



EMPLOYMENT TRIBUNALS

Claimant: Brian Taylor Wilson

First Respondent: Seighford Hall Nursing Home Ltd

Second Respondent: First Blue Propco 2 Limited

Third Respondent: Thomas Butler

JUDGMENT

The Second Respondent's application for costs is refused.

REASONS

1. The case was heard by me on 19 and 20 April 2022 and I reserved Judgment to 12 May 2022. I determined the Claimant was employed by the First Respondent and I dismissed the claims against the Second and Third Respondent. I upheld the claims for unlawful deductions from wages, and for holiday pay and made a financial award. I also upheld the complaint of unfair dismissal but ordered nil compensation. I dismissed the complaint of wrongful dismissal.
2. My Judgment was sent to the parties on 17 May 2022.
3. On 9 June 2022 the solicitors for the Second Respondent made an application for costs in writing and copied to the Claimant. This was referred to me. I directed the Tribunal to ask the Claimant for any response and to confirm whether he was content for me to decide the application on the papers i.e. without a hearing. The Claimant agreed for me to deal with the application on the papers and on 6 July 2022 he provided a response to the costs application and documents in support. On 26 July 2022, the Second Respondent's solicitor provided supplemental submissions and supporting documents.
4. Rule 76 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides "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 proceedings (or part) or the way that the proceedings (or part) have been conducted; or

b) Any claim or response has no reasonable prospects of success”.

Rule 78 provides

“A costs order may –

a) Order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party.”

5. The Second Respondent seeks an order for payment of £13621.50 plus VAT, being costs incurred by its solicitors and Counsel after 1 February 2022.
6. In Gee v Shell UK Ltd (2003) IRLR 82, the Court of Appeal confirmed that costs in employment Tribunal proceedings are the exception not the rule.
7. In J v K v L (2002) EAT 131, the Employment Appeal Tribunal (at paragraph 18 of the Judgment) set out 3 stages to be considered in relation to Rule 76 (1)(a)
 - d) Has the Claimant acted in the way set out in Rule 76 (1)(a)
 - b) If so, the Tribunal must consider whether to exercise its discretion to make a costs order. Robinson v Hall Gregory Recruitment Ltd (2014) IRLR 761, EAT.
 - c) If the Tribunal decides to exercise its discretion to make a costs order, it must consider what sum the Claimant should be ordered to pay.
8. Thus in relation to questions b. and c. above the Tribunal has a discretion. This is a wide and unfettered discretion. It is for the Respondent in this case to satisfy question a. above, i.e. that the Tribunal has jurisdiction to make a costs order and if it does, it is for the Tribunal to satisfy itself that it should exercise its discretion.
9. In cases (such as this) where an argument is made that the Claimant acted unreasonably “the Tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion” per Mummery LJ in McPherson v BVP Paribas (London Branch) (2004) ICR 1398, CA.
10. I had written submissions from both parties. I did not intend to set these out in full but rather to summarise the arguments put forward.
11. The Second Respondent’s position is that the Claimant’s actions were unreasonable because the unfair and wrongful dismissal claims had little or no reasonable prospect of success, that in bringing and/or continuing proceedings against the Second Respondent the Claimant acted unreasonably, that in ignoring costs warnings made the Claimant acted unreasonably, that the Claimant adopted an unreasonable stance in pre-trial settlement negotiations

and, finally, the Claimant behaved unreasonably in the final hearing by adopting a stance that the evidence against him was fabricated and by providing false explanations.

