



EMPLOYMENT TRIBUNALS

Claimant: Mr Konstantinos Giannopoulos v

Respondents: Sherwood Forest Hospitals NHS Foundation Trust

Record of a Hearing heard at the Employment Tribunal

Heard at: Nottingham (in chambers) **On:** 11 April 2022

Before: Employment Judge Hutchinson (sitting alone)

Representation

Claimant: No appearance

Respondent: No appearance

JUDGMENT

The Employment Judge gave judgment as follows;

The Claimant is ordered to pay costs to the Respondent in the sum of £3,620.00.

REASONS

Background to this Hearing

1. The Claimant presented his claim to the Tribunal on 15 September 2021. He claimed that he had been employed by the Respondent from 15 June 2021 until 18 June 2021 as a Locum Senior House Officer at Kingsmill Hospital.

2. He said that he had been employed for a week through a Company called Total Assist which is a locum agency and he had anticipated working 4 nightshifts.
3. In his claim form he said that there was a dispute about his duties and that he was cancelled for the rest of the week and his claim was for;
 - Unfair dismissal.
 - Wages comprising the 3 nightshifts that he did not work. This amounted to £1987.50
4. A strike out warning was sent to the claimant by the Tribunal on 27 September 2021. It informed the claimant that he needed two years or more service to be able to claim unfair dismissal and it appeared that he was not entitled to bring such a claim. He was given 7 days to respond to the warning. He did not respond. The claim of unfair dismissal was struck out by my colleague Employment Judge Ahmed on 12 October 2021 because the Claimant did not have two years' service.
5. The Respondent's filed their response to the wages claim on 18 October 2021. The grounds of resistance were short extending to 17 paragraphs and 3 pages They said that the Claimant had only been engaged as an agency worker and completed one shift overnight on 14/15 June 2021.
6. He had been engaged to work via an agency, Total Assist and they said there was no contractual relationship between the Claimant and the Respondent. The Claimant was not an employee of the Respondent and his claim for wages against the Respondent for arrears of pay was misconceived and was bound to fail.
7. They said that the Tribunal did not have jurisdiction to hear the claims. They then went on to explain that the Respondent had encountered several difficulties with the Claimant's behaviour during his night shift and it was as a result of this behaviour that his other 3 shifts were cancelled.
8. In the details about their response they made clear their position that there was no contract entered into with the Claimant and that his contract was with Total Assist.
9. It was Total Assist who had invoiced the Respondent for the work undertaken by the Claimant and that invoice had been paid. No other sums were due to be paid to the Claimant.
10. They said that the Claimant was neither an employee nor a worker of the Respondent and no contract had been entered into between the Claimant and the Respondent at any time. The Tribunal did not have jurisdiction to hear the breach of contract claim because there was no contract between the Claimant and the Respondent. It went on to say that the sums that he claimed could not be properly payable within section 13(3) of the Employment Rights Act 1996 (ERA) because there was no contract between them.
11. The non-payment of wages claim was listed for hearing on 4 February 2022 and a

notice was sent out to the parties on 27 September 2021. At that stage it was to be an attended hearing listed for 2 hours.

