# EMPLOYMENT TRIBUNALS

**Claimant:** Mr J Allan

**Respondent:** The Federation of Self Employed and Small Businesses Limited

**HELD AT:** Manchester **ON:** 16 June 2017

**BEFORE:** Employment Judge Franey
(sitting alone)

**REPRESENTATION:**

**Claimant:** Mr P Horan (Claimant's friend)
**Respondent:** Ms L Hatch (Counsel)

## JUDGMENT

The respondent's application for a costs order is dismissed.

## REASONS

**Introduction**

1. On 17 January 2017 the Tribunal promulgated my reserved judgment with reasons. I found that the claimant was neither an employee nor a worker and therefore dismissed all his complaints.

2. On 14 February 2017 the respondent made a written application for an order requiring the claimant to pay its costs. The application was put on the basis of unreasonable conduct in the way the claim had been pleaded and in the application to amend made in December 2016. The respondent also relied on the proposition that the claim had no reasonable prospects of success, and on the failure to heed a costs warning letter of 8 December 2016. The schedule of costs supplied with the application showed that the total amount sought was £78,478.37.

3. The claimant responded to the application in writing on 17 February 2017. He resisted the application. He also provided a witness statement setting out his financial position.

4. I had read all that material prior to the commencement of the oral hearing. I had also had the benefit of reading Ms Hatch's written skeleton argument on costs. I was provided with a bundle for the costs hearing running to over 340 pages, and any reference in these reasons to a page number is a reference to that bundle unless otherwise indicated. I also had a bundle of the respondent's authorities, and I had oral submissions from Ms Hatch and Mr Horan.

5. I indicated at the outset of the hearing that I would decide initially whether the power to award costs had arisen. Because I decided it had not arisen, it was not necessary to consider factors which go to the exercise of discretion to make a costs award such as the amount sought or the claimant's ability to pay.

## Relevant Legal Framework

6. The power to award costs is contained in the 2013 Rules of Procedure. The definition of costs appears in rule 74(1) and includes fees, charges, disbursements or expenses incurred by or on behalf of the receiving party.

7. Rule 75(1) provides that a Costs Order includes an order that a party makes a payment to another party "in respect of the costs that the receiving party has incurred while legally represented".

8. The circumstances in which a Costs Order may be made are set out in rule 76. The relevant provision here was rule 76(1) which provides as follows:

> **"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. The procedure by which the costs application should be considered is set out in rule 77 and the amount which the Tribunal may award is governed by rule 78. In summary rule 78 empowers a Tribunal to make an order in respect of a specified amount not exceeding £20,000, or alternatively to order the paying party to pay the whole or specified part of the costs with the amount to be determined following a detailed assessment.

10. Rule 84 concerns ability to pay and reads as follows:

> **"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."**

11. It follows from these rules as to costs that the Tribunal must go through a two stage procedure. The first stage is to decide whether the power to award costs has arisen, whether by way of unreasonable conduct or otherwise under rule 76; and secondly if so, to decide whether to make an award and of what sum.

12. The case law on the costs powers (and their predecessors in the 2004 Rules of Procedure) include confirmation that the award of costs is the exception rather than the rule in Employment Tribunal proceedings; that was acknowledged in **Gee v Shell UK Limited [2003] IRLR 82**.

13. In **AQ Ltd Holden [2012] IRLR 648** the Employment Appeal Tribunal said in paragraph 41 that whether a litigant was professionally represented was a relevant factor:

> **"A Tribunal cannot and should not judge a litigant in person by the standards of a professional representative. Lay people are entitled to represent themselves in Tribunals; and, since legal aid is not available and they will not usually recover costs if they are successful, it is inevitable that many pay people will represent themselves. Justice requires that Tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life…Lay people are likely to lack the objectivity and knowledge of law and practice brought by a professional legal adviser. Tribunals must bear this in mind when assessing the threshold tests in [**the rules**]…This is not to say that lay people are immune from orders for costs: far from it, as the cases make clear. Some litigants in person are found to have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity…"**

