Neutral Citation Number: [2022] EAT 159

Case No: EA-2021-000647-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 24 May 2022

Before:

JUDGE KEITH

- -

Between:

MR MARK WARD	**Appellant**
- v-	
DIMENSIONS (UK) LTD	**Respondent**

- -
- -

Zeljka Ivankovic for the **Appellant**
Written submissions from **Anthony Collins Solicitors** for the **Respondent**

Hearing date: 24th May 2022

- -

JUDGMENT

SUMMARY

Practice and procedure

The Employment Tribunal erred in its calculation of the Appellant's monthly expenditure, when making a costs order against him. That error was material, and the issue is remitted back to the same ET to consider the amount of the costs order.

JUDGE KEITH:

1. The Respondent did not attend and was not represented. Instead, it relied on written submissions only. The Appellant was represented by Ms Z Ivankovic, his partner.

2. The Appellant appeals against the costs order against him in the sum of £5,000 for the Respondent's costs of proceedings, made by the Employment Tribunal sitting in Watford, chaired by Employment Judge Bedeau, which was sent to the Parties on 19th April 2021. That is at paragraph. [3] of the bundle before me. The context was an earlier decision of the same ET sent to the Parties on 25th June 2019, followed by reasons sent on 6th September 2019, a copy of which is at paragraphs [76] to [97], in which the ET dismissed the Appellant's claims of ordinary unfair dismissal; automatically unfair dismissal, the reason for which was a protected disclosure; and detriment on the ground of a public interest disclosure, contrary to section 47B of the **Employment Rights Act 1996**.

3. Following that decision, on 5th July 2019, the Respondent applied for a costs order against the Appellant under Rule 76 of **The Employment Tribunal Rules and Procedure 2013**, on three bases:

a) that the Appellant had acted unreasonably in bringing the proceedings and in the way in which he has conducted proceedings, to which Rule 76(1)(a) applied;

b) the public interest disclosure claims had no reasonable prospects of success, to which Rule 76(1)(b) applied; and

c) the Appellant was in breach of the order to furnish further particulars of his claim for detriment and whistleblowing in respect of four protected disclosures, (see point 6 of the order made on 13th February 2019) to which Rule 76(2) applied.

4. In correspondence, a copy of which was provided loose, dated 12th July 2019, the Appellant sought from the Respondent details of the breakdown of its costs and raised a number of specific questions. In support of his requests, the Appellant pointed out that as he had been required to provide

specific evidence, the same principle should apply to the Respondent, namely it should provide more detail in respect of the costs schedule provided, which the Appellant asserted was vague.

5. In response, the ET wrote to the Parties on 19th January 2020 (once again a copy of this correspondence was loose in the bundle before me), indicating that the Respondent was required to answer the Appellant's request for information on costs by 10th February 2020.

6. The Respondent replied on 7th February 2020, answering specific questions on travel costs and attaching a more detailed note of billed, and time recorded but written off. The previous costs schedule was intended to summarise this and break it down in a format which was easier to understand, evidenced by invoices. The more detailed time recordings attached included the relevant invoice numbers, for ease of reference. The letter added:

> "Charity
>
> The Respondent also refers to point 26 of its Costs Application dated 5 July 2019 where it stated, "the Tribunal is also asked to note that the Respondent was charged lower than usual hourly rates on this case on account of it being a charity". What was meant by this statement is that the Respondent's solicitors treated Dimensions (UK) Limited as a charity when it came to the category of hourly rates charged, due to it being a not-for-profit organisation. It is to explain the lower hourly rates that it charged. For clarity, Dimensions (UK) Limited is a registered society with the FCA under the Co-operative and Community Benefit Societies Act 2014 (number 31192R) and with the Regulator of Social Housing (number 4648) as a non-profit registered society.
>
> Hearing on 16 April 2020
>
> We note from the letter from the tribunal dated 19 January 2020 that the parties will not be required to attend the hearing. However, the letter from the tribunal dated 28 January 2020 indicates that this will be a public hearing and also states, "you will have the opportunity to put forward oral arguments in any case".
>
> The Respondent understands that neither party is required to attend and due to a desire not to incur further costs and its understanding from the letter dated 19 January 2020 that it is not necessary to attend, the Respondent will not attend the hearing on 16 April 2020. The Respondent means no disrespect to the tribunal by its non-attendance."

7. Separately, the Appellant provided a witness statement dated 16th February 2021, a copy of which was at paragraphs [115] to [119], in which he detailed his income and expenses. In particular, these included his monthly costs towards shared bills such as tax, rent and utilities, his share of which was £446.82; personal bills totalling £108.46; and personal expenses of £690, with a total resulting monthly expenditure £1,245.28.

