EMPLOYMENT TRIBUNALS

Claimant: Dr D Augeri

Respondents: Elephant Family (1)

British Asian Trust (2)

Heard at: London Central (conducted by video using Cloud Video Platform)

On: 2 & 5 – 9 July 2021

Before: Employment Judge Khan
Mr S Godecharle
Mr P Secher

Representation
Claimant: Mr T Pacey, Counsel
First respondent: Ms A Beale, Counsel
Second respondent: Ms Y Genn, Counsel

RESERVED JUDGMENT

The second respondent's application for costs is refused.

REASONS

1. Having struck out the claims against the second respondent on the first day of the final hearing, and having given judgment on liability on the sixth and final day, we heard its application for an order for costs.

2. We have considered the oral representations made by the former second respondent (to whom we shall continue to refer as the second respondent in this judgment) and the claimant.

3. We have also considered: the second respondent's without prejudice (save as to costs) correspondence dated 16 April and 11 June 2021, its schedule of costs dated 25 June 2021 and its correspondence to the tribunal dated 16 April and 25 June 2021; the correspondence between the claimant and the respondents in relation to disclosure; and the

relevant documents in the agreed hearing bundle to which we have referred below.

4. No further written representations were made, the parties having been given leave to serve such representations by 17 July 2021 (the second respondent) and 24 July 2021 (the claimant).

The relevant legal principles

5. The relevant test is set out in rule 76(1) which provides:

> *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;*

6. A tribunal must consider an application initially in two stages: firstly, whether the threshold test has been met; and if so, secondly, whether it would be inappropriate in all the circumstances to award costs.

7. A factor relevant to the exercise of our discretion may be whether there has been any warning of a risk of costs, but such a warning is not a prerequisite to the making of an order; nor is it a prerequisite that the receiving party must have put the paying party on notice of any application.

8. Although the 'threshold tests' are the same whether a litigant is or is not professionally represented, the decision in *AQ Ltd v Holden* [2012] IRLR 648, EAT requires us to take the status of the litigant into account.

The decision on the second respondent's application

9. The second respondent's application for costs was made under rules 76(1)(a) and/or (b).

10. The claimant concedes that rule 76(1)(b) is applicable because of our strike out judgment.

11. The issues we had to decide were therefore restricted to:

    (1) Whether the claimant had acted unreasonably in pursuing his claims against the second respondent for the purposes of rule 76(1)(a)?

    (2) Whether it would be just and equitable to make an order for costs under rules 76(1)(a) or (b)?

    It will only be necessary to consider and determine the amount of costs to be ordered if these threshold tests are satisfied.

12. The second respondent was joined to these proceedings on the claimant's application (dated 28 May 2020) which was granted by Employment Judge Norris by an Order dated 3 June 2020. On the same date, a judgment was made by EJ Norris dismissing some of the claims on the claimant's withdrawal, including a claim for breach of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE").

13. In agreeing to join the second respondent, EJ Norris said this:

> 8. I also permitted the addition of the Second Respondent as a party since I was informed that there had been Early Conciliation with the Second Respondent but that the potential liability had been unclear at that stage, so the case was initially brought against the First Respondent only. Since January 2020, the First Respondent has been dormant and all assets etc have allegedly transferred to the Second Respondent. The date of the harassment allegation at least may relate to events only discovered since the employment relationship ended between the Claimant and the First Respondent and since the Second Respondent took over. It was unclear whether the First and Second Respondents will have the same representation. Any issues arising can also be dealt with on the next occasion. No response need be entered by the Second Respondent until the issues against it have been clarified.

14. The following factors were therefore relevant to this decision: (i) the issue of liability was unclear when the claim was presented; (ii) the first respondent had been dormant since January 2020 and it was alleged that its assets had transferred to the second respondent; and (iii) the harassment allegation may have related to events discovered after the date of the second respondent's "takeover". We also make the observation that self-evidently, the claimant's withdrawal of the TUPE claim was not treated as barring the second respondent from potential liability in relation to the remaining claims.

15. The second respondent did not apply to vary the tribunal's order that it be joined to these proceedings. It presented its response on 25 September 2020. Although this response purported to include a strike out application (at paragraphs 4 to 6 of the grounds of resistance) the second respondent failed to comply with the notification requirements under rule 30(2).

16. There was then another preliminary hearing on 17 October 2020 before EJ Norris at which both respondents participated. No reference is made to a strike out application in the corresponding Case Management Order and nor does the second respondent contend that this was discussed at the hearing on this date. The list of issues which was agreed by the parties and appended to the Order, enumerated the following as one of two preliminary issues to be determined at the final hearing commencing on 1 July 2021:

> "1. Are any of the claims correctly brought against the Second Respondent? If not, the Second Respondent should be removed from proceedings?"

The parties accordingly proceeded on this basis.

17. The second respondent made a written application to strike out the claims against it on 16 April 2021 (when it complied with rule 30(2)). In making this application, the second respondent stated that a merger between the

respondents had taken place on 31 December 2020 when all of the first respondent's assets and employees were transferred; and also that due to this merger "it may be necessary for some of the Second Respondent's employees to give evidence for the First Respondent…"

18. The second respondent also wrote to the claimant on the same date on a without prejudice save as to costs basis in which it made a costs warning and invited the claimant to withdraw the claims made against it by 30 April 2021. It wrote again to the claimant, on 11 June 2021, on the same basis, when it made a commercial offer to settle the claims against it to avoid incurring a brief fee for trial and warned that it would seek to recover a contribution towards its legal costs, if necessary.

19. The claimant did not respond to either warning although he wrote to both respondents on 21 April 2021 to make a request for specific disclosure which included:

> The following documentation regarding the transfer/merger between Elephant Family and British Asian Trust, which exists from 2018. This is at the core of the claim and is therefore relevant to item #1 in the List of Issues and to my protected disclosures. You are therefore required to disclosure:
>
> …
>
> iii. The transfer of Elephant Family liabilities, debts, obligations, financial and otherwise, to British Asian Trust before, during and after the Claimant's employment.

Only the transfer deed was disclosed. We were taken to earlier correspondence between the claimant's then legal representative, Mr Price, and the first respondent dated 22 April 2020, 19 June 2020 and 9 July 2020 in which information was requested in relation to the status of the first respondent and the transfer between the respondents. Notably, in his application to add the second respondent to these proceedings dated 28 May 2020, the claimant contended that the first respondent's solicitor had refused to confirm some information in relation to the transfer.

20. We heard from Mr Pacey that the agreed trial bundle was not finalised until 20 June 2021 and witness statements were served by the respondents on 25 June 2021. These dates were not challenged by Ms Genn.

21. We do not find that the claimant acted unreasonably in pursuing the claims against the second respondent.

    (1) Overall, notwithstanding the withdrawal of the TUPE claim, we accept that the claimant remained unclear and therefore uncertain about the potential liability of the second respondent in relation to the remaining claims. We accept that to the claimant, there was a degree of opacity in relation to merger arrangements and their impact on liability. As EJ Norris noted, the claimant had been unclear about potential liability when he presented his claim and the claimant's contention that the first respondent was dormant and its assets had transferred to the second respondent was a relevant

factor when she agreed to join the second respondent. In making its strike out application, the second respondent confirmed that all of the first respondent's assets and employees had transferred to the second respondent, some of whom would be giving evidence on behalf of the first respondent.

(2) Material which could have provided much-needed clarity in relation to the merger arrangements which the claimant requested was not disclosed.

(3) Nor did the second respondent confirm that it would meet the respondent's liabilities in the event that compensation was awarded to the claimant, until the first day of the final hearing. It is notable that Mr Pacey sought clarification following our strike out judgment, which we provided, that we had taken account that the second respondent had provided such an undertaking. We accept Mr Pacey's contention that a reason for the claimant joining the second respondent and proceeding with his claims against it, was to ensure that he was not deprived of an effective remedy. It is relevant that the second respondent had confirmed when making its strike out application that all of the first respondent's assets had transferred to it.

(4) We take account that the claimant was a litigant in person. It was not clear to us when his representative, Mr Price, ceased to act for him. We note that Mr Pacey was instructed on a direct access basis for the trial only.

(5) It is relevant that the parties proceeded on the basis that the issue of the second respondent's liability would be determined as a preliminary issue at the final hearing commencing on 1 July 2021 as enumerated in the agreed list of issues appended to the Order dated 17 October 2020. Although the second respondent made its strike out application on 16 April 2021 this application was not dealt with by the tribunal in the interim. We also take into account that the bundle was not finalised until 20 June 2021 and the respondents' statements were not served until 25 June 2021 and, as we have noted, they failed to provide the specific disclosure requested.

(6) We do not find that *Beynon & Ors v Scadden & Ors* [1999] IRLR 701, an EAT decision to which Ms Genn referred, assists the second respondent. In that case, the EAT upheld the decision of a tribunal to award costs against the claimants under then rule 12(1)(a) (now rule 37(1)(a)) in circumstances in which their trade union was found to have acted vexatiously and unreasonably in pursuing a claim when it knew or ought to have known that there was no reasonable prospect of success and when it did so with the collateral purpose of achieving union recognition. We were taken to paragraph 8 of this judgment in which the EAT said this:

> "A party, who despite having had an apparently conclusive opposition to his case made plain to him, persists with the case down to the hearing in the 'Micawberish' hope that something might turn up and yet who does not even take such steps open to

> him to see whether anything is likely to turn up, runs the risk, when nothing does turn up, that he will be regarded as having been at least unreasonable in the conduct of the litigation."

Here, however, the second respondent (and also the first respondent) had failed to provide the claimant, a litigant in person, with the specific disclosure he had requested and something did "turn up" namely the undertaking made by the second respondent to indemnify the first respondent for any liabilities it incurred.

22. Nor do we find, for the same reasons, that justice would be served by ordering costs against the claimant by reference to rule 76(1)(b).

23. I would like to apologise to the parties for my delay in promulgating this judgment.

Employment Judge Khan

Date 28.12.21

REASONS SENT TO THE PARTIES ON

30/12/2021

FOR EMPLOYMENT TRIBUNALS