EMPLOYMENT TRIBUNALS

Claimant Mr O Iwuchukwu

Respondent City Hospitals Sunderland NHS Foundation Trust

COSTS JUDGMENT OF THE EMPLOYMENT TRIBUNAL
Without a hearing

MADE AT NORTH SHIELDS ON 18 December 2018
EMPLOYMENT JUDGE GARNON (sitting alone)

JUDGMENT

I refuse the claimant's application for a costs order

REASONS (bold print being my emphasis)

1. The Law

1.1. The Employment Tribunal Rules of Procedure 2013 (the Rules) include:
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

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 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 the party

77. *… 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.*

I am sure this application should be decided on written representations without a hearing.

1.2. The Court of Appeal and EAT have said costs orders in the Employment Tribunal:

(a) are rare and exceptional.
(b) whether the Tribunal has the right to make a costs order is separate and distinct from whether it should exercise its discretion to do so
(c) the paying party's conduct as a whole needs to be considered, per Mummery LJ in Barnsley MBC v. Yerrakalva [2011] EWCA 1255 at para. 41:
"*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*."
(d) there is no rule/presumption that a costs order is appropriate because the paying party lied or failed to prove a central allegation of their case, see HCA International Ltd-v- May-Bheemul 10/5/2011 EAT.
(e) even if there has been unreasonable conduct making it appropriate to make a costs order, it does not follow that the paying party should pay the receiving party's entire cost of the proceedings. Yerrakalva at para. 53.

1.3. A "winning" party may still conduct the proceedings or part *vexatiously, abusively, disruptively or otherwise unreasonably.* It is hard to imagine a situation where *any claim* ***or*** *response had no reasonable prospect of success,* if it in fact succeeded. Also Rule 76(2) is plainly not targeted at penalising **every** postponement or breach of order**.**

2. The Issues

2.1. What I call the "threshold" issue is whether I am satisfied one of the circumstances in Rule 76 exists. If the " threshold " has not been reached. I need decide no more ,

2.2. If it is, the " discretion issues" are
(a) whether it is proper to exercise my discretion to make a costs order
(b) should it be for all or a specified part of the costs incurred
(c) how much was properly incurred

2.3. The respondent says there is an issue about whether the claimant can have a costs order made in his favour if Mr Christian Echendu, a non practicing barrister, was acting as they think, "pro bono" . I will decide this application on the assumption he can.

3 The Application

3.1. My judgment made on 22 November 2018 was sent to the parties on the 26th. I found the unfair dismissal claim was well founded confirming the judgment of what I called in my reasons " the original tribunal" which had been overturned by the EAT and remitted to a different Tribunal. I made no compensatory award and reduced the basic award by 50% for reasons I set out. Mr Echendu who has represented the claimant at all material times makes this application and cites Rules 76(1)(a)(b) and/or 76(2). It is on grounds which I quote verbatim in italics and have numbered 1-4, followed by my decision on each.

Ground 1

Unreasonable conduct and/or 76(2) application to postponed remedy hearing

1.The tribunal is reminded that the proceedings of the above matter started since August 2015, and it took one and half years for the tribunal to give its judgment on the matter on the 2nd of November 2016.

2.Following a 13-day full hearing and evidence and further 2 ***weeks*** *of Tribunal's deliberations, the tribunal gave its judgment on the 2nd of November 2016, providing a detailed reasons and fact findings as to why the unfair dismissal was well founded.* ***There was no basis on which the respondents could have successfully challenged the unfair dismissal claim***

3. Any reasonable legal representative would see that ***the detailed nature of findings and reasons for the judgment discloses no reasonable prospect of success for any appeal****. But the respondents while appealed to the EAT on findings of race discrimination* ***unreasonably included unfair dismissal****. Despite the claimant's application for remedy in December 2016,* ***the respondents made application for postponement of the remedy pending EAT determination.***

4 It is important to note that while the respondents use public money to litigate and prolong the proceedings, the claimant did not have any source of income as he was out of work for a number of Months and even on finding work was for a limited time for the purposes of remediation.

5. He has serious financial difficulties to pursue the matter and the respondents knew this and continued to frustrate him. This matter has attracted a disproportionate amount time and costs following the conduct of the respondents and thus contrary to the overriding objective of the tribunal in dealing with cases in ways which are proportionate to the complicity and importance of the issues.

My Decision

Dealing with the emboldened points

(a) there were two days of deliberations not two weeks

(b) the decision on the unfair dismissal claim was successfully challenged . That the Court of Appeal have given leave to appeal that decision does not mean it will be **successfully** appealed. More importantly, the decision of the original tribunal went against the claimant on about 90% of the claims, and individual aspects of them raised. The claimant's appeal on those was rejected at initial consideration by EAT. In the preliminary hearing which preceded the substantive hearing I conducted, I gave the claimant the opportunity of not running those parts of his unfair dismissal argument which he had run unsuccessfully before the original tribunal. He persisted in arguing his dismissal was substantively as well as procedurally unfair. I found it to be unfair on a procedural basis only and even in that regard came to conclusions which differed from those of the original tribunal to a certain extent. That apart, the unfair dismissal claim as presented to me would have failed.

I will deal with postponement of the remedy hearing under Ground 4 below.

