EMPLOYMENT TRIBUNALS

Claimant: Mr N Lewis

Respondent: Creativevents Limited

Sitting at: London Central (via CVP) **On:** 17th September 2021

Before: Employment Judge Nicklin

Representation

Claimant: Mr M Hallen (Solicitor)

Respondent: Mr P Olszewski (Solicitor)

JUDGMENT

1. The Claimant's application dated 20th July 2021 for a costs order against the Respondent in respect of the Respondent's application to dismiss the claims is dismissed.

REASONS

Background to application

1. On 8th July 2021, the reserved judgment and reasons on a preliminary hearing were sent to the parties by the tribunal. That judgment concerned the Respondent's application to dismiss the claim under both claim numbers on procedural and jurisdictional grounds. The application was heard as a preliminary issue (pursuant to Rule 53(1)(b) of the tribunal's Rules of Procedure).

2. My decision on that application, after a hearing which took place on 10th June 2021, was that the tribunal had jurisdiction to hear both claims; the above named

Respondent was substituted for 'Creative Events Limited' and the Respondent's application dated 20th April 2021 was accordingly dismissed.

3. By a letter dated 20th July 2021, the Claimant's solicitor applied for an order for costs against the Respondent, pursuant to Rule 76 of the tribunal's Rules of Procedure. The Respondent's solicitor sent a letter to the tribunal opposing the application, dated 25th July 2021.

4. There was an administrative delay in the application and the Respondent's letter being brought to my attention, for which I apologise to the parties. Once I had read the application and response, I directed that the parties provide further information. The Claimant was directed to provide a further breakdown of the costs claimed by 20th August 2021. This was sent to the tribunal by email on 19th August 2021. The Respondent was directed to provide any written representations on the Claimant's email and any information it wished to supply in respect of ability to pay (pursuant to Rule 84) by 27th August 2021. This was complied with on 19th August 2021.

5. In the original letter of application and response, both parties consented to the tribunal determining this application without a hearing and on written representations only. I agree with both parties that having regard to the nature of the application, the issues and amount of costs claimed, it is in accordance with the overriding objective to determine this application without a hearing.

6. I have had regard to my original decision dated 8th July 2021 along with all of the documents supplied as part of this application and response. I have carefully considered all of the written representations made by both parties.

The Claimant's application

7. The Claimant says that the Respondent acted unreasonably in proceeding with its application to dismiss the claims and that the application had no reasonable prospect of success (Rule 76(1)(a) and (b)).

8. In support, the Claimant says:

   8.1. The Claimant's solicitor warned the Respondent's solicitor by letter of 1st June 2021 that the two claim forms were correctly served and the tribunal had jurisdiction. The first claim stated the original address on the Claimant's contract and the second claim was served on a place where the Claimant had worked.

   8.2. The Claimant's solicitor referred the Respondent's solicitor to the case of Campbell v Jamie Stevens (Kensington) Ltd [2020] ICR D1 and the tribunal's earlier comments at a preliminary hearing that the principles of substitution

(under Rule 34) were open to the tribunal (applying Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650).

8.3. The Claimant's solicitor therefore says he warned the Respondent's solicitor that the tribunal at the hearing on 10th June 2021 would ultimately permit the claims to proceed and further warned that if the Claimant was successful, the Claimant would refer the letter of 1st June 2021 to the tribunal in an application for costs.

8.4. The Claimant contends that, following an earlier preliminary hearing on 13th May 2021 (at which point the hearing on 10th June 2021 was arranged), or after the Claimant's solicitor's letter dated 1st June 2021, the Respondent's solicitor should have advised the Respondent not to pursue the application on the basis it had no reasonable prospect of success.

8.5. The Claimant says that application has caused unnecessary costs in dealing with the preliminary hearing on 10th June 2021. The application goes on to set out extracts from the judgment sent to the parties on 8th July 2021.

9. The Claimant claims £1,500 in costs for preparing written submissions and attending the one-day hearing. By the email dated 19th August 2021, the Claimant's solicitor confirmed that the Claimant was charged a fixed fee of £2,500 to defend the application made by the Respondent. This included the preparation of the Claimant's witness statement for the hearing, drafting submissions, preparing case law and representation at the hearing. The application is for a contribution to those costs in the sum of £1,500. No VAT has been (or was required to be) charged to the Claimant.

The Respondent's response to the application

10. The Respondent refers to the fact that the Claimant accepted that his claim was brought against the wrong entity; the first claim used an old address for the Respondent (now demolished) and that he had conducted some due diligence or research prior to issuing his claim which led him to discover that a similar named (but entirely different) company was registered in Lancashire.

11. The Respondent also points out that the Claimant has, at all material times, been represented by a specialist employment solicitor and yet both claims were issued incorrectly.

12. In light of the wrong name for the Respondent used on both claim forms, the Respondent says that substitution would be required in any event. The Respondent makes the following submissions on this point:

12.1. At the preliminary hearing on 22nd March 2021 before Employment Judge Brown, the Claimant did not apply to substitute the Respondent on that occasion and the tribunal did not do so on its own initiative.
12.2. No earlier application for substitution was made by the Claimant following service of the Respondent's ET3 and the tribunal did not do so of its own initiative at that time.
12.3. At the preliminary hearing on 13th May 2021, before me, the Claimant did not apply to substitute the Respondent on that occasion and the tribunal did not do so of its own initiative.
12.4. Prior to the hearing on 10th June 2021 (at which this application was heard and then determined), the Claimant made no application to substitute and the tribunal did not take any such action of its own initiative.
12.5. The Respondent therefore says it was wholly necessary for it to continue with the application as the outcome would either be the claims were struck out or the Respondent would be substituted.

13. The Respondent also makes the point that the application and subsequent preliminary hearing would have been required in any event to allow for substitution of the Respondent.

14. The Respondent says that its application did have reasonable prospects of success because:
    14.1. The Claimant confirmed he had erroneously brought the application against the wrong entity;
    14.2. The application sets out substantial defects in the ET1 claim forms and ACAS certificates;
    14.3. The Respondent relies on its solicitor's attendance note of the hearing on 13th May 2021 and says that, in my oral judgment given on that occasion (in which I set down a one day preliminary hearing on 10th June, converting the original two day listing on 10th and 11th June, which was originally a full merits hearing), reference was made to the question of jurisdiction needing to be considered in depth by the tribunal and 'mistakes' made by the Claimant.

15. The Respondent also says the following as to any increased costs caused by its application:
    15.1. The Respondent says the application was caused by the mistakes made by the Claimant.
    15.2. The Respondent points to a submission said to have been made by the Claimant that 10th June 2021 should be reserved for a whole day for the application and directions for future case management and referred me to the need to hear live evidence. The Respondent submits that it was therefore the Claimant that insisted on a whole day application hearing with evidence, which served to increase costs. On this point, it is necessary for

me to note that the Respondent invited me to list a preliminary hearing to consider the issues. The Claimant had sought to have the issues determined at the outset of the two day full merits hearing.

15.3. The Respondent also contends that the Claimant should not be rewarded with costs given the mistakes made.

16. The Respondent also refers me to the findings of fact made in the reserved judgment, which I have re-read for the purposes of dealing with this costs application. It is submitted by the Respondent that it would be perverse to award costs in these circumstances, having regard to the mistakes made by the Claimant, which it says were not corrected.

17. As to the contribution to costs sought (£1,500), the Respondent says that no detail of the retainer or breakdown of the costs have been provided, nor any reason why only a contribution is claimed. It is said it would be unfair to make a decision without such information. I am also reminded by the Respondent that costs are the exception and not the norm.

Further submissions provided

18. Having directed further written submissions (as set out at paragraph 4 of this judgment, above) the Claimant's solicitor provided further information as to the fees charged to his client. This is set out at paragraph 9 of this judgment, above.

19. The Respondent's letter of 19th August 2021, says, in summary, that the Claimant's email of 19th August 2021 is not sufficient to provide information for the Respondent or the tribunal because:
    19.1. There is no information about the Claimant's solicitor's retainer;
    19.2. There is no adequate 'breakdown of costs'. The Respondent says there should be a time card to prove time incurred;
    19.3. The Respondent says that the initial letter of application referred to costs for preparing written submissions and supporting case law and representation at the hearing whereas the email of 19th August includes reference to preparing the Claimant's documents and witness statement, drafting closing submissions, preparation of case law and representation at the hearing.
    19.4. The Claimant has not clarified why the claim is for only 60% of the costs incurred for this work (which was £2,500 in total).
    19.5. There are no exceptional circumstances advanced by the Claimant to warrant making a costs order.
    19.6. The Respondent says it is confused by the contribution to costs which is sought, given two emails which were disclosed in the process which gave some idea as to the costs incurred.

20. As to rule 84 (ability to pay), the Respondent provided the following information:

20.1. The Respondent is a catering company, primarily providing catering services to the hospitality industry and schools;

20.2. The majority of its catering outlets were closed as a result of the COVID-19 pandemic. This has included the permanent closure of many of its outlets and a large percentage of its workforce have been laid off or made redundant. It is said that the Respondent has still not recovered from the effects of the COVID-19 pandemic.

20.3. The Respondent has been put to expense in dealing with and responding to these proceedings and refers again to the point that the Claimant made no application for substitution himself. It is also said that this written application for costs is further increasing costs and criticises the lack of detail provided.

20.4. The Respondent also says that ability to pay is not the only consideration and the tribunal should consider all the circumstances of the case, referring again to the Claimant's errors and failure to make any application for substitution.

20.5. The Respondent asks the tribunal not to make a costs order in the circumstances, regardless of any ability to pay.

Law

21. Rule 76 of the tribunal's Rules of Procedure provides:

> ***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;*
>
> *(b) any claim or response had no reasonable prospect of success;*
>
> *(c)…*

22. Rule 77 (procedure) provides:

> ***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.*

23. Rule 84 provides as follows (in respect of a party's ability to pay):

> ***84.*** *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.*

24. In determining a costs application of this sort, there is a two-stage test. Firstly, I must consider whether either statutory threshold is made out (under Rule 76(1)(a) or (b)). If I decide that it is, I must go on to exercise my discretion, having regard to all the circumstances, as to whether or not to make a costs order. Where the first threshold is satisfied (e.g. unreasonable conduct) it does not automatically follow that an order should be made. If an order is to be made, I must then go to determine the amount (see Ayoola v St Christopher's Fellowship, UKEAT/0508/13/BA, 6th June 2014, unreported, per HHJ Eady QC (as she then was)).

25. The tribunal can take into account ability to pay on the question of whether to make a costs order and also, if appropriate, on the amount.

Discussion and conclusions on the application

Unreasonable conduct

26. The first part of the conclusions in my reserved judgment dated 8th July 2021 concerned the issues raised by the Respondent regarding defects in the claim forms and ACAS certificates. I found that "*there is no basis to find that the tribunal does not have jurisdiction to hear the claims in respect of the points taken as to the ACAS EC certificates and the claim forms*". In my judgment, there was some unreasonable conduct on the part of the Respondent in bringing the application on this basis, which was professionally represented throughout. The application proceeded (on this issue) on the footing that, under Rule 12, the claim forms should have been rejected. That was an unreasonable argument to have pursued in relation to the first claim because, as I found, Rule 12 had no applicability and a careful reading of the rule and the documentation demonstrated this. As regards the second claim, the difference between the ACAS EC certificate and the claim form (which was a very small difference in the address) was quite clearly, on the face of the documentation, minor and, in any event, Rule 12(1)(f) only requires the matter to be referred to an Employment Judge in the case of the name of the Respondent (and not the address).

27. Further, in terms of the points taken as to service of the claim forms, I found that the first claim form had, by re-service directed by the tribunal, been served on a trading address of the Respondent. The distinction made by the Respondent between 'Olympia London' and 'Olympia Exhibition Centre' was, in my judgment, an unreasonable one to have made in the circumstances when the claim had effectively come to its attention (and there was no error in the remainder of the address or postcode). The Respondent did not keep the overriding objective in mind when considering this argument.

28. I also found that there was no substance to the argument as to defective service of the second claim when, service having taken place, the claim form came to the Respondent's attention and it duly instructed solicitors who prepared an ET3

Response. I therefore dismissed the arguments on both claim forms on this issue. They did not have any reasonable prospect of success and, in the circumstances, it was unreasonable to have taken the point.

29. As the parties are aware, I concluded at paragraph 48 of the reserved judgment that "*the real matter of substance is the fact that the two claim forms bring the claim, erroneously, against Creative Events, a different entity to the Respondent, which is the Claimant's employer*".

30. The Respondent's argument on this point was that the claims were out of time as against the Respondent. I concluded: "*to accept that argument the tribunal would be elevating form well above substance in a manner which is wholly incompatible with the overriding objective*" (paragraph 49). The Respondent's argument ignored the fact that the originating claim forms were both brought in time in respect of the complaints and, as a result, it was wrong to say that the tribunal did not have jurisdiction to hear the claims. Given that the effect of the name used by the Claimant on both claim forms was erroneous, it was necessary for the tribunal to consider substitution under Rule 34.

31. The reserved judgment then applied the principles in Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650 to determine whether to substitute Creative Events Limited with the Respondent. On this issue, I do not consider that the Respondent has acted unreasonably. It was entitled to challenge whether it should be substituted having regard to the principles set out in Cocking. This included the question as to whether the mistake made (as to the name) was a genuine one. In my judgment, this was a case where it was likely that a tribunal would substitute because, as I concluded: the difference in the name was not misleading; the Respondent had participated in the first ACAS EC process; and, it should have known that to have refused substitution would have caused the Claimant far more injustice or hardship than it would to a company which was the Claimant's employer (which had become aware of both claims at an early stage in the litigation following re-service directed by the tribunal).

