EMPLOYMENT TRIBUNALS

Claimant: **Mr M Jabang**

Respondent: **Elite Security Manned Guarding Ltd**

Heard at: **Bristol** **On:** **17 January 2022**

Before: **Employment Judge Livesey**
Mr H Launder
Ms L Simpson

Representation:
Claimant: **Mr Price, counsel**
Respondent: **Mr Wyeth, counsel**

JUDGMENT

The Respondent's application for costs succeeds in part under rule 76 (1)(a) and the Claimant is ordered to pay the sum of £3,000.

REASONS

1. Background

1.1 The Claimant's complaints were heard between 5 and 9 July 2021 before this Tribunal. All of the claims were dismissed and the Judgment was sent to the parties on 19 July 2021. Written reasons were requested and were subsequently sent on 11 October 2021.

1.2 On 22 July 2021, the Respondent's solicitors made an application for costs. A costs schedule and a letter of 15 April 2020 were attached. Mr Price responded on the Claimant's behalf on 10 November 2021.

1.3 The application was listed for hearing. The party's views on the format for that hearing was sought. The Claimant was not able to attend by video and the hearing was listed in person for the reasons set out in the Tribunal's letter of 6 December 2021.

2. Application

2.1 The Tribunal heard argument from both counsel and considered an additional bundle of documents relevant to the costs issue, R4, page numbers to which

have been referred to below in square brackets. The bundle included a Schedule of Costs which came to a total of in excess of £67,000 [39-44], but Mr Wyeth expressly limited the application to £20,000. The Claimant did not challenge the accuracy of the Schedule.

2.2 The Respondent's application was made on two bases;

(i) That the Claimant had acted vexatiously or otherwise unreasonably in the bringing of the proceedings and/or in the way in which they had been conducted (rule 76 (1)(a));

(ii) That the claim had never had any reasonable prospect of success (rule 76 (1)(b)).

2.3 The Respondent contended that the Claimant's initial 5 page claim had been poorly formulated at the outset. It had lacked clarity and had caused the Respondent to request additional information, but it contended that the Claimant did little to help to clarify or refine the issues. Instead, he attempted to broaden the allegations (by serving further information in a 19 page document) and also included Mr Mainprice as a named Respondent without good reason, an application which was subsequently abandoned. Excessive and unreasonable requests for disclosure were made of the Respondent in respect of matters which were not considered relevant (which caused the third Case Management Preliminary Hearing) and the Claimant failed to adhere to Tribunal directions, not only in respect of the dates that directions were to have been complied with, but also in respect of the agreed limits on the bundle and his witness statement (which was initially three times the limit).

2.4 Co-operation over the contents of the bundle had been particularly problematic. It was clear that the Respondent had struggled to gain the Claimant's reasonable engagement in the process in March [225], but problems persisted even into June 2020 [238]. The Claimant had requested the inclusion of over 100 additional items (see his email of 22 July 2020 [203-222]), including certain dictionary definitions [206]. It was clear that Employment Judge Emerton had been somewhat exasperated by the Claimant's approach (see his Order of 7 August 2020) and he was ultimately permitted to submit additional documents in a supplementary bundle at his own expense (see paragraph 3 of that Order).

2.5 At the fourth Preliminary Hearing which took place on the 28 August 2020, I considered a late application for a postponement of the final hearing that was then listed between 7 and 11 September. I was critical of both parties when I reviewed the file on that occasion, but particular criticism was reserved for the Claimant's conduct as set out in paragraph 26 of the Case Summary.

2.6 Further, the Respondent alleged that the Claimant had a wholly unrealistic expectation in respect of the value of his claim. His first Schedule of Loss ran to 28 pages and contained a claim for injury to feelings of nearly £70,000, well beyond the upper Vento band. There

was also a claim for personal injury loss, yet no medical evidence had been served. A claim for aggravated damages was included.

2.7 The Respondent also relied upon the fact that, on 15 April 2020, it had written to the Claimant to set out the alleged frailties in his case and to offer him the opportunity to withdraw his claim. He failed to do so and the letter warned that a costs application would be made if the claim subsequently failed at a hearing.

2.8 My Wyeth also contended that the claim had had no reasonable prospect of success. Although no application under rule 37 and/or 39 had been made, he argued that there were plenty of points in the Tribunal's Judgment which demonstrated how weak some of the allegations had been. The Claimant had been described as "dogmatic" in some aspects of his evidence (paragraph 6.9 [178] and 6.57 [191]). Other complaints were considered to have been of a very minor nature (paragraph 6.11 (c) and (d) [179]) and the stance which he took in another respect was said to have been "surprising" (6.30 [186]).

