



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr Sami

**v (1) NANOAVIONICS UK LIMITED
(2) NANOAVIONIKA UAB t/a
NANOAVIONIKA LLC
(3) AST & SCIENCE LLC**

Heard at: Watford

On: 19 February 2021

Before: Employment Judge Bartlett

Appearances

For the Claimant: decided on the papers

For the Respondent: decided on the papers

JUDGMENT

1. The claimant is ordered to pay Mr Abel Avellan (the fourth respondent) costs in the amount of £250.

REASONS

Background

1. It is useful to set out the background to the costs application:
 - 1.1 A preliminary hearing took place on 25 August 2020 and in written orders dated 26 August 2021 which was sent to the parties on 16 September 2020 I ordered:
 - 1.1.1 the consolidation of the two claims;
 - 1.1.2 refused the claimant's application for specific disclosure and further and better particulars;
 - 1.1.3 ordered the claimant's claim against the third respondent to be struck out;

- 1.1.4 ordered the claimant to pay £150 deposit order in respect of his claims against the second and fourth respondent;
- 1.1.5 the claimant did not pay the deposit orders and judgements striking out the claims against the second respondent was sent to the parties on 6 November 2020, against the third respondent on 15 October 2020 and the fourth respondent on 10 November 2020;
- 1.2 The fourth respondent was Mr A Avellan;
- 1.3 the respondent made a costs application dated 12 November 2020;
- 1.4 the claimant submitted a response dated 22 November 2020;
- 1.5 the respondent provided written clarification dated 30 December 2020;
- 1.6 the claimant responded to the respondent's letter on 3 January 2021;
- 1.7 I first had sight of these documents on 16 February 2021.

The Tribunal Rules relating to costs

2. The Employment Tribunal's Rules of Procedure 2013 as subsequently amended up to 8 October 2020 at rules 74 to 78 set out the principles and processes I must apply in relation to costs orders.
3. Paragraph 77 sets out "*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 judgement finally determine the proceedings in respect of that party were sent to the parties.*"
4. Paragraph 76 sets out:

When a costs order or a preparation time order may or shall be made

76.—(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.

The parties submissions

5. The respondent's application for costs can be briefly summarised as follows:

- 5.1 the claimant submitted two claims in the Employment Tribunal, the first claim dated 27 August 2019 (Claim 1) was submitted against the first, second and third respondents. The second claim dated 19 October 2019 (Claim 2) was submitted against the fourth respondent;
 - 5.2 the claimant acted unreasonably in bringing proceedings against the second, third and fourth respondents which were found to have had little or no reasonable prospects of success. The claimant's claims of discrimination and harassment are against the first respondent, the claimant's employer;
 - 5.3 the claimant's second claim was against the fourth respondent only and this should have been withdrawn following the claimant's receipt of the first, second and third respondents grounds of resistance to the first claim. Preparing the grounds of resistance in respect of the fourth respondent only incurred costs of £3368.75 excluding VAT;
 - 5.4 the claimant has not paid the deposit orders in respect of the second and fourth respondents and he should have withdrawn these claims prior to the preliminary hearing on 25 August 2020. The claimant had five months' notice of the preliminary hearing and the respondent incurred £11,812.50 exclusive of VAT in attending the preliminary hearing which was ordered to determine whether to strike out claim one or order a deposit order;
 - 5.5 the third and fourth respondents are based in Florida and Texas in the United States whereas the first and second respondents are based in the UK and Lithuanian. Additional costs were incurred in taking instructions from the US companies.
6. The claimant's response dated 22 November 2020 can be briefly summarised as follows:
 - 6.1 the cost application against the third respondent is out of time;
 - 6.2 the claimant's rights are prejudiced due to the timing of the application;
 - 6.3 the respondent made false and misleading comments in their application;
 - 6.4 the risk of costs only arises after a deposit order is made and the allegation then fails. As the claimant did not pursue the allegations subject to the deposit orders there can be no risk of costs. The claimant has behaved reasonably;
 - 6.5 by making a deposit order the tribunal recognised that the claimant had an arguable case;
 - 6.6 the claimant's rights were prejudiced because he decided not to appeal the order in respect of the third respondent but if the respondents had made their application within 28 days he would have been able to appeal the judgement relating to the third respondent;

- 6.7 the third respondent left an impression with the claimant, who is not a legal professional, that it had some involvement in the claimant's employment relationship.
7. The respondent made further submissions dated 30 December 2020 which can be briefly summarised as follows:
- 7.1 if, which it is denied, the application on behalf of the third respondent is out of time the employment tribunal should exercise its discretion and extend time;
- 7.2 the respondent was keen to avoid costs for all parties in making the application about costs concerning all the respondents and therefore waited to see whether or not the claimant would pay the deposit order;
- 7.3 clarification that the respondent's application is on the basis that it was unreasonable for the claimant to have brought the claim against the second and fourth respondent in the first place.
8. The claimant's response dated 12 February 2021 can be briefly summarised as follows:
- 8.1 asserting that the claimant suffered prejudice;
- 8.2 the respondents are compelled to make the application as early as possible;
- 8.3 arguments about abuse of process;
- 8.4 the third respondent did not make a genuine error in relation to the time point.
9. Given the detailed and lengthy written submissions that were sent to the employment tribunal I consider that it is in the interests of the overriding objective for me to make a decision on the cost application without a hearing.

