EMPLOYMENT TRIBUNALS

Claimant: Mr M Judge

Respondent: Centrica PLC

Heard at: Manchester **On:** 11 May 2021

Before: Employment Judge Ainscough (in chambers)

REPRESENTATION:

Claimant: Not in attendance
Respondent: Not in attendance

JUDGMENT ON COSTS

The judgment of the Tribunal is that:

1. The respondent's application for costs is successful.

2. The claimant is ordered to pay the respondent costs of **£4874.84**

REASONS

Introduction

1. Following the final hearing on 9 November 2020 the respondent made an application for costs in accordance with rule 77 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. I agreed to deal with the application without a hearing following receipt of a written response from the claimant dated 25 March 2021 and 6 April 2021.

The Proceedings

2. The claimant's ET1 form dated 21 May 2020 brought claims of unlawful deduction from wages contrary to section 13 of the Employment Rights Act 1996. Specifically, the claimant asserted that during the course of his employment the

terms of his bonus scheme had changed without notification and as a result of leaving employment on 8 January 2020, he missed out on his bonus for the previous 12 month period because he was not employed by the respondent in April 2020 when the bonus was paid. The value of the claim was £6879.48.

3. On 24 June 2020 the respondent submitted a response in which it sought to strike out the claimant's claim because both the old scheme (On Track Incentive Plan) and the new scheme (Annual Performance Incentive Plan) contained a clause that said if an employee leaves the respondent company before 1 April, which follows the qualifying bonus year, the employee will automatically forfeit participating in the bonus scheme and will not receive payment of the award. The respondent enclosed copies of both schemes with the response.

4. In accordance with rule 26 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Regional Employment Judge Franey considered both the claim form and response to ascertain whether there were arguable complaints brought by the parties. Having considered the pleadings and the enclosures, Regional Employment Judge Franey issued an Order dated 26 August 2020 to the claimant to provide further information, which included the questions as follows:

(1) Do you accept that **BOTH** the OTIP scheme and the APIP scheme included the clause stated at paragraphs 10 and 14 of the respondent's grounds of resistance?

(2) If not, please explain why not.

(3) If yes, please explain why you say you are entitled to the bonus claimed.

The claimant was asked to respond by no later than 21 September 2020.

5. On 6 September 2020 the claimant responded to that Order. In so doing the claimant accepted that the OTIP scheme included the clause stated at paragraph 10 of the response as summarised above. The claimant accepted that the APIP scheme had the same clause but that he only had knowledge of that clause from 16 April 2020. The claimant asserted that because he had not seen any documents about the APIP scheme he could not take the respondent's word that this clause existed.

6. The claimant clarified that he was bringing a claim because he had not been formally notified of a move to the APIP scheme and he had worked for the whole of 2019 and was entitled to the bonus. In addition, the claimant asserted that the respondent had made discretionary share awards and therefore he was entitled to the equivalent bonus.

7. As a result of the response from the claimant the final hearing was extended from a duration of one hour to two hours.

8. At the final hearing on 9 November 2020 I considered a bundle of 152 pages and heard evidence from the claimant and the respondent witness, Stephanie Hallett.

9. During evidence, the claimant maintained his case that because he had not been notified of the change in bonus scheme, he was entitled to his bonus. The claimant admitted during evidence that:

(a) The OTIP scheme precluded payment of a bonus if he was not employed as of 1 April 2020 and further, that the APIP scheme also included the same clause.

(b) The claimant also admitted that the respondent was entitled to modify the bonus scheme.

(c) The claimant disputed that he had received notification of the change to the scheme in February 2019.

10. At the conclusion of the hearing, I dismissed the claimant's claims for unlawful deduction from wages on the basis that he was not entitled to payment of his bonus and therefore there had been no unlawful deduction of his wages.

11. On 20 November 2020 the claimant applied for Written Reasons of my Judgment.

12. The Written Reasons were provided to the parties on 24 March 2021.

Respondent's Application

13. On 18 November 2020 the respondent made an application for costs in accordance with rule 77 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. The application was made on the basis that:

(a) The claim had no reasonable prospect of success contrary to rule 76(2); and

(b) The claimant had acted unreasonably in bringing the proceedings contrary to rule 76(1)(a).

A. <u>No reasonable prospect of success</u>

14. The respondent asserted that despite the change in bonus scheme, it was clear to the claimant that should he resign from his role prior to 1 April of any year, he would forfeit his right to a bonus payment. The respondent submitted that the claimant accepted during the final hearing that he was unable to put forward any legal basis as to why he was entitled to payment of the 2019 bonus.

15. The respondent seeks to rely upon the claimant's contract of employment and the associated bonus documentation, its ET3 and further the two costs warnings that were sent to the claimant on 31 July 2020 and 4 November 2020. The respondent contends that all made it plainly obvious that the claimant had no legal basis for his claim.

B. <u>Unreasonable Conduct</u>

16. The respondent asserted that the claimant has acted unreasonably because he ignored the costs warnings made on 31 July 2020 and 4 November 2020. The respondent pointed out that the claimant was urged to obtain legal advice and in responding to the first costs warning, on 2 August 2020, confirmed that he had taken such advice but was continuing with his claim.

17. The respondent submitted that as a result of the claimant's unreasonable conduct in pursuing a claim with no reasonable prospect of success it incurred significant costs in defending the claim.

18. The respondent seeks payment of all costs incurred since the receipt of the claim from the claimant.

Claimant's Response

19. In response, the claimant submitted that he had always based his claim on the grounds that he had not been notified of a transfer onto the APIP scheme. The claimant clarified that in evidence he accepted that had he only been on the "On Track Incentive Plan" he would not have pursued the claim. The claimant relied upon his response to the Tribunal of 6 September 2020 as justification of pursuing his claim.

20. The claimant denied that he had acted unreasonably and pointed to the fact that in "without prejudice" correspondence he had attempted to settle his claims following receipt of the cost warnings. The claimant also clarified that he did not seek legal advice about the merits of his claim.

21. The claimant asserted that the costs claimed by the respondent are disproportionate given that he was prepared to settle his claim for as little as £3,000, on 6 November 2020.

Relevant Legal Principles

22. Rule 76(1) states:

> "**When a costs order or a preparation time order may or shall be made**
>
> (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.
>
> (c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.

23. Rule 77 states:

"Procedure

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."

24. Rule 78 states:

"The amount of a costs order

1. A costs order may –

   i. 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;

   ii. order the paying party to pay the receiving party he 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; or, in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment and Further Provisions) 1993, or by an Employment Judge applying the same principles;

   iii. under the paying party to pay the receiving party a specified amount as reimbursement of all or part of a Tribunal fee paid by the receiving party;

   iv. order the paying party to pay another party or a witness, as appropriate, a specified amount in respect of necessary and reasonably incurred expenses (of the kind described in rule 75(1)(c)); or

   v. if the paying party and the receiving party agree as to the amount payable, be made in that amount.

2. Where the costs order includes an amount in respect of fees charged by a lay representative, for the purposes of the calculation of the order, the hourly rate applicable for the fees of the lay representative shall be no higher than the rate under rule 79(2).

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.

25. Rule 84 provides the Tribunal can have regard to the paying party's ability to pay, but the Tribunal is not obliged to take this into account when determining whether to make a costs order.

26. In **Meadowstone (Derbyshire) Ltd v Kirk and another EAT 0529/05 (2005)** the Employment Appeals Tribunal concluded that the respondent knew the defence was unmeritorious and untrue and therefore had no reasonable prospect of success and upheld the costs award.

27. In **Yerrakalva v Barnsley Metropolitan Borough Council and another 2012 ICR 420, CA** the Court of Appeal reiterated that costs in the Employment Tribunal are the exception rather than the rule.

28. In **Lodwick v Southwark London Borough Council 2004 ICR 884, CA**, the Court of Appeal determined that at both stages of the Tribunal's discretion to make a costs award, the fundamental principle that costs awards are compensatory not punitive, must be observed.

Discussion and Conclusions

A. Did the claim have no reasonable prospect of success?

29. In his response to the Tribunal on 6 September 2020 the claimant confirmed that he had known from 16 April 2020 that the APIP scheme contained the same clause as the OTIP scheme. However, the claimant also asserted that he did not have documentary evidence of this and therefore pursued his claim, which he lodged on 21 May 2020.

30. The respondent submitted its response on 24 June 2020 and reproduced the clause in each scheme at paragraphs 10 and 14 respectively and enclosed copies of each scheme. As a result, on 26 August 2020 Regional Employment Judge Franey asked the claimant to consider the content of the response and set out the legal basis of his claim.

