Case Number: 3312064/2022

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A Renner	**v**	Road Tech Computer Systems Ltd

Heard at: Bury St Edmunds **On:** 25 March 2024

Before: Employment Judge K J Palmer (sitting alone)

Appearances
For the Claimant: Mr S Harding (Counsel)
For the Respondent: Mr G Baker (Counsel)

RESERVED JUDGMENT
Pursuant to an application for costs heard at a hearing conducted by CVP.

It is the Judgment of this Tribunal that the Claimant is ordered to pay the Respondent costs in the sum of £5,000.

Reasons

1. This matter came before me today listed for a one day hearing to determine an application for costs, lodged by those representing the Respondents on 24 November 2023.

2. This hearing had been previously postponed.

3. The Claimant pursued a claim for constructive unfair dismissal and a claim for a failure to provide a written Contract of Employment.

4. The claim was due to be heard at a three day hearing on 6, 7 and 8 November 2023. The claim was due to be heard by a Judge sitting alone.

5. In the event, no Judge was available to hear the claim on 6 November and it was scheduled to commence on 7 and 8 November. It is conceivable that the claim would not have been completed within those two days and would have gone part-heard.

6. The original trial bundle was voluminous, running to some 1650 pages and there was extensive witness evidence.

7. On the morning of 7 November the Claimant withdrew his claims shortly before 9.00 am by sending an email to the Watford Employment Tribunal. There was no explanation or reason given for the withdrawal. The Judge sitting on the hearing, EJ R Lewis, dismissed the proceedings on withdrawal. The Claimant did not attend at the hearing centre on 7 November although he was represented by Mr C Moore of Counsel. At that time, the Respondents indicated an intention to apply for costs. Employment Tribunal Judge Lewis listed a Costs Hearing, originally scheduled for 12 January 2024 but ultimately, pursuant to an application to postpone which was sought by the Claimant, the costs hearing came before me today.

8. Pursuant to various Orders made by EJ Lewis in preparation for this Costs Hearing, the details of the Respondent's application for costs were contained in a letter dated 24 November 2023.

9. In that application letter the Respondents set out the basis upon which they are seeking costs from the Claimant. They do so under Rule 76 of the Employment Tribunals (Constitutional Rules of Procedure) Regulations 2013, Schedule 1. They rely on Rule 76(1)(a) and Rule 76(1)(b).

> 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.

10. In essence, the Respondents say that costs should be awarded on the basis that the Claimant acted unreasonably in the bringing of and the conducting of the proceedings and/or the claim had no reasonable prospect of success.

11. I heard extensively from Counsel for the Respondent, Mr Baker, and I am grateful to him for his written submissions passed to me this morning.

12. I also heard from Mr Harding on behalf of the Claimant.

13. At the commencement of the hearing I did not have the file in front of me which was on its way in the DX from Watford and, moreover, I had little documentation in advance as documents contained in a zip file sent to me by the Watford Administration, could not be accessed.

14. I am therefore most grateful to both Counsel for furnishing me with extensive documentation on the morning of the hearing. I had before me the main trial bundle, the witness evidence before the Tribunal on what was to be the first day of the hearing, a separate costs bundle prepared for this hearing and various other documents that were not in that cost bundle including the Claimant's witness statement before the Tribunal. I also had various statements from the Claimant pursuant to that including evidence specifically for this Costs Hearing plus additional documentation headed "Evidence List", not in either the trial bundle or the costs bundle and various other individual documents.

15. This all added up to a significant number of documents numbering well over 1500 pages.

16. After hearing submissions and being directed to a significant number of documents, it became clear that it would not be possible for me to consider submissions, read the various documents I have been directed to and deliver a judgment on costs today.

17. It was therefore necessary for me to reserve judgment.

Giving out my Judicial email address.

18. In the hope of speeding matters up and in light of the fact that I had very little documentation before me this morning, in confidence I gave my Judicial email address to both Counsel to enable them to send me documents direct rather than sending them through the Watford administration which would have caused considerable delay. I did not have a Bury St Edmunds Clerk whose email address I would usually have used in such circumstances.

19. On such occasions, that email address is given out in confidence and is to be used strictly for the purposes for which it was intended on that morning.

20. Unfortunately, since then it appears as if my email address has somehow been given to the Claimant's mother, who has since contacted me, sending me a lengthy letter which, presumably, contains entreaties to persuade me, in this application, to find in the Claimant's favour.

