

RESERVED COSTS JUDGMENT



EMPLOYMENT TRIBUNALS

Claimant: X
Respondent: Lowell Financial Limited

Heard at Leeds Employment Tribunal on 21 June 2023

Before Employment Judge Deeley
Ms G Fleming
Mr C Langman

Appearances
For the Claimant: in person
For the Respondent: Ms A Smith (Counsel)

RESERVED COSTS JUDGMENT

1. The Claimant shall pay the Respondent £1,000 by way of costs.

REASONS

Introduction

1. These reasons should be read in conjunction with the Tribunal's detailed liability judgment which was sent to the parties on 16 February 2023 (the "**Reserved Judgment**").
2. The respondent submitted a detailed application for £20,000 of costs to the Tribunal (copied to the claimant) dated 3 March 2023 under Rules 76(1)(a) and 76(1)(b) of the Employment Tribunal Rules of Procedure. We have not reproduced the respondent's application in full, however we considered its contents carefully as part of this hearing. The basis for the respondent's application was that:
 - 2.1 *"the claimant has continued to behave vexatiously, abusively, disruptively or otherwise unreasonably in pursuing his claims more generally; and/or*
 - 2.2 *the claims had no reasonable prospect of success."*
3. The respondent later submitted a schedule of costs for costs totalling of around £74,000 (excluding VAT which the respondent accepted they could recover).

RESERVED COSTS JUDGMENT

4. The claimant objected to the respondent's costs application in his email of 9 March 2023. He detailed his objections in a further email on 18 June 2023 stating:

“Reasonable Conduct and Compliance:

Throughout the entire tribunal process, I diligently followed all case management orders and instructions provided by the tribunal. I conducted myself in a professional and respectful manner, and any communication with the tribunal and Lowell Financial was in full compliance with the tribunal's requirements.

...

Self-Representation:

Due to financial constraints, I was unable to obtain legal representation throughout the tribunal proceedings. As a result, I represented myself as a litigant in person, diligently preparing my case, conducting research, and presenting my arguments to the best of my abilities. However, the lack of legal expertise limited my ability to fully evaluate the strength or weakness of my case.

Mental Health Challenges and Medication:

During the course of the tribunal proceedings, I have been grappling with significant mental health issues.

Recognizing the impact of these challenges on my overall well-being and capacity to effectively represent myself, I sought professional help and have recently commenced a new medication regimen. This step aims to address and manage my mental health concerns, enabling me to better cope with the stress and pressures.

Whistleblower Status:

It is important to note that prior to initiating legal action, I was one of five whistleblowers who raised concerns regarding Lowell Financial. The decision to blow the whistle stemmed from a genuine desire to expose wrongdoing and protect the interests of both employees and the wider community. My status as a whistleblower further emphasizes the significance of the issues involved and the importance of addressing them through appropriate legal channels.

Financial Challenges and Loan:

Additionally, I faced substantial financial challenges as a result of being on long-term sickness absence for nearly two years. This extended period of absence placed a significant strain on my financial stability and well-being. To manage my financial obligations during this time, I was compelled to secure a loan. However, this loan further exacerbated my financial burden and created long-term repayment commitments.

Trust in the Tribunal Process:

RESERVED COSTS JUDGMENT

As a litigant in person, I placed my trust in the tribunal process and the expertise of the tribunal panel to guide me through the proceedings. I relied on the preliminary hearings and case management orders to shape the trajectory of the case. If my claim lacked merit or had no reasonable chance of success, I believed that the tribunal would have identified and communicated this to me at the earliest opportunity.

Considering the aforementioned factors, I respectfully request the tribunal to consider the overall context in which my claims were pursued. This includes my reasonable conduct, compliance with orders, efforts at reconciliation, self-representation due to financial constraints, mental health challenges and medication, whistleblower status, financial hardships, and trust in the tribunal process. Together, these factors demonstrate my sincere commitment to a fair and just resolution throughout the process.

I am currently suspended by Lowell Financial and I do not expect to be allowed to return to work. I will have to be placed on benefits and I fear my financial situation is going to worsen in the near future.

I support my wife she is here on a spouse visa and we have two young children. I will find it very difficult to pay a costs order.

I followed all the procedure and complied with all instructions to the best of my ability.

I have attached the income & expenditure and as you can see, I am just about keeping things together but financially and mentally have been struggling for a while now.”

