EMPLOYMENT TRIBUNALS

Claimant: Mr M Waqar

Respondent: Vision Care Services Ltd

Heard at: Leeds **On: 3 March 2023**

Before: Employment Judge Shepherd

JUDGMENT ON APPLICATION FOR COSTS

The respondent's application for costs against the claimant is refused.

REASONS

1. The written reasons for the judgment of the Tribunal in respect of the claims brought by the claimant was sent to the parties on 31 October 2022. This followed a 4 day substantive hearing . My judgment was that the claimant had not established that there was a constructive dismissal and claim of unfair dismissal was not well-founded.

2. On 24 October 2022 the respondent made an application for costs pursuant to rule 76(1) (a) and (b) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013. It was stated that the application was on the grounds that the claimant had acted vexatiously, abusively, disruptively or otherwise unreasonably in bringing the proceedings and that the claim had no reasonable prospects of success.

3. It was agreed by both parties that the costs application should be considered in the basis of the written submissions from parties without their attendance. I have carefully considered the representations in reaching my decision.

The law

4. The Employment Tribunal is a completely different jurisdiction to the County Court or High Court, where the normal principle is that "costs follow the event", or in other words the loser pays the winner's costs. The Employment Tribunal is a creature of statute, whose procedure is governed by the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. Any application for costs must be made pursuant to those rules. The relevant rules in respect of the respondent's application are rules 74(1), 76(1) and (2), 77, 78(1)(a), 82 and 84. They state:-

> 74(1) "Costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purposes of or in connection with attendance at a tribunal hearing).
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> 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 –
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> > (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) had been conducted; or
> >
> > (b) any claim or response had no reasonable prospect of success.
>
> (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 postponed or adjourned on the application of a party.
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> 77 A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party, was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the tribunal may order) in response to the application.
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> 78(1) 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.
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> 84 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 ability to pay.

5. The discretion afforded to an Employment Tribunal to make an award of costs must be exercised judicially. (**Doyle v North West London Hospitals NHS**

Trust UKEAT/0271/11/RN. The Employment Tribunal must take into account all of the relevant matters and circumstances. The Employment Tribunal must not treat costs orders as merely ancillary and not requiring the same detailed reasons as more substantive issues. Costs orders may be substantial and can thus create a significant liability for the paying party. Accordingly, they warrant appropriately detailed and reasoned consideration and conclusions. Costs are intended to be compensatory and not punitive. The fact that a party is unrepresented is a relevant consideration. The threshold tests may be the same whether a party is represented or not, but the application of those tests should take account of whether a litigant has been professionally represented or not. (**Omi v Unison UKEAT/0370/14/LA**). A litigant in person should not be judged by the same standards as a professional representative as lay people may lack the objectivity of law and practice brought to bear by a professional adviser and this is a relevant factor that should be considered by the Tribunal. (**AQ Limited v Holden [2012] IRLR 648**). The means of a paying party in any costs award may be considered twice – first in considering whether to make an award of costs and secondly if an award is to be made, in deciding how much should be awarded. If means are to be taken into account, the Tribunal should set out its findings about ability to pay and say what impact this has had on the decision whether to award costs or an amount of costs. (**Jilley v Birmingham & Solihull Mental Health NHS Trust UKEAT/0584/06**).

6. There is no requirement that the costs awarded must be found to have been caused by or attributable to any unreasonable conduct found, although causation is not irrelevant. What is required is for the Tribunal to look at the whole picture of what happened in the case and to identify the conduct; what was unreasonable about the conduct and its gravity and what effects that unreasonable conduct had on the proceedings (**Yerraklava v Barnsley MBC [2012] IRLR 78**). As was said by Mummery LJ in **McPherson v BNB Paribas (London Branch) [2004] ICR 1398**, that there is a balance to be struck between people taking a cold, hard look at a case very close to the time when it is to be litigated and withdrawing, on the one side of the scale, and others, on the other side of the scale, who do what may be described as raising a “speculative action”, keeping it going and hoping that they will get an offer. The same principle will apply in respect of respondent’s conduct in respect of unmeritorious responses.

7. There is fundamental principle of costs in Employment Tribunal’s being the exception rather than the rule, as made clear by the Court of Appeal in **Gee v Shell UK Limited [2003] IRLR 82** and that the discretion of the Tribunal should only be exercised in exceptional cases. The onus was on the receiving party to make a compelling case that the costs threshold had been passed. Constructive dismissal claims are very fact sensitive and usually require an oral hearing to determine the matters in issue. The judgment was in favour of the respondent but there was no express criticism of the claimant within that judgment.

8. That remains the case today. Costs are still the exception rather than the rule. I am not satisfied that this case was exceptional. It was a claim for unfair constructive dismissal and required a hearing to determine the facts.

9. The response to the application for costs from the respondent's representative states that the claimant's application simply repeats extracts from the judgment and appears to be alleging that the claimant should have known from the outset that the claim had no prospects of success. It should not be overlooked that I reached my decision and conclusions only after hearing all the evidence and deliberating for a considerable period of time. It is also submitted that there were unnecessary delays because of the way the case was presented and run by the respondent.

10. This was the case in which I found in favour of the respondent because the claimant had not satisfied me that he had resigned in response to a repudiatory breach of contract. I reached that conclusion having heard a substantial amount of evidence and the decision was reached on the balance of probabilities. This was an arguable case and it was necessary to consider all the evidence before I reached a conclusion.

11. An apposite extract from the judgment of Sir Hugh Griffiths in **Marler v Robertson [1974] ICR 72 is**:

> '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 contestants when they took up arms'.

12. I am not satisfied that the claimant had acted vexatiously, abusively, disruptively or otherwise unreasonably in bringing the proceedings or that the claim had no reasonable prospects of success.

13. I am not satisfied that the costs threshold has been reached in this case. The claimant's application for costs against the respondent is refused.

Employment Judge Shepherd

3 March 2023