EMPLOYMENT TRIBUNALS

Claimant: Mr M Moody
Respondent: Mr F Morland
Heard at: Bristol (Claimant by video-CVP) **On:** 11 August 2021
Before: Employment Judge Livesey
Representation:
Claimant: Mr Lawrence, counsel (Mr McCabe, solicitor and the Claimant also in attendance), all by video
Respondent: In person

JUDGMENT

1. The Claimant's application for costs under rules 74-8 succeeds in part and the Respondent is to pay the sum of £2,064.00.

2. The Respondent's application for reconsideration of paragraph 3 of the Judgment of 6 May 2021 is dismissed under rule 72 (1).

REASONS

A. COSTS

1. Background

1.1 This claim, which had been issued on 19 June 2020, was concluded at a final hearing which took place on 6 May 2021. A Judgment was produced on that day and Reasons were requested and prepared on 25 May and sent to the parties on 16 June 2021.

1.2 The claim succeeded and the Respondent was ordered to pay a redundancy payment in the sum of £9,440.00 and compensation for breach of contract relating to notice in the sum of £3,448.56. A claim for unlawful deductions from wages was withdrawn upon the Respondent's undertaking to meet the liability to pay HMRC the deductions which had been made from the Claimant's pay in respect of national insurance and tax.

1.3 The factual circumstances giving rise to this claim were set out between paragraphs 4.1 and 4.11 of the Reasons. In essence, the Claimant had been employed from July 1975 at a small plant shop and nursery near Westbury, Wiltshire by Row Farm Nursery Ltd which was run by the Respondent's father, Mr Roger Morland. When Mr Roger Morland had retired in or around 1990, the Claimant became the only employee, with the Respondent overseeing the business. The Respondent, however, was disqualified from being a Director of the Limited Company in May 2016 and it was dissolved on 1 November of that year. He accepted that he then became the Claimant's employer himself (paragraph 4.6 of the Reasons).

1.4 In March 2020, the Claimant was dismissed. It was accepted between the parties that he had been made redundant, but he had not been paid a redundancy payment nor had he received any notice pay. The Claimant therefore needed to issue proceedings to recover those sums.

1.5 The issue between the parties was the length of the Claimant's employment. The Respondent alleged that there was a break in continuity when the Claimant had ceased work for Row Farm Nursery Ltd, but before his employment with him personally had commenced. That alleged break in continuity, in or around January 2017, resulted in very different approaches being taken in respect of the calculations for redundancy and notice pay.

1.6 As was clear from paragraphs 3.5, 5.2 and 5.3 of the Reasons, the Respondent had not been aware of the effect of the TUPE Regulations which were determined to have preserved the Claimant's continuous employment. He was therefore entitled to redundancy and notice payments calculated on the basis that there had been no break in continuity.

2. Costs application

2.1 The Claimant's application was supported by a bundle of correspondence (R1), page references to which have been cited in square brackets hereafter.

2.2 No application for costs was made at the conclusion of the hearing on 6 May 2021. An application was made on 2 June which the Respondent resisted on 28 June. The matter was therefore listed for this hearing.

2.3 The basis of the Claimant's application was threefold [1-4];

(i) That the Response had had no reasonable prospect of success (rule 76 (1)(b));

(ii) That the Respondent had, in any event, acted unreasonably in the manner in which proceedings had been conducted (rule 76 (1)(a));

(iii) That the Respondent had failed to comply with case management orders, which resulted in significant additional costs to the Claimant (rule 76 (1)(a) and/or rule 75 (1)).

2.4 As to the first and second matters, the arguments were the same. The Claimant contended that, although the Respondent had agreed that redundancy and notice payments were owed to him, he had adopted an unreasonable and un-meritorious stance by seeking to argue that there had been a break in continuity when the Limited Company ceased trading. The Claimant had, on 15 April 2021, written to the Respondent putting him at risk as to costs should he not have withdrawn his response [22-3]. A claim of unfair dismissal was also withdrawn on the same day [21].

2.5 As to the third matter, the final hearing was listed by a case management order dated 30 November 2020 in which directions for its preparation were given. The directions provided for disclosure on or before 11 January 2021, followed by the preparation of a joint hearing bundle by the Respondent on or before 25 March 2021 and exchange of witness statements by 8 April 2021.

