



EMPLOYMENT TRIBUNALS

Claimant: Mr M Spasov
Respondent: Hugh Lowe Farms Ltd

Heard at: Ashford on: 16 August 2018

Before: EMPLOYMENT JUDGE CORRIGAN
Sitting Alone

Representation

Claimant: In person
Respondent: Mr D Dracass, Counsel

PRELIMINARY HEARING

RESERVED JUDGMENT ON COSTS

1. The Respondent's application for costs is refused.
2. The Claimant's deposit in respect of his breach of contract claim shall be refunded to him.

REASONS

1. The Respondent's position is set out in the letter to the Tribunal dated 3 April 2018. The application is in respect of substantial costs incurred prior to and in relation to the Preliminary Hearing of 8 March 2018 (£16,067.70), in addition to the costs incurred by the further hearing on 16 August 2018, subject to the limit the Tribunal can award of £20,000.
2. The Claimant, by his claim presented on 5 October 2017, initially claimed disability discrimination, dismissal for asserting a statutory right, breach of contract, notice pay, unpaid wages and holiday pay. All of the claims were substantially out of time but were brought late as a result of R (Unison) v Lord Chancellor [2017] UKSC 51. The Claimant raised the time point in his claim.
3. The Respondent accepted that some holiday pay was outstanding and he

did receive a payment of holiday pay some three years after his employment ended as a result of bringing his claim.

4. Otherwise, the Respondent's Response submitted that the claims apart from the holiday pay complaint had little or no reasonable prospect of success on the merits. By letters dated 5 December 2017 and 6 December 2017 the Respondent applied for strike out or a deposit order and requested that the existing Preliminary Hearing deal with these issues. The Preliminary Hearing was postponed and re-listed on 8 March 2018 by the Tribunal in order to deal with the applications for strike out/deposit order.
5. The question of time limits which had been raised in the claim was overlooked until the Respondent raised it by letter dated 2 March 2018. Unfortunately that was too late for it to be considered at the preliminary Hearing on 8 March 2018, for the reasons set out in the Case Management Order dated 8 March 2018.
6. Prior to the Preliminary Hearing on 8 March 2018 the Claimant withdrew the disability discrimination claim. He also withdrew his wages claim during that Preliminary Hearing. He said on 16 August 2018 this was because it was for £52 and it was not worth contesting.
7. The remaining claims, save for breach of contract, were struck out. These were unfair dismissal for asserting a statutory right; notice pay and holiday pay. They were struck out by Employment Judge Wallis as they had no reasonable prospect of success as there was no assertion of statutory right; he had not worked the one day's notice and was therefore not entitled to pay and the holiday pay claim related to the remainder of the alleged fixed term and not to holiday accrued (the accrued holiday pay having been accepted by the Respondent).
8. A deposit was ordered to be paid in respect of the remaining breach of contract on the basis of the merits of the substantive claim as set out in the Deposit Order dated 8 March 2018. That claim has now been dismissed on 16 August 2018 on the basis it was out of time. The same time limit decision would likely have applied to the struck out claims in any event, the same principles on time limits applying.

Rules in respect of costs

9. The Respondent relies on Rule 76 of the Employment Tribunals Rules of Procedure which states
“(1) 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... has acted....unreasonably in either the bringing of the proceedings...or the way that the proceedings...have been conducted; or

(b) any claim or response had no reasonable prospect of success...”

10. Rule 84 provides that the Tribunal may have regard to the paying party's ability to pay.
11. In respect of the deposit in relation to the breach of contract claim Rule 39 (5) states that if the Tribunal decides the specific allegation (breach of contract) against the Claimant for substantially the reasons given in the deposit order then the Claimant shall be treated as having acted unreasonably in pursuing the allegation...and the deposit shall be paid to the Respondent. Otherwise, the deposit shall be refunded.

Conclusions

12. Although the Tribunal is obliged to consider a costs award where there has been a finding that a claim or claims had no reasonable prospect of success, it is not obliged to make such an order. Whether to do so is at the Tribunal's discretion.
13. The Respondent asserts that the Claimant demonstrated a level of legal acumen and exhibited knowledge of employment law. Implicit in this is that more should therefore be expected of him in terms of understanding the merits of his case and prospects of success. The Claimant has Bulgarian law degrees. These did not include UK law. He is proficient in online research and has experience of bringing other employment claims. Otherwise, he is not legally qualified here, nor is he an expert in employment law. He is a litigant in person.
14. The claims of disability discrimination and unpaid wages were withdrawn and there was no finding that there were no reasonable prospects of success. They were withdrawn following receipt of the Response and either before or at the first Preliminary Hearing. The Respondent therefore benefited from an early withdrawal of those claims. I don't consider the circumstances such as to merit a costs award.
15. The claims for unfair dismissal, notice pay and holiday pay were struck out as they had no reasonable prospect of success. The essence of the unfair dismissal claim was that the Claimant was dismissed the day after he said he no longer wanted to work 48 hours a week and wanted to withdraw his opt-out. It was found this could not amount to an assertion of a statutory right (within the meaning of s104 Employment Rights Act 1996). However in my view it is not unreasonable for a litigant in person to consider a dismissal for this reason (if established on the facts) was an automatic unfair dismissal for asserting a statutory right and to seek to have that aired at a Preliminary Hearing. It was so aired, with each side giving submissions and the Respondent benefitted from a strike out at an early stage of the proceedings. Similarly the claim for notice pay (which the Claimant had not received) was aired and the Respondent benefitted from a strike out at an early stage of the claim. Although the remaining claim for holiday pay was struck out, in fact the Respondent had already agreed there was holiday pay still due and agreed to pay it. The Claim was clearly necessary in that respect as otherwise the Claimant would not have received that.

16. In any event I do not consider that it was unreasonable for the Claimant to seek to make submissions at the preliminary hearing prior to the decision to strike out his claims. The Respondent has benefited from an early strike out.
17. The breach of contract claim has been dismissed on the basis of the time limit/jurisdiction point, which would also have applied to the claims that were struck out. It is unfortunate that this point was identified too late to include in the first Preliminary Hearing, as had that point been considered first, it likely would have been the end of the matter. This is no fault of the Claimant, who raised the issue in the claim form. Although the claims were brought out of time, I do not consider this was unreasonable. The Claimant had arguable points to make in respect of the extension of time. I did find that it was not reasonably practicable to lodge the claim in time but that it was not then submitted within a further reasonable period. It could have been submitted sooner. Nevertheless the Claimant's case in respect of the reasonable period was arguable. There is no basis for finding the Claimant should pay costs for the second preliminary hearing.
18. Overall, the claims have been struck out/dismissed or withdrawn at a preliminary stage, saving the Respondent from defending the claims further. I do not consider it appropriate to award costs.
19. In any event, the Claimant's evidence as to his current means was that he works 20-25 hours a week in a casino. He is only guaranteed 14 hours. His wage is at Minimum Wage level. He earns £700-£800 net per month out of which he pays £400 per month rent and £300 per month loans. The remaining money he spends on food. He has no savings. I find therefore that he is not in a position to be able to pay a costs order. Indeed during the hearing the Respondent conceded he could not afford anything like the amount claimed.
20. Moreover, the Respondent is of course entitled to incur such legal costs as it chooses, but an application for a £20,000 costs order at the preliminary stage of a case of this nature is, in my view, disproportionate.
21. The claim for breach of contract was dismissed due to expiry of time limits and not for the reasons set out in the deposit order therefore the Claimant is entitled to be refunded his deposit (rule 39(5)).

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Employment Judge Corrigan
10 December 2018