EMPLOYMENT TRIBUNALS

Claimant: Mr S Emmins

Respondent: Lazerbeam Fire & Security Ltd

Heard at: London South Croydon

JUDGMENT

The respondent's application for costs and the claimant's application for a preparation time order are refused.

REASONS

Introduction

1. Both parties have made applications against each other. The respondent for a costs order, the claimant for a preparation time order. I indicated in correspondence that in view of the Covid 19 pandemic and its impact on conducting face-to-face hearings and in order to say further costs/time expended by the parties, I believed it was proportionate to deal with the matter in writing after receiving further submissions, without the need for a hearing. Neither party has raised any objection to this approach.

Background

2. By a claim form received by the Employment Tribunal on 10 April 2019, the claimant, a litigant in person, brought a complaint of *"unlawful deduction of wages in respect of my three months' notice period and outstanding expenses"* (at paragraph 1 of the attachment to his claim form). The claimant was seeking notice pay of £12,995.20 and expenses of £3000. The claimant initially brought the claim against Mr Nejad, the managing director of Laserbeam Fire & Security Ltd, but this was subsequently amended to the company's name.

3. The claim was accepted by a letter from the Tribunal dated 28 May 2019. That letter also advised the parties that the hearing would take place at 2 pm on 22 August 2019, listed for one hour, and that the claimant was required no later than four weeks from the date of the letter to set out in writing what remedy the Tribunal was being asked to award, including any evidence and documentation in support and as to how the figures had been calculated.

4. Unbeknown to the parties, the Tribunal administration had coded the claim "BOC" meaning breach of contract and "WA" meaning unauthorised deduction from wages. I was aware of this on reading the file on the morning of the hearing.

5. The respondent presented a response to the Tribunal on 18 June 2019 in which it denied the claim and brought a counterclaim in the sum of £2180 in respect of improperly claimed expenses. Within the grounds of resistance, the respondent submitted that the Tribunal had no jurisdiction to deal with the claim because it was premised upon an illegal contract. In addition, the respondent submitted that the claimant was not entitled to any notice from the respondent and did not admit, or indeed understand, the claim for unpaid expenses. The response and counterclaim were accepted by the Tribunal on 1 July and 20 August 2019 respectively.

6. By a letter dated 20 August 2019, the Tribunal wrote to the respondent seeking further particulars of its counterclaim including the precise sums claimed and how they had been calculated.

7. The original hearing date of 22 August 2019 did not take place. The case was relisted for a hearing on 25 February 2020 with a time estimate of three hours, given representations by both parties as to one hour being insufficient. That date was subsequently postponed, and the hearing relisted for 25 March 2020. This date was inconvenient for the claimant and the matter was relisted for 23 March 2020.

8. However, the hearing was converted to a telephone preliminary hearing on case management in accordance with the guidance issued by the President of the Employment Tribunals following the outbreak of the Covid-19 virus and pandemic. That hearing was conducted by Employment Judge Hyams-Parish who set a further date for the final hearing of 19 August 2020 with a time estimate of one day. He also made a number of case management orders to prepare the matter for that hearing. I note, in particular, that the respondent was required to prepare, and then agree with the claimant, a list of issues to be determined at the final hearing.

9. On 11 September 2019, the respondent provided further particulars of its counterclaim with supporting evidence.

10. On 17 September 2019, the claimant presented his response to the counterclaim in which he denied improperly claiming any expenses.

The final hearing

11. I conducted the hearing on 19 August 2020, at which the claimant appeared in person and the respondent was directly represented by Mr Strelitz of Counsel. The hearing was in person.

12. At the start of the hearing, I explained to the parties that the claim had been coded by the administration as raising damages for breach of contract and unauthorised deduction from wages complaints.

13. I was provided with a list of issues at pages 219-220 of the hearing bundle. This set out the following matters: a) what relationship, if any, existed between the parties as employee or worker; b) if a contract was found to exist, was it rendered unenforceable by reason of illegality; c) what, if any, notice period was the claimant entitled to; and d) what expenses, if any, were due to him?

14. This document was drafted by the respondent and had gone through several iterations before arriving at the version before me. That version had been amended at the claimant's request to include the issue of his worker status and not just his employee status.

