EMPLOYMENT TRIBUNALS

Claimant: Mr E Haynes

Respondent: Chief Constable of Leicestershire Police

Heard: In chambers on written representations

On: Monday, 16 September 2024

Before: Employment Judge Clark (sitting alone)

JUDGMENT

1. The Respondent's application for costs **fails and is dismissed**.

REASONS

1 Background

1.1 On 18 April 2024, my judgment with reasons dismissed the claimant's claim of constructive unfair dismissal following an attended hearing at Leicester between 26 February and 1 March 2024.

1.2 On 11 May 2024, the respondent applied for a costs order and submitted a schedule of costs amounting to £19,022. The application is based on a contention that the claim had no reasonable prospects of success in accordance with rule 76(1)(b) of the 2013 rules of procedure.

1.3 I have made two case management orders in preparation for today. I initially made orders providing for the claimant to provide any initial comments on the application, and for each party to indicate whether they required the application to be dealt with at a hearing or on submissions. If it was to be on submissions, I indicated further orders would follow. By that time, Mr Haynes was representing himself having previously had the benefit of representation by solicitors and counsel. He set out his initial response. Both parties consented for the application to be dealt with on written submissions.

1.4 As a result, I issued further orders permitting any new evidence (such as inter party correspondence relevant to costs including that which may have been sent on a without prejudice save as to costs basis), any final submissions, and replies to the same including on the issue of the assessment of the costs claimed. Those orders were complied with.

2 The law

2.1 Rule 76(1)(b) permits an employment tribunal to make a costs order where a party has presented a claim or response which had no reasonable prospect of success. As elsewhere in the rules, 'no reasonable prospect' means that something about the law or facts or evidence in the case mean, effectively, that it could not succeed.

2.2 The conventional approach to costs applications is to consider them in three stages of: -

a) Whether the circumstances in the case engage one of the costs thresholds, sometimes referred to as a costs gateway.

b) If so, whether to exercise that discretion.

c) If so, the assessment of those costs arising.

2.3 Arguably, there may be a fourth discrete stage as somewhere overlapping the second and third stages is consideration of the form, reach and scope of any costs order which need not necessarily be costs of the entire litigation. That is part of the exercise of discretion and a necessary step before then performing the assessment of the costs incurred that fall within its scope.

2.4 In this case the mechanism for assessment falls within rule 78(1)(a) being a sum under £20,000. Neither party has sought detailed assessment. Whilst rule 78(1)(a) is not strictly 'summary assessment' as defined under the Civil Procedure Rules, the principles are broadly the same and the substantive tests on the assessment of costs still apply. In particular, that the sums are reasonably incurred, reasonable in amount and proportionate to the issues engaged in the case.

2.5 Rule 84 provides that when 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.

2.6 The focus is on the prospects of success of the claim itself. The equivalent threshold in the predecessor to rule 76(1)(b) was considered by the Court of Appeal in **Scott v Inland Revenue Commissioners 2004 ICR 1410**. The key question as to whether a claim has no reasonable prospect of success is not whether the claimant thought he was in the right, but whether he had reasonable grounds for doing so.

2.7 In **Hamilton-Jones v Black EAT 0047/04** the EAT held that the employment Tribunal is required to assess objectively whether the claim had any prospect of success at any time of its existence.

2.8 The case of **Radia v Jefferies International Ltd EAT 0007/18** provides guidance on the approach to the test. Whether the claim had no reasonable prospect of success is to be judged on the information known or reasonably available at the start. In assessing that, the Tribunal is entitled to view it through the prism of any information or evidence gained by

having heard the case that properly informs that question at that time, as long as it was available at that earlier time. The existence of factual disputes requiring a trial does not necessarily mean a conclusion cannot be reached that the claim had no reasonable prospects from the outset, or that it should have been appreciated at the outset.

2.9 Mr Haynes also referred to **Gee v Shell [2003] IRLR 82** and **Lodwick v Southwark [2004] ICR 844** to support the proposition that costs orders in the employment Tribunal are the exception rather than the rule.

2.10 Mr Haynes also referred to authority dealing with another costs threshold as set out in rule 76(1)(a) which, as it is not relied on by the respondent, I have not set out here.

3 Documents

3.1 In support of its application the respondent provided an email dated 30 August attaching its final submission, its costs schedule, and additional evidence including: -

a) Two emails dated 12 January and 13 March 2023 to the claimant's solicitor with a costs warning in advance of the hearing to decide its application for strike out/deposit. The costs warning explicitly referred to both a denial of any breach of contract and the events that went to the contention of affirmation of contract. At that stage the respondent offered a drop hands settlement.

b) Two emails dated 3 May and 17 November 2023 from the respondent to ACAS restating an earlier offer to settle on a "drop hands" basis.

