EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No S/4100134/14 & S/4102906/14

Held in Glasgow on 26 & 29 January, deliberations 30 January 2018

Employment Judge: Robert Gall
Members: Iain Macfarlane
John Kerr

Mr Brian F Gourlay — **Claimant**
Represented by:
Mr G Booth - Employment Consultant

West Dunbartonshire Council — **Respondents**
Represented by:
Mr Gavin Walsh - Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is that the application by the respondents for a Costs Order in terms of Rule 76(1)(b) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 is granted. The claimant is ordered to pay to the respondents the sum of £20,000 (Twenty Thousand Pounds) in respect of the costs of the respondents.

REASONS

1. The claimant brought a claim in which he was unsuccessful. The Hearing took place over 21 days which involved hearing of evidence and submissions. The claim was unsuccessful on all grounds.

2. The Hearing in respect of which this Judgment is issued resulted from an application for costs or expenses made by the respondents. That application was opposed.

3. At this Hearing the claimant was represented by Mr Booth. The claimant appeared on his own behalf in course of the Hearing in which the claim itself was advanced. The respondents were, at this Hearing and in the Hearing on the claim itself, represented by Mr Walsh.

4. For this Hearing both parties produced a bundle of documents. Where reference in this Judgment is to such a document produced on behalf of the respondents, it is preceded by the letter *"R".* Where such a document appears in the bundle prepared on behalf of the claimant for this Hearing, it is preceded by the letter *"C".*

5. The Tribunal heard evidence at this Hearing in relation to the claimant's ability to pay, the evidence coming from the claimant himself and from his wife Mrs Tracey Gourlay. In terms of Rule 84 of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 *("the Rules")* a Tribunal may have regard to the ability of the paying party to pay any such award in determining whether to make a Costs Order and if so in what amount.

Facts In relation to ability to pay

6. The following were found to be the relevant and essential facts on the evidence which the Tribunal heard at this Hearing.

7. The claimant is not employed at present. Given his unfortunate illness it is unlikely that he will gain employment in future. He has an annual income of £13,442 from state benefit and also from rental income from a property. He has expenditure, including expenditure to the extent of one half of some household bills, which exceeds that income by some £2,500.

8. In terms of capital assets, the claimant has an interest in property. The title to the property is held in the name of the claimant and his wife, and possibly in one instance, in joint names of the claimant, his wife and the claimant's sister. The value of that property is approximately £830,000.

9. The claimant owns a vehicle estimated by him as being worth £5,000. He has some electronic, electrical and mechanical equipment which he estimates as having a value of £5,000. He has savings of £739.67 as at 23 October 2017, that being the sum at that point in credit in his current account.

10. The figures just referred to are set out in a statement of means prepared on behalf of the claimant which appeared at R17/2. An earlier statement of means for the claimant prepared by him in July 2015 appeared as R14/3.

11. At July 2015 the claimant stated that he had a half share in property, the value of the property being £820,000. He said that he had a vehicle valued at £12,000 and gave the value of electronic, electrical and mechanical equipment owned by him as £20,000.

12. Although at that point the claimant had an online saver account in his name which had a credit of £53,444.84 showing, he included within the statement of means one half of £52,000 as savings.

13. At R14/4 a docket signed by Mrs Gourlay on 10 July 2015 appeared. That related to the savings account of Mr Gourlay, the claimant. It stated:-

> 7, *Tracey M Gourlay, confirm that my husband has my full support with regard to the action he is taking against West Dunbartonshire Council. As such he has my approval to use the savings above, in full, to pursue this action. In addition, I would be prepared to sell jointly owned capital assets if necessary. "*

14. There was no reference in July 201 5 by either the claimant or Mrs Gourlay to any interest in the heritable property which Mr Gourlay' s sister might have. The reference is to Mr Gourlay having a half share in the value of such property. There was no reference by the claimant or Mrs Gourlay to the claimant's sister having deposited any funds with the claimant to be held on her behalf but to be repaid to her.

15. It is unclear why any reference to heritable property did not include a reference to title to at least some of such property being held by the claimant's sister when the statement of means was produced in July 2015. It is unclear why, if as was maintained in evidence at this Hearing, Mr Gourlay' s sister had deposited funds with him to be held and to be repaid to her, those funds having subsequently been repaid and extending to between £20,000 and £30,000, there was no reference to that position in July 2015 nor any supporting documentation or account entries showing payment from or to the claimant's sister.

16. The claimant took legal advice in relation to his claim, however, not until the point where the Judgment in the claim had been issued. The advice related to possible appeal to the Employment Appeal Tribunal *("EAT').* It extended to preparation and submission of such an appeal. That appeal ultimately did not proceed, having been rejected at the sift of such appeals which occurs. Legal advice was also taken in relation to the application for Costs made by the respondents. That resulted in opposition to that application being submitted to the Tribunal. No vouching was produced in respect of any such costs. The claimant and Mrs Gourlay stated that costs had extended to some £25,000. Those costs had been settled by Mrs Gourlay, she said, with the

claimant repaying her from the savings account which was in credit to the extent of some £53,000 in July 2015.

