EMPLOYMENT TRIBUNALS

Claimant: **Diego Burzotta**

Respondent: **Ristorante Cucina Ltd**

Heard at: **London East Hearing Centre On: 13 December 2021**

Before: **Employment Judge S Knight**

JUDGMENT ON COSTS

1. The Respondent is ordered to pay the Claimant £4,486.29 in respect of the Claimant's costs.

REASONS

Introduction

The parties

1. Between 1 December 2013 and 16 August 2020 the Claimant was employed by the Respondent as a Head Chef. The Respondent operates an Italian restaurant.

The claim and the costs application

2. The Claimant claimed for unfair dismissal.

3. On 5 May 2021 the Tribunal found that the Claimant had been unfairly dismissed. The Tribunal gave an oral *ex tempore* decision on liability, which rejected the Respondent's evidence and accepted the Claimant's evidence. The Tribunal reserved, and later provided in writing, its reasons for remedy only.

4. The Claimant now seeks his costs of the proceedings.

5. The Claimant's solicitors acted under a Conditional Fee Agreement ("**the CFA**"). Under the CFA, they could recover from the Claimant no more than 35% of the money awarded to the Claimant by the Tribunal. The Claimant's barrister's fees were disbursements in addition to this. They were payable by the Claimant.

6. The total costs claimed of £4,726.29 (inclusive of VAT at 20%) are as follows:

   (1) £2,926.29 to the solicitors (calculated as 35% of the total paid by the Respondent following the settlement of an application for reconsideration of the judgment on remedy);

   (2) £1,200 to counsel for the hearing;

   (3) £360 to counsel for the application for costs; and

   (4) £240 to counsel for the application for reconsideration.

7. The Claimant also applied for witness expenses of £88.16.

Procedure

8. The parties consented to this application being dealt with on the papers.

Documents before the Tribunal

9. The Tribunal retained the papers from the liability and remedy hearing. The Tribunal was sent a bundle of documents by the Claimant. The Tribunal was sent written submissions by both parties.

Chronology

10. The chronology from the date of the hearing onwards has been as follows:

5 May 2021	The Tribunal gave an *ex tempore* oral judgment and reasons in relation to liability, and oral judgment in relation to remedy. The Tribunal reserved its reasons in relation to remedy.
20 May 2021	The Tribunal's judgment and its written reasons in relation to remedy were sent to the parties.
27 May 2021	The Claimant's representatives applied for reconsideration of the judgment in relation to remedy on the basis that the calculation in the written reasons in respect of remedy showed that the total award was incorrect. The error had arisen as a result, in part, of errors contained in the Claimant's Schedule of Loss.

16 June 2021	*42 days since the hearing.*
17 June 2021	*28 days since the Tribunal's judgment and its written reasons in relation to remedy were sent to the parties.* The Claimant made an application for costs. The Claimant requested that the application for costs was not decided until after the application for reconsideration was decided. This was because, due to the CFA, if the application for reconsideration succeeded, then the amount of costs applied for would be higher.
24 June 2021	The Tribunal wrote to the parties regarding the application for reconsideration. The Tribunal gave the Respondent until 29 June 2021 to object to the application for reconsideration. The Tribunal directed both parties by 6 July 2021 to inform it whether an oral hearing was required.
1 July 2021	*42 days since the Tribunal's judgment and reasons on remedy were sent to the parties.*
6 July 2021	The Claimant's representatives filed and served a response to the Tribunal's direction regarding whether an oral hearing of the application for reconsideration was required.
15 July 2021	The Claimant's representatives wrote to the Tribunal stating that the application for reconsideration appeared not to be challenged as the Respondent had paid the total amount that the Claimant sought in the application for reconsideration.
27 July 2021	The Tribunal wrote to the parties to set out its view on the reconsideration application. The Tribunal directed the Respondent to respond by 13 August 2021, and the parties to respond by 18 August 2021 about whether an oral hearing of the application for reconsideration was still necessary.
16 August 2021	The Claimant responded to the Tribunal's correspondence

	regarding whether an oral hearing of the application for reconsideration was necessary, to state that the application for reconsideration was withdrawn.
9 October 2021	The Tribunal sent to the Respondent its directions in relation to costs, requiring a response by 25 October 2021.
24 October 2021	The Respondent filed and served written submissions on costs.

Findings of fact

11. The central issue in the case was whether the Claimant resigned or was dismissed. The Tribunal determined that the Claimant was dismissed.

12. The relevant factual findings were set out in the *ex tempore* oral judgment. They can be summarised as follows:

    (1) The Respondent's director's evidence in respect of holiday pay and the Respondent's leave year was "*implausible and unsupported by any documentary evidence*".

    (2) Another restaurant had been seeking to poach the Claimant and the Claimant had constantly demurred politely. The evidence to the contrary, to the effect that the Claimant sought new employment with another restaurant before he left the Respondent, was "*unconvincing and exaggerated*".

