



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104003/2018 Held on Glasgow on 5 October 2018

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Employment Judge Shona MacLean

Mr D Monaghan

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Claimant
Represented by:
Mr A Bryce
Solicitor

Ingeteam UK Limited

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Respondent
Represented by:
Ms A Tishier
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the application for an order for expenses under Rule 76(1) (a) and (b) of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 is refused.

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REASONS

Background

1. Between 14 February 2018 and 28 March 2018 this matter was subject to early conciliation through ACAS.

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2. On 12 April 2018 Alasdair Bryce presented the claim form to the Tribunal's office for the claimant. The claimant complained of automatic unfair dismissal under Regulation 7(1) of the TUPE Regulations and unfair dismissal under Sections 94 and 98 of the Employment Rights Act 1996 following the termination of his employment on 26 January 2018. The claim form stated

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that the claimant's employment commenced on 29 February 2016 and that Mr Bryce was the claimant's representative. His contact details were provided.

- 5 3. The claim form was accepted and sent to the respondent on 13 April 2018 along with a blank response form for completion by 11 May 2018 and a date listing stencil form.
- 10 4. Ashely Holden, on behalf of the respondent sent an email to the Tribunal's office on 11 May 2018 attaching the response and completed date listing stencil. The email was not copied to Mr Bryce.
- 15 5. In the paper apart to the response the respondent raised a preliminary issue of jurisdiction as the claimant did not have the necessary qualifying period of service to bring his claim. It also stated, "*The claimant has acted unreasonably in bringing and continuing these procedures and the respondent hereby formally places the claimant on notice as to costs and seeks a wasted cost order against the claimant's representative.*"
- 20 6. The Tribunal sent a copy of the response to Mr Bryce on 16 May 2018.
7. The Tribunal wrote to the representatives on 18 May 2018 advising that the case would be listed for a preliminary hearing on jurisdiction and that notice of hearing would be sent.
- 25 8. On 23 May 2018, Mr Bryce wrote to the Tribunal and the respondent's representative advising that the claimant acknowledged the validity of the criticisms made by the respondent in the response and instructions had been received to withdraw the claim and consent to its subsequent dismissal
- 30 9. A judgment dismissing the claim under Rule 52 of the Rules contained in Schedule 1, of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the Rules). This was copied to the representatives of on 24 May 2018.

10. On 30 May 2018 the respondent's representative made an application for "an order for costs" either under Rule 76(1)(a) on the basis that the claimant acted unreasonably in bringing the proceedings or under Rule 76(1)(b) that the claimant had no reasonable prospect of success. The claimant's claim was misconceived and the respondent is entitled to recover "*the significant costs*" incurred by it in having to deal with the claim "*and respond in full to it*". The respondent's representative provided details of the costs incurred by the respondent "*at the County Court cost for national grade 1 solicitors with over eight years' experience*" and requested "*an ordinary order for costs of £1,909*".
11. The application was opposed. Both parties agreed to the application being determined without a hearing.

Submissions

The Respondent

12. The respondent referred to its application dated 30 May 2018. The claimant conceded that the claim was brought in circumstances where the claimant did not have the necessary qualifying service. Accordingly, the Tribunal did not have jurisdiction.
13. During the early conciliation process there were various communications between the respondent's representative and ACAS. The respondent raised the issue of lack of qualifying service and was advised that the claimant had indicated a whistleblowing claim and as such he did not require two years qualifying service. The claimant did not expand on the basis of such a claim and it was not raised by him in these proceedings although he did pursue a different claim under the TUPE Regulations that had no reasonable prospect of success.
14. The respondent reiterated that it was seeking an order for £1,909.

