



EMPLOYMENT TRIBUNALS

Claimant

Mr A Smith

v

Respondent

Wren Kitchens Limited

Heard at: Sheffield (by CVP)

On: 19 August 2022

Before: Employment Judge A James
Ms L Anderson-Coe
Ms J Noble

Representation

For the Claimant: In person

For the Respondent: Mr A Willoughby, counsel

COSTS JUDGMENT

- (1) The claimant conducted the proceedings unreasonably by continuing to pursue the proceedings on the third, fourth and fifth days (17, 18 and 19 August 2022); and by doing so, pursued a claim which had no reasonable prospect of success.
- (2) The Tribunal has concluded that this is a case where it should exercise its discretion to award a sum of costs to the respondent (Rules 76 and 78 Employment Tribunal Rules of Procedure 2013).
- (3) The claimant is ordered to pay to the respondent the sum of £1000 in total, as a contribution towards the respondent's costs of continuing to defend the claim on the final three days of the proceedings.

REASONS

The issue

1. In a Liability Judgment dated 23 August 2022, delivered orally on 19 August 2022, the Tribunal dismissed all of the claimant's claims. After delivery of the oral judgment, Mr. Willoughby made an application for costs on behalf of the respondent, on the basis that the claimant had, in conducting the

proceedings, acted vexatiously or unreasonably; and/or pursued a claim which had no reasonable prospect of success. Following a short adjournment, that application was heard by the Tribunal. Having heard arguments from both parties, and since written reasons had already been requested on the liability issues, the Tribunal reserved its judgment.

Relevant findings of fact

2. A without prejudice save as to costs letter was sent to the claimant at 18.51 on 16 August 2022, following the second day of the hearing. The letter set out in detail why the claimant's claims could not succeed. The letter stated:

Having reviewed the last two days of your Tribunal Hearing it is clear that you will not be successful in your claims and we invite you on behalf the Respondent to withdraw your claims immediately.

This is a lengthy email because it is right and fair that we explain to you in a clear and balanced way why we believe you will fail and what the potential consequences of continuing in your claim may be.

Should you continue to pursue your Tribunal claim into the third, fourth and fifth days and you are unsuccessful in establishing your claims against the Respondent, we are instructed to make an application to the Tribunal for a costs order to be made against you, under Rule 76 of the Employment Tribunals Rules of Procedure 2013.

3. The letter went on to explain why the claimant's claims for unfair dismissal and whistleblowing were likely to fail, following the conclusion of his witness evidence. The Tribunal has since dismissed the claimant's claims for broadly the same reasons.
4. The claimant was invited to withdraw the claims before or at the very outset of the proceedings on Wednesday 17 August. He was told that if he did so, no application for costs would be pursued. The claimant's response to the letter was to offer to settle his claim for the full amount set out in his schedule of loss (some £50,000 or so), without any negotiation.

Background

5. At the 6 April 2022 preliminary hearing, EJ Miller spent a considerable amount of time discussing the basis of the claimant's claims, in order to be able to draft the list of issues which this Tribunal has considered. The claimant maintained before Employment Judge Miller that his protected disclosures were set out in an email sent in or about March 2021 to Ms Ramage. The order which was sent out following that preliminary hearing contained the list of issues; the claimant did not make any attempt to correct them.
6. The respondent subsequently informed the claimant that, having made a search, it could find no such email, sent in or about March 2021. The claimant nevertheless maintained his claim on that basis, until he started to give oral evidence before the Tribunal. On questioning from Mr Willoughby, the claimant suggested that his protected disclosures were actually set out in an email dated 24 September 2021 – which was after a number of the alleged whistle-blowing detriments had taken place. The claimant still refused to concede that there could be no link between an email sent on 24 September and detriments that happened before that date.

7. The claimant also argued that he had shown photographs of alleged breaches of Covid regulations to Ms Ramage and others before that date. That was not however the case put at the preliminary hearing on 6 April 2022, or in his own lengthy witness statement. The Tribunal has rejected that contention. Further, the list of issues state that the information disclosed was that the claimant was being bullied by Sam Nixon and Nicholas Finch; set out evidence of breaches of Covid restrictions; and reports of other team members raising such concerns. In fact, apart from a brief reference to one alleged incident of bullying by Mr Nixon, none of the other information alleged is contained in the email.
8. The list of issues also stated that the claimant had made an oral disclosure to Owen Jackson after the email was sent – but since Owen Jackson was no longer with the business after March 2021, that again was an unsustainable argument. Further, the list of issues states that the claimant told Mr Finch he had sent the email to Ms Ramage; but simply being told that an email had been sent could not have put Mr Finch on notice as to its contents.

