EMPLOYMENT TRIBUNALS

Claimant: **Mr David Farr**

Respondent: **Cycling Score Limited**

Heard at: **East London Hearing Centre**, **with a determination made on the papers**

On: **13 May 2021**

Before: **Employment Judge Barrett**

JUDGMENT FOLLOWING COSTS APPLICATION

The Respondent's application for a costs order is refused.

REASONS

Introduction

1. By way of an emailed application sent on 1 March 2021 the Respondent seeks a costs order in respect of the Claimant's second claim under number 3213053/2020 presented on 25 October 2020 (the 'Second Claim').

2. The Second Claim included complaints of constructive unfair dismissal, wrongful dismissal, unauthorised deductions of furlough top up pay, holiday pay, and failure to provide written particulars. The Second Claim was struck out because it had been presented out of time, under a reserved judgment and reasons sent to the parties on 3 February 2021 following a hearing on 22 January 2021. The judgment further noted that the constructive unfair dismissal claim had no reasonable prospect of success because the Claimant had been expressly dismissed prior to the date when he contended that he resigned.

3. The Claimant's first claim under claim number 3202303/2020 (the 'First Claim'), presenting complaints of unfair dismissal, wrongful dismissal and unauthorised deductions, was permitted to proceed.

4. The Respondent has indicated it is satisfied for the application to be determined on the papers. The Claimant made representations in response to the Respondent's application by email of 13 March 2021 and did not object to the application being determined on the papers. I am satisfied that this approach is appropriate and in accordance with the overriding objective.

The Respondent's application

5. The Respondent makes its application on the following grounds:

5.1. That the Claimant acted vexatiously or otherwise unreasonably in presenting his second claim; and /or

5.2. That the second claim had no reasonable prospect of success.

6. In the Respondent's submission, the Claimant bringing and pursuing the second claim was vexatious or otherwise unreasonable because:

6.1. he could never have any genuine faith in the constructive dismissal claim, and must have been aware he had been expressly dismissed;

6.2. the wrongful dismissal and unlawful deductions claims were duplicative of complaints already included in the Claimant's first claim; and

6.3. the holiday pay and s.38 claims could and ought to have been pleaded as part of the first claim, and therefore were in breach of the estoppel rule in *Henderson v Henderson* (1843) 3 Hare 100.

7. The Respondent further submits that the Second Claim had no reasonable prospect of success, because the Claimant knew he had been expressly dismissed and so the constructive dismissal claim could not succeed, and because the whole claim was brought significantly out of time.

The Claimant's response

8. The Claimant refers to cost warning letters sent to him by the Respondent and states that it was not realistic to expect him to withdraw his claims because he has been seriously wronged. He describes the correspondence as being subjected to constant threats and ultimatums.

9. The Claimant further argues that the Respondent claimed government furlough funds in his name that it offered to pay him in exchange for relinquishing his shares in the Respondent, and that he resigned on the first day that these furlough funds were not put into the payroll system by the Respondent.

The applicable legal principles

10. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provide as follows (as relevant):

> **(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;**
>
> **(b) any claim or response had no reasonable prospect of success …"**

11. Orders for costs in employment Tribunals are the exception, not the rule (*Gee v Shell UK Ltd* [2003] IRLR 82 CA *per* Sedley LJ at [35]). However, the facts of a case need not be exceptional for a costs order to be made. The question is whether the relevant test is satisfied (*Vaughan v London Borough of Lewisham and others* [2013] IRLR 713).

12. The EAT in *Haydar v Pennine Acute NHS Trust* UKEAT/0141/17 held that the determination of a costs application is essentially a three-stage process (*per* Simler J at [25]):

> **'The words of the Rules are clear and require no gloss as the Court of Appeal has emphasised. They make clear (as is common ground) that there is, in effect, a three-stage process to awarding costs. The first stage - stage one - is to ask whether the trigger for making a costs order has been established either because a party or his representative has behaved unreasonably, abusively, disruptively or vexatiously in bringing or conducting the proceedings or part of them, or because the claim had no reasonable prospects of success. The trigger, if it is satisfied, is a necessary but not sufficient condition for an award of costs. Simply because the costs jurisdiction is engaged, does not mean that costs will automatically follow. This is because, at the second stage - stage two - the Tribunal must consider whether to exercise its discretion to make an award of costs. The discretion is broad and unfettered. The third stage - stage three - only arises if the Tribunal decides to exercise its discretion to make an award of costs, and involves assessing the amount of costs to be ordered in accordance with Rule 78."**

13. 'Vexatious' bears the following meaning (approved in *Scott v Russell* [2013] EWCA Civ 1432 at [30]):

> **'[T]he 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.'**

14. However, simply being 'misguided', or even 'seriously misguided' is not sufficient to establish vexatious conduct — *AQ Ltd v Holden* [2012] IRLR 648, EAT at [38].

