# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
|---|---|---|
| Mr Andrew Hack | **v** | Vehicle Medic Ltd |

**Appearances**
For the claimant: in person
For the respondent: Mr Cartwright, Director of the respondent company

# JUDGMENT

The Respondent's application for costs fails and is dismissed.

# REASONS

**The claims**

1. By a claim form filed with the Tribunal on 28 January 2013, the claimant claimed a redundancy payment, notice pay, holiday pay, arrears of pay, other payments.

2. On 21 April 2017 the claim was struck out because it had not been actively pursued. Employment Judge Moore said that, following a letter dated 24 March 2017 asking the claimant for reasons why the claim should not be struck out, the claimant had failed to make representations in writing, or failed to make any sufficient representations, why this should not be done or to request a hearing.

3. This is a claim by the respondent, for a costs order against the claimant. Initially, it was listed for a wasted costs order, but the respondent confirmed that it was for a preparation time order. The respondent argued it was a spurious, vexatious claim based on the claimant's ability to fund the claim by his house insurance and that he failed to produce documentary evidence of continuous employment or his contract of employment.

**The issues**

4. The issues are:

4.1 Has the putative paying party (the claimant in this case) behaved in the manner proscribed by the rules?

4.2 If so, the tribunal must then exercise its discretion as to whether or not it is appropriate to make a costs order. In doing so the tribunal may take into account the party's ability to pay;

4.3 If the tribunal decides that a costs order should be made, it must decide what amount should be paid or whether the matter should be referred for assessment and may take into account the paying party's ability to pay.

5. When the claimant filed his claim he was represented by Blake Lapthorn. The claimant had legal expense insurance and I accept his evidence that there was an initial assessment stating that he had good prospects of success.

6. The respondent, represented by Pictons, filed an ET3 on 23 February 2013, resisting the claims arguing that the claimant was not an employee of Car Medic Ltd (CML) or Car Medic International Limited (CMIL) so there was no transfer of his employment to Vehicle Medic Ltd. The respondent said that the claimant had received statutory redundancy payment, statutory notice pay and was not entitled to three months contractual notice pay or any holiday pay.

**The evidence**

7. The respondent provided a Summary of Hearings when he arrived at 11.45 am and I then adjourned to give the claimant an opportunity to review it. This also gave me an opportunity of reading the file in some detail and it was apparent that many hearings had been postponed, mainly because of Mr Cartwright's ill-health and two because of the Tribunal's postponements.

8. The respondent said he had a lot of documents in his car. I explained that the matter before me today was whether the claimant should pay costs. It is not to decide the claim which would be impossible without reading the documents and hearing from witnesses. As the claim has now been dismissed there will be no full merits hearing.

9. I heard evidence from Mr Cartwright and Mr Hack.

**The facts**

10. First, I will set out the sequence of events which was apparent from the Tribunal file. It is very unfortunate that there was very little progress from the ET1 being filed, which was mainly because of Mr Cartwright's illness, sometimes tribunal cancellations and in September 2016 because Mr Cartwright wanted time to get legal representation, leading to the September 2016 Hearing being postponed. A summary is set out below.

11. On 4 June 2013 the Tribunal made orders for the Hearing, which was listed for two hours on12 July 2013 but then re-listed for one day on 11 November 2013 because the two hours allocated on 12 July would not have been enough time.

12. On 10 July 2013 the respondent's solicitors ceased acting and Mr Cartwright, a director, acted for the company.

13. The case was then listed for a preliminary hearing on 13 February 2014. At this hearing Employment Judge Ord identified the claims and issues, gave further orders and listed the case for a final hearing on 12-13 May 2014. The respondent, represented by the company director, Mr David Cartwright, was unable to attend the hearing because of a medical condition. The case was stayed until the respondent provided medical evidence of his fitness to proceed. There was further correspondence between the parties and Mr Cartwright's GP said he was unable to attend the tribunal on the basis of his depression and anxiety symptoms.

14. After further correspondence, on 23 February 2015, Mr Cartwright's GP said he was still not fit enough to go to the tribunal.

15. On 24 February 2015 the respondent confirmed that the assets of Vehicle Medic Limited were liquidated in November 2012 and the company ceased trading on 30 November 2013.

16. A case management hearing by telephone was listed for 20 March 2015 but Mr Cartwright said he was too ill to participate. On 26 March Mr Cartwright's doctor said he could not give a timescale as to when he may be fit enough to attend the hearing.

17. On 14 May 2015 the case was stayed for three months. Mr Cartwright provided financial statements for the period ending 30 November 2013, showing the declining financial health of the company.

18. On 18 August 2015 Employment Judge Ord wrote to the parties saying he was considering striking out the claim because it had not been actively pursued. The claimant resisted this on the basis that the matter had been stayed and stated that the company was still showing as trading on Companies House.

19. A further preliminary hearing was listed, by telephone, on 29 October 2015. Mr Cartwright's GP said he was not fit to do the telephone conference. This hearing was postponed by Employment Judge Adamson and he gave a direction that the parties were to write to the Tribunal by no later than 18 April 2016 explaining the current position. On 4 April 2016 the claimant said he wanted to pursue his claim.

20. A further PH was listed for 26 May 2016 and orders were made and the case listed for 26-28 September 2016. Mr Cartwright applied for a postponement so that he could get legal advice and because further time was needed to get witness statements. The claimant agreed to the postponement. Employment Judge Moore refused a postponement and

listed a preliminary hearing at which counsel for the claimant said that the claimant may no longer be actively pursuing his claim.

21. On 17 October 2016, the claimant's solicitors stopped acting for the claimant but went back on the record on 21 October, having been contacted by the claimant. On 8 January 2017 the claimant's solicitors said they were no longer acting for the claimant. They provided the tribunal with the claimant's old address. He had moved to a new house in January 2017.

22. The claimant said that he understood from his solicitors that they would withdraw the claim because he was unlikely to recover any money given the respondent's financial position.

23. A further preliminary hearing was listed for 19 January 2017, but the hearing was postponed by the Tribunal on the basis that it was extremely unlikely it could have been heard. It was re-listed or 23 March 2017.

24. The claimant did not attend the hearing on 23 March or notify the tribunal why not. He said he did not get any letters from the tribunal nor did he know that he needed to inform the Tribunal why his claim should not be struck out. By that time, he had no solicitor acting for him.

25. Employment Judge Moore wrote to the parties to say that he was considering striking out the claim and the claimant should give reasons why he should not, by 10 April 2017.

26. On 21 April 2017 the claim was struck out as the claimant had not responded.

27. On 22 May 2017 Mr Cartwright wrote to the Tribunal seeking preparation time costs. The claimant did receive this letter as by then the Tribunal had his correct address. Mr Cartwright sent a costs schedule to the tribunal on 14 July 2017. No costs were incurred from January 2017. The claimant was asked for his comments by 7 August 2017. The claimant responded on 1 August 2017 saying that Mr Cartwright was dragging the whole process out, that the respondent had massive liabilities and he had been advised that there was no chance of receiving any settlement.

28. A hearing was listed for 10-11 April 2018. The claimant requested an adjournment to find legal representation and because his mother was ill. Mr Cartwright objected to the adjournment, saying that the claimant had had plenty of time to prepare and that the claimant had a record of non-attendance at the Tribunal during the case, demonstrating disregard for importance of the Tribunal procedures. In fact it transpired that, except for the 23 March 2017, the claimant was represented by his counsel. The claimant made a further application for a postponement as he had been admitted for emergency tooth surgery. This was granted by Employment Judge Byrne who asked for confirmation from the claimant's surgeon.

29. The Costs Hearing was listed for 12 March 2019 but had to be postponed by the Tribunal. It was re-listed for 3 July 2019.

