EMPLOYMENT TRIBUNALS

Claimant: Miss R Hannon

Respondent: Sooty's and Sweep's Limited

Heard at: Manchester **On:** 7 July 2021 (in Chambers)

Before: Employment Judge McDonald

REPRESENTATION:

Claimant: No attendance
Respondent: No attendance

JUDGMENT ON A COSTS APPLICATION

The judgment of the Tribunal is that the respondent's application for costs is refused.

REASONS

Background

1. By a Judgment given on 12 October 2020 following a CVP hearing I decided that the correct respondent to the claimant's claim for unlawful deduction from wages was Sooty's and Sweep's Limited, and substituted that company as the respondent in place of David Martin Williams. Mr Williams was the respondent named by the claimant in her claim. He was named c/o Williams & Co accountants which operated the respondent's payroll and is the registered office address for the respondent.

2. I found that the claimant's complaint that the respondent had failed to pay her holiday pay for the year 2019 to October 2019 succeeded, and ordered that the respoondent pay the claimant the gross sum of £960.67 less any appropriate deductions to the relevant authorities.

3. On 27 October 2020 Mr Chiffers, counsel who represented the respondent at the final hearing, applied for a costs order against the claimant. The respondent submitted in brief that the claimant had acted unreasonably, vexatiously and disruptively and that her claim against Mr Williams had no prospects of success.

4. After giving directions and considering written submissions, the costs application was initially listed for a hearing on 7 July 2021. However, on 6 July 2021 the claimant contacted the Tribunal to indicate that she had lost her voice. She asked whether she could type her contributions at the hearing. I considered that application and decided that while it might be possible for the claimant to do so using the chat box on the CVP video link screen, it was likely to lead to a longer hearing than that listed and also raised concerns about fairness to both parties if the claimant was not able to speak during the hearing.

5. Following further representations from the parties I decided that it was in accordance with the overriding objective to convert the hearing into an "in chambers" hearing and to deal with the costs application on the papers. That would avoid the risk of further delay in resolving the application. I was satisfied that the written submissions provided by the parties would enable me to determine the application in accordance with the overriding objective.

Issues to be determined

6. The issues to be determined by the Tribunal in relation to the respondent's application were:

(1) Whether the claimant had acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing of the proceedings (or part) or the way that the proceedings (or part) had been conducted; or

(2) Whether the claimant's complaint against Mr Williams had no reasonable prospect of success;

(3) If the answer to (2) or (3) above is yes, whether in all the circumstances it would be appropriate to make an order for costs or a preparation time order against the claimant; and

(4) If so, what amount of costs or preparation time should be awarded?

The Respondent's Application

7. The respondent submitted that the claimant had acted unreasonably and vexatiously in the bringing of the proceedings, specifically the respondent stated that:

(1) The claimant brought a claim against Martin Williams for alleged unpaid holiday pay of £1,632. On 7 November 2019 via email the correct respondent offered to pay the claimant the sum of £1,058.25 for unpaid holiday pay, which was more than the claimant was awarded by the Tribunal.

(2) The claimant did not send a letter before action with a coherent calculation of the unpaid holiday pay, nor did she engage with the ACAS conciliation process before issuing the claim. The respondent said that had she done so it would have been made clear to her that the correct respondent was Sooty's and Sweep's Limited and an attempt would have been made to agree the correct amount of holiday pay owed.

(3) The claimant issued the claim against the wrong party, namely Mr Williams. The respondent said this was pointed out to the claimant on several occasions by Mr Williams' representatives. The respondent says the claimant refused to acknowledge this even though she had in her possession at all material times her contract of employment which was produced by her on the day of the hearing.

(4) The respondent submitted that the claimant's error and persistent refusal to ask the Tribunal to substitute the correct respondent meant that Mr Williams did not fully engage in the proceedings and put Mr Williams to unnecessary time and expense in corresponding with the Tribunal and the claimant.

(5) The respondent also says that the claimant persistently failed to comply with the Tribunal's directions, including not filing and serving her contract until the day of the hearing and not filing any witness statement at any time.

(6) The respondent also criticised the claimant's behaviour at the hearing, stating that the Judge at the hearing had to calculate the claimant's holiday pay and elicit information from her, including asking for the contract to be sent. The respondent said the hearing lasted the full three hours because of the claimant's failure to provide any evidence for the Tribunal and having to decide on the issue of substitution. The respondent says this affected the amount that the respondent had to pay for counsel's brief fee and the amount of time spent on the day by Mr Williams.

