



EMPLOYMENT TRIBUNALS

Claimant: Mr M A Khan

Respondent: MMBA Accountants Limited

HELD AT: Manchester

ON: 31 March 2017

BEFORE: Employment Judge Feeney

REPRESENTATION:

Claimant: Mr Proctor, Solicitor

Respondent: Mr B Harwood, Counsel

JUDGMENT

The judgment of the Tribunal is that the claimant's application for costs succeeds, the claimant is awarded and the respondent ordered to pay £5,112.00.

REASONS

1. Following my judgment promulgated on the 14th November whereby the claimant succeeded in his claims of unfair dismissal for asserting a statutory right, for failure to be provided with written particulars of employment, for failure to be paid in accordance with the National Minimum Wage and for failure to pay notice pay.

2. The claimant applied on 15th December for costs.

Claimant's Submissions

3. The claimant submitted that in the light of my findings of fact the respondent's conduct of the case had been wholly unreasonable in that his defence was based on an array of documents which I had found had been falsified and never sent to the claimant. These comprised of documents establishing that the claimant was on a fixed term contract which was brought to an end. Further, that the Tribunal had

found Mr Baig's (a director of the respondent business and its only witness) evidence utterly unconvincing, in particular in relation to the time sheets which he said were not signed by him and had not been prepared by him. That I described the documents as self-serving in my judgment, not contemporaneous and that Mr Baig tried to prevent a witness from giving evidence and that I had said he had sought to mislead the Tribunal.

4. In respect of the respondent's means the claimant submitted it was unconvincing, the evidence provided was limited, it showed a turnover of £65,000. There was considerable doubt as to where the payments out of that account went to, further the claimant had chosen to pay his barrister £1,800 to defend the claim at a point in time when the claim was only £4,000. In respect of the respondent's arguments his representation at the hearing had been defective, was not a matter the Tribunal should concern itself with. It was not something that the respondent raised on the day.

Respondent's Submissions

5. The respondent submitted that the respondent was not saying that the findings of fact of the Tribunal should be challenged, but the respondent could not afford to apply for a reconsideration or appeal that decision that he had referred his Barrister to the Legal Services Ombudsman and had contacted the Bar Standards Authority as he felt that he had been considerably let down in the presentation of his defence by his Barrister. Further, that he was impecunious and he provided documentation evidence to that effect and finally, that the conduct was part of the cut and thrust of litigation.

6. There was some documentation attached to the respondent's witness statement.

Evidence

7. Mr Procter chose not to cross examine the respondent, I considered asking further questions myself but felt that the questions I had would require further documentation which would require a postponement of the hearing and therefore in that situation, the balance of hardship and in the light of the overriding objective it was more appropriate to proceed without further questioning of the witness.

8. The respondent submitted a witness statement stating that he believed he had lost his case because of poor representation by his barrister. He has made a complaint to the barrister's chambers, to the Bar standards Board and to the Legal Services Ombudsman. He complains about my having to tell his counsel that he had asked a question already and should move on, and that he should not raise questions on remedy. Overall Mr Baig says that counsel failed to present the claim properly. The respondent also had solicitors who would have been even more involved in preparing the case but no reference was made to them.

9. He also set out reasons why I should not have believed the claimant and his witness. However the respondent had not appealed or asked for a reconsideration. He explained further the fixed term contract - that it was not a fixed period of time

but was dependent on when the claimant finished his training. Again these matters had been considered at the first hearing as suggesting to me there was no such fixed term contract in practice or law.

10. Other matters were raised regarding the original judgment but I do not propose to set them out in detail as the respondent's representative has made clear today that the respondent does not rely on challenging the judgment.

11. In addition the respondent said that he was a small business with a net turnover of £70222 and that gross salaries were £41620 . He had other costs ofcourse such as energy rent etc. He said his net profit for the whole year was £1286. He said he had taken a loan to pay off the award from the judgment and only took £823 salary a month gross. The accounts showed a number of payments to persons unknown. There was no reference in the witness statement to who these individuals were or what work they did for the respondent. Whilst the respondent said he was only paid £823 a month there was a payment to him of £944.04 on 2nd November and on the 7th November there was a payment to Mr Baig of £823 . This month also showed what I presume to be the £5000 loan but also a payment to the claimants solicitors of £6756.15 a surplus debit of £1756.15. The overall; net profit for the month of November was £1316.29 but if the surplus over the loan is included it is £3072.44. bank statements were not provided for other months although the end of year accounts were for 2015 to verify the annual profit referred to above. Obviously these were prepared by Mr Baig and submitted to the board of the respondent which comprises Mr Baig and a Mr Ahmed.

