EMPLOYMENT TRIBUNALS

Claimant: Mr B Krol

Respondent: The Haulage (Holdings) Organisation Limited

Heard at: Bury St Edmunds Employment Tribunal (remote via CVP)

On: 26 to 28 January 2022

Before: Employment Judge K Welch (sitting alone)

Representation

Claimant: Mr L Werenowski, Counsel
Ms M Rodwell, Interpreter

Respondent: Ms L Gould, Counsel

RESERVED COSTS JUDGMENT

The claimant shall pay a contribution towards the respondent's costs of £5,000.

REASONS

Introduction

1. This case was heard before me on 26 to 28 January 2022. Having given oral Judgement in the case, written reasons were provided on 11 May 2022 following a request by the claimant.

2. The respondent made an application for costs on 18 March 2022, which, unfortunately, along with the claimant's request for written reasons were not forwarded to me until some months later.

3. The claimant also made an application under rule 71 for reconsideration of the Judgment, which, again was not referred to me for some time. The reconsideration application was considered prior to the costs application, in order to provide the claimant with an opportunity to comment on the costs application. The claimant's response was received on 13 June 2022 and the respondent made further comments on the claimant's response on 27 June 2022.

4. The parties were given the opportunity to request a hearing to consider the cost application but both parties appeared content for me to consider it on the basis of their written submissions, together with supporting documents. I had regard to these submissions and documents before coming to my decision.

Background

5. The claimant originally brought claims for automatic unfair dismissal and race discrimination against the respondent and another named individual. The claimant withdrew all claims against the named individual and the race discrimination complaints by email dated 15 December 2021 and these were dismissed on 12 January 2022.

6. The respondent's cost application related to costs incurred following withdrawal of the race discrimination complaints i.e. from 16 December 2021 onwards.

The respondent's application for costs

7. The application for costs relied upon the following grounds:

    a. the claimant had acted unreasonably in bringing proceedings;

b. the claimant acted unreasonably in continuing with his claim (ie the way the proceedings were conducted); and

c. the claimant brought claims that had no reasonable prospects of success.

8. The respondent did not distinguish between the separate grounds relied upon, since they were closely linked to each other.

The respondent's application for costs

9. In brief, the respondent's contentions were that the claimant had been made aware of the weaknesses in his case, by various emails/ letters sent to his representative. The claimant had been "knowingly untruthful" in the case he put forward and was not just mistaken. It ought to have been clear that the claimant had not raised health and safety concerns before his dismissal. It was therefore unreasonable behaviour of a kind to justify an award of costs. Even if untruthfulness was not apparent to his representative, it must still have been clear that the dismissing officer had not known about the claimant's grievance before he dismissed him. Therefore, the claimant, having had the benefit of legal advice, should have known that the claim had no reasonable prospects of success.

The claimant's opposition to the costs application

10. The claimant's response was that the claimant believed, and believes, that the respondent's working practices are unsafe. The claimant had twice sent his grievance on the day of his dismissal raising concerns about health and safety, and on the balance of probability, the claimant had not convinced the Judge that his dismissal was automatically unfair. This did not justify finding unreasonable conduct. The claimant denied knowingly lying. There were issues concerning the respondent forging documents, namely notes of an investigation meeting which had not taken place and training records for the claimant, which were reasonably challenged by the claimant.

Costs in the Employment Tribunal differ from those in the civil court system and do not follow the event. The claimant had acted reasonably in engaging in settlement discussions with the respondent. The respondent had not made an application to strike out the claim on the basis that it had no reasonable prospects of success nor did it make an application for a deposit order. The threshold had not, therefore, been met and the application should be refused.

The claimant's ability to pay

11. The claimant provided information in its submissions about the claimant's finances, which showed that he had approximately £500 unallocated earnings per month. Whilst it was said that he did not have savings and was in debt to family members, there was no evidence provided in respect of this. I note that the claimant had paid his own legal expenses by instalments.

Law

12. The relevant parts of Rule 76 provide:

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 (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.

13. The word "may" confirms that making a costs order is discretionary. However, the tribunal shall consider exercising that discretion in certain circumstances. The circumstances are often referred to as the threshold test or the gateway.

14. The threshold test is met in a number of circumstances which include: if either a party, or a party's representative, acts unreasonably in bringing or conducting proceedings (rule 76(1)(a)) and if the claim had no reasonable prospect of success (rule 76(1)(b).

15. Once the threshold test has been met, the tribunal must consider the exercise of its discretion. The exercise of the discretion can include the following: should costs be awarded at all; should the costs be awarded for a period; should the costs be limited to a percentage; and should the costs be capped. Any order can be tailored to suit the circumstances.

16. In exercising its discretion, the tribunal should have regard to all of the relevant circumstances. It is not possible to produce a definitive list of the matters the tribunal should take into account.

17. I should be cautious about the citation of authorities on costs, although recognise that broad principles can be taken from relevant authorities.

18. I should not adopt an over analytical approach to the exercise of this broad discretion. The vital point is to look at the whole picture and ask whether there has been unreasonable conduct in the bringing and conducting of the case. In so doing, I should consider what was unreasonable about the conduct and what effect it had. In Yerrakalva v Barnsley MBC [2012] ICR 420 LJ Mummery said:

> "39. *I begin with some words of caution, first about the citation and value of authorities on costs questions and, secondly, about the dangers of adopting an over-analytical approach to the exercise of a broad discretion.*
>
> *40. The actual words of Rule 40 are clear enough to be applied without the need to add layers of interpretation, which may themselves be open to differing interpretations. Unfortunately, the leading judgment in McPherson delivered by me has created some confusion in the ET, EAT and in this court. I say*

"unfortunately" because it was never my intention to re-write the rule, or to add a gloss to it, either by disregarding questions of causation or by requiring the ET to dissect a case in detail and compartmentalise the relevant conduct under separate headings, such as "nature" "gravity" and "effect." Perhaps I should have said less and simply kept to the actual words of the rule."

41. 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. The main thrust of the passages cited above from my judgment in Mc Pherson was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the ET had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances."

19. It is always the case that costs are compensatory; they are never punitive.

20. When considering whether to award costs because of a party's conduct in bringing or pursuing a case, the type of conduct which is considered unreasonable will depend on the facts of the case. This is particularly important when considering a case which is subsequently held to have lacked merit. In general, having regard to Cartiers Superfoods Ltd v Laws [1978] IRLR 315 it is at least arguable that in order to substantiate an allegation of unreasonable behaviour, it is necessary to look and see what that party knew or ought to have known if it had gone about the matter sensibly.

21. I note, as a general principle, that I should approach with caution the question of what a party should be taken to have known at a particular point in time, otherwise parties could end up being penalised for not assessing the case at the outset in the same way as a Tribunal may do following the hearing of evidence. I had regard to the comments of Sir Hugh Griffiths in ET Marler v Robertson 1974 ICR 72.

> *"Ordinary experience of life frequently teaches us that that which is plain for all to see once the dust of battle has subsided was far from clear to the combatants once they took up arms*."

22. I can consider how a party has pursued a matter. I note the following from Justice Lindsay in Beynon v Scadden [1999] IRLR 700, EAT:

> *"A party who, despite having had an apparently conclusive opposition to his case made plain to him, persists with the case down to the hearing in the "Micawberish" hope that something might turn up and yet who does not even take such steps open to him to see whether anything is likely to turn up, runs a risk, when nothing does turn up, that he will be regarded as having been at least unreasonable in the conduct of his litigation*."

23. When considering whether a party should reasonably have realised there was conclusive opposition to that party's case, I should consider if there were clear statements setting out that opposition. Those statements may appear in the response or claim form, correspondence, and cost warning letters.

24. Whilst deposit orders operate as a warning to a party that a particular allegation or argument may prove to be unsustainable, and failure to establish the allegation or argument engages rule 37(5)(a) from which unreasonable conduct may be found, I note that there is no requirement to apply for a deposit order.

25. Where evidence turns out to be false, it may be appropriate to consider whether the evidence was advanced dishonestly, particularly if it concerns a central allegation. However, a lie, even about an essential allegation, will not necessarily lead to an award of costs.

26. Rule 84 expressly provides that the tribunal may have regard to a paying party's ability to pay. It states:

> "*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*."