31. The purpose of a rule 26 referral to a Judge is to establish whether the claim and the response are arguable. The request made of the claimant by Regional Employment Judge Franey was to ascertain whether the claim remained arguable.

32. The response from the claimant on 6 September 2020 did not set out an arguable basis of a claim. The claimant relied upon the fact that he had not been informed that he had transferred from the OTIP scheme to the APIP scheme. The basis of the claim had no reasonable prospect of success. Regardless of whether the claimant was notified of a transfer onto a different scheme, both schemes contained identical clauses that precluded the claimant from receiving payment of the bonus once he had left the business before 1 April 2020.

B. Did the claimant conduct himself unreasonably?

33. On 24 June 2020 the respondent provided copies of the bonus schemes with the response. This submission was followed up by a detailed cost warning letter on

31 July 2020 setting out the reason the claim had no reasonable prospect of success.

34. Despite this clear proof of the respective schemes and an explanation of those schemes, the claimant continued to pursue his claim. In his response to the costs warning letter of 2 August 2020 the claimant asserted that he had taken legal advice.

35. The query from Regional Employment Judge Franey did not cause the claimant to pause and consider the merits of his position as asserted in his response on 6 September 2020. To pursue the claim thereafter is behaviour that cannot be reasonably explained. The claimant admitted during evidence that both schemes contained the same clause and he could not assert a legal basis for continuing with his claim.

36. The fact that the claimant did not receive notice of the change to the scheme and that there had been a discretionary share award are irrelevant to the fundamental point that both schemes precluded payment of the bonus should the employee leave before 1 April 2020.

C. Did the claimant's conduct cause the respondent to incur unnecessary costs?

37. The respondent set out its response to the claim very clearly on 24 June 2020 and even went to the trouble of enclosing a copy of the bonus schemes for the attention of both the Tribunal and the claimant.

38. The respondent reiterated the position in the costs warning of 31 July 2020. Regional Employment Judge Franey queried the legal basis of the claim on 26 August 2020. The claimant's response to that query on 6 September 2020 caused the respondent, from that date, to incur unnecessary costs in defending the claim.

D. Should a costs order be made?

39. At every stage of the proceedings the respondent has pointed out to the claimant that his claim was misconceived. Even after the respondent provided the wording of the relevant clause in both schemes with the response on the 24 June 2020 and Regional Employment Judge Franey queried the legal basis of the claim on 26 August 2020, the claimant was undeterred.

40. The claimant admitted during the hearing that there was no legal basis for his claim, yet despite this knowledge, he had continued with his claim. The claimant was provided with the necessary documentation on 24 June 2020 and could not credibly assert that the lack of documentation maintained the belief in his case. I conclude therefore, that both Rule 76(1)(a) and (b) are satisfied.

41. Costs in the Tribunal are the exception rather than the rule on the outcome of a case. Despite the tests in Rule 76(1)(a) and (b) being met, the Tribunal must also consider whether to exercise the discretion to make a costs award.

42. In correspondence the claimant asserted he was taking legal advice but in response to this application denied any such advice was taken. Whilst the claimant

is a litigant in person, it is clear from the nature of his employment that he is intelligent and capable of understanding commercial documents such as bonus schemes.

43. Following receipt of the response on 24 June 2020, the costs warning letter of 31 July 2020 and the query raised by Regional Employment Judge Franey on 26 August 2020, the claimant could have withdrawn his claim without causing the respondent to incur unnecessary costs. The last date on which he could have done this was when he submitted his response on 6 September 2020.

44. In the costs warning letter sent by the respondent on 4 November 2020, the respondent confirmed it would not pursue the claimant for costs if he withdrew the case at that stage. This conciliatory position does not mean that the costs incurred by the respondent from the 6 September 2020 were necessary. Rather it is indicative of the respondent doing all it can to stem the flow of unnecessary costs any further. The respondent should not be penalised for the position taken on the 4 November 2020.

45. The respondent has incurred unnecessary costs from 6 September 2020 and I order that the claimant is liable for those costs because it was clear from this date that the claim had no reasonable prospects of success and the claimant was unreasonable in continuing with the claim thereafter.

46. The total costs incurred by the respondent from this date were £4874.84.

Employment Judge Ainscough
Date 6 August 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON
9 August 2021

FOR THE TRIBUNAL OFFICE