



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101683/2017

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Held in Glasgow on 3 July 2019

Employment Judge L Wiseman

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Mr D Wardrop

**Claimant
No attendance**

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SThree Partnership t/a "Huxley Associates"

**Respondent
No attendance**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The tribunal decided to dismiss the respondent's application for expenses.

REASONS

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1. This hearing took place in chambers to consider the respondent's application for costs in terms of rules 75 -76 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the Rules). The parties had been instructed not to appear for the hearing because the respondent's application was to be considered by the Employment Judge in chambers.

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2. I noted there had been a considerable history to this case and it is helpful to summarise it. The claimant presented a claim to the Employment Tribunal on the 20 May 2017 alleging he had been unfairly dismissed and that there had been a breach of contract in respect of the payment of notice. The claim was brought against "Viridor".

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3. The respondent "Viridor" entered a response in which they confirmed the correct designation of the respondent was Viridor Waste Management Ltd. The respondent asserted the claimant was not, and never had been, an employee and they invited the tribunal to dismiss the claim.
- 5 4. A preliminary hearing took place on the 19 December 2017, and an Employment Judge ordered that SThree Partnership LLP trading as Huxley Associates be added as a respondent to the claim. The Employment Judge further decided to strike out the claim against Viridor Waste Management Ltd.
- 10 5. SThree Partnership LLP trading as Huxley Associates entered a response to the claim in which it denied the claimant was an employee, and asserted the claimant had been employed by Orange Genie Cover Ltd. The respondent further asserted the tribunal did not have jurisdiction to determine the claim because it was time barred, and that the claimant did not have qualifying service to bring a claim of unfair dismissal.
- 15 6. A preliminary hearing for the purposes of case management took place on the 2 March 2018. An Employment Judge ordered the claimant to set out the facts which led him to say (at the previous preliminary hearing) that he believed he "was employed by Huxley", and why he believed the tribunal had the power to consider his claim of unfair dismissal in circumstances where, according to
20 the claim form, he had less than two years' service.
7. The claimant responded to the Order by email of the 3 May 2018 and explained why he believed he had been employed by the respondent.
8. A further preliminary hearing took place on the 3 October 2018 to determine the respondent's application to have the claim struck out. The hearing did not
25 proceed because the claimant failed to attend.
9. The preliminary hearing was re-arranged and took place on the 18 December 2018. The claimant did not attend the hearing. An Employment Judge decided to strike out the claim under the terms of rule 37 of the Rules.

The respondent's application for costs

10. The respondent, by letter of the 23 January 2019 made an application for costs pursuant to rules 75 and 76 of the Rules, on the basis the claimant brought a claim which had no reasonable prospect of success and/or that the claimant had acted vexatiously, abusively, disruptively or otherwise unreasonably in bringing the proceedings and in the way the proceedings were conducted.
11. The respondent's representative set out the relevant legal principles and cited the case authorities: **Power v Panasonic (UK) Ltd 2003 IRLR 151; Yerraclava v Barnsley Metropolitan Borough Council 2012 ICR 420; Khan v Heywood and Middleton Primary Care Trust 2006 ICR 543; ET Marler Ltd v Robertson 1974 ICR 72; McPherson v BNP Paribas 2004 ICR 1398 and AQ Ltd v Holden 2012 UKEAT/0021/12.**
12. The respondent's representative noted the respondent had resisted its inclusion in the proceedings on three main grounds: (i) the claimant was at no time an employee of the respondent and did not have a contract of employment with the respondent; (ii) in the event that the claimant was found to have been employed with the respondent, the claimant did not have the necessary period of qualifying service to bring a claim of unfair dismissal and (iii) the time limits for any claim against the respondent had expired. Accordingly, it was submitted the claim against the respondent had no reasonable prospect of success.
13. The respondent's representative submitted the claimant's pursuit of a claim which had no reasonable prospect of success was in itself unreasonable.
14. The claimant had ignored two costs warnings from the respondent. The claimant had failed to attend a preliminary hearing. The claimant was ordered to set out his position, and notwithstanding the claimant's response, it was submitted the response was wholly inadequate in the circumstances.
15. The respondent's representative submitted the claimant continued in his failure to provide details in support of his claim. The respondent made an

application to have the claim struck out and instructed Counsel to appear for the hearing. The claimant failed to appear and the hearing had to be re-arranged.

16. The respondent instructed Counsel to appear for the re-arranged hearing and to seek strike out of the claim. The claimant again failed to appear for the hearing and thereby put the tribunal and the respondent to unnecessary cost.

17. The respondent's representative invited the tribunal to make an order for costs, and noted the respondent's legal costs currently stood at £6,173.65 plus VAT.

10 **Claimant's response**

18. The respondent's representative sent a copy of the application for costs to the claimant. The tribunal also wrote to the claimant on the 18 February 2019 asking him to lodge any comments he may have relating to the respondent's application for costs. The claimant failed to reply.

15 19. A further letter was sent to the claimant on the 22 March, but he again failed to reply.

Decision

20. I had regard to the terms of rules 75 and 76 of the Rules. Rule 75 provides that a costs order is an order that a party (the paying party) make a payment to another party (the receiving party) in respect of the costs that the receiving party has incurred while legally represented. Rule 76 sets out when a costs order may or shall be made. It states that a tribunal may make a costs order, and shall consider whether to do so where it considers that (a) a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings or the way the proceedings have been conducted or (b) any claim had no reasonable prospect of success.

