EMPLOYMENT TRIBUNALS

Claimant Mr G Thomas

Respondent Berwick Academy

COSTS JUDGMENT OF THE EMPLOYMENT TRIBUNAL
Without a hearing

MADE AT NEWCASTLE ON 12 August 2021
EMPLOYMENT JUDGE GARNON

JUDGMENT

I refuse the claimant's applications for a costs and/or preparation time order

REASONS

1. The Employment Tribunal Rules of Procedure 2013 ("the Rules") include a general power subject to the Rules for a Tribunal to regulate its own procedure. Rule 2 provides their overriding objective is to deal with cases fairly and justly which includes, in so far as practicable dealing with a case in ways proportionate to the complexity or importance of the issues, avoiding delay and saving expense. Rule 60 says *Decisions made without a hearing shall be communicated in writing to the parties, identifying the Employment Judge who has made the decision.*

2. On 27 July 2021 the claimant, then acting in person, made application for Costs or a Preparation Time Order further to my liability judgment of 11 December 2020 and my remedy award on 29 June 2021.In the former I upheld claims of unfair (but not automatically so under s103A of the Employment Rights Act 1996) dismissal, wrongful dismissal, compensation for untaken annual leave and breach of contract relating to missing property. I dismissed a claim of unlawful deductions from wages. At the latter, (a) for breaches of contract, I awarded damages of £755.50 for missing property and £ 3246.50. for wrongful dismissal (b) compensation for unfair dismissal, after a 50% contributory fault reduction, a basic award of £3,429 and a compensatory award of the statutory cap of £39,398.10 (c) £3293.28 compensation for untaken annual leave. Both applications are made on the same grounds. The respondent's solicitors wrote in response to the costs application for £40,272.72 or, in the alternative, a preparation time order for £34,850. It submitted they were entirely without merit and the "threshold" (see below) nowhere close to being met. In both hearings Ms. Sally Cowen of Counsel represented the claimant and Ms Claire Millns of Counsel the respondent. My reasons for the liability judgment ran to 44 pages and for remedy to 18 pages. All the major issues were well argued on both sides and the results were close, hence the length of the reasons.

3. The Rules, so far as relevant ,include
75. *(1) A costs order is an order that a party ("the paying party") make a payment to 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*

(2) A preparation time order is an order that a party ("the paying party") make a payment to another party ("the receiving party") in respect of the receiving party's preparation time while not legally represented. "Preparation time" means time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at any final hearing.

(3) A costs order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings.

76. *(1) A Tribunal may make an-- order .., and shall consider whether to do so, where it considers..*
*(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***
(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins
(2) . A tribunal may also make such an order …where a hearing has been postponed or adjourned on the application of the party

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.*

5. The Court of Appeal and EAT have said such orders in the Employment Tribunal:

(a) 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 L.J. 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 .. and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had*."
(d) there is no rule/presumption an order is appropriate because the paying party failed to prove a central allegation of their case HCA International Ltd-v-May-Bheemul 2011 EAT
(e) even if there has been unreasonable conduct, it does not follow the paying party should pay the receiving party's entire cost of the proceedings. Yerrakalva at para. 53.

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

7. I agree with the respondent's solicitors' written submissions the way in which the claimant advanced his case necessitated a far higher degree of case management than typically required for a

litigant-in-person. I wrote at paragraph 5.20.2 of the remedy judgment "*I documented in the liability reasons efforts by Employment Judges Buchanan, Arullendran and Morris to get the claimant to focus on what may help his case. He continued to write prolix statements and produce more documents than were needed*". Several points in dispute were determined in the respondent's favour. The claimant said before me its representatives misrepresented the truth or misled the Tribunal but I found no evidence to suggest that. I recall thinking, and may have said to the claimant, solicitors must fight hard for their client and provided they do not take improper advantage of litigants in person, which I have known some occasionally to do, they cannot be criticised. Although the claimant said they did take improper steps, I found no ground for him to do so. He criticises them about disclosure and the hearing bundle being agreed. At paragraph 2.34 of the liability judgment I noted several hundred pages included in the bundle at his insistence were "*largely irrelevant*". In short, no aspect of case preparation can be interpreted as unreasonable conduct on behalf of the respondent or its solicitors.

