EMPLOYMENT TRIBUNALS

Claimant: **Mr H Sam**

Respondent: **Mitie Security (London) Limited**

JUDGMENT

1. The Respondent's application for a Costs Order is refused.

2. The application is dismissed.

REASONS

1. This was a claim for holiday pay, unlawful deduction of wages and/or breach of contract in relation to holiday pay for the Claimant who was a security guard employed by the Respondent.

2. The Claimant had been transferred under TUPE which meant that this Respondent was responsible for the claim even though it was not the Claimant's employer at the material time.

3. The Tribunal heard this matter on 23 July 2019. The Tribunal's judgment was sent to the parties on 5 August 2019. The Tribunal's judgment was that the claim had been issued outside of the statutory time limits for issuing the claim and because even if we had jurisdiction, there was no reasonable prospect of it succeeding.

4. The Respondent's application for an order that the Claimant pay its total costs of defending this claim was received by the Tribunal on 19 August 2019. That application was copied to the Claimant, but it was not apparent that he had appreciated that he needed to respond to it so the Tribunal also sent it to him for comment. The Claimant sought advice from his local Citizens Advice Bureau and got assistance in preparing a response to the application. His response was received on 21 October. That response was sent to the Respondent for their records.

The application

5. The Respondent's application is that the Claimant had acted unreasonably by failing to comply with court orders early on in these proceedings, continuing to pursue the claim despite costs warning letters and continuing to pursue the claim

despite a settlement offer having been made by the Respondent. The costs warning letters referred to were dated 10 June and 12 July 2019.

6. The Respondent also based its application for costs on the ground that the claim had no reasonable prospects of success and had been brought out of time.

7. The Respondent sought an order that the Claimant should pay its total costs in this matter of £6,500 plus VAT.

The Law

8. Rule 76 of the Tribunals Rules of Procedure 2013 set out the circumstances in which an Order for costs may be made. Paragraphs 1 (a), (b) and (c) provide that a Tribunal shall consider making a Costs Order where, in the opinion of the Tribunal the paying party has in bringing the proceedings, or he or his representative has in conducting the proceedings, acted vexatiously, abusively, disruptively, or otherwise unreasonably; or where any claim/response had no reasonable prospect of success.

9. In assessing whether the party should pay costs because the claim had no reasonable prospects of success, the key question was not whether the party thought he was in the right or had a strong claim, but whether he had reasonable grounds for so believing, *(Scott v Commissioners of Inland Revenue* [2004] IRLR 713 CA).

10. Having so considered, the Tribunal may make a Costs Order against the paying party if it considers it appropriate to do so.

11. Rule 78(1) makes provision for the amount of costs that a Tribunal can order, which is either:

- A sum specified by the Tribunal provided that sum does not exceed £20,000.
- Any sum agreed by the parties, or
- Such amount as may be determined by the County Court on a Detailed Assessment, (a County Court process whereby a solicitor's costs are examined in detail and a ruling made on what is payable).

12. Rule 84 states that the Tribunal may have regard to the paying party's ability to pay when considering whether to make a Costs Order or how much that Costs Order shall be.

13. There is an initial two stage process involved in making a costs order: (a) there must be a finding that the statutory threshold under r 76(1)(a) or (b) has been met, and (b) if it has, the Tribunal must then consider whether it is appropriate to make an order in all the circumstances, i.e. in the exercise of its discretion (see *Robinson v Hall Gregory Recruitment Ltd* [2014] IRLR 761*, EAT, at para 15*). It is only when these two stages have been completed that the Tribunal may proceed to the third stage, which is to consider the amount of the award payable under Rule 78 (see *Haydar v Pennine Acute NHS Trust* UKEAT/0141/17 (12 December 2017, unreported), at para 2.

