EMPLOYMENT TRIBUNALS

Claimant: **Mr N Young**

Respondent: **Milo Music Ltd**

Heard at: **Croydon** **On:** **27/11/2019**

Before: **Employment Judge Wright**

Representation
Claimant: Mr I Krolick - counsel
Respondent: Mr N Hart - solicitor advocate

RESERVED JUDGMENT

The respondent's application for a costs order in its favour under Rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 fails and is dismissed.

REASONS

1. On 20/11/2018 the respondent made an application for a costs order in its favour after the claimant had withdrawn his claim. The sum the respondent seeks to recover from the claimant is £28,679, capped at £20,000. It is not clear from the costs schedule whether this sum is inclusive or exclusive of vat. The costs schedule presented was a brief summary of the costs sought and it did not contain sufficient detail had the Tribunal been minded to make a costs order.

2. The history of the matter is that the claimant worked for the respondent from 1992 until he resigned and worked his notice period which ended on 29/3/2018.

3. The claimant held a 19.215% shareholding in the respondent.

4. On 27/6/2018 the claimant presented a claim of constructive unfair

dismissal to the Tribunal.

5. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provide:

75 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.

76 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.

(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

(3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if—

(a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and

(b) the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment.

(4) A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer's contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party.

(5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing.

6. The respondent seeks its costs on the basis that the claimant's conduct of the proceedings was unreasonable and/or in the alternative was vexatious.

7. There was therefore a constructive unfair dismissal claim before the Tribunal and the issue of the shares to be resolved. Negotiations followed between the parties with a view to reaching a global settlement, which would include both the Tribunal claim and to buy back the claimant's shares. The Tribunal was told that privilege had been waived by the claimant's previous solicitors as the case could not otherwise be determined and the Tribunal was taken to without prejudice correspondence between the parties.

8. The claimant had a limitation period to present his claim in the Tribunal and had to do so by 28/6/2018, subject to any extension provided for due to Acas early conciliation. The Tribunal of course has no jurisdiction in respect of the shares.

9. On 11/7/2018 the Tribunal listed the case for a final hearing on 1/11/2018. The Tribunal also issued standard directions and a bundle should have been produced by 5/9/2018 and witness statements were due to be exchanged on 19/9/2018. There was no application from the parties to vary these directions.

10. On 5/10/2018, the respondent proposed to the claimant's solicitors that the final hearing be postponed as settlement negotiations were at an advanced stage. The respondent says an agreement in principle had been reached, however clearance from HMRC was required before it could be finalised; the respondent says this was received on 5/10/2018. In its skeleton argument, the respondent says a draft settlement agreement was sent to the claimant's solicitor on 16/10/2018, it pointedly states that the claimant's solicitor did not reply until the 23/10/2018, 'one week before the hearing', yet it does not state why it took from the 5/10/2018 to the 16/10/2018 to produce the settlement agreement. In any event, this is a criticism which should more properly be directed at the claimant's solicitor and not at him.

11. The respondent also seek to criticize the number of changes which were proposed to the agreement 'despite the claimant's representative having been aware of the broad mechanism for the proposed repurchase of the claimant's shares since July 2018 (and having previously received a "template" settlement agreement for their review on 7/8/2018), which addressed standard settlement terms'. Yet there is delay on both sides.

12. The claimant's solicitor refused the request for a postponement saying that it was not necessary. At that stage and bearing in mind the parties had been in settlement negotiations since at least May 2018 (Acas early conciliation took place between 3/4/2018 and 18/4/2018) there was still 18 working days before the final hearing.

13. On 23/10/2018 the respondent applied to the Tribunal for a postponement. The claimant's solicitor opposed that application. It is not clear what the outcome of that application was as there appear to have been IT 'issues' at the time. In any event, it appears the application was unsuccessful as the respondent made a further application on 30/10/2018.

14. The respondent says that by 24/10/2018 the claimant was 'utilising the threat of continuing litigation to enhance his bargaining position on the share valuation'. It also says that given the very real likelihood of a settlement not being reached and the claimant's representative's 'repeated refusals' to consent to a postponement; the respondent had no option but to prepare 'urgently' for the final hearing.

15. How the respondent conducts its case preparation is a matter for the respondent and is not something over which the claimant has any control. The respondent was already in breach of the Tribunal's directions order and if it had failed to prepare for the final hearing pending the outcome of the settlement negations, that was a risk which it took. There was never any guarantee a settlement would be reached or that the final hearing would not go ahead as listed on 1/11/2018.

16. It is an entirely legitimate litigation tactic and not one which strayed into unreasonable conduct for a party to use the pressure of a forthcoming hearing to facilitate reaching a settlement. The claimant was fully within his rights to seek a global settlement of his Tribunal claim and to receive compensation for his shares; and to use the forthcoming hearing to keep minds focused on the outcome it seems both parties wished to achieve.

