EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
MR. WILLIAM GOULD

Respondent
CREW EMPLOYMENT SERVICES CAMELOT

COSTS HEARING - JUDGMENT

HELD AT: London Central (CVP) ON: 29 March 2022

BEFORE: Employment Judge Russell (sitting alone)

REPRESENTATION:
Claimant: Ms.Breslin, Counsel
Respondent: Mr.Cook , Counsel

Judgment

1 The Respondent has acted unreasonably in the way it has conducted itself in respect of part of the proceedings by failing to admit liability at an earlier stage in respect of a defence with no reasonable prospect of success . It should have done so on or before 1 May 2021.

2 The Respondent did not act unreasonably in disputing Remedy. Remedy issues account for 25% of the Claimant's costs from 1 May 2021 to 9 September 2021 when Liability was admitted.

3 The Respondent is therefore ordered to pay 75% of the Claimant's costs from 1 May 2021 until 9 September 2021 to be assessed if not agreed provided that the costs to which the Respondent is responsible for paying shall not exceed £12,500 in total including VAT .

4 Unless either party writes into the Tribunal within 21 days (so by 19 April 2022) to seek an assessment of costs based on the costs order then £12,500 by way of a contribution of costs shall be paid to the Claimant due within 7 days of that so by 26 April.

Reasons

Application and principal submissions

1. The Claimant has applied for costs of £19,857 including VAT reflecting what he says , though his solicitors and counsel, were unnecessary costs incurred for the period 1 April 2020 to 9 September 2021 . On 1 April the Respondent was informed it did not have leave to appeal to the Court of Appeal in respect of the decision (made at the Employment

Tribunal (ET) and confirmed on appeal to the EAT) that the ET had jurisdiction to hear the Claimant's Unfair Dismissal claim. On 9 September 2021 the Respondent admitted liability and shorty after this withdrew its defence leading to the ET issuing a consent judgement in favour of the Claimant to include a full compensatory and basic award of compensation.

2. The Respondent submits that it is has not conducted the proceedings unreasonably at any stage and that the Respondent certainly had a reasonable basis to defend the claim at the outset on the grounds of jurisdiction . The Respondent argues that the Claimant at all times failed to engage meaningfully in settlement discussions which was unreasonable conduct and led to unnecessary and extra expense .

3. The Respondent submits that an earlier admission of liability for unfair dismissal would have made little or no difference to the work required to be undertaken by the parties to prepare for a hearing on remedy. And the Respondent remained entitled, reasonably, to defend the claim on grounds of quantum even if it was found by the ET today that it did not have such grounds on liability. The fact that the Respondent admitted liability and subsequently agreed to pay the statutory maximum compensatory award does not per se mean that the ET should readily accept that the claim had no reasonable prospects of success, such as to fall within rule 76(1)(b). The Respondent's further arguments were fully set out in writing and through oral submission by Mr Cook.

4. The Claimant accepts that for the period 25 September 2018 until 1 April 2021, the Respondent's response to the claim was not unreasonable. In particular that the Respondent had a reasonable basis to defend the claim at the outset on the grounds of jurisdiction. However, as the defence had no prospect of success other than on the jurisdictional grounds the Respondent should have withdrawn its case immediately on receipt of the CA's decision on April 1 . The Claimant was , in the meantime, entitled to refuse any settlement given the wrong done to him and the wish to vindicate his claim and reputation through a full hearing. The Claimant's further arguments were fully set out in writing and through oral submission by Ms. Beslin.

Legal Principles

ET Rules 2013 r.76(1) provides that:

"A tribunal may make a costs 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;

c. a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins."

Factual of fact and Legal Findings

1. An award of costs in the employment tribunal is the exception rather than the rule and, in particular costs do not automatically follow success. *Gee v Shell UK Ltd [2002] EWCA Civ 1479*, *[2003] IRLR* 82

2. In awarding costs against a party which/who has withdrawn an employment tribunal must consider whether the litigant has conducted the proceedings unreasonably in all the circumstances, and not only whether the late withdrawal of the claim was in itself unreasonable. *McPherson v BNP Paribas (London Branch) 2004 ICR 1398, CA*

3. However there were serious flaws in the Respondent's defence which was , as the Claimant described, " self -evidently weak" . So much so , without needing to or being able to go into the evidence in detail (but bearing in mind the authority of *Yerrakalva v Barnsley MBC 2012 ICR* reminding the Tribunal of the efforts it must make to do so) it is clear and I find that once the Respondent had lost its argument on jurisdiction their defence had no reasonable prosect of success on liability. The Claimant was dismissed summarily without any chance for a disciplinary hearing to take place and essentially on the (largely unparticularised) basis that his conduct had had a detrimental impact on the crew . There was no process, no hearing, no appeal and no overt fairness and an uncertain charge made on ambiguous allegations.

