EMPLOYMENT TRIBUNALS

Claimant: Mr M Ogden

Respondent: Bristol Street Fourth Investments Ltd

JUDGMENT

1. The respondent's application for costs succeeds in the sum of £3448.80

REASONS

The Application

1. In a letter dated 26 March 2021 the respondent made application for costs pursuant to rules 76(1)(a) and (b) of the Tribunal Rules of Procedure 2013. In summary, the respondent contends that the claim had no reasonable prospects of success from the outset, and that the claimant's failure to withdraw his claim within the timescales provided to him in a costs warning letter dated 15 January 2021 amounted to unreasonable conduct within the meaning of rule 76(1)(a) of the Tribunal Rules of Procedure 2013.

2. The parties agreed to the matter being dealt with without a hearing. Directions were given to allow the claimant to provide information about his means.

Background

3. Oral reasons were given dismissing the claimant's claim on 26 February 2021, but it is necessary to rehearse some of the background facts before turning to the application and the response to it.

4. The claimant commenced employment as a car sales executive in 2016. His wages were paid monthly and comprised of basic salary of £18,000 pa together with commission on sales made in the previous month. The claimant was paid in respect of March 2020 as per his contractual entitlement i.e. his basic pay together with commission in respect of sales generated in February 2020.

5. On 25 March 2020 the claimant was placed on furlough. The respondent's approach to pay in respect of its furloughed staff was first published in early April and reviews communicated to its staff monthly thereafter. Consequently, in April, May and June 2020, the claimant was paid pursuant to express agreements in which the calculation of the claimant's pay was based on his previous 6 months' income.

6. In June 2020, with the easing of the national lockdown, the respondent began to return employees to its workplace. The claimant returned to work on 1 July 2020, in the last tranche of returning employees. On 21 July, the claimant and all employees in his position were paid in respect of the month of July in accordance with their contractual entitlement, as indicated in a communication made to all staff at the beginning of the month. He received his basic pay only; having made no sales in the previous month he was not entitled to any commission element of pay. Commission receivable on sales made in June would be made in July's pay packet.

7. On 21 July 2020 after email exchanges and telephone calls with HR the claimant raised a formal grievance about, as he described, the financial hardship he had suffered *'having been subject to a furlough scheme that was designed to avoid such hardship'.* He subsequently expanded on his grievance alleging, as far as is relevant here, that he was penalised for being the last sales executive to return to the workplace. His proposed resolutions included that he be paid in respect of July what he was paid in June i.e. a figure based on the previous 6 months' pay, together with a share of the commission generated by an increase in sales on the easing of lockdown as enjoyed by the staff who returned in June.

8. The claimant met with Lee Upton (LU), General Manager on 12 August 2020 to discuss his grievance. He was accompanied by his trade union representative. Each allegation was methodically discussed as were the resolutions sought. The claimant wanted to know why he was the last to return to work and contended that he expected to be treated

fairly and that meant, he and his trade union argued, being paid in July that which he received in June.

9. On 27 August 2020, LU sent the claimant the grievance outcome letter, addressing each of the matters raised. LU shared with the claimant the feedback he received as to why he was one of the last returning sales executives; they are irrelevant to these findings. In relation to the specific complaint about pay, LU recognised that the changes in pay protection arrangements may have caused frustration but he disagreed that it was unfair; he stated '*this is our group policy which has been reviewed by our legal representatives and we are comfortable that our position is lawful'.*

10. Upon rejection of the grievance the claimant exercised his right to appeal. The claimant contended decision *to 'return me out of furlough last was fundamentally flawed given that I am the longest serving member of the sales team' repeated that he had lost out on deals made by colleagues returning in June and that the decision to pay employees in June differently to those returning in July 'is in direct breach of treating staff fairly'*. There was no suggestion made by the claimant that management who considered the dates staff returned to work had knowledge of how the pay protection arraignments would be altered on review.

11. The claimants appeal was heard on 24 September 2020 by Dave Allen (DA); again the claimant was accompanied by his trade union representative. The claimant contended that the explanation given was an improper basis upon which to determine the date on which he returned to work. He accepted that whilst he had not been invited to return to work any sooner than July, neither had he sought to do so. The claimant stated that commission was an important element of his income and that *'when the bonuses are taken away'. . 'whilst its not illegal its wholly wrong'* (emphasis applied).

