Case Numbers: 2202809/2020
2200247/2021

Reserved Judgment

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondent**
Mr S Khakimov		**Nikko Asset Management Europe Ltd**

JUDGMENT ON COSTS OF THE EMPLOYMENT TRIBUNAL

SITTING AT: London Central **ON: 15 February 2024; 16 February 2024 (in chambers)**

BEFORE: Employment Judge A M Snelson MEMBERS: Ms M Foster-Norman Ms S Aslett

On hearing Ms D Kasimova, lay representative, on behalf of the Claimant and Mr A Smith, counsel, on behalf of the Respondent, the Tribunal determines that:

(1) Although it has jurisdiction to make an order costs against the Claimant, the Tribunal in its discretion elects not to make any such order.
(2) Accordingly, the Respondent's application for costs is refused.

REASONS

Introduction

1 By a reserved judgment with accompanying reasons running to 253 paragraphs sent to the parties on 7 November 2023 following a hearing held on 2-20 October 2023 (the last two days being devoted to private deliberations in chambers), this Tribunal dismissed all the Claimant's claims either on withdrawal or on their merits and held that of those dismissed on their merits, all bar three (two under the Equality Act 2010 and the complaint of unfair dismissal) also failed on the ground that they had been presented out of time and so fell outside the Tribunal's jurisdiction. That document should be read alongside these reasons.

2 On 4 December 2023 the Respondent presented an application for costs, claiming £1.3 million. Detailed grounds were supplied.

3 On 15 December 2023, by a letter of some 16 pages, the Claimant resisted the application, giving detailed grounds for doing so.

4 The Respondent reconsidered its position in short order and gave notice that its application for costs would be limited to £20,000, the maximum sum awardable without a detailed assessment.

5 In correspondence the Claimant pursued various applications relating to the dispute over costs, necessitating an exceptional degree of intervention by the Tribunal. Two were pressed up to the hearing. We will return to them shortly.

6 The costs application came before us on 15 February this year with two days allocated by way of a 'remote' hearing by CVP. The Claimant was represented by his wife, Ms D Kasimova. The Respondent appeared by Mr Andrew Smith, counsel, who had represented it throughout.

7 The judge had given advance notice that the Tribunal would not be able to sit on the afternoon of the first day of the listing and that the parties would be expected to complete any evidence and oral argument on the morning of that day, leaving day two for the Tribunal's private deliberations and judgment-writing.

8 Of the two pre-hearing applications by the Claimant, the first was not pursued before us. He had sought some form of privacy order to protect certain information concerning his finances but, on being (a) assured that the Tribunal would approach such material discreetly and place it on the record only to the extent that it was necessary to do so and (b) reminded of the cardinal principle of open justice, Ms Kasimova, having taken the Claimant's instructions, told us that she would not seek the order which had been proposed. The second application had sought an order for the Respondent to reveal the costs which it had incurred (or committed) in pursuit of the costs application. We stated our preliminary view that it would not be proportionate to grant such an order, but that the Claimant would be free to make points (if so advised) about the *animus* or motivation which, he felt, might underly the costs application. After taking the Claimant's instructions Ms Kasimova did not expressly abandon or withdraw the application, but nor did she press us for a formal adjudication upon it. Accordingly, we left the matter there. But for the avoidance of any doubt, if a ruling had been required, it would have been to reject the second application since (a) it was directed to a point which was largely irrelevant (what mattered was not *why* the Respondent had applied for costs but whether the application had merit) and (b) it would obviously offend against the overriding objective and in particular the principle of proportionality (see the Employment Tribunals Rules of Procedure 2013, r2) to entertain it.

9 Preliminaries completed, Mr Smith told us that he would not seek to cross-examine the Claimant on his means. Accordingly, we moved at once to his oral submissions, which occupied about half an hour. After a second break, we next heard Ms Kasimova in reply, which took about an hour and a half, inclusive of breaks. The hearing on day one was completed at about 12.40 p.m. Day two was utilised as anticipated.

