EMPLOYMENT TRIBUNALS

Claimants: 1. Mr N Pearson
2. Mr L Smith

Respondents: 1. Ultra Group 2019 Ltd
2. Mr Aleksandar Chilingrov

HELD AT: Leeds (by CVP) **On:** 24, 25, 26, 27 and 28 May 2021
(in chambers 16 August 2021)

BEFORE: Employment Judge D N Jones
Ms L Fawcett
Mr L Priestley

REPRESENTATION:

Claimants: Ms A Dannreuter, Counsel
Respondents: Mr B Oduje, Counsel

JUDGMENT on COSTS

1. The first and second respondent acted unreasonably in their conduct of the proceedings and the response to the issue of worker status had no reasonable prospects of success.

2. There shall be a costs order in favour of the claimants against the first and second respondent.

3. The costs are assessed in the sum of £6,974. The liability is joint and several. The first and second respondents shall pay that sum to the claimants in respect of costs.

4. The decision is unanimous.

REASONS

Introduction

1. By rule 74(1), *"Costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing). In Scotland all references to costs (except when used in the expression "wasted costs") shall be read as references to expenses*.

2. By rule 75(1), *a costs order is an order that a party ("the paying party") make a payment to—(a) another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative*.

3. By rule 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*.

4. By rule 76(2), *a Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party*.

5. By 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; 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*.

<u>The applications</u>

6. The claimants make applications for costs against both respondents by their counsel, in writing dated 27 May 2021. The grounds are that the respondents had unreasonably conducted the proceedings. Further or alternatively it is said the response that the claimant were not workers had no reasonable prospect of success and that, had this not been raised as an issue, the claim could have been resolved within two days and not four.

7. The representatives of the parties made oral submissions in respect of this application on the 27 and 28 May 2021 and supplemental written submissions in respect of the respondent's ability to pay any order and the Tribunal's power to make

an award of costs and if so in what sum when a party is legally represented by way of a damages-based agreement (DBA). Those were considered without a hearing to avoid further expense to the parties.

Unreasonable conduct

8. The claims were presented on 27 April 2020. The response was due on 8 June 2020, but none was received. On 10 July 2020, the second respondent sent an email to the Tribunal disputing the claims with some documents which he said supported his defence that the claimant were not workers. At a preliminary hearing on 13 July 2020, Employment Judge Rogerson explained to the second respondent, who attended for both, that if he wished to defend the claim on his own behalf or on behalf of the first respondent, of which he is the principal director, he would have to submit a draft response in writing and an application for an extension of time.

9. The second respondent submitted that application on 15 July 2020 on behalf of both and it was accepted by Employment Judge Cox on 30 July 2020. The second respondent explained that he had returned to Bulgaria in early May 2020 because of the pandemic. He said that periods of isolation and quarantine there and a 14 day period of isolation in the UK upon his return had led to the delay in responding to correspondence, which he first opened on 26 June 2020 (expressed as 26 July 2020 in his application, but this would appear to be a typing error).

10. The issues in the case were identified at a case management hearing before Employment Judge Morgan on 30 October 2020. He identified the primary issue as one of worker status. In the list of issues, the judge included a secondary issue which concerned whether the claimant was subjected to 5 detriments as a consequence of having made 3 protected disclosures. He made orders for the disclosure of documents and preparation of a file by 20 November 2020 and 22 January 2021 respectively. Witness statement were to be exchanged simultaneously by 16 April 2021.

11. On 19 November 2020 the representatives of the respondent placed themselves on record.

12. The parties did not exchange witness statements in accordance with the order. The representatives had agreed to defer that until 10 May 2021. On 16 May 2021 the representative of the claimant sent a copy of the Tribunal bundle and copies of the witness statements with password protection. By letter of 20 May 2021 the representative of the claimant applied for an unless order as a consequence of the failure of the respondent to serve any witness statements. On 21 May 2021 that application was withdrawn as the statements had, by then, been provided.

13. On 21 May 2021 the representatives of the respondent sent to the claimants' representative five further documents to be added to the bundle. The tribunal allowed an application to introduce those documents on the first day of the hearing. The first two days hearing were taken up considering the preliminary issue as to worker status.

