



EMPLOYMENT TRIBUNALS

Claimant: Mr R Newlyn-Jones

Respondent: Herongrange Manpower Direct Limited
(Previously called Herongrange Security and Systems Limited)

Heard at: Cambridge Employment Tribunal

On: 9 March 2023 (remedy hearing)
21 April 2023 (deliberation)

Before: Employment Judge Hutchings
Mrs L Davies (Tribunal member)
Mr K Rose (Tribunal member)

Representatives:
Claimant: Mr Bignell of Counsel
Respondent: did not attend

RESERVED JUDGMENT ON COSTS

1. UPON APPLICATION made by the claimant at the remedy hearing on 9 March 2023; and
2. UPON assessment of the costs claimed by the claimant and in accordance with Rule 78 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, and the Civil Procedure Rules Part 44 the respondent is ordered to pay the claimant **£11,042.40** inclusive of VAT in respect of the claimant's costs.

REASONS

The application

1. At the remedy hearing before the Tribunal on 9 March 2023 the claimant made an application for a costs order under Rule 76 of the Employment Tribunal Rules of Procedure 2013 on the following grounds:
 - 1.1. That the respondent acted vexatiously and unreasonably in bringing the proceedings and in the way that the proceedings have been conducted; and
 - 1.2. The response had no reasonable prospect of success; and
 - 1.3. The respondent repeatedly breached Orders of the Tribunal.

2. In making the application Mr Bignell referred to the decision of the Employment Appeals Tribunal in the case of Mr M Radia v Jefferies International Ltd: UKEAT/0007/18/JOJ, paragraph 64, which states:

“...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?”

3. Mr Bignell submitted that, as the application is brought under Rule 71 (a) and (b), in determining whether to make a costs award against the respondents the Tribunal must consider 3 questions, noting that the respondent does not have to assess the case at the outset, but must make reasonable enquiries:

- 3.1. Did the defence objectively analysed have no reasonable prospect of success;
- 3.2. If so, did the respondent know or appreciate that;
- 3.3. If not, should respondent have known or appreciated that.

4. The claimant’s application is that the respondent knew or ought to have known that it had no real defence at the outset and that the defence was “hopelessly weak” by no later than 13 July 2021. In making this submission the respondent referred to the Judgment dated 17 June 2021 (in claim number 3302389/2020 against the same respondent and which Mr Kane, a director the respondent, which was also respondent in that claim, attended) and the findings made in that case, submitting they are common to this claim, Judgment being sent to the respondent on 13 July 2021.
5. The application is also made under Rule 72, which enables a Tribunal to make a costs order where a party has been in breach of any order of the Tribunal, Mr Bignell submitting that the respondents have breached several orders in the case management order of Judge Tynan dated 11 July 2022, made at a hearing at which the respondents’ representative, Mr Kane, was present.

6. The claimant’s application for costs totals £14,626.80.

Evidence

7. At the remedy hearing on 9 March 2023, we heard oral submissions from Mr Bignell on behalf of the claimant, who referenced the 263-page hearing bundle before the Tribunal for the liability and remedy hearings (8 and 9 March 2023).
8. In addition, at the hearing the claimant submitted the following documents:
 - 8.1. Schedule of costs 25 June 2021 to 2 August 2022 and supporting billing guides;
 - 8.2. Schedule of costs 3 August 2022 to and supporting billing guides;
 - 8.3. Herongrange Security and Systems Limited unaudited accounts for the year ended 31 March 2022; and
 - 8.4. Herongrange Group Limited unaudited financial statements for the year ended 31 December 2021.

9. At the remedy hearing the Tribunal ordered costs schedules which the claimant had not been able to collate in time for the remedy hearing. These were received by the Tribunal prior to deliberation. Invoice number 10688341 evidences legal costs of £1,500 plus VAT at 20% of £300, total amount: £1,800.
10. The respondent's representative, Mr Kane, did not attend the remedy hearing on 9 March 2023 so could not respond in person to the cost's application. Nor did the respondent make written submissions on costs prior to the date of the cost application deliberation.

