EMPLOYMENT TRIBUNALS

Claimant: Mr. N-M Harley-Ruud

Respondent: HIT Training Limited

Before: Employment Judge Midgley

Representation
Claimant: In person
Respondent: Mr. Thomas, Solicitor

JUDGMENT

(On the application for costs)

1. **The application for costs is well founded.**

2. **It is ORDERED that the claimant must pay the respondent £2,000.00**

REASONS

1. In this case the respondent seeks its costs of defending this action against the claimant.

General Background

2. The claimant was employed by the respondent as a Content Manager from 16 September 2019 until 22 January 2021. He was dismissed with notice of one week in accordance with the terms of his contract detailing notice.

3. In a claim presented on 1 June 2020 the claimant sought to bring claims of unfair dismissal and wrongful dismissal in respect of that termination. The claim of unfair dismissal was struck out because the claimant lacked the necessary continuity of employment within section 108 ERA 1996. The basis of his claim for wrongful dismissal was that his contract provided for a 6-month probationary period, but the respondent dismissed him prior to the conclusion of the that period.

4. The claimant sought to claim the following by way of damages for wrongful dismissal: (a) the wages due for the remainder of the probationary period (c. £3,000) and (b) the coincident utility costs of working from home, being £120

5. In a response presented on 20 July 2020 the respondent defended the claim. The basis of its defence to the wrongful dismissal claim was that the claimant was dismissed during his probationary period on the grounds that he had

failed to meet the expected standards of performance, and that he had been paid one weeks' notice in accordance with his contract.

6. The respondent identified in its response that the claimant was not entitled to claim working from home costs, as there was no provision for the payment of such cost in his contract, and his entitlement to damages for wrongful dismissal was limited to his notice pay, which he had been paid. The claim was, it argued, therefore legally and factually without merit and valueless.

7. The claimant was directed to confirm the precise sums he was claiming and their calculation, and on 7 September 2020 indicated that he was claiming the difference between the sums he received and wages due for the 6 months of his probation. The claimant reduced his claim for working from home to £30, being 5 months at £6 a month.

8. On 3 February 202 the respondent applied to strike out the claim. The respondent relied upon the term of the claimant contract relating to notice in the probationary period, and the fact of its payment of one weeks' notice. It argued that the claimant's case that he should not have been dismissed before the end of the probationary period was misconceived and had no reasonable prospect of success. Similarly, the respondent identified that there was no clause within the claimant's contract nor any policy that permitted the claimant to a homeworking allowance and therefore that aspect of the claim was also misconceived. A copy of the claimant's contract was attached to the application, the relevant term of which provided

   > "Your employment is subject to your satisfactory completion of a probationary period…. In the event, however, you were unable to achieve a satisfactory standard of work, the company reserves the right to terminate your employment at any time during the probationary period. Such termination of employment may be made without reference to the company's disciplinary procedures.
   >
   > During the first month of your probationary period, employment may be terminated without notice. Thereafter until the satisfactory completion of your probationary period, including extensions to it, employment may be terminated by either side giving notice of one week."

9. The application was copy to the claimant and the claimant was directed to provide his comments upon it. The claimant's comments were limited the fact that he disagreed with the application.

10. On 17 March 2021 Employment Judge Rayner directed that the application should be determined, if pursued, at the final hearing on 26 March 2021.

11. As often happens when litigants in person are required to prepare cases, the claimant misunderstood the nature of the issue for the tribunal arising out of the wrongful dismissal claim. He sought to demonstrate firstly that he was not provided with proper training during his probationary period, and secondly that he had not failed to meet the necessary standard during the probationary period. He therefore did not engage with the primary issue for the tribunal, which was whether the respondent was contractually entitled to terminate the employment by giving a week's notice, and if so whether the claimant was paid without notice.

12. On 23 March 2021 the respondent wrote the claimant a without prejudice, save as to costs letter in which it identified that there was no evidence that the respondent had acted in breach of contract, but rather the claimant had received notice pay in accordance with his contract of employment. The respondent put the claimant on notice that if the hearing were to proceed it would seek its solicitors' costs of £2000 plus VAT (the cost of preparing for and attending the hearing), unless the claimant withdrew his claim by 10 AM on 24 March 2021.

13. Regrettably, the claimant did not engage with that argument, but rather was predominantly focused at the time on the content of the bundle and the preparation of his witness statement. He maintained that he had not received a copy of the bundle, in circumstances where the respondent had emailed the claimant on 11 March proposing an index for the bundle and inviting the claimant to provide additional documents as he required, and secondly on 17 March, in the absence of any response from the claimant, the respondent emailed the claimant a copy of the finalised bundle. On 19 March the respondent sent the claimant a copy of the statement that was to be relied upon by the respondent. In light of the claimant's continued insistence that he had not received it, an additional copy of the bundle was sent to him on 23 March.

14. On 25 March 2021 I directed that if either party were intending to pursue an application costs or time preparation order, they should prepare a schedule of the work done, the rate claim for it and the dates the work the details the fee earner or individual who undertook work. I directed that no application would be heard in the absence of such a schedule.

