EMPLOYMENT TRIBUNALS

Claimant: Mr M Broomhead

Respondent: Peninsula Legal Services Limited t/a Irwell Law

Heard at: Manchester Employment Tribunal **On:** 16 February 2024
19 March 2024
(in Chambers)

Before: Employment Judge McDonald

REPRESENTATION:

Claimant: Self representing
Respondent: Mr C Crow (Counsel)

JUDGMENT ON A COSTS APPLICATION

The judgment of the Tribunal is that:

1. The respondent's application for a costs order against the claimant succeeds.

2. The claimant is ordered to pay the respondent costs of £2500 plus VAT, a total amount of £3000.

REASONS

The background to the costs application

1. By a claim form presented on 15 August 2023, the claimant brought a claim of automatically unfair dismissal because of making a protected disclosure (S103A Employment Rights Act 1996("ERA")). The claim form included an application for interim relief. I heard that interim relief application on 8 September 2023 ("the IR hearing") and refused it. I gave oral judgment at the IR Hearing. The claimant requested my reasons in writing. They were sent to the parties on 10 October 2023.

In this judgment, I refer to my judgment and reasons for refusing the application for interim relief as "the IR Judgment".

2. At the end of the IR hearing Mr Crow indicated that the respondent wanted to apply for the costs of that hearing. I directed that costs application be decided at a preliminary hearing on 16 February 2024. By that time the claimant had brought a second Tribunal claim against the respondent in this case and a number of individual respondents under case no.2411295/2023.

3. On 15 February 2024 I heard the costs application and made case management orders in relation to both claims. I reserved my decision on the costs application. I was due to decide it in chambers on 15 March 2024 but that was postponed to 19 March 2024. I apologise to the parties that other judicial work and absences from the Tribunal have led to a delay in finalising and sending them this judgment.

The Relevant Law

4. The power to award costs is contained in the 2013 Rules of Procedure. The definition of costs appears in rule 74(1) and includes fees, charges, disbursements or expenses incurred by or on behalf of the receiving party.

5. Rule 75(1) provides that a Costs Order includes an order that a party makes a payment to another party "in respect of the costs that the receiving party has incurred while legally represented".

6. The circumstances in which a Costs Order may be made are set out in rule 76(1). The relevant provision provides as follows:

> **"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."**

7. The procedure by which the costs application should be considered is set out in rule 77 and the amount which the Tribunal may award is governed by rule 78. In summary rule 78 empowers a Tribunal to make an order in respect of a specified amount not exceeding £20,000, or alternatively to order the paying party to pay the whole or specified part of the costs with the amount to be determined following a detailed assessment.

8. The procedure for applying for a costs order is set out in rule 77. That provides:

> "A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the Judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application."

9. Rule 84 concerns ability to pay and reads as follows:

> **"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."**

10. It follows from these rules as to costs that the Tribunal must go through a three stage procedure (see paragraph 25 of **Haydar v Pennine Acute NHS Trust UKEAT 0141/17/BA**). The first stage is to decide whether the power to award costs has arisen, whether by way of unreasonable conduct or otherwise under rule 76; if so, the second stage is to decide whether to make an award, and if so the third stage is to decide how much to award. Ability to pay may be taken into account at the second and/or third stage.

11. The case law on the costs powers (and their predecessors in the 2004 Rules of Procedure) include confirmation that the award of costs is the exception rather than the rule in Employment Tribunal proceedings; that was acknowledged in **Gee v Shell UK Limited [2003] IRLR 82**.

12. An award of costs is compensatory and not punitive so there should be an examination of what loss has been incurred by the receiving party.

13. In determining whether to make an order on the ground that a party has conducted proceedings unreasonably, a Tribunal should take into account the 'nature, gravity and effect' of a party's unreasonable conduct — **McPherson v BNP Paribas (London Branch) 2004 ICR 1398, CA**. However, this does not mean that the circumstances of a case have to be separated into sections such as 'nature', 'gravity' and 'effect', with each section being analysed separately. The vital point in exercising the discretion to order costs is to look at the whole picture. The Tribunal has to ask whether there has been unreasonable conduct by the paying party in bringing, defending or conducting the case and, in doing so, identify the conduct, what was unreasonable about it, and what effect it had. This process does not entail a detailed or minute assessment. Instead the Tribunal should adopt a broad-brush approach, against the background of all the relevant circumstances: **Yerrakalva v Barnsley Metropolitan Borough Council and anor 2012 ICR 420, CA**.

14. In assessing the conduct of a party, it is appropriate for a litigant in person to be judged less harshly in terms of his or her conduct than a litigant who is professionally represented. An employment tribunal cannot, and should not, judge a litigant in person by the standards of a professional representative: **AQ Ltd v Holden 2012 IRLR 648, EAT**. That does not mean that that lay people are immune from orders for costs: a litigant in person can be found to have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity.