27. I am not obliged to restrict the order to one the paying party could pay. In Arrowsmith v Nottingham Trent University 2012 ICR 159 at paragraph 37 Lord Justice Reimer said the following.

"…*The fact that her ability to pay was so limited did not, however, require the ET to assess a sum that was confined to an amount that she could pay. Her circumstances may well improve and no doubt she hopes that they will*."

28. In Vaughan v London Borough of Lewisham UKEAT 0533/12 the EAT also reiterated a Tribunal is not obliged to have regard to the ability to pay at all.

29. It may be desirable to consider means, and I should give reasons for why I have, or have not, taken means into account.

Conclusion

30. It was apparent that the claimant had withdrawn his discrimination complaints at a relatively early stage of the proceedings. The respondent, however, did not seek an award of costs for the period prior to this withdrawal.

31. I had to firstly consider whether any of the grounds relied on met the threshold.

32. Firstly, the respondent alleges that the claimant acted unreasonably in bringing his proceedings. This relies on a finding that the claim for automatic unfair dismissal had no reasonable prospects of success. Secondly, it was alleged that the claimant was unreasonable in continuing with those proceedings. Finally, the respondent contended that the claim had no reasonable prospects of success.

33. I am specifically looking at the costs in relation to the automatic unfair dismissal claim pursued after the withdrawal of the claimant's discrimination complaints. In this case, I am satisfied that the threshold to consider exercising the discretion has been met.

34. In order for the claimant's automatic unfair dismissal claim to succeed, he had to show that he had brought to his employer's attention by reasonable means circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety. I consider that the claimant should have been aware at the time of bringing his proceedings, and at the time that they were continued following the withdrawal of the discrimination claim, that he would be unable to prove that these concerns had been raised to his employer before the decision to dismiss had been taken. This was an essential element of his claim for automatic unfair dismissal since he had insufficient service to bring a general unfair dismissal complaint.

35. I find that the claimant was both unreasonable in continuing with his proceedings from 16 December 2021 onwards but also that his claims had no reasonable prospects of success both when they were presented, but also at the time that they were continued on 16 December 2021.

36. I understand that the claimant still contends that the respondent has unsafe working practices, but in order to bring the only claim before me, he would have had to raise

those concerns with his employer, which he ought to have known that he had not done prior to his dismissal.

37. Having found that the gateway threshold has been met, I then must consider whether to exercise my discretion to award costs against the claimant in this case. Even when the threshold has been met, I may still decline to order costs if I consider that appropriate in all of the circumstances.

38. The costs sought by the respondent, amount to £12,034.34 plus VAT to the date of its application.

39. The starting point is that costs do not follow the event in the tribunal claim. Normally, no costs are payable. When the threshold has been met, it is appropriate to consider whether the entirety of the cost should be paid or whether part of the costs, or whether they should be capped.

40. I take into account that the only claim being brought was automatic unfair dismissal, and the proceedings would not have continued had that claim been withdrawn at the same time that the race discrimination complaints had been withdrawn and therefore consider that the respondent has been put to considerable expense in defending those proceedings.

41. The respondent had sent detailed correspondence to the claimant about the weaknesses in his claim, and had offered to settle the claim prior to the hearing which would have avoided the necessity of defending the claim.

42. I do not accept that the respondent's failure to apply for a strike out or deposit order affects my decision to award costs against the claimant.

43. I consider that it is appropriate to exercise my discretion to award a contribution towards the respondent's costs in this case. In coming to my decision, I have applied

a broad brush approach when considering the costs claimed by the respondent, rather than going line by line through the breakdown provided. For example, I do not consider that costs should include representation by a solicitor and counsel at the hearing. I have taken into account the relatively limited means of the claimant but consider that his means do not prevent a costs order being made, however do not accept that it should be the full costs, as set out in the respondent's application.

44. In light of this, I consider that an appropriate sum to award is £5,000 as a contribution towards the respondent's costs. I therefore award the respondent costs of £5,000.

Employment Judge Welch

Date: 2 November 2022

JUDGMENT SENT TO THE PARTIES ON

11 November 2022

FOR THE TRIBUNAL OFFICE