    (3) The primary reason for the dismissal was that the Respondent's director was angry at the Claimant, that anger being precipitated by the Claimant's initiation of a conversation about tips combined with a previous incident with another member of staff.

    (4) The Respondent's employee's claim to have heard the Claimant resigning was "*plainly untrue*", since the Claimant and the Respondent's director were speaking in Sicilian Italian and not in English, and the witness does not speak Sicilian Italian. He did not overhear the conversation as claimed and his evidence was more likely than not "*concocted*".

    (5) The Respondent's director's evidence in respect of the correspondence between the parties on 23 August 2020 was, in the round, "*plainly incredible*" and false. The Respondent's director was attempting to create a fake paper trail to suggest that the Claimant had resigned, knowing that the truth was that he had dismissed the Claimant.

    (6) The Respondent did receive the Claimant's grievance of 14 September 2020 and the Respondent's director's claim to the contrary was false.

Relevant law

Procedure

13. The Employment Tribunal Procedure Rules provide as follows in relation to the procedure for making a costs application:

> "77. 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."

14. The Employment Tribunal Procedure Rules provide as follows in relation to the time when a deadline is to be complied with:

> "4.—(1) Unless otherwise specified by the Tribunal, an act required by these Rules, a practice direction or an order of a Tribunal to be done on or by a particular day may be done at any time before midnight on that day. If there is an issue as to whether the act has been done by that time, the party claiming to have done it shall prove compliance."

Power to make an order for costs

15. The Tribunal has the power to order the payment of costs and witness expenses. The Employment Tribunal Procedure Rules rule 75 sets out the nature of these orders:

> "75.—(1) A costs order is an order that a party ("the paying party") make a payment to—
>
> > (a) another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative; […] or
> >
> > (c) another party or a witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual's attendance as a witness at the Tribunal."

16. The Employment Tribunal Procedure Rules rule 76 sets out when a costs order or a preparation time order may be made:

> "76.—(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;[…]

(5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing."

17. The test for imposition of a costs order under rule 76(1) is a two-stage test: first, a tribunal must ask itself whether a party's conduct falls within rule 76(1); if so, it must go on to ask itself whether it is appropriate to exercise its discretion in favour of awarding costs against that party.

18. The decision to make a costs order is the exception rather than the rule. This was made clear in *Yerrakalva v Barnsley Metropolitan Borough Council* [2011] EWCA Civ 1255; [2012] ICR 420 (3 November 2011) by Mummery LJ giving the lead judgment in the Court of Appeal at ¶ 7 as follows:

"The employment tribunal's power to order costs is more sparingly exercised and is more circumscribed by the employment tribunal's rules than that of the ordinary courts. There the general rule is that costs follow the event and the unsuccessful litigant normally has to foot the legal bill for the litigation. In the employment tribunal costs orders are the exception rather than the rule. In most cases the employment tribunal does not make any order for costs."

Vexatious, abusive, disruptive, or unreasonable conduct of proceedings

19. In *Scott v Russell* [2013] EWCA Civ 1432; [2014] 1 Costs L.O. 95 (12 November 2013) Beatson LJ, giving the judgment of the Court of Appeal, cited with approval the definition of "vexatious" given by Lord Bingham in *Attorney General v Barker* [2000] 1 F.L.R. 759 (16 February 2000). That definition is as follows:

"The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding 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."

20. According to the EAT in *Dyer v Secretary of State for Employment* EAT 183/83 (20 August 1983), "unreasonable" has its ordinary English meaning and is not to be interpreted as if it means something similar to "vexatious". It will often be the case, however, that a tribunal will find a party's conduct to be both vexatious and unreasonable.

21. The Court of Appeal in *Yerrakalva* at ¶ 41 commented that it was important not to lose sight of the totality of the circumstances.

22. A party's lies may be the basis of an allegation of vexatious or unreasonable conduct. In this regard, in the case of *Arrowsmith v Nottingham Trent University* [2011] EWCA Civ 797; [2012] I.C.R. 159 (10 June 2011) the Court of Appeal

approved of the following passage in *HCA International Ltd v May-Bheemul* EAT 0477/10 (23 March 2011):

> "39. Thus, a lie on its own will not necessarily be sufficient to found an award of costs. It will always be necessary for the tribunal to examine the context and to look at the nature, gravity and effect of the lie in determining the unreasonableness of the alleged conduct.
>
> "40. As this last case makes abundantly clear, no point of principle of general application is established in any of the cases being relied upon by Mr Beyzade [and they included the Daleside case]. In our judgment the employment tribunal's reasoning in the present case, at para 12 of their judgment, is unimpeachable. Where, in some cases, a central allegation is found to be a lie, that may support an application for costs, but it does not mean that, on every occasion that a claimant fails to establish a central plank of the claim, an award of costs must follow."

