EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr M Aamir **v** **Axis International Security Limited**

Heard at: London Central **On**: 15 June 2021

Before: Employment Judge P Klimov, in chambers

JUDGMENT

The Respondent's application for a costs order succeeds in part. The Claimant is ordered to pay the Respondent **£61.50** in respect of the Respondent's costs. The sum shall be paid in six monthly installments of **£10.25** each on the first day of each month starting on 1 July 2021.

REASONS

Background

1. By a claim form presented on 28 January 2021 the Claimant brought various claims against the Respondent. The Respondent presented a response resisting the claims.

2. On 18 December 2020, there was an open preliminary hearing at Central London Employment Tribunal, by video. Employment Judge Nicolle struck out the Claimant's claims for: unfair dismissal under section 98 (4) of the Employment Rights Act 1996 (the ERA), the assertion of a statutory right under s.104 of the ERA, a failure to provide a written statement of reasons for dismissal under s.92 of the ERA, and holiday pay under s.23 of the ERA, and ordered that the remaining two claims for an unauthorised deduction of wages between 1 and 13 September 2019 and for a failure to provide a written statement of employment of particulars in accordance with s.1 ERA proceed to a full merits hearing.

3. On 12 January 2021, the Claimant requested written reasons for EJ Nicolle's judgment, which were provided to the Claimant on 9 April 2021.

4. On 16 April 2021, the remaining two claims were heard at an open hearing at Central London Employment Tribunal, by video.

5. The Claimant did not join the hearing. The clerk contacted the Claimant by the telephone. The Claimant claimed that he had not received the notice of the hearing and that he was feeling unwell and wanted to postpone the hearing. The clerk told the Claimant that he should join the hearing and explain that to the judge.

6. When the Claimant joined the hearing, he said that he had not received the notice of the hearing. He, however, confirmed that his contact details were correct and that he had received other correspondence from the Tribunal on that address. He also claimed not to have received my email I had sent to the parties the day before the hearing. I sent the email to the same email address as was used by the Claimant in corresponding with the Tribunal. The Claimant said that it might have gone into his junk email box, and that he had not checked his email. He, however, confirmed that he had received a day before the hearing an email from the Tribunal to the same email address with the joining instruction. The Claimant did not raise ill health as an issue. He did not appear to be suffering from any visible distress or discomfort.

7. He said that he was "*not into this case anymore*" and wanted to finish it, and if the Respondent gave him a good reference, he would drop the remaining claims. He said he was not interested in pursuing the claims.

8. The Claimant also confirmed that he did not work during the period for which he made his wages claim because he had enrolled on a training course unconnected with his work for the Respondent and accordingly was not available to work on those days. He accepted that under his contract with the Respondent he was entitled to be paid only for days actually worked.

9. He admitted receiving a draft contract containing particulars of employment. However, he claimed that the contract he had received was not for work on site, but in the office. He accepted that he had never asked the Respondent for a reference.

10. It appears the Claimant's real grievance is that the Respondent had initially rostered him to work in September 2019, but when the Claimant informed the Respondent that he would only be available on weekends because of his training course, the Respondent refused to change his roster and dismissed him. This, however, does not give the Claimant any entitlement to the wages he claims.

11. His claim for failure to provide particulars of employment was also not based on the facts known to the Claimant. He was trying to make out the claim on a tenuous ground that the particulars he had received were in a different contract to one that he thought he should have received instead. It appears he never asked the Respondent to re-issue his contract. In any event, he would have only been entitled to any compensation for the alleged failure to provide

particulars if he had been able to succeed on his wages claim, which claim was entirely misconceived.

12. After some further debate on irrelevant issues concerning the Claimant's ex-colleagues and what they said about him, I asked the Claimant whether he wished to continue with his two remaining claims and for me to give a judgment on those. He said no, and that he was happy to withdraw the remaining claims. I dismissed his claims on withdrawal.

13. On 30 April 2021, the Respondent applied for a costs order pursuant to Rule 76 (1) (a) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 (the "ET Rules") in the total sum of £1,200, on the ground that the Claimant has acted unreasonably in the way the proceeding have been conducted by the following:

    (i) He requested detailed notes from the Tribunal Service to the initial findings causing the Respondent additional work.
    (ii) He would not engage in a settlement process when the minimum claim matters were left to be determined causing additional costs work for the Respondent.
    (iii) He tried to defer the hearing after he entered late claiming to have received correspondence the later citing ill health.
    (iv) *Lastly just prior to the Judge's ruling he withdrew the remainder of the claim.*

14. On 17 May 2021, the Claimant submitted his representations. He argues that no costs award should be made against him because:
    (i) He engaged in settlement negotiations via ACAS and made a reasonable counteroffer to the Respondent but never heard back.
    (ii) He was unprepared for the hearing, panicked and withdrew the claims and now he intends to appeal the judgment and to seek the proceedings to be reinstated. The Tribunal's administrative failings put him at a substantial disadvantage and the Tribunal did not meet its obligations to him as a litigant in person.
    (iii) He pursued his claim diligently and met all case management orders. The Respondent, conversely, failed on more than one occasion to meet the deadlines and therefore failed to mitigate its own costs.

