EMPLOYMENT TRIBUNALS

Claimant:	**Mr D Hussain**
Respondent:	**Claim Time Limited t/a Claim Time Solicitors**
Heard at:	**Birmingham (and by CVP)**
On:	**30 June 2023**
Before:	**Employment Judge Flood** **Mrs R Forrest** **Mr N Howard**

Representation

Claimant:	**In person**
Respondent:	**Mr McGrath (Counsel)**

JUDGMENT on a costs application having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013 ("ET Rules"), the following reasons are provided:

REASONS

Background and relevant facts

1. By a claim presented on 31 August 2020 the claimant brought complaints of automatically unfair dismissal and unlawful detriment on the grounds of making a protected disclosure.
2. On the final day of a six day hearing, the Tribunal gave oral judgment dismissing all the complaints against the respondent and provided its reasons.
3. Mr McGrath made an application for costs on behalf of the respondent at the conclusion of the hearing under rule 76(1) (a) of the Employment Tribunals (Rules of Procedure) 2013 ('ET Rules'). The matter was listed for hearing and case management orders were made.
4. We had before us two separate bundles prepared by each party (as they had been unable to agree on the contents of a bundle).

5. At the conclusion of the hearing the Tribunal gave oral judgment that the respondent's application for costs against the claimant had been successful. The claimant was ordered to pay the respondent the sum of £17,650 in respect of its costs.

The Issues

6. The issues which needed to be determined were:

   6.1. Had the claimant acted unreasonably in either the bringing of the proceedings or the way the proceedings have been conducted (within rule 76 (1) (a) of the ET Rules?

   6.2. Should, in the Tribunal's discretion, a costs order be made?

   6.3. If so, how much should be awarded?

The relevant law

7. References to rules below are to rules under **Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.**

8. Rule 74 provides:

> (*1) "Costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing). In Scotland all references to costs (except when used in the expression "wasted costs") shall be read as references to expenses.*
>
> *(2) "Legally represented" means having the assistance of a person (including where that person is the receiving party's employee) who—*
>
> *(a) has a right of audience in relation to any class of proceedings in any part of the Senior Courts of England and Wales, or all proceedings in county courts or magistrates' courts;….*

9. Rule 75 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*

10. Rule 76 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; or*

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

(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.

11. Rule 77 provides:

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.

12. The relevant part of rule 78 provides:

"*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;…."

13. Rule 84 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."*

14. A Tribunal must ask whether a party's conduct falls within rule 76(1)(a). If so, the Tribunal must then go onto ask whether it is appropriate to exercise the discretion in favour of awarding costs against that party. It is only when these two stages have been completed that the tribunal may proceed to the third stage, which is to consider the amount of any award payable

15. **Gee v Shell UK Limited [2003] IRLR 82.** The Court of Appeal confirmed that that costs are the exception rather than the rule and that costs do not follow the event in Employment Tribunals.

16. **McPherson v BNP Paribas [2004] ICR 1398**. In determining whether to make an order under the ground of unreasonable conduct, a Tribunal should take into account the "*nature, gravity and effect*" of a party's unreasonable conduct.

17. **Barnsley Metropolitan Borough Council v Yerrakalva [2012] ICR 420** - "*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.*"

18. **Oliver Salinas v Bear Stearns International Holdings UKEAT/0596/04/ DM.** The question of whether a costs order was exceptional or unusual was not significant, so long as the proper statutory tests were applied.

19. **Vaughan v London Borough of Lewisham & Ors UKEAT/0533/12/SM –** it was not wrong in principle to make a costs order even though no deposit order had been made and the respondents had made a substantial offer of settlement (on an avowedly "commercial" basis). Nor was it wrong in principle to make an award which the claimant could not in her present financial circumstances afford to pay where the Tribunal had formed the view that she might be able to meet it in due course.

20. **Jilley v Birmingham and Solihull Mental Health NHS Trust UKEAT/0584/06/DA,** - if a Tribunal decided not to take account of the paying party's ability to pay, 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 to award costs or on the amount of costs, and explain why. There may be cases where for good reasons 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. There are also circumstances, for example, where a claimant is completely unrepresented, where, in the face of an application for costs, the tribunal ought to raise the issue of means itself before making an order: **Doyle v North West London Hospitals NHS Trust [2012] All ER (D) 205 (Jun) (UKEAT/0271/110).**

21. **Dyer v Secretary of State for Employment** -whether conduct is unreasonable is a matter of fact for the tribunal; unreasonableness has its ordinary meaning and should not be taken by tribunals to be the equivalent of vexatious. This was accepted by the Employment Appeal Tribunal in **National Oil Well Varco v Van der Ruit UKEATS/0006/14/JW.**

22. **McPherson v BNP Paribas [2004] ICR 1398 [40], [41**] – The Court of Appeal held that (the then) r14(1) did not require a party to prove that unreasonable conduct caused particular costs to be incurred, but required the tribunal to have regard to the nature, gravity, and effect of the unreasonable conduct when determine whether to exercise their discretion to award costs. The Court of Appeal further held, it is not punitive or impermissible for a tribunal to order costs without confining them to the costs attributable to the unreasonable conduct. In **Sunuva Ltd v Martin UKEAT/0174/17** at [22] the Employment Appeal Tribunal expressed the view that this is still the position under the ET Rules.

Conclusion

23. The respondents submitted that the claimant acted unreasonably in both the bringing of the proceedings and the manner in which the proceedings were conducted, and sought an order for costs in the sum of £17 650 being Counsel's fees incurred. It did not seek to recover any additional fees or preparation time incurred in respect of the conduct of the hearing by its partners or employees.