12. The Claimant prepared a witness statement in connection with his claim and this was sent to the Tribunal and to the Respondents on 29 October 2021. He argued that there was a contractual relationship between himself and the Trust. In his statement he acknowledged that he had been warned by the Respondent that they would pursue him for costs of £9,600 if carried on with the claim.
13. In his witness statement he indicated new claims of;
 - Race discrimination.
 - Sex discrimination.
 - Less favourable treatment as a fixed term employee.
14. These matters had not formed part of his claim previously presented and he had not made an application to amend his claim. The Respondent's solicitors pointed this out in their letter to the Tribunal of 1 November 2021. On 15 November 2021 the respondent's solicitor filed the witness statement of Daniel Clegg who was employed by the Trust as Variable Pay Lead in the Rostering Services department. The statement comprised 17 paragraphs over 4 pages.
15. The matter was reviewed by my colleague Employment Judge Adkinson at the Rule 26 Employment Tribunal Rules of Procedure Regulations 2013 stage and he determined that at the commencement of the hearing the Employment Judge would consider the issue of whether the Claimant was an employee or worker. He extended the length of the hearing to 3 hours. He said that the hearing would be an attended hearing at the Nottingham hearing Centre.
16. I have now seen the letter sent by the Respondents to the Claimant on 18 October 2021. It makes the Respondent's position clear. That the Claimant had not been engaged by the Respondent and that any claim that he might have would have to be with Total Assist the agency who had engaged him and paid him.
17. They told him that there was no contractual relationship between him and the Trust and that one would not be implied in the circumstances of this case They warned him that his claim was misconceived and had no reasonable prospects of success.
18. As a public body they would incur sums of money defending it and reserved the right to seek to recover from him the Trust's legal costs under the rule 76 of the Employment Tribunal Rules of Procedure 2013. They pointed out that under Rule 76 a Tribunal may make a costs order where it considers that a party has acted unreasonably in the bringing of the proceedings or if the tribunal considers that the claim had no reasonable prospects of success
19. They told him that if he continued with the claim, they reserved the right to seek to recover from him the Trusts legal costs under Rule 76 of the Employment Tribunal Rules of Procedure 2013. They said that the costs were likely to exceed £8000 plus vat.

20. They said that if he withdrew the claims by 25 October 2021, they would not pursue them and conclude the matter by way of COT3 agreement.
21. They invited Mr Giannopoulos to consider his position carefully, seek legal independent advice and discuss the matter with ACAS.
22. On 25 January 2022 the Respondent requested documents from the Claimant regarding his relationship with Total Assist. These must have existed because the Claimant had been engaged by the Respondent via the agency. The Claimant provide failed to provide these documents.
23. On 27 January 2022 the Respondent made an application to strike out the Claimant's claim pursuant to Rule 27 of the Employment Tribunals Rules of Procedure 2013. They forwarded to the Tribunal a bundle of documents and said that it was clear from the documents there was never any contractual relationship between the Claimant and the Respondent. They pointed out that the Claimant had specifically requested that he be engaged by the Respondent outside of the normal direct engagement procedure. He was not directly engaged by the Respondent. His only contract was with the Agency.
24. The Respondents explained that it was only in a rare case that an employment contract was to implied between an agency worker and an end user and such a contract is only to be implied when the Tribunal is able to properly conclude the agency arrangements no longer adequately reflect how the work was actually being performed. There was nothing in this situation which indicated that this was anything other than an agency agreement.
25. They again reiterated that the Claimant's claim was fundamentally misconceived, and they asked the Tribunal to strike out the claim on the basis the claim had no reasonable prospect of success.
26. My colleague Employment Judge Adkinson directed that the strike out application would be considered at the hearing on 4 February 2022. The hearing on 4 February 2022 was converted at the parties' request to a CVP hearing.
27. At 15.53 on 3 February 2022 the Claimant wrote to the Tribunal as follows;

*"I withdraw my claim 2602286/2021.

The reason is I am on call tomorrow on the labour ward and unfortunately, I can't change this. Also, it is unfair for me that I am a litigant in person while the hospital has Solicitors on board".*
28. The withdrawal of his claim was unequivocal.
29. At 18.21 on 3 February 2022 the Respondent wrote to the Tribunal to say they wished to pursue an application for costs against the Claimant. They sent a copy of that application to the Claimant. The basis of the claim for costs was;

- 29.1. That the Claimant had acted unreasonably in the way the proceedings had been conducted and/or,
- 29.2. The claim had no reasonable prospect of success.
30. The claim for costs was;
- 30.1. £9165.50 plus vat legal costs.
- 30.2. £1220.00 disbursement for Counsel's fees and courier costs.
31. They attached a schedule which set out their explanation. The time Ledger total was 55.2 hours
32. At 1.06am on 4 February 2022, Mr Giannopoulos wrote to the Tribunal again;
- "It was the Defendants choice to pay Solicitors.*
- The Employment Tribunal is a no cost Court.*
- I am now asking for a different day for the hearing as the hospital could not find an alternative Doctor to cover the shift".*

