EMPLOYMENT TRIBUNALS

Claimant: Ms G Thom

Respondent: Hobart Real Estate Partners Limited

Heard at: London Central (remotely by CVP)
On: 3 May 2022

Before: Employment Judge Heath

Representation
Claimant: Mr S Butler (Counsel)
Respondent: Mr G Powell (Counsel)

RESERVED JUDGMENT

1. The claimant's claim did not have no reasonable prospect of success, and she did not act unreasonably in either bringing the proceedings or the way that proceedings have been conducted.

2. The tribunal makes no order for costs

REASONS

Introduction

1. The Final Hearing of the claimant's claims for unauthorised deduction from wages took place before me on 14, 15 and 16 June 2021. By a reserved decision sent to the parties on 10 September 2021, I dismissed the claims. I concluded that the claims were for unquantified unidentified sums and that the tribunal lacked jurisdiction to consider the claims.

2. There had been a Preliminary Hearing before Employment Judge McKenna on 13 April 2021 at which the respondent sought to strike out the claimant's claim for unlawful deduction from wages. Employment Judge McKenna declined to make this order.

The costs application and the claimant's response

3. By letter of 4 October 2021 ("the Costs Application") the respondent's solicitors set out the respondent's application for costs, pursuant to Rules 76 and 77 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1 ("ET Rules"). In brief, the bases of the respondent's applications costs were: -

    a. That the claimant had no reasonable prospect of that the tribunal had jurisdiction to consider her claim (Rule 76(1)(b)); and

    b. That the claimant had acted unreasonably in conducting the proceedings by continuing to pursue her claim following offers of settlement made in open and without prejudice correspondence (Rule 76(1)(a)).

4. On 1 February 2022 the claimant's solicitors set out the claimant's response to the Costs Application ("the Costs Response"). Again, in brief, the claimant's position was: -

    a. The "gateway" conditions in Rule 76 were not met in that the claimant did not have no reasonable prospect of success, and it was not unreasonable to pursue her claim following settlement offers in correspondence;

    b. The question of whether the claimant had no reasonable prospect of success had already been determined against the respondent at the Preliminary Hearing on 13 April 2021 by Employment Judge McKenna;

    c. The unreasonable conduct alleged by the respondent appeared to be a failure to accept certain offers of settlement when the claims had no reasonable prospect of success;

    d. If the "gateway" conditions were satisfied, the tribunal should not exercise its discretion to award costs.

Procedure

5. I was provided with a 1027 page costs bundle, which was the original trial bundle with further documents added to it. Additionally, both counsel provided skeleton arguments and I was provided with a 448 page authorities bundle. The claimant provided a witness statement dealing with her financial situation. She was cross examined by Mr Powell. Both counsel made oral submissions and I reserved this decision.

The law

6. With due respect to the diligence of both parties' representatives, I will not set out all of the authorities I was referred to.

Costs - general

7. Costs orders in the tribunal are the exception rather than the rule and the tribunal must be able to explain why it is taking such an exceptional

step when it orders costs (*Barnsley Metropolitan Borough Council v Yerrakalva* [2012] IRLR 78, *Sud v London Borough of Ealing* [2013] 5 Costs LR 777, *Power v Panasonic (UK) Ltd* (09.03.05 unreported) UKEAT/0439/04/RN).

8. When applying both the "threshold" or "gateway" tests in Rule 76, or exercising the discretion to award costs, a professionally represented party is not to be judged by the same standard as a litigant in person (*AQ Ltd v Holden* [2012] IRLR 648).

Rule 76

9. Rule 76 ET Rules sets out as follows: -

> *76 (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".*

10. Rule 76(1) and (2) set out circumstances where a tribunal "may" make orders for costs in contrast with Rule 76(3) which set out circumstances when a tribunal "shall" order costs. Rule 76(1) contain "gateway" provisions which must be satisfied before the tribunal can go on to exercises its discretion to award costs.

No reasonable prospect of success

11. Rule 37 ET Rules provides that a tribunal may strike out all or part of the claim or response if it "*has no reasonable prospect of success*".

12. Both Rule 76(1)(b) and Rule 37 contain the wording "no reasonable prospect of success". Authorities on Rule 37 have pointed out that a claim has a reasonable prospect of success if there is "*a prospect which is more than fanciful*" that the claim will succeed (*A v B* [2010] EWCA Civ 1378).