15. In **Radia v Jeffries International Ltd [2020] I.R.L.R. 431, paras 62-64** HHJ Auerbach in the EAT gave guidance on rule 76(1)(b) and its interaction with rule 76(1)(a):

> "62. At the first stage, accordingly, it is sufficient if either Rule 76(1)(a) (through at least one sub-route) or Rule 76(1)(b) is found to be fulfilled. There is an element of potential overlap between (a) and (b). The Tribunal may consider, in a given case, under (a), that a complainant acted unreasonably, in bringing, or

> continuing the proceedings, because they had no reasonable prospect of success, and that was something which they knew; but it may also conclude that the case crosses the threshold under (b) simply because the claims, in fact, in the Tribunal's view, had no reasonable prospect of success, even though the complainant did not realise it at the time. The test is an objective one, and therefore turns not on whether they thought they had a good case, but whether they actually did…….
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> 64. This means that, in practice, where costs are sought both through the Rule 76(1)(a) and the Rule 76(1)(b) route, and the conduct said to be unreasonable under (a) is the bringing, or continuation, of claims which had no reasonable prospect of success, the key issues for overall consideration by the Tribunal will, in either case, likely be the same (though there may be other considerations, of course, in particular at the second stage). Did the complaints, in fact, have no reasonable prospect of success? If so, did the complainant in fact know or appreciate that? If not, ought they, reasonably, to have known or appreciated that?".

16. The EAT in **Warburton v Chief Constable of Northamptonshire Police 2022 ICR 925** confirmed that an application for costs under rule 76(1)(b) can be made in relation to an interim relief application, in contrast to a case management order where an application under rule 76(1)(b) cannot be made.

Discussion and conclusions

17. In his submissions, Mr Crow confirmed that the respondent's application for costs was made both under rule 76(1)(a) and 76(1)(b) but focussed his submissions on 76(1)(b). In essence, the respondent's case was that the interim relief ("IR") application as made by the claimant was misconceived.

Was the application for costs made in time?

18. The claimant submitted that the application for costs was not made in time. He submitted that any application for costs should have been made by 7 November 2023, i.e. 28 days from the date when the IR Judgment was sent to the parties.

19. For the respondent, Mr Crow made two submissions. First, he said that the respondent had made its costs application within 28 days of the IR Judgment, having made it at the hearing on 8 September 2023. Second, he submitted that in any event rule 77 required the application to be made within 28 days of the Judgment finally disposing of the proceedings. The IR Judgment did not "finally dispose of proceedings".

20. I accept Mr Crow's submissions. The respondent had made its application for costs at the hearing on 8 September 2023. That is why I directed by a notice of hearing sent to the parties on 19 September 2023 that the preliminary hearing on 16 February 2024 would consider the respondent's costs application.

21. I am satisfied, therefore, that the costs application was made on 8 September 2023. The claimant says that Mr Crow was unable to confirm the grounds for that costs application when I asked him about it on 8 September 2023. That is correct. However, I see no requirement in the ET Rules of the grounds for the costs application

to be set out when the application is made. In any event, it is clear from the "without prejudice save as to costs" correspondence that the claimant had been made well aware by 8 September 2023 that the respondent was going to be applying for costs on the basis that his application had no reasonable prospect of success.

22. If I am wrong that the application was made at the hearing on 8 September 2023, I would in any event find that the application was made in time. It seems to me that the 28 day time limit begins to run from the Judgment which finally disposes of "the proceedings", I find that "the proceedings" in this case means the claim number 2408762/2023 as a whole, not the application for interim relief. An application for interim relief is not separate "proceedings". An application for interim relief can only be made if a claim for unfair dismissal is being brought, i.e. it is subsidiary to those unfair dismissal proceedings. That is reflected in the fact that an interim relief application is not given a separate case number by the Employment Tribunal but dealt with under the case number given to the unfair dismissal proceedings. Were I wrong about the application having been made on 8 September 2023, I find that the respondent was still in time to make an application for costs in this case because the IR Judgment does not finally dispose of proceedings.

Findings of fact relating to the claimant's means

23. The claimant had provided a witness statement dated 13 February 2024. The claimant attached a statement of truth to that witness statement. Mr Crow cross examined the claimant about his means.

24. I find that the claimant's total expenditure amounts to £928 per month. He has income of £543 per month meaning that he has a deficit of £375 per month of income against expenditure. The claimant told me that he currently has savings of £1,400, that being reduced from a figure of £7,000 when he left the respondent's employment. He has, he told me, been living on his savings barring the benefit of £543 per month he has been receiving.

25. In terms of other assets, Mr Crow suggested to the claimant that he had received an inheritance. The claimant gave evidence (which I accept) that his only inheritance takes the form of a box of records i.e. vinyl LPs, that he received when his brother passed away. The claimant was his brother's executor. Those LPs are early progressive rock LPs. Although the claimant at one point suggested that they might be worth some money, he then reneged on that saying that they were not in very good quality. I accept the claimant's submissions they are unlikely to be of significant value. The claimant does not own a car.

26. It was also put to the claimant that he appeared to be continuing to act on a number of employment tribunal cases. The claimant said he was doing so on a pro bono basis, those cases being left over when he was operating an employment advice firm called Employment Rights Advice Limited. The claimant said that there were three or four cases which he was seeing through to an end. In the absence of any evidence to the contrary I accept the claimant's evidence on that point.

