Case Number: 2207736/2020

EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mr A. CARABIN	**v**	**CALYPSO TECHNOLOGY LIMITED**

Heard at: London Central **On**: 29 June 2021

Before: Employment Judge P Klimov, in chambers

JUDGMENT

The Respondent's application for a costs order fails and is dismissed.

REASONS

Background

1. The relevant background to this claim and my findings and conclusions are set out in my Reserved Judgment dated 10 May 2021 (the "Reserved Judgment"). In this judgment I will be referring to some paragraphs in the Reserved Judgment, where necessary.

2. On 4 June 2021, the Respondent applied for a costs order against the Claimant on the grounds that:

   (i) the Claimant's claim for breach of contract had no reasonable prospect of success; and/or
   (ii) the Claimant acted disruptively or otherwise unreasonably in the manner in which he conducted the proceedings

3. The Respondent argues that the Claimant's claim for breach of contract had no reasonable prospect of success because the Claimant's interpretation of the probation clause in his contract of employment (clause 7.1) was wrong and the Claimant knew or should have known that by 12 April 2021, at the

latest, because by that date he was in receipt of the Respondent's evidence showing that he had commenced employment on 29 June 2020 and not 26 June 2020 (the date stated in clause 1 of his contract). His probation was extended on 29 September 2020, within the initial three months' probation period, and therefore he was entitled only to two weeks' and not three months' notice of termination.

4. The Respondent further submits that the Claimant has acted unreasonably in rejecting the Respondent's settlement offers, the highest of which was £375 short of the maximum sum that the Claimant could have been awarded by the tribunal if he had succeeded in his breach of contract claim. The Claimant sought a much higher settlement figure, in addition to the Respondent covering his legal costs and providing a tax indemnity. His lowest settlement offer was greater than what he would have been able to recover if he had succeeded in his claim. The Respondent submits that it was an entirely unreasonable stance for the Claimant to take.

5. The Respondent further submits that it gave several costs warnings to the Claimant, pointing out that he could not recover more than £16,000 and that any tribunal's award would be calculated on a net basis.

6. Finally, the Respondent argues that the Claimant has acted unreasonably in refusing to concede that his start date was 29 June 2020, which necessitated the Respondent to call Mr Darren Ali to give evidence to the tribunal on this issue, which caused the Respondent to incur further legal costs of £1,198.80, plus VAT. The Respondent warned the Claimant that his stance on this issue was unreasonable, and a costs sanction might be attached to it.

7. The Respondents seeks an award in respect of its costs from 12 April 2021 in the total sum of £12,935.67, plus VAT. In the alternative, the Respondent asks the tribunal to award costs of preparing Mr Ali's witness statement in the amount £1,198.80, plus VAT.

8. The Claimant opposes the application. He contends that there was always an arguable claim for breach of contract. He argues that the length of the Reserved Judgment and detailed analysis of legal arguments by itself shows that the Claimant's claim had reasonable prospects of success. He relies on paragraphs 29, 36, 37, 42, 43 and 52 to 57 of the Reserved Judgment, which deal with legal issues, the parties' arguments and the tribunal's interpretation of the contractual provisions.

9. The Claimant further argues that the Respondent's settlement offers made before he commenced the proceedings show that the Respondent itself did not believe that the Claimant's claim had no reasonable prospect of success.

10. The Claimant contends that advancing the argument that the commencement date of his contract of employment and/or joining date was 26 June 2020 cannot be said to have had no reasonable prospects. He says it was the starting position, as recorded in his contract of employment, and it was for the Respondent to have proved otherwise. He argues, it was open for interpretation when three months elapsed for the purposes of the

commencement of his contract of employment or him joining the Respondent, and the tribunal's findings at paragraph 30 to 35 of the Reserved Judgment demonstrate that there was legal argument with regard to his start date. The finding by the Tribunal that the joining date was 29 June 2020 does not, he argues, mean that his argument had no reasonable prospects of success.

