EMPLOYMENT TRIBUNALS

Claimant: **Mr R Constable**

Respondent: **Marbank Construction Limited**

Heard on: **30th November 2020, 1st and 2nd December 2020**

Before: **Employment Judge Pritchard**

Representation
Claimant: In person
Respondent: Mr J Bryan, counsel

JUDGMENT

The Respondent's application for costs is refused.

REASONS

1. At the conclusion of the merits hearing, the Claimant's unfair dismissal claim having been dismissed, the Respondent made an application for costs. The Respondent submitted that the Claimant had acted unreasonably for the purposes of Rule 76(1) because:

    1.1. The losses claimed in the Claimant's schedule of loss dated 29 May 2020 exceeded £300,000 which was far in excess of anything he could hope to achieve, the compensatory award for unfair dismissal being limited to a year's salary;

    1.2. The Claimant declined to accept the Respondent's offer to settle his claim in the sum of £15,000 without admission of liability as communicated to him in a letter dated 21 November 2019 marked without prejudice save as to costs;

    1.3. The Claimant did not engage constructively with the offer to settle; and

    1.4. The Tribunal had comprehensively dismissed the Claimant's claim finding aspects of his case to be without merit.

2. The Respondent claimed costs arising in the period 19 November 2019 to the conclusion of the hearing, set out in a schedule, in the sum of £48,885 plus VAT to include counsel's fees and disbursements.

3. The Claimant objected to the application. He alleged failures on the Respondent's part to comply fully and/or failed to comply in a timely manner with case management orders which had been issued in the case. The Claimant provided the Tribunal with his written representations in this regard. The Respondent responded in writing, denying the alleged failures had taken place and submitting that the Claimant was not prejudiced by any delay in compliance.

4. The Claimant also told the Tribunal of the hardship he had suffered as a result of the dismissal and its financial impact on him and the adverse impact a costs order would have. He emailed the Tribunal to reiterate in writing his objection to the application.

5. Rule 76(1)(a) 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 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.

6. Thus, the Rules provide that a Tribunal must apply a two stage test: firstly, to determine whether the circumstances set out in 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 <u>Ayoola v St Christopher's Fellowship</u> UKEAT/0508/13.

7. The Court of Appeal stated in <u>Gee v Shell UK Ltd</u> 2003 IRLR 82 that costs in Employment Tribunals are still the exception rather than the rule. This was also repeated in <u>Lodwick v Southwark London Borough Council</u> 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.

8. In <u>Solomon v University of Hertfordshire</u> 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 have asked whether the conduct was within or outside the range of reasonable responses in the circumstances.

9. In <u>McPherson v BNP Paribas (London Branch)</u> [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.

10. In <u>Barnsley Metropolitan Borough Council v Yerrakalva</u> [2012] IRLR 78 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.

11. 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.

12. 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.

13. 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 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.

14. 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.

15. 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.

16. 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.

17. The Tribunal is not persuaded that the threshold of unreasonableness has been reached in the case.

    17.1. The Respondent has been legally represented throughout and would know full well of the limit that applies to a compensatory award. The Claimant told the Tribunal that he completed the form, which had been sent him by the Tribunal, setting out his full losses in the knowledge that an overall cap would be applied to the compensatory award. Completion of the schedule of loss in this way did not fall outside the band of reasonableness, not least because the statutory cap is applied last, after all relevant adjustments and deductions have been made, such as reductions for contributory fault and under Polkey principle which, the Tribunal notes, the Respondent submitted would apply in this case should the Claimant's claim succeed.

    17.2. The Claimant did not accept the offer to settle because he thought he had reasonable prospects of succeeding in his claim and that he would be awarded a greater sum. It was tolerably clear that the Claimant misunderstood the tests that a Tribunal is required to apply in an unfair dismissal case, in particular that relating to the band of reasonable responses. This is not untypical: Tribunals routinely encounter litigants in person who are similarly confused. In London Ambulance Service NHS Trust v Small [2009] IRLR 563 Lord Justice Mummery said this:

    > *It is all too easy, even for an experienced Employment Tribunal, to slip into the substitution mindset.* ***In conduct cases the claimant often comes to the Employment Tribunal with more evidence and with an understandable determination to clear his name and to prove to the Employment Tribunal that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job.*** *He may well gain the sympathy of the Employment Tribunal so that it is carried along the acquittal route and away from the real question – whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal.* [Emphasis added].

    17.3. The Tribunal does not refer to the extract above because it is legal authority in relation to the Respondent's costs application but, rather, as an illustration of the recognition by the courts and Tribunals of the misunderstanding many litigants have of the test which must be applied in unfair dismissal cases.

    17.4. It is not irrelevant that the Claimant in this case is a litigant in person. The Tribunal is unable to conclude that the Claimant's mistaken belief as to the test to be applied, and hence his belief that he had reasonable prospects of success upon which he decided that he would not accept the Respondent's offer of about 25% of what he believed he might be awarded, fell outside the band of reasonableness. His failure to engage further with the Respondent, not least because the offer was strictly time limited, falls to be adjudged in the same way.

17.5. The Tribunal's decision made reference to some of the Claimant's arguments not making sense, being inconsistent or without merit. However, that does not detract from the generality of the Tribunal's decision which was reached upon consideration of the question of reasonableness as required under section 98(4) of the Employment Rights Act 1996 and in accordance with the relevant case law. Costs do not follow the event. The Tribunal's decision does not lead to the conclusion that the Claimant, as a litigant in person, acted unreasonably as submitted by the Respondent.

18. The Tribunal has found the arguments about compliance with case management orders of no relevance in this application. Although the Claimant informed the Tribunal of his means and the hardship he would suffer is a cost order were to be made, these matters have not been taken into account when considering this application. Respondent's application falls at the first hurdle in that the threshold test has not been reached. It has not been necessary for the Tribunal to consider the second stage when means may have to be addressed.

19. For these reason, the Respondent's application is refused.

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Employment Judge Pritchard
Date: 10 December 2020

Note

<u>Public access to employment tribunal decisions</u>
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.