14. On 26 May 2021 an application was made by counsel for the respondent to admit 2 email chains which had been disclosed earlier that morning. A further 25 pages of documents were submitted later that morning by the respondent. The tribunal allowed an application to admit these documents as they were clearly relevant and it was still possible for the claimant to answer questions about their content, notwithstanding the fact that this arose during their evidence. The Employment Judge commented that such late disclosure was unreasonable conduct.

15. The documents which were disclosed by the respondent on 21 May 2021 and 26 May 2021 were highly material to the issue of the claimant's performance and conduct which the respondents had said was the reason their engagement had been terminated. They included contemporaneous correspondence with the first respondent's principal client about the continuing engagement of the claimants. The disclosure of these documents so late was a prejudice and disadvantage to the claimants and their representatives, because they were not able to evaluate the merits of the case against this material. The request for meta data for one of the documents was refused by the representatives of the respondents as it was too late. This has subsequently caused concern upon examination subsequently, but this is not a matter we need to explore as the disadvantage of late disclosure was substantial in any event. The service of the witness statements at such a late stage, the Friday before the hearing was to commence on the Monday, also prejudiced and disadvantaged the claimants and their representatives from being able to evaluate the case and focus on the material issues. Although some criticism could be made of the claimants and their representatives for not having sent their witness statements by the date ordered by Employment Judge Morgan, they had made steps to ensure that was done at a sufficient period before the hearing to allow for its proper preparation by both parties from 18 May 2021.

16. On 26 May 2021, counsel for the respondent made an application to amend the response to allege that the reason for the termination of the engagement of the claimants was their conduct and poor performance. This was allowed as Employment Judge Morgan had identified in general terms further issues to be determined, although the precise basis upon which that was to be advanced was not clear. In box 6.1 of the response form the defence was said to be, "*we have everything to prove that the claimants were not employed and why we could not use any more of their services*". A number of documents were attached to the response only one of which appeared to be of relevance to performance, dated 20 February 2020. However, the claimants' services were terminated on the 29 February 2020 and the events of that week were highly material. It was therefore necessary for an amendment to be made, but this should have been done weeks, if not months, before.

17. We are satisfied that there was unreasonable conduct of the respondents in the preparation of this case. From the outset it had not been properly conducted by or on behalf of both respondents.

18. The fact the tribunal allowed the second respondent to submit the response on behalf of both several weeks late does not exonerate the respondents from blame. Although the pandemic created problems for employers, there remained an obligation to review correspondence and comply with tribunal orders. In allowing the

response out of time the Judge recognised some mitigating circumstances but there is an compelling argument in most cases that the interests of justice of determining a case on its merits outweighs the hardship caused to the claimants by a relatively short delay. The failure of the respondents to submit a response in time led to an additional preliminary hearing which was no fault of the claimants.

19. The second respondent failed to make an adequate search for documents and disclose evidence in an appropriate timeframe, obligations which he had not only as the principal director of the first respondent but as a party himself. Documents did exist which assisted his case and that of the first respondent and these were served on the working day before the hearing and after the hearing had commenced. The provision of the witness statements on the working day before the hearing was unreasonable.

20. The aspects of the conduct and performance of the claimants which led to the engagement being terminated, as relied upon by the respondents, should have been identified in the response. An amendment at the hearing was unreasonably late, notwithstanding the preliminary hearing had identified further issues to the preliminary one about work status.

21. There had been non-compliance with the tribunal's orders; significant non-compliance. One failure to comply with an order or an individual instance of conducting the proceedings unreasonably, such as the failure to amend the response, would not have led to a finding that the preconditions for making a costs order in rule 76(1) had been crossed. In this case such breaches and failures were repeated and cumulative. The threshold for making a costs order has been made out against both respondents.

