Case Number: 3200108/2017

RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr A Michaels**

Respondent: **City Commercial Interiors Limited**

Heard at: **East London Hearing Centre**

On: **12 January 2018**

Before: **Employment Judge Goodrich (Sitting alone)**

Representation

Claimant: Written representations from legal representative

Respondent: Written representations from legal representative

ORDER ON COSTS APPLICATION

The Claimant's application for costs succeeds to the extent that the Respondent is ordered to pay the Claimant £750.

REASONS

Background/History of Proceedings

1 The background to this application for costs made on behalf of the Claimant; and history of these proceedings is as follows.

2 The Claimant issued proceedings on 3 February 2017. He brought a claim for unfair dismissal.

3 Throughout these proceedings the Claimant has been represented by the ELS Solicitors Limited.

4 Attached to the Claimant's claim were particulars of claim. Paragraphs 1 – 8 of the particulars of claim were described as "background".

5 On the last page of the particulars of claim were two headings namely “Unfair Dismissal” and “ACAS uplift”.

6 In paragraphs 1 – 8 of the particulars of claim a detailed account was given of the Claimant’s version of events. Amongst the contents was an assertion at paragraph 5 that the Claimant’s informal meeting with Mr Pile (at which he was dismissed) was not a disciplinary meeting and no disciplinary procedure was followed.

7 Under the Claimant’s heading of unfair dismissal on the last page of his claim it was stated that his dismissal was unfair and/or the Respondent did not follow a fair procedure when dismissing the Claimant. It was stated that even if the Claimant’s conduct amounted to misconduct (which was denied) it did not amount to gross misconduct and therefore the reason for the dismissal was unfair.

8 It was also stated that subsequent to the informal meeting the Claimant received a letter which sated that the reason for his dismissal was poor performance. It was stated that the disparity between the reasons given for the Claimant’s performance indicated that misconduct and/or poor performance were not the real reasons for the Claimant’s dismissal. It was contended that the Claimant’s dismissal was both substantively and procedurally unfair.

9 Under the Section as to ACAS uplift it was asserted that the Respondent did not follow the ACAS Code when dismissing the Claimant they did not implement and carry out a thorough and fair procedure prior to dismissing the Claimant; warn the Claimant of the meeting that resulted in his dismissal; inform the Claimant that he could be accompanied to the meeting; and inform the Claimant of his right to appeal the dismissal. The Claimant was claiming an uplift of 25% on compensation awarded.

10 The Claimant’s claim was brought both against City Commercial Interiors Limited; and Cumberland Construction Company Limited.

11 The Respondent entered an ET3 response defending the Claimant’s claim. The response was drafted by Serah Goldsworthy. She described herself as a director of Sereh Goldsworthy HR Associates Ltd.

12 Attached to the ET3 response were particulars of response.

13 In paragraph 3(ii) of the particulars of response it was stated that throughout 2015 and 2016 there were concerns relating to the Claimant and his work performance, thereafter setting out what these were.

14 In paragraph 3(iii) of the response it was stated that the Respondent had previously warned the Claimant about his poor performance and disruptive conduct on numerous occasions and giving a further description of what these were stated to be.

15 In paragraph 3(iv) from the particulars it was stated that at the meeting on 12 September 2016 the Claimant was given a reasonable opportunity to state his case, ask questions and present evidence, but was unable to provide the Respondent with a satisfactory explanation for his repeated failure to meet the described standards and

continued disruption, as a result of which the Claimant was dismissed.

16 In paragraph 3(v) it was stated that the Claimant had previously been given warnings and had failed to make improvements.

17 In paragraph 4 it was stated that the Respondent acted reasonably in dismissing the Claimant for capability and conduct and it was denied that the Claimant was unfairly dismissed.

18 In paragraph 5 of the particulars of response it was stated that if, which was denied, the Employment Tribunal finds that the dismissal was procedurally unfair the Respondent would rely on *Polkey* case to argue that the Claimant would be dismissed in any event and to seek a reduction in any award for compensation accordingly. Lengthy details were given of the Respondent's account of events as to the Respondent's case in this respect.

19 In paragraph 1 of the particulars of response the Respondent stated that the Claimant's employer and the correct Respondent was the second Respondent (City Commercial Interiors Limited). In an email dated 10 March 2017 Ms Goldsworthy asked that Cumberland Construction Company Limited be removed from the claim. She did not copy the Claimant's representatives with this email.

