EMPLOYMENT TRIBUNALS

Claimant	*Respondent*
Mr K Smith	Webworks Internet (UK) Ltd

COSTS JUDGMENT OF THE EMPLOYMENT TRIBUNAL

MADE AT NORTH SHIELDS ON 19th February 2018
EMPLOYMENT JUDGE GARNON (sitting alone)

JUDGMENT

I refuse the respondents' application, made under Rule 77 of the Employment Tribunal Rules of Procedure 2013 (the Rules) , for a costs order

REASONS

The Background Facts

1. On 15th November 2017 the claimant made a claim of unfair dismissal. For this he had to be an employee as defined in s230 of the Employment Rights Act 1996 (the Act) and have two years continuity of employment unless an exception applied. He gave his dates of employment as 1st January 2011 to 23rd August 2017. The claim was listed for hearing on service and standard directions given.

2.The response form said the claimant was employed from 8th May 2017 to 23rd August 2017 but prior to that was " engaged on a self employed basis" . The respondent made an application to strike out the claim because " (UK)" was missing from the name of the respondent on the claim form. Such an application was ludicrous . The claim form was simply amended

3. On consideration of the file under Rule 26 Employment Judge Shepherd asked for the claimant's comments on the length of service issue but before his request was even sent, the claimant's representative emailed the Tribunal saying although the period of alleged self employment was, on his client's version, a sham designed to break continuity of service , the claimant had accepted his advice to withdraw as he had no documentary evidence to support such a contention. Some three hours later a withdrawal was emailed.

4. On 23rd January 2018, the respondent's representatives applied for costs on the grounds the claimant had (a) acted vexatiously and unreasonably in bringing the claim and (b) it had no reasonable prospect of success

The Law

5. The Rules include as far as relevant

76. *(1) A Tribunal may make a costs 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 .. had ***no reasonable prospect of success****.*

77. *… No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.*

Both parties have elected to have this application decided on written representations without a hearing.

6. The Court of Appeal and EAT have said costs orders in the Employment Tribunal:

(a) are rare and exceptional.
(b) whether the Tribunal has the right to make a costs order is separate and distinct from whether it should exercise its discretion to do so
(c) the paying party's conduct as a whole needs to be considered, per Mummery LJ in Barnsley MBC v. Yerrakalva [2011] EWCA 1255 at para. 41:
"*The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had*."
(d) there is no rule/presumption that a costs order is appropriate because the paying party lied or failed to prove a central allegation of their case, see HCA International Ltd. v. May-Bheemul 10/5/2011, EAT.

7. Several factors are specifically relevant on withdrawals. In McPherson v BNP Paribas (London Branch) 2004 ICR 1398 the Court of Appeal said it would be wrong if, acting on a misconceived analogy with the Civil Procedure Rules, tribunals took the line it was unreasonable conduct for claimants to withdraw claims, and if they did, they should pay costs. The Court pointed out withdrawals could lead to a saving of costs, and it would be unfortunate if claimants were deterred from dropping claims by the prospect of an order for costs upon withdrawal that might well not be made against them if they fought on to a full hearing and failed.

8. What I call the "threshold" issue is whether I am satisfied one of the circumstances in Rule 76 exists. If the " threshold " has not been reached. I need decide no more.

9. By analogy, Rule 37 of the Rules includes " *a Tribunal may strike out all or part of a claim .. on any of the following grounds—*
(a) that it … has no reasonable prospect of success;

10. The standard **no** reasonable prospect of success is high . As Lady Smith in Balls v Downham Market High School and College [2011] IRLR 217 said

"I stress the word 'no' because it shows that the test is not whether the Claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short a high test. There must be no reasonable prospects."

11. In Ezsias v North Glamorgan NHS Trust [2007] ICR 1126). Elias P said:
"…where the facts themselves are at issue, in my judgment it can only be in the most extreme case that the Chairman can say that without any evidence being tested in cross-examination the disputed facts would inevitably, or almost inevitably be resolved against the Claimant."

Conclusions

12. The respondent accepts the claimant worked for it before 8th May 2017 and says he asked to be treated as self employed. In Smith v Goodmays Insulations an employee who requested to become self employed and who had been approved as such by the Revenue was not later prevented from resiling from that position. Similar cases are Young and Woods Limited –v- West and Basil Wyatt & Sons v McCarthy, in both of which the Revenue treated people as self employed but the Tribunal found they were employees. The status of people who do work for others has taxed the highest courts for many years. The point was considered in Autoclenz Ltd v Belcher and ors 2011 ICR 1157 which dealt with a "sham" arrangement. The " sham" does not mean the contract must be designed to deceive . In Protectacoat-v-Szilagi Sir Stephen Sedley said:

it seems to me that, in the field of employment at least, it is more helpful and relevant, … to ask in a case like this not whether the written agreement is a sham but simply what the true legal relationship is. Although there will be in many cases (as there was in this one) an intention to conceal or misrepresent the actual relationship, there is no logical reason why this should be a universal requirement. The courts not uncommonly have to decide whether the entirety of a contractual relationship is constituted or evidenced by a document which one party says is definitive, without any need to decide whether that party has studied to deceive or is simply mistaken.

13. The respondent says the claimant was engaged on a “self employed basis”. Whether that was so would have been an issue for the Tribunal to decide. I cannot say the claimant’s case stood no reasonable prospect of success .

14. The other limb of this application is that the claimant acted vexatiously and unreasonably because he knew his claim was spurious, as evidenced by comments to a former work colleague showing he was only bringing the claim to get some money out of them. Even if I had evidence to support that, what people say to others in the context of litigation may be “bravado”. I accept the evidence of the respondent, if proved, would constitute a strong defence to an unfair dismissal claim, but on the above authorities that is not the proper test. Mr Justice Megarry once said: *“the path of the law is strewn with examples of open and shut cases that somehow were not, and unanswerable charges that were in the event fully answered.”* It is rare a Judge can say a claim stands no prospect of success but the wording in the Rules is ‘no reasonable prospect of success’. That sometimes can be said, but not in this instance .

15. I cannot find the threshold for making a costs order is reached.

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T M Garnon EMPLOYMENT JUDGE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 19th FEBRUARY 2018