The hearing on 4 February 2022

33. At this hearing the Claimant did not attend, and the Respondent attended by way of Counsel, Oliver Lawrence.
34. I was not able to hear anything from the Claimant but as he had clearly withdrawn his claim it was necessary for me to dismiss it. It was not possible for him to reinstate the claim once he had withdrawn it because;
- 34.1. He had not expressed at the time withdrawal a wish to reserve the right to bring such a further claim.
- 34.2. It would not be in the interests of justice to not issue such a Judgment.
35. Mr Lawrence invited me to make an order for costs there and then, but I declined to do so because I wished to give the Claimant an opportunity to make representations about the issue of costs.
36. I ordered the Claimant to provide his written representations and said the Respondents could submit further written representations after the Claimant had served his.
37. My judgment and reasons were dated 10 February 2022 and sent to the parties on 15 February 2022.

The Claimant's Representations

38. On 1 March 2022 Mr Giannopoulos sent to me his written representations in the form a witness statement. I have considered all that he said. He said that he had *"passed the employment test"* and had *"the right to address the matter to the Employment Tribunal"*.

39. He went on to say it was;

"My irreducible right to be treated fairly, get notice of termination and the hospital failed to follow the proper dismissal procedures".

40. He went on to say;

"I believe it is utterly unfair and unreasonable for the defendant to seek an order for costs while my loss was significantly larger, and the Employment Tribunal is a no cost Court".

41. He said that he was a litigant in person without English being his first language and that it would have been extremely *"difficult, disadvantageous and unfair for me to encounter Solicitors"*.

42. He did not provide any details of his means but said it was unreasonable for the hospital to spend more than £10,000 on a claim of £1875.

The Respondents Response

43. I have seen and considered the Respondents response to this by letter of 16 March 2022.

44. They set out in that response the background to the claim and the Claimant's conduct.

45. They pointed out that the Respondents costs had been incurred in defending the Claimant's misconceived claim. It was reasonable for the Respondents to defend this unmeritorious claim and the Claimant had behaved unreasonably in the way that he had conducted the proceedings.

46. The Claimant had not produced any documents to evidence any contractual relationship with the Respondents and he had continued with his misconceived claim despite the Respondents setting out the position to him on 18 October 2021 and warning him about the costs to be incurred.

47. He had been told of the hearing on 4 February 2022 on 27 September 2021 and yet he had only withdrawn his claims at a very late stage just before the hearing was due to take place and after the Respondents had instructed Counsel.

48. They submitted that the Claimant had;

48.1. Acted unreasonably in the way that the proceedings had been conducted.

48.2. His claim had no reasonable prospect of success.

49. They sought costs under Rule 76 (1)(a) and (b) of the Employment Tribunal Rules of Procedure 2013 and the schedule of costs incorporates a claim for;

49.1. £9165.50 plus vat of legal costs.

49.2. £1220.00 of disbursements for Counsel fees and courier costs.

The Law

50. Rule 76 of the Employment Tribunal Rules of Procedure provides when a costs order or preparation time order may or shall be made;

“(1) A Tribunal may make a costs order or a preparation time order and shall consider whether to do so, where it considered that;

(a) A party... has acted vexatiously, abusively disruptively or otherwise unreasonably in either the bringing of the proceedings... or the way that the proceedings... have been conducted; or

(b) Any claim or response had no reasonable prospect of success”.

51. Rule 78 deals with the amount of a costs order and provides;

“(1) A costs order may;

(a) Order the paying party to pay the receiving party a specified amount not exceeding £20000, in respect of the costs of the receiving party”.

52. Rule 84 deals with ability to pay;

“In deciding whether to make a cost, preparation time, or wasted costs order, and if so, in what amount the Tribunal may have regard to the paying parties... ability to pay”.

