



EMPLOYMENT TRIBUNALS

Claimant: S THOMAS
Respondent: Cornerstone Care Solutions Ltd
Heard at: on paper application
On: 22 September 22
Before: Employment Judge Hay

JUDGMENT ON AN APPLICATION FOR COSTS

The Background

1. The Claimant, Susan Thomas, was an accountant who responded to a job advert posted by the Respondent seeking to recruit a bookkeeper to provide remote office support to the Respondent's consultancy service. Following an in-person interview the Claimant accepted an offer to work with the Respondent's company on 5th April 2019. She worked with the Respondent's company until a date in March 2021.
2. In May 2022 I conducted a preliminary hearing at which I determined that the Employment Tribunal had no jurisdiction to hear claims brought by Susan Thomas because she was engaged by the Respondent on a self-employed basis. The hearing at which that determination was made took two days and required evidence from 4 live witnesses.
3. The Respondent subsequently requested written reasons which were provided on 4 July 2022 date. The Respondent now applies for costs against the Claimant pursuant to Rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

The Law

4. Rule 76 (1) (a) and (b) as cited by the Respondent Applicant states a Tribunal may make a costs order 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.
5. Making any such order under rule 76 (1) involves a two stage process; determining whether the conduct meets the test or that the claim had no reasonable prospect of success, and then determining whether in all the circumstances it is appropriate to make an order.
6. The making of an order and any amount awarded are discretionary.

The Respondent's Application

7. In support of their application the Respondent Applicant cites some findings of fact made at the conclusion of the hearing which they say resulted in the disposal of "all four claims" (emphasis added by the Respondent). In fact, the Tribunal determined it had no jurisdiction to hear the claims and did not determine that the claims were necessarily without merit.
8. The Respondent Applicant relies heavily upon selected parts of the Tribunal's written reasons which detail findings adverse to the Claimant and her case to support their claim for costs. They have not specified how or why they say that these findings, the making of which required a two-day hearing, equates to vexatious, abusive, disruptive, or otherwise unreasonable conduct by the Claimant or her representatives.
9. They also assert that the findings indicate the case had no prospect of success and rely on the conclusion of the Tribunal as evidence in support of that position. They also equate expressions of incredulity at aspects of the Claimant's evidence with the making of serious and unsubstantiated allegations, presumably against the Respondent, capable of amounting to unreasonable conduct.
10. I have not sought a specific response from the Claimant to this application. The possibility of an application for costs was raised in pre-hearing correspondence which was included in the hearing bundle by agreement, and so I already have an indication of the potential response from the Claimant. Rule 77 states that no costs order may be made unless the paying party has had a reasonable opportunity to make representations in response to the application. In the circumstances I do not consider it compatible with the overriding objective of the Tribunal rules to put any party to additional delay and expense by requiring a repetition of the Claimant's arguments in a formal response to the Respondent's application.

Respondent's Application

11. In my view the Respondent Applicant has wrongly equated my determination on a preliminary issue with findings entirely adverse to the Claimant and entirely in

favour of the Respondent. In focussing on any criticism of the Claimant's evidence the Respondent has entirely ignored similar criticisms which were made of their own evidence, in particular at paragraphs 13 and 14 of my written reasons.

12. The only issue at the Preliminary Hearing was whether the Claimant was self-employed or not. Any ambiguity about her status arose because of contract documents created by the Respondent which bore many of the hallmarks of an employment contract and which included the words "The offer of employment is subject to...".
13. Both parties were legally represented and so will have understood that establishing someone's employment status is not merely a documentary exercise, but one that requires consideration of all the circumstances. It was for this reason that it was necessary to receive evidence to determine the issue in this case.
14. A person pursuing the right to seek such a determination is not acting vexatiously, abusively, disruptively, or unreasonably.
15. The Respondent Applicant has not identified any other conduct which might meet the test in rule 75 (1) (a).
16. The test under rule 75 (1) (b) is different; it allows costs to be made against a party whose claim had no reasonable prospect of success. I do not believe the Claimant's case can be characterised in this way because the ambiguity about her position was created by the Respondent. As the Claimant's representative made clear in correspondence before the Preliminary Hearing the Claimant had a reply to many of the points raised in the response to the claim (see pages 123 - 126 of the Preliminary Hearing Trial bundle), all of which were justiciable.
17. I therefore conclude that the basis for awarding the Respondent's costs are not made out and no such order will be made.

Employment Judge Teresa Hay

Date: 22 September 2022

JUDGMENT SENT TO THE PARTIES ON
03 October 2022 by Miss J Hopes

FOR THE TRIBUNAL OFFICE

NOTE

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of the written record of the decision.