



EMPLOYMENT TRIBUNALS

Claimants: Ms L Barnes
Ms V Taylor

Respondents: Arcis Biotechnology Limited
Arcis Biotechnology Holdings Limited

JUDGMENT

The judgment of the Tribunal is that:

1. The respondents' applications for costs order are refused;
2. The respondents' applications for wasted costs orders are refused.

REASONS

Introduction

1. The claimants brought Employment Tribunal proceedings against the respondents. Prior to a Preliminary Hearing (case management) taking place in either case, the claims were withdrawn. The respondents sought costs orders against each of the claimants and/or wasted costs orders against their representatives.

Issues and procedure

2. The respondents made an application for costs against Ms Barnes on 17 May 2021. Amongst other things, the respondents contended that:

- a. The claimant's claim was hopeless and had no reasonable prospect of success;
- b. The claim was brought for some other improper motive and was vexatious;
- c. Ms Barnes was a defendant in potential high court proceedings and the Tribunal claim had been brought in response to those proceedings; and
- d. The decision to withdraw the claim had followed immediately after a specific disclosure request made and it was suggested that the claim

was withdrawn because such disclosure would be damning to her case.

3. At the same time, the respondents also applied for wasted costs as a result of alleged improper and unreasonable actions by Ms Barnes' solicitors. That contention relied upon the assertion that the claimant and/or her solicitors never had any intention to proceed with the claim following submission.

4. The costs claimed by the respondents' solicitors were £9,600 inclusive of VAT (that is more than twice the value of the claim) in respect of Ms Barnes claim, albeit it was acknowledged by them as being difficult to separate costs from overlapping matters.

5. The respondents also made an application for costs against Ms Taylor on 17 May 2021. The application was similar to the application made in respect of Ms Barnes claim. They also applied for wasted costs against Ms Taylors' solicitors. The costs claimed were £9,600 inclusive of VAT (with the same caveat being identified).

6. Ms Barnes' solicitors opposed the application. Amongst other things, they submitted that:

- a. It was wrong to state that the claims had no reasonable prospect of success;
- b. Ms Barnes was not paid her salary for the final two weeks of her employment or her accrued but untaken annual leave;
- c. High court proceedings had been threatened but no proceedings had ever been issued; and
- d. The claims were withdrawn because of concern about the ongoing costs of continuing with the claim.

7. Ms Taylors' solicitors (being the same solicitors as those instructed by Ms Barnes) opposed the application in substantially similar terms. In respect of Ms Taylors' claims and the merits, the solicitors highlighted that she had raised serious allegations of sexual discrimination and harassment and made serious allegations of whistleblowing. She had raised grievances, which had been ignored. She had resigned in response. She was owed outstanding holiday pay.

8. Rule 77 of the Employment Tribunal rules of procedure provides for a costs application to be determined in writing, provided that the paying party has been given the opportunity to make representations in response to the application. The respondents stated that they were content for the application to be determined without a hearing if appropriate. The claimants solicitors have had the opportunity to respond. As a result, the determination has been made on the papers without a hearing.

The Facts

Ms Barnes

9. Ms Barnes was employed by the respondent(s) for eight years. Ms Barnes brought a claim alleging unlawful deductions from wages and a failure to pay holiday pay due, after the termination of her employment with the respondent(s). The claim form identified the total value of the claim as being £4,500. A solicitor was instructed by her at the time the claim was entered. The claim was entered on 8 January 2021.

10. Solicitors instructed by the respondents entered a response to the claim on 25 February 2021. That response stated that the claimant was a defendant in pending High Court proceedings which were stated as “*to be issued by the respondent*”. The response contended that there had been no unlawful deduction from wages because Ms Barnes had allegedly not performed work for a period during which she was employed by the respondent(s). The claim for holiday pay was also defended on the basis that, during a period of employment when such leave would have accrued, Ms Barnes was alleged not to have been devoting her time and attention to the business and she was alleged to have fundamentally breached the contract.

11. A final hearing had been listed for 20 April 2021, but in the light of the pleadings the Tribunal converted that hearing to be a preliminary hearing (case management). The parties were informed on 19 March 2021.

12. Ms Barnes’ solicitors withdrew her claim on 19 April 2021.

13. From the documents provided to the Tribunal which accompanied the respondents’ application, a draft agenda for the PH had been sent by the respondents’ solicitor to the claimant’s solicitor on 15 April. That included a specific disclosure application. It also stated that the Respondents intended to pursue High Court proceedings against Ms Barnes, however the claim had not been issued at the time. The respondents were not proposing that the Tribunal proceedings be stayed. The agenda contained no application by the respondents for the claims to be struck out as a preliminary issue because the claims had no reasonable prospects of success, nor did it state that a deposit was sought because the claims had little reasonable prospect of success.

Ms Taylor

14. Ms Taylor was employed by the respondent(s) for just under ten years. Ms Taylor brought a claim alleging unfair dismissal, sex discrimination, detriment and dismissal as a result of having made public interest disclosures, unlawful deductions from wages and for accrued but unpaid annual leave. In her claim form Ms Taylor asserted that she had raised grievances, but those grievances had not been addressed. She had resigned as a result. A solicitor was instructed by her at the time the claim was entered. The claim was entered on 8 January 2021.

