



EMPLOYMENT TRIBUNALS

Claimant: Mr Roe

Respondent: Reds True Barbecue Limited

Heard by CVP at: Newcastle

On: 20 November 2020

Before: Employment Judge O'Dempsey

Representation

Claimant: (no appearance)

Respondent: Mr Mellor (director of the respondent)

JUDGMENT

1. The Claimant's claims for unfair dismissal, breach of contract, redundancy payment and unpaid holiday pay are dismissed in their entirety;
2. The Respondent's application for costs/preparation time is dismissed.

REASONS

1. Oral reasons were given at the hearing, but Mr Mellor, for the respondent, asked me to provide written reasons. This was a remote hearing to which the parties consented or did not object. The form of remote hearing was CVP. A face to face hearing was not held because it was not practicable to do so and no one requested a face to face hearing or because it was not practicable and all issues could be determined in the current format of hearing.

2. The claimant's claims for unfair dismissal, notice pay, unpaid holiday pay are contained in the claim form which was presented to the tribunal on 21 February 2020. The claim has been case managed previously including a Case Management hearing on 2 July 2020.

3. Since that hearing before Employment Judge Sweeney, at which the claimant did attend by telephone, the claimant appears to have had no contact with either the tribunal or the respondent.

4. Under the terms of rule 47 I caused enquiries to be made concerning the whereabouts of the claimant. My clerk was unable to establish contact with the

claimant. Having given the claimant until 10.15 this morning to attend, I decided to consider whether to dismiss the claim under rule 47.

5. I considered all the information available to me concerning the reasons for the claimant's absence. There was no explanation.

6. In those circumstances I dismissed the claim. All of the claims therefore are dismissed.

7. Mr Mellor who is a director of the respondent then made an application for the respondent's costs/preparation time. The essence of his application was that the claim stood no reasonable prospect of success and that the respondent had made an open offer of settlement in August 2020 so that the subsequent conduct of the case was unreasonable. He said that it was a vexatious claim

8. The relevant principles are set out in rules 74-84 of the Employment Tribunal Rules.

9. I considered the contents of page 40 of the bundle. This was an email which was sent to the claimant's email address on 31 July 2020 at 16:21. It contains the reply of the respondent to the orders the tribunal for further particulars. At the end of that document the respondent explains that it considered that the claim had no prospect of success and that if this was shown, the respondent would ask the tribunal to award costs on an indemnity basis. The document requested the claimant to withdraw the application in writing via ACAS for the employment tribunal and asked the claimant formally to withdraw the claim. The claimant was given a period of approximately seven days (until Wednesday, 5 August 2020) to accept that offer. After that time it was clear that the respondent would seek costs. I consider that the claimant had very fair notice of this application.

10. The document also included an offer of settlement which is made on an open basis. The explained that the respondent's group was under pressure as a result of the COVID pandemic. The offer made it clear that notwithstanding that the respondent believes that no legal claim existed, Mr Mellor was sorry that the matter had been handled in the way it was by management. The document went on to say "as a gesture and an apology I would be happy to offer you reemployment at any of our continuing REDS sites (Leeds/Manchester/Nottingham) or at any of my wider group sites in Newcastle (Digital/think tank/Tup-Tup/City Vaults/Bier Keller) they are clubs so not currently allowed to trade but when they are permitted to open I would be more than happy to support any application for employment."

11. Mr Mellor explained to me the basis on which he says that there was no reasonable prospect of success. There had been a gap of approximately seven weeks between the claimant's employment by the first company under employment by the respondent. He argues on that basis and the fact of the insolvency issues surrounding the giving up of the lease, that the Transfer of Undertakings Regulations could not apply.

12. He claimed that the claimant must have known that his claim stood no reasonable prospect of success and that he did not have the requisite continuous employment to be entitled to the rights he said had been breached.

13. Mr Mellor also sought to argue that the claimant had made a fraudulent claim in respect of the amount of his wages in the claim form. This was because the amount was expressed to be something in the order of three times the amount that an inspection of the real-time information given to the HMRC revealed.

14. I considered Mr Mellor's submissions. The only one of these with which I agree is that the conduct of these proceedings has been unreasonable. The claimant after the Case Management hearing on 2 July 2020 has not engaged at all with the orders of the tribunal, and has not corresponded with the respondent. The respondent made an open offer of settlement including an offer of future written employment. Mr Miller explained to me that if the claimant wished to continue working in his previous role this would have involved going to one of the other cities mentioned above. If he had wanted to have employment in Newcastle it would have been in a slightly different capacity. It was in any event a genuine offer in my view.

15. The claimant has not been able, and has not attempted, to prove any of the necessary elements to give the tribunal jurisdiction.

16. In all those circumstances it seems to me that the conduct of these proceedings crosses the threshold for an award of costs or preparation time under rule 76 by being unreasonable.

17. However that is not the end of the matter. I have to consider whether, in my discretion, to award costs. I found this more difficult to decide as it was clear to me that the claimant had received fair warning of this application and had chosen not to attend the hearing to defend it.

18. I have considered the information that was before me concerning the claimants means. I have relied on the analysis that Mr Mellor put before me and to which he drew my attention. This was the real-time information provided to the HMRC. This reveals a very low gross pay of, on average (based on a 20 week analysis), £291.09 p. The net amount to pay would accordingly be lower than this.

19. Although, therefore, the behaviour of this claimant constitutes unreasonable conduct of the proceedings, particularly in the light of the offer made by the respondent, I do not consider it appropriate as a matter of discretion to award costs against him.

20. Clearly I did not hear full argument on the question of whether the claim had a reasonable prospect of success. I do not base my decision on that argument. This is not to say that it is a bad argument or that it is a good argument, simply that it is not one which could be determined without hearing evidence on the point and having that evidence tested in cross examination.

21. Mr Mellor told me that there are other claims of a similar nature. I make it clear that my decision on this case, is dependent solely on the factors to which I have made reference in this case. It should not be seen as indication of the prospects of success of any other claim where the evidential requirements on the claimant may or may not be made out, and in which full legal argument will be heard. It should also not be seen as an indication of a general principle that refusal of the respondent's open offer will lead to a conclusion of unreasonable

conduct of proceedings in other cases. Each case must be determined on its own particular facts.

22. Nonetheless, in this particular case, the decision of the tribunal is to dismiss the application for costs as matter of the exercise of its discretion.

Authorised by Employment Judge **O'Dempsey**

Date 20 November 2020