20 The Tribunal, without further consultation with the Claimant's representatives entered a judgment dismissing the claim against Cumberland Construction Limited clarifying that the claim would proceed against City Commercial Interiors Limited only.

21 There was an application for review of the dismissal of the claim against Cumberland Construction Company Limited, made by Claimant's solicitors. The Regional Employment Judge directed that the application could be considered at the full merits hearing.

22 On 31 May 2017 I conducted the hearing of the Claimant's unfair dismissal claim.

23 The outcome of the unfair dismissal claim was that I decided that the Claimant was unfairly dismissed. I gave an oral judgment with my reasons for the judgment. By the time of hearing the Respondent had decided to dispense with Ms Goldsworthy's representation and was represented by Ms Park, a Director for the Respondent. The Claimant was represented by Ms Smeaton of counsel.

24 Neither party asked for written reasons for the judgment, so none were supplied. Ms Smeaton, however, had made what was an accurate record of my oral reasons for the judgment.

25 There had been insufficient time to deal with remedy so a separate remedy hearing was required.

26 The remedy hearing took place on 19 September 2017. The Orders at the Remedy Hearing included that there be a 20% uplift of the award because of the Respondent's failures to follow the ACAS code. The compensation for unfair dismissal

included this uplift, remedy for unfair dismissal and two weeks pay for failure to provide written particulars amounted to a total award of £20,230.47.

27 The Claimant made an application for costs. Both parties agreed that I could determine the costs application on the basis of written submissions; and I made case management orders as to the submissions for and against a costs order.

28 The Claimant's representatives provided written submissions in support of their costs application; and a response to the Respondent's submissions.

29 The points in support of the Claimant's costs application included the following:

29.1 The Respondent's defence had no reasonable prospects of succeeding in defending the claim and they acted unreasonably in seeking to defend the claim to a final merits hearing and remedy hearing.

29.2 The Tribunal found in its judgment that the Respondent had dismissed the Claimant unfairly both substantially and procedurally; so that the defence of the Claimant's claim was unreasonable and vexatious.

29.3 The Tribunal found that any concerns Mr Pile might have expressed about the Claimant's work were done in such an informal way as to leave him unaware that he was receiving any form of informal warning, still less that he was at risk of dismissal if his performance was not to improve. The Respondent's defence in paragraph 3(v) of the ET3, that continuous warnings had been given, was exaggerated at best and fabricated at worst.

29.4 The Respondent had failed to follow its own processes as was belatedly admitted by Mr Donavan in his witness statement for the Respondent. In its ET3 response, however, the Respondent had suggested that it had followed the required procedures.

29.5 The Respondent had been unable to distinguish between issues of performance, capability and conduct and it should have been clear from the outset to the Respondent that it had no fair reason to dismiss the Claimant and it ought not to have defended the Claimant's claim at all.

29.6 Mr Donavan had finally accepted when cross-examined that what the Claimant had done did not amount to gross misconduct. The Respondent ought reasonably to have known that its defence was misleading, malicious and bound to fail as there was no reason for immediate dismissal.

29.7 Further or alternatively the Respondent's conduct throughout the proceedings was unreasonable and vexatious. The examples given included the following.

29.8 The Respondent's failure to call Mr Pile as a witness was criticised, with

reasons given. The Respondent sought to pressurise the Claimant by forcing him to proceed with litigation by maintaining a false position throughout the procedures up until the time where witness statements were exchanged.

29.9 Ms Park for the Respondent made bullying threats against the Claimant as to bringing proceedings against Cumberland Construction, threatening costs in order to put pressure on the Claimant to settle the claim by accepting nuisance offers made at the last minute by the Respondent.

29.10 The Respondent unreasonably failed to provide evidence ahead of the remedy hearing, seeking instead to make an oral application at the remedy hearing for Mr Donavan to provide witness evidence on his knowledge of the employment market.

29.11 The Respondent unreasonably took the Claimant to task as to the evidence he provided about his earnings after being dismissed.

29.12 The settlement offered by the Respondent ahead of the full merits hearing of £6,000 was an inadequate sum. Following this hearing, the lesser sum of £4,000 was offered when the parties were preparing for the remedy hearing. This was done maliciously to force the Claimant into accepting a low settlement.

