



EMPLOYMENT TRIBUNALS

Claimant: Mr S Witts

Respondent: Charnwood Borough Council

Heard at: Leicester

On: 6 March 2020

Before: Employment Judge Brewer

Representation

Claimant: No appearance

Respondent: Mr P Bownes, Solicitor

JUDGMENT

1. The respondent's application for costs is allowed.
2. The claimant is ordered to pay the respondent costs in the sum of £1,670.50 as particularized in the schedule of costs sent by the respondent to the claimant on 16 October 2019.

REASONS

Background and findings of fact

1. The claimant was engaged for a short period by the respondent in the role of building surveyor. When his services were dispensed with, the claimant brought claims before the tribunal alleging that he had been unfairly dismissed, that he was owed redundancy pay and notice pay.
2. The respondent denied that it had employed the claimant. It said that the claimant was engaged via an agency – CHANGE-IT Consulting Limited ("the Agency").

3. At a preliminary hearing before judge Clark on 22 July 2019, which the claimant attended, the issue of the claimant's employment status was discussed. At that hearing the claimant withdrew his unfair dismissal and redundancy payment claims accepting that he lacked qualifying service to bring those claims. However, the claim for notice pay was not withdrawn. At the preliminary hearing the claimant accepted a number of matters:
 - a. He accepted that there was a tri-partite relationship involving him, the Agency and the respondent;
 - b. He accepted he was not paid directly by the respondent;
 - c. He accepted that the respondent paid the Agency;
 - d. He accepted that the Agency took what he called 'a cut' from the monies paid to them by the respondent;
 - e. He accepted that the respondent did not deduct tax or national insurance contributions on his behalf.
4. Judge Clark clearly signposted the obvious difficulties the claimant would have in showing he was an employee, however, given that his hearing was not called to determine that matter he listed the case for a second preliminary hearing to consider that.
5. The second preliminary hearing was before me on 25 October 2019. The respondent was represented by Mr Bownes. The claimant failed to attend. Having considered the evidence, principally showing that the respondent paid the agency for the use of the services of the claimant, I concluded that there was no contract between the claimant and the respondent and thus no contract of employment. I dismissed the claim. My decision was sent to the parties on 9 November 2019.
6. Prior to the 25 October hearing, the respondent's solicitors wrote to the claimant on 16 October 2019. In that letter the solicitors set out the key issue – that of employment status. They note that Judge Clark had urged the claimant to seek legal advice. The bundle I had before me was enclosed and it was clearly stated that in light of the evidence the solicitors' opinion was that the claim had no reasonable prospect of success. The basis of this opinion was a combination of the concessions made by the claimant at the first preliminary hearing, Judge Clark's comments that there appeared to be no contract between the parties and the documentation which evidence the nature of the tri-partite relationship. The solicitors also set out the applicable Tribunal Rules and there was a very clear costs warning based on the above. Finally, the letter had attached to it a schedule of the costs that would be claimed.
7. I note that the claimant has not corresponded with either the respondent or the Tribunal since the original preliminary hearing and he has failed to attend or to explain his failure to attend two subsequent hearings. He has not sought any postponements. He specifically did not respond to the costs warning letter.
8. The respondent's application is made on two bases: first the claimant's conduct in pursuing the notice pay claim was unreasonable and/or vexatious; second, the claim had no reasonable prospect of success.

Law

9. The relevant parts of the Tribunal Rules 2013 are as follows:

Definitions

74.—(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...

Costs orders and preparation time orders

75.—(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...

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...

10. In the Employment Tribunal costs are the exception rather than the rule (see for example **Yerrakalva v Barnsley Metropolitan Borough Council and anor 2012 ICR 420, Court of Appeal**). Costs, as defined, are to be compensatory, not punitive.
11. In terms of unreasonable or vexatious conduct, rule 76(1) imposes a two-stage test: first, a tribunal must ask itself whether a party’s conduct falls within rule 76(1)(a); if so, it must go on to ask itself whether it is appropriate to exercise its discretion in favour of awarding costs against that party.
12. I have taken into account that, according to the EAT in **AQ Ltd v Holden 2012 IRLR 648**, an employment tribunal cannot, and should not, judge a litigant in person by the standards of a professional representative. Justice requires that

