EMPLOYMENT TRIBUNALS

Claimant *Respondent*
Mr C McMullen The Hill Cross Organisation Ltd

COSTS JUDGMENT OF THE EMPLOYMENT TRIBUNAL

MADE AT NORTH SHIELDS ON 18th September 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 and, under Rule 82, for a wasted costs order

REASONS

1. This is an written application for costs, or wasted costs, incurred after 16th February 2018 in a claim which was withdrawn on 5 June in respect of which I signed judgment dismissing the claim on withdrawal on 18 June. There have been many delaying features in the case which do not concern the issue I have to decide today.

2. The significance of 16 February is that it is the date upon which the respondent provided full disclosure of documentation and a letter setting out how strong its case was. At that point it says the claimant and his professional representative should have realised his claim had no reasonable prospect of success. It says they acted unreasonably in pursuing it until shortly before an application to consider strike out or a deposit order was to be heard on 6 June. In essence their argument is the case was only pursued from 16 February to 5 June in order to pressure the respondent, in the face of having to do a lot of preparatory work, to come up with a settlement offer and the claimant himself and his representatives must have realised it stood no reasonable prospect of success

3. If I could find sufficient factual basis to agree with those submissions it would certainly be a situation in which I would be prepared to make a costs order. However wasted costs orders are only made where solicitors have been in breach of their professional obligations. I cannot see that to be the case here.

4. I required the claimant to respond in writing to the written application for costs. He did so via his solicitor by email of 14 September. The email contains a detailed chronology setting out why the claim , at its inception did stand a reasonable prospect of success. It then says the claimant as the strike out hearing date approached took a pragmatic view of his own circumstances and decided he was not prepared to risk pursuing the claim further.

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.*

The parties have submitted written representations and not requested 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 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. This may be so even if the withdrawal is shortly before a hearing.

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. The essence of this application is that the claimant acted vexatiously and unreasonably because he knew his claim was spurious. Having read his representative's submissions I cannot accept that is the case. For me to find it was I would have evidence not merely the assertions of the respondent . I accept the respondent did tell the claimant it believed his case was weak and, if it proved to be they would apply for costs. However every solicitor will always put forward in correspondence the assertion his client has a strong defence.

10. The claimant knew he faced difficulties but thought until the eleventh hour he could overcome them . As 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 claim stands 'no reasonable prospect of success'. That sometimes can be said, but not in this instance .

11. I cannot find the threshold for making a costs , or wasted costs order is reached.

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T M Garnon EMPLOYMENT JUDGE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 18th SEPTEMBER 2018