21. That was received by me at 16.34 on Tuesday 26 March. I can confirm to both parties that other than identifying where the email came from and reading the first couple of lines, I have not read or considered the contents of that email in any way whatsoever in arriving at my Reserved Judgment.

22. I have deleted that email.

23. Judicial emails are rarely given out and only for the purposes that are specified at the time. They should not be used for other purposes and should not be disseminated to any third party.

The Respondent's application.

No reasonable prospect of success

24. I was principally addressed by Mr Baker on this ground under Rule 76(1)(b).

25. This also formed a significant part of the Respondent's written application.

26. The thrust of Mr Baker's submissions under this paragraph is that, from the very start there was never any prospect of the Claimant's claim succeeding, a fact of which the Claimant was well aware. Mr Baker referred me to the Respondent's skeleton submission, submitted the night before the hearing was due to start on 6 November 2023. I understand that they were sent to the Claimant and his advisors on the evening of 6 November. He also referred me to the list of issues which appeared at page 50 in the cost bundle, the detailed grievance outcome at page 875 of the trial bundle which, itself, runs to 20 pages, the various documentation pursuant to that including the Claimant's appeal from that outcome and aspects of the Respondent's evidence that was before the Tribunal on 7 November.

27. I have read all of those.

28. The Claimant raised a grievance in December of 2021 which forms the basis for his constructive unfair dismissal claim. In his resignation letter he relies on the points raised in his grievance which were not upheld in the grievance reply whilst also mentioning the slowness to deal with the grievance and other aspects post-grievance, not specifically detailed.

29. It is the Respondent's position that the Claimant had been intending to leave the Respondents since December of 2020 when he originally lodged his grievance and that the contents of the grievance are bogus and nothing more than a "shake down" of the Respondents. Mr Baker directs me to the points relied upon by the Claimant as being the Respondent's alleged repudiatory breaches which he sought to rely upon in the constructive unfair dismissal claim and invites me to conclude that none of those had any prospect of succeeding. He said that many were historic and some years earlier and even the more recent ones could not possibly have justified his resignation. It goes on to say that the resignation was some seven months after the grievance was raised and that the Claimant would almost certainly be found to have affirmed his contract in that time. He suggests there is not even the remotest possibility that the Claimant could have succeeded in his unfair dismissal claim.

30. He goes on to say that the section 38 claim for a failure to provide a written statement of terms was also hopeless in that a written statement had been provided some months before the hearing was due to commence.

31. He said that the Claimant was intending to leave the Respondents and this was evidenced in witness evidence and documentation before the Tribunal in the main hearing bundle and he directed me to the witness statement of Diane Dooley. He said it was evident in December of 2021 that the point of filing the grievance full of historic bogus allegations that the Claimant had decided to leave and was setting up his own company, Fleet Transport Consultants.

32. He asks me to accept that nothing in the grievance and the subsequent proceedings in support of the constructive dismissal claim, was in good faith and that it was nothing more than a shake down.

33. Mr Harding argues strongly that the test for no reasonable prospect of success is a high bar and says that at no point had the Respondent sought to ventilate such an application before the Tribunal prior to the day of the hearing on 7 November. He says no such application under Rule 37 to strike out the Claimant's claim was pursued, nor indeed was an application under Rule 39 for a Deposit Order.

34. He says that there are many hundreds of pages of documents and many hours of witness evidence that would have been put before a Tribunal prior to a Tribunal reaching a judgment and that it is not possible for me, at this distance, to draw a conclusion on the basis of those documents alone, that the Claimant's claims had no reasonable prospect of success.

Unreasonable behaviour under Rule 76(1)(a)

35. The Respondents rely on the fact that the Claimant was unreasonable in bringing the claims. Essentially they say section 38 was a hopeless claim because the Respondents had supplied the Claimant with a written contract of employment many months in advance of the start day of the Full Merits Hearing.

36. They also say that the Claimant behaved unreasonably throughout in failing to comply with various Case Management Orders prior to the Full Merits Hearing and, of course, they say that he behaved unreasonably in withdrawing his claim at 08.54 on the morning of the first day of the Full Merits Hearing.

37. Greater detail of the reported breach of Orders and Directions is supplied in the written application before me. I do not propose to repeat each and every one of those save to say that there is no dispute that the Claimant failed to comply with Orders made by the Tribunal in the Case Management Hearing when the Full Merits Hearing was listed. Such Case Management Hearing took place on 16 December 2022. There was ultimately compliance, albeit compliance by the Claimant was usually late. In

particular, the Claimant failed to provide a Schedule of Loss on time, agree a list of issues, albeit that the Respondents had sent a draft list to him and failed to provide a witness statement until some two and a half months after the Order for Exchange.

38. As to the withdrawal on the morning of the hearing, no explanation was given at the time. The Claimant has provided a statement for this hearing and has attempted to provide some explanation for the late withdrawal.

39. He essentially lays the blame for the late withdrawal at his Barrister's door, who, he says, misled him into believing that a late withdrawal would protect him against an application for costs. He said a lengthy discussion ensued between him and his chosen Barrister the night before the hearing on 6 November, pursuant to the delivery of the Respondent's skeleton argument. He says he wished to proceed but could not do so as his Barrister told him that he must withdraw.

40. Mr Baker, on behalf of the Respondents, reminds me that whether or not the advice from his Barrister was good or bad advice, the Claimant owns the actions of the lawyers he instructs and cannot hide behind a poor decision to withdraw as an excuse for unreasonable behaviour. He reminds me that the Claimant may have recourse against his advisors in due course but that is of no relevance in this application.

41. Mr Harding, in his submissions, takes a very different line. He says that the Claimant has not acted unreasonably throughout the process and at key points when he has failed to comply with Orders, it is because he was unrepresented at that time and felt overwhelmed. He said that he did not appreciate that he had to produce a witness statement, a common error amongst unrepresented claimants and that his failures to comply with Orders could be explained by his lack of representation.

42. He says that paragraph 11 of the Respondent's skeleton argument submitted the night before the Full Merits Hearing, was intended to intimidated into withdrawing his claim.

43. Paragraph 11 of that skeleton reads as follows:

> "The Claimant should ensure he is aware of Rule 76 of the Employment Tribunal Rules 2013. If he pursues litigation, it is essential he does so with open eyes. While tribunals have a power to have regard to a Claimant's ability to pay when making a Costs Award, this is in their discretion. In any costs application the Respondent would ask for its full costs".

44. Mr Harding invites me to interpret this paragraph as an intimidatory attempt to persuade the Claimant to withdraw his claim and an assurance that if he does so, costs will not be pursued.

45. He invites me, therefore, to conclude that the Appellant has not behaved unreasonably and the threshold under 76(1)(a) has not been met.

The Law

46. Awards for costs are detailed under Rules 75 to 84 of the Employment Tribunals (Constitutional Rules of Procedure) Regulations 2013, Schedule 1.

47. In this case I am concerned with Rule 76(1)(a) and Rule 76(1)(b).

48. It is to be remembered that the award of costs in the Tribunal is rare and it is not a case that a successful party will receive their costs from the other party, often known as costs following the event.

49. A Tribunal must consider whether the Rule in question is engaged and then whether to exercise a discretion to make an award in the event that the Rule is engaged. Thirdly, having considered those first two issues, if a Tribunal has determined to make an award, it must consider how much to award. It is important that the three stage test is applied. A Tribunal that jumps from stage one to stage three without actively considering the discretion inherent in stage two, will fall into error. This is highlighted by Monaghan v Close Thornton Solicitors EAT0003/01 and Beat v Devon County Council and Another EAT 0534/05.

50. The fact that a party is unrepresented and not receiving legal advice is a factor for Tribunal to consider in deciding whether to exercise its discretion and make a Costs Order.

51. In an application under 76(1)(a), the Tribunal must take into account the nature, gravity and effect of a party's unreasonable conduct. Reasonableness is a matter for the Employment Tribunal. The Tribunal must look at the whole of a party's behaviour throughout the course of the proceedings. The withdrawal of a claim is not, of itself, per se, unreasonable conduct. Tribunals are reminded of this in the case of McPherson v BNP Paribas (London Branch) [2004] ICR 1398CA. McPherson observed it would be unfortunate if claimants were deterred from dropping claims by the prospect of an order for costs on withdrawal in circumstances where such an order might well not be made against them if they fought on to a full hearing and lost. The critical question in this regard was whether the Claimant withdrawing the claim had conducted the proceedings unreasonably, not whether the withdrawal of the claim was, in itself, unreasonable.

CONCLUSIONS

Rule 76(1)(b) - No reasonable prospect of success.

