EMPLOYMENT TRIBUNALS

Claimant: Mr L Hermitt

Respondent: Trafford Council

HELD AT: Manchester in chambers without parties **ON:** 15 January 2024

BEFORE: Employment Judge Cookson
Ms Gilchrist
Ms Whistler

Costs Order

The claimant is ordered to pay to the respondent the total sum of £2,700 in respect of the respondent's costs in respect of his unreasonable conduct in the way the above proceedings have been conducted following a deposit order 1 June 2022.

The deposit paid by the claimant of £300 having already been released to the respondent, the claimant must pay the balance of £2,400 by 16 July 2024.

REASONS

1. Following a hearing between 19 and 23 June 2023, the claimant's complaints of unfair dismissal and detriment on the ground of a protected public interest disclosure were dismissed.

2. The respondent made an application for costs at the hearing under Rule 76 of the Employment Tribunal Rules of Procedure 2013 which says this

When a costs order or a preparation time order may or shall be made

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—

> *(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…

3. It is significant in this case that the various complaints in the claimant's claim were subject to a deposit order totally £300 made by Employment Judge Sharkett on 1 June 2022. That deposit had been paid. The Tribunal was satisfied that the grounds this panel found to dismiss the claimant's complaints were substantially the same as the reasons given in the deposit order. The consequence of that under Rule 39(5)(a) is that "the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of Rule 76, unless the contrary is shown… If a deposit order is made the paying party is warned about this in the information leaflet provided with the order.

4. At the end of the final hearing Mr Searle, the respondent's counsel made an application for costs limited to the amount of costs incurred by the respondent in respect of his attendance at this hearing.

5. Both parties indicated that they wished the issue of costs to be considered without a further hearing. The claimant was ordered to provide any representations about costs by 7 July 2023 and to provide information about his financial position which he wished the tribunal to take into account. The respondent was ordered to provide any reply to that by 23 July 2023.

6. Both parties made further written submissions in accordance with those case management orders, and the claimant provided financial information which has been considered by this tribunal along with further written submissions made by the claimant and received on 10 January 2024.

7. In its written submissions the respondent sought additional costs on the basis that the claimant had not immediately agreed to pay the costs sought by Mr Searle, although Mr Searle had not limited his application for costs by suggesting that a reduced amount would be sought only if the claimant agreed to a particular figure at the hearing.

8. The respondent provided a table showing the costs claimed which is somewhat difficult to follow. It appears to suggest that £10,773.00 is claimed in respect of case preparation and £16,905 in respect of Mr Searle's costs, including VAT, but the total claimed is £26,678.20. It is impossible to reconcile those figures in the respondent's table. There is either an error in the figures or in the calculations.

9. The total amount claimed seems to suggest that the respondent has sought costs to be determined by way of a detailed assessment under rule 78(1)(b) (because more than £20,000 is claimed), but if that is the case the respondent had wholly failed to explain the costs incurred and the information necessary for a detailed assessment. The only information provided to the tribunal in respect of case preparation is that the respondent had incurred "262.3 units" at the total cost of "£10,773". In its submissions the respondent stated that the hourly rates claimed in respect of the in-house litigation team are charged at its internal recharge rates and that Grade A solicitors are charged at £72 per hour

where appropriate, although the tribunal found this information difficult to reconcile with the unit and total cost information referred to above.

10. The employment tribunal considered that it was in accordance with the overriding objective for the issue of costs to be decided at this hearing rather than postpone the hearing to seek clarification from the respondent about the amount claimed. In the final paragraph of the respondent's submissions, it says this *"in such circumstances, the respondent maintains that it is reasonable the claimant to contribute towards the claimant's costs in at least some of £10,800 or such other sum the Tribunal considers to be appropriate".* In the circumstances the tribunal considered that it was appropriate to consider this application as a costs application under rule 78(1), that is an order for a specified amount not exceeding £20,000.

Submissions

11. In support of its application the respondent drew our attention to the judgment in Hemdan v Ishmail and other [2017] and in particular the following paragraph *"10. A deposit order has two consequences. First, a sum of money must be paid by the paying party as a condition of pursuing or defending a claim. Secondly, if the money is paid and the claim pursued, it operates as a warning, rather like a sword of Damocles hanging over the paying party, that costs might be ordered against that paying party (with a presumption in particular circumstances that costs will be ordered) where the allegation is pursued and the party loses. There can accordingly be little doubt in our collective minds that the purpose of a deposit order is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails. That, in our judgment, is legitimate, because claims or defences with little prospect cause costs to be incurred and time to be spent by the opposing party which is unlikely to be necessary. They are likely to cause both wasted time and resource, and unnecessary anxiety. They also occupy the limited time and resource of courts and tribunals that would otherwise be available to other litigants and do so for limited purpose or benefit."*

