EMPLOYMENT TRIBUNALS

Claimant: **Mr D Long**

Respondent: **Arrow Precision Manufacturing Ltd**

Heard at: **Watford** **On:** **12 March 2024**

Before: **Employment Judge K Hunt**

Representation
Claimant: not in attendance (decided on the papers)
Respondent: not in attendance (decided on the papers)

JUDGMENT ON A COSTS APPLICATION

The Respondent's application for costs under Rules 76(1)(a) and 76(1)(b) of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 is refused and no order for costs is made.

REASONS

Background to Application

1. The claimant brought a claim for constructive dismissal following a period of layoff about which he raised a grievance and for breach of contract for 4 weeks' loss of wages during the period of lay-off. It was the claimant's case that lay off was not properly applied and was in breach of his 2005 Contract and that he resigned due to a loss of trust and confidence in the respondent's managing director, which had been damaged beyond repair. The respondent defended the claims and relied on its right to apply layoff under the 2018 Contract with an express clause providing for lay off and/or alternatively on custom and practice. The claims were heard on 6 and 7 November 2023 and both parties were unrepresented. Oral judgment was given on the second day of the hearing and both claims were dismissed. The Judgment was sent to the parties on 21 December 2023.

2. The respondent's representative requested written reasons and submitted an application for costs by letter dated 17 January 2024, copied to the claimant. The claimant submitted his objections to the application by letter dated 22 January 2024. Written reasons were provided on 13 February 2024 to send to the parties and the Judge ordered that the application would be considered based on their written representations.

Application and Submissions

3. The respondent asks the Tribunal to make a costs order in the sum of £8500 representing the Respondent's legal costs incurred (excluding VAT and limited to the applicable court rate) for legal advice received by a Grade A solicitor with over 20 years qualification. The costs incurred and legal advice related to responding to the claim and steps taken in preparation for the hearing, though not representing the respondent at the hearing.

4. In its application the respondent submits that before the claim was issued and throughout the proceedings, it put the claimant on notice that costs would be claimed if he continued with his unfounded allegations'

5. The respondent's application is made under Rule 76(1)(a) and/or (b) (set out below) and the respondent says that costs should be awarded against the claimant because the claimant's claim was:
    i. vexatious; and
    ii. had no reasonable prospect of success.

6. The respondent acknowledges that the claimant was unrepresented when engaging with Acas and relies on the claimant being fully aware that a costs application would be made if he did not withdraw his claim because Mr Brudenell-Bruce (the respondent's managing director) made it clear to Acas that he would not settle if the claimant pursued legal action and specifically told Acas that no settlement negotiations would be entered into because the facts were clear that the Claimant's claim was motivated by greed and malice; that the Claimant was angry that he had not been made redundant as he had demanded; that if the Claimant continued with his claims they would be defended; and that the Claimant should be under no doubt that a claim for costs would be made against him if he made a claim. The respondent asserts in its application that the conversation and warning would have been discussed with the Claimant by Acas but he issued the claim regardless of knowing the costs warning given.

7. The respondent further relies on comments made by the claimant during the first grievance meeting (which was recorded) asserting that he stated:

"I spoke to a lawyer"
"it cost me"
"It was my choice"

8. Further during the second grievance meeting (which recording was not produced in evidence by the respondent and was no longer available at the time of the hearing) asserting that he stated:

"The ACAS man told me"
"case law"
"probably about 50/50"

9. The respondent relies on this as evidence that by his own admission the claimant sought legal advice before commencing proceedings but was not legally represented asserting in the application that this was "most probably due to being told he had no prospect of success". The respondent also asserts that following the claimant's alleged conversation with ACAS "they also stated that at best he had a 50/50 case".

10. The respondent refers to its ET3 response in which it was stated that the claim had no merit and should be struck out as an abuse of process, on the grounds that it was vexatious and had no reasonable prospects of success and requesting that the claimant be subject to a deposit order. I note that no application for a deposit order was subsequently made or ordered, though this is a factor, it is not determinative of the application now.

11. In addition, the respondent relies on Mr Brudenell-Bruce's witness statement in the proceedings, in which he stated:
"*I am conducting the hearing myself but I have already incurred substantial legal fees by defending this frivolous and malicious claim. When Dave's claim fails I respectively ask the Tribunal to award costs against him on an indemnity basis as this claim has never had any prospect of succeeding as the 2018 contract allows for layoff and he knew full well that layoff and short term working were custom and practice."*

12. Finally, the respondent's representative in the application refers to the final hearing (at which Mr Brudenell-Bruce represented the respondent) and submits that it is their understanding that "the Tribunal Judge made findings that the Claimant had been untruthful in his responses throughout the hearing". Written reasons had been requested with a view to including some of the Judge's comments in support of the application but had not been received at the date of submitting the application. Written reasons have since been provided and notice is taken of this submission and will be addressed further below.