5. The Tribunal panel considered submissions from both parties regarding the costs application and heard witness evidence from the claimant regarding his financial means.

Issues

6. The issues for the Tribunal to decide were:
- 6.1 Is the threshold for making a costs order met, in particular:
 - 6.1.1 did the claimant behave unreasonably in his conduct of the claims?
 - 6.1.2 did the claims have no reasonable prospect of success?
 - 6.2 If so, should the Tribunal make a costs order?
 - 6.3 If so, for how much?

Legal principles

7. The relevant parts of Rules 76 and 84 of the Employment Tribunal Rules of Procedure 2013 state:

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

(1) A Tribunal may make a costs 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.

RESERVED COSTS JUDGMENT

...

84 Ability to pay

In deciding whether to make a costs ... order, and if so in what amount, the Tribunal may have regard to the paying party's ... ability to pay.

8. In considering first of all whether to make a costs order, the following principles apply:
 - 8.1 Litigants without legal representation are not to be judged by the standards of a professional representative - the Tribunal must make an allowance for inexperience and lack of objectivity: see *AQ Limited v Holden* [2012] IRLR 648 EAT.
 - 8.2 The Tribunal must identify the unreasonable conduct, say what was unreasonable about it and say what its effect was: see *Yerrakalva v Barnsley MBC* [2012] ICR 420 CA. However, it is not necessary to link the costs awarded to costs caused by unreasonable conduct, i.e. the receiving party does not have to prove that the unreasonable conduct caused particular costs: see *Macpherson v BNP Paribas* [2004] ICR 1398 CA.
 - 8.3 The test is whether a claim had no reasonable prospect of success, judged on the basis of the information that was known (or reasonably available) at a particular point in time: see *Radia v Jeffries Ltd* EAT 0007/18.
 - 8.4 If a party has lied in the course of its evidence, that is not necessarily sufficient to lead to an award of costs. The Tribunal has to have regard to the context, and the nature, gravity and effect of the untruthful evidence in determining the question of unreasonableness: see *Arrowsmith v Nottingham Trent University* [2012] ICR 159 CA.
9. If the Tribunal decides that a party's conduct falls within Rule 76(1)(b), the Tribunal must then consider whether it is appropriate to exercise its discretion in favour of awarding costs against that party and, if so, the amount of any such award. We note that:
 - 9.1 Costs in the Tribunal are the exception, rather than the rule: see *Yerrakalva*.
 - 9.2 The Tribunal can take into account whether a party sent a 'costs warning letter': *Oko-Jaja v London Borough of Lewisham* EAT 417/00.
 - 9.3 The purpose of costs are to compensate the party who makes the application and not to punish the paying party: see *Lodwick v Southwark London Borough Council* 2004 ICR 884.
 - 9.4 The Tribunal is not required to limit any costs order to a sum that the paying party can afford to pay: *Arrowsmith*. The Tribunal must, however, give proper consideration to such matters as future earning capacity and the alternatives to making a whole costs order: see *Herry v Dudley Metropolitan Council* [2017] ICR 610.

RESERVED COSTS JUDGMENT

Was the claimant's conduct unreasonable or did his claims have no reasonable prospect of success?

10. The claimant brought a total of seventeen complaints of discrimination spanning the period from 19 January 2021 to 8 March 2022, one of which he withdrew during the liability hearing of this claim. The claimant's complaints related to direct discrimination and harassment on the basis of (variously): disability, race and religion.
11. We decided that it was unreasonable for the claimant to pursue many of his complaints in the absence of evidence that either:
 - 11.1 such incidents took place; and/or
 - 11.2 that such incidents met the tests for direct discrimination and/or harassment on the basis of the claimant's protected characteristics.
12. Our detailed conclusions on each of the claimant's allegations are set out in full in the Reserved Judgment. The references to allegation numbers in this document are to the allegations in the Agreed List of Issues (at Annex 1 to the Reserved Judgment).
13. For some of the claimant's complaints, we concluded that there was no factual evidence that the incidents that he complained about had actually taken place, including:
 - 13.1 **Allegation 2** – we concluded that the claimant had not in fact requested holiday during Ramadan 2021 via the respondent's holiday booking system. In particular, the claimant was unable to recall the date on which he requested holiday or the dates of any potential leave that he requested.
 - 13.2 **Allegation 4** – we concluded that the claimant was aware that Miss Ramsden decided that both Mr Watson and Mr Hussain (who was of the same race and religion as the claimant) would cover her role whilst she was on four days' holiday. We accepted Miss Ramsden's evidence that they were the two highest scorers against the respondent's Mid-Year 2021 criteria. This suggested that the reason for Miss Ramsden's decision regarding holiday cover was not linked to race and/or religion;
 - 13.3 **Allegation 5** – the claimant was unable to provide the date(s) on which he alleged that Miss Ramsden told him that he could not attend to his father during working hours. The documents in the hearing file did not support the claimant's complaint that SR told him that he could not attend his father during working hours or that he would face disciplinary action for doing so.
 - 13.4 **Allegations 15 (1 March 2022)** – the claimant did not provide a sick note for his ongoing absence (1 to 31 March 2022) until after Mr Gregg had chased him for it. The sick note provided by the claimant to the respondent on 4 March 2022 was produced by the claimant's GP on 2 March 2022 and therefore could not have been provided by 1 March 2022.
14. For some of the claimant's other complaints, there was factual evidence that the incidents had taken place but we concluded that these did not amount to discrimination and/or harassment, including:

