EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Ahamed	v	**Asda Stores Ltd**

FINAL HEARING

Heard at: **Watford** **On:** **15 & 16 March 2018**

Before: Employment Judge Bartlett

Appearances:

For the Claimant: **Mr Ahamed in person**
For the Respondent: **Ms Williamson, of Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The claimant was not dismissed on 5 October 2016.

2. The claimant's claim for unfair dismissal fails.

3. The claimant's claims are dismissed in their entirety.

REASONS

The issues

4. The issues to be decided in this case are as follows:

5. **Unfair Dismissal**:

   5.1 Was the claimant dismissed on 5 October 2016?
   5.2 If so, what was the reason for the claimant's dismissal – section 98(1) of the Employment Rights Act 1996?

The respondent's case is that the dismissal was for some other substantial reason, namely that there was a mistaken belief that the claimant had resigned and/or the P45 was issued in error

5.3 If so, did the respondent act reasonably in the circumstances in treating this as a sufficient reason for dismissing the claimant?

5.4 If not, and the dismissal was unfair, should there be a reduction in any compensation awarded on the basis of **Polkey v AE Dayton Services Ltd [1988] AC 344**:

5.4.1 Would the claimant have been dismissed in any event, such that there was no loss?
5.4.2 If the tribunal finds that the claimant would not in any event have been dismissed on 5 October 2016, would he instead have been dismissed in any event, on or before 8 July 2017?
5.4.3 If the claimant had not been dismissed on 5 October 2016, would he have returned to work at any stage after 10 June 2016?
5.4.4 If the tribunal finds that the claimant would have returned to work after 10 June 2016, would this have been to his substantive role or to a pattern of working one night per week?

5.5 Did the claimant contribute to his dismissal such that it is just and equitable to reduce the basic and compensatory award in accordance with sections 122(2) and 123(6) of the Employment Rights Act 1996?

5.6 Did the claimant unreasonably refuse an offer of reinstatement such that it is just and equitable to reduce his basic award under section 122(1) of the Employment Rights Act 1996?

5.7 Should the claimant's compensatory award be reduced on the basis that it is just and equitable to do so by reason of the claimant's failure to mitigate his loss, either by accepting the offer of reinstatement or by seeking alternative employment?

5.8 Did either party unreasonably fail to comply with the ACAS code, such that it is just and equitable to reduce/increase any award?

Holiday pay

6. At the hearing raised an issue about holiday pay. No mention of holiday pay was made in the ET1 or in the claimant's schedule of loss. The tribunal concluded that an amendment could not be made to include this claim are due to the extremely late nature of it being raised and the unfairness and this would cause the respondent. It would not be compatible with the overriding objective to allow this issue to be added at such a late stage.

Background

7. This section of the judgement sets out the background facts. Any areas of dispute have been noted and are dealt with in the findings of fact section.

8. The claimant was employed by the respondent from 2008 in its Southgate Circus store. The claimant was promoted to a night shift section leader and signed a contract to this effect on 9 July 2015 setting out that he worked 37.5 hours per week.

9. On 10 June 2016 the claimant's wife was admitted to hospital as she was suffering from severe mental ill-health which was diagnosed as schizophrenia. That evening the claimant telephoned the store in which he worked (the "Store") and informed them that he would not be able to attend work.

10. The claimant did not attend work any time after 10 June 2016.

11. The parties dispute how frequently the claimant kept the respondent informed about his absence.

12. On 23 or 25 July 2016 the claimant spoke to the general store manager, Mr Peter Sweetser and on 1 August 2016 the claimant wrote a letter confirming the verbal conversation that he would reduce his hours to one Saturday night shift per week and step down from his current position. The claimant's evidence was that he was forced into writing this letter and this is disputed.

13. The respondent did not send the claimant payslips during his absence. The claimant asked a colleague to collect his payslips which they did on or around 20 October 2016. When the claimant went through the payslips he discovered a P45 which set out that the claimant had left the respondent's employment on 5 October 2016. The claimant had not received any other communications prior to the receipt of the P45 from the respondent about terminating his employment.