No reasonable prospects of success

22. The defence that both claimants were not workers but the first respondent was one of their clients was hopeless, in the light of the decision of the Supreme Court in **Uber BV v Aslan [2021] UKSC 5**. The suggestion the claimants were in business on their own account was fanciful and the level of dependence and obligation to provide personal service beyond any doubt. We do not accept the submission advanced by counsel for the respondents it was reasonable to put the claimants to proof. The provision of the vehicles, arrangements for allocating work, integration of the claimants into the business of the first respondent and its principal client and their personal circumstances demonstrated, overwhelmingly, that they were workers and this was apparent during their engagement. Two days of hearing would have been avoided had the respondents conceded that the claimants were workers.

Should an order for costs be made?

23. The fact that the threshold for making an order for costs has been passed is the first component of consideration of the application. Costs orders remain the exception rather than the rule, see **Yerrakalva v Barnsley Metropolitan Borough Council [2012] ICR 420**. Orders are purely compensatory and not punitive, so that any displeasure in respect of a failure to comply with orders is immaterial. The

tribunal may have regard to a party's inability to pay, under rule 84, but that is not raised in this case, save by the claimants who are concerned about the potential for the first respondent evading a costs order by becoming insolvent.

24. We are satisfied that it is in the interests of justice to make costs orders against both respondents. Although the claimants did not succeed as against the second respondent, the claims were reasonably pursued against him because it was not clear who the employer was for the purpose of 230(3)(b) of the Employment Right 1996. There was no written agreement at all in respect of Mr Pearson and his discussions were with the second respondent, so there remained a very real possibility that he could have been the employer rather than the first respondent. Both respondents failed to conduct the defence of these claims reasonably, for the reasons we have set out.

25. As a consequence of the inadequate conduct of the responses to the claims, the claimants suffered significant prejudice up to and during the hearing when they were presented with new material for them to have to consider with their advisers. They were deprived of the opportunity of being able to negotiate a settlement on the basis of the documentation which they should have been sent at a much earlier stage.

<u>What sum should be payable in respect of costs?</u>

26. The total costs bill is £11,712; that is the sum which reflected which has been done on this case and would have been charged to a private client or recouped from 35% of the compensation recovered. The claimants seek a proportion of that, £6,978, for those costs attributable to the unreasonable conduct of the case or, alternatively £2,948 in respect of the costs incurred in defending the issue of worker status. In respect of the former this comprises £4,500 for counsel's fees, £1,080 for preparing witness statements, £404 for preparing a bill of costs, £120 for drafting an unless order application, £120 for drafting a default judgement application and £750 for attendance at the first of the preliminary hearings. In respect of the latter it comprises a proportion of the above, namely £2,000 for counsel's fee, £540 for preparing half the witness statements £408 for preparing costs. The respondents dispute that the sums were losses which were reasonably and necessarily incurred as a consequence of the unreasonable conduct. It is said that if a costs order were to be made it should be limited to those sums which were recoverable by the representatives of the claimants under the damages based agreement which will be a maximum of £770, i.e. 35% of the compensation awarded inclusive of interest, that being £4,400. To reflect the fact that it was appropriate to defend the claims, many successfully, it is submitted 50 percent of this sum of £770, £385, would be appropriate, if any order is to be made at all.

27. The respondents submit that there have been no other costs incurred by the claimants themselves, because they will recover their compensation apart from the above deduction. Relying on the case of **Barry v University of Wales Trinity St David case no 160 3120/2013**, as summarised in Harvey's, they submit that if it is only the representatives who benefit from the costs order, the tribunal does not have jurisdiction to make one. The tribunal could not make a costs order if the party is not the beneficiary.

28. On behalf the claimants, it is submitted the case of **Barry** concerned a DBA which provided for costs to be paid to the representative of the claimant. In contrast, it is said, the DBA which the claimants have signed provides, "*we will charge you on an hourly basis but cap our fees are 35% of what you are awarded or settle at. If you receive a costs award in your favour, we shall seek to recover our for fees from your opponent".* Furthermore, it is submitted that the **Barry** case must be considered in the light of **Mardner v Gardner and others [2013] UKEAT 0483/13** in which the Employment Appeal Tribunal held that the fact the claimant had an insurance policy which covered legal costs was irrelevant. Otherwise it would allow an unreasonable litigant to appropriate the benefit of the other party's insurance policy.