15. A preliminary hearing (case management) was listed for 29 April 2021.

16. Solicitors instructed by the respondents entered a response to the claim on 25 February 2021. That response stated that the claimant was a defendant in pending High Court proceedings which were stated as “*to be issued by the*

*respondent*ⁿ. The response denied the allegations of harassment, discrimination, detriment and unfair dismissal, as well as denying that any unlawful deduction from wages had been made. It was denied that grievances had been raised. The claim for holiday pay was defended on the basis that because Ms Taylor was alleged to have fundamentally breached the contract first, her holiday entitlement was limited to her statutory entitlement and was not her contractual entitlement. In Ms Taylor's case, the response did include an application made by the respondents for the claims to be struck out on the basis that they were contended to be vexatious and have no reasonable prospect of success.

17. Ms Taylor's solicitors withdrew her claim on 20 April 2021.

The Law

18. Costs in the Employment Tribunal are very much the exception and not the rule. Costs do not simply follow the event. The power to award costs is limited to the specific reasons provided in the Employment Tribunals Rules of Procedure.

19. Rules 76, 78, 80 and 84 of the Rules of procedure are relevant to the award of costs.

Rule 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...

Rule 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; (b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles ... (3) for the avoidance of doubt, the amount of a costs order under sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000.

Rule 80. (1) A Tribunal may make a wasted costs order against a representative of any party where that party has incurred costs - (a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative...

Rule 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 (or, where a wasted costs order is made, the representative's) ability to pay.

20. Also relevant is the costs section of the Employment Tribunals (England & Wales) Presidential Guidance – General Case Management. The Tribunal has considered that Guidance and will not reproduce it here, save for highlighting the first line of paragraph 1:

The basic principle is that employment tribunals do not order one party to pay the costs which the other party has incurred in bringing or defending a claim.

21. In *Yerrakalva v Barnsley MBC* Mummery LJ said at paragraph 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.

Conclusions – applying the law to the facts

22. Ms Barnes brought a claim for unpaid wages and unpaid accrued holiday, in circumstances when she was not paid wages for the final period of her employment and was not paid in lieu of accrued but outstanding annual leave. The Tribunal has not needed to determine whether the respondent's arguments for not making those payments were correct as the claim has been withdrawn, but the claims certainly appear to have had a reasonable prospect of success. The claim for accrued but untaken annual leave, in particular, appears to have had reasonable prospects of succeeding in circumstances where accrued but untaken annual leave was not paid (or at least where what would appear to be such accrued leave, was not paid).

23. It is also notable that the respondents' solicitors did not contend that Ms Barnes claims had no reasonable prospect of success in either the response or the agenda. That is in contrast to the response prepared for Ms Taylors' claims. It suggests that the respondents felt Ms Barnes' claims did have a reasonable prospect of success.

24. The Tribunal does not understand why the possibility of the respondents pursuing High Court proceedings against Ms Barnes has any genuine relevance to the merits of her claim or whether it was vexatious for her to bring her claim. The agenda prepared by the respondents' solicitors recorded that there was no application for a stay of the Tribunal proceedings. Ms Barnes was entitled to bring a claim for non-payment of wages and holiday pay, irrespective of any other dispute between the parties.

25. Proceedings were withdrawn before the Preliminary Hearing (case management) took place. Ms Barnes' solicitors have provided an understandable reason why she chose to do so. The conduct of the proceedings was not vexatious, abusive, disruptive or otherwise unreasonable. The claim was withdrawn at an early stage.

26.

27. Ms Taylor's claims were more complex. Due to the early withdrawal of the claims, the Tribunal is not in a position to be able to genuinely assess whether they had reasonable prospects of success. If what the claimant had asserted in the claim form had been supported by evidence, her claims would have had a reasonable prospect of success. The claim for accrued but untaken annual leave certainly had a reasonable prospect of success. The Tribunal does not find that Ms Taylors' claims had no reasonable prospects of success.

28. There is no evidence that possibility of the respondents pursuing High Court proceedings against Ms Taylor was the reason why she brought her claim. Ms Taylor was entitled to bring the claim which she did for potentially serious matters, irrespective of any other dispute between the parties.

29. Proceedings were withdrawn at an early stage and prior to significant costs needing to be incurred by the parties. Her claim was withdrawn nine days before the preliminary hearing was due to take place. The conduct of the proceedings was not vexatious, abusive, disruptive or otherwise unreasonable. The claim was withdrawn at an early stage.

30. As highlighted in the legal section, the basic principle is that employment tribunals do not order one party to pay the costs which the other party has incurred in bringing or defending a claim. That is certainly the case where, as here, the claims are withdrawn at an early stage.

31. For the same reasons as outlined, the Tribunal would not have made a wasted costs order in either of these claims. In any event, there is nothing which has demonstrated any improper, unreasonable or negligent act or omission on the part of the claimants' representatives.

32. Had it been necessary to further consider an award of costs, the Tribunal would have needed to have carefully considered the level of costs sought and the point made at paragraph 8 of each of the objections to costs being awarded. That argument was particularly strong for the level of costs sought in Ms Barnes' claim. The Tribunal was surprised by the suggestion that the respondents' solicitors could not identify precisely the costs incurred in defending the Tribunal claims, as opposed to acting on other instructions. In any event, the appropriate costs do not need to be determined where no award has been made.

Employment Judge **Phil Allen**

9 June 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON
17 June 2021

FOR THE TRIBUNAL OFFICE