14. The claimant wrote to the respondent on 8 November 2016 [p106-107] which set out the following:

> *"A colleague agreed to visit me to hand over my payslips. I received these and was shocked to find a P45 amongst my payslips. This stated my leaving date as 5 October 2016. I would like an explanation for this, I have not resigned and no one has told me, I have been dismissed, indeed, no dismissal procedure has been followed.*
>
> *Last Friday, 4 November 2016, I contacted the Personnel Manager Camila [sic] and asked her about this. She could not give me any explanation as to why this had happened but said she would contact me again on Monday, 7 November 2016. However I did not receive a call.*

I have been under very difficult circumstances, caring for my wife 24/7. ASDA has not shown me any respect by hiding a P45 amongst my payslips, without any further communication.

I would like an explanation for this in writing within 7 days."

15. There is some dispute about what happened between 7 November and 6 December 2016.

16. On 6 December 2016 the respondent sent the claimant a letter inviting him to a grievance meeting on 9 December 2016.

17. On 10 December 2016 the claimant wrote to the respondent saying he would not attend the meeting.

18. On 15 December the respondent invited the claimant to attend a grievance meeting on 20 December 2016.

19. The claimant's evidence was that he spoke to a colleague in store on 17 December 2016 about the grievance and his position of 10 December 2016 was maintained. The claimant's evidence was that he was then told his 10 December 2016 letter had not been received.

20. A letter dated 29 December 2016 [p121] from Kamila Voyce of the respondent set out the following:

"Thank you for your letters dated 8 November 2016 and 9 December 2016.

I understand that you complain [sic] is based on unfair dismissal and not following the process. I am sorry that we put you under unnecessary pressure and cause stress to you and your family. I assure that it was genuine error and there was nothing malicious about the separation…

The termination happened as error and miscommunication between Deputy Store Manager and previous GSM. They were aware he wrote a letter about your circumstances and for unknown reason sometime later, Deputy Store Manager assumed that the letter was your resignation letter and he processed separation through HRO.

I understand that this shouldn't happen and I apologise it for it.

You contact me on 4 November 2016, around 5 PM and explained the issue. I asked you to give me time to Monday 7 November 2016 to

resolve and come back to you which I did. I rang you twice that day to let you know that we identified the issue and steps had been taken to reinstate you which was completed on the 8 December 2016. I did not get through to use the phone did not answer. I believe that you have changed the number.

I wanted to assure you that we did not dismiss you…"

21. The claimant disputes receiving this letter.

22. The claimant received two payments from the respondent, one on 24 February 2017 and one on 3 March 2017 in respect of holiday pay. The claimant did not receive payslips for them until 26 February 2018. The claimant retained these monies and did not seek to return them to the respondent.

23. On 28 April 2017 Gifty Banno of the respondent wrote to the claimant. This letter stated, amongst other issues that the claimant was expected to return to work on Sunday 13 May 2017. The claimant's evidence was that on 18 May 2017 he called into the store and spoke with Ms Banno directly and asked her how he was expected to return to work on 13 May 2017.

24. As the claimant did not attend work the absence without leave procedure was implemented such that the respondent claims that the claimant was dismissed on 17 July 2017 for gross misconduct as a result of non-attendance at work without reason.

Evidence

25. Four witnesses appeared for the respondent: Mr Peter Sweetser Mr Ankur Imtiaz, Mr Highsted and Ms Tricia St Hilare. All witnesses adopted their witness statement. Mr Sweetser and Ms St Hilare were asked questions in examination in chief and cross-examination and answered questions from the tribunal. Mr Imtiaz and Mr Highsted were not asked any questions in cross-examination.

