EMPLOYMENT TRIBUNALS

Claimant: Mr D Farrell

Respondent: Shaw Trust Limited

Heard at: Birmingham by CVP on 28 June 2023
and reserved to 30 June 2023

Before: Employment Judge Hindmarch

Appearances
For the claimant: Did not attend
For the respondent: Mr Northall – Counsel

RESERVED JUDGMENT

1. The Respondents application for costs is refused.

REASONS

2. This hearing was listed before me to consider the Respondent's application for costs made on 29 November 2022, such application having been made after Employment Judge Broughton had struck out the claim on 31 October 2022 after the Claimant had failed to pay a deposit.

3. The Claimant did not attend the hearing. Mr Northall, counsel, represented the Respondent. I had a bundle comprising 140 pages and an authorities bundle from Mr Northall.

4. This application for costs was previously listed to be heard on 20 February 2023. In advance of that hearing, the Claimant wrote to the Tribunal arguing it should not go ahead for various reasons including the fact he had not received the Judgment of Employment Judge Broughton striking out his claim and saying he wished to seek legal advice.

5. I agreed to postpone the hearing and my reasons dated were recorded as 'the Claimant was not aware of the strike out and to allow him to consider that and take legal advice.'

6. The case was referred to me once more by the Tribunal office on 28 April 2023. The Respondent was keen for the hearing to be re-listed. Given that the Claimant had ample time to take legal advice and consider the strike out Judgment I agreed to re-list the hearing and I asked the Tribunal office to do so and I made Case Management Orders for a bundle to be agreed for use at the hearing and for this to contain 'any evidence as to means on which the Claimant wishes to rely.' The Notice of Hearing was sent to the parties on 4 May 2023. I was informed by the Respondent's solicitors that the Claimant declined to have any input into the bundle.

7. The costs hearing was re-listed for 28 June 2023 by CVP. The Claimant did not attend. At the outset of the hearing, Mr Northall made me aware of an email the Claimant had sent to the Tribunal on the evening of Sunday 25 June 2023. In this email, the Claimant stated that he was still waiting to hear if he qualified for legal advice/assistance related to insurance cover and that, as he had appealed the decision to make a deposit order to the EAT, he was surprised the hearing listed for 28 June 2023 was going ahead. He said he was unable to attend the hearing on 28 June 2023 and asked if the case would go ahead in his absence. He had sent this email in reply to the Tribunal office email notifying him of the link for the CVP hearing. Notably, the Claimant did not make any application for postponement, nor did he refer to any reason as to why he was unable to attend.

8. The Tribunal office did not respond to this email. Just after the hearing began at 10:03 the Claimant sent a Skeleton Argument to the Tribunal given his position in relation to the costs application. In this application, he indicated he was unable to attend video hearings and that he had emailed the Tribunal office regarding this. I have not had sight of any such email. The Claimant repeated the fact that he still did not have legal representation.

9. I firstly considered whether I should go ahead in the absence of the Claimant. I note he has made an appeal to the EAT regarding the making of a deposit order. That appeal has not yet passed the sift stage. The Respondent made its application for costs in November 2022, some seven months ago. There has already been one postponement of the costs hearing. It would be prejudicial to the Respondent to delay further, particularly as a) the appeal in the EAT may not pass the sift stage, b) even if it does it may take many months to determine and c) the Respondent has agreed not to seek to enforce any costs order that may be made until after the decision on the sift is communicated to the parties.

10. I considered the Claimant's argument that he is unable to conduct hearings by CVP. I am not aware of him applying to convert this hearing to an in-person hearing or to attend the Tribunal office himself for a hybrid hearing. I take note of the fact there have been several previous hearings in this matter by CVP, namely an interim relief hearing before Employment Judge Britton on 18 March 2021, and a strike out/deposit order hearing before me on 1 September 2022. There was no suggestion before me that the Claimant struggled with CVP hearings. He attended on time, did not appear to have any connectivity issues or issues with the device he was using and was able to make submissions and give evidence on oath as to means. I do not accept the Claimant had any difficulties but in any event no application for a postponement or for an alternative method of hearing the case had been made.

