



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Gavin Hudson

**Respondent:** Humberside Fire and Rescue Services

**Made at:** Hull Employment Tribunal      **On:** 17<sup>th</sup> November 2022

**By:** Employment Judge Flanagan (Sitting Alone)

## JUDGMENT

1. The Respondent's application for costs pursuant to Rule 76 of the Employment Tribunal Rules 2013 is refused.

## Reasons

### Background to the Respondent's Application for Costs

1. Through a Claim Form issued on the 18<sup>th</sup> April 2022, the Claimant made a claim for constructive unfair dismissal against the Respondent. The Claimant relied on the Respondent purportedly breaching the implied term of mutual trust and confidence in the contract, with acts that were individually or cumulatively sufficient for him to treat the contract of employment as broken, entitling him to resign.
2. The Claimant relied on four issues:
  - (i) not permitting him to continue working for Humberside police to the 31<sup>st</sup> July 2021, as had been originally agreed so he could finalise a project;
  - (ii) reducing his workload, which was not altered despite him flagging it to management;
  - (iii) excluding him from key meetings: the leadership forum, IRMP meetings and communication meetings; and

- (iv) denying him the opportunity to apply for two promotion opportunities and/or not complying with the policy on recruitment and acting transparently and openly.
3. The Respondent defended the claim, stating that the Claimant had not been dismissed and that the Claimant was not entitled to resign as there had not been any fundamental breach of contract. The Respondent further stated that the Claimant had always intended to resign, as he had obtained an offer of employment elsewhere – telling his colleagues as such at the time. The Respondent stated that the reason for his dismissal was him obtaining an unconditional offer of employment with another employer, having completed the vetting requirements.
  4. The final hearing of the matter was listed on the 23<sup>rd</sup> and 24<sup>th</sup> August 2022 at Hull Employment Tribunal, when witness evidence was heard. The Claimant represented himself at the Hearing; the Respondent was represented by Mr Price of counsel. The Claimant's claim for constructive dismissal was not well founded and therefore dismissed.

### **The Respondent's Costs Application**

5. In a letter dated the 21<sup>st</sup> September 2022, the Respondent made an application for costs in the sum of £16,135.48, representing the costs of defending the Claimant's claim to that date. The application was made on the basis of Rule 76(1), specifically that the Claimant's claim had no reasonable prospects of success. The Tribunal was reminded that the Respondent was a public body that had incurred considerable costs.
6. In addition to the four-page written application, the Respondent prepared a 50 page costs application bundle, comprised of correspondence between the parties, as well as the Claim Form and Response.
7. The correspondence provided by the Respondent with the application, detailed the efforts the Respondent made to resolve the matter without a Hearing. The chronology explains the occasions when the Claimant was informed by the Respondent that his claim was misconceived and/or had no reasonable prospects of success. The Claimant was also warned that a costs application would be made if he were unsuccessful. The latest correspondence from the Respondent was dated the 17<sup>th</sup> August 2022, inviting the Claimant to discontinue his claim without penalty.

### **The Claimant's Response to the Costs Application**

8. The Claimant, having been supplied with the Respondent's costs application, responded to the Tribunal in an email dated 22<sup>nd</sup> September 2022. He stated that he did not believe he had acted unreasonably or vexatiously, as he considered his claim was genuine. He also stated that he did not have the means to afford to pay the costs requested, which was also the reason he represented himself before the Tribunal.

9. Following correspondence from the Tribunal inviting both parties to provide any further submissions and indicate whether they wished for the matter to be decided on the papers, the Claimant supplied a further submission on the 18<sup>th</sup> October 2022.
10. The Claimant's submission reiterated his belief that he had been entitled to resign and claim unfair dismissal. The Claimant also explained that he was a litigant in person, but had received advice regarding his case from various sources, none of which indicated that his case was misconceived. He provided details of his means; detailing his income and expenditure.

### **Determination on Paper**

11. Having considered the correspondence from both parties and taking account of the Overriding Objective, it is proportionate and in the interests of justice to provide my decision without the need for a hearing.

### **Relevant Law**

12. The Tribunal's power to award costs is set out in rules 76 to 88 of the 2013 Employment Tribunal Rules. These rules state:

#### **When a costs order or a preparation time order may or shall be made**

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; or

(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.

(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been adjourned or postponed on the application of a party.

#### **The amount of a costs order**

78.- (1) A costs order may –

(a) order the paying party to pay the receiving 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 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; or, in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993, or by an Employment Judge applying the same principle

(c) order the paying party to pay the receiving party a specified amount as reimbursement of all or part of the Tribunal fees paid by the receiving party;

(d) order the paying party to pay another party or a witness, as appropriate, a specified amount in respect of necessary and reasonably incurred expenses (of the kind described in rule 75(1)(c)); or

(e) if the paying party and receiving party agree as to the amount payable, be made in that amount.

