EMPLOYMENT TRIBUNALS

Claimant: **Mr B Colbourne**

Respondents: **(1) Environmental Control Coatings Limited**
(2) Lyte Coatings Limited

Heard at: Bristol (In Chambers) **On:** 18 September 2023

Before: Employment Judge Cuthbert

JUDGMENT ON COSTS

1. The second respondent's application for a for a preparation time order succeeds.

2. The claimant is ordered to pay the sum of £2,500 to the second respondent.

REASONS

Introduction

1. The case came before me to determine an application for a preparation time order (**PTO**) by the second respondent against the claimant, following my earlier finding against the claimant on the issue of whether his employment had transferred to the second respondent pursuant to TUPE.

2. I proposed that the application be dealt with in writing and both parties set out their positions in writing accordingly. It was conducted in that manner because to do so met the overriding objective and there was no objection from the parties.

Background

3. The claimant brought claims against the respondents for whistleblowing detriment, constructive unfair dismissal (ordinary and pursuant to section 103A of ERA), unauthorised deductions from wages and a failure to consult pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) (**TUPE**).

4. Following two previous private case management preliminary hearings, the case came before me for a further preliminary hearing, in public, on 15 and 16 May 2023 to decide whether or not the claimant's employment had transferred from the first respondent (which was at that time in the process of a creditors' voluntary liquidation) to the second respondent pursuant to TUPE. Neither party was legally represented at the hearings.

5. By way of a reserved judgment dated 25 May 2023 (**the reserved judgment**) which was sent to the parties on 12 June 2023, I found that there had **not** been a TUPE transfer and, accordingly, I dismissed the claimant's claim against the second respondent. I also directed that the claimant indicate whether he intended to continue with his claims against the first respondent, in view of its financial position.

6. I have not referred in detail here to the findings I made in the reserved judgment, as they are set out fully in the reasons, which are publicly available.

7. Subsequent to my reserved judgment, the claimant withdrew his claims against the first respondent, following an acknowledgement by the liquidators of his claim for unpaid wages, and the second respondent applied for a PTO against the claimant. It is the second respondent's application which I address below.

Relevant law – costs in the Tribunal

8. The employment tribunal is a different jurisdiction to the county court or high court. In those courts, the normal principle is that *'costs follow the event'*, or in other words, the loser pays the winner's costs.

Costs generally

9. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 **(the Rules)** contain the relevant rules to be applied by employment tribunals, and for present purposes these are as follows:

    a. Rule 75(2) - A **preparation time order** (PTO) is an order that a party ("the paying party") make a payment to another party ("the receiving party") in respect of the receiving party's preparation time while not legally represented. "Preparation time" means time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at any final hearing.

    - Rule 74(2)(a) – 'Legally represented' means having the assistance of a person (including where that person is the receiving party's employee)

who has a right of audience in relation to any class of proceedings in any part of the Senior Courts of England and Wales, or all proceedings in county courts or magistrates' courts;

- Rule 76

  (1) A tribunal may make a costs order or a PTO 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) had been conducted; or

  (b) any claim or response had no reasonable prospect of success.

- Rule 77 - A party may apply for a costs order or a PTO 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.

- Rule 79 - The amount of a PTO

  Rule 79(1) The Tribunal shall decide the number of hours in respect of which a PTO should be made, on the basis of—

  > (a) information provided by the receiving party on time spent falling within rule 75(2) above; and
  >
  > (b) the Tribunal's own assessment of what it considers to be a reasonable and proportionate amount of time to spend on such preparatory work, with reference to such matters as the complexity of the proceedings, the number of witnesses and documentation required.

  Rule 79(2) - The hourly rate for a PTO was set at £33 in July 2013 and increases on 6 April each year by £1. The current rate is £43 per hour.

  Rule 79(3) The amount of a PTO shall be the product of the number of hours assessed under paragraph (1) and the rate under paragraph (2).

- Rule 84 - In deciding whether to make a costs, PTO or wasted costs order and if so in what amount, the Tribunal may have regard to the paying party's ability to pay.