13. In objecting to the respondent's application for costs, the claimant submits that as an unrepresented individual, his conduct in the case was reasonable in the circumstances.

14. He addresses the respondent's first ground that the claim was vexatious, and denies that he ever demanded to be made redundant; that he had been planning to stay until retirement and that after 17 years of loyal service, during which he made sacrifices for the company and went above and beyond his duties, submits that he fails to see how this can be seen as 'greedy and malicious'.

15. The claimant submits that his claim was made because he believed that the layoff was wrongly put in place and not in the contract that he was working under and that the process was not timely and in light of this he had no alternative but to leave his employment. Further that he contacted Acas in the hope that the matter could be settled amicably outside of the tribunal system and that the respondent refused to engage in early conciliation.

16. In addressing the respondent's second ground that the claim had no reasonable prospects of success, he refers to his evidence at the hearing that he was never told that the contract he had been given (the 2018 contract) was the final one, and that this was said to have been at a meeting that he did not recall and for which there was no proof of it happening. He accepts, however, that Mr Holloway's evidence on this was accepted by the Tribunal and that he was unable to prove that he was never told it was final. He submits that if he believed or had been advised that his claim was not reasonable, he would not have proceeded with a claim.

17. In response to the comments relied on by the respondent at the first grievance meeting, as detailed above, he submits that he did not in the end speak to a lawyer due to costs and spoke to the CAB and Acas.

18. With regard to comments at the second grievance meeting, he submits that if this was recorded it was without his knowledge and notes that it was not submitted as evidence nor was he provided with any minutes of the meeting.

19. In response to the submissions made by the respondent in its application on those alleged comments, he says that he spoke to the CAB and Acas and was told by Acas that unfair dismissal claims generally have a 50/50 outcome. He states that he was never advised that **his** claim was 50/50 or that he did not have a reasonable

claim. He again submits that if he believed, or had been made aware, that his claim was not reasonable, he would not have proceeded with a claim.

20. He submits that during the grievance meetings he felt under pressure and was frustrated at not being able to finish sentences and being talked over; that he felt the grievance was not handled well due to there being no independent person involved in the decision making; and that there was no response to his appeal which is why he was keen to engage in Acas early conciliation so an independent source could support with getting a mutually beneficial outcome.

21. He asserts that the reason he was not represented during the hearing or beforehand was for financial reasons as he was unable to afford legal representation.

22. Finally, it is his submission that during the tribunal hearing, he was truthful throughout, but sometimes had trouble expressing himself effectively and getting his point across. He submits that at no point did he tell untruths as asserted by the respondent.

The Issues

23. The issues to be determined are:
    a. Has the claimant acted vexatiously in the bringing or conduct of proceedings (rule 76 (1) (a) of the ET Rules)? and/or
    b. Did the claim have no reasonable prospects of success (rule 76 (1) (b) of the ET Rules)?
    c. If either section above is engaged, in the Tribunal's discretion, should a costs order be made?
    d. If so, how much should be awarded?

Relevant Law

24. References to rules below are to Rules under Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. The rules relevant to cost applications are set out in Rules 74-78 and 84.

25. Rule 76 (1) provides that:
"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*
>
> *....."*

26. Rule 77 provides that:
> *"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.*

27. Rule 78(1) provides that:
> *"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;…."*

28. Rule 84 provides that:

"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."

29. **Haydar v Pennine Acute NHS Trust UKEAT 0141/17/BA** In deciding whether to make an award for costs, there are three stages that a Tribunal must consider. First, a Tribunal must ask whether a party's conduct falls within rule 76(1)(a) or 76(1)(b). If so, secondly, the Tribunal must go onto ask whether it is appropriate to exercise the Tribunal's discretion to award costs against that party. If so, thirdly the tribunal may proceed to consider the amount of any award payable.

30. **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.

31. **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.

32. **Health Development Agency v Parish [2004] IRLR 550, EAT** . The discretion to make an order under Rule 76(1)(a) concerns the bringing or conduct of proceedings. A party's conduct prior to proceedings cannot found an award of costs.

33. "Vexatious" was defined by Lord Bingham in **Attorney General v Barker [2000] 1 FLR 759** and cited with approval by the Court of Appeal in **Scott v Russell [2013] EWCA Civ 1432** in relation to costs awarded by a Tribunal: "*The hallmark of vexatious proceedings is…that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant…*"

34. **Radia v Jefferies International Ltd EAT 0007/18** The EAT gave guidance on how tribunals should approach costs applications under rule 76(1)(b). The test is whether the claim had no reasonable prospect of success, judged on the basis of the information that was known or reasonably available at the start. The tribunal must consider how, at that earlier point, the prospects of success in a trial that was yet to take place would have looked. It should take account of any information it has gained, and evidence it has seen, by virtue of having heard the case, that may properly cast light back on that question, but it should not have regard to information or evidence which would not have been available at that earlier time. Whether the claim had no reasonable prospects from the outset, or whether the claimant could or should have appreciated this from the outset depends on what the claimant knew, or ought to have known, were the true facts, and what view the claimant could reasonably have taken of the prospects of the claim in light of those facts.

