EMPLOYMENT TRIBUNALS

Claimant:	**Mr R Smith**
Respondent:	**8D Closures Limited**
Heard at:	**Worcester Civil Justice Centre**
On:	**11 March 2020 and in chambers on 8 October 2021**
Before:	**Employment Judge Flood**
Appearances	
For the Claimant:	**In person**
For the Respondent:	**Mr Smith (Counsel)**

JUDGMENT ON COSTS APPLICATION

The respondent's application for costs is dismissed.

REASONS

Background

1. The claimant was employed from 7 February 2018 until 12 May 2019 as an Assembly Operative. His claim was presented on 6 May 2019 and complained about his dismissal claiming that the respondent "*did not follow their own staff handbook and procedures. They did not give me the opportunity to improve as it states in their handbook."* The response was presented to the Tribunal on 24 June 2019 and denied all claims and pointing out that the claimant had insufficient service to claim unfair dismissal and had suffered no loss having been paid in lieu of a month's notice and having secured employment straight away at a higher rate of pay.
2. The matter was listed for final hearing and came before me. Following some initial discussion on the issues at the outset of the hearing, the parties indicated that they wished to have some time to discuss resolving the claim. After a short adjournment, the parties confirmed that they had reached an agreement which was that the respondent having conceded that it breached the claimant's contract of employment by failing to follow the contractual disciplinary procedure, the claimant withdrew his claim. The claim was dismissed upon withdrawal.

3. Counsel for the respondent then made an application for costs under rule 76 (1) (a) of the Employment Tribunals (Rules of Procedure) 2013 ("ET Rules"). The respondent is seeking recovery of legal costs incurred which amounted to £2,080 plus VAT but would not seek further recovery of any additional costs which it says have in fact been incurred, including counsel's fees.

4. The claimant is a litigant in person. He responded to the application for costs at the hearing but had not provided any information about his means/ability to pay. I heard submissions from both parties but decided to give the claimant the opportunity to provide information on means within 21 days (and the respondent to provide a further breakdown of the costs claimed within 14 days). I also decided that it is in the interests of justice for both parties to be given an opportunity to make submissions on the information provided within a further 7 days. The matter was then to be listed for a reserved decision to be made on the papers with a decision to be confirmed in writing after.

5. The claimant sent further information to the Tribunal on 29 March and 1 April 2020. The respondent replied by an e mail on 15 April 2020 challenging some of the information provided by the claimant and making submissions on ability to pay. This was followed up by a further e mail on 5 August 2020 enquiring as to the progress of the costs application. The claimant then forwarded further correspondence apparently received by him from the respondent in November 2020. Regretfully, this correspondence was not dealt with at the time it was sent by the Tribunal administration as at this time it was under severe strain as a result of staffing issues caused by the Covid 19 Pandemic.

6. The correspondence was retrieved in September 2021 and at this time was referred and was listed for a reserved decision in chambers as per the original Tribunal case management orders. It came before me today.

The Issues

7. The issues which fell to be determined by the Tribunal are:

   7.1. Has the claimant acted "otherwise unreasonably" in the bringing of the proceedings or the way they have been conducted (within rule 76 (1) (a) ET Rules)?

   7.2. Should, in the Tribunal's discretion, a costs order be made against the claimant?

   7.3. If so, how much should be awarded?

The relevant law

8. References to rules below are to rules under **Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.**

9. Rule 76 provides

(1) 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.

(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

10. The relevant part of rule 78 provides:

"*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;…."

11. Rule 84 provides:

"*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."*

12. A Tribunal must ask whether a party's conduct falls within rule 76(1)(a) or (b) as applicable. If so, the Tribunal must then go onto ask whether it is appropriate to exercise the discretion in favour of awarding costs against that party. It is only when these two stages have been completed that the tribunal may proceed to the third stage, which is to consider the amount of any award payable

13. **Gee v Shell UK Limited [2003] IRLR 82.** The Court of Appeal confirmed that that costs are the exception rather than the rule and that costs do not follow the event in Employment Tribunals.

14. **McPherson v BNP Paribas [2004] ICR 1398**. In determining whether to make an order under the ground of unreasonable conduct, a Tribunal should take into account the "nature, gravity and effect" of a party's unreasonable conduct.

15. **Barnsley Metropolitan Borough Council v Yerrakalva [2012] ICR 420** - "*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.*"

16. **Oliver Salinas v Bear Stearns International Holdings UKEAT/0596/04/ DM.** The question of whether a costs order was exceptional or unusual was not significant, so long as the proper statutory tests were applied.