15. It is fair to say that the list of issues erroneously characterised both claims for notice pay and expenses as unauthorised deductions from wages as falling under section 13 of the Employment Rights Act 1996.

16. I explained to the parties, that this could not be the case because the claimant was seeking payment of alleged outstanding notice pay and unpaid expenses, neither of which fell within the definition of wages under section 27 of that Act. I further explained that the claim was more properly one of damages for breach of contract under the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994, which requires that the claimant must be an employee of the respondent at the time his employment ended.

17. As a result, I recast the issues as follows: a) whether the claimant was an employee; b) if he was, was any contract between the parties unenforceable by reason of illegality; c) if it was not, was the claimant entitled to damages for any shortfall in payment of his entitlement to notice; d) was the claimant entitled to damages in respect of reimbursable expenses; and e) was the respondent entitled to damages in respect of its counterclaim?

18. I sat from 10.18 am until 5.15 pm and heard evidence from the claimant and from Mr Najed and then submissions. In view of the lateness of the hour I reserved my Judgment.

19. In my Reserved Judgment and Reasons dated 5 November 2020 I determined that the claimant was not an employee (but was a contractor providing services under a contract for service) and so the Employment Tribunal had no jurisdiction to determine his claim of damages for breach of contract and the claim was dismissed. In my reasons I indicated that as a result of the lack of jurisdiction, I made no findings as to the claimant's entitlement to notice or reimbursement of expenses, it was not necessary for me to consider any issue of illegality raised by the respondent and I did not have jurisdiction to determine the respondent's counterclaim. My Reserved Judgment & Reasons were sent to the parties on 21 November 2020. I refer the parties to that document for further details.

The parties' applications

20. By an email dated 2 December 2020, the respondent made an application for costs stated to be *"in excess of £20,000"* and required the matter to be assessed in the County Court.

21. By an email dated 14 December 2020, the claimant lodged his objections to the respondent's costs application and appeared to be making an application for a preparation time order.

22. I instructed the Tribunal administration to write to the parties raising a number of queries arising from their emails and also setting out the procedure relating to costs/preparation time orders under the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("the Rules of Procedure"). Whilst I gave this instruction in January 2021, the letter was not sent out until 27 April 2021.

23. In that letter I gave some guidance as to the scheme of things under rules 74 to 87 of the Rules of Procedure, as it appeared to me that the parties did not have a clear understanding of the Tribunal's powers.

24. I stated that it was unclear whether the respondent's application was for costs as a represented party, costs as an unrepresented party or for a preparation time order. In addition, I required a breakdown of the costs incurred beyond a simple statement that they were *"in excess of £20,000"*. I indicated that the breakdown should set out in each instance, when the cost was incurred, what it was in respect of, how much time was expended on it, and how the amount sought in each instance had been calculated.

25. I also stated that it appeared that the claimant was seeking a preparation time order, but he had provided no information as to the amount of time expended. I therefore required the claimant to provide the same details as I had requested of the respondent.

26. I also asked the parties to consider whether they wished to provide evidence of their ability to pay any costs or preparation time order if made.

27. Finally I indicated, as I have set out above, that I would consider the matter on paper after receiving any further submissions without the need for a hearing.

28. By email dated 28 April 2021, the respondent provided further information in which it set out a limited breakdown of the costs it was seeking which were now in the total sum of £14,981.25. In addition, the respondent commented on the claimant's objections to its application.

29. By email dated 6 May 2021, the claimant provided further information in which he confirmed that he had made an application for a preparation time order and provided a limited breakdown claimed at the rate of £41 per hour for approximately 41 hours spent preparing the case, but discounting time spent at the hearing. He gave no further breakdown of this figure. The claimant also made further comments on the respondent's application.

30. Neither party provided any evidence of their ability to pay a costs/preparation time order if I were minded making one and neither party raised any objections to the applications being dealt with on paper without the need for a hearing.

31. Unfortunately, any further progress of the matter was delayed by the volume of work that the Employment Tribunal administration has faced because of the Covid 19 virus and pandemic, as well as my sitting and availability dates. As a result, I have only just been able to deal with the matter. I would apologise to the parties for this delay.

