EMPLOYMENT TRIBUNALS

Claimant: Mr W McGinty

Respondent: Vistry Homes Limited

Heard at: London South (in chambers) **On:** 3 August 2021

Before: Employment Judge Leach

JUDGMENT – RESPONDENT'S APPLICATION FOR COSTS.

The respondent's application for costs is refused.

REASONS

Introduction

1. The claimant brought a claim of unfair dismissal following his dismissal from the respondent in December 2019. Complaints of wrongful dismissal and a breach of the Working Time Regulations 1998 (WTR) were also made.

2. The claimant's claims were heard over one day on 22 February 2021. All evidence and submissions were heard on that day and I reserved my judgment.

3. My written judgment was dated 3 March 2021 and sent to the parties on 24 March 2021 ("ET Judgment"). I decided that the claimant had not been unfairly or wrongfully dismissed for the reasons set out in the ET Judgment. I also decided that the respondent had not breached the WTR as alleged.

4. By email dated 21 April 2021 the respondent applied for costs. The basis of the costs application is set out below.

5. The claimant has not provided any response to the costs application although has had an opportunity to do so. I decided that I could fairly consider and reach my decision on the application on the basis of the written submissions.

Respondent's application for costs

6. The respondent applies for costs under rule 76 of the Employment Tribunal Rules of Procedure 2013 ("Rules") on the basis that (1) the claimant's claims had no reasonable prospects of success (Rule 76(1)(b) and (2) that the claimant acted vexatiously and unreasonably in bringing and continuing with his claim (Rule 76(1)(a) and that the case was "*evidently misconceived from the outset of his claim"* (paragraph 11 of the respondent's costs application).

7. The legal costs claimed are those legal costs incurred by the respondent, for the whole of the proceedings amounting to £25,465 including VAT. This includes counsel's fees for representation at the one day hearing.

8. I note the following in support of this application:-

    a. 2 letters to the claimant (22 July 2020 and 7 December 2020) in which the respondent's solicitors recommended that the claimant obtain independent advice, that he should withdraw his claim, that if he did so, no costs application would be made but if he did not do so within the time frame set, a costs application would be made.

    b. In the letter of 22 July 2020, the respondent explained why it considers the claimant's claim "to be unreasonable and/or have no reasonable prospect of success." These reasons centre on the importance of health and safety and the seriousness of the claimant's actions in falling asleep whilst operating a fork lift truck ("FLT").

    c. The letter of 7 December 2020 effectively repeated the same messages as the letter of 22 July 2020 but this time following the exchange of evidence. (I note here that in both letters, the claimant was provided with a period of just 7 days to consider the terms of the letter, seek and obtain the legal advice that both letters recommended and withdraw his claims).

d. Whilst neither of these letters referred to "vexatious conduct" the costs application itself does. Further it notes that the claimant did not provide a substantive response to either costs warning letter. It also notes evidence which came out on cross examination of the claimant that his evidence changed, particularly in relation to previous alleged misconduct incidents involving other employees that the claimant sought to compare his own circumstances to. It also refers to my findings (at paragraph 42 of the ET Judgment) about when the claimant did (and did not) raise previous misconduct incidents.

The Law

9. Unlike the general procedure in Civil Courts, costs do not "follow the event" in Employment Tribunals. Traditionally, Employment Tribunals have allowed employees to challenge the fairness of dismissals (or other matters within the jurisdiction of Employment Tribunals) without a threat of costs in the event that a claim is unsuccessful and also for employers to respond to claims, without a threat as to costs in the event that a claimant is successful.