14. As for vexatious conduct, in **ET Marler Ltd v Robertson [1974] ICR 72** the National Industrial Relations Court said:

> **"If an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive, he acts vexatiously, and likewise abuses the procedure. In such cases the Tribunal may and doubtless usually will award costs against the employee…"**

15. More recently the matter was put in the following terms in **Attorney-General v Barker [2000] 1 FLR 759**:

> **"'Vexatious' is a familiar term in legal parlance. The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly difference from the ordinary and proper use of the court process."**

## Respondent's Submission

16. Based on the written application of 14 February 2017 and Ms Hatch's helpful skeleton argument and oral submissions, the position of the respondent can be summarised as follows.

17. Firstly, the application was put on the basis that the claimant had acted vexatiously in bringing the proceedings. That was said to be apparent from the tone

of the correspondence by Mr Horan on his behalf, and by the admission in correspondence that the claimant was extremely bitter about the way he had been treated by the respondent's Board of Directors. Ms Hatch submitted that Mr Horan shared this attitude towards the respondent and that the two of them had worked in concert to pursue a campaign to undermine the reputation of the respondent. Mr Horan had refused to stop copying correspondence to the Board, and had written in increasingly emotive and insulting terms until the respondent's solicitors warned him on 17 August 2016 (page 307) about his use of language. Ms Hatch took me to some examples in the bundle of the language in question. Further, it was suggested there was a collateral purpose to this litigation, namely to clear the claimant's name of the allegations which had been contemplated for publication by the Sunday Mirror at the time he was suspended in January 2016.

18. Secondly, Ms Hatch argued that the proceedings had been unreasonably brought and pursued in an unreasonable manner. She relied on the application to amend made shortly before the preliminary hearing on 15 December, which sought to introduce a complaint that dismissal was automatically unfair under section 103A Employment Rights Act 1996 (whistle-blowing) when such a complaint had been expressly disavowed by the claimant at the preliminary hearing before Regional Employment Judge Robertson on 5 September 2016. The amendment also sought to introduce new matters into the chronology for which the claimant sought a remedy, complicating the question of time limits which was to have been determined at the preliminary hearing (although in the event there was only sufficient time to deal with employment status).

19. Further, Ms Hatch relied on the proposition that the argument that the claimant had been an employee or a worker had no reasonable prospect of success and that if the claimant had acted sensibly he would have known this. She referred to the findings in the reserved judgment on employment status in support of this contention, particularly the documents which consistently negated any contractual relationship between the parties. She suggested that in so far as the claimant relied on a written opinion from counsel provided to the respondent in August 2010 (a copy of which appeared on the Tribunal file as it had been considered at a previous preliminary hearing) that was unreasonable. Although the advice indicated that the respondent's statutory officers were employees, it was advice which predated the claimant taking up any such role and there had been a number of changes in the way the respondent was structured which rendered it of no value by the time of the period with which this claim was concerned. She suggested that the lack of detail in the claimant's witness statement for the preliminary hearing (only two pages) showed that the claimant knew that his case had no reasonable prospect of success.

20. Finally, Ms Hatch relied on a costs warning letter of 8 December 2016 (page 147) which accurately predicted the outcome of the preliminary hearing and warned the claimant that if he pursued his case to that preliminary hearing an application for costs would be made. She also pointed out that prior to the commencement of proceedings the claimant had been offered £5,000 by the respondent through ACAS in order to settle his claim at a commercial level, but had responded with a counter proposal of £250,000.

**Claimant's Submission**

21. Based on the written document of 17 February and the oral submissions made by Mr Horan, the claimant's case can be summarised as follows.

