DJT

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondent**
	AND
Mr P Gibson	Interserve Construction Limited

RESERVED

COSTS JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham **ON 16 January 2017,**
RESERVED TO 29 March 2017

EMPLOYMENT JUDGE Dean **MEMBERS Dr N Bristow**
Mr P Talbot

Representation

For the Claimant: Mr P Gibson, in person

For the Respondent: Ms Grennan, of counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The respondent's application that the claimant be ordered to pay costs succeeds.

2. The claimant in the conduct and bringing of the claim and its continuation was abusive and disruptive and otherwise unreasonable in the way that the proceedings have been conducted.

3. The claimant is Ordered to pay to the respondents costs assessed to be the sum of £13,457.50 + VAT (as applicable).

REASONS

Issues

The respondents have made an application that the claimant should be ordered to pay costs not exceeding £20,000.00 incurred by the respondent defending the application. The basis of the application is as described at para 5 – 12 of the costs application:

"5. The claim for direct age discrimination was wholly without merit. Even on the claimant's case there was no evidence that could possibly have shifted the burden of proof to the respondents. This claim was doomed a failure.

6. The claim for unfair dismissal was wholly without merit. This was a case where there was an obvious redundancy situation and where the fairness of the dismissal (in respect of which the statutory tests set a low threshold) was apparent from the outset. In the circumstances this was a case that was doomed to failure.

7. The claimant made various and very serious unfounded allegations against the respondent and its officers and employees, including allegations of fraud corruption, conspiracy, cover up and collusion, none of which had any evidential basis whatsoever.

8. The claimant made further allegations of racist (as well as ageist) behaviour which were wholly unfounded and again had no evidential basis at all.

9. The claimant sought to rely on arguments which were completely fanciful and/or disingenuous, some of which directly contradicted his own documentary evidence (for example, the assertion that he had been dismissed at a meeting at which a protected conversation was held on 2 August 2015 when his own transcript of his covert recordings of the meeting said the opposite).

10. The claimant failed to comply with case management orders, particularly in relation to his witness statement / referencing of documents, the effect of which was to cause substantial inconvenience and unnecessary delay to the hearing.

11. The claimant having received clear advice from EJ Pirani as to the limited value of his claim at an earlier Preliminary Hearing, nonetheless acted unreasonably in the hearing to "without prejudice save as to costs" settlement discussions, taking a position that was wholly unrealistic and which bore no relation to the merits and value of his claims. Further, the claimant unreasonably refused a reasonable offer of settlement. "

The Law

5. In this case, the law to which we must have regard is that set out in the detailed provisions of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, in particular the relevant rules contained at Schedule 1:

COSTS ORDERS, PREPARATION TIME ORDERS AND WASTED COSTS ORDERS

Definitions

74.*—(1) "Costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing). In Scotland all references to costs (except when used in the expression "wasted costs") shall be read as references to expenses.*

(2) "Legally represented" means having the assistance of a person (including where that person is the receiving party's employee) who—

(a)has a right of audience in relation to any class of proceedings in any part of the Senior Courts of England and Wales, or all proceedings in county courts or magistrates' courts;

(b)is an advocate or solicitor in Scotland; or

(c)is a member of the Bar of Northern Ireland or a solicitor of the Court of Judicature of Northern Ireland.

(3) "Represented by a lay representative" means having the assistance of a person who does not satisfy any of the criteria in paragraph (2) and who charges for representation in the proceedings.

Costs orders and preparation time orders

75.*—(1) A costs order is an order that a party ("the paying party") make a payment to—*

(a)another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative;

(b)the receiving party in respect of a Tribunal fee paid by the receiving party; or

(c)another party or a witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual's attendance as a witness at the Tribunal.

(2) A preparation time order is an order that a party ("the paying party") make a payment to another party ("the receiving party") in respect of the receiving party's preparation time while not legally represented. "Preparation time" means time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at any final hearing.

(3) A costs order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings. A Tribunal may, if it wishes, decide in the course of the proceedings that a party is entitled to one order or the other but defer until a later stage in the proceedings deciding which kind of order to make.

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

***76.**—(1) 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.

(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

(3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if—

(a)the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and

(b)the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment.

(4) A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer's contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party.

(5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing.

Procedure

77. *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.*

The amount of a costs order

78.*—(1) 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;

(b)order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules

1998, or by an Employment Judge applying the same principles; or, in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993, or by an Employment Judge applying the same principles;

(c)order the paying party to pay the receiving party a specified amount as reimbursement of all or part of a Tribunal fee paid by the receiving party;

(d)order the paying party to pay another party or a witness, as appropriate, a specified amount in respect of necessary and reasonably incurred expenses (of the kind described in rule 75(1)(c)); or

e)if the paying party and the receiving party agree as to the amount payable, be made in that amount.

(2) Where the costs order includes an amount in respect of fees charged by a lay representative, for the purposes of the calculation of the order, the hourly rate applicable for the fees of the lay representative shall be no higher than the rate under rule 79(2).

(3) For the avoidance of doubt, the amount of a costs order under sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000.

Ability to pay

84. *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.*

We have been referred by both parties to a number of authorities to which we have had our attention drawn and to the relevant paragraphs within those authorities. All of the authorities have been considered by us, however, we

make specific reference to a number which caused us to determine the application as we did.

6. The respondent set out in detail their reasons for the application for costs in their email of 13 October 2016.

Findings of fact

7. We have made findings of fact on liability that have been detailed to the parties in the reasons that were delivered ex tempore and circulated to the parties on request on 24 October 2016. As a consequence we have in considering the respondent's application heard oral submissions from Ms Grennan on behalf of the respondents and from Mr Gibson in person. Ms Grennan in particular has taken us to passages of our reasoned judgment to support the application that the respondents make that the claimant had behaved in such a way that the respondents wished to make an application for costs to be determined on summary assessment by the tribunal.

8. The respondents have submitted cost schedules which significantly exceed £20,000. The respondent invites the tribunal to make an order in accordance with the provisions of Rule 78(1)(a) and/or (b) for a specified amount not exceeding £20,000 having had regard to the claimant's ability to pay in accordance with the provisions of Rule 84. We are reminded that it is for the tribunal to take a two stage approach to consider whether or not the threshold for costs has been met and, if met, whether this is a case in which we consider it appropriate to exercise our discretion and make an order for costs and if we find in the respondent's favour on both those considerations to make a calculation of any costs award.

9. We remind ourselves that costs, were they to be awarded are to be compensatory and not punitive and indeed costs are the exception rather than the rule in an Employment Tribunal. The claimant has appeared before us as

a litigant in person. He is, as we have referred in our full reasons in respect of liability, an intelligent and educated man familiar with legal documents and the conduct of litigation, albeit commercial litigation in which his experience may be rather more objective than the personal litigation that he pursues against the respondents.

10. In our judgment and the reasons for it, we have found that the claimant was inclined to employ similar 'commercial' tactics in his dealings with the respondents and to blind himself to the realities in pursuit of a commercial negotiation with his former employers both whilst in employment and thereafter. The claimant's complaints were that he was discriminated against because of his age and that his dismissal was unfair. The evidence to support the claimant's assertion that he was discriminated against because of his age by the respondents was sparse.

Paragraph 5.16:

> *"to support his complaint that the respondents discriminated against him because of his age the respondent refers only to the fact that because on occasions when people had birthdays they would bring to work cake and buns to share his colleagues would have known when his birthday was".*

And paragraph 5.18 we found that:-

> "*The claimant has not provided to the tribunal evidence that, other than that he was 67 when his employment terminated, there was more for us to consider that age was the reason or principal reason (if more than one) why the respondent chose to select the claimant for redundancy."*

The claimant's recollection of history was selective and in large part disingenuous.

11. In reaching the conclusions that we have in respect of his complaints, the claimant at the conclusion of his own evidence confirmed that in respect of his age discrimination complaint he was not aware that anyone had been pressured to leave because of age other than that they left naturally in the process of their own retirement plans.