15. He further submits that he would not be able to meet a costs award because his outgoings exceed his income by approximately £111 a month. He is working two jobs on a self-employed basis. His wife has recently lost her job. He is relying on credit cards. He has no savings. He intends to seek debt advice from Citizens Advice. He provided a table showing his monthly income and outgoings.

The Law

16. Rule 76 of the ET Rules provides:

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

17. The following key propositions relevant to costs orders may be derived from the case law:

18. There is a two-stage exercise to making a costs order. The first question is whether a paying party has acted unreasonably or has in some other way invoked the jurisdiction to make a costs order. The second question is whether the discretion should be exercised to make an order. Only if the tribunal decides to exercise its discretion to make an award of costs the question of the amount to be awarded comes to be considered (Haydar v Pennine Acute NHS Trust UKEAT/0141/17).

19. While the threshold tests for making a costs order are the same whether or not a party is represented, in the application of the tests it is appropriate to take account of whether a litigant is professionally represented or not. Litigants in person should not be judged by the standards of a professional representative (AQ Ltd v Holden [2012] IRLR 648).

20. A refusal of a settlement offer did not by itself inevitably mean that an order for costs should be made against the refusing party. However, such an offer is a factor which a tribunal could take into account when considering whether there was unreasonable conduct by that party (Kopel v Safeway Stores plc [2003] IRLR 753).

21. For term "vexation" shall have the meaning given by by Lord Bingham LCJ in AG v Barker [2000] 1 FLR 759:

> "*[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.*" (emphasis added)

(Scott v Russell 2013 EWCA Civ 1432, CA)

22. 'Unreasonable' has its ordinary English meaning and is not to be interpreted as if it means something similar to 'vexatious' (Dyer v Secretary of State for Employment EAT 183/83).

23. In determining whether to make a costs order for unreasonable conduct, 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)

24. While a precise causal link between unreasonable conduct and specific costs is not required, it is not the case that causation is irrelevant. However, the tribunal must look at the entire matter in all its circumstances. Yerrakalva v Barnley MBC [2012] ICR 420 Mummery LJ gave the following guidance on the correct approach:

> "*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's case was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the employment Tribunal 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*".

25. Rule 75 of the ET Rules state (***my emphasis***):

> *Costs orders and preparation time orders*
>
> *(1) A costs order is an order that a party ("the paying party") make a payment to—*
> *(a) another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented* ***or while represented by a lay representative*****;**

26. Rule 74 of the ET Rules contains the following definitions:

> *(1) "Costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing). In Scotland all references to costs (except when used in the expression "wasted costs") shall be read as references to expenses.*
> *(2) "Legally represented" means having the assistance of a person (including where that person is the receiving party's employee) who—*
> *(a) has a right of audience in relation to any class of proceedings in any part of the Senior Courts of England and Wales, or all proceedings in county courts or magistrates' courts;*
> *(b) is an advocate or solicitor in Scotland; or*
> *(c) is a member of the Bar of Northern Ireland or a solicitor of the Court of Judicature of Northern Ireland.*

(3) "Represented by a lay representative" means having the assistance of a person who does not satisfy any of the criteria in paragraph (2) and who charges for representation in the proceedings.

27. Rule 78(2) of the ET Rules provides that that while the costs of lay representatives are recoverable, the hourly rate of such representatives is capped for the purpose of assessing such costs. The applicable hourly rate should be no higher than the hourly rate used when calculating preparation time orders under Rule 79 (2), currently £41.

28. Under Rule 79 of the ET Rules a tribunal must decide the number of hours in respect of which a preparation time order should be made. This assessment must be based upon:

(a) information provided by the receiving party in respect of his or her preparation time, and

(b) the tribunal's own assessment of what is a reasonable and proportionate amount of time for the party to have spent on preparatory work, with reference to such matters as the complexity of the proceedings, the number of witnesses and the documentation required.

29. The amount of the award shall be the product of the number of hours assessed under Rule 79(1) and the current hourly rate (Rule 79(3)).

30. Rule 77 of the ET Rules provides that: "*No [costs] 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.*"

31. Rule 84 of the ET Rules provides that: "*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.*" (***my emphasis***)

Conclusions

Has the Claimant acted unreasonably?

32. The Respondent advances four reasons why it says the Claimant has acted unreasonably.

"*He requested detailed notes from the Tribunal Service to the initial findings causing the Respondent additional work*."

33. Under Rule 62 of the ET Rules, the Claimant is entitled to request written reasons. Therefore, it was not unreasonable for him to ask for written reasons.

"*He would not engage in a settlement process when the minimum claim matters were left to be determined causing additional costs work for the Respondent.*

34. Failure to engage in settlement discussions or accept a settlement offer, of itself, does not constitute unreasonable conduct. The Respondent did not provide any details of any settlement discussions it attempted with the Claimant and settlement offers it made. The Claimant submits that he made a settlement offer to the Respondent but received no reply. Therefore, I reject the Respondent's contention that the Claimant has acted unreasonably by reason of his alleged refusal to engage in a settlement process.

"*He tried to defer the hearing after he entered late claiming to have received correspondence the later citing ill health.*"

35. I find that the Claimant's initial failure to join the hearing was a deliberate attempt to prolong the matter and exert more pressure on the Respondent. I find that the reasons the Claimant gave for not joining the hearing were not genuine. However, the Claimant did join the hearing. Therefore, of itself, his initial attempt to postpone the hearing, in my judgment, would not have been a serious enough conduct for me to find that the Claimant has acted unreasonably. However, I must look at this attempt to delay the proceedings in the context of the Claimant's conduct of the entire proceedings in relation to his two remaining claims.

"Lastly, just prior to the Judge's ruling he withdrew the remainder of the claim".

36. I find it was unreasonable for the Claimant to continue with his wages and particulars of employment claims, while knowing full well that he was not entitled to the wages claimed because he did not work during the relevant period of time, and there were no other grounds upon which he would have been entitled to be paid for that period.

37. He abandoned the claims at the hearing. I do not accept the Claimant's submission that he was unprepared and panicked. He had his case prepared with assistance of Citizens Advice. The remaining issues in his case were well known to him and did not require additional preparatory work beyond what had already been done for the December 2020 hearing. No pressure was put on him to withdraw his claims. Without being asked, he said at the start of the hearing that he was no longer interested in pursuing it.

38. From the discussion at the hearing, it was apparent that the Claimant wanted to use the remaining claims as leverage against the Respondent to get a favourable reference, which he, in fact, had not even ask for before the hearing.

39. At the start of the hearing, the Claimant said he was not interested to pursue the claims, yet he made no attempts to contact the Tribunal to withdraw his claims earlier, so that the hearing could be vacated, thus avoiding unnecessary costs.

40. In my judgment, in pursuing his remaining claims knowing that there was no proper basis to make such claims, in trying to avoid joining the hearing to further prolong the proceedings, in using the claims as a means of exerting pressure

on the Respondent, and in abandoning the claims at the hearing, the Claimant has acted unreasonably.

41. Having decided that the Claimant's conduct has engaged Rule 76(1)(a), I now need to consider whether I should exercise my discretion and order the Claimant to make a payment in respect of the Respondent's costs.

42. I find that the nature, gravity and effect of the Claimant's conduct was such that it is appropriate for me to make an order. I find the Claimant conduct was calculated to make a nuisance of himself and he could not have and did not in fact believe that he was entitled to the wages he claimed. I take into account that the Claimant was not represented at the hearing. However, during the course of the proceedings he had access to Citizens Advice and used their services. Even without legal advice it should have been apparent to the Claimant that his claim was misconceived. He was asking the Tribunal to award him wages for the period he knew he did not work because he had refused to come to work due to his other commitments.

43. I shall now consider the amount I shall award. The Respondent seeks £1,200 inclusive VAT. Applying the statutory hourly rate of £41 under Rule 78(2), this represents 29.27 hours of work. I find this to be excessive for the preparation to the final hearing on 16 April 2021.

44. Considering the issues that remained to be decided at the final hearing and the fact that most of the work (bundles, witness statements, etc.) had been done in the preparation to the preliminary hearing on 18 December 2020, I find that 2 hours should have been sufficient for the Respondent to prepare the case for the final hearing. The hearing itself lasted only about an hour. Therefore, subject to my consideration on the Claimant's ability to pay, I find an award for 3 hours is appropriate.

45. Having considered the Claimant's representations on his ability to pay, and I find that it would be appropriate for me to reduce the award by 50% and order that the Claimant pays the Respondent a sum of £61.50 respect of costs of its lay representative incurred by reason of the Claimant's unreasonable conduct of the proceedings. The sum shall be paid in six monthly installments of £10.25 each on the first day of each month starting on 1 July 2021.

Employment Judge P Klimov
15 June 2021

Sent to the parties on:

15/06/2021..

For the Tribunals Office

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