



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr S Eckersley

**Respondent** Taylors Confectioners Limited

**HELD AT:** Manchester

**ON:** 3 February 2021 (in chambers)

**BEFORE:** Employment Judge Batten

**REPRESENTATION:**

For the Claimant: no attendance

For the Respondent: no attendance

## JUDGMENT ON A COSTS APPLICATION

The respondent's application for costs is refused.

### REASONS

#### Background

1. A preliminary hearing in this case took place on 26 October 2020. By a Judgment given orally at the hearing and sent to the parties on 6 November 2020, the Tribunal determined that the claimant's continuous service commenced on 1 November 2014. Following oral judgment, the parties jointly asked the Tribunal to implement a stay of proceedings, for 28 days, to allow time for terms of settlement agreed between the parties to be implemented.
2. On 19 November 2020, the respondent made an application for costs. The claimant submitted a response to the respondent's application on 7 January 2021, resisting the application.
3. Neither party has requested that the costs application be dealt with at a hearing. The Tribunal has therefore dealt with the respondent's application by considering the parties' written submissions and the Tribunal case file. The

Tribunal has taken the contents of the application and the response into account in reaching its decision.

Issues to be determined

4. The issues to be determined by the Tribunal in relation to the costs application were: -
  - 4.1 Whether the claimant had acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing of the proceedings and the way that the proceedings have been conducted;
  - 4.2 Whether the complaints had no reasonable prospects of success;
  - 4.3 Whether in all the circumstances it would be appropriate to make an order for costs against the claimant; and
  - 4.4 If so, what amount of costs should be awarded.

The respondent's application

5. The respondent submitted that the claimant had acted unreasonably and vexatiously in the bringing of the proceedings and in the way that the proceedings had been conducted. The respondent contended that the claim, based on length of service, had no reasonable prospects of success in light of the evidence presented at the hearing and the Tribunal's findings as to the claimant's length of service.
6. The respondent contended that the claimant had withheld evidence from his solicitor which, if known to those solicitors, would have dissuaded them from representing him and that the claimant had pursued his claim in order to cause as much harassment, financially and mentally, to the respondent as he could. The respondent said that it had no option but to incur the cost of legal representation to defend itself during what it described as a tumultuous year dealing with the pandemic.
7. The respondent sought payment of the sum of £4,200.00 including VAT which sum is within the limit of £20,000 under rule 78(1)(a) of the Employment Tribunal rules.

The claimant's response to the application

8. The claimant resisted the respondent's application and submits that none of the conditions in the Tribunal rules have been met. The claimant contends that the claim was pursued on reasonable legal grounds and that the respondent's application for costs raises arguments about the merits of the substantive claim, when the issue of length of continuous service was in dispute and needed to be decided first in any event. The claimant points out

that the respondent had agreed to settle an element of the claim in advance of the preliminary hearing to establish length of service.

9. In addition, the claimant contends that the fact that the Tribunal found for the respondent at the preliminary hearing, does not give grounds for a costs application, that the allegations that the claimant's evidence was dubious did not form part of the respondent's submissions at the hearing and that the fact that the claimant had repaid monies to the respondent in the past was not relevant to the issue of continuous service.

The applicable law

10. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, schedule 1, provides:

**76. When a costs order or 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 (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 prospects of success.

(c) ...

.....

**77. Procedure**

*A party may apply for a costs 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;

...

**84 Ability to pay**

*In deciding whether to make a costs ... order, and if so in what amount, the tribunal may have regard to the paying party's ... ability to pay.*

11. Costs orders are the exception rather than the rule – Yerrakalva v Barnsley MBC [2012] ICR 420
12. The Tribunal's power to award costs is discretionary. The fact that a party has succeeded does not prevent the Tribunal from making an order of costs against that party based on unreasonable conduct. The Tribunal must first consider whether the party's conduct falls within rule 76 and, if so, whether it would be appropriate to exercise its discretion to award costs.
13. An award of costs is to be compensatory and not punitive and so there should be an examination of what loss has been incurred by the receiving party.
14. In determining whether to make an order in respect of unreasonable conduct, the Tribunal should look at the totality of the circumstances of the case, taking into account the nature, gravity and effect of a party's unreasonable conduct: McPherson v BNP Paribas (London Branch) [2004] ICR 1398, CA.
15. Also, in McPherson, Mummery LJ confirmed that the Tribunal rules do not impose any requirement that the costs must be caused by, or proportionate to, the unreasonable conduct – it is not necessary to establish a direct causal link. The Tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of its discretion.
16. 'Vexatious' was defined by Lord Bingham in Attorney General v Barker [2000] 1 FLR 759 and cited with approval by the Court of Appeal in Scott v Russell [2013] EWCA Civ 1432 relation to costs awarded by a tribunal: "*the hallmark of a vexatious proceeding is ... that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant ...*"

### Conclusions

17. The Tribunal has determined the respondent's application in the following way.
18. Firstly, the Tribunal considered whether the claimant had acted unreasonably and/or vexatiously in the bringing of the proceedings or in the way that the proceedings had been conducted. The Tribunal took account of the complaints brought and pursued. By the date of the preliminary hearing, the claim consisted only of unfair dismissal and notice pay, as all other money claims had been settled between the parties. In addition, on 20 October 2020, the respondent's solicitor had reported to the Tribunal that the unfair dismissal and notice pay claims had been resolved and that the only issue remaining in the case was the question of the start date of the claimant's continuous employment. The Tribunal's determination of that issue was requested,

resulting in the preliminary hearing. The Tribunal did not consider this to be unreasonable or vexatious conduct.

19. The Tribunal considered the nature of the preliminary issue. There was a significant dispute between the parties on the facts relating to the claimant's length of service: the claimant alleged that he had been continuously employed by the respondent from 2002; the respondent asserted that there had been a break in service in 2014. At a case management preliminary hearing on 9 December 2019, before Employment Judge Ross, it had been agreed that the issue of the length of the claimant's continuous service should be tried first.
20. At the preliminary hearing, the claimant and his witness were subject to cross-examination on a number of matters surrounding the preliminary issue and events in 2014. The Tribunal also heard evidence from the respondent's 2 witnesses. The Tribunal reached its judgment on the evidence before it, including a bundle of 50 pages of documents, and ultimately found against the claimant.
21. The respondent also contended that the claimant had brought complaints which had no reasonable prospects of success. However, at no point in the course of proceedings did the respondent raise an issue about the merits of the substantive claim nor did the respondent apply to have any of the complaints struck out. Indeed, the complaints have been largely resolved without the determination of the Tribunal.
22. Costs are the exception rather than the rule. In the circumstances, the Tribunal did not consider that the claimant's conduct in pursuing his complaints or the issue of his length of service was so unreasonable as to justify an award of costs against him.
23. Ultimately the Tribunal found against the claimant on the preliminary issue but that is not a basis for a costs order – costs do not follow the event in the Employment Tribunal.
24. In light of all the above, the Tribunal considered that it would not be appropriate to make an award of costs in this case. Therefore, the respondent's application shall be refused.

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Employment Judge Batten  
4 February 2021

JUDGMENT SENT TO THE PARTIES ON  
5 February 2021

FOR THE TRIBUNAL OFFICE