EMPLOYMENT TRIBUNALS

Claimant: Mr D Usunov

Respondent: ABM Technical Solutions Limited

Heard at: London Central
On: 2 November 2022

Before:
Employment Judge Heath
Ms C Ihnatowicz
Mr D Carter

Representation
Claimant: In person
Respondent: Mr A O'Neill (Solicitor)

JUDGMENT

The claimant is ordered to make a payment of the sum of £12,000 to the respondent in respect of the costs it has incurred from 22 October 2021 to 2 November 2022.

REASONS

Introduction

1. By a unanimous decision, sent to the parties on 13 April 2022, the tribunal found the claimant's claims of automatic unfair dismissal for trade union membership and/or activities contrary to section 152 Trade Union & Labour Relations (Consolidation) Act 1992 ("TULRCA"), and his claim for ordinary unfair dismissal under section 98 Employment Rights Act 1996 ("ERA") not well-founded, and it dismissed them.

2. The respondent made an application by email dated 14 April 2022 for its costs under Rule 76 Employment Tribunals Rules of Procedure 2013 ("ET Rules") in relation to proceedings. The application referred to a deposit order made by the tribunal on 22 October 2021, and to the contention that

the claim itself was unreasonable, and that the way the claimant conducted proceedings was unreasonable.

3. There were some delays, for various reasons, but the matter was set down for an in-person hearing in front of the full tribunal panel.

Procedure

4. An interpreter, Ms A Antanasova, attended the hearing to assist the claimant. As at the liability hearing, and as agreed with the claimant at the costs hearing, the claimant chose to conduct proceedings in English, and to seek help from Ms Antanasova from time to time when he needed her to interpret.

5. Mr O'Neill produced a 61 page bundle with a numbering system following on from the liability trial bundle (page 445 to 506). He produced further written submissions.

6. The claimant had emailed the tribunal a number of documents in response to the respondent's application. Mr O'Neill printed these up, paginated them and gave paragraph numbers to the claimant's email of 27 October 2022, which set out the substance of his response to the application for costs. Claimant did not provide copies of his documents, and the tribunal considered it appropriate to use the paginated claimant's bundle provided by Mr O'Neill (we will call this "the claimant's bundle").

7. With the agreement of the parties, the tribunal heard oral submissions from Mr O'Neill as he took the tribunal to various documents in the costs bundle, and some in the liability hearing trial bundle. The claimant had not brought a copy of the liability bundle, and so Mr O'Neill provided him with a spare copy.

8. The claimant made oral submissions in response, which were not concluded when the tribunal rose for lunch. After lunch the claimant produced 13 further documents. He did not provide copies for Mr O'Neill or for the tribunal. A significant amount of time was spent i) establishing that some of the documents were already in Mr O'Neill's costs bundle, ii) some had previously been disclosed to Mr O'Neill, and iii) some documents were disclosed for the first time that day. Mr O'Neill took a pragmatic approach and did not object to the production of these documents. They were labelled A to M.

9. The tribunal took sworn evidence from the claimant on the question of his means, and he was questioned by Mr O'Neill and the tribunal.

10. The parties made further oral submissions, and after deliberation the tribunal gave the parties an oral decision. The claimant requested written reasons.

The respondent's application

11. Mr O'Neill put his application broadly on two bases: unreasonable conduct under Rule 76(1)(a), and the claim having no reasonable prospects of success under Rule 76(1)(b).

12. Mr O'Neill relied on the deposit order made by Employment Judge Brown on 22 October 2022. EJ Brown ordered the claimant to pay a deposit up of £150 as a condition of continuing to advance his allegation that the respondent automatically unfairly dismissed him because of his trade union membership and/or activities. She further ordered claimant to pay a deposit of £300 as a condition of continuing to advance his allegation that the respondent unfairly dismissed him under section 98 ERA.

13. In respect of the s 152 TURLCA claim, EJ Brown ordered the deposit because she considered "*that there is little reasonable prospect of the tribunal finding that the principal reason for dismissal was the claimant's trade union membership/activities, rather than that he failed to operate lockout, tag out on making safe the distribution board and that he switched the board on when there was significant water damage*".

14. In respect of the ordinary unfair dismissal claim, EJ Brown ordered the claimant to pay a deposit as a condition of continuing to advance the claim, and she identified two central arguments in it. She considered, first, that "*there was little reasonable prospect of the tribunal finding that the dismissal was predetermined and evidence was fabricated to ensure this*". Second, she considered "*that there was little reasonable prospect of the claimant succeeding in this argument that his dismissal was unfair because the respondent did not train him*". She went on to set out that there was little reasonable prospect of the tribunal finding that a trained electrician was not at fault in failing to operate safe practices regarding live electricity and water damaged areas which were obviously dangerous, even to an untrained individual.

