



EMPLOYMENT TRIBUNALS

Paying Party: Mr S Singh

Receiving Party: QGTC Shipping (MI) Inc

Heard at: Newcastle CFCTC by CVP **On:** 9 January 2024

Before: Employment Judge Arullendran

Representation:

Paying Party: Ms Charlotte Goodman (counsel)

Receiving Party: Ms Aliya Al-Yassin (counsel)

JUDGMENT having been sent to the parties on 10 January 2024 and written reasons having been requested in accordance with Rule 62 (3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The Facts

1. The paying party submitted a claim to the Employment Tribunal on 28 December 2022 and brought claims of constructive unfair dismissal, constructive automatic unfair dismissal for whistleblowing and whistleblowing detriment.
2. On 21 September 2023 the paying party wrote to the Tribunal and the receiving party withdrawing his claims against the receiving party and expressly reserving his right to pursue a civil claim in the High Court in accordance with Rule 52 of the Employment Tribunal Rules of Procedure 2013 (“the ET Rules”). The claims were withdrawn prior to the parties exchanging witness statements.
3. The Employment Tribunal issued a Judgment on 27 September 2023 confirming the paying party had withdrawn his claims and confirming the proceedings were not

dismissed because the paying party reserved his right to issue proceedings in another Court.

4. On 4 October 2023 the receiving party made an application for costs against the paying party pursuant to Rule 76 of the ET Rules, a copy of which can be seen at pages 67 to 72 of the bundle. The receiving party sought an order for costs on the grounds that the paying party's claims had no reasonable prospect of success, pursuant to Rule 76 (1)(b) of the ET Rules, and he acted unreasonably by pursuing the claim which had no reasonable prospect of success, pursuant to Rule 76 (1)(a) of the ET Rules. A schedule of the amount of costs claimed by the receiving party can be seen at pages 73 and 74 of the bundle. The total amount claimed was £37,320.78 but the claim was limited to the maximum £20,000 which could be awarded by an Employment Tribunal.
5. The paying party resisted the application for costs and a copy of his response can be seen at pages 75 and 76 of the bundle. The grounds of resistance were that he had extremely limited means as he was unemployed and he reasonably believed that his claim did have reasonable prospects of success when it was issued on the basis that his contract of employment stated that it was subject to English law and the jurisdiction of the English Courts. The paying party states at page 76 "Having now been able to receive legal advice on jurisdiction, though, I have promptly taken the decision to withdraw my claim, in favour of alternative routes of redress. ... Within this overall context, it seems to me that any accusation that I have acted unreasonably is completely unjustified."
6. The paying party's witness statement setting out the procedural history of his claims and his reasons for both bringing the claims and subsequently withdrawing them can be seen at pages 135 to 146 of the bundle. The paying party did not give evidence at the hearing because he was residing in India and had not previously made an application to HMCTS for permission to give evidence from overseas. The receiving party did not suggest that the contents of the paying party's witness statement are not accepted or are incorrect, but takes issue with the contention that the paying party did not know that he could not bring a claim under the statutory provisions afforded by the Employment Rights Act 1996 in circumstances where the paying party was not employed or did not have a close connection with the UK. The receiving party also took issue with the amount of assets available to the paying party on the grounds that he was a highly remunerated employee for a period of 10 years during his employment with the receiving party but did not challenge any of the individual figures on the financial documents produced by the paying party setting out his assets, debts and liabilities.
7. The paying party is an Indian national and was employed as an engineer on seafaring vessels but he accepts he was not employed in the UK and the majority of his journeys did not either start or end in the UK. The paying party's terms and conditions of employment and handbook make reference to English law and that the parties submit to the jurisdiction of the English Courts. The paying party understood from this that any dispute he had with his employer could be litigated in the English Courts which would include the Employment Tribunal of England and Wales, although he

now understands that is not the correct position in law in terms of claims brought under the statutory provisions of the Employment Rights Act 1996.

8. The paying party instructed a firm of solicitors in the UK prior to issuing proceedings in the Employment Tribunal in order to seek advice about bullying in the workplace arising from whistleblowing. Correspondence took place between the paying party's solicitor and the receiving party's adviser prior to the paying party being invited to a disciplinary hearing and after allegedly raising his public interest disclosures, which left him believing that the receiving party did not wish to deal with him fairly. Upon receiving correspondence from the paying party's solicitor dated 3 March 2022 the receiving party retracted its position regarding the invitation to a disciplinary hearing on 26 May 2022, without any explanation. The receiving party sought assurances from his employer that there would be no further ramifications, particularly as he was still absent from work at that point. The receiving party wrote to the paying party on 19 August 2022 (pages 82 to 86) but failed to provide him with the assurances he had sought and accused the paying party of committing misconduct which resulted in him resigning and then issuing his claims in the Employment Tribunal. It is common ground that the letter from the receiving party dated 19 August 2022 set out in detail the reasons why the paying party could not bring a claim in the Employment Tribunal in England and Wales, setting out a list of ports the paying party had embark and disembark from, but the paying party did not believe that this was the correct position and he felt that he was being bullied by his employer. The paying party sought assistance from Whistleblowers UK who provided him with some help but were unable to provide any specialist legal advice which resulted in the paying party submitting his application to the Employment Tribunal as a litigant in person on 28 December 2022.
9. The paying party relies on the CDC records of his voyages produced at pages 369 to 377 of the bundle as demonstrating the identity of the ports he embarked and disembark from and these records were not disputed by the receiving party. The records demonstrate that the paying party disembarked in Milford Haven in Wales in 2018 and 2020, as set out at pages 371 and 374. The list of the ports identified in the solicitor's letter dated 19 August 2022, which can be seen at pages 83 and 84 of the bundle, does not make any reference to the two occasions when the paying party disembarked at Milford Haven in 2018 and 2020. The paying party believed that the receiving party was trying to obfuscate the truth and deter him from bringing his claim in England and Wales and he relied upon this heavy-handed tactic as the final straw for resigning and issuing proceedings in the Employment Tribunal.
10. On 10 February 2023 the receiving party submitted a response to the claims setting out in considerable detail the reasons why the Employment Tribunal did not have jurisdiction to deal with the paying party's claims i.e. because of the territorial reach of the Employment Rights Act 1996, again omitting any mention of the paying party disembarking in Wales in 2018 and 2020. A copy of the receiving party's response was sent to the paying party in April 2023 and both sides attended a preliminary hearing on 19 May 2023 where the paying party represented himself. Employment Judge Jeram directed at the preliminary hearing that a public preliminary hearing would be listed on 9 October 2023 to determine whether the Tribunal had jurisdiction

to hear the claims and case management orders were made for the exchange of documents and witness statements in preparation for the public preliminary hearing.

11. The paying party tried to obtain further advice from a solicitor after the preliminary hearing on 19 May 2023, although he experienced some difficulties with this and matters were delayed. The paying party was not able to obtain the legal advice he required until 21 September 2023. Witness statements were due to be exchanged on 22 September 2023, however, immediately upon receiving the legal advice that the Employment Tribunal did not have jurisdiction to hear the claims, the paying party promptly withdrew his claim and notified the receiving party of the withdrawal.

