



EMPLOYMENT TRIBUNALS

Claimant: Mr G F Dolby

Respondent: Stuart Plant Limited

RECORD OF A PRELIMINARY HEARING

Heard at: Norwich (CVP)

On: 8-10 February 2021

Before: Employment Judge S Moore (sitting alone)

Appearances

For the Claimant: Mr M Bloom, solicitor

For the Respondent: Mr J Ratledge, counsel

COSTS JUDGMENT

The Respondent must pay the Claimant's costs in the sum of £6,352.20

REASONS

Introduction

1. At the conclusion of this matter, in which I found the Claimant had been unfairly dismissed and made an order for compensation in the sum of £42,000, Mr Bloom made an application for costs. The basis of the application was that the response had no reasonable prospect of success and/or that the Respondent acted unreasonably in its conduct of the proceedings. That application was made by written submissions dated 12 February 2021 and the Respondent provided a written response dated 5 March 2021. Unfortunately I did not have sight of these documents until 14 April 2021.

Settlement Negotiations

2. It appears from the documentation provided that on 2 August 2019 the Respondent's solicitors made an offer of settlement in the sum of £2,500. This offer was rejected by letter of 8 August 2019 in which the Claimant's solicitors made a counter-offer in the sum of £25,000. That letter concluded, 'Although this offer is made on a without prejudice basis we reserve the right to refer to this letter in the event of any application being made to the Employment Tribunal following its liability judgment. Such an application may of course include an application for costs'. On 2 March 2020 the Respondent's solicitors increased their offer to £5,000. By letter of 9 March 2020, the Claimant's solicitors rejected that offer and repeated the counter-offer of £25,000. That letter concluded, "Although this offer is made to you on a without prejudice basis we reserve the right to refer to this letter should the issue of costs become applicable at the hearing." On 13 March 2020 the Respondent's solicitors stated on a without prejudice basis that their client would offer £10,000 to settle the matter. This approach was rejected by the Claimant. On 6 April 2020 the Respondent's solicitors made a formal offer of £10,000. This offer was rejected, although the Claimant's solicitors indicated the Claimant would take £20,000. No further offers or counter offers were made.
3. The Claimant claims £12,704 in costs, alternatively £6,764.40 if the order applies to costs incurred after 8 August 2019, alternatively £5,354.40 if the order applies to costs incurred after 9 March 2020.

No reasonable prospect of success

4. While in the Employment Tribunal an award of costs is an exception, rule 76 of the Rules of Procedure lays down the circumstances in which a tribunal must consider whether to make an award of costs. In particular rule 76(1)(b) provides that one of those circumstances is "where it considers that... any claim or response had no reasonable prospect of success."
5. In this respect the Respondent submits that notwithstanding the fact the tribunal found as a matter of fact that Mr Sayer did not offer the Claimant the vacant KAM role, as he claimed in evidence, it was not unreasonable of the Respondent to have pursued the claim since Mr Sayer's evidence might, in the event, have been preferred.
6. I reject this argument.
7. First, the issue raised by rule 76(1)(b) is whether the response had any reasonable prospect of success. As pointed out in paragraph 26 of the judgment, in its response the Respondent did not plead that the KAM role had been offered to the Claimant but rather that it did not constitute suitable alternative employment – a fact which Mr Sayer must have known to be untrue since in the hearing he readily admitted that the role did constitute suitable alternative employment.
8. Secondly, and in any event, the tribunal found as a matter of fact, that Mr Sayer did not offer the Claimant the vacant KAM role. The implication of that finding

(and associated reasons at paragraphs 20-26), at least for the purposes of this costs application, is that Mr Sayer's evidence to the tribunal was untruthful and he must have known it to be so. In these circumstances the Claimant's submissions effectively amount to an argument that the response had a reasonable prospect of success because there was a reasonable chance the Tribunal would believe Mr Sayer's untruthful evidence.