Conspiracy theories

9. The claimant argued before us and in his witness evidence various conspiracy theories which he alleged were behind his dismissal. For example,
 - there was a “coupe” (sic) [WS11, para 69];
 - Mr Finch was “culturally cancelling” [WS12, para 70];
 - the respondent wanted to “assassinate and cancel” the claimant [WS19, para 95];
 - the respondent was induced by the “#metoo movement/era of a cancellation of a person with their claim of aggression and insubordinate attitude is only all projection through a proxy which is tantamount to denialism...” (sic) [WS19, para 95]; and
 - “...straight white males are now being pushed out of the business, either through psychological abuse or simply being deferred via intentional blockades”, which the claimant claims has led to a “mass purge” [WS19, para 97].
10. There was no evidential basis for such theories.

Assertions in claimant’s witness statement

11. The claimant’s witness statement also contains a number of assertions about Mr Finch, Mr Hodges, and Ms Ramage. For example in relation to Mr Finch, he asserts at para 70:

I now class Mr Finch as a deplorable degenerate. Who takes joy in the “schadenfreude” of the delight of other’s hardships and downfalls in which he knowingly plays a key role in purposeful character assassinating and culturally cancelling others, that be for his gain, and is truly devilish like behaviour. Backed by the companies left corporate ideology of “cancellation culture” in which he is shielded by and is fully aware of this abuse of power. (sic)

12. As for Mr Hodges, the claimant asserts at para 73:

I believe Stephen to be a cowardly deceiving and played purposefully played on the difficult conflated Ideocratic issues as his sword and shield to antagonise and bait to have people become frustrated. He has maniacally incited and acted cold and calculated to execute this "game" as he believed it to be as a game of "cat v mouse", this became quite upon comments such as "I guess it's checkmate, isn't it now mate". He would constantly be provocative through the means of his delusional gaslighting along with Ideocratic formed contradictions to purposefully antagonise to have my to lead to "breaking point", to a total wreck of my mental health, leaving myself distraught and feeling demoralised and upset to be taken advantage off and loosing self respect for myself. (sic)

13. The clamant states the following about Ms Ramage at paras 75&76:

75. I have never crossed someone who truly lacks character, someone who needs to seek reflection upon her "actions" and "Inactions" to be intentionally venomously spiteful. I would describe this person who extremely insecurely troubled and needs to find herself by looking inwards, as her misandry was deafening through her cold long disapproving gazes and tonality to be so hostile towards someone who had had fully weaponised her femininity. (sic)

76. Miss Ramage purposefully baited and coaxed me at every turn such examples;

- Pre emotive leading line of question; lost all touch with reality and was unable to rationalise common sense.

- Miss Ramage would savour the pleasure of creating anxiety-driven tension when necessary.

- Created a constant hostile working environment and targeted me specifically with a bias.

- Hostile treatment to others particularly men.

- Asked me to call her outside office hours; I believe was an attempt to frame as "aggressive" in a coax. (sic)

14. Having had the benefit of hearing live evidence from Ms Ramage and Mr Finch, the Tribunal considers all of these outlandish assertions to be baseless.

Additional points

15. The claimant maintained that things were said/done which were patently not said/done to him and which it was unreasonable for him to assert/maintain. We give three examples. First, the claimant alleged that his holiday on 17 September 2021 had been cancelled by Mr Finch on or around 16 September. Yet an email from Mr Finch to the claimant of 30 August 2021 clearly stated that the holiday had not been approved in the first place because of the requirement for the claimant to be in work on that date.
16. Second, the claimant maintained that Mr Hodges had told him he needed to leave the business on 16 September 2021. Even though this was maintained as an issue in the case (Issue 4.1.4), the claimant did not even allege that those words were used in his own witness statement to the Tribunal.
17. Third, the claimant alleged that he told Mr Finch he had concerns about breaches of the Covid regulations. But the document which Mr Finch was

taken to by the claimant did not say any such thing (see the judgment at para 64).

The claimant's means

18. The tribunal has made the following findings in relation to the claimant's means. He has no savings or other capital, and no valuable belongings such as a car. His mobile phone is not currently connected – he does not currently have a contract. He receives £77 per week benefit from the DWP. He pays £40 board and lodging. He is currently signed off as unfit for work, between 28 June and 27 September 2022. He was previously signed as unfit between 4 May and 28 June.

Costs incurred

19. Mr Willoughby's daily refresher fee is £900 per day for the last three days of the hearing, a total of £2700. The respondent's solicitors costs are limited to 3.6 hours at £261 per hours, £939.60; and 1.7 hours x £178 = 302.60; a total of £1242.40, based on the County Court guideline hourly rates.

