EMPLOYMENT TRIBUNALS

Claimants: Ms B Alexander (1) - 1402342/2021
Mr A Alexander (2) - 1402343/2021
Miss M Alexander (3) - 1402344/2021

Respondents: Ms S Alexander (1)
Mr P Johnson (2)
Both Trading As St Kitts Herbery (A Firm)

Heard at: Bristol (By VHS) **On:** 30 September 2022

Before: Employment Judge Cuthbert

Appearances:

For the Claimants: In Person (represented by Ms B Alexander)
For Respondent (1): In Person
For Respondent (2): Mr G Probert - Counsel

RESERVED JUDGMENT ON COSTS

The second respondent's application for costs fails and is dismissed.

REASONS

Introduction

1. The hearing came before me to determine a costs application by the second respondent against the claimants and the first respondent, following my earlier decision on liability in his favour.

2. The hearing was conducted with the parties attending by VHS. It was held in public. It was conducted in that manner without objection by the parties and because to do so met the overriding objective.

3. The claimants were jointly represented by the first claimant, Ms Betty Alexander; the first respondent appeared in person; and the second respondent was represented by Mr Probert of counsel. I was provided with a bundle of documents by the second respondent (142 pages including pleadings and my earlier decision) and a further bundle of submissions and supporting documents was adduced by the claimants (33 pages). I also received various other written submissions, referenced below.

4. The costs hearing was listed for three hours including judgment. Unfortunately, the start of the hearing was delayed by 40 minutes due to an issue with some participants not having received a link to join the hearing. There was a further 15-minute delay during the hearing because I had not received (or therefore read in advance) a four-page witness statement and five-page written submission from the first respondent. As such, in view of the limited hearing time remaining after briefly hearing evidence and then hearing three sets of oral submissions (and given the significant likelihood of written reasons being requested in any event) I decided to reserve judgment and explained I hoped this would be completed and sent out swiftly.

Background

5. The claimants brought various claims against the respondents, in particular for redundancy payments and for unlawful deductions from wages. The case came before me for a three-day hearing, via VHS, on 21, 22 and 23 March 2022. The claimants were represented by a solicitor, the first respondent appeared in-person, and the second respondent was represented by Mr Probert. It should be noted that the claimants are three siblings; the first and second respondents are their parents, who were and continued to be in the course of an exceedingly acrimonious and difficult divorce.

6. Judgment on liability and reasons were reserved (save that the wages claim was withdrawn at the end of the hearing), due to the unusual and complex nature of the case, and were sent out on 29 April 2022. The claimants' claims were dismissed, in particular because I found on the facts that there was no dismissal and there had, instead, been a TUPE transfer, by operation of law, of the claimants' contracts of employment to a new business which the first and second claimants had set up following the cessation of trading of the respondents' partnership.

7. I have not referred in detail below to the findings I made at the earlier hearing as they are set out fully in the reasons, which are publicly available.

The second respondent's application for costs

8. On 27 May 2022, the respondent lodged an application with the tribunal for costs against the claimants and first respondent.

9. In its costs application, the respondent submitted that the claimants' claims (1) had no reasonable prospect of success and (2) that the claimant and first respondent had acted vexatiously and unreasonably in bringing and conducting the proceedings.

10. The costs application was set out more fully in a written submission from Mr Probert for the costs hearing (14 pages) and supplemented by him with an oral submission. I had full regard to these submissions in reaching my decision.

11. In summary, the main points asserted on behalf of the second respondent were that:

    a. The claimants and the first respondent had colluded against the second respondent. It was said that the claimants' tribunal claims were a sham and an attempt to obtain an unjust windfall; they were vexatious and an abuse of process.

    b. The claimants' and the first respondent's evidence about the change in the businesses from the former partnership to the new business of the first and second claimants, to the effect that there had been a lack of co-ordination and co-operation between them, had not been accepted by the tribunal. The pursuit of the claims in the knowledge and face of that underlying factual position, a position which the claimants and the first respondent knew, was unreasonable. The claims also had no reasonable prospects of success in the face of that evidence. In his oral submissions, Mr Probert emphasised in particular that the claims submitted to the tribunal made no mention of the starting up of the new business and he said that was telling.

    c. He submitted that the claimants' unlawful deductions of wages claims had no reasonable prospects of success and were not withdrawn until closing submissions in the liability hearing. It was unreasonable to pursue those claims given the lack of any proper basis for them and in the absence of particularisation of the sums sought.

    d. The claimants present means were limited but, he submitted, I should have regard to their potential future financial positions. The first respondent also had a substantial financial interest in the matrimonial home.

