Case Nos. 2601798/2019
2601841/2019

EMPLOYMENT TRIBUNALS

Claimant: Mr S Chalimoniuk

Respondents: (1) Transkol Limited
(2) FN Transport Limited

Party to a costs application: Mr S Donovan

COSTS HEARING

Heard at: Midlands (East) **On:** 7 July 2020

Before: Employment Judge Camp

Appearances
For the claimant: written representations only
For the respondents: written representations only
For Mr Donovan: written representations only

RESERVED JUDGMENT

The respondents' costs and wasted costs applications are rejected, except that the claimant must pay the respondents' travel expenses totalling £14.85, pursuant to rules 75(1)(c) and 76(5).

REASONS

1. This decision on the respondents' applications for costs against the claimant and the claimant's representative, Mr Shaun Donovan, relates to an unsuccessful claim for unauthorised deductions from wages under the Employment Rights Act 1996 and unpaid holiday pay under the Working Time Regulations 1998. For the background, please see the Reserved Judgment & Reasons of 2 April 2020, which followed the final hearing on 24 February 2020.

2. It should be noted that there was only nominally a hearing on costs[1]. With the agreement of all of the parties, the application was dealt with on the basis of written representations only, pursuant to rule 42 of the Rules of Procedure.

3. The respondents made their applications for costs and wasted costs under cover of an email of 14 April 2020. Both a costs order and a preparation time order are mentioned, despite rule 75(3) preventing both types of order being made in favour of the same party in the same proceedings. In addition, a clear distinction is not made as to the rationale for the application against the claimant versus that against Mr Donovan.

4. Be that as it may, the basis of the applications seems to be that, pursuant to rule 76(1)(a) and rule 80(1)(a), the claimant and/or Mr Donovan acted vexatiously, disruptively or otherwise unreasonably in the bringing of the proceedings and/or in the way in which the proceedings were conducted, in that [allegedly]:

   4.1 a costs warning letter of 6 June 2019, in which it was argued that the claim had no reasonable prospects of success, was not responded to or properly considered;

   4.2 the claim was brought out of spite to harass the respondents, or for some other improper motive;

   4.3 the claim was inadequately prepared. In particular: the claimant failed to disclose "*vital evidence*"; a hearing in September 2019 had to be adjourned due to "*lack of preparation*" and a hearing in November 2019 "*could not be finalised due to the conduct of the claimant and his representative*";

   4.4 Mr Donovan "*was not authorised to represent the Claimant under the Compensation Act 2006 and the Financial Services and Markets Act 2000 (Claims Management Activity) Order 2018*".

5. Pausing there, I note that the application against Mr Donovan uses the same language, the language of rule 76(1)(a) – "*has acted vexatiously, disruptively or otherwise unreasonably in the bringing and/or conducting the case*" – as that against the claimant, but rule 80, which governs wasted costs, uses different language: "*any improper, unreasonable or negligent act or omission*". I assume Mr Donovan is accused of having acted unreasonably, although there may be some suggestion of impropriety.

6. An application for witness expenses under rules 75(1)(c) and 76(5) has also been made.

[1] A video hearing room was available, but was not needed.

7. The claimant and Mr Donovan have (through Mr Donovan) responded twice to the application, on 28 April 2020 and 16 June 2020. The response of 28 April 2020 is in very general terms and does not really engage with the substance of the applications. That of 16 June 2020 is more detailed and specific, but is concerning in several respects.

   7.1 Mr Donovan suggests that the claimant's evidence at the final hearing (which I accepted) to the effect that he had consulted with Mr Donovan before signing the contracts with the respondents in September 2018 was wrong. He did not make this suggestion at the final hearing itself. Further, I made a finding that that is what happened as a matter of fact. Moreover, there is an obvious potential conflict of interest between Mr Donovan and the claimant in relation to this costs application, which Mr Donovan does not seem to have thought about. To put is simply: it may well be in the claimant's best interests to blame Mr Donovan for giving him bad advice in September 2018. By denying that he gave the claimant any advice in September 2018, Mr Donovan seems to be acting in his own best interests and not in the claimant's.

   7.2 Mr Donovan has provided no information at all about his or the claimant's financial means, despite my case management order of May 2020 that, "*the claimant and the claimant's representative must provide the respondents and the Tribunal with all evidence and submissions relied on in opposition to the* [costs] *applications, including any evidence as to their ability to pay that they would like the Tribunal to take into account*".