17. On the 30/10/2018 the respondent tried a different approach. It said that the case could not be concluded within the one-day listing and said that a two-day listing was required. The claimant's solicitor had 'reluctantly' agree to that request. The postponement was granted and the hearing of 1/11/2018 was converted into a one-hour case management hearing. The case was postponed and relisted for two days starting on 16/5/2019.

18. Had the respondent given some thought to the forthcoming hearing at an appropriate stage, it would have realised earlier that a one-day listing was

insufficient and that two-days was required. Indeed, the claimant had earlier suggested (on 13/7/2018) that a three-day listing may have been more appropriate.

19. On 8/11/2018 the respondent's solicitor informed the claimant that they had no instructions to discuss a settlement and did not anticipate receiving any pending the final hearing. Mr Heart described this as calling the claimant's 'bluff', which he says worked. On 20/11/2018 the claimant withdrew his Tribunal claim.

20. The respondent asks the Tribunal to conclude that the claimant's claim in the Tribunal was brought to 'leverage' settlement negotiations with the respondent and to secure a favourable outcome for the claimant in respect of his shares. The Tribunal cannot see anything at all wrong in this. The respondent also confirmed that the claimant had an arguable constructive dismissal claim. The respondent kept repeating the word 'leverage', however the Tribunal finds this to be no more than vigorous negotiation.

21. The conclusion the respondent asks the Tribunal to draw is that the claimant never had any intention of attending a final hearing and therefore his conduct was unreasonable and/or vexatious.

22. The respondent's reasoning flies in the face of the chronology. The claimant refused two postponement requests and was instead asking the respondent when he would receive a bundle and was attempting to exchange witness statements. The claimant's solicitor confirmed that one of her colleagues had prepared to represent him at the final hearing as she had become disposed. It was the respondent who was not taking active steps to prepare the case for the final hearing.

23. In view of this, the Tribunal finds that there is no evidence to suggest that the claimant was not prepared to attend a final hearing.

24. The claimant explained that the reason why he withdrew his claim was in the main that, his health was suffering. At this point, he had been out of work and therefore without income for eight months. A friend of the claimant's who is a GP said that she had encouraged him to seek medical help as in her opinion, he was depressed. The claimant did not want to see his GP. He did eventually did so and he was formally diagnosed with depression on 17/12/2018.

25. It may well have been that the respondent's communication on 8/11/2018 pushed the claimant to the point of despair that he decided to withdraw his claim. The claimant was certainly facing further costs being incurred as even if the case was fully prepared for a final hearing on 1/11/2018, there is enviable further work (for example updating a schedule of loss) and therefore further costs to be incurred in view of the postponement. In the claimant's response to the respondent's costs application the further costs were referenced.

26. As Mr Krolick submitted, there is also the impact upon the claimant's

mental health of the hearing being postpone by a further six-months. Representatives are used to this happening, however this claimant was not. He had gone from being in a state of mind on 30/10/2018 to thinking that his Tribunal claim at least would be concluded on 1/11/2018 (at least in so far as him having to give evidence goes) to finding out that matters were going to drag on for another six-months at least.

27. The Tribunal was told that the claimant had been offered £30,000 to settle his unfair dismissal claim. If he had no intention of pursuing the claim to a final hearing, why did he not accept this sum? Consideration has to be given to the fact that he had been out of work since 29/3/2018. Indeed, the respondent says a number of options were considered, including settling the claimant's Tribunal claim and leaving the shares in abeyance. If the claimant had no intention of attending a final hearing, why not settle the Tribunal claim? The claimant would still own the shares and that issue would have to be resolved at some point as the shares had value.

28. The Tribunal finds there has been no unreasonable or vexatious conduct by the claimant so as to engage the Tribunal's exercise of its discretion in respect of costs.

29. To conclude, the Tribunal finds there is no evidence that the claimant never had any intention of attending the final hearing. On the contrary, all the evidence points to the opposite conclusion, until the claimant decided to withdraw his claim. Had it been the claimant's intention to push matters to a final hearing and to then withdraw; why did he instruct his solicitor to finally agree to the postponement application? The respondent's proposition is nonsensical.

30. Indeed, if the claimant intended to 'leverage' the respondent to a final hearing, he could have instructed his solicitor not to undertake any further work and leave matters as they were, caused the respondent to incur its own costs and then simply have instructed his solicitor to withdraw at the last minute before the final hearing. He did not do this and he withdrew shortly after the preliminary hearing on 1/11/2018.

31. Lastly, the claimant submitted that the impact of making an application for wasted costs against the claimant's solicitor by the respondent, created a potential conflict between the claimant and his representative, such that they concluded they could no longer act for him. The respondent confirmed the application had been withdrawn by agreement. The Tribunal knows no more than this, but it is concerned to be told that by making an application for wasted costs, a conflict was created which meant that firm could no longer act for the claimant and that he was then forced to seek advice elsewhere.

Employment Judge Wright
4/12/2019