8.The claimant's application is partly complaints about the fairness of the internal disciplinary appeal hearing in November 2018, many of which I upheld. My liability judgment also made some findings, which he is reluctant to accept, and his remedy witness statement criticised this aspect of the liability judgment. I agree his application seeks to continue his complaints but identifies no arguable basis for a costs or preparation time order.

9. Three aspects of his application show its overall lack of merit

9.1. First, he says the hearing listed for 16- 26 March 2020 was postponed on the application of the respondent. This is factually incorrect. I vividly recall, and have said in my earlier reasons, what happened at that time. There was a chance a hearing would lead to Covid 19 transmission. Paragraph 6 of EJ Aspden's order dated 19 March 2020 stated the respondent's counsel "*had been in contact with the claimant's counsel the previous night, and that they were both of the view the only way to proceed was to seek an adjournment. Therefore, we ordered that the hearing be adjourned*". **Both** parties requested the hearing was adjourned. Even if the hearing had been postponed upon the respondent's application, this would have been entirely reasonable in the circumstances. The timing of the application was plainly unavoidable in view of the chronology summarised in EJ Aspden's order. The hearing would have inevitably gone 'part-heard' in any event, as a result of the national lockdown which came into force on 23 March 2020. This would have necessitated the hearing (or the remainder thereof) being re-listed for a later date before the same judge which would have caused more delay.

9.2. Second, while it is accepted Ms Millns filed closing submissions 45 minutes after Ms Cowen, as a result of IT issues explained to Ms Cowen at the time, this caused no delay. There was a brief delay in Ms Millns joining the remedy hearing, as a result of technical issues with the CVP platform. I was entirely understanding of this, as was Ms Cowen who helped resolve the issue having had experience of the same inherent system error with CVP.

9.3. Third, the claimant became represented by David Rommer, a solicitor from the National Education Union at the remedy stage. The respondent's solicitors wrote to him on 1 February 2021 and their letter was enclosed for my reference. It is not hostile or churlish as alleged.

10. At the remedy stage the claimant sought £17,564.08 for wrongful dismissal but I ordered £3,246.50 (less than 20% of the amount claimed). The holiday pay claim was decided on an analysis of the

Working Time Regulations 1998. The defence may have succeeded entirely. The claimant sought £11,219 but was awarded £3,293.28 (less than 30%).

11. A party may still conduct the proceedings or part vexatiously**,** abusively, disruptively or otherwise unreasonably but it is hard to imagine a situation where any claim **or** response *had no reasonable prospect of success,* if it in fact succeeded. Even on matters in which I found in the claimant's favour, it cannot be said the response had " no reasonable prospects of success". I see nothing to support an allegation the respondent conducted and or part of the case vexatiously**,** abusively, disruptively.

12. A contributory fault deduction of 50% was applied on the basis the claimant was "*equally to blame for his dismissal*". I could have found his actions amounted to gross misconduct, though I did not. The breach of contract claim relating to lost possessions succeeded on me implying a term into his contract, despite an express term in the incorporated national collective agreement which I described as "*cryptic*". The claimant brought some claims which were unsuccessful and had little reasonable prospect of success. His claim of automatic unfair dismissal was rejected as were his claims (i) he should have received full pay throughout school holiday periods during his sickness absence (ii) was entitled to 6 months' full pay whilst his grievance was investigated (iii) was entitled to 6 months' full sick pay under paragraph 9.1 of Section 4 of the Burgundy Book.

13. I am sure this application should be decided on written representations without a hearing because nothing the claimant could add at a hearing would lead to a different result. I can see no basis upon which the "threshold" for making an order is reached. Even if I could, bearing in mind Yerrakalva "*The vital point in exercising the discretion to order costs is to look at **the whole picture** of what happened in the case",* I would not exercise my discretion to make such order. Neither Ms Cowen nor Mr Rommer have put their names to this application and I can see why they would not. This application lacks any arguable merit and, though I have read it fully, appears to be the claimant continuing to say he was entirely in the right and the respondent entirely in the wrong in every respect. His success was due to Ms Cowen distilling his good points from his wide ranging attack on everything done to him.

EMPLOYMENT JUDGE T M GARNON

JUDGMENT AUTHORISED BY THE EMPLOYMENT JUDGE ON 12 AUGUST 2021