Findings of fact

Conduct

11. At a preliminary hearing before Judge Tynan on 11 July 2022, at which Mr Kane represented the respondent, parties were directed to co-operate with each other to agree a list of issues and the respondent was ordered to produce the bundle of documents and send this and statements of its witnesses to the claimant and the Tribunal. The Respondent did not, in breach of the case management orders dated 11 July 2022, a copy of which was sent to the respondent on 3 August 2022. Non-compliance by the respondent was also contrary to the overriding objective of the Employment Tribunal (Rule 2: *'The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.'*)
12. Findings have already been made by this Tribunal in the Remedy Judgment dated 13 March 2023 that the request made by the respondent on 3 March 2023 to postpone the hearing on 8 and 9 March 2023 misled the Tribunal. By the case management order of Judge Tynan dated 11 July 2023 the respondent was ordered to produce the bundle. It failed to comply with this order and on 16 September 2022 the claimant produced the bundle. The claimant produced an updated bundle on 2 March 2023. This is the bundle about which the respondent complains; it contains an additional 16 pages from the bundle the claimant sent to the respondent in September 2022. We found that Claire Malham's email requesting an adjournment misled the Tribunal as follows:
 - 12.1. That it was the claimant's responsibility to produce the bundle when, in fact, by the Order of EJ Tynan it was the respondent's responsibility; and
 - 12.2. The claimant did not do so until within 7 days of the hearing; in fact, the claimant had produced the bundle in September 2022 when the respondent failed to do so and updated it with 16 additional pages.
13. At paragraph 9.6 of the Order Judge Tynan records that if any of the Orders made are not complied with, the Tribunal may award costs in accordance with rule 74-84. The respondent was aware of the potential consequences of its non-compliance.
14. In the Liability Judgment dated 13 March 2023 we concluded the proceedings have been conducted unreasonably by the respondent. It has not engaged with the process, attempted to adjourn the hearing on 8 and 9 March 2023, misleading the Tribunal with the reason given and its representative, Mr Kane, has misled the Tribunal at the hearing on 8 March 2022 as to the position, role and knowledge.
15. We conclude that the respondent has repeatedly failed to comply with Orders of the Tribunal, in particular the Order Employment Judge Tynan dated 11 July 2022, despite a bold warning in the same warning of the consequences of continuing not to engage with the process and to ignore legal orders. Its failings are egregious.

16. We concluded that the claim has a strong prospect of success and struck out the response as it has not reasonable prospect of success. In giving Judgment for the claimant we concluded that the respondent's unreasonable conduct of these proceedings and for non-compliance with any of these Rules or with an order of the Tribunal.
17. In the remedy Judgment dated 13 March 2023 the Tribunal further found that Mr Kane mislead the Tribunal at the hearing on 8 March 2023 as to his role in the respondent and only admitted his role as a director of Herongrange Group Limited, the owner of the respondent when questioned by the Tribunal by reference to Company House records. Prior to this he had told the Tribunal that he had no involvement with this company. The Remedy Judgment also records the requests by the respondent to postpone the remedy hearing and the basis on which this was refused by the Tribunal, referencing the Tribunal's findings in its Liability Judgement 13 March that the respondent has:
 - 17.1. Consistently failed to engage with proceeding, attending hearings with no relevant defence or witness evidence.
 - 17.2. Repeatedly ignored Orders of the Employment Tribunal (including disclosing documents, preparation, and delivery of the hearing file, of witness evidence).
 - 17.3. Attempted to frustrate the fair legal process: by email from Claire Malham dated 3 March 2023 the respondent requested an adjournment of the hearing on 8 and 9 March 2023 on grounds this Tribunal have found to be plainly false. Indeed, in this email Ms Malham actively misleads the Tribunal. The findings of fact in this matter are recorded below.

Defence: prospect of success

18. By no later than 13 July 2021 when the Judgment of Judge Ord in case 3302389/2020 was sent to the respondent, the respondent (and Mr Kane as its director and the respondent's representative in this claim) knew that the defence there was no TUPE transfer of the claimant was without merit, based on the findings of Judge Ord in that Judgment that the claimant was part of the same group of employees as the claimant in that case and that these employees were subject to a TUPE transfer. However, the respondent continued to defend this claim. As a result, the claimant instructed counsel to represent him.
19. The Liability Judgement dated 13 March 2023 struck out the respondent's defence, finding that the respondent's case is that it had never employed the claimant, supported by a witness statement from a Mr Withers dated 27 June 2021, a director of the respondent.
20. The respondent's defence in its ET 3 states:

"We brought a collection of contracts from Herongrange Ltd. We were unaware of Mr Newlyn-Jones. Further investigation has found he remained with Herongrange and was terminated at a later date"
21. The Liability Judgement records that this statement is factually incorrect. The respondent has provided no evidence to support this statement or to show that the principal reason for the dismissal was not the TUPE transfer or that it can invoke the ETO defence. Quite simply we find that there is no defence to the claim of unfair dismissal. Similarly, the respondent has not addressed the claim for direct age discrimination either in its ET3 or in the evidence it has placed before the Tribunal

(which is skeletal) since March 2020. On the evidence before us we conclude that the respondent does not have a pleaded defence or evidence in response to the claims of automatic unfair dismissal and direct age discrimination despite having known about claims since March 2020.