12. The Second Respondent submits that the Judgment I gave demonstrates the First Respondent formed a reasonable belief in the Claimant's guilt (as regards the misconduct allegations) and that the Claimant offered dishonest explanations for his conduct at trial, including suggesting all evidence was fabricated. The Tribunal in its Judgment found the Claimant's actions and conduct were blameworthy. The Second Respondent's solicitor wrote to the Claimant on 21 February 2022 by way of 'without prejudice save as to costs'. In this letter it was asserted that the 'claim' (undefined, there in fact being a number of claims) had 'no reasonable prospect of success' and that the Claimant 'had behaved unreasonably' in bringing the claim. The offer made was that the Claimant withdraw 'all outstanding claims' by 4pm on 7 March 2022 failing which on application for costs would be made. The Second Respondent repeated this warning on 16 March 2022.
13. The Second Respondent contends that the Tribunal should not take account of the Claimant's means given the Claimant ignored costs warnings and it being the case the Second Respondent is not seeking to recover all of its costs, just those incurred from 1 February 2022.
14. In the Claimant's written submissions, he argues that the issues at the trial were complex, involving the Tribunal having to decide which of the 3 Respondents was in fact the Claimant's employer at the relevant time. The First and Third Respondent did not respond to the claim. The Claimant argues that the Tribunal was required to consider somewhat complex TUPE arrangements. He also refers to the fact his dismissal was found to have been unfair.
15. The Claimant argues that 2 of his claims succeeded in terms of a financial award, those for holiday pay and unlawful deduction from wages.
16. The Claimant argues that he was not dishonest at trial and refers me to the fact he was unable to obtain a witness statement to support him from Mr Shah. He asks why the Second Respondent is seeking its costs from 1 February 2022 when the costs warning letter referred to above was dated 21 February 2022 and had a response time of 7 March 2022, such that only costs after that deadline should be pursued. He raises questions about the hourly rates and calculation of the Second Respondent's costs.
17. The Claimant sets out details of his means and says these should be taken into account.
18. I had supplemental submissions in writing from the Second Respondent. It argued success in the money claims did not justify the bringing of the other claims and that the unfair dismissal 'win' was a pyrrhic victory given my findings of 100% reduction in any compensation. It answered the Claimant's questions about hourly rates and calculations.

CONCLUSIONS

19. The first question for me is whether the Claimant acted in the way the Second Respondent contends i.e., is the threshold in Rule 76(1)(a) met. The Second Respondent firstly argues that the claims for unfair and wrongful dismissal against it has no reasonable prospects of success and/or that in bringing and continuing proceedings against the Second Respondent, the Claimant acted unreasonably. I do not accept this to be the case. Firstly, there was an argument that I had to determine as to who in fact was the employer. The trading relationships were complex and had to be examined. In June 2022 the Second Respondent had purchased the shares in the First Respondent and the Third Respondent had been a director of both companies. I find it was right of the Claimant to bring proceedings against all 3 Respondent's as he did not know who his employer was. The Second Respondent was rightly a party to the proceedings until the identity of the employer was determined and this was not done until the final hearing. It is perhaps unfortunate that an early Open Preliminary Hearing was not sought to determine who was the employer, which would have released the Second Respondent from the proceedings. I agree that the claim of wrongful dismissal did not succeed and that the claim of unfair dismissal did succeed but with no compensation awarded. It cannot be said the unfair dismissal claim had no reasonable prospects of success given the Claimant succeeded in this head of claim. It is the case that the award of compensation was nil, however this was a matter that required to be tested at trial where evidence could be given regarding Polkey and contributory fault deductions. A similar point can be made as regards the wrongful dismissal claim. I did not find the threshold (of no reasonable prospects of success) is met.
20. Turning next to whether threshold is met with regards to the ignoring of costs warnings and the alleged adoption of an unreasonable stance in pre-trial settlement negotiations. Again, I find the Claimant did not act unreasonably. The Second Respondent made an offer to the Claimant that he withdraw all claims against it or face a costs application. The Claimant chose to press on. For reasons already outlined above, there was an issue to be resolved as to who was the Claimant's employer, and this was only resolved at trial. It was the case I found that the Second Respondent was not the Claimant's employer, however this was an issue that was in play until trial. The Claimant went on to succeed in some of his claims and was awarded compensation. I do not therefore find that it was unreasonable for him to ignore the Second Respondent settlement offer or costs warning.
21. On the issue of whether the Claimant acted unreasonably in his evidence at trial, it is not at all unusual for Claimants in unfair dismissal claims to dispute that they have committed misconduct. The Claimant here was a litigant in person, albeit assisted by his wife. He did contest the allegations that led to his dismissal, and he did suggest they were fabricated. Having heard from the witnesses, and listed carefully to cross-examination and submissions, I

preferred the Respondent's evidence as to the allegations of misconduct however found there to have been procedural failings such that the unfair dismissal claim succeeded. At paragraph 84 of my Judgment, I recorded that the Claimant was 'not credible in his explanations...this behaviour was blameworthy'. I do not however accept that the Claimant behaved unreasonably. He was entitled to bring these claims, some of which were successful, and he was entitled to put forward his case. The fact that in many (although, not all) circumstances I preferred the evidence of the Respondent does not make the Claimant's presentation of his version of events unreasonable.

22. For the reasons above, I refuse the Second Respondent's application for costs.

Employment Judge Hindmarch
22 September 2022