



EMPLOYMENT TRIBUNALS

Claimant: Mr T Harris

Respondent: Praeclarus Group Limited

Heard at: On the papers

On: 16th October 2023

Before: Employment Judge Amy Smith

JUDGMENT

The Judgment of the Tribunal is that:

1. The claimant shall pay the respondent £4,947.50 by way of costs.

REASONS

Introduction

1. This Judgment should be read in conjunction with the Tribunal's strike out Judgment of 21st July 2023 and the notes of the telephone Preliminary hearing on 15th February 2023.
2. The respondent intimated at the end of the hearing on 21st July 2023 that a costs application may be made.
3. On 4th August 2023 the respondent made a costs application in writing and asked for the decision to be considered without a hearing.
4. The application was made under Rule 76 in that:
 - a. The claimant had acted scandalously, unreasonably, and vexatiously.
 - b. The claims had no reasonable prospect of success.
5. The application appended:

- a. The Tribunal's Strike Out Judgment,
 - b. An email chain between the parties dating between February and July 2023,
 - c. A letter from the respondent to the claimant on 3rd July 2023,
 - d. A costs schedule.
6. The claimant was copied in to the application.
 7. No response having been received from the claimant, the Tribunal wrote to the claimant on 4th September 2023 enclosing the application and asking for a response by 22nd September 2023.
 8. The claimant has not provided a response to the application.
 9. The application was therefore considered by the Tribunal Judge without a hearing.

Issues

10. The issues for the Tribunal Judge to decide are:
 - a. Is the threshold for making a costs order been met, in particular:
 - i. Did the claimant act scandalously, unreasonably, and vexatiously, and/or
 - ii. Did the claims have no reasonable prospect of success?
 - b. If so, should the Tribunal make a costs order?
 - c. If so, for how much.

The law

Tribunal Rules

11. The power to make a costs order arises from Rules 75 and 76. Rule 75 provides different ground for making such an order including:

“a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing or conducting of proceedings (or part thereof) — rule 76(1)(a)”

“a claim or response had no reasonable prospect of success — rule 76(1)(b)”
12. Costs is defined in Rule 74(1) as ‘fees, charges, disbursements 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)’.

13. Rule 78 states how the amount of costs will be determined. The Tribunal can award up to £20,000 unassessed costs.

Threshold: conduct

14. Rule 76(1)(a) relates to conduct.
15. There is a two stage test: firstly a Tribunal must ask itself whether the conduct falls within Rule 76(1)(a). If so, it must then go on to consider whether it is appropriate to exercise its discretion in favour of awarding costs.
16. A litigant in person is to be judged less harshly in relation to conduct than a professionally represented party (*AQ Ltd v Holden 2012 IRLR 648*).
17. Vexatious has been defined in *ET Marler Ltd v Robertson 1974 ICR 72* as:

‘If an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive, he acts vexatiously.’

18. Simply being misguided is not sufficient to establish vexatious conduct (*AQ Ltd v Holden 2012 IRLR 648*).
19. The Court of Appeal in *Scott v Russell 2013 EWCA Civ 1432* cited a definition of vexatious given by Lord Bingham in *Attorney General v Barker 2000 1 FLR 759*:

‘the hallmark of a vexatious proceeding is... that it has little or no basis in law (or at least no discernible basis); *that whatever the intention of the proceedings 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’.

20. Unreasonable is to be understood according to its ordinary English meaning (*Dyer v Secretary of State for Employment EAT 183/83*).
21. Under this ground, a Tribunal must take into account the ‘nature, gravity and effect’ of a party’s unreasonable conduct (*McPherson v BNP Paribas (London Branch) 2004 ICR 1398*).
22. But these factors are not to be separated into sections and analysed separately (*Yerrakalva v Barnsley Metropolitan Borough Council and anor 2012 ICR 420*). The point is to look at the whole picture and not lose sight of the totality of the circumstances.
23. It may be that a party’s conduct, taken as a whole, amounts to unreasonable conduct (*Sahota v Dudley Metropolitan Borough Council EAT 0821/03*).

No reasonable prospect of success

24. Rule 76(1)(b) gives the Tribunal the power to make a costs order where it considers that a claim or response had no reasonable prospect of success.
25. As above, this is a two stage test.
26. Under rule 76(1)(b), the focus is simply on the claim or response itself.
27. The assessment can include whether the claim had any reasonable prospect of success during the course of its currency (*Hosie and ors v North Ayrshire Leisure Ltd EAT 0013/03*).

Discretion

28. The Tribunal is not obliged to make an order simply because a ground has been made out. It has a discretion whether or not to do so.
29. Costs in the Employment Tribunal are the exception, rather than the rule (*Yerrakalva v Barnsley Metropolitan Borough Council and nor 2012 ICR 420*).
30. Costs are 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*).
31. The Tribunal must assess what loss has been caused to the applicant. They should be limited to those 'reasonably and necessarily incurred' (*Yerrakalva v Barnsley Metropolitan Borough Council and nor 2012 ICR 420*).
32. The Tribunal may have regard to the paying party's ability to pay (Rule 84).
33. If a costs warning has been given, it is a factor that can be taken into account when considering whether to exercise discretion to make an order (*Oko-Jaja v London Borough of Lewisham EAT 417/00*).
34. The fact that a party is not represented can also be a relevant factor (*AQ Ltd v Holden 2012 IRLR 648*).

Conclusions

Threshold: conduct

35. A telephone Preliminary Hearing took place on 15th February 2023, during which the claimant:
 - a. Repeatedly interrupted the Employment Judge,
 - b. Repeatedly interrupted despite being asked not to do so,
 - c. Interrupted the respondent's representative,
 - d. Repeatedly used offensive language,

- e. Repeatedly used offensive language despite being asked not to do so,
- f. Accused the Tribunal Judge and the Tribunal office of being “incompetent”,
- g. Raised his voice,
- h. Left the hearing without warning and did not return.

36. The Tribunal Judge listed a hearing in person to decide:

Whether to strike out the claims under Rule 37(1)(b): that the manner in which the proceedings have been conducted by the claimant has been scandalous, unreasonable or vexatious.

And/or

Whether to strike out the claims under rule 37(1)(c): non-compliance with the Orders of Employment Judge Steward made on 25th August 2022.

37. On 26th July 2023 the claimant did not attend the listed hearing to determine whether to strike out his claims. The Tribunal struck out the claimant’s claims in the following terms:

“The claims are struck out under Rule 37(1)(b) and Rule 37(1)(c) in that the manner in which the proceedings have been conducted by the claimant has been scandalous, unreasonable or vexatious and due to the claimant’s failure to comply with the Orders of Employment Judge Steward made on 25th August 2022.”

38. I take into account that the claimant is a litigant in person and was throughout the conduct of his case.

39. The nature, gravity and effect of the claimant’s conduct throughout the process has been unreasonable, despite him being a litigant in person. He was offensive to the respondent and the Tribunal, he interrupted so often that the hearing could not progress even to introductions, he used offensive language, raised his voice and left the hearing. Much of this behaviour was repeated and in spite of being asked and warned not to do so on more than one occasion by the Tribunal Judge.

40. As a result of his conduct the Tribunal and the respondent did not know what legal claims he was bringing and the basis of them. In addition, the Tribunal could not ascertain what the claimant’s position was on status, which appeared to be in dispute. Further, the Tribunal could not be clear on the position of the claimant’s separate County Court claims which may have resulted in a stay of the Employment Tribunal proceedings.

41. The hearing was therefore wasted.

42. Taken as a whole, I find that the claimant’s conduct was unreasonable.

43. The threshold is therefore passed.

Threshold: no reasonable prospect of success

44. Considering the claim form and response, it is clear that there was a potential dispute about worker status, whether the claimant had performed the contractual work and whether there had been discrimination.
45. In terms of documents, I have only the Professional Services Appointment which is purportedly signed by the claimant on 15th October 2021.
46. I consider that taking the above into account I cannot find that the claims had no reasonable prospect of success. There are significant disputes which would have required evidence, cross examination and submissions.

Discretion

47. I remind myself that costs in the Employment Tribunal are the exception, rather than the rule. I am also mindful that the purpose of costs is not to punish the claimant for his conduct, but rather compensate the paying party. I also remind myself that the claimant is a litigant in person.
48. The respondent had instructed professional representatives to draft the response, deal with correspondent and attend the telephone Preliminary Hearing. They also instructed Counsel to attend the Preliminary Hearing to consider Striking Out the claim. They have been put to expense for their legal fees.
49. I am unable to assess the claimant's ability to pay. Despite being given an opportunity to do so, the claimant has not responded to the application or the Tribunal's letter requesting a response.
50. All I have from the claimant is the ET1, an email dated 27th January 2022 and the claim form for the County Court claim. None of which assists me in relation to assessing the claimant's means.
51. The respondent provided a robust response to the claims in their ET3.
52. The respondent also sent a letter to the claimant on 3rd July 2023. This letter put the claimant on notice that, if he continued to pursue his claims, the respondent would apply for costs. The letter stated:

"We are of the opinion that your claim as pleaded has no reasonable prospect of success and, that you have acted vexatiously/abusively, disruptively and unreasonably for the reasons set out below:

1. Your claim as pleaded has no reasonable prospect of success, is extremely vague and, sets out no proper grounds and, is brought by you as an individual when our client had no contract with you personally.
2. You have persistently failed to comply with any tribunal directions; all directions for you to provide/file documents have been ignored in their entirety;
3. At the last hearing, (as noted by Employment Judge A Smith in the Case Management summary sent to all parties) you were abusive, aggressive and disruptive and, refused to take part in the hearing, hanging up during the hearing and then again later when the tribunal made further contact."

53. The letter further stated:

“We estimate that our client's costs in this matter incurred to date are approximately £4,405.00 plus vat (£5286.00) and the further necessary costs for the barristers attendance at the hearing on the 21st July will be £1500.00.

Given the above, we recommend that you obtain independent legal advice in respect of the merits of your claim and, as to potential for costs awards based upon your conduct in the proceedings as soon as possible, if you have not already done so.

Despite the significant amount of costs already incurred in these proceedings, our client is prepared not to pursue a costs order against you if you withdraw your claim in full not later than Friday 7th July at 4pm and, provide to us a copy of the withdrawal.”

54. I consider this letter to be clear and unambiguous. The claimant was on notice from the date that he received this letter (as sent by email it would be 3rd July 2023 (Rule 90(b))) that:

- a. The respondent considered that the claims had no reasonable prospect of success and that he had acted “vexatiously/abusively, disruptively and unreasonably”,
- b. The respondent considered that he had “persistently failed to comply with any tribunal directions”,
- c. The claimant was “abusive, aggressive and disruptive and, refused to take part in the hearing, hanging up during the hearing and then again later when the tribunal made further contact”,
- d. The respondent had incurred legal costs and would continue to incur more should the claims not be withdrawn.
- e. The legal costs were given an amount as up to the date of the letter.
- f. The potential amount of further costs.

55. Taking all the above into account, I consider it appropriate to exercise my discretion to make a costs order.

Amount

56. The respondent has provided a costs schedule amounting to £6,795.00 (including VAT).

57. I consider that I can make a summary assessment of the amount of costs.

58. I note that, in the costs warning letter, the respondent stated that they had incurred costs of approximately £4,405.00 (£5,286.00 including VAT) as of 3rd July 2023 and that they were likely to incur further costs of £1,500 for the Preliminary Hearing on 21st July 2023.

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59. The partner who has performed work on this case has charged £300 per hour. He is a solicitor based in Stockport. The Guideline Hourly Rates for solicitors of his experience and in his location is £255 per hour. I conclude that such an hourly rate would have been reasonably and necessarily incurred.
60. I consider Mr Zaman's fee of £1,250 to be reasonable considering the application which he was making and his likely reasonable preparation time.
61. Having summarily assessed the attendances and work on the case, I consider that the work completed by the solicitor for the respondent was eminently reasonable for the claims brought by the claimant, the potential complexity of the case, the potential financial risk to the respondent and the stage at which the proceedings had reached.
62. There is no VAT to be award for VAT registered individuals (*Raggett v John Lewis plc 2013 ICR D1*).
63. The application is therefore granted, and I award costs in the below sums:
 - a. Solicitor's fees: £3,697.50,
 - b. Counsel's fees: £1,250.00,
 - c. **TOTAL: £4,947.50.**

Employment Judge Amy Smith

Date: 16.10.23