EMPLOYMENT TRIBUNALS

Claimant: **Mohsin Mirchie**

Respondent: **Oak Furnitureland Group Limited**

Heard at: **London South (considered on the papers)**

Before: **Employment Judge Krepski**

Representation:
Claimant: **Gordons LLP**
Respondent: **Clements Solicitors**

JUDGMENT ON COSTS

1. The application for costs is dismissed.

REASONS

Preamble

2. Following an *ex tempore* judgment I gave on 3rd March 2023 which was promulgated on 17th March 2023, the Respondent made an application for costs on 14th April 2023 ("the Application").

3. The application was resisted by the Claimant by letter dated 27th April 2023 ("the Response").

4. The Claimant asked that the application be determined on the papers and the Respondent did not object to this.

The Application

5. The Respondent made its application for costs on the following two grounds (page 1 of the Application):

   5.1. The Claimant's claim had no reasonable prospects of success (Rule 76(1)(b)); and

   5.2. The Claimant acted unreasonably, vexatiously and abusively in the way in which the proceedings were conducted, namely in continuing to pursue his claim in light of the lack of prospects highlighted by the Respondent and in such a way as to unreasonably increase costs for the Respondent (Rule 76(1)(a)).

6. The first ground relates to the strength of the Claimant's case as a whole. The second ground, to the extent it differs from the first, appears to consist of the following (taken from the Application):

   6.1. "*that the claim was brought and pursued vexatiously in order to cause the Respondent to incur unnecessary costs*" (top of page 2);

   6.2. An objection made by the Claimant on 16th July 2021 in respect of the Tribunal's decision to appoint the Claimant's claim as the lead case was "*unreasonably made with an intent for the Respondent to have to defend two separate cases arising from a shared set of circumstances and furthermore vexatiously made to increase costs for the Respondent.*"

   Additionally, "*Despite having had over three months in which to respond to the Tribunal and make an objection, the Claimant's solicitor did not make an objection until 16th July 2021*" (paragraphs 1-3 of page 2);

6.3. The Claimant pursuing his claim to the final hearing which no reasonable Claimant would have done, thus "*acting vexatiously and abusively of the Tribunal system*" (paragraph 6 of page 2);

6.4. The Respondent "*had the task of preparing the bundle which was greatly in excess of the pertinent documents due to the Claimant's representative's unreasonable requests. The bundle ran to 555 pages and the Claimant referred to 77 pages in his witness statement*" (paragraph 7 of page 2);

6.5. The Claimant "*unreasonably failed to comply with the Tribunal's case management orders by failing to provide an updated Schedule of Loss on the 15th February 2023. A clerical error was blamed when the schedule was filed over a week late*" (paragraph 8 of page 2)

6.6. The Claimant's costs warning issued on 17th February 2023 was issued "*unreasonably and vexatiously, in an attempt to force a settlement where the Claimant and his representatives knew or ought reasonably [to] have known that the Claimant's case had no real prospects of success*" (paragraph 2 of page 3)

6.7. Following that costs warning, "*[despite] the Respondent's solicitor advising that further correspondence on the matter would simply increase costs for both parties […], the Claimant's solicitor persisted in attempting to continue to litigate in writing […]. The Respondent avers this was a further attempt to unreasonably increase costs for the Respondent.*"

The Law

7. Costs in the employment tribunals do not "follow the event" as they do in civil courts.

8. The key parts of the Employment Tribunals Rules of Procedure 2013 ("the Tribunal Rules") include the following:

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) have been conducted; or

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

[…]

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 (or, where a wasted costs order is made, the representative's) ability to pay.

9. As per the case of Dyer v Secretary of State for Employment EAT 183/83, unreasonable has its ordinary English meaning and is not to be interpreted as if it means something similar to vexatious.

