Case Number: 3401056/2014

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr D Underwood	**v**	**Wincanton Plc**

Heard at: Bury St Edmunds

On: 19 June 2017
18 September 2017 (Discussion day – no parties in attendance)

Before: Employment Judge Postle

Members: Mr AP Clark and Ms R Kilner

Appearances
For the Claimant: Mr Jackson, Solicitor.
For the Respondent: Mr Smith, Counsel (on behalf of Wincanton Plc only).
For Clarks Legal LLP: Ms Atwal, Solicitor.

JUDGMENT
ON THE CLAIMANT'S COSTS APPLICATION

1. There be no order for costs against the respondent.

2. The claimant's application for a Wasted Costs Order against Clarks Legal LLP/Ms M Atwal is not granted.

3. The hearing listed for 20 November is thus vacated.

REASONS

1. Employment Judge Postle firstly apologises to the parties in that originally a discussion day had been planned following the costs hearing in June for July, but due to illness that discussion hearing had to be postponed. Given then the summer holiday and dates of availability of the tribunal, the tribunal were not able to reconvene until 18 September 2017, being the first available date.

2. The claimant's costs application follows the tribunal's Judgment promulgated on 4 January 2016 following a five day hearing in Bury St

Edmunds in September 2015. There then was a remedy hearing on 11 April 2016.

3. The liability judgment was that: the claimant was automatically unfairly dismissed for asserting his statutory rights. However, the tribunal did not find the claimant was dismissed for making a public protected disclosure. The claimant did suffer one detriment following the making of the protected disclosure. The claimant had originally asserted 13 separate detriments. Further the claimant was wrongfully dismissed. There had been unlawful deduction from wages for a period 7 April to 13 June 2014. The tribunal did not find there was a breach of s.1 of the Employment Rights Act 1996.

4. The remedy hearing awarded the following:-

   4.1 A basic award of £696.

   4.2 A compensatory award of £3,521.

   4.3 A statutory uplift of £704.20.

   4.4 Unlawful deduction of wages £4,650.

   4.5 Expenses in relation to looking for alternative employment £50.

   4.6 An award for injury to feelings of £6,000.

   4.7 No award in respect of personal injury.

   4.8 No award in respect of aggravated damages.

   4.9 The repayment of the employers pension contributions of 4.5 weeks amounting to £125.46.

5. In this costs hearing the following claims are made:-

   5.1 Costs order against the respondent under rule 76(1) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

   5.2 A wasted costs order against Clarks Legal LLP and/or Ms Monica Atwal a solicitor in that firm under rule 80 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

6. In this tribunal we have heard evidence through prepared witness statements from:-

   6.1 Ms Wong a clerk employed by the claimant's solicitors.

   6.2 Ms Atwal solicitor at Clarks Legal LLP.

7. The tribunal have also had the benefit of skeleton arguments from:-

   7.1 The claimant's solicitor.

   7.2 The respondent's counsel.

   7.3 Ms Atwal for Clarks Legal LLP and on behalf of herself.

8. Originally the claimant's solicitors had claimed something in the region of £32,000, but appeared to be limiting their claim now to £20,000.

9. The claim against the respondent's solicitors/Ms Atwal was £610 plus VAT.

The law

Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013

10. Rule 76(1) states:-

> "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 (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 the proceedings (or part) have been conducted; or
>
> b) any claim or response has no reasonable prospect of success;
>
> c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins."

11. Rule 78 states:-

> "(1) A costs order may—
>
> (a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;
>
> (b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles; or, in Scotland, by way of taxation carried out either by the auditor of

> court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993(1), or by an Employment Judge applying the same principles;"

12. Rule 84 states:-

> "In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay."

13. All of the above grounds are discretionary, that is to say the Employment Tribunal may make a costs order if any ground is made out but is not obliged to do so. Although the ground under rule 76(1)(a) and (b) are discretionary, the tribunal is under a duty to consider making an order when they are made out. It is in affect a two stage exercise. The first stage being the employment tribunal must determine whether the paying party has acted unreasonably, vexatiously, abusively or disruptively so as to bring into play the jurisdiction to make an order for costs. Then if the tribunal is satisfied that there has been some unreasonable or other relevant conduct the second stage will be engaged. In other words the tribunal has a discretion whether or not to make the costs order once a relevant ground has been made out.

Wasted Costs

14. Rule 80 subsection 1 states:-

> "(1) A Tribunal may make a wasted costs order against a representative in favour of any party ("the receiving party") where that party has incurred costs—
>
> (a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative; or
>
> (b) which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay."

Rule 80 is based on wasted costs provisions that apply in the civil courts with the above definition of "wasted costs" being identical to that contained in s.51(7) of the Supreme Court Act 1981. Useful guidance is set out by the Court of Appeal in Ridehalgh v Horsefield [1994] 3 ALL ER 848 in which the court set out a three stage test that should be followed when a wasted costs order is being considered. First, a court or a tribunal should consider whether the representative acted improperly, unreasonably or negligently. If so, the next question is whether the representatives' conduct caused the respondent to incur unnecessary costs. If so, the court or tribunal should ask the third question namely, whether it was just

to order the representative to compensate the claimant for the whole or part of the relevant costs.

