



# EMPLOYMENT TRIBUNALS

Claimant  
Mr Benjamin Driver

Respondent  
(1) Caribou Worldwide Limited  
(2) Kris Couriers Limited

v

Considered on the papers on: 30 November 2020

Before: Employment Judge Laidler

## JUDGMENT ON FIRST RESPONDENT'S COSTS APPLICATION

1. The claimant acted unreasonably in the bringing of the proceedings against the first respondent and/or such claim had no reasonable prospects of success.
2. Having regard to the claimant's means no order for costs is made.

## REASONS

1. At the preliminary hearing on 24 July 2020 the claimant withdrew his complaint against the first respondent and Judgment was entered by default against the second respondent, Kris Couriers Limited in the sum of £1,273.50.
2. By application dated 20 August 2020 the first respondent made an application for costs against the claimant on the grounds that the claim against the first respondent had no reasonable prospects of success and/or that the claimant was unreasonable in bringing the proceedings against the first respondent in the first place.

The relevant rules

3. Rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 states as follows:

“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;  
or
  - (c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.
- (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 reengaged 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 84 states as follows:

“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.”

4. In its ET3 filed on 27 January 2020 the first respondent stated that it had not employed the claimant and that at all material times he was a driver for Kris Couriers Limited. It stated that at no time had he been engaged by the first respondent.
5. In its costs application the first respondent has exhibited correspondence with the claimant from March 2020 in which it stated the same position and invited him to withdraw his claim against the first respondent. The claimant maintained that he had been employed by that entity.
6. New solicitors were instructed by the first respondent in July 2020 shortly before the preliminary hearing in this matter (which was scheduled to be the full merits hearing but was not due to technical difficulties). Again, on 17 July the solicitors wrote to the claimant inviting that he withdraw his claim against Caribou Worldwide Limited, if he did so they would not pursue an application for costs against him. Again, they did not withdraw.
7. At this preliminary hearing (converted to a telephone hearing due to technical difficulties with the CVP platform) the claimant did then withdraw his complaint against the first respondent and a Default Judgment was entered against the second respondent.

#### Conclusions

8. The Tribunal has to accept that the complaint against the first respondent had no reasonable prospects of success and/or that it was unreasonable to bring it within the meaning of Rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 on the basis that the claimant had never been employed by that entity. The chronology clearly shows that the claimant had worked for EA Logistics and that its shareholdings were transferred to the Orb Group Holdings Limited on 30 April 2019. Part of that organisation is the first respondent. It is however the case under the Transfer of Undertakings (Protection of Employment) Regulations 2006 [TUPE] that a share transfer is not a TUPE transfer. The claimant continued to be paid by and employed by EA Logistics until his transfer to the second respondent in or about July 2019.

9. The basis of the first respondent's defence was pointed out to the claimant on a number of occasions and he had every opportunity to withdraw his claim before further unnecessary costs were incurred by the first respondent.
10. The rules however require a two-stage process and rule 84 states that in deciding whether to make a costs order the Tribunal may have regard to the paying party's ability to pay. The Judge requested that the claimant provide information about his means by 19 October 2020 and by a letter of 18 October 2020 he set out his present position. He was currently working as a coach driver but had only been in the position for a month due to the worldwide pandemic. Previously he had been working with an agency supporting front line NHS staff but on a very low income and it was difficult to make ends meet, pay bills and to support his partner and 11 month old son. They are living with his partner's parents due to not being able to afford a place of their own. They receive support from the claimant's partner's family. Although no documentary evidence has been received of the claimant's financial position the Tribunal is entitled to take into account his ability to pay and he clearly does not have any ability to pay a costs award.
11. The Tribunal has therefore concluded that no award should be made.

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Employment Judge Laidler

Date: 7 December 2020

Sent to the parties on: 5 January 2021

T Cadman  
For the Tribunal Office