12. The second respondent sought to recover the legal costs he had incurred to prepare for and attend the tribunal hearing, on a joint and several liability basis against the claimants and their mother, the first respondent. The entire legal

costs incurred were said to be £26,041 including VAT and were set out in a schedule of costs.

The claimants' and the first respondent's responses to the costs application

13. The claimants and the first respondent each adduced individual schedules of income, expenditure and debts and the first respondent also submitted a four-page witness statement. In summary, each presently had either had less than £100 per month of net disposable income or in fact no net disposable income at all. Each also indicated various debts. The second respondent did not challenge the figures, although Mr Probert did indicate that he considered most of the first respondent's witness statement to be irrelevant to the issues to be determined at the costs hearing (which it was).

14. Only the first respondent gave oral evidence on the issue of means, as Mr Probert did wish to challenge her assertion that her joint interest in the matrimonial home was unlikely to be realised. The precise value of the home was in some dispute, it was likely to be sold at some point in the near future (possibly by the bank via possession proceedings, I was told). The first respondent maintained her position under cross examination that she believed that the sale proceeds would not come to her, because they would be placed into the hands of the second respondent.

15. In terms of the substantive basis of their opposition to the costs application, the claimants submitted their own joint written response (four pages), the first respondent submitted a five-page written submission and the claimants also adduced a six-page written response to the costs application, drafted by the solicitor who had represented them at the liability hearing.

16. The claimants' and first respondent's main points, in summary, were that:

    a. the claimants had genuinely believed in their claims and the first respondent thought they were correct (she had been unrepresented throughout) and so had not opposed them. They were not brought with any improper motives. The fact that the tribunal did not accept their evidence about the setting up of the new business, on the balance of probabilities, should not lead to costs consequences;

    b. the second respondent had not engaged with grievances or with ACAS early conciliation;

    c. the case was an unusual one, a hearing was needed to determine the issue, including a reserved judgment, due to the complexity of the issues;

    d. the second respondent had himself raised and run with an argument as to his potential liability for proceedings, both at a PH and at the substantive hearing, which was rejected, wasting time and costs;

    e. the amount of costs claimed by the second respondent was excessive and disproportionate;

f. the claimants and the first respondent had no funds available to meet any costs award; and

g. the costs application was part of a *"vendetta"* by the second respondent against the claimants and the first respondent.

17. Both Betty Alexander and the first respondent made emotive oral submissions about the impact which events in the case and its complex surrounding circumstances had upon them. In reaching my decision below, I had regard to matters which were relevant to the legal tests which I needed to apply and I did not have regard to other matters raised before me.

Relevant law

18. The employment tribunal is a different jurisdiction to the county court or high court, where the normal principle is that *"costs follow the event"*, or in other words, the loser pays the winner's costs.

Costs generally

19. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 contain the relevant rules to be applied by employment tribunals, and for present purposes these are as follows:

- Rule 74(1) - "Costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purposes of or in connection with attendance at a tribunal hearing).

- Rule 76

  (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) had been conducted; or

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

- Rule 77 - A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party, was sent to the parties. No such order may be made unless the paying party has had a

reasonable opportunity to make representations (in writing or at a hearing, as the tribunal may order) in response to the application.

- Rule 78(1)(a) A costs order may 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.

- Rule 84 - In deciding whether to make a costs, preparation time or wasted costs order and if so in what amount, the tribunal may have regard to the paying party's ability to pay.

20. Costs in employment tribunals have long been, and remain, the exception rather than the norm. Lord Justice Sedley in *Gee v Shell UK Limited* [2002] IRLR 82 stated as follows: *"A very important feature of the employment jurisdiction that it is designed to be accessible to people without the need of lawyers, and that – in sharp distinction from ordinary litigation in the United Kingdom – losing does not ordinarily mean paying the other side's costs"*. That said, the facts of a case need not be exceptional for a costs order to be made. The question is whether the relevant test is satisfied (*Vaughan v London Borough of Lewisham and others* [2013] IRLR 713).

