EMPLOYMENT TRIBUNALS

Claimant: Ms C Cesari

Respondent: Brandmovers Europe Limited

Heard at: London South ET, Croydon (by video)
On: 20 February 2024

Before: Employment Judge Abbott, Miss N Murphy & Mrs N Beeston

Appearances
For the claimant: Ms I Baylis, counsel
For the respondent: Mr P Collyer, solicitor

JUDGMENT ON COSTS

The Claimant's application for a costs order under Rule 76(1) of the Employment Tribunals Rules of Procedure 2013 succeeds. The Respondent is ordered to pay the Claimant the sum of £2,750 plus VAT in respect of costs.

REASONS

Background

1. On 20 February 2024 the claim came before the Tribunal for its final hearing with a time estimate of 4 days. Witness statements and a file of documents had been prepared and were before the Tribunal.

2. By an email dated 12 February 2024 sent to the Tribunal and copying the Claimant's solicitor, the Respondent's solicitor had highlighted what he described as a "potential issue of illegality". The email sets out some background as to disclosure requests that had recently been made by the Respondent is respect of the Claimant's income tax self-assessments (we were told these requests were made on 31 January 2024), the response to which had been that the Claimant had not completed self-assessments because she did not need to. The Respondent's solicitor's email concluded as follows:

   "Subject to a valid explanation being provided by reply, we are of the view that the performance of the Claimant's employment with the Respondent could have been tainted by illegality. The tribunal will note that number of the issues raised by the

Claimant in her claim relate to those sums she received directly from the U.S. If that is the case, we believe the Claimant could be prevented from pursuing her complaints at an Employment Tribunal as matter of public policy. We copy in the Claimant's representative for their comments."

3. As is clear in the above, no particular application was being made by the Respondent at that stage. No judicial action was taken in respect of the 12 February 2024 email prior to the final hearing commencing.

4. Ms Baylis filed a note addressing the Respondent's email which the Tribunal read before the hearing commenced. In brief, this note questioned what point the Respondent was making, in particular given (it is said) she was advised by the Respondent's company accountant that she could receive her remuneration partly through UK PAYE and partly in US dollars (and that she paid tax in the US on that part of her earnings). The note highlighted that there was no pleaded defence of illegality, so an amendment would be needed if pursued, and further case management was necessary.

5. At the beginning of the hearing, I explored with Mr Collyer what the Respondent was asking for. He indicated that there appeared to be an issue as to whether the Claimant had properly declared all of her earnings to HMRC and that, because all of her earnings are encompassed within the losses claimed in the Schedule of Loss, this raised an illegality question. This could amount to a complete defence to the claim (as it goes to the Tribunal's jurisdiction and is not a matter that the parties can waive), but even if not would be relevant to remedy. No application to amend had been made because sufficient information was not available to be certain as to the position – rather more clarity was sought.

6. Ms Baylis took us through the chronology, emphasising that the Claimant had sought advice from the Respondent on her personal tax situation at the start of her UK-based role, so insofar as there was any issue of tax being underpaid (which she emphasised the Claimant did not accept), there would be a question of whose fault that was. The split-payment issue was squarely flagged in the Particulars of Claim (at paragraph 2), but any issue relating to the tax consequences was not raised in the Response, nor at the Case Management Discussion in January 2023. The Respondent sought no disclosure of the Claimant's HMRC self-assessments when disclosure was completed in March 2023, but rather only on 31 January 2024 for the first time. The Respondent had been completely unclear as to what the alleged illegality was and, as things were, the Claimant stood accused of something very serious (tax evasion) with a lack of clarity as to why and no ability to properly defend herself given the short notice and consequent lack of any witness evidence to address the point.

7. Having heard this, Mr Collyer confirmed that the Respondent did wish to apply to amend the response to raise a defence of illegality. He explained that the point had only come up late in preparation of the case, because it was not an issue identified at case management stage and there had since been a judicial mediation. He accepted that the issue opened a complicated 'rabbit hole' and that the existing witness evidence did not deal with the point. He did not accept the Claimant's attempt to shift the blame onto the Respondent. He accepted that, for the issue to be properly dealt with, an adjournment would be

necessary as disclosure and witness evidence would be needed.

8. Ms Baylis accepted (at this stage) that there was a potential jurisdictional issue and agreed that if the issue was to be considered an adjournment would be needed. She emphasised that it remained difficult to respond to the Respondent's position until it was made clear what precisely was being said. The Claimant would have been happy to deal with the point earlier but, obviously, had not been able to do so given it had been raised so late.

