Case No: 2206320/2016

EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mr P Burmester	**v**	**Validsoft UK Ltd**

JUDGMENT ON COSTS

The respondents are ordered to pay the claimant 100% of his costs on an indemnity basis from the date of issue of the ET3 on 25 July 2016 to the date of this judgment. The costs will be subject to a detailed assessment.

REASONS

The application

1. By a reserved judgment sent to the parties on 12 December 2016, the tribunal upheld the claim for unfair dismissal with no deduction under Polkey or for contributory fault. By a judgment given on 16 January 2017 and sent out to the parties on 17 January 2017, the tribunal awarded £79,760, the statutory cap having been applied. The award included a 25% uplift for breach of the ACAS Code of Practice on Disciplinary and Grievance Procedures. The respondents were ordered to pay the claimant £1200 in respect of his tribunal fees.

2. A provisional hearing date was fixed to hear the claimant's costs application. Both parties subsequently agreed that I should deal with this application on paper. The claimant provided written submissions on 20 February 2017. The respondents provided their submissions on 7 March 2017. The claimant provided a copy of Kew College Ltd v Parsley UKEAT/0565/06 and the respondents provided a copy of Secretary of State for Justice v Lown [2016] IRLR 22, EAT.

3. The claimant had provided a Schedule of Costs on 5 January 2017 excluding the costs of the remedy hearing and the costs application. At that stage, the total in the schedule was £70,985.20.

4. The claimant applies for indemnity costs on the basis of rule 76(1)(b) or alternatively rule 76(1)(a). The claim under s76(1)(b) is that the response had no reasonable prospects of success. The alternative claim under s76(1)(a) is that the respondents acted vexatiously, abusively, disruptively or otherwise unreasonably in …. the way that the proceedings (or part) have been conducted. By this, he meant the defending of a claim which had no reasonable prospects of success, and where the 'key players' gave critical evidence which was heavily criticised. In addition, he says it was unreasonable to defend the claim at the remedy stage when the schedule of loss indicated loss far above the statutory cap. There is no other basis on which it is identified that the respondents acted vexatiously, abusively, disruptively or otherwise unreasonably in the way proceedings have been conducted.

Law

5. The power to award costs is set out in the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013. Under rule 76(1) a tribunal may make a costs 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 …. the way that the proceedings (or part) have been conducted; or (b) any ….. response had no reasonable prospect of success. Under rule 84, in deciding whether to make a costs order, and if so in what amount, the tribunal may have regard to the paying party's ability to pay.

6. The tribunal's power to order costs is more sparingly exercised and is more circumscribed by the tribunal's rules than that of the ordinary courts. There the general rule is that costs follow the event and the unsuccessful litigant normally has to foot the legal bill for the litigation. In the tribunal, costs orders are the exception rather than the rule. (Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78, CA.)

7. When considering whether costs should be awarded on the ground of unreasonable conduct under r76(1)(a), it is the conduct of the respondents in defending the claim, or continuing to pursue the defence, which must be unreasonable - not conduct occurring before the institution of proceedings. However, conduct prior to the proceedings can of course be relevant to an assessment of whether it was reasonable to defend the proceedings.

Conclusions

Section 76(1)(b)

8. I find that the response had no reasonable prospect of success. The evidence of a sham dismissal was overwhelming. It is summed up in

paragraph 104 of the liability judgment. Not only was there powerful evidence that the dismissal was a sham, but there were also striking procedural failings including writing an investigation report and sending it to witnesses before the witnesses had been interviewed; pre-determined conclusions; not investigating the claimant's side of things and the repeated involvement of Mr Carroll and Mr Korff. The documentary ambiguities around the alleged deliberate deferring of the 2014 revenues and the issues raised by Mr Wilder were not circumstances which gave the claim any reasonable prospect of success when set in the overall context.

Section 76(1)(a)

9. I find the respondents acted unreasonably in the way they defended the proceedings given that there was no reasonable prospect of success. It was also unreasonable in that they perpetuated their false assertions as to the true reason for the claimant's dismissal.

10. At the liability stage, I found that the true reason for the claimant's dismissal was not the one which the respondents put forward in their ET3 and which was asserted by their witnesses at the tribunal hearing. The reason consistently put forward by the respondents in defending the case was a sham. They argued that their reason was the claimant's gross misconduct, whereas it was in fact that Mr Carroll was repositioning himself in anticipation of a potential buy-out. This was not a case of mislabelling or a slight difference of reason. It was an orchestrated dismissal which the respondents sought to disguise in the tribunal.

