



EMPLOYMENT TRIBUNALS

Claimant:

Mr K Okot-Ojok

v

Respondent:

Polycom (United Kingdom)
Limited (in voluntary liquidation)

Before:

Employment Judge Hawksworth (sitting alone)

JUDGMENT ON COSTS

The respondent's application for an award of costs is refused.

REASONS

The claimant's claim and liability hearing

1. The claimant's complaint of unauthorised deduction of wages in respect of commission was decided by me in a judgment dated 14 April 2020 and sent to the parties on 22 April 2020. The claimant's claim was dismissed.

The respondent's application for costs

2. On 19 May 2020 the respondent's solicitors made a written application for costs to be awarded against the claimant. A detailed schedule of costs was attached.
3. The respondent seeks a costs order under rule 76(1)(a) and (b) and/or rule 76(2) of the Employment Tribunal Rules 2013. It says that the claimant acted unreasonably in bringing and pursuing his claim, that his claim had no reasonable prospect of success and/or that he was in breach of an order of the tribunal.
4. The grounds relied on by the respondent are:
 - 4.1. the documents governing the payment of commission notified to the claimant and the additional explanations it provided to the claimant meant that the operation of its sales compensation plan was sufficiently clear to enable the claimant to understand that his claim was without merit;
 - 4.2. the respondent made efforts to explain the commission calculation process to the claimant, including providing a detailed breakdown of

the calculations in a spreadsheet attached to an email on 24 January 2019 and in its grounds of resistance presented on 18 April 2019;

- 4.3. the respondent sent 'without prejudice save as to costs' letters on 25 September 2019 and 13 January 2020 explaining the calculations and giving costs warnings but received no response from the claimant;
- 4.4. the tribunal's notice of claim dated 21 March 2019 included case management orders, and the claimant did not comply with the order to set out in writing within four weeks what remedy the tribunal was being asked to award and include any supporting evidence;
- 4.5. in its letters of 25 September 2019 and 13 January 2020, the respondent reminded the claimant of the requirement to set out what remedy he was seeking, but the claimant failed to comply with the order by the time of the hearing.

The claimant's response

5. On my direction, the tribunal sent the respondent's application to the claimant on 23 August 2020 and invited the claimant to reply by 21 September 2020. No response has been received from the claimant.

The Law

6. The power to award costs and to make preparation time orders is set out in the Employment Tribunal Rules of Procedure 2013. Unlike in civil litigation where the successful party can expect to recover some or all of their costs from the unsuccessful party, in the employment tribunal jurisdiction the general position is that parties bear their own costs, unless one of the grounds for making a costs or preparation time order is made out and the tribunal decides to exercise its discretion to make an award of costs. Orders for costs in the employment tribunal remain the exception rather than the rule.

7. Under rule 76(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 the way that the proceedings (or part) have been conducted; or

(b) any claim or response had no reasonable prospect of success.”

8. Rules 76(2) provides:

“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.”

9. Rules 74 to 78 provide for a two-stage test to be applied by tribunals in considering costs applications under Rule 76. The first stage is for the

tribunal to consider whether the ground or grounds for costs put forward by the party making the application are made out. If they are, the second stage is for the tribunal to consider whether to exercise its discretion to make an award of costs, and if so, for how much.

10. In determining whether to make an order under rule 76(1)(a) on the basis of unreasonable conduct, a tribunal should take into account the 'nature, gravity and effect' of a party's unreasonable conduct (*McPherson v BNP Paribas (London Branch)* 2004 ICR 1398, CA). However, it is not necessary to analyse each of these aspects separately, and the tribunal should not lose sight of the totality of the circumstances (*Yerrakalva v Barnsley Metropolitan Borough Council* 2012 ICR 420, CA). At paragraph 41 of *Yerrakalva*, Mummery LJ emphasised that:

"The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it has."