22. At the liability hearing this Tribunal concluded that the defence had no reasonable prospect of success for the following reasons:

22.1. A finding of the Tribunal that the defence statement in the ET3 is plainly false.

22.2. That the claimant has discharged his burden to establish a claim for automatic unfair dismissal; the transfer of the business has been found by the Tribunal to be a TUPE transfer and the timing of the dismissal is proximate (the same day) as the transfer.

22.3. The respondent has not discharged its burden to establish an ETO defence.

Respondent's financial position

23. We have considered the financial information.

23.1. Herongrange Security and Systems Limited unaudited accounts for the year ended 31 March 2022 show that in 2022 the company had cash at bank of £9,754 and debtors of £57,154.

23.2. Herongrange Group Limited unaudited financial statements for the year ended 31 December 2021 show that in 2021 the company had cash at bank of £67,023 and debtors of £2,128,792. It had net current assets of £200,407 and equity reserves of £260,861.

Issues to be determined

24. We must apply a 2-stage test:

24.1. Whether a party's conduct falls within the test in that it has where it considers that 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 any claim or response had no reasonable prospect of success; and

24.2. The claimant's representative submitted that, as the application is brought under Rule 71(a) and (b), in determining whether to make a costs award against the respondents the Tribunal must consider 3 questions, noting that the respondent does not have to assess the case at the outset, but must make reasonable enquiries:

24.2.1. Did the defence objectively analysed have no reasonable prospect of success?

24.2.2. If so, did the R know or appreciate that?

24.2.3. If not, should R have known or appreciated that?

24.2.4. If so, whether it is appropriate for the Tribunal to exercise its discretion in favour of awarding costs against that party. In determining whether it is appropriate we must assess the claimant's schedule of costs for work done by the respondent's solicitors for the period and consider the respondent's ability to pay.

Law

25. Below is the law the Tribunal considers relevant to this application for reconsideration.

Costs orders

26. The Tribunal has the power to order the payment of costs and witness expenses. The Employment Tribunal Procedure Rules rule 75 sets out the nature of these orders:

*(1) A costs order is an order that a party (“the paying party”) make a payment to—
another party (“the receiving party”) in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative; [...] or
another party or a witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual’s attendance as a witness at the Tribunal.*

27. The Employment Tribunal Procedure Rules rule 76 sets out when a costs order or a preparation time order may be made:

*(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 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
any claim or response had no reasonable prospect of success; [...]*

(5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing.

28. The test for imposition of a costs order under rule 76(1) is a two-stage test: first, a tribunal must ask itself whether a party’s conduct falls within rule 76(1); if so, it must go on to ask itself whether it is appropriate to exercise its discretion in favour of awarding costs against that party.

29. The decision to make a costs order is the exception rather than the rule. This was made clear in *Yerrakalva v Barnsley Metropolitan Borough Council* [2011] EWCA Civ 1255; [2012] ICR 420 (3 November 2011) by Mummery LJ giving the lead judgment in the Court of Appeal at paragraph 7 as follows:

“The employment tribunal’s power to order costs is more sparingly exercised and is more circumscribed by the employment tribunal’s rules than that of the ordinary courts. There the general rule is that costs follow the event and the unsuccessful litigant normally has to foot the legal bill of the litigation. In the employment tribunal costs orders are the exception rather than the rule. In most cases the employment tribunal does not make any order for costs.”

30. “Costs” are defined in rule 74(1) as “fees, charges, disbursement or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing).

31. Rule 84 provides that, in deciding whether to make a costs order and, if so, in what amount, the Tribunal may have regard to the paying party’s ability to pay.

32. The relevant principles to be considered are as set out in the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 and, particularly, Rule 78 which provides as follows:

(1) 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;

(b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles; or, in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993, or by an Employment Judge applying the same principles;

(c) order the paying party to pay the receiving party a specified amount as reimbursement of all or part of a Tribunal fee paid by the receiving party;

(d) order the paying party to pay another party or a witness, as appropriate, a specified amount in respect of necessary and reasonably incurred expenses (of the kind described in rule 75(1)(c)); or

(e) if the paying party and the receiving party agree as to the amount payable, be made in that amount.