2.6 The Claimant's solicitors asked for the Respondent's disclosure on 22 and 28 January [13-4]. The only response that they got was that the matter was 'receiving attention' (on 31 January). That prompted a letter to the Tribunal on 19 February in which they asked for the Response to have been struck out [15]. Further correspondence was sent to the Respondent on 24 and 30 March [16-7] with the result that the Respondent emailed the Tribunal on 31 March to apply for an extension of time [18].

2.7 The Claimant's solicitors wrote again on 7 April [20] and stated that they had still not received the Respondent's documents but it took a further

month, until 8 April, for the Respondent to provide just two documents by way of disclosure. He was three months late.

2.8 As a result of the Respondent's failure to comply and/or engage with the Tribunal process, the Claimant's solicitors produced the final hearing bundle themselves and a password protected witness statement on 28 April [24]. They had provided an initial draft on 30 March without any response [17]. The Respondent did not respond when the final documents were provided other than to write to the Tribunal to raise issues with the substance of the claim.

2.9 On 5 May, the day before the hearing, the Respondent attended the Claimant's solicitors offices and provided a folder of documents. Although that folder had to be reviewed, it was found to contain nothing other than inter parties correspondence and documents which the Claimant's solicitors had already included in the bundle.

3. The Respondent's arguments

3.1 The Respondent set out his arguments in response in an email dated 10 August 2021 which he supplemented orally at the hearing. He stated that it was the *Claimant* who failed to comply with case management orders and that the "*Respondent's repeated requests for that information* [….] *were either ignored or fobbed off*". It was never made clear what those 'repeated requests' had been. The Respondent contended that the Claimant had failed to take the first step in the case management timetable and failed to supply a schedule of loss but a letter dated 7 January 2021 was produced by the Claimant's solicitors which appeared to show that one *had* been sent as required. What was absent from the correspondence was any assertion, either to the Claimant's solicitors or the Tribunal, that the Claimant had failed to comply in that respect.

3.2 The Respondent further asserted that the withdrawal of the complaint of unfair dismissal "*changed the picture completely*". In respect of the other elements, although the principle of the complaints of unpaid notice and a redundancy payment had not been in dispute, just the quantum of those claims. The Respondent asserted that the case depended upon the application of "*some fairly complex legislation (TUPE) I was not familiar with*".

4. Legal principles

4.1 A party to tribunal proceedings may apply for costs which a Tribunal may award against another party if it was satisfied that one or more of the tests in rule 76 (1) had been met. Even if was so satisfied, a Tribunal still had a residual jurisdiction to award costs since the rule imposed a two-stage test: first, the tribunal had to ask itself whether the party's conduct had fallen within rule 76 (1)(a) and, if so it then had to ask itself whether it was appropriate to exercise its discretion in favour of awarding costs against that party.

4.2 The question which arose here was whether the Respondent's alleged unmeritorious defence was '*unreasonable conduct…in the way that proceedings had been conducted*' as defined by rule 76 (1)(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. It was also contended that the rule was invoked by the Respondent's failure to engage with case management directions and cooperate with the Claimant's solicitors in order to prepare the case effectively.

4.3 As the Court of Appeal reiterated in *Yerrakalva v Barnsley Metropolitan Borough Council 2012 ICR 420, CA*, an award of costs in the employment tribunal was still the exception rather than the rule. It was more sparingly exercised and was more circumscribed than that of the ordinary courts, where the general rule was that costs followed the event and the unsuccessful litigant normally had to foot the legal bill for the litigation.

4.4 The further dicta in *AQ Ltd-v-Holden* [2012] IRLR 648 (EAT) was relevant:
"*A tribunal cannot and should not judge a litigant in person by the standards of a professional representative. Lay people are entitled to represent themselves in tribunals; and, since legal aid is not available and they will not usually recover costs if they are successful, it is inevitable that many lay people will represent themselves. Justice requires that 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 for the claimant] *submitted, lay people are likely to lack the objectivity and knowledge of law and practice brought by a professional adviser…*"

4.5 The second question which arose here was whether the response had had any reasonable prospect of success within the meaning of rule 76 (1)(b) at the outset. It was relevant, but not a prerequisite, that the Claimant had put the Respondent on notice that he may have made an application for costs on the grounds that the Respondent's position had been misconceived. The essence of the test in rule 76 (1)(b) was neatly summarised in *Millin-v-Capsticks Solicitors* [2014] UKEAT/0093/14;
"*Where a claim is truly misconceived and should have been appreciated in advance to be so, we see no special reason why the considerable expense to which a Respondent will needlessly have been put (or a claimant in a case within which a response is misconceived) should not be reimbursed in part or in whole*" (paragraph 67).

