EMPLOYMENT TRIBUNALS

Claimant: **Mr A K Robson**

Respondent: **Eric Roberts Contractors Ltd**

Heard at: **Bristol (in chambers)**

On: 6 April 2022

Before: Employment Judge Cuthbert

RESERVED JUDGMENT ON COSTS

The respondent's application for costs is refused.

REASONS

Introduction

1. The claimant brought a claim for unfair dismissal in an ET1 presented on 1 March 2021. The case came before the tribunal for a two-day unfair dismissal hearing, via the Video Hearings service, on 22 and 23 December 2021. The claimant appeared in-person, as he had been throughout the proceedings, and the respondent was represented by Mr Falcao, its instructed solicitor.

2. Judgment and reasons were given orally on 23 December 2021 and the claimant's claim was dismissed, in particular because I found that the claimant had not established, on the balance of probabilities, that he had been dismissed by the respondent. I have not referred in detail to the findings made at the full merits hearing because those are set out in the subsequent written reasons dated 12 January 2022, which are publicly available.

The respondent's application for costs

3. On 30 December 2021, the respondent submitted an application for costs against the claimant and also a request for written reasons from the tribunal.

4. In its costs application, the respondent submitted that the claimant's claim (1) had no reasonable prospect of success and (2) that the claimant had acted vexatiously and unreasonably in bringing his claim.

5. The respondent asserted variously within the costs application that:

    a. the claim was bound to fail and that the claimant knew at the outset that it was without substance and was based on a complete fiction, namely an alleged discussion with Mr Roberts, the 89-year-old managing director of the respondent.

    b. the claimant had dictated the events upon which to base his own exit package and fabricated a fictional redundancy.

    c. the claim was brought with improper motives of taking advantage of the respondent's vulnerable owner, an elderly man, whom the claimant knew was suffering with dementia and in respect of whom there was a lasting power of attorney in favour of his nephew Mr Cox.

    d. the claimant relied on the possibility that the tribunal would either find that Mr Roberts' evidence was not credible because of his dementia or alternatively that the claimant would be found to be more credible as a person who was not suffering from dementia.

    e. the claimant pursued the claim despite being provided with ample evidence that his role was a) not redundant, b) very important at a time when the respondent needed his particular skills to a greater degree when the business was suffering a short seasonal downturn, c) contained the operator's licence holder element without which the respondent could not operate at all.

    f. the claimant was offered a generous walkaway deal, including keeping a redundancy payment of £7,263 and the Mercedes Van valued at the time at approximately £23,000 and failed to withdraw his claims, instead seeking a further unreasonable sum of £42,000.

    g. the claimant was warned as to costs prior to the hearing and given a further generous offer to end proceedings but failed to withdraw his claim.

    h. the claimant dishonestly appropriated a Mercedes van worth at the time in excess of £23,000 and a redundancy pay-out of £7,263 from the respondent.

6. The respondent asserted that the claimant's conduct was vexatious because he brought the proceedings dishonestly and based on an entirely fictional account of events. The claimant knew his claim had no substance as it had been so manifestly misconceived that it could have no prospect of success (see *Marler Ltd v Robertson* [1974] ICR 72).

7. Furthermore, the respondent asserted that the claimant acted wholly unreasonably in bringing the proceedings given that his version of events presented to the tribunal was untrue and found to be "implausible". The respondent submitted that where a claimant was so unreasonable as to fabricate circumstances and assertions with the foreseeable aim/consequence of causing the respondent and its vulnerable witness distress and loss, this must logically fall at the highest end of unreasonable conduct; see *Daleside Nursing Home Ltd v Mathew* UKEAT/0519/08.

8. The respondent sought to recover the legal costs it incurred by solicitors to prepare for and attend the tribunal hearing. The entire legal costs incurred were said to be £14,000 + VAT.

9. A bundle of supporting documents was provided by the respondent (16 pages), including:

    a. a "without prejudice" drop-hands offer dated 8 March 2021 which included the claimant keeping the disputed van and the redundancy payment. I noted that the basis of the respondent's offer was an illegality argument which was not pursued at the substantive hearing. The claimant replied that he knew the true facts and would proceed to a hearing. In his response, Mr Falcao included a costs warning and suggested that the claimant obtain legal advice;

    b. an email from Acas to the respondent dated 23 August 2021 indicating, in response to a request from the respondent as to what the claimant sought by way of settlement, that he was seeking £42,000 and a letter confirming that he had been unfairly dismissed. That was rejected by the respondent; and

    c. an email to the claimant, "without prejudice save as to costs", dated 16 December 2021 (following exchange of witness statements), in which the respondent asserted that the claim was vexatious, that the claimant had resigned and was not redundant, and the claimant's case was "absurd" and "a complete creation". A further drop hands offer was made, on this occasion requiring the return of the van. I have not seen any response from the claimant to that offer and it was evidently not accepted by him.

The claimant's response to the respondent's costs application

10. On 7 January 2022, the claimant submitted his written response to the respondent's costs application by email to the tribunal.

11. He stated (in summary) that:

    a. he had behaved responsibly, reasonably, properly and professionally and had complied with all the case management orders and deadlines and co-operated fully with the respondent's solicitors.

    b. he had always told the truth and acted honestly before and during the hearing.

    c. he had not been represented and, as such, should not be judged by the standards of a legal professional.

d. he submitted a claim supported by evidence and good grounds and so it was reasonable for him to believe he had a chance of success.

e. he considered that his account of the meeting with Mr Roberts was supported by Mr Grainger's text message and he had a letter signed by Mr Roberts confirming his redundancy, and that the respondent did not respond to his appeal letter.

f. there was no evidence of 'improper motives'.

g. he found the offers from the respondent intimidatory.

h. he found the tribunal process stressful, especially as he was not legally represented.

i. he was critical of the respondent's solicitor for allegedly contacting his wife at her workplace the day before the hearing leaving a message for her to contact him urgently about a court case involving the respondent.

j. he stated that during the video hearing, the respondent, his solicitor and witnesses were sat a long way away from the camera which made it difficult for him to hear their responses, see their faces and their reactions. He stated that he raised this problem with the respondent's solicitor on more than one occasion but it was not addressed. He stated that this may have affected his ability to present his case as effectively as he would have wanted

(On this point, the respondent's witnesses successively gave their evidence close to the camera and microphone in a conference room at Mr Falcao's firm's offices, having discussed this at the start of the hearing. My notes of the hearing do not indicate the claimant having raised any concerns during the course of the respondents' evidence about his ability to hear them; rather he asked a series of questions he had prepared and received responses to each one).

Correspondence subsequent to the costs application and response

12. Written reasons, at the request of the respondent. were completed by me on 12 January 2022 and sent out to the parties by the tribunal on 18 January 2022

13. On 9 March 2022, I asked the respondent to confirm if it maintained its costs application following the written reasons and, of so, whether the parties consented to the costs application being determined on the papers. The respondent indicated that it did maintain the application and the parties each consented, on 14 March 2022, to the costs application being dealt on the papers previously provided by the parties.

Relevant law

14. The employment tribunal is a different jurisdiction to the county court or high court, where the normal principle is that "costs follow the event", or in other words, the loser pays the winner's costs.

15. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 contain the relevant rules to be applied by employment tribunals, and for present purposes these are as follows:

- Rule 74(1) - "Costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purposes of or in connection with attendance at a tribunal hearing).

- Rule 76

  (1) A tribunal may make a costs order or a preparation time 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) had been conducted; or

  (b) any claim or response had no reasonable prospect of success.

- Rule 77 - A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party, was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the tribunal may order) in response to the application.

- Rule 78(1)(a) A costs order may 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.

- Rule 84 - In deciding whether to make a costs, preparation time or wasted costs order and if so in what amount, the tribunal may have regard to the paying party's ability to pay.

16. Costs in employment tribunals have long been, and remain, the exception rather than the norm. Lord Justice Sedley in *Gee v Shell UK Limited* [2002] IRLR 82 stated as follows: *"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 United Kingdom – losing does not ordinarily mean paying the other side's costs"*. That said, the facts of a case need not be exceptional for a costs order to be made. The question is whether the relevant test is satisfied (*Vaughan v London Borough of Lewisham and others* [2013] IRLR 713).

17. The discretion afforded to a tribunal to make an award of costs must be exercised judicially (*Doyle v North West London Hospitals NHS Trust* UKEAT/0271/11/RN. The tribunal must take into account all of the relevant matters and circumstances. The tribunal must not treat costs orders as merely ancillary and not requiring the same detailed reasons as more substantive issues. Costs orders may be substantial and can thus create a significant liability for the paying party. Accordingly, they warrant appropriately detailed and reasoned consideration and conclusions. Costs are intended to be compensatory and not punitive.

18. The EAT in *Haydar v Pennine Acute NHS Trust* UKEAT/0141/17 held that the determination of a costs application is essentially a three-stage process (per Simler J at [25]) (emphasis added):

> *The words of the Rules are clear and require no gloss as the Court of Appeal has emphasised. They make clear (as is common ground) that there is, in effect, a three-stage process to awarding costs.*
>
> *The first stage - **stage one** - is to ask whether the trigger for making a costs order has been established either because a party or his representative has behaved unreasonably, abusively, disruptively or vexatiously in bringing or conducting the proceedings or part of them, or because the claim had no reasonable prospects of success.*
>
> *The trigger, if it is satisfied, is a necessary but not sufficient condition for an award of costs. Simply because the costs jurisdiction is engaged, does not mean that costs will automatically follow. This is because, at the second stage - **stage two** - the Tribunal must consider whether to exercise its discretion to make an award of costs. The discretion is broad and unfettered.*
>
> *The third stage - **stage three** - only arises if the Tribunal decides to exercise its discretion to make an award of costs, and involves assessing the amount of costs to be ordered in accordance with Rule 78.*

19. For the purposes of rule 76(1)(a) above, **"unreasonable"** has its ordinary meaning; it is not equivalent to "vexatious" (*Dyer v Secretary of State for Employment* UKEAT/183/83).

20. In *Yerraklava v Barnsley MBC* [2012] IRLR 78 Mummery LJ gave the following guidance at [41] including as to the question of causation in the context of unreasonable conduct and related costs claimed:

> *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. The main thrust of the passages cited above from my judgment in McPherson was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the ET had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances.*

21. In *Daleside Nursing Home Ltd v Mathew* UKEAT/0519/08, the EAT said that where there was a *"clear-cut finding that the central allegation ... was a lie, it is perverse for the tribunal to fail to conclude that the making of such a false allegation at the heart of the claim does not constitute a*

person acting unreasonably." However, in *Kapoor v The Governing Body of Barnhill Community High School* UKEAT/0352/13, the EAT found that a tribunal had misdirected itself in its approach to the question of costs, because it considered that the simple fact that a claimant had lied meant that she had conducted the proceedings unreasonably; it should instead have considered all the circumstances of the case, including the procedural history and the extent to which the claimant's lies had made a material impact on its actual findings.

22. A failure to accept an offer not to pursue a party for costs does not, of itself, constitute unreasonable conduct: *Lake v Arco Grating (UK) Ltd*, UKEAT/0511/04. However, if a party issues a clear costs warning, but the other party (particularly if represented) fails to take it seriously and to engage with it, by addressing their minds to the issues raised in support of the warning, a costs order on the basis of unreasonable conduct will be more likely.

23. The meaning of the word, ***"vexatious"*** has been the subject of a number of reported cases. In *Attorney General v. Barker* [2000] 1 FLR 759, Bingham CJ described the hallmark of vexatious proceedings as being that it had: *"Little or no basis in law (at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and it involves an abuse of the process of the court, meaning a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process"*. In *Ashmore v. British Coal Corporation* [1990] ICR 485 the Court of Appeal observed that whether a case was vexatious depended on all the relevant circumstances of the case.

24. In *Marler Ltd V Robertson* [1974] ICR 72, NIRC the National Industrial Relations Court stated that *"If an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive, he acts vexatiously."*

25. Simply being "misguided", or even "seriously misguided" is not sufficient to establish vexatious conduct — *AQ Ltd v Holden* [2012] IRLR 648, EAT at [38].

26. On the question of a claim having **no reasonable prospect of success**, for the purposes of rule 76(1)(b) above, under the previous tribunal rules, a "misconceived" claim was synonymous with a claim having no reasonable prospect of success. In *Scott v Inland Revenue Commissioners* [2004] ICR 1410, CA, Lord Justice Sedley observed that "misconceived" for the purposes of costs under the Tribunal Rules 2004 included *"having no reasonable prospect of success"* and clarified that the key question in this regard is not whether a party thought he or she was in the right, but whether he or she had reasonable grounds for doing so.

27. In *Radia v Jefferies International Ltd* [2020] IRLR 431 the EAT gave guidance on how tribunals should approach costs applications under rule 76(1)(b). It emphasised that the test is whether the claim had no reasonable prospect of success, judged on the basis of the information that was known or reasonably available at the start. Thus, the tribunal must consider how, at that earlier point, the prospects of success in a trial

that was yet to take place would have looked. In doing so, it should take account of any information it has gained, and evidence it has seen, by virtue of having heard the case, that may properly cast light back on that question, but it should not have regard to information or evidence which would not have been available at that earlier time. The EAT went on to clarify that the mere existence of factual disputes in the case, which could only be resolved by hearing evidence and finding facts, does not necessarily mean that the tribunal cannot properly conclude that the claim had no reasonable prospects from the outset, or that the claimant could or should have appreciated this from the outset. That still depends on what the claimant knew, or ought to have known, were the true facts, and what view the claimant could reasonably have taken of the prospects of the claim in light of those facts.

28. In *Radia* the EAT also considered the overlap between a claim or response having no reasonable prospect of success and unreasonable conduct and stated as follows at [64]:

> *This means that, in practice, where costs are sought both through the r 76(1)(a) and the r 76(1)(b) route, and the conduct said to be unreasonable under (a) is the bringing, or continuation, of claims which had no reasonable prospect of success, the key issues for overall consideration by the Tribunal will, in either case, likely be the same (though there may be other considerations, of course, in particular at the second stage). Did the complaints, in fact, have no reasonable prospect of success? If so, did the complainant in fact know or appreciate that? If not, ought they, reasonably, to have known or appreciated that?*

27. In terms of the general exercise of discretion, the fact that a party is unrepresented is a relevant consideration. The threshold tests may be the same whether a party is represented or not, but the application of those tests should take account of whether a litigant has been professionally represented or not (*Omi v Unison* UKEAT/0370/14/LA). A litigant in person should not be judged by the same standards as a professional representative as lay people may lack the objectivity of law and practice brought to bear by a professional adviser and this is a relevant factor that should be considered by the Tribunal (*AQ Limited v Holden* [2012] IRLR 648).

28. The means of a paying party in any costs award may be considered twice – first in considering whether to make an award of costs and secondly if an award is to be made, in deciding how much should be awarded. If means are to be taken into account, the tribunal should set out its findings about ability to pay and say what impact this has had on the decision whether to award costs or an amount of costs (*Jilley v Birmingham & Solihull Mental Health NHS Trust* UKEAT/0584/06).

Conclusion

29. Having considered the law above against the respondent's application, I have concluded that the respondent has **not** overcome the hurdle of establishing, for the purposes of its application for costs, that the claimant acted unreasonably or vexatiously in the bringing or conduct of the proceedings or that his claim had no reasonable prospect of success.

30. This was an unusual case in which there were significant facts in dispute, being facts relevant to determining whether or not the claimant had been dismissed.

31. There were few documents before me at the substantive hearing, or seemingly in existence, which were directly relevant to the key issues in dispute and so I had to base my findings of fact almost entirely upon the witness testimony. Whilst I generally preferred the evidence of the respondent's witnesses where there was a material issue of dispute, there were nonetheless some potentially significant anomalies which could on one view have lent support to the claimant's unfair dismissal claim, including:

    a. A text message from Mr Grainger to the claimant which was clearly open to interpretation and on one view could have supported the claimant's account of the key meetings with Mr Roberts and his claim that he had been made redundant in them.

    b. The fact that Mr Roberts had signed the purported letter of dismissal to the claimant which set out details of the potential redundancy package.

    c. The failure by the respondent to engage at all with the appeal letter submitted by the claimant or to correct the claimant's version of events set out in that letter.

32. There were therefore a number of points which were open to interpretation (as opposed to pointing overwhelmingly in the respondent's favour) and which required determination after hearing oral evidence from the relevant witnesses.

33. In his oral evidence, the claimant appeared to believe in his account of events, and stood firmly by it, and I did **not** make any finding that he had lied in his evidence to the tribunal.

34. Faced with two sides that steadfastly stood by their contrasting accounts of the disputed events, it was self-evident that I would need to opt for the one which I found most likely to have occurred after hearing their oral evidence. Whilst, for the reasons given in the substantive decision dated 12 January 2022, I came down on the side of the respondent on the main factual disputes and did not find the claimant's case on those disputes to be a plausible one, a different tribunal could have reached a different conclusion on the same evidence, particularly in light of the matters at paragraph 31(a) – (c) above. Therefore, the fact that I accepted the respondent's evidence on the disputes of fact did not detract from the fact that those points required scrutiny.

35. It was clear to me that evidence would have been required to be heard in order to determine whether or not the claimant's claim was well-founded. I was not satisfied that his was a case that was entirely hopeless or that it was a claim without reasonable a prospect of success. I was not satisfied that the claimant appreciated those matters at any time prior to the hearing, or that he ought reasonably to have done so.

36. I also do not accept that the claimant had acted unreasonably or vexatiously in bringing the proceedings or in the way in which they were

conducted. There was no direct evidence or finding of any improper motive on his part and the assertions to this effect by the respondent are merely inferential. The earlier offers of settlement made by the respondent were predicated largely upon a dispute (alleged illegality in the operation of the contract of employment) which was not pursued at the substantive hearing. The final drop hands settlement offer was only made very shortly before the hearing before me, and I do not consider that, in not accepting that offer, the claimant's conduct of the proceedings thereby became unreasonable.

37. Consequently, for the reasons given above, I have found that the threshold required by the rules to demonstrate vexatious or unreasonable behaviour or that the claim had no reasonable prospect of success was not reached. Therefore, the respondent's application for a costs order failed at the first stage and there was, strictly, no need for me to consider the second or third stages of the process.

38. Had I gone on to consider the second stage, and the broad discretion available to me, I would **not** in any event have exercised that discretion in the respondent's favour. Costs remain the exception rather than the rule. The claimant was unrepresented throughout the proceedings and there was no evidence that he had recourse to legal advice. I was mindful again of the unusual nature of the case and of the possibility that a different tribunal could have arrived at a different outcome on the facts which were before me. As Sir Hugh Griffiths observed in *Marler v Robertson* [1974] ICR 72: *"Ordinary experience of life frequently teaches us that that which is plain for all to see once the dust of battle has subsided was far from clear to the contestants when they took up arms"* and that statement is apposite here. I would have exercised my discretion and not awarded costs in the circumstances.

39. The respondent's application for costs is refused and is dismissed accordingly.

Employment Judge Cuthbert
Date: 18 April 2022

Judgment & reasons sent to parties: 29 April 2022

FOR THE TRIBUNAL OFFICE