RESERVED COSTS JUDGMENT

- 14.1 **Allegation 6** – Miss Ramsden did not respond to the claimant’s message at 4.56pm on 23 July 2021 requesting ‘time back’. However, she had responded to three previous messages within the previous two minutes and the claimant’s final message was sent shortly before Miss Ramsden finished work on a Friday evening. The claimant did not chase Miss Ramsden up on this matter, despite exchanging other messages with Miss Ramsden on 26 July 2021. Miss Ramsden’s failure to respond was an oversight;
- 14.2 **Allegation 9** – no return to work meeting was carried out on 6 September 2021 because Miss Ramsden was on holiday on that date and the claimant changed teams (at his request) before she returned from leave;
- 14.3 **Allegation 11** – we concluded that Miss Ramsden sat in her usual desk (which had been adjusted specifically for her) near her own team and the management team on 29 September 2021. Miss Ramsden was not aware as to which days the claimant normally worked in the office because he was no longer part of her team and the claimant did not in fact attend the office on that day.

Should a costs order be made?

15. The Tribunal concluded that it should exercise its discretion to make a costs order. We considered that the claimant’s ability to pay could be taken into account when deciding how much to award and that it did not prevent the making of a costs order in principle.
16. The respondent wrote to the claimant on 4 January 2023 (after witness statements had been exchanged), explaining in detail its view that his claims had no reasonable prospect of success and inviting him to withdraw them without having to pay any costs (the “**Costs Warning Letter**”). The Costs Warning Letter stated that the respondent envisaged that its costs would be in the region of £50,000. The Costs Warning Letter also suggested that the claimant sought legal advice on his claim and include details of the Citizen’s Advice Bureau website and telephone number.
17. The claimant did not respond to the respondent’s Costs Warning Letter. He stated in his submissions that:
- 17.1 he received some legal advice at the start of the proceedings but had since represented himself;
 - 17.2 he had complied with each of the case management orders;
 - 17.3 the respondent’s application for strike out of his claim was rejected and the respondent had not sought a deposit order at any of the preliminary hearings;
 - 17.4 his claim involved complex issues and he strongly believed that he had been mistreated; and
 - 17.5 he believed that the respondent was ‘victimising’ him for bringing a Tribunal claim and was likely to dismiss him shortly after the hearing on 21 June 2013;
 - 17.6 he received the Costs Warning Letter shortly before the hearing date and thought: *“it may just be a tactic deployed to scare me off from taking my claim further and getting a fair hearing...My focus was on representing myself as best I could.”*
18. The Tribunal took into account that the claimant was not legally represented during these proceedings. We also appreciate that the claimant suffered (and continues to suffer) from

RESERVED COSTS JUDGMENT

difficulties relating to his mental health. However, he was an able and articulate person, having represented himself during the preliminary hearings, the six days during which the parties were present at the liability hearing and at this hearing on 21 June 2023.

19. In all the circumstances, the Tribunal considered that it was appropriate to make a costs order in this case.

For how much?