12. DA investigated further the reasons why the claimant was one of the last sales executives to return before responding to the claimant's appeal was dated 2 October 2020. His investigations, he said, clearly indicated that the constant change in position during lockdown meant that, whilst some thought had gone into who to bring back on any particular week and why, not much attention was paid to the order of returning employees. The claimant was reminded he was one of several other colleagues who returned to work in July; he was not last.

13. DA reminded the claimant that his opportunity to earn bonuses had not been *'taken away'* by the company, but it was, rather a direct consequence of the national lockdown and that he was still able to earn a bonus in July albeit that it would be payable the following month. DA explained that the company supported its colleagues above that which was required of it, and that a transition was necessary and so a decision was made to drawn the line in July, treating that month as a normal month.

14. DA also dealt with another contention made by the claimant, namely that the company was driven by a desire to save money rather than treat people fairly. DA, in rejecting that suggestion pointed out that the company had supported all its colleagues during lockdown and did so by paying above that which it was required to pay.

15. On 2 October 2020 the claimant, unrepresented, presented a claim for wages. He was still in the employment of the respondent. He complained that he was financially worse off on his return in July than his colleagues who returned in June and *'I find it hard to believe that this is legal and certainly find it insulting'.*

16. A fully pleaded response was filed defending any claim of unauthorised deductions (or breach of contract). An application made by the respondent on 13 November 2020 for a strike out order / deposit order in respect of the claim was defended by the claimant and declined by the Tribunal on the basis that it was unlikely to save time or costs.

17. An application made by the claimant for a witness order was rejected on 19 February 2021, when EJ Butler wrote to the claimant stating: '*Whether your version of events is correct is not an issue before the Tribunal. The issue is whether the respondent's actions were lawful and whether there was any legal obligation to make further payments to you'*.

18. On 26 February 2021, the matter came before me for determination. Both parties were unrepresented at the hearing, the respondent having elected, in an effort to minimise its costs, to dispense with legal representation at the final hearing.

19. There was no, or no significant dispute on the facts. The claimant did not adduce any additional factual information in support of his claim than that which was already in his possession when he commenced his claim; he was able to express no opinion as to the cause of action he sought to advance, but was content to proceed with an allegation of unauthorised deduction from wages pursuant to s.13 Employment Rights Act 1996. In his closing submissions, the claimant when pressed contended that *'the document'* he

sought to rely on establish unlawful conduct was *'unfortunately not in the bundle'*. He was unable to quantify his claim. He said he found it hard to pinpoint a precise amount, but claimed £3,000.

20. The claimant did not satisfy me that what he received was less than that which was properly payable. Oral reasons for dismissing the claim were given at the conclusion of the hearing and judgment was sent to the parties on 1 March 2021.

21. On 28 March 2021 the respondent made an application for costs on the grounds that the claim had no reasonable prospect of success form the outset and further that the claimant's conduct of the proceedings was vexatious, disruptive and/or unreasonable. The respondent referred to its earlier application for a strike out or deposit order.

22. The respondent attached a letter dated 15 January 2021, sent to the claimant on a without prejudice basis. It was well structured and detailed in content; it was written in plain English. The letter set out rules 76(1)(a) and (b) of the Tribunal Rules of Procedure before continuing *"we believe your claim has no reasonable prospect of success and that to continue your claim would be unreasonable. Our reasons for this are as follows: your claim appears to be that our client has made an unlawful deduction from wages, or has otherwise breached your contract in such a way that has resulted in our client owing monies to you. . . you were paid [during furlough] in excess of your base entitlement under the Coronavirus Job Retention Scheme. . .as your salary is heavily dependent on commissions, this resulted in you being paid less on your return to work . .while this is unfortunate. . .it is in no way illegal. There has been no deduction from wages whatsoever and our client does not owe you any monies whatsoever.. . it is clear from your claim form that you are unhappy with the fact that you were returned to work . . at a later date than some of your colleagues. However, this does not give rise to any legal cause of action in the Employment Tribunal. Our client has acted in accordance with his legal obligations at all times.'*

23. The letter warned the claimant that the respondent had already incurred significant cost and was likely to incur '*thousands of pounds'* preparing for the final hearing. It invited the claimant to withdraw his claim by 5 February 2021, in order to avoid the application in the event that his claim failed. He was strongly advised to seek independent legal advice.

24. The application included a reminder that the respondent had chosen not to be professionally represented at the final hearing in order to mitigate its costs. It sought an order for £3,448.80 plus VAT.

25. The claimant defended the application on the grounds that 'the reason I pushed this to Tribunal in the first place was due to the financial hardship the immoral behaviour by the respondent in their decision to pay staff differently upon their return to work' (emphasis applied). He later added that his indicated conditions of Attention Hyperactive Deficit Disorder and autism cause him to have a strong moral code' and sense of unfair treatment. He provided evidence of his means, as did the respondent.

26. Both parties provided evidence of the claimant's means, the claimant still being in the employment of the respondent. Both parties were content for the costs application to be determined without a hearing.

27. The claimant made submissions that he has been assessed for ADHD and Autism Spectrum Disorder and that, consequentially, he has strong views on moral code, and therefore driven more than most to seek justice for the way his employer has treated him. Furthermore, an adverse costs order may possibly push him into bankruptcy.

The Law

28. Rule 76 of the Employment Tribunal Rules of Procedure 2013 ("the ET Rules") govern the awarding of costs by the Tribunal. So far as relevant, it provides:

> "76. Where a costs order or preparation time order may or shall be made
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> *(1) 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…"*

29. If either threshold at rule 76(1)(a) or (b) is made out, then it does not automatically follow that a costs order will be made; rather the second stage involves the exercise of judicial discretion as to whether to make the order at all, and if so, in what amount.

30. Rule 84 provides that, in deciding both whether to make a costs order, and if so, in what amount, the Tribunal may have regard to ability to pay.

31. In the exercise of my powers under the relevant provisions of the Rules, I have a duty to give effect to the overriding objective.

32. Awards of costs are intended to be compensatory not punitive.

33. It is not necessary to be precise causal link between any relevant conduct in any specific costs claimed. The tribunal is required to look at the whole picture and to ask itself whether there has been unreasonable conduct in bringing the case and to identify the conduct, what was reasonable about it and what effects it had: Barnsley Metropolitan Borough Council v Yerrakalva.

34. The tribunal is not confined to ordering a sum that a party is able to pay, or able to pay the moment an order falls to be made: Arrowsmith v Nottingham Trent University [2011] EWCA Civ 797 and Vaughan v London Borough of Newham [2021] IRLR 713.

Discussion and Conclusions

Stage 1 – The Threshold Test

35. I am satisfied that the claim had no reasonable prospects of success. In April 2020 and May 2020, the claimant enjoyed a different, separately agreed pay package; in June he returned to his contractual terms of payment, which required him to generate sales before receiving, the following month, commission on them. On his return to work in June 2020, he had made no sales in May 2020, in respect of which commission was payable and so nothing other than his basic pay was payable. Objectively, when the case was begun, it had no reasonable prospects of success.

36. Turning to the respondent's alternative contention, i.e. that to continue with his claim in the face of the respondent's costs warning letter amounted to unreasonable conduct within the meaning of rule 76(1)(a). I find that the claimant's decision to continue with his claim beyond 5 February 2021, being the time allowed for the claimant to withdraw his claim, was unreasonable, for the reasons which follow.

37. Before the issuing of proceedings, the claimant, assisted by his trade union representative had exhausted the grievance procedure. The interviews and outcome letters were methodical, thorough and clear. He had himself accepted at the appeal stage that the basis of the grievance appeal was not that the payment made to him was unlawful, but that it was unfair'. DA reminded the claimant in explicit terms, insofar as he needed reminding, that there was a distinction to be drawn between that which was fair and that which was lawful. He was told in terms that the respondent's pay arrangements had been reviewed by lawyers; he knew what his own contract allowed for. He is plainly intelligent and articulate and his role as a salesman requires him to be alert to the existence or absence of contractual terms, more so than many unrepresented parties.

38. The contractual position was not complex.

39. When the claimant issued proceedings on 2 October 2020, he did not positively aver that he had suffered an underpayment. Instead he stated that he *'found it hard to believe'* that his pay was lawful. He provided no basis to support his disbelief, insofar as he doubted it was lawful. In truth, his complaint, since at least the grievance appeal stage and at all times thereafter was that what he received on his return to work in July 2020 was what he, subjectively, perceived as unfair. Put another way, his sole contention was that he should be paid more than his contractual entitlement, because people who had returned to work sooner had received more than him. He presented his case in the hope that something would come of his claim.

40. I have considered the claimant's submissions that he suffers an impairment that causes him to hold a strong moral code. But before he even received the costs warning letter, he had received the response form, which denied the claim as well as an application to strike out or attach a deposit order. The latter did not proceed, not because of any concern with the merits of the application but on proportionality grounds only. Both of the response and the application underscored what DA had already told him before he presented his claim i.e. that he must not conflate his perceived unfairness with unlawfulness.

41. Turning to the costs warning letter itself. It was dated 15 January. Its contents were detailed, clear and well structured. It informed him of the extent of the costs likely to be incurred was in the 'thousands' and it informed him that he was at risk of an adverse costs order if he proceeded with his claim. It recommended he take legal advice and it was clear as to the potential consequences of continuing to advance his claim. It gave

the claimant three weeks until 5 February 2021 to withdraw his claim. It was a well drafted letter.

42. The claimant did not withdraw his claim and two weeks after the expiry of the deadline given by the respondent, he was again reminded by EJ Butler on 19 February 2021, that the sole issue was whether there was a legal obligation to make further payments.

43. All of these matters should have indicated to the claimant that he should revisit his determination to proceed with his claim.

44. At the final hearing, the claimant adduced no factual evidence that was not already in possession before he presented his claim and that had not already investigated thoroughly by his employer. He had no view on the cause of action he sought to advance. He was able to express no basis on which he contended he was underpaid. He was unable to quantify his claim. He had proceeded with his case in the hope that something would come of his claim.

45. The threshold test, in relation to rule 76(1)(b) is therefore met on both bases advanced by the respondent i.e. no reasonable prospects and unreasonable conduct.

Stage 2 – Discretion

46. The threshold test having been met, it does not automatically follow that a costs order will be made. I turn to consider whether to make an order at all, and if so, in what amount.

47. The claimant knew before he presented his claim that his claim had no reasonable prospects of success, since (a) he accepted that his pay was not unlawful time during the grievance process at a time when he was assisted by his trade union representative (b) he did not ever subsequently advance any basis upon which he contended it was, or even may be, unlawful (c) his contractual position was simple comprising only of basic pay and commission and, the latter of which required him to secure sales as a condition of payment.

48. Indeed, to some extent the claimant appears to recognise that, since he advances his submission that his assessment of ADHD and ASD causes him to have a ‘strong moral code’ and which, I infer, was therefore a factor in his decision to proceed with his claim.

I have regard to that diagnosis and attach some weight to the effect of the diagnosis on the claimant's perception of right and wrong. But the existence of a distinction between lawfulness and fairness was specifically drawn to his attention by DA, at a time when he was being assisted by his trade union representative. He issued and proceeded with the litigation with a determination that he knew it did not merit. It was a proceeded with in the simple hope of receiving or securing monies in excess of his contractual entitlement.

49. Nothing after the presentation of the claim occurred which indicated that his claim had gained a reasonable prospect of success and at least four events thereafter served as further warnings to him (the response, the application, the costs warning letter, the letter from EJ Butler). Given those four stages, it is difficult to know what further steps the respondent could reasonably be expected to take to protect its position. The inevitable consequence of the claimant's determination to proceed to a final determination of his claim was that the respondent was forced to expend costs to defend it. His conduct caused the respondent to incur the costs that it now seeks. The respondent could not reasonably be expected to take the one further step which in fact it did, which was dispense with legal representation at the hearing and attend unrepresented with a view to saving costs. It exposed itself to a heightened litigation risk, however modest that risk may have been, in circumstances where the costs savings may well not be recovered.

50. I am satisfied that it is appropriate to exercise my discretion to make a costs order in favour of the respondent.

51. I am not required to take the claimant's ability into account, but I do, on the limited basis that follows. I received evidence from the parties and am satisfied that the claimant's net pay fluctuates between approximately £1,600pm to £2,200pm. I have taken into account the claimant's submission that his net outgoings are almost equal to his income as well as his submission, that he would be at risk of becoming bankrupt if I were to make an adverse costs order, but I have received no details and no evidence to support those submissions. Furthermore, I have received no evidence of other means, such as the claimant's savings or capital assets.

52. The costs sought therefore represent approximately 2 months' net pay; it would have been significantly greater had the respondent attended the hearing, as was its right, with legal representation to defend the claim.

53. It is not necessary for me to conclude that the claimant's means are such that he can satisfied the order the moment is made. I am satisfied on the evidence before me that the net amount of £3,448.80 is within the claimant's grasp to discharge within a reasonable period of time. As for the VAT element, I make no award to represent that element of the application, since I am not satisfied that the respondent cannot recover that element of its costs against its VAT liability as a whole.

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Employment Judge Jeram

Date: 16 February 2022

Sent to the parties on:

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For the Tribunal: