Case Number: 1406077/2020

EMPLOYMENT TRIBUNALS

Claimant: **Mr Harry Simmons**

Respondent: **Mr Mark Brown t/a Strongman Moustache**

Heard at: **Bristol (In chambers, on the papers)**

Before: Employment Judge Midgley
Mrs G Mayo
Mr H Adams

Representation
Claimant: In person
Respondent: In person

RESERVED JUDGMENT ON COSTS AND REMEDY

UPON the parties agreeing figures for unauthorised deduction of wages for the periods 1 until 21 March 2020 and for furlough pay.

FURTHER UPON consideration of the parties' written submissions in respect of compensation for unpaid annual leave

AND FURTHER UPON consideration of the parties' written submissions in relation to the respondent's application for costs

IT IS ORDERED THAT:-

1. The respondent must pay the claimant the following sums in compensation in respect of the claims for unauthorised deduction of wages and unpaid annual leave:

    a. Unpaid annual leave **£1030.60 gross**
    b. Unpaid wages 1 – 21 March 2020 **£ 260.70**
    c. Unpaid wages (furlough pay) **£ 140.00**

2. The application for costs is dismissed.

REASONS

Introduction

1. Following the final hearing in January 2022 and the handing of an extempore Judgment and summary reasons, the parties were ordered to agree the figures for compensation for unauthorised deduction of wages and unpaid annual leave.

2. On 14 February 2022, prior to the handing down of the full written reasons, the respondent made a protective application for costs, which was supported by detailed grounds. It was treated as an application for a Time Preparation Order ("TPO") as the respondent was unrepresented. On 22 March 2022 the claimant filed a written response to the application, as directed.

3. The written reasons were sent to the parties on 24 March 2022 and on 19 April 2022 the parties were directed to confirm whether they consented to the issue of TPO application being determined on the parties' written arguments. Both agreed to that course.

4. On 11 April 2022, we directed that the respondent should file a schedule identifying the sums admitted to be owed for (a) wages due for 1 – 21 March 2020 and (b) unpaid annual leave, and the claimant should respond to the schedule within 14 days.

5. On 22 April 2022 the respondent submitted a further written document, addressing the findings in the written reasons and a supporting bundle of documents consisting of Without Prejudice Save as to Costs correspondence, together with a schedule of work undertaken in support of the application.

6. I am grateful to the parties for their helpful written submissions.

<u>The Grounds of the Application</u>

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

   7.1. The pursuit of the proceedings was vexatious or an abuse of the Tribunal's process as the purpose for which they were pursued was to avoid or compromise proceedings which were or might be brought by the respondent against the claimant for breach of the restrictive covenants in his contract of employment;

   7.2. Alternative to 5.1 above, the claims under ss. 47, 103A and 111 ERA 1996 had no reasonable prospect of success as the cause of the claimant's dismissal was clearly evidenced and was known to both the claimant and the respondent at the time of the dismissal prior to the issue of proceedings.

   7.3. The claimant acted vexatiously or unreasonably because he failed to disclose relevant documents which demonstrated that he had breached the restrictive covenant in his contract of employment; and

7.4. The claimant acted vexatiously or unreasonably because he had introduced irrelevant documents into the bundle to increase the respondent's costs.

8. The claimant resists the application on the grounds which may be summarised as follows:

8.1. The claims were not vexatious but had reasonable prospect of success because the claims for unpaid annual leave and unauthorised deduction of wages succeeded and/or the other claims were arguable; in that context the claimant established that he had made a protected disclosure and that the respondent had not followed a proper procedure in relation to his dismissal as required by the ACAS Code;

8.2. The respondent made the application for costs in order to avoid paying any compensation awarded in respect of those successful claims;

8.3. The claimant did not disclose documents because he could not disclose documents he did not have;

8.4. The claimant made an offer to settle on a 'drop hands basis' before the respondent had indicated that he would pursue a civil claim for damages against the claimant, and it was therefore a genuine offer to settle.

8.5. The preparation time claimed as a TPO was excessive and entirely disproportionate to the complexity and value of the claims.

The Applicable Law

<u>The Rules</u>

9. The relevant rules are the Employment Tribunals Rules of Procedure 2013 ("the Rules").

10. Rule 75(2) provides:

> "A preparation time order is an order that a party ("the paying party") make a payment to another party ("the receiving party") in respect of the receiving party's preparation time while not legally represented. "Preparation time" means time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at the final hearing.

11. Rule 76(1) provides:

> "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) have been conducted; or (b) any claim or response had no reasonable prospect of success.

