EMPLOYMENT TRIBUNALS

Claimant: Mr H Khan

Respondent: Conexus Recovery and Field Services Limited

Heard at: Manchester

Before: Employment Judge Phil Allen

COSTS JUDGMENT

The judgment of the Tribunal is that the claimant is ordered to pay the respondent **£2,450** in respect of its costs.

REASONS

Introduction

1. The claimant brought a claim against the respondent for breach of contract, unlawful deduction from wages and in respect of annual leave under the Working Time Regulations 1996. The claims were for sums the claimant said were due to him relating to, or arising from, the termination of his employment by the respondent. The respondent brought a counter-claim against the claimant for breach of contract.

2. Both the claim and the counter-claim were heard in person at Manchester Employment Tribunal on 16 March 2020. The respondent attended, evidence was given on its behalf, and it was represented by counsel. The claimant did not attend. The claimant's claims were dismissed and the counter-claim upheld. Judgment was given for the sum of £1,685.68.

3. The respondent also applied for costs at the hearing on 16 March 2020. As the claimant was not in attendance, the Tribunal did not consider the application for costs on the day, but orders were made for any costs application and the response to be provided in writing. The parties were informed that the Tribunal intended to determine the costs application based on the documents, but the claimant could request a hearing if he wished to.

4. This Judgment is the decision in respect of the costs application, reached on the basis of the written application and response. The code P in the heading records that the decision has been made on the papers without the attendance of the parties. The claimant did not request a hearing, as he was able to do.

Claims and Issues

5. The respondent contends that the claimant's conduct of the claim was unreasonable. It claims that he should be required to pay the respondent's costs in defending his claim, pursuing its counter-claim, and in seeking recovery of costs. The respondent has provided a schedule which records the respondent's costs as being £10,600 (plus VAT), albeit that the schedule appears to have included within it a fee of £600 which would have been incurred if a costs hearing had been required (when the decision has been made without such a hearing). The claimant opposes the respondent's application.

Procedure

6. In compliance with the order made at the hearing on 16 March 2020, the respondent has provided its application for costs in writing. The application is dated 16 April 2020. The application included the following documents:

a. An application outlining the basis upon which costs are sought, prepared by Mr Thornsby, of counsel (who had represented the respondent at the hearing on 16 March 2020);

b. A schedule of costs;

c. A witness statement dated 10 April 2020 signed by Mr S Riley, a Director of the respondent;

d. A printed copy of a Linked In profile, which appears to be that of the claimant, which is referred to in Mr Riley's statement;

e. A without prejudice save as to costs letter sent by the solicitors acting for the respondent to the claimant on 5 March 2020; and

f. An authority upon which the respondent relies, *Yerrakalva v Barnsley MBC* [2012] ICR 420.

7. Also in compliance with the relevant order, the claimant has sent an email to the Tribunal dated 12 May 2020, providing the claimant's response to the respondent's costs application.

8. Neither party has objected to the Tribunal's proposal that the application be determined on the papers.

Relevant Facts

9. The claimant was employed by the respondent as a Field Agent from 1 March 2019 to 23 October 2019. After undertaking ACAS Early Conciliation, the claimant

brought claims against the respondent in the Employment Tribunal for unlawful deductions from wages, breach of contract and for unpaid annual leave. The claim form was entered on 12 November 2019. In it, the claimant claimed a total of £10,981.49. The claim form contained an explanation of how this figure was calculated, which included some reference to credit card balances. The claim form also contained a claim for a statutory redundancy payment which was struck out on 16 December 2019 (without a response being required to be entered in respect of it), as the claimant did not have the required continuity of employment.

10. When entering its grounds of resistance on 20 December 2019, the respondent also entered a counter-claim. The respondent alleged (amongst other things) that: the claimant had claimed for expenses which he had not incurred; and the claimant had not undertaken work on some dates when he claimed he had done so, including fabricating visits to properties by using Google maps. In the response form, it was acknowledged that the respondent had withheld wages due to the claimant pending its investigation. It also accepted that there was pay in lieu of accrued but untaken holiday outstanding which had not been paid. The respondent's position was that it was entitled to deduct amounts due to it, from sums due to the claimant, under the terms of his employment contract.

11. The respondent counter-claimed and sought the following damages as part of its breach of contract claim: £398.40 as the cost of replacing an unreturned tablet; £84 for the cost of replacing an unreturned fob; £1,603.93 for expenses which had been claimed but were not due; and £2,080 as a result of losses incurred because the claimant had failed to work for the period of notice required under his contract of employment.

12. The claimant sought an extension of time in which to respond to the counter-claim and one was granted by the Tribunal. No response to the counter-claim was ever entered by the claimant.

13. The case was listed for hearing on 16 March 2020. Directions were made by the Tribunal, which included an order that the parties were to send each other copy documents and witness statements on or before 9 March 2020.

14. On 5 March 2020 the respondent made an offer to the claimant on a without prejudice save as to costs basis, which was open for acceptance until close of business on 9 March. The offer was contained in a lengthy and detailed letter which explained the respondent's position and the rules relating to costs. The offer made was that if the claimant withdrew his claim, in return the respondent would not seek costs from the claimant and would withdraw its counter-claim. This offer was not accepted.

15. The claimant did not attend the hearing on 16 March 2020. The respondent attended with counsel instructed on its behalf.

16. The Tribunal did not receive any application from the claimant ahead of the 16 March hearing for a postponement of the hearing, nor did the claimant inform the Tribunal or the respondent that he would not be attending. At the time when the hearing was due to start and in the absence of the claimant, the claimant was

telephoned by a member of the Tribunal staff who established that he was not intending to attend the hearing that day (the claimant informed her that he was unwell). The claimant has not provided any explanation to the Tribunal for his non-attendance in the documents he has prepared in responding to this application.

17. In the documents appended to the respondent's application for costs is a signed witness statement from Mr Riley of the respondent. He explains that he believes that the claimant was working on the day of the hearing and his statement confirms how he came to that conclusion, based upon what he was told by contacts and clients. His statement also appends a Linked In profile page which appears to show the claimant as a Field Specialist at another named company, or at least shows the claimant as holding himself out to be working for that company (albeit it is recorded in the detail of the profile as the claimant being self-employed). The claimant has not said anything, in the response he has made to the costs application, which refutes that information or the evidence of Mr Riley (which had been provided to him with the respondent's application).

18. Mr Mulla of the respondent attended and gave evidence at the hearing on 16 March, relying upon a witness statement. As part of his evidence, Mr Mulla explained that as part of his internal investigation he had considered the claimant's movements when employed, and had concluded that the claimant had not attended work on twelve days in October 2019, but had decided that twelve days pay was due for October. His statement also acknowledged that there was some annual leave pay which was due to the claimant which had not been paid. His statement explained that many of the expense claims made by the claimant were not genuine (and detailed why he believed that to be the case).

19. In the summary in his statement, Mr Mulla accepted that £1,207.21 of wages and £276.92 holiday pay, were due to the claimant. These sums were offset against the amounts claimed by the respondent in its counter-claim to calculate the damages awarded.

20. Mr Mulla stated that £1,603.93 of expenses which had been paid to the claimant were sums to which he was not entitled. At the hearing the amount awarded was reduced to £1,557.93.

21. In his evidence, Mr Mulla also asserted that the respondent was entitled to £2,080 as the losses incurred by it as a result of the claimant's failure to work the period of contractual notice due. The amount awarded as damages for this element was £1133.88, as in the hearing the respondent accepted that it had not given credit for the costs it would have incurred in paying the claimant for his notice period had he remained employed.

22. Mr Mulla also evidenced the claim for £478.80 in respect of unreturned company property which needed to be replaced, as recorded at paragraph 11. This amount was awarded.

23. The respondent has sought to recover the costs of the entire claim, which the schedule provided record as being £10,600. This is more particularly broken down to include the following:

a. £2,500 as preparation of the witness statement for 16 March 2020 hearing;

b. £600 as preparation for the hearing on 16 March;

c. £850 counsel's fee for 16 March hearing;

d. £1,200 for the costs application and witness statement in support; and

e. £600 for counsel's attendance at a costs application hearing (albeit the Tribunal assumes that this aspect is not in fact being claimed as no such hearing has been required).

24. Two parts of the costs claimed are separately identified within the schedule: £2,450 as the costs of finalising statements, preparation and counsel's fees, being costs incurred after the deadline for the without prejudice offer had expired to the end of the 16 March hearing; and £1,200 for the costs application.

25. In his response to the application, the claimant has not asked that a hearing be arranged to consider the costs application. It was made clear in the order following the previous hearing that the Tribunal intended to consider the costs application on the papers, but if the claimant wished for it to be considered at a hearing he must confirm this when responding.

26. The claimant's email of 12 May does not provide any explanation for his non-attendance at the hearing. What the claimant's email focuses upon are his means. He states that he has no assets or income, and is awaiting approval for universal credit. He says that he is not going to be able to be employed in the near future due to the current crisis. He states that he resides in emergency housing and has debts. The email also makes reference to mental health issues and the claimant losing family members due to covid-19 (for which the Tribunal sympathises).

27. The claimant's email does not explicitly refute the account of Mr Riley. It does not record anything about the claimant's relationship with the named company referred to in the Linked In profile which has been provided to the Tribunal, nor does it contain any reference to any income or earnings from that relationship or any information about whether that relationship has ended.

The Law

28. Costs in the Employment Tribunal are very much the exception and not the rule. Costs do not simply follow the event. The power to award costs is limited to the specific reasons provided in the Employment Tribunals Rules of Procedure.

29. Rules 76, 78 and 84 of the Rules of procedure are relevant to the award of costs.

> *Rule 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...(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction ....*
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> *Rule 78. (1) A costs order may - (a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party; (b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles ...(3) for the avoidance of doubt, the amount of a costs order under sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000.*
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> *Rule 84. In deciding whether to make a costs, preparation time or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.*

30. Also relevant is the costs section of the Employment Tribunals (England & Wales) Presidential Guidance – General Case Management. The Tribunal has considered that Guidance and will not reproduce it here, save for highlighting the first line of paragraphs 1 and 19:

> *The basic principle is that employment tribunals do not order one party to pay the costs which the other party has incurred in bringing or defending a claim.*
>
> *When considering the amount of an order, information about a person's ability to pay may be considered, but the Tribunal may make a substantial order even where a person has no means of payment.*

31. The case upon which the respondent placed particular reliance is *Yerrakalva v Barnsley MBC* in which Mummery LJ said at paragraph 41:

> *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. The main thrust of the passages cited above from my judgment in* McPherson *was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the ET had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances.*

32. In relation to offers to settle, the Tribunal is not bound to award costs where the amount offered is not exceeded, but an offer and the rejection of it is a relevant matter to be taken into account in determining whether the claimant has acted unreasonably. The respondent's submission placed reliance upon *Anderson v Cheltenham and Gloucester* EAT 0221/13. The Tribunal has also taken into account the Judgment in *Raggett v John Lewis plc* UKEAT 0082/12 in which the following is said at paragraphs 41 and 43:

> *"The litigation conduct of a Claimant may also be taken into account in assessing the amount of a costs order. In* Kopel v Safeway Stores *plc [2003] IRLR 753 the EAT held that "There is no doubt . . . that an offer of the* Calderbank *type is a factor which the employment tribunal can take into account ..."…..*
>
> *The following principles can be derived from the authorities set out above:*
>
> *(1) ETs are not required … to identify the particular costs caused by particular conduct …. The ET should look at the whole picture of what happened in the case and the effects of such conduct in deciding whether to make and the amount of a costs order;*
>
> *(2) The conduct of the litigation by the Applicant for a costs order can be taken into account in determining the amount of costs ordered to be paid;*
>
> *(3) The conduct of a Claimant in rejecting a "Calderbank" type offer of settlement can be taken into account in assessing the amount of costs ordered against them provided that the conduct of the Claimant in rejecting the offer was held by the ET to be unreasonable;*
>
> *(4) Although the CPR do not apply directly to ET proceedings, ETs should exercise their powers under the ET Rules in accordance with the same general principles which apply in the civil courts but they are not obliged to follow the letter of the CPR in all respects.*"

33. The respondent has provided a full submission of the basis upon which it seeks a costs award, which the Tribunal will not reproduce here. What is recorded is only a summary of some pertinent issues included in it. In summary, the respondent seeks costs on the basis of the claimant's unreasonable conduct and/or that he had no reasonable prospects of success.

34. The respondent contends that it was unreasonable for the claimant to have brought claims for payments where there was the suspicion of fraudulent activity. It contends that the part of his claim which measured his losses by reference to credit card balances was fundamentally nonsensical. The respondent says the claim had no reasonable prospect of success. The respondent accepts that, for the claims for unlawful deductions from wages and accrued holiday pay, the respondent has always been candid that something was likely owed to the claimant. However it says that it was unreasonable for the claimant to bring his claim in the circumstances and, in particular, it was unreasonable for the claimant to make the decision immediately

to litigate notwithstanding the respondent's concerns about his honesty and its desire to protect itself regarding the return of equipment.

35. In terms of unreasonable conduct, the respondent submits that the without prejudice offer and the non-acceptance of it should be taken into account. It submits that the claimant effectively put in a claim form and took no further part in the proceedings. It also relies upon the statement of Mr Riley and did explicitly invite the claimant to address his non-attendance at the hearing with his own statement, when he responded to the application.

Applying the law to the facts

36. The basic principle is that employment tribunals do not order one party to pay the costs which the other party has incurred in bringing or defending a claim, that is costs are the exception and not the rule.

37. The respondent, as it acknowledged, failed to pay the claimant certain sums which were due to him. These amounts were significant. Mr Mulla's statement accepted that the claimant was due unpaid wages of £1,207.21 and £276.92 holiday pay. The claimant's claim, at least in part, had a reasonable prospect of success because some of the sums claimed were in fact due. It was not unreasonable for the claimant to pursue a claim against the respondent for these amounts. His claim had some validity. The Tribunal does not find that the claimant was obliged to delay claiming pending the respondent resolving matters for itself, nor does it find that the claimant's claim was unreasonable because of his activity whilst employed, where the claims included claims for sums validly due. The claim form does seem to have over-estimated what the claimant was likely to recover and did include some confusing reference to credit card balances, but these elements do not make it unreasonable for the claimant to pursue claims for unlawful deductions from wages, breach of contract and for unpaid annual leave, when the claimant was in fact due payment for wages and annual leave.

38. The claim for a statutory redundancy payment was misconceived, but it had no costs implications for the respondent as it did not need to respond to that part of the claim and it was stuck out in any event by the Tribunal.

39. The respondent counter-claimed (as it was entitled to). It is perhaps surprising that the claimant did not enter a response to the counter-claim as he had sought an extension of time for doing so. However, the claimant did not enter a response to the counter-claim and the respondent was accordingly able to succeed in its claims without the claimant being able to defend that claim. This was not unreasonable conduct by the claimant. In any event and as related in the facts section above, the respondent was not awarded the full amount it counter-claimed at the end of the hearing.

40. It is not entirely clear to the Tribunal at what point the claimant determined that he was not going to take an active role in proceedings or attend the hearing in his claim. In the absence of any explanation from the claimant for his non-attendance at the hearing on 16 March, the Tribunal finds that the claimant chose not to attend. On balance that decision appears likely to have been made in advance of the day of

the hearing. Accordingly, the claimant could have informed both the Tribunal and the respondent that he was not intending to attend on the day (and pursue his claim). It was unreasonable conduct of the proceedings for him not to do so. That finding is made irrespective of whether or not the claimant was working elsewhere on the day (as Mr Riley evidences and the claimant does not refute in his email), in the absence of any other positive explanation it was unreasonable conduct of the claimant not to attend without informing the respondent or the Tribunal that he would not be doing so.

41. Once the respondent had entered its counter-claim, it was not in the claimant's hands as to whether proceedings should be discontinued. Accordingly, it was not unreasonable for the claimant not to withdraw his claim, as even had he withdrawn his claim the hearing on 16 March and the proceedings would still have continued. The Tribunal is also mindful of the fact that the claimant was a litigant in person, and has taken that into account. He may not have understood the options open to him where a counter-claim has been issued.

42. What the Tribunal does consider particularly important, when looking at the whole picture of what happened in the case and asking whether there has been unreasonable conduct by the Claimant in bringing and conducting the claim and whether (if so) the discretion to award costs should be exercised, is the offer made to the claimant on 5 March 2020. The Tribunal finds that once the respondent had written to the claimant making the offer that it would not pursue the counter-claim against the claimant or seek costs, if the claimant withdrew his claim, the claimant did act unreasonably in continuing his claim in circumstances where he also chose not to attend the hearing. In circumstances where the claimant made the decision not to attend the hearing or to endeavour to argue his claim, not accepting such an offer was also unreasonable conduct of the proceedings. When considering the whole picture, the Tribunal finds this to be a key factor in determining that the claimant's conduct was unreasonable, and in deciding to exercise the discretion to order that the claimant should pay part of the respondent's costs.

43. The claimant put the respondent to the expense of attending the hearing on 16 March 2020 (or at least attending prepared and ready for a contested hearing), when the claimant had no intention himself of attending. Such conduct was unreasonable, particularly in circumstances where the respondent's solicitors had made very clear to the claimant how he could end the proceedings, that is by withdrawing his claim on the drop hands basis proposed in the respondent's letter of 5 March 2020. The claimant's ongoing conduct of the proceedings from on, or about, the deadline set for acceptance of that drop-hands offer on 9 March 2020 was unreasonable.

44. Having determined that the claimant acted unreasonably and that he should be required to pay the respondent's costs arising as a result, the Tribunal is required to determine the amount of costs which the claimant should be required to pay.

45. The sum which the respondent's schedule has identified as being the costs incurred in terms of finalising preparations for the hearing and attendance and representation at that hearing, following the 9 March 2020 deadline, is £2,450.

Looking at the totality of the circumstances, the Tribunal finds that the claimant should pay the respondent in respect of this element of their costs.

46. In reaching this decision, the Tribunal has, as required, taken into account the claimant's ability to pay. The Tribunal accepts the claimant's account that he has limited means as detailed in his email, albeit that his email makes no reference to an engagement which the claimant appears to have undertaken (as evidenced by the Linked In status evidenced by Mr Riley). As the Presidential Guidance confirms that the Tribunal may make a substantial order even where a person has no means of payment, and as the Tribunal has concluded that these costs were incurred by the respondent as a result of the claimant's unreasonable conduct, the Tribunal does not find that the claimant's means (based on the information available to it) outweigh the other factors which have resulted in the costs award being made.

47. The respondent also sought to recover the £1,200 expended by it in pursuing its costs application. The Tribunal has carefully considered whether the claimant should also be required to pay this amount, but has decided that he should not be required to do so. The reasons for this decision are: the costs are not those which directly arise from the claimant's unreasonable conduct; the costs were incurred in complying with the orders which the Tribunal decided to make; and taking account of the claimant's limited means.

Summary

48. The claimant's conduct of the proceedings was unreasonable and the Tribunal has determined that the claimant should pay the respondent £2,450 in respect of costs incurred as a result.

Employment Judge Phil Allen

Date: 12 June 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

23 June 2020

FOR THE TRIBUNAL OFFICE

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