10. Costs[1] in the Tribunal have long been, and remain, the exception rather than the norm. Lord Justice Sedley in *Gee v Shell UK Limited* [2002] IRLR 82 stated as follows: *"A very important feature of the employment jurisdiction that it is designed to be accessible to people without the need of lawyers, and that – in sharp distinction from ordinary litigation in the United Kingdom – losing does not ordinarily mean paying the other side's costs"*. That said, the facts of a case need not be exceptional for a costs order to be made. The question for the Tribunal is whether the relevant test is satisfied (*Vaughan v London Borough of Lewisham and others* [2013] IRLR 713).

11. The discretion afforded to a Tribunal to make an award of costs must be exercised judicially (*Doyle v North West London Hospitals NHS Trust* UKEAT/0271/11/RN. The Tribunal must take into account all of the relevant matters and circumstances. The Tribunal must not treat costs orders as merely ancillary and not requiring the same detailed reasons as more substantive issues. Costs orders may be substantial and can thus create a significant liability for the paying party. Accordingly, they warrant appropriately detailed and reasoned consideration and conclusions. Costs are intended to be compensatory and not punitive.

The process for determining costs applications

12. The EAT in *Haydar v Pennine Acute NHS Trust* UKEAT/0141/17 held that the determination of a costs application is essentially a three-stage process (per Simler J at [25]) (emphasis added):

> *The words of the Rules are clear and require no gloss as the Court of Appeal has emphasised. They make clear (as is common ground) that there is, in effect, a three-stage process to awarding costs.*
>
> *The first stage - stage one - is to ask whether the trigger for making a costs order has been established either because a party or his representative has behaved unreasonably, abusively, disruptively or vexatiously in bringing or conducting the proceedings or part of them, or because the claim had no reasonable prospects of success.*
>
> *The trigger, if it is satisfied, is a necessary but not sufficient condition for an award of costs. Simply because the costs jurisdiction is engaged, does not mean that costs will automatically follow. This is because, at the second stage - stage two - the Tribunal must consider whether to exercise its discretion to make an award of costs. The discretion is broad and unfettered.*
>
> *The third stage - stage three - only arises if the Tribunal decides to exercise its discretion to make an award of costs, and involves assessing the amount of costs to be ordered in accordance with Rule 78.*

[1] The criteria for a Tribunal considering making an award of costs and a PTO are the same and so references to costs orders in the caselaw are equally applicable to the discretion as to whether to make a PTO.

Acting vexatiously (rule 76(1)(a))

13. The meaning of the word, *"vexatious"* has been the subject of a number of reported cases. In *Attorney General v. Barker* [2000] 1 FLR 759, Bingham CJ described the hallmark of vexatious proceedings as being that it had: *"Little or no basis in law (at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and it involves an abuse of the process of the court, meaning a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process"*. In *Ashmore v. British Coal Corporation* [1990] ICR 485 the Court of Appeal observed that whether a case was vexatious depended on all the relevant circumstances of the case.

14. In *Marler Ltd v Robertson* [1974] ICR 72, NIRC the National Industrial Relations Court stated that *"If an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive, he acts vexatiously."*

15. Simply being *"misguided"*, or even *"seriously misguided"* is not sufficient to establish vexatious conduct — *AQ Ltd v Holden* [2012] IRLR 648, EAT at [38].

No reasonable prospect of success (rule 76(1)(b))

16. On the question of a claim having no reasonable prospect of success, for the purposes of rule 76(1)(b) above, under the previous tribunal rules, a "misconceived" claim was synonymous with a claim having no reasonable prospect of success. In *Scott v Inland Revenue Commissioners* [2004] ICR 1410, CA, Lord Justice Sedley observed that "misconceived" for the purposes of costs under the Tribunal Rules 2004 included *"having no reasonable prospect of success"* and clarified that the key question in this regard is not whether a party thought he or she was in the right, but whether he or she had reasonable grounds for doing so. The issue is not whether the claim was *"genuinely brought"* or the claimant genuinely believed in it - see *NPOwer Yorkshire Limited v Daly* and *Vaughan* (above).

