# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr Ben Smart**

**Respondent:** **On Direct Business Services Limited t/a Cloud Direct**

**Heard at:** **Bristol** **On: 11-12 November 2020**

**Before:** **Employment Judge Walters**

**Representation**
**Claimant:** **Mr Smith, Counsel**
**Respondent:** **Mr Ohringer, Counsel**

# RESERVED JUDGMENT

1. The Claimant's application for costs pursuant to rule 76(1) (a) and (b) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 is upheld.

2. The Respondent is ordered to pay the Claimant's costs assessed in the sum of £16,093.

# REASONS

## Introduction

1. The Claimant commenced proceedings in the Bristol Employment Tribunal on 7 December 2018 alleging inter alia that he had been unfairly dismissed and that his right to be accompanied as established by section 10 Employment Relations Act 1999 had been infringed. Other claims were also made but those were not proceeded with having been dismissed by the tribunal at preliminary hearings.

2. The claim was heard at Bristol on 11-14 November 2019. Judgment was given for the Claimant in respect of both his claim of constructive unfair dismissal and breach of s.10 Employment Relations Act 1999. In respect of the latter there was a concession of liability at the hearing.

3. The Tribunal gave extensive written reasons for upholding the claim of constructive unfair dismissal to which it will be necessary to refer in these reasons in due course. In addition, by agreement of the parties the Tribunal also made findings of fact and determinations in order to determine the issue under the principle in **Polkey v AE Dayton Services Limited.** This exercise was undertaken to assist the parties in addressing the question of remedy. Accordingly, evidence was heard which would permit conclusions being reached in respect of potential Polkey deductions and submissions were made by both counsel to the Tribunal in respect thereof. In fact, the outcome of the Tribunal's determination was that any deduction from the compensatory award under the Polkey principle would be negligible.

4. As a result of the judgment on liability it was necessary for the Tribunal to determine the remedy component of the claim. The parties attended a CVP hearing on 11 -12 November 2020 at the conclusion of which the Tribunal gave judgment on remedy for a substantial amount of compensation.

5. After giving judgment on remedy the Claimant then pursued his application for costs against the Respondent which he had launched by way of written application on 4 December 2019. That application had been the subject of opposition by written response dated 19 June 2020.

6. In support of the application for costs the Claimant provided a schedule of costs. However, his Counsel indicated that the application would be limited to £20,000 in order that a summary assessment might be made. The Tribunal will return to the schedule in due course.

7. After reading the written submissions of both parties and hearing oral submissions from both counsel the Tribunal reserved judgment in order to consider those detailed submissions and to undertake the legal research necessary as a result of those submissions.

8. In support of the application for costs Counsel for the Claimant provided a substantial excerpt from Harvey on Employment and Industrial Relations Law paras 1064 to 1080 and he made reference in submissions to the cases of **Arrowsmith v Nottingham Trent University [2012] ICR 159** and **Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78**[1] and in particular the passage from the judgment of Mummery LJ at para 41.

## The submissions of the parties

### Submissions of the Claimant

9. The Claimant submits that the Respondent has acted unreasonably in the way it has conducted its defence. It should be emphasised that the costs application relates only to the conduct of the Respondent up to and including the liability hearing in November 2019. The Claimant relies on a number of factual findings made by the Tribunal in the written reasons. The paragraphs relied upon, so it is submitted, go to the "*heart of the veracity of key witnesses. For [the Respondent].*" Counsel referred to paragraphs 54-58 and paragraph 60. I set out below paragraphs 53-60 to give wider context.

> *"53. I find that by 9 August 2018 the Respondent had, in effect, decided upon a course of action which included completely removing for the time being the Claimant's role and dismissing Gregg Thompson one of his sales team. [161-162]*
>
> *54. I do not accept the evidence of Mr. Raynes that the email from him to the senior management team on 9 August 2018 was a straw man proposal because by 13 August 2018 Mr. Bowen was seeking to put into effect what it contained. It had clearly been given a lot of thought and discussion see first line on [161].*
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> *55. I also do not accept his evidence or the evidence of Mr. Bowen for that matter that at that time the Respondent was content to follow a PIP in respect of the Claimant and that they wanted him to succeed in the role. Had that been the case the organisational structure would not have been developed as it was proposed and nor would Mr. Raynes have written "Sales manager role – removed for now and a search takes place for a senior replacement over the coming months."*
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> *56. I find that by no later than July 2018 some employees were going to be made redundant. [144-156]. At that time it was not envisaged that the Claimant would be made redundant. There was no reference to a settlement agreement in the spreadsheet prepared by the Respondent for its own use. [144]*
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> *57. In respect of the Claimant I find that by early August 2018 a decision had been taken by the senior management team that the Claimant needed to be removed as sales manager because he was underperforming. I also find that they envisaged that he should revert to being a sales person because they felt that he was good at that job and that he could achieve good sales results which is why Mr. Raynes wrote "BenS -> quota sales person taking over Greggs pipeline" it having been decided to dismiss Gregg Thompson. Mr. Raynes' view about him was succinctly expressed as follows: "Gregg – removed- will never cut it" [162]*
>
> *58. I have seen no evidence of any further discussions or debate amongst the senior management team as to the content of the email from Mr. Raynes on 9 August 2018.In my judgment there was none.*