26. Mr Sweetser's evidence can be summarised very briefly as follows:

    26.1 he had a number of telephone conversations with the claimant between 10 June and 23/25 July 2016 about his absence. These conversations were not part of implementing an absence procedure instead they were an informal attempt to deal with the situation arising from the claimant's difficult personal circumstances;
    26.2 he explained to the claimant on the telephone that the situation of the claimant simply not attending work could not continue. The claimant expressed to Mr Sweetser his difficult circumstances with having a 2-year-old child and a mentally ill wife to care for and that he had a desire to remain with the respondent. His evidence was that after discussing the needs of the business and the claimant's needs the claimant agreed to

reduce his working pattern from full-time to one nightshift per week on Saturdays;

26.3 the claimant confirmed this in writing on 1 August 2016;

26.4 he had little to do with the claimant's situation after that as he would not have directly managed the claimant's absence himself;

26.5 after 23/25 July 2016 he had no contact with the claimant;

26.6 he did not inform anyone that the claimant had resigned or that his employment should be terminated;

26.7 on 1 October 2016 he moved to work at the Park Royal store.

27. Ms St Hilare's evidence can be summarised as follows:

27.1 she first became aware of the claimant's situation on 14 November 2016 when she was copied into an email by her manager;

27.2 on receipt of the email she telephoned Dipesh, the Deputy Store Manager, and Kamila Voyce, People Trading Manager, who both confirmed to her that the claimant had been spoken to and it was confirmed to him that he was rehired;

27.3 Kamila had left the respondent and joined a competitor and therefore she was not available to give evidence;

27.4 Dipesh had emigrated to Australia and was unavailable to give evidence;

27.5 from 14 November 2016 she undertook all the administrative steps to ensure that the claimant was put back on the system and retained all of his leave entitlements and continuous service;

27.6 she believed that the letter dated 29 December 2016 authored by Kamila been sent to the claimant on that date because the letter was on file when she checked and Kamila had assured her that the letter had been sent. Her evidence was that Kamila had asked her advice on how to draft a letter on 10 December and she did not respond until 14 December 2016 because she had had surgery and had to return to hospital as a result of complications during the start of December. She accepted that there was no proof of postage as it would have been normal practice for the letter to have been sent out by standard post;

27.7 she spoke to the claimant by telephone on 23 January 2017. In this conversation she explained to the claimant that he was still employed. She suggested that the claimant applied for a career break as it afforded the employee the longest period of leave. Following the meeting she sent the claimant the career break policy and a covering letter but he did not make an application for such leave;

27.8 the claimant agreed to have a meeting with her and another employee of the respondent Ken on Saturday 11 February 2017. She did not work Saturdays and therefore came in specially for the meeting. The claimant did not attend, they telephoned him repeatedly and he did not answer;

27.9 he was invited to attend a meeting on 12 May 2017 and again he did not attend.

28. The claimant appeared as a witness and was asked a number of questions in cross-examination and by the judge.

29. The claimant's evidence can be summarised very briefly as follows:

29.1 the claimant accepted that he was aware of the employee handbook and that it included various policies such as a disciplinary policy and AWOL policy;

29.2 his evidence was that Mr Sweetser told him over the telephone what to write in the 1 August 2016 letter. The claimant did not want to write the letter. He had no intention of undertaking the shift of one night per week. He felt under pressure to write the letter because Mr Sweetser was continually asking him when he was coming back;

29.3 the claimant was asked why he did not state, he was put under pressure to write the 1 August 2016 letter until his oral evidence. The claimant said that he could not put that in his letter of 8 November or 10 December 2016 and that it did not make any sense but that is what happened;

29.4 he said that after writing the 1 August 2016 letter he felt safe and that he was left alone by the respondent;

29.5 he had informed the night shift managers prior to a number of shifts in June 2016 that he would not be attending work, but then after around 4 July 2017 he said that he would only call if his circumstances changed;

29.6 he went into store sometime in October 2016 and spoke to Kamila but he did not tell her anything about his personal plans to send his wife and son to India so that he could work in the United Kingdom;

29.7 he thought that the respondent would take him back on his full-time night shift pattern whenever he decided he wanted to come back to work;

29.8 he accepted that he only received the P45 and no letter or explanation. He also accepted that no one had told him that he had been dismissed and stated that without the P45 he would not have known he was dismissed;

29.9 he said that he was shocked to receive the P45 and he spoke to Kamila on 4 November 2016. He said she knew nothing about it and would contact him on 7 November but she did not;

