



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

AND

Respondent

Mr K Redhead

Blanc Aero Industries

HELD AT Birmingham

ON 6 January 2023

EMPLOYMENT JUDGE Choudry

Representation:

For the claimant: No appearance

For the respondent: Mr Iain Lovejoy (Legal Executive)

JUDGMENT

The Respondent's application for costs pursuant to Rule 76 of the Employment Tribunal Rules 2013 is successful and the Claimant is ordered to pay the sum of £2,111.90 in costs.

REASONS

Background to the Respondent's Application for Costs

1. By a Claim Form received by the Tribunal on 2 September 2020, the claimant brought a claim for unfair dismissal following the termination of his contract of employment by the Respondent on 23 July 2020 by reason of misconduct.

2. The claimant relied on two grounds for supporting his claim for unfair dismissal: that he did not “*bad mouth*” the Respondent through social media as alleged, his brother was posting on his social media as his Facebook account was open on his tablet and that his appeal was not heard by his general manager. The Respondent did not accept the Claimant’s explanation and dismissed the Claimant on notice as he was already on a final written warning for similar misconduct. The Respondent explained to the Claimant that the general manager could not hear his appeal as he had been involved in the earlier stages of the disciplinary process.
3. By a Judgment sent to the parties on 10 February 2022 the Tribunal found that the Claimant had not been unfairly dismissed and the Claimant’s claim was dismissed.

The Respondent’s Costs application

4. On 12 February 2021 the Respondent sent the Claimant a letter headed without prejudice save as to costs setting out the basis upon which it believed the Claimant’s claim had no reasonable prospects of success. The Claimant was put on notice that if he pursued his claim to Tribunal and his claim failed the Respondent would be making an application for costs against him. The Claimant was given 7 days to withdraw his claim in return for his no application for costs would be made against the Claimant. This offer was subsequently extended to 7 February 2022.
5. The Claimant indicated on 14 January 2022 that he had received legal advice and would be pursuing his claim in the Tribunal.
6. By a letter dated 15 February 2022 the Respondent made an application for costs and by a letter dated 12 October 2022 the matter was listed for a costs hearing before me today.
7. By an email dated 13 October 2022 the Respondent requested the Claimant to provide information in relation to his means. The Claimant did not respond. A follow up email was sent on 8 November 2022 to which the Claimant simply responded by “????????”. Accordingly, on 14 November 2022 the Respondent sought an order of the Tribunal compelling the Claimant to disclose his means.
8. On 22 December 2022 the Tribunal ordered the Claimant to provide details of his monthly outgoings, details of his savings, details of any outstanding loans or mortgages and for him to provide his last 3 months bank statements by 30 December 2022. The Claimant has not complied with this order nor provided an explanation for his non-compliance or indeed his non-attendance today.

9. The Respondent seeks the sum of £2,296.70 (excluding the time for the hearing today) which comprises 54.68 hours at the non-qualified rate of £42 per hour.

Applicable law

10. The Tribunal's power to award costs is set out in rules 76 to 88 of the Employment Tribunal (Constitution and Rules of Procedure) Rules 2013 ("Employment Tribunal Rules"). These rules state:

"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; or
(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.

(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 adjourned or postponed on the application of a party.

The amount of a costs order

78.- (1) A costs order may –

(a) order the paying party to pay the receiving 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 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 principle

(c) order the paying party to pay the receiving party a specified amount as reimbursement of all or part of the Tribunal fees 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 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.*

11. Guidance on how the costs rules should be applied in the Employment Tribunal had been provided by the Appellate Courts. Firstly, in **Milan v Capsticks Solicitors LLP & Others UKEAT/0093/14/RN**, it was determined that a structured approach should be taken in relation to an application for costs and this involves a three-stage exercise (at paragraphs 52): *“There are thus three stages to the process of determining upon a costs order in a particular amount. First, the tribunal must be of the opinion that the paying party has behaved in a manner referred to in [Rule 76]; but if of that opinion, does not have to make a costs order. It has still to decide whether, as a second stage, it is “appropriate” to do so. In reaching that decision it may take account of the ability of the paying party to pay. Having decided that there should be a costs order in some amount, the third stage is to determine what that amount should be. Here, covered by Rule [78], the tribunal has the option of ordering the paying party to pay an amount to be determined by way of detailed assessment in a county court.”*
12. Secondly, additional guidance was given by the Court of Appeal in **Yerrakalva v Barnsley Metropolitan Borough Council [2012] ICR 420**, where the Court of Appeal indicated that costs in the employment tribunal remained the exception rather than the rule

Submissions

13. I received written submissions from Mr Lovejoy on behalf of the Respondent which were supplemented by oral submissions. Mr Lovejoy pointed out that the Claimant was on a final written warning for using his phone and had no alleged any procedural unfair on the part of the Respondent, other than that his appeal was not heard by the General Manager, which was found to be reasonable by the Tribunal (Paragraph 27 of the Employment Tribunal’s Judgment).