17. The claimant is able to make payment of £20,000 by way of expenses, albeit he may need to re-arrange finances and potentially to borrow sums from Mrs Gourlay or other family members. He confirmed this as being his position in course of his evidence.

Costs Warning Letter

18. The respondents issued to the claimant a Costs Warning Letter. That was sent to him on 29 May 2015. A copy of it appeared at R10.

19. The claimant did not take legal advice in relation to that Costs Warning Letter. He did not engage with the respondents in respect of the detailed position which they set out in relation to his claim and why it was that they took the view that his claims had no reasonable prospects of success.

The claim initially brought and determined by the Tribunal

20. The claim brought by the claimant was one of disability discrimination and of detriment said to have been suffered due to acts done by the respondents on the ground that the claimant had made a protected disclosure. The claim was heard by this Tribunal over a period of 21 days. Those days involved evidence and submissions. The Hearing was in relation to liability alone. The claim was unsuccessful in all regards. The Judgment of the Tribunal was dated 23 May 2016 and issued to parties on 25 May 2016. A copy of it appeared at R11.

The Issues

21. The issues for the Tribunal at this Hearing were:-

(1) Given the facts set out to it, was the Tribunal of the view that this was a case where it should consider whether to make a Costs Order on the basis that the claim had no reasonable prospects of success? Alternatively, had the claimant behaved unreasonably in the way in which the proceedings were conducted?

(2) If the Tribunal was of the view that this was a case where it was appropriate to consider making a Costs Order, would it exercise its discretion and make such a Costs Order?

(3) In its assessment of whether a Costs Order was to be made and if so what the amount of any such Costs Order would be, what impact, if any, did the claimant's ability to pay have upon both of those questions i.e. whether an award should be made or, if made, in what amount should an award be made?

Applicable Law

22. Rule 76 states that a Tribunal *"shall consider** whether to make a Costs Order where it considers that any claim had no reasonable prospect of success or where a party has behaved unreasonably in the bringing of proceedings or in the way that they have been conducted.

23. Rule 78 states, in the passage relevant to this case, the following:-

> *u(1) 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."*

24. In terms of Rule 84, in deciding whether to make a Costs Order and if so in what amount, the Tribunal may have regard to the paying party's ability to pay-

25. There have been cases in this area. From those cases, the following principles are discerned **:-**

(a) An Order for Costs is the exception rather than the rule.

(b) In assessing whether a party knew or ought to have known that its case had no reasonable prospect of success, the question was whether that party ought to have appreciated that had they gone about the matter sensibly. The test was whether they ought to have known that the claim had no reasonable prospect of success. This is confirmed in the cases of ***Cartiers Superfoods Ltd*** -v- ***Laws [1978] IRLR 315 ("Cartiers")*** and ***Keskar -v- Governors of All Saints Church of England School [1991] ICR 493 ("Keskar").***

(c) The fact that a party is a litigant in person may relevantly be considered by the Tribunal.

(d) The case of ***Saka*** -v- ***Fltzroy Robinson Ltd EAT/0241/00 ("Saka")*** sees the EAT underline that discrimination cases are fact sensitive and often dependent upon the evidence which emerges at Tribunal. Paragraph 10 of that case contains the following:-

> *"We wish at the outset to make it clear that Tribunals should always have in mind the very real difficulties which face a Claimant in a discrimination claim. Very rarely is there overt evidence of discrimination; and thus it may be and often is very difficult for the Claimant to know whether or not he has real prospects of success until the explanation of the employer's*

conduct which is the subject of complaint is heard, seen and tested."

(e) It is not enough that a claimant firmly believes in his own case. If he is not to be viewed as having acted unreasonably or as having pursued a case inappropriately when he ought to have known that there was no reasonable prospect of success, he must have acted in a sensible and rational manner in assessing the position. Whether or not he took advice is a matter of relevance.

(f) In assessing the position in respect of any costs application the Tribunal is entitled to have regard to any Costs Warning Letter issued in assessing the actings of a party in relation potentially to pursuing a case which the party ought to have appreciated had no reasonable prospect of success and also in relation to considering whether or not the actings of a party were unreasonable. The case of ***Peat -v- Birmlngham City Council UK/EAT/0503/1 1 ("Peat")*** is of relevance in that regard.

(g) A case dealing with principles of a Costs Order is that of ***Barnsley Metropolitan Borough Council -v- Yerrakalva [2012] IRLR 78.*** In that case the following paragraphs appear:-

"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 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 .

42. On matters of discretion an earlier case only stands as authority for what are, or what are not, the principles governing the discretion and serving only as a broad

steer on the factors covered by the paramount principle of relevance. A costs decision in one case will not in most cases pre-determine the outcome of a costs application in another case: the facts of the cases will be different, as will the interaction of the relevant factors with one another and the varying weight to be attached to them."

(h) The case of ***Ladak v DRC Locums Ltd UK/EAT/0488/13 ("Ladak")*** confirms that where a representative is an in-house solicitor, recovery of costs may be sought and awarded.

(i) The entire means of a party potentially subject to a Costs Order requires to be considered by the Tribunal. That includes both income and capital. That is confirmed in the case of ***Shields Automotive Limited -v- Greig UK/EATS/0024/10 ("Shields").***

(j) An award of costs or expenses is to be compensatory, not punitive.