11. With respect to the Respondent's second ground, the Claimant argues that his conduct in rejecting the Respondent's settlement offers was not unreasonable. In support of his contention, he refers to a chronology of the settlement negotiations between the parties, arguing that it demonstrates:

    (i) the Respondent's initial settlement offer was not reasonable because it failed to take into account tax on the offered settlement sum, he would have had to pay,
    (ii) his initial counteroffer was reasonable in the circumstances, and he then further reduced it,
    (iii) when he said that he would be prepared to accept the Respondent's offer, the Respondent reduced it, which caused him to revert to his previous offer,
    (iv) It was the Respondent who broke the settlement negotiations causing him to issue the proceedings,
    (v) the Respondent failed to properly engage in settlement negotiations after the claim had been issued.

The Law

12. Rule 76 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

    (b) any claim or response had no reasonable prospect of success.

13. The following key principles relevant to costs orders may be derived from the case law.

14. 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).

15. 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).

16. 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).

17. 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.*" (Scott v Russell 2013 EWCA Civ 1432, CA)

18. '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).

19. 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)

20. 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".

21. Where a tribunal is considering a costs application at the end of a trial, it must decide whether the claims had no reasonable prospect of success on the basis of the information that was reasonably available at the start, and considering how, at that earlier point, the prospects of success in a future trial would have looked (Radia v Jefferies International Ltd EAT 0007/18).

Conclusions

Did the Claimant's claim have no reasonable prospect of success?

22. Dealing with the "no reasonable prospect of success" ground first, I do not agree with the Respondent's submissions that the Claimant's claim for breach of contract had no reasonable prospect of success.

23. The Claimant's breach of contract claim was not solely based on his start date being 26 June 2020. As apparent from my Reserved Judgment (see paragraphs 26 – 49), his principal case was one of legal construction and interpretation of clause 7.1, and in more than one respect. Therefore, even if the Claimant had conceded that his employment with the Respondent commenced on 29 June 2020, that would not have automatically resolved all other construction and interpretation in favour of the Respondent.

24. Although I found against the Claimant on the key construction and interpretation issues, in my judgment, his case was far from being doomed to fail from the start. Clause 7.1, as drafted, was ambiguous and open to alternative interpretations. It also contained terms which were potentially in conflict with other terms in the contract (e.g. clauses 1.1 and 17.1)

25. Further, the Claimant also argued, albeit only by way of construction of clause 7.1, that the Respondent was not entitled to extend the probation period without "reasonable justification", and for that argument his actual commencement date was irrelevant.

26. Finally, until it was clarified at the start of the hearing (see paragraphs 52 – 55 of the Reserved Judgment), it appears that the Respondent case was that the Claimant's initial probation period ended on 28 September 2020 (see paragraph 12 of the Grounds of Resistance), which would have meant that even on the Respondent's case as to the correct start date, the Respondent was a day late in extending the Claimant's probation in writing on 29 September 2020. Also, the Respondent's letter and the covering email extending the Claimant's probation by three months stated the new end date as 25 December 2020, which counting backwards would have meant that the initial probation period had expired before 29 September 2020.

27. For these reasons, I do not accept that the Claimant's claim had no reasonable prospect of success. It follows that the Respondent's application under Rule 76(1)(b) fails.

Has the Respondent acted unreasonably?

28. Turning to the alternative ground under Rule 76(1)(a). The Respondent's submission states it is "*on the basis that the Claimant acted disruptively or otherwise unreasonably in the manner in which he conducted the proceedings*."

29. The Respondent's arguments on this ground are based on the Claimant's refusal to accept settlement offers, making unwarranted settlement demands and refusing to concede the factual issue of the correct commencement date. None of these, in my judgment, could be described as the Claimant acting "*disruptively*", and he certainly did not act in any way which I would consider disruptive during the hearing.

