



EMPLOYMENT TRIBUNALS

Claimant

Mr V Mihailescu

v

Respondent

Better Lives (UK) Limited
t/a Bluebird Care Ipswich

Heard at: Bury St Edmunds

On: 29 November 2018

Before: Employment Judge Laidler

Appearances:

For the Claimant: In person, assisted by an interpreter

For the Respondent: Mr L Clarke, Solicitor

JUDGMENT having been sent to the parties on 8 January 2019 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This was a hearing to determine the respondent's cost application. A schedule totaling £22, 383.10 plus VAT had been submitted.
2. The ET1 in this case was received on 24 October 2016 and accompanied by a schedule of loss totaling £18,879.06. The statement of remedy prepared for the claimant by the Ipswich Citizens' Advice Bureau of 23 November 2016 set out more detail in support of that schedule of loss.
3. There have been three preliminary hearings. On 16 February 2017 the claimant did not attend as he was unwell and his application for a postponement was granted. At the hearing on 26 May 2017, the tribunal found the claimant to be an employee or alternatively, a worker. At the hearing on 25 August 2017, there was a clarification of the issues in the claim.
4. At the hearing on 8 August 2017 the Claimant withdrew a claim of failure to pay the National Minimum Wage and unfair dismissal, although it had to be pointed out to him that no unfair dismissal claim had ever been brought. At that hearing, as clarified at paragraph 6 and 7 of the summary sent to the parties, the tribunal had to remind the claimant it did not have jurisdiction to deal with the Data Protection Act, Health and Safety at Work

Act or issues about the claimant's P60 or P45.

5. In a further letter dated 21 August 2017, the claimant set out the amounts he was now seeking to recover and by this date they totaled £86,340.03. The summary sent to the parties records at paragraphs 9 – 12 the basis of the claimant's claim for loss of earnings since he ceased working for the respondent on 9 June 2016. As recorded at paragraph 11, the claimant was reminded that the tribunal had power to award costs if it found that a party had, in the bringing or conducting of the proceedings, acted unreasonably or the claim had no reasonable prospects of success. This was a warning also stated in the respondent's ET3. The claimant was also urged to seek advice before continuing with the claims.
6. The two-day hearing listed for 30 and 31 October 2017 was postponed by the tribunal and relisted for 4 and 5 January, although another day was required on 23 January 2018. In its decision following that hearing sent to the parties on 7 March 2018, the only claim that succeeded was the admitted sum by the respondent in respect of holiday pay of £2,498.47.
7. In reaching its decision on costs the tribunal has taken account of the following matters it dealt with at that hearing. As recorded in its decision sent to the parties. At:

Paragraph 5	the claimant was reminded that he was attempting to resurrect matters that he had already abandoned;
Paragraph 6	that the tribunal had no jurisdiction to deal with revenue matters;
Paragraph 7	that the claimant had provided further witness statements and more calculations;
Paragraph 8	that the claimant sought a declaration that certain clauses of his contract were inadmissible, in particular that he was working on a zero hours contract;
Paragraph 9	the tribunal allowed the claimant to continue with a claim for wrongful dismissal but the claimant persisted in seeking his losses to date;
Paragraph 10	the claimant would not accept the respondent's calculations in relation to holiday pay.

8. The tribunal did not find any fabrication of documents by the respondent. It found that the claim for wages during the contract had varied, that the claimant had not been dismissed but that no further work had been offered under a zero hours contract.
9. In its conclusions the tribunal found the claimant's evidence to be contradictory and not credible and that he had been relying on matters told to him by someone at the CQC and the Health and Safety Executive.

10. All the claims were not established save for the respondent's admitted amount for holiday pay.
11. The relevant rules on costs are found in the Employment Tribunal Rules 2013:

When a costs order or a preparation time order may or shall be made:

76.(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 (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

Ability to pay:

84. 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 (or, where a wasted costs order is made, the representative's) ability to pay.

Conclusions

12. The tribunal is satisfied the claimant has acted unreasonably in the bringing of these proceedings and in the manner in which they have been conducted and that the majority of the claims had no reasonable prospects of success. As such the tribunal's discretion to award costs arises. The claimant who at the outset had advice from a Citizens' Advice Bureau chose to pursue claims that were not within the jurisdiction of the tribunal. This was explained to him at the preliminary hearings, but he still tried to pursue them. It does not appear that the claimant sought further advice on his position.
13. The claimant is aggrieved that he was working under a zero hours contract and how his pay was calculated, but the tribunal found at a preliminary hearing that he was employed under a zero hours contract. It had to remind him on numerous occasions that it could not revisit that finding or look into whether or not it was a 'fair' term of the contract.
14. The claimant kept changing the basis of his claims. He came to the full merits hearing claiming over £80,000. This was a significant claim that the respondent had no choice but to incur costs in defending. The claimant cannot criticise the respondent for so doing.

15. Even at this hearing, the claimant has sought to argue the issues in his claim rather than focus on the issue of costs.
16. Rule 84 states that in deciding whether to make a costs order, the tribunal may have regard to the ability to pay. The claimant told this tribunal that he did no work at all for the first year and a half after he stopped working for the respondent, but that since July he was working as a carer. His evidence was as usual quite vague as to how this work had fluctuated with evidence being given that it was about one day a week, but then that sometimes he worked 16 hours in a row and for three weeks he had worked 70 hours and then had not received one day of work for a month and a half.
17. His pay has varied from £60 to £80 but then the claimant said it could be more than £100 if he did a 12 hour shift. He referred to rent of £475, water bills of £35 and electricity of £100. These he shares with his wife who is also a carer and not working full time. They have no savings and the only asset is a car in his wife's name.
18. The issue of costs in the Employment Tribunal is still discretionary and does not follow the event. The claimant should not have to pay costs for the hearings on 26 May when it was found he was an employee and 25 August which was a standard hearing to clarify the issues.
19. The respondent has referred to the case of Vaughn v London Borough of Lewisham (No.2) [2013] ILR 713, when an award of £83,000 one third of the respondent's costs, was upheld against an unemployed claimant. In the decision of the Employment Appeal Tribunal in that case reference was made to another case of Arrowsmiths v Nottingham Trent University [2011] EWCA Civ 791, when it was held that costs orders do not need to be confined to sums the party could pay as it may well be that their circumstances improve in the future. The tribunal found that the claimant in that case, although currently unemployed, was aged 36 so relatively young with 15 years' work experience who had until recently been earning around £30,000 per annum. It expressly found there was no reason to assume she would not return to her chosen career at that level at some point in the future.
20. The tribunal finds that the case before it is slightly different in that the claimant here has been working as a carer and now does so again at approximately National Minimum Wage rates. The claimant gives his date of birth as 1955 so is 63 and therefore not as young as the claimant in Vaughn.
21. Having considered all the circumstances, the respondent's cost schedule and the bills to the respondent had accompanied it and giving consideration to the claimant's ability to pay, the tribunal has concluded an award of £5,000 inclusive of VAT and disbursements should be made to cover, in effect, some of the costs of the full merits hearing which could have been avoided had the claimant not acted unreasonably in pursuit of these claims.

22. How that sum is to be paid will be a matter for the County Court if the respondent seeks to enforce the award.

Employment Judge Laidler

Date:20.03.19.....

Judgment sent to the parties on

.....22.03.19.....

.....
For the Tribunal office