21. The discretion afforded to a tribunal to make an award of costs must be exercised judicially (*Doyle v North West London Hospitals NHS Trust* UKEAT/0271/11/RN. The tribunal must take into account all of the relevant matters and circumstances. The tribunal must not treat costs orders as merely ancillary and not requiring the same detailed reasons as more substantive issues. Costs orders may be substantial and can thus create a significant liability for the paying party. Accordingly, they warrant appropriately detailed and reasoned consideration and conclusions. Costs are intended to be compensatory and not punitive.

The process for determining costs applications

22. The EAT in *Haydar v Pennine Acute NHS Trust* UKEAT/0141/17 held that the determination of a costs application is essentially a three-stage process (per Simler J at [25]) (emphasis added):

> *The words of the Rules are clear and require no gloss as the Court of Appeal has emphasised. They make clear (as is common ground) that there is, in effect, a three-stage process to awarding costs.*
>
> *The first stage - stage one - is to ask whether the trigger for making a costs order has been established either because a party or his representative has behaved unreasonably, abusively, disruptively or vexatiously in bringing or conducting the proceedings or part of them, or because the claim had no reasonable prospects of success.*
>
> *The trigger, if it is satisfied, is a necessary but not sufficient condition for an award of costs. Simply because the costs jurisdiction is engaged, does not mean that costs will automatically follow. This is because, at the second stage - stage two - the Tribunal must consider whether to*

> *exercise its discretion to make an award of costs. The discretion is broad and unfettered.*
>
> *The third stage - stage three - only arises if the Tribunal decides to exercise its discretion to make an award of costs, and involves assessing the amount of costs to be ordered in accordance with Rule 78.*

Unreasonable conduct (rule 76(1)(a))

23. For the purposes of rule 76(1)(a) above, "unreasonable" has its ordinary meaning; it is not equivalent to "vexatious" (*Dyer v Secretary of State for Employment* UKEAT/183/83).

24. In *Yerraklava v Barnsley MBC* [2012] IRLR 78 Mummery LJ gave the following guidance at [41] (referring to his earlier decision in *McPherson v BNP Paribas*) including as to the question of causation in the context of unreasonable conduct and related costs claimed:

> *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 bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. The main thrust of the passages cited above from my judgment in McPherson was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the ET had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances.*

25. In *Daleside Nursing Home Ltd v Mathew* UKEAT/0519/08, the EAT said that where there was a *"clear-cut finding that the central allegation ... was a lie, it is perverse for the tribunal to fail to conclude that the making of such a false allegation at the heart of the claim does not constitute a person acting unreasonably."* However, in *Kapoor v The Governing Body of Barnhill Community High School* UKEAT/0352/13, the EAT found that a tribunal had misdirected itself in its approach to the question of costs, because it considered that the simple fact that a claimant had lied meant that she had conducted the proceedings unreasonably; it should instead have considered all the circumstances of the case, including the procedural history and the extent to which the claimant's lies had made a material impact on its actual findings. I was also referred to the following authorities about untruthful evidence and costs by Mr Probert and had regard to them: *HCA international v May Bheemul* and *Arrowsmith v Nottingham Trent University*.

26. I was also referred by Mr Probert to *Davidson v John Calder Publishers Ltd and Anor* [1985] IRLR 97 EAT for the principle that conduct in bringing or defending

a claim, not conduct before proceedings, is relevant to the issue of unreasonable conduct.

Acting vexatiously (rule 76(1)(a))

27. The meaning of the word, *"vexatious"* has been the subject of a number of reported cases. In *Attorney General v. Barker* [2000] 1 FLR 759, Bingham CJ described the hallmark of vexatious proceedings as being that it had: *"Little or no basis in law (at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and it involves an abuse of the process of the court, meaning a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process"*. In *Ashmore v. British Coal Corporation* [1990] ICR 485 the Court of Appeal observed that whether a case was vexatious depended on all the relevant circumstances of the case.

28. In *Marler Ltd v Robertson* [1974] ICR 72, NIRC the National Industrial Relations Court stated that *"If an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive, he acts vexatiously."*

29. Simply being *"misguided"*, or even *"seriously misguided"* is not sufficient to establish vexatious conduct — *AQ Ltd v Holden* [2012] IRLR 648, EAT at [38].