14. In the discrimination claim of *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 for ordinary litigation in the United Kingdom, losing does not ordinarily mean paying the other side's costs".*

15. Mummery LJ in *McPherson v BNP Paribas* [2004] IRLR 558 stated, referring to a previous version of the Tribunal Rules:

> *"Although employment tribunals are under a duty to consider making an order for costs in the circumstances specified in rule 14(1) in practice they do not normally make orders for costs against unsuccessful applicants. Their power to make costs orders is not only more restricted than the power of the ordinary courts under the CPR, it has also for long been generally accepted that the costs regime in ordinary litigation does not fit the particular function and special procedures of ETs"*

16. On the question of the need for any causal link between the unreasonable conduct and the costs awarded, the Court of Appeal considered this in *Barnsley MBC v Yerrakalva* [2012] IRLR 78 and held that there does not have to be a causal link between the unreasonable conduct and the costs claimed, but that does not mean causation is irrelevant. Mummery LJ said:

> *"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."*

17. In relation to the power to take into account of the paying party's means to pay, the Tribunal considered that this was something it 'may' have regard to. In the case of *Jilley –v- Birmingham Solihull Mental Health NHS Trust* EAT 2008 All ER (D) 35 (Feb) the court stated that if we decide not to take into account the party's means to pay, we should explain why, and if we decide to do so, we should set out our findings about the ability to pay, what impact that has had on our decision whether to award costs and if so, what impact means had on our decision as to how much those costs should be.

History of this matter

18. In this case the issue of the claim being out of time was not a matter referred to in the ET3 Response. At that time the claim was one of two brought by the Claimant and one of his colleagues against an earlier employer. At the time, the Response focused on the fact that the Claimant and his colleague had brought the complaint against the wrong Respondent.

19. The Claimant's colleague was able to reach a resolution of his claim and this was withdrawn in October 2018. It was not until 3 December 2018 that EJ Russell ordered that the correct Respondent be added as a party to these

proceedings and work began to clarify exactly what claim was being made. The Judge stated in her judgment that this matter had been significantly complicated by the operation of TUPE as the Claimant had been transferred on two separate occasions during his employment. The Claimant brought his claim against Kingdom Security as in his understanding they were responsible for his outstanding holiday pay claim as he had been dealing with that company over his holiday entitlement. The Claimant did not understand the application of the TUPE Regulations and was clearer about this after the hearing on 3 September.

20. At that hearing, EJ Russell recorded that in addition to adding the now sole Respondent, Mitie to the proceedings, she was also ordering the Claimant to think about whether he was owed money and to set his claim out clearly to the Respondent in writing by 17 January 2019. The Claimant provided copy bank statements with a short email by response on 7 March 2019.

21. Although the Claimant can read and did read from documents shown to him at the hearing in July 2019 it is clear from this email, from the lack of information in his witness statement for the open preliminary hearing and from his evidence that he needed his friends to assist him in completing the ET1 form; that the Claimant is not comfortable with writing things down or with the written word. His evidence was that he was also unfamiliar with computers and needed assistance with navigating the website to submit his ET1 claim form. The Tribunal notes that he waited for assistance from the CAB to respond to the Respondent's application for costs.

22. The Respondent stated at the open preliminary hearing in July that the issue of the claim being out of time was a matter raised before EJ Russell but it is not a matter that was noted in the minutes of her hearing. It was also not raised in Mitie's ET3 Response filed on 14 February 2019. The combination of those facts made it highly unlikely that the Claimant was aware of this time limit issue before he received the Respondent's costs warning letters in June and July. Before that the issue had been who was responsible for his holiday pay claim and whether it could be resolved without the need for further hearing.

23. The issue of the Claimant's holiday pay, the period it related to and the exact nature of the Claimant's complaint on holiday pay did not become clear to the parties or the court until the open preliminary hearing in July. The Claimant's belief was simple and as he explained it – he had leave booked which he was unable to take due to certified illness and he could not understand why his employer did not exercise its discretion to let him take the leave at a later date. That was reiterated in the letter from the CAB on his behalf dated 17 October.