[1] As did Counsel for the Respondent

*59. On 13 August 2018 Mr. Bowen met with the Claimant in an unscheduled meeting. The Claimant was not aware of what was to be discussed before he attended the meeting. I find it was not a formal meeting. There was no HR support for Mr. Bowen. I am satisfied that at the meeting Mr. Bowen started the conversation by saying, "This is an official .. hold on is it?" Yes, this is an official meeting." He continued to explain that Brett Raynes and Jane Hall were meeting with investors who knew that the company was not meeting the growth targets which had been set.*

*60. Mr. Bowen then said that the Claimant would not like what he was about to say. He said that they wanted the Claimant to stay with the Respondent but to step down to the role of sales person. The Claimant asked Mr. Bowen what would happen if he didn't accept the demotion and Mr. Bowen said that the Respondent didn't think that the Claimant was cutting it as a sales manager and if he did not take the position "we will have to go down the performance route out." When asked what performance issues the company had Mr. Bowen stated "it could be targets, or recruitment, or employee development." He added that "we don't want someone learning on the job."*

10. The Tribunal was then referred to paragraphs 65-68 of the Reasons:

*"65. Mr. Bowen did not respond to the Claimant but he did email Mr. Raynes and the senior management team on the morning of 13 August 2018. [161] In the email he indicated he had told the Claimant they "did not feel he was cutting it as sales manager – learning on the job etc – but we did want him to stay as a sales person." I note that the former comment is the language he denied using when being cross-examined.*

*66. In making the findings of fact above I have rejected the evidence of Mr Bowen as to what he says he said to the Claimant. I found him to be somewhat evasive in his answers as to what had been said in the conversation and I found his suggestion that his preferred outcome would have been to place the Claimant on a PIP which would have led to him being successful as a sales manager to be disingenuous bearing in mind the proposals which had already been formulated.*

*67. If it had truly been his intention to see the Claimant succeed as sales manager then there would have been no need to mention demotion to sales person at that meeting. Furthermore, if it had been the joint aspiration of him and Mr. Raynes (as suggested by both of them) that the Claimant should succeed as a sales manager I find it surprising that on receipt of the email from Mr. Bowen the response from Mr. Raynes was "Well Done". [160] One might have thought a more appropriate response might have been to question why Mr. Bowen had gone 'off message' by suggesting a demotion.*

*68. I am also satisfied that neither Mr. Bowen nor Mr. Raynes actually thought a PIP would work. They had come to the conclusion that the Claimant could not do the job and they had decided he had to go as sales manager. I accept that they wanted him to revert to being a sales person."*

11. Further reliance is placed upon paragraph 72 of the Reasons:

*"72. The evidence of Mr. Raynes in respect of the content of the discussion with the Claimant on 15 August 2018 was less than impressive. He agreed with virtually the whole of the Claimant's account of the meeting as per the Claimant's witness statement at paragraphs 23-27. When it was pointed out to him that his own witness statement, therefore, was not true he agreed that it did appear to conflict with the evidence he had given orally to the Tribunal. I find that the content of the statement provided by Mr. Raynes at paragraph 9 was untrue."*

12. As to the findings of the Tribunal about the meeting of 13 August 2018 and the discussions on 15 August 2018 reliance is placed on paragraphs 93 and 94 of the Reasons:

> *"93. I am satisfied that the conduct of Mr. Bowen on 13 August 2018 was wholly unacceptable and his suggestion that if the Claimant did not accept the demotion then he would be performance managed out was a very serious breach of the implied term and that such behaviour would be likely to destroy or seriously damage the relationship of trust and confidence and I find that it did so. Mr. Bowen did not act with reasonable or proper cause: he should have dealt with the matter in accordance with good industrial relations practice and in accordance with the Respondent's own internal procedures. This was a clear repudiatory breach of contract. I consider there to have been a total failure by the HR department to provide meaningful advice to Mr. Bowen as to how to conduct a discussion about performance.*
>
> *94. As to Mr. Raynes behaviour on the 15 August 2018 I consider that his behaviour was also destructive of the relationship of trust and confidence by in effect conveying his pre-determined view as to whether the Claimant was fit to undertake the role of sales manager. There was no justification for him speaking to the Claimant as he did. He clearly had decided that the Claimant was not fit for the role he was playing without following any PIP. I find that he had no reasonable and proper cause to impart the information he did and the conduct amounted to a repudiatory breach of contract*."