17. In *Radia v Jefferies International Ltd* [2020] IRLR 431 the EAT gave guidance on how a Tribunal should approach costs applications under rule 76(1)(b). It emphasised that the test is whether the claim had no reasonable prospect of success, judged on the basis of the information that was known or reasonably available at the start. Thus, the Tribunal must consider how, at that earlier point, the prospects of success in a trial that was yet to take place would have looked. In doing so, it should take account of any information it has gained, and evidence it has seen, by virtue of having heard the case, that may properly cast light back on that question, but it should not have regard to information or evidence which would not have been available at that earlier time. The EAT went on to clarify that the mere existence of factual disputes in the case, which could only be resolved by hearing evidence and finding facts, does not necessarily mean that the Tribunal cannot properly conclude that the claim had no reasonable prospects from the outset, or that the claimant could or should have appreciated this from the outset. That still depends on what the claimant

knew, or ought to have known, were the true facts, and what view the claimant could reasonably have taken of the prospects of the claim in light of those facts.

18. In *Radia* the EAT also considered the overlap between a claim or response having no reasonable prospect of success and unreasonable conduct and stated as follows at [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?*

19. The means of a paying party in any costs award may be considered twice – first in considering whether to make an award of costs and secondly if an award is to be made, in deciding how much should be awarded. If means are to be taken into account, the tribunal should set out its findings about ability to pay and say what impact this has had on the decision whether to award costs or an amount of costs (*Jilley v Birmingham & Solihull Mental Health NHS Trust* UKEAT/0584/06).

20. In terms of the amount of costs, the purpose of an award of costs is to compensate the receiving party, not to punish the paying party (*Lodwick v Southwark London Borough Council* [2004] IRLR 554).

The second respondent's PTO application

21. On 12 June 2023, the second respondent submitted an application to the Tribunal for a PTO against the claimant, on the basis that:

    a. the claimant had acted vexatiously in bringing the claim; and

    b. his claim had no reasonable prospect of success.

22. In its PTO application, the second respondent said that:

    a. The Tribunal had found that there was no positive evidence of any transfer of a business entity from the first respondent to the second respondent, nor any basis from which it was possible to infer a transfer.

    b. The Tribunal had found that there was no evidence, by the time of the hearing in May 2023, nearly two years after the second respondent was formed, of any continuation of the first respondent's business, or any attempt to continue that business.

    c. The Tribunal had accepted the second respondent's case that the business represented a vehicle to take advantage of a future potential opportunity, but that opportunity had not yet arisen – there was plainly

no continuation by the second respondent of the business activities of the first respondent.

d. The claimant had submitted a number of irrelevant legal authorities at the hearing in May 2023 in support of his case (the majority of those he had submitted).

e. The Tribunal had noted that the claimant had misconstrued comments during telephone calls.

f. The Tribunal had noted that the claimant appeared to have actively deterred a potential investor in the first respondent, via a telephone call.

g. The claimant had refused to engage with the respondents before making a claim and during the submission period.

23. The second respondent sought the following costs:

Calculation of claim : Preparation Time			
Respondent	Hours	£ Rate / Hr	£ Claim
David McLoughlin	120	45	5,400
Mark Cusack	80	45	3,600
Giles Wilson	20	45	900
Total	220	135	9,900

24. Mr McLoughlin, Mr Cusack and Mr Wilson are the three directors of the second respondent. Mr McLoughlin had primary conduct of the litigation, prepared a 2-page witness statement and gave oral evidence at the May 2023 hearing; Mr Cusack provided a lengthy witness statement (27 pages) and gave oral evidence; and Mr Wilson provided a statement for the hearing (2 pages) in the bundle but did not give evidence. The hearing bundle ran to 284 pages.

