



EMPLOYMENT TRIBUNALS

BETWEEN
AND

Claimant
Mr S Barton

Respondent
GT Access

JUDGMENT OF THE EMPLOYMENT TRIBUNAL (COSTS APPLICATION)

HELD AT Birmingham ON 21 October 2020

EMPLOYMENT JUDGE GASKELL

Representation

For the Claimant: No Attendance (Paper Hearing)
For Respondent: No Attendance (Paper Hearing)

JUDGMENT

The judgment of the tribunal is that:

Pursuant to Rules 74 – 77, 79 - 82 and 84 of the Employment Tribunals Rules of Procedure 2013, the respondent's application for a Preparation Time Order following the claimant's withdrawal of these proceedings on 22 October 2019 is refused.

REASONS

Introduction

1 The claimant in this case is Mr Simon Barton who was employed by the respondent, GT Access, as an Engineer from 26 January 2016 until 9 May 2019 when he resigned. When the claimant received his final pay there was a deduction shown in the sum of £842.26 which was unexplained and described simply as "*miscellaneous*". It was only after the claimant made contact with ACAS that he was informed that the deduction was in respect of the repairs to damage to the respondents van for which the claimant was held responsible.

2 By a claim form presented to the tribunal on 18 June 2019, the claimant claimed that the deduction was unlawful. In its response to the claim, the respondent asserted that it had a contractual right to make the deduction in respect of repairs necessary to the vehicle. It was only at a later date that the claimant was provided with documentation quantifying the repair costs.

3 The case was listed for Hearing on 23 October 2019. The respondent's representative, Ms Sarah Hudson - a Legal Consultant (lay representative) together with a colleague and the respondent's witness attended the tribunal on that day. On arrival, Ms Hudson was informed that the claimant had withdrawn his claim by email submitted to the tribunal the previous day. The claimant had indicated in his email that he would not be attending the Hearing. The email had not been forwarded to the respondent either by the tribunal staff or by the claimant. In fact the claimant's withdrawal was not processed by the tribunal for a further week - the Judgement on Withdrawal being signed by Employment Judge Meichen on 31 October 2019.

4 Consequent upon this, the respondent now makes application for a Preparation Time Order in respect of the time and expenses involved in attending the Hearing. Cost which could have been avoided if the claimant had withdrawn his claim earlier and/or notified the respondent of his withdrawal. In support of the application the respondent also maintains that the claim was vexatious; and that the claimant never had any intention of pursuing it to a Final Hearing.

5 The amount of the preparation time order claimed is £450 being the time spent by Ms Hudson her colleague and the witness in travelling to and attending the hearing centre on 23 October 2019. No claim is been made in respect of time spent preparing for the case in advance of that date and no claim for out-of-pocket expenses. Further in the application, Ms Hudson indicates that, as an alternative to a Preparation Time Order, the respondent applies for a Wasted Costs Order.

6 Both parties have consented to the application being considered on paper and neither party therefore attended the hearing today. I have considered the entirety of the tribunal file including the claim form and the response form and written representations made by both parties on the question of costs.

The Law on Costs

7 The Employment Tribunals Rules of Procedure 2013

Rule 74: Definitions

(1) "Costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing). In Scotland all references to costs (except when used in the expression "wasted costs") shall be read as references to expenses.

(2) "Legally represented" means having the assistance of a person (including where that person is the receiving party's employee) who—

- (a) has a right of audience in relation to any class of proceedings in any part of the Senior Courts of England and Wales, or all proceedings in county courts or magistrates' courts;
- (3) "Represented by a lay representative" means having the assistance of a person who does not satisfy any of the criteria in paragraph (2) and who charges for representation in the proceedings.

Rule 75: Costs orders and preparation time orders

- (1) A costs order is an order that a party ("the paying party") make a payment to—
 - (a) another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative;
 - (b) the receiving party in respect of a Tribunal fee paid by the receiving party; or
 - (c) another party or a witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual's attendance as a witness at the Tribunal.
- (2) A preparation time order is an order that a party ("the paying party") make a payment to another party ("the receiving party") in respect of the receiving party's preparation time while not legally represented. "Preparation time" means time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at any final hearing.
- (3) A costs order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings. A Tribunal may, if it wishes, decide in the course of the proceedings that a party is entitled to one order or the other but defer until a later stage in the proceedings deciding which kind of order to make.

Rule 76: When a costs order or a preparation time order may or shall be made

- (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 or where a hearing has been postponed or adjourned on the application of a party.
- (3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if—
- (a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and
 - (b) the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment.
- (4) A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer's contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party.
- (5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing.

Rule 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.

Rule 79: The amount of a preparation time order

- (1) The Tribunal shall decide the number of hours in respect of which a preparation time order should be made, on the basis of—
- (a) information provided by the receiving party on time spent falling within rule 75(2) above; and
 - (b) the Tribunal's own assessment of what it considers to be a reasonable and proportionate amount of time to spend on such preparatory work, with

reference to such matters as the complexity of the proceedings, the number of witnesses and documentation required.

- (2) The hourly rate is £33 and increases on 6 April each year by £1.
- (3) The amount of a preparation time order shall be the product of the number of hours assessed under paragraph (1) and the rate under paragraph (2).

Rule 80: When a wasted costs order may be made

- (1) A Tribunal may make a wasted costs order against a representative in favour of any party (“the receiving party”) where that party has incurred costs—
 - (a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative; or
 - (b) which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay.

Costs so incurred are described as “wasted costs”.

