Case Numbers: 2304395/2018
2304396/2018
3335509/2018
3335510/2018
3335511/2018
3335012/2018
3335013/2018

EMPLOYMENT TRIBUNALS

Claimants: Mrs S Gill (C1)
Mr M Gill (C2)
Ms T Knight (C3)
Ms J Adams (C4)
Ms S Sweet (C5)
Ms K Segger (C6)
Ms A Bevan (C7)

Respondents: Eostre Education Limited R1
~~Central Education Ltd R2~~

Heard at: **Croydon via CVP** **On:** **23/2/2021**

Before: **Employment Judge Wright**
Mr C Mardner
Ms C Edwards

Representation
Claimants: C1 and C2 In person
C3 to C7 Ms I Egan - counsel

Respondents: R1 Mr W Astill - director
R2 Mr M Walker - counsel

JUDGMENT ON COSTS

It is the unanimous Judgment of the Tribunal that the first respondent is to pay costs of £20,000 to the second respondent and of £11,114 to the third to seventh claimants (inclusive of vat).

REASONS

1. Further to the unanimous Judgment of the Tribunal on 22/2/2021 that the

claimants' claims for redundancy payments and notice pay (where applicable) succeeded, the claimants and second respondent made an application for costs against the first respondent.

2. In short, the application was that the first respondent's defence to the claims was unmeritorious and had no reasonable prospects of success. The first respondent then disengaged from the process, was subject to an unless order (which took effect) and did not attend the final hearing. It was unreasonable of the first respondent to bring the second respondent into the proceedings and that was against the wishes of the claimants.

3. Due to the first respondent's failure to engage in the Tribunal process and in breach of Orders made at a hearing on 30/8/2019, the first respondent was subjected to an Unless Order on 27/11/2020. The first respondent did not comply with that Order, it took effect on 18/12/2020 and the first respondent's response was dismissed as if it had never been presented. Rule 21 (3)[1] therefore applied and the first respondent was entitled to notice of any hearings, but was only be entitled to participate at any hearing to the extent permitted by the Judge.

4. The first respondent ran a school in Haywards Heath and employed the claimants. On 19/6/2018 the claimants were informed the school was to close at the end of the summer term and they were all to be made redundant. On 1/7/2018 Mr William Astill, the sole director of the first respondent wrote to all of the claimants to inform them that a redundancy situation was 'unavoidable following discussions with our key customers and the fact the school has not received a rating by OFSTED allowing students to be placed at the school'. The last day of term was 24/7/2018 and the claimants' employment terminated on 31/7/2018.

5. The letter of 1/7/2018 informed the claimants of the amount of redundancy payment.

6. Mr Astill then informed the claimants that he had been advised they were entitled to their August salary, albeit this was paid late on 18/9/2018. Mr Astill did not at any point, until 17/10/2018 deny redundancy payments were due. At this point, Mr Astill took the view there had been a transfer under Regulation 3 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) to the second respondent.

7. The Tribunal found there had been no TUPE transfer and found that it was fanciful to suggest there had been.

8. It should be noted that the first respondent was legally represented at the

[1] Of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the Rules).

time the response was presented and at the preliminary hearing when Orders were made (which were not complied with), until February 2020 when its representatives ceased to act. At that preliminary hearing, a five-day final hearing was listed. In fact, as the first respondent's response was dismissed and as the first respondent had not engaged in the process at all and was in breach of the Order following that preliminary hearing, the hearing concluded within a day.

9. The cost applications were made at the conclusion of the hearing. Taking into account Rule 77, the Tribunal decided to adjourn until 11am on the second day of the hearing and directed a message be sent to the first respondent to inform it that the claims had been successful and monetary sums had been awarded. The first respondent was also put on notice that an application for costs had been made and informed when the hearing would resume, in order that a representative could attend. Mr Astil subsequently attended on behalf of the first respondent and was permitted, to set out the first respondent's ability to pay any costs awarded. He agreed the second respondent was paying rent of £20,000 to the first respondent at the start of each school term (three times a year). He also said the first respondent had £25,000 in a bank account which was frozen. He said the property was worth £550,000 or that there was an agreement to sell it for that sum and the outstanding loan was just under £300,000. He is repaying £3,000 per month in respect of that loan.

10. The Tribunal found the first respondent had no defence to the claims. In fact, the first respondent agreed the redundancy payments were due until 17/10/2018 when it changed its position. It does appear the first respondent overlooked the contractual position in respect of notice pay and it would appear seemed to think giving a month's notice was sufficient.