**The law**

30. Rule 75 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 Schedule 1 states that a preparation time order is an order that a party (the paying party) make a payment to another party (the receiving party) in respect of the receiving party's preparation time while not legally represented. Preparation time means time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at any final hearing.

31. Rule 76 provides that a Tribunal may make a preparation time order, and shall consider whether to do so, where it considers that

    a. A party 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; or
    c. A hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.

32. The Tribunal shall decide the number of hours in respect of which a preparation time order should be made on the information provided by the receiving party and the Tribunal's own assessment of what it considers to be a reasonable and proportionate amount of time to spend on such preparatory work.

33. Rule 84 provides that in deciding whether to make a preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's ability to pay.

34. In Gee v Shell UK Limited [2003] IRLR 82 Sedley LJ said:

> "It is nevertheless a very important feature of the employment jurisdiction that it is designed to be accessible to ordinary people without the need of lawyers and that in sharp distinction from ordinary litigation in the UK losing does not ordinarily mean paying the other side's costs'.

35. In Yerrakalva v Barnsley Metropolitan Borough Council [2012] ICR 420 Mummery LJ said that the tribunal should, where it is argued the conduct was unreasonable:

> '…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'.

36. In relation to whether conduct was vexatious, in Attorney General v Barker [2000] 1 FLR 759 QBD in the context of an appeal against an employment tribunal's costs order, the court said:

> '…the hallmark of a vexatious proceeding is … that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant, and that it involves an abuse of the process of the court, meaning that by a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process'.

**No reasonable prospects**

37. This is an objective test. It will be relevant whether a party has been professionally advised or genuinely believes they have been a victim of illegal wrongdoing.

**Means**

38. The tribunal has a discretion to take into account means to pay. Account may be taken of the potential effect a costs order may have on the paying party and dependants because of his means.

**Conclusions**

39. I do not accept that the test under Rule 76 has been met. Although the respondent said that the claimant acted vexatiously, abusively, disruptively or otherwise unreasonably in bringing proceedings, or in the way they had been conducted, there was no credible evidence supporting this. There has been no full merits hearing and I cannot judge the merits of the claim or response at this costs hearing.

40. The respondent suggested that the claimant repeatedly failed to attend hearings, including 26 May and 26 September, but he was represented by counsel at these preliminary hearings. He only failed to attend one preliminary hearing on 23 March 2017, but this was because he did not get notice.

41. A substantial reason for the long delay in the proceedings was Mr Cartwright's ill-health. Hearings were repeatedly postponed because of this.

42. There was no delay or any unreasonable behaviour by the claimant when he was represented, which was up to 9 January 2017. All the preparation time claimed by the respondent was incurred before 12 January 2017. The respondent did not spend any preparation time (that he claimed) during the period when the strike out order was considered. During this period, the claimant believed that his solicitor had withdrawn the claim so was not expecting any letters or emails from the Tribunal.

43. The claimant did receive the notice about the costs hearing as by that time the Tribunal had his proper address and he received an email.

44. This is a long and sorry story with a lot of stress and ill-health suffered by both parties because of the litigation, long delays and number of postponements, but the reasons for the delays were not the fault of the

claimant. I find that he did not behave 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.

45. I cannot assess properly the full merits of the claim, but it could not be said, from the ET1, that it was without any merit. Further, I accept that if there had been no merit, following an assessment, the claimant's insurers would not have funded it.

46. I do not accept the respondent's suggestion that it was a 'vexatious and unfounded claim, motivated perhaps by revenge and in the knowledge that the claimant incurred little costs and cause the respondent maximum inconvenience in terms of time, stress, effect on business and financial costs'. In any event, as explained, this is not a merits hearing. I find that the claimant took his solicitor's advice not to pursue the claim because he would not recover anything, given the company's precarious financial situation.

47. The respondent's application for costs fails and is dismissed.

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Employment Judge C Palmer

29 July 2019
Date: ……..

Sent to the parties on: 31/7/2019

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For the Tribunal Office