

THE INDUSTRIAL TRIBUNALS

CASE REF: 2641/16IT

CLAIMANT: Gordon Simpson

RESPONDENT: Wholesale Electrical Supplies (NI) Ltd

DECISION ON A COSTS HEARING

The sum of £1,626.00 in respect of costs is awarded to the respondent.

Constitution of Tribunal:

Employment Judge (sitting alone): Employment Judge Wilson

Appearances:

The claimant appeared in person and conducted his own case.

The respondent was represented by Mr Doherty, Barrister-at-Law, instructed by Holmes and Moffitt, Solicitors.

BACKGROUND

1. The claimant was employed by the respondent as a branch manager from 1 January 2010 until his resignation on 1 September 2016.
2. The claimant was suspended from his employment on full pay on 10 August 2015 pending the outcome of an investigation into the misappropriation of company stock, funds and dishonesty. Suspension followed CCTV footage which showed the claimant removing a TV from the respondent's premises without permission after hours. The investigation, which was conducted by an external organization "Heads Together", was ongoing when the claimant resigned.

3. Following the completion of the investigation, it was concluded that the claimant had been dishonest and had been misappropriating company property. The matter was referred to the PSNI, a search was made of the claimant's premises, property belonging to the respondent was found and a criminal prosecution followed.
4. At the criminal trial on 27 February 2019, the claimant pleaded guilty to fraud by use of position and was given a six-month custodial sentence suspended for 2 years.

INDUSTRIAL TRIBUNAL PROCEEDINGS

5. On 17 November 2016 the claimant lodged an Industrial Tribunal claim against the respondent alleging constructive dismissal, unlawful deduction from wages, breach of contract and holiday pay. It was the claimant's case that he was suspended from his employment and subjected to an investigation because he disciplined an employee who was related to the owner of the business. He alleged this to be the case in some detail at paragraph seven of his claim form.
6. It is not for me to rule on the merits of the claimant's claim as it would if this was a hearing on the merits of the substantive case. However, to consider this costs application, I must assess the claim to consider whether it was taken and conducted reasonably within the meaning of paragraph 40(3) of Schedule 1 to the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 (the Rules).
7. The claimant's evidence at this hearing is that his IT claim was motivated by unlawful deductions from his August 2016 salary. Unlawful deduction from salary was included as a head of claim but I do not accept his evidence that it formed the principal reason for the claim. In general terms I find the claimant to be an unreliable witness. He continues to justify his criminal conviction notwithstanding the unassailable fact that he was convicted on a guilty plea. Further constructive dismissal is mentioned as the first head of claim at paragraph seven of the claim form and the circumstances in which the claimant alleges that he was constructively dismissed are set out in some detail. I therefore conclude that this claim related first and foremost to an allegation of constructive dismissal.
8. I have considered the IT1, the Response, the evidence of Mr Turner, the claimant's evidence and the submissions of Mr Doherty, Barrister-at-Law. I place great weight on the claimant's guilty plea to the criminal charges against him. Those charges were directly related to his employment and what proved to be well founded suspicions of dishonesty leading to his suspension. For that reason, I am satisfied that there was never any foundation to the claimant's claim of constructive dismissal. I am further

satisfied that the claimant couldn't reasonably have believed there to be any foundation to it from the outset. I am satisfied that he knew at all times that he was suspended and investigated for genuine reasons and that he was solely responsible for that suspension in circumstances where he has been dishonest. His attempts to blame others as he does at paragraph 7 of his claim form do him little credit. I am entirely satisfied that he knew he was dishonest and that he had abused his position of trust. His guilty plea puts the matter beyond doubt in my mind.

