EMPLOYMENT TRIBUNALS

Claimant: **Mr T Jeynes**

Respondent: **The Chief Constable of Gloucestershire Constabulary**

Heard at: **Bristol**

On: **2 February 2022**

Before: Employment Judge Midgley
Mrs S Maidment
Mr H Launder

Representation
Claimant: Mr D Leach, Counsel
Respondent: Mr R Oulton, Counsel

JUDGMENT having been sent to the parties on 2 August 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This is the Tribunal's unanimous Judgment upon the respondent's application for costs dated 24 August 2021 and made consequent to receipt of the reserved Judgment dated 28 July 2021 which was sent to the parties on 2 August 2021.

Procedure, Hearing and Evidence

2. We were provided with the parties' skeleton arguments and copy authorities and an agreed bundle of relevant documents of 343 pages. We took time to read the skeleton arguments before hearing the submissions from counsel.

The Parties' Arguments

3. The respondent's application was made on two grounds:
   3.1. The claimant acted unreasonably in bringing these proceedings (in whole or in part); and/or
   3.2. The claims had no reasonable prospect of success.

4. The grounds of the application may be summarised as follows:

   4.1. The claimant lied to bolster a claim of victimization against PH which had no merit. (The lie identified was one made prior to the proceedings to RP, albeit the respondent argued that the claimant adopted and repeated it in his statement and evidence.)

   4.2. Elements of the victimization claim, which was rejected by the Tribunal, included allegations which were untrue, and therefore lies, in particular the assertion that:

      4.2.1. PH had said that she needed to consider what was in the public interest when 'demoting' the claimant and either directly referenced his disability or that was the inference to be drawn (the latter being the position adopted by the claimant in evidence);

      4.2.2. PH had instructed PC not to permit the claimant to act up;

      4.2.3. AH told the claimant that he, PC and PH knew that the complaints against the claimant were groundless;

      4.2.4. The claimant had put an entry for a meeting in PH's electronic diary and she subsequently failed to attend;

      4.2.5. The claimant had spoken to ND and agreed to reschedule the informal mediation meeting for 22 February 2022.

   4.3. Alternatively, if the claimant was not deliberately lying, but was suffering from a distorted perception of reality, that could still constitute unreasonable conduct following Topic v Hollyland Pitta Bakery and ors EAT 0523/11.

   4.4. The claim of reasonable adjustments was bound to fail as the claimant pursued it under section 20(3) and did not seek to amend to include an alternative case under s.20(5) EQA 2010 of failure to provide an auxiliary aid. The claimant therefore acted unreasonably in pursuing the s.20 claim.

   4.5. The section 15 claim generally had no reasonable prospect of success because the claimant was unable to appreciate, as the Tribunal found, that he was treated more favourably and not less so, because of matters arising from his disability.

5. The claimant's resistance to the application rested to three main arguments:

   5.1. First, a finding that a lie has been told does not necessitate or establish without more that a there has been unreasonable conduct (Kapoor v Governing Body of Barnhill Community High School (12.12.13,

UKEAT/0352/13/RN; HCA International Ltd v May-Bheemul (23.3.11, UKEAT/0477/10/ZT) at para.39; and Arrowsmith v Nottingham Trent University [2012] ICR 159 (at para.33, per Rimer LJ)). Here the Tribunal found that the claimant had unconsciously adopted the lie, rather than deliberately and knowingly doing so. Critically, the lie predated the proceedings and so could not be unreasonable conduct of the proceedings (Davidson v John Calder (Publishers) Ltd and Calder Educational Trust Ltd [1985] IRLR 97 (EAT));

5.2. Secondly, often claims fail because the burden of proof whether as to the conduct complained of, but more often as to the reason for it is not discharged (Tabidi v British Broadcasting Corporation [2020] IRLR 702 (CA) at paras.43 and 47-48 respectively). This was the case here, not because the claimant had lied: the claimant relied upon a table identifying each allegation and the basis on which failed, referencing the relevant passage of the Judgment. That analysis demonstrated that the majority of the claims failed on the issue of causation; in many instances the unfavourable treatment or detriment relied upon was conceded or proved.