10. As for vexatious, the Court of Appeal in Scott v Russell [2013] EWCA Civ 1432 cited with approval the following definition given in Attorney General v Barker [2000] 2 WLUK 602:

"*19. […] The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or 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 that it involves an abuse of the process of the court, meaning by that 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.*"

11. With regards to the test for reasonable prospects of success, I remind myself of the case of Radia v Jefferies International Ltd [2020] 2 WLUK 282, and in particular that:

"67. Where the Tribunal is considering a costs application at the end of, or after, a trial, it has to decide whether the claims "had" no reasonable prospect of success, judged on the basis of the information that was known or reasonably available at the start, and considering how, at that earlier point, the prospects of success in a trial that was yet to take place would have looked. […]"

12. I also remind myself of the case of Yerrakalva v Barnsley MBC [2011] EWCA Civ 1255 in which Mummery LJ stated at paragraph 41:

"*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.*"

13. With both Rules 76(1)(a) and 76(1)(b), a two-stage test applies. Firstly, I must consider whether the ground is made out, and, if so, secondly I must consider whether to exercise my discretion to award costs.

Discussion – 76(1)(a)

14. The following section uses the paragraph numbering as above.

5.1 – Claim brought and pursued vexatiously

15. This is a bare assertion made by the Respondent and no specific explanation is given for it. I therefore do not find this to be made out.

5.2 – Objecting to his case being linked with another

16. The Respondent averred that this case had a shared factual background with that of another Claimant, Mr Zawadzki. The Respondent made a request to the Tribunal on 31st March 2021 asking that this matter be the lead case. The Respondent criticises the Claimant for objecting to this proposed course of action.

17. Although the Respondent no doubt disagreed with the Claimant's objections (sent in an email of 16th July 2021), having read them myself, I can find nothing inherently vexatious or unreasonable. The Claimant's representatives were making reasonable representations that they believed would benefit their client.

18. With regards to the time it took for the objection to be made, however, I note that whilst the Claimant submits that the objection was only made as a result of the Tribunal's correspondence being "unclear" in nature, it seems unlikely to me that this was the case. The objection is a comprehensive rebuttal of the Respondent's request rather than anything based solely upon the perceived ambiguity of the Tribunal's correspondence.

19. I find that the Claimant responding to the Respondent's request over three months later, and after the Tribunal had made an initial decision to have a lead case, was unreasonable.

5.3 – Pursuing the claim to the final hearing was vexatious and abusive

20. This appears to be a duplication of the application being made under 76(1)(b) To the extent that it is not, it is a bare assertion made by the Respondent and no specific explanation is given for it. I therefore do not find this to be made out.

5.4 – Preparing the bundle

21. The Respondent avers that the bundle was greatly in excess of the pertinent documents due to the Claimant's representative's unreasonable requests, but

fails to state what those requests were or even give an example of such requests.

22. The Claimant's representatives, in their Response, stated that the Respondent did not prepare an index, which would have allowed the parties to agree the contents of the bundle.

23. They also stated that the Respondent's initial bundle ran to 521 pages, which I note would be the majority of the 556-page final bundle.

24. The Claimant's representatives also point to the Respondent not raising the issue of the bundle, or the inclusion of irrelevant documents at the time of the preparation of the bundle.

25. Given the vague nature of the allegations made by the Respondent in respect of this head of the application, and the explanations given by the Claimant, I do not find that there was any unreasonable behaviour on the part of the Claimant.

5.5 – Providing a schedule of loss late

26. The Respondent points to the Claimant submitting an updated Schedule of Loss over one week late as unreasonable behaviour. The Respondent states that this was as a result of a clerical error.

27. Whilst parties are required to comply with orders of the Tribunal, given the minimal lateness and the explanation given by the Claimant, I find that there would need to be something more for this failure to rise to the level of unreasonable behaviour.

5.6 – Claimant's costs warning to force a settlement

28. The Respondent avers that the Claimant's costs warning issued on 17th February 2023 was issued "*unreasonably and vexatiously, in an attempt to force a settlement where the Claimant and his representatives knew or ought reasonably [to] have known that the Claimant's case had no real prospects of success*".

29. This is a somewhat unusual argument, given the aim of costs warnings is to encourage a settlement or the withdrawal of a claim, by virtue of there being cost consequences in the event that the receiving party is unsuccessful.