21. I next had regard to the authorities to which I was referred and noted that although awards of costs are the exception to the rule, this does not mean that the facts of a case must be exceptional for a costs order to be made

(*Power v Panasonic* above). Litigants in person should not be judged according to the same standard as professional representatives in deciding whether the threshold to award costs is met. Further the fact that a party is unrepresented may be relevant circumstances in deciding whether or not to exercise the discretion to award costs (even if the threshold for making such an award is met) (*AQ Ltd v Holden* above).

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22. The respondent's representative submitted the claimant's conduct of the proceedings had been unreasonable and this submission focussed on two points: (i) that the claimant had ignored costs warnings and (ii) the claimant's response to being ordered to set out the basis of his claim against the respondent was wholly inadequate.

23. I did not consider the ignoring of a costs warning to be unreasonable conduct. I say that because costs warnings are simply that, a warning that a party may seek costs unless the other party takes certain action. There is no bar to a party not complying with such a warning because ultimately it will be for a tribunal to determine any application for costs.

24. I next considered the claimant's response to being ordered to set out the basis of his claim against the respondent. The claimant did respond to this and set out a short explanation of why he considered he had been employed by the respondent. I acknowledge the respondent considered this response wholly inadequate, but I was satisfied the claimant had responded to the order and explained why he thought the respondent was his employer. Ultimately this issue would have to have been determined by a tribunal.

25. I was, having had regard to these points, satisfied the claimant had not conducted the proceedings unreasonably or vexatiously.

26. I next considered whether the claimant had failed to actively pursue his claim. I have set out above, a summary of the chronology of this claim. I noted there were occasions where the claimant either failed to attend a hearing or failed to respond to correspondence. However, I further noted that on each occasion the claimant failed to attend a hearing, he provided an explanation which was subsequently acceptable to the Employment Judge. For example, the

Employment Judge at the first hearing to determine the respondent's application for strike out noted there had been a previous issue with the claimant not receiving correspondence and it was for this reason that he considered it would be appropriate for the hearing to be re-arranged.

- 5 27. I acknowledged the claimant did not appear for the re-arranged hearing to determine the respondent's application for strike out of the claim. I noted no explanation had been provided by the claimant for his failure to attend, and I accepted that if he had provided an explanation (or withdrawn his claim prior to the hearing) it may have saved the respondent the expense of pursuing
10 their application and attending a hearing.
28. I noted that rule 76 gives the tribunal a discretionary power to make a costs order where it considers a party has acted disruptively or unreasonably in the conduct of the proceedings. I considered the claimant's failure to actively pursue his claim amounted to unreasonable conduct of the proceedings, and
15 I must now consider whether to make a costs order.
29. I, in considering whether to make a costs order, noted the claimant was a litigant in person. I further noted that it is appropriate for a litigant in person to be judged less harshly in terms of his conduct than a litigant who is professionally represented. A litigant in person is likely to lack the objectivity
20 and knowledge of law and practice.
30. I do not know why the claimant has failed to engage in the process he started, but I did have regard to the fact that what may have started as a straightforward claim in his eyes, became more complicated when the company he believed employed him, did not in fact do so.
- 25 31. I have acknowledged the claimant could have attended the final preliminary hearing, or advised the respondent he did not intend to do so. However, I balanced this with the fact the respondent's application to have the claim struck out was successful.
32. I decided, having had regard to the above points, and on balance not to make
30 an order for costs.

33. I next considered the respondent's submission that the claim had no reasonable prospect of success. The respondent advanced that argument on the basis (i) they were not the employer of the claimant; (ii) even if they were, the claimant lacked two years service and (iii) the claim was timebarred.
- 5 34. I noted the claimant initially brought his claim against Viridor because he considered he had been employed by them. He subsequently brought the respondent into the claim. I considered the issue of the correct identity of the claimant's employer was not a straightforward matter in circumstances where it appeared the respondent provided specialist recruitment services for a range of permanent and contractor roles. They found the claimant a contractor role with a client (Interserve) and, the respondent asserted, the claimant opted to have a contract with an umbrella service provider which was Orange Genie.
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35. I noted it would be usual for a preliminary hearing to take place to determine the correct identity of the employer.
- 15 36. The claimant was asked to explain the basis upon which he maintained a tribunal could determine his claim of unfair dismissal in circumstances where he did not have two years' service. The claimant did not ever respond to this enquiry. The claimant's claim form was lacking in detail, but there did not appear to be a basis for asserting this was a situation where the claimant did not need two years qualifying service.
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37. The respondent asserted the claim was timebarred. I noted there had not been an issue of timebar in respect of the original claim. I further noted the respondent did not set out the basis of their position, and accordingly I can take no view on this point.
- 25 38. I also had regard to the Judgment dated 20 December 2018 where an Employment Judge decided to strike out the claim, and one of the reasons for doing so was because the claim had no reasonable prospects of success. The Employment Judge reached that view because the respondent had clearly set out its position. The claimant had been given every opportunity to respond and set out his position, but had failed to do so, and accordingly the
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Judge concluded there was no reasonable prospect of the claimant being able to show he was an employee of the respondent.

39. I must now consider whether to exercise my discretion to make an order for costs. I have noted above the fact the claimant is a litigant in person. I have
5 also noted the issue of the identity of the claimant's employer was not a straightforward matter. I considered the claimant had responded to the order asking him to set out his position, but his response took the matter no further.

40. I acknowledge the issue of whether the claim had a reasonable prospect of
10 success could have been dealt with earlier in the proceedings, but I balanced that with the fact that not all of that delay rested with the claimant. I concluded this was a case which the claimant started with good intentions, but which subsequently mushroomed beyond his ability to deal with it. I decided, in all the circumstances, not to make an order for costs.

15 Employment Judge: Lucy Wiseman
Date of Judgment: 03 July 2019
Entered in register: 10 July 2019
and copied to parties

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