



# EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant**

**Respondents**

Mr G L Ford

**AND** Alfresco Concepts (UK) Limited (1)  
and David Ezrine (2)

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**HELD BY VIDEO**  
(Panel only – based on papers)

**ON**

16 December 2021

**EMPLOYMENT JUDGE GRAY**

**MEMBERS**

**MRS C DATE**  
**MR J EVANS**

## RESPONDENTS APPLICATION FOR COSTS

The unanimous judgment of the tribunal is that the Respondents' application for costs is refused.

## REASONS

1. By reserved unanimous judgment of the tribunal dated 4 July 2021, which was sent to the parties on 9 July 2021, it found:
  - a. The complaints of unfair dismissal, detriments for making a protected disclosure, automatic unfair dismissal (section 103A Employment

Rights Act 1996) harassment related to nationality, and victimisation, fail and are dismissed.

- b. The complaint of wrongful dismissal (notice pay) succeeds.
2. The Respondents then made an application for their costs, by letter dated 5 August 2021, against the Claimant under rules 75 and 76(1) of the Employment Tribunals Rules of Procedure 2013 (“the Rules”) and an application for wasted costs against the Claimant’s representative, Anita Rai, under rules 80(1)(a)-(b) of the Rules.
3. Under rule 77 of the Rules a party may apply for a costs 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. The Respondents’ application was therefore received in time.
4. Further, 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. By letter dated 20 August 2021 the Claimant resisted the application.
6. The parties agreed for the application to be determined on the papers.

#### The Application for Costs

7. The Respondents submit ... “that the Claimant and/or his representative Anita Rai who is a partner in the employment department at JMW Solicitors LLP, has acted vexatiously, abusively, disruptively or otherwise unreasonably in bringing the proceedings. We also consider that the Claimant and Anita Rai were aware that the claims had no reasonable prospect of success.”.
8. The submissions refer and rely upon a “Without Prejudice Save as to Costs” letter the Respondents’ representative sent to Ms Rai on 28<sup>th</sup> January 2020. A copy was provided as part of this application. This asserts that the Claimant’s case did not have reasonable prospects of success.
9. The Respondents’ application then refers to how that lack of prospects makes the behaviour of the Claimant and his representative vexatious, abusive, disruptive or otherwise unreasonable, for example by reference to the way the without prejudice settlement process was conducted.
10. The Claimant resists the application, by asserting it could not be said that the claim did not have reasonable prospects of success. As also highlighted

by the Claimant's submissions ... "The Respondents did not, at any point, apply for strike out of the Claimant's claims suggesting that they did not think at the start of the claim (when reasonableness must be assessed) that the claims had no reasonable prospects of success."

11. The Claimant and his representative's behaviour is then explained with that premise (i.e. the claim did have reasonable prospects of success), as well as with reference to the Claimant's state of health early in the potential litigation.

The Rules and Relevant Law:

12. We were referred to rules 74 to 84 of the Rules by the parties, and certain case law as follows:

13. By the Respondents in particular:

14. Rule 76(1) of the ET Rules provides that a Tribunal may make a costs order, and shall consider whether to do so, where it considers that:

- a. (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. (b) Any claim or response had no reasonable prospect of success.

15. Rule 80(1) of the ET Rules provides that a Tribunal may make a wasted costs order against a representative in favour of any party ("the receiving party") where that party has incurred costs:

- a. (a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative; or
- b. (b) which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay

16. By the Claimant in particular:

17. That under Rule 76, there is a two-stage test: the Tribunal must consider (a) whether 76(1)(a) or (b) applies and, if so (b) whether to exercise its discretion to award costs.

18. That an order for costs is the exception, and not the rule.

19. With reference to **Solomon v University of Hertfordshire and Ors [2019] UKEAT**, we are referred to paragraph 107 when assessing whether a Claimant's behaviour meets the high threshold of being "unreasonable":

*"when it is dealing with the question whether the conduct of litigation is unreasonable, to keep in mind that in many (though not all) circumstances there may be more than one reasonable course to take. The question for the ET is whether the course taken was reasonable; the ET must be careful not to substitute its own view but rather to review the decision taken by the litigant. Even where a party is legally represented there may be more than one reasonable course...."*

20. Further, that when the Tribunal assesses whether what the Claimant did amounts to unreasonable conduct, the Tribunal must place themselves in the shoes of the Claimant, and then apply the range of reasonable responses test (see Soloman and Vaughan).
21. The guidance in **Radia v Jefferies International Limited UKEAT/0007/18/JOJ** at paragraphs 65 to 69, and are reminded that whether there were reasonable prospects should be assessed at the point at which the claim was begun.
22. In respect of an application for wasted costs, the Tribunal must adopt the three-stage test (**Ridehalgh v Horsefield [1994] Ch 205**). Namely:
- a. Has the representative acted improperly, unreasonably or negligently?
  - b. If so, has the conduct caused the applicant to incur unnecessary costs?
  - c. In all the circumstances is it just to order the representative to compensate the applicant for the relevant part of the costs in whole or in part?
23. As to the meaning of "unreasonable" in this context it was considered in Ridehalgh:

*"Unreasonable" also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an*

*unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable."*

The Decision

24. We do not find that the claim had no reasonable prospect of success. We observe that this was a matter that did require a consideration of all the evidence at full hearing. Oral evidence was required to make clear the reason for the dismissal and the process (as detailed in our unanimous judgment). Further, the Claimant did evidence protected disclosures and protected acts that meant certain of the alleged detriments and dismissal needed the Respondents' evidence to be put to proof. As to the complaint of harassment certain parts of the conduct complained of were proven on the balance or probability. The complaint of wrongful dismissal did succeed.
25. With this finding we do not find that the Respondents have proven that the Claimant or his representative acted in an unreasonable, vexatious, abusive or disruptive way. Nor that the Claimant's representative acted improperly, unreasonably or negligently. The litigation process was conducted based on the parties' views of their respective positions, including the settlement negotiations. The conduct of the Claimant's representative and how she dealt with the Claimant's health as presented to her at that time was not a matter we were asked to determine. With reference to the recording of the hearing, this was addressed at the time, and the Claimant's representatives acted appropriately by raising the matter in the way they did. As the Respondents' application notes ... "Whilst we do not consider that this behaviour affected the outcome of the Hearing or the Judgment, we raise this as an example of Ms Rai's abusive behaviour.". We do not agree that this in an example of abusive behaviour, when the conduct is looked at in its entirety.
26. The Respondents' application is therefore refused.

Employment Judge Gray  
Date: 16 December 2021

Judgment sent to Parties: 30 December 2021

For the Tribunal Office