Case Number: (1) 3307445/2018
(2) 3307446/2018

EMPLOYMENT TRIBUNALS

Claimants		**Respondent**
(1) Mr Andrew Reed (2) Mr Roland Reed	**v**	Thorney Golf Club Limited

Heard at: Bury St Edmunds **On:** 8 November 2019

Before: Employment Judge Laidler

Appearances
For the Claimants: Mr A Ross, Counsel.
For the Respondent: Did not attend and were not represented.

JUDGMENT

1. The respondent's costs application is dismissed.

2. The Tribunal is satisfied that circumstances exist within the provisions of Rule 76 to consider the claimants' application for costs of this hearing. As the respondent did not attend, an order has been made as set out below for it to provide submissions in writing with regard to that application.

REASONS

1. The ET1 in this matter was received on 25 May 2018 and the claimants brought claims of arears of pay and "other payments".

2. The respondent filed its response on 4 July 2018. The details of the defence were attached to the ET3 form signed by Kim Abbott, manager on behalf of the respondent. The claim related to sick pay and the respondent disputed that the claimants had been sick. They stated that the claims were false and were "nothing other than a cynical deliberately planned and long-term strategy to obtain free money whilst not doing any work at all". The respondent did not state that the tribunal had no jurisdiction to deal with the complaints.

3. A preliminary hearing took place before Employment Judge Warren on 30 November 2018. The claimants were represented by Miss Farah solicitor, but the respondent did not attend. The Judge set out in his summary how if SSP is properly due and is not paid, its non-payment is a non-payment of wages and the Employment Tribunal has jurisdiction. However, if there is a dispute as to whether the payment is due that is a matter for Her Majesty's Revenue and Customs (HMRC). The Judge listed the hearing for 25 March 2019 to allow time for the summary to be sent to the parties and for them to take the matter up with HMRC. It was anticipated that the listed hearing may no longer be required.

4. By letter of 1 February 2019 the claimants' solicitors notified their clients withdrawal of the claims. A judgment confirming that the claims were dismissed on withdrawal was sent to the parties on 26 February 2019.

5. By letter of 1 February 2019 the respondent applied for an order for costs in respect of the matter. It stated that an enormous amount of work and time had been spent on this "speculative and outrageously abusive claim". No details were given of the amount of costs claimed.

6. On the same date, 1 February 2019 Thompsons instructed on behalf of the claimants responded stating that if the Tribunal were minded to treat the email as an application for costs then they requested an opportunity to reply in writing or at an oral hearing.

7. The matter was referred to Employment Judge Ord who instructed a letter to be sent to the parties on 17 February 2019. This stated as follows: -

> "It is not clear whether the Respondent is making an application for costs / a preparation time order.
>
> If the Respondent does intend to make such an application, please conform within 14 days, thereafter the Claimant will have 14 days to respond before the matter is considered by a Judge, which may involve listing a hearing."

8. The respondent replied to the Tribunal's letter on the same date, 17 February 2019. The name of the individual replying is not clear as it came from an email address "jetmail99@gmail.com" and is only signed off "Thorney Golf Club" with no named individual on it. The email was sent to Thompsons and the Watford Employment Tribunal together with the registry of the Supreme Court, David Gauke and enquiries@justice.gsi.gov.uk. It questioned the Tribunal's letter of 17 February 2019 and stated as follows: -

> "Your response is cynical and abusive – in fact it is exactly as per the ET system itself – with its gravy train of money for second-rate failed lawyers as judges and the whole corrupt, enormous, stinking bent bandwagon.
>
> Proof that your response is cynical and abusive is the fact that the claimant's lawyer, Ms Farah (who unquestionably is a typical 2nd rate employment lawyer and who made a fraudulent claim (on behalf of work-shy benefit abusers cheating

the system) that was not within the jurisdiction of the ET), even managed to decipher that we were making an application for costs.