52. I carefully listened to the submissions of both Counsel who had reviewed the documentation to which I was referred.

53. With respect to the section 38 claim under the Employment Act 2002 for the failure to provide a written Contract of Employment, there is no question that

such a claim would have proved to be hopeless had the full merits hearing proceeded. A contract of Employment had definitively been supplied some months in advance.

54. Turning to the more significant claim than looking at the Acts the Claimant sought to rely upon in support of his argument that the Respondent was in repudiatory breach of contract, Mr Baker's arguments carry some force.

55. Many of the Acts relied upon appear to be minor and considerably historic. Some are years earlier. Even the more recent acts relied upon were not indeed relied upon until some 7 months later. It is evident that anyone advising the Claimant on his prospects of success in that constructive unfair dismissal claim would likely have regarded those prospects as weak.

56. The evidence I was referred to to conclude that the Claimant was essentially pursuing a shakedown of the Respondents in that he had decided to leave the Respondents in December of 2021 and set up his own business competing with the Respondents, is inconclusive. The Claimant has produced evidence to counter that, both in his witness statement and from the owner of the business in question. The evidence in the witness statement of Dooling, is inconclusive. The documents referred to in paragraphs 194-196 of her witness statement before the Full Merits Hearing are, in my judgment by no means conclusive. Unhelpful and unnecessary redaction renders them somewhat confusing but, even in the absence of that redaction it is likely that no such conclusive evidence could be drawn.

57. This was due to be a three day hearing which may, in any event in light of the amount of evidence I have seen and the documentation before me, would have proved to be an inadequate time listing. There would have been considerable cross-examination of the witness evidence including the Claimant's and the documents would have been scrutinised in a far greater fashion that I have had time to do in this application.

58. The no reasonable prospect of success test is a very high bar and I cannot conclude by simply reading the documents I have been referred to, which have been many, that the Claimant has no reasonable prospect of success. Certainly, on the face of it, it looks as if his claim was very weak but I do not think that the high threshold to satisfy that test has been crossed on the evidence I have before me. I agree with Mr Baker that, to some extent, tribunals do have to crystal ball gaze as to the likely outcome when applying that test. However, there is an awful lot of evidence that would have been tested before a three day Tribunal or longer and I do not consider, on balance, that I am able to conclude that the Claimant's claims for unfair dismissal had no reasonable prospect of success.

59. Accordingly, I do not consider that Rule 76(1)(b) is engaged.

Unreasonable conduct

Rule 76(1)(a)

60. The Respondent's argument that the Claimant behaved unreasonably falls essentially into two categories.

61. The first of those is the Claimant's failure to comply with Orders made by the Tribunal on 16 December 2022. These were Orders made of the Tribunal's own volition when listing the matter originally for a two day hearing in June 2023. Subsequently, there was a further Case Management Order pursuant to a hearing on 20 September 2023 before EJ Hunt.

62. At that Preliminary Hearing where further Case Management Orders were made and a further listing of a three day hearing in November 2023 was effected, the Claimant was represented. However, it appears that at the earlier point in time when the Tribunal made its own Orders in December 2022, he was not.

63. It is common ground that he failed to comply with those Orders.

64. Mr Harding asked me to accept that the Claimant was essentially an unrepresented "babe in arms", who was overwhelmed and had no understanding of what was involved. I have some difficulty in accepting that. Those Orders are drafted so claimants, in person, can understand them. They are very clear if read. Mr Harding asked me to accept that the significant failure of the Claimant to exchange witness statements was because he didn't understand that, as a Claimant, he had to produce a witness statement. I do not accept this argument. It is unattractive. The Order contained in the Tribunal document dated 16 December 2022 is in standard form. The Order relating to witness evidence is very carefully drafted and is specifically drafted in that way so that claimants, in person, can understand it. It states as follows:

> "Everybody who is going to be a witness at the hearing, including the Claimant, needs a witness statement. Witness statements should be typed if possible".

65. There can be no doubt that if a Claimant read the document of 16 December 2022, he would understand that he had to produce a Witness Statement.

66. I therefore accept that the Claimant failed to comply with several of those Orders as set out in the Respondent's application before me. I have not heard evidence other than the submissions of Mr Harding to which I have referred, to suggest that the Claimant was overwhelmed and therefore his failure to comply with those Orders is unreasonable.