Submissions

Submissions for the Respondents

26. Mr Walsh addressed the Tribunal in support of his application for costs. He tendered a written submission. A copy of that is produced in Appendix 1 to this Judgment. He underlined some of the comments made in that written submission as he went through it. The following is a summary of the position set out by Mr Walsh in his written submissions as supplemented. It also summarises the response made by Mr Walsh to the submission made by Mr Booth for the claimant.

27. Mr Walsh said that it was of significance that the respondents had sent to the claimant a Costs Warning Letter. They had not simply said, however, that there was a risk of costs being awarded. They had set out in their letter of 29

May 2015 the reasons why it was that they said that the case as brought by Mr Gourlay had no reasonable prospect of success. The Tribunal had then made its Judgment. The claims had been unsuccessful. They had failed for substantially the same reasons as the respondents had set out in their Costs Warning Letter.

28. The Hearing had been extensive, lasting some 20 days. The claimant had been prolix and scattergun in the case which he brought. He had not heeded the Costs Warning Letter. The test was not whether he believed that he would be successful or whether he genuinely thought he had a good case. The test was whether he knew or ought to have known that his claim had no reasonable prospects if he had gone about the matter sensibly in assessing the position. In short, the claimant had not done that. He had been, Mr Walsh submitted, *"bloody minded"* in proceeding with the case. He had not engaged with the Costs Warning Letter. He had been determined to pursue his case and, Mr Walsh submitted, would have pursued it no matter what.

29. The claim as set out in Tribunal involved the claimant advancing his position on the basis of what he thought. He expressed his own view. That did not, however, have any basis in fact. It was not tethered to something which gave him a reasonable basis to proceed.

30. Mr Walsh accepted that an award of costs was the exception rather than the rule. He also accepted that an award of costs was compensatory in nature rather than punitive. The respondents' costs, however, were well in excess of £20,000. A detailed account had been produced at R9.

31. The claimant had confirmed in evidence that he would be in a position to make payment if ordered so to do. He had said that he would *"not be stuck"* if the Tribunal ordered that he pay costs and that the amount was to be £20,000. Ability to pay was therefore not a factor which weighed against making any award or against the sum awarded being £20,000, Mr Walsh submitted.

32. There were some instances quoted by Mr Walsh as illustrating what he said was the irrational approach of the claimant and the failure on his part to consider the matter sensibly. He referred, for example, to the claimant's view that his email had been hacked when in fact a reasonable decision had been taken by management that, in the absence from work of the claimant, his email would be redirected. In another example given, Mr Walsh said that the claimant had failed to put forward any basis on which the decision that he did not carry out further health and safety activities in relation to the fourth floor could be said to have been an act of harassment based on his protected characteristic of disability. That had to be contrasted with the respondents' position which had been put before the claimant well in advance of the Hearing. That was that there was a conflict of interest in that the claimant had made a complaint about health and safety matters. That "irrational" categorisation also pertained in relation to his allegation that Mr McDougall obtaining legal advice upon the application of the Regulation of Investigatory Powers (Scotland) Act 2000 to photographs which Mr Gourlay had taken was a discriminatory act, as opposed to it being a sensible step by way of obtaining legal advice upon a potential problem area. There were other examples given by Mr Walsh in support of his proposition.

33. Mr Walsh said that whilst substantial disadvantage had been found to exist through the absence of storage facilities for the claimant, it had not been found that there had been a failure to make reasonable adjustments as the claimant had not raised this as an issue or as being something which required to be addressed. The claimant knew that he had not raised this as an issue with the respondents at the time when the decision as to storage facilities was being considered. It had been unreasonable for him to pursue this as a ground of claim.

34. Mr Walsh accepted that the Tribunal had said in its Judgment that if a question posed by the claimant in relation to car parking facilities had been framed differently it would have found that the claimant was at a substantial

disadvantage. He highlighted that the question asked was whether the claimant was placed at a substantial disadvantage by the disabled car parking facilities which he used. The Tribunal in its Judgment in a passage which appeared at page 157 of the Judgment confirmed that for there to have been a failure to make reasonable adjustments the disabled person must have been placed at a substantial disadvantage in comparison with persons who were not disabled. Persons who were not disabled could not have used the disabled parking bay. Had the question been framed on the basis of there potentially having been substantial disadvantage through provision of car parking facilities in the general car parking area that might have been accepted by the Tribunal. The Tribunal detailed, however, that the evidence was that the disadvantage was intermittent. It had concluded that the respondents had met any obligations in that regard if the question had been framed on that different alternative basis.

35. The failure by the claimant to engage with the Costs Warning Letter was unreasonable, Mr Walsh said. That formed the basis of a claim for payment of costs to be awarded in terms of Rule 76(1) (a). The application, however, was mainly based upon Rule 76(1)(b).

36. The Tribunal had noted, and should keep in mind in considering the costs application, the confirmation given by the claimant to the respondents on 11 May 2015 that he was happy in relation to reasonable adjustments with the arrangements which had been made by the respondents for his working in the office. Notwithstanding that, he had proceeded with his claim in respect of an alleged failure to make reasonable adjustments.