10. The Tribunal Rules provide Tribunals with a power to award costs in the circumstances set out in those Rules.

11. The Rules which are relevant to the respondent's costs application state as follows:

> "*76. When a Costs Order or Preparation Time Order may or shall be made*
>
> *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 has no reasonable prospect of success….*
>
> *……*
>
> 77. *Procedure*
>
> *A party may apply for a Costs Order or a Preparation Time Order at any stage up to 28 days after the date on which the Judgment finally determining the proceedings in respect of that*

> *party was sent to the parties. 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.*
>
> *78. The amount of a Costs Order*
>
> (1) *A Costs Order may –*
>
> *(a) Order the paying party to pay the receiving party a specified amount not exceeding £20,000 in respect of the costs of the receiving party;*
>
> *(b) Order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of a detailed assessment carried out either by a County Court in accordance with the Civil Procedure Rules 1998 or by an Employment Judge applying the same principles."*
>
> *……..*
>
> *84. Ability to Pay*
>
> *In deciding whether to make a costs …….order and if so in what amount, the Tribunal may have regard to the paying party's….ability to pay."*

12. In relation to an application under rule 76(1)(b) (no reasonable prospect of success), this test should be considered on the basis of the information that was known or reasonably available at the start of proceedings (see paragraph 67 of the decision in Radia v Jefferies International Limited [UKEAT/007/18/JOJ] ("Radia"):

> *"Where the Tribunal is considering a costs application at the end of, or after, a trial it has to decide whether the claims 'had' no reasonable prospect of success judged on the basis of the information that was known or reasonably available at the start, and considering how at that earlier point the prospects of success in a trial that was yet to take place would have looked. But the Tribunal is making that decision at a later point in time, when it has much more information and evidence available to it, following the trial having in fact taken place. As long as it maintains its focus on the question of how things would have looked at the time when the claim began, it may and should take account of any information it has gained and evidence it has seen by virtue of having heard the case, that may properly cast light back on that question. But it*

> *should not have regard to information or evidence which would not have been available at that earlier time."*

13. Where a party seeking costs makes out one or more of the grounds for costs to be awarded, then the Tribunal must consider whether to award costs. This consideration requires the Tribunal to exercise a discretion. There is no finite list of matters that Tribunals must take into account when exercising this discretion, and the relevant importance of various factors will depend on the particular circumstances of the case. In the case of Barnsley MBC v. Yerrakalva [2011] EWCA Civ 1255 the Court of Appeal provided some guidance to Tribunals when considering costs applications:-.

> *"On matters of discretion an earlier case only stands as authority for what are or what are not the principles governing the discretion and serving only as a broad steer on the factors covered by the paramount principle of relevance. A costs decision in one case will not in most cases predetermine the outcome of a costs application in another case: the facts of the cases will be different as will be the interaction of the relevant factors with one another and the varying weight to be attached to them."*

14. In the 2012 case of AQ Limited v. Mr A J Holden [2012] UKEAT/0021/12 ("AQ Limited") the Employment Appeal Tribunal noted the following in relation to costs applications against litigants in person:-

> *32. The threshold tests in rule 40(3) are the same whether a litigant is or is not professionally represented. The application of those tests may, however, must take into account whether a litigant is professionally represented. A tribunal cannot and should not judge a litigant in person by the standards of a professional representative. Lay people are entitled to represent themselves in tribunals; and, since legal aid is not available and they will not usually recover costs if they are successful, it is inevitable that many lay people will represent themselves. 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. As Mr Davies submitted, lay people are likely to lack the objectivity and knowledge of law and practice brought by a professional legal adviser. Tribunals must bear this in mind when assessing the threshold tests in rule 40(3). Further, even if the threshold tests for an order for costs are met, the Tribunal has discretion whether to make an order. This discretion will be exercised having regard to all the circumstances. It is not irrelevant that a*

> *lay person may have brought proceedings with little or no access to specialist help and advice.*
>
> *33. This is not to say that lay people are immune from orders for costs: far from it, as the cases make clear. Some litigants in person are found to have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity.*

15. That judgment considered an Employment Tribunal's refusal to make a costs order under the previous version of the Tribunal rules (2004) which is why there is a reference to rule 40(3) rather than rule 76. However, the principles noted in the extract above in relation to litigants in person remain relevant.

16. When considering whether a claim had any reasonable prospects of success (for the purposes of Rule 76(1)(b)) it is clear that Tribunals are required to assess this objectively (see for example Hamilton-Jones v. Black EATS/0047/04). Where a claim, assessed objectively, has no reasonable prospects of success, it is irrelevant (for the purposes of rule 76(1)(b)) that the claim has been brought by a litigant in person. However, and as made clear by the AQ Limited case, the fact that the claim was brought by a litigant in person may be relevant when the tribunal goes on to consider whether to make a costs order once the threshold of 76(1)(b) has been met.

