EMPLOYMENT TRIBUNALS

Claimant: Mr P A Bailey

Respondent: Persimmon Homes Limited

Before: **Employment Judge Fowell** **On: 6 February 2019**

JUDGMENT ON RECONSIDERATION

1. The original decision of the Tribunal is maintained.

2. The sum ordered to be paid as a deposit was correctly paid out to the respondent.

REASONS

1. Judgment was given on 4 January 2018 but failed to deal with the deposit order. This deposit order was made on the basis that the claimant's contention that he was given a contractual promise to pay him more for taking on extra duties had little reasonable prospect of success. This was referred to in the Judgment as the "reward claim."

2. Since the claimant was unsuccessful on that issue a direction was given, after the hearing, for the deposit to be paid to the respondent as a contribution to its costs.

3. The claimant has challenged this order. The main reason relied on is that the notes accompanying the deposit order provide that in the event that costs are not awarded against the claimant, the deposit will be returned.

4. The actual wording relied on has not been provided but I note that the Tribunal's standard directions, which accompany a notice of a preliminary hearing at which a deposit order may be awarded, state as follows:

> If the case goes ahead and no award of costs or preparation time is made against the party that paid the deposit in respect of those allegations or arguments, the deposit will be refunded. If an award of costs or preparation time is made against that party, the deposit will go towards the payment of the costs or expenses. If these were less than the deposit, any remainder of the

deposit will be refunded.

5. That wording certainly supports the argument put forward by the claimant, but does not appear to me to be correct in all cases. The confusion is unfortunate.

6. The relevant Tribunal rule is at rule 39:

> **Deposit orders**
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> 39.— (1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.
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> …
>
> (5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—
>
> (a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and
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> (b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),
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> otherwise the deposit shall be refunded.

7. The outcome here was that the specific allegation or argument - the reward claim - was decided against the claimant for substantially the reasons given in the deposit order. It follows that by virtue of rule 39(5)(a) the claimant must be treated as having acted unreasonably in pursuing that complaint, "unless the contrary is shown." (I will return to that last phrase shortly.)

8. That does not mean however that costs will be awarded on every occasion on which a deposit order is made and the paying party is unsuccessful. The liability to pay costs is provided at rule 76:

> **When a costs order or a preparation time order may or shall be made**
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> 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.

9. This involves a two-stage test. The first stage is to decide whether or not a party has acted vexatiously, abusively, disruptively or otherwise unreasonably. If so, the claimant is, as it is often described, "in costs territory".

10. The second stage is to consider, in the exercise of the Tribunal's discretion, whether to make a costs order. That discretion comes from the word "may" highlighted above. The rule does not *require* a Tribunal to make a costs order if a party acted unreasonably, it simply allows the Tribunal to do so if it considers that a costs order would be appropriate.

11. Hence, the normal position in such cases is that the claimant in Mr Bailey's position is generally deemed to have acted unreasonably, but costs may or may not be awarded to the respondent. There is therefore no automatic connection between losing on the argument in question and having to pay costs.

12. Returning to rule 39, that general rule about being treated as having acted unreasonably is subject to an exception where "the contrary is shown". On reconsidering that original Judgment I conclude that the findings need revising.

13. At paragraph 29 of the Judgment I concluded that the reward claim never enjoyed any reasonable prospects of success, so the conditions at Rule 76(1)(b) were satisfied. The case was therefore "in costs territory".

14. I also concluded at paragraph 30 that Mr Bailey had not acted "vexatiously or unreasonably" in pursuing the claim. That form of words is part of the test in rule 76(1)(a). It is not necessary to satisfy both limbs of this test so that remark was, strictly speaking, redundant. It was made in the context of the second stage, i.e. whether to exercise discretion, but in any event, on further consideration I conclude it was incorrect. It was unreasonable to have pursued that claim.

15. It appears to me that a more accurate explanation of the position would have been:

    a. to conclude (as I did) that the reward claim never enjoyed any reasonable prospects of success and so for that reason costs might be awarded - the claimant was in costs territory;

    b. mindful of test in Rule 39 that the failure of a complaint in these circumstances is ordinarily regarded as unreasonable, to conclude that pursuing it was indeed unreasonable, and so for that reason too the claimant was in costs territory;

    c. to decline to make a costs order in the exercise of my discretion.

16. I therefore remake my decision on costs in the above terms.

17. In short, I am satisfied that the normal rule should apply here and the sum deposited was correctly paid the respondent.

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Employment Judge Fowell

Date: 06 February 2019

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