37. In replying to Mr Booth's submissions, Mr Walsh adhered to his own earlier submissions. He said it might well be the case that the claimant had suspicions as to why things had occurred. There was, however, no backup ever produced to support the claimant’s suspicions. On the contrary the respondents had given explanations as to why decisions had been taken. The claimant simply would not accept those. This was not therefore a case where

a claimant was able to make assertions providing him with a case *"on paper* which he would then be entitled to test in evidence. It was essentially a case where the claimant had set out his own view of issues but had not addressed any contrary position or evidence which might have supported a contrary position.

38. Mr Walsh pointed to paragraph 454 of the Tribunal's Judgment The Tribunal said at that point that it did not doubt that the claimant genuinely regarded the respondents' motives as being those which he set out. The Tribunal, however, went on to say that the evidence did not support there being a valid basis for the claimant's view. Mr Walsh said that this was something which the claimant ought to have known in the circumstances, particularly when the Costs Warning Letter set out the position quite clearly. He set out that position for the respondents.

39. The Tribunal had looked at the individual elements of claim but had also looked at the overall position. Looking at matters individually and also looking at them on an overall basis did not, however, support the validity of the claim in the view of the Tribunal. This was confirmed at paragraphs 460 and 468 of the Judgment of the Tribunal.

40. It required to be borne in mind, said Mr Walsh, that just because there were a lot of claims and the matter was fact sensitive, did not mean that there was *"no smoke without fire"* or that there must be something in the claim as brought.

41. The Tribunal should bear in mind that the claimant had access to his union. He had not, however, sought advice on the Costs Warning Letter, whether from the union, from a solicitor or from any Citizens' Advice Bureau ("CAB").

42. Mr Booth had said that the claimant had a right to advance his claims and to proceed to a Hearing. Mr Walsh accepted that as a general proposition. He said, however, that in the context of a Costs Warning Letter and the claim as

then insisted upon, the respondents were entitled to seek to persuade the Tribunal that this was an exceptional case where the threshold for an award of costs had been met. In that scenario the Tribunal was entitled to award costs.

43. Mr Walsh referred to the following cases - ***Cartiers, Shields, Ladak, Keskar, Vaughan -v~London Borough of Lewisham UK/EAT/0534/12, Abertawe Bro Morgannwg University Health Board -v- Ferguson]2004] IRLR 14, Anyanwu -v- Southbank Students' Union [2001] ICR 391 , Peat, Saka and Rodgers -v- Dorothy Barley School UK/EA T/0503/1 1.***

Submissions for Claimant

44. Mr Booth for the claimant also lodged a written submission to which he then spoke. A copy of the written submission is attached to Appendix 2. What follows is a brief summary of the submissions made by Mr Booth.

45. The claimant had acted in good faith. He had a reasonable belief that he had been subjected to unlawful treatment. He was entitled to pursue his claim. He had not acted unreasonably. He had not pursued a case where there was no reasonable prospect of success. Even if the Tribunal took the view that either of those instances applied, it should exercise its discretion and not award costs. Alternatively it should limit costs to reduce them below £20,000.

46. It required to be borne in mind, Mr Booth said, that the claimant was not legally qualified. He was unrepresented. Disability claims were complicated. The law was difficult to follow.

47. It was the case that the claimant had been unsuccessful. Costs did not automatically follow. An award was the exception rather than the rule. Because the claim had been unsuccessful, it did not follow that the grounds on which costs might be awarded existed.

48. The claimant had had regard to the Equality Act 2010 and to the statutory Code of Practice. He had co-operated with the Tribunal by responding to orders. He had appeared at the Hearing and had done his best to conduct what was a lengthy case.

49. Mr Booth accepted that the Tribunal could take into consideration the fact that the claimant had not taken legal advice upon the Costs Warning Letter. The complexity of the matter, however, required to be kept in mind. There had been a long Hearing. Sometimes the strength of a claim or otherwise was not clear until the Hearing itself, when evidence could be led and could be tested.

50. At a very early stage the claimant had sought advice from his union. Nothing, however, came of that advice in terms of their guiding him or representing him. He had approached a CAB at that early stage. They had difficulty understanding the law, Mr Booth said. The claimant had not, however, taken any advice in relation to the Costs Warning Letter or the implications of such a letter being received. Mr Booth referred to the grounds of opposition to the application put forward. Those were set out in the documentation which appeared at R1 2.

51. There were passages in the Judgment which were referred to in that reply to the costs application. The Tribunal had not doubted that the claimant genuinely saw things as he set out in his evidence. The Tribunal had accepted that the claimant had his own personal opinion as to what had motivated one of the respondents' employees in particular, Mr McDougall, in taking decisions and in acting in a way which the claimant regarded as discriminatory or as constituting a detriment due to an act done on the ground that the claimant had made a protected disclosure. The Tribunal had also been critical of the respondents in some regards. It found that Mr McDougall had not reported back to the claimant in one instance and that this was an oversight. The Tribunal had said in relation to a proposed meeting with the claimant that it might have been better had the respondents set out their

thinking so that the claimant could understand why it was that they proposed to meet with him. The meeting had been close to the claimant commencing his sick leave. It had then been stated by the Tribunal in the passage at page 114, paragraph (e) of the Judgment that this *"perhaps gave the impression of some form of pressure being applied by the respondents"*

52. The Tribunal had also referred to the raising of the possibility of ill health retirement as something which could have been handled more sensitively by the respondents. It had found that there was a substantial disadvantage due to the absence of appropriate storage facilities.