17. The respondent's application for costs is, in part, made on the basis that the claimant has engaged in vexatious conduct. In the 1974 case of ET Marler v. Robertson the National Industrial Relations Court included the following description of vexatious conduct in Tribunal litigation

> *"If an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive, he acts vexatiously, and likewise abuses the procedure."*

18. In the more recent case of AG v. Barker [2000] 1 FLR 759 (not an employment case but cited by the Court of Appeal in the case of John Scott v. Sir Bob Russell MP [2013] EWCA Civ 1432 – an appeal against a costs order made by an Employment Tribunal) Lord Bingham LCJ stated:

> *"[T]he hallmark of a vexatious proceeding is … that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant, and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process."*

19. It is not uncommon for an offer of a financial settlement to include a notification, that an application for costs will be made if the offer is rejected and the case pursued. In other jurisdictions a "Calderbank" letter can be an effective tactic, ensuring that a party rejecting a financial settlement has some confidence that he or she will recover more than was offered at a trial. It is clear that "Calderbank" letters do not lead to a successful costs application in Employment Tribunals, in the event that the party rejecting the offer does not succeed at a full Tribunal hearing. It is Rule 76 which sets out the circumstances in which costs orders may be made. However, Tribunals can take these types of letters into account in appropriate circumstances when applying Rule 76 (see for example Anderson v. Cheltenham & Gloucester plc UKEAT/0221/13).

Analysis and Conclusion

Did the claimant engage in vexatious conduct?

20. I do not find that the claimant engaged in vexatious conduct having regard to the definitions noted above. The claimant pursued a claim of unfair dismissal in circumstances when he had more than 2 years' service and which resulted in a one-day hearing before the Tribunal. The effect of those proceedings was neither disproportionate nor an abuse of process (applying Lord Bingham's definition noted above). I am satisfied that the claimant did not bring and pursue his claim out of spite or an attempt to harass (applying the earlier "Marler" definition).

Did the claim have no reasonable prospects of success?

21. Whilst I made a number of findings against the claimant, those were findings made on the basis of the evidence before me having heard and considered that evidence. My decision to dismiss the unfair dismissal claim required me to make findings of fact; for example:-

    a. The events of 27 November 2019 and whether the claimant was prevented from taking his statutory break;
    b. Whether the other concerns/complaints regarding the claimant's conduct/capability as a FLT which formed part of the initial report into the claimant's conduct on 28 November 2019 (pages 103/4 of the bundle) also formed part of the decision to dismiss;
    c. Whether, in the light of the claimant's stated regret and apology for his actions on 28 November 29019, dismissal was within the range of reasonable responses;
    d. Whether the threat of disciplinary sanctions for any sickness unsupported by a doctor's note (see para 47 of the ET judgment) had any impact on the claimant's decision to work whilst feeling tired?

22. The judgment in Radia (see para 13 above) makes clear that the no reasonable prospects test must be applied as things would have looked at the start of the case, not with the benefit of hindsight when all findings of fact have been made.

23. It is also relevant to take some account here of the fact that the respondent did not make an application for a strike out or deposit order. Prior to the final hearing and the findings of fact made, it was very unlikely that a Tribunal would have determined that the claimant had no reasonable prospects of success (the threshold applicable to a strike out application). There was however a likelihood in this case that a Tribunal would have determined that the claim had little reasonable prospects of success (the threshold applicable to an application for a deposit order) and, given the amount of costs incurred in this one day case and now being claimed from the claimant, such an application (and the costs involved in making it) would have been proportionate . The claimant's case was a pretty weak one. The misconduct was admitted and there were reasonable prospects that the respondent would show that dismissal for that admitted act of misconduct was within the range of reasonable responses. However, the claimant's case was not a hopeless one, nor was it one which had no reasonable prospects of success and that is the threshold that I need to apply when determining this costs application.

24. As I have decided that the claim had some reasonable prospects of success, it is not necessary for me to consider whether to exercise my discretion and make a costs order against the claimant and, if so, for what amount.

Employment Judge Leach
Date: 3 August 2021