# EMPLOYMENT TRIBUNALS

| Claimant | Respondent |
|---|---|
| **Mr M T Skillen** | **Cranswick Convenience Food Limited** |

**Heard by hybrid CVP on 28 September 2022**

**Before:** **Employment Judge Rogerson**

**Members:** **Mr J Howarth**

**Mr R Webb**

**Appearances:**

**For the Claimant: In person**

**For the Respondent: Mr Graham (Counsel)**

# RESERVED COSTS JUDGMENT

The claimant is ordered to pay the respondent costs in the sum of £20,000.

# REASONS

Respondent's costs application.

1. By letter dated 30 March 2022 (pages 49-54 costs bundle (CB)) the respondent made an application for the claimant to pay its costs in defending these proceedings. Mr. Graham represented the respondent at the liability hearing and relies upon the findings of fact about the claimant's unreasonable conduct to persuade the Tribunal to exercise its discretion and make a costs order capped at £20,000. He contends that the claimant's unreasonable conduct easily crosses the threshold under rule 76(1)(a) which provides that:

> "A **tribunal may** make a costs order and **shall** consider whether to do so, **where it considers** 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". (all highlighted text in these reasons is for our emphasis)

2. 3 aspects of the claimant's 'unreasonable' conduct are relied upon:

a. The claimant conducted the proceedings in both a highhanded and unreasonable manner.

b. The claimant has brought the Tribunal process into disrepute by falsifying evidence to bolster his claim, misleading the Tribunal as to what factually occurred and generally conducting the proceedings in a scandalous and vexatious manner.

c. The claimant acted unreasonably in failing to accept a reasonable offer of settlement.

3. Dealing firstly with the unreasonable conduct identified in a) and b) Mr. Graham very carefully took the Tribunal and the claimant to the specific findings of fact in the liability judgment (pages 23-48 CB) relied upon by the respondent.

Paragraph 19: "*The claimant was **dishonest** and has **deliberately fabricated evidence** to bolster his case and to discredit the respondent*".

Paragraph 42: "*The claimant was l**ying** and had **fabricated this allegation** to bolster his case and was deliberately attempting to mislead the Tribunal*".

Paragraph 46: "*The claimant was making serious **unsubstantiated** personal allegations"*.

Paragraph 47: "*The claimant fabricated these **unsubstantial** allegations to try to discredit the respondent's witnesses".*

Paragraph 61: "*The claimant **misrepresented** the facts to fit the case … **instead of giving a truthful and transparent account** of the event from the outset".*

Paragraph 63: *"Instead of addressing the **inadequacy of his own evidence** the claimant has **tried to make mileage** out of a witness he knew would not be giving evidence"*.

Paragraph 90: "*The claimant **brought a claim founded on dishonesty** which is **vexatious and unreasonable conduct**. The claimant is on his own evidence an experienced litigant in person, knowledgeable about the tribunal process and law. He ought to have known. In his resignation he signaled his aim which was to **use this claim to embarrass and damage the respondent's reputation and its relationship with customers**. In pursuing that aim the claimant has had **no regard to the consequences of his dishonesty to the individuals he falsely accused of wrongdoing**"*. The claimant was given time to read and consider those findings of fact and the context in which they were made. He did not comment upon those findings or resist the grounds upon which the application is made. What was clear to the Tribunal from rereading the liability judgment is that there were multiple findings of fact of very serious unreasonable and vexatious conduct by the claimant found to have brought a false claim and pursued that false claim to a final hearing.

4. The second aspect of the claimant's unreasonable conduct Mr. Graham relies upon is the claimant's failure to accept a reasonable offer of settlement. On 22 April 2021 the respondent offered the claimant £2000 in a genuine attempt to settle the claim to try to save the costs it would have to incur in defending an unmeritorious claim. The respondent put the claimant on notice that if that offer was refused and the claim failed, he would be at risk of costs estimated at just

under £45,000. The claimant was urged to seek independent legal advice and seriously consider the offer.

