



EMPLOYMENT TRIBUNALS

Claimant: Mr Kieran Pagett

Respondent: JCB Cabs System

Heard at: Birmingham West

On: 16.11.2022

Before: Judge L Mensah on the papers

JUDGMENT

The Tribunal orders are;

1. The Respondent's application for costs is dismissed.

Background

2. I gave Judgment on the substantive claims after hearing on the 30.08.2022 and 31.08.2022. I gave final oral judgment at the end of the hearing and a written judgment followed dated 01.09.2022. The Respondent have made an application for costs dated 09.09.2022. The Claimant resists this application. Both parties have asked I deal with this application on the papers. I concluded this was a proportionate way of dealing with the application. I gave clear case management orders so both parties had a full opportunity to file evidence or written submissions in support.

Findings

3. The starting point is the Employment Tribunals Rules of procedure 2013. The relevant provisions state;

Rule "75.—(1) A costs order is an order that a party ("the paying party") make a payment to—

(a) another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative;

(b) the receiving party in respect of a Tribunal fee paid by the receiving party; or

(c) another party or a witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual's attendance as a witness at the Tribunal.

(2) 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 any final hearing.

(3) A costs order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings. A Tribunal may, if it wishes, decide in the course of the proceedings that a party is entitled to one order or the other but defer until a later stage in the proceedings deciding which kind of order to make.

Rule 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..."]

[underlined for emphasis]

Application

4. The Respondent's application is based upon a general discretionary ground "otherwise unreasonable" relating to the bringing or conducting of the proceedings. In the costs warning letter dated 21.04.2022 they stated,

"For the reasons outlined above we consider that your claim is, at best, misconceived and potentially that you have acted vexatiously, disruptively and otherwise unreasonably. We are writing to put you on notice that our client intends to robustly defend your claim and to request that an order for costs is made against you at the appropriate time."

5. In the application they say,

"13. The Respondent did not receive a response to the Offer. The Respondent respectfully submits that the Claimant's failure to engage with this Offer was unreasonable, particularly in light of the explanation of the test of reasonableness. By reason of this failure to act, the Respondent incurred significant and unnecessary legal costs in the final preparation for the FMH, including briefing Counsel and attending the hearing which could otherwise have been avoided, if the Claimant had taken proper notice of the Offer and withdrawn his claim. The Respondent

respectfully submits that this amounted to unreasonable conduct on the Claimant's part."

6. I am being asked by both parties to make a decision based upon their written submissions. I am being asked to consider the Respondents' cost schedule as filed, and either order a specified sum, or detailed assessment on the whole or part of the costs (if I don't feel able to make a summary assessment).

7. The Respondent's seek to claim under the £20,000 detailed in Rule 78(a) and so Rule 78(3) does not apply. The Respondent argue the Claimant had enough information (at least by the time he had read a costs warning letter dated 21.04.2022, as to the claim he was pursuing, to enable him to understand he had "no reasonable prospect of success." It is argued he should have withdrawn his claim at that stage and so prevented the Respondent from having to incur the additional £11,317.50 in legal costs (including £4000 in Counsel's fees). It is therefore argued the Claimant's conduct was otherwise unreasonable in continuing to pursue the claim.

8. There are a number of factors I have taken into account:

- In assessing whether a parties conduct was unreasonable I adopt a "range of reasonable responses" approach rather than substituting my own view (Solomon v University of Hertfordshire UKEAT/0258/18)
- When considering whether to make an order or the amount, I can have regard to the paying parties ability to pay (Rule 84)
- Having considered the reasonableness of the costs claimed, I should consider the proportionality of the total figure considered to be reasonable having regard to the factors and, if relevant, any wider circumstances akin to those matters set down in CPR 44.3 and 44.4. In doing so it should ignore unavoidable items such as court fees. If the court considers the total to be disproportionate it should consider each category of costs claimed (such as time spent drafting witness statements) and consider whether those costs were disproportionate. If they are, then the court should reduce the costs in that category to a figure that is proportionate. In that way, reductions for proportionality will be clear and transparent. However, the court may also consider the proportionality of a particular item when it considers the reasonableness of that item. See *West v Stockport NHS Foundation Trust* [2019] EWCA Civ 1220.
- I can have regard to future earning capacity. However if I have regard to future earnings capacity, which the Respondent asks me to do, I take into account whether the Respondent has made it clear to me, whether they have any intention of serving a statutory demand and bringing bankruptcy proceedings if costs are awarded on this basis.

