Case No: 2305757/2021

EMPLOYMENT TRIBUNALS

Claimant: Mr. W Poucher

Respondent: Old St Labs Limited

Heard at: **London South Employment Tribunal (by CVP)**
On: **1 February 2023**

Before: **Employment Judge Macey**

Representation
Claimant: In person
Respondent: Mr. Anderson, counsel

JUDGMENT on **COSTS** having been sent to the parties on **1 February 2023** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

APPLICATION

1. On 16 December 2022, the respondent submitted an application for costs against the claimant.

2. In its costs application, the respondent submitted (1) that part of the claimant's claim had no reasonable prospect of success and (2) that the claimant had acted unreasonably in the conduct of the proceedings. The respondent asserted variously within the costs application that:

    a. The share options part of the unlawful deduction from wages claim never had a reasonable prospect of success from the start.
    b. That the claimant did not seek timely legal advice after a Without Prejudice Save As To Costs letter dated 10 March 2022 (and the claimant had told ACAS that he would seek legal advice).
    c. That if the claimant had instructed solicitors earlier (he waited until 14 November 2022 to instruct solicitors) the claimant would have withdrawn his claims earlier.

3. The respondent sought to recover the legal costs it incurred by its solicitors and counsel fees after 10 March 2022. The entire legal costs incurred from 10 March 2022 were said to be £14,786 plus VAT. The respondent did not apply for the costs it had incurred prior to 10 March 2022.

4. A bundle of documents was agreed for the costs hearing (105 pages), including:

    a. A Without Prejudice Save As To Costs letter dated 10 March 2022 [48-50].
    b. An email to ACAS from the claimant dated 24 March 2022 [51].
    c. Another Without Prejudice Save As To Costs letter, dated 6 January 2023 [67-68].
    d. The claimant's response to the January 2023 WPSATC letter dated 13 January 2023 [70-71].

CLAIMANT'S RESPONSE

5. On 16 January 2023, the claimant submitted his written response to the respondent's costs application.

6. He stated (in summary) that:

    a. Throughout he has always been honest, courteous, co-operative and timely.
    b. That he did not instruct solicitors because he felt able to navigate the entire employment tribunal process up to a hearing.
    c. That he had every intention to either reach a settlement or represent himself at a final hearing.
    d. As to there being no reasonable prospects of success the WPSATC letter dated 10 March 2022 did not provide a costs warning towards one part of the unlawful deduction from wages claim, but rather was general and applicable to both parts of the claim.
    e. Given the complexity of the concept of "wages" for the purposes of the ERA it could not be said with certainty that the claimant had no reasonable prospects of success.
    f. The respondent has not prepared a schedule of costs.

7. The claimant also prepared a witness statement for the costs hearing on 1 February 2023.

RELEVANT BACKGROUND FACTS

8. The claimant presented a claim for unlawful deduction from wages on 7 December 2021. There were two parts to the unlawful deduction from wages claim, one part related to share options and the other part concerned a salary increase.

9. The respondent submitted its ET3 and Grounds of Resistance on 13 January 2022. The claimant had been living in Austria for part of his employment with the respondent. In its Grounds of Resistance, the respondent stated, "*The respondent believes that the Tribunal has jurisdiction to hear the claimant's claim. The claimant was paid in pounds sterling, from which the respondent deducted tax and national insurance contributions*".

10. The claimant had moved to the USA. In line with Presidential Guidance the claimant raised his location with the tribunal on multiple occasions between May 2022 and November 2022.

11. The final hearing was originally listed for 12 May 2022. The respondent requested a delay to the final hearing on 10 May 2022 and also requested that the hearing on 12 May 2022 be converted to a preliminary hearing for case management and to hear the respondent's strike-out application. The tribunal postponed the hearing on 12 May 2022 so that the claimant could receive clearance to provide evidence remotely from the USA and did not convert the final hearing to a preliminary hearing.

12. The final hearing was re-listed for 7 July 2022 and was postponed again on the respondent's request.

13. The claimant instructed solicitors on 14 November 2022. After instructing solicitors the claimant on 18 November 2022 withdrew the part of the unlawful deduction from wages claim relating to the share options so that he could pursue that part of the claim in the civil jurisdiction.

14. The final hearing started on 21 November 2022 and when I raised the territorial reach issue for the claim of unlawful deduction from wages the claimant decided (on advice from his legal representatives) to also withdraw the other part of the claim relating to the salary increase.