Ground 2

Deliberate provision of large amount of unnecessary and unrelated documents

*1.Further, the respondents have **deliberately caused the tribunal and the claimant to spend a lot of time and on the part of the claimant including huge amount of costs** by their **deliberate provision** of 9 layers of bundles of documents totalling up to eight thousand documents in the first tribunal and 6 layers of bundles of documents totalling up to four thousand pages of documents in the second tribunal of which 80% of the documents were duplicated to enlarge the number of files and did not relate to unfair dismissal proceedings.*

2. During the preceding preliminary hearing when EJ Garnon emphasised that the bundles should not be more than 100 pages, and must be relevant only to unfair dismissals, the respondents provided not 200 pages but more than 4000 pages of documents of which most of them were unnecessary and did not relate to unfair dismissal claim. This act impacted on the time for the preparation and costs to the claimant.

My Decision

There are two distinct issues here - disclosure and the content of the trial bundle. At the first stage everything should be disclosed if it is potentially relevant to the claim, whether it assists the party producing the document or the other party. The more the claims made and the wider the allegations contained in each claim, the more documents it is necessary to include in the trial bundle. I am particularly keen that preparation time and costs to the parties, and judicial time, should not be wasted by enormous document bundles. As I said in the reasons for my judgment, I would have wished for shorter statements and more concise bundles though I do not recall specifying 100 or 200 pages . Whenever I have challenged parties' representatives to justify huge bundle I have never found evidence that bundles are large due to the fault of one party alone. I do not accept it was unreasonable conduct of proceedings for the respondent to produce large bundles and long statements in response to the wide and serious allegations which the claimant chose to run before me

Ground 3

Disruptive conduct of small letter printing of the case laws relied upon by the Claimants at EAT hearing & threatening letter to the claimant to withdraw his claims of face cost applications

*1. Throughout the proceedings, the respondents have acted vexatiously, abusively and disruptively. During the middle of the proceedings, the respondents have severally **threatened the claimant with costs unless he withdraws his claims.** This sort conduct is disruptive and abusive despite the clear picture of the procedural unfairness of the respondent's dismissal of the claimant.*

2. This was excavated by the respondent's representative when she provided to the EAT all the case laws relied upon by the claimant while she printed the case law relied upon by the respondents on big prints. ***This act was brought before the EAT judge who reserved the matter to the Employment tribunal.*** *The effect of this was the claimant could not rely upon all his case laws during the appeal hearing effectively*

My Decision

I deal with the points in reverse order. I often express dismay at the production of any documents in small print. However, case law is available electronically and can be printed in any size. I cannot imagine His Honour Judge Shanks would have reserved to the Employment Tribunal the task of dealing with a point which, if it went to costs at all, would be in relation to the costs of the hearing he was conducting.

The first point conflates two matters which should be kept separate. To give an opponent a costs **warning** is not the same as making a threat. I have not read any letters or emails from the respondent's solicitors to the claimant or his representative, but I suspect they were to the effect that if he continued to run again arguments which had failed before they would apply for costs. Such an indication is in my view wholly proper.

Ground 4
Postponement of remedy hearing 76(2)

The respondent ***disruptively made application for the remedy hearing listed by the Tribunal on February 2017 to be postponed*** *despite the tribunal's detailed finding of facts and its reasons which made it almost impossible for their appeal to have reasonable prospects of success* ***while insisting that a rehearing should go ahead despite the Court of appeal leave for the EAT judgment to proceed to full hearing for the unfair dismissal rehearing case.***

My Decision

The first part of the above paragraph is mentioned under Ground 1. The decision whether to postpone a remedy hearing, when there has been a reserved decision on liability only which is being appealed, is a judicial decision which was in this case made by Employment Judge Buchanan. There is nothing unreasonable in the conduct of a would-be appellant applying for such a postponement. In all the circumstances of this case, I would almost certainly have made the same decision.

The second emboldened part is simply incorrect. Prior to the hearing before me, I read four long statements, the 90 page reasons of the original tribunal and the EAT decision. Mr Echendu only notified me on the morning of the hearing he had leave to appeal. I expressed my concern about whether I should proceed if there may be a further appeal. Both parties, not just the respondent wanted me to do so. Both representatives took the view , with hindsight correctly , that even if the Court of Appeal allowed the appeal against His Honour Judge Shanks's decision the case would have to come back to the

Employment Tribunal to determine the remedy on the unfair dismissal anyway . As I said in my reasons the indications were the original tribunal would also not have made a compensatory award. I find nothing unreasonable in the respondent's approach.

My Overall Conclusion

I cannot find the threshold for making an order is reached. The closest to reaching it is Ground 2 but, if it were primarily the respondent's fault that the bundles and statements were so long , I would not exercise my discretion to make a costs order in favour of the claimant because he , or Mr Echendu, bring upon themselves such excesses by running every argument possible rather than choosing only ones likely to succeed .

_____

T M Garnon EMPLOYMENT JUDGE

JUDGMENT SIGNED BY EMPLOYMENTJUDGE ON 18 DECEMBER 2018

JUDGMENT SENT TO THE PARTIES ON

19 December 2018

Miss K Featherstone
FOR THE TRIBUNAL