53. As can be seen from the above-mentioned rule I have to be satisfied that either;

53.1. The Claimant has acted unreasonably in the bringing or conducting of the proceedings and/or the claim had no reasonable prospect of success. If I am satisfied that those grounds are made out, then I must decide whether to exercise my discretion to make a costs order. I have a duty to consider making an order where they are made out.

54. The factors that are relevant to my discretion include;

54.1. Making a costs order in the Employment Tribunal are still the exception rather than the rule. My power to order costs is by its nature more sparingly exercised and is more circumscribed than that of the ordinary Courts where the general rule is that costs follow the event.

54.2. Costs are compensatory not punitive.

54.3. In deciding whether to make a costs order I may have regard to the Claimant's ability to pay.

54.4. I can consider whether the Claimant had been warned about costs at any stage. Whilst a costs warning is a factor to be taken into account it is not decisive.

54.5. I should take into account if a party has not taken legal advice and is not represented during the course of a hearing.

Late Withdrawal

55. Whilst a Claimant might think he can avoid a possible cost penalty if his claim is withdrawn before the hearing this is not necessarily so in situations where costs have been incurred in advance of the hearing. If a Claimant allows preparations for the hearing to go on too long before abandoning an untenable case, he may be liable for costs on account of his or her conduct.

56. I should consider whether the Claimant in this case has conducted the proceedings unreasonably in all the circumstances and not simply whether the late withdrawal of the Claimant was itself unreasonable.

57. In deciding the amount of costs, I should consider what loss has been caused to the receiving party. As decided in the case of ***Yerrakalva v Barnsley Metropolitan Borough Council [2012] ICR420*** costs should be limited to those "reasonably and necessarily incurred".

58. In accessing this I must look at what amount is proportional considering the amounts claimed.

My Conclusions

59. I am satisfied in this case that the Claimant's claim had no reasonable prospect of success. There was never any contractual relationship between himself and the Respondent. Nor was he a worker for the Respondent and he should have known that.

60. If he did not know at the time that he presented his claim the Respondents position was set out not only in their ET3 but in their letter to him dated 18 October 2021. He had plenty of time to consider whether he should withdraw the claim, take legal advice or speak to ACAS. He did not withdraw his claim until the afternoon before the hearing took place.

61. I am also satisfied that the Claimant acted unreasonably in his conduct of the proceedings. He continued to pursue his claim even though he must have known that his claim had no prospect of success.

62. He did not withdraw the claim until the very last moment i.e on the afternoon before the hearing took place. That amounts to unreasonable conduct.
63. I take into account that the Claimant is an intelligent man who undertakes a professional job as a Registrar in a hospital. Whilst he is a litigant in person, he must have understood that his claims had no prospect of success.
64. Whilst in his submissions to me he refers to language barriers. There is no evidence that any language barrier prevented him from understanding a simple concept that he had no contractual relationship with the Respondent.
65. The Claimant has not provided me with any details relating to his ability to pay. In any case even if he did provide such details it would have made no difference to my decision about whether it would be reasonable to make him contribute towards the Respondent's costs.
66. In assessing the amount of costs that the Claimant should pay though I consider what is reasonable and proportionate. After his claim for unfair dismissal was dismissed at a very early stage his claim was for 3 shifts. It was a claim for wages of less than £2000.
67. This is a claim that was for non-payment of wages only. I do not consider that the amount of costs claimed by the Respondent are proportionate to the claim made or the issues that the Tribunal had to deal with. Those issues were perfectly straightforward namely that there was no contractual arrangement between the Claimant and the Respondent.
68. I note in the schedule of costs that the Respondent's Solicitors have spent over 55 hours in respect of this case. That is not proportionate. It is also not reasonable.
69. In the circumstances therefore I am ordering the Claimant to pay to the Respondent's the following;
- 69.1. £2000 plus vat in Solicitors costs.
- 69.2. £1220 in disbursements.
70. The total amount payable by the Claimant to the Respondent is £3,620.00

Employment Judge Hutchinson

Date: 01 June 2022

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