15. The Court of Appeal in that case also examined the meaning of improper, unreasonable and negligence as follows (albeit whilst focusing on members of the legal profession rather than on representatives generally):-

> "Improper" covers, but it is not confined to conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty.
>
> "Unreasonable" describes conduct that is vexatious, designed to harass the other side rather than advance the resolution of the case.
>
> "Negligence" should be understood in an un-technical way to denote failure to act with the competence believed to be expected of ordinary members of the profession.

The Court of Appeal went on to note that representatives should not be held to have acted improperly, unreasonably or negligently simply because his or her client pursued a claim or defence that was plainly doomed to fail. However wasted costs order will be appropriate where a representative lends his or her assistance in proceedings which are an abuse of process.

16. The tribunal reminds itself that costs are compensatory and should not be seen as punitive. The power to award is discretionary, it is the exception rather than the rule. We should also consider where a costs warning has been made has the party taken proper legal advice. Whether offers to settle have been made, and whether rejected unreasonably although not binding in itself.

17. The claimant's claim is well documented in the skeleton argument, but in summary the claim is as follows; that the respondent's conduct throughout the proceedings was vexatiously, abusive, disruptive and/or unreasonable. That the respondent's defence though mis-conceived from the outset and legally flawed was couched in what the claimant regarded as an extreme and threatening language. The claimant relies on paragraph 4 of the grounds of resistance in which the respondent state "the claimant was bringing a claim based on the protected disclosure because the claimant had insufficient qualifying service to bring a claim for unfair dismissal".

18. The claimant's solicitor then goes on to advance a case that the respondent's have breached the solicitor's conduct rule suggesting that in some way they had deceived or knowingly or recklessly mislead the court.

19. Further making unnecessary applications to the court/tribunal in particular relying on an unless order the respondent requested which was in respect of the claimant's schedule of loss and mitigation.

20. Further an allegation of repeated and baseless costs warnings.

21. The claimant's solicitor further advances the claim for costs in respect of "behaviour of the respondent's solicitor at preliminary hearing on 30 October 2014, suggesting that Ms Atwal was either aggressive, rude or uncooperative outside the employment tribunal room" following Regional Employment Judge Byrne's suggestion that "in accordance with the overriding objective" the parties should discuss and agree the evidence that the claimant had requested in relation to the respondent's defence. It is said that when Mr Jackson the claimant's solicitor attempted to discuss what was needed Ms Atwal refused to co-operate and walked off.

22. Furthermore the claimant's solicitor asserts the evidence of the respondent's witnesses in support of the above, they refer to the judgment of the tribunal in the section headed 'credibility' in which it refers to the employment tribunal's concern over the credibility of some of the respondent's witnesses.

23. Finally the suggestion that the respondent's defence was in some way misconceived from the outset, suggesting that the respondent's did not only loose heavily in the case but in effect the respondent's should have been well aware of the risks of pursuing the hopeless defence.

24. In relation to the wasted costs against Ms Atwal/Clarks Legal LLP, in support of this the claimant's solicitors assert that because of the respondent's unnecessary applications for costs orders and unnecessary demands to the claimant that caused extra work and unnecessary costs in the sum of £3,500. Particularly there was Ms Atwal's failure to address matters at the employment tribunal on 30 October 2014 which the claimant's solicitors assert required further communications that could have been avoided.

25. Mr Smith, Counsel for the respondent submits that the threshold test for an award of costs against the respondent is not by any means met.

26. With regard to the allegation that the respondent's response had no reasonable prospect of success, he relies on the following matters:-

    26.1 The claim for automatically unfair dismissal pursuant to s.103A of the Employment Rights Act 1996 was successfully defended.

    26.2 12 of 13 allegations of detrimental treatment as a result of having made protected disclosure were successfully defended and the claim under s.11 of the Employment Rights Act 1996 was successfully defended.

    Therefore, Mr Smith asserts there can be no criticism of the respondent for defending these complaints which were very serious allegations and which were vindicated at trial.

27. Dealing with the claims that were successful, he asserts the following:-

    27.1 The s.104 Employment Rights Act 1996 claim did not feature in the agreed list of issues resulting from either:-

        27.1.1 A the preliminary hearing on 30 October 2014; or

        27.1.2 The telephone preliminary hearing on 24 April 2015 at which hearings the claimant was legally represented.

28. Furthermore paragraph 71 of the claimant's own witness statement made it clear that from his perspective the reason or principle reason for his dismissal was "because of my whistle blowing" as opposed to asserting a statutory right to be paid whilst suspended. The respondent's were therefore entitled to proceed on the basis that the claimant was not advancing a positive case before the tribunal that his dismissal was in beach of s.104 of the Employment Rights Act 1996.