Relevant law

32. Under rule 75(1)(a) of the Rules of Procedure, the Employment Tribunal has the power to make an order against one party to proceedings ("the paying party") to pay costs incurred by another ("the receiving party") which had been incurred whilst legally represented or whilst represented by a lay representative. Rule 74(1) defines costs as fees, charges, disbursements or expenses incurred on or by the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing).

33. Under rule 78, the Employment Tribunal has the power to make an order in a specified amount, not exceeding £20,000, in respect of the costs of the receiving party or to refer the matter to the County Court for detailed assessment or to carry out a detailed assessment itself.

34. Under rule 75(2), the Tribunal has the power to make a preparation time order in respect of the receiving party's preparation time whilst not legally represented. Preparation time means time spent by the receiving party, including any employees or advisers, in working on the case, except for time spent at any final hearing.

35. Under rule 75(3), an Employment Tribunal cannot make a costs order and a preparation time order in favour of the same party in the same proceedings.

36. Under rule 79, the Employment Tribunal has to assess the number of hours in respect of which a preparation time order should be made on the basis of information provided by the receiving party and its assessment of what it considers to be a reasonable and proportionate amount of time to spend on such work.

37. Under rule 78(2) and 79(2), the hourly rate payable in respect of a lay representative and for time preparation respectively is capped and is currently £40 per hour.

38. Under rule 76(1)(a), a costs or preparation time order can be made where a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing or conduct of the proceedings (or part). The Employment Tribunal should determine whether any of the categories in which it can award costs/preparation time orders apply, then determine whether to use its discretion to award such and if so in what amount (Monaghan v Close Thornton Solicitors UKEAT/3/01).

39. Under rule 76(1)(b), a costs or preparation time order can also be made where any claim or response had no reasonable prospects of success.

40. Under the previous Rules of Procedure 2004, the word "misconceived"

formed one of the grounds on which to award a costs/preparation time order. This word was defined as including "no reasonable prospects of success." In Scott v Commissioners of Inland Revenue [2004] IRLR 713, CA, LJ Sedley clarified that the key question with regard to whether proceedings were misconceived is not whether the party thought he was in the right, but whether he had reasonable grounds for doing so. This involves assessing objectively whether the claim had any prospect of success at any time of its existence (Black v Hamilton-Jones 19th October 2004 UKEAT 0047/04 [2004] All ER (D) 321 (Nov)).

41. Under rule 76(1)(b), the focus is simply on the claim or response and whether the claim or response had reasonable prospects of success.

42. It is appropriate for a litigant in person to be judged less harshly in terms of his conduct and a litigant who is professionally represented. According to the EAT in AQ Ltd v Holden [2012] IRLR 648, a Tribunal cannot, and should not, judge a litigant in person by the standards of a professional representative. Justice requires that Tribunals do not apply professional standards to lay people, who may well be embroiled in legal proceedings for the only time in their life. Lay people are likely to lack the objectivity and knowledge of law and practice brought to bear by a professional legal adviser. The EAT stressed that Tribunals must bear this in mind when assessing the threshold tests in the then equivalent to rule 76(1) of the Rules of Procedure 2013. It went on to state that, even if the threshold tests are met, the Tribunal still has discretion whether to make an order. That discretion should be exercised having regard to all the circumstances. In this respect, it was not irrelevant that a lay person may have brought proceedings with little or no access to specialist help and advice. This was not to say that lay people are immune from orders for costs/preparation time order: far from it, as the decided cases make clear. Some litigants in person are found to have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity. However, the EAT concluded that, in the instant case, the Tribunal had been entitled to take into account the fact that Mr Holden represented himself when refusing the employer's costs order.

43. I have also taken into account that costs/preparation time orders should not be lightly awarded on the basis of unreasonably bringing a claim. The Rules of Procedure place a high threshold on the award of costs/preparation time orders, and "unreasonable" should be interpreted in the context of the other words in that rule (Ganase v Kent Community Housing Trust UKEAT/1022/01). The fact that a claimant's case is relatively weak, does not necessarily mean it is unreasonable or has no reasonable prospect of success. Indeed I bear in mind E T Marler Ltd v Robertson [1974] ICR 72, NIRC, as quoted with approval in Lodwick v Southwark LBC [2004] IRLR 554, CA:

"Ordinary experience of life frequently teaches us that that which is plain for all to see once the dust of battle has subsided was far from clear to the contestants when they took up arms."

