EMPLOYMENT TRIBUNALS

Claimant: Mrs G Hancock

Respondent: Nottingham F & B Limited

Heard at: Manchester (by CVP) **On: 28 September 2020**

Before: Employment Judge Leach

REPRESENTATION:

Claimant: In person
Respondent: Mr Ince (Director)

JUDGMENT –APPLICATION FOR COSTS

The respondent's application for costs is refused

REASONS

Introduction

1. The claimant's claims in these proceedings were dismissed following a final hearing on 29 March 2019. Written reasons were requested and sent to the parties on 23 April 2019.

2. By email dated 1 May 2019, the respondent applied for a Costs Order. I have considered this application as made under rule 76(1)(a) of the Employment Tribunals Rules of Procedure 2013 ("Rules") ("unreasonable conduct") and rule 76(1)(b) of the Rules ("no reasonable prospect of success").

3. Unfortunately, and for various reasons (including and particularly the disruption caused by the COVID 19 Pandemic) the costs application was not heard until today.

4. In the period in between the final hearing and this costs hearing, Employment Judge Ryan (who presided over the final hearing) retired.

Summary of the Claimant's Claims and outcome.

5. On the basis of the claim form, the claimant's claims were straightforward – that she had not been paid her salary for the final 17 days of her employment (1 to 17 May 2018) and she had not been paid for her accrued untaken annual leave of 10.49 days.

6. It is apparent however that the circumstances surrounding the claim were not at all straightforward. The claimant was a director and possibly also a shareholder of the respondent for some (but not all) of her employment. She had also made loans to the respondent. Her then business partner, Mr Ince, was another director and shareholder of the respondent and director and shareholder of various other businesses one of which was a former employer of the claimant. It is apparent from the response form and the evidence provided in this case, that a significant dispute arose between the claimant and Mr Ince (and possibly others).

7. I note the following from the judgment of Employment Judge Ryan:-

   a. That the respondent's position was that the claimant's annual salary was £25,000 whereas the claimant's position was that it was £30,000

   b. In the event that the respondent was correct in relation to salary level, the claimant would have been overpaid her salary to an extent which would have exceeded any amounts owing to her for May 2018.

   c. The Judge decided that the only person with authority to act on behalf of the respondent and agree a salary with the claimant was Mr Ince. The judge decided that Mr Ince proposed a salary of £25000, rejected a counterproposal from the claimant at £35000 and, although there was nothing in writing subsequently, the claimant's actions (including her commencing employment with the respondent) all indicated that she had agreed a salary of £25,000.

   d. The judge also decided that the claimant did not at any stage have authority to bind the respondent in to an employment agreement with her under which a higher salary was paid to her.

8. On that basis the claim was dismissed.

The Respondent's Application and Submissions

9. The respondent's application for costs was first made in an email to the Tribunal dated 1 May 2019 and then referred to in subsequent emails. There are 3 grounds set out in support of the application: -

a. That the claimant had purposefully misled the Tribunal when she stated that she was the sole director of the respondent and another company (Third Floor F & B Limited) and had purchased the respondent (and another company) using £90,000 of her own money. The respondent refers particularly to a passage from the claimant's evidence:

> *"I was sole director of Nottingham F and B Limited and 3rd floor F and B Limited until 18 May 2018*
>
> *I personally paid 90k into these accounts for capital contribution, these were my companies purchased via an administrator for Mr Ince's companies that went into liquidation. He believes this was theft because I took him on as a consultant he was entitled to his businesses and assets back (we were friends) unfortunately it didn't transpire and I terminated his services, things got very bitter after that and it never went to court and there is no court case pending. I resigned as a director when he deceitfully got a share back in each company. I do not have to give him any information in relation to the time I was a director, all correspondence through solicitors has now ended and file has been closed with my solicitor."*

b. That she was untruthful at the hearing on 29 March because she told the Tribunal on that day that she had called the Royal Bank of Scotland in relation to a matter that had come up in the course of the hearing and that she was told the relevant person (Mr Powell) would be contacted and asked to call her back. In fact, say the respondent, Mr Powell had not been employed by RBS for a year.

c. That the respondent had warned the claimant that they would make a costs application against her – and they referred to the final paragraph of the grounds of resistance document, attached to the response form.

10. The respondent refers to paragraphs 15-17 of the judgment particularly in support of the first of these grounds and also notes the Judges findings that the claimant had acted outside her powers when setting herself an annual salary of £30,000.

11. In response to my question about paragraphs 26 a and b – and whether the claimant had created payslips and paid herself holidays and salary for 1-17 May 2018, the respondent noted that she had created payslips but not made payments.