No reasonable prospect of success (rule 76(1)(b))

30. On the question of a claim having no reasonable prospect of success, for the purposes of rule 76(1)(b) above, under the previous tribunal rules, a "misconceived" claim was synonymous with a claim having no reasonable prospect of success. In *Scott v Inland Revenue Commissioners* [2004] ICR 1410, CA, Lord Justice Sedley observed that "misconceived" for the purposes of costs under the Tribunal Rules 2004 included *"having no reasonable prospect of success"* and clarified that the key question in this regard is not whether a party thought he or she was in the right, but whether he or she had reasonable grounds for doing so. The issue is not whether the claim was *"genuinely brought"* or the claimant genuinely believed in it - see *NPOwer Yorkshire Limited v Daly* and *Vaughan* (above).

31. In *Radia v Jefferies International Ltd* [2020] IRLR 431 the EAT gave guidance on how tribunals should approach costs applications under rule 76(1)(b). It emphasised that the test is whether the claim had no reasonable prospect of success, judged on the basis of the information that was known or reasonably available at the start. Thus, the tribunal must consider how, at that earlier point, the prospects of success in a trial that was yet to take place would have looked. In doing so, it should take account of any information it has gained, and evidence it has seen, by virtue of having heard the case, that may properly cast light back on that question, but it should not have regard to information or evidence which would not have been available at that earlier time. The EAT went on to clarify that the mere existence of factual disputes in the case, which could only be resolved by hearing evidence and finding facts, does not

necessarily mean that the tribunal cannot properly conclude that the claim had no reasonable prospects from the outset, or that the claimant could or should have appreciated this from the outset. That still depends on what the claimant knew, or ought to have known, were the true facts, and what view the claimant could reasonably have taken of the prospects of the claim in light of those facts.

32. In *Radia* the EAT also considered the overlap between a claim or response having no reasonable prospect of success and unreasonable conduct and stated as follows at [64]:

> *This means that, in practice, where costs are sought both through the rule 76(1)(a) and the rule 76(1)(b) route, and the conduct said to be unreasonable under (a) is the bringing, or continuation, of claims which had no reasonable prospect of success, the key issues for overall consideration by the Tribunal will, in either case, likely be the same (though there may be other considerations, of course, in particular at the second stage). Did the complaints, in fact, have no reasonable prospect of success? If so, did the complainant in fact know or appreciate that? If not, ought they, reasonably, to have known or appreciated that?*

33. The means of a paying party in any costs award may be considered twice – first in considering whether to make an award of costs and secondly if an award is to be made, in deciding how much should be awarded. If means are to be taken into account, the tribunal should set out its findings about ability to pay and say what impact this has had on the decision whether to award costs or an amount of costs (*Jilley v Birmingham & Solihull Mental Health NHS Trust* UKEAT/0584/06).

Conclusion

34. I have applied the relevant law summarised above to the specific position in the present case, mindful that I have a broad but not unfettered discretion on issues of costs. In terms of the first part of the *Haydar* test, I have considered the redundancy pay claims separately to the unlawful deductions of wages claims.

35. The question is whether in either case the second respondent has overcome the hurdle of establishing that the claimants and the first respondent acted unreasonably or vexatiously in the bringing or conduct of the proceedings or that the claims had no reasonable prospect of success.

The redundancy claims – rule 76(1)(b) and reasonable prospects of success

36. This was a very unusual case**.** There were significant facts in dispute which were relevant to determining whether or not the claimants had been dismissed for the purposes of a redundancy payment and whether or not there had been a TUPE transfer and/or a dismissal of the claimants.

37. There were a limited number of documents on these issues at the substantive hearing, or seemingly in existence, which were directly relevant to the key issues in dispute and so I had to base my findings of fact largely upon the witness testimony. For the reasons given in the substantive decision dated 12

January 2022, I came down, on the balance of probabilities, on the side of the second respondent on the main factual disputes around the setting up of the new business and as to whether there had been co-operation and co-ordination between the claimants and the first respondent in that process (paras 68 and 69 of the reasons). Those findings were not, however, fatal to the claimants' claims and were only arrived at after detailed oral evidence and extensive cross examination. A different tribunal could potentially have reached a different conclusion on the evidence.

38. I later set out in my reasons, at para 134, why I found that there had been a TUPE transfer to the new business, and so therefore no dismissals had occurred. The factors which I weighed up were open to interpretation and argument (as opposed to pointing overwhelmingly in the second respondent's favour). They required determination after hearing oral evidence from the relevant witnesses. Again, another tribunal may have weighed up those matters and reached a different conclusion.

