EMPLOYMENT TRIBUNALS

Claimant: Mr I Turner

Respondent: Tower Demolition (Holdings) Ltd[1] (company number 07747685)

Heard at: Initially in person in Croydon, then via CVP **On:** 20/3/2023 to 22/3/2023

Before: Employment Judge Wright

Representation
Claimant: Dr J Bickford Smith - counsel
Respondent: Mr J Egan (initially) - director

COSTS JUDGMENT

The claimant's application for costs is unsuccessful.

REASONS

1. At the conclusion of the liability and remedy hearing, the claimant made an application for costs.

2. The claimant submitted that the respondent's conduct was unacceptable, acknowledging that word did not feature in the Rules. It was said that the respondent had acted both unreasonably and that its response had no reasonable prospect of success. Although the ET3 was well-drafted, it has made a series of board aggressive contentions against the claimant.

3. Dr Bickford Smith went onto say that central premises were known to be false by the respondent and there was no way the respondent could not know the case it was advancing was false.

[1] According to Companies House, the respondent was called Tower Demolition and Enabling Ltd between 5/1/2022 and 1/3/2023 and then changed its name to Tower Demolition (Holdings) Ltd.

4. Dr Bickford Smith submitted that there is no specific costs regime in respect of a respondent. He referred to a 'kitchen sink' of a bundle and material dating back many years. There was he said, a protracted and aggressive attack on the claimant, his conduct and many other things. If the respondent had been proportionate, the case need not have proceeded to trial at prodigious expense. The ET3 had no reasonable prospects of success and there was unreasonable conduct. It was not his job or that of the Tribunal to conceive how the respondent may have taken a more reasonable or streamlined approach. The respondent's expanded response was doomed to fail and as such, was wholly unreasonable.

5. Dr Bickford Smith referred to the respondent's costs figure of £170,000, and even if that included the High Court litigation, this was litigation on a grand scale. The claimant's costs figure is significantly lower and it could not be said that the claimant had done anything to contribute to this spiralling litigation, other than to bring proceedings, which he was entitled to do. This was a case there the two cost limbs were engaged.

6. Then focussing on what had happened in the last few weeks; the short answer was the respondent was seeking to adjourn or settle the case. It had communicated its position clearly to the claimant and the Tribunal. The Friday before the final hearing, long after the claimant had booked a hotel and briefed counsel, at the eleventh hour, the respondent had applied for the hearing to be adjourned. That itself was unreasonable. It was also unreasonable for the respondent to then walk out. There was further unreasonable conduct in 'ambushing' the Tribunal via email. It was not appropriate for the respondent to have dipped in and out of the proceedings. The point was not taken by the claimant, however some Judges may consider that to be disrespectful.

7. The respondent refused to give the claimant or the Tribunal the benefit of its evidence. Nor, had it taken a realistic position. It had continued to take pot shots at whatever part of the case were not found to be in its favour. This is no way to conduct litigation. It was unreasonable.

8. Notwithstanding the delay it will cause, it was the claimant's position that under Rule 78(1)(b) the costs should be referred for detailed assessment to the County Court.

9. To conclude, the claimant submitted that he was dismissed on spurious grounds, the reason given was not the real reason for the dismissal and the respondent's broader case was not acceptable, was unreasonable and was doomed to fail. The respondent's case to the Tribunal persisted to defend the indefensible; with the respondent then refusing to be cross-examined on it. The Tribunal was therefore invited to make an order that the respondent pay the claimant's costs to be assessed in the County Court.

10. The claimant's application for costs was in the sum of £69,921.80 excluding vat. The claimant provided a costs schedule of five-pages, however it was not a detailed costs breakdown.

11. Costs do not 'follow the event' in Tribunal claims. In other words it is not usual practice for the loser to pay the winner's costs. Costs in the Employment Tribunal are still the exception rather than the rule (Yerrakalva v Barnsley Metropolitan Borough Council 2012 ICR 420, CA). Furthermore, the fundamental principle is that the purpose of an award of costs is to compensate the party in whose favour the order is made, and not to punish the paying party.

