EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Mark Ward	v	Dimensions (UK) Ltd

Heard at: Watford **On**: 14 January 2021 & 16 February 2021

Before: Employment Judge Bedeau
Mr D Bean
Mr K Rose

Appearances
For the Claimant: Ms Z Ivankovic, Partner
For the Respondent: Did not attend – written submissions

RESERVED JUDGMENT ON COSTS

The claimant is ordered to pay the sum of £5,000 towards the respondent's costs in these proceedings.

REASONS

1. Having sat from 10-13 and 17-20 June 2019, the tribunal gave oral judgment on the last day of the hearing on liability, concluding that all the claimant's claims were not well-founded. They were: unfair dismissal under s.98(4) Employment Rights Act 1996; unfair dismissal under s.103A Employment Rights Act 1996; and public interest disclosure detriment under s.47B Employment Rights Act 1996.

2. The tribunal promulgated its liability judgment to the parties on 11 June 2019.

3. As Mr Crow, counsel for the respondent, had asked for respondent's costs to be met by the claimant, the tribunal ordered that a formal written application for costs, together with a costs schedule, and the respondent's "within prejudice" letter dated 20 March 2019, be served on the claimant by 5

July 2019. It was initially agreed that the application for costs should be dealt with on the papers.

4. The claimant was ordered to serve a witness statement in relation to his means and ability to pay together with supporting documents, on the respondent by not later than 19 July 2019.

5. The respondent's costs application is in its letter dated 5 July 2019, is made on three bases, firstly, that the claimant had acted unreasonably or disruptively in bringing proceedings or in the way proceedings have been conducted. Secondly, that the claims had no reasonable prospect of success. Finally, the claimant had been in breach of the order of the tribunal, that is, paragraph 6, dated 13 February 2019.

6. In the costs schedule the respondent claims from 30 May 2018, the preparation and submission of the response, to dealing with correspondence from the tribunal, and in preparing for the final hearing. The total sum claimed is £85,121.45. However, it has invited the tribunal to award costs of £20,000, that being the Tribunal's unassessed limit.

7. Following a request by the claimant, written reasons were promulgated to the parties on 26 September 2019.

8. As a result of a family bereavement the judge was unable to sit on the day listed for the costs hearing and there then followed the practical problems in arranging an in person hearing due to the advent of the Covid-19 pandemic.

9. The case was eventually listed on 14 January 2021. Although it was intended that the judgment be based on written representations, the claimant and his representative, Ms Z Ivankovic, could attend the hearing in the morning to make submissions. The respondent confirmed that it would not be attending and invited the tribunal to rely on its application and supporting documents.

10. The hearing on 14 January 2021 had to be adjourned due to technical difficulties experienced by the claimant in connecting to Cloud Video Manager. It was adjourned to 16 February 2021.

The evidence

11. The tribunal heard evidence from the claimant. In addition, he produced a separate bundle of documents. The respondent also produced a bundle of documents in support of its application for costs.

Findings of fact

12. The claimant served on the respondent, a total of 9 Scott schedules "schedule", with each having been subsequently amended. The schedule on 2 August 2018, contained 53 allegations of public interest disclosures. On 16 September 2018, a further schedule contained 36 disclosures. On

13 February 2019, at the preliminary hearing, the claimant agreed to reduce the number of disclosures, particularly where there was no alleged detriment. He was ordered to provide further particulars in relation to the detriments linked to four specific disclosures in paragraph 6 of the Order of Employment Judge Henry. The further particulars were to be served on the respondent by 27 February 2019.

13. On 22 February 2019, the respondent sent to the claimant the schedule agreed by him and the tribunal in the form of tracked changes for him to complete. Instead, the claimant sent a revised schedule dated 27 February 2019, containing fewer disclosures but with amended dates of the allegations; changes in the names of those to whom the disclosures were made; and a description of the disclosure and the detriments. These changes made it difficult for the respondent to respond. Added to this the claimant did not provide the further particulars as ordered on 13 February 2019.

