EMPLOYMENT TRIBUNALS

Claimant: Miss C Byron
Respondent:
1. …
2. …
3. DDE Law
4. …

JUDGMENT

The application for costs made by DDE Law is refused.

REASONS

Introduction

1. This is an application by a party for an award of costs to be paid by the tribunal. The hearing of the application was postponed because of the COVID-19 pandemic. With the helpful consent of the only party affected by the application, it has been determined without a hearing.

Conclusion – no jurisdiction

2. There is a short answer to this application, which is that the tribunal has no jurisdiction to order itself to pay costs to a party. DDE Law, who seeks the costs order, have not informed the tribunal of the legal basis for making that order, despite having been required to do so more than once.

Conclusion – order would be refused in any event

3. There is, however, another basis for refusing the application. Even if DDE Law could point to a legal provision that gave the tribunal a discretionary power to make a costs order of this kind, I would exercise my discretion against the making of such an order. In order to explain why I would exercise my discretion in this way, I need to set out the procedural history.

Procedural history

4. The application arises out of a preliminary hearing on 30 July 2019, conducted by Employment Judge Buzzard. The claimant represented herself.

5. One of the purposes of the hearing was to establish who should be the respondents to the claim. All the claimant's complaints were of a kind that could only be brought against her employer, but there was some uncertainty and dispute about who her employer had been. The claimant alleged that her employment had transferred under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"). She was not sure who the transferor was.

6. Following that hearing, a case management order was sent to the parties on 12 August 2019. The order provided for DDE Law to be joined as a respondent. The case management summary gave a narrative explanation for joining DDE Law:

> "
>
> (7) In discussion with the claimant and with the two respondent representatives present the claimant confirmed that she understood that at least one employee who had previously worked for Parkway Marketing Limited had moved to a firm called DDE Law, a partnership. The claimant indicated that this individual employee, [Ms M], was working for DDE Law doing the same or similar work as she had done for Parkway Marketing Limited, acting on behalf of the same or similar clients. Mr Edgerton, who also works for DDE Law, stated that he did not believe that [Ms M] was employed or had ever been employed by DDE Law.
>
> (8) Mr Edgerton confirmed that DDE Law had acquired work from Parkway Marketing Limited, which it had continued to pursue following the closure of Parkway Marketing Limited.
>
> …
>
> (12) DDE Law Limited has been added as a respondent on the basis that the claimant identified an individual former employee of Parkway Marketing Limited, Megan Maden, who the claimant says moved to work for DDE Law Limited, whether as an employee or otherwise, continuing to do the same work for the same or similar clients as had been the case with Parkway Marketing Limited.
>
> (13) Mr Stephen Edgerton confirmed to the Tribunal at the preliminary hearing that that DDE law has clients who had previously been clients of Parkway Marketing Limited. Mr Edgerton stated that he was not aware of Megan Maden working for DDE Law"

7. DDE Law presented an ET3 response and instructed Mr Hughes to represent it at the next preliminary hearing, which took place before me on 3 December 2019. My case management order records what happened at that hearing, so far as DDE Law is concerned:

> "

11. At today's hearing, the claimant said that [paragraph (13) of the previous order] had been based on a misunderstanding. She said that she has no claim against DDE Law Limited and had never told the tribunal that she had one. She confirmed that DDE Law was just a client of Parkway Marketing Limited and, later, Old Hall Consultancy Limited. She does not believe that her employment, or Ms Maden's employment, ever transferred to DDE Law. She does not think that DDE Law would be liable to her in any other way.

12. Mr Hughes applied for DDE Law Limited to be removed as a respondent. He also applied for "wasted costs", although he was unable to say against whom the order should be made. The paying party can only be identified, he said, once an "investigation" has been carried out into how paragraph (13) came to be written as it was. He told me he accepted the claimant's explanation that she had never claimed to have been employed by DDE Law. But, he said, if that explanation was correct, it would mean that the wasted costs order should be paid by the tribunal itself for having misunderstood the claimant's case. He agreed to provide details of the legal provision under which such an order would be made.

13. It was agreed that DDE Law would remain a respondent solely for the purpose of pursuing its costs application if, indeed, it is pursued.

8. I ordered that the file be returned to EJ Buzzard, so that he could confirm whether or not the claimant had asserted on 30 July 2019 that DDE Law had been her employer. I also ordered DDE Law to inform the tribunal in writing of the statutory provision under which DDE Law made its costs application.

9. On 16 January 2020, at the direction of EJ Buzzard, the tribunal wrote to the parties as follows:

> "…Judge Buzzard has directed me to confirm that his notes from the hearing are consistent with the case management summary sent to the parties on 5 August 2019. The notes are in summary form and less detailed than the case management summary, which records indicate was dictated the same day, immediately after the preliminary hearing concluded.
>
> Judge [Buzzard] has no specific further recollection of the discussion…"

10. Mr Hughes replied to the tribunal's letter on 27 January 2020. He wrote:

> "Unfortunately the [letter does] not make it clear whether as the Claimant alleges it was on the Employment Judge[']s advices that my clients were added to [these] proceedings or whether some other cause encouraged this action on the Claimant[']s behalf.
>
> In the circumstances this matter should be re listed with the Claimant attending in order that it can be determined on whose instruction my clients [were] added to this proceedings. Until that is determined it is impossible to submit the basis upon which my client[']s claim for costs is made i.e. whether against the Tribunal or the Claimant."

11. By letter dated 28 February 2020, the tribunal notified the parties that there would be a hearing on 2 April 2020 to determine the costs application. Paragraph 4 of the letter stated:

> "If DDE Law pursue their application for an order for costs against the tribunal, DDE Law must identify the legal provision under which such an order is sought. That information must be delivered to the tribunal in writing not less than 7 days before the hearing."

12. In accordance with a separate direction, DDE Law submitted a schedule of costs totalling £1,235.

13. Unfortunately the hearing on 2 April 2020 could not proceed. The COVID-19 pandemic saw to that. Mr Hughes was informed by telephone on 30 March 2020. He was asked whether or not DDE Law would agree to the costs application being determined without a hearing on the basis of written submissions. He wrote to the tribunal the same day. His letter helpfully expressed DDE Law's consent to a paper determination. It also indicated that DDE Law would not pursue any application for costs against the claimant. The only matter still to be determined was DDE Law's application for an order that the tribunal should pay its costs. This position was confirmed by the tribunal in a letter dated 1 April 2020. The letter gave DDE Law until 8 April 2020 to make its written representations.

14. No written representations have been received by the tribunal from DDE Law or from any other party.

Relevant law

15. The tribunal's power to make costs orders and wasted costs orders derives from the Employment Tribunals Act 1996. Section 13(1) provides:

> "(1) Employment tribunal procedure regulations may include provision—
>
> (a)for the award of costs or expenses;
>
> (b)for the award of any allowances payable under section 5(2)(c) or (3).

16. Section 5(2)(c) is not relevant. Section 5(3) provides:

> "(3) The Secretary of State may pay to any other persons such allowances as he may with the consent of the Treasury determine for the purposes of, or in connection with, their attendance at employment tribunals."

17. Rule 75(1) of the Employment Tribunal Rules of Procedure 2013 begins:

> "A costs order is an order that a party ("the paying party") make a payment to..."

followed by a list of potential recipients.

18. Rule 80(1) begins:

> "A Tribunal may make a wasted costs order against a representative…"

19. A "representative" is defined in rule 80(2) as "a party's legal or other representative or any employee of such representative…"

20. Rule 2 sets out the tribunal's overriding objective. It is to deal with cases fairly and justly.

21. By rule 34, "The Tribunal may on its own initiative, or on the application of a party …, add any person as a party…, if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings…"

22. I am not aware of any provision in the Rules of Procedure which enables the tribunal to make an order requiring the Secretary of State to pay any allowances described in section 5(3) of the Employment Tribunals Act 1996.

No jurisdiction

23. There is nothing in the Employment Tribunals Act 1996 or the Employment Tribunal Rules of Procedure 2013 that gives the tribunal any power to make an order requiring itself to pay costs to a party.

Discretion

24. Even if the tribunal had a discretionary power to make the order sought by DDE Law, I would decline to exercise my discretion in this case. It appears that EJ Buzzard ordered DDE Law to be joined as a respondent because he considered it possible that DDE Law may have been the claimant's employer. It was reasonable to consider that possibility given the facts presented to him by the claimant at the preliminary hearing. The claimant was self-represented. The identity of the claimant's employer was unclear. In deciding whether or not to join DDE Law as a respondent, EJ Buzzard had to balance two risks. On the one hand, he had to take into account the potential risk that there might have been no transfer to DDE Law, and that DDE Law might incur costs in responding to a claim that was not well-founded against them. On the other hand, he had to bear in mind that if it turned out that there was a transfer to DDE Law, the claimant's claim might fail on the technical ground that she had not joined her employer as a respondent.

25. There is nothing to indicate that the claimant positively asked for DDE Law to be joined as a respondent, but nor is there anything to suggest that she in any way sought to discourage EJ Buzzard from taking that step. Whether DDE Law were joined at the request of the claimant, or on EJ Buzzard's own initiative, the judge was acting squarely within his powers under rule 34 in a manner consistent with the overriding objective. I see no reason why the tribunal should be ordered to pay DDE Law's costs.

22 June 2020

Employment Judge Horne

SENT TO THE PARTIES ON

26 June 2020

FOR THE TRIBUNAL OFFICE