LAW

15. The employment tribunal is a different jurisdiction to the county court or high court. In those jurisdictions the normal principle is that "costs follow the event", or in other words, the loser pays the winner's costs. That is not the position in the employment tribunal.

16. The Employment Tribunals Rules 2013 contain the relevant rules to be applied by employment tribunals, and for present purposes these are as follows:
    a. Rule 76 (1) A tribunal may make a costs 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.

b. Under rule 76(2) of the Employment Tribunals Rules a tribunal has the discretionary power to make a costs order against a party who has breached an order or Practice Direction.
c. Rule 77 - A party may apply for a costs 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.
d. 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.

17. The respondent's application in the present case is made on the grounds in Rule 76(1)(a) and Rule 76(1)(b) above.

18. Costs orders 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 is 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."*

19. 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**).

20. 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 are intended to be compensatory and not punitive.

21. 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."*

22. 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**).

23. In **Yerraklava v Barnsley MBC [2012] IRLR 78** Mummery LJ gave the following guidance at [41] 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 … 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."

Stage one of the Haydar process

24. On the question of a claim (or part of a claim) having no reasonable prospect of success, for the purposes of rule 76(1)(b), under the previous tribunal rules, a "misconceived" claim was synonymous with a claim having no reasonable prospect of success.

25. In **Scott v Inland Revenue Commissioners [2004] ICR 1410, CA,** Lord Justice Sedley observed that "misconceived" for the purposes of costs under the Employment Tribunals 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.

26. In **Radia v Jefferies International Ltd [2020] IRLR 431** the EAT gave guidance on how tribunals should approach costs under rule 76(1)(b). It emphasised that the test is whether the claim or response 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.

27. The EAT went on in **Radia** 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.

28. There has been case law that has held that there is no obligation to instruct solicitors in bringing or pursuing proceedings in the employment tribunal and a failure to instruct solicitors until later in the proceedings will not constitute unreasonable conduct even if time and money would have been saved by instructing them earlier (**Larwood -v- Earth Tronics Inc Ltd EAT0558/03**).

29. It also been held that it is not unreasonable conduct per se for a claimant to withdraw a claim just before it proceeds to a final hearing - **McPherson BNP Paribas (London branch) [2004] ICR 1398 Court of Appeal.** Here the Court of Appeal held that the critical question in this regard is whether the claimant withdrawing the claim has conducted the proceedings unreasonably, not whether the withdrawal of the claim itself is unreasonable.

Stage two of the Haydar process

30. In terms of the more general exercise of discretion at the second stage, the fact that a party is unrepresented is a relevant consideration. The threshold tests may be the same whether a party is represented or not, but the application of those tests should take account of whether a litigant has been professionally represented or not (**Omi v Unison UKEAT/0370/14/LA**).

31. A litigant in person should not be judged by the same standards as a professional representative as lay people may lack the objectivity of law and practice brought to bear by a professional adviser and this is a relevant factor that should be considered by the tribunal (**AQ Limited -v- Holden [2012] IRLR 648.**

32. 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**).

CONCLUSIONS

33. Having considered the law above against the respondent's application I'm going to consider firstly whether the claim (in part) had no reasonable prospect of success.

34. Given that I have not actually heard the case at a final hearing, did not make any findings of fact and did not look at the law in detail this is obviously more difficult for me to assess than if I had actually heard the case.

35. But I have concluded that the respondent has not overcome the first hurdle of establishing for the purpose of its application for costs that the claim in part had no reasonable prospects of success.

36. The definition of wages under section 27 of the Employment Rights Act 1996 (ERA) is not as simple as the respondent has submitted. Section 27 is quite wide, section 27(1) of the ERA defines wages as "*any sum payable to the worker in connection with his employment*" and indeed there are parts of section 27 of the ERA, as Mr. Poucher submitted, that are not actually a sum in numerical terms, they have to be calculated to discover their numerical value.

37. There is a lack of case law in this area. There is no case authority on whether share options fall within section 27(1) of the ERA. The only case that is similar is **Nosworthy -v- Instinctif Partners Ltd EAT 0/100/18** and this case was about shares and loan notes. The EAT held that the shares and loan notes could be said to be payable in connection with Ms. Nosworthy's employment. But then on the facts of that case it was taken outside of Section 27(1) of the ERA by virtue of Section 27(2)(e) of the ERA because the payment was made otherwise than in her capacity as a worker. The EAT felt able to hold that loans and share notes could indeed fall within Section 27(1) of the ERA, but in this case on the facts the shares and loans were held to be deferred consideration for Ms. Nosworthy's sale of shares to the company previously.

38. I note what Mr. Anderson has submitted regarding that this is a property claim and that the employment tribunal has no jurisdiction. But I also note that shares and loan notes are also property. That is why in the civil jurisdiction it is possible to apply for a charging order over shares if someone owes you money on for a Judgment in the civil jurisdiction. The EAT felt able to hold that the shares and loan notes could be said to be payable in connection with Ms. Nosworthy's employment and then took it out of the scope of wages by holding that on the facts it fell under section 27(2)(e) of the ERA.

39. I also did not decide this issue at the hearing on 21 November 2022 nor did the tribunal convert the final hearing to a preliminary hearing at an earlier hearing (12 May 2022) to consider the strike out as requested by the respondent.

40. Certainly, the tribunal would not have been able to order that the respondent allow the claimant to retain all the vested share options, that would not have been an option open to the tribunal. There is, however, guidance from breach of contract claims on the valuation of share options and representations would have been made by both parties as to how the tribunal could have calculated the monetary value on the sum owed.

41. The tribunal would have been breaking new ground in this case by holding that share options were wages, but just because the tribunal would have been breaking new ground it does not necessarily follow that the claim had no reasonable prospect of success.

42. There was always going to be a greater chance that this part of the claim would be successful as a breach of contract claim rather than as an unlawful deduction from wages claim, but again this does not mean it did not have a reasonable prospect of success.

43. There were also significant facts in dispute about whether the share option agreement had been sent to the claimant before he entered into his contract of employment, there were also factual disputes about the content of the good leaver and bad leaver provisions. There were also factual disputes about whether Jeff Jones (the Chief Operating Officer of the respondent at the relevant time) had varied or added to the bad leaver provisions with his assurances to the claimant that the board would not define the claimant as a bad leaver unless the respondent had cause to terminate the claimant's employment.

44. There were, therefore, a number of points that were open to interpretation (as opposed to pointing overwhelmingly in respondent's favour) that would have required determination after hearing oral evidence from the relevant witnesses.

45. I also conclude that the respondent has not overcome the hurdle of establishing that the claimant has acted unreasonably in the conduct of the claim.

46. Although I note that the respondent sent a Without Prejudice Save As To Costs Letter to the claimant on 10th March 2022 (WPSATC) encouraging him to seek legal advice I do not conclude that the claimant's failure to take legal advice at that time (and waiting until 14th November 2022) was unreasonable. The employment tribunal procedure allows people to represent themselves and to also have lay representatives. The claimant clearly felt able to prepare for the hearing and to represent himself at any hearing. There is no obligation on a party to instruct solicitors when bringing or pursuing proceedings in the employment tribunal. Failure to instruct solicitors until later in the proceedings does not constitute unreasonable conduct.

47. Regarding the late withdrawal of the share options part of the claim the critical question is whether the claimant's conduct of the proceedings was unreasonable, and I have concluded in paragraph 46 above that it was not.

48. I do not need to go on to consider the second stage, but even if the threshold has been reached in the first stage, I would not have in any event exercised my broad discretion in the respondent’s favour.

49. Costs remain the exception rather than the rule. They are intended to be compensatory (not to punish the party). The claimant throughout most of the proceedings was representing himself and it was not unreasonable for him to do so.

50. I also note that the WPSATC dated 10 March 2022 from the respondent in respect of the share options simply referenced the bad leaver provisions in the share option agreement, but it made no reference to the respondent's argument that the share options could not be considered as being wages under the ERA, nor did it reference the respondent’s later arguments that this is a property claim and that what the claimant had claimed in the claim form could not be ordered by the employment tribunal.

51. The WPSATC dated 10 March 2022 additionally warned the claimant that the salary increase part of his claim would also be unsuccessful and why that was the case in the respondent's opinion. This meant that the claimant thought the respondent was merely posturing and using scare tactics and so he was not being unreasonable in his decision to not take legal advice at that point.

52. The claimant also had strong economic reasons not to instruct solicitors earlier, but I do not have enough information about his current finances to assess whether the claimant has the ability to pay a costs order but given my conclusions above it is not necessary for me to make this assessment.

53. The respondent’s application for costs is therefore refused and is dismissed accordingly.

Employment Judge Macey

Date: 20 March 2023