EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr E C Oise	v	Spring & Co Solicitors Ltd

[I have been away from work for several months due to illness. I apologise to the parties for the delay in promulgating this Judgment. I have addressed the request to consider costs at the earliest opportunity.]

JUDGMENT ON COSTS

There is no order as to costs.

REASONS

1. By way of Judgment dated 17 August 2022 I found:

    1. *The claim for unfair dismissal is well founded.*

    2. *The Respondent is to pay the Claimant £1,177.51. This award is made up as follows; basic award £1,535.88 reduced by 50% by Claimant's conduct (£767.94), Compensatory award £511.96 reduced by 50% by Claimant's conduct (£255.98) and a 15% ACAS uplift (£153.59). The recoupment provisions do not apply.*

2. An application for reconsideration of this judgment was refused on 11 December 2022.

3. By way of an application dated 12 October 2022, the Claimant made an application for costs. This was responded to on 20 October 2022, this response attached an email from the SRA regarding a complaint raise by the claimant. The application for costs was transferred for my attention on 6 February 2023. I have considered this on the papers.

The Law

4. The costs provisions are in rules 74 to 84, schedule 1, Employment Tribunals (Constitution and Rules of Procedure) regulations 2013, as amended. "Costs" includes any fees, charges, disbursements or expenses including witness expenses incurred by or on behalf of the receiving party, rule 74(1).

5. The power to make a costs order is contained in rule 76. Rule 76(1) provides,

> "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
>
> (b) any claim or response had no reasonable prospect of success."

6. In deciding whether to make a costs order the Tribunal may have regard to the paying party's ability to pay, rule 84.

7. In the case of Yerrakalva v Barnsley Metropolitan Borough Council [2011] EWCA Civ 1255, the Employment Judge in the case awarded the respondent 100% of its costs based on the claimant's lies prior to her decision to withdraw. On appeal the EAT said that it was unable to see how the lies told at the prehearing review caused the respondent any loss at all from which they were entitled to be compensated. She succeeded in her appeal. On appeal to the court of Appeal, Mummery LJ giving the leading judgment held:

> "The vital point in exercising their discretion to order costs is to look at the whole picture of what happened in the case and asked 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 affects it at that. The main thrust of the passages cited above from my judgement in McPherson's case was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the employment tribunal had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs the claimant. In rejecting that submission I have no intention of giving birth to erroneous notions, such as that causation was irrelevant or the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances….
>
> 52 In my judgement, although the employment tribunal had jurisdiction to make a costs order, it erred in law in the exercise of its discretion. If, as should have been done, the criticisms of the council's litigation conduct had been factored into the picture as a whole, the employment tribunal would have seen that the claimant's unreasonable conduct was not the only relevant factor in the exercise of the discretion. The claimant's conduct and its effect on the costs should not be considered in isolation from the rest of the case, including the council's conduct and its likely effect on the length and costs of the prehearing review."

8. In the case of Vaughan v London Borough of Lewisham UKEAT/0533/12/SM, the Employment Appeal Tribunal held that there was no error of law when the employment tribunal in awarding costs took into account whether there was a reasonable prospect of the claimant being able, in due course, to return to well-paid employment and be in a position to pay costs. Also in that case it was held that the failure on behalf of the respondent to apply for a deposit order is not necessarily an acknowledgement that a claim has a reasonable prospect of success as there are a variety of reasons why such a course of action may not be adopted, such as additional costs involved in having the matter considered at a preliminary hearing and which may not deter the claimant.

9. The tribunal have to consider, once the claims have been brought, whether they were properly pursued, Npower Yorkshire Ltd v Daly UKEAT/0842/04.

10. Knox J, in Keskar v Governors of All Saints Church England School and Another [1991] ICR 493, page 500, paragraphs E-G, held,

> "The question whether a person against whom an order for costs is proposed to be made ought to have known that the claims he was making had no substance, is plainly something which is, at the lowest capable of being relevant, and we are quite satisfied from the decision itself, in the paragraph which I have read and need not repeat, that the industrial tribunal did have before it the relevant material, namely that there was virtually nothing to support the allegations that the applicant made, from which they drew the conclusion that he had acted unreasonably in bringing the complaint.
>
> That in our view, does involve an assessment of the reasonableness of bringing the proceedings, in the light of the non-existence of any significant material in support of them, and to that extent there is necessarily involved a consideration of the question whether the applicant ought to have known that there was virtually nothing to support his allegations."

11. I have also taken into account the cases of AQ Ltd v Holden [2012] IRLR 648, a judgment of the Employment Appeal Tribunal, E.T Marler v Robertson [19974] ICR 72, a judgment of the National Industrial Relations Court, and Oni v Unison UKEAT/0370/14/LA.