4.6 Rule 76 (1)(b) used the same wording as rule 37 (1)(a). In the case of *QDOS Consulting Ltd and others-v-Swanson* UKEAT/0495/11 HHJ Serota QC indicated that the test of whether a claim had had no reasonable prospect of success was only met in "*in the most obvious and plain cases in which there* [was] *no factual dispute and which the applicant* [could have] *clearly crossed the high threshold of showing that there* [were] *no reasonable prospects of success.*"

4.7 In terms of causation, it was unnecessary to show a direct causal connection between a defaulting party's conduct and certain costs incurred (*McPherson-v-BNP Paribas* [2004] ICR 1398 and *Raggett-v-John Lewis* [2012] IRLR 911, paragraph 43), but there nevertheless had to be some broad correlation between the unreasonable conduct alleged and the loss (*Yerraklava-v-Barnsley MBC* [2010] UKEAT/231/10). Regard had to be taken of the '*nature, gravity and effect*' of the conduct alleged in the round (both *McPherson* and *Yerraklava* above).

4.8 A costs order was restorative, not punitive (*Lodwick-v-Southwark London BC* [2004] EWCA Civ 306) and could not be made one simply because the Respondent had got something wrong.

5. Conclusions

5.1 The allegation that there was a break in continuity was not wholly without merit and the test within rule 76 (1)(b) was not met (see *QDOS Consulting* above). The Respondent's defence to the claim was nevertheless ill-advised and naïve. Did that make it unreasonable within the meaning of rule 76 (1)(a)? He was not necessarily expected to have known of the provisions of TUPE and the words in *AQ Ltd* had particular resonance in that respect. It was no appropriate to make a costs award on either of the first two bases put forward by the Claimant.

5.2 Further, the offer that the Claimant made on 15 April [22] was really little more than a threat. The Respondent was not considered to have acted unreasonably by continuing with his defence beyond that date.

5.3 The Respondent's adherence to the case management directions timetable was, however, extremely poor and was unreasonable within the meaning of rule 76 (1)(a). The following criticisms were the most obvious ones which could be made;

- He failed to engage with the Claimant's solicitors in January in relation to disclosure;
- He failed to provide his disclosure until 7 April, 3 months late;
- He failed to put the hearing bundle together as required under the directions order;
- He failed to respond to or acknowledge the Respondent's bundle on 27 April;
- He produced his own bundle the day before the hearing;
- He failed to exchange witness statements and never produced a statement of his evidence in accordance with the directions at any time in the proceedings.

5.4 His conduct had undoubtedly caused unnecessary expense to have been incurred by the Claimant in his preparation for the hearing. The Tribunal was used to seeing litigants in person prepare for hearings efficiently and competently, often litigants who were unsophisticated and poorly equipped to deal with such matters. The Respondent, however, had been an accountant, a county councillor and was a parish councillor at 5 councils. There was no good excuse for his failures and it was an appropriate exercise of discretion to award costs in those circumstances.

Means and amount of award

5.5 Under rule 84, in deciding whether to make a costs order, a tribunal was entitled ("*may*") to have regard to the Respondent's ability to pay. The Judge informed the Respondent that he could give details of his means to enable him to assess whether a costs order ought to be paid and, if so, in what sum. He was, however, at liberty to withhold those details if he chose. Mr Morland simply stated that he had the means to pay the costs promptly.

5.6 The Claimant's application was in the sum of £5,328 [12]. Having heard further argument from the Claimant and Respondent, the Judge determined that the appropriate award was in the sum of £2,064, made up of the following elements;

(i) ¾ of the sum claimed for correspondence (£405) since the vast amount was considered to have been necessitated by the Respondent's failure to adhere to case management directions. A broad assessment of that figure was made and £300 was awarded;

(ii) £324, being the costs of the Claimant having to prepare the hearing bundle;

(iii) £540 and £900 being the costs associated with the costs application and hearing. Although it might have been possible for the Claimant to have made the application for costs at the end of the hearing on 6 May 2021, it would have been difficult to have dealt with it in the detail which was required within the time remaining. The Judge did not consider it unreasonable for the Claimant to have taken time to study the written Reasons and to have formulated the application after the hearing. Although he had not succeeded in full, the application had nevertheless succeeded and there was no suggestion that the Respondent had made any offers in respect of it.