11. When assessing whether the 'no reasonable prospect of success' ground in rule 76(1)(b) is made out, the test is not whether a party had a genuine belief in the prospects of success. The tribunal is required to assess objectively whether at the time it was brought, the claim had no reasonable prospect of success, judged on the basis of the information known or reasonably available to the claimant, and what view the claimant could reasonably have taken of the prospects of the claim in light of those facts (*Radia v Jefferies International Ltd* EAT 0007/18).
12. A tribunal may also make a costs order under rule 76(2) where a party has been in breach of an order of the tribunal. Unlike the grounds set out in rule 76(1) it is not mandatory for the tribunal to consider whether to make a costs order where this ground applies.
13. In costs applications, litigants in person may be judged less harshly than those who are professionally represented (*AQ Ltd v Holden* 2012 IRLR 648 EAT). Tribunals should not apply the standards of a professional legal adviser to lay people.

Conclusions

14. The respondent did not request a hearing for this application. The claimant has not made any representations about the application or how it should be decided. I have decided that it would be in accordance with the overriding objective for me to determine this costs application without a hearing. That would be in the interests of proportionality, and would avoid the parties incurring the further expense of attending another hearing.

First stage

15. The first stage is for me to consider whether there are grounds for an award of costs under rule 76(1) or (2).
16. The respondent's grounds for applying for costs under rule 76(1)(a) and (b) are both essentially put on the basis that the claim was without merit and for this reason it was unreasonable of the claimant to have brought and conducted his claim. For the reasons set out below, I have concluded that the claimant's conduct in bringing proceedings and continuing them did not amount to unreasonable conduct.
17. I have taken into account the efforts the respondent made both before the claim was presented and during proceedings to explain its compensation scheme and its calculations to the claimant. However, as reflected in the findings of fact and conclusions in my judgment, the respondent's compensation scheme was not straightforward. It was contained in the claimant's contract of employment, in a 23 page compensation plan document and in a detailed appendix which recorded how the scheme applied in the claimant's case. A number of complex aspects of the scheme had to be analysed to understand whether the claimant had been correctly paid his commission, including the non-recoverable draw provisions, the advance payments and the reconciliation processes. The calculations were further complicated in the claimant's case by the overpayment which was made to him in the last month of his employment.
18. I have also taken into account the important factor that the claimant was a litigant in person.
19. Considering these circumstances, I have concluded that it was not outside the parameters of reasonableness for the claimant to consider that his commission had not been properly paid and to present and continue his claim. For the same reasons, I do not consider that it can be said that the claim had no reasonable prospect of success at the time it was presented. This was not a case where, looked at objectively, the claimant ought to have known, even without the benefit of legal representation, that the claim had no merit.
20. I have concluded that the grounds to make a costs order under rule 76(1)(a) and (b) are not made out.
21. I have next considered whether grounds for a costs order arise under rule 76(2) from the claimant's breach of the tribunal's order of 21 March 2019. I have concluded that this ground is made out, as the claimant did not comply with this order.

Second stage

22. Having reached this conclusion at the first stage, I go on to consider the second stage, that is whether I should exercise my discretion to award costs and if so what award I should make.

23. In considering whether I should award costs, I have taken into account the costs warnings that the claimant was given by the respondent. However, for the following reasons, I have decided that I should not exercise my discretion to make an award of costs:
- 23.1. orders for costs in the employment tribunal remain the exception rather than the rule;
 - 23.2. the order which was breached by the claimant was a standard order included in the notice of claim and was not an order made and explained to the claimant at a preliminary hearing;
 - 23.3. the claimant had included in section 8.2 of his ET1 claim form the calculations he had carried out and on which he based his claim that he had not been correctly paid his commission;
 - 23.4. as explained above, the respondent's scheme and the calculations required were complex; and
 - 23.5. the claimant is a litigant in person.
24. For these reasons the respondent's application for costs is refused.

Employment Judge Hawksworth

Date: 19 October 2020

Judgment and Reasons

Sent to the parties on: .22/10/2020

Jon Marlowe
For the Tribunal Office

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