12. During the course of the evidence the claimant made wholly un-evidenced allegations that the other employee who was selected as redundant was so selected because of his race. The allegation was made in public at the tribunal hearing that was entirely unsupported by evidence and the tribunal were quick to dismiss the contention that the claimant sought to make that race discrimination was prevalent in deciding to select another employee as redundant.

13. We found that the age discrimination claim was entirely without merit and would have been known as such by the claimant. We observe however that the claimant is aged 67, he is married with a dependent wife, explained that he has not been in a position to retire from full time employment because his pension arrangements were with Equitable Life and he does not have sufficient funds to support the retirement that he would otherwise have wished. The claimant's view of the decision taken by the respondents to select him as redundant was one which undermined his aspirations to work until his late 60s to provide income and an opportunity for him to maximise further his pension arrangements.

14. We have found that the claimant's non-engagement with the respondents in respect of the redundancy consultation procedure was entirely tainted by his wish to negotiate severance terms with the respondents that were greatly enhanced above, that which the respondents sought to make. We have referred in our reasons at paragraph 5.28 to the claimant's efforts to negotiate an enhanced severance package that would have paid him the

equivalent of 3 years loss as a pay off enhancement as he stated he had hoped to work until he was 70. He had sought but failed to secure a "without prejudice" compromise agreement to procure an enhanced exit from the respondents.

15. Defeated in his efforts to secure a negotiated exit that was favourable to him the claimant had failed to engage in a consultation process with the respondents. That led we found to his fair selection for redundancy. The claimant's assertion that he had been victimised or that the decision to terminate his employment was because he had made a qualifying protected disclosure was found by the tribunal to be entirely without merit. We remind ourselves, however, that in our liability determination we concluded that they were not directly relevant to the issues before us, the claimant did not cooperate either with investigations conducted by the respondents, in particular Mr Bradbury, into the alleged "whistleblowing" concerns that the claimant raised and that investigation was one that we had no reason to believe was not with integrity.

16. The claimant during the latter part of his employment from 12 August until his termination engaged in a negotiation with the respondent that did not bear fruit and his employment was terminated on statutory redundancy payments. The claimant issued proceedings in the Employment Tribunal and enclosed with his application a position statement extending over some 39 pages. The claimant did not take legal advice before issuing his application or at any time during the period leading up to the final Hearing.

17. The claimant in his statement of case and in correspondence with the respondents when he tried to negotiate an enhanced severance made a number of very serious allegations against the respondents and its officers and employees, including allegations of fraud, corruption, conspiracy cover up and collusion. The tribunal heard no evidence to support those very serious allegations that were aired by the claimant in his statement of case and in the

unsubstantiated evidence that he gave to the tribunal and which he put to the respondent's witnesses. We are mindful that those allegations were made in an open tribunal to which members of the public had access and could have caused significant damage to the respondent's reputation. The claimant's allegations were repeated again in his closing submissions in respect of the costs application again without having previously led any evidence on those allegations against the respondents.

18. Prior to the hearing on liability this case came before Employment Judge Pirani on 23 March 2016 (page 75-82) for case management at a hearing in which the parties were issued with a range of directions and Judge Pirani identified the issues to be determined at the hearing. It became evident that the claimant had, by 23 March 2016, mitigated his loss having found alternative employment at a higher salary than he enjoyed with the respondents. The issues to be determined were at that hearing limited to age discrimination and unfair dismissal. The tribunal have been referred to the fact that Judge Pirani expressed the view at that hearing that in light of the claimant's mitigation, the value of his complaint, even if it was entirely successful, would be limited. Both parties accept that the value of an entirely successful claim was identified to be no more than £30,000. We are aware that "without prejudice" discussions took place between the parties following that Preliminary Hearing and the claimant pursuing a commercial negotiation as he had sought to do in August 2015, in discussions that were "without prejudice" save as to costs was sought to negotiate in a schedule of loss that ran to the sum of £39,050 (page 115).