9. The claimant also claimed unlawful deduction from wages, holiday pay and breach of contract. Breach of contract is alleged to arise from a loss of trust and confidence in the employer/employee relationship based upon the respondent's treatment of the claimant. In circumstances where the claimant was suspected and later pleaded guilty to fraud, was suspended on full pay, afforded a full investigation, resigned and was given an opportunity to retract his resignation, it is hard to understand the breach alleged. In all the circumstances pertaining I am satisfied that this claim in so far as it is separate from constructive dismissal, was unreasonable from the outset and that the claimant couldn't reasonably have believed otherwise.
10. I am satisfied that the claims for unlawful deduction from wages and holiday pay were secondary to the claim of constructive dismissal. In any event there is evidence that the claimant signed an authority allowing deductions in respect of sums due, from his final salary in the event of his leaving the company. He had already claimed unlawful deduction from wages directly with his employer, had received payment, an explanation for the deduction and an apology prior to his lodging these proceedings. Even today there is no precise detail of the sum alleged to be outstanding or of the holiday pay alleged to be outstanding. For all these reasons and considering the case overall, I am satisfied that the claim in so far as it related to unlawful deduction from wages and holiday was unreasonable.
11. I considered the claimant's evidence relative to his conviction and noted proof of that conviction. He was convicted further to a guilty plea on the first day of the criminal hearing. It defies credibility that he seeks to attribute his guilty plea to a shambolic PSNI investigation. It is inconceivable that anyone and particularly someone holding the position the claimant held would plead guilty to a crime they did not commit.
12. The claimant withdrew his Industrial Tribunal claim in September 2018 almost 2 years after initiating it. In the meantime, there was activity on the file to include numerous case management discussions. The respondent now seeks costs against the claimant in the amount of £1,626.00. It is the respondent's case that in bringing the claim, the claimant acted unreasonably within the meaning of paragraph 40(3) of Schedule 1 to the

Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 (the Regulations). It is their case that the claim should never have been taken and that the claimant was fully aware at all times that his claim was a fabrication which had no prospect of success.

13. I have considered Rule 40 of the Regulations.

14. Rule 40(2) provides: -

“40 (2) A tribunal or chairman shall consider making a costs order against a paying party where, in the opinion of the tribunal or chairman (as the case may be), any of the circumstances in paragraph (3) apply. Having so considered, the tribunal or chairman may make a costs order against the paying party if it or he considers it appropriate to do so.

(3) The circumstances referred to in paragraph (2) are where the paying party has in bringing the proceedings, or he or his representative has in conducting the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably, or the bringing or conducting of the proceedings by the paying party has been misconceived.”

15. I have considered **Barnsley Metropolitan Borough Council v Yerrakalva [2011] EWCA Civ 1255** as referred to by Mr Doherty. I recognise that I have a wide discretion to award costs if I consider the claimant behaved unreasonably in his conduct of the proceedings as is alleged here. I having also considered the case of **Daleside Nursing Home Ltd v Mathew** find the following extract at paragraphs 20 and 21 helpful: -

“20. In our judgement, in a case such as this, where there is a clear-cut finding that the central allegation of racial abuse was a lie, it is perverse for the Tribunal to fail to conclude that the making of such a false allegation at the heart of the claim does not constitute a person acting unreasonably. Whatever may be their genuine feelings about the other matters of which a complaint is made, on the particular facts of this case it was the fact that the lie was explicit and so much at the heart of the case that, in our judgement, it is appropriate for us to conclude that this was an overwhelming case where the Tribunal has failed properly to address the point, and as a result has come to a perverse conclusion.

21. It therefore follows that, in our judgement, any Tribunal reasonably applying themselves to the findings of fact which they made, must have conclude that the Claimant had acted

unreasonably in bringing and conducting the proceedings, and furthermore was wrong in law in rejecting the claim for costs on that basis.”

16. Applying the law as recited above and having considered the evidence and the compelling submissions of Mr Doherty, Barrister-at-Law, I award costs in the sum of £1,626.00 as claimed by the respondent. I have noted the Bill of Costs submitted and I am satisfied that it is reasonable in the context of work undertaken in connection with this claim to include a number of case conferences. I am satisfied that the claimant’s conduct in relation to the claim in its entirety was unreasonable from the outset for reasons given above. I do not accept his evidence that he pleaded guilty to criminal charges relative to his position in the respondent company because of what he describes as a shambolic PSNI investigation. This lacks any shred of credibility and particularly so given the position of trust he held with the respondent and the consequences for him of a criminal conviction.
17. I have considered that Mr Simpson does not dispute his ability to pay as indicated by him at hearing.

Employment Judge:

Date and place of hearing: 1 May 2019, Belfast.

Date decision recorded in register and issued to parties: