EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs M Elavalakn	**v**	London Fuel Limited

Considered at: Bury St Edmunds **On**: 11 October 2017

By: Employment Judge G P Sigsworth

Determined on written submissions from:

For the Claimant: Mr J Parker-Bishop, Solicitor.

For the Respondent: Mr R Clement, Counsel.

JUDGMENT

1. The respondent's application for costs is refused.

REASONS

1. The respondent has made an application for costs against the claimant, following the withdrawal by the claimant of her claim. The parties are content that this matter be determined on the basis of their written submissions, without the need for a hearing.

2. It is helpful to set out briefly a chronology and the arguments of the parties.

   2.1 1 November 2016 – claim form submitted (in time) complaining of unfair dismissal, breach of contract and non-payment of accrued holiday pay. The unfair dismissal claim is both for automatic unfair dismissal, that the reason or the principal reason for the dismissal was a transfer of undertaking and, in the alternative, the case is put as one of ordinary unfair dismissal. The breach of contract claim is for a failure to give statutory notice, and the claimant also claims accrued holiday pay.

2.2 2 December 2016 – submission of the response. There is a dispute over the claimant's contract of employment. The claimant says that she was employed by the transferor employer from 1 April 2006 until the date of the transfer on 13 June 2016, and then until her dismissal on 23 June 2016. The respondent says that, according to records received from the transferor employer, there was a contract of employment identifying the start date for the claimant as being on 6 April 2016. The claimant was therefore dismissed within her probationary period, there being an issue over her working hours and her rostered duties. The transferor employer was owned by the claimant's brother.

2.3 16 December 2016 – the claimant made an application to amend the claim form to add a claim for automatic unfair dismissal for refusing Sunday work. This application to amend was notified to the respondent by hard copy letter, apparently not reaching the respondent until 3 or 5 January 2017.

2.4 9 January 2017 – the application to amend was resisted by the respondent on the basis that it was a new cause of action and therefore out of time.

2.5 13 February 2017 – the date of the originally listed hearing. There had been a direction that the application to amend would be determined at the start of that hearing.

2.6 10 February 2017 – the listed hearing was postponed by the Tribunal itself because there was no available Judge to hear the case.

2.7 4 February 2017 – a notice of hearing to list the case for one day on 19 June 2017. The parties had suggested to the tribunal that the case might not be capable of determination within one day.

2.8 14 June 2017 – the claimant wrote to the tribunal, copying the respondent, withdrawing her claim. The reason given was that she had mitigated her loss and it was not financially practicable to pursue the claim to a hearing.

2.9 14 June 2017 – the respondent's initial application for costs. It was said by the respondent that they had notified the claimant that the respondent considered the claim to have no reasonable prospects of success in a letter dated 17 January 2017. The letter had invited the claimant to withdraw her claim. The claimant had responded to that letter on 19 January 2017 indicating they did not agree with the respondent's analysis of the law and that her complaint was not misconceived and, further, the claimant's application to amend had not been unsuccessful, as alleged by the respondent, but was still pending.

2.10 22 June 2017 – the tribunal issued a dismissal on withdrawal judgment.

2.11 23 June 2017 – the respondent made further submissions on costs. They claimed £3,000 for the costs of employing a direct access barrister to draft the response and advise, and for the first day of the hearing. There was a further £275 for an additional fee for the resistance to the application to amend. It was said by the respondent that the claimant could not have mitigated her loss to any significant extent, by reference to the schedule of loss, and had no intention of pursuing the matter to a hearing and was simply hoping for an offer of payment by the respondent.

2.12 23 June 2017 – the claimant's submissions on the respondent's application for costs, on the basis that it was an application that the claim had no reasonable prospects of success. The claimant had obtained new employment and had obtained new documentation concerning her income which indicated to the claimant that it was not financially viable to pursue her claim to a hearing. She had instructed solicitors and had incurred considerable expense to that date. It was pointed out that there had been no previous application by the respondent to strike out her claim or for a deposit order, yet the respondent was now saying that the claim had no reasonable prospects of success. The claimant contended that there was a strong prima facie case for the TUPE related dismissal, and further the claimant had more than two years employment and so had an ordinary unfair dismissal claim. It was argued by her that the matter could only be determined on the evidence.

2.13 21 July 2017 – the claimant's further submissions, this time on the respondent's allegation in their submissions on costs that the claimant's conduct was vexatious and unreasonable in the conduct of the claim.