11. The defence the first respondent concocted was spurious, putting it at its highest. As pleaded by the second respondent, there was no detail of the purported transfer pleaded at all. The Tribunal finds the first respondent invented the existence of a TUPE transfer so as to avoid its responsibilities and liabilities to its staff, simply to save money and avoid making payments which were lawfully (which the first respondent had admitted were) due. The Tribunal finds that there were no discussions between the first and second respondents which could have amounted to pre-transfer discussions. All the second respondent did was to take advantage of an opportunity which presented itself when the first respondent ceased trading (that is not to say the second respondent was opportunistic). There was no misunderstanding over what happened and it is fanciful to suggest otherwise.

12. The first respondent was clear that it was no longer going to continue trading and as a result the staff were redundant. There was no suggestion a

transfer took place as claimed by the first respondent. The second respondent did not exist until 22/8/2018 and yet, the first respondent paid the salaries in full, for August 2018, albeit late on 18/9/2018. It is not clear why it would do so if it believed a transfer had taken place at some point in August 2018.

13. The Tribunal finds the first respondent cannot have been mistaken that a transfer had taken place. The first respondent has not provided any detail at all to set out why it takes this position. The extent of its pleading was that the claimants' employment transferred to the new operator of the School under TUPE. That was the sum of the defence.

14. The second respondent obtained the necessary contracts from local authorities, the Department for Education and undertook DBS checks. It started to trade early in September and a few days after the start of term.

Relevant Law

15. Costs do not 'follow the event' in Tribunal claims. In other words it is not usual practice for the loser to pay the winner's costs. Costs in the employment tribunal are still the exception rather than the rule (Yerrakalva v Barnsley Metropolitan Borough Council 2012 ICR 420, CA). Furthermore, the fundamental principle is that the purpose of an award of costs is to compensate the party in whose favour the order is made, and not to punish the paying party.

16. The Employment Tribunal is created by statute and the procedure is governed by the Rules. Any application for costs must be made pursuant to those Rules. The relevant Rules in respect of the application are Rules 74(1), 76(1), 77, 78(1)(a) and 84. They state:

> *74 (1) "Costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purposes of or in connection with attendance at a tribunal hearing).*
>
> *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.

…

77 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 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 (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 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 ability to pay.

17. Rule 76 imposes a two-stage exercise – first the Tribunal must determine whether the claim had no reasonable prospect of success/if the party has acted vexatiously or unreasonably such as to invoke the jurisdiction to make an order for costs. If that stage is satisfied, the second stage is engaged – the Tribunal is required to consider making a costs order but has a discretion whether or not to do so. (Oni v Unison UKEAT/0370/14/LA).

18. The Court of Appeal in Scott v Russell 2013 EWCA Civ 1432, cited the definition of 'vexatious' given by Lord Bingham in Attorney General v Barker 2000 1 FLR 759, QBD (DivCt):

> *'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, and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process'.*

19. In determining whether conduct was unreasonable, 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). This does not mean that the circumstances of a case have to be separated into sections such as 'nature', 'gravity' and 'effect', with each section being analysed separately (Yerrakalva v Barnsley Metropolitan Borough Council

and anor 2012 ICR 420, CA). The Court of Appeal in Yerrakalva commented that it was important not to lose sight of the totality of the circumstances. The vital point in exercising the discretion to order costs is to look at the whole picture. The Tribunal has to ask whether there has been unreasonable conduct by the paying party in bringing, defending or conducting the case and, in doing so, identify the conduct, what was unreasonable about it, and what effect it had.

20. Tribunals must take into account all of the relevant matters and circumstances when deciding on costs applications. The fact that a party is unrepresented is a relevant consideration. Justice requires that Tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life. The threshold tests may be the same whether a party is represented or not, but the application of those tests should take account of whether a litigant has been professionally represented or not (AQ Limited v Holden [2012] IRLR 648).

21. If the means of a paying party in any costs award are to be taken into account, the Tribunal should set out its findings about ability to pay and say what impact this has had on the decision whether to award costs or an amount of costs (Jilley v Birmingham & Solihull Mental Health NHS Trust UKEAT/0584/06).

22. Vaughan v Lewisham Borough Council 2013 IRLR 713 is authority that It was not wrong in principle for a Tribunal to make a costs order against an employee even though no deposit order had been made or costs warning given, or to make an award which the paying party could not in their present financial circumstances afford to pay where the Tribunal considered that it might be able to pay in due course.

Conclusions

23. The Tribunal is invited to find that the first respondent's conduct was vexatious and/or unreasonable. In the alternative, to find that the response had no reasonable prospects of success.

24. The Tribunal has to find that the first respondent's conduct falls within Rule 76 (1) (a) or (b). If so, is it appropriate to exercise its discretion in favour of awarding costs?