5.3. Lastly, in relation to the reasonable adjustments claim the claimant argued that the Tribunal had misunderstood his case which was clearly put, and that no amendment was needed as the claim was pleaded in clear terms when read across:

5.3.1. the particulars of claim (which relied upon specifics which were contained in documents which were not identified in the particulars: “the proper implementation and monitoring of previously agreed reasonable adjustments””,

5.3.2. the amended particulars of claim (placing reliance on a paragraph which was not contained within the pleaded s.21 claim, namely “the Respondent has not prevented other officers from using the personalised chair when the Claimant is away from the office,” in circumstances where the pleaded claim, which begins at paragraph at paragraph 59(b) states “With regard to working arrangements, providing officers with standard equipment and facilities for the performance of their duties.”)

5.3.3. The manner in which questions were put to witnesses (“issuing a clear instruction or lawful order that the chair was not to be adjusted”); and lastly

5.3.4. The manner in which the claim was put in submissions (“ensuring that the chair’s settings were not altered.”)

5.4. In any event, the claim was workable but was rejected on the facts.

The Relevant Law

6. We deal with the law in relatively short form.

7. Rule 76 of the ET Rules of Procedure 2013 provides, inter alia, that a Tribunal

"may make a costs order, and shall consider whether to do so, where it considers that:

7.1. a party has acted vexatiously, abusively, disruptively or otherwise unreasonably either in bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

7.2. any claim or response had no reasonable prospect of success.

8. The process of making a costs order requires a three-stage process (Hossaini v EDS Recruitment Ltd [2020] ICR 512, at para 64):

8.1. First, the Tribunal must assess whether the threshold or thresholds relied upon have been crossed;
8.2. If so, decide whether the discretion to make a costs order should be exercised; and
8.3. If so, determine in what amount.

9. The correct starting position is that an award of costs is the exception rather than the rule. As Sedley LJ stated at para 35 of his judgment in Gee v Shell Ltd [2003] IRLR 82, CA:

> "*It is nevertheless a very important feature of the employment jurisdiction that it is designed to be accessible to people without the need of lawyers, and that in sharp distinction from ordinary litigation in the UK, losing does not ordinarily mean paying the other side's costs …*"

Unreasonable conduct

10. 'Unreasonable' has its ordinary English meaning and is not to be interpreted as if it means something similar to 'vexatious' — Dyer v Secretary of State for Employment EAT 183/83.

11. The Tribunal has a wide discretion where an application for costs is made under Rule 76(1)(a). In determining whether to make an order under this ground, it should take into account the 'nature, gravity and effect' of a party's unreasonable conduct (see McPherson v BNP Paribas (London Branch) [2004] ICR 1398). In conducting that assessment, as it was put Mummery LJ at para 41 in Barnsley BC v Yerrakalva [2012] IRLR 78 CA; "*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*."

12. However, the Tribunal should look at the matter in the round rather that dissecting various parts of the claim and the costs application, and

compartmentalising it. Nonetheless, an Employment Tribunal must consider, after the claims were brought, whether they were properly pursued (see for instance NPower Yorkshire Ltd v Daley EAT/0842/04). If not, then that may amount to unreasonable conduct.

13. There is no need for the tribunal to find a causative link between the costs incurred by the party making the application for costs and the event or events that are found to be unreasonable (see McPherson v BNP Paribas, and Kapoor v Governing Body of Barnhill Community High School UKEAT/0352/13 in which Singh J held that the receiving party does not have to prove that any specific unreasonable conduct by the paying party caused any particular costs to be incurred.)