15. Mr O'Neill briefly went through the history of how the claimant's claim progressed. He pointed to paragraphs 17 to 19 of the Case Management summary of a preliminary hearing conducted by EJ Elliott on 12 August 2021. The claimant had been encouraged to seek legal advice and his attention was drawn to a fact sheet on three sources of legal advice. EJ Elliott stressed the need for the claimant to set out his case in one document rather than obliging the respondent to work out what his case was from 20 emails that he had sent to the respondent solicitor. She ordered him to produce particulars.

16. Mr O'Neill said these particulars were never provided, but that the claimant sent him another 33 different emails. He said EJ Brown similarly urged the claimant to seek legal advice. He said she also had to ask the claimant to sit outside the hearing room at one point because his behaviour was so bad.

17. Mr O'Neill referred to paragraphs 53(h), 60, 61(f), 77, 78 of our liability decision as demonstrating that we had decided the specific allegations relating to the section 152 TURLCA claim which were subject to a deposit

order against the claimant. He pointed to paragraphs 66, 87-89, 100 and 101 of our liability decision as showing that the specific allegations in the ordinary unfair dismissal claim which were subject to the deposit order had been decided against the claimant.

18. Mr O'Neill pointed to paragraphs 6 to 9 of our liability decision as examples of how the claimant had conducted proceedings unreasonably in the way he had approached disclosure and the production of evidence.

19. Mr O'Neill drew attention to paragraph 4 of the claimant's email of 27 October 2022 in which the claimant, effectively, accused EJ Brown of conducting the hearing in an improper and biased way. He also observed that the claimant's email of 26 April 2022 (page 3 claimant's bundle) contained similar allegations of bias, impropriety and corruption against this tribunal.

20. Mr O'Neill took the tribunal through some correspondence between himself and the claimant and the tribunal, which included:

    a. On 16 July 2021 Mr O'Neill asked for specific further information;

    b. On 6 September 2021 Mr O'Neill wrote to the claimant setting out his failure to respond to various letters, and notifying him that the respondent would apply to strike out his claim because of various matters, including the claimant's behaviour. He set a deadline for the provision of the further information. The claimant did not comply with this.

    c. On 20 October 2021 Mr O'Neill wrote to the tribunal highlighting the claimant had failed to produce particulars ordered by EJ Elliott;

    d. An email of 8 November 2021 from Mr O'Neill highlighting the claimant not having told the truth about receiving a bundle, and his making accusations about other people's conduct;

    e. An email from Mr O'Neill to the claimant on 7 February 2022, in which he reiterated the tribunal's advice to the claimant to seek legal advice.

    f. Correspondence on 10 February 2022 showing the claimant rejecting an offer of £750 in full and final settlement of his claims. Correspondence on 4 March 2022 showing the claimant had rejected an offer of £2000.

    g. A letter from Mr O'Neill to the claimant on 11 March 2022 setting out the deposit orders, setting out efforts to seek the claimant's cooperation in preparing the bundle, highlighting his unwillingness to set out his claim (which Mr O'Neill suggested was because the claim was fundamentally flawed), setting out an intention to apply the costs which then stood at £6560 plus VAT, but which were likely to double if the matter went to trial. Again, he was urged to seek legal advice. Mr O'Neill drew attention to the rejected offers for

settlement of £750 and £2000. He said these offers were made to protect the respondent's position in a subsequent cost application.

h. On 16 March 2022 Mr O'Neill wrote to the claimant again urging him to seek legal advice, confirming the current costs position of £8720 plus VAT (which was likely to be closer to £15,000 plus VAT at the end of the final hearing) and confirming the respondent's intention to seek costs if his claim is unsuccessful.

i. Mr O'Neill emailed the claimant on 26 October 2022 encouraging him to attend the costs hearing with information about his financial position, including wage slips, savings and outgoings in property ownership information.

21. The claimant's response to the application consisted, almost entirely, of his complaints about how the respondent had treated him whilst employed by them. He also complained about how his complaints to the tribunal was not processed in a timely manner. He considered that he had cooperated with the tribunal direction to provide particulars by sending 20 emails to Mr O'Neill, and noted that Mr O'Neill complained of being bombarded with information.

22. As regards rejecting offers of settlement, the claimant said that he had spoken to his trade union representative, Mr O'Donnell, who told him that the amount was not enough. He said that his trade union would not represent him at the tribunal hearing because of COVID.

23. The claimant said he had not produced a witness statement for the final hearing, because he had spoken to a person at the employment tribunal who told him that if he did not have a witness, he did not need a witness statement.

24. In response to being asked why he had pursued his claim after being ordered to pay a deposit, he appeared to suggest that at the hearing in front of EJ Brown on 21 October 2021, EJ Brown had asked questions which suggested that she had previous dealings with Mr O'Neill and that she knew something about a previous case. He also alleged that EJ Brown had come to the door of the tribunal room and had a conversation with Mr O'Neill.