20. The Tribunal took into account the Claimant's ability to pay a costs order. The claimant's current net pay is around £1749.02 per month, according to his May 2023 payslip. However, we note that the claimant was absent on long term sick leave from January 2022 to 1 March 2023. The claimant was on nil pay from 11 May 2022. On 1 March 2023, the claimant returned to work and was suspended on full pay, pending the disciplinary proceedings against him that were ongoing as at the date of this hearing.
21. We accepted the claimant's oral evidence regarding his financial means, including his evidence that:
- 21.1 his immediate family (i.e. himself, his wife and his children) live with his extended family and pay £400 per month towards living costs;
 - 21.2 his monthly bills (including food, council tax, car insurance, fuel/travel, mobile phone and TV subscription) are around £865 per month;
 - 21.3 he owns a 2006 registered car that is worth around £1200. He uses the car to take his young children to school;
 - 21.4 he has a loan of £10,000 (which will increase to around £15,000 with interest) that he is repaying at £250 per month;
 - 21.5 he owes around £4000 in credit card payments and has been making minimum payments towards this debt for around five years.
22. The claimant's total outgoings are around £1515 per month and his partner (who does not work) receives child benefit of £82 per month. The claimant's remaining net income is around £235 per month.
23. The claimant is awaiting a reconvened disciplinary hearing into matters which the respondent has informed him may (if proven) be treated as gross misconduct. The claimant stated that he believed that he was 'most likely to be dismissed' as a result of the disciplinary proceedings, which relate to matters dating back to 2021. The respondent's letter of 25 May 2023 invited the claimant to attend a disciplinary hearing to consider two allegations:

"1. It is alleged that the trust and confidence required to maintain an employment relationship between you and Lowell has been fundamentally and irrevocably broken as a consequence of the behaviour you have displayed between 2021 to present day, including behaviour which has directly led to colleagues reporting a significant negative impact on their mental health and wellbeing as a consequence of your unfounded allegations of misconduct. There are several examples of colleagues feeling anxious about how you will interact with them and react to them during the course of the usual employee / employer relationship if your employment continued.

RESERVED COSTS JUDGMENT

2. *It is alleged that on 16th November 2021 you emailed sensitive personal data of persons, unknown to Lowell, to your work email address and subsequently stored this personal data on Lowell's system without informing anyone, in breach of the Data Protection requirements as set out in the contract variation you signed on 28th July 2021 and several policies, including but not limited to the UK Information Risk Policy, Acceptable Use Policy and UK Information Retention Schedule. Acts of this nature are (if proven) considered to amount to gross misconduct."*

24. We noted that the letter of 25 May 2023 also states:

"Subject to findings made following the hearing, a possible outcome of the hearing could be the summary termination of your employment on the grounds of gross misconduct or the termination of your employment on notice for some other substantial reason, namely a fundamental and irrevocable breakdown of the trust and confidence required to maintain the employment relationship."

25. The respondent's representative stated that there were 'a number of potential outcomes' to the disciplinary proceedings and that the claimant 'may not necessarily be dismissed'. However, given that one of the respondent's allegations is that the employment relationship has been "*fundamentally and irrevocably broken*", we concluded that there is a significant risk that the claimant's employment will be terminated in the short term.

26. The Tribunal approached this question on the basis that the claimant currently has the ability to pay a costs order. However, the Tribunal concluded that there is a significant risk that the claimant's ability to pay a costs will be affected by the outcome of the pending disciplinary proceedings.

27. The Respondent provided detailed schedules of loss. Its costs since the respondent sent the claimant the Costs Warning Letter which stated that the respondent's legal costs were in the region of £50,000. The Tribunal did not make any detailed assessment of those costs. Bearing in mind average rates of pay for solicitors and barristers, the seriousness of the allegations, the volume of the documentation, the number of applications and preliminary hearings and the nature and length of the final hearing, these costs are in the region that the Tribunal would expect to have been incurred.

28. But for his ability to pay, the Tribunal would have considered that the effect of his unreasonable conduct made it appropriate to award the respondent a greater proportion of its costs. Had we done so, we would have carried out a detailed assessment of such costs.

29. However, the Tribunal concluded that should exercise its discretion to order the payment of a lower figure, taking into account the claimant's ability to pay, including his existing level of debt. We concluded that the claimant should be ordered to pay £1,000 (one thousand pounds). Such a sum could be repaid, for example, at the rate of £25 per month over a three to four year period. The Tribunal considered that it was appropriate to order the payment of this lower figure, rather than a substantially higher sum that the claimant perhaps has little realistic prospect of paying back.

RESERVED COSTS JUDGMENT

Case Number: 1806686/2021

Employment Judge Deeley

24 July 2023

Sent to the parties on:

26th July 2023

.....
For the Tribunal Office: