



EMPLOYMENT TRIBUNALS

Claimant: Mr J Jamieson

Respondent: Luxus Limited

Heard at: Midlands East Employment Tribunal (on the papers)
On: 14th November 2023

Before: Employment Judge Singh

JUDGMENT

1. The Claimant is ordered to pay the Respondent the sum of **£7,000 (plus VAT)** in costs.

REASONS

Introduction

1. There was a final merits hearing in this case on the 25th and 26th September 2024. I dismissed the Claimant's claim for Unfair Dismissal in that hearing.
2. Prior to that hearing, there had been a case management hearing on the 22nd April 2024 before Employment Judge Shore, to decide whether the Claimant's claims should be struck out on the basis that it had no reasonable prospect of success, or, in the alternative, if a deposit order should be made.
3. EJ Shore decided that the case did not meet the test for being struck out, but did find that the case had little reasonable prospect of success and so ordered the Claimant to pay a deposit if he wished to continue with the claim.
4. The reasoning of EJ Shore was that, even when taking the claim at its highest, the Claimant would have significant difficulty in succeeding.
5. EJ Shore decided that the Claimant would struggle to show that many of the acts that he complained about were unreasonable, either singularly

or when taken together and would not constitute a repudiatory breach for the purposes of a constructive dismissal claim.

6. He specifically found that he could not see on the papers that the Respondent had acted unreasonably in seeking to investigate the reason for the Claimant's absence from work.
7. He also found that the Claimant would have difficulty to show that the Respondent had no justifiable reason to invite him to the disciplinary hearing. The Claimant had said he had told his employer that he rarely got dressed or left the house but had been photographed working on a market stall.
8. The Claimant was warned by EJ Shore about the weaknesses in his claim and that he should consider whether he wished to proceed with it or not.
9. In his order, EJ Shore made reference to the Employment Tribunal Rules of Procedure 2013 on costs. The Claimant paid the deposit.

The application on costs

10. Following the decision being delivered at the final merits hearing, the Respondent made an application for costs.
11. They had previously sent a warning to the Claimant on the 18th September 2024 stating their intention to pursue the Claimant for costs if his claim failed and setting out the amount of costs incurred.
12. The Respondent claimed a total of £9,000.
13. The basis of the Respondent's application was that the Claimant had acted unreasonably in pursuing his claims, as they had no merit.

The Law

14. The Employment Tribunal's power to award costs is contained within the Employment Tribunals Rules of Procedure Regulations 2013.
15. Rule 76(1) provides that a Tribunal may make a costs order 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.

16. Rule 77 provides that an application can be made at any stage up to 28 days after the date on which the judgment determining the proceedings in respect of the party was sent to the parties. The paying party must be given a reasonable opportunity to make representations in response.
17. Rule 78(1) provides that a costs order may 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.
18. Rule 84 provides that the Employment Tribunal may have regard to the paying party's ability to pay.
19. The award of costs is an exception, rather than a rule. Costs are designed to compensate the receiving party for costs unreasonably incurred, not to punish the paying party for bringing an unreasonable case, or for conducting it unreasonably.
20. There is a three-stage process when considering a costs application:

- a. The rule 76;
- b. Exercise of discretion – the Employment Tribunal must consider as an exercise of discretion whether the conduct merits a costs order; and
- c. The appropriate amount of costs incurred

21. Dishonesty by a party does not necessarily lead to a meritorious award for costs. Cox J held, in **HCA International Limited v May-Bheemul** [UKEAT/0477/10, 23 March 2011 unreported] that:

“It will always be necessary for the Tribunal to examine the context and to look at the nature, gravity and effect of the lie in determining the unreasonableness of the alleged conduct”.

23. Lord Justice Mummery stated, at paragraph 31 of his judgment in **Yerrakelva v Barnsley MBC [2012] ICR 420**:

“The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had.”

22. Rule 39 states that

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying part for substantially the reasons given in the deposit order-

- (a) The paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purposes of rule 76, unless the contrary is shown; and*
- (b) The deposit shall be paid to the other party, otherwise the deposit shall be refunded*

Conclusion and Reasons

23. I made findings at the final merits hearing on the issues that EJ shore had used as the basis for his finding on the deposit order.

24. In relation to whether the complaints raised by the Claimant were unreasonable and could constitute a breach of trust and confidence for the purposes of a constructive dismissal. These issues were those as set out in the order of EJ Shore following the case management hearing.

