



EMPLOYMENT TRIBUNALS

Claimant: Mr Griffiths

Respondents: (1) ACPOA Limited
(2) Bournemouth Borough Council

Heard at: Southampton On: 24 June 2019

Before: Employment Judge Gardiner

Representation:

Claimant: No attendance

First Respondent: Mr Watson, Legal Consultant

Second Respondent : Mr Piddington, Counsel

JUDGMENT

1. The Second Respondent's application made under Rule 76(1) of the 2013 Employment Tribunals Rules for a costs order against the First Respondent is granted.
2. The First Respondent is to pay the sum of £12,500 towards the Second Respondent's costs.

REASONS

1. In my Judgment dated 18 February 2019, I decided that the Claimant was not assigned to the organised grouping carrying out the Bournemouth car park contract. As a result, the Claimant's employment did not transfer from the First Respondent, ACPOA to the Second Respondent, the Council, when that car park contract was taken back in house by the Council in what was a TUPE transfer.
2. The Council now argues that ACPOA should pay the costs it incurred in conducting the litigation. The basis for this argument is twofold. Firstly, the Council argues ACPOA's assertion that the Claimant's employment transferred to the Council was one that had no reasonable prospect of success. Based on its own evidence, and its own documents, the Council should always have appreciated that the Claimant was never specifically assigned to the Avenue Road car park contract with the result that his employment would transfer to the new provider of car park services. Secondly, that ACPOA's conduct of the proceedings was unreasonable. The Council points to the following features as amounting to unreasonable conduct :
 - (1) Failure to provide timely disclosure of key documents relevant to the issues – 54 pages were disclosed late and unnecessary costs were incurred in finalising the hearing bundle;
 - (2) Evidence of Ms Chelsey Smith in her witness statement in asserting that the Claimant was being moved over to duties involving the Avenue Road car park contract over time – for which, the Council argues, there was no evidential foundation whatsoever;
 - (3) Failure to agree to the drop hands settlement proposal made in the costs warning letter;
 - (4) Production of documents to exaggerate the extent of the Claimant's role working on the Avenue Road car park contract;
 - (5) The approach taken by ACPOA's solicitors to the previous Preliminary Hearing.
3. In relation to this costs issue, I have been provided with written submissions from the parties' legal representatives, as well as skeleton arguments. In addition, there was an agreed bundle of documents to which both parties made reference.
4. With one exception, there is no dispute as to the applicable legal principles, which can be summarised as follows :
 - (1) The tribunal must first be satisfied that it has the jurisdiction to make a costs order. Relevant to the present application, that requires a consideration of whether ACPOA's case had a reasonable prospect of success and/or whether ACPOA has acted unreasonably in its conduct of the proceedings.

- (2) If it does have jurisdiction, then the Tribunal must consider whether to exercise its discretion in favour of making a costs order. It does not follow from the Tribunal having the jurisdiction that it must make a costs order if that would be inappropriate in the particular circumstances.
- (3) If the Tribunal decides that it would be appropriate to make a costs order then the Tribunal must assess the appropriate amount to award by way of costs. The assessment depends on a consideration of all the circumstances. This includes the extent to which any unreasonable conduct has caused or contributed to the costs incurred by the receiving party.
5. The parties agree that there is a cap on the costs that can be assessed by the Tribunal of £20,000. What they dispute is whether this cap applies to the totality of the claim, or to each stage of the claim. Mr Piddington, for the Council, argues that there is a separate cap that applies to the costs of the Preliminary Hearing, the costs of the litigation in general, and the costs of the costs application. As a result, he argues that the Tribunal ought to make a costs order in a sum just under £29,000.
6. My conclusion is that the cap of £20,000 applies to all costs claimed by the Council in its application. There is only one costs application in relation to all costs incurred to date. This is not a case where there had been an earlier costs application in respect of a discrete part of the proceedings, which had been adjourned to be decided at the conclusion of the case. For instance, no indication was given at the conclusion of the case management Preliminary Hearing that costs would be sought at the end of the case, given the manner in which that application was conducted by ACPOA. Had that been done, and had that costs application been determined at the time or postponed until the conclusion of the case, that may have been a situation in which separate £20,000 caps might apply to each application.
7. As a result, given that the Council is not seeking a detailed assessment of its costs in the County Court, the Council's application must be limited to claiming a maximum sum of £20,000.

Does the Tribunal have jurisdiction ?

8. I consider that the Tribunal does have jurisdiction here to make a costs order in favour of the Council and against ACPOA. This is for two reasons.

A. No reasonable prospect of success

9. ACPOA's stance that the Claimant's employment transferred to the Council was a stance that had no reasonable prospect of success. There were only two evidential features that at first sight suggested that the Claimant was assigned to the Avenue Road car park contract in Bournemouth. These were that, for ACPOA's internal budgetary purposes, almost the entirety of the Claimant's

salary costs were assigned to this contract. In addition, ACPOA's witnesses and in particular, Mr Horton, were under the impression that the Claimant worked for more than 50% of his time on the Avenue Road contract.