Accordingly we require directions on our costs application and suggest;

- 21 days for us to provide a schedule
- 21 days thereafter claimants' response
- 14 days later any reply we wish to make
- To be decided on paper, without a hearing, by an impartial accountant / business advisor and somebody well outside of the profoundly corrupt and self-serving ET system."

9. The dismissal judgment although signed by a Judge on 15 February 2019 was sent to the parties on 26 February 2019. The respondent then wrote on 27 February 2019 as follows:-

> "…
>
> 2. Where is the provision for our costs in the attached order – you bent, corrupt, bastards? There has already been significant correspondence (as below) about our costs, but now you just omit any provision for them from the order (as attached)."

10. This email then went on to ask whether the Employment Tribunal had any comprehension about the "massive and far reaching damage that you do to the employment market just so that some failed members of the legal profession can parasite off it" and explained why employers would not employ people on PAYE because of the Employment Tribunal system "routinely uphold overwhelmingly spurious and false claims …".

11. The letter concluded again with suggested directions that the Tribunal should make as set out before.

12. By letter of 12 March 2019 Employment Judge Brown confirmed the following directions in a letter to the parties : -

> "1. By **26 March 2019** the Respondent may set out in writing, its costs application;
>
> 2. By **9 April 2019**, the Claimant shall respond to any application in writing, but the Claimant may (with reason) seek an oral hearing of the application;
>
> 3. By **16 April 2019** the Respondent may reply to the Claimant's response.
>
> Thereafter, an Employment Judge will consider the parties representations, consider whether there should be a hearing of the application, if so, list such a hearing, and otherwise decide the application on the papers."

13. No schedule of costs or application was ever received from the respondent other than its first indication that it was claiming costs.

14. The claimants' solicitors submitted their response to the application in a five page document dated 28 February 2019.

15. No further steps were then taken by either party and the administration referred the file to a Judge on 30 July 2019. Employment Judge Foxwell instructed a letter be written as follows: -

> "An unrepresented party cannot seek a costs order under the Tribunal's Rules of Procedure 2013 but can seek a preparation time order under Rule 79. Employment Judge Foxwell has treated the respondent's application for a costs order as one for a preparation time order. The amount limit for such an order is £39 per hour."

16. That letter was sent to the parties on 24 August 2019. Employment Judge Foxwell also directed the administration to list a hearing at which the application would be considered. Notification of that hearing listed for today's date was sent to both parties on 5 September 2019. The letter was sent by email on that date at 16:45. It was sent to Thompsons and to kim@tallington.com, the contact email address for the respondent.

17. The respondent replied to the Tribunal's letter on 3 September 2019 and stated as follows:-

> "• What compete bollocks the attached is from you regarding costs
>
> - We were not an 'unrepresented party'
> - We are a company and consequently the company must always be 'represented' as it is not a natural person
> - The company was represented by a director in these proceedings and the director's hourly rate for the work done in these proceedings was £200 per hour
> - This hourly rate is a fraction of what many members of the legal profession charge for representation and it is approximately 50% of our lawyer's hourly rate
> - We have repeatedly had costs order made and upheld in courts for the director's time @ £200 per hour including recently before Mrs Justice Lang in the High Court (will provide copy of the Order she made if you so require)"

18. At the end of the email it asked that it be treat as a reconsideration and an application for directions as to the costs to be made.

19. The matter was referred to Employment Judge Foxwell who instructed a letter be sent which went to the parties on 20 October 2019 stating that the respondent was referred to Rules 74-79 of the Employment Tribunals Rules of Procedure 2013 and in particular Rules 74 and 75.

20. The day before this hearing the administration contacted the parties to remind them of the hearing date. Kim Abbott for the respondent replied that they had never received notice of the hearing. The respondent was advised that it had been sent at 16:45 on 5 September 2019 to Thompsons and the respondent. The parties were advised that the hearing remained as listed.

21. The respondent did not attend the hearing. During the hearing further communications were received from Kim Abbott, the first was at 10:07 and stated: -

> "As per our conversation a few moments ago we would be grateful if you would let the Judge know that the with regards to the costs hearing this morning the hourly rate of £200 has been agreed between the two parties, it is just the number of hours that is to be determined."