44. Where a case seems reasonable at the outset, but its weaknesses emerge during preparation, then it can be appropriate to only award a costs/preparation time order from the point when it becomes apparent that

there is no reasonable prospect of success or from when a party's behaviour becomes unreasonable (Ramsay and others v Bowercross Construction Ltd and others UKEAT/0534 5/07; McPherson v BNP Paribas (London Branch) [2004] IRLR 558, CA).

45. I have taken into account that the claimant was a litigant in person, with some access to pro bono legal advice and that the respondent had in-house legal advice as well as advice from and representation by Counsel, as is apparent from its table of costs/preparation time order, for most of the proceedings.

46. The fact that a costs warning has been given is a factor that may be taken into account by a Tribunal when considering whether to exercise its discretion to make an order. The absence of a warning may be a relevant factor in deciding that costs should or should not be awarded.

47. In Rogers v Dorothy Barley School UKEAT 0013/12, the EAT had "no doubt" that it had jurisdiction to make an order for costs against Mr Rogers, a litigant in person, on the basis that his appeal was misconceived. The Tribunal had correctly rejected his breach of contract claim on the basis that, as Mr Rogers was still employed by the School, it had no jurisdiction to hear it. However, in the circumstances of the case, the EAT concluded that it would not be right to order Mr Rogers to pay costs. The School had known for many months that Mr Rogers was acting in person and was simply not grasping the jurisdictional question that his appeal raised, yet it had not warned him that if he proceeded, an application for costs would be made. That case has striking similarities to the one before me.

48. I remind myself that costs/preparation time orders in the Employment Tribunal are the exception rather than the rule. I also note that of course the respondent could have given the claimant advance notice of its intention to apply for a costs on the basis that he had brought or was continuing with a misconceived claim/acting unreasonable in doing so or applied to the Employment Tribunal for a preliminary hearing to consider striking out his claim or for a costs/deposit order to be issued. Indeed, the respondent could have made it much clearer in its grounds of resistance why it was that it considered his claim to be misconceived or it was unreasonable of him to continue with it.

49. Under rule 84 of the Rules of Procedure, the Employment Tribunal may have regard to the paying party's ability to pay when considering whether to make a costs/preparation time order, and, if so, in determining in what amount. I am not obliged to take account of means and having made the enquiry of the parties and received no response, I feel that I have taken the matter as far as I am obliged to do so.

The respondent's application

50. The respondent's application is for legal costs of its legal representative, Mr Strelitz incurred at various stages of preparation of the case, attendance at the Tribunal hearing and in drafting its costs application. This is set out within a table indicating the type of work undertaken, when and the cost of each piece of work (exclusive of VAT). The total amount that the respondent seeks is £14,981.25. The respondent has not indicated the amount of time spent on

each piece of work or the hourly rate or other way in which the cost has been calculated.

51. The respondent grounds of application are that the claimant has acted vexatiously or otherwise unreasonably in the bringing, or alternatively the conduct of the proceedings, or in the further alternative that the claim had no reasonable prospects of success.

52. The respondent submits that the claimant was expressly warned within its grounds of resistance as to the likely consequences of continuing his claims had obtained specialist employment law advice, as indicated in his particulars of claim, was aware of the significance of having to assert employment status as an employee and sought to mislead the Tribunal as to his belief in order to pursue a remedy against the respondent. This is set out at paragraphs 3 to 9 of its application.

53. In summary, at paragraph 11 of its application, the respondent submits that the claim was instigated when it had no reasonable prospects of success, was based on the claimant's claim to be employed which was something he robustly guarded against during his employment, and from at least receipt of the respondent's response, he ought properly to have realised that the respondent disputed his employee status, having himself advocated for the contrary during his employment, and he should have discontinued his claim.

54. In the application, the respondent submits that the statutory threshold on which to make a costs order is met and that the tribunal should then go on to consider whether it is appropriate to make an order in all the circumstances (Robinson v Hall Gregory Recruitment Ltd [2014] 761, EAT at paragraph 15).

55. The respondent further submits that it would be appropriate to make an order because the claimant's case that he was an employee was so fundamentally opposed to that which the claimant as an experienced businessman operating at Managing Director level on a six-figure salary felt able to negotiate so confidently to remove from the draft contractual instrument that was intended at the time to govern his engagement by the respondent.

56. The respondent's primary position is that it should be awarded its costs for the entirety of the proceedings and in the alternative costs to allow a short but appropriate period after its very clear response was submitted and the claimant ought properly to have taken advice upon the same. The respondent submits that such a period should be no more than 28 days after the filing of its response.

The claimant's application and response

57. In response, in his email of 14 December 2020, the claimant objected to the respondent's application. In essence, he raise the following matters: that the amount of costs claimed, originally in excess of £20,000, was disproportionate for a case originally listed for one hour and then increased to one day at the respondent's request; that the case ultimately turned on a narrow issue which was not whether he was an employee and therefore could not bring a breach of contract claim but whether he was an employee or worker and whether he could bring a claim of unlawful deduction from wages;

the list of issues prepared by the respondent initially omitted the issue as to whether the claimant was a worker and only included this after he asked for it to be included; he did not know until I raised it at the start of the full hearing that his claim was limited to damages for breach of contract; it had not been raised at the preliminary hearing or by the respondent; the respondent relies on this as evidence that his claim was misconceived, but this was not a point raised in its response, which focused on illegality and as to why he was not an employee; he is a litigant in person, only received some limited assistance from a lawyer on a pro bono basis; the Tribunal concluded he was a contractor and so he may still have a remedy against the respondent but could not bring the claim in the Tribunal because of its limited scope; during proceedings the respondent conducted itself in an unreasonable, vexatious and misconceived manner; he applies for a preparation time order and asks the Tribunal to take into account that the respondent's illegality argument took up a lot of costs and time, but in the end the Tribunal did not need to determine that matter; the respondent brought a counterclaim which it lost on the basis that he was not an employee and if the point that he was not an employee was so obvious as the respondent now claims, then its counter claim was misconceived, had no reasonable prospect of success and was wrongly brought; the Tribunal criticised respondent for failing to keep all of the CCTV footage including the partner dealt with discussion of expenses and Mr Nejad's explanation for this was not accepted.

Further responses from the parties

58. In response to my letter dated 27 April 2021, seeking clarification of the two applications, I received responses from both parties.

59. The response from the respondent dated 28 April 2021 confirmed that it was making an application for costs incurred when it was legally represented, a breakdown of its costs as indicated above and responded to the claimant's email of 14 December 2020. The points raised were as follows: the Tribunal found that the payment regime for the claimant's salary was structed by him, and had the Tribunal found it necessary to consider the point, the respondent would have likely succeeded; the counterclaim was pursued without prejudice to the respondent's principal argument of refuting the claimant's claim; a failure to keep CCTV cannot be relevant to a preparation time order application and does not relate to the conduct of the proceedings, and in any event the Tribunal's reasons do not evidence anything approaching unreasonable conduct on the part of Mr Nejad.

60. The response from the claimant dated 6 May 2021, confirmed that he was making an application for a preparation time order. The claimant also reiterated that he had not done anything that he believed to be unreasonable or that he should have to pay the respondent's costs. Further he stated that the amount of costs had gone down, over £2500 postdates the hearing, including £1406.25 to draft the costs application and that there is no evidence in support. He also states that the claim was relatively straightforward, related to just under £13,000 notice pay and £3000 expenses, and that the costs claimed nearly equals this. His email goes on to reiterate his point that neither the previous Employment Judge nor the respondent raised any issue about him needing to be an employee to win his claim and so he thought that being a worker would be enough.

Conclusions

61. With regard to the applications on the grounds that the claim/response had no reasonable prospects of success I have looked carefully at both documents.

62. In the attachment to the claim form, the claimant starts off by stating that he is claiming unlawful deduction from wages in respect of his three months' notice period and outstanding expenses. He then sets out the events in support of this. In the last paragraph on the second page of the attachment he says as follows:

"Whilst the written contract sent to me states that I am not an employee, the agreement is not signed, and I was in practice subjected to control, provided with work over that period, and expected to attend and give personal service. I was not permitted to send a substitute and never did so I therefore consider that I was an employee. Alternatively, I am a worker."

