



EMPLOYMENT TRIBUNALS

Claimant: Mr R Murray

Respondent: London General Transport Services Ltd (t/a Go Ahead London)

Heard at: London South Employment Tribunal, on paper

Before: Employment Judge Abbott

JUDGMENT ON COSTS

The Respondent's application for a costs order under Rule 76 of the Employment Tribunals Rules of Procedure 2013 succeeds. The Claimant is ordered to pay the Respondent the sum of £4,254.50 in respect of costs.

REASONS

1. On 22 March 2023 the claim came before the Tribunal to determine, as a preliminary issue, whether the complaints were brought out of time. By its Judgment sent to the parties on 31 March 2023 (reasons having been delivered orally on 22 March 2023) the Tribunal found in favour of the Respondent and dismissed the claim in its entirety on the basis that the Tribunal does not have jurisdiction to hear any of the complaints brought by the Claimant, which were all brought out of time. The Claimant's representative, Mr Daniel Ibekwe, requested written reasons, which were sent to the parties on 10 May 2023.
2. By a letter dated 3 April 2023, the Respondent applied for a costs order against the Claimant. It contended that it should be awarded its costs on the basis that the Claimant's claims at no stage had reasonable prospects of success (Rule 76(1)(b)). The application enclosed a statement of costs indicating total costs claimed of £4,254.50 plus VAT up to and including the hearing on 22 March 2023. It also attached a costs warning letter that had been sent to Mr Ibekwe on 4 October 2022 (the same date on which the ET3 response was presented). The Respondent requested that the application be determined on paper.
3. The Respondent's costs application was copied, by email, to Mr Ibekwe. On 10 May 2023, on my instructions, the Tribunal wrote to Mr Ibekwe, copying the

Respondent's solicitors, with the following request:

As regards the Respondent's application for a costs order, the Claimant should within 21 days of today provide written representations in response, to address:

1. whether rule 76(1) is engaged;
2. if so, whether I should exercise my discretion to make a costs order – which should include any submissions and evidence in relation to the Claimant's ability to pay such an order; and
3. any challenge to the figures claimed by the Respondent.

I am presently minded to determine the costs application on paper but will consider any reasoned request for a hearing from the Claimant, if necessary.

4. On 23 May 2023, the Respondent's solicitors wrote to the Tribunal informing that they had learned that Mr Ibekwe had sadly passed away since the hearing on 22 March 2023. They copied the Claimant on that email (using the email address for him given on the ET1 claim form). The Respondent's solicitors subsequently followed up by email on 21 June 2023.
5. At that stage, it was not clear to me whether the Claimant had received all of the relevant materials, and I therefore directed that a letter be sent to him in the following terms:

I have reviewed the correspondence on file regarding the Respondent's costs application. Although it appears that the Respondent's application has been sent directly to the Claimant, it is not clear to me whether the Tribunal's letter of 10 May 2023 has come to his attention. A further copy of this letter is attached. The Claimant must provide a response to that letter within 14 days of today's date. If no response is received, I will determine the application without a hearing based on the materials currently available to me.

6. Unfortunately, when that letter was sent on 1 August 2023, due to an administrative error it was directed to Mr Ibekwe's email address and not to the Claimant's. When the file came back to me, I directed that it be resent to the Claimant (by email and post) to make sure that he had the opportunity to see all of the materials and respond accordingly. This was done on 2 October 2023.
7. The 14-day period for responding expired on 16 October 2023 and, by the date of this judgment, no response has been received from the Claimant. Having made substantial efforts to bring the application to his attention, I am satisfied that it is in the interests of justice now to determine the application based on the materials I have before me.

The law

8. Rule 76(1) provides (insofar as relevant):

A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that — [...] (b) any claim or response had no reasonable prospect of success [...].

9. There is a three-stage process. First, I must ask myself whether rule 76(1) is engaged; if so, it must go on to determine whether it is appropriate to exercise

my discretion in favour of awarding costs against the Claimant; and if so, I must quantify the order (Rule 78). Rule 84 provides that, in deciding both whether to make a costs order, and if so, in what amount, I may have regard to ability to pay.

10. The Employment Appeal Tribunal (HHJ Auerbach) discussed the approach to applications under Rule 76(1)(b) in *Radia v Jefferies International Ltd* [2020] IRLR 431. The EAT explained at [65] that the Tribunal should first, at stage 1, consider whether, objectively, the claim "had no reasonable prospects of success" when it was begun. If so, then at stage 2 the Tribunal will usually need to consider whether, at that time, the complainant knew this to be the case, or at least reasonably ought to have known it. When considering these questions, the Tribunal must be careful not to be influenced by the hindsight of taking account of things that were not, and could not have reasonably been, known at the start of the litigation. However, it may have regard to any evidence or information that is available to it when it considers these questions, and which casts light on what was, or could reasonably, have been known, at the start of the litigation.

