EMPLOYMENT TRIBUNALS

Claimant: Mr J Serrao Da Veiga

Respondent: Titan Risk Management Limited

Heard at: Manchester Employment Tribunal (by CVP)

On: 15 January 2024

Before: Employment Judge Dunlop
Mr A Clarke
Mr R Cunningham

Representation

Claimant: In person
Respondent: Ms A Rollings (counsel)

Interpreter: Mr N Jones

RESERVED JUDGMENT

Rules 76(1)(a) and 78

1. The claimant acted unreasonably in the way that the proceedings have been conducted and is Ordered to pay the respondent the sum of **£2,000.00** as a contribution towards its costs.

REASONS

Background

1. By a Judgment sent to the parties on 19 May 2023, this Tribunal gave Judgment on a number of claims brought by the claimant, Mr Veiga. Mr Veiga's claims of disability discrimination, race discrimination, victimisation and wrongful dismissal were all dismissed. Mr Veiga succeeded in one claim, that was a claim for unpaid wages, and it was conceded by the respondent during the hearing. By agreement, Mr Veiga was awarded £102.50.

2. Mr Veiga applied for Reconsideration of the Judgment. That was refused in a written Judgment dated 1 June 2023.

3. In a detailed written application dated 16 June 2023, the respondent applied for its costs of defending the proceedings. According to the Schedule submitted with the application, those costs totaled £25,389.60.

4. There was some delay in making arrangements for a hearing at which the Tribunal panel who made the original decision could reconvene to determine the costs application. Unfortunately, no specific case management orders were made for the hearing and, in particular, Mr Viega was not required to provide any evidence of his means.

Today's Hearing

5. As with the final hearing, today's hearing proceeded as a remote hearing with all parties attending by CVP. There were no major issues with the technology. Again, as with the final hearing, the Tribunal had booked a Portuguese interpreter to assist in communication with Mr Veiga. There was some initial confusion as to whether Mr Veiga required a Portuguese interpreter who speaks Brazilian Portuguese or European Portuguese. He speaks European Portuguese and Mr Jones informed the Tribunal that he was competent to interpret in both varieties of the language, although noted that his speech may sound more Brazilian. In the end, Mr Veiga was not concerned about that distinction, but was concerned that Mr Jones was a non-native speaker, instead being a native English speaker who had learned and studied Portuguese to a high level.

6. The Judge explained that accredited interpreters need not be native speakers and that we would proceed with Mr Jones. If, at any point, Mr Vega felt that he was having difficulties with the interpretation he must raise this with the Tribunal. As it transpired, Mr Veiga raised no such difficulties.

7. The Judge then raised with the parties the lack of evidence around Mr Veiga's financial means. Both sides were, understandably, very keen to get a final resolution to the case today. It was agreed that Mr Veiga would be allowed to introduce evidence as to his financial means and the Judge would assist him in doing so by asking so neutral questions following which Mr Veiga would have the chance to address any additional matters and Ms Rollings would have the opportunity to ask any questions in cross-examination.

8. Once we had heard evidence from Mr Veiga, we then heard submissions from Ms Rollings and then Mr Veiga. The submissions concluded around 12:40pm. Mr Veiga had informed us at the start of the hearing that one of his children was unwell and that he may have to collect him from school early. Fortunately, Mr Veiga did not receive any call to that effect during the hearing. However, in view of that possibility, and of school collection times in any event, the Judge informed the parties that the decision would be reserved and sent out to them in writing.

Findings of Fact

9. The respondent's application was based on findings of fact made by the Tribunal in our original decision following the liability hearing. This Judgment should be read alongside the earlier liability Judgment.

10. We made the following additional findings of fact about Mr Veiga's financial means:
    10.1 We find that Mr. Veiga's employment with the respondent was in low-paid and precarious work.
    10.2 We accept his evidence (which was not challenged) that he has not worked since the end of 2021. (The reasons why he has not worked are not relevant in assessing his financial means for the purpose of a costs application. We make no finding as to whether or not the respondent has acted to prevent him obtaining further work, as he asserts.)
    10.3 Mr Veiga receives benefits, primarily Universal Credit in the sum of £1,389.96 per month and child benefits in the sum of £55.80 per week.
    10.4 He supports three children as a single parent. His mother also lives with the family but has no income.
    10.5 The family live in council accommodation for which Mr Veiga pays rent of £615 per month. He pays council tax of £104 per month and around £125 for electricity and gas. He has other bills for water, insurance and telephone, as well as the costs of food and general costs of raising a family.
    10.6 Mr Veiga has a council tax debt of between £600-£800 which he is repaying at £2.50 per week. He has no other debts.
    10.7 Mr Veiga has no savings or assets, in this country or abroad. His only active bank account is currently around £500 overdrawn.

Legal Principles

11. Rule 76(1)(a) Employment Tribunal Rules of Procedure 2013 provides:
    A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that: 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

12. Rule 78 provides that the Tribunal can award a specified amount of up to £20,000 within conducting a detailed assessment of the costs incurred. Alternatively, the Tribunal can award the whole or a specified part of the costs incurred to be subject to detailed assessment (usually by the county court). Having heard the claimant's evidence on means, Ms Rollings confirmed that the respondent would limit its application to £20,000 and did not seek detailed assessment.

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. The respondent referred in its written submissions to a number of legal authorities and we have considered the submissions and those authorities carefully. In summary, the key points are:
    14.1 There is a three-stage test. Firstly, we must consider whether conduct falls within Rule 76(1)(a) such that our jurisdiction to consider awarding costs is engaged.
    14.2 At that stage, we must be satisfied that there has been unreasonable conduct (including, but not limited to, conduct that can properly be described as vexatious, abusive or disruptive). the words "unreasonable" bears its ordinary in the English language.
    14.3 At the second stage, we must consider whether it is appropriate, in this particular case, to exercise that discretion and to make an award.
    14.4 We must remember, at this stage, that award of costs in the Tribunal is the exception, costs do not follow simply because a party has lost, or because the Tribunal has preferred one party's evidence;
    14.5 An award of costs should be compensatory, not punitive;
    14.6 A litigant in person should not be judged to the standard of a professional representative. (In this case, we also take account of the fact that English is Mr Veiga's second language and that will also disadvantage him in his ability to conduct litigation).
    14.7 We are entitled to take financial means into account at the second stage, in determining whether to make any award at all.
    14.8 Finally, if an award is appropriate, we must go on to determine the amount.
    14.9 Again, it will be relevant at this stage to consider the question of the claimant's means.
    14.10 The costs awarded need not be directly caused by the unreasonable conduct identified, although the Tribunal must consider the nature, gravity and effect of the conduct in broad terms when determining the amount.

15. In addition to the general principles set out above, we paid careful regard to the authorities dealing with applications arising out of dishonesty and false evidence. In **Daleside Nursing Home Ltd v Matthew EAT 0519/08** the Employment Appeal Tribunal held that the Employment Tribunal had reached a perverse decision when concluding that the making of false allegation which lay at the heart of a race discrimination claim did not constitute unreasonable action in bringing the claim. However, the Judgment stressed that the decision was not intended to create a general principle. In the subsequent case of **HCA International Ltd v May-Bheemul EAT 0477/10** the EAT noted that "*a lie on its own will not necessarily be sufficient to found an award of costs. It will always be necessary for the Tribunal to examine the context and look at the nature, gravity and effect of the lie in determining the unreasonableness of the alleged conduct*." (A statement approved by the Court of Appeal in **Arrowsmith v Nottingham Trent University 2021 ICR 159, CA**).

Submissions

16. Ms Rollings summarised the respondent's detailed written application. She emphasised the serious nature of Mr Veiga's conduct in relation to the screen shots (discussed further below) and in making unmerited allegations of discriminatory comments. She also emphasised the large sums of money

claimed in Schedules of Loss which had been served by Mr Veiga in the course of the litigation and said that that made settlement a 'non-starter'. The respondent had been put to great expense defending the claim and had no real choice in the matter. When asked by the Judge about the successful wages claim, Miss Rollings noted that this had been for a very small sum and the respondent's concession was based on reasons of proportionality and commerciality. It should not be held against the respondent in the context of this application.

17. When Mr Veiga was given the opportunity to make submissions he spoke through the interpreter for around 20 minutes in a clear and courteous way. Unfortunately, however, almost everything he said was directed towards repeating his submissions at the final hearing about why it was the respondent that was untruthful and that the Tribunal should accept everything he said in his underlying claim and find that he had been discriminated against. We understand that Mr Veiga does not agree with our Judgment, but it is not the purpose of today's hearing to re-visit that Judgment.