2.9 The Respondent argued that it was clear that the Claimant had had an axe to grind and that the claim was used to make a nuisance of himself. Even after the Judgment had been given, the Claimant made threats against the owner of one of the sites where he had worked, Mitsubishi [32].

2.10 The Claimant argued that his claims had not been entirely hopeless. He had succeeded in reversing the burden of proof in respect of one of his allegations of direct discrimination (see paragraph 7.8 (b) of the Reasons [194-5]). Neither the Respondent, nor the Tribunal of its own initiative, had considered the claims so weak such that deposit orders were made, or even sought?

2.11 Although the Tribunal had clearly preferred the evidence which the Respondent's witnesses gave, no particularly adverse findings were made against the Claimant; he had not, for example, been found to have deliberately attempted to mislead or lie to the Tribunal. This was a claim which was fought and lost on the evidence and there was nothing unique or unusual which marked it out. The Tribunal had simply preferred the Respondent's case.

2.12 As to the procedural aspects, Mr Price argued that there had clearly been merit in the late application for disclosure because Employment Judge Emerton had made an order in his favour. The Claimant received the benefit of legal advice under the Bar's Direct Access scheme but it was not consistent in the same way as the Respondent's representation had been provided.

3. Legal principles

3.1 Rule 76 (1) imposed a two-stage test: first, a tribunal had to ask itself whether a party's conduct fell within one of the tests within sub-section (1). If so, it had to go on to ask itself whether it was appropriate to exercise its discretion in

favour of awarding costs against that party. As the Court of Appeal reiterated in Yerrakalva v Barnsley Metropolitan Borough Council [2012] ICR 420, CA, costs in the employment tribunal were still the exception rather than the rule. It commented that the tribunal's power to order costs was more sparingly exercised and more circumscribed than that of the ordinary courts, where the general rule was that costs followed the event and the unsuccessful litigant normally had to foot the legal bill for the litigation.

3.2 Here, the Respondent alleged that the Claimant had been guilty of 'unreasonable conduct…in the way that proceedings had been conducted' as defined by rule 76 (1)(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

3.3 In relation to the costs warning letter, where a party held out an unrealistically high expectation, not only in excess of what was awarded, but in excess of what might ever have been awarded, unreasonable conduct may well be demonstrated (Power-v-Panasonic [2005] All ER (D) 130 and G4S Security-v-Rondeau [2009] UKEAT/0207/09). In Peat-vBirmingham City Council UKEAT/0503/11 it was held to have been unreasonable conduct for multiple claimants, acting through their union, not to have engaged with a respondent's costs warning letter and in respect of their failure to have applied their minds to an assessment of their claims.

3.4 The second question which arose here was whether the complaints had had any reasonable prospect of success within the meaning of rule 76 (1)(b) at the outset. It was relevant, but not a prerequisite, that the Respondent had put the Claimant on notice that it may make an application for costs on the grounds that the claim had been misconceived. It was not necessary for the Claimant to have lied or otherwise acted unreasonably for an award to have been made on this ground alone (Topic-v-Hollyland Pitta Bakery UKEAT/0523/11). The essence of the test in rule 76 (1)(b) was neatly summarised in Millin-v-Capsticks Solicitors [2014] UKEAT/0093/14; "Where a claim is truly misconceived and should have been appreciated in advance to be so, we see no special reason why the considerable expense to which a Respondent will needlessly have been put (or a claimant in a case within which a response is misconceived) should not be reimbursed in part or in whole" (paragraph 67).

3.5 Rule 76 (1)(b) uses the same wording as rule 37 (1)(a). In the case of QDOS Consulting Ltd and others-v-Swanson UKEAT/0495/11 HHJ Serota QC indicated that the test of whether a claim had had no reasonable prospect of success was only met in "in the most obvious and plain cases in which there [was] no factual dispute and which the applicant [could have] clearly crossed the high threshold of showing that there [were] no reasonable prospects of success."

3.6 We recognised that, in terms of causation, it was unnecessary to show a direct causal connection (McPherson-v-BNP Paribas [2004] ICR 1398 and Raggett-v-John Lewis [2012] IRLR 911, paragraph 43), but there nevertheless has to have been some broad correlation between the unreasonable conduct alleged and the loss (Yerraklava-v-Barnsley MBC [2010] UKEAT/231/10).

Regard had to be taken of the 'nature, gravity and effect' of the conduct alleged in the round (both McPherson and Yerraklava above).

3.7 A costs order was restorative, not punitive (Lodwick-v-Southwark London BC [2004] EWCA Civ 306) and we could not make one simply because the Claimant had got something wrong.

3.8 Under rule 84, we may take into account the Claimant's means when considering both whether to make a costs award and, if so, in what amount.