4. So, on 1 April 2021 when the jurisdiction issue was finally resolved the Respondent knew or should have known that the Respondent had no reasonable prospect of success on liability applying the second and third limb tests in *Opalkova v Acquire Care Ltd EA-2020-000345.* It is however accepted that there remained issues, or at least potential issues, related to contributory conduct that the Respondent was entitled to argue and *Polkey* which an employment tribunal is bound to consider on remedy (if it has the opportunity to do so at a full hearing , other than in exceptional cases) and as to the duty to mitigate .

5. The Claimant's schedule of loss showed a gross loss to the date of the listed October 2021 hearing of €131,347 (approximately £110,000) and indicated that a 25% uplift would also be sought. This is not so high that the Respondent was not entitled to consider whether , on remedy, factors affecting compensation (including contributory fault and/or *Polkey* and /or Mitigation *)* when applied to the Claimant's losses would mean the Claimant might receive less than the statutory cap. I do not accept the Claimant's argument that whatever findings were made on remedy the Claimant would have got the maximum award available in any event. But the Respondent points of potential substance all go to remedy not to liability .

6. The Respondent's decision to withdraw does not necessarily mean that its position on remedy was without merit and one might imagine their lack of enthusiasm for even a remedies hearing given the cost and publicity involved. It was however entitled to proceed to a remedies hearing if it had wished to do so just as the Claimant was entitled to proceed to a full hearing on liability and remedy without accepting an offer of settlement that fell short of what he considered to be a vindication of his actions given the unclear and unsupported allegations made against him. This was his choice, and it was not unreasonable of him to refuse the initial (low) settlement offered on 9 September 2020 or even the high settlement offer of 31 August 2021 given this had some caveats to it and did not include any contribution to costs. But the further point being, relevant to the costs application by the Claimant, that the Respondent's only reasonable choice after 1 April 2021 was to argue as to quantum.

7. The Respondent was however first entitled to a reasonable period to consider the decision of the Court of Appeal and assess fully the merits (or lack of merit) as to its case on both liability and remedy. But I do not find (as claimed by the Respondent if the tribunal were to find against them on costs and look to determine the period when costs might be awarded) that the Respondent should be permitted to take some 4 months to accept liability. Notwithstanding the "international dimension" of the decision making parties involved as the Respondent's counsel put it , I find that a month was/ is adequate for them to have acted .

So, by 1 May 2021 . But they left it until 9 September 2021 to accept liability and the Claimant incurred unnecessary costs as result.

8. The Respondent argues that liability and remedy were inextricably connected and that some 66.6% of the work undertaken by the Claimant in the period from 1 April to 9 September 2021 can be apportioned to remedy not liability. I find however that a more appropriate spilt is 75%/25% the other way and make this award in favour of the Claimant in respect of 75% of all costs incurred between 1 May and 9 September 2021 subject to a cap . Clearly the substantive case was one of unfair dismissal rather than quantum especially given the fact the Claimant had been out of work a year and was claiming well in excess of the statutory cap. I have done my best without sight of the relevant documents to make this determination and bearing in mind formal disclosure of all documents never took place and the ET today is not expected to conduct a mini trial as to the issues which have (of course) never been considered by a full tribunal .Nor am I able ,or is it desirable for me , to undertake a forensic analysis of the costs incurred which will need taxation in any event unless the parties otherwise agree. However, I limit the award of costs to £12,500 in the hope that this capped figure can be agreed by both parties and paid without the need for a costly and time consuming taxation process.

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EMPLOYMENT JUDGE - Russell

29 March 2022
Order sent to the parties on

.30/03/2022.

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for Office of the Tribunals