13. In *Ezsias v North Glamorgan NHS Trust* [2007] EWCA Civ 330 the Court of Appeal observed: -

> *"It seems to me that on any basis there is a crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence… It would only be in an exceptional case that an application to an Employment Tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation."*

Unreasonable conduct

14. In *Cartier Superfoods Ltd v Laws* [1978] IRLR 315 the EAT held that there was no requirement that the party actually know that its conduct was frivolous (to use the wording of a previous iteration of Rule 76). The tribunal will look at what the party ought to have known had it gone about the matter sensibly. The test is not a subjective one *Vaughan v London Borough of Lewisham* UKEAT/0533/12/SM).

15. The tribunal is to assess the totality of the evidence, but there is no need for the tribunal to establish a direct link between the unreasonableness and the cost consequences (*McPherson v BNP Paribas* [2004] EWCA Civ 569 and *Yerrakalva).*

16. The object of Rule 76(1)(a) is to stop cases which ought not to be launched (*Balamoody v UK Central Council for Nursing* [2002] ICR 646).

17. The rule in *Calderbank v Calderbank* has no place in tribunal proceedings, but a Calderbank offer is a factor a tribunal can take into account when considering what if any order for costs to make and how much, provided the rejection of the offer was unreasonable (*Raggett v John Lewis* [2012] 6 Costs LR 1053). However, the failure to beat a Calderbank offer should not, by itself, lead to an order for costs being made against the party who did not beat it (*Lake v Arco Grating UK Ltd* UKEAT/0511/04/RN). Obstinately pressing for an "*unreasonably high award despite its success been pointed out and despite a warning that costs might be asked for or against that party were persisted in, the tribunal could in appropriate circumstances take the view that the party had conducted the proceedings unreasonably*" (*Kopel v Safeway Stores* [2003] IRLR 753 and *Power v Panasonic* UKEAT/0439/04/RN).

18. The EAT observed in *Solomon v University of Hertfordshire* UKEAT/0258/18/DA that it is: -

> "*important for an ET, when it is dealing with the question whether the conduct of litigation is unreasonable, to keep in mind that in many (though not all) circumstances there may be more than one reasonable course to take. The question for the ET is whether the course taken was reasonable; the ET must be careful not to substitute its own view but rather to review the decision taken by the litigant. Even when a party is legally represented there may be more than one reasonable course*".

Res judicata

19. The Supreme Court examined the principles relating to *res judicata* in *Virgin Atlantic Airways Limited v Zodiac Seat UK Ltd* [2014] AC 160. Lord Sumption set out six different legal principles of *res judicata* with different juridical origins. One of these is described as "issue estoppel" which is "*the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issues which is necessarily common to both was decided on the earlier occasion and is binding on the parties*". Another was "*the more general procedural rule against abusive proceedings, which may regarded as the policy underlying all of the above principles* [with one exception]".

Conclusions

Rule 76(1)(b) no reasonable prospect of success

20. I will take this aspect of the application first, as, while this comes after Rule 76(1)(a), I agree with the claimant that arguments relating to unreasonable conduct follow from the respondent's assertion that the claim had no reasonable prospect of success.

21. I will turn first to the question of whether the issue is subject to the doctrine of *res judicata*.

22. Under Rule 37 the tribunal may strike out the claim if, among other things, it "has no reasonable prospect of success". The wording in rule 76(1)(b) is that a tribunal may make a costs order if "any claim or response had no reasonable prospect of success" (emphasis added in both). One is in the present tense and one is in the past tense.

23. Authorities on Rule 37 make clear that the tribunal will not conduct a mini-trial on an application to strike out. The claimant's case will be taken at its highest, with the assumption made that he or she will establish the facts presented in their claim. As set out above, where there is a crucial core of disputed facts the tribunal will only strike out in exceptional circumstances.

24. The tribunal hearing an application for costs under Rule 76(1)(b) is carrying out a slightly different exercise with a slightly different perspective. The tribunal on a strike out application is making certain assumptions and is scrupulously avoiding determining disputed facts. When considering a costs application under Rule 76(1)(b), the tribunal is looking back. I consider that it is open to a tribunal, in looking back to see whether the claimant's claim had no reasonable prospects of success, to consider, for example, how factual disputes had in fact been resolved at the final hearing.

