Case No: 2500916/2021

EMPLOYMENT TRIBUNALS

Claimant: P Bainbridge

Respondent: Navigator Terminals Seal Sands Limited

Heard at: via Common Video Platform **On:** 22nd June 2022

Before: Employment Judge AEPitt

Representation
Claimant: Mr Robinson-Young, Counsel
Respondent: Miss Cullen, Counsel

JUDGMENT

1. The respondent's application for costs is refused.

REASONS

1. This is an application under rule 76 (1) (a) and (b) for costs made by the Respondent associated with defending a claim brought by the claimant. I heard the substantive claim on the 10th and 11th February 2022, having heard the evidence and submissions of both parties, I reserved my decision. The Judgment is dated 10th March 2022. I dismissed the claim.

2. Under rule 76(1)(a) the respondent submits that the claimant has acted otherwise unreasonably in either bringing the proceedings or in the manner in which they were conducted. This is based on two factors, first, that the claimant was warned in writing that his claim had no prospect of success and if he was unsuccessful the respondent would seek its costs. He thereafter did not withdraw his claim and they incurred the costs of a full hearing. Secondly, that the application to extend the time estimate for the hearing from one day to two was unreasonable. To support this latter Counsel asks

me to conclude that the manner in which the hearing was conducted was itself unreasonable.

3. Under Rule 76(1)(b) the respondent I am invited to conclude that the claimant's case had no reasonable prospect of success.

4. I had before me the application for costs, a schedule of costs, a small bundle which included some disputed letters and other correspondence between the parties and submissions from both Counsel. Ms Cullen also provided me with the relevant case law.

The Issues

5.

i. Is the correspondence between the parties dated 11th,13th 24th August 2021 and 25th January 2022 admissible or are they subject to the rule of 'without prejudice' and inadmissible?
ii. Did the claimant act unreasonably in the way that the proceedings have been conducted? iii. Did the claim brought by the claimant have any reasonable prospect of success? iv. If so, should I exercise my discretion to make an award of costs in favour of the respondent?
v. If so, in what sum of costs should be awarded to the respondent?

6. As a preliminary issue, I was invited to deal with the question of the admissibility of disputed correspondence.

7. On behalf of the respondent, Ms Cullen submitted that the letters between the parties on 11th, 13th 24th August 2021 and 25th January 2022 were admissible for the purpose of a cost's application because although headed 'without prejudice' this must be read in the context of the body of the letter.

8. Mr Robinson-Young maintains they should not be considered because they letters subject to the rule of 'without prejudice'.

9. I was referred to Rush &Tompkins v Greater London Council [1989] HL. Which reviewed the law privilege in particular 'without prejudice' privilege.

10. The purpose behind the 'without prejudice rule is to encourage parties to settle a legal issue. In particular by allowing them to discuss anticipated or ongoing legal proceedings with a view to settlement without fear that anything said by them may be used against the party at a hearing.

11. However, there may be exceptions to that rule where the meaning of the phrase is altered because of other words used. Cutts v Head [1984] Ch 209 is an example where the phrase 'without prejudice' was qualified by the use of words such as 'we reserve the right to being this letter to the attention of the court on the question of costs.' This was held to mean that the parties intended and agreed that privilege will cease once an agreement is reached.

The Letters

12. 11th August 2021 is a letter from the claimants' solicitors headed 'Without prejudice and subject to contract'. An offer is made to settle the claim. The response on 13th August 2021, rejects the offer and contains these words, '*Should your client not withdraw his claim and our client proceeds to successfully defend the claim, our client will rely on the contents of this email in support of an application for costs. Such an application will be made on the basis that your client's claim had no realistic prospect of success.'*

13. 24th August 2021 is a letter from the respondent solicitors to the claimant's solicitors headed 'without prejudice and subject to contract'. The letter is disclosing a video of an appeal meeting. It also contains the words '*Should your client not withdraw his claim and our client proceeds to successfully defend the claim, our client will rely on the contents of this email in support of an application for costs. Such an application will be made on the basis that your client's claim had no realistic prospect of success.'*

14. 25th January 2022 is a letter from the claimant's solicitors headed 'without prejudice and subject to contract'. This letter is a further attempt to settle the case. The respondent's replied the same day. The letter has the same heading. It contains the words '*I reserve my client's position on costs.'*

15. In relation to the August letters, I concluded that the respondent was qualifying the position on privilege as envisaged in 'Cutts' by the use of the phrases set out above. The claimant did not challenge that assertion at any time i.e., state that privilege would not be waived in relation to costs. I therefore concluded that there was an implied waiver of the privilege.

16. The letter on 25th January falls into a separate category. The phrase used is not so explicit. I concluded that it did not qualify the heading 'without prejudice'.

17. The letters of 11th 13th and 24th of August 2021 are therefore admissible in relation to this application. The letter on 25 January 2022 is not.

18. This means the respondent can rely upon the fact that it warned the claimant it would make an application for costs in relation to the August letters.

<u>The Costs Application</u>

19. I have heard from Counsel on behalf of both parties and have read written submissions. I am grateful for their assistance in dealing with this case. It is agreed that I first must consider whether the threshold in either rule has been met before I can go on to consider whether to exercise my discretion award of costs should be made in principle. If I exercise that discretion, I must then consider how much of the sum claimed the claimant should pay.

20. it is agreed by both counsel that costs in the employment tribunals are rare and indeed exceptional. The purpose behind the creation of the Industrial Tribunal when they were originally established was to allow those employees and workers who were aggrieved about an employment matter to achieve redress by suing using a simple and speedy process. It was originally intended that it would be a simple process and that lawyers would not be heavily involved. We all know that has changed and counsel to a very senior level are often instructed. But I do bear mind the original public policy for the establishment of these tribunal's in making my decisions.

The Threshold

21. Mr Robinson-Young invites me to say that under rule 76(1)(a) the phrase unreasonably in the context of the sentence must be read in light of the words which preceded it. I do not agree, they are separated by the word 'or' and if the government had wanted to it would have said that the words be read conjunctively. The words vexatiously, abusively disruptively et cetera each word has its own separate meaning unreasonable is not the same as vexatious. I also note that in *Dyer v Secretary of State for Employment EAT 183/83* the word 'Unreasonable' has its ordinary English meaning and is not to be interpreted as if it means something similar to 'vexatious'.

22. Having concluded that the August letters may be relied upon I asked myself whether it was unreasonable of the claimant to fail to withdraw following receipt of them. The reliance on these documents is unusual in this regard, this is not a classic 'Calderbank' case where an offer was put forward by a respondent which was then rejected by a claimant who then failed to meet that offer. This is a case where an offer was put forward by the claimant and rejected by the respondent based on its assessment of the prospect of the claimant succeeding. I concluded; this is inextricably linked to the issue of the prospect of success which I deal with further in the Judgment.

23. The second matter relied on by the respondent is the application to extend the hearing from one day to two days as evidence of the claimant's unreasonable behaviour. I have considered the letters which passed between the solicitors between 6th – 10th September 2021. The respondent's solicitors concedes in its letter of 6th September at 16:57 that five witnesses would be a stretch in one day and invited the claimant's solicitor to consider whether any witnesses could be agreed. I have gone through my notes and concluded leaving aside any issues in relation to missing documents, time to consider documents, and general housekeeping which arose, I calculated there was six hours of evidence. It seems to me therefore that it was unlikely even without the peripheral matters that hearing would have concluded within one day. Adding in time for me to read documents and witness statements, deliberation and delivering of judgement it is highly unlikely I would have finished on day one that is not to say that there wasn't an issue on the day there clearly was but without those issues this was always going to be a two-day hearing.

24. One of the matters which Miss Cullen asks me to consider is the conduct of hearing as evidence of unreasonable behaviour prior to that. She points to issues being raised which were not pursued and documents being sought. Although there were issues surrounding the bundle and Mr RobinsonYoung appeared to have difficulty with his instructions. No additional costs were incurred on the day. I concluded that the manner in which the hearing was conducted was not unusual, often documents are missing, and unsustainable issues being abandoned.

25. Turning to the issue of the prospects of success I have considered the ET1 and in particular the grounds of claim and the ET3. Although I do also consider the issues as they were set out at the hearing the first step is to consider whether at the time the claim was issued there was any prospect of success.