3.2 Objecting to the application, Mr Haynes provided: -

a) His original comments to the application

b) His response to costs application by email dated 30 August 2024. That attached the detail of his response together with the following attachments" -

(i) Mr Simon Lane's "initial response".

(ii) Spreadsheets of overtime and hours worked (relevant to how much he understood he was working over normal hours)

(iii) Evidence of the views of others about the workload in text and other electronic messages.

(iv) Details of his means by way of breakdown of his income and expenditure.

(v) The on-call rota for the past 7 years

(vi) The question set for the IT mental health and wellbeing questionnaire template. (not completed)

(vii) A statement from Kemlash Mistry dated 23 July 2024 together with a table of text messages the two had between 2018 and December 2022.

(viii) Mr Hayne's analysis of the occasions and times he responded to calls out of normal working hours.

(ix) Responses to a “solutions architect questionnaire” apparently prepared by Mr Haynes which poses various questions about the experience in the workplace. Responses are submitted from Simon Lane, A White, George Onoufriou, Ian Carr and Kemlash Mistry. The content is reflective of the issues that emerged from the trial and those matters on which the claim failed. Most, but not all, answered the leading questions in a way supportive of the claimant’s contentions.

(x) However, a theme of those was the sense that the workload was too high to cope, backlogs and that the critical nature of the work meant there was no real ability to refuse work asked of staff in the department. That staffing concerns were raised in weekly meetings, in particular the reliance on the claimant for the datacentre systems.

(xi) A timeline document prepared by Mr Haynes with embedded documents from the final hearing bundle.

4 Submissions

4.1 The respondent’s application is, in summary, put in these terms: -

a) The Tribunal dismissed the 7 specific allegations of breach, both individually and when considering the totality of the conduct; that what happened was done was with reasonable and proper cause; that if there had been breach, the contract was subsequently affirmed.

b) That this outcome was evident throughout, and in any event by the exchange of witness statements, such that it should have been clear the claim had no reasonable prospect of success.

c) The claimant was legally represented.

d) The respondent’s application for strike out/deposit was refused but this happened before the exchange of documents or witness evidence, after which it should have been clear the claim had no reasonable prospect of success.

e) That the respondent had given and repeated its costs warnings and made a drop hands settlement offer.

f) That it is a public body that has incurred significant expense in defending the claim.

4.2 Mr Haynes makes a number of submissions opposing the application which can be summarised as follows. In respect of whether the threshold is made out: -

a) That he had no knowledge of the employment tribunal litigation process and took reasonable steps to seek advice from CAB and then a firm of solicitors specialising in this area of law.

b) That their advice was that there was a reasonable prospect.

c) That his legal costs were funded through his home insurance cover which had to pass its own merits or “prospects of success” test.

d) That he is dissatisfied with the conduct of his case by his professional advisers, the result of which he says meant critical aspects of his case were not advanced before the tribunal, that he was not asked to explain aspects of his case, that documents were not included in the bundle and witnesses were not kept in contact and additional information provided by witnesses was not used with the result that the strength of his case was weakened.

e) That a number of colleagues confirmed the culture of relying on staff expertise to provide the services within an under-staffed department lacking in resilience.

f) That one of the respondent's witnesses evidence was incorrect in one particular respect

g) That he lacked enough records to present the picture of the out of hours work he had to do to keep the system operational.

4.3 Alternatively, if it is made out, on the question of whether to make any order Mr Haynes points to: -

a) His financial means, which are such that he only just covers his commitments.

b) He is no longer represented as his insurers have now refused to continue to fund the representation.

4.4 As to the order and any assessment of costs, Mr Haynes is unable to make any material representations. His submissions on means would, of course, apply equally to the amount of costs as to whether to make an order at all.

4.5 My case management orders gave each party the opportunity to submit a reply to their opponent's submissions. On 12 September 2024, the respondent provided its comments on the claimant's response. In short it makes the following observations: -

a) That the claimant has, in part, sought to challenge the tribunal's findings on liability.

b) That the claimant has sought to introduce new evidence on the issues in the claim.

c) That the claimant has sought to introduce new allegations.

d) That the claimant's evidence on means shows a surplus but that, even if the tribunal accepts the claimant's contention that that reduces by the end of 2025 and concludes that amounts to an inability to meet any costs order, that this does not mean an order should not be made (relying on **Chadburn v Doncaster & Bassetlaw Hospital NHS Foundation Trust & Anor UKEAT/0259/14**.)

e) That reading rule 78(1)(b) together with rule 84, the tribunal can make an order for a specified part of the costs **(relying on *Kuwait Oil Company v Al-Tarkait [2020] EWCA Civ 1752*)**.