   7.3 Mr Donovan hints that he may be alleging, but does not actually say that he is alleging, that he is "*a representative who is not acting in pursuit of profit with regard to the proceedings*", in accordance with rule 80(2). The beginning and the end of what he has to say about this is: "*We thank Mr. Wiensek* [the respondents' representative] *for his reference to Reg. 80 of The Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, however paragraph (2) states the "Representative" means a party's legal or other representative or any employee of such representative,* ***but it does not include a representative who is not acting in pursuit of profit with regard to the proceedings.*** [original emphasis] *A person acting on a contingency or conditional fee arrangement is considered to be acting in pursuit of profit.*" If it is being asserted by Mr Donovan that rule 80 does not apply to him because he is a pro bono or not-for-profit representative:

      7.3.1 one would have expected this to be his 'headline' defence to the wasted costs application since, if the assertion were true, it would be the obvious thing to say, is straightforward, and would wholly defeat the application, whatever its other merits;

      7.3.2 it was incumbent upon him to say so in terms, and to provide some evidence in support, particularly in circumstances where there seems to be

nothing in his organisation's publicity materials[2] suggesting he is such a representative.

7.4 Mr Donovan has also not responded substantively to the respondents' representative's allegation that Mr Donovan "*was not authorised to represent the Claimant in the proceedings before the Employment Tribunal, in breach of the Compensation Act 2006 and the Financial Services and Markets Act 2000 (Claims Management Activity) Order 2018*". As neither Mr Donovan nor his organisation, "Resolutions", appears to be on the relevant FCA register, this is a surprising omission. Representing people in the Employment Tribunals if you are not registered, and an exemption does not apply to you, is a serious matter. If he is alleging that he / his organisation benefits from an exemption, I would expect him to say so clearly.

8. I shall now consider each of the four bases for the respondents' applications in turn.

9. First, the respondents argue to the effect that the claimant should have abandoned the claim upon receipt of the costs warning letter. Possibly it is also being suggested that the claim had no reasonable prospects of success in any event, although that is not in terms put forward as a basis for claiming costs.

10. The costs warning letter is little more than a bald assertion that "*We are of the opinion that the Claim has no reasonable prospect of success and you has acted vexatiously, abusively and unreasonably in bringing the Claim. At all times you were an independent contractor under the contract for services and not an employee*" [*sic*]. Beyond that, there is a reference to the written contracts with the respondents and nothing else of substance. The letter does not address the question of whether the claimant was a worker. It certainly does not analyse the claim in any detail, in such a way as ought to have made it clear to the claimant and to Mr Donovan that the claim was hopeless.

11. The Rules of Procedure do not have any provision equivalent to Part 36 of the Civil Procedure Rules. It is often necessary to have written a costs warning letter before the Tribunal will make an award of costs. But it is rarely, if ever, sufficient to have written one. In any event, it was not unreasonable conduct for the claimant to have proceeded with his claim after reading this particular costs warning letter.

12. I turn to the suggestion that the claim had no reasonable prospects of success and that it was unreasonable conduct for the claimant to have proceeded with it.

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[2] The respondents' costs documents include a print-out of the "*Legal Services*" page of Mr Donovan's organisation's website, which includes this: "*I am a highly successful legal professional offering 25 years of legal service experience in administrative law representation before tribunals; tenant duty counsel, landlord / tenant problems, evictions, rent arrears; employment law tribunal, ACAS applications and County Court cases. // I am able to help you with your legal and court forms; I can represent you with your case before the Social Security Appeal Tribunal in Nottingham, Lincoln, Chesterfield and Derby all the way up to the Upper Tribunal (Administrative Appeals Chamber) in London. I can also help you with your County Court case or your employment complaint to ACAS and the employment tribunal. I can help in your landlord matter, eviction or rent arrears.*" I have visited the website to check whether there was any mention elsewhere of it being a not-for-profit or pro bono advice organisation, in case the respondents' representative was being selective. As far as I can see, there isn't.

13. It does not follow from the fact that someone has lost and lost badly that their claim was misconceived from the start. I have to consider costs and prospects of success without the benefit of hindsight. I recall thinking, before I made my decision, that there were at least three things the claimant had in his favour in relation to the key issue of whether there was any relevant contract at all between him and the respondents. First, there was the fact that the claimant began working for the respondents before his company, Sylwek Transport Ltd, was incorporated. This meant that there had to be a contract between the claimant himself and the respondents at the start. Secondly, there was the fact that there was no written contract at all until September 2018, more than a year after the claimant started working for the respondents. In fact, the claimant was working for the respondents for significantly longer without a written contract than with one. Thirdly, the contracts themselves were not well drafted and, as is noted in paragraph 27 of the Reasons for my decision at the final hearing, they are to an extent worded as if they were contracts between an individual and the respondents rather than between a company and the respondents.

14. Although I made the decisions that I made in relation to each of these three points, I don't think the claimant's position, looked at prospectively, was hopeless. For example, another judge might conceivably have decided that the contract the claimant had with the respondents at the start remained in place throughout the arrangement and was not displaced by the written contract, entered into more than a year later and/or that the written contract did not reflect the true agreement.