29. In **Swissport Ltd v Exley and others [2017] ICR 1288**, the Employment Appeal Tribunal held that under rule 78(1)(b), the requirement to apply the CPR would lead to the consequence that a paying party's liability will be limited the amount payable under the DBA because of the provisions of CPR rule 44.18, although it held this would not preclude a tribunal from making a period order which would not reflect strictly the application of that statutory limit to recovery by reference to the work done during the period in question. Slade J made the point that this arose because the tribunal had made an order under rule 78(1)(b) for detailed assessment and not rule 78(1)(a), in respect of which the tribunal may assess costs up to the sum of £20,000 without detailed assessment.

30. We are satisfied that the sums of £6,978 were reasonably and necessarily incurred and attributable to the additional work arising from the unreasonable conduct of the respondents. There would not have been a need to have a first preliminary hearing had a response been submitted in time, no need for drafting a rule 21 judgment nor for an application for an unless order had the statements been served on time. There was every likelihood the case would not have come to a hearing at all had it been possible to evaluate its merits as an early stage and give realistic advice on quantum. The case might have settled or the representatives of the claimant re-evaluated the risks and withdrawn from the DBA. The respondents have not challenged any individual aspect of the amount claimed for costs and we consider each to be both proportionate and reasonable with regard to hours done and sums charged.

31. We do not consider the first instance case of **Barry** applies to the facts of this case because of the wording of the agreement. The DBA which these claimants entered into expressly provides for the recovery of costs on their behalf.

32. In respect of the restriction of any costs awarded to that amount, we consider the strictures of the CPR do not apply, because this award is made under rule 78 (1)(a), a distinction referred to by Slade J in **Swissport**. It is only when a detailed assessment is to be made that there is the importation of the CPR. Parliament did not seek to extend that requirement to those cases in which the tribunal assesses costs itself. Detailed assessment is only likely to arise when the sums in costs are substantial, above £20,000.

33. It would be an unusual anomaly for a claimant who has his legal costs covered by an insurance policy to be able to recover his full costs in contrast to the claimants who enter into agreements of this type with their lawyers. For the

insurance, the party has paid a premium and for the DBA the party has agreed to pay a proportion of the compensation if successful, but the law does not restrict recovery of the costs in insurance cases to the price of the premium. The same public interest policy identified in **Marner** applies to recovery of costs in cases where the legal service is provided by way of DBA as in cases where it is provided by insurance.

34. We do not agree with the submission that no costs have been incurred. The DBA expressly provides for charges by way of hourly rate. The solicitors and counsel did the work and thereby displaced the opportunity during the period of the provision of their service to the claimants to work for others. The fact recovery of them is conditional upon success does not mean they were never incurred. It was not an agreement to work for free. In his written submission, counsel for the respondent draws a distinction in the agreement with disbursements and the work done by the solicitors; disbursements would not be subject to the same limitation as the charges of the solicitors. He says that counsel's fees may be one such disbursement, but this had not been addressed in the submissions made by the claimants and we do not consider it necessary to resolve.

35. We do not consider the making of the costs order infringes the indemnity principle, that is that a costs order should not operate as a punishment against the paying party and be given as a bonus to the receiving party. The legislation which governs this type of conditional funding arrangement, currently the Damages Based Agreement Regulations 2013, overcomes the challenge that such funding arrangements infringe the common law rule against champerty and maintenance. There is nothing in the nature of the application which generates a bonus to the claimants. Rather it represents a payment of legal costs which are subject to independent judicial assessment as to what is appropriate and proportionate.

36. Parties may pursue claims or defend them in the Tribunal without legal representation and they often do. Nevertheless, the law relating to what has become known as whistleblowing is complex and difficult to negotiate without specialist advice and that of itself provides an obstacle to bringing these types of claims. The restrictions which the respondent submits apply to the recovery of costs might deter some members of the legal profession from taking cases funded by way of DBA's and that would have the potential to restrict access to justice. Some workers may be deterred from bringing a claim at all without legal assistance. The extent of that impact without evidence is speculative and, in those circumstances, we do not make this decision on basis that the public interest principle of access to justice precludes the interpretation the respondent contends for.

Employment Judge D N Jones

Date: 1 September 2021