23. In *Kapoor v Governing Body of Barnhill Community High School* EAT 0352/13 (12 December 2013) the Employment Appeal Tribunal confirmed that costs should not automatically be awarded simply because a party has knowingly given false evidence.

Absence of reasonable prospects of success

24. In *Radia v Jefferies International Ltd* [2020] I.R.L.R. 431 (21 February 2020) the EAT gave guidance on how tribunals should approach costs applications under rule 76(1)(b). It emphasised that the test is whether the claim had no reasonable prospect of success, judged on the basis of the information that was known or reasonably available at the start. Thus, the tribunal must consider how, at that earlier point, the prospects of success in a trial that was yet to take place would have looked. In doing so, it 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. The EAT went on to clarify that the mere existence of factual disputes in the case, which could only be resolved by hearing evidence and finding facts, does not necessarily mean that the tribunal cannot properly conclude that the claim had no reasonable prospects from the outset, or that the party could or should have appreciated this from the outset. That depends on what they knew, or ought to have known, were the true facts, and what view they could reasonably have taken of the prospects of the claim in light of those facts.

25. In *Opalkova v Acquire Care Ltd* EAT 0056/21 (1 September 2021) the EAT considered the test for determining whether an employer's response has no reasonable prospects of success. There are 3 key questions:

> "First, objectively analysed when the response was submitted did it have no reasonable prospects of success; or alternatively at some later stage as more evidence became available was a stage reached at which the response ceased to have reasonable prospects of success? Second, at the stage that the response had no reasonable prospects of success did the

respondent know that was the case? Third, if not, should the respondent have known that the response had no reasonable prospect of success?"

Costs are compensatory

26. As Pill LJ noted when giving the lead judgment in the Court of Appeal case of *Lodwick v Southwark London Borough Council* 2004 ICR 884 (18 March 2004), it remains a fundamental principle that the purpose of an award of costs is to compensate the party in whose favour the order is made, and not to punish the paying party.

27. Given that costs are compensatory, it is necessary to examine what loss has been caused to the receiving party. In this regard in the case of *Yerrakalva* at ¶ 54 Mummery LJ held that costs should be limited to those "reasonably and necessarily incurred".

Ability to pay is a relevant factor for the Tribunal to consider

28. The Employment Tribunal Procedure Rules rule 84 provides as follows in relation to ability to pay:

"84. 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 […] ability to pay."

29. A tribunal is not obliged by rule 84 to have regard to ability to pay — it is merely permitted to do so. That said, in *Benjamin v Interlacing Ribbon Ltd* EAT 0363/05 (1 November 2005) the EAT held that where a tribunal has been asked to consider a party's means, it should state in its reasons whether it has in fact done so and, if it has, how this has been done.

30. As noted by the EAT in *Howman v Queen Elizabeth Hospital Kings Lynn* EAT 0509/12 (30 April 2013) at ¶ 13, any tribunal when having regard to a party's ability to pay needs to balance that factor against the need to compensate the other party who has unreasonably been put to expense. The former does not necessarily trump the latter, but it may do so.

Conclusions

Was the application for costs made in time?

31. The Respondent says that the Claimant's application for costs is late. The Respondent says that the application for costs "*must be made within 28 days of Judgment*". The Respondent therefore says that "*the application in this matter is clearly out of time and prejudicial to the rights of the Respondent. To this end it is submitted that the Claimant's application be struck out.*"

32. Contrary to the Respondent's case, rule 77 requires the application to be made "*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***". As is clear from the chronology above, the Claimant's solicitors made the application for costs on the 28th day from the date on which the Judgment was sent to the parties. As

such, they made the application on the last day for doing so. The application is in time.

Does the Respondent's conduct fall within Rule 76(1)?

Whether the Respondent has acted vexatiously or otherwise unreasonably in its conduct of the proceedings (rule 76(1)(a))

33. The Claimant says that the Respondent's entire response to the claim was based on a false premise: that the Claimant resigned. The Tribunal rejected that premise. The Tribunal found that the Respondent knew that the premise was untrue. It was therefore unreasonable and vexatious to take this case to trial. Further, the Respondent's conduct of the case involved accusing the Claimant of dishonesty when it was itself putting false evidence before the Tribunal.

34. The Respondent has characterised the Claimant's application for costs as being based on the contention "*that where a Respondent is unsuccessful at trial, they essentially had a Defence which had no reasonable prospect of success, and that their actions in defending were vexatious and unreasonable*."

35. However, that is not the Claimant's case in relation to costs. The Claimant's case is that the Respondent's response had no reasonable prospect of success *because the Respondent knew that it was based on untrue evidence*.