15. I therefore reject the costs application made on the basis that it was unreasonable to pursue this claim because it had no reasonable prospects of success.

16. The wasted costs application that seems to be being made on the same basis fails partly for similar reasons and partly because even if I was persuaded that the claim had no reasonable prospects of success, that would not make Mr Donovan's acts or omissions unreasonable, improper or negligent. Representing someone who is bringing a weak or hopeless claim is none of those things in and of itself. There is no basis in the evidence I have for thinking that Mr Donovan improperly, unreasonably or negligently caused the claimant to bring a claim he would not otherwise have brought.

17. There is no objective basis for the assertion that the claim was brought out of spite to harass the respondents, or for some other improper motive. I made no finding to that effect, and based on the evidence that was before me at the final hearing, I think the claimant may have been misguided in bringing the claim, but was not acting in bad faith. Again, I can see nothing in the evidence showing that Mr Donovan is to be criticised in this respect.

18. The respondents' allegations about the hearings in September and November 2019 are incorrect as a matter of fact. To an extent, they turn the truth on its head. The hearing in September was adjourned mainly because there was not enough time and because no case management orders for disclosure of documents and witness statements had been made beforehand. Both sides could be criticised for not writing into the Tribunal asking for a longer hearing and suggesting that some case management orders should be made. The hearing in November was also adjourned partly because there was not enough time, but more so because the respondents failed to tell the Tribunal that their witnesses needed an interpreter in addition to the interpreter that had been booked to assist communications between the claimant and

the Tribunal. In fairness to the respondents, there may well have been a genuine misunderstanding about interpreters. However, the important point is that it was not, substantially, the claimant's or Mr Donovan's fault (or. at least, not their fault more than it was the respondents') that either hearing was adjourned.

19. There is a proper basis for the allegation that the claimant failed to disclose evidence that he should have disclosed, but to describe the relevant thing that was not disclosed, namely the recording of the conversation between him and his accountant, as "*vital*" exaggerates its importance. Moreover, the failure to disclose this piece of evidence did not materially affect the length of the final hearing, or otherwise cause significant costs to be incurred that would not anyway have been incurred. It would not be in accordance with the overriding objective in rule 2 to make a costs or wasted costs order because of this.

20. The fact that Mr Donovan was (and is) not registered with the FCA is very concerning. It is something the Tribunal may well be taking further. But it does not, in and of itself, make a wasted costs order appropriate. Based on the evidence I have, there is no good reason for saying that what happened would have been any different, and that the respondents would not have incurred the same costs and expenses, had Mr Donovan been registered or had the claimant been represented by someone who was registered.

21. That leaves the claim for witness expenses under rules 75(1)(c) and 76(5). There is no basis for making that claim against anyone other than the claimant himself. If he thinks it is Mr Donovan's fault that these expenses were incurred, that is a matter between him and Mr Donovan. Unlike other costs or preparation time, witness expenses can be claimed by a successful party even where the unsuccessful party is not guilty of any unreasonable or improper conduct, but simply on the basis that one side has won and the other lost.

22. I do not think it would be appropriate to award the respondents witness expenses for the hearings in September and November 2019, because they were ineffective for reasons that were at least as much the respondents' fault as the claimant's.

23. There is no good reason not to award witness expenses in relation to the hearing in February 2020, as all the respondents' witnesses gave relevant evidence, to a lesser or greater extent, and the respondents were wholly successful. That does not, however, mean that the respondents' witnesses are automatically entitled to what they are claiming, and the claim is, in my view, overstated.

    23.1 There is a claim for lost earnings, on the basis of a number of hours multiplied by the national minimum wage rate. Not only are lost earnings not "*expenses*", there is no evidence that any of the witnesses actually lost the claimed amount of earnings as a matter of fact.

    23.2 There is a claim for the cost of flights from Poland to the UK, but the respondents are UK-based companies and the relevant witnesses, who are the directors of the respondents, both have England / the UK as their country of residence in the records held at Companies House. I am not persuaded that those flights were necessarily and reasonably incurred because of, or in connection with, the hearing in February 2020.

24. The only legitimate expenses claimed are petrol costs. 45 pence per mile is the right rate. But even that is over-claimed, in that, as I understand it, the respondents' witnesses travelled together and the claim has been made as if they all travelled separately. The distance between the relevant part of Mansfield and the Tribunals in Nottingham is 33 miles. 33 miles at 45 pence per mile is £14.85, and that is all I am awarding.

17 July 2020

EMPLOYMENT JUDGE CAMP

Sent to the parties on:

29 July 2020

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For the Tribunal:

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