19. We have been referred to the exchange of open correspondence (page 110-115) which deals in large part with correspondence from the respondents directing the claimant to the orders made by Employment Judge Pirani that there should be compliance with orders in respect of the service of a schedule of loss and a list of documents. The respondents in their letters of 12 April

(page 110) and 21 April (page 112) reminded the claimant of the need to comply with the orders:-

> *"We will write to the Employment Tribunals to request an order for your claim to be struck out on the basis of your persistent failure to comply with the tribunal's order and/or for our client's wasted costs that have been incurred in having to request this information. We reserve the right to bring this correspondence to the Employment Tribunal's attention on the matter of costs.*
>
> *If you are in any doubt as to your legal position we suggest you take independent legal advice."*

Sadly the claimant did not take independent legal advice although he did, albeit belatedly, comply with the orders. No further application was made by the respondents. The respondent asserts that the claimant's conduct of his litigation both having brought the litigation and having pursued it has done so vexatiously, abusively, disruptively or otherwise unreasonably.

20. We have no doubt that had the claimant's case been considered by the objective eye of a professional adviser or indeed had the claimant been objective in his consideration of the merits of his case, the complaint would not have been presented to the Employment Tribunal. The claimant's efforts to secure a commercial and well remunerated severance payment from his employers were understandable given his compromised private pension arrangements. However, in the claimant's pursuit of a satisfactory financial settlement the claimant had in his sights that a settlement would have provided him with a sum equivalent to income had he worked until aged 70 with the respondents. The claimants aspirational sights were adjusted by Judge Pirani who indicated that, even if his claim were to be wholly successful, the most generous interpretation of the value of his claim would have been for unfair dismissal and injury to feelings have not been more than

£30,000. The claimant adjusted his sights to £39,050. The respondents in response to the claimant's schedule of loss indicated that a commercial settlement for them represented £5,000 and no further negotiation took place and the respondents prepared for a tribunal hearing that was expected to last for 6 days.

21. We conclude that the claimant was unable to accept the assertions of the respondents in relation to the fairness of the dismissal and indeed did not accept the guidance given by Judge Pirani at the Preliminary Hearing pursued his complaint.

22. The claimant having given his evidence to the tribunal on 12 & 13 September had following cross-examination and direction from the tribunal panel had the blinkers, through which he viewed the merits of his claim or the righteousness of his claim, removed. Notwithstanding reality the claimant pursued his litigation and robustly cross-examined the respondent's witnesses for the remaining days of the hearing until the outcome in which he was informed that his claims were entirely unsuccessful.

23. In his submissions to the tribunal the claimant suggested that his claim form having been taken through the sift process was one that evidently was not without reasonable prospect of success on the initial consideration of the papers. We remind ourselves that there is a very low threshold when considering complaints on the written papers and the likelihood of any Employment Judge being able to judge that a case has no reasonable prospect of success is slim and a Judge is properly cautious of dismissing complex and fact sensitive cases in relation to discrimination on the basis that they have no reasonable prospects [Anyanwu & Others -v- South Bank Students Union [2001] ICR 391 HL]. The tribunals are reminded that it is important not to strike out discrimination claims except in the most obvious cases because they are generally fact sensitive and require a full examination to make a proper assessment. We observe that that is not to say that a party

is not able to make an assessment of the merits of their claim. However, in this case the claimant was not able to make such an assessment notwithstanding the clear and obvious difficulties that he faced in asserting that his dismissal was unlawfully discriminatory because of his age and was unfair.

24. The claimant asserts that Employment Judge Pirani had seen the prospects of success of his claim, we disagree with the claimant's assessment of the guidance given by Judge Pirani at the Preliminary Hearing stage. On the claimant's own admission the guidance given was to assess the value of his complaint hypothetically, were it to have been entirely successful. The respondent subsequently clarified the guidance that had been given and recommended to the claimant that he took legal advice.

25. We have been referred to the parties' correspondence following Judge Pirani's Preliminary Hearing. Although warnings were given to the claimant in respect of costs, were he not to comply with the orders issued by Judge Pirani, we have not had sight of any correspondence that suggests that it is "without prejudice" save as to costs that any proposals were made to the claimant.