12. The Employment Tribunal is created by statute and the procedure is governed by the Rules. Any application for costs must be made pursuant to those Rules. The relevant Rules in respect of the application are Rules 74(1), 76(1), 77, 78(1)(a) 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) have been conducted; or
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> > (b) any claim or response had no reasonable prospect of success.
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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 –
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> > (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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> > (b) order the paying party to pay the receiving party the whole or a 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 (Taxation of Judicial Expenses Rules) 2019, or by an Employment Judge applying the same principles;

13. In deciding whether to make a cost, 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.

14. Rule 76 imposes a two-stage exercise – first the Tribunal must determine whether the claim had no reasonable prospect of success/if the party has acted vexatiously or unreasonably such as to invoke the jurisdiction to make an order for costs. If that stage is satisfied, the second stage is engaged – the Tribunal is required to consider making a costs order but has a discretion whether or not to do so. (Oni v Unison UKEAT/0370/14/LA).

15. The Court of Appeal in Scott v Russell 2013 EWCA Civ 1432, cited the definition of 'vexatious' given by Lord Bingham in Attorney General v Barker 2000 1 FLR 759, QBD (DivCt):

> 'the hallmark of a vexatious proceeding is… that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant, and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process.'

16. Clearly the principles can also apply to a respondent who is subjecting the claimant to inconvenience, harassment and expense out of all proportion to any gain to the claimant.

17. In determining whether conduct was unreasonable, a Tribunal should take into account the 'nature, gravity and effect' of a party's unreasonable conduct (McPherson v BNP Paribas (London Branch) 2004 ICR 1398, CA). This does not mean that the circumstances of a case have to be separated into sections such as 'nature', 'gravity' and 'effect', with each section being analysed separately (Yerrakalva v Barnsley Metropolitan Borough Council and anor 2012 ICR 420, CA). The Court of Appeal in Yerrakalva commented that it was important not to lose sight of the totality of the circumstances. The vital point in exercising the discretion to order costs is to look at the whole picture. The Tribunal has to ask whether there has been unreasonable conduct by the paying party in bringing, defending or conducting the case and, in doing so, identify the conduct, what was unreasonable about it, and what effect it had.

18. Tribunals must take into account all of the relevant matters and circumstances when deciding on costs applications. The fact that a party is unrepresented is a relevant consideration. Justice requires that Tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life. 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 (AQ Limited v Holden [2012] IRLR 648).

19. If the means of a paying party in any costs award 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).

20. Vaughan v Lewisham Borough Council 2013 IRLR 713 is authority that It was not wrong in principle for a Tribunal to make a costs order against an employee even though no deposit order had been made or costs warning given, or to make an award which the paying party could not in their present financial circumstances afford to pay where the Tribunal considered that it might be able to pay in due course.

21. The claimant did not produce any 'cost warning' letters, nor did it refer to a strike out or deposit application.

22. The respondent was legally represented until three days before the final hearing.

23. The claimant's first argument under Rule 76(1)(a) was that the proceedings were conducted unreasonably. Overall, the Tribunal was troubled by the unnecessary comments and language used in the pleadings and finds that both parties were culpable.

24. The claim form ran to 41-paragraphs over 16-pages. In C v D UKEAT/ 0132/19 the EAT said

> 'Narrative Claim Form and Response
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> 10. As I have set out above, the Particulars of Complaint (PC) which were attached to the Claim Form were in a 'narrative' format. I use that phrase to describe a document in which there is a detailed explanation of factual events, in some ways, not dissimilar to that one would expect to see in a witness statement. Like a witness statement, the PC sets out a detailed narrative of factual events. In my judgment, on a fair reading of the document, all that could be reliably discerned from it about the specific statutory claim asserted within it, was that the Claimant was making claims of disability discrimination, sex discrimination and constructive unfair dismissal. I recognise that some language was used within the document which was consistent with allegations of direct discrimination (paragraph 37) and also, although less clearly, 'because of something arising in consequence' of disability, contrary to Section 15 of the Equality Act 2010. In respect of the allegation of direct discrimination, paragraph 37 makes express reference to conduct 'because of' the relevant protected characteristics. In respect of Section 15, at paragraph 25, it was stated that the Claimant had been treated differently as a 'consequence' of her mental health issues.
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> 11. I do not encourage parties, particularly lawyers, to engage in that type of 'narrative' pleading. I would encourage legal representatives, in particular, to adopt a more succinct and clear drafting style. Whilst I do not suggest that the employment tribunal is a forum in which meticulous or unnecessarily pedantic pleading points should be raised, I do consider

that, increasingly, there is a need to refocus on the purpose of a claim form, a formal document which initiates legal proceedings.

