



# EMPLOYMENT TRIBUNALS

**Claimant:**

Mr M Jagers

**Respondent:**

SOLL (Vale)

v

**Heard at:**

Reading

**On:** 3 October 2018 (Chambers discussion 5 October 2018)

**Before:**

Employment Judge Gumbiti-Zimuto

Members: Ms SP Hughes and Mr D Gregory

**Appearances**

**For the Claimant:**

Mr A Line (Counsel)

**For the Respondent:**

Mr D Reade (Queens Counsel)

## RESERVED COSTS JUDGMENT

1. The claimant is ordered to pay costs to the respondent in the sum of £20,000.

## REASONS

1. Rule 76 (1) of the Employment Tribunals Rules of Procedure 2013 provides that a Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that 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. The respondent makes an application for costs on the grounds that the claimant acted unreasonably in the bringing and in his conduct of the proceedings and or that the claim has no reasonable prospect of success. The basis of the application is that the claimant's conduct in fabricating a version of his contract of employment for his financial gain and giving a dishonest account of his conduct in this respect.
3. The respondent relies on the following matters: The false document first arose in the context of without prejudice correspondence. That led to the eventual conclusions of the Tribunal and EAT dismissing his claims. The claimant was the most senior employee, he created a fabricated document for financial gain, he relied on the document in the proceedings, he adopted a disingenuous avoidance of answering direct questions on the contract. Had the claimant been

truthful and admitted the charge he would have been fairly summarily dismissed.

4. The claimant relies on the fact that he was successful in his claim of unfair dismissal. The claimant by reason of operation of the Polkey principle was not entitled to an award of compensation. The respondent's response to this is that the claimant cannot rely on a pyrrhic victory of unfair dismissal, had the claimant admitted the truth before the employer it would have led to his fair summary dismissal; maintaining the lie of the false contract maintained the unfair dismissal case he technically succeeded on.
5. In Employment Tribunals an award of costs is the exception not the rule. Costs are compensatory not punitive. Lord Justice Mummery in Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78 stated that: "*The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so to identify the conduct, what was unreasonable about it and what effects it had.*"
6. In coming to our conclusion, we have noted that rule 76 provides for a situation where a party has acted unreasonably in either the bringing of the proceedings or the way that the proceedings have been conducted. It is the view of the Tribunal that it was both the bringing of the proceedings and conduct of the proceedings which was unreasonable.
7. There were in our view questions around the circumstances of the claimant's dismissal which the claimant was entitled to raise and if justified seek a remedy from the Tribunal in respect of. The original Tribunal found that the claimant was unfairly dismissed, and that part of the decision has not been altered by the decision of the EAT.
8. The claimant could have brought these proceedings without reliance on the fabricated contract. Had he done so the considerations of both parties would have been different, but the case would have to have been conducted without reliance on the fabricated contract. Here the claimant did rely on the fabricated document in the pursuit of his case. The claimant did seek to place reliance on the fabricated contract. The claimant was questioned about the fabricated contract and did not accept it was a fabricated document. The original Tribunal found the claimant was responsible for creating the fabricated document.
9. If the claimant did not rely on the fabricated contract the case before the Tribunal would have been very different. There would have been an earlier and more significant emphasis on the question of remedy, whether the case was in fact only likely to result in a pyrrhic victory for the claimant. The claimant may have considered pursuing a declaratory form of relief but that in our view is fanciful having regard to what this case was really about. The claimant in these proceedings was seeking significant and substantial financial compensation from the respondent. In our view it is a very different type of case if the claimant proceeds on a basis that recognises the fabricated nature of the contract of employment.
10. Looking at the whole picture of what happened in the case there has been unreasonable conduct by the claimant in bringing and conducting the case. That unreasonable conduct is around the claimant's reliance on the fabricated

contract of employment. The effect that the unreasonable conduct had in this case was the conduct of a case where the claimant was seeking significant and substantial financial compensation from the respondent where it was not justified and at best only some form of declaratory relief may have been justified.