11. The key witnesses for the respondents, Mr Carroll and Mr Korff, were the two people who closely controlled and manipulated the disciplinary process from start to finish. They had been looking for a stick with which to beat the claimant. They were aware of strong evidence that the claimant had been acting on Mr Turner's instructions when he reduced the offer to $12 million, yet they came to the tribunal and talked about the claimant's 'betrayal'. Mr Carroll had been aware of conduct which he later told the tribunal was a reason for his conclusions that the claimant was guilty of gross misconduct. At the time, he had sent the claimant an email stating, 'excellent result'.

12. This is not simply a matter of a dismissal which was orchestrated at the time. The respondents chose to defend the case on the same basis and to continue the charade. I consider the respondents unreasonable to have defended the proceedings on this basis and in this way. I add that Mr Carroll and Mr Korff were not minor employees of the respondents. They were its Chairman and General Counsel.

13. It was not reasonable to defend the claim on the basis that there would in any event be arguments on Polkey and contributory fault. The claimant immediately clarified Mr Wilder's misunderstanding of a

clumsy sentence in his email of 30 October 2015. It related to an issue with a real client, IWS. Mr Carroll was copied into the email, did not object, and only three days later sent the claimant an email saying 'Excellent result'. As for the statistics in relation to the RBS project, these showed a pause in February, which supported the claimant, and there was sufficient ambiguity in when the figures should be posted to give no reasonable prospect of an award for contributory fault on that basis. On Polkey, as set out in paragraph 118of the liability decision, there was never any evidence to suggest Mr Carroll would have dismissed the claimant had there not been other agendas. Again I refer to his praise of the claimant, Excellent result'.

14. I do not accept the respondents' argument that they had little choice but to defend the claim because of their parlous financial state. Defending the claim would patently not succeed and all that would happen would be that the respondents would face their own and potentially the claimant's legal costs as well as the original value of his claim.

15. As I have found the entirety of the respondents' conduct of the defence unfair on this basis, there is no need for me to consider the separate question whether it was unreasonable to defend the remedies hearing because the claimant's award would obviously well exceed the statutory cap.

Should costs be awarded?

16. Having found the response had no reasonable prospect of success and that the respondents acted unreasonably in the way they conducted the proceedings, I go on to consider whether to exercise my discretion to award costs and, if so, on what basis and to what extent.

17. I do not accept the respondents' argument that, because the claimant received the benefit of a 25% uplift under the ACAS Code, it would be a 'double recovery' for him to receive costs, or indeed that the respondents have already been punished or fined by that award. The two matters are entirely separate and governed by different considerations. Indeed, I do not see how the respondents can argue on the one hand that the ACAS uplift is relevant to whether to award costs and on the other hand, that the statutory cap – because it is the creation of parliament – is not relevant. Whether the claimant is being over or under-compensated by the substantive award relative to his loss of earnings is either relevant to costs or it is not. There is a statutory regime which sets out how compensation for unfair dismissal should be calculated. That regime includes an uplift for procedural unfairness. Reimbursement of some or all legal costs is a separate consideration where, as here, the case should not have been defended in the first place.

18. I have considered the respondents' ability to pay any costs award. The respondents have apparently been losing between $1.6 and $2.7

million each year since 2012. The respondents say they are on the verge of insolvency. However, I note that they have carried these losses for several years. Indeed the loss for 2015 and estimated loss for 2016 are each lower than the previous three years, and the loss figures are set against large and substantially increasing revenue. I am therefore not satisfied that the level of costs which the claimant seeks would make a great deal of difference to this picture or that the respondents would be unable to pay.

19. Overall, I believe this is a case which the respondents were wholly unjustified in defending. Mr Carroll and Mr Korff knew they had engineered a sham dismissal and they came to the tribunal to repeat their false explanations. This should have been obvious to anyone in the respondents who looked at the matter. The false basis of the case was apparent from start to finish.

20. I therefore order the respondents to pay 100% of the claimant's costs on an indemnity basis from the date of issue of the ET3 on 25 July 2016 to the date of this judgment. The costs will be subject to a detailed assessment by an Employment Judge, from whom the parties will hear in due course.

Employment Judge Lewis
17 March 2017