



EMPLOYMENT TRIBUNALS

Claimant: Mr P Lloyd

Respondent: British Telecommunications PLC

Before: Employment Judge Howden-Evans

Dated: 7 September 2017

COSTS APPLICATION

The respondent's application for costs is rejected.

Reasons

1. By an ET1 claim form presented on 8 May 2017, the claimant sought compensation for breach of contract. The respondent's ET3 contested the claim. In the ET1 and ET3, both parties accept that on 20 February 2017, the respondent had offered the claimant the role of Team Leader Sales and Retention within its Consumer department based in Cardiff. This appointment was intended to commence on 27 March 2017. In the ET1 and ET3, it is agreed that the claimant had, at the assessment centre on 15 February 2017, informed the respondent that he had previously been convicted of theft. On 14 March 2017, the respondent withdrew the offer of employment. The respondent asserts the claimant had not disclosed the full extent of his conviction for theft and this was the reason for withdrawing the employment offer.
2. The claimant asserts he had provided full disclosure of his conviction. He also asserts that having received the respondent's offer of employment and

having subsequently been advised that everything was in order, he had given notice to his former employer. He asserts he was unable to retract his notice and became unemployed on 24 March 2017.

3. The Tribunal issued standard directions; notice was given to the parties and the Tribunal listed the case for a one-day final hearing on 13 July 2017. On 23 June 2017, the claimant provided further details of his claim by email to the Tribunal and respondent.
4. At 7.30am on 13 July 2017 (i.e. the morning of the hearing) the claimant emailed the Tribunal and respondent indicating he was withdrawing his claim with immediate effect. Whilst he was clearly withdrawing his claim, this appears to have been a late “change of heart” as the claimant had prepared and attached a detailed letter of the evidence he would have given. In his email he states *“my reasons for withdrawal is the impact that this has had on my health and wellbeing in dragging up my past mistake in a clear attempt at discrediting me further”*.
5. The respondent’s solicitor, Ms Bradley from BT’s legal department, attended the hearing, having travelled to Cardiff from London that morning. The respondent had intended to call one witness; fortunately Ms Bradley had been able to contact her to cancel her attendance. The respondent had also prepared a bundle of documents and a short witness statement. There was no attendance by or on behalf of the claimant.
6. Having carefully considered the claimant’s email, I dismissed the claim upon the claimant’s withdrawal.

Application for costs

7. On behalf of the respondent, Ms Bradley made an application for the respondent’s costs under Rule 76 of the Tribunal’s Rules of Procedure. This was on two bases: firstly, that the claimant’s claim had no reasonable prospect of success and ought not to have been presented in the first place; and secondly, by his late notification of the withdrawal of his claim, the claimant had conducted the proceedings unreasonably.
8. Ms Bradley submitted that any offer made had been conditional upon satisfactory pre-employment checks. Further and in the alternative, she submitted no employment contract had been formed by the parties and, finally, if an employment contract had been formed, the respondent would have been able to dismiss the claimant without notice as the respondent contended he had not been honest in his account of the conviction.
9. Turning to her submission that the claimant had acted unreasonably in withdrawing proceedings at the 11th hour, Ms Bradley submitted the

claimant ought to have withdrawn proceedings shortly after 8th June 2017 upon receipt of the respondent's ET3 response.

