EMPLOYMENT TRIBUNALS

Claimants: Mrs J Belsey and Mrs O Dargue

Respondent: Europcar Group Ltd

Heard at: Cambridge (on paper)

Before: EJ Dobbie

Representation
Claimants: In person
Respondent: Gateley Legal (solicitors)

JUDGMENT

1. The Claimants must pay to the Respondent costs in the sum of £500.00 (£250.00 each). This sum is reduced by the £100.00 each already paid as deposit orders, such that the additional payment to be made by each Claimant is £150.00.

REASONS

Introduction

1. Following a final hearing conducted by video on 8 June 2022, at which the Claimants' claims for unpaid wages were dismissed, the Respondent applied for costs against both Claimants in an application dated 6 September 2022. The basis for the application is (in brief) that having paid deposit orders in respect of the claims, the Claimants' claims failed for substantially the same reason and that the Claimants unreasonably initiated and maintained their claims. The Respondent seeks a total of £15,495.00 split equally between the two Claimants covering their entire costs from presentation of the claims (which the Respondent states ought never to have been presented) to the end of proceedings. Alternatively, the Respondent seeks at least its costs from the date of payment of the deposit order in the sum of £5844.00, split equally between the Claimants.

Relevant background

2. The Claimants presented claims for unpaid wages in respect of the pay they

received during a period of furlough. In essence, they argued that the pay should have included commissions, whereas the Respondent maintained it was agreed that only 80% of *basic pay* would be payable.

3. The matter came before EJ Hyams on 3 February 2022 for case management. At that hearing, deposit orders were made in respect of each claim as to the argument that the furlough pay should have included commission. At paragraph 14 of the related case management order, EJ Hyams explained that since the letter of 1 April 2020 from the Respondent to the Claimants stated that they would receive 80% of basic pay only, this plainly excluded commission payments. He ordered that each Claimant pay a deposit of £100 to continue with their claims. The usual note accompanying the deposit order explained to the Claimants what the implications of the order were.

4. On 19 March 2022, Mrs Dargue enquired of the Respondent whether she would be subject to an application for costs if she withdrew her claim at that stage. The Respondent confirmed it would not pursue costs if she did so.

5. In a letter dated 22 March 2022, the Respondent made an offer headed "Without Prejudice Save as to Costs" informing the Claimants that if they withdrew their claims, the Respondent would not seek any costs against them. However, if they continued, the Respondent would seek its full costs, which it estimated to be approximately in the region of £10,000 plus VAT to the final hearing. The Claimants maintain this was sent on 22 April 2022. I can see from the email at page [48] of the costs bundle that it was indeed in April, and not March, that these offers were sent.

6. Both Claimants replied to the Respondent setting out why they believed they had a strong case and rejecting the offers.

7. The Claimants both paid the deposits and the matter came on for final hearing on 8 June 2022. At that hearing, the Claimants continued in their argument that despite the express terms of the letter stating they would be paid 80% of basic pay only, it was an implied term that they would also get 80% of their commission payments, because the commission payment had become part of their "normal wages" over time and/or because the Coronavirus Job Retention Scheme ("CJRS") guidance envisaged that such payments should be included, which they say was thereby incorporated into a contractual agreement.

8. For the reasons given in my judgment sent to the parties on 12 August 2022, the claims were dismissed. In brief, it was held that whilst the latter CJRS guide (from June 2020) envisaged that all contractually due elements of pay would be included, the earlier guide (from March 2020) had expressly stated that commissions should be excluded (without distinction as to whether they were contractual or not). Neither guide was incorporated into the agreement between the parties. Moreover, irrespective of the wording of the guide (which was not law) the express agreement between the parties, on or around 1 April 2020, was that the Claimants would receive 80% of *basic pay* only, as stated in the letter and as agreed by the Claimants (which they confirmed in their oral evidence they had understood and agreed at the time).

9. The Respondent applied for costs by way of an application dated 6 September 2022, seeking that the matter be resolved on the papers.

10. On 12 September 2022, Mrs Dargue wrote to the Tribunal objecting to the application for costs. Her main reasons can be summarised as follows:
    (a) She had not acted vexatiously, abusively or unreasonably;
    (b) EJ Hyams had the power to strike out the claim as having no reasonable prospects but did not;
    (c) The argument was whether the commission was contractual or non-contractual, and the final judgment did not determine that issue, therefore the basis of the final judgment differs from the reasons given under the deposit and it was necessary for her to continue to the final hearing.

11. On 13 September 2022, Mrs Belsey also objected to the costs application. She stated she concurred with Mrs Dargue's objections and disputed some of the aspects of the costs application.

12. I invited the Claimants to indicate whether they agreed for the matter to be dealt with in writing and to present any evidence or submissions as to their ability to pay that they wished to be considered.

13. On 19 March 2023, Mrs Dargue confirmed she was content for the costs application to be determined on paper and that she wanted to advance written evidence about her ability to pay. On 24 March 2023, she duly did so, providing a statement of means. Aside from stating she had only £0.27 in her savings account, she gave no further specific information about cash in the bank, income, capital and outgoings. She stated that she has debts (without saying how much) and two children. She did not explain whether she was working or not at the relevant time, nor whether she was supported financially in any way. She used the rest of the document to re-argue aspects of the case.

14. On 12 April 2023, Mrs Belsey provided a statement stating she was working but would be reducing her hours from full to part time due to her age (66 years at that time, turning 67 in June 2023). She stated she had a state pension and small private pension (but did not indicate what the payment from this was). She stated that her husband was a pensioner who was unable to work due to disability and that they lived in council accommodation which they were looking to downsize to save money on the basis that they were "struggling and living month by month". She also stated that she was paying off debt in the hope she would be debt free by retirement.

15. On 25 April 2023, the Respondent confirmed it would not be making any further submissions on the matter.

Relevant law

16. Tribunals have a discretionary power to make a costs order or under rule 76(1)(a) of the Employment Tribunal Rules of Procedure 2013 ("the Rules") where it considers that a party has acted "vexatiously, abusively, disruptively or otherwise unreasonably" in either the bringing of the proceedings or the way that the proceedings have been conducted. Rule 76(1) imposes a two-stage test: first, a tribunal must ask itself whether a party's conduct falls within rule 76(1)(a); if so, it must go on to ask itself

whether it is appropriate to exercise its discretion in favour of awarding costs (**Monaghan v Close Thornton Solicitors** EAT 0003/01).

17. In cases where a deposit order has been made and the tribunal subsequently decides the matter for substantially the same reasons as those it relied on when making the deposit order, the deposit will be paid to the other party under rule 39(5)(b). There is no discretion in this. However, that is not the end of the matter. Under rule 39(5)(a), the party who paid the deposit order is automatically treated as having acted unreasonably in pursuing that specific argument for the purposes of rule 76 (unless the contrary is shown). Therefore, whilst rule 39(5)(b) is obligatory (in that the deposit must be paid to the winning party) the tribunal may make a greater costs award under rule 76(1). Whilst the first stage of the test for costs may be deemed to be satisfied under rule 39(5)(a), the tribunal still has to determine the second stage of the test, namely whether to exercise its discretion to award costs (**Ono v UC (UNISON)** 2015 ICR D17, EAT).

18. Rule 39(6) provides that if a deposit has been paid to a party under rule 39(5)(b), the amount of the deposit shall count towards the settlement of any costs order made in favour of the same party.

19. In **Dorney and ors v Chippenham College** EAT 10/97 the EAT said that there should not be a "fine-tooth comb" approach to a comparison between the reasons for making the deposit order and the reasons leading to a finding against the claimant.