15. 'Unreasonable' has its ordinary meaning. It is not equivalent to 'vexatious' (*Dyer v Secretary of State for Employment* UKEAT/183/83).

16. A party may be found to have acted unreasonably, although she had a sincere belief in his or her allegations, if she or he ought to have appreciated that there was no foundation for them: *Keskar v Governors of All Saints C of E School* [1991] ICR 493 at 500D-G.

17. In relation to r. 76(1)(b), a tribunal should look at what a party knew, or ought to have known, had she gone about the matter sensibly: *Cartiers Superfoods Ltd v Laws* [1978] IRLR 315, per Phillips J.

18. In *AQ Ltd v Holden* [2012] IRLR 648 the EAT held that whether a party is unrepresented is a relevant consideration in the decision whether to avoid costs. However,

> **'This is [not] to say that lay people are immune from orders for costs: far from it, as the cases make clear. Some litigants in person are found to have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity' [33].**

19. Costs awards are intended to be compensatory, not punitive. The costs awarded should be no more than is proportionate to the loss caused to the receiving party by the unreasonable conduct (*Barnsley Metropolitan Council v Yerrakalva* [2012] IRLR 78). However, unlike the wasted costs jurisdiction, in exercising its discretion to order costs, the Employment Tribunal does not have to find a precise causal link between any relevant conduct and any specific costs claimed. Mummery LJ gave the following guidance at [41]:

> **'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 had. The main thrust of the passages cited above from my judgment in McPherson was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the ET had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances.'**

20. A failure to accept an offer not to pursue a party for costs does not, of itself, constitute unreasonable conduct: *Lake v Arco Grating (UK) Ltd*, UKEAT/0511/04. However, if a party issues a clear costs warning, but the other party (particularly if represented) fails to take it seriously and to engage with it, by addressing their minds to the issues raised in support of the warning, a costs order on the basis of unreasonable conduct will be more likely.

Conclusions

The threshold test

21. The question to consider at the first stage is whether the trigger for making a costs order has been established either because a party or his representative has behaved unreasonably, abusively, disruptively or vexatiously in bringing or conducting the proceedings or part of them, or because the claim had no reasonable prospects of success (*Haydar v Pennine Acute NHS Trust*).

22. The threshold under r. 76(1)(b) ('no reasonable prospect of success') is met on the basis of the findings in the Preliminary Hearing Judgment.

22.1. One of the complaints presented in the Second Claimant was for constructive unfair dismissal. The Respondent describes this as the 'main' complaint presented, which is a fair description. At paragraph 67 of the Preliminary Hearing Judgment, I found this complaint was "*no longer arguable*" due to the finding that the Claimant had been dismissed on 29 May 2020. The Claimant had therefore been expressly dismissed prior to the date on which he sought to resign, and could not have been constructively dismissed. It does not automatically follow that

the complaint had no reasonable prospect of success at the date it was pleaded. The reason why the preliminary hearing was listed was to determine the date of dismissal, which was not immediately obvious. However, I also found as a fact that the Claimant did know he had been expressly dismissed at some point prior to the submission of the First Claim, although he was confused as to when this occurred (see paragraph 44 of the Preliminary Hearing Judgment). The inference I draw is that the Claimant, had he gone about the matter sensibly, knew or ought to have known that a constructive unfair dismissal claim, which necessarily must be predicated on a resignation rather than an express dismissal, was misconceived. It had no reasonable prospect of success from its inception.

22.2. Further, the Second Claim was presented almost 2 months after the primary time limit and there was no basis for extending time (see paragraphs 51 and 65 of the Preliminary Hearing Judgment). As noted above, I found as a fact that the Claimant knew he had been expressly dismissed at some point prior to the submission of the First Claim, and therefore he knew or ought to have known that the time limit had elapsed prior to the submission of his Second Claim. The Second Claim had no reasonable prospect of success because it was presented significantly out of time.