12. The respondent argued that the claimant had pursued his claim despite the consequences of doing so when the deposit order had been made clear and it was further submitted that the claimant had pursued his case in a manner which was reasonable, wanting to the claimant generating excessive amounts of sometimes unintelligible correspondence and applications in which he was unable or unwilling to identify the correct basis with claim. It is argued that this led the tribunal and the respondent to have to undertake additional work in order to clarify the matters raised. In that context the respondent argues that the grounds for costs and made out under both rules 76(1)(a) and (b) are made out.
13. In his submissions of 7 July, the claimant argued that he not acted unreasonably in pursuing his complaints. The claimant appears to rely on the fact that there has been no prior warning of a costs application until the tribunal had given its judgment. In his submissions he does not explain why he decided to pursue his complaints despite the deposit order and warning of Employment Judge Sharkett that his complaints had little reasonable prospect of success, but the

claimant does say that in relation to the information he provided to the employment tribunal he had believed that he had acted reasonably, and he disputed that his correspondence had been conducted in an unreasonable manner.

14. The claimant goes on to refer to his means and submitted that a costs order would cause financial hardship. In the claimant's additional submissions provided in the week before this in-chambers hearing, he has explained that he has obtained new employment, but he says that "the claimant's current means from this employment sector is not yet fully commensurate" which the Tribunal understands to mean that his new salary is less than he was paid by the respondent. The claimant did not provide us with details of his new pay.

Our approach to the law, discussion and our conclusions

15. Rule 76(1) usually imposes a three-stage test in considering costs: first, the tribunal must ask itself whether a party's conduct falls within rule 76(1)(a) — in other words, is its costs jurisdiction engaged?; if so, secondly, it must go on to ask itself whether it is appropriate to exercise its discretion in favour of awarding costs against that party; and the third stage is the determination of the amount of any award.

16. As noted above, under rule 39(5)(a) the claimant is presumed to have acted unreasonably in pursuing the specific allegation or argument for the purposes of a costs order in light of our findings at the final hearing. In other words, it is for him to prove the contrary or unreasonable conduct will be made out under rule 76(1)(a) and the tribunal must consider whether to make a costs order.

17. However, that presumption of unreasonableness does not mean that the tribunal must automatically make a costs order: under rule 76(1) the Tribunal must still ask itself whether it is appropriate to exercise its discretion in favour of awarding costs against that party.

18. The claimant is a litigant in person. As Mr Searle reminded us, lay people are not immune from orders for costs: far from it, as the cases make clear. However, we did take the view that we cannot judge a litigant in person by the standards of a professional representative. Justice requires that tribunals do not apply professional standards to lay people and we recognise that lay people are likely to lack the objectivity and knowledge of law and practice brought to bear by a professional legal adviser.

19. In terms of whether the costs threshold has been engaged as noted above, Rule 39(5) makes a presumption of unreasonableness where complaints have been pursued despite a deposit order being made, but generally the burden lies on the party seeking costs to establish that the costs jurisdiction is engaged.

20. The respondent appears to argue that the claimant had acted unreasonably before the deposit order was made and a costs order should be made in respect of that period of time.

21. We considered that it was relevant to seek to look at this case in relation to two periods of time. After the deposit order there is a presumption, the claimant has acted unreasonably which it is for him to rebut. Before the deposit order it is for the respondent to show that the threshold has been met.

22. The respondent argued that the claimant had frequently submitted unintelligible correspondence and applications and that this was unreasonable conduct which predated the deposit order. The tribunal panel had some sympathy with that submission. The claimant has a somewhat florid way of expressing himself which is sometimes hard to follow, and the tribunal panel itself has had some difficulty following the claimant's evidence and arguments at times. However, the tribunal panel did not find any suggestion that this was done mischievously, or even knowingly. On balance we are satisfied that the claimant, as a litigant in person, was doing his best and we did find the respondent had not shown that the threshold for costs had been met before the hearing on 1 June 2022 that date from which the presumption in Rule 39(5) applies.

23. In terms of the threshold for costs after the deposit order on 1 June 2022 we accept the respondent's submissions and find, in accordance with Rule 39(5), that the threshold for costs had been met.

24. We therefore had to decide whether to exercise our discretion to award costs having regard to all the relevant factors, from 1 June 2022.

25. It is clear to us that the claimant failed to pay proper heed to the deposit order and the warning about his prospects of success from the employment judge. He has offered us no explanation for that. It appeared to us that he genuinely, although misguidedly, believed the council had a case to answer and that this is one of those cases whereas a litigant in person, the claimant's lack of objectivity was telling but that did not excuse his conduct. The claimant should have made paid more attention to the judge's warning.

26. We accept that because the claimant failed to take heed of the warnings about the likelihood of success the respondent was forced to incur unnecessary costs. We also accept that the claimant failed to explain his complaints and that his failure to explain the protected disclosure he relied upon in particular was unreasonable. In the circumstances we accepted that we should exercise our discretion and make an award of costs in the respondent' favour. However, we decided to exercise that discretion in a limited way.