10. The principle application for costs, was for all costs incurred by the respondent's solicitors and their preparation time since 8th June 2017, which amounted to £1,512.84. In the alternative, Ms Bradley sought the costs incurred in her travelling to and attending the hearing, which amounted to £709.20.
11. Ms Bradley's argument on costs had some merit, but I declined to consider the respondent's application until the claimant had opportunity to reply to it.
12. By email dated 9 August 2017, the claimant explained he remains unemployed, with his sole source of income being job seekers allowance of £73.10 per week. He refers to accruing "considerable levels of debt". He also refers to having "fragile mental wellbeing".
13. I now consider the applicable law. Rule 76 (1)a of the Tribunal's Rules of Procedure provides 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 bringing the proceedings or the way that the proceedings have been conducted. Rule 76 (1)b is a similar provision but is triggered when a Tribunal considers that any claim had no reasonable prospect of success.
14. The appeal courts have often observed that the general power to award costs under the Tribunal's Rules of Procedure remains the exception rather than the rule (see for instance the decision of the Court of Appeal in *Barnsley Metropolitan Borough Council v Yerrakalva* [2012] IRLR 78). In relation to Rule 76 (1)a, a two-stage process applies: first, I should consider whether the claimant has conducted the proceedings unreasonably (or as otherwise set out in Rule 76(1)a); and, secondly, I should consider whether I should exercise my discretion to award costs. The same is true for Rule 76(1)b: I should firstly consider whether the claim had no reasonable prospect of success and then consider whether I should exercise my discretion to award costs. This process has been confirmed in cases such as *Power v. Panasonic UK Ltd* (unreported, EAT/0439/04) and *McPherson v. BNP Paribas* [2004] IRLR 558.
15. Did the claim have no reasonable prospect of success? Firstly, at the time of drafting the ET3, the respondent must have thought there was some prospect of the claimant succeeding, as there was no application for this claim to be struck out or for a deposit order. There is a dispute between the parties as to the level of disclosure given by the claimant and as to whether the respondent had advised the claimant that all the pre-employment

checks had been completed. In these circumstances, I cannot say the claim had no reasonable prospect of success.

16. Has the claimant conducted the proceedings unreasonably? I have concluded that he has not. I have looked at the whole picture of what has happened in this case. The claimant, who has been unrepresented throughout, appears to have been fully participating in the case, right up until the morning of the hearing. He submitted detailed further information on 23 June 2017, three weeks prior to the Hearing and had very recently prepared a letter that appears to be the evidence he had intended to present at the Hearing. Far from being a case in which the claimant had no intention of attending the Hearing, Mr Lloyd's withdrawal of his claim appears to be prompted by an eleventh hour genuine lack of confidence.
17. As I have not found that either of the circumstances set out in Rule 76(1)a or Rule 76 (1)b exists here, there is no requirement to go on to consider the discretion to award costs. For the sake of completeness, I've set out my considerations on the second stage of the test.
18. Even if I had considered that the claimant had acted unreasonably or that the claim had no reasonable prospect of success, I would not have exercised my discretion to award costs. I am concerned that the claimant's sudden lack of confidence may be a reflection of his current mental health, given that his recent emails refer to "the impact on his health and wellbeing" and his "fragile mental wellbeing". If the claimant is currently experiencing ill health, a costs order will exacerbate his condition.
19. Further and in the alternative, whilst the claimant's ability to pay is just one of the factors that can be considered, when a claimant's only current income is £73.10 per week and his debt is already increasing it is difficult to see how he would be able to afford to pay any amount towards a costs order. Mr Lloyd is likely to experience great difficulty finding future employment given his previous conviction. His financial situation is likely to remain difficult for a considerable time; this contrasts sharply with the resources of the respondent. I am also mindful that the respondent did offer the claimant a job, albeit this offer was conditional upon pre-employment checks. The respondent gave Mr Lloyd enough confidence to resign to take up this position, before the respondent withdrew the job offer. Whilst the claimant's legal claim against the respondent was not strong, it would not be equitable for Mr Lloyd to be further burdened by the respondent's costs incurred in this case, particularly as the respondent's initial actions were part of the chain the lead to his unemployment.
20. Further and in the alternative, the claimant has been unrepresented throughout these proceedings. I am mindful of the guidance in *AQ Ltd v Holden 2012 IRLR 648, EAT*. Whilst costs can be awarded against a

litigant-in-person, proper allowance needs to be made for a litigant-in-person's inexperience. In this case, Mr Lloyd had no reason to doubt the strength of his case; he has not had any warning from the tribunal that he risks incurring the respondent's costs, so it was perfectly reasonable for him to continue to pursue what he thought was a strong claim.

21. I am also mindful of Mummery LJ's words in the *McPherson* case: "It would be unfortunate if claimants were deterred from dropping claims by the prospect of an order for costs on withdrawal, which might well not be made against them if they fought on to a full hearing and failed". In this case, if Mr Lloyd had attended the hearing and had lost his case, it would have been unlikely that he would have had a costs order made against him.
22. For these reasons, the application for costs has been rejected.

Employment Judge Howden-Evans
Dated: 7th September 2017

ORDER SENT TO THE PARTIES ON

18 September 2017

.....
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS