



EMPLOYMENT TRIBUNALS

Claimant: Mr Derek Allen

Respondent: Ringway Infrastructure Services Limited

JUDGMENT on COSTS

Upon consideration of the Respondent's application for costs made on the 4 May 2022 and determined without a hearing

The Respondent's application for costs is dismissed.

REASONS

1. In an email dated 4 May 2022, the Respondent made an application for costs against the Claimant. The costs sought are particularised in a separate schedule. The total sum sought is £13,690.
2. The Claimant has been provided with a copy of this application and has provided submissions in response dated 10 May 2022.
3. The grounds of the application for costs are that:
 - i. The claimant, or the claimant's representative, behaved unreasonably in both bringing the claim and continuing to prosecute the claim, having falsely claimed without reasonable excuse that one of the Early Conciliation exemptions applied, when no such exemption applied. In this regard the Respondent relies upon Rule 76(1)(a).
 - ii. The claim, as presented, had no reasonable prospect of success. In this regard the Respondent relies upon Rule 76(1)(b).
4. I deal first with the issue of prospects of success because this is relevant not only to the application of rule 76(1)(b) but is also relevant to the assessment of whether the Claimant and/or his representative acted unreasonably in pursuing the matter through to a preliminary hearing.
5. I do not consider that this was a case with no reasonable prospect of success. Whilst the weight of past caselaw was against the Claimant, there had been a change in the Employment Tribunals Rules of Procedure on the 8 October 2020 which provided the Tribunal with discretion in discrete circumstances. It was not possible, without hearing evidence, to establish whether or not discretion could

be exercised in this case under rule 12(2)(2ZA). This is because the position regarding how the first Early Conciliation was obtained and by who was unclear from the documentary evidence before the Tribunal. In particular, it was unclear why the Claimant appeared to have the ACAS reference number and yet had not provided the actual certificate reference number on the form given that the first certificate was issued some weeks before the claim was lodged.

6. Had rule 12(1)(da) applied and the only defect in the claim form been that an exemption had been incorrectly claimed, then it would, possibly, have been arguable that a purposive interpretation to rule 12(1) was required. I say this because 12(1)(d) appears to me to have been included in the rules as a substantive defect in order to prevent or discourage the mischief of a claimant relying upon an exemption when they are not actually exempt. The rules do not provide for a situation where a correct Early Conciliation certificate number has been included in the claim form (thus showing that the early conciliation process has been followed) and at the same time an exemption has been claimed.
7. Had the Tribunal interpreted rule 12 in this respect in a purposive manner, and also found that rules 12(1)(da) and 12(2)(2ZA) applied, it was possible that the Tribunal could have reached the conclusion that it had jurisdiction. This is therefore not a case in which it could be said prior to the hearing that there was no reasonable prospects of success.
8. The legal issues that arise in this case are of a complex technical nature. The requirements concerned have been the subject of much litigation in the Employment Appeal Tribunal, including very recently in the case of *Pryce v Baxterstorey* [2022] EAT 61.
9. The applicable rules in this case are not easy to grapple with and their interplay with other aspects of the rules (such as rules 6, 10 and 13) adds a further degree of complexity.
10. In addition, it is understandable, given the manner in which such cases are required to be dealt with due to the strictness of the rules, that the approach to be taken perhaps does not always make sense from a lay person's viewpoint.
11. Neither the Claimant or his representative (who is also his brother) are legally qualified. Bearing in mind their more limited understanding of the complexities of the rules, and more limited ability to accurately assess the likelihood of success of the various approaches such as an application under rule 13 of the Employment Tribunals Rules of Procedure, I do not consider that pursuing the claim in the manner that the Claimant has done can be described as unreasonable behaviour on the facts of this case. Further, whilst the claim form fell to be rejected on the facts as I found them, the outcome was not a foregone conclusion.
12. In terms of the Respondent's assertion that it was falsely claimed without reasonable excuse that one of the early conciliation exemptions applied, when no such exemption applied, I do not consider the allegation that there was no reasonable excuse to be well founded. I found as a fact that there was no dishonesty, or attempt to mislead, involved in the Claimant's, or his representatives, actions in this respect.

13. Taking in to account the above factors, the Claimant has not acted unreasonably in bringing the proceedings or in the way that proceedings have been conducted nor could it be said that the claim had no reasonable prospects of success.
14. The Respondent's application for costs is therefore dismissed.

Employment Judge Boyes

Date: 17 July 2022

Sent to the parties on: 19 July 2022

For the Tribunal Office

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