39. I am therefore not satisfied that the claims for redundancy payments were entirely hopeless or were claims without a reasonable prospect of success. I am also not satisfied that the claimants had appreciated those matters at any time prior to the hearing, or that they ought reasonably to have done so.

The redundancy claims - vexatious or unreasonable conduct (rule 76(1)(a))?

40. I also do not accept the submission that the claimants or the first respondent acted unreasonably or vexatiously in bringing the claims for redundancy pay. This was plainly a very unusual and sad factual situation involving the extremely difficult breakdown, for all involved, of a family relationship and business.

41. I did find that there was contact and interaction between the claimants and the first respondent with a view to carrying on the family business in a new form, but that in itself did not necessarily preclude there having been dismissals when the previous business ceased trading or invariably lead to the finding that there had been a TUPE transfer of the claimants' employment to the new business. Those matters were only determined after hearing all of the evidence and could not have been known beforehand to the claimants or the first respondent.

42. I do **not** find that the tribunal proceedings were a sham, in effect a proxy war with the second respondent engineered between the claimants and the first respondent, as had been asserted on behalf of the second respondent. The evidence before me at the liability hearing as to likely co-operation between the claimants and the first respondent went no further than suggesting that there had been co-ordination around matters such as the date on which trading started in the new business and in directing customers from the old business to the new one going forwards.

The unlawful deductions from wages claims

43. The claims for unlawful deductions from wages were pursued on behalf of the claimants until near the end of the liability hearing, but simply did not get off the ground. That is very clear from paragraphs 12 – 14 of the reasons and the

claims would invariably have been dismissed had they not been withdrawn. The claimants were unable to particularise the sums claimed and rather the claims appeared to be an attempt to obtain a finding from the tribunal as to what sums of tax and national insurance were due on amounts paid gross to the claimants, which was not a remedy available to them. As such, I **do** find that these claims had no reasonable prospect of success and that the pursuit of them was unreasonable conduct.

The second stage of the Haydar test – the exercise of discretion

44. Given my findings above, the second respondent's application for a costs order, save in respect of the unlawful deductions claims, fails at the first stage.

45. I have considered the second stage, and the broad discretion available to me, and have decided **not** to exercise that discretion in the respondent's favour in respect of the wages claim (and would have reached the same conclusion on the redundancy payment claims had they reached this stage). My reasons are as follows:

    a. Costs remain the exception rather than the rule in the tribunal.

    b. I was mindful again of the very unusual nature of the case and of the possibility that a different tribunal could have arrived at a different outcome on the facts which were before me. As Sir Hugh Griffiths observed in *Marler v Robertson* [1974] ICR 72: *"Ordinary experience of life frequently teaches us that that which is plain for all to see once the dust of battle has subsided was far from clear to the contestants when they took up arms"* and that statement is apposite here.

    c. Insofar as the first respondent is concerned, in terms of not opposing the claims, she was unrepresented throughout, and so she relied upon the fact that the claimants, in pursuing the claims, were legally represented at the liability stage. She reasonably inferred from that position that the claims were viewed as having some merit by the claimants' legal advisors.

    d. The unlawful deduction of wages claim, whilst having no reasonable prospect of success and being a claim which should not have been pursued for the reasons above, took up relatively little time at the substantive hearing of the case, involved only limited evidence and was ultimately withdrawn. At least an equivalent amount of time was spent dealing with a point raised on behalf of the second respondent as to his potential liability (paras 75 - 84, 105 – 107, 127 - 132 of the reasons) which I firmly rejected on the basis that I could see *"no lawful or legitimate basis"* as to why the provisions of the Partnership Act 1890 should not apply to the second respondent.

    e. I had regard the claimants' and first respondent's limited means and very low levels of disposable income, in two cases they had none at all. There was no evidence to suggest that their income/expenditure positions were likely to materially change in the foreseeable future. Whilst the first

respondent does maintain an interest in the matrimonial home, there was considerable uncertainty about what that asset might realise, when it might be realised and no evidence to contradict the first respondent's unchallenged schedule which indicated that she had substantial debts in excess of £100,000 (mainly legal fees).

46. In light of the above, the second respondent's application for costs is refused and is dismissed accordingly.

3 October 2022

Sent to the parties on
07 October 2022
By Mr J McCormick

For the Tribunal Office