The Law

20. The application is made under Rule 76 of the Employment Tribunal Rules of Procedure 2013 ("the 2013 Rules"), which provides, in so far as relevant here:
 - (1) *A Tribunal may make a costs 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 the proceedings (or part) have been conducted;*
 - (b) *any claim or response had no reasonable prospects of success*
 - (2) *A Tribunal may also make such an order where a party has been in breach of any order ...*
21. Rule 76 requires the Tribunal to adopt a two-stage approach:

the tribunal must first consider the threshold question of whether any of the circumstances identified in [what is now Rule 76] applies, and, if so, must then consider separately as a matter of discretion whether to make an award and in what amount." (Vaughan v London Borough of Lewisham (No. 2) [2013] IRLR 713 at [5])
22. In Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78 it was stated:

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." (Paragraph 41)
23. It remains a fundamental principle that the purpose of an award of costs is to compensate the receiving party, not to punish the paying party (Lodwick v London Borough of Southwark [2004] IRLR 554 CA).

24. If the Tribunal is satisfied that the claimant acted vexatiously or unreasonably, it must then consider separately whether to make an award and, if so, in what amount. At this stage:

the Tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of its discretion ...

although the respondent is not required:

to prove that specific unreasonable conduct by the [claimant] caused particular costs to be incurred". (Kapoor v Barnhill Community High School Governors (UKEAT/0352/13/RN), unreported, 12 December 2013 at #15)

25. Rule 78 provides, in so far as relevant here:

(1) A costs order may—

(a) 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;

26. The relevant parts of Rule 84 provide:

In deciding whether to make a costs ... order, and if so in what amount, the Tribunal may have regard to the paying party's ... ability to pay.

Conclusions

Threshold requirements

27. The Tribunal concludes that two of the threshold requirements for making a costs order have been met. First, the claimant's conduct of the proceedings was unreasonable, at least from 6 April 2022. The claimant continued to pursue whistle-blowing claims that could not possibly succeed, because there had been no disclosure of the information alleged, save for one allegation of bullying, which could not meet the public interest test.
28. The claimant has also conducted the proceedings unreasonably by putting forward baseless conspiracy theories, making scandalous allegations against certain individuals, and pursuing hopeless points.
29. Yet further, the claims had no reasonable prospect of success, since there was no evidential basis for them; and/or they were illogical. For example, detriments which predated the 24 September 2021 email could not possibly have been caused by the contents of that email. Further, the whistle-blowing claim as a whole had no reasonable prospect of success, in light of the mismatch between what the claimant asserted the disclosures of information were, and the actual content of the 24 September email.
30. As for the unfair dismissal claim, the claimant had been told in August that the holiday on 17 September had not been approved. The claimant had also been told, on return to work, that the possibility of working from home was to be reviewed. It had not been agreed. It was not approved, following review on 16 September, because of ongoing concerns about the claimant's time-keeping and attendance. The claimant had admitted those allegations, and he had been given a final written warning as a result. Despite all of this, the claimant called Mr Hodges an idiot on 16 September and took his laptop in order to be able to work from home without permission. At no stage did the claimant acknowledge that he acted inappropriately. Instead he sought to justify his use of the word

idiot; and went on to refer to Mr Hodges as 'a prick'. The claimant has demonstrated no insight during these proceedings as to why these behaviours would be deemed to be unacceptable by the respondent, justifying his summary dismissal. Instead, the claimant has continued to pursue a hopeless case, making unreasonable comments and scandalous assertions in the process.

Discretion whether to make an award

31. Bearing in mind that two of the threshold requirements have been met, the Tribunal has concluded that this is an appropriate case to exercise our discretion to make an award of costs against the claimant. In deciding whether to do so, the tribunal has taken into account the claimant's means.
32. The claimant was given an opportunity to withdraw his claims at the close of play on the second day. The respondent's letter to the claimant of 16 August was measured and detailed; the offer made was a reasonable one. The claimant's unreasonable response, was to ask for one hundred percent of his losses.

Amount of award

33. The effect of that unreasonable, and unreasoned response, was to put the respondent to further costs, by having to continue to defend the proceedings. In deciding the amount of the award, the Tribunal notes that the claimant is of limited means. Nevertheless, there is currently a surplus of £37 per week, after the claimant's basic needs have been met. On the basis of the information provided, the Tribunal considers that the claimant could reasonably pay £15 per week or more towards any costs award. Whilst the claimant remains unwell, the conclusion of these proceedings at least offers the opportunity for his mental health to improve, so he can find other work.
34. In all of these circumstances the Tribunal concludes that the claimant should pay £1,000 towards the respondent's costs.

Employment Judge A James
North East Region

Dated 5 September 2022

Sent to the parties on:

20 September 2022

For the Tribunals Office

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant (s) and respondent(s) in a case.