12. Again, in response to my question, Mr Ince noted that there were no other proceedings between the parties or between Mr Ince himself and the claimant. He explained that proceedings had been contemplated but he/the respondent simply could not afford the costs of taking legal action in relation to the wider dispute.

13. Mr Ince, on behalf of the respondent also noted that the claimant's actions had been upsetting including allegations she made during the proceedings that he was a "bad boss" and a "bully."

Claimant's Submissions

14. The claimant disputed that she had been untruthful at the final hearing; that they went through everything with Judge Ryan and he made clear that he was not required to determine lots of things that were of wider dispute between the parties.

15. The claimant disputed everything that Mr Ince told me in relation to the shareholdings. She then provided her own version of events particularly around October 2017.

16. As for calling RBS- she had done so on the day of the final hearing and had informed the judge accurately about the response she received. The claimant provided a telephone record to indicate that the call had indeed been made.

17. The claimant and Mr Ince had worked together for about 13 years. She also told me that she had put in an additional £5000 of her own money in order to ensure employees were paid for May 2018. I informed the claimant that I would not consider this at this stage. It was something the claimant could have considered bringing up at the final hearing in March 2018 but had not.

18. Although she had issued payslips for May 2018, she had only done so when she knew that she was leaving because she was concerned that no one else would be able to do this and therefore staff would not be paid. The payslips included one for herself, but no payment.

The Law

19. Unlike the general procedure in Civil Courts, costs do not "follow the event" in Employment Tribunals. Traditionally, Employment Tribunals have allowed employees to challenge the fairness of dismissals (or other matters within the jurisdiction of Employment Tribunals – such as in this case) without a threat of costs in the event that a claim is unsuccessful and also employers to respond to claims, without a threat as to costs in the event that a claimant is successful.

20. The Rules provide Tribunals with a power to award costs in the circumstances set out in those Rules.

21. The Rules which are relevant to the respondent's costs application state as follows:

> "*76. <u>When a Costs Order or Preparation Time Order may or shall be made</u>*
>
> *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 has no reasonable prospect of success….*

……

77. *Procedure*

A party may apply for a Costs Order or a Preparation Time Order at any stage up to 28 days after the date on which the Judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.

78. The amount of a Costs Order

(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 a 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."

22. In relation to an application under rule 76(1)(b) (no reasonable prospect of success), this test should be considered on the basis of the information that was known or reasonably available at the start of proceedings (see paragraph 67 of the Judgment in Radia v Jefferies International Limited [UKEAT/007/18/JOJ] ("Radia").

> *"Where the Tribunal is considering a costs application at the end of, or after, a trial it has to decide whether the claims 'had' no reasonable prospect of success judged on the basis of the information that was known or reasonably available at the start, and considering how at that earlier point the prospects of success in a trial that was yet to take place would have looked. But the Tribunal is making that decision at a later point in time, when it has much more information and evidence available to it, following the trial having in fact taken place. As long as it maintains its focus on the question of how things would have looked at the time when the claim began, it may and should take account of any information it has gained and evidence it has seen by virtue of having heard the case, that may properly cast light back on that question. But it should not have regard to information or evidence which would not have been available at that earlier time."*

23. The fact that there were factual disputes which could only be resolved by hearing evidence does not necessarily mean that a Tribunal cannot properly conclude that a claim had no reasonable prospects from the outset, as that depends

on what the party knew or ought to have known were the true facts (paragraph 69 of Radia).

24. We also note the comments of the EAT the case of AQ Limited v. Mr J A Holden (UKEAT/0021/12/CEA) in relation to costs applications and unreasonable conduct:-

> *"a Tribunal cannot and should not judge a litigant in person by the standards of a professional representative. Lay people are entitled to represent themselves in Tribunals; and since legal aid is not available and they will not usually recover costs if they are successful, it is inevitable that many lay people will represent themselves. Justice requires that Tribunals do not apply professional standards to lay people who may be involved in legal proceedings for the only time in their life. As Mr Davies submitted lay people are likely to lack the objectivity and knowledge of law and practice brought by a professional adviser. Tribunals must bear this in mind when assessing the threshold tests in* [what is now Rule 76(a)].
>
> *Further even if the threshold tests for an order are met, the tribunal has discretion whether to make an order. This discretion will be exercised having regard to all the circumstances. It is not irrelevant that a lay person may have brought proceedings with little or no access to specialist help and advice."*

25. Where a party seeking costs makes out one or more of the grounds for costs to be awarded, then the Tribunal must consider whether to award costs. This consideration requires the Tribunal to exercise a discretion. There is no finite list of matters that Tribunals must take into account when exercising this discretion, and the relevant importance of various factors will depend on the particular circumstances of the case. In the case of Barnsley MBC v. Yerrakalva [2011] EWCA Civ 1255 the Court of Appeal provided some guidance to Tribunals when considering costs applications:-.