The ET's conclusion on unreasonable conduct

8. In reaching the decision on the challenge, the ET considered the three separate bases on which the costs application had been made. In relation to the second basis, at paragraphs [55] and [57], the ET rejected the contentions that the unfair dismissal and public disclosure interests claims had no reasonable prospects of success. The ET rejected the similar contention in respect of the unfair dismissal claim at paragraph [56]. In relation to the third basis, the ET also concluded at paragraph [57] that there was not enough evidence that the Appellant had deliberately breached the relevant Tribunal order, or that his behaviour was "contumelious." However, in relation to the first basis, the ET concluded that the Appellant had conducted the proceedings unreasonably. The ET referred at paragraph [52] to the way in which the Appellant made multiple changes to the Scott schedules, which had resulted in considerable documentation having been produced by the Respondent, which was no longer needed, and witnesses had to be released. The ET also concluded at paragraph [55], that the Appellant was unreasonable in refusing an offer, made "without prejudice save as to costs", of £18,500, representing a year's net salary, and instead claiming £1.7 million.

9. At paragraph [58], the ET proceeded to consider a costs order on the basis that the Appellant had acted unreasonably in respect of the Scott Schedule changes and the refusal of the settlement offer. The Appellant does not appeal those conclusions.

The amount of the costs award

10. In considering the amount of any costs award, the ET reminded itself at paragraphs [49] and [50] of the authority of **Arrowsmith v Nottingham Trent University [20211] EWCA Civ 797,** and the principle that a person's limited financial means did not limit the size of an award against them. The ET went on to consider the authority of **Jilley v Birmingham and Solihull NHS Mental Health Trust (EAT/584/06)**. The guidance in that case confirmed that an ET did not have an absolute duty to take into account a party's ability to pay, and there may be cases where for good reason ability to pay should not be taken into account: for example, if the paying party has not attended or has given unsatisfactory evidence about means, but if an ET decides not to do so, it should say why. If it decides to take into account ability to pay, it should set out its findings about ability to pay, say what impact this has had on its decision whether to award costs or on the amount of costs, and explain why.

11. The ET had made relevant findings at paragraphs [33] to [34], concerning the Appellant's financial means:

> "33. In relation to the claimant's financial circumstances, he does not own any shares, bonds, or stocks. He has no savings and lives in house provided by his local council. Ms Ivankovic is the sole tenant. He owns a car which is a Y registration Honda HRV, valued at between £300-£400. He has personal expenses which include, AA membership, mobile phone, car insurance, road tax, which comes to a total of £108.46 per month. He spends £200 per month on tobacco as he is a smoker. He also shares all bills relating to the council property with Ms Ivankovic which totals £446.82 per month.
>
> 34. He told the tribunal that his total expenses each month is around £690."

12. The ET reached its conclusions at paragraphs [59] to [61]:

> "59. We have taken his means into account. On the assumption that his average weekly earnings are around £300, this would give a monthly figure of £1,300. We, however, accept that he is currently on a zero-hour contract and there is no certainty that he would remain in employment indefinitely. He has no savings nor assets of his own. We apply Jilley.
>
> 60. The respondent is a not-for-profit organisation and could not afford to incur costs in excess of £85,000. Its full legal costs, undoubtedly, would have an impact

> on the services it provides. Although we accept that it has reduced its claim to £20,000, we do doubt whether the claimant would be able to pay such a figure on his low and variable earnings."
>
> "61. Costs must be proportionate and not punitive, Oni, Simler P, as she then was [Oni v Unison UKEAT/0370/14/LA] We have concluded that he should pay the respondent's costs in the sum of £5,000."

The Appellant's Appeal

13. The Appellant presented a Notice of Appeal received by this Tribunal on 1st June 2021 (paragraphs [15] to [21]) which included 22 grounds, only the first seven of which have been permitted to proceed on a review under Rule 3(7) of **The Employment Appeal Tribunal Rules** by Choudhury P. Very broadly speaking, paragraphs [1] to [6] all focus on the same point and assert that the ET's recitation of the evidence on the Appellant's outgoings was inaccurate and that his monthly expenditure totalled £1,245.28, and not £690, as found by the ET. The Respondent accepts that the Appellant's monthly expenditure was £1,245.28. Paragraph [7] says that the consequence of this error was that the ET's award of costs against him of £5,000 was not proportionate, since his monthly income was only £1,300.

14. It is unnecessary to decide the remainder of the Grounds except those given permission by Choudhury P. At paragraphs [8] to [15], the Appellant complained about the ET's process in considering the Scott Schedule, which appeared to be a challenge to the ET's conclusions on his unreasonable conduct, in respect of which permission had been refused and an application for permission has not been renewed. I mention this because some of Ms Ivankovic's oral representations to me reiterated that the Appellant's conduct was not unreasonable, but that issue was not one which it was for me to decide.

15. At paragraphs [16] to [20], the Appellant had appealed the ET's findings about the Respondent's financial means, as a large organisation, and at paragraphs [21] to [22], reiterated his

allegation that the Respondent had "doctored" documents. Once again, I mention this as Ms Ivankovic reiterated some of these points before me, in respect of which Choudhury P had already refused permission.

The Respondent's reply

16. The Respondent did not attend the hearing before me, in order to avoid further legal costs. In its reply, as already noted, the Respondent accepted that the ET's finding at paragraph [34], namely that the Appellant's monthly expenditure was £690, was not correct, and accepted that this was "an incorrect reading of the Claimant's document". The figure of £690 per month was, in fact, the total only of the Appellant's personal expenses, at paragraph [7] of his statement. The Respondent accepted the total expenditure per month, according to the Appellant's statement was, in fact, £1,245.28, comprising shared bills of £446.82, personal bills of £108.46 and personal expenses of £690.

17. However, the Respondent submitted that the error was not material, and that the ET was nevertheless entitled to reach the decision to award £5,000 in costs. In particular, the ET had reduced the costs claimed from £20,000 to £5,000, taking into account both the Appellant's unreasonable conduct, the impact in terms of the Respondent's costs, and the Appellant's means. While the Respondent accepted that the ET's decision may have been different if it had not misstated the Appellant's expenditure, this was by no means certain where, as in the case of **Jilley**, the ET was under no absolute duty to take into account the Appellant's means. Affordability at the time of a costs order was not the sole criteria. Moreover, as the authority of **Arrowsmith** at paragraph [37], made clear, the Appellant's financial means did not operate as a cap on the amount that could be awarded against him.

18. The Respondent submitted that in the alternative, if I were to conclude that the ET's error was material then, as per the authority of **Sinclair Roche & Temperley & Ors v Heard & Anor [2004] IRLR 763**, it was only appropriate, for the original ET (with full knowledge of the facts, including the Appellant's conduct) to consider the appropriate award. It would be proportionate to do so, as it would not have to consider the whole matter afresh, and the passage of time was not too distant (the decision only being made in 2021). Moreover, there was no allegation of bias or partiality and, indeed, the ET had made some findings in the Appellant's favour, and no one had doubted its professionalism.

Discussion and remedy

19. I return to the Appellant's submissions before me, first of all his skeleton argument and then the oral submissions made by Ms Ivankovic. I am very conscious of the fact that both she and the Appellant are not legally represented. Much of the skeleton argument and Ms Ivankovic's oral submissions related to grounds which have not been permitted to proceed.

20. The one submission which was relevant to the materiality of the ET's error was that it resulted in an award which the Appellant may realistically have no means to pay. I accept the point made in the Respondent's submissions that an ET is not bound to take into account an appellant's financial means. I also accept the Respondent's point that the limitation on financial means does not necessarily act as a cap, nor is it the sole criteria for the exercise of discretion (see the authorities of **Arrowsmith** and also **Vaughan v London Borough of Lewisham [2013] IRLR 713**). However, the issue here is that were an ET to decide that, notwithstanding the Appellant's lack of financial means, it was making the order regardless, it was incumbent for the ET to explain that clearly.

21. Here, in contrast, the ET expressly took into account the Appellant's financial means. The Respondent realistically accepts that the ET's mischaracterisation of the evidence may well have had

an important impact on the ET's eventual conclusion in making a costs order of £5,000. I accept that the difference between the monthly expenditure of £690 and £1,245.28, when the Appellant's monthly income was only £1,300, was very significant, so his remaining disposable income was far smaller than what the ET may have perceived. In the circumstances, I do regard the ET's error as material and that the ET's conclusion on the amount of the order, of £5,000, is unsafe.

22. In terms of remedy, I accept that the Respondent's submissions, by reference to the authority of **Sinclair Roche & Temperley,** that the original ET should consider the amount of the costs order. I do so on the basis that it has discretion to consider the Appellant's financial means, with its appreciation of the wider case. There is no sustainable bias allegation before me, and the ET's decision is relatively recent.

23. I also accept that the remission back to the ET should be on a narrow basis, specifically on the following terms: the costs order made by the ET is remitted back to it to consider, to take into account the Appellant's previous evidence as to his monthly expenditure (that is, £1,245.28) and all of the other factors referred to in the ET's existing judgment in answering two questions: should there be costs awarded in the Respondent's favour? and, if so, what should the amount of that award be?

24. I also accept the Respondent's submission that it would be appropriate for the parties to have the opportunity of written submissions to the ET, with any updated financial circumstances and any supporting evidence on finances, but that the issue of the Appellant's unreasonable conduct has been decided and it should not be reopened.