EMPLOYMENT TRIBUNALS

Claimant: **Mr R Clarke**

Respondent: **Bristol Sport Limited**

Heard at: **Bristol Employment Tribunal, via CVP**

On: **10 June 2022**

Before: **Employment Judge Lowe**

Representation-

Claimant: **Oscar Davies (Counsel)**
Respondent: **The Legal Director (written submissions)**

COSTS HEARING

The issue for determination

The matter is listed to determine the Respondent's application for costs.

Hearing

With the agreement of the parties this hearing was conducted by CVP video platform and was a fully digital hearing. There were no disruptions to the proceedings.

Pursuant to the Order of Judge Midgley on 19 April 2022, the Respondent has provided written submissions for the consideration of the Tribunal.

The Claimant attended the hearing, with a representative from the Workers of England Union (WOEU).

Evidence

The Tribunal was provided with the following documentation:

Respondent's Submissions and authorities
Document 1 - Respondent's correspondence bundle comprising 5 pages
Document 2 – Workers of England Union document
Document 3 – Costs schedule
Claimant's Skeleton argument
Claimant's bundle comprising 101 pages
Witness statement from the Claimant dated 19 May 2022.

References in this judgment to documents are in the form **[Document/page number]**.

Application chronology

11 October 2021 – ET1 claim form issued

17 December 2021 – ET3 response filed

29 December 2021 - Respondent application filed (and served on the Claimant's representative) to strike out the claim and requests that, if it were to continue, the Tribunal consider making a deposit order in the sum of £1,000

17 February 2022 - ET3 accepted by the Tribunal

21 February 2022 – Parties notified by the Tribunal of the date of hearing in respect of the strike out/deposit order application

22 February 2022 – Claimant notification that he wishes to withdraw his claim in its entirety

8 March 2022 – Respondent application filed in relation to costs

Relevant statutory framework:

General Principle
Costs in Tribunal claims are the exception, rather than the rule. There is a high hurdle to be established before the Tribunal can consider making any such order: Gee v Shell UK Ltd [2003] IRLR 82.

The circumstances in which a costs order or preparation time order may be made are provided for by Rule 76 Employment Tribunals 2013 (ET Rules), which so far as is relevant to this application provides:

"(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; or…"

The Tribunal has been referred to the following authorities:

Ms I Opalkova v Acquire care Ltd EA-2020-000345-RN

Dr Iren Kovacs v Queen Mary & Westfield College, The Royal Hospitals NHS Trust [2002] EWCA Civ 352

Summary of the respondent's position-
The Respondent avers that:

1. the claim brought by Mr Clarke had no reasonable prospect of success and that an order should be made under Rule 76(1)(b), and or in the alternative,
2. that the issuing the ET1, he acted unreasonably and that a costs order should be made under Rule 76(1)(a).

Summary of the claimant's position-
The Claimant avers that:

1. There should be no order as to costs, as is the usual position in the Employment Tribunal. The test for awarding costs in the Tribunal is high and the respondent has not discharged the burden of showing that the test is made out;
2. At the relevant time, the claimant's claim did have a reasonable prospect of success and he did not act unreasonably in pursuing his claim.

Findings-
Claim form

The ET1 form completed by the claimant indicated at paragraph 8.1 that the type of claim was "Other" rather than any of the particular types of claims listed. Further, that it detailed: "I do not consent to mandatory mask-wearing/lateral flow testing as is my right under common law to work".

The claimant details further at 8.2 that "I am employed on a casual contract to work security at Bristol Sport under DS, head of security. He has introduced a policy that mandates mask-wearing and lateral flow testing in order to work my normal shift pattern which I do not consent to as is my human right under common law. Therefore, I have not been offered any work and am being discriminated against and have lost work and wages as a result which I and my dependents rely upon. DS says I am suffering no prejudice, but he will not give me work because of my lawful standing up for my rights principles".

At 9.2, the claimant ticked that a number of remedies were sought, namely: reinstatement, compensation and a recommendation.

No reasonable prospect of success – Rule 76(1)(b)

Applying the guidance as set out in Opalkova v Acquire Care Ltd EA 2020 00345-RN, paragraph 24:

(a) Whether, objectively analysed when the claim was submitted, did it have no reasonable prospect of success?

The respondent avers that the ET1 form did not disclose any claim or legal basis upon which the Tribunal could make an order. In effect, they had to 'guess' what the claims might be and file a Response that covered each of these [Submissions/paragraph 10].

I find that the ET1 claim form was drafted and submitted by the claimant personally, without either: any assistance in drafting, or, checking before submission by a representative of the WOEU. This is clearly evidenced in the email correspondent trail [claimant's bundle/2-3].

Whilst the precise statutory references have not been included in the claim form, I accept that the claimant completed the claim form to the best of his knowledge and skill at that time.

It is accepted that there was a lack of clarity over the particulars of claim within the ET1 form. However, of itself, does not support the proposition that a claim form drafted in such circumstances would automatically equate to having no chance of success. The respondent was able to 'guess' the likely claims that it encompassed based on the information provided. Further, and without criticism, they were able to do this without a request for further and better particulars, an option available to them.