20. Unrepresented parties should be judged less harshly than represented parties (**AQ Ltd v Holden** 2012 IRLR 648, EAT). This is because unrepresented parties are likely to lack the objectivity and knowledge of law and practice of a legal adviser. The EAT stated that even if the threshold tests for an order for costs are met, the tribunal still has discretion whether to make an order. That discretion should be exercised having regard to all the circumstances. In this respect, it was not irrelevant that an unrepresented party may have brought proceedings with little or no access to specialist help and advice. This was not to say that unrepresented litigants are immune from orders for costs however.

21. "Unreasonable" has its ordinary English meaning and is not to be interpreted as if it means something similar to "vexatious" (**Dyer v Secretary of State for Employment** EAT 183/83).

22. In determining whether to make an order for costs, a tribunal should consider the nature, gravity and effect of a party's unreasonable conduct (**McPherson v BNP Paribas** 2004 ICR 1398, CA).

23. As the Court of Appeal reiterated in **Yerrakalva v Barnsley Metropolitan Borough Council** 2012 ICR 420, CA, costs in the employment tribunal are still the exception rather than the rule.

24. Also **Yerrakalva**, the Court of Appeal commented that it was important not to lose sight of the totality of the circumstances. The vital point in exercising the discretion to order costs is to look at the whole picture.

25. An award of costs is to compensate the party in whose favour the order is

made, and not to punish the paying party (**Lodwick v Southwark London Borough Council** 2004 ICR 884, CA).

26. In deciding whether to make a costs order (and if so in what amount) an employment tribunal may have regard to the paying party's ability to pay (rule 84). However, a tribunal is not obliged to do so, it is merely permitted to do so. In **Jilley v Birmingham and Solihull Mental Health NHS Trust and ors** EAT 0584/06 it was held that, if a tribunal decides not to take into account a party's ability to pay after having been asked to do so, it should say why. If it does decide to take into account ability to pay, it should set out its findings on the matter, say what impact these have had on its decision whether to award costs or on the amount of costs, and explain why.

Decision

27. I find that the reasons for which I rejected the claims are substantially the same as the reason given in the deposit order. Accordingly, the first stage of the test for costs is satisfied under rule 39(5)(a), unless the Claimants can demonstrate the contrary.

28. I have considered their submissions in respect of costs and do not hold that they have demonstrated to the contrary. Addressing the submissions, whilst it is correct that EJ Hyams had the general power to strike out the claim as having no reasonable prospects but did not, I note that the hearing he presided over was a private preliminary hearing and the Claimants had not been given notice of a risk of striking out. Accordingly, EJ Hyams would not have had the power to strike out the claims at that hearing. However, and in any event, he did find that the claims had little reasonable prospect of success and made deposit orders. It is this that underpins the operation of rule 39(5)(a), leading to the presumption of unreasonableness in the circumstances of this case.

29. I disagree with the Claimants' argument that the reasons the claims failed at final hearing are not sufficiently similar to trigger the operation of rule 39(5). EJ Hyams made the deposit order on the basis that the Claimants had expressly agreed to receive 80% of basic pay only (not including commissions) by reason of the letter dated 1 April 2020 (para 15 of the Case Management Order). In the Deposit Order itself, EJ Hyams worded the matter even more broadly stating that "the claimant is unlikely to be able to show that she was entitled to more than 80% of her basic salary i.e. not including commission payments, when she was not at work and furloughed."

30. The final judgment held at paragraph 43 that the express agreement between the parties was for 80% of basic pay only (referencing the letter of 1 April 2020) and that any other discussions, policies or guidance were superseded by this or came after (and hence cannot have been incorporated into the agreement made at an earlier time). Bearing in mind that tribunals are not meant to apply a "fine-toothed comb" approach to comparing the reasons on a deposit order and reasons on judgment, I find that rule 35 applies. Accordingly, under rule 39(5)(b), the Respondent is therefore entitled to receive the £100 each Claimant paid as a deposit. Further, under rule 39(5)(a), I am bound to find that the Claimants acted unreasonably within the meaning of rule 76.

