EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr P Ruelle **v** **Emirates Airline**

COSTS HEARING

Heard at: London Central **On :** 12 September 2018

Before: Employment Judge K Ayre

Appearances

For the Claimant: Mr J Sykes, Consultant

For the Respondent : Mr D Barnett, Counsel

RESERVED JUDGMENT ON COSTS

1. The claimant is ordered to pay to the respondent the sum of £7,500 in respect of the costs incurred by the respondent in defending this claim.

REASONS

Background

1. Following an open preliminary hearing on 15 November and 14 December 2017, I found that the Employment Tribunal does not have territorial jurisdiction to hear the claimant's claims. The reasons for that decision are set out in a judgment sent to the parties on 8 June 2018 and I do not propose to repeat them here.

2. By letter dated 18th June 2018 the respondent made an application for an order that the claimant pay the respondent's costs pursuant to Rule 76(1) of Schedule 1 to the ETs (Constitution & Rules of Procedure) Regulations 2013 ("**the Rules**"). The grounds for the application were that the claim had no reasonable prospect of success.

3. In the alternative, the respondent applied for an order for wasted costs against the claimant's representative under Rule 82.

4. The claimant resisted the application and the case was listed for a hearing to consider the costs application on 12 September 2018.

5. The respondent's written application for a costs order did not contain a figure for costs. At the costs hearing Mr Barnett, on behalf of the respondent, sought an order that the claimant pay the sum of £20,000 in respect of the respondent's costs.

The Proceedings

6. The tribunal heard evidence from the claimant. The claimant had prepared 2 witness statements and a letter addressed "To the Judge" which the tribunal admitted into evidence as a 3rd witness statement.

7. The respondent produced a witness statement for a Mr Harry Sherrard, principal of Sherrards Employment Law Solicitors, who were instructed to advise the respondent in relation to this claim. Mr Sherrard was not present at the costs hearing to be cross examined. His statement had not been served as a written representation pursuant to rule 42of the Rules, and accordingly very little weight was placed upon it.

8. Both representatives made oral submissions. Mr Sykes, on behalf of the claimant, also submitted a written skeleton argument, which I have considered carefully and for which I am grateful.

Findings of fact

9. The claimant was dismissed by the respondent on 1 March 2017. The claimant suffered from ill health both prior to and following his dismissal, and from 29 March to 4 April 2017 was hospitalised due to gastroesophageal disease for which he had surgery on 29 March.

10. The claimant was initially unable to work following his dismissal due to ill health. The respondent did however pay him 2.5 months' salary, which the claimant said is the minimum legal requirement under Belgian law. The claimant also received what he called "medical assistance" payments from the Employment Ministry in Belgium.

11. Fortunately the claimant was subsequently able to find alternative employment and on 6 August 2017 he began working for a company called Autogrill Belgie. He earns on average 1,500 euros a month in his new employment.

12. At the end of March 2018 the claimant suffered a stroke, and was hospitalised from 30 March to 6 April He is currently recovering from the stroke and is incurring significant costs on medical treatment. He envisages that this treatment will last until at least April 2019.

13. The claimant gave evidence that he expects to have between 500 and 600 euros of 'free money' (ie disposable income) each month from May 2019. He also said that he could afford to pay 5,000 euros in costs if ordered to do so.

14. He described his case against the respondent in Belgium as a "strong"

one and said that he expects to recover 60,000 euros from that claim.

15. The claimant is paying lawyers in Belgium to pursue that claim, although said that he had not paid anything since April 2018. He is also paying Mr Sykes to represent him in these proceedings, at the rate of £150 an hour.

16. The claimant lives with his mother in a 3 bedroomed house on her farm and has no rent to pay. The claimant has not given any evidence to suggest that he has any financial dependents, such as children. He is an only child.

17. The claimant has a partner/wife but does not, according to his evidence, live with her. He and his partner had hoped to buy a flat together but that plan has been put on hold.

18. The claimant has two bank accounts, one of which is overdrawn and the other contains approximately 2,000 euros. The claimant also has a pension fund into which he is paying 400 euros a month. He owns his own car but does not have any stocks or shares.

19. In its response to the original claim, the respondent invited the claimant to withdraw his claim and threatened an application for costs if he did not do so. The claimant in his evidence admitted that he had seen the grounds of resistance to the claim, and knew that from 'the beginning of the process that the respondent was stalking about costs and strike-out.".