5. The claimant rejected the offer because he thought it was 'derisory'. He contends (page 117 and 118) that if the respondent was serious about settling the claim they should have agreed to judicial mediation. He says: "*everything can be mediated on including wars*". The claimant has completely missed the point. When this offer was made the claimant knew he had fabricated allegations to support a false whistleblowing claim. In those circumstances he ought reasonably to have viewed any offer to settle as a good offer which provided him with a way out without exposing his dishonesty or exposing him to the risks of paying costs of up to £45,000. In April 2021, the respondent was making a genuine offer of settlement on a commercial basis with the legal costs in mind without knowing for certain that the claimant had brought a false claim.

Ability to Pay

*6.* The claimant invites the Tribunal not to exercise its discretion under rule 76(1) and not to order him to pay the respondent's costs relying also on his inability to pay any costs award if it is made. The relevant parts of Rule 84 (provide that "*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"*

7. Before listing this hearing, the parties were ordered to take steps to ensure advance disclosure of relevant documents and written representations. On 19 April 2022, case management orders (page 55CB) were made including:

"3. *The Tribunal may have regard to information about the Claimant's ability to pay when exercising its discretion to make a costs order under rule 76 78 and 84 of the Rules of Procedure. If the Claimant is going to rely on evidence to show he is unable to pay (if an order is made) he must provide evidence of his income, his expenses, his savings, any assets (including any ownership he has in property), his debts and his liabilities to the respondent and the Tribunal by no later than 13 May 2022"*

8. In response to that order the claimant (page 118CB) provided the following information about his ability to pay:

"*Ability to Pay*

*The claimant is out of work (see dismissal letter attached dated 14 April 2022). The claimant has mortgages and very little savings to live off. I also have CCJ of £60,000 from the county court".*

9. The claimant had provided very limited information about his means and only provided 3 documents: the front page of a bank statement to 26 April 2022 showing a balance of £10,889.30, 2 mortgage documents relating to the Halifax Bank and Lloyds Bank confirming an increase in the payments due on those mortgages to £139.79 per month and £145.79 respectively.

10. Unsurprisingly, on 30 May 2022 the respondent made an application for specific disclosure of financial documents to provide a fuller picture of the claimant's ability to pay. That application was refused by EJ Rogerson on 13 June 2022 for the following reasons:

"*Rule 84 Ability to Pay" provides that "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" If the claimant is asserting that he does not have the ability to pay because of his income/expenses/debts and liabilities or lack of assets/savings it is for him to provide supporting evidence to prove this. If the claimant chooses not to provide voluntary disclosure of that evidence the* ***Tribunal may draw the inference that he has the ability to pay a costs order of any amount if costs are awarded****. It is a matter for the claimant to provide the evidence voluntarily if he wishes the respondent and the Tribunal to consider it"*

11. On 12 July 2022, the claimant voluntarily disclosed some further financial information (pages 129-134 CB):

    a. Default Costs Certificate Carlisle County Court dated 5 August 2016 in the sum of £65,194.60.

    b. Lloyds bank statement for the period 26 March to 26 April 2022 (opening balance of £10,416.61, closing balance of £10,889.30).

12. Despite that warning the claimant has chosen to provide partial disclosure of his financial information. At the hearing he confirmed that he did not have any dependents. He owns two properties. One is let out on a long term let and he lives in the other property located in Beverley. He estimates the total value of both properties as £120,000. He has mortgages on those properties but has not provided evidence of the amounts outstanding or evidence to support his valuation of the properties which appears to be very low. He confirmed he receives rental income of £600 a month. He has been working for an agency as a full time HGV Driver since April 2022 but has not provided any details of that job or income even though he has been working as a driver for some time and has earned income in that role. He will continue to work as an HGV driver. There is currently a high demand for HGV Drivers. His future-prospects of work as a driver are very good. He has a CCJ from 2016 which is outstanding in full and has not yet been enforced. He says he is now in discussions with the defendant's lawyers in those proceedings about repayment but has not provided any evidence of this. No other details of income or expenditure or capital assets was provided.