24. The claimant submitted that he did not behave vexatiously or unreasonably but was simply inexperienced in the law and in the conduct of employment tribunal proceedings. He attributes his failure to succeed in his claim on his lack of experience in particular his failure to apply for specific disclosure, to include all relevant evidence in his witness statement and to provide the required connection between the alleged disclosures and the detriment.

Have the tests within Rules 76 (1) (a) been met?

25. The initial question we considered is whether the claimant acted unreasonably in bringing the claim in the first place. We entirely accept the respondent's submissions in this regard. Our findings at paragraph 14 and 15 of the written reasons support our view that the claimant brought his claim in the knowledge that many of the allegations made were untrue. He fabricated allegations of having made disclosures and constructed a case around information he had discovered elsewhere to try and link this to his own situation. We found as a fact that none of the e mails relied upon by the claimant were sent. The claimant tries to suggest that this is solely down to his failure to apply for specific disclosure and had he done so, he would be vindicated. We do not accept this is the case for the reasons we have already addressed in paragraph 15 of our written reasons. The claimant indicated as early as 15 May 2020 that he intended to bring legal proceedings against the respondent and then proceeded to do precisely this and then enter into extensive correspondence with the respondent and its employees direct. We refer to paragraphs 18.79 and 18.80 of our written reasons and in particular our finding that the claimant entered into a campaign conducted to cause disruption culminating in issuing a claim that was ultimately doomed to fail as there was no truth in it.

26. We also accepted the submissions that the claimant was unreasonable in the conduct of the proceedings and again refer to paragraphs 14 and 15. The claimant presented and continued to pursue a claim that was based on false allegations. He was given warnings about the possibility of costs being applied for but did not heed such warnings. He then continued to pursue and expand his case based on disclosures he must have known to be false. The claimant was given an opportunity to settle the claim and exit the proceedings without further repercussion but again continued to pursue the allegations which led to a length 6 day hearing. The claimant was not able to connect his claimed detriments to the alleged disclosures which is unsurprising as we find no such disclosures were ever made. The claimant continued with what he must have known was false evidence about a comment made by Mr Shabir about the reason for his dismissal despite being given the opportunity to withdraw this (see paragraph 18.57 written reasons).

27. We have taken into account the guidance of the authorities above and have taken the ordinary meaning of the word 'unreasonable'. Unreasonableness has its ordinary meaning and should not be taken by tribunals to be the equivalent of vexatious. We therefore did not hesitate to find as a fact that the above conduct was unreasonable.

Should a Costs Order be made?

28. Having found that the conduct of claimant fell within rule 76 (1) (a) the Tribunal had to then go onto ask whether it is appropriate to exercise the discretion in favour of awarding costs against him.

29. In considering whether a costs order should be made, we conclude that this behaviour caused significant unnecessary cost of instructing counsel and also given the very many serious and damaging allegations of misconduct and criminal activity, have cased significant distress to the employees of the respondent. Therefore, we concluded it is appropriate to exercise our discretion to award costs. We are entirely aware of the authorities regarding costs being the exception rather than the rule, but we find that this case is indeed an exceptional case where the behaviour was so unreasonable as to merit an award of costs. The claimant places much weight on his status as a litigant in person and his lack of experience. However the unreasonable conduct is largely the pursuance and continuation of allegations that the claimant knew to be false which must have been clear to the claimant was unreasonable to have done, irrespective of his status. The claimant is clearly an intelligent and educated man who presented and argued his case eloquently at the tribunal. He does have litigation experience in his career so far so it is not entirely correct for him to allege that he was lacking in experience. In our view it is entirely appropriate for an award to be made.

How much should be awarded?

30. In terms of how much should be awarded by way of a costs order against the respondent, we have considered the information provided by the parties and all the submissions. The costs claimed solely relate to counsels fees in preparing for and attending the hearing. These are not excessive and we do not accept the submissions that the respondents could have avoided such costs by keeping the litigation in house themselves. The potential costs had this been done could (as submitted by Mr McGrath) have indeed been much higher as would have been on the basis of an hourly rate. The respondent has already limited its claim for costs to those external costs necessarily incurred and we have no concern with the sums sought and their proportionality to the issues to be determined at the hearing.

31. We have considered the information provided to us about the means of the claimant. The claimant is clearly capable of obtaining and sustaining paid employment at the level he has done broadly since May 2021. He is not working currently, but since May 2021 he has not had any significant period out of work and we see no reason why he would be unable to obtain similar employment relatively quickly upon making the appropriate applications. The claimant lives at home and is not responsible for the payment of a mortgage or rent. We entirely accept that he contributes to the family costs (as shown by his direct debits and the copy bills shown) but he accepted that this was a variable amount paid depending on his level of earnings. The claimant has student debt but we note that this would only continue to be deducted in the event his earnings were at a particular level. He does not appear to have any other liabilities by way of credit card debt or personal loans. He has no dependents or firm financial commitments. The evidence produced does not support his suggestion that he is in financial difficulty and we note from his statements that he is able to sustain a reasonable level of expenditure (including spending on eating out, delivery food

and trips) even though he was aware of this hearing coming up on the horizon and the potential of a significant award being made against him.

32. We noted the guidance from the authorities that it is not just current earning capacity but future earning capacity that is relevant. We concluded that given the information on means before us the claimant would be in a position to pay the costs awarded if not in full at this time, but potentially either in full in the near future, or by way of an agreed instalment plan (which we encourage the parties to explore). The claimant is early in his career and has significant earning potential in his chosen field.

33. For those reasons, we made the Order as sought in favour of the respondent and order that the sum of £17,650 is paid by the claimant by way of costs under rule 78 (1) (a) of the ET Rules.

Employment Judge Flood

11 September 2023