zd

EMPLOYMENT TRIBUNALS

Claimant	**AND**	**Respondent**
Mr K Owusu-Ansah		Foreign and Commonwealth Office

Heard at: London Central **On**: 19 April 2017

Employment Judge: Goodman

Representation

For the Claimant: In person
For the Respondent: Miss C Haywood, Counsel

REASONS

1 This is a claim for unlawful deductions from wages in which the Respondent accepts that it did make unlawful deductions, and has now paid them, together with the issue fee. The real issue at the hearing this morning has been whether the Claimant should be ordered to pay costs.

2 In order to decide the respondent's application for costs, I have read the claim form, the response, correspondence between the parties and the Employment Tribunal, and the bundle of documents which each submitted, which includes earlier correspondence between the parties and the grievance brought by the Claimant. I asked questions of the Claimant, who was not represented. Additional information was supplied by the Respondent on a point about the vetting procedure. Based on that information the relevant facts are these.

Factual Summary

3 In 2013 the Claimant brought a claim in the Employment Tribunal against the Respondent for race discrimination and harassment, and in December 2014 the Claimant was ordered to pay the Respondents costs in that claim in the sum of £2,000. As £500 had already been paid, he then owed the Respondent £1,500. He sent a cheque for £1,500 to the Respondent but when presented for payment his bank refused because they could not identify his signature. The Claimant then sent a second cheque, which did go through. It was payable to the Foreign and Commonwealth Office, the respondent.

4 There is dispute between the parties as to whether the Claimant sent it direct to the Respondent, his employer, or whether he sent it to the Government Legal Service with whom he had corresponded about the claim.

5 On 5 March 2013, the Claimant, underwent developed vetting in the course of employment. A letter shows that the Developed Vetting Officer asked if he could see the Claimant's current bank statement, to show that he had now satisfied the Employment Tribunal's costs order. The Claimant says he produced that statement, and that must be correct, because on 21 May he received a letter telling him that he had been cleared until May 2019, that is, the vetting had been satisfactory.

6 The Respondent says there is no communication between the vetting officer and their HR department or the claimant's line manager because the details of developed vetting are confidential.

7 Either the Foreign Commonwealth Office or the Government Legal Service overlooked the £1,500 payment and did not appreciate that the Claimant had in fact satisfied this order, because, on 4 February 2016, Joanne McKie of the Government Legal Service wrote to the Claimant to say the Respondent had now waited the best part of a year for payment of the money he owed and that they would be seeking an attachment of earnings order. He should reply by 8 February.

8 The Claimant did not reply. Asked in this hearing why not, he said it was because he wanted to give his answer to the County Court saying that he had in fact paid it, and did not want to tell the Respondent or the Government Legal Service.

9 On 13 June 2016 Ms McKie wrote again saying that as "we have an order against you for the costs of £1,500", they intended to deduct £100 a month from his wages. The amount deducted each month could be less if he made contact with them. This was to start on 1 August 2016.

10 The Respondent has clarified that by "order" they meant the Employment Tribunal order and that they had not in fact registered the costs order as a judgment in the County Court, nor obtained an attachment of earnings order.

11 Deductions did not I fact start on 1 August. Instead, on 12 August, Ms McKie wrote again saying the Respondent was attempting to "seek a collection order to deduct the monies which is owed by you at source from your salary". She invited him to reply by 1 September 2015 otherwise they intended to go to the County Court.

12 The Claimant did not reply and the Respondent did not go to the County Court either. Instead on 29 September 2015 when the Claimant got his payslip for the month of September he found that a £100 deduction from his wages. He made enquiries, and was told in a letter from Mr Peter Walters of the Respondent's HR Department that the deduction was made

because there was an attached court order It has been clarified today that "attached court order" meant the Employment Tribunal costs order, and was not an order of the County Court.