25. The example I raised during the hearing is of a tribunal refusing to strike out a claim, holding that there is a core of disputed facts, and therefore not finding that the claim has no reasonable prospects of success. What then if at the final hearing the tribunal finds, in resolving the factual disputes, that key documents were forged by the claimant and he or she told lies? These are factors which a tribunal must surely be allowed to take account of in determining whether the claimant's claim had a reasonable prospect of success. It might be held that the claim had no prospect once the claimant's fundamental dishonesty was taken into account. This was a factor, however, which had not been taken into account in determining whether, at an earlier stage, the claimant's claim has a reasonable prospect of success.

26. I find that there is no *res judicata* here. The issue determined by Employment Judge McKenna was whether the claim has reasonable prospects of success at that point in time. In determining this she rightly avoided resolving disputed factual issues, and she took the claimant's claim that its highest. She was exercising a degree of foresight based on the information before her. My perspective is different, and the issue I am deciding, although focused on the identical point of relating to the claim's

prospect of success, is whether it had a reasonable prospect of success. In determining this I am free from some of the constraints the authorities imposed upon Employment Judge McKenna. I do not consider that res judicata arises either by way of issue estoppel or the procedural rule against abusive process.

27. Turning to the substantive question of whether he claim had no reasonable prospect of success, I considered that Employment Judge McKenna's judgement is not irrelevant, notwithstanding my finding that the issue of reasonable prospect of success is not *res judicata*. Employment Judge McKenna declined to strike out the claim because there were disputed facts around whether an agreement collateral to the contract of employment entitled her to 10% of the respondents performed the in respect of the Worship Square development. She also referred to the "heavily contested" role played by the claimant in the development (presumably on the basis of what appeared in the respondent's Response, and possibly submissions made to her). She also referred to the disputed evidence about the nature of the fee paid in respect of the development, which called for resolution by oral evidence. She further declined to make a deposit order and observed that the "*claim will turn on the oral and documentary evidence and the tribunal will have to consider that evidence and make findings of fact… I accepted that there was a dispute between the parties as to the amount payable, if any, of the Worship Square performance fee to the claimant but that would be a matter for the tribunal hearing the case to determine*".

28. In my decision I set out the starting point for my conclusions in paragraph 79, where I explained that: -

> *The primary task for me in this case is ascertaining what the parties agreed. As set out above in the section on the law, I must seek to ascertain what the reasonable person, apprised of relevant background matters, would have understood the parties to have agreed.*

29. This was a case where the claimant's claim was that a series of emails (which followed a meeting between the claimant and the directors of the respondent on 25 February 2019) gave rise to or recorded an agreement that had been reached between the parties.

30. The parties disagreed about the interpretation of the discussions and emails between the parties. I heard detailed written and oral submissions from both counsel about the facts and law.

31. My findings, set out that paragraph 95 of my decision, were that the evidence did not support the existence of a concluded agreement for a 10% profit share from the Worship Square investment. I concluded at paragraphs 101 and 102 that the parties did not reach agreement under clause 6.2 of the contract of employment that the percentage of the company's performance fee would be paid to the claimant in respect of this development. I did not uphold a claim for a discretionary entitlement as "*it would not be a perverse or irrational exercise of any retained discretion for the respondent to fail to pay her something she had expressly not accepted*". I further held that the "Bridges calculation"

created further difficulty for the claimant being able to point to ascertainable sum. I went on to say that it followed that any claim in respect of such a sum would be a claim for an unquantified and unidentified sum. I held that the tribunal did not have the jurisdiction to entertain an unlawful deduction from wages claim in respect of such a sum.

32. In order to determine whether or not there had been a concluded agreement, and if so what it was, I had to read and hear the evidence. I had to assess the background evidence, which any hypothetical reasonable person would have been apprised of when forming an understanding of what the parties had agreed. This involved setting the emails in their proper context of the relationship between the parties and the business in which they operated. This could only be done properly by hearing the evidence of both parties, and evaluating it in the context of the detailed legal submissions made by their counsel. It was not a fanciful notion that the dealings between the parties, especially their emails set out in paragraphs 26 to 32 of my decision, gave rise to or recorded an agreement that had been reached between the parties. The conclusion that I eventually did reach was one that I could only safely come to having read and heard the disputed evidence and the legal submissions relating to it.

33. Additionally, this was not the sort of case contemplated earlier, where hindsight lays bare a claim not having any prospect of success because of subsequently discovered facts, for example, fundamental dishonesty.

34. In the circumstances I do not find that the claimant's claim had no reasonable prospect of success.

Rule 76(1)(a) unreasonable conduct of proceedings

35. Briefly, the respondent's case is that the claimant was unreasonable to continue to pursue her claims when she had been told how weak they were and had been made reasonable offers of settlement.

