EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr D Lyons	**v**	Interserve Group Limited

Heard at: Reading (by CVP) **On:** 14 December 2020

Before: Employment Judge Hawksworth (sitting alone)

Appearances
For the Claimant: Ms R Morton (counsel)
For the Respondent: Ms J Shepherd (counsel)

JUDGMENT (COSTS)

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

2. The claimant's application for costs is refused.

REASONS

The claim and the preliminary hearing judgment

1. By a claim form presented on 23 August 2019 the claimant brought complaints of unfair dismissal, protected disclosure detriment, race discrimination, harassment and victimisation and for other payments. The ET3 was submitted on 25 October 2019. The respondent defended the claim and raised preliminary jurisdictional issues.

2. A public preliminary hearing was held before me to decide who was the claimant's employer and whether the tribunal had territorial jurisdiction to hear the claimant's claim. In a judgment sent to the parties on 22 January 2021 I decided that the claimant was employed by ESG Saudi Arabia LLC, a company registered in the Kingdom of Saudi Arabia, and that the tribunal did not have territorial jurisdiction to decide the claimant's claim. The claimant's claims were dismissed.

The respondent's application for costs

3. The respondent made an application for costs on 1 February 2021. A revised application, with amended costs schedules, was sent on 4

February 2021. The respondent has asked for the application to be dealt with without a hearing.

4. The respondent's application for costs is made under rule 76(1)(b) on the basis that the claim had no reasonable prospect of success, and under rule 76(1)(a) on the basis of unreasonable conduct by the claimant.

5. The conduct which is said to be unreasonable relates to costs warnings and a settlement offer. The respondent's solicitors wrote to the claimant's solicitors on a 'without prejudice save as to costs' basis, setting out in detail its views as to why the claimant's claim had no reasonable prospect of success, and warning the claimant that it would seek a costs order if his claim did not succeed. I was provided with copies of letters sent on 6 May 2020, on 12 August 2020 (in which the respondent made the claimant a settlement offer of £2,000 on a commercial basis) and on 30 September 2020 (which enclosed a copy of the judgment of the employment tribunal in a similar case brought by Mr Saloo against Interserve Learning and Employment (Services) Limited, case 1800168/2020).

The claimant's response

6. The claimant's solicitors wrote to the tribunal on 11 February 2021 setting out the claimant's response to the respondent's application for costs. The claimant's solicitors said that on matters of significance the evidence was wholly in dispute and it was entirely appropriate for the claimant to wish to test that evidence before a tribunal. The claimant's solicitors also said that there were significant factual differences between the claimant's and Mr Saloo's claims.

7. The claimant's solicitors made a cross application for costs, seeking costs in the sum of £600 incurred in dealing with the respondent's application for costs.

8. The claimant's solicitors confirmed that, like the respondent, the claimant preferred that the costs applications be dealt with on the papers.

9. The respondent's solicitors replied to the claimant's application for costs in a letter of 12 February 2021, correcting a point about Mr Saloo's claim and pointing out that the parties had agreed facts for the hearing on 14 December 2020.

10. I decided that these applications can be dealt with without a hearing, in the interests of proportionality and saving time and costs, and taking into account that this was the preference of both parties. I apologise to the parties and their representatives for the delay in promulgating this costs judgment. This was the result of a delay in the applications being referred to me, and the current pressure of work in the employment tribunal.

The law

11. The power to award costs is set out in the Employment Tribunal Rules of Procedure 2013. Under rule 76(1) a tribunal may make a costs 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 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."*

12. Rules 74 to 78 provide for a two-stage test to be applied by a tribunal considering costs applications under Rule 76. The first stage is for the tribunal to consider whether the ground or grounds for costs put forward by the party making the application are made out. If they are, the second stage is for the tribunal to consider whether to exercise its discretion to make an award of costs, and if so, for how much.

13. In determining whether unreasonable conduct under rule 76(1)(a) is made out, a tribunal should take into account the 'nature, gravity and effect' of a party's unreasonable conduct (McPherson v BNP Paribas (London Branch) 2004 ICR 1398, CA). However, it is not necessary to analyse each of these aspects separately, and the tribunal should not to lose sight of the totality of the circumstances (Yerrakalva v Barnsley Metropolitan Borough Council 2012 ICR 420, CA). At paragraph 41 of Yerrakalva, Mummery LJ emphasised that:

> *"The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it has."*

14. When considering whether rejecting an offer of settlement amounts to unreasonable conduct, the tribunal should consider the position of the party whose conduct is said to be unreasonable, and then apply the 'range of reasonable responses' test, since there may be more than one reasonable course to take. It is not permissible for the tribunal to substitute its own view of what is reasonable: "*the true task of the ET [is] to examine why [the party] took the decision to refuse the offer and whether that decision was within the parameters of reasonableness*." (Solomon v University of Hertfordshire and anor EAT 0258/18) EAT).

15. When assessing whether the 'no reasonable prospect of success' ground in rule 76(1)(b) is made out, the test is not whether a party had a genuine belief in the prospects of success. The tribunal is required to assess objectively whether at the time it was brought, the claim had no reasonable prospect of success, judged on the basis of the information known or reasonably available to the claimant, and what view the claimant could

reasonably have taken of the prospects of the claim in light of those facts (Radia v Jefferies International Ltd EAT 0007/18).

Conclusions

16. I first need to consider whether there are grounds for an award of costs under rule 76(1)(a) or (b). I have started with rule 76(1)(b). I have to assess objectively whether at the time it was brought, the claim had no reasonable prospect of success, judged on the basis of the information known or reasonably available to the claimant, and the view the claimant could reasonably have taken of the prospects of success in light of those facts.

17. There was a preliminary issue as to whether the claimant was employed by the respondent. At the time the claimant brought his claim against the respondent, he was aware (or certainly ought to have been aware) that his written contract of employment was with a different company, ESG Saudi Arabia LLC ('ESG'). To succeed on this point, he would have to show that the respondent, as the ultimate parent company of ESG, was his employer (or de facto employer). The claimant had the benefit of legal advisors at the time he presented his claim. They would have been able to advise him about corporate group structures and that employment by one company in a group is not the same as employment by the parent company.

18. It would or should have been apparent that the claimant's case on the identity of his employer was not straightforward. However, the claimant did set out in his particulars of claim at paragraph 3e 13 points which he said suggested that his employment relationship was managed from the UK. There were broadly three groups of points with a number of examples of each:

    18.1. the use of the name or address of 'Interserve' in emails and other documents;
    18.2. 'Interserve' policies being provided to the claimant; and
    18.3. employees of the respondent dealing with queries and concerns raised by the claimant.

19. It seems to me that, viewed objectively at the time when the claimant presented his claim, a reasonable assessment of the prospect of success on this point would have been that it would be difficult for the claimant to establish that he was employed by the UK parent company of the company which his contract of employment expressly stated was his employer, but not that he had no reasonable prospect of success on this point.

20. For the claimant's claim to succeed, he would have had to show that the tribunal had territorial jurisdiction to hear his complaints against the respondent. Again, in the light of the information which was available to the claimant at the time he presented his claim form, he must have been aware that this would be difficult. He was obviously aware at that time that

ESG was a company which was registered in the Kingdom of Saudi Arabia ('KSA'), that he had lived and worked in KSA throughout his employment with ESG, that he had an iqama (a KSA residence visa), that he was paid in Saudi Riyals, and that he paid no tax in the UK and paid social security contributions in KSA.

21. However, there were some connections between the claimant's employment and Great Britain, and the claimant set out at paragraphs 3a to 3d of his particulars of claim the points which he based his claim that the tribunal had territorial jurisdiction to consider his complaints.

22. Judged on the basis of the information known or reasonably available to the claimant at the time he presented his claim, I have concluded that, while the territorial jurisdiction point was difficult for the claimant, there were some grounds supporting his claim on this and it cannot be said, viewed objectively, that at the time he presented his claim it had no reasonable prospect of success. This means that there is no ground for an award of costs under rule 76(1)(b).