(7) In relation to the claim having no reasonable prospect of success, the respondent said that the claimant's claim was for holiday pay, which is a question of fact, and the claimant was simply wrong about the amount payable despite there being no dispute over the facts that would have been used to calculate the holiday pay.

(8) Finally, the respondent said that the claimant could have accepted the amount offered to her on 7 November 2019 or engaged with the respondent so that it could have been explained to her that she was mistaken as to her employer and the amount of holiday pay owed.

The Claimant's Submissions

8. The claimant denied that she acted in any way unreasonably, etc. She points out that she won her case and that it was only at the Employment Tribunal that it was

pointed out to her that because her hours were irregular this meant that her holiday pay had to be calculated by using an average. She submitted that she had all the correct information with her at the Tribunal, and the Tribunal had to stop the hearing on a number of occasions to allow the respondent to read the information, which she had to re-send on the day of the hearing. She stated that she had sent all her wage slips to Mr Williams on 7 July which he had not passed to Mr Chiffers therefore she had to re-send her wage slips on the day. She points out that Mr Williams as a director of the respondent company would have her contract of employment and could easily have provided it.

9. The claimant also pointed out that the Tribunal was originally listed for hearing on 11 February 2020 and had to be re-listed for a three hearing because the respondent failed to acknowledge who she was and that she had worked for him. The Employment Judge at that hearing indicated that that was not assisting the Tribunal and was wasting the Tribunal's time.

10. The claimant also questioned the amount being claimed. The full amount being claimed was £1,116, which was on the basis that Mr Dixon, a solicitor for Mr Williams, had represented the respondent throughout. However, the claimant points out it was Mr Chiffers who represented the respondent at the hearing. She suggests that it was Mr Chiffers rather than Mr Dixon who did the legal work on the case and therefore cannot understand why there should be a claim for Mr Dixon's time.

The Relevant Law

11. The power to award costs is contained in the 2013 Rules of Procedure. The definition of costs appears in rule 74(1) and includes fees, charges, disbursements or expenses incurred by or on behalf of the receiving party.

12. Rule 75(1) provides that a Costs Order includes an order that a party makes a payment to another party "in respect of the costs that the receiving party has incurred while legally represented".

13. The circumstances in which a Costs Order may be made are set out in rule 76. The relevant provision here was rule 76(1) which provides as follows:

> **"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."**

14. The procedure by which the costs application should be considered is set out in rule 77 and the amount which the Tribunal may award is governed by rule 78. In summary rule 78 empowers a Tribunal to make an order in respect of a specified amount not exceeding £20,000, or alternatively to order the paying party to pay the whole or specified part of the costs with the amount to be determined following a detailed assessment.

15. Rule 84 concerns ability to pay and reads as follows:

> **"In deciding whether to make a costs, 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."**

16. It follows from these rules as to costs that the Tribunal must go through a three stage procedure (see paragraph 25 of **Haydar v Pennine Acute NHS Trust UKEAT 0141/17/BA**). The first stage is to decide whether the power to award costs has arisen, whether by way of unreasonable conduct or otherwise under rule 76; if so, the second stage is to decide whether to make an award, and if so the third stage is to decide how much to award. Ability to pay may be taken into account at the second and/or third stage.

17. The case law on the costs powers (and their predecessors in the 2004 Rules of Procedure) include confirmation that the award of costs is the exception rather than the rule in Employment Tribunal proceedings; that was acknowledged in **Gee v Shell UK Limited [2003] IRLR 82**.

18. An award of costs is compensatory and not punitive so there should be an examination of what loss has been incurred by the receiving party.

19. In determining whether to make an order in respect of unreasonable conduct the Tribunal should look at the totality of the circumstances of the case, taking into account the nature, gravity and effect of a party's unreasonable conduct (**McPherson v BNP Paribas (London Branch) [2004] ICR 1398 Court of Appeal**).

20. In **McPherson** the Court of Appeal confirmed that the Tribunal Rules do not impose a requirement that the costs must be caused by or be proportionate to the unreasonable conduct – it is not necessary to establish a direct causal link. The Tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of its discretion.

21. "Vexatious" was defined by Lord Bingham in **Attorney General v Barker [2000] 1 FLR 759** and cited with approval by the Court of Appeal in **Scott v Russell [2013] EWCA Civ 1432** in relation to costs awarded by a Tribunal:

> "The hallmark of vexatious proceedings 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…"

Findings as to the conduct of the proceedings

22. The claimant issued her claim against David Martin Williams c/o Williams & Co Accountants. At box 8.2 of her claim form (page 20) she stated that she "worked at Sooty's and Sweep's café". She set out her calculation of holiday pay as being £1,632. That was based on her being entitled to 24 days' holiday pay. She worked out that her daily hourly rate was £8.50 and as she worked 8½ hours per day minus

30 minutes a day for lunch break she calculated the hours over 24 days to amount to 192 hours. That claim form was received on 14 November 2019.

23. The response form for Mr Williams was filed on 23 December 2019. At box 3 in relation to the early conciliation details it stated:

> "As neither David Martin Williams nor Williams & Co Accountants were consulted or contacted by ACAS through the early conciliation process it is not agreed that there was any early conciliation attempted in this case."

24. There was no suggestion, however, that the address given by the claimant to ACAS (as it appeared on the early conciliation form at page 26) was wrong. It is the address of Williams & Co Accountants. It is also the registered office of Sooty's and Seep's Limited, the correct respondent.

25. At box 6 of the response Mr Williams stated that:

> "It is the respondent's case that the claimant has never been employed by him in his personal capacity nor by Williams & Co Accountants, which is the trading name of Williams & Co (Corporate) Limited."

26. It went on to deny that there had been any contractual relationship between the respondent (i.e. Williams & Co (Corporate) Limited t/a Williams & Co Accountants) and the claimant. The claimant was therefore "put to strict proof that a contractual relationship giving rise to her claim for holiday pay exists or has ever existed between the parties". On that basis the respondent "denies that it is indebted to the claimant in the sums alleged at all and also denies that she is entitled to any remedy whatsoever)." Pausing there, I note that Mr Williams/Williams & Co did not in its response form clarify who it said the correct employer was, as is common practice for respondents in Tribunal proceedings where the employee has got the legal person who is the employer wrong. It is clear Mr Williams knew who the correct employer was.

27. On 29 January 2020 Mr Dixon of Williams & Co wrote to the Tribunal in relation to the hearing listed for Tuesday 11 February 2020. That was the first hearing allocated for the final hearing of the claimant's claim. That email requested that the claimant's claim be struck out on the grounds that:

> "(1) The claimant has failed to comply with the Tribunal Order dated 30 November 2019;
>
> (2) That the claimant has failed to establish that a contractual relationship existed between her and the respondent that gave rise to the requirement for her to be paid holiday pay in the sum claimed or at all."

28. Again, I note that although clearly being aware who the claimant's correct employer was, Mr Dixon made no attempt to assist the Tribunal and the claimant at this point by indicating who the correct employer was. Instead, the then respondent simply sought to avoid liability by indicating there was no contractual relationship between the claimant and Mr Williams or Williams & Co. Mr Dixon took the same

approach to the Tribunal on 3 February 2020 responding to a re-listed notice of hearing for 4 May 2020.

29. On 5 February 2020 Ms Benedetto of ACAS contacted Williams & Co in relation to the claim. The response from Mr Dixon was that:

> "Unfortunately we cannot see how this can be resolved through ACAS as the claimant has issued against the incorrect party, there being no contractual relationship whatsoever between the claimant and David Martin Williams or Williams & Co Accountants. There is therefore no liability owed to the claimant." *(Email from Mr Dixon on 6 February 2020 at page 69)*

30. Once again, we note that Mr Dixon made no attempt to seek to resolve matters by clarifying to ACAS who the correct employer was. In addition, we note that contrary to what was implied in Mr Chiffers' application, the claimant had initiated contact through ACAS which resulted in ACAS contacting Mr Williams. It is inaccurate to say that there was no contact from ACAS in relation to the matter. Instead, ACAS' contact was rebuffed by Mr Dixon clinging to the fact that there was no contractual relationship between the claimant the respondent that she had at that point named in the proceedings.

31. On 3 March 2020 Employment Judge Holmes rejected the respondent's application that the claimant's claim be struck out. The basis for that application was that the claimant had failed to provide in writing the remedy the Tribunal was being asked to award. Employment Judge Holmes ordered that the claimant provide copies of all wage slips in her possession to the respondent "forthwith" but decided that the claim should not be struck out because a fair hearing was still possible (page 71).

32. On 15 April 2020 Mr Dixon wrote to the Tribunal to ask whether (given the lockdown status then in place due to COVID) the hearing on 4 May would still be proceeding. The hearing was then vacated due to COVID.