11. The Claimant asserted he had still not been able to obtain legal advice. The ET1 was filed on 27 January 2021, some two and a half years ago. The Claimant has been a litigant in person throughout. He only raised the possibility of obtaining legal advice after the first costs hearing was listed. I allowed him a postponement and he had had a further 4 months to seek advice. I note the Respondent's solicitors first wrote to the Claimant by way of a costs warning letter on 13 January 2022 (pages 96-98) of the bundle. In that letter they state 'If you have any concerns as to the contents of this letter, or if you do not understand any of it, we strongly advise that you get legal advice.' It appears the Claimant has left it a further 13 months or so before seeking to obtain advice through legal expenses cover. He has had plenty of time since February 2023, when he first raised this with the Tribunal, to do so. It would be prejudicial to the Respondent to delay further.

12. For those reasons I decided to hear the Respondent's costs application in the absence of the Claimant. I had his Skeleton Argument which I will refer to further in my deliberations below.

13. Mr Northall for the Respondent made oral submissions in support of the costs application, which as noted above was sent to the Tribunal on 29 November 2022. The application was made on four grounds as follows:

    a) The Claimant's bringing of the claim was unreasonable.
    b) The Claimant's conduct of the claim was unreasonable.
    c) The claim had no reasonable prospect of success.
    d) The claim pursued against Mr C Luck, CEO of the Respondent, was vexatious.

14. In Mr Northall's submission the first 3 grounds stand or fall together. In short, the Claimant was dishonest when he made his application for employment with the Respondent in 2019 and, when this was discovered by the Respondent and the Claimant was the subject of disciplinary proceedings, the

Claimant tried to cover up his dishonesty by sending in a doctored CV. The Respondent's position was the Claimant must have known he had misled the Respondent when making his application for employment and must have know that was the reason for his dismissal. His claim that he was in fact dismissed for making a protected disclosure has to be unreasonable.

15. This claim came before me on 1 September 2022, to hear the Respondent's application for a strike out or deposit order. I reserved my Judgment dated 22 September 2022, I sent out a chronology of events that had led to the dismissal of the Claimant.

16. In short, and it is not in dispute, the Claimant was first employed by the Respondent from June 2008 to December 2009. His employment came to an end when he resigned during a period of suspension pending investigation into an allegation of fraud. He resigned by email on 3 December 2009 with immediate effect citing an 'irrevocable breach of mutual trust and confidence', stating that the contract between himself and the Respondent was 'damaged beyond repair' (page 121 of the bundle).

17. On 22 August 2019, some 10 years or so later, the Claimant applied to work for the Respondent once more. He did so by way of an online application supported by a CV. In the application, he referred to being 'currently employed' by Travis Perkins as a key account manager. In his employment history he refers to working for In2Ambition from 3 April 2006 and makes no mention of his employment with the Respondent in 2008/2009.

18. In the accompanying CV, he give his current job title as 'key account manager', referring to his role and duties with Travis Perkins and states from 2006-2011 he was working for In2Ambition (pages 122-126).

19. The Claimant was successful in his (second) application to work for the Respondent and was appointed to the role of support manager by offer letter dated 15 October 2019, with a start date of 28 October 2019 (pages 127-128).

20. The Respondent says the Claimant was dishonest in his job application as he did not disclose his prior employment with the Respondent in 2008/2009.

21. At the hearing before me on 1 September 2022, the Claimant told me he had not submitted the application himself. Instead, a recruitment agent Passion4Progression did this for him and any mistakes were theirs. I asked Mr Northall to comment on this. He said it was absurd to argue a recruitment agent would compile a CV on behalf of a candidate and get their employment history so badly wrong and/or not ask the candidate to check it.