26. We are mindful that the absence of a formal costs warning letter in respect of the merits of the claim is not determinative that a costs application is not successful. It is evident, having seen the tone of the claimant's response to the respondent's letters issuing costs warnings in respect of non-compliance with the orders (pages 110 & 112), that the claimant responded on 23 April 2016 (page 114) referring to the tone of their letters being

> *"unduly threatening and in my opinion unwarranted. If it is your deliberate intention to intimidate me, you have merely succeeded in causing offense and further antagonising me. It appears that you are cut from the same cloth as your client, who has managed this affair*

from the start. They chose to adopt an aggressive, condescending, overbearing and manipulative attitude which has brought us to where we are".

We have no doubt that were the respondents to have issued a formal costs warning letter, and we have been referred to no such letter ourselves in correspondence, the claimant would have disregarded it as he had the directions of Judge Pirani and the observations made by the respondent's solicitors in correspondence.

27. We find that, having in fact issued the proceedings and conducted them in a manner that was abusive, disruptive and otherwise unreasonable, the claim having no reasonable prospect of success, the claimant once he had completed his own evidence to the tribunal could not have failed to understand the hopelessness of his case.

28. We find that the threshold has been met in accordance with Rule 46(1)(a) and (b). Having had regard to the claimant's means, we move to consider whether it is appropriate to exercise our discretion and make an order for costs. The claimant has provided details of his income and outgoings having completed Form EX1. Sadly the claimant's current income is £73,000 gross per annum. The evidence that the claimant has given as to his outgoings has been submitted in accordance with the tribunal's direction. He has completed Form EX1 and provided copies of his last three months bank statements which demonstrate direct debits. On the basis of the information provided by the claimant his lowest net income from his current employment amounts to £4,890 per month and the expenditure as identified in the completed EX1 amounts to £4,543 per month. We assess the claimant's disposable income to be a monthly £347 per month. We observe, however, that the claimant makes significant pension contributions to Re Assure in the sum of £1,250 per month and indeed the expenditure has not been subject to significant scrutiny other than the respondent's response to that information

and the assertion in relation to its paucity. We have considered also the claimant's response to the respondent's concerns about the lack of financial information (emails 1 and 3 February 2013). We take the claimant's disposable income at its highest to be £347.00 disposable income per month. The claimant says that he and his wife have no savings other than his pension which is identified as having a current value as at 2 June 2016 of £58,785.40. The claimant suggests that his 4 bedroom home has a current value of approximately £600,000. The respondents in their correspondence suggest that the so-called "Zoopla" valuation is an estimate of £899,000. The claimant has disclosed that his home is subject to a £40,000 mortgage which at the end of a 14 year term that was taken in 2005 i.e. by 2019. On any view it is apparent that the appellant has at least £560,000 equity in the property jointly owned by him and his wife.

29. We are mindful of the fact that the claimant has at his disposal assets in which he may release equity and has income that he may choose to divert from payment of substantial private pension contributions currently paid at the rate of £1250 a month to discharge of his indebtedness.

30. Having assessed the claimant's means and in light of the conclusions that we have reached that the claimant was, if not before, clearly aware as to the frailty of his claim after 15 September 2016 when examination of his evidence and case was concluded. We consider that having exercised our discretion, that the claimant should bear the respondent's costs that continued to be incurred on and after 15 September 2016 having had regard to the assessments schedules of costs of the respondents which do not appear to us to be unreasonable. We conclude that counsel's fees in respect of the brief fee for the hearing £7,350, drafting of the costs application £320, attendance at the costs application £1,800 are reasonable incurred together with instructing solicitors costs from 15 September 2015 to 19 January 2016 in the sum of £3,987.50 plus VAT. We conclude that the claimant is responsible for

the respondent's costs accruing from 15 September in the total sum of £13,457.50 plus VAT as appropriate.

31. The tribunal having had regard to the claimant's ability to pay, makes a costs order against the claimant who is found to have acted unreasonably in both the bringing of the proceedings and the way in which the proceedings have been conducted. Mindful that the claimant is a litigant in person the claimant is ordered to pay to the respondents the costs of the respondent limited for the costs incurred from the 15 September 2016 after the conclusion of the claimant's evidence and his case amount of £13,457.50 +VAT as applicable as determined by the Employment Tribunal.

Signed by _____ on 9 June 2017

Employment Judge Dean

Judgment sent to Parties on

9 June 2017

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