27. We also took into account the tribunal panel's concerns, expressed at the hearing to the parties, to the approach which the respondent had taken to the preparation of the hearing bundle. We accept that it is unfortunate that there were no case management orders in place for the preparation of the hearing bundle although of course the parties could have sought orders if they were needed. If the respondent was unclear on the approach to adopt it could have referred to the Presidential Guidance on General Case Management which

makes clear what is required and that it is usually appropriate for documents to be included in chronological order.

28. We do not suggest that the respondent had breached any tribunal order, but nevertheless the bundle prepared is very difficult to work with. The documents are divided into "claimant documents" and "respondent documents" and are not organised in date order. The index refers to correspondence by reference to pdf numbers rather than using the convention of explaining briefly what a document is, for example "email between the claimant and his line manager sent on [date] which enables both the claimant as a litigant in person and the tribunal to navigate the bundle easily. If this had been done, we think it is likely the claimant would have found it easier to prepare for and present his case at the hearing. It was also clear that the bundle had only been sent to the claimant at a relatively late stage and this too is likely to have increased the pressure on the claimant.

29. This was a case where both parties had conducted the litigation and presented evidence in a somewhat unhelpful way and the claimant raised concerns with us about the late delivery of documents by the respondent. In other words, there is some criticism to be made of both parties in relation to the conduct of this litigation.

30. In his submissions on costs Mr Searle had acknowledged these issues and suggested that we should consider making an award in relation to his costs of attending the final hearing. That was a sensible approach and we have decided that, notwithstanding the claimant's unreasonable conduct, we should not exercise our discretion to award any preparation costs for the period before the final hearing.

31. We decided that although the costs threshold had been met after the deposit order was made, we should only exercise our discretion to award costs in relation to the final hearing itself in accordance with Mr Searle's application at the final hearing.

32. We also make this point. Even if we had decided to exercise our discretion to award costs for hearing preparation, the respondent had failed to provide us with adequate information. Awards in relation to costs are compensatory and therefore it is important to examine what loss has been caused to the receiving party. Costs should be limited to those 'reasonably and necessarily incurred'. An assessment under Rule 78(1) can take a broad-brush approach of course, but nevertheless we considered the lack of any information at all about the "case preparation costs", other than an assertion of a particular sum and the total units which in any event we found difficult to follow, made it impossible for us to assess what costs were reasonably and necessarily incurred by the respondent's legal team between the deposit hearing and the final hearing. We were concerned in particular that we were unable to determine if the costs figure included time before the deposit hearing and we thought it was likely that it did.

33. Turning then to the amount of costs we should award the respondent in relation to the final hearing itself, we accepted that the claimant has limited means and that was something we should take into account, although we did not have to.

34. In terms of the amount of the costs claimed, we also took some account of the fact that despite the respondent's arguments that this was a claim which was, in essence, obviously and straightforwardly doomed, the respondent had nevertheless chosen to instruct a very experienced specialist employment barrister. We could not help but reach the conclusion that it could not be said to have been reasonably necessary to instruct so experienced, and therefore expensive, a barrister to conduct this hearing on its behalf. In reaching that finding we emphasis we make no criticism whatsoever of Mr Searle, whose conduct of the case was helpful and courteous throughout.

35. However, the most significant factor for us was the claimant's means. We found that it was reasonable to reduce the amount of costs payable to take account of the claimant's ability to pay costs. We did not consider it appropriate for us to make an order for costs which we thought the claimant would not be able to pay.

36. Turning to the information about the claimant's means, he had provided us with somewhat brief information, but there was no suggestion on the part of the respondent that we should not accept that information. The claimant gives details about his own and his partners' income and set out a number of outgoings. The tribunal panel noted that the amounts set out seemed reasonable and very little in the way of discretionary spending had been referred to.

37. We did not consider it appropriate to take into account the claimant's partner's means. The claimant's partner had not been involved in the proceedings and we did not consider it to be in accordance with principles of fairness to require them, in effect, to contribute to the amount to be paid to the respondent.

38. We considered the amount we should order in relation to costs by reference to the claimant's limited disposal income and £600 in savings. In considering that we accepted and worked to the respondent's calculations included with its submissions, using the figures from its analysis in the "excluding partner's income" column. That calculates the claimant as having available [to pay costs] around £328 per month, in addition to the £600 in savings.

39. On balance and taking all of the above into account we considered the total sum of £2,700 to be a fair and reasonable sum under Rule 78(1) taking into account our assessment of income and savings above. We have provided for an extended timescale for the awarded sum to be paid which enabled us to be satisfied this was as an amount which the claimant should be able to pay without further enforcement. The amount now payable is reduced by the amount of the deposit which was paid by the claimant in accordance with the deposit order.

Employment Judge Cookson

Date: 16 January 2024

ORDER SENT TO THE PARTIES ON
22 January 2024

FOR THE TRIBUNAL OFFICE