(2) Where the costs order includes an amount in respect of fees charged by a lay representative, for the purposes of the calculation of the order, the hourly rate applicable for the fees of the lay representative shall be no higher than the rate under rule 79(2).

(3) For the avoidance of doubt, the amount of a costs order under subparagraphs (b) to (e) of paragraph (1) may exceed £20,000.

Summary assessment: Civil Procedure Rules Part 44

33. Rule 44.4 sets out the factors to be taken into account in deciding the amount of costs as follows:

(1) The court will have regard to all the circumstances in deciding whether costs were –

(a) if it is assessing costs on the standard basis –

(i) proportionately and reasonably incurred; or

(ii) proportionate and reasonable in amount, or

(b) if it is assessing costs on the indemnity basis –

(i) unreasonably incurred; or

(ii) unreasonable in amount.

(2) In particular, the court will give effect to any orders which have already been made.

(3) The court will also have regard to –

(a) the conduct of all the parties, including in particular –

(i) conduct before, as well as during, the proceedings; and

(ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;

(b) the amount or value of any money or property involved;

(c) the importance of the matter to all the parties;

(d) the particular complexity of the matter or the difficulty or novelty of the questions raised;

(e) the skill, effort, specialised knowledge and responsibility involved;

- (f) the time spent on the case;*
 - (g) the place where and the circumstances in which work or any part of it was done;*
 - and*
 - (h) the receiving party's last approved or agreed budget.*
- (Rule 35.4(4) gives the court power to limit the amount that a party may recover with regard to the fees and expenses of an expert.)*

Conclusions

34. The findings made by this Tribunal in the Liability and Remedy Judgments are confirmed, even if they are not referred to or repeated in this Judgment. Applying the 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 based on our findings that the respondent did the following:
- 34.1. Consistently failed to engage with proceeding, attending hearings with no relevant defence or witness evidence.
 - 34.2. Repeatedly ignored Orders of the Employment Tribunal (including disclosing documents, preparation, and delivery of the hearing file, of witness evidence).
 - 34.3. Attempted to frustrate the fair legal process: by email from Claire Malham dated 3 March 2023 the respondent requested an adjournment of the hearing on 8 and 9 March 2023 on grounds this Tribunal have found to be plainly false. Indeed, in this email Ms Malham actively misleads the Tribunal. The findings of fact in this matter are recorded below.
35. Further, applying the 3 stage test, we conclude that the response, objectively analysed had no reasonable prospect of success based on our finding that the defence statement in the ET3 is plainly false and the respondent has not discharged its burden to establish an ETO defence. We conclude that, following the hearing before Judge Ord the respondent should R have known or appreciated that. We have also found that the claimant has discharged his burden to establish a claim for automatic unfair dismissal; the transfer of the business has been found by the Tribunal to be a TUPE transfer and the timing of the dismissal is proximate (the same day) as the transfer. Therefore, we conclude it is fair and just for the Tribunal to exercise its discretion in favour of awarding costs against that party, taking account of the respondent's ability to pay.
36. First, we must consider the amount of the award.

Level of costs award

37. In assessing amount, we apply the rule that costs are compensatory not punitive. Given this rule, we examine the costs incurred by the receiving party, the claimant in these proceedings. Our examination is based on the figures provided by the respondent in its 3 schedules of costs:
- 37.1. £1800.00 for invoice 10688341;
 - 37.2. £3600.00 for the period 25 June 2021 to 2 August 2022; and
 - 37.3. £9226.80 for the period 03 August 2022 to 8 March 2023.
38. First, we consider the rates charged by the respondent's legal advisors by reference to the guideline figures for carrying out an assessment of court costs, listed by pay band and grade for different parts of the country. Our assessment of rates is based on the information provided by the claimant. The claimant's advisors are in Northampton, which is classified by the government guidance as national band 2. The guidance identifies that a solicitor in band 2 with more than 4 years' experience may charge

£218, with less £177, a trainee or paralegal £126. The rate charged by all 3 solicitors identified on the timesheets is £200. We are not provided with the qualification experience of these solicitors. Therefore, we apply the rate of £177. We will apply an adjustment down of 12% to bring the fees in line with national guidance.