B. RECONSIDERATION

1. The Respondent had applied for a reconsideration of paragraph 3 of the Judgment dated 6 May 2021 which was sent to the parties on 10 May 2021. The grounds were set out in his application of 30 June 2021. The Tribunal had indicated that the application was to have been addressed at this hearing, given that it was to have been convened to deal with the Claimant's costs application in any event.

2. Schedule 1 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 contains the Employment Tribunal Rules of Procedure 2013 ("the Rules"). Under rule 71, an application for reconsideration under rule 70 must be made within 14 days of the date on which the decision (or, if later, the written reasons) were sent to the parties. The application was therefore received outside the relevant time limit and no reason for its lateness was provided.

3. The grounds for reconsideration were only those set out within rule 70, namely that it is necessary in the interests of justice to do so. The earlier case law suggested that the 'interests of justice' ground should have been construed restrictively. The Employment Appeal Tribunal in *Trimble-v-Supertravel Ltd* [1982] ICR 440 decided that, if a matter had been ventilated and argued at the hearing, any error of law fell to be corrected on appeal and not by review. In addition, in *Fforde-v-Black* EAT 68/80 (where the applicant was seeking a review in the interests of justice under the former Rules which is analogous to a reconsideration under the current Rules) the EAT decided that the interests of justice ground of review does not mean "*that in every case where a litigant is unsuccessful he is automatically entitled to have the tribunal review it. Every unsuccessful litigant thinks that the interests of justice require a review. This ground of review only applies in the even more exceptional case where something has gone radically wrong with the procedure involving a denial of natural justice or something of that order*". More recent case law has suggested that the test should not be construed as restrictively as it was prior to the introduction of the overriding objective (which is now set out in rule 2) in order to ensure that cases are dealt with fairly and justly. As confirmed in *Williams-v-Ferrosan Ltd* [2004] IRLR 607 EAT, it is no longer the case that the 'interests of justice' ground was only appropriate in exceptional circumstances. However, in *Newcastle Upon Tyne City Council-v-Marsden* [2010] IRLR 743, the EAT stated that the requirement to deal with cases justly included the need for there to be finality in litigation, which was in the interest of both parties.

Discussion and conclusion

4. The Respondent objected to paragraph 3 of the Judgment, the basis of which was more fully explained in paragraph 3.5 of the Reasons. At the hearing in May, the Respondent had accepted that he had not paid HMRC the sums for tax and national insurance which had been deducted from the Claimant's wages. He nevertheless accepted liability to do so and, upon his undertaking in that respect, Mr McCabe had been content to withdraw the claim.

5. The Judge re-read his notes of that exchange and undertaking to the Respondent at the hearing. The Respondent denied that he had given such an undertaking and merely wanted his liability to HMRC to have been recorded. The Judge considered that, should the paragraph have been reconsidered and the undertaking be withdrawn, the condition upon which the Claimant had indicated his withdrawal of the claim would not have been met and *he* might legitimately have then sought to have reinstate that element of this claim. The Claimant did not want to have to face HMRC chasing *him* for the tax and was entitled to have his national insurance contributions met for the period of his employment. He would have been entitled to claim unlawful deductions made from his salary if they had not been paid to HMRC in accordance with the law. The Respondent was not entitled to make the deductions and pocket the money.

6. Mr Morland explained the problem on the basis of confusion surrounding the dissolution of the limited company. That explanation was not accepted since he had been the Claimant's employer personally for the material period.

7. Accordingly, in view of the concessions which had been made on 6 May and in view of the Respondent's undoubted duty to make payment to HMRC, there was no reason to reconsider paragraph 3 of the Judgment and the application was dismissed under rule 72 (1) since there was no reasonable prospect of it being varied or revoked.

Employment Judge Livesey
Date: 11 August 2021

Sent to the Parties: 19 August 2021

FOR THE TRIBUNAL OFFICE