9. Thirdly, and in any event, even on the Respondent's version of events (which the tribunal rejected), the reprehensible manner in which the Claimant's employment was terminated plainly did not satisfy the requirements of a fair dismissal on grounds of redundancy, and for this reason too the response had no reasonable prospect of success.
10. It follows I consider the response had no reasonable prospect of success and accordingly that there are grounds for making a costs order against the Respondent.

Exercise of Discretion

11. I am also satisfied it is appropriate to exercise my discretion to make such an order. In this respect, the Respondent is a substantial company which has the means to meet a costs order, and it has not been submitted that it does not. Further the Respondent has been on notice since the letter from the Claimant's solicitors of 8 August 2019 that in the event his claim succeeded a costs application might be made. Indeed, in any event, regardless of the letters from the Respondent's solicitors of 8 August 2019 and 9 March 2020, since the Respondent was represented it would, or should, have appreciated the risk of a costs order in the event the claim succeeded.

Quantum of Costs

12. The Respondent submits that during cross-examination the Claimant gave evidence he applied for 4 additional roles (at a poultry farm, at a mushroom farm, at a garden centre, and as grain sampler) which he had not previously disclosed. The Respondent argues that had the Claimant disclosed this evidence in good time, it could have been taken into account as part of a settlement offer and this may have avoided the need for a hearing at all. Further, that until that additional documentation was disclosed the Respondent had reasonable prospects of seeking to argue that the Claimant had failed to mitigate his loss.
13. The evidence in respect of the Claimant's search for alternative employment is summarised in paragraphs 15-19 of the judgment. As stated in paragraph 19 thereof, the Claimant applied for the additional roles referred to above in or about March 2020, which was shortly before he did in fact obtain alternative employment in April 2020. The Respondent was aware both of the fact the Claimant had obtained alternative employment in April 2020 and of his other efforts to mitigate his loss from

November 2018 onwards (as recorded in paragraphs 15-18). In these circumstances, even if the Respondent had also known about the 4 additional unsuccessful applications the Claimant made in March 2020, I consider it highly unlikely the information would have led it to increase its settlement offer significantly or at all. Further, I do not consider the fact the Claimant made four unsuccessful applications in March 2020 reduced by any significant extent the Respondent's prospects of seeking to argue the Claimant had failed to mitigate his loss, and the Respondent cannot legitimately claim that it was reasonable to argue the Claimant had failed to mitigate his loss up until the point of that late disclosure.

14. In a separate argument the Respondent submits that the costs claimed are insufficiently particularised and also unreasonable. In this latter respect the Respondent argues that the hourly rate of the Claimant's solicitor, Mr Bloom, at £250 per hour compares to the guideline rate of £201 per hour for a Grade A fee earner in Peterborough (which is where the parties' representatives are based). It is further submitted that some of the work should have been delegated to a junior solicitor or paralegal at a Grade C rate of £146 per hour.
15. I reject the argument the costs are insufficiently particularised, I have been provided with a schedule itemising each element of cost incurred by reference to date, activity and length of time. As regards the quantum claimed, I note that Mr Bloom is the only individual identified on the schedule as incurring costs and I accept it is likely that some work could have been delegated to a more junior solicitor. I therefore take into account the fact that not all the costs claimed may have been reasonably and necessarily incurred.

Conclusion

16. Taking all of the above factors into account, I have decided it appropriate to award the Claimant 50% of his total costs claimed, namely £6,352.20. This figure has regard to the points made by the Respondent referred to above as regards the hourly rate claimed. It also makes a small adjustment for the small possibility that had the Claimant disclosed the four applications he made in March 2020 this might have led to a saving of costs. It also broadly correlates with amount of costs the Claimant incurred after 8 August 2019, which was when the Respondent was first put on notice of a potential costs claim.

Employment Judge S Moore

Date: 13/5/21

Sent to the parties on:

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For the Tribunal: