EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Sean Murphy	v	Eisai Europe Limited

Heard at: Watford (By video link) **On**: 9 July 2020
Before: Employment Judge Alliott

Appearances
For the Claimant: Mr Paul O'Callaghan (Counsel)
For the Respondent: Mr Craig Rajgopaul (Counsel)

JUDGMENT

1. The judgement of the tribunal is that:

   1.1 The respondent's application for costs is dismissed.

REASONS

1. This has been a hearing conducted by videolink with the consent of the parties due to the current guidance during the Covid 19 pandemic. The materials before me are listed below.

Introduction

2. Following an open preliminary hearing held on 21 June 2019, I determined that the claimant was not an employee, worker or employed as in the definition of the Equality Act 2010. Consequently, the claimant's claim was struck out as the tribunal did not have jurisdiction to hear the disability discrimination claim.

3. On 20 August 2019 the respondent made a application for costs. This was opposed by the claimant in a letter dated 27 August 2019. As a result, I directed that this hearing should take place.

4. <u>The material before me.</u>

   4.1 I have been provided with a hearing bundle running to some 270 pages. In addition, I have a skeleton argument/written submissions from both parties.

5 The law

5.1 Rule 76 of the Employment Tribunal's (Constitution & Rules of Procedure) Regulations 2013 provides as follows:

> "76 When a costs order or a preparation time order may or shall be made
>
> (1) A Tribunal may make a costs order… and shall consider whether to do so, where it considers that –
>
> (a) a party… has acted … otherwise unreasonably in either the bringing of the proceedings … or the way that the proceedings… have been conducted; or
>
> (b) any claim… had no reasonable prospect of success;"

6 The respondent's application relies on both grounds. Although the initial application cited "vexatiously, abusively and disruptively" these are no longer relied upon.

7 I have a discretion to make a costs order and am required to consider making such an order if either or both of the grounds in Rule 76(1) are made out.

8 It is well established that costs in the employment tribunal are the exception and not the rule. It has been held that the tribunal rules contain a high hurdle to be surmounted before such an order can be considered.

9 The respondent has drawn the following propositions to my attention:

9.1 The case of Scott v Inland Revenue Commissioners [2004] ICR 1410, at paragraph 45, that the ability to award costs where a claim has "no reasonable chance of success" (the wording of the relevant legislation at the time) has "lowered the threshold for awarding costs" from the traditional criteria of "vexatious, abusive, disruptive or unreasonable bringing or pursuit of proceedings".

9.2 At paragraph 46 the Court of Appeal directed tribunals to consider, in determining whether a claim had no reasonable prospect of success, not whether the relevant party thought they were right "but whether they had reasonable grounds for thinking they were".

9.3 From the IDS Handbook on Employment Tribunal Practice and Procedure, at 20.72:

> "It was well established under the old rules that the term "misconceived" could cover unmeritorious claims brought by employees who, possibly because they are unrepresented, are unaware of the legal position and genuinely believe that their employers committed illegal acts against them. This will continue to be the case under the Tribunal Rules 2013… since now a tribunal merely has to decide whether or not a claim had reasonable prospects of success".

9.4 As per the IDS Handbook on Employment Tribunal Practice and Procedure at paragraph 20.51:

> " "Unreasonable" has its ordinary English meaning and is not to be interpreted as if it meant something similar to "vexatious" - Dyer v Secretary of State for Employment EAT 183/83…
>
> In determining whether to make an order under this ground, an employment tribunal should take in to account the "nature, gravity and effect" of a party's unreasonable conduct - McPherson v BNP Paribas (London Branch) [2004] ICR 1398, CA… However, a tribunal should not misunderstand that to mean that the circumstances of a case have to be separated into sections such as "nature", "gravity" and "effect", with each section being analysed separately – Yerrakalva v Barnsley Metropolitan Borough Council [2012] ICR 420, CA…"

9.5 The case of Anderson v Cheltenham & Gloucester UK EAT/0221/13/BA the EAT confirmed at paragraph 8 that the conduct of a claimant in rejecting a without prejudice save as to costs offer can be considered in determining whether a party had acted unreasonably in conducting proceedings.

10 The claimant's case

10.1 Apart from my determination on the preliminary issue, there has been no determination on the underlying facts relied upon by the claimant.

10.2 In particular, the claimant alleges that he had disabilities, namely Cauda Equina Syndrome, deep vein thrombosis and a pulmonary embolism. His case is that he dealt with an ergonomic specialist and the respondent's HR Department concerning the provision of a reasonable adjustment, namely a sit/stand desk. He complains that such a desk was not provided and his engagement with the respondent was terminated as a result.

10.3 Without going into the rights and wrongs of the claimant's complaints, there is certainly contemporaneous documentary evidence to the effect that the claimant was requesting a sit/stand desk whilst undertaking work at the respondent's premises (see for example notes of a meeting held on 13 August 2018).

10.4 As regards these underlying facts relied upon by the claimant, there is clearly an arguable case and as such, I do not conclude that relying on them was unreasonable or that there was no reasonable prospect of successfully establishing them. The claimant had reasonable grounds for thinking they would be established.

10.5 Hence, in my judgment, this application for costs is solely concerned with the issue as to jurisdiction, ie whether the claimant could claim the protection of the Equality Act 2010.

10.6 I have taken into account the observations set out in the cases I refer to in paragraphs 4 and 12 of my judgment on the open preliminary hearing, namely:

10.6.1 In Leeds City Council v Woodhouse [2010] IRLR 625, CA the Court of Appeal made obiter, but no doubt influential, comments advising tribunals that the question whether a contract worker falls within the discrimination legislation, should not be dealt with as a preliminary issue unless the case is very straightforward. The scope of evidence relevant to the applicability of section 41 might not be immediately obvious to a tribunal, and, as the issue is largely one of fact, it should ideally be determined by a full tribunal rather than by an Employment Judge sitting alone.

10.6.2 The extract from the Northern Ireland Court of Appeal case Jones v Friends Provident Life Office [12004] IRLR 785 NICA, summarised in the IDS Handbook at 23.24, indicating that the court thought it desirable for the contract worker's provisions to be construed broadly so as to protect a wide range of workers.

10.7 Further, as set out in paragraph 11 of my judgment on the open preliminary hearing, it was conceded by the respondents that if the claimant was employed under a contract of employment by his service company, then the chain of contracts between him and the respondent would nevertheless mean that he came within the provisions of a contract worker.

10.8 It is true to say that both prior to the claimant's claim form and in its response, the respondent had expressly asserted that the claimant was not employed by his personal services company and, consequently, was not covered by section 41 of the Equality Act 2010.

10.9 The respondent's position would appear to have been based upon answers the claimant gave to how he was remunerated from his services company, namely by way of dividends. The respondent clearly equated the taking of dividends to be mutually exclusive with working pursuant to a contract of employment. However, in my judgment, such an arrangement is not necessarily mutually exclusive. An individual may be employed pursuant to a contract of employment with his service company but also may take dividends as a shareholder.

10.10 In my judgment on the open preliminary hearing, I found that the claimant had not proved that he was working for his service company pursuant to a contract of employment or a contract personally to do work. The claimant had given evidence that he paid himself through PAYE and made employee National Insurance contributions but I was not prepared to accept his uncorroborated word on the issue as to whether or not he was working pursuant to a contract of employment. However, the mere fact that the claimant has failed to prove an essential pre-requisite to bringing a claim under the Equality

Act does not of itself mean that he had no reasonable grounds of success and/or that the bringing of proceedings was unreasonable.

10.11 In the bringing of these proceedings I have concluded that it cannot be said that the claimant had no reasonable prospects of success and/or acted unreasonably. The issue is fact sensitive in an area of law designed to protect workers and it is not impossible that the claimant may have established that he was working pursuant to a contract of employment.

10.12 I have gone on to consider whether the claimant's conduct of the proceedings was unreasonable. In particular, the order of Employment Judge Manley, made on 18 December 2018, specifically directed the parties towards disclosure, the creation of a bundle and the exchange of witness statements on the preliminary issue. No documentary evidence in support of the contention that the claimant worked pursuant to a contact of employment was produced by the claimant and his witness statement was silent on that matter. I have considered whether it can be regarded as unreasonable of the claimant to continue to prosecute his claim up to and including the preliminary hearing in the absence of such evidence. I have considered this in the context of the letter sent by the respondent's representatives dated 18 June 2019, asserting that the claimant had no standing to bring the claims, inviting him to withdraw his claim and making a costs warning.

10.13 In my judgement, the high hurdle for making a costs order has not been crossed and I do not conclude that the conduct of the case, up to the open preliminary hearing, was unreasonable. How the claimant presents his claim is a matter for him. The fact that I have found that his evidence was insufficient has meant that the claimant has lost his claim. However, I do not conclude that the bringing of the claim or its conduct was unreasonable. Accordingly, I make no order for costs and dismiss the application.

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Employment Judge Alliott

Date: 27/07/2020

Sent to the parties on: 27/07/2020

Jon Marlowe
For the Tribunal Office

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