Decision

10. I have decided to make one costs order. This is in respect of claim 2 which is against the fourth respondent for the following reasons:
- 10.1 the claimant submitted claim 1 against the first, second and third respondents on 27 August 2019. The respondents submitted their grounds of response after which on 19 October 2019 the claimant submitted claim 2 against the fourth respondent only. In its grounds of resistance to claim one respondent one did not seek to argue that it was not responsible for the acts of any other respondent or to rely on a statutory defence against the fourth respondent or any other directors or employees. In short it is hard to identify the benefit to the claimant of bringing this additional claim. It is possible that he wanted to pursue the public interest in bringing discriminatory behaviour to light;

- 10.2 the claimant made complaints that the fourth respondent “aided”, contrary to section 112 of the Equality Act 2010, the first, second and third respondents in carrying out discriminatory acts. This was specifically in relation to failing to engage with an informal grievance process and carry out an appeal process. The fourth respondent is Mr Abel Avellan, chairman of respondent two;
- 10.3 in claim 2 the claimant asserts that the fourth respondent was the principal in charge of all the group companies, that he “falsely” undertook to the claimant on no less than two occasions that the claimant would receive an opportunity to discuss the matter in a proper setting and approved the termination of the claimant’s employment;
- 10.4 section 112 of the Equality Act 2010 requires the fourth respondent to have knowingly helped the second respondent and the third respondent act in contravention of the Equality Act 2010;
- 10.5 in my judgement of 26 August 2020 I set out that *“I do not find that there are no or little reasonable prospects of success of the claim that, given the intertwined nature of the management teams in the group structure, R4 knew about the termination of the claimant’s employment... I find that there is little reasonable prospects of success of the claimant establishing all of these elements, particularly when the wider circumstances of the claim are considered which is a dispute surrounding a relatively short period of employment and a dismissal which is alleged to be for poor performance/discriminatory.”*;
- 10.6 I find that the fourth respondent is an individual and bringing a claim against a named individual when they are an employee or director of an employer who is already named as a respondent can and does put an individual concerned under pressure and stress at a level which they would not experience if they were merely identified in a claim against their employer. In this case the fourth respondent with the director of the second respondent and I made a deposit order in respect of the claims against the second respondent;
- 10.7 the claimant’s dismissal was on 24 May 2019 and the claimant’s case was that this was authorised or approved by the fourth respondent. It was also his case that the fourth respondent is chairman of respondent two and CEO of respondent three who were all parties to claim one. It is also his claim that the appeals process was to be run by respondent 3. In these circumstances it is again difficult to determine the real benefit to the claimant in bringing claim 2 against the fourth respondent;
- 10.8 the claimant’s evidence at the 25 August 2020 hearing was that he did not initially bring a claim against the fourth respondent because ACAS had told him to bring a claim against his employer which was evidently not the fourth respondent;
- 10.9 the notice of the preliminary hearing on 25 August 2020 set out that the reason for the preliminary hearing was to determine if there were little

or no prospects of success of the claimant's claims against respondent's two and three. This notice of hearing was sent approximately five months before the 25 August 2020 hearing took place. This notice of hearing did not explicitly refer to claim 2 but I find that this gave the claimant opportunity to consider the merits of his claims and how they were being conducted. It was a notice that he needed to think about these issues because the tribunal felt it necessary to have a hearing to consider them;

10.10 the respondent incurred additional and specific costs as a result of the claimant submitting claim 2. The fees of £3368.75 excluding VAT for the preparation of the grounds of response to claim 2 are solely attributable to claim 2 and relate solely to the fourth respondent.

10.11 taking all of the circumstances together I consider that the claimant did act unreasonably in bringing and continuing to bring claims against respondent 4. He had remedies against the other respondents and on his own evidence even according to ACAS the appropriate party against which to bring the claims was his employer which was not and which the claimant could not reasonably have considered was the fourth respondent.

11. I have decided not to make a costs order in respect of claim 1 and the claims against the second and third respondents for the following reasons:

11.1 I found that respondent 1 was the claimant's employer, I consider that this was clear from the documentation and day-to-day arrangements. The employer is usually but not always the most relevant party against which to bring a claim;

11.2 I accept that this situation was a little more complicated because respondent 1 was a small organisation in a corporate group of larger companies. I am willing to accept that the claimant had a concern that he wanted to make sure that he would have a corporate entity against which he could bring his claim and that he may not have been initially sure who was the correct entity. In these circumstances I am not prepared to make a costs order at this stage.

12. I have taken into account the claimant's ability to pay and no evidence has been provided to me that the claimant's financial situation has materially changed since the 25 August 2020 hearing.

13. The respondent has sought a costs order in the amount of £20,000 which is less than the fees it has incurred to date. In all the circumstances I have decided to make a costs order in the amount of £250.

Employment Judge Bartlett

Date: 19 February 2021..

Sent to the parties on: .11/3/2021.

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For the Tribunal Office