



EMPLOYMENT TRIBUNALS

Claimant: Rosemary Spencer

Respondent: Christopher Giddings

Heard at: Bristol ET **On:** 27 April 2023

Before: Employment Judge G. King

Representation

Claimant: Sarah Spencer – Claimant’s daughter

Respondent: Mr J. Bromige – counsel

RESERVED JUDGMENT

1. The Respondent’s application for a Costs Order is granted. The Claimant shall pay the Respondent’s costs in the sum of £11,130.00.

REASONS

Background

2. By a claim form dated 3 August 2022, the Claimant brought claims for unfair dismissal under s.94 and s.98 Employment Rights Act 1996 (“ERA 1996”), as well as unlawful deduction of wages under s.23 ERA 1996.
3. In the Judgment given on 27 April 2023, the Tribunal found:
 - a. The Claimant was not an employee of the Respondent. The Claimant therefore has no standing to bring a claim of unfair dismissal, and that claim is dismissed.
 - b. The Claimant was not a worker for the Respondent. The Claimant therefore has no standing to bring a claim of unlawful deductions from wages, and that claim is dismissed.
4. Following the oral Judgment, the Respondent made an application for a

Costs Order under Rule 75 and 76 of the Employment Tribunal Rules of procedure 2013.

Relevant Law

5. Rule 75 of the Employment Tribunal Rules of Procedure 2013 sets out the definition of a preparation time order: -

(1) ...

(2) A preparation time order is an order that a party ('the paying party') make a payment to another party ('the receiving party') in respect of the receiving party's preparation time while not legally represented. 'Preparation time' means time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at any final hearing.

(3) A Costs Order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings. A Tribunal may, if it wishes, decide in the course of the proceedings that a party is entitled to one order or the other but defer until a later stage in the proceedings deciding which kind of order to make.

6. Rule 76 sets out the test to be applied by the Tribunal in considering whether to grant a costs application: -

(4) 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;

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

[or

(e) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.]

(5) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

...

7. Rule 77 sets out the procedure for determining such applications: -

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.

8. The principle in the Rules is that “costs” (the Tribunal will use this term as shorthand for both costs and preparation time) do not follow success as they do in other areas of civil litigation. Rather, the Tribunal has power to make awards of costs in the circumstances set out in the Rules. In this case, the relevant provision is Rule 76(1)(a) which gives the Tribunal a discretion to award costs of the conduct of a party meets the threshold test set out in the Rule.
9. The Tribunal’s discretion to award costs is not fettered by any requirement to link any unreasonable conduct to the costs incurred (*McPherson v BNP Paribas (London Branch)* [2004] ICR 1398 and *Salinas v Bear Stearns International Holdings Inc* [2005] ICR 1117, EAT). However, that is not to say that any issue of causation is to be ignored and the Tribunal must have regard to the “nature, gravity and effect” of any unreasonable conduct (*Barnsley Metropolitan Borough Council v Yerrakalva* [2012] IRLR 78).
10. The Tribunal takes into account that the “no reasonable prospect of success” provision is not the same as that when assessing whether a claim should be struck out or not. In those cases, the Tribunal as not hurtful evidence, and so the test for strike out is a high bar. In assessing whether or not a claim has no reason prospect of success when considering an argument for costs the Tribunal has the benefit of having heard all the evidence in relation to the Claimant’s claims and the Respondent’s response to those claims.

Deliberation

11. In this Judgment in respect of the application for a Costs Order, the Tribunal does not intend to repeat the full reasons for the liability Judgment. The reasons were given orally on 27 April 2023 and there has been no request for written reasons. Nonetheless, the Tribunal does need to set out some of the Tribunal’s findings and reasoning on liability in order to explain the decision in respect of the Costs Order.
12. The Claimant’s claim had two limbs; the first being a claim for unfair dismissal, and the second being a claim for unlawful deduction of wages. Looking at the unlawful deduction of wages claim first, the Claimant confirmed in her statement, paragraph 8, that she had never expected to be paid a wage while she was, as per her argument, employed as the Respondent’s housekeeper. Notwithstanding the Tribunal’s findings that the Claimant was not an employee of the Respondent, the Claimant’s own admission is, that will any alleged employment was in place, she had no expectation of being paid for this employment.
13. A benefit in kind can amount to wages for the purpose of such a claim, it can only do so in limited circumstances. These are set out in s.27(5) ERA 1996:

(5) For the purpose of this Part any monetary value attaching to any payment or benefit in kind furnished to a worker by his employer shall not be treated as wages of the worker except in the case of any voucher, stamp or similar document which is -

- (a) of a fixed value expressed in monetary terms, and*
- (b) capable of being exchanged (whether on its own or together with other vouchers, stamps or documents, and whether immediately or only after a time) for money, goods or services (or for any combination of two or more of those things)*

14. The Tribunal is therefore of the view that the Claimant's claim in respect of unpaid wages, even if there had been an employee-employer relationship for some sort of benefit in kind, would not have been a claim capable of succeeding in the Employment Tribunal. The Claimant accepted that she was never going to be paid a wage, and therefore any claim in respect of unlawful deduction of wages had no reasonable prospects of success.
15. The Claimant's claim of unfair dismissal was contingent on her being an employee of the Respondent. This was the issue that was decided at the preliminary hearing on 27 April 2023.
16. The Tribunal found that there was insufficient mutuality of obligations between the Claimant and the Respondent to amount to any contract of employment having been formed. It was the Claimant's own evidence that she could, and indeed did, work elsewhere from time to time while she was living in the Respondent's house. There was no irreducible minimum of work that the Claimant had to perform. The Claimant accepted she was free to come and go as she pleased, as was the Respondent.
17. It was further accepted by the Claimant that the Claimant and her children did benefit from the work in action of the Respondent, just as the Respondent benefited from the work done by the Claimant.
18. The Claimant gave examples of duties that she did perform, such as sweeping the chimney, and said she did not expect these to be part of a housekeeper's role. The Tribunal found that, if the Claimant was an employee, she could have refused to do these duties, simply saying that it was not part of her job. The fact that she did these duties, coupled with the fact that she contributed to the food and running costs of the house, in the findings of the Tribunal, were inconsistent with that of an employee relationship. The Tribunal found that the status of the Claimant was akin to someone in a shared domestic arrangement.
19. The Tribunal further found that, even if there had been a contract of employment, it was a housekeeping job with accommodation. There was no evidence to suggest that accommodation for life was a term of any alleged contract. On the Claimant's own evidence, the offer of the Respondent's house took place after any alleged employment had started. It therefore could not have been a term of the contract. The Claimant further described the offer as a "gift", and one which she rejected.
20. Based on the Tribunal's findings at the hearing on 27 April 2023, the

Tribunal further finds that the Claimant's claim for unfair dismissal, and her claimed remedy of £100,000.00, had no reasonable prospect of success.

21. The Respondent further contends that the Claimant acted unreasonably in the bringing of the proceedings or the way that the proceedings have been conducted. The Respondent refers to the Respondent's letter of 11 November 2022; a copy of which was handed to the Tribunal at the conclusion of the hearing on 27 April. This letter was sent by email to the Claimant daughter, who was on record as acting as her representative, and by recorded delivery to the Claimant herself. The Tribunal is satisfied that the Claimant, or her representative, had sight of this letter and were aware of its contents.
22. The issue employment status was due to be decided at a preliminary hearing listed for 8 December 2022. In the event, this hearing did not go ahead and had to be adjourned to a hybrid hearing which took place on 27 April 2023. This Tribunal is not concerned with the reasons why that hearing had to be adjourned. The Tribunal does however take into account that the Respondent's letter was sent to the Claimant, and her representative, nearly a month before the hearing at which it was expected the issue of employment status would be determined. The Tribunal notes further that it is approximately six and a half months from the date of the Respondent's letter to the hearing at which the issue of employment status was finally decided.
23. The Respondent's letter of 11 November 2022 sets out the Respondent's arguments as to why the Respondent says the Claimant's claim has no reasonable prospect of success, and/or was being brought unreasonably. The Claimant was therefore aware that the Respondent would be advancing this argument.
24. The Respondent's letter further puts the Claimant on notice that the Respondent intends to make an application for costs in the event that the Claimant's claim is dismissed at the Preliminary Hearing. The Claimant was therefore on notice that she could be facing an application for the Respondent costs.
25. The Respondent's letter contains an offer to the Claimant, made as a gesture of goodwill, and without admission of liability, that the Respondent would pay the Claimant a further £10,000.00 in order to settle the claim without the need to proceed to a hearing. This offer had been put forward by ACAS on 7 November 2022 and the Claimant had rejected it. The Respondent's letter asks the Claimant to reconsider the offer, thereby confirming that it is still open to her to accept. The Respondent did not receive any reply to the letter of 11 November 2020.
26. The Tribunal should not make a Costs Order without the party against whom the order is being sought having a chance to make representations to the Tribunal in relation to the application. At the hearing on 27 April 2023, the Tribunal is satisfied that the Claimant had been on notice that such an application would be made. The Tribunal listened to the arguments against the Costs Order being made which will put forward by the Claimant's representative.

27. The Claimant's daughter, speaking on the Claimant's behalf, confirmed she had received the letter of 11 November 2022. She said she had not shown it to her mother, as her mother had been depressed at that time, and she did not want to add to her troubles, the Tribunal, however, is satisfied that the letter was posted to the Claimant herself, and so she either was or reasonably should have been aware of its contents and the offer contained therein.
28. The Respondent also wrote to the Claimant after the abortive hearing on 8 December, by way of a letter dated 21 September 2022. That letter was emailed to the Claimant's representative and posted by recorded delivery to the Claimant herself. The letter raised issues with the Claimant's ability to join the virtual hearing on eight December, which is not a matter that this Tribunal is concerned with. The letter also, however, reiterated that the offer of £10,000.00 to settle the claim remained open for acceptance and that there would be no deduction for wasted costs if the offer was accepted. The Respondent's letter again encouraged the Claimant to consider accepting the offer.
29. The Claimant's representative said that she had looked at the rules regarding the Employment Tribunal and was aware that Costs Orders were rare. On that basis, the Claimant made a decision to continue with the claim. The Claimant's representative also confirmed that neither she nor the Claimant replied to the Respondent in respect of the points raised in the letter, or the offer of £10,000.00 to settle the claim. The Claimant's position was that the further £10,000 would not have been sufficient to allow her to buy a place to live, which was what she hoped to get out of the proceedings.
30. The Tribunal needs to take a step back and consider, looking at all the circumstances, if the Claimant has acted unreasonably in bringing the proceedings. If the Claimant did act unreasonably, then this is a second gateway by which the Respondent's application for a Costs Order against the Claimant could succeed. The decision, however, is ultimately one for the Tribunal.
31. The Tribunal finds that the Claimant knew to have known that her claims against the Respondent were very weak, for the reasons set out above in relation to prospects of success above. She therefore acted unreasonably in the bringing of her claim. The Tribunal further finds that the offer of £10,000 to settle the Claimant was a reasonable one. It was kept open and reiterated even after the hearing on 8 December 2022. The Tribunal finds that the Claimant's refusal of that offer does amount to acting unreasonably on the part of the Claimant. Finally, the Tribunal finds that the Claimant's decision to continue with the claim on the basis that she believed a Costs Order was rare and therefore unlikely to happen to her regardless of her actions, was in itself unreasonable.
32. Before making any Costs Order, the Tribunal is obliged to make enquiries into the paying party's ability to pay. This was done at the hearing on 27 April 2023, and the Claimant confirmed that she still had the majority of the £100,000.00 that have been paid to her in order that she vacate the Respondent's house. She confirmed that she had the ability to pay the Costs Order sought.

33. Finally, the Tribunal is entitled to look at the reasonableness of the costs sought. The Tribunal has been presented with a costs schedule, which was also sent to the Claimant and her representative on 5 December 2022 the Tribunal finds that the time claimed is reasonable. Having regard to the government guidelines on solicitors' hourly rates, the Tribunal finds that the hourly rate claimed is also reasonable.
34. The decision of the Tribunal is that the Claimant's claim had no reasonable prospects of success, and further, that the Claimant acted unreasonably in the bringing and in the course of the proceeding. The Claimant has the ability to pay the Costs Order sought, and the costs sought are reasonable. The Claimant is ordered to pay the Respondent's costs in the sum of £11,130.00.

Employment Judge G. King
Date: 5 May 2023

Judgment sent to the Parties: 10 May 2023

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 this written record of the decision.