20. On 28th September 2017 the respondent wrote to the claimant by email. In the email the respondent warned the claimant that "*We are confident that your claim will be struck out. I have to warn you that we will apply for legal costs against you in the event that your claim is indeed struck out. I estimate that the costs claim against you will be in the region of £3,500 plus VAT.*

21. On 13 December the respondent sent a second costs warning to the claimant in the form of an email to the claimant's representative to which was attached an updated Schedule of Costs. In that email the respondent's solicitors wrote that "*We are of the view that your client has no reasonable prospect of success in establishing jurisdiction, and to pursue this claim is unreasonable. As such, it is our intention to claim costs…*"

22. The claimant alleged that the respondent's conduct during the preliminary hearing last year was inappropriate.

23. On 19 December 2017 the claimant complained to the SRA about the conduct of Harry Sherrard. His complaint, in essence, was that Mr Sherrard had written to the claimant directly on one occasion, rather than to his solicitor, which the claimant considers was harassment. The SRA concluded that there was insufficient evidence of any fitness to practice issues and that as a result they would not be taking any action against Mr Harry Sherrard or his firm.

24. On 10 February the claimant wrote to the Legal Ombudsman asking the Legal Ombudsman to review the case. He also wrote again to the SRA.

25. The SRA responded by letter dated 4 June 2018 in which Graham Taylor, Regulatory Support Officer, wrote :-

"Upon review, I have decided to uphold our previous decision…

It appears this incident only occurred once, if the solicitor continued to write directly to you please inform us of this and send us the correspondence and we will consider this further…

I do not believe that the letter is threatening. It is stating the current situation and the beliefs of the firm and this is acceptable…"

26. On 18 June, having received the judgment of the Tribunal following the Preliminary Hearing, the respondent indicated that it did intend to apply for costs.

27. On 19 June Sherrards sent an email attaching a letter to the claimant directly. In that email they explained that they had also sent the letter directly to the claimant's representative but delivery had failed. The claimant responded to that email on 24 June in an email sent directly to Sherrards.

The Law

28. Rule 76(1) of the Rules 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 had no reasonable prospect of success.

29. Rule 78(1) states that a costs order may "*Order the paying party to pay* the *receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party".*

30. Rule 84 (Ability to pay) provides that "*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 …ability to pay.*"

Submissions

Claimant

31. Mr Sykes provided written submissions on behalf of the claimant, which I have carefully considered and for which I am grateful.

32. Mr Sykes submitted that the Employment Tribunal is a no costs regime in

which costs do not follow the event. He argued that, in deciding whether to make a costs order pursuant to Rule 76(1)(b) a Tribunal has to 'work through' 3 stages:-

a. Whether the claim had no reasonable prospects of success;

b. If so, whether to exercise the discretion to award costs; and

c. If so, whether to take into account the losing party's means.

33. He argued that the test at section 76(1)(b) is prospective rather than retrospective, namely, taking the pleadings at their highest, does the claim have no reasonable prospect of success.

34. Mr Sykes also submitted that if the Tribunal finds it has discretion to make an order for costs, it must then consider whether to exercise that discretion, and a relevant factor at that stage is the conduct of the other party   Mr Sykes referred to the cases of *Yerrakalva v Barnsley Metropolitan Borough Council* [2012] 2 All ER 215, *Anderson v Manpower Uk Ltd (26014909/2016).*

35. He argued that the factual matrix in this case was not simple, and that to succeed in costs the respondent must show that it was "pretty obvious" that the claim was going to fail.

36. He suggested that the respondent had made direct threats to the claimant to deter him from suing, and used their knowledge of his illness to cause him distress.

Respondent

37. Mr Barnett submitted on behalf of the respondent that under Rule 84(1) - the Tribunal should consider the claimant's means twice:-

a. In deciding whether to make an order for costs; and

b. In deciding the amount of the order.

38. In support of his submission that the claim had no reasonable prospects of success, Mr Barnett referred to the Judgment, and argued that all of the relevant factors pointed overwhelmingly away from employment in the UK, with none of them pointing towards employment in the UK.   This is not, in Mr Barnett's view, a case in which factors were pointing both ways – all the factors pointed one way.

39. Mr Barnett also argued that this was not a case in which there were disputed issues of fact. On the claimant's case everything pointed towards employment not being in the UK. No evidence pointed the other way, other than the grievance being processed through the UK. That was not enough, in Mr Barnett's submission, to give the claimant reasonable prospects of success in establishing jurisdiction.

40. There was, in Mr Barnett's view, no unreasonable conduct by the respondent.   The respondent accepted that the original costs warning

letter should have been to the claimant's representative rather than directly to the claimant. That was a mistake. The only other correspondence sent to the claimant directly was this application for costs, because it bounced back from Mr Syke's email address.

