THE EMPLOYMENT TRIBUNALS

Claimant: Ms V Heslop

Respondent: Deichmann Shoes UK Ltd.

Heard at: Leeds

On: 22 February 2021

Before: Employment Judge Shepherd

JUDGMENT ON APPLICATION FOR COSTS

The claimant's application for costs against the respondent is refused.

REASONS

1. The judgment of the Tribunal in respect of the claims brought by the claimant was sent to the parties on 29 July 2020. This followed a 1 day substantive hearing on 24 July 2020. The judgment of the Tribunal was that the claim of unfair dismissal was well-founded and the respondent was ordered to pay the basic award and compensatory award subject to a reduction of 25% for contributory fault and an increase of 25% on the compensatory award for failure to follow the ACAS code of practice pursuant to section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.

2. The claimant has made an application for costs pursuant to rule 76(1) (a) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 it is contended that the respondent acted unreasonably in the way that the proceedings had been conducted.

3. It is submitted on behalf of the claimant that, on 13 July 2020, the claimant's representatives wrote to the respondent suggesting that, in the light of the documents and the evidence, it was inevitable that the claimant's claim of unfair dismissal would succeed and the issue would then be the level of compensation awarded. It was suggested that the matter be referred to judicial assessment or mediation. It is

submitted that the response from the respondent rejected any overtures as to judicial assessment, mediation and negotiation. It merely said that, regretfully, their view of the outcome of the Tribunal hearing differed significantly from that of the claimant.

4. The respondent has responded to the claimant's application for costs. It is said that the account of events given by the claimant's representative which led to the matter being heard is correct. It is then stated:

> "This said throughout the process we did have a belief that the outcome of the hearing may be different and at no time intended to act in a manner which is now being referred to as unreasonable, in particular that relating to is declining judicial assessment or mediation.
> Additionally since the hearing the business has reflected heavily on your findings in particular those relative to compliance with the ACAS code of practice and our own internal procedures.
> We apologise if our approach is viewed as unreasonable as this was never our intention."

5. In response to the respondent's submission it is stated on behalf of the claimant:

> "Insofar as the contents of the respondent's email to the Tribunal of 21 September, is concerned, whilst the respondent may have held a belief that the outc are ome of the hearing would be different to its eventual outcome, in our respectful submission, the issue is whether or not that was a reasonably held belief. The respondent is a large organisation with a designated HR support. It could, in fact, should have taken legal advice. It is submitted that the outcome of the Tribunal was inevitable and this in turn makes the respondent's failure to engage in any form of judicial assessment/mediation/negotiation wholly unreasonable."

6. The parties have both indicated that they have no objection to the claimant's application for costs being dealt with on the papers.

The law

7. The Employment Tribunal is a completely different jurisdiction to the County Court or High Court, where the normal principle is that "costs follow the event", or in other words the loser pays the winner's costs. The Employment Tribunal is a creature of statute, whose procedure is governed by the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. Any application for costs must be made pursuant to those rules. The relevant rules in respect of the respondent's application are rules 74(1), 76(1) and (2), 77, 78(1)(a), 82 and 84. They state:-

> 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 purposes of or in connection with attendance at a tribunal hearing).

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) had 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.

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.

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.

84 In deciding whether to make a costs, preparation time or wasted costs order and, if so, in what amount, the Tribunal may have regard to the paying party's ability to pay.

8 The discretion afforded to an Employment Tribunal to make an award of costs must be exercised judicially. (**Doyle v North West London Hospitals NHS Trust UKEAT/0271/11/RN**. The Employment Tribunal must take into account all of the relevant matters and circumstances. The Employment Tribunal must not treat costs orders as merely ancillary and not requiring the same detailed reasons as more substantive issues. Costs orders may be substantial and can thus create a significant liability for the paying party. Accordingly, they warrant appropriately detailed and reasoned consideration and conclusions. Costs are intended to be compensatory and not punitive. The fact that a party is unrepresented is a relevant consideration. The threshold tests may be the same whether a party is represented or not, but the application of those tests should take account of whether a litigant has been professionally represented or not.

(**Omi v Unison UKEAT/0370/14/LA**). A litigant in person should not be judged by the same standards as a professional representative as lay people may lack the objectivity of law and practice brought to bear by a professional adviser and this is a relevant factor that should be considered by the Tribunal. (**AQ Limited v Holden [2012] IRLR 648**). The means of a paying party in any costs award may be considered twice – first in considering whether to make an award of costs and secondly if an award is to be made, in deciding how much should be awarded. If means are to be taken into account, the Tribunal should set out its findings about ability to pay and say what impact this has had on the decision whether to award costs or an amount of costs. (**Jilley v Birmingham & Solihull Mental Health NHS Trust UKEAT/0584/06**).

9 There is no requirement that the costs awarded must be found to have been caused by or attributable to any unreasonable conduct found, although causation is not irrelevant. What is required is for the Tribunal to look at the whole picture of what happened in the case and to identify the conduct; what was unreasonable about the conduct and its gravity and what effects that unreasonable conduct had on the proceedings (**Yerraklava v Barnsley MBC [2012] IRLR 78**). As was said by Mummery LJ in **McPherson v BNB Paribas (London Branch) [2004] ICR 1398**, that there is a balance to be struck between people taking a cold, hard look at a case very close to the time when it is to be litigated and withdrawing, on the one side of the scale, and others, on the other side of the scale, who do what may be described as raising a "speculative action", keeping it going and hoping that they will get an offer. The same principle will apply in respect of respondent's conduct in respect of unmeritorious responses.

10. The claimant makes the point that the respondent is a large organisation with designated HR support and submits that it should have taken legal advice.

11. The respondent did not have legal representation. Lord Justice Sedley in the case of **Gee v Shell UK Limited (2002) IRLR 82** stated that it is:

> "A very important feature of the employment jurisdiction that it is designed to be accessible to people without the need of lawyers, and that – in sharp distinction from ordinary litigation in the United Kingdom – losing does not ordinarily mean paying the other side's costs".

12. That remains the case today. Costs are still the exception rather than the rule. I am not satisfied that this case was exceptional. It was a claim for unfair dismissal and required a hearing to determine the facts.

13. The response to the application for costs made by the respondent's HR Manager is laconic and merely states that, throughout the process, they had a belief that the outcome of the hearing may have been different and they did not intend to act in a manner which was unreasonable.

14. The claim of unfair dismissal was heard. There were found to be substantive and procedural failings on the part of the respondent. However, there was also a significant finding of contributory fault. The claimant knew that the respondent, her District and Regional Manager, had indicated that she should not take the holidays in question and the basic and compensatory award were reduced by 25% for a contributory fault.

15. An apposite extract from the judgment of Sir Hugh Griffiths in **Marler v Robertson [1974] ICR 72 is**:

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

16. The respondent chose not to have legal representation and relied on its HR Manager. This was not a case in which there was a hopeless defence. The respondent was of the view that it had a reasonable prospect of defending the case at the Tribunal hearing. The claimant's representative had a different view of the prospect of the respondent's chances of successfully defending the claim.

17. I am not satisfied that the costs threshold has been reached in this case. The claimant's application for costs against the respondent is refused.

Employment Judge Shepherd

22 February 2021

JUDGMENT SENT TO THE PARTIES ON

24 February 2021