13 On 30 September the Claimant lodged a grievance with his employer saying that the deduction was illegal because he had not consented to the deduction being made, there was nothing in his contract to say that a deduction could be made, and there was no court order either. In an accompanying letter he said: "I do not owe Peter Walters or the FCO any money whatsoever", and asserted again that there was no court order nor consent from him or authority. He asserted that there was no debt, though he did not mention when or how he had discharged the order to pay.

14 His grievance was investigated. In a telephone interview with the investigator, also confirmed in an email, he said that it was a "non-debt" to the FCO; there was no contract provision, and no consent, and deductions therefore could not be made. The investigator also contacted Mr Walters, and in her report, which was sent to the Claimant on 20 December 2016, she stated he had been unco-operative and evasive and unwilling to expand on his grievance, and that Mr Walters had said that the cheque had been returned, and that he had not attempted to pay anything since then. It was therefore found to be a vexatious grievance.

15 On 24 December 2016 the Claimant presented a claim to the Employment Tribunal for unlawful deductions for wages, which by that point came to £300, at £100 per month over three months. He paid the £160 issue fee due. He had already contacted ACAS in relation to early conciliation. In this claim form he stated that he had paid the £1,500 on the second attempt in March 2015.

16 On 15 February 2017 the Employment Tribunal sent the claim form to the Respondent asking them to reply on ET3 by 15 March 2017 and notifying them of today's hearing. On the same date, 15 February, the Employment Tribunal sent the Claimant a notice to pay the hearing fee of £230 by 29 March 2017.

17 The Respondent having received the claim from the Claimant set about investigating. The Respondent says this was the first time they knew that the Claimant was saying he had paid them in March 2015. They found that this was correct. On 2 March 2017 they arranged to pay what by now amounted to £600 unlawful deductions into his bank account with Barclays at Romford.

18 On 14 March the Respondent sent an ET3 response to the claim in which they stated that they had now paid the £600 and that they also intended to pay the Claimant the issue fee - which they believed was £170 - and said that they did not think that the Claimant had needed to claim, because if he had told them that he had paid direct they would not have made the deductions, and he would not have needed to bring a Tribunal claim, but to save time, money and court time that they were going to pay the issue fee. They asked the Tribunal to strike out the claim.

19 On 13 March the Claimant had sent a schedule of loss which said that he was still owed £600 and his tribunal fees.

20 On a date soon after 19 March, when it was posted to him, the Claimant received ET3 response from the Respondent. He paid the hearing fee of £230.

21 On 29 March the file was reviewed by Employment Judge Hodgson to consider what the issues were in the light of ET3, and he directed the case worker to write to the parties to ask if the Claimant still pursued the claim as all the deductions had now been paid and the Respondent said they wanted to pay the fee. That letter was not however sent to the parties by the Tribunal caseworker until 11 April.

22 On 11 April the Respondent wrote to the Tribunal saying that they had sent the issue fee to the Claimant. The covering letter for the payment to the claimant was dated 3 April, but it is not clear whether in fact it was sent to him with a cheque attached before 11 April.

23 The Claimant responded on 12 April to say that he wanted the payment receipt. He said the Respondent has “denied the unauthorised”. He added that he had already paid the hearing fee.

24 On 13 April, the Claimant says, he returned the cheque for the issue fee to the Respondent. Asked why he did this, he said “because no one had ordered me to accept the money”. Because of the intervening Easter holiday weekend the Respondent has not yet received this correspondence.

25 On 18 April (yesterday) the Respondent said that they had now paid the hearing fee as well to the Claimant, although, presumably because it is in the post, the Claimant has not yet received it. They applied for a postponement, which was refused by Employment Judge Lewzey, who said that today’s hearing should go ahead.

26 On 18 April the Respondent made an application for their costs in the sum of £2,937.02 on grounds that the claim had no reasonable prospect of success. On 19 April they posted the hearing fee to the Claimant.