The applicable law

10 The power to make costs awards is contained in rule 76 of the Employment Tribunals Rules of Procedure 2013, the material part of which is the following:

> **(1) A Tribunal may make a costs order … , and shall consider whether to do so, where it considers that –**
>
> **(a) a party … 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.**

As the case-law explains, the rule poses two questions: first, whether the Tribunal has power to make an order; second, if so, whether the discretion should be exercised (see *eg Oni v Unison* [2015] UKEAT/0370/14).

11 By rule 84 it is provided that, when considering whether to make a costs order and, if so, in what amount, the Tribunal 'may' have regard to the putative paying party's ability to pay any award.

12 We are mindful of the fact that orders for costs in this jurisdiction are, and always have been, exceptional. Employment Tribunals exist to provide informal, accessible justice for all in employment disputes. We recognise that, if Tribunals resorted to making costs orders with undue liberality, the effect might well be to put aggrieved persons, particularly those of modest means, in fear of invoking the important statutory protections which the law affords them. It would be contrary to the purpose of the Tribunals if parties to disputes declined to exercise their right to bring (or contest) proceedings as a result of unfair economic pressure. On the other hand, we also bear in mind that, when our rules of procedure were revised in 2001, the Tribunal was for the first time not merely permitted, but obliged, to consider making a costs order where any of the prescribed conditions (vexatiousness, abusiveness etc) was fulfilled, and a new and wider criterion of unreasonableness was added. It seems to us that these innovations, preserved in subsequent revisions of the rules, indicate a policy on the part of the legislature to encourage Tribunals to exercise their costs powers more freely than they did in the past, where unmeritorious claims or defences are pursued or where the manner in which litigation is conducted is improper or unreasonable.

13 Where the discretion to make a costs order is engaged, the Tribunal must have regard to all relevant circumstances. One factor which is often significant is whether the putative 'paying party' has, or has not, been legally represented. The Tribunal has been warned against judging unrepresented litigants by the same standards as professional representatives (see *eg AQ Ltd v Holden* [2012] IRLR 648 EAT).

14 The word 'may' in r84 means what it says: it conveys a discretion. But the Employment Appeal Tribunal has commented that it will very often be appropriate to take account of means and the Tribunal should always give reasons for its decision whether or not to do so (see *Jilley v Birmingham & Solihull Mental Health NHS Trust* UKEAT/0584/06 and UKEAT/0155/07).

Materials

15 We had before us a bundle of documents of about 500 pages, the Claimant's witness statement directed to the subject of his means, Mr Smith's skeleton argument and a bundle of authorities.

The rival cases on costs

16 The parties have argued their positions very fully on paper and their contentions can largely be left to speak for themselves. In bare summary, Mr Smith's main case was that a costs award was warranted because the Claimant had acted unreasonably (a) in bringing claims which, as he must have known, had no merit and (b) in the manner in which he had conducted the litigation. It followed that the Tribunal had power to make an order. Moreover, it should exercise the power because this was a bad case and the Claimant had capital assets and income potential such that he had ample means to find the modest sum claimed.

17 Ms Kasimova argued that the claims had been arguable and properly brought and fiercely denied that the Claimant had acted unreasonably in the way in which he had conducted them. On her case, the unreasonableness had all been on the Respondent's side.

Analysis and conclusions

18 On balance, we are not persuaded that the Claimant acted unreasonably in bringing his claims. The fact that they comprehensively failed does not by itself justify that conclusion. They are not shown to have been brought in bad faith. They did not fail on account of resting on a false narrative and although some were, on analysis, shown to be notably weak, we cannot say that any had no reasonable prospect of success. Bearing in mind the dangers of hindsight and the allowances to be made for an unrepresented party, we find that the Respondent's first argument falls short of establishing unreasonableness of the sort which engages the statutory discretion. Rather, the wise and humane observations of the EAT in ET Marler Ltd v Robertson [1974] ICR 72 (Sir Hugh Griffiths and members) seem to us to be in point (p74):