30 The Respondent's submissions included the following points:

30.1 Simply defending a case does not give rise to a right for a Claimant to recover costs. The Claimant's case on the costs appeared to be that the Respondent should not have defended the case but simply pay the Claimant whatever sum was demanded.

30.2 There was no suggestion made by the Judge that the defence of the Claimant's claim was unreasonable and vexatious.

30.3 The Respondent had made no assertion that the earlier warnings given to the Claimant were formal in nature.

30.4 It is fully accepted that EJ Goodrich made findings against the Respondent in reaching the conclusion that the dismissal was both procedurally and substantively unfair. The Judge, however, made important findings against the Claimant, particularly the finding that the real reason for dismissal was capability.

30.5 In relation to the finding that the dismissal was procedurally unfair, at no stage did the Respondent assert that proper procedures had been followed in the termination process.

30.6 The Claimant has already benefitted from his award being uplifted by 20% due to the Respondent's failure to follow the ACAS code on disciplinary

and grievance procedures.

30.7 In any event the evidence produced at the full merits hearing would have needed to have been heard in any event as part of the Respondent's defence was that if the dismissal was procedurally unfair the Claimant would have been dismissed in any event (paragraph 5 of the ET3). Although the Respondent was ultimately unsuccessful on this issue, it was denied that it was unreasonable for the Respondent to rely on this defence especially given the finding that the reason for dismissal was capability.

30.8 As regards to remedy, the Claimant schedule of loss exceeded £40,000; and the total award made to the Claimant was less than 50% of that claim. No award of costs should be paid for the remedy hearing.

30.9 In response to the claim as to unreasonable conduct in the litigation generally the Respondent's submissions included the following.

30.10 The decision not to call Mr Pile was made on the basis of legal advice and this had no impact on the Claimant's costs.

30.11 The Respondent believed that the Claimant clearly knew who his actual employer was and that the attempt to join Cumberland Group Limited was a vexatious act. It was denied that seeking costs in this respect was done to pressurise the Claimant into settlement.

30.12 It is accepted that the Respondent failed to prepare adequately for the remedy's hearing, believing naively that he would be able to settle the claim prior to the hearing.

30.13 As regards the Respondent's requests for documentation as to the Claimant's earnings, he would have to provide evidence of this.

30.14 Although a reduced offer of £4,000 was made in May 2017, this was because the earlier offer had been overlooked. In September 2017 the Respondent increased its offer of settlement to £9,000 and then to £12,000, whereas the Claimant materially increased the amount it required to settle the claim to £35,000.

30.15 The Claimant should not be awarded any costs; further or in the alternative any award of costs should be a small proportion of the amount claimed.

The Relevant Law

31 Rule 76 Employment Tribunals Rules of Procedure 2013 provides that:

"(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 … 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)."

32 The Tribunal's rules envisage, therefore, a staged approach as to the making of costs orders.

33 The first step is for a Tribunal to consider whether a party has behaved in any of the ways described in Rule 76(1)(a) or (b) above.

34 If the Tribunal does consider that the threshold has been breached the Tribunal has a duty to consider whether to make a costs or preparation time order.

35 The Tribunal, when considering whether to make such an order, has a discretion both as to whether to make the order and, if it does, how much the order should be.

36 The general rule in Employment Tribunal proceedings is that costs are the exception. In this respect it is unlike the County Court or High Court where the losing party will generally expect to pay the costs of the successful party.

37 There have been numerous cases giving guidance on whether to make a costs or preparation time order and to how much any such order should be for. In exercising a discretion to order costs the Tribunal will consider the whole picture of what happened in the case and ask whether there has been unreasonable conduct in bringing and conducting the case and, in doing so, identify the conduct, what was unreasonable about it and what effects it had. There does not need, however, to be a precise cause or link between the unreasonable conduct in question and the specific costs being claimed.

Conclusions

38 I have considered, firstly, whether the Respondent's defence had no reasonable prospect of success so as to trigger Rule 76(1)(b) of the Rules, as contended by the Claimant and resisted by the Respondent.

39 I have also considered whether the defence of the Claimant's claim was unreasonable and vexatious at the full liability hearing.