27 At the hearing this morning the Claimant was asked to confirm that he had in fact received the £600 which the Respondent said they had paid him, and he replied that he had not checked his bank account since 2 March 2017 (7 weeks ago), the date the Respondent said that they had paid it. He said this was because there had been two bereavements in the intervening seven weeks. When the Tribunal adjourned to consider what order to make, I asked the claimant to confirm with his bank during the adjournment whether the money had been received, and he has confirmed that it has.

28 So, summarising the position on payment, the Claimant has received £600 for the unlawful deductions claim. He was sent, but has returned, a cheque for the issue fee, and he has been sent, but has not yet received, a cheque for the hearing fee.

Relevant Law

29 The relevant law in relation for unlawful deductions is set out in sections 13 to 23 of the Employment Rights Act 1996. Of particular relevance is section 14 which deals with excepted deductions, which at section14(6) says that section 13 (which says that an employer should not make unauthorised deductions from wages) does not apply to deduction from a worker's wages made by his employer with his prior agreement or consent signified in writing where the purpose of deduction is the satisfaction whether wholly or in part of an order of a court or Tribunal requiring the payment of an amount by the worker to the employer. So it appears that it is not just sufficient that there should be an order for a court or Tribunal requiring a payment but that the employee has given prior agreement or consent to deduction for that purpose. Section 15 provides that an employer shall not receive a payment from a worker unless he has agreed beforehand in writing, and section 16 excepts from this payment "where the purpose of the payment is the satisfaction (whether wholly or in part) of an order of the court or tribunal requiring end of the amount by the worker to the employer".

30 The other relevant law is in the Employment Tribunal Rule 76(1) which says a Tribunal may make a costs order and "shall consider whether to do so where it considers that a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in either in the bringing of the proceedings or the way that the proceedings had been conducted". Rule 76(4) says that a Tribunal may make a costs order for reimbursement of fees where a party has paid a Tribunal fee and decided the claim was in favour of the party. Rule 78 provides for the payment of a summary assessment of up to £20,000 and Rule 84 that when deciding whether to make an order, and if so, how much, the Tribunal may have a regard to the paying party's ability to pay.

Discussion

31 The costs application was first made on the basis that the claim was misconceived. It appears on the undisputed facts that at the point that the claim was issued it was not misconceived, because unlawful deductions had been made. The claimant had not consented in writing to deductions for a debt, and he had satisfied the order for costs so there was no debt.

32 The real issue therefore is whether the Claimant's conduct of the claim, whether before or after the issue of proceedings, has been unreasonable. The Respondent says that the Claimant never told them until they got his ET1 claim form in February 2017 that he had already paid the £1,500, despite being asked about it three times by the Government Legal Service in 2016, before the first deduction was made. Nor did he correct the impression that he still owed the money when he did not when he lodged his grievance about deductions, nor when he appealed in January 2017 against the ruling that his grievance was vexatious. At that stage he had already submitted the Tribunal claim form which told the story, but the Respondent did not get that until after the appeal. They say that as soon as they found out that they had in fact been paid and had mislaid the payment, they restored the deductions. The Claimant says that they must

have known this because of the positive vetting back in May 2015, but the Respondent says that they would not know that because the detail of the vetting procedure is confidential. The Respondent says that the Claimant has insisted on his day in court unnecessarily and at public expense, because at least by 2 March they knew that the deductions had been paid, and at least by 14 March he knew they were going to pay his issue fee as well.

33 The Claimant says they should have known that they had been paid. They had had the £1,500; he had told them that he did not owe them the money, even if he was not explicit on when and how he paid. It is in his grievance letter that they had no authority to make the deductions.

34 The order at Rule 76 is in fact set in two parts. First of all the tribunal must be satisfied that the threshold is passed for saying that the Claimant's behaviour has been unreasonable. Then the Tribunal has a discretion whether to make an order for costs: "shall consider whether to do so". The Claimant's conduct appears unreasonable. It is very odd the Claimant did not at any stage assert to the Respondent or to the Government Legal Service that he had already paid them. It is hard to conceive of any reasonable person, faced with a debtor (whether an employer, or say an electricity company or builder) saying he owed money, who would not reply that he had already paid, and say when and how.