- I should have regard to alternatives to a whole costs order, which should be reasonable and proportionate in the circumstances.
- 'Unreasonable' should be given its literal meaning.
- Costs will be proportionate if they bear a reasonable relationship to
 - (a) the sums in issue in the proceedings
 - (b) the value of any non-monetary relief in issue in the proceedings
 - (c) the complexity of the litigation
 - (d) any additional work generated by the conduct of the paying party
 - (e) any wider factors involved in the proceedings, such as reputation or public importance and,
 - (f) any additional work undertaken or expense incurred due to the vulnerability of a party or any witness

9. Having read the costs warning letter I start by agreeing with the Respondent that it's view of the difficulties faced by the Claimant in pursuing his claim before the Tribunal were highlighted. Further, that ultimately, my decision fell within the parameters of the view they expressed. In simple terms, they correctly pre-empted the outcome of the Tribunal proceedings.

10. The Claimant had brought claims for outstanding holiday pay and unfair dismissal. At the start of the hearing he conceded he had misunderstood the holiday pay he had received but accepted he now understood there was nothing outstanding. I note this was not explored further during cross examination or submission, and therefore on the face of it there is nothing to address the basis upon which he came to realise he had been paid his outstanding holiday pay. The Respondent mentions this but does not pursue this as a key feature in the argument about the Claimant's conduct. For my part, I am not satisfied it has been shown the Claimant was unreasonable in the way he dealt with the holiday pay claim without more details about how he came to understand that aspect of his claim.

11. Turning to the central issue, the Respondent has referred to my judgment on the unfair dismissal claim. It is correct the Claimant did not dispute he was dismissed for the potentially fair reason of misconduct. The Claimant's case focused on the procedure followed by the Respondent and the quality of the evidence relied upon to make the decision.

12. The Respondent case is that two female members of staff made allegations of inappropriate touching of their person by the Claimant within a period of two or three days. The second complaint was treated very seriously by the Respondent because it was an allegation the Claimant had pushed his groin into the rear of a female staff member when she was bent over. The parties know the details so I have no need to expand upon them here. The Respondent did carry out an investigation, gathered

evidence and met with the Claimant. They decided there was a case to answer. The Respondent's went through a disciplinary and appeal hearing which the Claimant attended and was represented and concluded the evidence against the Claimant established he was guilty of the alleged misconduct. Given the serious nature of the conduct they dismissed the Claimant for gross misconduct.

13. The Claimant's case can also be more generally summarised, The Claimant felt the handling of the complaint and investigation suggested the Respondent had prejudged him as guilty, and the evidence relied upon to dismiss him was either unreliable, or failed to take give appropriate weight to his account of being autistic.

14. In his response to the application the Claimant asks me to take into account the position as he saw it at the time he pursued his claim, that he was represented by a lay person (his mother) and that he genuinely believed the Respondent had unfairly dismissed him. He also refers to his financial position.

15. It was clear to me and I said so in my judgment, that the Claimant had not understood the legal position and the test under Section 98 of the Employment Rights Act 1996. The Claimant had not understood the 'range of reasonable responses test.' The Claimant was clearly very keen to demonstrate he had not committed the behaviour he was dismissed for. In particular, he denied the more serious sexual touching.

16. The Claimant had felt his employer had wrongly taken the evidence of the two female complainants over his own account, but conceded he had been unable to call any witnesses who actually undermined their accounts or the other witnesses who gave evidence against the Claimant. In fact, of the two witnesses he named in the later appeal, at least one gave evidence against him.

17. The Claimant had not understood why his employer had suspended him and not the women who had made the allegations, and had wrongly believed his employers were under some sort of duty to take a formal statement from him (as opposed to giving him a full opportunity to explain his position during the investigation and through the disciplinary and appeal hearings). He believed this was evidence by implication, that his employers had pre-determined the outcome. He also felt the staff had an opportunity to collude because there was a delay of about a week before interviews took place, but could not give the Respondent or me, an explanation or motive for why any of the witnesses or the complainants would have colluded. This was instead premised on the basis he says the two woman had lied about what had happened.

