EMPLOYMENT TRIBUNALS

Claimant
Mr P. Stienlet

Respondent
PPCE Holdings Ltd

Employment Judge Garnon **27 May 2021**

COSTS JUDGMENT (without a hearing)

I grant the claimant's application for a costs order to the limited extent set out in the reasons. Unless the parties inform the Tribunal within 14 days of this judgment being sent to them that a figure has been agreed, a three hour costs hearing will be listed.

REASONS (bold print being my emphasis)

1. The Law

1.1. The Employment Tribunal Rules of Procedure 2013 ("the Rules") include:
75. *(1) A costs order is an order that a party ("the paying party") make a payment to—*
(a) another party ("the receiving party") in respect of the costs the receiving party has incurred while legally represented or while represented by a lay representative

76. *(1) A Tribunal may make a costs order .., and shall consider whether to do so, where it considers that—*
(a) a party (or that party's representative) has acted … ***otherwise unreasonably*** *in ..the way that the proceedings* ***(or part)*** *have been conducted; or*
(b) any claim or response had ***no reasonable prospect of success***

77. *… 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.*
I feel I can decide this application **in principle** on the well formulated written representations made by the parties without a hearing.

1.2. The Court of Appeal and EAT have said of costs orders in the Employment Tribunal:

(a) they are rare and exceptional.
(b) whether the Tribunal has the right to make a costs order is separate and distinct from whether it should exercise its discretion to do so
(c) the paying party's conduct as a whole needs to be considered, per Mummery LJ in Barnsley MBC-v-Yerrakalva 2011 EWCA 1255 at para. 41: "*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 … in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had*."
(d) there is no presumption a costs order is appropriate because the paying party lied or failed to prove a central allegation of their case, HCA International Ltd-v- May-Bheemul 10/5/2011 EAT.

(e) even if there has been unreasonable conduct making it appropriate to make a costs order, it does not follow the paying party should pay the receiving party's entire cost of the proceedings. Yerrakalva at para. 53.

1.3. 'No reasonable prospect of success' is a high test. As Lady Smith said in Balls-v-Downham Market (a case on strike out). *"I stress the word 'no' because it shows the test is not whether the .. claim is likely to fail nor is it a matter of asking whether it is possible a claim will fail nor is it a test which can be satisfied by considering what is put forward .. either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short a high test. There must be **no** reasonable prospects."* Mr Justice Megarry once said: *"the path of the law is strewn with examples of open and shut cases that somehow were not, and unanswerable charges that were in the event fully answered."* It is rare a Judge can say an argument stands **no** prospect of success but the wording in the Rules is 'no **reasonable** prospect. That can be said in my judgment of part of the response in this case.

2. The Issues

What I call the "threshold" issue is whether one of the circumstances in Rule 76 exists. If the "threshold "is not reached. I need decide no more. If it is, the "discretion issues" are
(a) whether it is proper to exercise my discretion to make a costs order
(b) should it be for all or a specified part of the costs incurred
(c) how much was properly incurred

3 . My Decision

3.1. The hearing was on 8-11 March 2021. The claim was unfair dismissal only. There were two dismissals. The first was on 17 September 2019, with notice, which I found procedurally unfair, but accepted the respondent had valid concerns. The claimant had run the business in the past, now had a new role and had to do what the respondent wanted him to, in the way it wanted him to do it. I said Ms Brewis, Counsel for the respondent, "*won her only really arguable point which was that however hard he tried he never would, or could, bring himself to do that. As in Abernethy the proper label for the first dismissal, in my judgment, is **capability** due to unwillingness, more probably inability, to become "subordinate". I do not underestimate how difficult it is for anyone who has built a company to do that. The respondent's view he never would change was the true principal reason for dismissal, a potentially fair one and, last but not least, it had reasonable grounds for its belief even though, having heard the claimant, I accept he would have liked to stay. He wanted to stay on his terms, not the respondent's.*
Unlike the respondent's witnesses, I do not attribute his failure to "commit" and "engage" to "pride" but to his genuine belief their way was wrong for the long term future. However, I have no doubt had he been told bluntly he had a choice between "buying in" to a subordinate role or being dismissed, he would have tried to "buy in" but could not have brought himself to do so."

3.2. I found the dismissal was procedurally very unfair. The proviso identified by Lord Bridge in Polkey did not help the respondent which did not act ***"**reasonably in taking the view that, in the **exceptional circumstances of the particular case**, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with.* Had it not been for the second dismissal. I would have made a full basic award but limited the compensatory award to six week's pay, on top of pay due in the notice period, on the basis that is how long it would have taken to follow a fair procedure at the end of which either resignation by the claimant or a fair dismissal with notice would have occurred. As Ms Brewis suggested the latest date that would have happened was the end of October. I would not have

reduced under s 123(6) because I found the claimant did not contribute to his dismissal by **culpable and blameworthy** conduct. However, that he did was a reasonably arguable point and may have had a major effect on remedy depending on how the evidence came over.

3.3. **I wholly rejected t**he respondent had a potentially fair reason for the summary dismissal. It had no reasonable belief he had committed a serious breach of his fiduciary duties which meant it could not reasonably continue to employ him. An indicator of a breach of fiduciary duty is a director safeguarding his personal wealth at the expense of the company. A contra-indicator is him giving personal guarantees putting his wealth at risk, and mortgaging personal assets, to raise money to shore up the company. That is what he did. The respondent was unable coherently to explain **why** there was a breach of fiduciary duty. It was nowhere close to passing the Burchell test even with a neutral burden of proof. There was no investigation, he was not given any particulars of the allegations or asked to explain. Had he been, and had the respondent listened with an open mind, it could not reasonably have come to any other conclusion than that he had remortgaged Waterloo House, not for personal benefit, but to “shore up” PPL. The respondent jumped to the conclusion **any** guarantee by PPL of a liability of directors **must be** a breach of fiduciary duty.

3.4. Therefore, the summary dismissal was procedurally **and substantively** unfair. The loss arising was the difference between what happened and what would have happened had the claimant not been summarily dismissed. I made an award on the basis that at the end of October a fair dismissal with notice, or resignation with notice, expiring end April 2020 would have occurred.

3.5. The claimant’s solicitors, Collingwood Legal, refer in their application to costs warnings and the respondent’s refusal to settle. Although, having heard the evidence, I disagreed with the respondent’s view the claimant was not trying his best, I cannot find its view was unreasonable or had no reasonable prospect of success. Had that argument succeeded, the proviso identified by Lord Bridge **may** have applied and remedy may well have been less. In short, I do not think the threshold for a costs order is reached in respect of the first dismissal.

3.6. In contrast, the arguments on the second dismissal were wholly unreasonable or had no reasonable prospect of success. Had they not been pursued, the case would have taken at least one day less to hear and preparatory work would have been less. Collingwood Legal say the entire costs exceed £20000, which does not seem excessive, but I have no detailed breakdown. I would be inclined to award 30% of the total costs, which would not exceed £20000, but unless the parties agree a figure, I need more information and/or submissions to quantify my award.

Employment Judge T.M. Garnon
Judgment authorised by the Employment Judge on 27 May 2021.