



## EMPLOYMENT TRIBUNALS

Claimant  
**Mr A I Fothergill**

Respondent  
**v PPG Architectural Coatings  
UK Limited**

## PRELIMINARY HEARING

**Heard at: Leeds**

**On: 5 April 2017**

**Before: Employment Judge Rogerson**

**Members: Mr R Stead**

**Mr G H Hopwood**

**Appearance:**

**For the Claimant: No attendance (written representations)**

**For the Respondent:**

## COSTS ORDER

1. The Claimant is ordered to pay the Respondent, costs, in the sum of £12,500.

## REASONS

1. Neither party attended this Hearing, having agreed that the respondent's costs application would be dealt with based on written representations submitted in advance of this hearing.
2. The tribunal gave oral judgment and reasons on 10 February 2017, dismissing all of the complaints made of unfair dismissal and disability discrimination (direct/indirect/discrimination arising from disability). The respondent has provided detailed written grounds for the costs application and a schedule of costs for the period 16 May 2016 to 10 February 2017, of £26,472.50 plus VAT.
3. The grounds relied upon are the claimant's unreasonable conduct in bringing and conducting these proceedings and that the claim had no reasonable prospects of success pursuant to Rule 76(1) (a) and (b) of the Employment Tribunals Rules of Procedure Regulations 2013.

4. In the application the respondent has accurately set out the findings of the tribunal and these are not repeated here. The final point made at paragraph 25 is pertinent in that *“the claimant’s claim was brought on the basis of facts which he could not have succeeded on”*. In addition, the respondent had sent the claimant a costs warning letter dated 6 January 2017, in which *“the precise weakness in the claimant’s case (which the tribunal eventually found as a fact) was clearly predicted”*.
5. That weakness was and should have been clear to the claimant. He changed his evidence and was found to have lied to the Tribunal. That lie was central to all of the complaints he was making. The claimant should have been aware of how unreasonable and serious that conduct was and the consequences of that conduct.
6. From the costs warning letter onwards he could be in no doubt that the respondent would pursue their costs against him, if he maintained his position based on his unreasonable conduct. Unfortunately he did not heed that warning and persisted in the lie upon which his whole claim has been founded.
7. The costs warning letter made the position crystal clear. It states *“Our client believes that your client’s contention that he applied for voluntary redundancy after receiving notification of his score is a **fabrication**, evidenced in part by the way his story has changed. In the claim form, your client was clear that he was informed of his score on 23 November 2015. Indeed, much was made of the fact that this post dated Katherine Packer’s letter of 15 November 2015 (paragraph 12 of the Claim Form). However, in his witness statement, he now says he was informed of his score on 10 November 2015, at the first consultation meeting. No doubt your client realized that the chronology of events as suggested by him did not work... the deadline for voluntary redundancy applications was 20 November 2015”*.
8. The cost warning letter urged the claimant to consider his position carefully. Unfortunately the claimant did not do this. On the contrary the response from his solicitor dated 12 January 2017, disputes the contents of the costs warning letter in its entirety and denies the assertion that the claimant had *“at any stage fabricated or changed his version of events”*. Unfortunately, for the claimant that is exactly what he was found to have done by the Tribunal.
9. In response to the costs application, the claimant’s representatives have provided a detailed ‘position’ statement and instructed a costs draftsman to consider the reasonableness of the costs claimed. The tribunal considered all of that information before reaching its decision.
10. The ‘position’ statement correctly sets out the 3 stage test for costs, requiring the tribunal to consider firstly, whether, it has jurisdiction; secondly, whether it should exercise its discretion; and thirdly, if so, what amount of costs should be ordered? It refers to the case of Yerrakalva v Barnsley Metropolitan Borough Council [2012] IRLR 78, which sets out the guidance given by the Court of Appeal in relation to costs orders. Paragraph 41 of the judgment of Lord Justice Mummery states that:

“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”.

11. Looking at the whole picture of what happened in the case the Claimant's 'dishonesty' was central to the claimant's case of unfair dismissal and disability discrimination. The 'dishonesty' issue is addressed at paragraph 24 of the position statement. The Tribunal is referred to the Court of Appeal's decision in Arrowsmith v Nottingham Trent University [2012] ICR 159 when Lord Justice Rimmer endorsed the statement of Justice Cocks in HCA International Ltd v May – Bheemu! UK EAT/0477/10 (EAT, 23 March 2011, unreported) that there is no principle of general application that lying, even in respect of a central allegation of the case **must inevitably result** in an award of costs, **“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”**.
12. This was not a case where there were 2 contrasting versions of events between the parties which had to be determined by the Tribunal. The context was a case where the claimant deliberately changed his own story to make it fit his case. He deliberately lied about a material event to support his pleaded case. It is notable that in the 'position' statement the claimant accepts now his claim had no reasonable prospect of success (paragraph 20). However it is asserted that his 'changing' evidence is the result of confusion” and is not a case of the claimant acting dishonestly or seeking to mislead the tribunal. That proposition, it is suggested, is supported by the fact that it is unlikely that he would have spent £16,000 in pursuing this claim if that was not the case. We disagree. The claimant deliberately lied and deliberately misled the tribunal knowing the true position from the outset. We don't know why the claimant continued to pursue a case in those circumstances but that is what he chose to do. He cannot now rely on the fact that he has incurred those costs to support an argument that he did not lie he was simply 'confused'.
13. Furthermore, we find it difficult to see how the claimant could be confused about such a critical event as the notification of his redundancy score, so fundamental to his case. That flaw was identified clearly in the costs warning letter. He chose to ignore the warning and continue with his case but now asserts that he was not fabricating or changing his story when that was not the case. If he was confused he was given the opportunity of 'clearing up' any confusion then. It was clearly a case where we had jurisdiction to make a costs order on 2 grounds: the claim had no reasonable prospects of success and the claimant's unreasonable conduct in lying to the tribunal.
14. As to the 'amount' of the costs order, at paragraph 28 of the claimant's position statement we are asked to place no reliance upon the claimant's ability to pay in determining the amount of costs ordered and we did not do so. The claimant does however rely on a costs draftsman's report to defend the £26,000 plus costs sought by the respondent. It is submitted and we agree that the tribunal should consider what costs are “reasonable and proportionate” given the complexity of the claim pursued.

15. We take into account the fact that this was a 2 day case with narrow issues of dispute, limited allegations and events. It was not a complex case. We consider the appropriate amount of costs to award the respondent in the circumstances is £12,500. This sum reflects the reasonable costs incurred from the period of the costs warning to the hearing when the Claimant should really have withdrawn his claim. We note 2 fee earners for the Respondent were involved in this case which was not in our view proportionate given that the case was not a complex one. £12,500 is in our view a reasonable and proportionate sum of costs to award in all of the circumstances.

**Employment Judge Rogerson**

Date: 2 May 2017