12. Under 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.

13. Under Rule 78(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; (b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles …"

14. Under Rule 79(1) the Tribunal shall decide the number of hours in respect of which a preparation time order should be made, on the basis of – (a) information provided by the receiving party on time spent falling within rule 75(2) above; and (b) the Tribunal's own assessment of what it considers to be a reasonable and proportionate amount of time to spend on such preparatory work, with reference to such matters as the complexity of the proceedings, the number of witnesses and documentation required. Under Rule 79(2) the maximum hourly rate for preparation time costs is currently £36.00 per hour.

15. Under 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 (or, where a wasted costs order is made, the representative's) ability to pay.

The Relevant Case Law

16. I have been referred to and/or have considered the following cases: Gee v Shell Ltd [2003] [2003] IRLR 82 CA; McPherson v BNP Paribas [2004] ICR 1398 CA; Monaghan v Close Thornton [2002] EAT/0003/01; NPower Yorkshire Ltd v Daley EAT/0842/04; Arrowsmith v Nottingham Trent University [2011] ICR 159 CA; AQ Ltd v Holden [2012] IRLR 648 EAT Kapoor v Governing Body of Barnhill Community High School UKEAT/0352/13; Nicholson Highland Wear v Nicholson [2010]IRLR 859; Barnsley BC v Yerrakalva [2012] IRLR 78 CA; Topic v Hollyland Pitta Bakery & Ors UKEAT/0523/11/MAA; Kovacs v Queen Mary and Westfield College [2002] IRLR 414 CA; Vaughan v LB of Newham [2013] IRLR 713.

The Relevant Legal Principles

17. 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 "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 …"

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

19. In addition, the Employment Tribunal has a wide discretion where an application for costs is made under Rule 76(1)(a). As per Mummery LJ at para 41 in Barnsley BC v Yerrakalva "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." 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.

20. 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 also Kapoor v Governing Body of Barnhill Community High School 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.

21. When considering an application for costs the Tribunal should have regard to the two-stage process outlined in Monaghan v Close Thornton by Lindsay J at paragraph 22: "Is the cost threshold triggered, e.g. was the conduct of the party against whom costs is sought unreasonable? And if so, ought the Tribunal to exercise its discretion in favour of the receiving party, having regard to all the circumstances?"

22. The threshold to trigger costs is the same whether a litigant is or is not professionally represented, although in applying those tests, the EAT has held that the status of a litigant is a matter which the tribunal must take into account – see AQ Ltd v Holden in which Richardson J commented:

> "Justice requires the tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life. As [counsel] submitted, lay people are likely to lack the objectivity and knowledge of law and practice brought about by a professional adviser. Tribunals must bear this in mind when assessing the threshold tests in rule 76(1)(a). Further, even if the threshold tests for an order of costs are met, the tribunal has discretion whether to make an order. This discretion will be exercised having regard to all the circumstances. It is not irrelevant that a lay person may have brought proceedings with little or no access to specialist help and advice."

23. However, Richardson J also acknowledged that it does not follow from this "that lay people are immune from orders for costs: far from it, as the cases make clear. Some litigants in person are found to have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity". These statements were approved by Underhill P in Vaughan v London Borough of Newham.

24. With regard to costs warning letters, while it is good practice to warn a claimant of the weakness of his or her case where the respondents may be minded to apply for costs should they succeed at the end of the case, the failure to do so will not, as a matter of law, render it unjust to make a costs order even against an unrepresented claimant. In Vaughan v London Borough

of Newham, the EAT upheld a substantial order for costs against the claimant, notwithstanding the absence of a costs warning letter, and in doing so had regard to the likely effect such a letter would have had. Underhill P pointed out that the claimant had never suggested that she would have discontinued her claim if she had received such a letter, and, even if she had, such an assertion would not have been credible. The claimant was "convinced, albeit without any rational or evidential basis, that she was the victim of a conspiracy and of a serious injustice, and it seems to us highly unlikely that a letter from the respondents, however well crafted, would have caused the scales to fall from her eyes."

25. The same approach is to be taken in circumstances where the respondent has not applied for a deposit order. Underhill P in Vaughan also acknowledged that respondents do not always, for understandable practical reasons, seek such an order even where they are faced with weak claims, so that failure to do so "is not necessarily a recognition of the arguability of the claim." On the facts of Vaughan, neither the failure to seek a deposit order nor the failure otherwise to warn the claimant of the hopelessness of her claims was "cogent evidence that those claims had in fact any reasonable prospect of success" and neither failure was "a sufficient reason for withholding an order for costs which was otherwise justified".