12. In Marler, it was held by Sir Hugh Griffiths under the old "frivolous or vexatious" costs requirements that

> "If the employee knows that there is no substance in his claim and that it is bound to fail, or if the claim is on the face of it so manifestly misconceived that it can have no prospect of success, it may be deemed frivolous and an abuse of the procedure of the tribunal to pursue it. If an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive, he acts vexatiously, and likewise abuses the procedure. In such cases the tribunal may and doubtless usually will award costs against the employee.", page 76 D-F.

13. In the Oni case, Simler J, President, re-stated the principles, namely that the tribunal has a wide discretion in deciding whether to award costs. It is a two-stage process. The first being, to determine whether the paying party comes within one or more of the parameters set out in rule 76. The second, is if satisfied that one or more of the requirements have been met, whether to make the award of costs. However, costs had to be proportionate and not punitive and reasons must be given.

14. In Arrowsmith v Nottingham Trent University [2011] EWCA Civ 797, a case where the claimant was ordered to pay costs of £3,000 because she had made a case dependent on advancing assertions that were untrue. The Court of Appeal held that under rule 41(2) the tribunal was not obliged to take her means into account although it had done so. The fact that her ability to pay was limited, in that she was unemployed and no longer in receipt of statutory maternity pay, did not require the tribunal to assess a sum limited to an amount she could pay. The amount awarded was properly within the tribunal's discretion.

15. In relation to the exercise of the tribunal's discretion whether to take into account the paying party's ability to pay, under the old rules, HHJ Richardson, in the case of Jilley v Birmingham & Solihull Mental Health NHS Trust (EAT/584/06), held:

> "The first question is whether to take ability to pay into account. The tribunal has no absolute duty to do so. As we have seen, if it does not do so, the County Court may do so at a later stage. In many cases it will be desirable to take means into account before making an order; ability to pay may affect the exercise of an overall discretion, and this course will encourage finality and may avoid lengthy enforcement proceedings. But there may be cases where for good reason ability to pay should not be taken into account: for example, if the paying party has not attended or has given unsatisfactory evidence about means."
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> "If a tribunal decides not to do so, it should say why. If it decides to take into account ability to pay, it should set out its findings about ability to pay, say what impact this has had on its decision whether to award costs or on the amount of costs, and explain why. Lengthy reasons are not required. A succinct statement of how the tribunal has dealt with the matter and why it has done so is generally essential."

Conclusion

16. I have considered the cases of Oni, Keskar, and Marler. I acknowledge that costs in an employment tribunal case do not follow the event and that I have a wide discretion in relation to costs. Caselaw set out above considers and analyses the factors for consideration.

17. The claimant's application is on two bases, firstly, that it; *'is based on the unreasonable and vexatious act by the Respondent during litigation.'* It was submitted the Respondent had provided false and misleading information to

the Tribunal. Secondly, an allegation of the falsification of documents has also been made and that the Respondent breached confidentiality by disclosing documents from the claimant's personal injury file.

18. The Judgment delivered on the day of hearing and promulgated shortly thereafter made clear why the claim of unfair dismissal was upheld:

> *'52. However, I find the dismissal was procedurally unfair. The Respondent's policy on disciplinary hearings gave scope for delay [189 – paragraph 3.10]. The Respondent had received a medical 'fit note' that the Claimant was unfit for work. To expect him to attend a disciplinary meeting and to find, in the face of medical evidence to the contrary, that he was not ill as claimed, the Respondent acted unreasonably. Further, given the seriousness of the consequences for any employee but particularly a solicitor of a potential finding of gross misconduct I find the decision to proceed in absence to be procedurally unfair.*
>
> *53. I find had the Respondent delayed the disciplinary hearing the Claimant would nevertheless have been dismissed…..'*

19. As set out in paragraph 5 above, Rule 76 states that a party, or their representative, must have 'acted vexatiously, abusively, disruptively or otherwise unreasonably'

20. As emphasised above the power to award costs is discretionary. The points argued by the claimant are in the main the same issues raised at the hearing. No application was made for documents to be excluded on the basis of privilege or falsification. I found the claimant was dismissed for gross misconduct. I did not find the Respondent had misled the Tribunal or had provided falsified evidence as claimed. The same claims were advanced to the SRA and their email to the Respondent of 30 September 2022 concluded.

'Our investigations and outcomes are evidence based. In our careful consideration of the matter, we have not identified any corroborating evidence which supports the allegations. The facts present Ms Jabin's word against your word. This is not sufficient evidence to establish that our rules have been breached. Therefore we are unable to take any further action and are closing our investigation.'

21. I find the Respondent did not act vexatiously, abusively, disruptively or in any other unreasonable manner in defending the claims advanced by the claimant.

22. The application for costs is therefore dismissed.

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Employment Judge G D Davison

Date: 19 June 2023

Judgment sent to the parties on

20 June 2023

For the Tribunal office