22. The claimant denied that there was any vexatious element to these proceedings. He was seeking in good faith to assert his right to compensation for the way he had been treated. Although there were broader issues between the parties that did not render these proceedings an abuse of process because of some collateral purpose. If the language of correspondence became emotive at times that was because of the very strong feelings on the claimant's part about the way he had been treated. In particular he was very concerned when it dawned on him in the summer of 2016 that the respondent had failed to provide its taxi account records to the newspaper to enable the newspaper to accept that there was nothing in the allegations. He felt and continues to feel that this simple step would have removed the damage to his reputation which the newspaper allegations and the suspension had created. Mr Horan suggested that there were good grounds for the strong views expressed in that correspondence about apparent impropriety on the part of the respondent and its advisers.

23. More broadly Mr Horan denied that there had been any unreasonable conduct on the part of the claimant. He emphasised that although he has got some knowledge of health and safety matters and civil litigation he is not an employment law specialist. He was helping the claimant unpaid as a friend. The claimant had not had access to professional legal advice although he had spoken briefly for advice to three lawyers prior to bringing proceedings, each of whom had said that he was an employee.

24. The application to amend was a consequence of the claimant not fully having understood matters at the preliminary hearing on 5 September 2016, and of a misreading of the Notice of Hearing subsequently issued by the Tribunal in respect of the preliminary hearing. That notice said that written representations could be submitted not less than seven days before the preliminary hearing, and Mr Horan and the claimant had understood that this allowed him to make amendments to hiscase. He appreciated now that was a misunderstanding.

25. The claimant had never thought that his case had no reasonable prospect of success. He had relied on the advice from counsel from 2010 in forming the view that it was reasonable to argue he was an employee. His witness statement lacked detail because of inexperience and misunderstanding of the Tribunal process, not because there was nothing to say. The fact it took three days for the Tribunal to hear the evidence and submissions showed how complicated it was, and the reserved judgment with reasons ran to 25 pages. The Tribunal recognised on a number of occasions that there were aspects of the relationship which were consistent with the claimant's case. As for the costs warning, it did not change the claimant's view of his case because it was his position that there was an employment relationship which was independent of the signed documents relating to his statutory office. The claimant had tried to resolve matters by asking for mediation through ACAS on more than one occasion.

## Discussion and Conclusions

26. Before addressing the main points of contention I reminded myself that an award of costs is the exception in Employment Tribunal proceedings rather than the rule. The Tribunal has to be satisfied that there has been vexatious or unreasonable conduct, or that a case had no reasonable prospect of success, before the power to award costs arises. Further, it would be wrong to judge the claimant by the standards which would apply if he had been represented by an Employment Law specialist. For the purposes of this application it seemed to me that the claimant and Mr Horan collectively were in the same position as a litigant in person. They had not had access to specialist legal advice on any formal basis.

Vexatious Conduct

27. I considered first whether the litigation could be characterised as vexatious. The tone of much of the correspondence written by Mr Horan on behalf of the claimant was striking and inappropriate. Mr Horan expressed himself in very strong terms and in emotive language. That reflected the genuine strength of feeling on the claimant's part, and to some extent his own strength of feeling as a person with his own disputes with the respondent. The insistence on copying correspondence about the case to members of the Board was unnecessary, and was explicable by the strength of feeling on the part of the claimant and his desire to make the Board aware of issues other than those being pursued in these proceedings. This Employment Tribunal claim was part of a broader picture.

28. Nevertheless, I was satisfied that it was not pursued vexatiously. During his time as chairman the honorarium was the claimant's only source of income. It was how he earned his living. He was genuinely aggrieved by events in the last few months of his tenure, understandably so given the damage to his reputation by being suspended from his office in January 2016. Even though these proceedings faced some significant difficulties, and even though the claimant's expectations of the level of compensation if he succeeded were hugely inflated, the case did not meet the test in **Barker**. There was a discernible basis for the claim that he had been an employee and, if so, that his employment rights had been infringed.