35 It is especially odd that he should refuse to do so in February 2016 when he was told would be going to court about it, and even more odd once deductions from his pay had started and he insisted they had no right to make deductions that he did not say why they were wrong that he still owed them £1,500. It would have been apparent to anyone that there had been a misunderstanding or some administrative error. Even if he thought that the vetting procedure should have told the Respondent that the debt was now satisfied, it is odd that he should not say so, especially in the grievance appeal, when he saw in the grievance outcome letter that the Foreign and Commonwealth Office asserted that he had made (to quote Mr Walters) "no further attempt to pay after the first cheque was sent back". In view of the tribunal, any reasonable person would responded that this was, and he had paid on the second occasion.

36 It is also odd that when he saw this (it was sent to him on 20 December 2016) he should still proceed to send the claim to the Employment Tribunal, which is stamped as having been submitted the 24 December. It could, of course, be that the Claimant was concerned about the lapse of the three month time limit and did not wish to risk being out of time to bring a claim. That is speculation because he has not explained that. The question arises as to why he kept this up his sleeve, so to speak. Perhaps there is a background of resentment.

37 In the Tribunal's finding it was not unreasonable that he should bring a claim on 24 December, because at that date deductions had been made and were ongoing, his grievance had not succeeded, and the deductions were unlawful because the tribunal order to pay costs had been satisfied in full.

38 The issues then is his conduct thereafter, particularly when on 2 March, within a couple of weeks of getting explicit notice that they had already been paid £1,500 the Respondent recognised their fault and paid the Claimant £600 direct to his bank account. It can only be said that it is extraordinary that the Claimant should not have looked at his bank account in the seven weeks between then and today, to check if they have made the refund they said they had. Despite there having been two bereavements, it only took one phone call to make this check today, and in the intervening period he has had the time to prepare and put together a detailed bundle, and to type a witness statement and a schedule of loss, and the schedule of loss which asserts that he had been deducted £600 was filed at a date after he had been told that it was paid. Not checking at this stage is inexplicable. If he had time to type a schedule, he had time (if he does not bank online) to make a phone call.

39 It is also odd that he should return the issue fee cheque which he received last week, saying he could not accept this as payment of it had not been ordered. The Claimant is no stranger to Employment Tribunal proceedings given the earlier claim he made, and although unrepresented he has some familiarity with the process and knows where to access that basic information.

40 Then there is the hearing fee: the Claimant still had a week to go before the payment deadline when he paid it on 19 March, and by that stage he had received the ET3 which asserted that he had already been paid £600, and said he was going to be paid the issue fee. He could have contacted the respondent to clarify when they were going to pay the issue fee. He could have contacted ACAS for advice. It is possible that as a litigant in person he was unclear about the fees position or whether there has to be a hearing even though he had been paid what he was claiming. Asked in this hearing, at the point when he said he had not checked his bank accounts to see if the respondent was correct when they said they had paid him £600, what in fact he wanted from the tribunal if it turned out they were right that the money had gone into his account, he replied that he wanted a declaration that the deductions made had been unlawful.

41 The Tribunal is not satisfied that this came about because the claimant did not know what to do. There is a clear element in this behaviour of a grudge - that the Respondent was being pursued to say that they had acted unlawfully. It was not enough for them to acknowledge their wrong and pay him. The evidence of the grudge element is that he did not at any stage tell them that the debt had in fact been satisfied in March 2015, whether before or after starting Tribunal proceedings. Like the Claimant, the Tribunal is unimpressed at the Foreign Commonwealth Office accounting standards in failing to account for an amount of £1,500, or if they did account for it, the lack of communication between the Department and the Government Legal Service trying to enforce the order for payment of costs, regardless of whether the Claimant sent the money to the Government Legal Service or to the Respondent. But the failure to say so in the course of 2016, despite three communications from the GLS, or in his grievance, makes it almost look as if he wished to keep the information up his sleeve so as to get them to make deductions so he could put them in the wrong and present an Employment Tribunal claim, at which point for the first time explained that the respondent or government legal service was wrong and he had paid in full. It is of a piece with his answer to the Tribunal that he did not