14. On 3 April 2019, he sent a further revised schedule, the fifth, with references to other legislation.

15. On 5 and 20 May 2019, a further Scott schedule was sent and later corrected. On 3 June 2019 at the preliminary hearing, a sixth schedule was considered and further disclosures it was agreed should be removed. This resulted in a seventh schedule being served which was to be used, according to the judge, at the final hearing.

16. On 10 June 2019, schedule number eight was served which was considered by the tribunal at the final hearing on 10 June 2019 and amendments were made to the number of qualifying disclosures reduced by one third to three. In effect this revised schedule was the ninth.

17. During the time when the respondent was taking witness statements, March to May 2019, it had to consider the disclosures and detriments set out in schedules 3, 4 and 5. It meant that additional time was taken with witness statements, many of which were unnecessary. It did not call four of its witnesses at the final hearing as their evidence was no longer relevant following the claimant's reduced qualifying disclosures on 10 June 2019.

18. The respondent stated, and we do find as fact, that half of the bundle of documents became irrelevant and was not referred to during the hearing. Significant resources had been used in reading and redacting each page of the bundle comprising of over 900 pages, as well as considering disclosure relating to each of the claimant's claims. A total of 54 Lever Arch files of documents had to be produced by the respondent. This amounted to three Lever Arch files per person involved in the case.

19. Neither the claimant nor his representative is a lawyer. They live together and are engaged to be married but no date has yet been fixed.

20. Part of the claimant's case was that some documents had been doctored in relation to vehicle record checks which showed that different entries were made in respect of the same vehicle by different individuals as the handwritings were different.

21. We commented on this at paragraph 37-39 of the liability judgment in which we stated that the vehicle checks were not falsified. The checks had been done but not properly recorded. This resulted in an improvement notice being issued to Ms Bennett for signing off vehicle checks when she did not carry the checks out herself.

22. The claimant told us that most of the documents had been doctored but was unable to take the matter any further as the respondent's response was that the documents in question were destroyed.

"Without prejudice" offer

23. The respondent relies on the refusal by the claimant to accept the sum of £18,500 made to him in its representatives' letter dated 20 March 2019, after the preliminary hearing on 13 February 2019. It is headed "Without prejudice save as to costs". The claimant was warned that should he continue to pursue his claims and was unsuccessful, or receive compensation less than the offer made, the respondent will make an application for its costs to be paid by him. An explanation was given of the significance of a costs order and the application of rule 76, Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. The letter further stated, "We would therefore urge you to give serious consideration to this offer." The representatives recommended that the claimant should seek independent legal advice on the merits of his claims. The offer was time-limited to 3 April 2019. The claimant did not engage in any negotiations with the respondent or with the representatives. Instead, his schedule of loss claimed, in total, the sum of over £1.7 million. That was his response to the respondent's offer. He also told the tribunal that he was prepared to leave the issue of compensation for the tribunal to hear and determine.

24. Although in 2018 he had the benefit of legal advice, in 2019 he could not afford to pay for either legal advice and or assistance.

25. On 5 June 2019, the respondent gave him a further opportunity to withdraw his claims to avoid an application for costs, but this was not acceded to. He went ahead with the final hearing on 10 June 2019.

26. He had been informed on 20 March and 5 June 2019, that his claims had little reasonable prospect of success. His public interest disclosure claims, even if he had made qualifying disclosures, he would be unable to establish a causal link between those disclosures and any detriments in relation to the disciplinary process leading to his dismissal. He was also informed that he would be unable show that he suffered any detriments. In relation to the other claims, they also had no reasonable prospect of success.

27. In relation to each of the orders of 13 February 2019, referred to earlier, he did not provide further particulars despite being reminded by the respondent on several occasions. The failure to comply with the orders affected the respondent's ability to amend its response by 20 March 2019, as stated in the order.