30. Whilst the Claimant was perhaps not giving his costs warning from a position of strength, having received no counter-offer to his offer, and having already received a costs warning himself, I find nothing inherently vexatious or unreasonable in the issuance of a costs warning in these circumstances.

5.7 – Further correspondence

31. The Respondent's representatives sent an email on 17th February 2023 stating, *inter alia*, "*I don't think further correspondence is necessary and simply increases costs for our clients*".

32. The Respondent provided with their application one email from the Claimant's representatives which was sent in response, that same day, around 25 minutes later. It consists of three short paragraphs and addresses the points made in the previous email.

33. Although the Respondent made it clear they did not think further correspondence was necessary and would increase costs, I do not find that the Claimant sending one short email in response, dealing with the points made by the Respondent, could be described as unreasonable.

Discussion – 76(1)(b)

34. There were three heads to the Claimant's claim: unfair dismissal, wrongful dismissal and unlawful deduction from wages.

Unfair dismissal & Wrongful dismissal

35. These heads of claim related to a number of grievances brought by the Claimant and other employees, and a theft of £14,500 from the safe at the Respondent's Croydon store.

36. In relation to the theft, the Claimant pointed in his evidence, to various failures (as he saw them) to comply with the test in Parr v Whitbread (t/a Threshers Wine Merchants) [1989] 11 WLUK 214.

37. He argued there was an inadequate investigation and an inadequate identification of the pool of possible culprits. He pointed to the method used to discount certain employees, and that there were seemingly discrepancies between who was supposed to know safe codes and who actually knew them.

38. It is evident that the Claimant failed in these arguments, however in large part this was because I preferred the evidence of the Respondent's witnesses to that of the Claimant.

39. In relation to the remaining acts for which the Claimant was dismissed, he again pointed to various "failures".

40. He pointed to his belief that a number of the gross misconduct allegations were rewording of other previously made allegations. He gave explanations as to why he had acted in the way he did in respect of keeping his

commission and why he raised a grievance in the manner he did. He also put forward arguments as to why the Respondent could not have found him to have acted aggressively in relation to a co-worker and why finding a breach of the mobile phone policy was improper.

41. Again, it is evident that the Claimant failed in these arguments, however once again this was because I preferred the evidence of the Respondent's witnesses to that of the Claimant.

42. Although these arguments did not, objectively speaking, have high prospects of success, I find that they had more than no reasonable prospects of success.

Unlawful deduction of wages claim

43. The Claimant relied on the cases of Kent Management Service Limited v Butterfield [1990] 12 WLUK 142 and Rice Shack Limited v Obi [2018] 3 WLUK 66, which dealt with the payment of non-contractual and discretionary commission, and being paid an average weekly wage whilst on suspension, respectively.

44. Whilst I ultimately distinguished these cases from the present one, they were relevant to the claim and the Claimant presented an arguable, if ultimately unsuccessful, claim in relation to in relation to the commission he states was not paid.

45. In those circumstances, I am satisfied that the Claimant had more than no reasonable prospects of success in relation to this claim.

Discussion – Discretion

46. Having found that the behaviour of the Claimant in relation to paragraph 5.2 above was unreasonable, I must consider whether to exercise my discretion.

47. Having considered that costs are the exception rather than the rule in Employment Tribunals, that it is not apparent the Respondent suffered any prejudice or expense in relation to the Claimant's actions, the Claimant's limited ability to pay, and that this was one instance of unreasonable behaviour in an otherwise long-running case (and thus having considered the case and the conduct of the Claimant in the round), I find it would not be appropriate to exercise my discretion to order in this instance.

Conclusion

48. Having considered the Respondent's application and found that:

48.1. The Claimant's claim had reasonable prospects of success; and

48.2. The Claimant did not act unreasonably, vexatiously or abusively in conducting the proceedings (save for the one instance described above for which I decline to exercise my discretion to award costs),

the application for costs is dismissed.

Employment Judge Krepski

19 June 2023

Notes

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.

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