15. Also, on 25 March 2021 the respondent emailed the claimant stating, "the issue to be considered by the ET is a very narrow, contractual matter." It referred the claimant to the relevant clause of the contract (set out above).

16. The hearing proceeded on 26 March 2021, and I dismissed the claimant's claims on the grounds that the respondent had terminated the claimant's employment and paid him notice pay in accordance with the terms of his contract. During the hearing the claimant indicated that he had received advice from two independent lawyers as to the merits of his claim. Sensibly he did not disclose the content of that advice, although he maintained that he believed his claim had reasonable prospects

17. I directed that any application costs should be submitted in written form by 16 April, and any reply to the application by 30 April 2021

The Application for Costs

18. On 9 April 2021 the respondent submitted a written application for costs requesting the matter to be determined on the papers. The grounds of the application were that the claimant had acted unreasonably in pursuing claimant had no prospect of success. The respondent placed reliance upon the fact that it had sent to costs warning letters to the claimant and the claimant indicated that he had received advice from two independent solicitors. It therefore maintained the claimant firstly knew that his claim was without legal merit, and secondly would have necessarily understood the respondent would be incurring costs in defending the claim.

19. Secondly, the respondent argued that the claimant had acted vexatiously or unreasonably by inflating the value of his claim, beyond the mere notice pay to which he was entitled, and by denying receipt of emails, which his subsequent emails showed he had received. Lastly, the respondent argued that the claimant had failed to comply with case management orders in relation to the preparation of the bundle and the disclosure of his witness statement and schedule of loss, and that those delays caused unnecessary cost.

20. The respondent sought costs under two heads; first, solicitors costs of £500 plus VAT in respect of the costs warning letter incorporating both advice as to that action and the drafting the letter itself. Secondly costs of instructing Mr Thompson to prepare for and attend the hearing and to draft the costs application, amounting to £2000 in total.

21. On 9 April 2021 the claimant commented on that application in which he disputed the allegation that he had acted unreasonably but averred that the respondent had sought to place obstacles in front of him in preparation for the hearing, and secondly denied that his conduct was unreasonable, or the claim lacked reasonable prospects on the grounds that two solicitors had advised him that he had a reasonable claim. He did not however disclose that advice.

22. On 13 May 2021 I directed that the claimant should indicate whether he consented to the case being determined on the basis of the parties' written representations. He consented to that course by email dated 18 May 2021. The file was referred back to me on 24 June 2021.

The Law

23. The relevant rules are the Employment Tribunals Rules of Procedure 2013 ("the Rules").

24. Rule 76(1) provides: "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.

25. Under Rule 77 a party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such 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.

26. Under 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 …"

27. Under Rule 84, in deciding whether to make a cost, 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.

28. Rule 76(1) imposes a two-stage test: first, a tribunal must ask itself whether a party's conduct falls within rule 76(1)(a); if so, it must go on to ask itself whether it is appropriate to exercise its discretion in favour of awarding costs against that party.

29. An award of costs is the exception rather than the rule. As Sedley LJ stated at para 35 of his judgment in Gee v Shell Ltd [2003] IRLR 82 CA "It is nevertheless a very important feature of the employment jurisdiction that it is designed to be accessible to people without the need of lawyers, and that in sharp distinction from ordinary litigation in the UK, losing does not ordinarily mean paying the other side's costs …"

30. 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 (Yerrakalva v Barnsley Metropolitan Borough Council and anor [2012] ICR 420, CA.) This process does not entail a detailed or minute assessment. Instead, the tribunal should adopt a broad-brush approach, against the background of all the relevant circumstances (Sud v Ealing London Borough Council 2013 ICR D39, CA).

31. '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. The Tribunal must consider, after the claims were brought, whether they were properly pursued. If not, then that may amount to unreasonable conduct.

32. In determining whether to make an order under this ground, 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. There must be some causal link between the unreasonable conduct and the costs claimed, in the sense the causation is not irrelevant, but there does not need to be a precise causal link between the unreasonable conduct in question and the specific costs being claimed.

33. The threshold to trigger costs is the same whether a litigant is or is not professionally represented, although in applying those tests, the EAT has held that the status of a litigant is a matter which the tribunal must take into account – see AQ Ltd v Holden [2012] IRLR 648 in which Richardson J commented:

> "Justice requires the tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life. As [counsel] submitted, lay people are likely to lack the objectivity and knowledge of law and practice brought about by a professional adviser.

> Tribunals must bear this in mind when assessing the threshold tests in [rule 76(1)(a)]. Further, even if the threshold tests for an order of costs are met, the tribunal has discretion whether to make an order. This discretion will be exercised having regard to all the circumstances. It is not irrelevant that a lay person may have brought proceedings with little or no access to specialist help and advice."

34. However, Richardson J also acknowledged that it does not follow from this "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". These statements were approved by Underhill P in Vaughan v London Borough of Newham 2013] IRLR 713.