29.10 he accepted that his 8 November 2016 letter identified that he was aware that the respondent should follow a dismissal process and he asked what the procedure was. He accepted that he thought a company like the respondent would not just dismiss an employee and that someone should have called him, had a meeting about it or written him a letter, but that nobody had started any procedure or investigated any issues. He repeatedly stated that he was totally confused by the P45;

29.11 his evidence was that he was angry that Kamila did not get back to him on 7 November as requested. He disputes that there was any conversation on 8 November 2016 and said that the emails at page 118 of the bundle set out that Kamila stated she could not reach the claimant on 7 November;

29.12 he accepted that he spoke to Kamila on 9 December and she said that she had not dismissed him and said that she would get back to him to find out what happened but he did not speak to her after this;

29.13 his evidence was that between 8 and 14 November nobody spoke to him and denied that Dipesh spoke to him on 15 November;

29.14 it was put to the claimant that from 9 December 2016 when he spoke to Kamila he knew that he had been reinstated. The claimant's evidence was that he was totally confused: Kamila had given possible reasons for his dismissal as it was Dipesh, Mr Sweetser, or a mistake;

29.15 the claimant's evidence was that he wanted a written explanation of what had happened, he was totally surprised by the respondent treating his letter of 8 November 2016 as a grievance. He informed the respondent that he did not want to attend a meeting and said that he could not do so because of his personal circumstances. The claimant maintained that it was not possible for him to have a call with the respondent because of his personal circumstances;

29.16 it was put to the claimant that he knew that if he had been dismissed he could challenge it by an appeal. His response was that he asked for an explanation and without that explanation he was not able to appeal because he did not know what had happened.

Submissions

30. Ms Williamson relied on a written skeleton argument which she supplemented with oral submissions which are set out in full in the record of proceedings.

31. The Claimant stated that he had nothing new to say , but that he had spent a substantial amount of time on preparing his case and if he was successful, would seek a wasted costs order.

The Law

32. The burden of proof lies on the claimant to establish on the balance of probabilities that he was dismissed by the respondent on 5 October 2016.

33. Ms Williamson referred me to a number of authorities as to whether a P45 could establish a dismissal. I have considered all of these. The EAT in **Kelly v Riveroak Associates Ltd UKEAT/0290/05/DM** states at paragraph 19:

"there are no indicia whatever of the continuation of the employment relationship after 3 April, which would contra-indicate the effect of the P45 which stated, unequivocally, that the employment contract was at an end. Both parties believed that the contract was at an end, albeit for the different reasons."

34. I have had particular regard to the EAT decision in **Frederick Ray Ltd v Davidson [1980] UKEAT 678/79** in which Talbot J stated:

"the sending of the P45 cannot in law amount to termination of contract; it must depend upon the particular circumstances of the case. The relevance and importance of it here was that Mr Priestley had said that if the respondent received his P45 it would indicate the end of the employment."

35. Therefore I consider that in order to determine whether or not there was a dismissal I must consider all of the background circumstances.

Findings of fact

36. This section sets out the findings of fact of the tribunal.

37. This is a case where the claimant had been absent from work for a substantial number of months. The claimant had notified the respondent at the start of his absence that he was not able to attend work because of the needs of his ill wife and that he had a 2-year-old son. However, the claimant did not comply with the absence policy and did not contact the Respondent at all after July 2016, to inform it of his absence and reasons for it. The tribunal finds that such actions by the claimant were a clear breach of its AWOL policy. However the respondent did not seek to take any action against the claimant under its AWOL or disciplinary policies until May 2017 which was some 11 months after his absence had commenced.

38. I accept the respondent's submissions that the respondent had acted in an unusually accommodating and understanding manner about the claimant's absences and his personal situation. The claimant's evidence was that he believed he had the right to take leave, he should not have to contact the respondent regularly about his absence and that he would be able to walk back into his job when he chose. This demonstrated an extremely egocentric attitude of the claimant who appeared to have no appreciation that an employment contract involves obligations on both sides and that employers employ people because they have a need for work to be undertaken. The claimant's belief that he had a right to take leave seemed to be based on his belief that he needed it and it was convenient to him and therefore he should have it rather than any other basis.