26. Where a party has been lying this will not of itself necessarily result in a costs award being made, although it is one factor that needs to be considered. As per Rimer LJ in Arrowsmith v Nottingham Trent University it will always be necessary for the tribunal to examine the context, and to look at the nature, gravity effect of the lie in determining the unreasonableness of the alleged conduct. Nonetheless, to put forward a case in an untruthful way is to act unreasonably, see Kapoor v Governing Body of Barnhill Community High School. 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, see Topic v Hollyland Pitta Bakery & Ors. In addition, the result of a claim is not necessarily linked to the alleged unreasonable conduct. 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 of the individual case."

27. With regard to the paying party's ability to pay, Rule 84 allows the tribunal to have regard to the paying party's ability to pay, but it does not have to (see Jilley v Birmingham and Solihull Mental Health NHS Trust and Single Homeless Project v Abu). The fact that a party's ability to pay is limited, does not, however, require the tribunal to assess a sum that is confined to an amount that he or she could pay see Arrowsmith v Nottingham Trent University which upheld a costs order against a claimant of very limited means and per Rimer LJ "her circumstances may well improve and no doubt she hopes that they will."

28. One reason for not taking means into account is the failure of the paying party to provide sufficient and/or credible evidence of his or her means. The authorities also make it clear that the amount which the paying party might be ordered to pay after assessment does not need to be a sum which he or she

could pay outright from savings or current earnings. In Vaughan v LB of Newham the paying party was out of work and had no liquid or capital assets and a costs order was made which was more than twice her gross earnings at the date of dismissal. Underhill P declined to overturn that order on appeal because despite her limited financial circumstances, there was evidence that she would be successful in obtaining some further employment. Per Underhill P: "The question of affordability does not have to be decided once and for all by reference to the party's means at the moment the order falls to be made" and the questions of what a party could realistically pay over a reasonable period "are very open-ended, and we see nothing wrong in principle in the tribunal setting the At a level which gives the respondent's the benefit of any doubt, even to a generous extent. It must be recalled that affordability is not, as such, the sole criterion for the exercise of the discretion: accordingly, a nice estimate of what can be afforded is not essential."

29. Insofar as it does have regard to the paying party's ability to pay, the tribunal should have regard to the whole means of that party's ability to pay, see Shield Automotive Ltd v Greig (per Lady Smith obiter). This includes considering capital within a person's means, which will often be represented by property or other investments which are not as flexible as cash, but which should not be ignored.

30. Under Rule 78(1)(a) a costs order may order the paying party to pay the receiving party a specified amount not exceeding £20,000. Under Rule 78(1)(b) a costs order may order the paying party to pay an amount to be determined by way of detailed assessment, carried out either by the County Court or by an Employment Judge applying the principles of the Civil Procedure Rules 1998. Where the receiving party does not regard the limit of £20,000 to be sufficient an order for summary assessment should not be made in those circumstances, see Kovacs v Queen Mary and Westfield College.

Conclusion

31. We address the first ground of the application, namely that the pursuit of the proceedings was vexatious or an abuse of the Tribunal's process as the purpose for which they were pursued was to avoid or compromise proceedings which were or might be brought by the respondent for breach of the restrictive covenants in his contract of employment.

32. We remind ourselves of the relevant findings in the written reasons:

    32.1. The claimant was notified in a letter of 23 July 2020 that the respondent believed he had breached the restrictive covenants in his contract;

    32.2. On 24 July 2020, during the disciplinary hearing, the claimant sought to suggest that what was in the contract was not "the law" and that he would test it in court. Subsequently, during the same meeting, he argued that the terms of his contract which precluded him from approaching clients were unenforceable and unlawful;

32.3. The dismissal letter of 24 July 2020 identified that the claimant had breached the restrictive covenants;

32.4. On 2 October 2020 Mr Brown wrote a letter before action to the claimant in relation to his breach of the restrictive covenants;

32.5. On 7 October 2020, the claimant suggested for the first time that the respondent had committed repudiatory breaches of contract, thereby causing the contractual restrictions to fall away. The claimant did not draft the letter, did not understand its legal basis and was unable to explain what a "repudiatory breach" was when asked by the Tribunal. The letter contained the first reference to unauthorised deductions of wages in respect of annual leave, furlough pay and wages.

