EMPLOYMENT TRIBUNALS

Claimant: **Mr A Belchamber**

Respondent: **Marex Financial**

JUDGMENT

The Respondent's application for costs is not successful.

REASONS

1. This claim was subject to a final merits hearing on the 30th and 31st July May 2023 at the London Central Employment Tribunal. The Claimant pursued a claim for Unfair Dismissal which was unsuccessful.

2. The Respondent made an application for costs in writing on the 13th June 2023, as under Rule 76(1)(a) of the Employment Tribunal (Constitution and Rules of Proceedings) Regulations 2013. The basis for that application is the Claimant has acted unreasonably for pursuing a claim that had no merit. The Respondent argues that this should have been apparent to the Claimant once witness statement exchange had taken place on the **24th May 2023**. The amount of costs being claimed is £14,824.56.

3. The Claimant resists the application. The Claimant's position is that the threshold for an award of costs has not been met. The Claimant argues that the merits of the claim could not be determined until all the evidence had been heard. The Claimant also points out that there was no finding of dishonesty in the case.

Law

4. Rule 76 of the ET Rules provides:

   '76.— When a costs order or a preparation time order may or shall be made

   (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

5. If one of the thresholds for making a costs order is reached the employment tribunal still has a discretion to exercise in deciding whether to award costs, and if so, in what sum.

6. In considering an application for costs the employment tribunal should bear in mind that it is generally a costs free jurisdiction: *Gee v Shell UK Ltd* [2002] . Where a party considers that a claim or response is misconceived, a costs warning letter may be sent. There is no obligation to do so and a failure to do so does not prevent the employment tribunal making a costs order. However, the failure to do so is a matter that the employment tribunal may take into account in deciding whether to award costs, or in fixing the amount of an award.

7. Rule 84 of the ET Rules provides:

   '84.– Ability to pay

   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.'

8. The employment tribunal is empowered to consider the paying party's ability to pay, but is not required to do so. If the employment tribunal exercises the discretion to disregard the paying party's ability to pay it should generally give reasons: *Jilley v Birmingham and Solihull Mental Health NHS Trust* (2007) (at para 44). In considering ability to pay the employment tribunal is entitled to have regard to the likelihood that a person's financial circumstances may improve in the future: C*hadburn v Doncaster & Bassetlaw Hospital NHS Foundation Trust* (2015). This can include the possibility that money will be received from a third party.

9. Costs are rarely awarded in proceedings before an employment tribunal. Costs remain exceptional (*Gee v Shell UK Ltd (2002)*) and the aim is compensation of the party which has incurred expense in winning the case, not punishment of the losing party (*Davidson v John Calder (Publishers) Ltd and another* (1985)).

<u>The Respondent's application</u>

10. The basis of the Respondent's application is that the Claimant's claim had no merit and that would have been clear to them upon exchange of witness evidence on the 24th May 2023. The Respondent raises 3 points specifically-

a. The Respondent's disclosure included a screenshot of a Teams chat in which the Claimant discussed, minutes after receiving an all staff email regarding revisions to the Respondent's 'out of hours' access policy, using an alternate entry into the Respondent's offices to evade its security presence, despite the restrictions placed on him specifically by a final written warning.

b. The Respondent's disclosure included clear and detailed documentation setting out the seriousness with which the Claimant's entry into Marex's offices on the evening of 26 November 2022 had been taken, including that a security guard had been dispatched to search for the Claimant, that an incident report had been prepared and that the incident had been immediately escalated to the Respondent's Senior Management.

c. The Respondent provided three witness statements from Ms Neffar, Mr Scally and Ms Bull which set out in detail why the Respondent had commenced disciplinary action against the Claimant and taken the decision to suspend him.

11. They state that in response that evidence, the Claimant proceeded to advance arguments which the Respondent calls "far-fetched".

a. The Teams chat was in fact the Claimant referring to his line manager using an alternate entry due to his line manager's relationship with the Security guards; and

b. The Claimant was not aware that he was not able to attend Marex's offices out of hours.

12. The Respondent states that the pursuing of such argument was unreasonable conduct and refers to the judgment in the case which found that the Claimant's position was not credible.

<u>The Claimant's response</u>

13. As stated, the Claimant opposes the application. The Claimant states that there is a high hurdle which must be overcome before a costs order can be made.

14. The Claimant submits that

a. Determination of the case required resolution of factual disputes, and judgments about the implications of the evidence as found. It could not be said there was no prospect of success before the evidence was heard.
b. R does not allege that there were no prospects of success prior to the exchange of evidence and disclosure on 24 May 2023. In fact the parameters of the case did not significantly change on that date.
c. There were no findings of dishonesty in the case.

d. The elements of C's evidence that were the subject of criticism were not at the heart of the claim and were not the reason the claim was dismissed.

e. If R had considered there were no merits to the claim after exchange of evidence, it would have sent a costs warning letter prior to trial. It did not do so for good reason.

Decision

15. Upon review of the judgment and the notes taken at the hearing, the tribunal accepts that no finding of dishonesty was made. They also agree that the factual dispute could only have been conclusively decided after hearing all the evidence. It is not accepted therefore that it would have been wholly apparent to the Claimant after exchange of evidence and witness statements that his claim had no merit.

16. Further, the tribunal only made a finding regarding the credibility of evidence after hearing from all witnesses during cross examination.

17. The tribunal did not find that the proceedings were misconceived within the meaning of the rule. Moreover, as Sir Hugh Griffiths stated in *E T Marler Ltd v Robertson* (1974): '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'.

18. On that basis the application for costs is refused.

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Employment Judge **Singh**

_____14th July 2023_____
Date

JUDGMENT & REASONS SENT TO THE PARTIES ON

06/09/2023

FOR THE TRIBUNAL OFFICE