36. I agree with the Claimant about whether the actions of the Respondent were unreasonable. The Respondent has always known that if the truth was known, then it could not win. In terms of liability, there was a central issue in the case: whether the Claimant had resigned or had been dismissed. On this central issue, the Respondent knew that their response was untruthful from the outset.

37. In this light, the Respondent's case had no basis in law, and its effect has been to subject the Claimant to the inconvenience, harassment, and expense of litigating proceedings. It was both unreasonable and vexatious to conduct proceedings on this false premise and to make accusations that the evidence of the Claimant was untrue.

Whether there were no reasonable prospects of success (rule 76(1)(b))

38. The Claimant says that the Respondent knew that its response was untruthful from the outset, and therefore that it had no reasonable prospects of success.

39. The Respondent says that this case was fully litigated, and that the Respondent complied with all directions. At no stage did the Claimant make an application for strike out. The case was well-prepared by the Respondent.

40. The Respondent is correct in each of these submissions. However, good conduct of litigation is what is expected of the parties. It does not prohibit the making of a costs order on some other ground. Further, the fact that a strike out order was not applied for or granted is of limited relevance.

41. When the response was submitted by the Respondent, objectively analysed, it did not have any reasonable prospects of success. The Respondent knew that

this was the case, given that it knew it was calling untrue evidence in order to substantiate its defence. The mere existence of factual disputes in the case, which could only be resolved by hearing evidence and finding facts, does not necessarily mean that the tribunal cannot properly conclude that the response had no reasonable prospects from the outset. The Respondent knew what view they could reasonably have taken of the prospects of the claim in light of the true facts of the case. The only view that could have been reached is that the response had no reasonable prospects of success.

Should the Tribunal exercise its discretion to make an order for costs?

42. The hearing was conducted with efficiency and a high degree of competency by counsel for both sides. No point is taken, or could conceivably be taken, about the way that the hearing was dealt with by counsel.

43. Equally, the Respondent has had the benefit of competent representation by solicitors.

44. The fault in this case lies entirely with the Respondent.

45. I bear in mind that it is exceptional to make a costs order in the Tribunal.

46. However, the actions of the Respondent in this case, in basing its entire response on factual contentions it knew to be false, were egregiously bad. This is a case where the ordinary position that costs do not follow the event can and should be departed from.

47. The Respondent challenges the assumptions underlying the Claimant's assertion that the Respondent is able to pay any costs awarded. However, the Respondent has not said that they would be unable to pay part or all of any costs order. The Respondent has provided no evidence that they would be unable to pay part or all of any costs order. They have paid the original award for unfair dismissal and the increased amount that was agreed in response to the application for reconsideration. The Respondent has paid its representatives throughout the case. There is no evidence before the Tribunal on which it could be concluded that the Respondent now cannot pay any costs award.

48. In any event given the seriousness of the Respondent's conduct, and the fact that the Claimant is a relatively low-earning individual who has unreasonably been put to expense, it would still be appropriate to make an order for costs.

49. As such, an order for costs will be made.

What costs should be awarded?

50. The Claimant's counsel's fee for the hearing was well below a reasonable level. That fee was a disbursement which the Claimant has paid for. I award those costs in full.

51. The Claimant's counsel's fee in respect of the application for costs follows from the incurring of the original costs and the Claimant's attempt to recover them. The

fee is low. That fee was a disbursement which the Claimant has paid for. I award those costs in full.

52. The Claimant's counsel's fee in respect of the application for reconsideration follows from errors made in the Schedule of Loss. It is not attributable to the Respondent. I make no award for those costs.

53. The Claimant's solicitors billed for 31.65 hours' work at £217 per hour plus VAT.

54. The Claimant's Schedule of Loss contained errors. This led to the requirement to seek reconsideration. Work which contains errors is not necessary and the Respondent should not be responsible for paying for it. I would deduct 2 hours to account for this. However, this would not alter the total fee that the Claimant is due to pay to his solicitors, which (as a result of the CFA) is capped at 35% of his damages. £2,926.29 is the total amount owed to the Claimant's solicitors, calculated as 35% of the total paid by the Respondent following the settlement of the application for reconsideration. That relates to 31.65 hours' work (or 29.65 hours once the 2 hours for the Schedule of Loss is taken off). The fee is again low. I award those costs in full.

55. The Claimant attended the Tribunal hearing for 1 day, during the day. I have been provided with no evidence as to whether the Claimant was unable to attend work as a result (for example, attending work after the court day finished). In any event, I would not order the Respondent to pay the Claimant's costs of attending as a witness, these being £88.16. I make no award for those costs.

56. As such, I order the Respondent to pay a total of £4,486.29 inclusive of VAT composed of:

    (1) £2,926.29 in respect of solicitors' fees

    (2) £1,200 in respect of counsel's fee for the hearing; and

    (3) £360 in respect of counsel's fee for the application for costs.

Employment Judge Stephen Knight

Date: 13 December 2021