Closing Submissions

13. The claimant resists the application and invites the Tribunal not to exercise its discretion because of the unreasonable conduct of the respondent in refusing to engage in judicial mediation which could have avoided the costs they now claim. He also relies on the fact that he is a litigant in person he is not a lawyer and should be given some leeway for that. He believes it is an honorable thing to be a whistleblower and he should be commended. He is confident that in future other evidence will come to light to vindicate him. His view is that it is an injustice if he 'lets it go' and that is why he "could be back some day". He does not challenge the detailed costs information provided by the respondent's solicitors to support the amount of costs claimed limited to £20,000 (see pages 93-109 details of activity report from 23/4/20 to 24/3/22, and the disbursements invoices for counsel's fees of £12,300)

14. Mr. Graham's response to the judicial mediation point that is repeatedly made to resist the costs application is that mediation is an entirely voluntary process. No adverse inference can be made against the respondent for its decision not to engage in judicial mediation. It is surprising that the claimant is inviting the tribunal to find this was unreasonable conduct by the respondent to persuade it

not to make a costs order for the claimant's proven unreasonable conduct. The claimant is ignoring the multiple damaging findings made about his dishonesty. The claimant's valuation of his claim at that time was also completely unrealistic and it is unlikely the mediation process would have worked. Instead, the respondent made a sensible offer of settlement which was rejected. It is the claimant's decision to ignore the costs warning and his dishonesty which has puts him at risk of costs, not the respondent's decision not to engage in judicial mediation. In contrast to the claimant's unreasonable conduct the respondent has very reasonably limited the amount of costs it claims to £20,000. Even though a higher claim could be made is supported by the evidence, the respondent has pragmatically taken this view to bring the claim to an end and avoid the additional costs of having a detailed assessment. Very limited information has voluntarily been provided about the claimant's ability to pay demonstrating a continuing lack of transparency. He has only disclosed information about his means that he wishes to provide instead of providing a full and honest picture of his finances. He was warned that the Tribunal might then assume he has the ability to pay costs of £20,000 and that is what he invites the Tribunal to award.

Conclusions

15. We agreed with Mr. Graham that the threshold of unreasonable conduct had been crossed by reason of the unreasonable conduct identified (see paragraph 3). It is not difficult to see why that would be so for a claimant who brings a false claim, fabricates serious allegations of wrongdoing and attempts to mislead the Tribunal. We were therefore required to consider making a costs order under rule 76(1) unless the claimant has persuaded the Tribunal that we should not exercise our discretion under rules 76 and rule 84.

16. The claimant has in his written and oral representations focused on the respondent's decision not to engage in judicial mediation. We agreed and accept Mr. Graham's submissions. The respondent has not acted unreasonably in deciding not to engage in judicial mediation and that decision was not a reason for declining to make a costs order. The claimant tries to justify his rejection of the offer described as derisory to justify his decision to ignore the costs warning issued by the respondent in April 2021. In very clear terms the claimant was warned that if he continued with the claim, he was at risk of paying the respondent's costs estimated to be just under £45,000. This was the time when the claimant should have withdrawn the claim to avoid the application he now faces. Instead of seeking the independent legal advice he was urged to take and withdraw with a sum of money he decided not to take advice and to continue with his false claim. He rejected a sensible commercial offer to settle his claim which he knew was false. We find that the claimant's rejection of the offer was unreasonable conduct of these proceedings. The claimant is familiar and experienced in bringing tribunal claims. Many litigants in person bring genuine claims about employment disputes for a Tribunal to determine on the merits of the claim. Not many litigants in person bring false claims the important distinguishing factor in the claimant's case which he has completely ignored in his representations. The claimant is also familiar with the cost regime having been issued with a CCJ in 2016 (whether it was litigation in the employment tribunal or in another court). While the same costs regime does not apply in employment tribunals, the rules we are invited to apply exist for a reason. Mr. Graham invites us to draw an adverse inference in relation to the non-disclosure/limited selective disclosure made by the claimant about his ability to pay. The case management

order (see paragraph 8) made it clear full disclosure was expected if ability to pay was a factor. The respondent applied for specific disclosure suspecting the claimant was deliberately hiding information about his ability to pay and their suspicion has proved to be correct. While the specific disclosure order was refused, the claimant knew that if he *"chooses not to provide voluntary disclosure of that evidence the* ***Tribunal may draw the inference that he has the ability to pay a costs order of any amount if costs are awarded****. It is a matter for the claimant to provide the evidence voluntarily if he wishes the respondent and the Tribunal to consider it"*