12. A claim form sets out a legal claim. It is not a witness statement (although in this case both the Claim Form and Response in this case bear many similarities to a witness statement). Ideally, in a Claim Form, the author should seek to set out a brief statement of relevant facts, and the cause of action relied upon by the Claimant. The purpose of doing so is to allow the other side to understand what it is that they have done or not done which is said to be unlawful. It should be clear from the document (Claim Form) itself, within the brief summary of the relevant factual events, which facts are relevant to which claim, if more than one is advanced. The Respondent can then properly respond to that claim or claims. The Respondent can admit, not admit, or deny the facts and claims asserted by the Claimant and, where appropriate, set out a brief summary of the relevant facts the Respondent asserts occurred. Lawyers will, or should, understand, that each of the phrases 'admit, not admit, or 'deny' have a particular meaning in this context. The task in hand, when setting out a Claim or Response (certainly for an instructed lawyer) is to distil the relevant factual matters to their essential or key component parts. Doing that effectively will often be more difficult, and take more time, than simply reciting lengthy facts and then listing a series of claims. It is often, however, time well spent. Different considerations obviously apply where parties represent themselves and the documents are prepared by people who are not lawyers. However, the basic principle remains good: the Claim form should set out what the claim is and a brief summary of the facts relevant to each particular claim.

13. This case in my judgment, is a paradigm example of that which can occur when a claim is not set out with sufficient legal precision. Valuable time can be lost. Costs can increase. There may be a delay in the case being heard, because the parties are not clear precisely what issues are in dispute or consider that they have inadequate time to meet the case that is advanced against them, once they have understood it.

14. Regrettably, I consider that some criticism must be levelled in this case at the manner in which the Claim and Response were set out. I am also well aware that the parties and representatives in this case have adopted a style many choose. A narrative style of Claim Form and Response appears to now be more the norm than the exception. I can understand where the temptation for adopting it has come from: a fear that a relevant fact might not be included and fear that a witness might be challenged in a hearing because a detail was not included within the claim. That can be managed: a document can make it clear that it sets out key facts; requests for further details of factual matters can be made; parties and representatives can remember that the purpose of the Claim Form and Response is not to exhaustively set out factual detail in the way a witness statement does, but to set out the claim.

15. The narrative style of pleading makes the task of Employment Judges who need to case manage the case more difficult: it takes more time than may be available to properly identify the issues. Defuse documents do not necessarily assist a Judge seeking to do that. This case would have benefitted from more rigorous case management at an early stage, through which the Judge ensured that both the parties and the Tribunal knew what the claims were and which factual allegations were relied upon

> in respect of each of those claims at the outset. I suspect that one of the obstacles to that taking place may have been the length of the Claim Form and Response.
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> 16. Further, once it became clear that an application to amend needed to be determined, that should only have proceeded to be heard once it had been established what that proposed amendment would look like, whether it was opposed, and if it was opposed, the basis upon which it had been opposed. There was ample time for these issues to have been clarified by the parties, both of whom had the benefit of legal representation.
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> 17. I recognise that all this is said with the benefit of hindsight, and I do not underestimate the workload facing those dealing with this case in its early stages. Nonetheless, looking back now, and with the objective of establishing better outcomes in the future, I consider that it is appropriate to recognise that had any one of those steps been taken in this matter, significant time and cost may well have been saved.

25. The claimant has claimed legal fees of £69,921.80, presumably excluding VAT as VAT is not mentioned. The costs schedule runs to five pages. There is no copy of the claimant's solicitor's time recording. The first three pages give a sub-total of £41,296.80. Yet the Tribunal calculates the total of the figures given to be £16,732.80. Ignoring the subtotals, the figure for the total solicitor's fees on the final page of £41,296.80 does appear to be correct based upon the figures given.

26. There has only been one preliminary hearing in this case, on the 15/9/2022. That does not account for the claimed counsel's fees of Mr Alex Robson of: £4,125 on 30/6/2022; £5,000 on 31/8/2022; and £4,500 on 28/7/2022. Nor, is there any explanation of the fees of Dr Bickford Smith of £7,500 on 28/2/2023 and 13/3/2023, although it is assumed that some of the is attributable to the final hearing. The costs schedule is not in a format which could be referred for detailed assessment.

27. The claimant's witness statement comprised 143 paragraphs over 34-pages. It contained a lot of irrelevant material and commentary, rather than evidence from the claimant. Of the 'background' (paragraphs 4 to 42), to that extent that evidence was relevant, it could have been summarised in a few short paragraphs. There was a whole section (paragraphs 102 to 119) of commentary on the ET3, followed by a section (paragraphs 120 to 135) referring to the High Court claim. The fees claimed for drafting this statement were 36.5 hours (a week's worth of work) giving a cost of £11,576. This was not an example of proportionate costs on the part of the claimant.

28. The claimant complains that the respondent has maligned him, yet he has done the same in his witness statement (for example see paragraphs: 7; 11; 14; 83; 103; 105; and 106).

29. The claimant's claims were relatively succinct and straight forward. He claimed he had made two protected disclosures. One orally on 15/3/2022 and in writing via his solicitor on 18/3/2022. Nothing turned upon the first disclosures, as the wrongdoing relied upon was the dismissal on the

9/6/2022. Besides that, the claimant claims unfair dismissal, in that he says he was not dismissed for conduct, but in retribution for making a protected disclosure. He also claimed the dismissal was procedurally unfair in that the process was predetermined and not independent. There was not really much more to the claimant's claims than that.

30. The claimant accuses the respondent of making a personal attack in respect of his conduct. The claimant was not slow to respond. His own conduct had been far from exemplary. In respect of the personal nature of the conduct of the proceedings, the Tribunal finds that both parties were culpable. The respondent's conduct was not so significantly worse than that of the claimant so as to engage the costs threshold. To the extent that there was unreasonable conduct, both parties engaged in it.

31. In respect of the contention that the response had no reasonable prospects of success, the Tribunal was not taken to any strike out application or an application for a deposit. If, as per the claimant's case, the respondent's response was so doomed to fail from the outset, then although it is not a necessary precursor to a cost application; it would be reasonable conduct of the proceedings, to make such an application. To do so is in accordance with the overriding objective and would no doubt have saved costs in preparing for the final hearing.

32. There was a factual dispute between the parties. It cannot be said that the respondent's case was so hopeless that it had no reasonable prospects of success. This aspect of the claimant's application for costs is also unsuccessful.

33. Finally, the claimant submitted that the respondent's withdrawal from the proceedings was also unreasonable conduct. As noted, the respondent was polite and its withdrawal did not disrupt the proceedings. The respondent did use the email to contact the Tribunal on five occasions. That of itself is not unreasonable conduct. Those emails were given such weight as was warranted in the circumstances, which was very little. The respondent had attended the hearing and it then withdrew. It was encouraged to remain and to engage in the proceedings; it chose not to do so. The respondent cannot then reasonably hope to influence the proceedings via emails, rather than attendance.

34. Even if the conduct of withdrawing from the proceedings could be considered to be unreasonable, it is difficult to establish what additional costs were incurred and there is no indication of this from the claimant. The length of the hearing was shortened as there was no evidence from the respondent. It was established at the outset that there was an issue over whether the dividends were included in the claimant's pay for the purpose of any compensation. That required submissions from the claimant.

35. The respondent is not obliged to defend the proceedings. It had done so initially and then it withdrew. It is not unreasonable conduct for it to withdraw and in doing so, the claimant did not incur any additional cost.

36. For those reasons, the Tribunal finds the costs threshold has not been crossed and the Tribunal declines to make a costs award in the claimant's favour.

Employment Judge Wright
27/3/2023