The Law

3. Rule 76 of the Employment Tribunals Rules of Procedure 2013 provides that:-

> "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 has no reasonable prospect of success".

4. Rule 84 (ability to pay) is not in play in this case.

5. The claimant's representative in his submissions has cited some case law. There was no reference to case law in the respondent's submissions.

6. In McPherson v BNP Paribas (London Branch) [2004] ICR 1398, CA, it was held that it would be unfortunate if claimants were deterred from dropping claims by the prospect of an order for costs on withdrawal in circumstances where such an order might well not be made against them if they fought on to a full hearing and failed. Withdrawal could lead to a saving of costs and the tribunal should not adopt a practice on costs that would deter claimants from making sensible litigation decisions. On the other hand, it also said that tribunals should not follow a practice on costs that might encourage speculative claims, allowing claimants to start cases and pursue them down to the last week or two before the hearing in the hope of receiving an offer to settle, and then, failing an offer, dropping the case without any risk of a costs sanction. The critical question in this regard was whether the claimant in withdrawing the claim has conducted the proceedings unreasonably, not whether the withdrawal of the claim is in itself unreasonable.

7. In Yerrakalva v Barnsley Metropolitan Borough Council [2012] ICR 420, CA, it was held that an order for costs in the employment tribunal is still the exception rather than the rule.

8. In Benyon v Scadden [1999] IRLR 700, EAT, it was emphasised that it is the relevant rules that must be construed and not the cases. The decision should not be made on the basis of existing case law.

Conclusions

9. The application for costs is put on two bases. The first basis is that the claim did not have reasonable prospects of success. I conclude that it is not possible to establish this on the basis of the pleadings alone. Regarding the application to amend, and looking at the original claim form, it is clear that the claimant's case was that she was employed for more than 10 years by the transferor employer before her employment transferred to the respondent. Whether that is in fact the case or whether there was a contract of employment dated only April 2016 is an evidential matter and can only be determined on the basis of the evidence. Further, the respondent admits the TUPE transfer on 13 June 2016, and the dismissal just 10 days later by the new owner of the business. This gives rise to a prima facie case that the sole or principal reason for the dismissal was the transfer itself. It is noted that no ETO defence is pleaded by the respondent in the alternative. The claimant's ordinary unfair dismissal claim (again depending on her length of service) also gives rise to a prima facie case, as no procedure was followed and there was a near summary dismissal. The respondent appears to acknowledge in their ET3 that there is a possibility that there was no contract as pleaded by them, as they say that if that was the case there was some mis-information/incorrect information given to them by the transferor employer, and there is a

request in the response to join the transferor employer as second respondent. That application does not seem to have been pursued by the respondent or picked up by the tribunal. Clearly, if the claimant had 10 years continuous service, then she also had a strong pay in lieu of notice claim in circumstances where she was only paid one week's notice.

10. The second basis of the respondent's application is that the claimant was vexatious and unreasonable in bringing or conducting the claim. If and in so far as this refers to the application to amend, then that had not been determined as at the date of withdrawal. Therefore, it cannot be said that such application would not have been successful. Such application therefore cannot be said to be vexatious or unreasonable. The claimant sought a case management discussion in place of the one day listed hearing because there was likely to be insufficient time to deal with the claimant's application to amend, and any application by the respondent to join the transferor employer as second respondent, as well as hear and determine the listed hearing. The claimant's representative had written to the respondent to suggest this way forward – substituting a case management discussion for the listed hearing – but the respondent's reply was that they did not agree to that listed hearing being vacated and replaced with a CMD. It does seem very likely that the tribunal would not have had sufficient time in one day to hear and complete the case, including any preliminary applications and determination of preliminary issues, such as whether the claimant had sufficient service to bring an ordinary dismissal claim. In any event, the hearing was vacated by the tribunal itself. The respondent has not identified any other alleged vexatious or unreasonable conduct by the claimant. For example, it has not been suggested by the respondent that there was any procedural default on the part of the claimant leading to unnecessary expense. Further, the respondent has no evidence for its contention that the claimant had no intention of pursuing her claim and was simply hoping that the respondent would pay her some money. As they say in their written application, it was a suspicion only. Such allegation is strongly refuted by the claimant.

11. In all the circumstances, therefore, it not being established that the claim had no reasonable prospects of success, or that the claimant has brought or conducted the proceedings unreasonably or vexatiously, the respondent's application for costs is refused.

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Employment Judge G P Sigsworth

Date: ……20/10/17……..

Sent to the parties on: .....

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For the Tribunal Office