Discussion and conclusions

18. Although we generally preferred the evidence of the respondent's witnesses at the liability hearing, we considered that, for the most part, the disputes of fact in this case were very much within a parameters of 'normal' disputes heard by the Tribunal. Some (although not all) of the differences in evidence could be explained by differences in recollection or interpretation, particularly given the language barrier. We also note that had the respondent in this case acted better overall, the likelihood of litigation could have been significantly reduced. In this respect the respondent's poor administration (for example the failure to complete the contract correctly, and failure to send any letter acknowledging the claimant's resignation and setting out termination payments) is relevant, as well as their failure to resolve the legitimate wages dispute at an early state (see paragraph 76 of the liability Judgment).

19. The key factor which takes this case outside the normal parameters of disagreement, is the screenshot evidence. As set out in paragraph 36 of the liability Judgment, we found that Mr Veiga had presented 'doctored' screenshots in an attempt to persuade the Tribunal that he had declared his disability to the respondent when he had not. This dishonesty encompassed not only the presentation of doctored screenshots which were supposed to show that he had completed information related to his diabetes within the C247 app, but further doctored evidence of the electronic 'properties' of the screenshots which was intended to substantiate his assertions that the screenshots were genuine. Mr Veiga then lied when giving evidence on oath about having done so. It is worth noting that, even today, Mr Veiga continued to argue that the screenshots were accurate.

20. Mr Veiga's actions put the respondent to considerable cost and inconvenience in obtaining evidence to disprove the apparent evidence of the screenshots. Had they been unable to do so, the screenshots would have had a significant bearing on the evidence in the case. In a case which turned largely on credibility, the outcome could well have been different.

21. In those circumstances, we consider that Mr Veiga's conduct of the litigation, in relation to the screenshots, was unreasonable, within the meaning of Rule 76(1)(a). It was conduct of a serious and grave nature, which could have had a very significant effect on the course of the litigation.

22. As the threshold set out in Rule 76(1)(a) has been passed, we have a discretion whether or not to award costs. We move into the second stage of deciding whether it is right to do so in this case.

23. We remind ourselves that costs are the exception and not the rule, but we find that Mr Veiga's conduct in relation to the screenshots was exceptional. Mr Veiga has urged us take into account the fact that he is a litigant in person with a limited grasp of English. We take account of both of those factors, but find that neither would cause or excuse him in faking evidence to put before the Tribunal, which is what we have found he has done.

24. A more persuasive factor against awarding costs is Mr Veiga's very limited financial means, and the fact that any meaningful award will, inevitably, have a negative effect on his children by reducing the already limited funds available to the family. Our conclusion in this case, however, is that that is a factor is more properly taken into account in determining the level of the costs award. The gravity of the unreasonable conduct we have found is, in our view, so serious, that a failure to make any award would represent a serious injustice to the respondent, and also send an unacceptable signal to Mr Veiga (and potentially other litigants) about their ability to introduce evidence of this nature into Tribunal proceedings with no effective consequences.

25. We conclude that it is appropriate to make a costs Order in this case, and move to the third stage of determining the value of that Order.

26. The respondent invites us to make an Order in the maximum sum of £20,000. The production of the screenshot evidence has been a major factor in this case and we would not seek to limit the award purely to costs occasioned directly by the need to disprove it. However, even leaving aside questions of Mr Viega's means, we would not be prepared to award the maximum sum. That matters set out in paragraph 18 above are relevant, and would, in our view, justify a substantial 'discount' from the full amount claimed.

27. With that discount, the likely figure reached would still have been in excess of £10,000. As a panel, we did not finalise that figure, because we were each very firmly of the view that, having proper regard to Mr Veiga's financial means, we would be unwilling to make an award of anywhere near that sum.

28. We sought to balance the need to compensate the respondent and make an award which is meaningful, against the difficulty that any award would undoubtedly present to Mr Veiga and his dependents. We also took into account that Mr Veiga should still have some 'credit' for the matters referred to above, and the fact that there was only one aspect of his conduct of the case which gave rise to serious concern on the part of the Tribunal.

Balancing all those factors, we unanimously agreed on the final figure of £2,000.

Employment Judge Dunlop

Date: 16 January 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

Date; 25 January 2024

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FOR EMPLOYMENT TRIBUNALS