4.6 On 13 September 2024 Mr Haynes provided his reply, although it is more accurately a reply to the points made by the respondent in its own reply. In that he-

a) Explained the purpose of the additional evidence was not to challenge the decision, but to illustrate the evidence he believed would be submitted. In effect, to support his

contention of the objective reasonableness of his belief in the prospects of success. (although he accepts part of it is to demonstrate some of Mr Craigs evidence was factually incorrect)

b) Responded to the key points relied on as indicating affirmation and explained the conditional nature of his preparedness to continue in employment on the basis that the previous pressures of work had been and/or were to be resolved.

5 Discussion and Conclusions

5.1 The first stage is whether the threshold was engaged at the outset of the claim or at any time. This was a single claim for constructive unfair dismissal. The claimant was legally represented, and his claim professionally drafted. He relied on a breach of the implied term of trust and confidence. To succeed, the claimant had to show: -

a) The implied term of trust and confidence had been breached by the employer (That without reasonable and proper cause it had conducted itself in a manner that was at least likely to seriously damage trust and confidence)

b) That the conduct was at least part of the reason for the claimant's resignation.

c) That he had not affirmed the contract before it ended.

5.2 As to prosects of showing a breach, I am not satisfied that this falls within the concept of *no* reasonable prospect. I have not placed any weight on anything produced by Mr Haynes in response to this application that might be said to be new evidence, save to the extent that I accept some of it illustrates Mr Haynes' point about the claim he sought to advance and his belief in its prospects. I am satisfied there were reasonable grounds for Mr Haynes alleging a breach arising from the generality of the recent history of the organisation of his work. The breach of the implied term focused on pressures of work, in particular out of hours work, and the demands on him arising from the nature of his work in the data centre and limitations in its hardware and other aspects. The way the claim was prepared and presented had the result that the list of issues eventually distilled between legal representatives and presented to the tribunal as the issues it was to determine, moved away from the generality of the long-standing work pressures to focus on a series of specific examples which itself reduced the matters raised in the grounds of complaint. Of that general proposition, there was little dispute and, in any event, I found as a fact that the IT department had been lacking in resilience and that the claimant, and all staff, were under particular pressures of work to maintain service-critical IT systems. Those were matters which by late 2022, and after Mr Haynes had tendered his resignation, were being addressed by the respondent with more systemic and sustainable solutions which all expected would relieve that pressure. Within that general contention, there was a basis for arguing breach of the implied term of trust and confidence.

5.3 Of the specific examples chosen to illustrate that breach, the example of the weekend working over 26 and 27 March 2022 is a good example of why this costs application has been made. That was always known to be a weekend of voluntary overtime to put in place changes which were part of the longer-term solution to the work pressures. If that were the only contention, I would have concluded without hesitation that it had no reasonable prospect of success. Whilst it arguably should not have featured as a specific criticism of

the employer's conduct, the other examples are examples of the general contention which, whilst not the strongest case ever, is enough for the claim not to be caught by the test of no reasonable prospects of success.

5.4 Central to the issue of out of hours work was whether there was an expectation of responding. Ultimately, I found that staff not actually on call would not be sanctioned if they did not respond to a request for assistance out of hours, even to the point of being able to actively decline to do so. The issue in the case was more subtle than the presence or absence of a black letter rule and Mr Bidnell-Edwards properly argued for the claimant that the organisational culture was such that the informal expectation of responding had reached a status of an unwritten rule that the claimant was then bound by. Whilst I rejected that, it was nonetheless a genuine view of Mr Haynes and that his personality traits were being taken advantage of in the absence of any systems response to the repeated concerns raised by staff generally in the weekly meetings. Again, it is an arguable contention to have made.

5.5 Turning to the second issue of causation, I am satisfied that there were at all times reasonable prospects of the claimant showing that the reason for his resignation was, in part at least, the issues flowing from the pressure of work including the specifics of the out of hours working. There were other reasons, not least the issues in his private life and the earlier disciplinary investigation. However, the test only requires that the conduct of the employer was part of the reason.

5.6 The final issue is affirmation. This is a contention that will be advanced by a respondent as part of its defence, as opposed to being a positive constituent element of the legal cause of action for the claimant to prove. Nevertheless, it remains an aspect of a claim that all claimants must consider when bringing a claim. That is particularly so when there were facts within the claimant's knowledge that made it more than likely this argument would arise from the fact of his decision to seek to rescind his resignation.