41. Mr Barnett submitted that if the Tribunal considered that there was unreasonable conduct by the respondent it should consider also the unreasonable conduct by claimant, and specifically:-

    a. The claimant's application to strike out the ET3 (because of Mr Barnett's email to 30,000 people which it was suggested identified the claimant or his representative) which the claimant's representative had refused to proceed with;

    b. Lodging a complaint to the Bar Standards Board about Mr Barnett;

    c. Complaining about Sherrards to the SRA and the Legal Ombudsman.

42. Mr Barnett also pointed out that that claimant had been given 3 costs warnings but chose to pursue his claim in the full knowledge that he was at risk of a costs award.

Conclusions

43. Much was made in the claimant's evidence at the costs hearing of the respondent's alleged unreasonable behavior – prior to, during and after the preliminary hearing to determine jurisdiction.

44. I find no evidence whatsoever of any unreasonable conduct by the respondent. One email was sent to the claimant directly, at the outset of the proceedings. This was a mistake. Subsequently, an email was sent to the claimant direct after the respondent received a 'bounceback' or error message when it tried to send the email to the claimant's representative. Again, there was nothing untoward in this, and the claimant responded directly to that email, which suggests he did not object to direct communication with the respondent's solicitor.

45. In contrast, I find that the claimant did behave unreasonably in pursuing a claim which it was clear from the outset, did not have reasonable prospects of success. This was not a case which was finely balanced or involved any significant conflicts of evidence. On the claimant's case alone, there were no reasonable prospects that the Tribunal would find that it had jurisdiction.

46. It is clear to me that this has been a badly tempered litigation – and more so on the claimant's side than on the respondent's. For example – the allegation that Daniel Barnett emailed others about the case was based on a misunderstanding by the claimant's representative which was without any basis in fact.

47. The claimant is, in my view, someone who is not easily intimidated.

Despite costs warning letters he continued to pursue his claim in the UK as well as in Belgium. I find no evidence whatsoever that the respondent sought to or indeed did intimidate the claimant.

48. The claimant had the benefit of legal advice from an experienced employment law specialist throughout.

49. The claimant's allegations of harassment and threats by the respondent – both prior to and at the preliminary hearing, were entirely unfounded. There was no harassment of the claimant. It was, in my view, appropriate for the respondent's solicitors to send costs warning letters in a case such as this where there is little, if any, evidence which supports the claimant's case.

50. This was a claim which was, in my view, highly likely to fail. The respondent did not harass the claimant – it was merely seeking to avoid a claim in which the employment had at best a tenuous link to the United Kingdom.

51. As set out in para 58 of the Judgment, the claimant in this case:-

a. Is a Belgian national who applied for the role in Belgian, was interviewed in Belgium and offered the role in Belgium;

b. Lived and worked in Belgium throughout the course of his employment with the respondent;

c. Was not required to carry out <u>any</u> duties in Great Britain, and did spend any working time in GB;

d. Was employed on a Belgian contract, subject to Belgian law and to the jurisdiction of the Belgian courts;

e. Reported to and was managed by the Belgium country manager who carried out his performance reviews and took the decision to dismiss him;

f. Was paid in Euros, the Belgian currency, into a Belgian bank account;

g. Paid Belgian tax and social security contributions;

h. Was dismissed in Belgium. The fact that Mr Martin consulted HR in London about the dismissal does not point to the employment relationship being controlled from London, as the claimant appeared to suggest. It was clear to the Tribunal that the decision to dismiss was taken by Mr Martin in Brussels on the advice of a local law firm.

52. All of the relevant factors pointed in favour of the Belgian courts having jurisdiction rather than the Employment Tribunal in the UK.

53. For the above reasons, I find that this was a claim which, from the outset, did not have reasonable prospects of success. I also find that it should

have been apparent to the claimant and/or his legal advisors that the claim did not have reasonable prospects of success. There was no new evidence that came to light during the course of the proceedings and which changed the prospects of success.

54. This is, in my view, a case in which it would be appropriate to exercise my discretion to make an order for costs.

55. In deciding whether to make an order for costs, I have considered the claimant's means. The claimant is currently in work. He has some savings (2,000 euros) and is able to pay 400 euros a month into his pension. He owns his own car and is living rent free in his mother's house. He has no dependents. The Claimant did not explain why he could afford to pay 5,000 euros but not more.

56. The respondent asks that I make an order that the claimant pay the sum of £20,000 in respect of the respondent's costs in defending this claim. I do not consider that it would be appropriate to make such an order. In reaching this decision I have taken into account the means of the claimant, and the overriding objective.

57. In light of the above, and in balancing the interests of both parties, it seems to me that it would be appropriate for the claimant to pay the sum of £7,500 to the respondent in respect of the costs incurred by the respondent in defending this claim.

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Employment Judge Ayre

Date 21 December 2018

JUDGMENT SENT TO THE PARTIES ON

4 January 2019

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FOR THE TRIBUNAL OFFICE