33. On 2 September 2020 Mr Dixon wrote to the claimant. By this time the hearing had been relisted for 12 October 2020. The email said that despite being ordered to do so by the Tribunal, the claimant had failed to provide any evidence to support her claim or establish a contractual relationship between herself and Mr Williams or Williams & Co. The email went on to state that the claimant was at no stage employed by either Mr Williams or Williams & Co., and in the circumstances Mr Dixon invited the claimant to withdraw her claim. The email went on to warn the claimant that if she did not do so Mr Williams would instruct a barrister to represent his interests and Williams & Co at the hearing. It warned her that costs can be awarded in "situations like this" where the claim does not and has never had a reasonable prospect of success. It drew her attention to the formal response to her claim (and to paragraph 4.3 and paragraph 6.3 quoted above) and to the response to ACAS (again quoted above).

34. Once again the email made no attempt to clarify that the correct respondent in this case was Sooty's and Sweep's Limited (a fact of which Mr Dixon, Mr Williams and Williams & Co were clearly very well aware).

35. The claimant responded to that email on the same day (page 80) to confirm that she had provided all wage slips to Mr Williams via email and that she had evidence to back up that she had worked for Sooty's and Sweep's Limited, which was Mr Williams' business. She said in those circumstances she would not be withdrawing her claim.

36. On 3 September 2020 Mr Dixon responded stating that the claimant:

> "…needs to understand that Sooty's and Sweep's Limited is a completely separate legal entity. It is not Martin's business alone. He owns a majority of the shares but he is not the sole shareholder. There is no contract of employment between you and Martin. If there is a contractual relationship it is between you and Sooty's and Sweep's Limited. The fact that Martin owns shares in the company does not create a contractual relationship between you and him. Indeed the Tribunal does not have jurisdiction to hear your claim against Martin or Williams & Co Accountants if there is no contractual relationship between you."

37. That email ended by "strongly recommending that you look at the terms of your contract of employment and seek urgent independent legal advice".

38. This seems to me to be the first email where the respondent refers to the fact that the claimant's correct employer is Sooty's and Sweep's Limited. I note that it does so even in this email in conditional terms, "if there is a contractual relationship". In fact, it is clear to me that there was, and the contract of employment would have indicated that. While accepting that it is not for the respondent to give advice to the claimant, the respondent throughout maintained an intransigent attitude and an unhelpful one which was not conducive to resolving the dispute between the parties.

39. On 24 September 2020 Mr Dixon wrote to the Tribunal. He forwarded copies of the exchange of emails with the claimant on 2 and 3 September 2020 (page 82). The email to the Tribunal stated that:

> "The failure by the claimant to produce any evidence of a contractual relationship between her and the respondent, David Martin Williams, is prejudicing the preparation of the case so far as the respondent is concerned. By way of example, despite the order of 30 November 2019 the claimant has still not served any written confirmation as to the remedy which she is seeking, the basis upon which she seeks a remedy, evidence and supporting document supporting the claim, or a breakdown as to how her claim is calculated. She has not even produced any evidence of a contract of employment between her and the respondent."

40. Again, we note that this is disingenuous on the part of Mr Dixon. The claimant had set out her holiday pay claim and how it was calculated in full in the claim form. As I have said, it was clear that Mr Dixon was well aware that there was contract of employment between Sooty's and Sweep's Limited (of which Mr Williams was the majority shareholder and director), and he continued to maintain that the claimant had provided no supporting documentation of a contract between her and Mr Williams. While technically that is correct, because the contract was between the

claimant and Sooty's and Sweep's Limited, the maintenance by the respondent of that technical defence (rather than taking steps to clarify the issue) seems to me to have put the claimant in a position where she had to continue to maintain her claim.

41. On 6 October 2020 Employment Judge Slater responded to point out that the respondent had not identified the correct employer for the claimant in proceedings and that given that Mr Williams was the director and majority shareholder of the respondent he would have known the identity. I agree with Employment Judge Slater than it was surprising that the respondent did not simply set out who the correct employer was. Instead, it simply denied the claimant's claim to holiday pay. While accepting that there is an onus on a claimant to set out the basis for a claim, I take into account the fact that the claimant in this case is a litigant in person. The difference between legal persons i.e. Sooty's and Sweep's Limited and Mr Williams, are not obvious to all litigants in person. That is particularly so because as the evidence from Mr Williams confirms, the payroll for Sooty's and Sweep's Limited was dealt with in practice by Williams & Co.

Discussion and Conclusion

42. It is not correct to say that the claimant's claim had no reasonable prospect of success in a general sense. That is demonstrated by the fact that her claim succeeded. It is correct, however, that legally her claim against Mr Williams did not have any reasonable prospect of success because he was not her employer. In considering the respondent's application, it seems to me that the core argument being made is that the claimant should be ordered to pay costs because she did not bring her claim against the correct legal person. That is what underlies the application based on the prospects of success and the claimant's conduct of the case.