22. Separately was forwarded a decision of the High Court of Justice Queen's Bench Division, Planning Court heard on Friday 5 July 2019 by Mrs Justice Andrews, case number CO/4385/2018 – this was an order that the claimants in those proceedings, Great Hadham Country Club Limited (1) and Mr Neil Morgan (2) be awarded costs of £30,000 including VAT.

23. The Tribunal heard from counsel on behalf of the claimants. The Tribunal is satisfied that it was more likely than not that the email sending notice of the hearing had been received by the respondent. It had been received by the claimants' solicitors, sent to the email address used by Kim Abbott in the recent correspondence with the Tribunal. The Tribunal also noted on the tribunal file that before Employment Judge Warren's preliminary hearing the respondent had written on 13 August 2018 indicating its directors were not prepared to travel to Cambridge and invited the Tribunal to make case management orders without a hearing or by a telephone hearing. They then indicated in a letter dated 15 September 2018 that the directors were attending Crown Court to give evidence that day. They did not attend, and no one represented them at that preliminary hearing.

24. The Tribunal also took into account when deciding to proceed in the respondent's absence that it had been given every opportunity to submit details of its costs application but had not done so other than to make an application (without any details), suggest the directions that should be made and then provide no further information. Their attention was drawn to the Employment Tribunals Rules and the rules about preparation time which they never responded to in a constructive way.

Submissions on behalf of the claimants

25. The claimants' solicitors had filed their written objection to the costs application on 28 February 2019. Counsel addressed the Tribunal on these points. Counsel also produced for the Tribunal a copy of the decision in Taylor Gordon & Co Ltd v Stuart Peter Timmons EAT/0159/03 which was referred to in the written submissions. That case makes it clear

that only where there is a dispute over whether a payment should be made is the Employment Tribunal not the proper place for a claim under s.27(1)(b) of the Employment Rights Act 1996. The claimants submitted that in the response it appeared the respondent was stating they did not believe that the claimants were sick despite receiving GP fit notes. In the claimants' submissions that was not an argument that was considered to firmly fall within "disputed payments", the reason that the payment was disputed in the Taylor Gordon case was because they believed the claimant was not contractually entitled to the payments and not because they simply did not agree with a qualified GP's assessment of his condition. The claimants' solicitors together with their clients further considered the position after the preliminary hearing and decided the best way to proceed and protect their position was to go to HMRC and not continue with the claim in the Employment Tribunal which was withdrawn on 1 February 2019.

26. The claimants submitted (paragraph 14 of the written submissions) that in addition to receiving the respondent's response they received the following correspondence from the respondent:-

> "Email 13 August 2018
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> A further email dated 17 August 2018
>
> Email 15 September 2018
>
> Email 21 January 2019"

27. These emails were sent from the respondent themselves and not a legal representative. They used abusive and unreasonable language throughout.

28. The claimants' solicitors submitted that the respondent made it clear they were applying for costs and not a preparation time order. However, such can only be applied for whilst the respondent was legally represented.

29. It was submitted that the claimants had not conducted themselves vexiatiously, abusively, disruptively or otherwise unreasonably in the bringing or conducting of the proceedings nor that the claim was one with no reasonable prospect of success such as to give rise to the Tribunal's discretion to award costs.

30. The claim for costs should therefore be dismissed.

Relevant Rules

31. Rule 74 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 states as follows: -

> **"Definitions**
>
> (1) "Costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing). In Scotland all references to costs (except when used in the expression "wasted costs") shall be read as references to expenses.
>
> (2) "Legally represented" means having the assistance of a person (including where that person is the receiving party's employee) who—
>
> (a) has a right of audience in relation to any class of proceedings in any part of the Senior Courts of England and Wales, or all proceedings in county courts or magistrates' courts;
>
> (b) is an advocate or solicitor in Scotland; or
>
> (c) is a member of the Bar of Northern Ireland or a solicitor of the Court of Judicature of Northern Ireland.
>
> (3) "Represented by a lay representative" means having the assistance of a person who does not satisfy any of the criteria in paragraph (2) and who charges for representation in the proceedings."