29. More broadly I rejected the contention that there was any collateral purpose in bringing the claim. It is right to say that the claimant wanted compensation, but that is true of almost every claimant in Employment Tribunal proceedings. These were not proceedings pursued in bad faith simply to embarrass the respondent. I rejected the contention that the claimant had acted vexatiously.

Unreasonable Conduct - Pleadings

30. Turning to unreasonable conduct, I considered first the way in which the case had been pleaded. There were some deficiencies in the original claim form and it took Regional Employment Judge Robertson almost three hours at the preliminary hearing on 5 September 2016 to obtain and record clarity as to the claims being pursued. However, difficulties of that kind are common in complicated cases where people represent themselves, especially in whistle-blowing cases.

31. As for the application to amend made in December 2016, I was satisfied that it was a consequence of a genuine misreading of the Tribunal Notice of Hearing which permitted written representations to be made not less than seven days before the hearing. In so far as it sought to raise matters which should have been in the claim form, or to revive an automatic unfair dismissal complaint not pursued at the preliminary hearing, those were factors to be taken into account by the Tribunal in exercising its discretion as to whether the amendment should be permitted. It is a matter of speculation whether that application would have been successful, although it was certainly arguable. Had the claimant been represented by employment lawyers throughout I might well have concluded that this amounted to unreasonable conduct, but judged by the standards of a litigant in person with limited assistance from Mr Horan it seemed to me to fall short of being unreasonable in such a way as to give rise to any liability for costs.

No Reasonable Prospect of Success

32. Employment status is frequently far from straightforward. Documents do not necessarily mean what they say. There is often room for a difference of opinion between lawyers, let alone between lay people and lawyers. I accepted that with hindsight it can be said confidently that the claimant's case had a fundamental flaw (the lack of any contract) but in my judgment it was not a case which to a litigant in person would appear as one lacking any reasonable prospect of success. The claimant was entitled to take some support from the opinion from counsel obtained by the respondent in 2010 despite the passage of time, the change in the respondent's structures and the other factors to which Ms Hatch drew my attention. Ultimately, of course, a proper judgment on employment status requires a close analysis of the facts and the application of legal principles which can be complicated, resulting in a three day hearing and a lengthy judgment. Further, the claimant earned his living from this role. Some aspects of it were consistent with there being a contract and there was some degree of control over his activities by the respondent. It could not be said that there was nothing on which his argument could be based. I was satisfied that the argument that he was an employee or worker was one which was reasonably pursued to the preliminary hearing.

Costs Warning Letter

33. Receipt of the costs warning letter did not alter that. The letter was entirely appropriate. It accurately predicted the outcome of the hearing. It helpfully suggested that the claimant should seek proper legal advice before proceeding. It gave a warning to the claimant as to the level of costs which the respondent would seek to recover in the event that the Tribunal found against him on the employment status point. The respondent and its solicitors cannot be criticised for writing that letter.

34. However, it came at a point by which the degree of mistrust between the claimant (and Mr Horan) and the respondent (and its solicitors) was extremely significant. Without suggesting that the degree of mistrust was in any way warranted, the fact it existed contributed to a situation in which the claimant saw the letter as a stance taken in litigation rather than a genuine objective assessment of his chances of success. Had he been represented by employment lawyers but still pursued his case that might well have been unreasonable, but in the absence of any

such expert advice I concluded he did not act unreasonably in allowing the Tribunal to decide on his employment status at the preliminary hearing.

**Summary**

35. Overall, therefore, I rejected the costs application because the power to award costs had not arisen. Although the respondent had been put to significant expense because of litigation which failed at the first hurdle, the claimant had acted neither vexatiously nor unreasonably in bringing his complaints and pursuing them as far as the preliminary hearing. It could not be said that his complaints had no reasonable prospect of success.

Employment Judge Franey

20 June 2017

JUDGMENT AND REASONS
SENT TO THE PARTIES ON

28 June 2017

FOR THE TRIBUNAL OFFICE