The claimant's evidence on means

25. The claimant gave sworn evidence on his means. He said that he had not worked for eight months following his dismissal as COVID had meant that offices stood empty. He said he made 700 applications for work and registered with 50 to 60 employment agencies. In this regard, as with all other matters concerning means, the claimant did not provide any documentation.

26. He said he got a job on 17 October 2020 as an electrician through an agency, earning a similar amount to what he had earned with the

respondent (£2054 pcm net according to his ET1). He said he was unemployed at the moment, and had last worked on 20 October 2022, again earning a similar amount. He had been with this particular employer for three months until they sacked him for complaining about not being paid properly for overtime.

27. The claimant said he paid rent of £1350 per month, and that his outgoings, including rent, were £1800 per month. He said that his daughter and family were living in a different place in London. He does not own any property in the UK or overseas. He has no car.

28. The claimant said that he had registered for jobseekers allowance, but was not applying for that now as he was looking for jobs. He said he has received a P45 in the past, but not for the last employment.

The law

29. Rule 75 ET Rules provides:

> *(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;*

30. The power to make a costs order is in Rule 76 which provides:

> *(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;*
>
> *(b) any claim or response had no reasonable prospect of success;*

31. Rule 84 ET Rules provides:

> *"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".*

32. Rule 39 ET Rules deals with deposit orders, and includes:

> *(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—*

> *(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and*
>
> *(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),*
>
> *otherwise the deposit shall be refunded.*

33. Costs orders are the exception rather than the rule in employment tribunal proceedings, but that does not mean that the facts of the case must be exceptional (*Power v Panasonic (UK) Ltd* UKEAT/0439/04).

34. Such awards can be made against unrepresented litigants, including where there is no deposit order in place all costs warning (*Vaughan v London Borough of Lewisham* UKEAT/0533/120).

35. In terms of abusive, disruptive or unreasonable conduct, "unreasonableness" bears its ordinary meaning and should not be taken to be equivalent of "vexatious" (*National Oilwell Varco UK Ltd v Van de Ruit* UKEAT/0006/14).

36. Guidance has been given by the Court of Appeal in *Barnsley Metropolitan Borough Council v Yerrakalva* [2012] IRLR 78 on the approach to assessing 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".*

37. The tribunal does not need to identify a direct causal link between the unreasonable conduct and the costs claimed (*MacPherson v BNP Paribas (London Branch*) (No 1) [2004] ICR 1398).

38. Rule 39(5) ET Rules provides a shortcut to finding unreasonable conduct for the purpose of considering the discretion to award costs under Rule 76, but the discretion as to whether to award costs remains to be exercised by the tribunal taking account of all relevant circumstances in determining whether it is appropriate and proportionate to make an order, and if so, in what amount (*Oni v UNISON* UKEAT/0370/14).

Conclusions

39. There are three stages in determining whether or not to award costs under Rule 76 ET Rules; first, whether the party has reached the threshold of establishing that a party had acted vexatiously, abusively or disruptively or that a claim had no reasonable prospects of success. Second, if the threshold has been reached, the tribunal will go on to consider whether it

is appropriate to make an order for costs. Finally, if it is appropriate to make an order for costs tribunal will go on to consider the amount.

Threshold

40. As set out above, if the tribunal has made a deposit order, then where a tribunal subsequently decides that allegation or argument against that party then that party will be treated as having acted unreasonably unless the contrary is shown.

41. We accept Mr O'Neill's submissions, set out at paragraph 17 above, that our findings in the paragraphs referred to in our liability decision, exactly correspond with the deposit orders made by EJ Brown.

42. We therefore consider whether the claimant has persuaded us to the contrary. He has not. His submissions were, more or less entirely, geared towards seeking to go behind our liability decision, rather than addressing the issues at play in the cost application. He has advanced nothing that would persuade us that he should not be treated as having acted unreasonably in continuing to pursue the claims after the deposit orders were made. Accordingly, we find that the threshold for making a costs order has been made out. The claimant has acted unreasonably in pursuing the specific allegations or arguments subject to the deposit orders.

43. In deciding the above, we have not considered it appropriate to decide whether the claimant had, aside from pursuing the claim after the deposit orders had been made, conducted the case unreasonablyor pursued a claim which had no reasonable prospects of success. Unless there are particular features of the case which might need to be considered at stages two and three of the approach to cost outlined above, an applicant for costs need only get over the threshold once.

Appropriateness of a costs order

44. We have taken into account a number of factors in deciding that it is appropriate and proportionate to make an order for costs in this case.

45. The claimant was urged on numerous occasions, by EJ Elliott, by EJ Brown and by Mr O'Neill to seek legal advice on his claim. It appears he did not heed this advice. Ms might have been particularly useful to him after the deposit orders had been made and he was told in very clear terms that his claims stood little prospect of success.

