Case Number: 3201454/2019

EMPLOYMENT TRIBUNALS

Appellant: **Amber Construction Services Limited**

Respondent: **The Health and Safety Executive**

Heard at: **East London Hearing Centre**

On: **Tuesday 5 November 2019**

Before: **Employment Judge Burgher**

Representation

Appellant: Written submissions

Respondent: Written submissions

JUDGMENT

The judgment of the Tribunal is that the Appellant's application for costs is dismissed.

REASONS

1 On 21 May 2019, the Appellant, Amber Construction Services Ltd, lodged an appeal to the Employment Tribunal against the Health and Safety Executive in respect of prohibition notices and improvement notices issued on 1 May 2019 (the Notices). The Appellant appealed to have the Notices cancelled.

2 A Consent Judgment in respect of the Appellant's appeal was issued by the Employment Tribunal on 8 August 2019 cancelling the Notices. Despite being dated 8 August 2019, the Consent Judgment was not actually sent to the parties until 27 August 2019. Pursuant to rule 77 the 28 day time limit to apply for costs expired on 24 September 2019.

3 It is now apparent that the Appellant named the incorrect Respondent to its appeal. The correct Respondent is Sarah Elizabeth Robinson (One of Her Majesty's Inspectors of Health and Safety). However, this does not affect the Consent Judgment which has the effect of cancelling the relevant notices.

4 Efforts were made to seek agreement regarding the Appellant's costs. Email correspondence on 27 June 2019 from the Appellant to the Respondent sought costs and expert fees of £29,335 excluding VAT. The Appellant offered to accept £20,000 pursuant to rule 78(1)(a) of the 2013 Employment Tribunal Rules in settlement of its costs. No agreement in this regard was concluded and this resulted in the costs application.

5 The parties agreed for the costs application to be dealt with without a hearing.

Appellant's submissions

6 On 24 September 2019, the Appellant applied for costs and submitted a 6 page application supported by 8 attachments consisting of email correspondence, case law, and guidance in relating to fire safety and fire risks in the relevant context. The Appellant relied on the digest of the Sunuva Limited v Martin [2018] ICR D9.

7 In summary, the Appellant contends that the Notices should never have been issued by the Respondent in the first place. Strong criticism is levelled against the competence of the Respondent to do her task, her understanding of the relevant law and her lack of authority to even issue the Notices.

8 The Appellant presented cohesive arguments in email correspondence to the Respondent on 14 May 2019 challenging the jurisdiction of the Respondent issue the Notices under the relevant regulations. The Respondent responded on 21 May 2019 confirming that the appeal would be resisted as she was confident that the Tribunal would support her assessment of the prevailing facts known at the time.

9 The Appellant appealed against the Notices on 21 May 2019.

10 By way of background, the Appellant was tasked to remove cladding from a tall residential property, Following the Notices, it sought expert advice that related to whether the works it was undertaking could include residential property where residents were at fire risk. The point of this is that if residents were involved and it was not just a place of work, pursuant to the applicable regulations, the relevant fire authority would have jurisdiction over the fire safety of the works and not the Respondent. The Respondent subsequently sought legal advice who reviewed and considered this argument and on 17 June 2019 her lawyers accepted that the Notices were issued *ultra vires*. No response to the appeal was submitted and the Consent Judgment was agreed.

11 The Appellant contends that as a result of the above chronology the Respondent was unreasonable and had no reasonable prospect of successfully rebutting the appeal. The Appellant has had to incur costs and expense to pursue the appeal. The Appellant maintains that costs should be awarded pursuant to rule 76(1)(a) and 76(1)(b) of the Tribunal rules.

12 The Appellant also relies on the case of Sunuva for the proposition that the Tribunal can award costs incurred before the Tribunal proceedings have begun. It submits that the case of Davidson v John Calder (Publishers) Ltd [1985] IRLR 97, EAT relied on by the Claimant relates to the previous Employment Tribunal 1980 rules and should not be followed.

Respondent's submissions

13 The Respondent submitted its 7 page response the Appellant's application for costs on the 25 October 2019. It referred to and relied on the following cases:

> Davidson v John Calder (Publishers) Ltd [1985] IRLR 97, EAT
>
> HM Inspector of Health and Safety v Chevron North Sea Ltd, [2018] UKSC 7
>
> Sunuva Limited v Martin UK/EAT/0174/17, EAT (full text).
>
> The Respondent also referred to relevant commentary for *Harvey on Industrial Relations and Employment Law* and *IDS Employment Law Handbooks*.

14 The thrust of the Respondent's position is that rule 76 of the Employment Tribunal rules is not engaged at all as the preconditions for the Tribunal to award costs do not apply. It contends that the Appellant is misconceived in seeking to apply for costs for matters totally unrelated to the '*proceedings*' or '*response*'.