30. Dealing with the issue of refusing to accept settlement offers and making settlement demands substantially higher than the maximum value of his claim. While I accept that it would have been unreasonable for the Claimant to refuse to settle for an amount equal to the maximum sum the tribunal would have been able to award him if he had been successful in his claim, the Respondent never made such an offer to the Claimant. The Respondent's offer was close, but still, as admitted by the Respondent in its submissions, £375 short of the maximum sum.

31. In my judgment, it was not unreasonable for the Claimant to refuse to settle his claim for an amount which was less than what he believed he was entitled to under his contract. The fact that his settlement offers were higher than the maximum sum, is not sufficient for me to conclude that he would not have settled for the maximum sum if it had been offered by the Respondent. In fact, it appears that he was open to accept the Respondent's "375 short of the maximum sum" offer, however the Respondent withdrew it.

32. The Claimant was under no duty to make any settlement offers to the Respondent, and therefore him making offers, which were higher than what he would have been able to recover if he had succeeded at the tribunal, in my judgment, cannot be said to be unreasonable conduct. In any event, it appears that he dropped his demands quite substantially, and it was the Respondent who declined to settle for sums, which were below the maximum value of his claim.

33. Looking at the chronology of the settlement negotiations, it seems to me the parties were engaged in the usual "horse trading" one would expect to see in such circumstances, especially with legal costs escalating as the case progresses to the final hearing. Therefore, if there is a blame to be attached to the failure of the settlement negotiations, I find, it should be shared in equal proportions between the parties.

34. For these reasons, I reject the Respondent's contention that the Claimant has acted unreasonably in not accepting the Respondent's settlement offers or making his settlement demands.

35. Finally, turning to the question of the Claimant's refusal to concede that his actual start date was 29 June 2020. I find that paragraph 4 of the Claimant's witness statement, where he says: "*As far as I am aware, my start date with the Respondent was 26th June 2020*", considering evidence which came to light at the hearing, misrepresents the true situation. The Claimant knew that his actual start date was 29 June 2020. He admitted that on cross-examination. Also, see my findings of fact in paragraphs 17 and 18 of the Reserved Judgment. Therefore, in my judgment, maintaining the position that his start date was 26 June 2020 was unreasonable.

36. I do not accept the Claimant's argument that it "*was the starting point and it was for the Respondent to have proved otherwise*". While the phrase "*from the date of joining the Company*" in clause 7.1 of the Claimant's employment contract was certainly a matter for legal interpretation, the date when he actually started his work for the Respondent (that date being 29 June and not 26 June 2020) was well known to him, and there was nothing about that fact that was "*open for interpretation*".

37. Having found that the Claimant's conduct in refusing to concede the start date point (as a matter of fact and not legal interpretation of clause 7.1) was unreasonable, I must step back and look at all the circumstance of the case to decide whether I should exercise my discretion and make a costs award against the Claimant.

38. I do not accept the Respondent's submission that Mr Ali's witness evidence was only required to deal with the start date issue. Mr Ali was the only witness called by the Respondent. He gave evidence on various matters, and not only on the start date of the Claimant's employment. I find it hard to imagine that even if the Claimant had conceded the start date point, given the issues in the case, the Respondent would have run its defence without calling any witnesses.

39. Further and more importantly, the case turned on my interpretation of clause 7.1, which, as I stated in my Reserved Judgment, was far from being a masterpiece of legal drafting (see paragraph 40). As I stated above in this judgment (see paragraph 23) even if the Claimant had conceded that his start date was 29 June 2020, that would not have resolved all the issues in the case, and would not have materially, if at all, shorten the length of the hearing.

40. Therefore, and considering the nature, gravity and effect of the Claimant's unreasonable conduct, I am not prepared to exercise my discretion and make a costs award against the Claimant.

41. It follows, that the Respondent's application for a costs order against the Claimant fails and is dismissed.

Employment Judge P Klimov
London Central Region

Dated: 29 June 2021

Sent to the parties on:

30/06/2021

For the Tribunals Office

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