23. I further find the threshold under r. 76(1)(a) (vexatious or unreasonable conduct) was met to the extent that it was unreasonable for the Claimant to institute and pursue claims which he knew or ought to have known were out of time and, in relation to the constructive unfair dismissal claim, had no reasonable prospect of success on the merits.

24. I do not find the Claimant acted vexatiously; although the Second Claim was presented out of time and the constructive unfair dismissal allegation was misconceived, it cannot be said the claim had little or no discernible basis in law or that its effect was to subject the Respondent to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the Claimant (*Scott v Russell*).

25. The facts giving rise to the Second Claim were that the Respondent had, prior to dismissing the Claimant, offered to pay him furlough money claimed from the Government in exchange for relinquishing his shares in the Respondent (paragraphs 21 and 38 of the Preliminary Hearing Judgment). After dismissing the Claimant, the Respondent continued to claim furlough money in his name, which were attributed to him on the Respondent's payroll system, although not paid into his bank account (paragraph 26 of the Preliminary Hearing Judgment). On 4 August 2020, the Respondent made a lump sum payment to the Claimant of £6,010.52 which the Claimant understood represented the money that had been claimed in his name from the furlough scheme but not paid to him (paragraph 29 of the Preliminary Hearing Judgment). The Claimant was wrong to consider these matters gave him a basis for arguing he remained in employment and could resign and claim constructive unfair dismissal. However, just because he was misguided does not mean his conduct was vexatious (*AQ Ltd v Holden*).

26. Further, I do not find that including complaints in the Second Claim which were to an extent duplicative of matters advanced in the First Claim, or which otherwise might have been pleaded in the First Claim, was vexatious or otherwise unreasonable. The

Second Claim was more fully pleaded and provided further particulars of the claims in the First Claim. This does not meet the threshold of vexatious or unreasonable conduct. Had the Second Claim not been struck out for other reasons, the Respondent's argument that the holiday pay and s.38 complaints were in breach of the estoppel rule in *Henderson v Henderson* would have been considered. However, the rules on issue estoppel and the rules on costs concern different tests. Even if these complaints could have been presented earlier, it does not follow that their inclusion in the Second Claim was unreasonable or vexatious.

Exercise of discretion

27. As the threshold for the costs jurisdiction to apply has been met, I must go on to consider at the second stage whether discretion ought to be exercised in favour of awarding the Respondent costs. In doing so, the surrounding circumstances are relevant.

28. In particular, the following factors weigh in favour of making a costs order:

    28.1. The Respondent warned the Claimant that his claims were out of time and that the complaint of constructive unfair dismissal was misconceived, by correspondence via ACAS on 11 November 2020 and in direct correspondence on 11 January 2021. The relevance of the warnings is reduced although not extinguished because the Respondent's offer was not to pursue the Claimant for costs if he withdrew both claims. There was no distinction as between the First and Second Claim. Further, the correspondence advanced the argument that the Claimant was expressly dismissed on 15 May 2020, which the Tribunal has found to be wrong.

    28.2. The Respondent was put to additional expense in drafting its Grounds of Resistance to the Second Claim.

29. The following factors weigh against making a costs order:

    29.1. The Claimant was by the time of the hearing before me a litigant in person. However, I accept the Respondent's submission that limited weight should be placed on this factor because the Claimant has had the benefit of legal advice in the past.

    29.2. Although I have found the Claimant was misguided and acted unreasonably, the events giving rise to the Second Claim, as detailed at paragraph 25 above, were also the responsibility of the Respondent. The Respondent acted unlawfully in claiming money from the furlough scheme in the Claimant's name after the Claimant had been dismissed (see paragraphs 26-28 and 38 of the Preliminary Hearing Judgment). Had the Respondent not done so, the Claimant would not have presented the Second Claim advancing the argument that the furlough pay demonstrated a continuing employment relationship.

30. Taking these factors into account I conclude it would not be in accordance with the overriding objective to exercise my discretion in favour of awarding costs to the Respondent. Although the threshold criteria are satisfied, the Second Claim came about because of both parties' unreasonable (and in the Respondent's case, unlawful)

conduct. It would not be fair to compensate the Respondent for costs incurred in these circumstances.

31. Accordingly, the Respondent's application for costs is dismissed.

Employment Judge Barrett
Date: 13 May 2021