tribunals do not apply professional standards to lay people, who may well be embroiled in legal proceedings for the only time in their life. An example of unreasonable behaviour by a lay person meriting an order for costs can be found in **Liddington v Zgether NHS Foundation Trust EAT 0002/16**, where the employment judge made an order for costs against the claimant on the basis of unreasonable conduct because, despite being given a number of opportunities to do so, she was unable to provide sufficient details of her complaints. The judge recognised that the standard of pleading expected of a lawyer did not apply to the claimant as a lay person and so she could not be expected to provide a detailed legal pleading. However, she should have been able to articulate in lay terms what it was that was said or done, by whom and on what dates, and she had failed to do so. This conclusion, the EAT held, was permissible in the circumstances of the case.

13. The most useful definition of ‘vexatious’ was given by Lord Bingham in **Attorney General v Barker 2000 1 FLR 759, QBD (DivCt)**:

‘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 by that 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’

14. This suggests that where the effect of the conduct falls within Lord Bingham’s stringent definition, this can amount to vexatious conduct, irrespective of the motive behind it.
15. In relation to unreasonable conduct, ‘unreasonable’ has its ordinary English meaning and is not to be interpreted as if it means something similar to ‘vexatious’ — **Dyer v Secretary of State for Employment EAT 183/83**.
16. An employment tribunal has a discretion to make a costs order where it considers that a claim or response had no reasonable prospect of success — rule 76(1)(b) Tribunal Rules 2013. As with rule 76(1)(a), a two-stage test applies requiring the tribunal to consider first whether this ground is made out, and, if so, secondly to exercise a discretion as to whether or not to actually award costs.
17. I may, but do not have to, take into account the claimant’s means in making my decision.

Issues

18. The issues for me to determine were therefore:
- a. Whether the claimant’s conduct was vexatious and/or unreasonable;
 - b. Whether the claimant’s claim had no reasonable prospect of success;
 - c. If either of the above is made out, whether it is appropriate to exercise my discretion to award costs; and if so

d. How much to award.

Discussion and conclusion

19. I have set out above the sequence of events which led to today's hearing. Mr Bownes relied on the 16 October 2019 letter and of course the claimant's failure to engage with the Tribunal process which included his non-attendance today.
20. The claimant is a litigant in person. However, he has pursued the claim, he represented himself, he understood the points put forward as to jurisdiction by Judge Clark to the extent that he withdrew his unfair dismissal and redundancy claims. In my judgment the claimant has fully understood his position and the difficulty he had with pursuing his claims. He has had time to seek legal advice. The claimant did not withdraw the notice pay claim, he provided no evidence of an employment relationship and he failed to attend today.
21. In my judgment his behaviour in not addressing the issue he raised – that he was employed by the respondent, in failing to engage at all with either the respondent or the Tribunal and in not attending the preliminary hearing which dealt with his notice pay claim the claimant has behaved wholly unreasonably. I further find that the assertion that the claimant was employed by the respondent had no reasonable prospect of success. Thus, I consider that the first question I have to answer, whether a ground for making a costs award is made out, is answered in the affirmative – both unreasonable conduct and 'no reasonable prospects' are made out.
22. I then have to consider whether to make an award.
23. I take into account that a clear and concise costs warning letter was issued to the claimant. Whilst it does not follow automatically that costs should be awarded in these circumstances, it is a factor to be taken into account and in this case I consider that the warning, coupled with the discussion before Judge Clark at the original preliminary hearing and the clear implication that the claimant was in difficulty, is a significant factor in favour of an award. I note particularly that the issue of whether there was a contract at all between the parties was always an issue and along with the costs warning letter the trial bundle was sent. At that stage the claimant, even though not legally qualified, should have seriously considered his position and there is no evidence that he did. There is no evidence that he took advice. There is ample evidence of the relationship between the respondent and the Agency. Given all of that it seems to me that the minimum the claimant ought to have done was seek some advice. In my view the claimant has not acted in good faith in a) not properly considering the evidence, b) failing to engage with the respondent and c) failing to provide any support for his claim.
24. For those reasons my judgment is that the respondent's application for costs succeeds and accordingly I have made an award of costs against the claimant and in favour of the respondent in the sum of £1,670.50.

Employment Judge Brewer

Date:- 6 March 2020

JUDGMENT SENT TO THE PARTIES ON

.....

.....

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.