



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr B Kemp

**Respondent:** Utility Engineering Solutions Limited

**Heard at:** Manchester

**On:** 24 January 2022  
(in Chambers)

**Before:** Employment Judge Ross

## REPRESENTATION:

**Claimant:** Not in attendance

**Respondent:** Not in attendance

# JUDGMENT

The respondent's application for costs made on 21 May 2021 pursuant to rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, in respect of the Judgment sent to the parties on 17 May 2021, is not well-founded and fails.

# REASONS

1. The claimant made a claim for unlawful deduction from wages in relation to not receiving pay when he was furloughed during the period 10 April 2020 to 31 July 2020. I noted that although it was unusual I found that the claimant had agreed to be furloughed without pay during that period and had not specifically stated that he anticipated receiving payment from the Government's Coronavirus Job Retention Scheme or being paid at a later date by the respondent. Thus his claim failed.

2. The respondent brings the application on the basis that the claimant's claim had no reasonable prospect of success and the claimant acted vexatiously or otherwise unreasonably in the bringing of proceedings.

3. I reminded myself that in the Employment Tribunal costs do not “follow the event”. Awarding costs in the Employment Tribunal is still the exception rather than the rule (see **Yerrakalva v Barnsley Metropolitan Borough Council [2012] ICR 420 CA**).

4. I must consider first whether or not I consider the claimant’s claim had no reasonable prospects of success and whether the claimant acted vexatiously or otherwise unreasonably in the bringing of the proceedings. I then must consider whether or not I should exercise my discretion to award costs.

5. I turn to the first ground, that the claimant's claim had no reasonable prospect of success.

6. I am not satisfied that this is accurate. There is an implied term in every contract of employment that an employee is to be paid. I found there was no written contract with a lay off clause because I was satisfied the claimant had not received the contract relied upon by the respondent. However in the unusual circumstances of this case I found there was an agreement between the claimant and Mr Lambert that he stay at home, where he was unable to work because of the nature of his job, without pay. In his letter to the Employment Tribunal objecting to an award of costs, the claimant suggests that he agreed to stay at home without pay because he did not want to cause any problems as a new employee in difficult times. If I had preferred that evidence, it is possible his claim may have succeeded, although unlikely. I am therefore not satisfied that there was no reasonable prospect of success.

7. I turn to the second ground, which is that the claimant acted vexatiously or otherwise unreasonably in bringing the proceedings. I am not satisfied he did. The claimant was not represented. He had the misfortune that in a time of exceptional circumstances, namely the COVID-19 pandemic, he was furloughed and apparently was not eligible for payment under the Government’s Coronavirus Job Retention Scheme. That scheme is highly complex and new guidance was issued regularly. The claimant, who had a senior role, was furloughed for a lengthy period of time with no wages. I am not satisfied that he acted vexatiously or otherwise unreasonably in bringing the claim because he believed that there was hope of him being eligible for a furlough payment and of the respondent being required to make such an application on his behalf. Accordingly, I find the grounds are not made out.

8. However, even if I am wrong about that and the claimant can be said to have had no reasonable prospects of success or the claimant can be said to have acted unreasonably in bringing the proceedings, I decline to exercise my discretion. The claimant is not a lawyer. He held a responsible position as a senior estimator/quantity surveyor and had only commenced employment with the respondent on 9 March 2020. It is not disputed his take home pay was £2,371 per month and yet he received no wages for the relevant period at all. No doubt this put him in a position of hardship. I note that the respondent sent the claimant a costs

warning letter before the Tribunal hearing and that he was unsuccessful at the hearing. That is not sufficient for me to exercise my discretion. I must take all the circumstances into account.

9. Taking all the circumstances into account in this case, notably the claimant was a litigant in person who did not receive any wages during the relevant period, a time of a global pandemic, I decline to exercise my jurisdiction to award costs against him.

Employment Judge Ross  
Date: 25 January 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON  
28 January 2022

FOR THE TRIBUNAL OFFICE