53. The Tribunal had also found that had the question been framed differently in relation to car parking facilities it would have found that the claimant had been at a substantial disadvantage.

54. Mr Booth then turned to case law. He founded in particular upon *Saka.* That highlighted that there was very rarely overt discrimination. It supported the view that the evidence required to be led and tested. It was not unreasonable for the claimant to have pursued the case to that point. *Saka,* he said, outweighed *Cartiers.*

55. It was reasonable of the claimant to have had regard to the Equality Act 2010 and to the Statutory Code of Practice. The claimant had not been bloody minded. He had co-operated with the Tribunal.

56. In relation to the amount of any costs, Mr Booth accepted that the claimant's evidence had been that he would be in a position to meet any award of costs, albeit through making arrangements with regard to his assets and finances, including family finances.

57. Insofar as any criticism might be levelled at the claimant on the basis of his evidence in this Hearing, Mr Booth said that the claimant had been a little confused. He had explained that his wife dealt with the finances. Mrs Gourlay

had given evidence willingly. That had supported the claimant's position. Mr Booth said even if the Tribunal was of the view that the claimant had been dishonest, that might be academic given his willingness to pay if found liable to pay.

58. The Tribunal need not take means or ability to pay into account. Mr Booth referred in that regard to the case of ***Jllley -v- Birmingham & Solihull Mental Health NHS Trust & Others UK/EAT/9584/06 ("Jilley").***

59. The case of ***Peat*** was also highlighted by Mr Booth. He referred to paragraph 26 in that case. That had highlighted that the jurisdiction was generally cost free. The Tribunal decision in that case containing the following passage was quoted by the EAT:-

> *"Certainly, we should not wish to give the impression that a Costs Warning Letter should always or generally have the effect of putting a party at risk as to costs. This was, however, a highly unusual case. It was by way of being a test case. The claimants were at the opposite end of the spectrum from those unsophisticated and unrepresented parties who are involved in many Tribunal cases: they were represented by solicitors and counsel who are both well respected specialists in employment law."*

60. The claimant had been unrepresented. The Tribunal should have regard to the whole picture. It should take account of the complexity of the subject matter and the level of detail and number of events involved. There had been an agreed list of issues. Witnesses had been stood down by the claimant in an effort to reduce the length of Hearing.

61. In ***Peat*** the issue had been one which ought to have been clear to the claimants or their representatives. That contrasted with the current case where the claimant was unrepresented.

62. The Tribunal should have regard to the rules. Each case turned on its own facts. The facts in this case were such that no award of costs should be made.

Discussion & Decision

63. The Tribunal understood why the application for expenses had been made in the particular circumstances of this case. It recognised that, particularly with a lengthy Hearing, the expenses incurred by the respondents were substantial and well in excess of £20,000. That was not surprising given the length of Hearing and the preparatory work carried out, both that which would have been involved *"behind the scenes"* and that of which the Tribunal was directly aware from its interaction with both parties and from the production ultimately of an agreed statement of facts and issues for the Tribunal.

64. The starting point for the Tribunal was that an award of costs is the exception rather than the rule. Expenses do not follow success. The terms of the rule applicable to costs and awarding of costs require to be met before any award of costs is made. Further, the Tribunal must be satisfied that it is appropriate for it to exercise its discretion and to award costs before it then goes on to make an award of costs.

65. In this case, the Tribunal had the statement of means produced and the evidence from both the claimant and Mrs Gourlay. Given that information the Tribunal did not have a basis on which it could, in its view, conclude that it was appropriate, in light of ability to pay, that there be no award of costs. Equally given the evidence before the Tribunal in relation to ability to pay, the Tribunal could not, in its view, conclude that it was appropriate to restrict or limit an award of costs on the basis of ability to pay.

66. In saying that, the Tribunal recognised that with the amount of expenses sought, £20,000, a high and significant sum is involved. There is no automatic provision that, if a party cannot afford readily to pay an amount of costs, either no costs should be awarded or costs should be limited. That is

subject to the view which might be reached that awarding costs would be punitive in that circumstance. There are examples however in case law of substantial costs being awarded even in circumstances where a party is not able to make payment either readily or perhaps at all within a short or reasonable timeframe. In the circumstances of this case it had been confirmed to the Tribunal (a) that assets existed and (b) that payment could and would be made if £20,000 was ordered to be paid. There was not therefore, in the view of the Tribunal, a basis on which it could exercise discretion and, having regard to ability to pay, either not make an award of expenses or reduce the amount from the sum sought, namely £20,000. That was the position notwithstanding sympathy which the Tribunal had with the position of the claimant in that the sum involved is a substantial amount of money in any one's circumstances. The Tribunal required to keep in mind that the sum of £20,000 was a small amount towards the overall expenses of the respondents, even if modification of the account to a degree might take place if the full account proceeded to taxation by the auditor of court. The respondents, of course, capped the amount which they sought to recover at £20,000. That amount was therefore, given that fact and the ability to pay of the claimant, compensatory, not punitive, albeit it was a substantial sum.