35. **AQ Ltd v Holden [2012] IRLR 648, EAT**. In exercising the discretion under both sub-sections representation is relevant – a party which is not professionally represented should not be judged by the same standard as a party who is professionally represented; although awards may be made against unrepresented parties, who can be found to have behaved vexatiously or unreasonably, even when proper allowance is made for their inexperience and lack of objectivity.

36. **Lake v Arco Grating (UK) Ltd EAT 0511/04, Rogers v Dorothy Barley School EAT 0013/12** Whether or not a costs warning has been given is a factor a Tribunal may take into account in exercising its discretion.

37. There is also Presidential Guidance on costs (Presidential Guidance; General Case management – Guidance Note 7 Costs) which I have taken into account.

Conclusions

38. The respondent seeks a costs award against the claimant of £8,500 and in summary submits that the bringing of the claimant's claim was vexatious and motivated by 'greed and malice' and that it had no reasonable prospects of success, as the 2018 contract allows for layoff and the claimant knew that layoff and short term working were custom and practice, as outlined above.

39. The claimant denies that he acted vexatiously in bringing the claim or was motivated by greed or malice and that as an unrepresented individual believes that his conduct in the case was reasonable. He submits, in summary, that his claim was made because he believed that the layoff was wrongly put in place and that if he believed or had been advised that his claim was not reasonable he would not have proceeded with a claim, as outlined above.

Has the claimant acted vexatiously in the bringing or conduct of proceedings (rule 76 (1) (a) of the ET Rules)?

40. In considering this question, I am mindful that the discretion to make an order under Rule 76(1)(a) concerns the bringing or conduct of proceedings and a party's conduct prior to proceedings cannot found an award of costs. In its application, the respondent relies on an alleged demand for redundancy during the grievance process in support of its contention that the claimant was motivated by greed and malice. The claimant denies this. This was not an issue that was put to me nor on which I needed to make a determination or finding at the hearing and even if there were a finding of a demand for redundancy during the grievance process, I conclude that cannot found a claim for costs.

41. In its application the respondent also relies on warnings given to the claimant prior to issuing the claim, made via Acas that it believes was or would have been relayed to the claimant, that costs would be sought if he pursued a claim and that the bringing of the claim was vexatious. The respondent does not specifically point to conduct on the part of the claimant during the proceedings, save that further costs warnings were given in the ET3 and in Mr Brudenell-Bruce's witness statement to that effect.

42. On the latter point, I do take note that in its application the respondent's representative made reference to their understanding that I made findings that the claimant had been untruthful throughout the hearing. Having delivered my oral judgment at the hearing, written reasons have now been provided. As to any such findings, there were findings made on matters that the claimant in evidence said he did not recall and I accepted the evidence of other witnesses, in particular Mr Holloway, as referenced by the claimant himself (above) and occasions where I weighed the evidence from witnesses and in the bundle of documents, and in the absence of additional supporting evidence on a given issue, made findings on the balance of and taking account of all of the evidence before me. I weighed the evidence in the balance and reached my conclusions on the balance of probability and made no express findings that the claimant had been 'untruthful throughout the hearing'.

43. In applying the law (**Attorney General v Barker** summarised above) as to the hallmark of vexatious proceedings, I also take account of the fact that the claimant is a litigant in person and was unrepresented. In bringing his claims and in his conduct of the proceedings, including his evidence at the hearing and taking account of the written representations by both parties in this application, I find no

basis for the respondent's contention that the claimant's claim was motivated by 'greed and malice'. Furthermore, in the circumstances of the claimant's claims for constructive dismissal due to a loss of trust and confidence and for breach of contract for the loss of 4 weeks' pay, I do not conclude that they had little or no discernible basis in law, nor that in having to defend the claims the effect on the respondent was out of all proportion to any possible gain to the claimant. Accordingly, I conclude that the claimant did not act vexatiously in the bringing or conduct of proceedings and that s.76(1)(a) is not engaged.

Did the claim have no reasonable prospects of success (rule 76 (1) (b) of the ET Rules)?

44. In considering this question, I must consider that whether the claim had no reasonable prospect of success is judged on the basis of the information that was known or reasonably available at the start and taking account of the EAT's guidance in **Radia** above.