Invoice 10688341

39. It is our finding that the respondent knew or ought to have known that it's defence had no real prospect of success following the hearing on 13 July 2021. The work charged under this invoice predates 13 July 2021; accordingly, it is outside the period of our findings, and we make no award in relation to the time incurred.

Costs incurred for the period 25 June 2021 to 2 August 2022

40. It is our finding that the respondent knew or ought to have known that it's defence had no real prospect of success following the hearing on 13 July 2021. We calculate the time cost before this date totals £576 including VAT of 20% and conclude it is not fair and reasonable for the claimant to recover this amount.
41. Turning to the balance on the schedule of costs of £2,520 for this period, net of VAT, we have adjusted this to align with national rates. 88% of this figure is £2,217.60. Inclusive of VAT this total an amount of **£2,661.12** which we conclude was work undertaken by claimant's solicitors because of our finding that the respondent's defence had no reasonable prospect of success and which is attributable to our findings on the respondent's conduct.

Costs incurred for the period 03 August 2022 to 8 March 2023

42. Solicitor: as all this work is attributable to the respondent's conduct we consider the full time costing is attributable to the respondent's conduct. We have adjusted the amount to reflect national guidelines. The amount awarded is: **£5,681.28**.
43. Hearing: we consider that the full amount of counsel's brief fee of £1,800 and refresher fee of £900, totaling **£2,700** is attributable to my findings on the conduct by the claimant. These amounts relate to the hearings before us on 8 and 9 March 2023.

Rule 84: claimant's inability to pay

44. Next, we consider the respondent's ability to pay. The respondent did not attend the remedy hearing and did not send any evidence to the Tribunal for consideration in response to the claimant's application for a costs award. By the respondents' non-attendance at the remedy hearing on 9 March 2023 neither the claimant's representative nor the Tribunal could ask questions about the figures in the respondent's means. For these reasons, while we have taken account of the Herongrange Security & Systems Limited unaudited accounts for the year ended 31 March 2022 and Herongrange Group Limited for the year ended 31 December 2021. Based on figures for cash at bank, debtors falling due and current net assets I conclude that the respondent has the ability to pay the costs claimed by the claimant. The respondent has available funds within its group companies in the region of £67,000, even accounting for adjustments since production of the accounts before the Tribunal.
45. In reaching this conclusion we note the case of Kovacs v Queen Mary and Westfield College and another [2002] ICR 919 in which the Court of Appeal considered the position in relation to the Tribunal taking a party's ability to pay into account and the following statement of Simon Brown LJ (paragraph 13)

“It does not appear, on the face of the relevant Regulations, that it was intended that poor litigants may misbehave with impunity and without fearing that any significant costs order will be made against them, whereas wealthy ones must behave themselves because otherwise an order will be made.”

46. We have also taken account of the EAT in *Jilley v Birmingham and Solihull Mental Health NHS Trust and Others* UKEAT/0584/06 & UKEAT/0155/07 which identifies that if a Tribunal takes into account a parties ability to pay in making a costs order it should set out (indeed the EAT considers it ‘essential’) in its reasons a succinct statement of how the Tribunal has dealt with the matter and why it has done so.
47. The evidence before us does not sit with a company that is impecunious. By not attending this hearing the respondent has not afforded itself the opportunity to explain otherwise, nor afforded Mr Bignell or the Tribunal to explore the company figures.
48. Therefore, there is no evidence before us which leads us to reduce the costs awards, which we consider reasonable and proportionate for the claimant to recover given the findings made throughout this matter as to the respondent’s conduct of the litigation.
49. In reaching this conclusion we are also mindful of the guidance in the case of *Howman v The Queen Elizabeth Hospital Kings Lynn* UKEAT/0509/12. If the Tribunal decides to have regard to someone’s ability to pay in deciding what order for costs it should make, *‘what it needs to do is to balance the need to compensate the litigant who has unreasonably been put to expense against the other litigant’s ability to pay. The latter does not necessarily trump the former, but it may do so.’* [paragraph 13]. Given the respondent’s conduct throughout this case it is our judgment that the balance on the findings of facts made and evidence before us today is in favour of the claimant.
50. The claimant is awarded costs of **£11,042.40 inclusive of VAT.**

Employment Judge Hutchings

Date: 2 May 2023

JUDGMENT SENT TO THE PARTIES ON

15 May 2023

FOR THE TRIBUNAL OFFICE