25. The third to seventh claimants were legally represented and their solicitor sent a cost warning to the first respondent's solicitor on 13/3/2019. It is relevant that the costs warning letter set out the reason why the defence would fail, which mirrored the Tribunal's own findings.

26. It is correct to say this letter was the only costs warning made, however, the

parties rely upon Vaughan v London Borough of Lewisham in this regard.

27. The Tribunal concludes the first respondent's conduct was unreasonable, relying upon the ordinary meaning of the word. Not to comply with Orders of the Tribunal, without explanation, is unreasonable. Not to comply with the overriding objective is unreasonable. To completely disengage in the process is also unreasonable. Furthermore, the first respondent's conduct was vexatious and was designed to inconvenience and harass the other parties. The second respondent was, on the first respondent's case, dragged into defending itself in the proceedings. All of this caused the claimants and second respondent to incur unnecessary costs. All the claimants were seeking, were the sums they were lawfully entitled to and which until the 17/10/2018 the first respondent agreed were due.

28. The first respondent's response was without any foundation at all. The first respondent was retrospectively using the factual scenario to avoid its liabilities. It was vexatious to continue to run the defence to the claimants' claims and from the outset, the defence had no reasonable prospects of success.

29. It was unreasonable not to promptly pay the claimants' redundancy payments which for four months the first respondent accepted were due. The payments still have not been paid over two-and-a-half years later. It may be that there is no immediate prospect of them being paid by the first respondent, although based upon the financial evidence, there is no reason why not[2].

30. The Tribunal therefore finds the first respondent's conduct did fall within Rule 76 (1) (a) and (b). It then considered whether it was appropriate to exercise its discretion to award costs against the first respondent. The Tribunal concluded the threshold of making a costs award was met. There was no defence to the claims and purported transfer did not happen and there was not one shred of evidence provided by the first respondent to show that it had. There was no information provided to which the second respondent could counter. The first respondent was legally represented for the vast majority of the time and at the preliminary hearing. Most of the directions (up to the point of disclosure) were to have been carried out whilst the first respondent was represented, however, no action was taken. Following the withdrawal of the first respondent's representatives, it failed to engage with the claimants and second respondent. That led to the Tribunal to issue an Unless Order, which took effect on 18/12/2020.

31. Looking at the whole picture, the unreasonable conduct was inventing a

[2] The basis of the costs application was that the first respondent has the means to meet any award made. It therefore follows the first respondent has the means to meet the sums awarded to the claimants.

transfer as a means to avoid making the payments to the claimants. The conduct was unreasonable and it was designed to avoid liability. The effect was that it not only forced the claimants to claim in respect of their lawful entitlement, it also put them and the second respondent to the expense, stress and unpleasantness of these proceedings.

32. The third to seventh claimants claim costs of solicitor's fees of £8,140 and counsel's fees of £2,150, a total of £10,290 + vat = £12,348. The second respondent seeks solicitor's fees of £9,620 and counsel's fees of £8,700 + vat = £21,984. The second respondent will cap its fees at £20,000.

33. The Tribunal found the fees incurred to be reasonable. The solicitors' hourly rates were not excessive. Neither party had spent an undue amount of time on the claim and the costs were reduced as the same solicitor acted for five of the seven claimants.

34. In applying the cap of £20,000 to the second respondent's costs, it was effectively reducing its claim by 10%. In order to be fair to the parties claiming costs, the Tribunal found it equitable to also reduce the claimant's costs claimed by 10%. The Tribunal therefore awards costs of £20,000 to the second respondent and of £11,114 to the third to seventh claimants, inclusive of vat.

35. The Tribunal had regard to the first respondent's ability to pay these costs. It took into account the fact that the first respondent is now liable for redundancy and notice payments in excess of £50,000. That however was a liability which existed and which was acknowledged in the summer of 2018. The first respondent took the decision to close the business down and calculated and informed the claimants of their redundancy entitlement. That liability is not therefore new and it was only when the first respondent tried to reinterpret the factual position to its own advantage, that it denied any liability.

36. The first respondent has £25,000 in a current account and on its own account, approximately £200,000 equity in the property. In addition, the first respondent is receiving annual rent of £60,000 and agrees that rent is paid at the start of each term. In terms of debts, the Tribunal was told the loan against the property is repaid at an annual cost of £36,000. The first respondent did not provide any evidence of any means and all the Tribunal had was (provided by the second respondent) company accounts from 2017 (the last time accounts were filed) and the Land Registry entry for the property.

37. The Tribunal was satisfied, taking into account the ability to pay, that the first respondent had available to it, sufficient ability to pay the costs ordered to be paid to the third and seventh claimants and to the second respondent.

Employment Judge Wright

Date: 19 April 2021

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