28. At the time of his dismissal his normal take home pay was £1,200 per month. His net annual pay was £14,400. The offer of £18,500 was more than one year's net salary.

29. Employment Judge Henry at the preliminary hearing on 13 February 2019, according to both parties, gave the claimant a guide on compensation were he to be successful. It was in the region of one year's salary plus between £6,000 to £10,000 injury to feelings.

30. The claimant told the tribunal that his gross salary was about £24,000 gross a year. He, therefore, believed that the judge was saying that his compensation, were he to be successful, would be in the region of £30,000 to £40,000.

31. In the claimant's witness statement, he asserted that he did not reduce the disclosures on 10 June on the morning of the first day of the final hearing. It was done at the request of the trial judge who allegedly stated that most of the disclosures were too old to be considered. Although Ms Ivankovic explained the relevance of the disclosures, the claimant said that the judge insisted that the disclosures were too old to be considered and were removed.

32. That was not the position taken by the tribunal. In the afternoon on the first day of the hearing, Ms Ivankovic and Mr Cross, counsel for the respondent, made references to the various Scott schedules and to the recent Scott schedule received from Ms Ivankovic on Tuesday 4 June 2019. It was Ms Ivankovic who said to the tribunal that the claimant was prepared to withdraw several the alleged disclosures. The judge did not insist on some of the disclosures being removed. It was not within his power to do so without the approval of the Non-Legal Members and the parties.

33. In relation to the claimant's financial circumstances, he does not own any shares, bonds, or stocks. He has no savings and lives in house provided by his local council. Ms Ivankovic is the sole tenant. He owns a car which is a Y registration Honda HRV, valued at between £300-£400. He has personal expenses which include, AA membership, mobile phone, car insurance, road tax, which comes to a total of £108.46 per month. He spends £200 per month on tobacco as he is a smoker. He also shares all bills relating to the council property with Ms Ivankovic which totals £446.82 per month.

34. He told the tribunal that his total expenses each month is around £690.

35. From 4 August 2020, he has been working on a zero-hour contract as a Covid-19 operative with the NHS Test and Trace scheme. He would

normally work four days on and four days off at £80 per day and would earn net per week between £188-£465.

36. He does not have any dependant children.

37. We bear in mind our findings in the liability judgment on the status of the respondent. It is a charity under the Industrial and Provident Society. It provides support for people "with learning disabilities, including autism, to live the life they choose. It employs 7,000 members of staff and delivers a range of services to approximately 3,500 individuals across the United Kingdom. It is Care Quality |commission registered and must ensure that its services are safe, effective, responsive and well-led.", paragraph 12 of the judgment.

Submissions

38. Ms Ivankovic submitted that the claimant did not know and, nor did she, that he could negotiate in relation to the £18,500 "without prejudice" offer. The claimant does not own any property and lives in a council house with her. He is on a low income and has no savings. She said that he has always been honest in his dealings with her. Neither had any form of legal training and they were doing their best in their conduct of proceedings.

39. Her submissions to us were quite brief but supplemented by her written response to the application for costs.

The law

40. The costs provisions are in rules 74 to 84, schedule 1, Employment Tribunals (Constitution and Rules of Procedure) regulations 2013, as amended. "Costs" includes any fees, charges, disbursements, or expenses including witness expenses incurred by or on behalf of the receiving party, rule 74(1).

41. The provisions in relation to making a costs order are contained in rule 76. Rule 76(1) provides,

> "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."

42. In deciding whether to make a costs order the Tribunal may have regard to the paying party's ability to pay, rule 84.

