Case No: 2301248/18

EMPLOYMENT TRIBUNALS

Claimant: Mr C Lammy

Respondent: Dartford Borough Council

RESERVED JUDGMENT ON COSTS

The Tribunal's decision is that the Respondent's application for costs succeeds and the Claimant shall pay to the Respondent £5,000 towards its costs of defending the claim.

RESERVED REASONS

1. The Respondent made an application for costs which by agreement was dealt with on the papers to save costs. I had before me the application, the Claimant's reply, together with his schedule of income and expenditure.

2. The application for costs was made on 10 December 2019. I sat in chambers to consider the application on 5 May 2021. I do not know the precise reason for the delay but must apologise to the parties on the Tribunal's behalf.

3. The basis of the application is that the claims had no reasonable prospect of success and/or the Claimant acted unreasonably in bringing or continuing the proceedings.

The relevant law

4. Costs do not follow the event in employment tribunal proceedings and an award of costs is the exception and not the rule (Lord Justice Mummery in ***Barnsley Metropolitan Borough Council v Yerrakalva 2012 IRLR 78***).

5. The power to award costs is contained in **Rule 76 of the Employment Tribunal Rules of Procedure 2013** which provides that:

    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) have been conducted; or*
>
> *(b) any claim or response had no reasonable prospect of success.*

6. The Court of Appeal held in ***Yerrakalva*** (above) 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 to ask whether there was unreasonable conduct in bringing and conducting the case and in doing so, to identify the conduct, what was unreasonable about it and what effects it had. There does not have to be a precise causal link between the unreasonable conduct in question and the specific costs being claimed.

7. Rule 84 provides that in deciding whether to make a costs order and if so in what amount, the Tribunal may have regard to a paying party's ability to pay.

8. In ***Vaughan v London Borough of Lewisham No2. 2013 IRLR 713*** the EAT (Underhill P) said that affordability is not the sole criterion for the exercise of the discretion on costs.

Background

9. The Claimant presented a claim to the Tribunal. He had ticked the box on the ET1 form indicating that he was claiming unfair dismissal, notice pay, holiday pay, arrears of pay, 'other payments' and sex discrimination. There was a preliminary hearing on 19 August 2018 at which it was noted that the claim for unfair dismissal was based on conduct and the 'usual principles apply'; and the issue for the wrongful dismissal claim was whether the Clamant was in fact guilty of such misconduct. In relation to the sex discrimination claim it was noted on the case management order that whilst the box had been ticked there were no other details provided. Whilst the Claimant's solicitor produced a document which purported to deal with this, it was described in the order as being '*wholly inadequate'*.

10. The Claimant was ordered to provide addional information and a further preliminary hearing was listed for 11 January 2019.

11. The Claimant withdrew his claims for arrears of pay and 'other payments' at the first preliminary hearing and his holiday pay claim was withdrawn on 11 January 2019. At the hearing on 11 January 2019, the claims for sex discrimination were not allowed to continue, and therefore the only remaining claims were for unfair dismissal and wrongful dismissal.

12. The Respondent's application set out what it had put in its grounds of resistance. The Respondent has set out in some detail the nature of the conduct that led to the Claimant's dismissal for gross misconduct. I have summarised this for the purpose of this judgment as follows.

13. The Respondent's disciplinary policy includes the following definition of gross misconduct: "provoking, instigating or taking part in violent behaviour, of threatening violence against a person whilst at work, whether verbal or physical

violence". The allegations against the Claimant were that he acted in an inappropriate and threatening manner to a female colleague including calling her a '*bitch'*. His colleague was very upset and said she felt intimidated and trapped and was crying. She told her manager that she was being abused and bulled in the workplace by the Claimant.

14. This led to an investigation in which all witnesses were interviewed, including the Claimant. This led to a disciplinary hearing where the Claimant was accompanied by his trade union representative. The application says that the Claimant was given the opportunity to ask questions of the investigating manager and call and ask questions of any of the witnesses. He did ask questions of three of the witnesses. During the disciplinary procedure the Claimant maintained that he had not acted as alleged and that this type of behaviour was not in his character.

15. The Claimant was informed that he had been dismissed for gross misconduct in a letter dated 18 January 2018. The Claimant appealed by letter dated 23 January 2018 and his appeal was heard on 22 March 2018. The Claimant was accompanied by a workplace colleague on this occasion. The appeal stated inter alia that the decision was *'biased and in favour of malicious allegations made …'*. At the hearing the Claimant would not elaborate on this repeatedly saying he had further to add. He would not be there when the chair of the disciplinary panel gave evidence to the appeal and the interview was conducted separately. The Claimant's dismissal was upheld, and his appeal dismissed.

16. The Respondent submits that as all this information was in its grounds of resistance that the Claimant and the representative, he had at the time should have known from the date they received this document, that the claim had no reasonable prospect of success and if not then, then certainly after the first preliminary hearing which is referred to above. The Claimant did not withdraw his claims. The Respondent submits that during disclosure, the Claimant disclosed a document which he said was a grievance he had intended to raise but did not do so. In that document he says that he called his colleague a "*germ and a bitch*". This was not provided to the Respondent in the disciplinary process or at any time in the Claimants employment. In the Claimant's witness statement (he was still represented by a solicitor at that time) he denied calling his colleague these words, despite the contents of the document he had provided in disclosure. The Respondent's witness statement confirmed that the words had been said and gave detail about the disciplinary process. I have read those witness statements. The Claimant did not withdraw his claims.

17. On 12 November 2011 the Respondent wrote a letter to the Claimant on a without prejudice save as to costs basis. I have read this letter. This letter goes into some detail setting out the relevant legal tests and explaining why on the facts the Claimant's claim would have no reasonable prospect of success. The Respondent said in this letter that if the Claimant unconditionally withdrew his claims by 4.30 pm on 21 November 2019, then it would not make an application for costs but that it would if he later withdrew his claim.

18. The Claimant did not withdraw his claim and neither he nor his solicitor made any contact with the Respondent. The Respondent therefore had to instruct Counsel and incurred a brief fee for the hearing, which was listed to commence on Monday, 9 December 2019. On Friday, 6 December 2019 the Claimant sent

an email to the Tribunal withdrawing his claim. His solicitor also sent an email on the same day withdrawing his claim. By this time the Respondent had incurred costs and spent time in preparing the case for the hearing.

19. Somewhat surprisingly, the Claimant sent the Tribunal correspondence between him and his solicitor and counsel who had been instructed to advise thereby waiving privilege. The correspondence was dated 19 November 2018 and 5 December 2019. The advice was unequivocal. The advice given is reproduced in part here to give the flavour.

"Mr Lammy should be warned that there is a high risk that he will lose his claims and that the Tribunal will order him to ay the Respondent's legal costs… I have not been able to identify a sensible basis on which to argue that this dismissal was unfair…...I think that a tribunal may well conclude that he is lying about what happened on 18 October 2017." (19 November 2019)

*…. very unlikely to succeed.. there is a significant risk that the tribunal will order him to pay the Respondent's costs" (*5 December 2019)

20. The Respondent set out the costs it has incurred in defending the claim. It has incurred external legal fees of £14,000 in addition to the costs for the in-house solicitor. Despite this it limits its application for costs to £5,000 which is the cost of Counsel's brief fee. It asked the Tribunal to consider the following:

    a. The Respondent is a public body and all costs incurred are at the taxpayer's expense.

    b. A marker should be laid down to employees who bring claims with no reasonable prospect of success and behave in the unreasonable manner that the Claimant has.

    c. The Claimant had the opportunity to avoid costs if he had withdrawn his claim by the deadline in the without prejudice save as to costs letter.

    d. The Claimant is currently earning £675 net per week which is more than he was earning when employed by the Respondent.

21. The Claimant's response to the cost's application was very short. He submits that he was not correctly represented by his solicitor from the start. That his legal team did not have his bests interests at heart. He maintains he was not justly treated by the Respondent and unfairly dismissed by a '*kangaroo court*' which included collusion by managers and other colleagues with the main witness being forced to lie because they did not like him and his '*face did not fit*'. He said he had not received justice and '*it will be interesting to see what your decision will be'*. He objected to paying £5,000 towards the Respondent's costs.

22. In terms of income and expenditure. His schedule shows he earns £2,894.00 gross pcm and £2,120.00 net. His expenditure as set out on this schedule amounts to £2,038.07 pcm.

My conclusions

23. Having read the application, the Claimant's response, the pleadings, and all other relevant documentation I have come to the following decision. I first must consider whether the threshold for a costs award has been met. The

application was made on two grounds, namely no reasonable prospect of success and the manner of conduct being unreasonable. I find that the threshold for a costs award has me on both grounds. The Claimant's case was very weak. The Tribunal in a conduct dismissal case is not concerned about whether a claimant has actually committed the act for which he or she was dismissed but rather whether on the evidence before it, the Respondent had reasonable grounds on the balance of probabilities that the conduct had happened and whether it was reasonable to dismiss. The evidence from the Respondent is overwhelming and the Claimant's claim had no reasonable prospect of success.

24. The Claimant knew this. He was told by Counsel in no uncertain terms that his case was doomed to failure and that he was at significant risk of costs. Yet he still waited until the last minute to withdraw his claim. The only inference is that he was hoping that the Respondent would make a last-minute offer to settle. His claim had no reasonable prospect of success and his actions in continuing his claim until the last working day before the hearing was in the circumstances unreasonable.

25. I then considered whether it is appropriate in all the circumstances of the case to awarded costs. I conclude that it is and that it is proportionate. The Claimant says he was wrongly advised and that his legal team were not acting in his best interests. I do not know what advice his solicitor gave him, if it was incorrect then that is a matter between him and his solicitor. However, Counsel's advice was correct and there to protect him against an application of this sort. He chose to ignore that advice which is why this application has been made. The first advice from Counsel was made two days before the costs warning deadline and the Claimant had ample time to withdraw his claim then. The without prejudice save as to costs letter is clear and explains in detail why the Claimant's claim would not succeed. As set out in **Yerrakalva** (above) I have looked at the whole picture, I have identified the conduct that is unreasonable and the effects it had – namely increasing the costs the Respondent had to incur.

26. I then considered amount payable. I have in mind the **Vaughan** case (see above) which held that affordability is not the sole criteria. I have considered the Claimants schedule of means. I note that the Respondent incurred costs of £14,000 but is limiting its application to £5,000 which is Counsel's brief fee for the hearing. Had it not limited its application I would have been minded to award a higher amount and include costs incurred from the deadline set out in the costs warning letter. However, given the limit on what is applied for, my decision is that the Claimant shall pay £5,000 towards the Respondent's costs. It is between the Claimant and the Respondent as to whether this award of costs can be paid in instalments.

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Employment Judge Martin

Date: 5 May 2021