13. Finally, Counsel refers to paragraph 105 of the Reasons:

> *"105. However, when one then proceeds to consider section 98(4) ERA 1996, I find that the way in which the Respondent conducted itself was well below the expected standards of fairness. I find that no reasonable employer would have behaved in such a way. It conducted no proper capability process and, in the circumstances, it acted unreasonably in the way it conducted itself. The Respondent did not carry out a proper investigation/appraisal of the Claimant's performance (it never got to apply its own PIP) and failed to identify the exact cause of the problem. Simply asserting that the Claimant could not cut-it assists no one to improve or understand how they are failing. It did not give any warnings in line with its own PIP nor a reasonable chance to improve. It sought to address capability by the 'bull in a china' shop method of issuing an ultimatum of demotion or out. And if that were not bad enough (and it clearly was) it then conducting a shambolic and unfair grievance process: one which no reasonable employer would have considered rigorous or fair.*"

14. Counsel for the Claimant submits that the findings of the Tribunal as to disingenuity/dishonesty as referred to by him are particularly damning as they go the heart of the case. Complaint is made that both Mr. Bowen and Mr. Raynes knowingly gave witness statements which were not true. He submitted that, *"The architecture of their defence to this matter was built on a foundation of deceit."* Counsel also submitted that "*this was calculated as an attempt to deceive the ET and dishonestly deprive C of justice*."

15. In his oral submissions Counsel for the Claimant asserted that the findings against the Respondent's witnesses were "*coruscating*" and that they lied on oath. Accordingly, it is submitted that the proven dishonesty amounts to unreasonable conduct because, so it is contended, the defence was hopeless.

16. Finally, Counsel submits that because the Respondent ran the defence it did his client's legal costs were significantly greater than they ought to have been. He refers to passages from the preliminary hearing narrative dated 9 September 2019.

**The Respondent's submissions**

17. Counsel for the Respondent had drafted the Respondent's submissions on costs dated 19 June 2020. He asserts that the Tribunal did not make findings that Mr. Raynes or Mr. Bowen had lied in their evidence or had otherwise been dishonest.

18. Furthermore, the defence of the Respondent did not rely entirely on the evidence of Mr. Raynes and Mr. Bowen. The Claimant was underperforming in his role and this was the Respondents motivation. The Respondent lost the case because of the way in which it addressed the issue of his lack of capability.

19. Counsel submits relying on the Barnsley case that the Tribunal has to look at the case as a whole when assessing whether conduct was unreasonable. Even where a defence is based on lies does not automatically equate to unreasonable conduct.

20. It is correctly submitted that even if the threshold is met costs remain a matter of discretion.

21. Counsel accepts that the evidence of Mr. Raynes and Mr. Bowen was rejected. However, he asserts they did not lie or give dishonest evidence. Where there is a dispute of fact there will always be adverse findings to one of the parties. And that does not mean the unsuccessful party acted unreasonably.

22. Furthermore, there were many aspects of the case which were in dispute. Even if the evidence of Mr. Raynes and Mr. Bowen was unreasonable then the conduct of the case as a whole was not unreasonable.

23. Counsel also submitted that the discretion should not be exercised if the conduct is held to have been unreasonable: it is submitted that important factual findings about the Respondent's motivations and the Claimant's capability were only capable of determination at the hearing.

24. In his oral submissions Counsel for the Respondent emphasised that in looking at the question of costs the Tribunal had to focus on the conduct of the proceedings only. He also stressed that in case where there were genuine concerns as to the capability of an employee there are very real issues about Polkey deductions and what the future would have held for the Claimant as an employee.

25. The Respondent also referred to attempts by the Respondent to settle the claim. He submitted that although the Claimant had done better than the offers made there had been attempts to settle the claim by both parties prior to the liability hearing. And during it. The gap proved too large to bridge.

## Legal principles

26. I turn firstly to rule 76 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013:

*"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 his 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*

## Unreasonable conduct

27. Even in cases where the Employment Tribunal finds that the conduct of a party has been unreasonable such that the 'threshold has been passed the Tribunal retains a wide discretion to award costs.