9. Having considered the parties' submissions, the Tribunal agreed that it would be necessary to adjourn the final hearing as it would be wrong and contrary to the interests of justice to proceed without this serious issue being properly pleaded and addressed through disclosure and witness evidence, as appropriate. We relisted the final hearing and made appropriate case management directions as agreed with the parties.

10. In view of the circumstances of the adjournment, the Claimant applied for a costs order under Rule 76(1)(a) or 76(1)(c). We heard oral submissions from Ms Baylis (which focused on the lateness of this issue being raised) and from Mr Collyer; the latter also provided a short written submission by email. Rather than reciting the submissions, the points raised are dealt with within our reasons. We gave an oral judgment in favour of the Claimant at the hearing; these written reasons are prepared at the request of the Claimant.

The law

11. 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 — (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 […] (c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins."

12. There is a three-stage process. First, we must ask whether rule 76(1) is engaged; if so, we must go on to determine whether it is appropriate to exercise our discretion in favour of awarding costs against the Respondent; and if so, we must quantify the order (Rule 78).

Discussion

Stage 1: Rule 76(1) engaged?

13. In the judgement of the Tribunal, this is a situation to which rule 76(1)(c) applies. It is clear that the final hearing has been adjourned on the application of the Respondent made orally at the beginning of the final hearing. The email of 12 February 2024 cannot be interpreted as an application for an adjournment; the Respondent's position only crystallised at the hearing. It is not therefore necessary to determine also whether rule 76(1)(a) applies, though points made by the Claimant regarding the Respondent's conduct can be considered at the second stage.

Stage 2: discretion

14. In deciding whether to exercise our discretion, we 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). We considered the following factors to be relevant in this case:

    a. The Claimant's split payment situation was well-known to the Respondent throughout her employment. Indeed, she had raised questions about the tax treatment of her remuneration at an early stage, and again in her grievance and claim.

    b. Notwithstanding this, the Respondent did not identify any issue around potential illegality in its response, not did it seek any further information or disclosure in this regard prior to 31 January 2024, being less than 3 weeks prior to the final hearing.

    c. The first notice that the Respondent may raise an issue of illegality came in the Respondent's solicitor's email to the Tribunal on 12 February 2024, but even that email does not make clear what the Respondent's position really was. It was only this morning that Mr Collyer clarified that the Respondent did wish to amend its response to rely on this issue in view of the information provided by the Claimant.

    d. No issue of illegality was identified at the Case Management Discussion in January 2023. In our view, contrary to the submission of Mr Collyer, it is not obvious that, had the issue not been raised by the Respondent, it would necessarily have come out at the final hearing (at least on liability). This is not a case where the potential for illegality being an issue is obvious – indeed, it remains unclear now whether or not there is a genuine issue of illegality here.

    e. Overall, the Tribunal is satisfied that the Respondent should have been alert to this issue earlier, and should have raised it much sooner than in the weeks running up to the final hearing. We do not accept that the fact of judicial mediation, or that the issue wasn't identified at the Case Management Discussion and therefore in the List of Issues, excuses the Respondent in this respect.

    f. We give no weight to the strength of the point, given it is unclear how strong it actually is. In any event, the issue for us to deal with in respect of the costs application is the timing of the issue being raised, and not its ultimate strength.

    g. We accept the Claimant's submission that the late adjournment has financial implications for the Claimant, and also means her claim will delayed in its determination by around 1 year.

15. Mr Collyer did not make any submissions as to the Respondent's ability to pay any costs order. In the circumstances, this is a factor that we will disregard.

16. Taking account of the factors set out above, we are satisfied that we should exercise our discretion to make a costs award against the Respondent. In short, the final hearing has been lost because of the Respondent raising this serious illegality issue unjustifiably late, with material adverse consequences for the Claimant. The making of a costs order is appropriate.

Stage 3: quantification

17. The costs claimed are under £20,000, so we can make an order ourselves (Rule 78(1)(a)).

18. The Claimant sought payment of Ms Baylis's brief fee for the present hearing (£2,000 plus VAT) plus her solicitors' fees limited to the sum of £750 plus VAT for the preparations for this hearing, and an unquantified order in respect of the future costs of dealing with the illegality issue. Mr Collyer made no specific submissions in relation to the amounts claimed.

19. We are satisfied that the fees claimed for preparation for and attending the hearing are reasonable and proportionate and that it is appropriate to make an order in respect of them. We make no award in relation to the future costs of dealing with the issue now that it has been raised. Of course, had the issue been raised earlier, such costs would have needed to be incurred in any event.

20. We therefore order that the Respondent pay to the Claimant the sum of £2,750 plus VAT.

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Employment Judge Abbott

Date: 27 February 2024