12. In addition he had agreed he had paid his barrister £1800 for the hearing when overall costs were then £4000. He had also told Mr Shah he would rather pay the legal costs than settle with the claimant.

13. The claimant claimed £5472 in costs comprising of - for the first hearing - 7.2 hours at a solicitors rate of £150, 5.5 hours at partner's rate of £200 plus various letters and emails and £1250 for the hearing itself; for the costs hearing £450 .All plus VAT at 20%.

Law

14. My findings are under Rule 75(1)(a) of the Employment Tribunals (Constitution and Rules of Procedure) 2013 combined with Rule 76 the Tribunal has the power to make a costs order against one party of the proceedings to pay the costs incurred by another party. Rule 75 states that:

- (a) a costs order is an order that a party (the paying party) make a payment to (another party) the receiving party in respect of the costs that the

receiving party has incurred whilst legally represented or whilst represented by a lay representative;

(b) the receiving party in respect of a Tribunal fee paid by the receiving party; or

(c) another partner or witness in respect of expense incurred or to be incurred for the purpose of or in connection with an individual attendance as a witness at the Tribunal

and Rule 76 when a costs order may or shall be made:

(i) a Tribunal may make a costs order or preparation time order and shall consider whether to do so where it considers that

(a) a party or that party's representatives has acted vexatiously, abusively, disruptively or otherwise unreasonable in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted"

15. The ground pursued here for the costs order is that the conduct of the respondent was unreasonable 76(1)(a). If there is unreasonable conduct then potentially a costs award is justified although not axiomatic, I have to consider whether having decided there was unreasonable conduct that the making of an order is appropriate and that the amount claimed or awarded is appropriate. For example, although a party might have behaved unreasonably they might have a mental impairment which makes it inequitable to exercise my discretion to actually make what might otherwise be a justified costs order.

16. I have considered the case produced by Mr Procter which was Barnsley Metropolitan Borough Council -v- Yerrakalva, Court of Appeal 2011 which states that it is appropriate to make a costs order where there is unreasonable conduct but that the ET should have reference to the nature, gravity and effect of the unreasonable conduct and should weigh up the extent the unreasonable conduct affected the procedures looking at the whole picture, identifying the unreasonable conduct, what was unreasonable about it and the effect it had. Here the unreasonable conduct was the pursuing and conduct of a defence to the claim which I found was based on false documents and utterly unconvincing witness evidence.

17. Under Rule 84 I have to consider the ability to pay. Rule 84 says that "in deciding whether to make a preparation or wasted costs order and if so, in what amount the Tribunal may have regard to the paying party's ability to pay."

Conclusions

18. In respect of the first step I find it is appropriate to make a costs award on the following basis based on my findings of fact in the original judgment. (Respondent did not appeal or seek a reconsideration of any of these findings):

(1) the falsification of documents;

(2) that in effect the main witness for the respondent and owner of the business Mr Baig was lying about the provenance of the letters, about the existence of a fixed term contract and about the time sheets;

(3) that he had tried to prevent a witness from giving evidence.

This was very serious unreasonable conduct.

19. I have gone on then to consider whether or not the factors put forward by the respondent meant that I should not make a costs award. I cannot accept the respondent's argument that he was so poorly represented that it was not his fault that the conduct was unreasonable. The conduct which led to the case failing was wholly the conduct of the Mr Baig acting as a Director of the respondent and not the conduct of his counsel. Insofar as it might have been matters suggested to him by his solicitors which would have been the time at which such conduct might have been suggested Mr Baig has not suggested this and indeed, had this been the case the solicitors would have been guilty of the gravest conduct which would have led to a striking off.