> *"On matters of discretion an earlier case only stands as authority for what are or what are not the principles governing the discretion and serving only as a broad steer on the factors covered by the paramount principle of relevance. A costs decision in one case will not in most cases predetermine the outcome of a costs application in another case: the facts of the cases will be different as will be the interaction of the relevant factors with one another and the varying weight to be attached to them."*

Analysis and Conclusion

26. In this section I set out my conclusions in relation to respondent's application for costs.

Being untruthful to the Tribunal – RBS

27. Deliberately misleading the tribunal would be conduct falling with Rule 76(1)(a).

28. On the basis of the evidence I have (including the claimant's response and a copy of her own telephone record) it is clear that she did make contact with RBS at 11.38 on the day of the final hearing. The claimant then informed the Tribunal that she had been unable to speak with the relevant person, Mr Powell and the operator on the RBS helpline would contact him.

29. It now appears clear that Mr Powell had left the employment of RBS some months earlier – another employee of RBS has informed the respondent of this. However, this does not assist in understanding what the claimant had been told over the telephone on the morning of the final hearing.

30. It is clear that a call was made by the claimant to RBS on the morning of the final hearing. The claimant's explanation, including her account of what she was told, is a plausible one and on balance I accept it.

<u>The claimant misled the Tribunal in her written statements about the shareholding.</u>

31. It is clear from the judgment that Employment Judge Ryan considered the evidence in front of him and decided that the claimant did not have the authority within the company in order to set or her salary at £30,000 or to have increased it from £25,000 to £30,000.

32. I have to decide whether, in bringing the claim, the claimant acted unreasonably and/or whether there were no reasonable prospects of the claim succeeding. In reaching my decision, I have considered the following:-

a. just because a party has been unsuccessful in their claim does not mean that claim had no reasonable prospects of success and/or that the party bringing the claim was unreasonable.

b. It is clear that there has been (and potentially remains) significant dispute between the parties and the shareholders of the respondent. I observe the dispute is personal as well as commercial and of course has ended 13 years during which the claimant and Mr Ince have worked together. It is most unlikely that the parties will have considered and dealt with the issues in this claim objectively and dispassionately.

c. It is very disappointing that such basic matters as pay and holidays were not recorded in a written agreement between the parties such as a contract of employment. Although the salary amount of £25,000 was stated in emails of 11/12 October 2017 (with various other terms including in relation to personal loans the claimant was making to the respondent) no standard contract of employment was issued and agreed in writing between the parties. It was incumbent on the respondent employer to provide that and it did not do so. Such a document could have reduced considerably the potential for dispute, the costs incurred by the parties as well as the Tribunal's time and resources taken up in this dispute;

d. The claimant has dealt with these proceedings in person and it would not be appropriate that, when deciding whether or not she has acted

unreasonably, that I should apply the same standards to her as I would apply to a professionally represented party.

33. Having considered all of these factors, I have decided that :-

a. On the basis of information that was known or reasonably available at the start, including the absence of effective communication/written agreement between the parties, the claimant's status as director, the potential dispute about shareholdings and intended shareholdings, there were some reasonable prospects that the claim would succeed.

b. The claimant was not unreasonable in bringing her claim

Factors relevant to the exercise of discretion

34. Having reached this conclusion that the threshold for considering costs has not been crossed, is not necessary for me to consider whether a costs order should be made. However, I do note that:-

a. The claimant has not provided any documentary evidence in relation to her income and outgoings. Based on the very limited information provided in relation to these and her ability to pay, I would not have taken any account of the claimant's ability to pay when exercising my discretion including in relation to the amounts of costs payable;

b. The claimant was provided with some warning that a costs application would be made – see paragraph 31. I would have taken account of this.

c. The respondent provided 2 invoices from their solicitors. One invoice was headed "*Gaynor Hancock….Professional Charges…. Employment Advice.2* and was for £716.50 plus VAT. The other was headed *"Gaynor Hancock …. Professional Charges …….Client Due Diligence Investigation"* and was for £870 plus VAT. Neither invoice included any further detail of the work done and I would have expected and required this detail including a clear understanding that all fees claimed related to work done in handling the employment tribunal proceedings rather than for example, other potential disputes with the claimant.

Employment Judge Leach

Date: 28 September 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON
6 October 2020

FOR THE TRIBUNAL OFFICE