(2) Where the costs order includes an amount in respect of fees charged by a lay representative, for the purposes of the calculation of the order, the hourly rate applicable for the fees of the lay representative shall be no higher than the rate under rule 79(2).

(3) For the avoidance of doubt, the amount of a costs order under subparagraphs (b) to (e) of paragraph (1) may exceed £20,000.

13. The Appellate Courts have provided guidance to the Employment Tribunals on how the Rules should be exercised. Firstly, in *Milan v Capsticks Solicitors LLP & Others* UKEAT/0093/14/RN, it was determined that a structured approach should be taken in relation to an application for costs where Langstaff J, described the exercise to be undertaken by the Tribunal as a three-stage exercise (at paragraphs 52):

*“There are thus three stages to the process of determining upon a costs order in a particular amount. First, the tribunal must be of the opinion that the paying party has behaved in a manner referred to in [Rule 76]; but if of that opinion, does not have to make a costs order. It has still to decide whether, as a second stage, it is “appropriate” to do so. In reaching that decision it may take account of the ability of the paying party to pay. Having decided that there should be a costs order in some amount, the third stage is to determine what that amount should be. Here, covered by Rule [78], the tribunal has the option of ordering the paying party to pay an amount to be determined by way of detailed assessment in a county court.”*

14. Secondly, additional guidance was given by the Court of Appeal in *Yerrakalva v Barnsley Metropolitan Borough Council* [2012] ICR 420, where the Court explained that costs in the employment tribunal remained the exception rather than the rule.

## Conclusions

15. I have to consider the following three-stage test:

- (i) Has the Claimant behaved in a manner prescribed by the Rules?
- (ii) If so, should I exercise my discretion to award costs in the Respondent's favour?
- (iii) If I exercise my discretion in favour of a costs order, what amount should be paid?

16. Dealing with the first stage, the Respondent relies on the Claimant's case being misconceived and having no reasonable prospects of success. Meanwhile, the Claimant does not accept that he has behaved in a manner prescribed by the Rules. He relies on his own beliefs at the time, as well as advice provided to him from several sources.

17. The Claimant's case was unusual; he relied on the Respondent's conduct that occurred *after* he had obtained a conditional offer of employment elsewhere and informed colleagues that he intended to leave. However, his evidence was that whilst he had made a provisional decision to resign, it was equivocal and he only decided to resign following the Respondent's alleged repudiatory conduct.

18. In the factual findings at the Hearing, the Claimant's contentions, as described at paragraph 2 above, were not found to satisfy the legal test to amount to a repudiatory breach of the contract, either individually or cumulatively, as required in *Malik v BCCI* [1997] ICR 606 and *Kaur v Leeds teaching Hospitals NHS Trust* [2019] ICR 1. The Claimant's claim therefore failed.

19. Nevertheless, I accepted the Claimant's evidence and that he, subjectively at least, felt aggrieved by the decision to appoint a colleague to a role above the Claimant, without an open and transparent recruitment process. I found that it was reasonable for the Claimant to have been upset by the 'cloak and dagger' approach behind the promotion, as the Claimant had more historic experience in the field. Furthermore, I considered it to be unusual for the Claimant not to have been invited to at least one meeting that related to task that he was required to undertake. Significantly, no explanation was provided by the Respondent for the Claimant's absence. These represented examples of the Respondent's somewhat careless behaviour toward the Claimant before his ultimate resignation.

20. It follows that whilst the Claimant's case did not pass the threshold to amount, objectively, to sufficient cause to destroy or seriously damage the implied term of trust and confidence, there were issues upon which the Tribunal understood the Claimant's sense of grievance. The Claimant's case was not strong, as there was evidence that he had made an unequivocal decision to leave the Respondent over four months before he ultimately resigned. However, in the absence of an

actual resignation, there was conduct that could have been viewed as unreasonable by his employer in the interim period. In conclusion, I am satisfied that the Claimant may have had little prospects of success, but it could therefore not be said to have no reasonable prospects of success.

21. On that basis, as the first of the three-stage test noted above has not satisfied, the Tribunal does not have the power to make an award for costs against the Claimant.
22. In any event, taking into account the means available to the Claimant, the Tribunal would have been unlikely to exercise its discretion to award costs against the Claimant for the sum requested.

Employment Judge **Flanagan**

Date: 17<sup>th</sup> November 2022