32. However, the application did require oral evidence and, even if the tribunal had decided to consider substitution under Rule 34 of its own motion, it would have still required some oral evidence from the Claimant in order to consider whether he had made a genuine mistake. The Respondent was, in my judgment, entitled to test that and ask for evidence about it. The tribunal needed to consider that evidence to decide the question of substitution in the circumstances. It was, accordingly, not unreasonable conduct on the part of the Respondent to have challenged the question of the Claimant's mistake, especially given that the Claimant was professionally represented and had named the Respondent incorrectly on both claim forms.

33. Accordingly, for the above reasons, I conclude that the Respondent acted unreasonably in pursuing the arguments as to: defects in the ET1 claim forms and ACAS EC certificates and the arguments as to defective service. However, it did not act unreasonably in resisting and testing the question of substitution, which was confirmed by the tribunal as an issue to be determined in the Respondent's application when the parties came before me for the first time on 13th May 2021.

No reasonable prospect of success

34. Whilst the costs application is also put under Rule 76(1)(b), this concerns a situation where the tribunal finds that *any claim or response* has no reasonable prospect of success. The wording does not extend to the application made by the Respondent. In any event, this does not take matters further since I have found that Rule 76(1)(a) applies as explained above and any consideration of whether the Respondent's application had any reasonable prospect of success is engaged under that test in the circumstances of this case.

Whether to make a costs order

35. I must, therefore, exercise my discretion as to whether or not to make a costs order in this case, having found that part of the Respondent's conduct in its application to dismiss the claims amounted to unreasonable conduct.

36. I have decided not to make a costs order in this case for the following reasons:

    36.1. As was made clear at the preliminary hearing on 13th May 2021 and as was argued on submissions by both parties at the hearing on 10th June 2021, a key aspect of the matter before the tribunal was whether or not to substitute the Respondent under Rule 34. As explained above, this required some oral and written evidence from the Claimant in order for the tribunal to apply all of the principles in Cocking. It was not unreasonable of the Respondent to have argued that issue and it was certainly entitled to challenge the Claimant's evidence at the hearing on 10th June 2021.

    36.2. The Respondent did act unreasonably in pursuing some of its arguments. I have taken this into account and considered whether that conduct would merit the making of a costs order by itself. However, I must have regard to all of the circumstances of the case. In my judgment, it is relevant that two claims had been brought (arising out of the same facts); both were erroneous as to the correct Respondent's name; there had been defective service of the first claim form the first-time round (which was acknowledged by the Claimant at the first preliminary hearing on 22nd March 2021) and the Claimant had been professionally represented throughout. The Respondent sought to have the claims dismissed as against itself (as his employer) in circumstances where the Claimant, despite being represented, had made a mistake on both claim forms. It is regrettable that the Respondent pursued the arguments regarding technical defects and, to

some extent, this may have increased the Claimant's costs in responding to the application. However, considering the circumstances, I conclude that it is not appropriate to make a costs order on the basis of the Respondent having taken those technical points alone.

36.3. I do not find that the Respondent's ability to pay (or otherwise) is relevant, in the circumstances of this case, in deciding whether or not to make an order. There is no evidence that its ability to pay a costs award has had an impact on its conduct or how it has sought to deal with the claims that have been brought.

36.4. I have had regard to the Claimant's submissions in respect of a letter it sent to the Respondent's solicitor on 1st June 2021 and the warnings given. I have read the letter (in the hearing bundle at p.111-12). The primary warning in the letter concerns the likelihood of the tribunal ordering substitution under Rule 34 (echoing a discussion on the point which took place at the hearing on 13th May 2021). The argument made is that, at least after this point, the Respondent should not have continued with its application. However, in my judgment, even if the Respondent had agreed to that course, the tribunal would have still required the hearing on 10th June 2021 and would still have had to have heard evidence and decided the question of substitution, applying Rule 34 and Cocking. The need for any consideration as to substitution arose from the Claimant's original mistake (albeit an honest and genuine one) and this engaged the tribunal's remedial procedure under Rule 34 in order to rectify that mistake as between the correct parties.

36.5. Finally, I agree with the Respondent's submission that this was a case where the Claimant could have made its own early application for substitution. The Claimant effectively invited substitution as part of its submissions at the hearing on 10th June 2021, but the preliminary hearing arose from the Respondent's application to dismiss the claims. Had earlier consideration been given to substitution to deal with the Claimant's error in the name of the Respondent (or the listing of a hearing to consider substitution on this basis) costs may have been saved in the circumstances. In my judgment, this militates against the making of an order in the Claimant's favour on this occasion.

37. Accordingly, the Claimant's application for a costs order on the Respondent's application to dismiss the claims is dismissed.

Employment Judge Nicklin

Date: 17th September 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

20/09/2021.

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FOR THE TRIBUNAL OFFICE