- (2) “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. A person acting on a contingency or conditional fee arrangement is considered to be acting in pursuit of profit.
- (3) A wasted costs order may be made in favour of a party whether or not that party is legally represented and may also be made in favour of a representative's own client. A wasted costs order may not be made against a representative where that representative is representing a party in his or her capacity as an employee of that party.

Rule 81: Effect of a wasted costs order

A wasted costs order may order the representative to pay the whole or part of any wasted costs of the receiving party, or disallow any wasted costs otherwise payable to the representative, including an order that the representative repay to its client any costs which have already been paid. The amount to be paid, disallowed or repaid must in each case be specified in the order.

Rule 82: Procedure

A wasted costs order may be made by the Tribunal on its own initiative or on the application of any party. A party may apply for a wasted costs order at any stage up to 28 days after the date on which the judgment finally determining the proceedings as against that party was sent to the parties. No such order shall be made unless the representative has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application or proposal. The Tribunal shall inform the representative's client in writing of any proceedings under this rule and of any order made against the representative.

Rule 84: Ability to pay

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.

8 DECIDED CASES: COSTS AND PREPARATION TIME ORDERS

Beynon & others –v- Scadden & others [1999] IRLR 700 (EAT)

Gee –v- Shell UK Ltd. [2003] IRLR 82 (CA)

An award of costs in the employment tribunal is the exception rather than the rule. Costs are compensatory not punitive.

Salinas –v- Bear Stearns International Holdings Inc. & another [2005] ICR 1117 (EAT)

The reason why costs orders are not made in the vast majority of employment tribunal cases is that the high hurdle has to be overcome for a costs order to be made has not, in fact, been overcome.

Beynon & others –v- Scadden & others [1999] IRLR 700 (EAT)

Monaghan –v- Close Thornton Solicitors UKEAT/0003/01

Beat –v- Devon County Council & another UKEAT/0534/05

Lewald-Jeziarska –v- Solicitors in Law Ltd. & others UKEAT/0165/06

The tribunal must not move straight from a finding that conduct was vexatious, abusive, disruptive, unreasonable or misconceived to the making of a costs order without first considering whether it should exercise its discretion, to do so.

Yerrakalva –v- Barnsley MBC UKEAT/0231/10

There is no general rule that withdrawing a claim is tantamount to an admission that it is misconceived. There is no requirement for a direct causative link between the unreasonable conduct and the costs incurred but there should be some connection.

Dyer –v- Secretary of State for Employment UKEAT/0183/83

Whether conduct is unreasonable is a matter of fact for the tribunal to decide. Unreasonableness has its ordinary meaning.

McPherson –v- BNP Paribas [2004] ICR 1398

The late withdrawal of proceedings is not of itself evidence of unreasonable conduct. The claimant's conduct overall must be considered. But a late withdrawal is a factor in a case where the claimant might reasonably have been expected to withdraw earlier.

Keskar –v- Governors of All Saints Church of England School [1991] ICR 493

A tribunal is entitled to take account of whether a claimant ought to have known his claim had no reasonable prospect of success.

Kaur –v- John Brierley Ltd. UKEAT/0783/00

An award of costs against the claimant was upheld in a case where the claimant had failed, despite several requests, to properly set out her claim. She proceeded with the claim only to withdraw at the commencement of the trial.

Vaughan –v- Lewisham LBC (No 2) [2013] IRLR 713 (EAT)

There is no requirement for the receiving party to have written a costs warning letter. It is not wrong in principle for an employment tribunal to make an award of costs against a party which that party is unable to pay immediately in circumstances where the tribunal considers that the party may be able to meet the liability in due course.

DISCUSSION & CONCLUSIONS

9 Firstly, there is nothing in the papers available to me from which I could properly conclude that the claim was vexatious. Indeed, the respondents own conduct cannot be immune from criticism: the deduction was made without explanation; in the ordinary course of business one would expect notice of the intention to make the deduction to have been given; and for this to be supported by a full explanation and appropriate documentation. In my judgement therefore, the claimant was entirely justified in embarking on the proceedings.

10 The claimant is not to be penalised for withdrawing from the proceedings if he realises that his claim is not well founded and should not be in a worse position for having done this on the day before the hearing that he would have been if he'd done it at the hearing - or indeed if he had pursued the claim to final judgement and lost.

11 The one element of the claimant's conduct for which he can be criticised is his failure to copy the respondent into his email withdrawing the claim. The respondent would then have been aware of the withdrawal and would not have

attended the following day. The claimant's failure to copy the respondent in is itself a breach of Rule 92 of the Employment Tribunals Rules of Procedure 2013. If the claimant had complied with the Rule the respondent would have been notified of the withdrawal and would not have attended.

12 On the basis of the claimant's non-compliance it is open to me to find that he has conducted the proceedings unreasonably. In those circumstances, I should consider the making of a Preparation Time Order.

13 In this case however, the application for a Preparation Time Order is itself fundamentally misconceived. The application is in respect of time spent in travelling to and attending the Hearing Centre for the Final Hearing. This time is expressly excluded from a Preparation Time Order under the provisions of Rule 75(2). Accordingly, there is no jurisdiction to make the Order which is sought in this case.

14 The alternative claim for a Wasted Costs Order is even more misconceived. A Wasted Costs Order can only be made against the claimant's Legal Representative. The claimant in this case does not have a Legal Representative and accordingly a Wasted Costs Order simply cannot be made.

15 Accordingly, and for these reasons, the application is refused.

Employment Judge Gaskell
21 October 2020