20. It is true that the respondent has complained about his Counsel to the Legal Services Ombudsman however there is no adjudication of that complaint and the matters he has complained of in his witness statement today are not matters so wholly unusual as to make me conclude that there was a serious failure of duty by the Counsel. For example the claimant has relied on Counsel being told by me at the first hearing that he has asked the question before and therefore that he should move on, and that he should not raise issues of remedy. Neither of those matters are so unusual as to suggest behaviour completely out of the ordinary. In any event I do agree with the claimant that this is a matter between the claimant and his legal advisors and any claims in respect of them he wishes to make.

21. In respect of the claimant's impecunious argument I am obliged to consider the paying party's means

22. The respondent says that he makes only a small profit under £2,000 or a loss in the past three years and that he may go out of business if costs of the orders ought (£5,400) are awarded. In respect of this although Mr Bague was not cross examined and I expressed clearly my reasons for not asking him questions above I still find his evidence unconvincing. Mr Proctor pointed out that the accounts provided show a gross profit before expenses of £65,000 which to my mind is a relatively healthy profit for a small business. The evidence is that most or more of that £65,000 was spent on administrative expenses in relation to the business and the claimant provided business accounts for November and no other months. There are payments here to a number of individuals who appear to be related to Mr Bague and I have no descriptions of what work they did, no wage slips, no evidence as to whether what they were paid if they were paid for work done, whether the work done was commensurate with the payments, their credit card bills paid which I do not know whether they comprise wholly business expenses or whether they include personal expenses, there are payments to other companies which may be rent but I do not know whether they are rent, there is no proof that they were rent.

23. In any event even on the evidence provided for November the claimant was still at least £1,300 in credit at the end of the month which again in my experience is a reasonable amount of credit after all expenses were paid. In addition the respondent has not provided convincing documentary proof that the business expenses were legitimately incurred and therefore I am not convinced the respondent is impecunious as he says.

24. Further I have borne in mind that he states that he borrowed the money last time and has been able to pay some of it back although he borrowed again to pay his Counsel. I have further borne in mind the fact that he has paid his representative £1,800 (not just incurred these costs the representative pointed out an account which appeared to show that the amount had actually been paid). When the amount the claimant was claiming in costs was £4,000 which is nearly half of the claim cost. Further I accepted Mr Shah's evidence at the original tribunal that Mr Baig had said to him in respect of the claimant's claim that he would rather pay a solicitor than pay the claimant.

25. Accordingly I am not dissuaded for making a costs award on the grounds put forward by the respondent.

26. The next question is is the respondent responsible for all of the costs. I find that he mainly is, he has run this defence from the start of the contact with the claimant's solicitors, he has submitted an ET3 in the same terms, relying on the idea of a fixed term contract, he did not in any of this time say he had letters to prove this, whilst he might have been expected to have referred to these letters in the ET3, he certainly would have been expected to have passed these letters on when the letter before action was sent by the claimant's solicitors. Had he done so at this early stage he could have "knocked the claim on the head" as it were and avoided incurring any costs as had they been genuine they would have gone a long way to establishing an unassailable defence. However the fact that he did not refer to these letters was one of the reasons I found they were manufactured after the event.

27. Throughout the respondent has majored on there being a fixed term contract when there was no such signed contract to establish this but this is what the letters purported to support. Consequently I find the respondent's defence from the beginning was artificial and that is a starting point for considering what costs I should award. I see no reason not to award the majority of the claimant's costs, I do reduce them to some extent on the following grounds:

(i) that even had the respondent conceded the claim there would have some initial costs in respect of the claimant obtaining legal advice, I put this as 1 hour of solicitor time £150.

(ii) that the case in my opinion should not require as much work from a partner as is claimed and the partners work should have been limited to a small amount of supervision therefore I reduce the amount of partner time from 5 1/2 hours to 2 1/2 hours however that missing 3 hours would have been taken up by additional work by the solicitor therefore there is a difference of £50 before the charging amount for the solicitor and the partner

(£150 an hour for the solicitor and £200 an hour for the partner). That again is an overall reduction of £150.

(iii) in respect of VAT I have taken a broad brush approach and in Tribunal I was not told this was incorrect in calculating VAT as 20% of the £300 I have referred to above and therefore the total amount I have reduced the bill by is £360.

28. Consequently I award the claimant an order for the respondents to pay costs of £5,112.

Employment Judge Feeney

Date 3rd July 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON
05 July 2017
FOR THE TRIBUNAL OFFICE