EMPLOYMENT TRIBUNALS

Claimant **Respondent**
Mr J Lane **v** **Hyperoptic Ltd**

Heard at: **Central London Employment Tribunal** **On: 12 July 2022**

Before: **Employment Judge Brown**

Appearances
For the Claimants: **In Person**
For the Respondent: **Mr M Greaves, Counsel**

COSTS JUDGMENT

The judgment of the Tribunal is:

1. **The Claimant acted unreasonably in continuing with his claim after 27 February 2022 and his claims had no reasonable prospects of success.**

2. **It is appropriate to make a costs order against him.**

3. **The Claimant shall pay the Respondent a total of £10,500 costs.**

REASONS

Background

1. By an oral judgment on 12 July 2022 I decided that the Respondent had not breached the Claimant's contract of employment, so that the Claimant's claim for breach of contract against the Respondent failed.

2. The Respondent then made an application for costs, limited to £20,000. The Claimant agreed that he had had notice of the application before this hearing and that it was appropriate for the application to be determined.

3. There was a Bundle of Documents for this Costs hearing, containing correspondence between the parties. The Respondent also produced a detailed schedule of costs, showing the costs breakdown. Page references in these reasons refer to pages in that Bundle. I heard evidence from the Claimant as to his means. I read a Respondent's skeleton argument on costs. Both parties made submissions.

The Facts

4. The Claimant presented his claim on 27 November 2019. It claim contained complaints of unfair dismissal, breach of contract and failure to pay notice pay. The Claimant did not have 2 years' service.

5. The Respondents instructed a solicitor, Lisa Patmore, partner at Co-Counsel Limited, a legal firm, to represent them in the proceedings.

6. On 5 December 2019 Ms Patmore emailed the Claimant saying that he did not have the 2 years' service required to bring an unfair dismissal complaint and that his notice pay had been paid in full. She invited him to withdraw his claim and said that the Respondent would apply for the claim to be dismissed if he did not. She reserved the Respondent's right to claim costs, p3.

7. The unfair dismissal complaint was struck out by EJ Spencer in a judgment promulgated on 10 February 2020

8. On 27 February 2022 Ms Patmore wrote to the Claimant again, saying that the Respondent would pursue its costs against him if he pursued his claim for breach of contract.

9. On 9 July 2020 EJ Adkin struck out the Claimant's notice pay claim but did not strike out the Claimant's claim for breach of contract entirely. EJ Adkin acknowledged the express wording of clause 18.4 of the Claimant's Contract of Employment which provided that the disciplinary procedures were non-contractual. However, following Autoclenz v Belcher [2011] ICR 1157, SC and Uber v Aslam [2021] ICR 657, SC, EJ Adkin noted that the express wording was not necessarily the final word – and declined to strike out the claim on the basis that, without hearing evidence, the Claimant might be able "to establish that there was some contractual entitlement to the procedures to be followed" Deposit Order Decision, paras 7-8. However, he said that it would "be difficult for [the Claimant] to establish factual circumstances which lead to the conclusion that the express wording of clause 18.4 does not reflect the contractual position between the parties" and made a deposit order on the basis that the claim had little reasonable prospects of success, Deposit Order Decision, para. 10.

10. EJ Adkin set out the issues to be decided in the breach of contract claim as follows:

    1.1 What was the claimant's notice period?
    1.2 What process, if anything, was the claimant contractually entitled to?
    1.3 If there was a process that the claimant was contractually entitled to, did the respondent fail to provide that? If so was that a breach of contract?
    1.4 Do the cases of Boyo v London Borough of Lambeth [1995] IRLR 50 or Gunton's [1980] IRLR 321 apply in this case on the basis that there was a period of time during which contractual disciplinary procedures should have been complied with in circumstances where that is longer than the notice pay?

11. By an email dated 9 September 2020, p20, Ms Patmore reminded the Claimant of the deposit order. By an email of 17 September 2020, p14, Ms Patmore set out in writing to the Claimant why the Respondent said that the Claimant's breach of

contract claim was fundamentally flawed. Ms Patmore quoted clause 18.4 of the Contract of Employment and said that "A failure to follow a procedure/policy that is non-contractual cannot be a breach of contract.", p14. She said that, nevertheless, the Respondent was prepared to offer the Claimant 2 weeks' salary in full and final settlement of the claim, which the Tribunal had indicated was the maximum amount he could hope to recover.

12. The Claimant replied, saying that "[whether] it be contractual or not an employee has the right to a disciplinary process", p17. He stated that the Respondent's offer was "an insult" and rejected it, p17.

13. On 21 April 2022 Ms Patmore again wrote to the Claimant, warning him that he was at risk of an order for costs, given the deposit order, and recommending that he take urgent independent legal advice, p24 -25. Ms Patmore extended the Respondent's offer to pay £600 to enable the Claimant totake legal advice from a solicitor, and provided the Claimant with "details of several law firms operating in Manchester which advertise free initial consultation services" as well as the details of the "Employment Legal Advice, which works with Citizens Advice Manchester and local law firms to provide individuals in Greater Manchester with access to free employment-related legal support."