67. I also conclude that despite being written to and invited to withdraw his claim for breach of section 38 of the Employment Act 2002 in light of the fact that he was supplied with a written contract, the Claimant's failure to do so was unreasonable behaviour.

The withdrawal

68. The Claimant withdrew his claims at 8.54 on the morning of the first day of the hearing. The Respondents were fully prepared to proceed that morning with all available witnesses. They had, over a period of time, spent much time preparing for the hearing, as is usually the case. Counsel was instructed. Significant costs had been incurred.

69. Mr Harding invites me to conclude that the Respondent was effectively intimidated by paragraph 11 of the Respondent's skeleton argument submitted on the evening of 6 November into believing that if he withdrew then no costs application would follow.

70. That submission is rejected. Paragraph 11 says no such thing. Paragraph 11 merely points out as part of a detailed skeleton that the Tribunal has power to award costs in circumstances where claim fails and that various tests are met. It does nothing more.

71. Even the Claimant, on the basis of his own evidence, submitted to this costs hearing, does not ventilate that argument. He says the reason that he withdrew was because when the skeleton was read by his instructed Counsel and he discussed it with him, his Counsel felt that he should not proceed. It seems highly likely that the lengthy discussion which ensued into the night was as to the Claimant's prospects of success which were likely characterised by the Claimant's Counsel as weak.

72. Having regard to the McPherson case above, withdrawal of itself should not be deemed unreasonable behaviour. However, tribunals must also be mindful of the fact that claimants should not be permitted to withdraw on the morning of the hearing with impunity and without risk of possible cost sanctions.

73. I reject the submissions of Mr Harding.

74. The Claimant's withdrawal was unreasonable. He clearly had decided to withdraw prior to the email at 08.54 as be had not attended at the hearing himself. That was further unreasonable behaviour as he could have emailed the Tribunal and his opponents somewhat sooner, potentially saving some cost. He did not.

75. His acts in failing to comply with the Orders as set out above and the act of withdrawing, as he did at the time he did, in my judgment, constitute unreasonable behaviour and accordingly, it is my judgment that Rule 76(1)(a) is engaged. I therefore have to consider whether, in the circumstances of such engagement, I am going to exercise my discretion to make a Costs Order. In all the circumstances and taking into account all of the points above, I have determined that I will. The Claimant's behaviour was such that it merits a Costs Award.

The amount of the Award.

76. Rule 84 of the Employment Tribunal Rules of Procedure states as follows:

> 84. In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.

77. That specifies that a Tribunal "may" have regard to the paying party's ability to pay.

The case of Kovacs v Queen Mary and Westfield College and Another [2002] EWCA Civ 352 reminds tribunals that although a Tribunal may take a party's ability to pay into account, this does not mean poor litigants may misbehave with impunity and without fearing that any significant Costs Order will be made against them, whereas wealthy ones must behave themselves because otherwise an Order will be made.

78. In this case I am asked by Mr Baker to disregard the Claimant's ability to pay. He says that the Respondent's have incurred far greater costs than that which they seek in this application. They have limited this application to costs of £15,000.00. I have before me a statement from the Claimant specifying his ability to pay. It clearly points out that the Claimant is in great difficulty servicing his monthly outgoings and as a result has run up considerable debts. The Respondents have not cast any doubt on that evidence and therefore, on the face of it, I accept it.

79. It does seem to me that to fail to take into account the Claimant's needs means, in this case, would be exceptionally hard on the Claimant and accordingly I therefore determine that I will take his means into account when assessing payment costs.

80. Having due regard to the evidence before me as to means and weighing that carefully as a balancing exercise in respect of the costs incurred by the Respondents and the nature of the Claimant's unreasonable behaviour and the future prospects of income as a consultant with Fleet Transport Consultants, I conclude that in the circumstances an appropriate Costs Award to be paid by the Claimant to the Respondents is the sum of £5,000.00.

_____
Employment Judge K J Palmer

Date: 17 April 2024

Sent to the parties on: .1 May 2024....

…….....
For the Tribunal Office

Public access to Employment Tribunal decisions

Judgments and Reasons for the Judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant(s) and Respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal Hearing has been recorded you may request a transcript of the recording, for which a charge is likely to be payable in most but not all circumstances. If a transcript is produced it will not include any oral Judgment or Reasons given at the Hearing. The transcript will not be checked, approved or verified by a Judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/