32. Rule 75 states: -

> **"Costs orders and preparation time orders**
>
> (1) A costs order is an order that a party ("the paying party") make a payment to—
>
> (a) another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative;
>
> (b) the receiving party in respect of a Tribunal fee paid by the receiving party; or
>
> (c) another party or a witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual's attendance as a witness at the Tribunal.
>
> (2) 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.

(3) A costs order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings. A Tribunal may, if it wishes, decide in the course of the proceedings that a party is entitled to one order or the other but defer until a later stage in the proceedings deciding which kind of order to make."

33. Rule 76(1) states: -

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

(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."

34. Rule 79 states: -

"The amount of a preparation time order

(1) The Tribunal shall decide the number of hours in respect of which a preparation time order should be made, on the basis of—

(a) information provided by the receiving party on time spent falling within rule 75(2) above; and

(b) the Tribunal's own assessment of what it considers to be a reasonable and proportionate amount of time to spend on such preparatory work, with reference to such matters as the complexity of the proceedings, the number of witnesses and documentation required.

(2) The hourly rate is £33 and increases on 6 April each year by £1.

(3) The amount of a preparation time order shall be the product of the number of hours assessed under paragraph (1) and the rate under paragraph (2)."

Tribunal's conclusions

35. The Tribunal is satisfied that there are no grounds within the meaning of rule 76 to make an award of costs in favour of the respondent. The claimants have not acted vexiatiously, abusively, disruptively or otherwise unreasonable and the claim was not one that had no reasonable prospects of success.

36. The respondent has not instructed solicitors. If they have no details have been provided and they have never engaged in correspondence with the Tribunal or the claimants' solicitors.

37. Even if it could be argued that the claim as pleaded had no reasonable prospect of success that is only the first stage of the process and the Tribunal still has a discretion as to whether or not costs should be awarded. There are however in this case no circumstances whereby legal costs could be awarded when there is no evidence that solicitors have been instructed. If preparation costs were being claimed the respondent has failed to set out how much work was undertaken by it and what sum is being claimed.

38. As Judge Foxwell has pointed out on two occasions the application should have been for a preparation time order and the current hourly rate of £39 per hour.

39. The respondent seeks to rely upon a High Court case. As is clear from reading the judgment given by Mrs Justice Andrews, she was applying the provisions of the CPR. Those provisions do not apply to the Employment Tribunal which has its own rules regarding costs. Those are contained in the Rules as set out above and as stated provide only for preparation time of £39 per hour. The respondent has not set out the amount of time they have spent, even though they were given the opportunity to do so.

40. However, as in relation to a costs order, the circumstances do not exist in this case which would give rise to the Tribunal exercising its discretion to award costs. The claimants were entitled to issue proceedings. After the preliminary hearing they reconsidered their position and the claims were withdrawn so they could pursue the matter through HMRC. Although the respondent defended the proceedings, they did not take any jurisdictional point. This was a point raised by Employment Judge Warren at the preliminary hearing which the claimants reasonably gave consideration to and then withdrew. That should not in the circumstances of this case give rise to a costs/preparation time order.

Claimants' costs application of today

41. Counsel had been instructed to attend this hearing and the claimants' costs incurred are £480 including VAT plus travel costs of £78.50. An application was made for those costs under the same Rules as set out above. It was submitted that the costs application had no reasonable prospects of success, but further that the manner in which the respondent has dealt with the matter was vexiatious, abusive, disruptive or otherwise unreasonable within the meaning of rule Rule 76(1)(a).

42. Counsel handed up without prejudice correspondence which had been written without prejudice save as to costs. This included an offer from Thompsons dated 14 October 2019 to settle the costs application at £740 in full and final settlement representing 3.7 hours at £200 per hour. That was rejected and a counter offer of £5,000 made which was rejected. The claimants' solicitor Mr Ellis made it clear on 30 October 2019 that if the hearing proceeded an application for costs of this hearing would be made.

43. The Tribunal is satisfied that circumstances do exist for the Tribunal to consider that application. It was pointed out to the respondent by Employment Judge Foxwell on two occasions that all they could obtain in the Employment Tribunal was preparation time, but they have taken no note of that. They continue to maintain they are entitled to £200 per hour relying on a High Court case which does not apply in this jurisdiction. They have never complied with the order of Employment Judge Brown to set out details of the work undertaken.

44. Further, there is absolutely no doubt that the way they have conducted these proceedings is abusive. The correspondence which they see fit to write to this Tribunal and to the claimants' solicitors is appalling. It is unnecessary and takes the litigation no further. Some examples have been given as set out above. There are further examples.

45. Before Employment Judge Warren's hearing the claimants' solicitors were asked to comment on the application by the respondent to have the preliminary hearing by telephone and did so in an email of 17 August 2018. The respondent through the jetmail99@gmail.com address replied on 17 August at 15:25 saying they had read the email from Thompsons "with some incredulity", they set out nine reasons for this. The first was that it was the "usual and typical totally unacceptable patronising solicitor arrogance of laypersons and the usual gratuitous rudeness towards laypersons". They stated they did not have legal representation because it would cost thousands and thousands of pounds "charged by the grasping and hideous legal profession; and far, far more than the value of this speculative and opportunistic claim".

46. The email went on to allege that Ms Farah of Thompsons and her firm were: -

> "… charging the taxpayer a fortune for this complete farce and this massive abuse of the system and the taxpayer. No doubt she has already billed, and has been paid, a few thousand pounds and more than the value of the claim. The usual 'Fat Cat' gravy train. The usual complete opportunistic fraud by the legal profession as they prey upon their victims."

47. The email then went on to deal with the Supreme Court decision abolishing fees for Employment Tribunal claims which it was alleged was:-

> "… not because they were 'unlawful', not for access to justice, and not for Human Rights or any other such contrived and false nonsense. The real reason was jobs for the boys and lots of money for the boys. No doubt there was great concern in much of the judiciary and the profession that the big gravy train / river of money had been turned off because of the introduction of ET claim fees (by Cameron and Osborne) which turned off the tap of entirely false and speculative claims that so, so many of the legal profession were making a fortune from as they preyed upon, and fed upon, employers."

48. There were then several paragraphs the respondent's view about lawyers and the system.

49. Another example of their abusive emails to Thompsons, copied to the Tribunal and others is that of 1 February 2019. This made the costs application stating that: -

> "An enormous amount of work and time had been expended by ourselves on this speculative and outrageously abusive claim."

50. They then enquired as to the level and nature of the fees that Ms Farah had created for herself and whether the:

> "… work shy Reed brothers paid these fees themselves or whether the money was stolen from the public purse by the disgusting legal profession, parasitizing off the public in the conventional and time-honoured manner? The lying lawyer FatCats with which we are all (all – in the nationwide sense) too familiar."

51. The email concluded:

> "It should be noted that whilst Ms Farah was patronisingly and condescendingly telling us to obtain legal advice and that she was 'concerned' that we were not legally represented; it is her that has had to withdraw her claim because there is no jurisdiction for the ET to hear it. This situation is once again so utterly typical of the profoundly arrogant legal profession."

52. Other examples have already been set out above.

53. The Tribunal is satisfied that the discretion exists to consider the claimants' costs of attending this hearing. It is limited only to counsel's fees for attending. As representations have not been heard from the respondent, they have 14 days from the date upon which these reasons are sent to them to submit to the Tribunal and the claimants' solicitors their comments in writing on the claimants' costs application of today. Once received the decision will be finalised on the papers.

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Employment Judge Laidler

Date: 21st November 2019

Sent to the parties on:
27th November 2019

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For the Tribunal Office