18. The Claimant had also raised his autism in the appeal and at the hearing, to suggest his employer didn't give this sufficient weight. The Claimant had suggested his autism was an explanation for his poor behaviour during the investigation/disciplinary process, and his union representative at the time of the

appeal had suggested this may have been a factor in his behaviour towards the women. This is reiterated again in the response to the cost application.

19. It became clear at the hearing the Claimant hadn't told his employer about his autism until he was at the appeal hearing, and the Respondent's decision discounted his poor behaviour in the disciplinary process. Having listened to the Respondent's witnesses give evidence he told me he realised that he had not told his employer when he went through induction at commencement of his employment.

20. The appeal letter did not specifically say the decision would have been the same if the Claimant's behaviour in the investigation and disciplinary meetings was discounted or that it had been discounted. This came out during cross-examination of the Claimant when it was put to him that his behaviour was not the basis for the decision. Whilst I concluded this was the reality, it was not clearly set out in either the documentary evidence or the witness evidence. The Respondent did not adequately address this before the hearing. In reality therefore, the Claimant had an arguable point with regard to the potential for the decision to have unfairly taken into account behaviour he attributed to autism (his poor behaviour in the investigation meeting and disciplinary hearing). The fact I concluded in the Respondent's favour (that this did not negatively influence the decision) was my view after hearing all the evidence. This doesn't make the Claimant's argument about it unreasonable prior to the hearing.

21. I haven't covered every single issue raised in the claim as I gave full oral judgment to the parties and they have clearly taken a good note of my conclusions (as shown by the written submissions). What I do take from the case is the Claimant was genuinely seeking to show the Respondent's decision was unfair and felt his autism had been the reason why he had given such a poor impression in the investigation meeting and disciplinary hearing. He sought to prove that this tainted the Respondent's view of his innocence. Whilst he failed to prove this, it was an argument open to him on the evidence.

22. He was, as a lay person and being represented by a lay person (his mother). The Respondent's did seek to described in some detail in the cost warning letter, the legal tests regarding the reasonableness of any investigation and decision, but these are complex legal phrases and it was clear to me the Claimant had not understood them. I note despite what is said in the cost warning letter no application was made by the Respondent to strike out the claim or seek a deposit order and the Tribunal of its own initiative did not raise the same. So, the Claimant was not being told by a Judge that his case had little prospect of success and was trying to navigate lawyers letters for the Respondent.

23. Overall, whilst I accept my decision was in line with the view taken by the Respondent in the cost warning letter, and there were weaknesses the Claimant failed to understand, I do not find the Claimant's decision to pursue his claim was outside the range of reasonable responses for a lay person in his position. The

Claimant and his lay representative played a full part in the hearing and presented their case as they saw it. Ultimately, I did not agree with their arguments, but that of itself doesn't mean it was unreasonable conduct.

24. Further, taking into account the Claimant's financial position, he lost his employment with the Respondent, found some agency work, secured employed and then was laid off and has secured a new job on minimum wage. He has little savings and has had to rely upon his parents to assist him financially in keeping up his home costs. His employment position appears somewhat precarious and his income low. He has provided bank statements and an account of his finances and the Respondent was given the opportunity to comment on this evidence and did not do so. I therefore conclude he has limited means and would struggle to pay the costs or a proportion of them.

25. On the above, and considering costs do not automatically follow in this jurisdiction, I do not exercise my discretion to award costs. I have considered whether a part order would be appropriate but as I have concluded the Claimant's conduct was not unreasonable in pursuing proceedings and his financial position means he has limited means, I also do not consider a part payment appropriate.

26. The Respondent has suggested I look at the Claimant's future ability to earn but they have not made their position with regard to any intention to apply for a statutory demand and bringing bankruptcy proceedings clear in their application. I do not feel in that case able to look to the future given the potentially serious and life changing consequences for a young man, if the Respondent did seek to make him bankrupt if he didn't pay any order forthwith.

27. For all these reasons the application fails.

Employment Judge Mensah

21.11.2022