The Claimant

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15. The application was based on Rule 76(1)(a) and (b) in suggesting that costs, should be awarded where either the claimant acted unreasonably in bringing the proceedings or the claim brought had no reasonable prospects of success.
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16. It was acknowledged that the claimant in bringing the proceedings did not have the necessary qualifying service. Accordingly, the Tribunal did not and could not have jurisdiction to consider the claim. The claim was presented on the basis of instructing a solicitor who framed and presented the claim form.
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17. Immediately it became clear that there was a fundamental difficulty with jurisdiction and that there was the lack of qualifying service the claim was withdrawn to avoid further proceedings and expense. The claimant immediately accepted the advice given to him regarding the withdrawal of the claim once the jurisdictional difficulty was identified. The claimant has not acted in any way unreasonably and indeed acted upon advice been tendered as to the futility of his claim, instructing its withdrawal in good time and in good faith.
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18. Rule 78 provides for the quantification of any expenses order which may be awarded. No comment was made in relation to the individual fee entries.
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19. It was observed that the matter was subject early conciliation and respondent's only contribution appeared to have been to agree a 14 day extension.
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20. Immediately upon the jurisdictional difficulties being identified and brought to the claimant's attention the claim was withdrawn. The claimant acted entirely reasonably and appropriately, and an award of expenses would be unjustified in all the circumstances.

Deliberations

21. I referred to the Rules. The application was that the claimant or his representative has acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing or conducting the proceedings (Rule 76(1) (a)) and/or the claim had no reasonable prospect of success (Rule76(1)(b)).
22. Even if the grounds for the expenses order are made out I am not obliged to make the order.
23. I turned to consider whether the conduct of the claimant or his representative fell within Rule 76(1) (a).
24. From the information available I did not understand Mr Bryce to have been involved in the early conciliation discussions. It was unclear if the reference in the ACAS discussion to "the respondent's representative" was the legal representative or a representative of the respondent company. In any event the claimant sought legal advice before raising the proceedings. It was not suggested that he was advised of the jurisdictional difficulty until May 2018 when he withdrew his claim. In these circumstances I did not consider that he had vexatiously, abusively, disruptively or otherwise unreasonably in the bringing or conducting the proceedings.
25. The claim form was ostensibly framed and presented by Mr Bryce a partner in a law firm. The claim form states the claimant's period of employment. I did not understand it to be suggested that Mr Bryce was acting vexatiously, abusively, disruptively in bringing the proceedings. I therefore considered whether Mr Bryce was acting unreasonably in bringing or conducting the proceedings.
26. In determining whether to make an order under this ground I considered the nature, gravity and effect of Mr Bryce's conduct. I identified the conduct as raising proceedings in which the Tribunal did not have jurisdiction. While it would be expected that before presenting a claim a legal adviser would consider the legal basis of the claim I did not consider that the claim form as

a whole looked ill-prepared. It appeared that the claimant's qualifying service had been overlooked. This had the effect that the respondent received a claim form and had 28 days in which to prepare a response.

5 27. I considered that if as the respondent said it knew during the early conciliation that the claimant did not have sufficient qualifying service and the Tribunal had no jurisdiction this was not raised immediately with the claimant's legal representative. Instead the respondent instructed solicitors who incurred "*the significant costs*" in preparing a detailed response for a claim which the
10 Tribunal had no jurisdiction to consider. The detailed response was sent to the Tribunal on the last day for so doing but not copied to the claimant's representative. On receiving the response from the Tribunal Mr Bryce obtained instructions to withdraw the claim which he did immediately.

15 28. Looking at the totality of the circumstances I did not consider that Mr Bryce's conduct was unreasonable in bringing or conducting the proceedings.

29. I then turned to consider whether the claim had no reasonable prospect of success. Given the claimant's length of service I concluded that the claim did
20 not have reasonable prospects of success and the application under this ground was made out. I did however have discretion whether to actually award expenses.

30. Expenses in the employment tribunal are the exception rather than the rule.
25 The claimant took legal advice before presenting the claim. The cost warning was in the response by which point the claim had been raised and the "*significant costs*" incurred. The claimant withdrew the claim on being advised that he had insufficient service. I appreciated that the respondent had to respond to the claim form. However, it was possible to protect the
30 respondent's position and keep cost to a minimum by either contacting Mr Bryce on receipt of the claim form to clarify the position or immediately presenting a holding response raising the jurisdiction issue and reserving the right to provide addition information if the Tribunal had jurisdiction.

31. It is unfortunate the respondent incurred expense which could have been avoided. However, in all the circumstances I decided to not to exercise my discretion and make an order for expenses. Accordingly, the respondent's application was refused.

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32. For the avoidance of doubt while the response referred to wasted costs there was no reference to an application under Rule 80 in the application dated 30 May 2018 or in the submissions.

Employment Judge: S Maclean
Date of Judgment: 08 October 2018
Entered in register: 15 October 2018
and copied to parties