45. The respondent contends in its application that the claimant sought legal advice prior to bringing proceedings, that he was 'most probably' not represented because he was told he did not have reasonable prospects of success and that Acas told him he had a 50/50 chance of success. The claimant disputes this. I find no basis for the respondent's assumption as to any advice given to the claimant and I accept the claimant's submission that he was not represented because of the cost. I also accept his explanation that Acas may have referred generally to prospects in unfair dismissal cases being 50/50 rather than to his case specifically. Acas has a clearly defined role in early conciliation and does not act as an advisor to either of the parties on the merits of a claim. I accept the claimant's submission that he was not advised that he did not have a reasonable claim and that if he believed his claim was not reasonable he would not have proceeded with a claim.

46. In its application the respondent also makes the submission, with reference to Mr Brudenell-Bruce's witness statement, that the claim never had any prospect of succeeding as the 2018 Contract allows for layoff and the claimant knew full well that layoff and short term working were custom and practice.

47. Whilst the ability or otherwise of the respondent to layoff the claimant in reliance on the 2018 Contract and/or according to custom and practice was a fundamental issue in the claim, in identifying the issues in the claim at the outset of the hearing, his constructive dismissal claim was based on whether the respondent's actions breached the implied term of trust and confidence, the loss of which, following the layoff and raising of a grievance, was relied on by the claimant in his claim form.

48. Given that the 2018 Contract was unsigned and it was disputed by the claimant that it was finalised and in effect, determination of this issue was largely based on witness evidence from the claimant and Mr Holloway in relation to events in or around May 2019 and reference to subsequent verbally agreed but undocumented changes in 2020, and on close examination of an unsigned but marked up copy of the 2018 Contract. There was little other corroborating documentation.

49. Having weighed the evidence, I found in favour of the respondent on this issue, though note that I necessarily weighed very carefully the reliance on an unsigned contract by the respondent in circumstances where the offending term did not have immediate effect.

50. Although it was not necessary to do so, I also noted in my judgment that I would have found in favour of the respondent in their alternative argument that there was a custom and practice of invoking layoff and short time work over the years.

51. In light of the above, in determining the issue as to whether therefore, the respondent's actions breached the implied term of trust and confidence, so as to found a claim of constructive dismissal, I made findings that as layoff was expressly provided for in the 2018 Contract and that notifying the claimant in writing in advance was reasonable in the circumstances, the respondent's actions had not breached the implied term of trust and confidence.

52. However, in considering the claim and response at the outset and the facts as found and in deciding whether the claim had no reasonable prospects of success, I must also ask myself what the claimant knew or ought reasonably to have known were the facts at the outset and what view of the prospects he ought reasonably to have formed based on the facts.

53. I conclude that the respondent's contention that there were no reasonable prospects of success because the 2018 Contract allows for layoff and the claimant knew full well that layoff and short time working were custom and practice, is not necessarily so. As a constructive dismissal and breach of contract claim the relevant findings of fact have to be made and the facts determined by me on this issue, were in large part determined on weighing in the balance witness evidence at the hearing from the claimant and Mr Holloway respectively. As set out above, in the absence of a signed contract, the respondent's reliance on the same and the application of the law in this regard was not cut and dried and the facts found and issue was not bound to be determined in its favour. Neither was the outcome in reliance on a defence of custom and practice.

54. The claimant advanced his case on the basis of a loss of trust and confidence following the layoff and although the claimant's claims ultimately were not successful, I do not conclude that the claimant knew or ought reasonably to have formed the view that his claim had no reasonable prospects of success from the outset.

55. Based on the claims asserted and on the issues and conclusions drawn above, overall I do not conclude that the claim had no reasonable prospects of success and therefore s.76(1)(b) is not engaged.

If either section above is engaged, in the Tribunal's discretion, should a costs order be made?

56. Although I have found that s.76(1)(a) and s.76(1)(b) are not engaged, and am not required to go further, whether I should award costs is a discretionary decision and is an exception and not the rule. In this case I would go on to say that if I had found that s.76(1)(b) was engaged, I would not have exercised my discretion to award costs based on the prospects of success of the claimant's constructive dismissal claim or his breach of contract claim. The claims pursued were not so outside the scope of an arguable case that may be brought before the tribunal by an unrepresented claimant. Neither is it an unusual occurrence in tribunal proceedings for an unrepresented claimant to pursue arguments which ultimately, after hearing the case, turn out not to have had much prospect of succeeding. I would not have awarded costs on that basis in this case based on the claimant's case that he resigned due to a loss of trust and confidence, a claim that in the circumstances was not an unreasonable case to pursue for the reasons outlined above and one which I note the claimant was keen to settle through Acas conciliation but with which the respondent chose not to engage, given its view the claim was based on greed and malice, for which I found no basis.

57. Having considered the submissions made carefully and taking account of the Rules, the Presidential Guidance and the case authorities and relevant factors, the respondent's application for costs is refused for the reasons above.

Employment Judge Hunt

Date 12 March 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON
13 March 2024

FOR THE TRIBUNAL OFFICE

Notes

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/