Discussion

Stage 1: Rule 76(1) engaged?

11. In accordance with the guidance in *Radia*, the first step is to look objectively at the prospects of the individual complaints within the claim when they were begun.
12. It is evident from the particulars of claim that, aside from the dismissal, every act and detriment relied upon fell well outside the primary time limit for the claims being brought – as is explained in the written reasons for the substantive judgment. The dismissal could only fall within the primary time limit on the basis of it being characterised as a continuing act that lasted from December 2021 to June 2022, but this was an argument objectively flawed in law, again as explained in the substantive written reasons. The dismissal was therefore also outside of the primary time limit.
13. Accordingly, all of the complaints could only have any prospects of success if an extension of time could be granted. As explained in the substantive written reasons, for all complaints, this placed a burden on the Claimant to justify an extension of time under the relevant provisions. In those circumstances, one would expect to see in the claim some explanation for why time should be extended. No such explanation was provided in the claim (or, indeed, at any point thereafter). That being the case, I am satisfied that, viewed objectively, none of the complaints had reasonable prospects of success from the outset, because there was never a reasonable prospect of the Tribunal extending time.

Stage 2: discretion

14. In deciding whether to exercise my discretion, I acknowledge that the making of costs orders in the Employment Tribunal is an exception rather than the rule (*Yerrakalva v Barnsley Metropolitan Borough Council and anor* [2012] ICR 420, CA). I consider the following factors to be relevant in this case:

- a. The Claimant was represented throughout the proceedings. Whilst Mr Ibekwe was not legally qualified, he was someone with considerable familiarity with employment law and who, based on my own research, has appeared on numerous occasions in the Employment Tribunal and Employment Appeal Tribunal. In *Brooks v Nottingham University Hospitals NHS Trust* EAT 0246/18 the EAT noted that positive legal advice will not necessarily insulate an unsuccessful claimant against an award for costs. In the absence of any evidence to the contrary, the tribunal is entitled to assume that a represented party has been properly and appropriately advised as to the merits of his or her case. However, in this case, that assumption must be caveated a little due to Mr Ibekwe's lack of formal legal qualification.
 - b. The Claimant's representative was warned at the very outset of the case by the letter dated 4 October 2022 that the Respondent considered that Rule 76(1) applied and that it would seek to recover costs. The jurisdictional / time points were raised in the ET3. A choice was, it seems, made to proceed with the claim regardless yet, even up to the hearing on 22 March 2023, offer no real explanation for why the Tribunal should extend time.
 - c. The nature of the evidence required to give the complaints a reasonable prospect of success (at least in respect of getting over the jurisdictional hurdle as regards time limits) was in the hands of the Claimant himself. It was not dependent upon anything from the Respondent.
15. Despite being invited to do so, the Claimant has provided no information as to his ability to pay any costs order. In the circumstances, this is a factor that I will disregard since I have no reliable information on which to form a view as to the Claimant's means.
16. Drawing the points together, I find that the Claimant (with Mr Ibekwe's assistance) ought to have known from the outset that the time points rendered his complaints without reasonable prospects of success unless the Tribunal could be persuaded to extend time, but no genuine effort was made to so persuade the Tribunal. It is fair to infer that no proper basis to argue for an extension could be made. Taking into account all of the factors set out above, I consider it is right to exercise my discretion to make a costs order against the Claimant in this case.

Stage 3: quantification

17. The costs claimed are under £20,000, so I can make an order myself (Rule 78(1)(a)).
18. I have considered the Respondent's Schedule of Costs and note that the Claimant has made no submissions in this respect. It seems to me that the rates of the Respondent's solicitors and the numbers of hours they have spent on the case are reasonable and proportionate. The same can be said for Counsel's brief fee for the hearing on 22 March 2023. I see no proper basis to

make any deductions from the costs claimed.

19. I will therefore order that the Claimant pay to the Respondent the sum of £4,254.50, this being the figure claimed (exclusive of VAT, as I understand the Respondent to be VAT-registered and, therefore, able to recover the VAT element of its legal fees from HMRC as input tax).

Employment Judge Abbott
Date: 30 October 2023

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