EMPLOYMENT TRIBUNALS

Claimant: Mr G Dellal

Respondent: ABM Aviation UK Limited

Heard at: Manchester (in Chambers) **On:** 2 July 2021

Before: Regional Employment Judge Franey
(sitting alone)

REPRESENTATION:

Claimant: Written submissions only
Respondent: Written submissions only

COSTS JUDGMENT

The respondent's application for a costs order against the claimant fails and is dismissed.

REASONS

Background

1. At a preliminary hearing on 29 April 2021 I dismissed the two complaints brought by the claimant.

2. The first was a complaint of detriment contrary to regulation 2 of the Exclusivity Terms in Zero Hours Contracts (Redress) Regulations 2015. That complaint was struck out because it had no reasonable prospect of success.

3. The second complaint was a complaint of unlawful deductions from pay contrary to Part II Employment Rights Act 1996. That complaint was dismissed because it had been brought outside the applicable time period when it was reasonably practicable for it to have been brought within time.

4. My Judgment was subsequently issued in writing, with written reasons, on 6 May 2021. I will assume that the person reading this Judgment and Reasons has already read that earlier Judgment.

5. As envisaged at the end of the hearing, the respondent made an application for costs by a letter of 25 May 2021. The total amount sought was £5,382.00 plus VAT. That represented the costs for the whole case. In the alternative, the respondent sought an order for costs incurred since a costs warning letter of 9 March 2021 in the sum of £3,648 plus VAT. The costs application was accompanied by a breakdown of how those costs had been incurred, and an indexed bundle of documents running to 53 pages. Included in that bundle were extensive "without prejudice" email exchanges between the parties.

6. The claimant provided his response to the costs application on 8 June 2021. His objection to the application ran to 11 pages. He also provided a bundle of documents in support of his position which ran to 83 pages.

7. Both sides agreed that this matter could be determined on the papers without a further costs hearing, and I was content that that was a fair way to proceed. I considered the matter in chambers on 2 July 2021. I read the written material provided by both sides and made the decision set out above. My reasons were as follows.

Relevant Legal Framework

8. The power to award costs is contained in the 2013 Rules of Procedure. The definition of costs appears in rule 74(1) and includes fees, charges, disbursements or expenses incurred by or on behalf of the receiving party.

9. Rule 75(1) provides that a Costs Order includes an order that a party makes a payment to another party "in respect of the costs that the receiving party has incurred while legally represented".

10. The circumstances in which a Costs Order may be made are set out in rule 76. The relevant provision here was rule 76(1) which provides as follows:

> **"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) of the way that the proceedings (or part) have been conducted; or**
>
> **(b) any claim or response had no reasonable prospect of success."**

11. The procedure by which the costs application should be considered is set out in rule 77 and the amount which the Tribunal may award is governed by rule 78.

12. Rule 84 concerns ability to pay and reads as follows:

> **"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."**

13. It follows from these rules as to costs that the Tribunal must go through a three stage procedure (see paragraph 25 of **Haydar v Pennine Acute NHS Trust UKEAT 0141/17/BA**). The first stage is to decide whether the power to award costs has arisen, whether by way of unreasonable conduct or otherwise under rule 76; if so, the second stage is to decide whether to make an award, and if so, the third stage is to decide how much to award. Ability to pay may be taken into account at the second and/or third stage.

14. The case law on the costs powers (and their predecessors in the 2004 Rules of Procedure) include confirmation that the award of costs is the exception rather than the rule in Employment Tribunal proceedings; that was acknowledged in **Gee v Shell UK Limited [2003] IRLR 82**.

15. A well-argued warning letter offering settlement can provide a basis for an order for costs if the recipient has unreasonably failed to engage properly with the points raised: **Peat v Birmingham City Council UKEAT/0503/1**. It is a relevant factor even though the "Calderbank" rule applicable in civil proceedings does not apply in Employment Tribunal proceedings: **Kopel v Safeway Stores PLC [2003] IRLR 753**.

16. In **Vaughan v London Borough of Lewisham & Others (No. 2) [2013] IRLR 713** the Employment Appeal Tribunal endorsed earlier comments in **AQ Ltd v Holden [2012] IRLR 648** to the effect that a litigant in person must not be judged by the standards of a professional representative.