17. **Vaughan v London Borough of Lewisham & Ors UKEAT/0533/12/SM –** it was not wrong in principle to make a costs order even though no deposit order had been made and the respondents had made a substantial offer of settlement (on an avowedly "commercial" basis). Nor was it wrong in principle to make an award which the claimant could not in her present financial circumstances afford to pay

where the Tribunal had formed the view that she might be able to meet it in due course.

Conclusion

18. Counsel for the respondent referred me to the letter sent on 19 September 2021 which was a costs warning sent to the claimant. He submitted that this contained an offer by the respondent in September that it would admit that it had breached the claimant's contract of employment by not following its procedures. The claimant had admitted that he had not suffered any financial loss as a result of these breaches and the respondent therefore submitted that the claimant having the admission he sought was thereafter acting unreasonably in continuing to pursue his claim. It was submitted that the claimant as an intelligent and articulate man well understood the position but still pursued a complaint and so behaved unreasonably. The respondent asked me to make an order for costs in the sum of £2,080 plus VAT, even though more costs than this had been incurred to date by the respondent.

19. The claimant denied that he had behaved in an unreasonable manner and claimed that he was just seeking the truth from the respondent about his dismissal. He said that he was suffering from mental health difficulties. He explained that his motivation was not about money but that he wanted justice and fairness.

20. The initial question I must consider is whether the claimant *acted "otherwise unreasonably"* in either the bringing of the proceedings or the way that the proceedings have been conducted under rule 76(1)(a). The claimant was clearly aggrieved at the way his dismissal was carried out as evidenced by the correspondence submitted at the time including his detailed appeal against dismissal. The respondent dealt with his appeal and informed him of the outcome in writing. However it is clear that the claimant still felt that the respondent had not followed its own procedures in the way it had dismissed him and so he submitted a breach of contract complaint. The respondent sensibly made attempts to resolve matters and as part of this offered to make a concession to the claimant that there had indeed been a breach of contract in that it had not followed its disciplinary procedures. The respondent's position remained that as the claimant had suffered no loss, no damages would be awarded should the matter get to final hearing. It is clear to me that the claimant did not appreciate perhaps how a Tribunal must approach a complaint of breach of contract and the losses that flow from that and that it must take into account any mitigation of loss. His schedule of loss submitted prior to the hearing makes reference to claiming 3 month's salary and the annual leave he would have accrued during that period. He acknowledges the payment in lieu of notice paid by the respondent but does not acknowledge monies earned elsewhere. I appreciate that the respondent's solicitors made attempts to explain the position to the claimant in correspondence but were not successful in doing this. Perhaps had the claimant been able to seek legal advice himself during this period the matter may have been resolved much earlier.

21. Following discussions at the beginning of the hearing and outside the hearing with counsel for the respondent, the claimant now appears to understand the position he is in. He did at this point withdraw the claim before the Tribunal proceeded to hear evidence, deliberate and issue a judgment. I entirely

understand the respondent's frustrations that it had taken until the hearing itself for the claimant to reach this position. By this time of course the respondent had already incurred significant legal costs preparing for the hearing. However despite this, I cannot conclude that the claimant's refusal to discontinue his claim amounted to unreasonable conduct. The claimant is a litigant in person. He felt he had a good claim for breach of contract on the basis of a breach of disciplinary policies and procedures. The respondent acknowledged in without correspondence that it had in fact breached contractual disciplinary procedures so the only issue in dispute was the appropriate compensation for such a breach. This is not an entirely straightforward issue for a lay person to appreciate. Concepts such as causation, remoteness of loss and mitigation are not necessarily familiar to all and the claimant may not have appreciated until today (despite communications from the respondent's solicitors) that an admitted breach of contract does not always result in the payment of compensation. In these circumstances, I do not consider that the claimant was unreasonable in not withdrawing his claim earlier and deciding to wait until the matter came before the Tribunal. This does not appear to me to be a case of the claimant simply wanting "his day in court" at all costs. Rather perhaps not appreciating what the Tribunal could award him by way of damages, he decided to wait for the Tribunal to deliberate on the matter, rather than simply accept what he had been informed by the respondent. It is to his credit that he was prepared to listen to the information discussed at the outset of the hearing today and during discussions with the respondent's counsel agree to withdraw which saved the respondent's witnesses having to give evidence. It is unfortunate this did not occur earlier, but the conduct does not meet the threshold of being unreasonable when considering the nature, gravity and effect of his conduct as a whole.

22. Having found that the claimant's conduct did not fall within rule 76 (1) (a), it is not necessary to go onto ask whether it is appropriate to exercise the discretion in favour of awarding costs against him or how much should be awarded. The application for costs is dismissed.

Employment Judge Flood

27 October 2021