Submissions

12. The receiving party submits that the paying party should never have brought his claim in the first place because the pre-issue correspondence from the employer's solicitor clearly set out the reasons why the Employment Tribunal did not have jurisdiction and that the claims had no reasonable prospect of success. The receiving party further submit that the paying party's conduct in issuing and continuing to pursue the proceedings after receiving the grounds of resistance and after receiving the case management orders from the preliminary hearing on 19 May 2023, which was sent to the parties on 14 July 2023, amounted to unreasonable conduct and it claims its legal costs, limited to the maximum amount of £20,000, in accordance with Rule 78 of the ET Rules.
13. The paying party submits that he was acting as a litigant in person and that, although he now accepts the Employment Tribunal does not have jurisdiction to hear his claims, it was reasonable for him not to accept the contention put forward by the employer's solicitor because there had been a history of bullying and the receiving party was presenting its best case, deliberately missing out information showing his connection with ports in the UK. The receiving party further submit that it was reasonable for him to believe that his contract of employment was governed by the laws of England and subject to the jurisdiction of the English Courts and that it was not until he received specialist legal advice on 21 September 2023 that he understood that was not the position in law and acted promptly as soon as he received that advice. The paying party submits that he should not be penalised with a costs order when he acted as soon as he received the relevant legal advice.

The Law

14. Both parties referred me to Rule 76 of the Employment Tribunal Rules of Procedure 2013 which states
 - “(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 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; or

(c) ...”

15. Rule 84 of the Employment Tribunal Rules of Procedure 2013 provide that the Tribunal may have regard to the paying party’s ability to pay in deciding whether to make a costs order and in relation to the amount.
16. The receiving party referred to the case of Haydar v Pennine Acute Hospitals NHS Trust UKEAT/0023/18 at §§23-24 per Simler J (as she then was):

“23. The proper approach to an award of costs in the Employment Tribunal is now well established and applies whether the costs in question are the costs of legal representatives or preparation time costs. Costs are the exception and not the rule. An award of costs involves a two-stage approach. First, consideration of the threshold question whether any of the circumstances identified in Rule 76(1) apply. At the second stage, if the first stage is met, the Tribunal considers whether it would be appropriate to exercise discretion to make an order for costs in the particular circumstances of the case. There is a third stage, if it is reached, at which the Tribunal determines the amount of costs to be awarded or refers that question for assessment to a Judge in the County Court or a Tribunal Judge.

24. As Mummery LJ made clear in Yerrakalva v Barnsley Metropolitan Borough Council [2012] IRLR 78, in exercising discretion to award costs, Tribunals should consider the whole picture of what happened in the case and ask whether there has been unreasonable conduct by the putative paying party in the bringing, defending or conducting of the case, and in doing so should identify the specific conduct relied on, what was unreasonable about that conduct, and what effect it had on the proceedings.”

Discussion and Decision

17. Applying the relevant law to the facts, I find that it is common ground that the paying party’s claims had no reasonable prospect of success at the time he submitted his application to the Employment Tribunal. I note that this is an objective assessment and it does not matter whether the paying party reasonably or unreasonably believed he had the right to bring his claim in the UK. I accept the paying party was unaware of the correct legal position at the time he submitted his application to the Employment Tribunal as the question of territorial jurisdiction under the Employment Rights Act 1996 is a complicated issue and is not easy for legal advisers to grapple with, let alone a litigant in person. However, the paying party accepts today that there was no reasonable prospect of success of his claim succeeding at the time he issued proceedings and, looking at this objectively, the first threshold for awarding costs under Rule 76(1)(b) is made out.
18. In terms of the paying party’s conduct of the proceedings, looking at all the circumstances in the round and taking into account that he was a litigant in person, I find he was not acting unreasonably in either bringing the claims or pursuing the claims after receiving correspondence from the employer’s solicitors and the case management orders because he believed that his contract of employment was governed by the laws of England and that any claims against his employer was

subject to the jurisdiction of the English Courts and Tribunals. I find that the paying party did not act unreasonably in not accepting the receiving party's solicitors word for it when they told him that he could not bring such a claim in the Employment Tribunal of England and Wales given the history of mistrust between the parties and the conduct of the receiving party's solicitor in missing out relevant information from its letter dated 19 August 2022 in which it set out the various ports the paying party had embarked and disembarked from when that information would have shown that the paying party disembarked in Wales and that his employment did have some connection with the UK. With the backdrop of that history between the parties, it is not unreasonable for a litigant in person to believe that he is being misled by the other side or their legal representative and, in those circumstances, it was not unreasonable for the paying party to issue proceedings in the Employment Tribunal of England and Wales.