32.6. The claims were presented on 17 November 2020.

32.7. We concluded that the claimant knowingly and deliberately breached the restrictive covenants with intention of setting up a business in direct competition with the respondent.

33. In addition, the bundle of without prejudice correspondence, including the negotiations which were conducted through ACAS demonstrate that the claimant was advancing a 'drop hands' offer of settlement as early as November 2020. The correspondence reveals the claimant's position that he was only interested in a drop hands settlement and not pursuing any claim for compensation and specifically refers to prospective injunctive action by the respondent.

34. In our judgment the claimant's pursuit of the claims under s.47B and 103A ERA 1996, and/or that he was wrongfully dismissed were pursued solely in an attempt to establish a breach of contract to extricate himself from a potential County Court claim for breach of covenant, by which the respondent might seek damages and/or equitable tracing. He was aware that the respondent's claim potentially had very high prospects of success given the evidence he was confronted with during the disciplinary hearing, the answers that he gave and the terms of his contract.

35. It is worthy of note that the claimant did not make any reference to unauthorized deduction of wages until his letter of 7 October 2020. In our view that demonstrates, on a balance of probabilities, that the cause of the claimant's decision to present the proceedings the following month was his desire to defeat the potential County Court claims, and not the pursuit of unpaid wages, annual leave of furlough pay. That is supported by the claimant's stance during ACAS conciliation that he was seeking a 'drop hands' settlement and not pursuing any claim for compensation. The only claims of the respondent's which could possibly fall within the scope of such an agreement were those which had been intimated in the letter before action.

36. We conclude that the claimant's conduct in presenting and subsequently pursuing the claims to a final hearing was vexatious and/or abusive because its primary and sole purpose was to seek to secure a protection against proceedings in the County Court, rather than any genuine pursuit of claims in the Tribunal.

37. Although it is not necessary to do so, given our finding above, we also conclude that the claims in respect of the claimant's dismissal had no reasonable prospect of success: the evidence overwhelmingly demonstrated that the true reason for the claimant's dismissal was his conduct in breaching the restrictive covenants and seeking to solicit the respondent's clients (the evidence is detailed in our written reasons, but for ease of reference given the content of the text messages sent by the claimant, the recording of the disciplinary hearing and the answers provided in it and the content of the disciplinary invite and dismissal letter, it must have been clear to the claimant that he had no reasonable prospect of demonstrating that the cause was a protected disclosure made in an WhatsApp message months before hand).

38. We conclude therefore that the threshold for a time preparation order has been met. It is unnecessary to consider the other grounds of the application. We next consider whether, allowing for the fact that the claimant is a litigant in person, we should exercise our discretion to make such an order. In our view, the following factors are relevant.

39. First, the claimant has had access to legal advice, as is clear from the letter of 7 October 2020. He therefore pursued the proceedings with his eyes open, rather than unwittingly pursuing a claim due to some mistaken belief as to the powers or jurisdiction of the Tribunal.

40. Secondly, in December 2021 the respondent sent the claimant a costs warning letter, identifying that the respondent had evidence which clearly identified the true reason for the dismissal, further that the claim was vexatious because it was brought solely to avoid the potential civil claim, and lastly identifying that the pursuit of the claim would put the respondent to considerable time and expense in defending it. The letter warned of a costs application if the claims failed.

41. Thirdly, the claimant continued to pursue the proceedings notwithstanding that costs warning letter. The evidence did not change after it; no new evidence materialised which materially improved the claimant's prospects of success in relation to the claims under ss.47B, 103A and 111. We do not accept that the claimant's continued pursuit of the proceedings marked a change in its purpose so that his primary aim was then to recover unpaid wages; his only goal was to obtain a judgment which would enable him to escape the effect of the restrictive covenants.

42. If those were the only factors to be considered, we would have held that it was appropriate to exercise our discretion to make a time preparation order. However, the respondent has submitted a wholly exaggerated and inflated schedule of hours worked: he claims that he has spent 1383 hours preparing for and attending the three-day hearing and preparing the costs application.

43. The respondent's claim is made in a detailed schedule of work undertaken which he filed in support of the application. The claimant has not responded to that schedule to critique it, save for to say that it is exaggerated and inflated.