14. On 21 April 2022, the Claimant responded, declining the Respondent's offer to pay for legal advice for him, and saying, "TELL HYPEROPTIC TO KEEPTHE £600 IM NOT INTRESTED [sic]" p24. He said, "I HAVE NO TRUST IN LAWYERS IN THIS MATTER AS FROM DAY ONE AFTER TRYING SEVERAL LEGAL COMPANIES I WAS DECLINED ANY HELP OR ADVICE AS THEY DIDNT SEE ME HAVING A CASE OR WERE NOT INTRESTED IF THIS WAS NOT A " UNFAIR DISMISSAL " CASE I HAVE THROUGH THIS WHOLE PROCESS FOLLOWED MY GUT FEELING…"

15. The Claimant repeated, at this Costs hearing, that he had been advised by lawyers he consulted at an early stage that his claim lacked merit, but that he wanted his "day in court". He said that EJ Adkin had not struck out his claim, so the Claimant considered that he was entitled to go to a Final Hearing.

16. The Claimant does not own his home, he is a Council tenant. He owns a 2007 registration car which might be worth £1,000 - £2,500. He has no savings. He was in receipt of Universal Credit for a year after his dismissal. The Claimant is now employed. He takes home £1,800 each month after tax and other deductions. He gives his partner £1,100 towards rent, utilities, council tax and other household expenses every month. After paying his phone bill and car-related expenses, he has about £400 a month in his pocket to spend.

Relevant Law

17. *Rule 76 Employment Tribunal Rules of Procedure 2013* provides as follows:

"*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 … has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that proceedings or part have been conducted; or

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

18. The Tribunal must consider making an order for costs where it is of the opinion that any of the grounds for making a costs order has been made out.

19. Following *Hayden v Pennine Acute NHS Trust* UKEAT/0141/17, the Tribunal should take two-stage approach:

    19.1. Consider whether any of the grounds in *r76(1)(a)* have been established;

    19.2. Consider whether, in all the circumstances of the case, a costs award is merited, *Ayoola v St Christopher's Fellowship* UKEAT/0508/13.

Unreasonable Conduct

20. The failure by the Claimant to "address their minds to [the prospects]", or to engage with a Respondent's costs warning letter, which would have led them to an earlier assessment of the merits of their claims, can justify a costs award, *Peat v Birmingham City Council* UKEAT/0503/11/CEA.

21. *Rule 39(5)(a) ET Rules 2013* provides that there is an automatic presumption of unreasonable conduct where a party loses for the same reasons as a deposit order was made: "If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown."

Exercise of Discretion

22. In *Barnsley Metropolitan Borough Council v Yerrakalva* [2011] EWCA Civ 1255 Mummery LJ stated (at para 41) that "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 if had".

23. in deciding whether to award costs on the basis that a claim had no reasonable prospect of success, the ET can take into account what the party knew or ought to have known if 'he had gone about the matter sensibly'. In *Keskar v Governors of All Saints Church of England School* [1991] ICR 493 the EAT said (Knox J): 'The question whether a person against whom an order for costs is proposed to be made ought to have known that the claims he was making had no substance, is plainly something which is, at the lowest capable of being relevant'. The fact that there was nothing in the evidence to support the allegations involved an assessment of the reasonableness of bringing the proceedings, and this 'necessarily involved' a consideration of the question whether the claimant ought to have known that there was no such supportive material.

24. It is usually appropriate for a litigant in person to be judged less harshly in terms of his or her conduct than a litigant who is professionally represented, given that "a lay person may have brought proceedings with little or no access to specialist help and advice. This is not to say that lay people are immune from orders for costs: far

from it, as the cases make clear", AQ Ltd v Holden [2012] IRLR 648, EAT at [32]-[33].

25. A party's ability to pay is also a factor which the Tribunal may consider in deciding whether to make a costs order and, if so, in what amount (*ET Rules 2013, rule 84*).

Discussion and Decision

Unreasonable Conduct

26. I decided that the Claimant acted unreasonably in continuing with his claim after 27 February 2022 when Ms Patmore wrote to the Claimant, saying that the Respondent would pursue its costs against him if he pursued his claim for breach of contract.

27. She had already written to him on 5 December 2019 warning him he did not have 2 years' service to bring an unfair dismissal complaint and that his notice pay had been paid in full. She invited him to withdraw his claim at that point.

28. As Ms Patmore had therefore already warned the Claimant, EJ Spencer struck out his unfair dismissal claim in a judgment promulgated on 10 February 2020

29. As Ms Patmore had also indicated to the Claimant, on 9 July 2020 EJ Adkin struck out the Claimant's notice pay claim.

30. The Claimant had proceeded with the notice pay claim after 27 February 2020 when the Respondent had told him that the Respondent would seek its costs against him and why his claim for notice pay had no merit. He had had ample time to consider the Respondent's original letter of 5 December 2020.

31. It appeared that the Claimant did not direct his mind at that point, or later, to the merits of his claim.

32. The Claimant continued to pursue his claim unreasonably. While EJ Adkin did not strike out the whole of the Claimant's complaint of breach of contract he made a deposit order in respect of it, because it would "be difficult for [the Claimant] to establish factual circumstances which lead to the conclusion that the express wording of clause 18.4 does not reflect the contractual position between the parties" and made a deposit order on the basis that the claim had little reasonable prospects of success (the Deposit Order Decision, para. 10).