17. The claimant has not explained why he has not provided full disclosure of his means. He did not provide details of the properties, a market valuation, the amounts outstanding on the mortgages to show how much equity he has in each property. He did not disclose the fact that he had been working as an HGV driver after losing his job in April 2022 to show that income but did disclose evidence to show he had lost a job in April 2022 to show he had no income from work. He did not disclose the earnings in his employment which was well paid and is likely to continue in the future given the current demand for HGV drivers. The inference we drew from the claimant's lack of transparency in relation to the information he provided about his income, capital assets, his employment and future prospect of work, was that he was deliberately attempting to hide evidence he knew might not help him. While some evidence of savings (10,000) and liabilities (CCJ) was voluntarily disclosed, the full picture was deliberately concealed. The CCJ appears to be a historical debt and no enforcement action appears to have been taken for 6 years. If enforcement action was now being contemplated as is suggested, we would have expected to see some evidence of that. We did not find all the evidence given by the claimant about his means was credible. We were satisfied the claimant has the ability, to pay a costs order. In reaching our decision we do not consider methods of enforcement which are for the county court to decide if enforcement action is taken which would take account of the individual's means from time to time in deciding payment methods and amounts.

18. For those reasons we are persuaded to exercise our discretion and grant the respondents application for costs under rule 76(1)(a) and 84. As to the amount of a costs order rule 78 provides that:

*"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".*

19. The claimant has not challenged the detailed costs information provided by the respondents to support the £20,000 capped costs. We accept that evidence accurately reflects the work undertaken. After disbursements of £12,300 the rest of the legal costs total £6,700 representing a very small part of the cost of the actual work undertaken by the respondent's solicitors in defending the claim. We were satisfied the amount claimed of £20,000 was reasonable and proportionate and that is the amount the claimant is ordered to pay.

20. In reaching our decision on the application we applied the following principles from cases where there has been more detailed consideration of these rules.

20.1 Where a Tribunal exercises it discretion to make a costs order then the amount awarded should normally reflect the Tribunal's assessment of what is both reasonable and proportionate, with any doubt to be resolved in the favour of the paying party. This is the standard and usual basis of assessment. In **Yerraklava-v- Barnsley Metropolitan Borough Council 2012 ICR420,** the Court of Appeal provided guidance that costs should be limited to those '*reasonably and necessary incurred*' as a consequence of the unreasonable conduct. 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.

20.2 'Costs' means fees charges, disbursements or expenses incurred by or on behalf of the receiving party (Rule 74: Definitions)

20.3 In assessing means, account must be taken of information (if it is provided) of capital as well as income and expenditure. In **Shields Automotive Ltd - v- Greig** the EAT stated that *"assessing a person's ability to pay involves considering their whole means. Capital is highly relevant aspect of anyone's means. To look only at income where a person has capital is to ignore a relevant factor*'.

20.4 A Tribunal is not required to limit the costs that the paying party can afford to pay - **Arrowsmith -v- Nottingham Trent University 2012 ICR 159 CA.** There is "*no reason why affordability has to be decided once and for all by reference to a party's means as to the moment the order falls to be made".*

20.5 If a costs order is made, it would have to be enforced through the county court, which would itself take into account the individual's means from time to time in deciding payment methods and amounts. **Vaughan-v- London Borough of Lewisham and Others 2013 IRLR 713.**

20.6 The regulations do not mean that "*poor litigants may behave without impunity and without fear, that a significant costs order will be made against them, whereas wealthy ones must behave themselves otherwise a costs order will be made"* **Kovacs -v- Queen Mary and Westfield College (2002) IRLR 414**.

**Employment Judge Rogerson**

**20 October 2022**