> **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 combatants once they took up arms.**

19 Turning to unreasonable conduct, we see matters quite differently. In our judgment the Claimant's conduct of this litigation was grossly unreasonable in numerous respects. We could almost leave the litany of unreasonable acts and omissions set out in the Respondent's letter of application of 4 December 2023, pp2-4 to speak for itself.[1] In particular, unreasonableness is manifested in the numerous unmeritorious applications which the Claimant has pursued, his repeated breaches of case management orders and his many groundless appeals

[1] See also our observations in our original Reasons, at para 6.

against the Tribunal's procedural decisions. The massive expense in time and trouble to which he has put the Respondent is out of all proportion to the relatively straightforward issues for decision. Likewise his squandering of the Tribunal's meagre and overstretched judicial and administrative resources. He is, as we have found, a highly articulate and intelligent individual and we have no doubt that he has been fully aware throughout of the actual or likely consequences of conducting the dispute in the style and manner in which he has chosen to conduct it. There is no medical evidence before us to suggest that his behaviour can be excused or explained on medical grounds. (No such argument was advanced – by way of defence or mitigation. Rather, his case before us (through Ms Kasimova) was simply to deny any unreasonableness and press ambitious arguments seeking to place the blame for the procedural history on the Respondent.) In the circumstances, we conclude without hesitation that the Claimant's conduct of the proceedings has been such that the Tribunal has jurisdiction to make a costs order.

20 Should the Tribunal exercise its power to award costs and if so, in what sum? We take the view that, in principle, a costs order would be entirely proper and that the appropriate award would be the capped sum claimed, namely £20,000. This is a particularly bad case and the award would represent little more than token compensation for the costs to which the Claimant has quite unjustifiably put the Respondent, which stand at many times that figure. Nor is there a rational basis for granting costs in a lesser sum.

21 Should our 'in principle' position be adjusted to take account of the Claimant's means? We think that it should. Rule 84 specifically refers to ability to pay and it seems to us that the starting-point must be that Parliament regards that as a material consideration. The trend of the case-law is to the same effect (see *eg Jilley*).

22 If the Claimant's means are to be taken into account, what is the proper adjustment? We find on the evidence presented that the Claimant is without an earning capacity at present. His medical state may improve in the future, but we are not in a position to make an assessment as to how good his prospects of returning to gainful employment are, let alone how long it may take him to do so. We are driven to treat him as income-poor for the time being. As to capital, there seems to be equity of between £200,000 and £300,000 in his property (the family home). On any view, that represents many times our 'in principle' award, but the difficulty is that there is an obvious doubt as to whether, given his lack of income, he would be in a position to remortgage, even to the extent of raising an extra £20,000. On balance, we conclude that the Claimant's (only significant) capital asset cannot safely be treated as liquid.

23 For all of these reasons, on the rough-and-ready assessment which it has been necessary for us to make, we have concluded that the Claimant would not have the means to meet an award of £20,000 or any appreciable part of that sum, and that in the circumstances the justice of the case is met by leaving the Respondent with the findings which we have made in their favour, but making no award of costs.

24 Finally, we wish to make three observations. First, we have arrived at our decision with some difficulty. We can well see that another Tribunal in like circumstances might have granted the Respondent's application in full. As we have explained, there were powerful grounds for bringing it. Secondly, we are troubled by the absence of any contrition on the Claimant's part. After a narrow escape from a second costs order in this case we hope that his disastrous experience in this litigation, and our findings about the way in which he has conducted it, will cause him to reflect anew on his behaviour and its dangers, both for him and for those for whom he cares. Any further irresponsible resort to litigation by him might have much more painful consequences. Thirdly, we also hope that the Claimant will not continue to disregard the medical advice consistently offered that prolongation of hostilities between him and the Respondent is contrary to his interests and will serve only to prejudice his prospects of recovery.

Employment Judge Snelson

20 February 2024 _

Judgment entered in the Register and copies sent to the parties on 1 March 2024
for Office of the Tribunals