5.7 In my liability judgment, I identified eight events which potentially engaged the concept of affirmation, not all of which were relied on by the respondent. I rejected the first five. I concluded the that the 6th and 7th, reinforced by the 8th, demonstrated affirmation such that the claim would have failed in any event for that reason. The context of that, however, is again not something I consider to be black and white. I referred in the judgment to Mr Bidnell-Edwards submissions on the claimant's actions being analogous to working under protest. Whilst I rejected that, I did find that his request to rescind his notice happened on the back of learning from Mr Lee about the positive changes that were to happen in the structure and organisation of the IT department, and which reasonably led him to believe the circumstances that had led to his resignation were resolved. Those changing circumstances, particularly occurring in the context of the modified common law on affirmation arising from section 95(1)(c), mean I am unable to conclude that there was no reasonable prospect of rebutting a contention of affirmation, even though my conclusion after trial was that he had affirmed.

5.8 The respondent's contentions against these three limbs of the test were examined at a preliminary hearing before EJ Ahmed on 24 April 2023 which sought to strike out the claims or make them subject to a deposit. He refused both applications. The reasons for

doing so were apparently given orally at the time and are not before me in writing. What is apparent is that not only did Judge Ahmed not consider that the claim fell within the test of no reasonable prospect of success, which is the same substantive test as I am now applying, but he also declined to impose a deposit on the less demanding test of ***little*** reasonable prospect of success. It is hard to see why that decision could have been based on declining to exercise a discretion to make an order which was otherwise made out, as opposed to a view that the tests were not made out. The case of **Vaughan** reminds me that the fact a party does not *apply* for strike out or a deposit is not in itself evidence of the prospects, although it might be relevant to discretion. This situation is different where the application is made but refused. I do not consider I am bound absolutely by EJ Ahmed's determination any more than had the converse applied. One difference is that although the test he applied is the same as I am applying, we are each viewing it from a different perspective in the life of the case. Nevertheless, it is supportive of the conclusion that I otherwise come to at this stage and would in any event have further relevance at the second stage of discretion, had I got that far.

5.9 Similarly, so far as assessing what the claimant ought reasonably to have understood were the prospects of his claim, his position has been supported in fact by his colleagues, some of whom continued to be employed by the respondent and were prepared to give evidence for him whilst still employed. That, in itself, weighs very little in the balance but what weighs more heavily in supporting what he ought to understand about his claim is the results of his reasonable attempts to seek professional advice which has resulted in positive assessments, including an insurance prospects test. As before, I do not consider that to be determinative, but it is supportive of my conclusions and does go to his reasonable grounds for bringing and pursuing his claim.

5.10 The respondent's final submissions introduce an alternative application that if the threshold is not made out from the outset, it is at least made out from the exchange of documents and witness statements. I suspect that may have evolved from consideration of why the claimant should reasonably have recognised there was no reasonable prospect of success after a tribunal has itself refused to accept that contention. There is no separate costs schedule for such an application, but it would be possible to overcome that by focusing on the trial costs only. However, against the generality of the contentions in the claim, I do not accept the disclosure and evidence exchanged altered the position to such an extent that it brought any of the essential limbs within the no reasonable prospect test.

Whether to exercise the discretion and in what form?

5.11 If I am wrong on the question of threshold, I would then have to consider whether to make a costs order and in what form. Various factors engage in that discretion. The reasonable steps Mr Haynes went to in order to seek professional advice, the steps to fund the representation which included a merits test and the outcome of the preliminary hearing tip strongly against exercising the discretion. As Mr Haynes puts it, the outcome increased his confidence that his claim was some way from having no reasonable prospects of success. That was only reinforced further upon the tribunal declining to impose even a deposit order.

5.12 On the other hand, the respondent has given clear costs warnings, outlining the areas in which it was ultimately successful in defending the claim. However, just as the absence of a costs warning does not in itself preclude a tribunal from making a costs order, I do not consider the presence of one to add to the assessment of the threshold. Particularly, as in this case, as the contentions were raised before EJ Ahmed declined the strike out and deposit applications. It would, if the threshold was made out, add weight to the scale in favour of exercising the discretion.

5.13 I also have Mr Hayne's evidence of means, both now and in the future. At present, he has a surplus of around £1038 per month. He anticipates that reducing to around £316 from early next year after mortgage repayments increase. He has a negligible ISA account of £413. He has not disclosed any capital accounts, in particular the value and any equity in his home. I consider that his finances could have some weight potentially to influence the amount of a costs order but, in itself would not prevent an order being made.

5.14 The balance between the various factors, particularly the implications EJ Ahmed's judgment means I would not exercise the discretion.

Assessment of costs

5.15 Because of where I have got to, it is not necessary to deal with the assessment of the costs claimed. All I would add is that even if an order were made, it would engage consideration of the ability of the respondent to recover VAT, to the reasonableness of solicitor attendance throughout trial and, if there were grounds to limit an order to the trial itself, the preparation costs claimed.

EMPLOYMENT JUDGE R Clark

DATE 19 September 2024

JUDGMENT SENT TO THE PARTIES ON

……20 September 2024……..

AND ENTERED IN THE REGISTER

……...……

FOR THE TRIBUNALS