39. Kamila of the respondent sent the claimant a letter on 20 July 2016 which set out the following:

> *"You should be aware that not contacting us, during your shift is a serious breach of Asda's attendance policy. As such, you are considered absent without leave (AWOL) and this could result in disciplinary action."*

40. The claimant's evidence was that after his call with Mr Sweetser on 23/25 July 2016 and the claimant's letter dated 1 August 2016 setting out that he would reduce his contractual working hours to one night work per week, his position at the respondent was safe and that things could continue as they were; namely that he remained on leave without contacting the respondent and the respondent would leave him alone.

41. To a large extent this is what happened: the claimant did not contact the respondent at the beginning of his shifts or at all about his absence and the respondent took no steps to implement the disciplinary policy.

42. The tribunal accepts the claimant's evidence that he felt safe in the sense that his job was secure and not at risk of dismissal after the call with Mr Sweetser on

23/25 July 2016. The claimant repeatedly stated that the 1 August 2016 letter was about job security.

43. The tribunal accepts that at the end of July 2016 the claimant would have been feeling some pressure from his difficult personal circumstances and that the respondent was, quite understandably, regularly contacting him to find out what was happening and when he would return to work. The tribunal does not accept that Mr Sweetser wrote the letter of 1 August 2016 for the claimant. The tribunal finds that the claimant agreed to reduce his hours to one shift per week in the conversation of 23/25 July 2016 and confirmed this in the letter dated 1 August 2016 because this was the best solution in the difficult circumstances. The claimant felt that he had to write the letter and come to that agreement but I find that compulsion arose from his personal circumstances which he had not chosen to befall him and which created significant life problems for him. I consider the claimant's evidence that he was forced by Mr Sweetser into this position to be an expression of the claimant being forced into the situation by circumstances, namely his wife ill-health, rather than any personal desire to agree to the arrangement or unreasonable pressure from Mr Sweetser.

44. The tribunal accepts the claimant's evidence that the respondent did not indicate to the claimant that any dismissal or absence process would be implemented or that his employment was at risk prior to the receipt of the P45 on or around 22 October 2016.

45. The tribunal accepts the claimant's evidence that he was confused after receipt of the P45 and that on 4 November 2016 he contacted Kamila of the respondent by telephone for an explanation. The tribunal finds that Kamila did not confirm that the claimant had been dismissed, to the contrary, she said that she had not dismissed the claimant and would have to look into it. The tribunal finds that there was no confirmation on 4 November 2016 that the claimant's employment had been terminated. Instead the claimant was told that Kamila, the representative of the respondent, was unaware of the dismissal and confused by what the claimant had told her such that she needed to look into it. Therefore there was no communication to the claimant that the respondent had intended to dismiss the claimant. The claimant's own evidence was that Kamila had suggested one possible reason for the issue of the P45 was mistake and the tribunal accepts that this was communicated to the claimant.

46. The tribunal prefers the claimant's evidence that he was not contacted by telephone by Kamila on either 7 or 8 November 2016 and that he did not receive the letter dated 29 December 2016 despite the claims of the respondent to the contrary. The tribunal found Ms St Hilare to be an honest and credible witness and recognises that her evidence about what she believed happened in relation to the 7 and 8 November 2016 phone calls and the 29 December 2016 letter were based on what she had been told by others who worked at the respondent but who have since left. The tribunal accepts that Ms St Hilare gave her honest opinion. However the tribunal prefers the claimant's evidence on this issue for the following reasons:

46.1 The email chain at pages 115 to 118 of the bundle concern the content of the letter dated 29 December 2016 and the email dated 30 December 2016 and 16 January 2017 give a clear indication that the letter was not completed by those dates;

46.2 the statement of Kamila at page 116 in the email dated 19 December 2016 "*I rang Tanjir on the 7th November so did Dipesh but none of us came through to Tanjir. The next thing I knew was information from Patricia about his letter.*" supports the claimant's claim that he was not contacted by telephone on 7 or 8 November 2016;

46.3 the claimant came across as an individual with remarkably fixed thought processes. It is quite likely that this has caused some of the problems that have arisen in relation to his employment situation and its end. However, the claimant was adamant that what he wanted from 4 November 2016 onwards was an explanation about why he had received a P45 which set out that he left the respondent's employment on 5 October 2016. The tribunal finds that he was genuinely annoyed and upset by not receiving that explanation promptly. He fixated on it and his fixed thought pattern could not accept anything other than a written explanation. I find that this is consistent with the Claimant not receiving the 29 December 2016 letter.

47. The tribunal finds that the claimant received a full explanation that the P45 was a mistake, that there was no intention to dismiss him and that he remained employed by 23 January 2017 at the latest. This is the date when Ms St Hilare had a telephone conversation with the claimant.

48. The tribunal accepts that the claimant continued to demand a written explanation and refused to engage with the respondent as a result of his upset about the issue.

49. It is not disputed that in December 2016 the claimant had various forms of contact with the respondent. The tribunal finds that on 6 December 2016 he was invited to a grievance meeting on 9 December 2016. On 10 December 2016 he went in store and said he would not be attending and submitted a letter. The claimant's evidence was that he spoke to Kamila and Dipesh in December 2016. The claimant was asked to attend another grievance meeting on 20 December and he did not attend. The tribunal finds that none of the communications with the claimant in December 2016 set out that he was or had been dismissed or that that was the respondent's intention. The grievance invitation letters appear to be standard form documents and simply invites the claimant to a grievance meeting. The claimant did not take any steps to ask what would be discussed at the grievance meeting and instead refused to attend because of his family circumstances. The claimant's evidence was that it was not possible for him to have a meeting with the respondent at the time by any means, whether by telephone or otherwise. The tribunal rejected the claimant claims that it was not possible for him to have a meeting. Whilst the tribunal recognised that the claimant had to care for his 2-year-old son and his wife it does not accept the claimant would not have been able to arrange telephone call for example. The tribunal finds that the claimant's refusal to attend the grievance meeting prevented him from hearing further from the respondent about an explanation for the P45. Further, the claimant's refusal was another example of his fixed thinking

that all he wanted was a written explanation and he refused to engage in any other process.

Conclusions

50. Taking the above findings into account and considering the situation as a whole, the tribunal concludes that the P45 did not dismiss the claimant. The tribunal found that there was no other communication from the respondent which evinced an intention to dismiss the claimant. Prior to the receipt of the P45 the respondent had left the claimant alone, no absence or disciplinary procedures were being followed, the claimant's evidence was that he felt safe and that he had job security. The P45 was not accompanied by any communication, whether orally or in writing indicating an intention to dismiss the claimant. In those circumstances the tribunal finds that a dismissal has not taken place.

51. This conclusion is further supported by what happened after the P45 was received by the claimant.

52. The claimant's evidence was that he was confused by the P45 which the tribunal finds establishes that that he did not believe that he had been dismissed by the P45.

53. The tribunal finds that the claimant contacted the respondent and asked for an explanation about the P45. The letters dated 8 November 2016 and 10 December 2016 from the claimant clearly set out that he wanted an explanation and that he was aware that the respondent had not followed a policy or procedure or had any conversation with him about it.

54. Further, the claimant's conversation with Kamila on 4 November 2017 set out that she did not know he was dismissed and gave a possible explanation that it was a mistake. She said that he had to look into it further.

55. The claimant's evidence was that he was aware that the respondent had various policies governing dismissals and that the respondent had made no attempt to follow any of those policies.

56. As a result of my findings above that the respondent did not telephone the claimant on 7 or 8 November 2016, I find that there was a regrettable delay in the respondent contacting and communicating with the claimant after 4 November 2016. The tribunal accepts that this may have given rise to continued confusion in the claimant's mind. However the respondent did not communicate at any point that the claimant had been dismissed. The tribunal does not accept that in these circumstances the issuing of the P45 resulted in a dismissal of the claimant. This is because there was a lack of communication of intention or desire to dismiss the claimant. When an explanation was finally given to the claimant on or before 23 January 2017 this was a full explanation with an apology.

