



EMPLOYMENT TRIBUNALS

Claimant: Mr D Chadwick

Respondent: Lidl (Great Britain) Ltd

COSTS JUDGMENT

The respondent's application for an order that the claimant pay all or part of the respondent's costs pursuant to rules 76(1)(a) and/or rule 76(1)(b) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 is refused.

REASONS

Relevant background

1. By a claim form presented on 19 June 2020, the claimant brought claims against the respondent for unfair dismissal and unpaid wages, following the termination of his employment by the respondent for gross misconduct on 26 March 2020.
2. The claimant challenged the decision to summarily dismiss him and alleged that the respondent had failed to consider his clean disciplinary record and 6 years' service and had failed to properly consider alternative sanctions to dismissal (including the option of giving the claimant a role that was not customer-facing and/or allowing the claimant to move into a different role), pending the outcome of the appeal against his criminal conviction. He also alleged that the decision to summarily dismiss him was inconsistent with the treatment afforded to other employees in similar circumstances.
3. The respondent defended the claimant's claims and contended that the reason was misconduct, being the fact that the claimant had been charged and convicted with a criminal offence. The respondent's position was that a full and fair investigation and process had been undertaken and that the decision to dismiss fell within the band of reasonable responses.
4. The claimant also alleged that there were monies owing to him on termination, in respect of additional hours worked. He believed that the respondent had admitted that there were hours owing in email correspondence at the relevant time.
5. The respondent's position was that the claimant was remunerated by way of an annual salary and that he was not entitled to overtime pay for or time off in lieu of additional hours worked.

6. A CVP hearing took place on 22 January 2021, attended by both parties, with the claimant representing himself and the respondent being represented by Mr Boyd (Counsel). Evidence took the form of witness statements, oral witness evidence and an agreed bundle of documents.
7. By its judgment delivered orally on 31 March 2021, the Tribunal dismissed the claimant's claim of unfair dismissal and dismissed his unauthorised deduction from wages claim.

Respondent's application

8. By letter dated 12 April 2021, the respondent made an application for an order that the claimant pay all or part of the costs incurred by the respondent in defending the claim, pursuant to rules 76(1)(a) and/or 76(1)(b) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the **Tribunal Rules**). The respondent provided a costs breakdown and Counsel's invoice, along with copies of correspondence exchanged with the claimant, marked "*without prejudice save as to costs*".
9. In the first letter (dated 13 August 2020) to the claimant warning him of its intention to pursue him for costs, the respondent stated: "*Having regard to your conviction, the publicity and your position the decision to terminate your employment was well within the band of reasonable responses*".
10. In its second costs warning letter (dated 27 October 2020), it also referred to the respondent's Disciplinary Policy, provided copies of press articles regarding the claimant's conviction and stated that: "*prior to the decision to summarily terminate your employment our client carefully considered the representations you made to include in respect of your employment record*".
11. By email dated 9 December 2020, the respondent reminded the claimant of the costs warning.
12. In each instance, the respondent urged the claimant to seek legal advice.
13. In its letter to this Tribunal dated 12 April 2021, the respondent relies on the following factors in support of its application for a costs order under rule 76(1)(b):-
 - a. the claimant's criminal conviction;
 - b. the related publicity;
 - c. his position of trust and responsibility; and
 - d. the offence and the respondent's disciplinary procedure.
14. It further highlights the following in support of its application:
 - e. the claimant's contention that he told his Area Manager of his arrest and charge, which was false;

- f. that the claimant did not dispute that he had been convicted and that this brought him into disrepute;
 - g. that his contentions that the respondent failed to consider (i) his disciplinary record (ii) alternative roles and (iii) he was treated inconsistently were without merit.
 - h. the claimant's claim for unpaid wages had no basis.
 - i. that it had placed him on a costs warning and urged him to take legal advice.
15. The parties were informed by the Tribunal that the costs application would be considered in chambers and that a decision would be made on the papers alone unless either party requested a hearing. The claimant was invited to provide comments on the application and to provide full details of his financial position (if he wished his ability to pay to be taken into account).
16. By email dated 26 May 2021, the claimant objected to the respondent's application for a cost order, stating that: *"I made the application because I believed I had been wrongly convicted and contested the decision to dismiss me on the same basis. I advised my former employers of the fact that I was appealing my conviction and requested a postponement of proceedings to await the outcome of the appeal process. This was declined"*.
17. The claimant further stated: *"I raised the action. It was not frivolous. It was raised because I was innocent of the crime"*.
18. Accompanying the email was evidence that his criminal conviction had been overturned, following an appeal hearing on 9 April 2021. The claimant also provided evidence of his means.
19. The claimant's comments were provided to the respondent, with no further comment being received from either party. Neither party requested that the costs application be dealt with by way of oral hearing.

The Law

20. The power to award costs is contained in the Tribunal Rules, which sets out the definition of costs at rule 74(1).
21. Rule 75(1) provides that a costs order includes an order that a party makes a payment to another party *"in respect of the costs that the receiving party has incurred while legally represented"*.
22. The circumstances in which a costs order may be made are set out in rule 76 and relevant to this application is rule 76(1) which provides as follows:

"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."