40 I have also considered whether the Respondent's conduct throughout the proceedings was unreasonable and vexatious, as submitted by the Claimant and disputed by the Respondent.

41 I consider that the Respondent had no reasonable prospect of succeeding in contending that the dismissal was procedurally unfair. The Respondent failed to notify the Claimant in writing, or verbally, in advance of the meeting at which he was informed that

he was dismissed, what the allegations against him were. The meeting at which the Claimant was dismissed was not a disciplinary hearing. Mr Pile had been instructed by Mr Donavan of Mr Donavan's decision to dismiss him. There was a comprehensive failure to follow the guidance given in the ACAS Code of Practice on disciplinary and grievance procedures. The Respondent failed to follow even the minimum steps that used to be required in the (previous, now repealed) statutory disciplinary procedures. There was no reasonable prospect of the Respondent defending the procedural unfairness aspect of the Claimant's claim.

42 The issue of whether there was a reasonable prospect of defending the claim that the dismissal was also substantively unfair is, perhaps, more arguable. The Respondent did not submit, however, in its submissions about costs that it was reasonably arguable that the dismissal was substantively fair (their submissions concentrated on the procedural unfairness point and on their alternative case but if the dismissal was procedurally unfair the Claimant would have been dismissed in any event, as per paragraph 5 of the ET3. It is arguable, perhaps, that with the threshold for no reasonable prospect of success being a high one (see *Balls v Downham Market High School & College [2011] IRLR 217 EAT)* that this threshold was not reached. As Mr Donavan accepted when cross-examined that the Claimant had not been committed gross misconduct it may be that there was no reasonable prospect of success. It is unnecessary for me to give a definite conclusion on this in view of my comments below on the effect of the Respondent's unreasonable conduct.

43 As regards the remedy hearing, I agree with the Respondent's submissions that there was not unreasonable conduct in defending this element of the case, although they prepared for it poorly and had to make an application to allow Mr Donavon to give evidence at the remedy hearing. The Respondent was successful in the Claimant's schedule of loss being substantially reduced.

44 As regards unreasonable conduct generally the only aspect in which I consider that there was unreasonable conduct by the Respondent was in their attitude to threatening costs as to the claim being against both companies. An employee who has been dismissed and is having to fund legal representation themselves when having limited financial means is in a vulnerable position. Unless there are good reasons for claiming costs they are intimidating for Claimants and can be experienced as bullying behaviour. I do not consider that there was good reason for threatening costs in this respect. The Claimant was legally represented, so may well have been advised that the prospects of a costs order being made against him were remote. Nor should the Tribunal have dismissed the claim against one of the Respondents without obtaining representations from the Claimant's representative. Nonetheless it was bullying behaviour and unnecessary.

45 I made no finding that the Respondent had lied in the course of the hearing, although in various respects I preferred the Claimant's evidence to that of the Respondent.

46 I have gone on to consider whether or not to exercise my discretion, having found that the Respondent had no reasonable prospect of success in defending the claim at least to the extent of procedural unfairness and possibly also as to substantive unfairness; and that the threat of costs as to the naming of two Respondents was unreasonable. The

failure to concede that the dismissal was unfair it was also unreasonable conduct. I consider it appropriate to exercise my discretion as I see no reason for the Respondent not to take responsibility for its actions.

47 I have gone on to consider how much the award of costs should be. In this respect I consider that, even if the Respondent had conceded that the dismissal was unfair, their *"Polkey"* defence was reasonably arguable. Additionally, I consider that the case that the Claimant had failed to mitigate his losses at an earlier point than I held that he had done so was also reasonably arguable. I consider that there would have been some saving of time if the Respondent had made concessions such as to the Claimant's dismissal being procedurally unfair. I consider, however, that it is likely that two days would have been required for liability and remedy because the "*Polkey"* case advanced in paragraph 5 of the grounds of response would have been likely to have taken much of the time of the liability hearing. This would have taken place and, as stated above, the Claimant would have had the reassurance of knowing before the hearing took place that he would have been successful in obtaining at the very least a basic award and at least a small compensatory award.

48 I consider, therefore, it appropriate to make only a small award for costs, compared to what has been claimed having in mind the effect of the unreasonable conduct and the part of the Respondent's response that had no reasonable prospect of success. I consider it appropriate to make an award of £750.

Employment Judge Goodrich

26 February 2018