28. The Tribunal does not need to link the award causally to particular costs which have been incurred as a result of specific conduct that has been identified as unreasonable see **McPherson v BNP Paribas (London Branch) [2004] ICR 1398.**

29. In McPherson, Mummery LJ stated (at para 40):

*'The principle of relevance means that the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion, but that is not the same as requiring [the receiving party] to prove that specific unreasonable conduct by [the paying party] caused particular costs to be incurred'*

30. However, in **Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78**, at para 40) Mummery LJ stressed that the above passage in McPherson was never intended to be interpreted as meaning either that questions of causation are to be disregarded.

31. At paragraph 41 he stated:

*'The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects if had'.*[2]

[2] Or defending proceedings

32. As to lying in proceedings in **Arrowsmith v Nottingham Trent University [2012] ICR 159**, it was held that there is no point of principle of general application that lying, even in respect of a central allegation in the case, must inevitably result in an award of costs, and that

*'it will always be necessary for the tribunal to examine the context, and to look at the nature, gravity and effect of the lie in determining the unreasonableness of the alleged conduct'*

**No reasonable prospects of success**.

33. The authorities seem to suggest that the party against whom it is said has pursued a hopeless case must at least know or be taken to have known that their case is unmeritorious. However, in **E T Marler v Robertson [1974] ICR 72** it was stated that:

*'Ordinary experience of life frequently teaches us that which is plain for all to see once the dust of battle has subsided was far from clear to the combatants once they took up arms'*.

34. In **Keskar v Governors of All Saints Church of England School [1991] ICR 493** Knox J stated:

*'The question whether a person against whom an order for costs is proposed to be made ought to have known that the claims he was making had no substance, is plainly something which is, at the lowest capable of being relevant'*.

35. Finally, even under this ground of application an Employment Tribunal retains a discretion whether or not to award costs. Even if it decides that defending of the proceedings has been misconceived, it does not have to award costs.

**CONCLUSIONS**

36. In this case the Claimant brought a constructive unfair dismissal claim. As can be seen from the Reasons two of the contentions of breach of the implied term of trust and confidence were the conduct of Mr. Bowen at the meeting on 13 August 2018 and the conduct of Mr. Raynes during the discussion on 15 August 2018. Both of these matters were asserted to be breaches of the implied term.

37. The Tribunal was satisfied that the version of events given by Mr. Bowen at the meeting on 13 August when one had regard to all the circumstances was untrue. The Tribunal rejected his account of it. The decision about the Claimant's employment had already been taken. Mr Bowen clearly knew that as did Mr. Raynes.

38. In respect of Mr. Bowen the Tribunal found that his answers had been, at times, evasive and disingenuous i.e. less than candid and insincere. Perhaps

the Tribunal was being too polite. In so far as it is suggested that the Tribunal did not reject his account as being untrue the submission is rejected. There was no room for a mistake on Mr. Bowen's part as to what had been discussed. He knew that the decision had been taken to remove the Claimant as Sales Manager before meeting the Claimant: all the surrounding evidence supported the contention that the Respondent had taken a decision to remove the Claimant as Sales Manager and if he didn't agree to his demotion then he would be performance managed out. Mr. Bowen clearly knew that and his account of the meeting was untrue.

39. It would have been entirely obvious to Mr. Bowen and the Respondent that if the Claimant's version of the meeting was correct the Claimant was bound to succeed in his contention that he had been constructively dismissed

40. As to Mr. Raynes, his conduct at the hearing was extraordinary. He had prepared a witness statement dealing with, inter alia, the conversation between himself and the Claimant of 15 August 2018 and at the hearing he had sworn that his statement was true. Then, almost without demur and within about five minutes of cross-examination commencing and with a degree of nonchalance seldom seen by a witness of his intellect he agreed with pretty much the whole of the alternative version of the conversation as advanced by the Claimant in his witness statement. It is to be noted that by that stage the Claimant had been cross-examined about his account of the meeting on instructions which, as it turned out, were wholly incorrect.

41. The effect of Mr. Raynes admissions meant that the Claimant was bound to succeed in his contention that he had been constructively dismissed.

42. The Tribunal finds that Mr. Raynes must have known that his witness statement contained untruths. It is inconceivable that he would not have known the importance of the conversation between himself and the Claimant. The Tribunal reminds itself that it was one of the aspects of the grievance which should have been upheld and it clearly featured as a central issue in the Employment Tribunal proceedings. If he had been truthful with his own legal advisers then the proper outcome would have been to concede unfair dismissal because, as Counsel for the Claimant conceded, if there was a dismissal it was inevitably unfair. The Respondent could and should have simply maintained arguments on remedy. Indeed had it done so it might have fared better on the remedy issue at the recent hearing.