43. The question is whether the claimant can be said to have acted unreasonably in failing to amend the claim at an earlier stage. Stepping back, what happened in this case was that the claimant issued proceedings against the person who paid her i.e. who by Mr Williams' own admission operated the payroll. The respondent's response simply denied liability. It did not seek to clarify who the correct employer was so the matter could be resolved. When ACAS contacted Mr Williams again there was a denial of a contractual relationship but no attempt to seek to assist resolution of the matter by saying that, for example, "the correct employer is Sooty's and Sweep's Limited".

44. The respondent's strongest point is that the claimant should at some point have applied to amend the name of the respondent to reflect the correct employer. It says that she would have known that Sooty's and Sweep's was the employer because that was said on her contract of employment. Obviously, that that was equally evident to the respondent, perhaps more so given it was better placed to understand the differences between legal persons than the claimant.

45. Did the claimant act unreasonably in failing to apply to the Tribunal to amend the name of the respondent? I do not find that she did so. The context for this is that the claimant was working in a café and it is clear that so far as she was concerned the person who paid her wages was Mr Williams through his company.

She was not wrong in that in practice. To her, Sooty's and Sweep's Limited was "Martin's company", which is why she brought the claim against him. I do not find that she acted unreasonably in continuing her claim when the respondent's attitude was that she should withdraw it because it was brought against the wrong respondent. There was never any move from the respondent to put aside that technical defence to the claim and engage with the substance of the claim.

46. If I am wrong, and the failure to apply to amend the respondent was unreasonable and/or the claimant's claim had no reasonable prospect of success so that the power to make a costs order is triggered, then I would need to consider whether to exercise my discretion to make a costs order in this case. Had I been required to do so, I would have decided that it was not. The case law makes clear that in deciding whether to exercise my discretion to make a costs order the conduct of the respondent can be taken into account. In this case, the respondent intransigently stuck to its defence on the basis that it was not the correct employer while being fully aware of all the facts which would have enabled that issue to be clarified simply and quickly. Taking into account the fact that the claimant was a litigant in person, I have decided that it is not appropriate for me to exercise my discretion to make a costs order in this case.

47. In reaching that decision I have also considered the submission put forward by the respondent that the claimant was offered more than she actually finally won at the Tribunal before proceedings were issued. This refers to an email exchange between the claimant and Catriona Smith in November 2019 (pages 91-94). Ms Smith was employed by Williams & Co. It starts with an email from Ms Smith to the claimant on 6 November saying that there has been a "query raised of your final holiday pay and we are currently looking at the correct position". Ms Smith asks the claimant whether she has a copy of her contract and it would be helpful if she could send a copy to her. The claimant responded that same day (page 93) to say that she had a copy of her contract in front of her and asks if Ms Smith could get hold of her contract "at your end" and asks her "could you please let me know what's happening regarding payment so we can get this resolved and I'm out of your hair". She followed up the following day by saying that she appeared to have been underpaid and had not got any of her holiday pay. Later that same day (7 November) Ms Smith sets out the respondent's calculation of her holiday pay, which comes to £1,058.25 (page 92-93). The claimant responds on the same day (pages 91-92) setting out her calculations in response. Ms Smith's response on 8 November was to say that "I've spoken to Martin and unfortunately he will not be in the office today but he has said we will be in touch with you again on Monday" (page 91). The claimant responded to say that while she accepted none of that was Ms Smith's fault, it was not her problem that Mr Williams was not in the office and "he has had over three weeks to sort this out and I don't understand the issue. All he has to do is ok the payment over the phone and all is done with. Not being in the office is not an excuse". She goes on to say that, "simply not paying me is breaking the law. So I'm going to take this as he is refusing to pay me and I'm going to be on the phone to ACAS and see what my next steps are".

48. I note two things from that. The first is that it backs up the claimant's case that she understood that it was Mr Williams was responsible for paying her wages. Again, that practically was the case, which is why Ms Smith was dealing with her

query. Second, I note that this was not an offer to settle by the respondent or anything characterised as an offer made "without prejudice save as to costs". There was a statement by the respondent of what it thought the amounts due were, to which the claimant responded. It does not seem from the bundle that there was any further response from the respondent. This was not a case of the claimant turning down an offer to settle proceedings which she subsequently failed to better at Tribunal. It does not seem to me that the claimant behaved unreasonably in issuing proceedings having not heard back from Mr Williams/Williams & Co. and I find her behaviour is not such as to justify making an order for costs.

49. The respondent's application for costs is refused.

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Employment Judge McDonald

Date: 7 September 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON

20 September 2021

FOR THE TRIBUNAL OFFICE