It is submitted that the claim could constitute under unfair/wrongful dismissal, and or discrimination on the basis of a philosophical belief, namely a belief in not wearing face coverings. Further, that there is no evidence to suggest that this belief would not pass the Grainger test, and that several cases are underway at the present time considering these points. There is no precedent to the contrary.

The EAT in Grainger plc and ors v Nicolson 2010 ICR 360, provided importance guidance of general application on the meaning and ambit of 'philosophical belief'. Further, Harron v Chief Constable of Dorset Police [2016] IRLR 481, is one of a number of decisions where the EAT have stressed the point that the Grainger criteria are modest threshold requirements which should not set the bar too high or demand too much of those professing to have philosophical beliefs. The latter also include beliefs that are based on science.

The EAT in Forstater v CGD Europe and Others EKEAT/1505/20/JOJ also made clear that Tribunals should not stray into the territory of adjudicating on the merits and validity of the belief itself. They must remain neutral and abide by the cardinal principle that everyone is entitled to believe whatever they wish, subject only to a few modest requirements.

Taking together the findings and guidance as outlined above, I conclude that it is not possible to determine that the claim had no prospect of success. The formulation of the ET1 was unfortunately brief, but that is not to say that the substance of the complaint was unfounded or misconceived.

(b) Secondly, at the stage that the claim had no reasonable prospect of success, did the claimant know that was the case?

The respondent avers that, as Mr Clarke had the benefit of advice of Mr Morris from the WOEU, prior to the issuing of the ET1 claim form, he would have known that his claim had no reasonable prospect of success.

It is common ground that the claimant first instigated the assistance of Mr Morris from WOEU prior to the termination of his employment, when the matter was still in house with the respondent. There is correspondence between the claimant and Mr Morris dated 14 June 2022 in relation to ‘masks’ and ‘tests’ [Document 1/3].

I find further that Mr Morris is not the claimant’s legal representative for the purpose of these proceedings. He is a Union official within the WOEU who assist with the claims of its members. The level of his knowledge is consistent with this role, nothing further. In particular, and with the greatest of respect to Mr Morris, I do not consider this to include detailed legal expertise in relation to discrimination claims arising from philosophical belief matters.

There is no evidence within the documents that suggest or infer that the claimant was advised that his claim would have no reasonable prospect of success. The union were aware of his intention to issue a claim and there is no evidence that he was advised against such a course.

I conclude that the claimant, at the time of issuing the ET1 form, had no reason or cause to suspect that his claim had anything other than a reasonable prospect of success.

© Third, if not, should the claimant have known that the claim had no reasonable prospect of success?

The respondent submits that Mr Morris and the claimant had access to legal advice through the union’s solicitor, Mr Tilbrook. As such, if he did not know at the time that the claim had no reasonable prospect of success, as he had access to employment law advice and representation, then he should have known.

Neither the claimant or Mr Morris had any cause to believe that the substance of the complaint was misguided or unfounded. As such, and in the context of the findings above, it was reasonable not to have sought further advice at the stage when the ET1 claim form was issued.

Unreasonable conduct - Rule 76(1)(a)
The respondent avers that:

1. all the factors referred to above are also relevant to consideration to the threshold test as set out in Rule 76(1)(a)
2. the Claimant did not utilise the option to trying to resolve the matter through the ACAS Conciliation process, and this decision is reflective of his intention to use the Tribunal process to make a wider point in relation to mask wearing [Submissions/paragraph 14]
3. there was an unacceptable delay by the claimant in withdrawing his claim, given that the Claimant was put on notice that the respondent intended to apply for a strike out/deposit order on 29 December 2021, nearly 2 months before the Claimant's notification of withdrawal.

The claimant asserts that the withdrawal was made in good time, the application for strike out having been made during the Christmas period. The timeline of the proceedings in totality was less than 2 months, and this was reasonable in all the circumstances.

Unreasonable conduct is a matter of fact for the Tribunal. In exercising discretion to order costs, the Tribunal has been referred to the Court of Appeal's guidance as set out in Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78, paragraph 41, which stated:

"The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in binging and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had".

The claimant spoke to ACAS on the phone. He has submitted that the reason why he did not continue with the conciliation process was that the respondent HR department raised discussions with him regarding his P45. In those circumstances, the claimant concluded that the respondent had already determined that they wished his employment to end. Conciliation, therefore seemed, superfluous. I accept that this was a reasonable conclusion for the claimant to have reached.

I further find that the claimant's decision to withdraw the proceedings was based solely on his concerns in relation to the strike our/deposit order application, and not because he did not have confidence in his own claim [WS/RC/6]. The timing of the decision to withdraw supports this; it was filed the day after notification of the hearing date for this specific application.

The claimant withdrew his claim prior to any hearing, preliminary or otherwise. I do not consider that the timeframe was unreasonable in the circumstances. The claim was withdrawn a few days after the ET3 was accepted and in immediate response to the matter being listed for the strike out application.

Conclusion-

The Tribunal does not consider that either of the grounds as outlined in Rule 76(1)(a) or (b) are made out, and as such, no costs order is made in this matter.

Case number: 1403993/2021

Employment Judge Lowe
Date: 9 August 2022

Reasons Sent to the Parties on
19 August 2022 by Miss J Hopes

FOR THE TRIBUNAL OFFICE