22. The Claimant told me at the September 2022 hearing that before he was interviewed by the Respondent, he realised the application and CV submitted

were incorrect and he wrote to the Respondent's head office enclosing a revised and correct CV. He also told me that he, somewhat inexplicably, made a recording of his interview and later had that recording transcribed.

23. In November 2020, it came to the attention of the Respondent that the Claimant may have worked for it previously and enquiries were made. The Respondent discovered the Claimant had worked for it in 2008/2009 and was of the view he had not declared this in his application in 2019. The Claimant was suspended and invited to a disciplinary hearing which took place on 6 January 2021. At that hearing, the Claimant referred to the fact he has sent an updated CV in advance of his interview and that he had recorded the interview. After the disciplinary hearing on 15 January 2021, the Claimant sent the decision maker documents in support of these contentions. These included a letter said to have been sent by the Claimant to the Respondent on 28 August 2019 and a copy of the (revised) CV said to have been sent along with that letter. Also sent was a transcript of the recording the Claimant made of his interview.

24. As to the letter and revised CV, copies were at pages 134-136 of the bundle. The CV gives the current role held by the Claimant as 'support manager' (that being the title of the role the Respondent offered to the Claimant in October 2019) and references his duties under the hearing 'Profile' as 'An experienced welfare to work and employer engagement professional that exceeds service expectations and ensures a smooth and consistent link between service users/participants, training providers and employers. Has worked on numerous programmes including New Deal, Flexible New Deal, The Work Programme and currently working on the Work and Programme.' In his CV there is reference to the Claimant working for the Respondent in 2008/2009. There appears to be no reference to any work for In2Ambition.

25. The Respondent's position is that the Claimant cannot have sent that CV to the Respondent in August 2019 because it references his current role and profile as being that which he was carrying out for the Respondent but not until October 2019.

26. Any correct CV as at August 2019 would refer to the current role being that with Travis Perkins. The Respondent says the Claimant must have been acting dishonesty when he produced this in the disciplinary process as evidence of his trying to correct matters before his interview.

27. At the hearing before me in September 2022, the Claimant argued that he regularly updates his CV and the one he provided in January 2021, during the disciplinary process, would have been an updated one, updated since his employment with the Respondent began in October 2019, rather than being the exact same one he sent with the letter of 28 August 2022.

28. I noted he had only offered that explanation relatively recently. He did not appear to have argued it at the interim relief hearing, and I noted the Respondent's position that this was an attempt to 'row back' from a position which will prove difficult for the Claimant to explain. It was this that persuaded me the claim had little reasonable prospects of success and that I should make a deposit order.

29. Turning to the transcript of the recording of the interview, this appears to refer to one of the interviewers (Suki) at the end of the interview inviting any questions from the Claimant and the Claimant saying 'no erm just really obviously you know I've worked at Shaw Trust before and if you (sic) comfortable with that.' Suki is said to reply 'sure so we've got erm another one more person to interview today and we will be making the decision by tomorrow.'

30. As the Claimant was not present at the hearing on 28 June 2023, I raised this transcript with Mr Northall as on the face of it did appear to confirm the Claimant had mentioned his prior employment with the Respondent in his interview. Mr Northall accepted that as the Claimant failed to pay the deposit, and thus his claim was struck out, this matter had never been tested at a final hearing and no determination about it had been made. In his submission the evidence was thin and unpersuasive. The comment made by the Claimant came out of nowhere at the end of the interview and Suki does not acknowledge that she heard it, rather she sets out the next steps. Suki had left the employment of the Respondent by the time the disciplinary hearing that led to the Claimant's dismissal took place and it did not put the transcript to her. Claire (who was one of the other interviewers) was still employed and was interviewed at the appeal stage and could not recall the Claimant making a comment at interview as to his prior employment with the Respondent.

31. The Claimant was summarily dismissed by the Respondent for gross misconduct namely dishonesty in purposefully hiding his prior employment with the Respondent in his 2019 job application. By his ET1 the Claimant claimed automatic unfair dismissal and detriment on account of making protected disclosures. He contended the disclosures were made by anonymous email to the Respondent's CEO on 18 March 2020 and in a formal grievance on 26 November 2020.

32. In his submissions, Mr Northall referred me the Respondent's cost warning letter sent to the Claimant in January 2022 (page 96 of the bundle). In this letter, the Respondent's solicitor set out the Respondent's position, namely that the paramount issue for it was the Claimant knowingly falsifying his CV and that being the reason for dismissal.

33. In Mr Northall's submission, the Claimant knew full well he had done this; at the outset of these proceedings the Claimant knew he had been dishonest.

34. Mr Northall referred me to various authorities as follows:

    a. Growcott v Glaze Auto Parts Ltd (UK EAT/0419/11/SM) at para 8 where the Respondent's solicitors had sent a cost warning letter to the Claimant, and the EAT noted 'the (costs warning) is couched in accurate, straightforward and simple terms. It was wholly suitable to convey to any litigant the way in which the Employment Tribunal was bound to approach the forthcoming hearing… The Employment Tribunal, plainly from their costs Judgment, directed themselves properly as to the applicable law… they regarded that (costs warning) as being a fair and sensible warning to Mrs Growcott of the way in which the Tribunal would approach her unfair dismissal claim and that if she continued to proceed with her claim, she would be running a risk as to an award of costs.' Mr Northall submitted that the Respondent's costs warning letter of January 2022 should be similarly viewed and that it accurately predicted the key issue.

    b. Opalkova v Acquire Care Ltd (UK EAT/0056/21/RN) where the EAT noted that a determination that a response (or claim) did not have a reasonable prospect of success can overlap with a finding of unreasonable conduct on a cost's application. At paragraph 24 of that Judgment, it states '…there are three key questions. First, objectively analysed when the response was submitted did it have no reasonable prospects of success, or alternatively at some later stage as more evidence became available was a stage reached out which the response ceased to have reasonable prospects of success? Second, at the stage that the response has no reasonable prospects of success did the Respondent know that was the case? Third, if not, should the Respondent have known that the response had no reasonable prospects of success.' This case involved a Claimant pursing costs against a Respondent, and in this case, it is the Respondent making the application. In Mr Northall's submission plainly the Claimant knew at the outset that his claim had no reasonable prospects of success, and he knew of his dishonesty with regards to his CV.

    c. Kapoor v Governing Body of Barnhill Community High School (UK EAT/0352/13/RN) in which there was a review of the authorities and at paragraph 13 of the Judgment there was a quote from HCA International Ltd v JL May-Bheemul UK EAT/0477/10/ZT, 'a lie on its own will not necessarily be sufficient to found an award of costs. It will always be necessary for the Tribunal to examine the context and look at the nature, gravity and effect of the lie in determining the unreasonableness of the alleged conduct.' In Mr Northall's submission, the context in this case is critical. If the Claimant accepted his application for his role with the Respondent was dishonest he would

not have brought the claim. He could not have genuinely believed there was any other reason for dismissal.

35. Mr Northall put forward an alternative position namely that once the Claimant received the costs warning letter he ought to have withdraw his claim and the Respondent should have its costs from that date.

36. As to the claim against Mr Luck, the Respondent's CEO, the Respondent's position was this was brought only to embarrass Mr Luck or to place commercial pressure on the Respondent to settle. In Mr Northall's submission this was vexatious.

37. On the issue of means Mr Northall made the observation that means carries little weight where a Claimant has been dishonest. The Claimant had provided no documentary evidence as to means and it was not possible to make any evidential enquiry as to his ability to pay costs.

38. The Respondent had provided a breakdown of the costs incurred by it. These exceeded £20,000 but it was content to limit its cost application to £20,000.

