been made against him.

33. The Tribunal reaches the same conclusion with regard to the Claimant's race discrimination claim. Even though aspects of the discrimination claim were presented outside the statutory time limit, the Tribunal nevertheless reached a conclusion on its merits. The Claimant was unable to adduce any credible evidence to suggest race discrimination could be inferred (the Tribunal's conclusion is set out at paragraphs 119 to 128 of its Judgment). The Claimant could have had no reasonable grounds for thinking he had been discriminated against as he alleged.

34. As to the Claimant's whistleblowing claim, the legislation requires a reasonable belief on the part of the worker that the disclosure is made in the public interest. The Tribunal addressed this at paragraph 116 of its Judgment and found that

the Claimant did not have a reasonable belief that he had made a disclosure in the public interest; the Tribunal found that it was the Claimant's reasonable belief that he was making the disclosure in his own (private) interests and that this was demonstrably the case,

35. The Tribunal concluded at paragraph 130 of its Judgment that the Claimant's holiday pay claim was misconceived. As such, it had no reasonable prospect of success.

36. The Tribunal concludes that the Claimant's claims had no reasonable prospects of success at any time.

<u>Did the Claimant act unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) had been conducted?</u>

37. The Claimant brought claims without any credible evidential basis. He was offered three opportunities to withdraw his claims on a costs-free basis but he declined to do so. Instead he replied sarcastically and in a way which could be perceived as threatening.

38. The Claimant told the Tribunal that he had been advised by the CAB that he "had a case" and by ACAS that he "had a good chance of winning". The Tribunal finds it highly unlikely in this case that the CAB, properly instructed, would have advised the Claimant that he "had a case" or that ACAS would have advised the Claimant on the merits of his case or read the disclosure documents or the witness statements. The Claimant also told the Tribunal that he had spoken to a solicitor friend who lives in his area and who had warned him that the Respondents would seek to dissuade him from pursuing his claim and adopt tactics in order to do so; the Tribunal is not persuaded that what he might have been advised by the solicitor in relation to an ex-employer's tactics has any significant relevance to the costs application.

39. The Tribunal has had careful regard to what was said in the cases of <u>Oko-Jaja</u> and <u>AQ</u> referred to above. The Tribunal concludes that in this case the Claimant, who was unrepresented, nevertheless acted unreasonably in pursuing claims which clearly had no reasonable prospect of success and in respect of which he must have known that he would be unable to adduce any credible evidence. In particular, the Tribunal finds that after disclosure and exchange of witness statements, he must reasonably have known that his claims were doomed to failure. The Claimant's conduct in pursing his claims, in particular after refusing the offer to withdraw without costs ramifications following disclosure and exchange of witness statements, fell outside the band of reasonableness.

40. The effect of continuing to pursue his claims put the Respondent to significant costs. Six individuals were necessarily called to give evidence on the Respondent's behalf which undoubtedly caused inconvenience to the Respondent and most likely caused anxiety on the part of those witnesses, particularly those alleged to have unlawfully discriminated against the Claimant.

<u>Is it appropriate for the Tribunal to exercise its discretion to make a costs order and, if so, in what amount?</u>

41. By reason of the Claimant's unreasonableness in pursing his claims against the background of his claims having no reasonable prospect of success, the Tribunal concludes that, notwithstanding costs being the exception rather than the rule, it is appropriate for a costs order to be made in this case. By reason of the Claimant continuing to pursue his claim despite the Respondent's offer in its letter of 12 December 2018, the Respondent incurred further costs of £6,986 plus VAT plus counsel's fees and disbursements. Those costs set out in the Respondent's schedule of costs appear to have reasonably incurred.

42. The Tribunal enquired of the Claimant as to his means. He told the Tribunal that after he fell into mortgage arrears, his house had been repossessed and the proceeds of sale used to discharge his debts, including a debt to the Respondent of approximately £57,000 in relation to county court proceedings.

43. He has not worked since his dismissal by the Respondent. He receives Universal Credit and housing benefit. After fines are deducted directly from his monthly payment, he is left with £291 per month for food, clothes and toiletries. Payment of his fines will continue for about five years. He has no savings and no assets. He has no prospect of any inheritance.

44. The Tribunal is mindful of the likelihood that that many individuals will find themselves out of work as a result of the Covid pandemic. However, the Tribunal is also mindful of the opportunities presently available, including jobs as drivers for supermarket and other businesses offering home deliveries. In the Tribunal's view there must be realistic prospect that the Claimant will be able to enter paid employment in the future. If the Claimant were to find work within, say, six months then he would have three years to his state retirement age. Using, as it must, a broad brush approach, when in employment the Claimant might reasonably be able to afford about £100 per month in order partly compensate the Respondent. In the Tribunal's view it would be appropriate and proportionate for a costs order to be made in the sum of £3,600 in the Respondent's favour.

Notes

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Employment Judge Pritchard

Date: 27 October 2020