44. In our view the periods suggested are excessive, exaggerated and utterly unreasonable. As a start point, if the average working week is 40 hours, the

respondent's schedule suggests that he has spent over 32.5 weeks preparing for a three-day hearing. That is patently unreasonable, even if it were true, which it is not; the respondent consistently suggests that he has worked more hours than there are in the day. By way of the example, it is not uncommon for the respondent to allege that he worked 50 hours on a particular day: a task which is of course impossible. Initially, we believed that the references to hours in the schedule may be in error and might refer instead to minutes, which would have been more reasonable, but the costs warning letter and other documents repeatedly refer to the respondent having conducted in excess of 800 hours of work. They make in plain that the reference to hours in the schedule was deliberate and not a mistake.

45. The schedule of time undertaken therefore provides us with no assistance in identifying how long the respondent actually required to prepare for the case. It is no part of the Tribunal's function in a costs application to seek to recreate what would be a reasonable period for each piece of work undertaken; the Tribunal's process is not a detailed assessment as might be conducted in the County Court.

46. For those reasons, whilst the threshold for a Time Preparation Order has been met, we do not exercise our discretion to such an Order and the application is dismissed.

Remedy

47. In accordance with the orders to endeavour to agree figures for unauthorised deduction of wages and unpaid annual leave, the parties were able to agree the sums due for wages due in the period 1 – 21 March 2020 and unpaid wages for furlough. These are reflected in the awards made at the head of this reserved Judgment.

48. The remaining dispute is solely in relation to unpaid annual leave. The parties initially agreed that the claimant was entitled to 123.9 hours holiday, calculated on a pro-rata basis between the 1 January 2020 and the claimant's dismissal in July, but their respective written submissions indicate that that agreement has now fallen away.

49. The parties still agree that the claimant worked 39.5 hours a week and that the relevant rate of pay was £10.20 for January 2020 and £11 an hour from February 2020, meaning that the figure for annual leave due to the claimant, calculated using his average hours pay over a week, prior to consideration of what he was in fact paid, was £1362.90.

50. The parties agree that the respondent deducted £765.60 from the claimant's final payslip on the basis of an overpayment, which the respondent had impermissibly calculated by making deductions for each occasion the claimant had left the premises.

51. The thrust of the dispute between the parties is in relation to the sums that were paid to the claimant, and whether, as a result, there was any overpayment or whether there is a balance owed to the claimant. The claimant argues that payments in his July wage slip are not payments for annual leave and cannot be offset against any sums owed to him, the

respondent that the claimant received annual leave top up payments for the month and that this must also be deducted. The sum in question is £259.00

52. We found at paragraph 41 of the written reasons that the staff had agreed to use their annual leave to make up the shortfall in payment of wages when they were paid furlough. In addition, we referred at paragraph 44 to the respondent's PowerPoint which recorded that annual leave had been paid at 100% (rather than 80%).

53. It is not entirely clear, however, how the parties calculated the figure of 123.9 hours. Applying the formula in Regulation 14 of the Working Time Regulations 1998, the calculation of owed annual leave is

    (A x B) – C

    where—

    A is the period of leave to which the worker is entitled under regulation 13(1);

    B is the proportion of the worker's leave year which expired before the termination date, and

    C is the period of leave taken by the worker between the start of the leave year and the termination date.

54. Thus, the correct calculation would be (28 x 7/12) – leave taken.

55. We were provided with pay slips as part of the liability hearing which detail payments of annual leave. Nowithstanding that, the respondent now seeks to argue that the pay slips are inaccurate, and that the claimant took two additional days in January and three days in March. He sought to add evidence, in the form of pasted WhatsApp messages (which were not considered during the liability hearing) to support his assertions in relation to the leave actually taken by the claimant. We are not prepared to admit this evidence and prefer to use the days reflected in the pay slips.

56. The claimant accepts that he took four days annual leave, amounting to 29 hours in January; the parties agree that the claimant took five days annual leave (amounting to 39.5 hours) in February. The pay slips show that no annual was leave taken between March and the claimant's dismissal.

57. Thus, the appropriate calculation is (28 x 7/12) – 9 = 7.33 days. The claimant's monthly pay was £2177.80, amounting a gross daily wage of £71.60. The total sum owed was therefore £524.81 at the point of termination, less any payments made. There was a payment of £259 in July. The balance was there £524.81 – £259 = £265.

58. The respondent made a deduction from the claimant's wages of £765.60 purportedly in respect of overpayments of salary; for the reasons detailed in the written reasons that deduction was unlawful. The claimant was therefore paid £1,030.60 less than he should have been for annual leave in his final payslip.

59. We therefore award £1,030.60 gross for unpaid annual leave.

Employment Judge Midgley
Date: 26 August 2022

Judgment & Reasons sent to the parties: 26 August 2022

FOR THE TRIBUNAL OFFICE