Discussion and Conclusions

Self-Direction

17. The first stage in considering any costs application is to decide whether the power to award costs has arisen. The issue in this case was whether there had been unreasonable or vexatious conduct by the claimant.

18. In assessing whether the claimant behaved unreasonably I took into account the fact that he represented himself throughout these proceedings and did not have access to any legal advice. That, of course, does not make him immune from a costs order if his conduct of the proceedings was nevertheless unreasonable or vexatious.

19. I also took into account the broad general principle that an award of costs in the Employment Tribunal is the exception rather than the rule, but where proceedings are conducted unreasonably or vexatiously, and costs incurred as a consequence, it can be in accordance with the overriding objective in rule 2 to make a costs award.

20. I also reminded myself that it was important not to judge the position by hindsight alone. It became clear on 29 April 2021 that neither of the two complaints pursued could go any further, but that does not mean that an order for costs should inevitably follow.

21. Against that background I considered the points made by the respondent in the costs application. Broadly two themes emerged from that application. The first

was that the claimant had acted unreasonably in pursuing his claim despite the legal difficulties it faced, particularly after a costs warning letter of 9 March 2021 which explained why the claim was legally unsustainable. The second was that the claimant's conduct of "without prejudice" negotiations, and his expectations in relation to settlement, had been unreasonable and/or showed that he had pursued the proceedings in a vexatious way.

Unreasonable pursuit of the case

22. The respondent made some points about the way in which the case had been pursued by the claimant which I did not consider amounted to unreasonable conduct. They included his attempt to strike out the response, which was rejected at the preliminary hearing before Employment Judge Benson on 20 January 2021, and his allegations of some form of "campaign" on the part of the respondent. Unsuccessful applications, and exaggerated allegations of impropriety, are frequently encountered in Employment Tribunal cases where unrepresented parties feel strongly about the way they have been treated, and where they do not have a sound understanding of the pragmatic realities of Employment Tribunal procedures.

23. The core element of this first theme, however, was that it was unreasonable for the claimant to pursue his claim at all because it was legally unsustainable on the zero hours point. In November 2020 the respondent asked the claimant to clarify exactly what his case was, and the response of 24 November 2020 made some assertions about the legal position which subsequently proved to be mistaken. The legal difficulty with the claim was discussed by Employment Judge Benson at the preliminary hearing on 20 January 2021, resulting in the listing of the public preliminary hearing on 29 April 2021.

24. The respondent places particular emphasis on its costs warning letter of 9 March 2021. A failure properly to engage with a costs warning letter can be a factor relevant to the question of unreasonable conduct, even though there is no strict rule in Employment Tribunals that costs must follow if the warning letter proves to be well-founded.

25. The costs warning letter of 9 March 2021 was in exemplary terms. It encouraged the claimant to take independent legal advice. It accurately predicted the "fundamental flaw" that the claimant had not breached his contract by obtaining secondary employment, the very point which (without having seen the costs warning letter) I described as the "core problem" in paragraph 25 of my earlier Judgment. The costs warning letter also correctly asserted that the unlawful deductions complaint had been brought out of time, and that if both substantive claims were dismissed the complaint about a failure to provide written particulars of employment would also fail. The claimant was warned that the costs to date were approximately £1,800 plus VAT but would be considerably higher by the time of the next hearing. It said that if the claimant agreed to withdraw it was very likely that the respondent would agree not to pursue any costs application.

26. With hindsight it is plain that the claimant should have accepted that proposal. It was an accurate prediction of what was going to happen at the public preliminary hearing.

27. Even so, I do not consider that the claimant acted unreasonably in pursuing his case up to receipt of that costs warning letter. The legislation is complicated and rarely encountered, even for employment lawyers. Further, he made a mistake about time limits in relation to the unlawful deductions complaint which was a reasonable one for him to make (see paragraph 42 of my earlier Judgment and Reasons).