27. In terms of prospects of employment, the claimant is an experienced employment lawyer. He has registered with a job agency. There have been indications of potential job leads but they have as yet led nowhere.

28. I find that the claimant currently has no disposable income and very limited assets. I find, however, that there are reasonable prospect of his earning income in the future as an employment lawyer. It seems reasonable to assume that the income from any such role would be similar to that he was earning with the respondent, i.e. around £2500-£3000 net per month. I find that would significantly exceed his outgoings.

Whether the "threshold" test in rule 76(1)(a) or (b) is met

29. As I explain in the Judgment, the primary reason why the claimant's application of interim relief failed was that he brought it against the wrong respondent. An application for interim relief must be brought against the claimant's employer. The claimant brought the claim against Peninsula Business Services Ltd. There was no dispute that he was employed by Peninsula Legal Services Limited t/a Irwell Law.

30. The claimant suggested that it was not correct to say that his application had no reasonable prospect of success because there was the possibility of substituting the correct respondent (which is what I did) and postponing the hearing to allow service on the correct respondent. As I explained in the IR Judgment, the consequence of the claimant's error in bringing the application against the wrong respondent was that the relevant procedural rules as to service and time limits had not been complied with so the application failed on jurisdictional grounds. Given the strict nature of those rules, including the lack of any power for the Tribunal to modify the length of service required in s.128(4) and the high threshold applied in determining postponement applications I do find that, viewed objectively, the application for interim relief had no reasonable prospects of success because of the jurisdictional issues arising from the claimant's bringing the application against the wrong respondent.

31. If I am wrong that the jurisdictional issues by themselves meant the IR application had no reasonable prospect of success, I find that was the case when those were combined with the weakness of the substantive application. As I explained in the IR Judgment (para 28) there was a transcript of the meeting at which the claimant alleged he had made a protected disclosure. There was no reference to any public interest aspect, with the focus being on the unfairness' to the claimant of work allocation processes. Given that, I do find that there was no reasonable prospect of the claimant being able to show there was a "pretty good chance" of his claim under s.103A succeeding because of the difficulty of establishing the necessary reasonable belief on the claimant's part in the public interest element in the alleged protected disclosure. Taken with the jurisdictional issues, I do find that that meant the IR application had no reasonable prospect of success so the "threshold" in rule 76(1)(b) is met.

32. Had it been necessary to do so I would also have found that that meant the threshold in rule 76(1)(a) was met. Applying **Radia** I find that the claimant, as an experienced employment solicitor and advocate, ought reasonably to have realised or appreciated that the application had no reasonable prospect of success.

Should I exercise my discretion to award costs?

33. The claimant submitted that it would be wrong in principle to award costs in an IR application case. The right to apply for interim relief is an important one and claimants should not be dissuaded from doing so by the threat of costs. I accept that.

However, I am making a decision on this specific application. This is not a case of an unrepresented claimant not fully understanding what an IR application involves and requires. It involves an experienced employment lawyer bringing the IR application against the incorrect respondent. This is not a case where the claimant was uncertain who his employer was, as can be the case for some employees. The claimant was, or should have been, well aware of getting the name of the respondent correct in proceedings and of the consequences of not doing so.

34. This is also a case where the alleged protected disclosure was recorded in an undisputed transcript rather than for example, being the subject of a factual dispute as to what was said. Given his expertise the claimant would have known the threshold required for an IR application to succeed and been in a position to reasonably assess the prospects of his claim succeeding. The respondent had also set out a costs warning highlighting the weakness of the substantive case and its intention to seek costs on the basis that the application had no reasonable prospects of success. It had offered the claimant the opportunity to withdraw his application. As against that, it does not appear that the respondent in that costs warning raised the issue of the wrong respondent being named and the consequences of that.

35. The effect of the claimant's decision to proceed with the application despite the flaws in the application and the weakness of the substantive case was that the respondent incurred the cost of counsel in attending the IR hearing.

36. I do take into account the claimant's financial means in deciding whether to make an order for costs. I accept the claimant's current financial means are constrained. However, I find that he has reasonable prospects of obtaining work as an employment lawyer in the future. If he does so, he will have a reasonably significant income, certainly enough to meet his current expenditure and leave disposable income available to pay any costs order.

37. Taking those factors together, I do find that this is a case where it is appropriate to make an order for costs.

<u>What costs should I order the claimant to pay?</u>

38. The respondent claimed solicitors' costs of £1911.60 and £3000 counsel's fees both of which were inclusive of VAT. Taking into account the claimant's limited means, I do not consider it appropriate to order that he pay the whole amount of costs claimed. However, given the claimant's earning potential I do find it appropriate to order the claimant to pay the respondent the counsel's fees which it incurred of £2500 plus VAT giving a total of £3000.

Employment Judge McDonald
Date: 12 May 2024

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
17 May 2024

FOR THE TRIBUNAL OFFICE

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