23. I have therefore gone on to consider whether there are grounds for an award of costs under rule 76(1)(a). In considering whether this ground is made out, I have to consider whether there has been unreasonable conduct by the claimant in either bringing or conducting the case and, in doing so, I must identify the conduct, what was unreasonable about it and what effect it has had. I bear in mind that there may be more than one reasonable course for a party to take. In respect of the claimant's response to the respondent's costs warnings (a form of settlement offer) and its commercial settlement offer, I consider whether the claimant's conduct was outside the parameters of reasonableness.

24. I understand the respondent to be saying that it was unreasonable conduct for the claimant to continue his claim after the response to the claim and after the costs warnings it sent on 6 May 2020, on 12 August 2020 (the settlement offer of £2,000) and on 30 September 2020 (in which the respondent enclosed a copy of the judgment in Mr Saloo's case).

25. I agree that it would be reasonable to expect the claimant and his legal advisors to have reviewed the merits of the claimant's claim on receipt of the ET3 and on receipt of the costs warning and commercial settlement offer sent on 6 May 2020 and 12 August 2020. That is particularly so given that, viewed objectively, the claimant's claim should have been identified from an early stage as one which was likely to be difficult. However, I do not consider that it was outside the parameters of reasonableness for the claimant to continue his claim after receiving a costs warning and settlement offer. The ET3 and the letter of 6 May 2020 set out the respondent's position, which the claimant disagreed with. While the basic facts in the letter of 6 May 2020 were largely undisputed (as demonstrated by the agreed facts recorded in my judgment of 18 January 2021), there were areas of the factual background which were disputed (requiring additional findings of fact at paragraphs 32 to 44 of my judgment). The

claimant wanted to test the disputed evidence before the tribunal. My findings of fact on the matters which were not agreed could have impacted on my conclusions in relation to the identity of the claimant's employer and the territorial jurisdiction point, both of which are highly fact-sensitive. In those circumstances it was within the parameters of reasonableness for the claimant to continue his claim.

26. I have found the question of whether the claimant conducted proceedings unreasonably in continuing his claim after 30 September 2020 the most difficult. On that date the respondent wrote to the claimant with a copy of the judgment of the employment tribunal in Mr Saloo's case. Mr Saloo's circumstances and the issues considered by the employment tribunal in his case were very similar to those in the claimant's case. However there were material differences between Mr Saloo's case and the claimant's, most obviously the identity of the respondent, and, as I say, these are highly fact-sensitive areas of law. Although I have found this finely balanced, I have concluded that the claimant's decision to continue with his claim after receiving a copy of the judgment in Mr Saloo's case was not outside the parameters of reasonableness and therefore was not unreasonable conduct. This means that there is no ground for an award of costs under rule 76(1)(b).

27. For these reasons the respondent's application for costs is refused.

28. The claimant has applied for his costs incurred in responding to the respondent's costs application. I understand the claimant to be saying that in making a costs application the respondent was conducting proceedings unreasonably, and therefore that rule 76(1)(a) applies. There were clearly issues, some of which were difficult, for me to consider when assessing whether there were grounds to make a costs order. I am satisfied that the making of a costs application by the respondent was not unreasonable conduct and therefore that no grounds arise for a costs order against the respondent.

29. The claimant's application for costs is also refused.

Employment Judge Hawksworth

Date: 22 June 2021

12 July 2021

Sent to the parties on: .....

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For the Tribunals Office

Public access to employment tribunal decisions:
All judgments and reasons for the judgments are published, in full, online at

www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

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23. I have therefore gone on to consider whether there are grounds for an award of costs under rule 76(1)(a). In considering whether this ground is made out, I have to consider whether there has been unreasonable conduct by the claimant in either bringing or conducting the case and, in doing so, I must identify the conduct, what was unreasonable about it and what effect it has had. I bear in mind that there may be more than one reasonable course for a party to take. In respect of the claimant's response to the respondent's costs warnings (a form of settlement offer) and its commercial settlement offer, I consider whether the claimant's conduct was outside the parameters of reasonableness.

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27. For these reasons the respondent's application for costs is refused.

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