10. For the reasons already given in my Reasons on the issue of liability, neither was a plausible basis for insisting that the Claimant's employment transferred to the Council. Firstly, it appeared to be standard practice amongst ACPOA's Area Managers for the staffing costs to be recorded against the most valuable contract. This was not an indication that the Manager was in fact assigned to that contract. Secondly, Mr Horton's evidence that the Claimant spent 70% of his time on the Avenue Road contract was wrong and inconsistent with the contemporaneous documents that recorded only that more than 50% of his time was being spend on that contract in the period shortly before the contract ended.
11. The remaining evidential features all pointed strongly towards the Claimant not being assigned to this particular contract. His title was Area Manager, not Avenue Road car park manager; he was responsible for five public car parks as well as seven travel lodge car parks; he was expected to actively seek out new sources of work both in Bournemouth and beyond; he was set targets based on general revenue levels rather than specific targets for that car park; there were restrictive covenants in his employment contract that restricted post employment activity far more broadly than was necessary to protect just the Avenue Road contract. It was only because ACPOA had consistently maintained that the Claimant's employment had transferred to the Council, that the Claimant issued proceedings against both ACPOA and the Council.

B. Unreasonable conduct by ACPOA

12. I consider that there has been unreasonable conduct by ACPOA in some but not all of the respects identified by the Council.
13. Taking the unreasonable conduct points made by the Council in chronological order :
 - a. Whatever the motives for ACPOA producing a detailed document only dealing with the Claimant's duties in relation to the Avenue Road car park contract – and not dealing with his other duties - the production of that document does not give the Tribunal jurisdiction to make a costs order. The document was not created in the course of the proceedings. Therefore its existence cannot amount to the unreasonable conduct of the proceedings;
 - b. I do not consider that there was unreasonable conduct by ACPOA in relation to the Preliminary Hearing determined by Employment Judge Wright on 31 May 2018. Although the hearing had been listed to determine five issues raised by ACPOA in correspondence, the mere fact that none of those issues were determined in the Claimant's favour does not mean that it was unreasonable conduct for the Claimant to raise those issues. Nor does it become unreasonable conduct on ACPOA's

part merely because the Claimant chose to withdraw four of those issues without requiring a determination from the Tribunal. In any event, it appears that the Tribunal did discuss other case management issues at the hearing in relation to the forthcoming final hearing;

- c. I do not consider that there was unreasonable conduct in relation to ACPOA's general attitude to settlement. The Council has sought to argue that there was an unreasonable stance adopted by ACPOA during settlement discussions. However, I have not heard specific oral evidence in relation to those discussions, nor have I seen any documents that specifically evidence the points advanced by the Council;
- d. However, I do consider that ACPOA was guilty of unreasonable conduct in not accepting the Council's drop hands offer made in its costs warning letter dated 4 June 2018. That letter specifically warned ACPOA that it would seek a costs order in the event that ACPOA did not accept that the Claimant remained its employee and had not transferred to the Council, by reason of TUPE. Given the weakness in ACPOA's case that ought to have been readily apparent by that point, close to the original final hearing, ACPOA ought to have accepted the offer and so not put the Council to further legal expense.
- e. I do consider that there was unreasonable conduct by ACPOA in its attitude to disclosure. The Council had repeatedly pressed for disclosure of categories of documents that would assist the parties and the Tribunal in determining the issue of whether the Claimant was assigned to the entity that was transferring. However, ACPOA's stance was that there were no further documents to be disclosed. It was only during the course of the final hearing, when ordered to provide further documents by the Tribunal, that over 50 pages of relevant information was disclosed. No good reason has been provided as to why this was not done at an earlier stage. Indeed Ms Chelsey Smith had wrongly asserted in a witness statement that there were no further documents. It was on the basis of this assertion that the Council had not pursued its application for specific disclosure. In addition, there was a lack of co-operation from ACPOA in the preparation of the hearing bundle.
- f. Furthermore, I do consider that there was unreasonable conduct in relation to the contents of Ms Chelsey Smith's witness statement in stating that the Claimant had been gradually moved over to the Bournemouth Avenue Road contract and away from the Portsmouth Port car park. There was no evidential basis for this assertion.

Given that the Tribunal has jurisdiction, should the Tribunal exercise its discretion to make a costs order in the Council's favour ?

- 14. No good reason has been provided by ACPOA as to why the Tribunal should not exercise its discretion to make a costs order, if (as I have found) it has the jurisdiction to do so. ACPOA has had professional assistance from Peninsular Legal Services throughout this claim. It was incumbent on ACPOA's advisers

to assess the strength of its position not just at the outset, but also throughout the course of subsequent events. This ought to have been done to ensure that the prospects of success justified the risks of continuing to maintain its original stance.

What sum should be awarded by way of costs ?

15. I consider it would be appropriate to order ACPOA to pay the sum of £12,500 toward the Council's costs. In coming to this figure, I have been influenced by the following features :

- a. It is always appropriate to have regard to the extent to which unreasonable conduct has caused the receiving party's costs.
- b. It was the combination of the weak prospects of success and the costs warning letter that made it unreasonable for ACPOA to persist in arguing that the Claimant's employment had transferred to the Council.
- c. The costs incurred before the costs warning letter were £13,006.77. The costs incurred after that letter were just over £15,400. It would not be reasonable to expect ACPOA to pay all of the costs after that date, given that all of those costs would not be recovered on a detailed assessment. It would be reasonable to expect ACPOA to pay a significant majority of those costs.
- d. In addition, the Council's costs were specifically increased to some extent as a result of the difficulties in agreeing the contents of the trial bundle (on which point I accept the points made on behalf of the Council), and as a result of ACPOA's refusal to properly consider whether the categories of documents sought by the Council by way of specific disclosure existed and were relevant to the issues.

16. For these reasons, I order that ACPOA should pay the sum of £12,500 to the Council by way of a costs order.

Employment Judge Gardiner

Dated: 2 July 2019