15 The Respondent contends that it did not do anything in the proceedings, it did not file a response and took no part in them other than to concede and agree a Consent Judgment.

16 The Respondent contended that the costs in the Employment Tribunal are discretionary, but before the discretion can even be exercised, in this case rule 76(1)(a) or 76(1)(b) must be engaged. The Respondent refers to the cases of Davidson and Sunuva in this regard.

17 The Respondent submitted that it was not unreasonable to carry out her important public safety function of an inspector, which at times have to be undertaken urgently and promptly. The fact that she may be wrong is not unreasonable. The appeal process is provided specifically for this purpose. The Supreme Court case of Chevron North Sea was referred to in this regard.

18 Finally, the Respondent submitted that the legal provisions were not straightforward and were fact dependent. The facts were seemingly resolved following the Appellant instructing an expert, following which the Respondent reviewed her position and agreed to cancel the notices.

Appellant's reply

19 The Appellant replied to the Respondent's response on 28 October 2019. It contended that it was not a precondition of rule 76(1)(b) for an actual response to be submitted and the Respondent's failure to accept the Appellant's position on 21 May 2019 prior to submitting the appeal was unreasonable.

20 The Appellant submitted that that the correct factual situation at the time of issuing the notices ought to have been immediately obvious at the time and certainly from 14 May 2019 when the Appellant presented cohesive arguments to her by email.

Conclusions

21 Insofar as is relevant, Rule 76 of the 2013 ET Rules provides:

> *"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*."

22 When considering the competing submissions, I consider that the Respondent's submissions regarding the necessary preconditions is the correct proposition of law. Specifically, in this matter, before I can even consider whether to exercise my discretion to award costs I must conclude that there has either been unreasonable action in the way the Respondent has conducted the proceedings or that the Respondent's response had no reasonable prospect of success.

23 I conclude that the Appellant is incorrect in its assertion that pre-appeal actions of the Respondent engage rule 76(1)(a) or (b) at all. In particular, I do not conclude that the decisions taken by the Respondent in issuing the notices on 1 May 2019 can properly form part of my consideration whether she was unreasonable in conducting '*the proceedings'* or whether '*any response'* had no reasonable prospect of success. Following the Chevron North Sea to hold otherwise would run contrary to the public policy for the Respondent to be able undertake her important statutory duties without impediment.

24 In any event, had the Appellant not appealed, and accepted what it considered to be an erroneous decision of the Respondent, there would have been no proceedings for the Respondent to respond to, or for a costs award to be based. However, the Appellant did appeal on 21 May 2019. This was the commencement of the proceedings and a significant proportion of the Appellant's costs had been incurred prior to the commencement of proceedings

25 Having considered the matter further, the Respondent decided against responding to the appeal, conceded the point and agreed to a Consent Judgment. I conclude that this is reasonable conduct of the proceedings. It may have been unreasonable not to respond at all and disengage from the proceedings but this was not the case. Therefore, I do not accept the Appellant's assertion that the Respondent was unreasonable in the conducting the proceedings.

26 The Respondent did not provide a response to the appeal which had no reasonable prospect of success. It did not provide a response at all. I do not accept the Appellant's contention that rule 76(1)(b) by reference to *any* response refers to a response that has not been presented. Whilst I accept that not presenting a response could engage unreasonable conduct under rule 76(1)(a) I conclude that rule 76(1)(b) does require a finding that a specific response to the proceedings would having no reasonable prospect

of success. Contrary to the Appellant's contention, there is nothing in the provision requiring the Tribunal to consider, on the balance of probabilities, whether any response that could have been provided would have had no reasonable prospect of success. This could have the absurd effect of requiring the Tribunal to engage in consideration of potentially endless hypotheticals of responses that could have been submitted only to then conclude that they would have no reasonable prospect of success. In any event, the Respondent could have provided a response accepting the appeal. This would not have had no reasonable prospect of success.

27 Given that I have concluded that neither rule 76(1)(a) or 76(1)(b) are engaged in this case the Appellant's application for costs must fail.

28 I accept the Appellant's submission that it is possible to award costs for fees incurred prior to commencement of proceedings. However, before any discretion can be exercised to award such fees, it is necessary to conclude that there has been unreasonable conduct or the response has no reasonable prospect of success. Neither of these matters arise.

29 Had either of the matters been engaged, I would have had regard to the fact that the Tribunal is generally not a costs jurisdiction and costs are the exception rather than the rule and this would have formed a significant factor when considering whether I exercised my discretion to award costs.

30 I conclude that the Appellant has wrongly conflated its disquiet with being issued with the Notices with the separate appeal process to the Employment Tribunal. None of the necessary preconditions form the basis for a costs award under rule 76 of the Employment Tribunal rules are engaged.

31 I therefore dismiss the Appellant's application for costs.

Employment Judge Burgher
Date: 7 November 2019