36. The offers of settlement are as follows:-

    a. Before the issue of claim, the claimant was offered £30,000.

    b. On 27 January 2021 a letter from the respondent's solicitors made a without prejudice offer that should the claimant withdraw her tribunal claims by 10 February 2021, the respondent would not seek a costs order in respect of any costs in respect of the tribunal claims.

    c. On 11 June 2021, at 4.30pm on the last working day before the final hearing, the respondent's solicitors made a without prejudice offer of £125,000.

37. What is clear from the correspondence following the proposal to terminate the claimant's employment, is that the claimant's solicitors made strenuous efforts to ascertain how much money respondent made from the Worship Square development. They made written enquiries on 26 August 2020, 14 September 2020 (twice), 13 October 2020 (twice), 20 October

2020, 4 November 2020 (twice, once when she suggested resolution by an independent QC), 11 November 2020, 12 November 2020 and 8 January 2021. In an email of 13 October 2020 the claimant's solicitor makes the point that the claimant could not identify a sensible offer until she knew "*the payment/fee (or whatever you want to call it) that your client received upon the disposal of the property. All this requires is some simple transparency . The fact that this is being denied to Gill rather tells its own story doesn't it?*".

38. The respondent's responses on the question of how much money they received are described by the claimant as inconsistent and incomplete. The respondent asserted it had "received no performance fee", "no performance fee/profit share whatsoever" and asserted in its Grounds of Resistance that a separate entity, HWSL, had received "an advisory fee relating to the sale of shares".

39. I also note my finding at paragraph 44 of my decision that Mr Bhadra sought to minimise the amount of information reaching the claimant about money received from the Worship Square development, and that the directors withheld from her the fact that another company owned and solely controlled by them was being paid large sums of money in relation to the disposal of the property.

40. On 4 June 2021 the claimant made her own proposal for settlement, £30,000 ex gratia payment, £80,000 plus VAT for legal fees, £270,000 (less tax) arrears of salary.

41. I have sympathy for the claimant's view that the respondent has not been transparent about how much money was received from the Worship Square development. Her scepticism in the face of what appeared to her to be inconsistent and incomplete information is understandable. I do not consider that it was unreasonable of her not to take up the respondent on its offer of £30,000 prior to filing her claim in the tribunal when her solicitors were seeking information about the Worship Square and pressing for transparency.

42. The offer of 27 January 2021 was referred to by the claimant's representatives as a "drop hands" settlement. Mr Powell was at pains to point out that this offer only related to dropping tribunal proceedings, and did not cover any potential litigation in other fora. Nonetheless, the claimant had formed a view, which I have found, was more fanciful, that she would have been entitled to 10% of around £400,000. One can easily appreciate why an offer of nothing apart from immunity from a costs application might seem deeply unattractive.

43. Mr Butler makes a further point that the fact that the respondent subsequently increased its offer to £125,000 on the day before trial shows that it was reasonable not to accept the January offer.

44. I find that the claimant was not unreasonable in refusing the January offer. She had an understandable scepticism that she was not being given accurate information about the money respondent may have made on the Worship Square development. Had she accepted this offer of nothing apart from immunity from costs, she would not have been the recipient of

a rather more generous offer. It was not unreasonable for her to want to put what I consider to have been an arguable claim for a very significant sum before the employment tribunal for determination.

45. The 11 June 2021 offer was made with practically no time to consider it before the day of the final hearing. Virtually all costs had been incurred apart from counsel's refreshers at this stage. I remind myself that I am not considering what I think should have been done, but reviewing the reasonableness of the claimant's decision to continue with her claim after this offer. Some litigants may have accepted the offer, and that may well have been a reasonable approach. That does not mean that not accepting it was unreasonable. I do not consider, having incurred virtually all of the costs and having emotionally geared herself up for trial, that it was unreasonable of the claimant to see things through to the end of the final hearing.

46. In the circumstances, I do not find that the claimant or her representatives have acted unreasonably in the way that the proceedings have been conducted.

Overall conclusion

47. I have found that the claim did not have no reasonable prospect of success, and that the claimant did not act unreasonably in the way she conducted proceedings. I have not found, therefore, that these "gateway" or "threshold" criteria for making a costs order are made out and I do not need to go on to consider whether to exercise my discretion to award costs. I do not make any order for costs against the claimant.

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Employment Judge **Heath**

19 May 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

19/05/2022.

FOR EMPLOYMENT TRIBUNALS