28. The strongest argument on behalf of the respondent was that the position was made clear to the claimant in the costs warning letter, and that he acted unreasonably in not accepting the legal analysis and withdrawing his claims. Had the claimant been represented by an employment lawyer and taken the same course of action I would have considered that unreasonable. However, given his status as a litigant in person I consider that he acted reasonably in still pursuing his complaints to the preliminary hearing despite the terms of the costs warning letter. I have reached this conclusion taking into account the following factors:

(a) He was a litigant in person with no specialist knowledge or understanding of employment law;

(b) the zero hours provisions are complicated and rarely encountered;

(c) whether his two complaints were viable was going to be decided at a preliminary hearing. This was not a case where the matter was going to continue to a lengthy final hearing if he did not withdraw;

(d) it was not unreasonable for him to view with some scepticism what was being put to him by the respondent's solicitor given his feelings of mistrust for his employer arising out of his perception of how he had been treated, and

(e) it cannot be said that the this was a case in which the claimant refused to engage with the costs warning letter. He engaged fully with it and responded in some detail on 16 March 2021.

29. In summary, therefore, despite the legal flaws in his claims it was not unreasonable in my judgment for the claimant to continue to pursue his case to the preliminary hearing, despite the terms of the costs warning letter.

Settlement Negotiations

30. In the costs application the respondent has provided a clear and comprehensive account of the course which settlement discussions took. It says that the claimant acted unreasonably, and that the figures he was seeking were so excessive as to show that he was behaving vexatiously.

31. I have read the relevant "without prejudice" correspondence. I have taken into account the points that had already been made to him in the costs warning letter of 9 March 2021 about the lack of merit in his zero hours claim and the time limit problem affecting his unlawful deductions complaint.

32. In broad terms the respondent made an offer on 16 March 2021 to settle for the sum of £229.86, the amount of the alleged unlawful deduction, and after further

exchanges the claimant made a proposal for settlement in the sum of £18,609.09. There were further discussions through ACAS during which the claimant reduced his proposal to £12,000 and then to £6,176.22. The respondent had increased its offer to £750, pointing out that a proper quantification of the claims, if they were well-founded, was only £1,500.

33. I have also considered the attempt made by the respondent after the preliminary hearing before me to resolve the costs issue by agreement.

34. I consider that once again the conduct of the respondent's solicitor in seeking to resolve this matter has been exemplary. There has been a commendable attempt to explain the position to the claimant and to seek a resolution on a "without prejudice" basis in a case which the respondent, rightly, regarded as not well-founded. However, the question for me is not whether the respondent behaved reasonably in seeking to settle the matter, but whether the claimant's conduct of those negotiations was sufficient to amount to unreasonable or vexatious conduct justifying a costs award.

35. In my judgment the claimant did not act unreasonably within the meaning of rule 76(1)(a) so as to mean that the power to award costs has arisen. Although there was a great disparity between his figures and the respondent's proposals, that is of course not unusual in litigation. Importantly, however, the claimant's proposals were based on a suggestion that the terms of settlement include terms upon which his employment should come to an end, primarily by way of redundancy. Although the respondent rightly observes that the termination of employment was no part of the litigation, the claimant's view that it could still be discussed and form part of resolution was a reasonable one given his views about how he had been treated and his concerns about what might happen in future. Accordingly, although his proposals for compensation significantly exceeded the amount which the Tribunal might have awarded had his claim succeeded, he was negotiating on a wider basis that this Employment Tribunal litigation alone.

36. Further, this was not a situation where the claimant failed to engage with settlement discussions. He engaged fully with them and made a number of proposals in which he moved considerably in what he was prepared to accept in return for withdrawing his claim.

37. Taking this into account, and his status as an unrepresented litigant unfamiliar with this area of law, I do not consider that he acted unreasonably in the conduct of the negotiations.

38. Nor do I consider that his approach to settlement evidences that the claim was pursued vexatiously. The claimant was doing his best to put a value on his claims, taking into account the wider possibility of an agreement encompassing termination of employment.

39. For those reasons I concluded that the power to award costs had not arisen. My decision would have been different had the claimant been legally represented. The rejection of this costs application should not be seen in any way as a criticism of the approach that the respondent's solicitor has taken, which in my view has been exemplary.

40. That means that it is not necessary for me to consider the two further questions of whether to make a costs order, and if so in what amount. However, I would observe that the amount to be awarded, if an award were appropriate, might well have been considerably less than sought by the respondent, even given the alternative amount restricted to the period after the costs warning letter, because the information I have about the claimant's ability to pay indicates that his income has been very limited indeed over the last 15 months or so, making any substantial costs award very unlikely.

Regional Employment Judge Franey
2 July 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON
6 July 2021

FOR THE TRIBUNAL OFFICE