29. Further and in any event, the reason relied upon by the respondent for dismissing the claimant was that he had reneged on the agreement that he had reached with the respondent's regarding unpaid suspension and acted in bad faith which gave rise to a number of factual disputes requiring resolution by the tribunal. It was therefore not misconceived from the respondent's to defend both the claimant's claims of automatically unfair dismissal (one of which was ultimately successful following its 'revival' shortly before closing submissions, and one which failed).

30. Further the tribunal upheld only one of the claimant's 13 allegations of detrimental treatment on the grounds of whistle blowing. The respondent's were therefore legitimately entitled to defend all 13 allegations. With regard to the one allegation that was upheld the tribunal expressed itself as follows:-

> "The tribunal therefore concludes on the balance of probabilities that by may well have been connected to the claimant's previous history and his disclosures."

31. The above language is far removed from finding that the respondent's defence of this allegation was doomed to fail, whether from the outset of the proceedings or by the time of the trial.

32. Further, at no stage did the claimant ever seek to strike out the respondent's defence or seek a deposit order on the basis that they had no or little reasonable prospect of success.

33. With regard to the allegation that the respondent or the respondent's solicitor's had acted vexatiously, abusively, disruptively or otherwise unreasonably the respondent makes the following points:-

33.1 It is not accepted the respondent's ground of resistance were extreme and threatening. The respondent's have ultimately proved correct that the vast majority of the whistle blowing allegations advanced by the claimant including his claim for automatic unfair dismissal were without foundation.

33.2 It is not accepted that the respondent made unnecessary applications to the tribunal. The respondent submitted courteous written requests for what is considered to be relevant documentary evidence on 4 June, 1 July and 2 July 2015. When they received no response from the claimant's representative by 21 July the respondent supplied to the tribunal for an unless order relating to the alleged non-disclosure. There is therefore nothing vexatious about this conduct.

33.3 It is not accepted that the respondent's without prejudice save as to costs letters were heavy handed or vexatious. The respondent is entitled to set out its position as it did. The claimant was legally represented at all times.

33.4 It is not accepted that Ms Atwal's behaviour at the preliminary hearing 30 October 2014 was aggressive, rude or uncooperative. Such as the conduct complained of by the claimant engages the tribunals costs jurisdiction.

33.5 It is accepted that tribunal in its liability judgment expressed concerns over the credibility of the respondent's witnesses. The tribunal did not however make any findings that the respondent's witnesses had tampered with or purposely withheld documents or sought to obstruct the proper administration of justice. There is clearly a significant difference between rejecting a witness' evidence (on the balance of probabilities) and concluding that a witness wilfully and purposely gave false evidence.

Conclusions

<u>The wasted costs application against Clark Legal LLP/Ms Atwal</u>

34. The tribunal unanimously concluded on the evidence before them looking at the whole picture that Ms Atwal's conduct at the preliminary hearing on 30 October 2014 on the balance of probabilities was no in any way aggressive, rude and uncooperative, or indeed in any way improper. Clearly Mr Jackson and Ms Atwal do not get on, clearly there is friction between those solicitors and their firms but one simply cannot conclude that her behaviour was in any way improper, unreasonable or negligent when one looks at the Court of Appeal definition of such conduct.

35. Ms Atwal is entitled to disagree with Mr Jackson and if she does not wish to engage in conversations with Mr Jackson outside court she is free to do so providing such conduct does not fall within the three categories referred

to above. Furthermore if as Mr Jackson advances she has breached in some way the solicitor's conduct rules then no doubt he would have raised this with the Law Society.

36. The tribunal therefore does not make a wasted costs order against either Ms Atwal or Clarks Legal LLP.

37. Turning to the main application under rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, the tribunal immediately asked itself has the respondent looking at the whole picture in some way behaved vexiatiously, abusively, disruptively or otherwise unreasonably in the defence of these proceedings. The answer to that question in the unanimous opinion of the tribunal was there is simply no evidence to justify that claim. The respondent put up a strong defence and vigorously defended their client's position. Which ultimately, following the tribunal's judgment was substantially correct. The tribunal says that because the main thrusts of the claimant's arguments were the 13 detriments that he alleged he'd suffered following the making of protected disclosures, ultimately the tribunal found only one of those proven. The tribunal further did not of course find that the claimant had been dismissed for making any protected disclosure. We repeat the dismissal was because he wanted his pay during a period of suspension, and when the respondent wouldn't agree to that they dismissed him.

38. There is simply no evidence before this tribunal, looking at the claim and response objectively, and the way proceedings have been conducted that any of the factors under rule 76(1)(a) have been engaged.

39. Furthermore for the reason already stated the tribunal could not conclude in its unanimous opinion based on the judgment, that the response was in any way misconceived and arguably one could go as far as to say that the listed detriments advanced by the claimant were misconceived or doomed to failure.

40. The tribunal therefore unanimously concluded looking at all the factors and the way the proceedings had been conducted by both parties that a costs order had not been engaged.

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Employment Judge Postle

Date: 30/11/2017

Sent to the parties on: 30/11/2017

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For the Tribunal Office