14. The Claimant's only claim of "unfairness" was that the Respondent not entitled to rely on the Facebook posts as the Claimant asserted that his brother had made them instead.
15. The result of the Claimant's claim was therefore inevitable and obvious from the start and the Claimant had no reasonable prospects of success. The Claimant had received legal advice which would have confirmed that his claim had no reasonable prospects of success and the Claimant must have know that his claim was hopeless from the start.
16. Since the Claimant was in receipt of legal advice he must have known that even if were true that his brother had produced the Facebook posts and not himself, as a matter of law in the absence of any unfairness by the Respondent themselves in dealing with the matter, this would render the Claimant's dismissal unfair.
17. Mr Lovejoy further submitted that even if the Claimant started the claim based on a misunderstanding of the law and a misconception of what required, it was unreasonable of the Claimant to continue it after repeated warning and having taken legal advice.
18. It was submitted that this would be enough to make pursuing the claim unreasonable in itself; the Respondent however goes further as the Tribunal found as a fact that was no evidence that the Facebook posts had been tampered with (paragraph 28 of the Judgment).
19. It was further submitted that it was inherently implausible that the Claimant's brother, who is an adult, would post Facebook posts apparently from the Claimant on the times the Claimant just happened to be at work, especially given that the Claimant had repeatedly made posts himself while at work and never mentioned anything about his brother before.
20. It was submitted that the Tribunal is entitled to conclude that the Claimant's explanation for the Facebook posts is in fact made up, and the Claimant knew and knows perfectly well that he was dismissed for conduct he was in fact guilty of, and it is submitted that this makes the Claimant's bringing and pursuing the claim even more entirely unreasonable.
21. Mr Lovejoy pointed out that under the Rule 84, the Tribunal may have required to a party's ability to pay, but it does not have to. The Claimant has ignored the Tribunal's order to produce evidence as to his means, and so it was submitted that the Tribunal is entitled to disregard them in making any Order.
22. Mr Lovejoy further submitted that the conduct of the Respondent's case has been by Make UK, paid for under the Respondent's

membership of the organisation, for which the Respondent pays an annual fee.

23. He point out that under the Employment Tribunal Rules, Rule 74(1) costs incurred "on behalf of" a party may be recovered notwithstanding that they are not charged directly to the party themselves.
24. The Tribunal was referred to the case of **Ms F Taiwo v Mr J Olaigbe, Ms S Olaigbe, UKEAT/0254/12/KN, UKEAT/0285/12/KN**, in particular paragraphs 68 and 74 where the EAT make it clear that this is the import of this rule.
25. The Tribunal was also referred to the case of **Mr C Mardner v Mr C Gardner, Mr W Ali, Ms M Press UKEAT/0483/13/DA**, in particular paragraph 35 of the judgment. Mr Lovejoy submitted that the Respondent had paid for membership of Make UK to cover costs of Tribunals such as this. Although this is not an insurance policy with premiums as such but rather a membership fee (which includes additional fee to cover potential Tribunals) and it is submitted that same principle applies.

Conclusions

26. In reaching my conclusions I have heard and considered the costs bundle in its entirety I also considered the submissions made by Mr Lovejoy.
27. I am satisfied that the Claimant's claim had no reasonable prospects of success and that it is appropriate to award costs in this case. I am satisfied that the Claimant has been given the opportunity to provide information in relation to his means but has failed to do so and therefore it is appropriate to not take into account his means. I am also satisfied that in light of the Taiwo decision that costs can be awarded in this case notwithstanding that the Respondent pays a membership fee to Make UK.
28. I do not believe that it would be appropriate to award costs in respect of the period prior to 14 January 2022 when the Claimant indicated that he would be pursuing his claim as the Respondent had indicated that it would not pursue the Claimant for costs if he withdrew his claim. I have also discounted 173 minutes in respect of time incurred on 2 February 2022 in respect of a strike out application made by the respondent which was unsuccessful and one minute in respect of time recorded for receiving the Tribunal's auto-generated email. These deductions amount to £121.80. I have also awarded 1.5 hours (equating to £63) for the hearing this morning (discounting 30 minutes of the hearing for an adjournment requested by Mr Lovejoy to revisit his costs schedule). In the circumstances, the total costs awarded to the Respondent amount to £2,111.90.

Employment Judge Choudry
Date 06/01/2023