24. The matter was unfortunately not that simple and has already been explained and addressed in this Tribunal's judgment from the open preliminary hearing held on 23 July but it does not mean that it was always that clear or straightforward to the Claimant as someone who has difficulty with the written word and who had to navigate the complexities of TUPE to even work out who was the correct Respondent to his claim.

25. In addition, the Tribunal notes that the Claimant was unwell during the course of this litigation, having had surgery. His compliance with EJ Russell's order was delayed due to his stay in hospital as he explained in his short email on 7 March.

26. The recent letter from the CAB refers to the Claimant's need for debt counselling as he is having financial problems. Further detail of those financial problems was not given in the letter but it does state that he was due to see one of their debt advisors in due course.

27. Lastly, the Tribunal notes that Mitie was served with these proceedings on 17 January 2019. They filed what could be described as a short holding Response on 14 February, engaged in some correspondence and attended two preliminary hearings on this matter. The Tribunal queries how Mitie's total costs in this matter rose to £6,500 with that limited involvement in the matter.

28. The Claimant's advisors state that he did not refuse the Respondent's settlement offer in its letter of 12 July but mistakenly thought that it was an opening offer and attempted to negotiate on it. Clearly that was the only offer available to save costs and expense.

Decision

29. In this Tribunal's judgment, it would not have been clear to the Claimant or to anyone advising him at the start of this litigation that his claim had no reasonable prospects of success. The issue of his claim having been issued late was not a matter explored properly until the July 2019 hearing. The terms of the contract that this Tribunal considered in July and which were referred to in the judgment were not before the court before that day. It was not a matter that EJ Russell considered in her two preliminary hearings.

30. The application of the TUPE Regulations complicated matters. The blame for that cannot be laid at the Claimant's door. He is a security guard and did not understand the application of TUPE to his situation. Most of the year of this litigation has been taken up with resolving that issue.

31. It is also the Tribunal's judgment that the Claimant did not conduct his claim unreasonably or vexatiously. He considered that the Respondent could have let him have the time that he had lost by being ill and having seen his colleague's claim resolved, it is likely that he thought that he might also be able to do the same. Where there has been delay in pursuing this matter this was either due to him being in hospital, recovering from surgery or waiting for assistance to comply with Tribunal orders.

32. His claim had been issued outside of the statutory time limits. That was not a matter that either party fully appreciated until the July open preliminary hearing. It was not a matter referred to in the "*without prejudice save as to costs"* letters written to him on 10 June or 12 July 2019. It proved fatal to his claim but it was not an issue that had been brought to his attention earlier.

33. In the circumstances, it is this Tribunal's judgment that the Claimant has not conducted this claim unreasonably. At the time he issued his complaint, it was not vexatious and never became so as the claim he was bringing did not become clear to him or to the Respondent until we clarified it at the hearing. As a litigant in person who needed assistance with the written word, the Claimant clearly did not understand his contract or what had actually happened with his

annual leave until we went through it in detail on 23 July 2019. Had the TUPE Regulations not complicated matters it is likely that this case would have been resolved many months earlier which would have saved some costs but as already stated, it is this Tribunal's judgment that that added complication is not due to the Claimant's unreasonable, vexatious or disruptive conduct.

34. It was also not clear during the course of the litigation that the Claimant's claim had no reasonable prospect of success. The Respondent's *without prejudice* letters refer to the fact that the Claimant had failed to particularise his claim as the reason the Respondent considered that his claim was likely to fail. No reference is made to what was this Tribunal found in the hearing which was that the contract stipulated that leave could not be carried forward if unused.

35. In this Tribunal's judgment, the Claimant has not, either in bringing or in conducting these proceedings, acted vexatiously, abusively, disruptively, or otherwise unreasonably. It was not clear until the final hearing on 23 July that the claim had no reasonable prospect of success. In the circumstances, it is this Tribunal's judgment that it is not appropriate to make an Order for costs against the Claimant and the Respondent's application is refused.

Employment Judge Jones

26 November 2019