35. With regard to costs warning letters, while it is good practice to warn a claimant of the weakness of his or her case where the respondents may be minded to apply for costs should they succeed at the end of the case, the failure to do so will not, as a matter of law, render it unjust to make a costs order even against an unrepresented claimant (see Vaughan (above)).

36. The same approach is to be taken in circumstances where the respondent has not applied for a deposit order. Underhill P in Vaughan also acknowledged that respondents do not always, for understandable practical reasons, seek such an order even where they are faced with weak claims, so that failure to do so "is not necessarily a recognition of the arguability of the claim." On the facts of Vaughan, neither the failure to seek a deposit order nor the failure otherwise to warn the claimant of the hopelessness of her claims was "cogent evidence that those claims had in fact any reasonable prospect of success" and neither failure was "a sufficient reason for withholding an order for costs which was otherwise justified".

37. The unpreparedness of a litigant in person which causes an inability properly to particularise the claim can constitute unreasonable conduct and was a proper basis on which to award costs to the respondent - Liddington v 2gether NHS Foundation Trust EAT 0002/16 IDS 1059.

Discussion and Conclusion

38. In my judgement the claimant acted unreasonably in pursuing a claim that had no reasonable factual basis because the claimant had received his notice pay, and no legal basis insofar as the claimant sought to recover the wages to the end of his probationary period. The claimant was alerted to those difficulties with his claim on the 23 February in the response and subsequently on 25 March 2021 in the costs warning letter. Although it is unclear, it does not appear that the claimant sought legal advice in respect of either, but rather had obtained advice at about the time that he issued his claim.

39. In the circumstances where the respondent had made it clear at a very early stage that the claim was misconceived through its application for strike out in February 2021, and subsequently that it would apply for its costs of defending the hearing if the claimant were to continue to pursue his claim through its costs warning letter on 25 March 2021, it was unreasonable (even making allowance for the fact that he was a litigant in person) for the claimant not to

heed that warning or to engage with it anyway but to continue to pursue a claim that was without a legal basis or factual merit.

40. It was certainly open to the claimant to seek further advice as to the merits of the application for costs and its potential consequences to him, and, in circumstances where he had previously sought advice, it was foolish, if not unreasonable, to fail to do so. If the claimant were unwilling to spend a small sum to obtain that advice, then, at the very least he should have sought some free advice or spent time and care engaging with the arguments by which the respondent suggested his claim was misconceived. There was no evidence before me to suggest that he had actively sought to consider the issues the respondent had first raised in February 2021. On the contrary, at the time of the hearing the claimant persisted in pursuing the claim on an erroneous basis, without being able to identify how the contract could support it - he was unable to articulate how the contract or the law permitted him to claim losses for the six month period of his probation, and was focused upon demonstrating that the respondent had failed to provide him with reasonable training during his probationary period and/or establishing that he had performed to the appropriate standard.

41. Having determined that the claimant acted unreasonably by continuing to pursue a meritless claim despite receiving an early strike out application and a cost warning, I must go on to consider whether I should exercise my discretion to order the claimant to pay the respondent's costs as claimed.

42. In my judgement, it is appropriate to exercise my discretion to order costs on the facts of this case. Whilst the claimant is a litigant in person, here the respondent identified the relevant documents and the relevant legal propositions in its defence to the claim. The claimant received that with sufficient time to take advice or to research whether the respondent's arguments were legitimate. Even if he did not take either of those reasonable steps, the receipt of the respondent's costs warning letter on 25 March necessarily put him on notice of the risk he exposed himself to by continuing the claim in circumstances where it was potentially misconceived. At that stage (at the very least) a reasonable course would have been to take urgent advice or to make the necessary enquiries himself. The claimant did neither. That conduct was unreasonable.

43. I must then consider whether to award the costs sought by the respondent. In my view, it would not be appropriate to award the respondent the costs of advice as to the cost warning letter or the costs of the letter itself. It is quite common for claimants to pursue meritless claims or claims which are significantly weak on the facts despite robust responses being provided by respondents. Costs are not awarded as a matter of right or common practice in those circumstances. Something more is required. In my view the something more was the cost warning letter of 25 March 2021. The benefit of the letter was that it provided the respondent the opportunity to recover its costs of the hearing or avoid them if the claimant withdrew. The claimant did not heed the warning, but rather doubled his focus on irrelevant matters. It is that conduct that was particularly unreasonable. In those circumstances, in my judgement the appropriate sum to award is the respondent's costs are preparing for and attending the hearing on 26 March 2021 in the sum of £2,000.00

44. The claimant was aware of the relevant rules at the time that he responded to the application, but neither provided any evidence of his means or any information relating to it, despite being aware that the respondent was seeking costs in the summer £2600. In those circumstances I presume that the claimant has the means to pay the £2000. I therefore grant the respondent's application for costs in the sum of £2000.

45. The claimant attention is drawn to rule 66 in relation to the time for payment.

Employment Judge Midgley
Date: 13 July 2021

Judgment and Reasons sent to the Parties: 20 July 2021

FOR THE TRIBUNAL OFFICE