39. As noted earlier in this decision I received a Skeleton Argument from the Claimant. He quoted from my Reserved Judgment of 7 September 2022 in which I refused the Respondent's application to strike out the claim and in which I made a deposit order stated as follows: -

"54. The Claimant's case at its highest is that the reason (for dismissal) must be false as he did in fact provide a correct CV in advance of his 2019 interview, that CV was in the possession of those interviewing him and that he has a transcript of the interview which proves he mentioned his previous employment with the Respondent. Bearing all that in mind, this is not a case that I can strike out. I cannot say there are no reasonable prospects of success.

55. I do however conclude there are little reasonable prospects of success. The Claimant provided a copy of a CV to the Respondent after his disciplinary hearing that cannot have been the CV he says he provided in advance of his interview. This is because it plainly refers to a job title and work experience he simply did not have as at August 2019. His explanation that he regularly updates his CV's has only been made relatively recently and the Respondent is right to argue that this appears an attempt to 'row back' from a position which will prove difficult to explain. This may give weight to the reasons put forward for dismissal. With that in mind, I am persuaded to make a deposit order on the basis the claim has little reasonable prospects of success. The Claimant must pay a financial deposit if he intends to pursue the claim. Having regard to the Claimant's means I order him to pay a deposit of £250."

40. In the Claimant's submissions little prospects of success did not mean 'no prospect' particularly where witness evidence had yet to be heard and where the Tribunal had not had the benefit of listening to his recording of the interview.

The Law

41. The power to make costs orders is contained in Rules 74 – 79 of Schedule 1, to the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013. Under Rule 76 (1)

> "A Tribunal may make a costs order…, and shall consider whether to do so, where it considers that –
>
> a) A party…had 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 prospects of success."

42. In Gee v Shell UK Ltd (2003) IRLR 82, it was confirmed that costs are the exception, rather than the rule.

43. I have set out earlier the various authorities that Mr Northall had taken me to. if the threshold for making an order is made out under either Rule 76(1) (a) or (b) it is a matter for the Tribunal in considering all relevant factors to decide whether to exercise its discretion to make an order.

44. Under Rule 84, when a Tribunal makes a costs order it may take the paying party's ability to pay into account when considering both whether to make an order and the amount of any order.

Conclusions

45. I am unable to accept that the Claimant's bringing or conduct of the claim was unreasonable, nor that the claim had no reasonable prospects of success. Indeed, on the latter point, at the hearing in September 2022 I refused the Respondent's strike out application as I concluded it could not be said the claim had no reasonable prospects of success. Whilst I accept the Respondent's position that it appears the Claimant was not truthful in his job application, I am conscious that he tendered an explanation for this (it was the fault of the recruitment agent) and that he sent in a corrected CV and that he has a recording of his interview where he mentions his previous employment. These arguments may have failed at trial however they needed to be aired and considered. It cannot, without airing these matters, be said the Claimant was dishonest or had lied.

46. The fact the Claimant failed to pay the deposit that I ordered him to pay meant the issues in this claim were never ventilated. No findings have been made on the merits, I cannot say at the time the claim was filed, or at any time before the claim was struck out due to the failure to pay the deposit, that the claim was unreasonable or had no reasonable prospects of success. I cannot find that the Claimant lied or was dishonest as his arguments to the contrary have not been heard.

47. As to the 4th ground, the claim pursed against the Respondent's CEO, I agree it was not appropriate for the Claimant to pursue Mr Luck as a Respondent. It appeared Mr Luck had no direct involvement in any matters concerning the Claimant's employment or the termination thereof. I note however that by the time I conducted the Case Management Preliminary Hearing in this claim on 27 January 2022, the Claimant had withdrawn the claim against Mr Luck. This withdrawal came relatively early in the proceedings. The Respondent company would have incurred the costs of defending the proceedings in any event and I doubt much by way of additional costs were involved in the filing of a response on the part of Mr Luck. I am not persuaded to award costs on this ground.

Employment Judge Hindmarch

15 August 2023