67. As mentioned, the Tribunal kept in mind that an award of costs is compensatory rather than punitive. The Tribunal was conscious that there was no behaviour by the claimant whilst in Tribunal which would have been worthy of sanction by way of punitive imposition of a cost order. The claimant had been pleasant and co-operative during the Hearing. He had also co-operated with the respondents prior to the Hearing in agreeing issues and certain elements of fact.

68. The *"good conduct"* therefore of the claimant in these areas was appropriately factored into the exercise of discretion by the Tribunal in the decision which it reached.

69. Given the evidence that payment of £20,000 would be made if ordered, the Tribunal did not have regard to any concerns which it had as to the candour in the evidence given by the claimant and Mrs Gourlay in relation to the statement of assets. That evidence did seem strange in some areas to the Tribunal. In some aspects the Tribunal had doubts as to the credibility of that evidence. It was not appropriate, however, for the Tribunal to factor into its decision reservations which it might have had in relation to evidence given at this Hearing. The Tribunal did not therefore base its decision on any view it might have had as to the quality or reliability of that evidence. This was particularly so when the net effect of all of the evidence given at this Hearing was an acceptance by the claimant that he could and would make payment of any award of expenses, even if that was in the sum of £20,000.

70. In considering the application and opposition to it, the Tribunal kept in mind that the claimant had been unrepresented at time of presentation of the claim form, during the period prior to the Hearing and in course of the Hearing itself. He is not legally qualified. The claim involves an area of law which can be quite technical in its nature.

71. The claimant is, however, clearly an intelligent man having regard both to his qualifications and to the position which he held with the respondents. He clearly understood the case which he brought and had a good grasp of documentation presented to the Tribunal and the evidence and issues which he wished to advance.

72. During the conduct of the hearing, however, it was apparent that he found it difficult to distinguish between areas where he simply disagreed with a course of action decided upon by the respondents as employers whether in relation to his own position or on a broad matter of principle, and instances where there was a potential basis for an argument that discriminatory conduct might be involved.

73. This is a point commented upon by the Tribunal in its Judgment following the Hearing. At the outset of the passage dealing with the discussion and decision, pages 98, 99, 100 and 101 of the Judgment the following passages appear:-

"446. *It is also relevant to note that the claimant, Mr Gourlay, clearly had issues with the decision of the respondents to move personnel from the third floor to the fourth floor and as to the way of working which was to be involved once the office set up on the fourth floor was up and running. That was apparent both from his own evidence and from his questions in cross-examination.*

447. On various occasions the Tribunal was required to remind Mr Gourlay that whilst he might disagree with the decision made and the manner in which the process was handled, the purpose of the Hearing was to consider whether discrimination had occurred and whether the Public Interest Disclosures had been made by Mr Gourlay, with associated detriment. It seemed on a relatively frequent basis during the Hearing that Mr Gourlay was intent on there being some form of enquiry into the decision to move staff from the third to fourth floor. His focus at times seemed to be on the wider picture rather than in relation to his own particular circumstances and grounds of claim. Whilst it is, in general terms, helpful in discrimination claims to understand the background to a situation and to have context, especially so when assessment of motivation or intention is of significance, the areas which were of interest to Mr Gourlay and which he sought to explore were often outwith that scope.

453. Mr Gourley found it hard to remember what precisely had happened at particular times in, for example, meetings. He

occasionally contradicted himself. Often, his basis for challenge of evidence from a witness for the respondents as to why a particular step was taken was simply his own view that there was something sinister which lay behind it. There will sometimes in that situation be some document or comment or something unusual about the step taken which assists the Tribunal in forming the view that, perhaps notwithstanding protestations from the witness, there was indeed some underlying motive. Equally assessment of a witness can on occasion lead to that view. None of these elements however, were present in this case.

454. The Tribunal did not doubt that Mr Gourlay genuinely regarded the respondents' motives as being those which he set out. The evidence however, did not support there being a valid basis for Mr Gourlay' s view. Many of the steps taken were those which it would be anticipated would properly be taken in a situation. For example consultation with HR or with Legal Services by Mr McDougall at different times was quite clearly in the view of the Tribunal a step which was appropriate. Indeed it was a very sensible step to take. Criticism might have resulted had such a step not been taken by Mr McDougall. "

74. The test to be applied by the Tribunal is a two stage one. The Tribunal must consider whether the actings of the claimant have been unreasonable in the way the proceedings have been conducted. It has to consider whether the claimant knew or ought to have known that the claim had no reasonable prospect of success. In considering whether he ought to have known that it was so, the Tribunal is to judge that by considering the position of a claimant who had acted sensibly in the circumstances.

75. If the Tribunal is satisfied that the claimant had acted unreasonably in conduct of the proceedings and/or that the claim had no reasonable prospects of success and that the claimant knew or ought to have known of that, it must then consider whether in its discretion, expenses should be awarded. If it was to decide that expenses should be awarded, it then requires to exercise discretion as to the level at which any such award is to be made.