reply to the 4 February 2016 email because he wanted to tell the County Court, not the Government Legal Service, that the costs had been paid - he wanted the respondent to issue court proceedings, so he could show them up and put them to the trouble of doing that. It is also of a piece with returning the issue fee - as if he did not wish to lose the opportunity to have an order made against them today. I conclude that his behaviour is consistent with insisting on his day in court even though this was unnecessary because the Respondent was prepared to pay everything he was owed. If there was any uncertainty about whether in the circumstances he had to pay the hearing fee the claimant Claimant could have contacted the Government Legal Service, or ACAS, or the tribunal, by email or by telephone.

42 On the other hand there were reasons why the Claimant should be mistrustful. He had paid a substantial sum of money and his employer had still insisted on payment. He had had several letters threatening him with court proceedings, but none had started. The issue fee was not in fact sent to him until 11 April, at a point when he had already paid the hearing fee, and he may have been concerned that if by failing to pay the hearing fee he let today's hearing go that he would lose the chance of getting the issue fee if the respondent did not, despite their announcement, pay it. Clearly had the issue fee been sent with the ET3, or even a week later, it would have been unreasonable for him to proceed. Nevertheless, when he got the ET3 he had time to negotiate and confirm they would pay the hearing fee as well. Further, he paid the hearing fee five days after getting the ET3 saying deductions from and being paid back to him, and that they would pay the issue fee, when there was still another week to go before his deadline for paying it.

43 I conclude that although the Claimant was not unreasonable in commencing proceedings, he has acted unreasonably in pursuing his claim to a hearing today. It should have been clear to him from the time he got the ET3, if not before, that he had been paid the unlawful deductions and the Respondent said they would pay the issue fee. Had he told them he was paying the hearing fee, or had he refrained from paying it while contacting them, it would not have been payable at all. So the order I make is that the Claimant did act unreasonably in pursuing this case to a hearing, and I do so, having regard in the exercise of discretion to the Claimant's behaviour both before and after proceedings, in that whatever the rights and wrongs of commencing proceedings when he did, he could at any stage have stopped that happening by informing the Respondent , as he did on ET1 for the first time, that they were mistaken and he had in fact paid.

44 I take account of the Claimant's means, as required by rule 84, when deciding whether to make an order, and how much. He says that his income after tax and national insurance deductions is £1,500 per month. He pays around £400 a month rent; he lives on his own but pays £250 for the care of his children; he pays £120 per month for travel to work; he owes £7,000 on credit cards which he is paying off at £200 per month; he has a few hundred pounds in savings and no property. Clearly his means are not substantial.

45 I have considered the Respondent's schedule, which amounts to £2,437.02 incurred over 33 days. This appears to represent 26.3 hours work at £92 per hour. In addition there was counsel's fee of today of £190. It is not stated when the work was done but clearly must include drafting the ET3 and making investigations. Assess the costs of today four hours at 90, which is added VAT at 20%, £73.60, and £190 counsel's fees, which are not certain to attract VAT, so the total cost is £631.60.

46 After judgement, there is a declaration respondent made unlawful deductions from the claimant's wages, but no further order as the amount has been refunded. There is an order that the respondent pay the claimant the employment tribunal fees in the total sum of £390. There is an order that the claimant acted unreasonably in the conduct of the proceedings, for which is ordered to pay the respondent £631.60 in costs. On the basis that the claimant will either return the respondent's cheque for the hearing fee when it arrives in the post, or the respondents will stop it, I order set off of the two orders for payment, such that the claimant pay the respondent £241.60 in satisfaction of the balance due on the costs order to the respondent

Employment Judge Goodman
16 May 2017