46. It appears, in fact from document J which the claimant produced after lunch at the costs hearing, that even before this his trade union had been telling him how weak his case was. In an email in response to the claimant's email of 25 April 2020, Mr O'Donnell, the Unite Regional Officer, writes "*You can continue but I'm afraid Unite cannot support you in your claim because as you have under 2 years service any claim for unfair dismissal would have no prospects of success at the tribunal*". As Mr

O'Neill observed, it is only after this point that the claimant sought to bring discrimination claims (which were struck out) and the section 152 TURLCA claim, which could get round the lack of service issue. But the real point is that even the claimant's own trade union representative had been telling him that his claim would not succeed.

47. The claimant was the recipient of a number of costs warning by the respondent's solicitor, which he ignored.

48. The claimant also refused two offers of settlement, which in the context of his bringing claims which stood little reasonable prospects of success, were more than reasonable.

49. The effect of all of this was that the claimant pursued his claims after 22 October 2021, when the reasonable approach would have been to have withdrawn his claims. This put the respondent to the expense of having to continue to defend the proceedings.

50. The claimant also conducted proceedings in an unreasonable manner in a number of respects. At paragraphs 6 to 9 in our liability decision we have set out what we described as "difficulties in case preparation". This was an understatement, as the claimant was in breach of case management orders, and behaved in a thoroughly unreasonable manner. Similarly, at the costs hearing the claimant did not produce any documentary evidence of means, despite this having been sensibly suggested by Mr O'Neill. He also produced documents late, with no copies for the respondent or the tribunal, and which were unpaginated.

51. Tribunals are prepared to be more forgiving when litigants in person do not conduct litigation in the way that represented party would. But the claimant's conduct has fallen far below what a tribunal could reasonably accept of a litigant. He has repeatedly failed to comply with orders to produce further particulars and a witness statement. He has been reminded of his obligations both by the tribunal and by Mr O'Neill. His late production of single unpaginated documents that the costs hearing led to time being wasted. His failure to comply with orders has hampered the orderly preparation of the case for hearing and resulted in unnecessary and costly correspondence.

52. For all these reasons, we consider it appropriate and proportionate to make an order for costs.

Amount of order

53. While we are satisfied that the claimant was conducting his claim unreasonably prior to the making of the deposit orders on 22 October 2021 (by failing to produce particulars requested by the respondent and ordered by the tribunal, for example) this date is the starting point for our consideration of the appropriate amount.

54. The claimant was a litigant in person and it is reasonable for him, perhaps, to ignore suggestions from the respondent solicitor that his case is weak. However, the deposit orders made it clear that the claims had little prospects of success. It was unreasonable for the claimant to continue with his claims after the deposit orders were made. The claims really should have stopped there.

55. Our starting point was to look at the respondent's costs schedule after the 22 October 2021.

56. Rule 84 ET Rules provides that the tribunal "may" have regard to the claimant's ability to pay. Mr O'Neill urges us not to have regard to it. However, we have had regard to it and assessed the evidence put before us by the claimant.

57. He was earning £2000 net per month, with outgoings of around £1800 per month. We accept as evidence that there would have been a period following his dismissal where he would not have worked because of the effect of the pandemic on the construction and facilities industries.

58. The claimant was invited to produce documentary evidence, and chose not to. He was evasive in his answers on means, and as Mr O'Neill points out it is surprising that, just as immediately before the hearing on 22 October 2021 where his means were relevant to the making of deposit orders, so here the claimant has apparently just lost another job. His evasiveness and his failure to produce any documentary evidence lead us to conclude that he has probably sought to minimise his means in his evidence to us.

59. We find that the claimant is an experienced tradesman with an in-demand set of skills. He has good earning potential, and even on the basis of the evidence that he has chosen to put before us has disposable income of £200 per month.

60. We looked at the costs schedule prepared by Mr O'Neill. His charge-out rate is £200 per hour. The schedule sets out costs of £14,000 for 70 hours work. This is from 21 June 2021 until 31 October 2022. Mr O'Neill said that he would charge for a further five hours, £1000, for the costs hearing. We consider this costs schedule reasonable and even restrained.

61. We have deducted all of the costs on the schedule up to 22 October 2021, and added the £1000 costs claimed for today. This led to a figure of just over £12,000. We round this down to even £12,000. Standing back, and looking at this figure as a whole in the context of the unreasonable conduct by the claimant (largely in continuing to pursue his claim after being made subject to deposit orders) we consider it an appropriate and proportionate sum.

Case No: 2202637/2020

Employment Judge **Heath**

18 November 2022
Date

JUDGMENT & REASONS SENT TO THE PARTIES ON

21/11/2022

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FOR THE TRIBUNAL OFFICE