11. The conclusion of the Tribunal is that this is a case where we are required by rule 76 to consider whether to make an order for costs.
12. Rule 84 provides that: “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. The claimant states that he does not have the means to pay costs now or in the reasonable near future. The claimant’s net monthly pay is £2,650. He pays interest on his mortgage of £300 per month. The claimant has an outstanding mortgage on his home (jointly owned with his wife) of £109,000. The claimant has two young adult daughters whom he supports whilst they live at home.
14. The respondent has produced a costs schedule in the sum of £189,257.80. The claimant points out that the costs have increased from £150,800 when the matter was before the EAT to the figure now claimed. The claimant also refers to other figures for costs that have been produced by the respondent and concludes that there is not confidence in the amount claimed because of the failure to provide reliable or consist account of costs. The claimant states that the costs are “excessive, unreasonable and disproportionate”.
15. The Tribunal consider that this is an appropriate case in which to make an order for costs. In coming to that conclusion, we have considered the claimant’s means. The claimant is in employment and the claimant’s share of the equity in his home provides some scope for the claimant to meet a costs order. Taking account of the claimant’s means we are satisfied that the claimant is in a position to meet an order for costs.
16. We note the level of costs sought in this case. The costs figure is very high. This is a case where the issues were broadly whether there was a protected, what the reason for the dismissal was, and whether the claimant’s conduct merited a reduction in any award of compensation. The evidence that the Tribunal heard came from the claimant, and trustees of the respondent. The case required us to make banal findings of fact based on the evidence of individuals which were we were required to assess and determine whether we accept it or not. The case as a forensic exercise was not unusually complex.
17. Are the costs claimed of £189,257.80 proportionate to the matters in issue? We do not need to determine that question as the claimant has asked us to consider a cap on costs and the respondent has asked us to order a detailed assessment of the respondent’s costs.
18. The claimant’s costs, we were told were less than a third of the amount claimed by the respondent, we assume were around £60,000. This is a case where both sides recognised that a significant amount of money is required to meet the costs. Having regard to the amounts in issue between the parties we consider that a figure of around £60,000 would have been a proportionate amount. The respondent’s costs schedule has reached a total of £189,27.80, on a detailed assessment a higher figure may be considered reasonable and proportionate.

19. The claimant's conduct justifies an order for costs. It would in our view be unfair to require him to pay the whole of the respondent's costs, but the claimant should be required to make a significant contribution to the respondent's costs in this case.
20. It is our view that there were questions around the circumstances of the claimant's dismissal which the claimant was entitled to raise. The claimant has been successful in part but has obtained no remedy. Bearing that in mind we consider that the claimant should be required to pay some but not all the respondent's costs.
21. We note that costs are intended to be compensatory. Requiring the claimant to pay costs in the amounts claimed by the respondent would in our view be punitive and place a significant extra level of hardship on his family beyond that which is the ordinary consequence of bringing this unsuccessful claim.
22. Before having any regard to the claimant's ability to pay we consider that this is a case where the claimant should be required to pay costs in a sum that represents a third of what the respondent's properly recoverable costs. The amount of the respondent's recoverable costs will be reasonable and proportionate.
23. At the respondent's claimed level of costs that one third figure is around £63,000. Using our estimation of the claimant's costs (around £60,000) which we consider to be a proportionate total figure for costs one third is £20,000. We have also considered that the respondent's costs summary has reached a total of £189, 257.80 and therefore a higher figure may be considered a reasonable and proportionate amount on a detailed assessment.
24. We are able to make a costs order of £20,000 but a higher figure may be awarded on a detailed assessment.
25. We have considered whether we should place a cap on the costs recovered by the respondent and if so at what level.
26. We have taken into account the claimant's means and consider that there should be a cap. We consider that the cap should be at £20,000. We consider that this is a fair amount taking account of the claimant's level of income and the fact he has the means to raise money to pay a costs order. We also take into account that a sum of £20,000 would be a significant contribution to what we consider a reasonable and proportionate level of costs for a case such as this.
27. We have therefore made an order that the claimant should be ordered to the pay the respondents cost up to the sum of £20,000.

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Employment Judge Gumbiti-Zimuto

Date: 31 December 2018

Sent to the parties on: .....

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For the Tribunals Office