19. In April 2023, when the paying party received a copy of the ET3 response to his Tribunal claim, it was not unreasonable, in my opinion, for the paying party to continue with his claim given that he knew a preliminary hearing had been listed to take place the following month and, as a litigant in person, it was not unreasonable for him to consider the grounds of resistance as being the receiving party's best position, but not the inevitable outcome. Looking at the case management order produced by Employment Judge Jeram at the preliminary hearing which took place in May 2023, I find that the Judge clearly gave an indication to the paying party that his claims may not have a reasonable prospect of success in that she listed a public preliminary hearing to take place in October 2023. However, the listing of such a hearing is not in itself sufficient, in my opinion, for a litigant in person to believe that the claim should be withdrawn at that stage as the Judge had clearly indicated that there would be a determination at the public preliminary hearing and, in such circumstances, a claimant is entitled to attend that hearing and receive a fully reasoned decision. There is nothing on the face of the case management order which amounts to an indication by the Judge for the paying party to withdraw his claims at that stage and I find that it was not unreasonable for the paying party to continue with his claim given his misunderstanding of the applicability of English law to his claims whilst at the same time making efforts to obtain independent legal advice, which he did. That conduct is not unreasonable.
20. The paying party withdrew his claims promptly as soon as he received independent legal advice to the effect that the Employment Tribunal did not have jurisdiction to hear his claims. That is most certainly not unreasonable conduct as the alternative would have been to proceed to the public preliminary hearing which would have resulted in further costs to the receiving party. In all the circumstances and looking at all of the issues in the round, I find that the paying party's conduct in issuing and pursuing his claims up to 21 September 2023 was not unreasonable and, therefore, I find that the ground under Rule 76(1)(a) of the Employment Tribunal Rules of Procedure 2013 is not made out. The receiving party's application for costs on this ground is dismissed.
21. The receiving party's additional contention that the paying party's conduct in withdrawing his claim but reserving his right to issue proceedings elsewhere is

unreasonable conduct is without foundation and I have no hesitation in rejecting that ground for awarding costs against the paying party.

22. Given that I have found the paying party's claims had no reasonable prospect of success, I then have to go on to consider whether I should exercise my discretion as to whether a costs award should be made in favour of the receiving party. Similar to the reasons I have set out above, I find that the paying party's conduct should not be compared to that of a legally qualified representative as he was a litigant in person and I should review his actions as a litigant in person when deciding whether I should exercise my discretion in awarding costs. As such, I find that the paying party has not acted unreasonably in this litigation as he was litigant in person and he acted promptly as soon as he received specialist legal advice on matters of jurisdiction. The paying party also acted reasonably in withdrawing his claims prior to the preliminary hearing upon receiving the legal advice. In those circumstances, my decision is to exercise my discretion not to award costs in this matter even though the claims had no reasonable prospect of success. In particular, I take into account the paying party subjective view of the employer's course of conduct against him prior to his dismissal and in the terms on which the pre-issue correspondence was entered into on behalf of the receiving party which left the paying party feeling that he was being bullied into dropping his claim by deliberately concealing relevant information. It is not unreasonable in such circumstances for an injured party to seek legal re
23. For completeness, if I had exercised my discretion in favour of making an award for costs in this matter, I would have taken into account the paying party's ability to pay. The figures produced by the paying party on his schedule of income, assets and outgoings (pages 126 to 134 of the bundle) has not been disputed by the receiving party and I accept that the paying party is currently unemployed, with no income or assets, in poor health and with several debts. In those circumstances, I find that the paying party does not have the means to pay anything to the receiving party by way of costs and I would not have made an award for costs against the paying party and my assessment would have been for a nil amount.
24. The Judgment of the Employment Tribunal is that the receiving party's application for costs is refused.

Employment Judge Arullendran

Date: 23 April 2024