57. Therefore for all these reasons the tribunal concludes that the claimant was not dismissed on 5 October 2016 and that the claimant himself could not reasonably and genuinely have believed that he was dismissed.

58. The tribunal finds that the claimant was dismissed on 17 July 2017 following numerous unsuccessful attempts to engage with the claimant and the implementation and completion of the respondent's absence and disciplinary procedures.

Costs

59. The Respondent made an application for a costs award under rule 75 of the Employment Tribunal Rules of Procedure 2013 to be made against the claimant. The Respondent had written to the claimant on 14 February 2017 some 13 months before the final hearing making a settlement offer of £3,500 on a without prejudice as to costs basis. This letter referred to the claimant having continually agreed that he was unable to work and therefore he could have no ongoing loss and if he had remained employed by the respondent he would have received no pay as he was not attending work.

60. The respondent's costs were set out as £6183 comprising a partner rate of £286, senior solicitor rate of £198, trainee solicitor rate of £102 and a paralegal rate of £74 with additional counsel's fees. Having reviewed the schedule of costs I determined that by far the majority of the work was carried out by a paralegal i.e. the cheapest fee earner and there was little senior and expensive involvement.

61. I asked the claimant what his position was and he stated that he never thought he would lose.

62. I asked the claimant to establish his income and received the following responses:

    62.1 His income comprised £62.70 pw from carer's allowance and approximately £150pw from Income support;
    62.2 His wife's income comprised approx. £320 pm from PIP, daily living at the enhanced rate;
    62.3 Additional family income included £50pw child tax credits, child benefit, and housing benefit (including a discretionary payment) of £1500pm.

63. The Tribunal Rules of Procedure 2013 governing costs sets out the following:

    When a costs order or a preparation time order may or shall be made

    76.—(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 (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 a party.

(3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if—

(a)the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and

(b)the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment.

(4) A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer's contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party.

(5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing.

Procedure

77. A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. 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.

The amount of a costs order

78.—(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(23), or by an Employment Judge applying the same principles;

(c)order the paying party to pay the receiving party a specified amount as reimbursement of all or part of a Tribunal fee paid by the receiving party;

(d)order the paying party to pay another party or a witness, as appropriate, a specified amount in respect of necessary and reasonably incurred expenses (of the kind described in rule 75(1)(c)); or

(e)if the paying party and the receiving party agree as to the amount payable, be made in that amount.

(2) Where the costs order includes an amount in respect of fees charged by a lay representative, for the purposes of the calculation of the order, the hourly rate applicable for the fees of the lay representative shall be no higher than the rate under rule 79(2).

(3) For the avoidance of doubt, the amount of a costs order under sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000.

64. I have had regard to the established principle that costs awards are the exception in this jurisdiction and rule 76. I find that the claimant acted unreasonably in bringing the proceedings following the letter of 14 February 2017 in that even if he genuinely believed he had been dismissed on 5 October 2016 and had he been successful in that claim the claimant could not have reasonably believed that he could have established any loss or a loss exceeding £3,500 as offered by the respondent for a multitude of reasons which include the following:

64.1 a failure to accept his old job back from the respondent;
64.2 his refusal and failure to attend work;
64.3 his personal circumstances prevented him from working;

64.4 in the alternative that he had made no effort whatsoever to apply for a new job. His evidence was that he had not made a single job application.

65. Therefore I find that rule 76(1)(a) has been satisfied.

66. I have considered the claimant's ability to pay and I find that his only income is as set out above and he does not have any assets. Therefore his income is limited.

67. I have decided to make a fixed costs order under rule 78 of £600. I have made this order due to the claimant's limited finances and in recognition that he would have chosen cheaper legal representation if he had had the choice. I also recognise that the respondent's costs were reasonable in this case as work was carried out by junior members and was not excessive.

_____

Employment Judge Bartlett

16 March 2018

Sent to the parties on:

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For the Tribunal:

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