23. The procedure by which the costs application should be considered is set out in rule 77 and the amount which the Tribunal may award is governed by rule 78. In summary rule 78 empowers a Tribunal to make an order in respect of a specified amount not exceeding £20,000, or alternatively to order the paying party to pay the whole or specified part of the costs with the amount to be determined following a detailed assessment.

24. Rule 84 concerns ability to pay and reads as follows:

"In deciding whether to make a costs, preparation time or wasted costs order and if so in what amount, the Tribunal may have regard to the paying party's (or where a wasted costs order is made the representative's) ability to pay."

25. In determining whether to make a cost order, the Tribunal must go through a three-stage procedure (see paragraph 25 of Haydar v Pennine Acute NHS Trust UKEAT 0141/17/BA). The first stage is to decide whether the power to award costs has arisen, whether by way of unreasonable conduct or otherwise under rule 76; if so, the second stage is to decide whether to make an award, and if so the third stage is to decide how much to award. Ability to pay may be taken into account at the second and/or third stage.

26. I have taken into account the relevant case law on the costs powers, which confirms that the award of costs is the exception rather than the rule in Employment Tribunal proceedings (as acknowledged in Gee v Shell UK Limited [2003] IRLR 82) and also the Court of Appeal guidance in Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78:

"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 by the claimant in bringing and conducting the case, and in doing so to identify the conduct, what was unreasonable about it and what effects it had."

Decision

27. I must first consider, has the power to award costs arisen, whether by way of unreasonable conduct or otherwise under rule 76. It is my decision that it has not.

28. The claimant's conduct does not fall within the scope of rule 76(1)(a) of the Tribunal Rules. Nor was this a claim that had no reasonable prospects of success such that an award should be made pursuant to rule 76(1)(b). This is a decision I have reached for the reasons set out below. I have also taken account of the fact that the claimant was a litigant in person and unrepresented throughout and that

it is appropriate for a litigant in person to be judged less harshly in terms of his or her conduct than a litigant who is professionally represented.

29. This was a case in which there were facts in dispute, being facts relevant to determining the fairness of the claimant's dismissal. The claimant therefore had an arguable case and his conduct in bringing proceedings cannot be said to have been unreasonable (or to the extent asserted, vexatious, abusive, or disruptive).
30. By way of example, the claimant's position was that the respondent did not consider his clean disciplinary record and 6 years' service. The respondent's position was that it did. To make a finding on this fact, I did not take account only of the pleaded position and documentary evidence. I also had regard to the oral evidence from the relevant witnesses and their responses when challenged under cross examination. At the final hearing, I found that account had been taken by the respondent of the claimant's disciplinary record and length of service. However, had I found that the respondent had given no consideration to these matters (and on testing the evidence found that the documents and pleaded case did not truly reflect what had been considered at the relevant time), the termination of the claimant's employment may well not have satisfied the test of fairness at section 98(4) of the Employment Rights Act 1996. There was therefore an arguable case.
31. Further factual matters to be determined on a similar basis included the extent to which the respondent had considered alternative sanctions to dismissal, the possibility of waiting until the claimant's criminal appeal had taken place before reaching a decision and the extent to which the respondent had taken a consistent approach in dealing with the claimant.
32. There were also findings of fact to be made regarding the claimant's unpaid wages claim. He believed that emails provided evidence that the respondent admitted he had hours owing. The respondent's position was that there was no such evidence. This was resolved at the tribunal hearing, where it became apparent that although the respondent may have admitted that the claimant worked additional hours, this was not the same as it accepting that he was entitled to payment for such hours. The claimant acknowledged in his comments on this application that "*this was not explained away until the day of the tribunal*".
33. I have also considered the factors put forward by the respondent in support of its application, but I am satisfied that these do make this claim an exceptional one in which a cost order should be awarded: -
 - a. It is not in dispute that the claimant had been convicted of a criminal conviction. However, having a criminal conviction for conduct outside of the workplace does not, of itself, amount to gross misconduct warranting a summary dismissal. The reasonableness and fairness of such a dismissal will depend on all the circumstances of the case.
 - b. It is not in dispute that there was information in the public domain about the claimant's conviction. However, again, the reasonableness and fairness of a dismissal will depend on all the circumstances of the case.

- c. The claimant accepted that he was in a position of trust and responsibility. However, his submission was that a move to a position that was not customer-facing should have been considered and accommodated by the respondent, but that he says was not.
- d. It is not in dispute that the claimant's conduct fell within the scope of the definition of gross misconduct under the respondent's disciplinary procedure. But a dismissal for a reason listed as being gross misconduct will not always be fair.
- e. The claimant did state that he had told his Area Manager of his arrest and charge, which was false and which he corrected at the Tribunal hearing, but determination of the claim did not turn on that fact in any event.

Employment Judge Peck
16 July 2021

JUDGMENT SENT TO THE PARTIES ON
3 August 2021

FOR THE TRIBUNAL OFFICE

Notes

1. 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.