26. Mr Robinson-Young invites me to conclude that because the respondent did not pursue an application for strike out or a deposit order is indicative of the prospect of success. I disagree there are many reasons why a respondent may not pursue such an order, such as the costs that may be incurred in so doing weighed against the potential outcome. Such an application is not a prerequisite for a cost's application and therefore the fact that the respondents did not pursue one is not relevant for determining whether the threshold has been met.

27. On behalf of the respondent Ms Cullen says this is a straightforward Burchill case, that there was little dispute on fact and the question was simply an assessment of whether or not a reasonable employer could dismiss and whether dismissal was in the range of reasonable responses.

28. I have considered the ET1. The claim as pleaded at paragraph 15 sets out that the claimant was not offered the chance to retrain or given personal improvement plan other staff making similar mistakes were not dismissed, he did not have active warnings on his file. These do appear to amount to a claim that the decision to dismiss was not within the range of reasonable responses as set out in the Burchill test.

29. In relation to the disparity of treatment, this in the end came down to the claimant not being afforded time to collect himself following the first error he made that day. He went on to blame the second error on his state of mind and whilst that isn't clear in its entirety from the pleadings it did become clear in his witness statement as the person, he was comparing himself to had been allowed to take time off. I dealt with that in my judgement. In addition, the claimant is alleging there was disparity between his treatment and that of another person on site.

30. The claimant also alleges at paragraph 21 that he was dismissed for speaking to HR regarding the behaviour of Mr Cheney, who was involved at the dismissal hearing.

31. Finally, the claimant alleges that the appeal hearing was conducted in such a manner that it should not remedy any flaws before that.

32. I have reviewed the ET3 which responds to that document, there is a categorical denial that other people were treated differently, it maintains that this was a serious incident, despite the claimant assertion otherwise, that if there were any flaws it will rely on Polkey for a reduction, and also seek to rely on the claimants conduct the contribution.

33. it is clear from the letters to which I have referred that the respondent was of the view it acted in an appropriate and proper manner in dismissing Mr Bainbridge.

34. On the basis of the claim at the point it was issued, whilst there was little dispute on the facts, and many of these revolved around how the claimant reacted to the situation and how others had reacted to a similar situation. Even on the most straightforward of Burchill cases it is possible for an employer to fall into error. On my decision that is what I found.

35. In addition, the claimant asserted that the appeal hearing was conducted in 'oppressive' manner, my phraseology. At the time the ET1 was presented, this would be a question of fact for the Tribunal to determine on the evidence before it.

36. I asked myself the question then was there a reasonable prospect of success; that is to say did it fall within a range of reasonable response. I concluded as the case was pleaded at its commencement, there was a reasonable prospect of success because there were arguments to be aired and determined.

37. Following the initial pleadings, the respondent disclosed to the claimant video footage of an appeal hearing held by zoom. It followed this with the letter of 25th of August inviting the claimant again to withdraw on the basis that his argument in relation to the appeal hearing would not stand scrutiny. Again, I have to consider the case as it was at that time, but I have the benefit of hindsight because I have viewed the video. Whilst in my judgement I concluded that the appeal hearing cured any flaws in the original decision, that is not to say that there is the claimant should be unable to challenge it.

38. Having viewed the video the respondents took a particular view with which I eventually agreed however the claimant and his advisers clearly took a different view and decided that there was still an arguable case.

39. One aspect of the case was the involvement of Mr Cheney, and whether the dismissal was motivated by him, this was pursued at the appeal. This had to be considered by the appeal manager and it was a legitimate issue for the claimant to pursue before the Tribunal.

40. A further issue was concern about the manner in which the appeal manager carried out any additional enquiry. I concluded that where there is an issue

concerning the manner in which the appeal officer carried out any additional enquiry is a legitimate matter to put before the Tribunal.

41. Assessing the case objectively I concluded that there was a reasonable prospect of success at the point of presentation of the ET1. In addition, following the disclosure of the video there remained a reasonable prospect of success.

42. To conclude the conduct of the case does not fall within Rule 76(1)(a) as being 'otherwise unreasonable.' The claim had a reasonable prospect of success under Rule 76(1)(b). The application is dismissed.

Employment Judge AE Pitt

Date 15th July 2022