



EMPLOYMENT TRIBUNALS

Claimant: Mr K Middleton

Respondent: Effective Security Services Ltd T/A Professional Security

Heard at: Leeds (on the papers) **On:** 15th November 2023

Before: Employment Judge Moxon

JUDGMENT ON COSTS

1. The Claimant is ordered to pay the Respondent **£8,696.34** costs.

REASONS

Introduction

1. I dismissed the claim for unfair dismissal after a final merits hearing that was heard remotely on 31st August 2023.
2. The Claimant had initially worked for the Respondent from 2018 as a security worker. He was dismissed on 3rd March 2023. I found that the continuity of the employment had been broken between 5th November 2020 and 21st May 2021, and between 28th September 2022 and 11th October 2022. I found that the Claimant knew of those breaks in his employment and therefore knew that he did not have the requisite two years' continuous employment to claim unfair dismissal, as required by section 108 of the Employment Rights Act 1996.
3. The Claimant also pursued a claim for failure to pay holiday pay but was unable to quantify any loss and so that claim was also dismissed.
4. The Respondent indicated at the end of the hearing that there may be an application for costs. That application was submitted in writing on 13th September 2023. Directions were issued to the parties by letter dated 27th September 2023. The directions were complied with by the Respondent who, on 9th October 2023, clarified the breakdown of their costs and, on 2nd November 2023, confirmed their view that a hearing to determine costs was

not necessary. The Claimant did not comply with the directions and has not otherwise engaged with the application. He has failed to comply with directions to respond to the application and to provide details of his ability to pay costs. He has not requested an oral hearing.

5. I determined the cost application on the papers on 15th November 2023. In doing so, I considered the following:
 - a. My judgment on liability and my oral reasons, of which a note was retained. No written reasons were requested;
 - b. The Respondent's cost application, dated 13th September 2023;
 - c. The Respondent's costs application bundle, consisting of 13 pages; and
 - d. The Respondent's updated breakdown of costs, dated 9th October 2023.

Costs Application

6. The application for costs was made on the ground of unreasonable conduct and the fact that the claim had no reasonable prospect of success, particularly:
 - a. The Claimant acted unreasonably in issuing and pursuing the claim for unfair dismissal when he knew he did not have the requisite service. His evidence to the contrary was "*patently untrue*";
 - b. Notwithstanding the fact that the claim could not legally succeed, the Respondent had made an offer of settlement of £2,000 on 28th July 2023, together with an explanation of why the Claimant did not have the requisite service;
 - c. The Claimant did not engage with either the Respondent or ACAS in response to the 28th July 2023 communication; and
 - d. In dismissing the claim, I had made findings consistent with the information provided to the Claimant by the Respondent on 28th July 2023 and had found that the Claimant knew that his case was fundamentally flawed and that he had been knowingly dishonest.
7. The costs sought amount to £8,696.34, inclusive of VAT, which consists of costs arising after 28th July 2023 up to and including the final merits hearing on 31st August 2023.

Response to the application

8. By letter, dated 27th September 2023, the Claimant was directed as follows:

"By 24th October 2023 the Claimant shall send to the Respondent and the Tribunal a response to the application and details of his ability to

*currently, or in the future, pay costs. The Claimant should note that he has the burden of proving any inability to pay and should therefore provide evidence; and
By 7th November 2023 the parties shall notify the Tribunal whether they require a hearing to determine the application for costs, and if so whether the hearing should be in person or remote. At a hearing, the parties will be able to give evidence and make oral submissions. If no hearing is requested, the application will be determined upon the papers, upon consideration of any documentation provided by the parties.”*

9. The Claimant did not comply with those directions and has not communicated any response to the costs application.

The Law

10. The Employment Tribunal's power to award costs is contained within the Employment Tribunals Rules of Procedure Regulations 2013.
11. Rule 76(1) provides that a Tribunal may make a costs order 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.
12. Rule 77 provides that an application can be made at any stage up to 28 days after the date on which the judgment determining the proceedings in respect of the party was sent to the parties. The paying party must be given a reasonable opportunity to make representations in response.
13. Rule 78(1) provides that a costs order may order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party.
14. Rule 84 provides that the Employment Tribunal may have regard to the paying party's ability to pay.
15. The award of costs is an exception, rather than a rule. Costs are designed to compensate the receiving party for costs unreasonably incurred, not to punish the paying party for bringing an unreasonable case, or for conducting it unreasonably.
16. There is a three-stage process when considering a costs application:
- a. The rule 76;
 - b. Exercise of discretion – the Employment Tribunal must consider as an exercise of discretion whether the conduct merits a costs order; and
 - c. The appropriate amount of costs incurred.

17. Dishonesty by a party does not necessarily lead to a meritorious award for costs. Cox J held, in *HCA International Limited v May-Bheemul* [UKEAT/0477/10, 23 March 2011 unreported] that:

“It will always be necessary for the Tribunal to examine the context and to look at the nature, gravity and effect of the lie in determining the unreasonableness of the alleged conduct”.

18. Lord Justice Mummery stated, at paragraph 31 of his judgment in *Yerrakelva v Barnsley MBC* [2012] ICR 420:

“The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had.”

Conclusions and Reasons

19. During the final merits hearing I rejected the claim that the Claimant had two-years' continuous service and I found that there were two gaps in the employment.
20. In relation to the gap of employment between 5th November 2020 and 21st May 2021, I made the following findings of fact, which were communicated to the parties orally:
- a. Whilst I note that the P45 was sent to his old address, it is common place for people to collect post from old addresses or have post re-routed. The height of the Claimant's evidence is that he cannot recall receiving the P45. I find it more likely than not that he did;
 - b. The fact that the Respondent did not have details of the Claimant's new address indicates that the Claimant did not consider himself to remain employed otherwise he would have provided the change of his personal details. I do not accept that he told Stuart Heath, Area Manager. I note that there had been no reference to Mr Heath in any of the written evidence from the Claimant and he was first mentioned in his oral evidence. I have had sight of the records maintained by the Respondent and find that had they been informed by the Claimant of a change of address it would have been inputted on their system;
 - c. The Claimant was not paid for a period of 9 months, between his last furlough pay in August 2020 and upon recommencing work in May 2021;
 - d. He did not work for the Respondent during that period, and in fact did not work for the Claimant for a period of 14 months, between March 2020 and May 2021;

- e. His SIA card, which is a legal requirement to work in the security industry, expired on 5th November 2020. The Claimant said in the hearing that it was renewed 6 days later but he did not detail that fact in his witness statement nor has he provided corroborative evidence. His assertion that he notified the Respondent is undermined by the lack of any record of it being received. The only reference is to a badge check on 14th May 2021, which would not have been necessary if the card had been received earlier;
- f. Upon returning to work with the Respondent in May 2021 various forms were completed that were consistent with a person returning to employment after a period away from the organisation's employ. This included vetting and address checks; and
- g. The Claimant signed terms and conditions on 16th May 2021 which I am satisfied is consistent with recommencing employment. I reject the Claimant's account that this was related to Covid given that the records show that separate Covid documents were signed. The title of the document is the same as the other occasions when the Claimant had previously signed contracts with the Respondent.

21. In relation to the gap of employment between 28th September 2022 and 11th October 2022, the Claimant asserted that he had pretended to resign from the Respondent as a ruse to fool safeguarding professionals who had told him that he must leave his employment to be permitted contact with his children. I rejected that account and made the following findings of fact, which were communicated to the parties orally:

- a. The Claimant had not long before the incident had disputes with the Respondent and had indicated an intention to resign in an email dated 15th August 2022;
- b. There was no reason to drop off his equipment at the Respondent's premises, such as his company mobile telephone, as safeguarding professionals would not know of him doing so;
- c. He needed the equipment to adequately continue his job if he was to maintain his employment;
- d. He did not tell the Respondent that it was a ruse, which no doubt he would have done to prevent the Respondent from concluding that he had resigned;
- e. He gave the password to his company laptop and passcode to his mobile telephone in a message to Mr Carl Uttley, Head of Operations, on the same day without any qualification that he was not actually resigning. He did not reply to the request for a chat. Instead, on the following day, he sent information about staffing that is consistent with a partial handover;

- f. The Respondent was not aware of any potential ruse as they took action on 28th September 2022 to process him as a leaver, including blocking his email address and rediverting his number;
- g. On 29th September 2022 Mr Uttley sent a message to the Claimant to say that he was sorry he had “*walked away*” but that he appreciated that the Claimant had his reasons. Mr Uttley added: “*If we can help you with any of them then please let me know, even if its on a part time basis?*”. The Claimant did not reply to say that he had not resigned / walked away or to say that he would be fulfilling his full-time contract. He would have surely corrected Mr Uttley had Mr Uttley wrongly asserted that the Claimant had resigned;
- h. Whilst there were some messages between Mr Uttley and the Claimant thereafter, they were consistent with, as Mr Uttley said, him having to undertake the Claimant’s duties and asking questions of the Claimant in absence of a full handover. The Claimant was happy to help as he said in a subsequent WhatsApp message, which I agree was exactly that, to help with any queries rather than to undertake employed work;
- i. The Claimant announced his resignation on Facebook on 30th September 2022;
- j. Whilst the Claimant did have some messages with staff and clients this appears to have been mainly responding to their queries. I note that he told another that he was not working and did not have access to the system, which I am satisfied is consistent with him no longer being employed with by the Respondent. He said that he normally worked an average of 80 hours per week and when asked during the hearing whether he had continued that between 28th September and 11th October he was evasive and failed to answer the question;
- k. When the Claimant returned to the Respondent’s employment on 11th October 2022 he signed a new contract, which was identical to his previous contract, save for the start date. That indicates that he knew that he had left the company otherwise he would not have needed a new contract as the old one would continue to have had affect; and
- l. The Claimant was only paid for approximately 2/3 of his normal salary in October 2022, which is consistent with him working only 2/3 of the month, which in turn is consistent with him not being employed between 28th September and 11th October. I do not accept his explanation for not raising this with the Respondent.

22. I am satisfied that the Claimant acted unreasonably in initiating a claim for unfair dismissal when he could not satisfy the statutory criteria of two years’ service. He then unreasonably pursued that claim despite the Respondent outlining in detail within correspondence dated 28th July 2023 why the claim could not legally succeed. He was unreasonable in failing to accept the offer of settlement contained within the 28th July 2023 correspondence and for failing to engage

with the Respondent or ACAS in relation to that communication. He then unreasonably pursued his claim, which he knew could not succeed, and about which there was substantial documentary evidence undermining his claim, to a final hearing, during which I found that he had been dishonest and evasive.

23. Similarly, he acted unreasonably in pursuing a claim for unpaid holiday pay. At no point did he provide any detail as to the time period he was claiming for or the days / sums owed. He failed to reply to the 28th July 2023 communication in which it was noted that no detail had been provided. He was unable to provide any detail when asked to do so during the hearing.
24. Within the 28th July 2023 communication, the Respondent outlined that the £2,000 offer was made on a commercial basis. It also outlined that, if the claim was unsuccessfully pursued, costs would be sought and the communication brought to the attention of the Employment Tribunal.
25. Whilst the Claimant did not have the benefit of legal representation, he nevertheless failed to engage with ACAS.
26. Given that the grounds award costs have been satisfied, namely that the Claimant acted unreasonably and pursued a claim with no prospect of success, I must then consider whether to exercise my discretion to award costs.
27. I consider that it is appropriate to exercise my discretion to make a costs order for the following reasons:
 - a. Although costs are the exception rather than the rule, this is one of those exceptional cases where a costs order is appropriate;
 - b. I am mindful that telling of untruths does not automatically lead to justifying an order as to costs, however, the untruths in this case go to the heart of the claim. These must have been known to be untruths by the Claimant at the outset and were maintained throughout the proceedings, despite compelling documentary evidence that defeated his claim. In those circumstances, it is appropriate for me to exercise my discretion to award costs;
 - c. Whilst the Claimant did not have the benefit of legal advice, the Respondent identified to him the fact that his claim could not succeed within the communications dated 28th July 2023 and the Claimant appears to have failed to seek external advice or to liaise with ACAS;
 - d. The Claimant was put on notice by the Respondent that costs would be sought for pursuing an unmeritorious claim. He was given the opportunity to settle the claim without costs being pursued; and
 - e. It cannot be in the interests of justice, or pursuant to the overriding objective as provided by rule 2, to permit a Claimant to bring and maintain a claim that they know is not well-founded in fact and law.

28. Rule 84 provides that I may take into account the paying party's ability to pay costs. The Claimant has failed to comply with directions to provide information about his ability to pay. There is therefore no information before me to indicate that the Claimant does not have the ability, either now or in the future, to pay the costs sought by the Respondent.
29. When determining the amount of costs that should be awarded, I note that the Respondent has limited its application to costs from the 28th July 2023 communication up to and including the final merits hearing on 31st August 2023. No costs prior to the cost warning are sought and no costs are sought pursuant to this application.
30. The costs sought by the Respondent are contained within an updated costs schedule, dated 9th October 2023, in compliance with my directions.
31. I consider that a summary assessment of costs is in accordance with the overriding objective of saving costs and avoiding delay. I note that neither party requested a hearing and the Claimant has not engaged with the application. The sums sought are not excessive and are supported by appropriate schedules.
32. The costs are split into three broad categories: solicitors' fees; counsel's fees; and other disbursements.
33. The solicitors' costs amount to a total of almost 22 hours of work. I had some initial concern that this was excessive but those concerns have been alleviated by the helpful breakdown of action taken by the solicitors. I note that the Respondent's solicitors were responsible for compiling the 415-page bundle, which includes personnel records and lengthy WhatsApp conversations, and obtaining witness statements from two witnesses. It also includes attending the final merits hearing, which was appropriate. I am therefore satisfied that the solicitors' costs accrued are reasonable and should be paid in full.
34. Counsel's fees consist of a pre-hearing conference, which I accept was necessary and appropriate, and a brief fee for the final merits hearing. The fees are reasonable and should be paid in full.
35. The other disbursements amount to less than £40 and include the postage of the bundle. Those sums are reasonable and should be paid in full.

Employment Judge Moxon

Date: 15th November 2023