63. This indicates to me that whilst the claimant has either received or obtained some legal advice, he has presented a claim for unauthorised deduction from wages but based the needs to be an employee, and correctly, although in the alternative, a worker in order to do so. He does not recognise or acknowledge that his complaint cannot succeed because what he seeks to recover falls outside the legal definition of wages. Whilst he criticises the Tribunal for not providing him with legal advice, of course it is not the Tribunal's role to do this. That responsibility falls to each party. Whilst there are practical and financial difficulties in obtaining such advice, matters are easily researched on the Internet these days and what comes with making and indeed defending a claim is a degree of responsibility, given the impact such proceedings have on the other party. However, I accept that I should not apply the same standards to a litigant in person as that of a professional representative as guided by the EAT in AQ Ltd v Holden.

64. I have also looked carefully at the respondent's response. In the grounds of resistance, the respondent sets out its defence to the claim based on illegality of contract and a denial that the claimant was an employee. In essence, the respondent submitted that the claimant originally had a contract of employment as an employee, strived to convert this to a self-employed contractor relationship, and for these proceedings he purported to be an employee, this in turn raising matters of illegality as to his tax position with HMRC. The respondent addresses the unauthorised deduction from wages claim purely on the basis of employment status. The response does not make it expressly clear that the claimant's case cannot succeed although by implication it does. The respondent does not recognise that the unauthorised deduction from wages claim cannot succeed given that what is claimed falls outside the definition of wages.

65. The Tribunal internally coded the claim as one of breach of contract and unauthorised deduction from wages. However, the parties were unaware of this.

66. Turning then to the conduct of each party.

67. Whilst there was a lack of understanding on both sides as to the nature of the claim in that it simply could not succeed as an unauthorised deduction from wages complaint, this was a matter that both parties should have taken steps to determine for themselves and is not something that can be placed at the door of the Tribunal.

68. Whilst the claimant should on receipt of the respondent's response, taken stock of his position and sought advice, I have to take into account again that he was a litigant in person with limited access to legal advice and the guidance from Holden. I also bear in mind the guidance from Lodwick v Southwark LBC.

69. The respondent on the other hand had legal assistance throughout, as the dates of its breakdown of costs indicate, as well as in house assistance. The respondent was in a better position to obtain/make an objective assessment of the true legal position of the complaint of unauthorised deduction from wages and that the claim could only succeed as one of damages for breach of contract if the claimant was found to be an employee.

70. The claimant had previously received pro bono advice from a lawyer and there is no reason given as to why he could not have done this again. Indeed, advice is readily found on the Internet and in particular from the Citizens Advice website. Further, the claimant, in running the argument primarily that he was an employee or alternatively a worker, was relying on circumstances where he had engineered a self-employed relationship with the respondent and his subsequent denial of that relationship in order to pursue a claim in the Tribunal. That is not to say that there is necessarily anything wrong in so doing, given that an employment relationship is not just judged on its express written terms but also on the reality of the relationship. And of course, the relationship could have amounted to worker status, if the employee status argument failed, in order to bring the complaint of unauthorised deductions from wages as the claimant saw it. But in reality, it was a complaint he could simply not have succeeded in, even if as he states he was not aware of this until I raised it at the final hearing.

71. My view is that both parties are equally at fault both in terms of reasonableness of their actions in bringing/defending the claim/counterclaim and as to their conduct, and as a result allowing the claim to continue as far as it did. The respondent, in not being alert to what was an erroneous complaint of unauthorised deduction from wages notwithstanding its greater access to legal advice and in not raising this with the claimant so as to put the focus squarely on his employee status. Indeed, the respondent could and perhaps even should have sent a costs warning letter to the claimant to put him firmly on notice of his risk in continuing and why, but it did not do so. The claimant, in not seeking advice from the sources available to him as to the true nature of his claim and thus as to the key significance of him being an employee and not a worker.

72. In conclusion, I therefore find it inappropriate to make any award to either party. The time and costs expended by each side are entirely of their own making in equal degrees.

73. In any event, neither party has provided adequate information as to the costs

incurred or the time expended despite having two opportunities in which to do so.

74. I therefore refuse both applications.

Employment Judge Tsamados
25 August 2021