76. Whether the claimant in question did or did not take legal advice prior to or at the time of presentation of the claim, upon receipt of the Costs Warning Letter or during the course of the proceedings is of relevance in the assessment of the Tribunal of whether the claimant acted reasonably and whether he knew or ought to have known, acting sensibly, that the claim had no reasonable prospects of success. It is important that the Tribunal keep in mind that there is no requirement to have legal representation or advice in a case. The decision made by this Tribunal turns, in this regard, upon consideration of the reasonableness of the claimant's actings and what he ought to have known, acting sensibly.

77. The fact that a Costs Warning Letter was issued is of much significance in the view of the Tribunal in this case. This is not a situation where a claimant was not alert to the possibility of costs being awarded. That possibility was made plain to him by the respondents in May 2015. In the letter intimating that possibility, the respondents also took some time and care to set out the basis on which they maintained that there was no reasonable prospect of success in various elements of the claim brought.

78. The Tribunal, of course, had no knowledge of the fact that a Costs Warning Letter had been sent or of the terms of that Costs Warning Letter when it heard the case and when it reached and issued its Judgment. It is of some significance, however, that the grounds on which the claim failed are in many respects foreshadowed by the terms of the Costs Warning Letter.

79. The Costs Warning Letter also suggests to the claimant that he should take independent legal advice. He did not do so. He is not therefore able to say that he took that step and was reassured or was advised that he had sufficiently explained in the pleadings why it was that he said acts were discriminatory in nature or were done on the ground that he had made protected disclosures.

80. Looking at the grounds of claim advanced, one of those grounds was that the claimant had been harassed in terms of Section 26 of the Equality Act 2010 by various acts on the part of the respondents.

81. For a successful claim of harassment, conduct has to be unwanted and has to relate to a relevant protected characteristic. The illness by which the claimant is unfortunately affected is such that he is disabled for the purposes of the Equality Act 2010 and was at the relevant time.

82. For a successful claim under this head the conduct must have had the purpose or effect of violating the dignity of the person involved or of creating an intimidating, hostile, degrading, humiliating or offensive environment for him. There is a subjective and objective element to assessment of the effect. The first essential element, however, is that the conduct must be related to a relevant protected characteristic.

83. The Judgment of the Tribunal in relation to each of these elements of claim was that the conduct which was founded upon was not related to the claimant's disability other than in one instance. That instance involved a referral to Occupational Health. That referral was related to the claimant's disability as it was made in order to obtain advice as to the claimant's potential return to work and his health in general. Both that conduct and the other conduct to which the claimant referred did not constitute harassment with there being sound and appropriate reasons for the acts of the respondents.

84. The Costs Warning Letter was, as mentioned, something of which the Tribunal had no knowledge at time of the Hearing or at time of its Judgment being issued. It does, however, highlight the fundamental areas of weakness in the claimant's case in this area. It details that there has been no coherent basis set out by the claimant for the suggestion that the purpose of the conduct was to violate his dignity or to create an intimidating, hostile, degrading, humiliating or offensive environment for him. It further details that no coherent basis is set out for the suggestion that the conduct related to the claimant's disability rather than being for a reason unrelated to it. That latter point is not made in relation to the element of claim founded upon the referral to Occupational Health.

85. In the Costs Warning Letter the respondents also highlight in relation to the claims of victimisation advanced by Mr Gourlay that, considering the matter sensibly, it could not reasonably be considered that there had been a protected act as required in terms of Section 27(2) of the Equality Act 2010. In its judgment, the Tribunal found that there had been no protected act.

86. A claim of alleged failure to make reasonable adjustments was also advanced by the claimant.

87. The Costs Warning Letter highlighted the confirmation given by the claimant at the meeting on 11 May 2015 referred to above that he considered that the respondents had made all reasonable adjustments relative to his employment. It set out the steps taken by the respondents in relation to matters which the claimant had raised with them. It also highlighted areas where the claimant advanced a claim to the Tribunal of there having been a failure to make reasonable adjustments notwithstanding the fact that he had not raised any issue or alleged disadvantage potentially requiring an adjustment.

88. In its Judgment the Tribunal found that the claimant was at a substantial disadvantage by comparison to non-disabled employees by, at a particular

time, not having the designated desk which he was ultimately given. It found, however that there was no failure to make a reasonable adjustment as this had not been a matter raised with the respondents either by Occupational Health or by the claimant until the period immediately preceding the respondents' decision, which was to provide the claimant with a designated desk. Similarly whilst the Judgment found that there was substantial disadvantage to the claimant through a requirement to use lower level filing cabinets resulting in the claimant having to bend or go on to his knees to use them, it found that there had been no failure to make reasonable adjustments. This was on the basis that the claimant had not raised with the respondents any issue in relation to storage despite having that opportunity given to him.

89. In relation to other elements of the allegation by the claimant that the respondents had failed to make reasonable adjustments, the Tribunal was satisfied that there had been no failure by the respondents or indeed that there had been no substantial disadvantage to the claimant by application of Provision, Criterion or Practice ("PCP"). The terms of the Costs Warning Letter put the claimant on notice in those areas.