43. The Tribunal notes that there were attempts made by the Respondent to settle the claim and that is to its credit. However, had Mr. Raynes and Mr. Bowen been frank with their legal advisers the efforts to settle the claim would probably have taken on a more substantial hue because the Respondent would have been approaching the negotiations from a position whereby it was only able to maintain remedy arguments and there would have been no risks to the Claimant on liability.

44. The Tribunal is satisfied that the Respondent retained viable arguments on remedy. In particular, the Polkey argument which was argued at the liability

hearing and on which evidence was given at the liability hearing. The Tribunal agonised over the decision in relation to the Polkey principle and although it found the extent of any deduction to be negligible the argument was properly and reasonably run and no reasonable criticism can be levelled at the Respondent for seeking to maintain it.

45. However, the Tribunal finds that the conduct of the proceedings when taken as a whole was unreasonable as follows:

    a. the Respondent's two principal witnesses were untruthful in their statements and in their confirmation of their statements at the hearing
    b. Mr. Bowen persisted with his untrue account in the teeth of overwhelming evidence that it was untrue
    c. both witnesses knew that the evidence they gave was untrue and in Mr. Raynes' case he ultimately agreed that the evidence in his statement was untrue
    d. it is inconceivable that both of them did not know that their evidence was central to the Claimant's claim and the Respondent's defence of the claim
    e. had one or other of them told their legal advisers the truth at the outset or at any point before giving evidence they would have received advice that their case on unfair dismissal was hopeless
    f. the Respondent should not have persisted in denying a dismissal had occurred
    g. the Respondent should have admitted liability

46. The Tribunal concludes that in the above circumstances the thresholds for making costs awards under both rule 76(1) (a) and (b) are met.

47. The Tribunal turns now to the question of the exercise of discretion. In both instances the Tribunal has a wide discretion. The Tribunal considers that the conduct of the Respondent in advancing a case which was based in part on knowingly untruthful accounts was wholly unacceptable and unreasonable conduct. The Respondent is a substantial organisation with access to HR support and legal advice. It failed to admit liability when the case clearly was hopeless. It did not require a hearing to determine these issues.

48. In putting the Claimant to proof as was suggested at the preliminary hearing in circumstances where the main witnesses for the Respondent knew that there was, in reality, no defence to the unfair dismissal claim because their evidence was untrue the Claimant has undoubtedly been subjected to considerable unnecessary work to prepare for the case and additional legal costs.

49. The Respondent does not advance a case that it is not in a position to pay costs.

50. In respect of both limbs of the application, therefore, the Tribunal considers it appropriate that the Respondent should make a contribution to the costs claimed by the Claimant.

51. As to the level of costs, the Tribunal was told that the costs far exceeded the costs claimed. If that is correct it doesn't help the Tribunal at all. The better course would have been to provide full details of the costs incurred in these proceedings and then to limit it. The Tribunal notes that the schedule the costs also exceed £20,000 in any event. However, I note that the Schedule refers to *"Total costs of the Tribunal case"* and I accept the submission of Counsel for the Respondent (which was not disputed) that in respect of the first invoice only a quarter of the costs related to these proceedings. Accordingly, the correct figure is £22,990 including VAT which I have to consider to be the total costs of the proceedings.

52. No reliance appears to be made by the Claimant on cost warning letters as set out in the schedule (they were not referred to by Counsel at all) but in any event in light of the Tribunal's judgment the position is unaffected by them. I should also add that an amended schedule of costs to include the remedy costs was not pursued by the Claimant in light of the grounds of the application for costs.

53. As indicated above, notwithstanding the unreasonable conduct and the pursuit of a hopeless defence there would have been costs incurred by the Claimant in respect of the Polkey argument which was not resolved until the hearing. It was an argument which undoubtedly would have required evidence from witnesses and disclosure of a substantial number of documents albeit a shorter hearing would have occurred.

54. Stepping back and looking at the picture overall the Tribunal considers that the 'pure liability' aspect of the claim was responsible for about 70% of the overall costs. The Tribunal takes the view that the unreasonable conduct led to the running of the hopeless aspects of the case and it is this which the Claimant should be compensated for.

55. Accordingly, the costs order against the Respondent shall be in the sum of £16,093.

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Employment Judge Walters

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Date: 5th December 2020

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
6th January 2021
By Mr J McCormick

FOR THE TRIBUNAL OFFICE