EMPLOYMENT TRIBUNALS

Appellant: Michigan Construction Limited

Respondent: Mark Patrick Welsh of HSE

Heard at: Bury St Edmunds by video **On:** 26 October 2023 (panel only)

Before: Employment Judge Dobbie, sitting with members Mrs H.Gunnell and Mrs A.Brown

Representation
Parties were not in attendance and the matter was determined in writing as set out below.

RESERVED JUDGMENT

1. The Respondent's application for costs is upheld in the sum of £2,176.60 only.

REASONS

Introduction / procedure

2. On 2 May 2023, the date on which the matter had been set down for final hearing, the Tribunal heard and determined the Respondent's application to strike out the Appellant's appeal. The Tribunal upheld the application on the basis that the appeal had no reasonable prospects of success. The Tribunal found that had it not upheld the strike out on that basis, it would have struck the appeal out for the Appellant's failure to pursue the appeal. Reasons were given orally on that day and a written judgment was sent to the parties.

3. As is explained in greater detail below, the Appellant did not attend the final hearing on 2 May 2023.

4. At the end of the hearing on 2 May 2023, the representative for the Respondent, an in-house Senior Enforcement Lawyer, applied for costs against the Appellant. Upon enquiry, he confirmed that the Appellant had not been warned of the risk of costs. At that stage, the Respondent

confirmed it did not have a schedule of costs to provide the Tribunal with. Hence the Appellant cannot have been provided with an application for costs or a costs schedule. The Tribunal accordingly invited the Respondent to submit an application for costs in writing to give the Appellant the opportunity to reply as is required under Rule 77 of the ET Rules 2013.

5. On 15 May 2023, the Respondent applied for costs in an email stating:

> Application for costs:
> In accordance with Rule 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.
> In light of the Tribunal finding that the claim had no reasonable prospects of success, we are therefore seeking our costs, as attached.
> Further, the Respondent seeks to recover these costs in accordance with *Ladak v DRC Locums Ltd Employment Appeal Tribunal [2014] 6 WLUK 448 16 Jun 2014* where it was held a party awarded its costs in an employment tribunal was entitled to claim costs where it was legally represented by a qualified employee and the definition in the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 Sch.1 para.38 did not place any artificial restriction on such a claim; *and Henry Wiggins & Co v Jenkins - Employment Appeal Tribunal [1981] 2 WLUK 121 , [1981] C.L.Y. 837* where it was held, that it was well established in ordinary litigation that a successful party was entitled to his costs regardless of whether he had been represented by "in house" or outside lawyers.

6. The email was copied to the most recent email address for the Appellant, which he had used and replied from as recently as 2 May 2023. He did not reply to the application. A Bill of Costs was attached to the application email, seeking £2823.90 in costs.

7. On 15 August 2023, the Tribunal wrote to the Appellant as follows:

> "Employment Judge Dobbie directs that the Appellant indicate within 14 days of this communication whether he wishes to contest the Respondent's application for costs made on 15 May 2023 (attached) and if so to specify whether he wants to do so in writing or at a short video hearing.
>
> If he wants to contest the application at a hearing, he must specify why a hearing is necessary.
>
> If he is content for the matter to be dealt with on paper, he must explain his reasons for contesting the application in full in writing when he replies, providing any supporting evidence as necessary, including about his ability to pay any costs award that might be made.
>
> If he does not contest the application, he must say so.

> If the Appellant fails to reply at all, the Tribunal will determine the application without a hearing based on the information currently available."

8. The Appellant did not reply within 14 days or at all and the matter was listed for a hearing on 26 October 2023. A Notice of Hearing was sent to the parties in error. It ought to have been a chambers day for the panel to determine the application on paper without the parties needing to attend.

9. On 23 October 2023, the Respondent submitted an amended / updated Bill of Costs, totalling £4133.30.

10. The parties were informed of the error in listing (and that they were not required to attend) on 25 October 2023, when it became clear that the Respondent intended to attend the hearing.

11. As of today's date, 26 October 2023, the Appellant has not written to the Tribunal or replied in respect of the judgment, the Respondent's email sent on 15 August 2023, the updated Bill of Costs sent by the Respondent on 23 October 2023, the Notice of Hearing or the email of 25 October 2023 informing the parties that their attendance was not necessary.

12. On 26 October 2023, the panel met to determine the application without the parties present and the reasons for the decision are as follows:

Law

13. "Costs" are fees, charges, disbursements or expenses that have been incurred by or on behalf of the party receiving costs (see rule 75). Costs incurred by an in-house lawyer can be recovered (see Wiggin Alloys v Jenkins [1981] IRLR 275 and more recently confirmed in Ladak v DRC Locums Ltd Employment Appeal Tribunal [2014] 6 WLUK 448 16 Jun 2014).

14. Under rule 76(1) of the Employment Tribunal Rules 2013, a Tribunal may award costs and shall consider whether to do so when a party or a party's representative acts vexatiously, abusively, disruptively, or otherwise unreasonably in bringing or conducting the proceedings (rule 76(1)(a)); and/or any claim or response had no reasonable prospect of success (rule 76(1)(b)).

15. Following Monaghan v Close Thornton UKEAT/0003/01, when considering making an order for costs, the Tribunal must undertake a two-stage test and consider:
    (a) Is / are there grounds for a costs award?; and
    (b) If so, should the Tribunal exercise its discretion such as to award costs?

16. Whether conduct is unreasonable is a matter of fact for the Tribunal. Unreasonableness has its ordinary meaning and should not be taken to be the equivalent of vexatious (Dyer v Secretary of State for Employment UKEAT/183/83).

17. A party failing to attend a hearing has been held to be unreasonable in some cases (e.g. Ayobiojo v London Borough of Camden EAT/0510/02).

18. Under rule 76(1)(b) of the ET Rules 2013 (no reasonable prospects of success) the receiving party does not need to also show that the paying party acted unreasonably in presenting / pursuing a case which had no reasonable prospects.

19. It must be recalled that an order for costs under rule 76(1)(b) is discretionary. As such, even if a claim is shown to have been misconceived, it does not follow that costs will automatically be awarded.

20. The discretionary exercise is not fettered by any statutory rules or case law but must of course be exercised in accordance with the Overriding Objective. Accordingly, many factors might be relevant in any individual case. Case law has suggested that the following might be relevant in certain cases (albeit this is a non-exhaustive list and not binding in any way):
    (i) Whether the paying party was legally represented, on the basis that unrepresented litigants should not be held to the same standard as parties with legal representatives;
    (ii) Proportionality;
    (iii) The nature of the conduct giving rise to the application;
    (iv) The effect of such conduct;
    (v) The merits (or lack thereof) of a claim / response;
    (vi) Costs must be compensatory, not punitive;
    (vii) Whether the paying party knew or ought to have known of the defects in their case;
    (viii) Whether the receiving party had applied for strike out or a deposit order and pursued / secured it;
    (ix) Whether there had been a costs warning;
    (x) Whether a claim / response survived an application to strike out or for a deposit unscathed;
    (xi) Whether the receiving party has conducted its case appropriately; and
    (xii) The paying party's ability to pay and the effects of ordering them to pay.

21. The paying party's ability to pay is relevant to both whether they should be ordered to pay costs (the discretionary exercise) and if so, in what sum (rule 84).

22. There is no *absolute obligation* to take the paying party's ability to pay into account, the power to do so is permissive, not obligatory. However, if the Tribunal decides to disregard information about a party's ability to pay, it must explain why it has done so (Jilley v Birmingham and Solihull Mental Health NHS Trust UKEAT/0584/06 and UKEAT/0155/07).

Conclusions

23. For the reasons given orally on 2 May 2023, the Tribunal held that the appeal had no reasonable prospects of success and struck it out. It also held that it would have struck out the appeal on the basis that it had not been actively pursued, even if it had not struck it out on merits.

24. The facts giving rise to that failure to actively pursue the appeal are as follows:
    (a) On 16 March 2023, the Tribunal wrote to parties copying Mr Fielding at the address given on the ET1, stating the date for the final hearing, that it would start at 10am, be convened by video and informing him of the need to produce witnesses, documents, make submissions and to inform the Tribunal if anyone with a disability has difficulty participating.
    (b) There is no record of any correspondence from him or of the Appellant providing any evidence, nor informing the Tribunal of any difficulty attending. In particular, the Appellant did not produce the structural engineer's report referenced in the ET1 and did not send a copy to HSE either.
    (c) No one attended for the Appellant on 2 May 2023 and it had provided no evidence or submissions. Contact had been received by Mr Fielding on Friday 28 April, Monday 1 May and 2 May 2023 about the hearing. In those emails, he questioned timings and methods of hearing, but he did not indicate that no one was going to attend on behalf of the Appellant, nor did he suggest he was unable to participate. He also did not seek an adjournment.
    (d) On 2 May 2023, a clerk to the Tribunal sent an email to Mr Fielding at 10:35 encouraging him to attend the hearing, reminding him it had started at 10am. He replied at 10:50 "OK, was this in relation to the build or the council booby trapping the gas mains?" Shortly after 11am, he was informed that he should log in to the proceedings by 11:25 and if he does not do so, the hearing would commence them without him. At 11:35, the hearing was re-opened and he did not attend. He did not send any further emails that day or since. (See above in respect of the Appellant's failure to engage in the correspondence from the Respondent and Tribunal in respect of costs).

25. The Tribunal proceeded to hear the Respondent's application to strike out the appeal on the basis that it had no reasonable prospects. That application was upheld on the basis that: There was no evidence whatsoever produced by the Appellant, despite the content of the notice of hearing (referenced above) and despite the Appellant referring to an expert's report in the ET1. Therefore, there was no basis for suggesting that the Penalty Notices were in any way defective or should be cancelled. Further, the ET1 form itself did not state the basis on which the Penalty Notices should be cancelled other than to refer to a structural engineer's report which the ET1 itself stated had not been obtained at that time. Thus the Appellant cannot have known whether any such report would support an appeal in any event. The appeal was instituted on a prospective / hypothetical basis.

26. The fact that the appeal was struck out for having no reasonable prospects of success gives rise to a basis for costs under rule 76(1)(b) and the Tribunal is under an obligation to therefore consider whether to award costs.

27. The Tribunal held in the alternative that the Appellant had failed to actively pursue the appeal up to the date of hearing. In light of the correspondence prior to an on 2 May 2023, we find that the failure to do so was unreasonable and the failure to attend on 2 May 2023 (despite being in correspondence with the Tribunal that day) was also unreasonable. The Appellant's continued failure to engage in the matter as set out above (in respect of Tribunal correspondence and the Respondent's application or costs) is further unreasonable conduct. Therefore, under rule 76(1)(a) there is also a basis for costs which the Tribunal is obliged to consider.

28. Turning to the discretionary element of the exercise, we noted that the Appellant was not legally represented and had not been warned of the risk of costs before the final hearing on 2 May 2023. Further, the Respondent had not applied to strike out the claim at a preliminary stage or seek a deposit order, and instead waited until the full merits hearing. However, these factors do not amount to a bar to costs being awarded, they are merely factors to weigh in the mix, and which weigh against an award.

29. The factors weighing in favour of an award were: (1) the nature and extent of the unreasonableness of the Appellant's conduct (as set out above); (2) the extent of the weakness of the appeal; (3) the fact the Respondent's time and resources were wasted being spent on the appeal, which depleted public money (the Respondent being a public body); (4) the fact that further public money and Tribunal resources were wasted by reason of the fact that the Appellant failed to communicate with the Tribunal at any time to suggest that the appeal would be withdrawn or that no one would be attending (and no evidence was submitted); (5) the impact on the Respondent; (6) the fact that the Appellant is a company and it or its sole director ought to have known that the appeal was defective / bound to fail given that no evidence or submissions whatsoever were advanced; and (7) the Respondent had conducted itself reasonably in the circumstances.

30. We were unable to consider the Appellant's ability to pay because no evidence / submissions were made in respect of that, despite the Appellant being invited to produce any such information as set out above.

31. Weighing all relevant matters, we find that it is just and fair to award costs to the Respondent and that it is a proportionate response to the Appellant's conduct of the appeal. In doing so, we have reminded ourselves that costs must be compensatory, not punitive and we have taken that into account when determining the sum of costs to be awarded.

32. We have decided that it would not be fair and just to award costs for the HSE Inspector's time. These are not legal fees, and we can see certain items that appear to duplicate work, including the fact that the paralegal and inspector both worked on the bills of costs. The Respondent has not articulated in its application the basis on which the Inspector's time should be recoverable and we would not have exercised our discretion to award the entire costs bill even if this had been made plain.

33. As to the costs attributable Counsel, we consider it would not be fair and just to visit these upon the Appellant. This is because the only reason the

Respondent instructed Counsel is because the Tribunal sent a Notice of Hearing, which was an error. This loss does not flow from the Appellant's conduct and we therefore think it would be unjust to award it against the Appellant. In the same vein, we do not think it fair and just to award costs for the work done by the legal advisers after 15 May 2023, all of which was incurred due to the belief that the Respondent had a right to attend a hearing on 26 October 2023.

34. Therefore, we award all costs claimed in the updated Bill of Costs other than those indicated, namely costs in the total sum of £2,176.60.

35. In doing so, we have considered the rates charged by the internal legal advisors and consider them to be appropriate given that the hourly rates are well within the Guideline Hourly rates for even the most junior lawyers (trainees / paralegals) under the CPR.

Correct Respondent

36. In reaching this decision on costs, the Tribunal recalled the Respondent's submission at the liability hearing that only the party on whom the Prohibition Notice was served had standing to appeal it under s.24 Health and Safety at Work Act 1974. The prohibition Notices had been served on Michigan Construction Ltd.

37. The Respondent considered that the ET1 named Mr Marcus Fielding as the Appellant and Tribunal notices had used his name as the Appellant. Mr Fielding is the sole statutory director of Michigan Construction Ltd, as checked on Companies House on 2 May 2023 and today. On that basis, the Respondent argued on that occasion that the ET1 was defective and should be rejected under rules 10 and 12 of the ET Rules 2013.

38. On 2 May 2023, the Tribunal was dealing with a strike out application and considered that such a defect in the ET1 did not invalidate the application under rules 10 or 12 of the ET Rules 2013 because the Tribunal had the power to substitute or add parties under rule 34 and further, the ET1 form named Mr Marcus Fielding but also referenced Michigan Construction Ltd. It did not matter at that stage which was deemed to be the correct Appellant given that the matter was being struck out.

39. However, now that judgment is made on costs, the Tribunal has considered who ought to be the party to bear those costs and has reached the view that since the corporate entity is the only entity that had standing to bring the appeal, the costs judgment must lie against that entity alone, and not against Mr Fielding personally. Accordingly, of its own initiative, the Tribunal substitutes Michigan Construction Ltd as the Appellant to this matter and removes Mr Fielding as a party to the matter under its powers contained in rule 34 of the ET Rules 2013.

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Employment Judge Dobbie

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Date 26 October 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
8 November 2023

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FOR EMPLOYMENT TRIBUNALS