33. The effect of the Deposit order was that there would be a presumption that the Claimant had pursued his claim unreasonably if it eventually failed for the same reasons as the deposit order had been granted.

34. The issues in the breach of contract claim identified by EJ Adkin made clear that the crucial issue in the case was whether the disciplinary policy was contractual.

35. In my judgment in the liability hearing, I noted that the Claimant had given very little evidence at all as to why the express wording of clause 18.4 might not reflect the true agreement between the parties. I dismissed the claim for the same reasons as the deposit order had been granted.

36. It was clear to me that the Claimant acted unreasonably in pursuing his claim for breach of contract when, in fact, he had little or no evidence to show why the crucial clause of the contract did not apply. The Claimant did not prove that he had not acted unreasonably. On the contrary, he appeared to wish to insist on his day in court, regardless of the lack of merit in his breach of contract claim.

37. The Claimant's unreasonable conduct was underscored by his rejection of a reasonable settlement offer in September 2020. The Claimant also had the opportunity to obtain legal advice at the Respondent's expense, but declined to do so and chose to rely on his "gut feeling". On his own submissions, the Claimant apparently did receive some legal advice from lawyers he approached who informed him they "DIDNT SEE ME HAVING A CASE". The Claimant nevertheless pursued his claim, despite having been warned by the Respondent and by other advisers that it was meritless.

38. As a result, the Respondent has been put to considerable expense in defending claims which the Claimant ought to have known, from a very early stage, were baseless.

No Reasonable Prospect of Success

39. The Claimant's claims for unfair dismissal and notice pay were struck out. His claim for breach of contract only survived a strike out on the basis that he might produce evidence that the crucial, fatal, clause 18.4 of his contract, did not represent the true agreement between the parties. It is apparent now that he never had any such evidence. He did not adduce it at the final hearing. None of his claims had any reasonable prospect of success.

Discretion

40. I decided that it was appropriate to make an order for costs. The Claimant did not suggest why I should not. On the other hand, the Claimant's conduct in continuing with his claim was unreasonable in so many ways over such a period of time that I considered that it was entirely appropriate for me to make a costs order against him. The Respondent has had to bear the costs of defending a baseless claim.

41. I considered that costs should only be awarded from 27 February 2020, however.

42. While the whole claim had no reasonable prospects of success from the outset, the Claimant was a litigant in person and I considered that he did not act unreasonably until after 27 February. It might take a litigant in person some time to digest and understand why their claim was very unlikely to succeed. It was appropriate to take that into account in deciding from when costs should be awarded. The Claimant had had plenty of time properly to consider the merits of his claim by that point.

Amount of Costs

43. I disallowed any costs before 27 February 2020.

44. The Claimant has only about £400 each month disposable income. Nevertheless, he does have earnings from which costs could be paid, over time.

45. The Respondent claims £20,000 in costs. Its costs schedule amounts to £19,117.50 + VAT.

46. The Respondent engaged Ms Patmore, a partner, to conduct its defence. Her chargeable rate was £295 per hour. I did not consider that this case required a partner's level of expertise. All the complaints were simple. I accepted that the hourly rate charged by Ms Patmore was lower than a London partner rate, but I considered that a very junior solicitor's rates were more appropriate.

47. I accepted that the Respondent's breakdown of costs was accurate, but I also considered that some of the time spent was excessive. It would not be appropriate to order the Claimant, who is of very limited means, to pay large sums in costs in this simple case.

48. I therefore allowed £2,000 for preparation for the preliminary hearing after February 2020. I allowed £1,000 for attendance at the Preliminary Hearing. That particular attendance cost was not excessive.

49. I allowed £2,000 for preparation of disclosure and consideration of the Claimant's disclosure. The £3,679.65 claimed was simply too high, even though a legal executive was engaged in some of the work. I accepted that Bundle preparation encompassed both the Final Hearing Bundle and the costs hearing bundle. However, I only allowed £1,500. There were unlikely to have been any time consuming questions about relevance, for example.

50. I allowed £1,500 for preparing Mr Woodward's witness statement and reading the Claimant's witness statements. All were very straightforward and did not address any complex legal argument. The £3,006.05 claimed was plainly too much.

51. I allowed £500 for instructing counsel. That should have been a straightforward exercise. The £295 hourly rate charged was too high.

52. I accepted that Counsel's preparation for this hearing included preparation for both the liability and costs matters and 2 skeleton arguments. I accepted that Counsel was relatively junior. However, it was not appropriate to order the Claimant to pay more than £2,000 in respect of the Respondent's costs of representation in such a simple matter.

53. Overall, I considered that a total order for costs against the Claimant of £10,500 (including VAT) was appropriate. He was very significantly at fault is pursuing his baseless claims, but any higher award of costs would have been punitive when the claims were so simple.

_____12 July 2022_____

Employment Judge Brown

SENT TO THE PARTIES ON

14/07/2022.

FOR THE TRIBUNAL OFFICE