90. The claim made of discrimination arising from disability covered the same areas as the claim of failure to make reasonable adjustments. The Costs Warning Letter made the same points essentially as it did in relation to the failure to make reasonable adjustments claim. The Tribunal found that this element of claim was unsuccessful. The Tribunal was entirely satisfied that the claims advanced under the head of discrimination arising from disability were not successful. This was either on the basis that there had been a reasonable adjustment made or that the decision *"under attack"* was entirely unrelated to the disability of the claimant.

91. A further ground of claim advanced was that of indirect discrimination. The Judgment referred to the terms of Section 19 of the Equality Act 2010. For a successful claim, people who share the same protected characteristic as the claimant require to have been put a particular disadvantage by the PCP when

compared with persons with whom the claimant does not share that protected characteristic. That was not so on the evidence given by the claimant. That evidence was that those affected by the illness by which he is affected were affected in different ways and to different degrees.

92. This requirement and potential failing in the case of the claimant was drawn to his attention in the Costs Warning Letter.

93. There was said by the claimant to have been detriment suffered by him due to acts of the respondents, which acts had been done on the ground that the claimant had made a protected disclosure.

94. The Tribunal in its Judgment found that what were said to have been detriments suffered by the claimant were not in fact detriments. It also found that there was clear and compelling evidence from the respondents that the decisions which they took were not taken on the ground that the claimant had made a protected disclosure. It concluded that two elements said to constitute protected disclosures were properly viewed as being protected disclosures. Given, however, that there was no act done by the respondents on the ground of either of these protected disclosures, and further that there was no detriment suffered by the claimant, this ground of claim was unsuccessful.

95. In their Costs Warning Letter the respondents maintained that no protected disclosure had been made. The Judgment did not agree with their position. The Costs Warning Letter, however, went on to detail that there was no basis given by the claimant as to why it was that he said that any protected disclosure found had formed the basis of the act of the respondents which he regarded as a detriment. In those regards the Costs Warning Letter foreshadowed the Judgment of the Tribunal.

Conclusion

96. The standard of *"no reasonable prospects"* was kept in mind by the Tribunal. An expenses order would not be appropriate if the Tribunal was of the view that the claimant should have appreciated that he had, for example, a difficult case. If an expenses order was potentially to be made, the Tribunal required to be satisfied that, acting sensibly, the claimant ought to have known that his case had no reasonable prospect of success.

97. The Tribunal came to the view, after careful deliberation, that the claimant ought to have known, viewing the matter sensibly, that his claim had no reasonable prospect of success. The Costs Warning Letter was of high significance in informing the view of the Tribunal. That letter was careful and full in its terms. The absence of a basis being advanced on which it was said that incidents or events were discriminatory in nature was highlighted. The points which the Costs Warning Letter made were ultimately reflected in the Judgment of the Tribunal in almost every area. The claimant had not taken advice upon the letter nor had he replied with information which might have set out the basis why he took the view which he did, as to, for example, there being a link between the behaviour of the respondents to which he took exception and his disability.

98. The failure by the claimant to engage with the Costs Warning Letter was also seen as an unreasonable acting by him in the way in which he had conducted the proceedings.

99. After much consideration, the Tribunal concluded that the first stage in the test had been met.

100. The Tribunal then turned to whether it should exercise its discretion to make a costs award, looking at the matter in the round.

101. It concluded that this was a case where a costs award was appropriate. There had been substantial time, in excess of 20 days, spent in relation to the conduct of the Hearing itself. There had been substantial work and time involved in the preparatory stages. It kept in mind that the principle of awarding costs is that they are to be compensatory rather than punitive. It was satisfied that the respondents' costs were well in excess of £20,000. It recognised that some elements in the detailed account produced might not, on taxation by an auditor, prove recoverable. Nevertheless there was a figure potentially recoverable by way of costs which, on any view, well exceeded £20,000.

102. The Tribunal was very conscious that an award of £20,000 involves payment of a large sum of money. It was also conscious, as mentioned, that Mr Gourlay had been co-operative and pleasant during his interaction with the Tribunal. Further, an award of costs or expenses is the exception rather than the rule.

103. The Tribunal came to the view that, weighing all factors, an award of expenses was appropriate, subject to consideration of ability to pay.

104. In relation to ability to pay, it did not seem to the Tribunal that there was argument advanced by the claimant, on the basis of the evidence which he gave and submissions made, that ability to pay should affect either whether an award was made or, if an award was made, the amount of any such award. Insofar as it may have been the intention that these were points made on behalf of the claimant, looking to his overall assets, whilst taking account of his absence of income from employment both currently and the likely position in that regard in the future, the facts and circumstances are not such that ability to pay would be a basis, in the mind of this Tribunal exercising its discretion, on which not to make an award of costs or expenses or to restrict that award from the sum of £20,000 claimed.

105. In those circumstances and for these reasons, the Tribunal was unanimous in its view that in the particular circumstances of this case a costs or expenses award was appropriate and that fixing that in the sum of £20,000 was also appropriate.

Employment Judge: Robert Gall
Date of Judgment: 12 February 2018
Entered in register: 13 February 2018
and copied to parties