- a. In relation to the allegation of harassing the Claimant to allow access to his medical records, I found that the Respondent had not harassed the Claimant as alleged. They had requested access to his records and when he had refused, they had not pressed this further, until their had been a change in circumstances. Even then they had not pressed the matter. This was not unreasonable conduct.
- b. In relation to asking the Claimant what support his mother gave to the Claimant when they visited, I found that this had not been unreasonable conduct. The Respondent had asked out of curiosity after they had been present at the meeting at the Claimant's home.
- c. In relation to delivering letters to the Claimant's home in person, I found that this was not unreasonable conduct given that the Claimant had asked the Respondent to do this so that he did not miss important correspondence.
- d. In relation to knocking on the Claimant's door without invitation, I found that this was not unreasonable conduct. The Claimant had made it clear at a late stage that he didn't want the Respondent to knock on his door and they stopped after that. Prior to that, they had no reason to believe the Claimant did not want them to knock on his door.
- e. In giving the Claimant's phone number to Natalie Blanchard's boyfriend, I found that this had not happened. Ms Blanchard's boyfriend had called the Claimant after Ms Blanchard had missed the

Claimant's call, but this was only because the Claimant had called from an unknown number. This was not unreasonable conduct.

- f. In relation to coercing the Claimant to do physical activity, this had not happened. The Respondent had offered to discuss the Claimant returning to work on limited duties but there had been no coercion.
- g. In relation to adding the words "and confidence" to the disciplinary allegation, I found this was not unreasonable conduct. The Claimant had not understood there was a difference between the 2 phrases and it in fact made no difference to the issues being raised by the Respondent.
- h. In relation to the accusation of the Claimant gardening, I found this had not been unreasonable. The Claimant had been challenged based on what the Respondent had seen and this was perfectly reasonable to do so.
- i. In relation to the Respondent asking questions when the Claimant said he was not in a mental state to answer, I found that this had not happened.
- j. In relation to the being asked to attend the meeting at the Respondent's premises, I found that given the nature of the meeting, it was reasonable to refuse to have it by telephone and given the Claimant's aggressive behaviour at the previous meetings at his home, it was reasonable to refuse to have the meeting at the Claimant's home.
- k. In relation to the allegation of withholding information, I found that this had not occurred.
- l. In relation to delivering the letter to the Claimant's partner and not identifying themselves, I found that this was not unreasonable conduct. The Claimant could not explain why it was unreasonable.
- m. In relation to the requirement to attend a disciplinary hearing, I found that this was not unreasonable. The Respondent had photographic evidence of the Claimant's alleged misconduct and therefore it was reasonable to ask him to attend a meeting to provide an explanation.

25. These findings also encompassed EJ Shore's specific findings about the need for the Respondent to investigate and the requirement to attend the hearing. In relation to the latter, the Claimant changed his position at the hearing and did not say that he could not attend the disciplinary hearing because he didn't leave the house, but now said it was because he was embarrassed of his colleagues seeing him. He confirmed he had not raised this with the Respondent at the time and therefore there actions could not be seen to be unreasonable conduct.

26. I consider that it is appropriate to exercise my discretion to make a costs order for the following reasons:

- a. Although costs are the exception rather than the rule, this is one of those exceptional cases where a costs order is appropriate;
- b. I am mindful that telling of untruths does not automatically lead to justifying an order as to costs, however, the untruths in this case go to the heart of the claim. These must have been known to be untruths by the Claimant at the outset and were maintained throughout the proceedings, despite compelling documentary evidence that defeated his claim. In those circumstances, it is appropriate for me to exercise my discretion to award costs;
- c. Whilst the Claimant did not have the benefit of legal advice, the Respondent identified to him the fact that his claim could not succeed within the communications dated to him and the Claimant appears to have failed to seek external advice or to liaise with ACAS;
- d. The Claimant was put on notice by the Respondent that costs would be sought for pursuing an unmeritorious claim. He was given the opportunity to settle the claim without costs being pursued; and
- e. The Claimant was warned about the risks involved in continuing to pursue his claim by EJ Shore.

27. It cannot be in the interests of justice, or pursuant to the overriding objective as provided by rule 2, to permit a Claimant to bring and maintain a claim that they know is not well-founded in fact and law.

28. In light of the wording of rule 39(5) of the ET Rules, I must find that the Claimant has acted unreasonably in pursuing the allegations that were the basis of the costs order as he not shown to the contrary.

29. As such, I find that the test set out in rule 76 has been met- the Claimant has acted unreasonably in bringing proceedings and therefore costs should be awarded to the Respondent.

30. However, I am mindful that the Claimant may not have been aware of the extent of the flaws in his case before the case management hearing with EJ Shore. On that basis, I do not

award the Respondent any of the costs they incurred before that hearing. They have confirmed that the costs incurred after that hearing were £7,000 (plus VAT).

- 31. Rule 84 provides that I may take into account the paying party's ability to pay costs. The Claimant has failed to comply with directions to provide information about his ability to pay. There is therefore no information before me to indicate that the Claimant does not have the ability, either now or in the future, to pay the costs sought by the Respondent

- 32. This therefore £7,000 (plus VAT) is the amount I award to the Respondent. This is of course less the £250 the Claimant has already paid as a deposit, which will be paid the Respondent by HMCTS.

Employment Judge **Singh**

_____ 14th November 2024 _____
Date

JUDGMENT & REASONS SENT TO THE PARTIES ON

..... 14 November 2024.....

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FOR THE TRIBUNAL OFFICE