43. In the case of Yerrakalva v Barnsley Metropolitan Borough Council [2011] EWCA Civ 1255, the Employment Judge in the case awarded the respondent 100% of its costs based on the claimant's lies prior to her

decision to withdraw. On appeal the EAT said that it was unable to see how the lies told at the prehearing review caused the respondent any loss at all from which they were entitled to be compensated. She succeeded in her appeal. On appeal to the court of Appeal, Mummery LJ giving the leading judgment held:

> "The vital point in exercising their discretion to order costs is to look at the whole picture of what happened in the case and asked 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 affects it at that. The main thrust of the passages cited above from my judgement in McPherson's case was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the employment tribunal had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs the claimant. In rejecting that submission I have no intention of giving birth to erroneous notions, such as that causation was irrelevant or the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances….
>
> 52 In my judgment, although the employment tribunal had jurisdiction to make a costs order, it erred in law in the exercise of its discretion. If, as should have been done, the criticisms of the council's litigation conduct had been factored into the picture as a whole, the employment tribunal would have seen that the claimant's unreasonable conduct was not the only relevant factor in the exercise of the discretion. The claimant's conduct and its effect on the costs should not be considered in isolation from the rest of the case, including the council's conduct and its likely effect on the length and costs of the prehearing review."

44. The tribunal must consider, once the claims have been brought, whether they were properly pursued, Npower Yorkshire Ltd v Daly UKEAT/0842/04.

45. Knox J, in Keskar v Governors of All Saints Church England School and Another [1991] ICR 493, page 500, paragraphs E-G, held,

> "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, and we are quite satisfied from the decision itself, in the paragraph which I have read and need not repeat, that the industrial tribunal did have before it the relevant material, namely that there was virtually nothing to support the allegations that the applicant made, from which they drew the conclusion that he had acted unreasonably in bringing the complaint.
>
> That in our view, does involve an assessment of the reasonableness of bringing the proceedings, in the light of the non-existence of any significant material in support of them, and to that extent there is necessarily involved a consideration of the question whether the applicant ought to have known that there was virtually nothing to support his allegations."

46. We have also considered the cases of E.T Marler v Robertson [19974] ICR 72, a judgment of the National Industrial Relations Court, and Oni v Unison UKEAT/0370/14/LA.

47. In Marler, it was held by Sir Hugh Griffiths under the old "frivolous or vexatious" costs requirements that

> "If the employee knows that there is no substance in his claim and that it is bound to fail, or if the claim is on the face of it so manifestly misconceived that it can have no prospect of success, it may be deemed frivolous and an abuse of the procedure of the tribunal to pursue it. If an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive, he acts vexatiously, and likewise abuses the procedure. In such cases the tribunal may and doubtless usually will award costs against the employee.", page 76 D-F.

48. In the Oni case, Simler J, President, re-stated the principles, namely that the tribunal has a wide discretion in deciding whether to award costs. It is a two-stage process. The first being, to determine whether the paying party comes within one or more of the parameters set out in rule 76. The second, is if satisfied that one or more of the requirements have been met, whether to make the award of costs. However, costs had to be proportionate and not punitive and reasons must be given.

49. In Arrowsmith v Nottingham Trent University [2011] EWCA Civ 797, a case where the claimant was ordered to pay costs of £3,000 because she had made a case dependent on advancing assertions that were untrue. The Court of Appeal held that under rule 41(2) the tribunal was not obliged to take her means into account although it had done so. The fact that her ability to pay was limited, in that she was unemployed and no longer in receipt of statutory maternity pay, did not require the tribunal to assess a sum limited to an amount she could pay. The amount awarded was properly within the tribunal's discretion.

50. In relation to the exercise of the tribunal's discretion whether to take into account the paying party's ability to pay, under the old rules, HHJ Richardson, in the case of Jilley v Birmingham & Solihull Mental Health NHS Trust (EAT/584/06), held:

> "The first question is whether to take ability to pay into account. The tribunal has no absolute duty to do so. As we have seen, if it does not do so, the County Court may do so at a later stage. In many cases it will be desirable to take means into account before making an order; ability to pay may affect the exercise of an overall discretion, and this course will encourage finality and may avoid lengthy enforcement proceedings. But there may be cases where for good reason 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."
>
> "If a tribunal decides not to do so, 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 whether to award costs or on the amount of costs, and explain why. Lengthy reasons are not required. A succinct statement of how the tribunal has dealt with the matter and why it has done so is generally essential."

51. In the case of Kopel v Safeway Stores plc [2003] IRLR 753, the EAT held that an employment tribunal can consider a claimant's refusal of any settlement offer in deciding whether it should award costs based on now unreasonable conduct, rule 76(1)(a).

Conclusion

52. We have concluded that the several changes to the Scott schedules resulted in the respondent incurring costs in having to deal with each schedule and in preparing for the final hearing. In the end it had to release four of its witnesses as they were no longer required because their evidence was no longer relevant. 53 bundles of documents were produced but not all the documents were referred to during the hearing. To have so many changes to the Scott schedules and the consequent cost to the respondent in money and time, was unreasonable conduct.

53. The claimant was entitled to raise concerns about the procedure being followed in relation to the recording of vehicle checks, and the respondent acknowledged that the procedure was not correctly followed and issued an improvement notice. It was, therefore, not unreasonable conduct nor disruptive behaviour by the claimant in challenging some of the documents, some of which he could not challenge any further as the respondent stated that they were destroyed.

54. We have also concluded that the claimant's conduct of proceedings was unreasonable when he refused the offer of £18,500. This would have amounted to a net salary payment for the year as well as a sum towards injury to feelings. He did respond to the offer by submitting a schedule of loss within which he was claiming more than £1.7 million. His claim did not take into account the significant litigation risk factors, and the inherent weaknesses in his claims. It was totally unreasonable having regard to the claimant's salary, to have expected total compensation in the region of £1.7 million. We will follow Kopel.

55. In relation to being no or little reasonable prospect of success in respect of the public interest disclosure claims, the claimant had an arguable case in relation to the qualifying disclosure in respect of vehicle checks. In that regard we have concluded that it could not be said that the public interest disclosure claims stood no reasonable prospect of success.

56. As regards the unfair dismissal claim, in our liability judgment, we drew attention to the role of Mr Ellis who conducted the disciplinary appeal and his earlier involvement with Ms Bennett, who was in some fear of the claimant. The claimant was entitled to challenge the disciplinary process. He did but was unsuccessful in the end. We have concluded that it could not be said that this claim or indeed the other claims stood no reasonable prospect of succeeding as he was entitled to put forward his case to the tribunal.

57. In relation to breach of the order at paragraph 6 made on 13 February 2019, the claimant did respond although not in full compliance with the order. There was not enough evidence upon which we could conclude that he had deliberately breached the order, nor was his behaviour to be regarded as contumelious.

58. In respect of the various changes to the Scott schedules and the refusal to accept £18,500, we have concluded that the claimant had acted unreasonably in the way he had conducted proceedings, Rule 76(1)(a). The letter from the respondent's representatives invited the claimant to "give serious consideration to this offer". In other words, they wanted a response.

59. We have taken his means into account. On the assumption that his average weekly earnings are around £300, this would give a monthly figure of £1,300. We, however, accept that he is currently on a zero-hour contract and there is no certainty that he would remain in employment indefinitely. He has no savings nor assets of his own. We apply Jilley.

60. The respondent is a not-for-profit organisation and could not afford to incur costs in excess of £85,000. Its full legal costs, undoubtedly, would have an impact on the services it provides. Although we accept that it has reduced its claim to £20,000, we do doubt whether the claimant would be able to pay such a figure on his low and variable earnings.

61. Costs must be proportionate and not punitive, Oni, Simler P, as she then was. We have concluded that he should pay the respondent's costs in the sum of £5,000.

_____
Employment Judge Bedeau
12 April 2021
Date: ……..
19 April 2021
Sent to the parties on: .....

.....
For the Tribunal Office

.