31. I have then considered whether any behaviour prior to the deposit order was unreasonable, such that costs from inception of the claims might be in scope. I do not find that the Claimants' behaviour before the date of the deposit order to have been unreasonable, given their lack of legal representation and the relative complexity of contractual doctrines they sought to rely on. However, after being warned by EJ Hyams and being subject to a deposit, rule 39(5)(a) stipulates that the first stage of the test is met. I note that the Respondent's costs after the deposit order are £5844.00 (inclusive of VAT).

32. Rule 39(5)(b) mandates that the deposits be paid to the Respondent. The next question therefore is whether the Respondent should recover more than the £100 paid by each Claimant under the deposit orders. This is the discretionary part of the test for costs under Rule 76.

33. I have considered the fact that both Claimants were unrepresented throughout and did not have the benefit of legal advice at any stage. The arguments they sought to run about implied terms and incorporation of written documents or implication by custom and practice were based on somewhat sophisticated principles of law that they cannot be expected to have fully understood. On the other hand, they both gave evidence that when they received the letters of 1 April 2020, they knew what was being offered (namely 80% of basic pay only) and they both agreed to that. There was thus a meeting of the minds in respect of that rate of pay and it was clear and certain and supported by consideration. It was only after that express agreement that the Claimants considered this to be an unfair application of the CJRS, which they say ought to have been implied / incorporated into the earlier deal. Therefore, in simple terms, they both knew what the deal was and they accepted it in April 2020, only to think better of it at a later date, when they read the terms of the relevant CJRS guides. Notwithstanding this, the Claimants cannot be held to the same standard as lawyers when considering the reasonableness of continuing in the claims running the arguments which they did.

34. I have also considered the fact that they were warned by the deposit order and by the Respondent as to the weakness of their claims. They both paid the deposits and I find that they both genuinely believed they had good claims to run. However, they were mistaken on this due to their misunderstanding of the relevant legal principles.

35. I have considered the Respondent's offer made on 22 April 2022, but this does not impact my decision.

36. I have considered the impact of their actions, which is that the Respondent had to prepare for and attend a final hearing, incurring costs and management time. No doubt this is an inconvenience, but it was at least a short hearing. Therefore the nature, gravity and effect of the Claimants' conduct was not egregious. It was misguided in nature, and relatively modest in gravity and effect.

37. Finally, I have considered the limited evidence advanced as to the Claimants' ability to pay. Neither Claimant gave a detailed account of their means. They both understood the sorts of matters that were relevant, but neither gave detailed accounts of those (i.e. the level of debt they had or

the extent of their income). Therefore, whilst both Claimants indicate that they are not particularly affluent, they similarly do not depict an inability to make some contribution to the Respondent's costs. I am nonetheless willing to take it into account and consider that these are Claimants of limited means. Their pay at the Respondent was modest and there is nothing to suggest they have come into money since.

38. In light of all the circumstances, I consider it just and fair to compensate the Respondent in respect of some of the costs paid by it in defending the claims after the date on which payment of the deposit orders fell due. It was put to cost and inconvenience it ought never to have incurred.

39. In exercising my discretion in favour of the Respondent, I have considered a sum that is just, bearing in mind the fact that the Claimants did not knowingly act unreasonably and hence have not acted or vexatiously. Further, I have considered their ability to pay to be limited and that they have not had the benefit of legal representation. Therefore, I order each Claimant to pay a contribution towards the Respondent's costs in the sum of £250.00 each, of which £100.00 each is satisfied by the deposits already paid. Accordingly, each Claimant is obliged to pay a *further* £150.00 to the Respondent. The Respondent shall therefore receive a total of £500.00 towards its costs of £5844.00.

_____

Employment Judge Dobbie

_____

Date 10 July 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
24 August 2023
.....

.....
FOR EMPLOYMENT TRIBUNALS