4. Discussion and conclusions

4.1 We did not consider that the test within rule 76 (1)(b) was made out. It could not be said that the claim had had no reasonable prospect of success within the meaning of the cases of Millin and QDOS above. The Respondent's failure to apply for and/or obtain a deposit order was not determinative but the fact that the victimisation complaint had superficial merit (paragraph 7.24 of the Reasons [199]) and that one of the complaints of direct discrimination caused the burden of proof to shift (paragraph 7.8 (b) [194-5]) stood in the Claimant's favour. Although all of the Claimant's allegations had failed, that did not mean that they had had no chance of succeeding at the start.

4.2 We were, however, satisfied that the Claimant had behaved unreasonably in the manner in which the proceedings had been conducted. We reached that conclusion for two reasons.

4.3 First, his conduct during the preparation of the case had been unreasonable in several material respects; an 'unless' order had been required in respect of the provision of further information in May 2019 because of his initial failure to comply with a tribunal direction. When the information came, it was 19 pages long, compared to the original Claim Form which was only five pages in length. An amendment application was therefore necessary (see Employment Judge Bax's Order of 10 October 2019).

4.4 Further, there had been a failure to engage properly in relation to the preparation of the hearing bundle and the excessive and disproportionate request for documents to be inserted into it had unnecessarily taxed the Respondent. Employment Judge Emerton was clearly also frustrated by the additional disclosure applications which had been made on that occasion, some of which he described as part of an "unwarranted and irrelevant fishing expedition" (paragraph 8 of his Order of 7 August 2020). The application was made late and in the month before the listed hearing, yet the case had been listed since December 2019 and disclosure had taken place the following month (see the Order of 16 December 2019). Yet further, the Claimant initially sought to rely upon a witness statement which was grossly in excess of the length set by consent at the December 2019 hearing. That took further time to unravel (see the Tribunal's letter of 21 January 2021).

4.5 All this conduct caused extra time and expense to be incurred. It was clear from the Orders of 7 and 28 August 2020 and the direction of 21 January 2021 that the Tribunal's patience had been tested. There ought not to have been the need for four Case Management Preliminary Hearings and the Respondent's

costs bill was undoubtedly increased as a result of this conduct, particularly as it bore the responsibility of preparing the documentation for the final hearing. Case management directions are to be adhered to. Most litigants are able to do so. The Claimant's conduct caused needless additional time and expense to be incurred during the interlocutory stages of the case.

4.6 Secondly, as the case developed, its breadth and size increased unnecessarily and disproportionately in our judgment. We accepted some of what Mr Wyeth had argued; that elements of the claim ought never to have been added. Their inclusion, Mt Wyeth had argued, reflected an attempt on the Claimant's part to cause mischief to the Respondent. They were the elements upon which he had fared so poorly at the final hearing. Had the case been prepared impeccably, we may not have regarded some of the additional elements of the claim in that light, but the whole picture, including the threats made to Mitsubishi the day after our Judgment [32], did support Mr Wyeth's characterisation of certain elements.

4.7 We heard submissions about the Claimant's means. We were told that he received a salary of approximately £1,500/month, net of student loan repayments, although he had not worked before and after Christmas because his wife was undertaking a nursing course and he had had responsibility for childcare. His expenditure was as shown on [66]; approximately £1,158.26/month, in addition to the debt of £44 at [67].

4.8 The Claimant initially disclosed the operation of four bank accounts, two with Lloyds ([77-86] and [87-113]) and two with Halifax ([114-145] and [146165]). A fifth was identified, statements for which were provided to Mr Wyeth during the course of the hearing (No. 14499762 [100]). A sixth (No. 32536567 [148]) was said to have been closed. The Claimant explained the further 'svgs' payments shown on some of the statements (assumed to be 'savings') on the basis that they were cross account transfers (see [151] and [92]) and the payments from 'K Jabang' [101], his wife, and 'Y Sanyang', his sister-in-law, [101 & 112] as loans in the event of him having been particularly hard up.

4.9 We accepted what Mr Wyeth said; that there was up £2,000/month going into the Claimant's accounts reasonably regularly from a number of sources. We were informed that his wife earned approximately £1,000/month net yet only contributed £125 to the family's outgoings (half of the council tax bill and £50 towards food). The Claimant could not explain where the remaining £875/month went.

4.10 In light of the matters set out above and the Claimant's means, we considered it appropriate to exercise our discretion in the Respondent's favour, but we did so cautiously; although satisfying the test under rule 76 (1)(a), the Claimant's conduct had not been so egregious as to warrant a significantly high award. The order that we made was one of £3,000 balancing the level of his unreasonable conduct against his means.

Case No: 1400778/2019

Employment Judge Livesey
Date: 17 January 2022

Judgment sent to parties: 20 January 2022

FOR THE TRIBUNAL OFFICE