14. Particular reliance was placed (at para.13) on the judgment of Cox J in HCA International Ltd v May-Bheemul (23.3.11, UKEAT/0477/10/ZT) at para.39:

> *"… 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"*

15. That statement was endorsed by the Court of Appeal in Arrowsmith v Nottingham Trent University [2012] ICR 159 at para.33, per Rimer LJ,

16. Nonetheless, to put forward a case in an untruthful way is to act unreasonably, (Kapoor). The fact that a claimant may not have deliberately lied does not preclude reaching the conclusion that a claim had no reasonable prospect of success or that the claim had not been reasonably brought and pursued (Topic v Hollyland Pitta Bakery & Ors UKEAT/0523/11/MAA)

17. Furthermore, the result of a claim does not preclude a finding of unreasonable conduct in its pursuit. In Nicholson Highland Wear v Nicholson Lady Smith made it clear that: "a party could have acted unreasonably and an award of [costs] be justified even if there has been a partial (or whole) success. It will depend on the circumstances."

Discussions and conclusions

18. The respondent says the claim was predicated on a lie. Our finding was that claimant had lied in respect of matters which predated the allegations in the claim and were connected but ancillary to the claims themselves.

19. Largely the claims failed on two grounds:
    19.1. Either we preferred the respondent's evidence in relation to whether an event had occurred to that of the claimant, whether the event was

the basis of the allegation itself or was relied upon as a fact from which we were asked to draw a conclusion to support it, or

19.2. We found that that the claimant did not prove the necessary element of causation.

20. Our findings as to the manner in which the claimant interpreted events through a prism of victimhood and paranoia were connected to both of those matters. However, we did not find that the lie which we found occurred was causative of or underlined the specific allegations. Put simply, it was no part, or no significant part, of our findings that claimant had lied about the matters about which he complained.

21. Mr Leach's submissions focused upon a table analysing the Judgment and the basis for the rejection of the claims, identifying whether the detriment was proved, conceded or rejected and where proved or conceded, whether the claim failed on the basis that causation was not established. It is accurate for those purposes and we adopt it.

22. Thus, whilst the claimant lied in relation to a matter which predated the claim and whilst that lie influenced the allegations he made and the manner of his evidence, firstly many of the detriments which were the subject of the allegations were established and, secondly, the Tribunal did not reject the claims on the basis of the lie, but on the basis that causation was not proved. That is not unreasonable conduct

23. It follows that we reject the first ground of the application.

24. We turn to the second ground – that the claims had no reasonable prospect. It is relevant but not determinative that the respondent did not either apply for a deposit order or issue a costs warning letter to the claimant. Its position may, perhaps, have been stronger if it did, although as the authorities make clear, that is not a necessity.

25. However, in the circumstances of this case, where detriments were admitted or proved, and the basis on which the allegation failed was causation, it is a very high hurdle for the respondent to clear to say that the claimant knew or must reasonably be taken to have known that he had no reasonable prospect of establishing the necessary evidence or evidence from which an inference to support his allegations could have been drawn. In that sense this case was no different from many others: there were facts from which inferences might have been draw, such as the concessions made by the respondent's in the grievance interviews.

26. The reasonable adjustments claim was pleaded and developed in a way which was at times contradictory and often inconsistent with the allegations which were clearly pleaded. However, as Mr Leach argued, the Tribunal

accepted a PCP and that it placed the claimant at a disadvantage. The consequence of the manner of the pleading was that the claimant was always going to struggle to show that the adjustment was not made, but the claim would have proceeded even if the allegation were not pursued as a section 20 claim, and the facts which were the focus of the s.20 claim were still part of the background which formed the battleground for the other claims. Looking at the whole picture of the claim, the manner in which the s.20 claim was pleaded and advanced did not render the pursuit of the specific claim or the proceedings more generally, unreasonable.

27. In all the circumstances, we are not persuaded that the allegations had no reasonable prospect of success such that it was unreasonable for the claimant to pursue them.

28. The application for costs therefore fails and is dismissed.

Employment Judge Midgley
Date 20 April 2022

Judgment & reasons sent to parties: 20 April 2022

FOR THE TRIBUNAL OFFICE