The claimant's response to the PTO application

25. The claimant responded to the PTO application in an email dated 14 July 2023. In summary, he said:

a. He said he took 'advice' from both the Tribunal and Acas earlier in the proceedings.

b. He was a litigant in person and brought a 'reasonable' claim against the respondent.

c. He referred to comments made by the judge at the Preliminary Hearing in September 2022, when the claimant's application to amend his claim to include the second respondent, was granted (in the absence of the second respondent). He set out paras 31, 32, 33 and 35 from that decision. (I also set out a summary of that hearing at paras 5 – 7 of the reserved judgment).

d. He said that the second respondent did not prepare the bundle for the May 2023 hearing – he did.

e. He said that he complied with Tribunal orders during the proceedings.

f. He said that the second respondent's claim for 220 hours' preparation was excessive and unreasonable.

g. He said that there was likely duplication between the costs claimed by the second respondent and the costs of the first respondent, which had the same directors.

h. He made references to the law, which I have summarised above (and which is well-settled).

i. He said he did not bring a vexatious claim – rather, he said, the Tribunal had simply found that there was insufficient evidence to support the claimant's belief that there was a continuation of the first respondent's business under the basis of TUPE law. He said that he relied on his own belief at the time that the evidence he had available supported such an argument under the basis of TUPE law.

j. He said he was seeking employment and had not been paid wages by the first respondent between December 2019 and May 2022, when he resigned.

Second respondent's reply

26. On 14 July 2023, Mr McLoughlin replied to the claimant's email above, in summary as follows:

a. The judge in the September 2022 preliminary hearing made the comments following a one-sided hearing at which neither respondent was represented, as the respondents were unaware of the hearing.

b. He was critical in various general ways of the claimant's conduct of the litigation

c. He offered to provide a breakdown of costs and said that the directors of the second respondent are self-employed and time spent preparing for the case meant a significant loss of opportunity.

Claimant further information as to his means

27. The claimant also provided information as to his means on 30 August 2023, having previously sent an email 'in confidence' to the Tribunal, not copied to the respondent, which I have not read in full or taken into account in reaching my decision.

28. The claimant said he was in a lowincome family. He had two children who were on Universal Credit. He has not found new work and was living in rented accommodation. He attached copies of PAYE and self-assessment records

(which indicated virtually no income between 2019 and 2023 in those documents). The liquidators of the first respondent said in around mid-2023 that the claimant was owed £312,000 in unpaid wages between 2019 and 2022, and he would need to submit a claim to the RPS. He said he had incurred £58,000 in costs in dealing with the directors of respondents over the previous three years.

Discussion and Conclusion

29. I have applied the relevant law summarised above to the specific position in the present case, mindful that I have a broad but not unfettered discretion on issues of costs.

30. In terms of the first part of the *Haydar* test, the question is whether the second respondent has overcome the hurdle of establishing that the claimant acted vexatiously in the bringing or conduct of the proceedings or that the claims had no reasonable prospect of success (the two limbs of the grounds for a PTO relied upon by the second respondent).

31. In the reserved judgment, in short, I concluded that there was no evidence to support the claimant's argument that there had been a TUPE transfer, which was the basis upon which he had applied to add the second respondent to proceedings. I refer to paragraphs 32 – 34, 38 – 39, 41 – 42, 46 – 53 and 55 of the reserved judgment in particular. These paragraphs clearly indicate an absence of any positive case to the effect that there had been a TUPE transfer between the first and the second respondent. This was also very apparent from the claimant's attempts to cross-examine the second respondent's witnesses – he had no meaningful evidence to put to them to support his argument that there had been a TUPE transfer.

32. Further evidence was provided to the claimant during the proceedings to support the second respondent's case that there had been no transfer during 2023 – see paragraphs 59 and 60 of the reserved judgment, but he pressed on. On 1 March 2023, Mr McLoughlin attempted to press the claimant as to whether there was any factual basis of his assertion that there had been a TUPE transfer, but the claimant did not meaningfully engage with the various questions which were sensibly and reasonably put to him (para 61 of the reserved judgment).

33. Having regard to the authorities above, particularly *Scott* and *Radia,* I am satisfied that the claimant's claim that there had been a TUPE transfer between the first and the second respondent **had no reasonable prospect of success.** He either knew, or ought reasonably to have known that this was the case. His TUPE argument was based on no more than weak speculation. The speculative nature of it was apparent from his original application to add the second respondent, in which he had stated (my emphasis):

> *The date at which the transfer occurred is likely 1 December 2021 whereby* ***the transfer likely included the transfer of "economic entities", being that of intellectual property, patents, clients,***

products, assets, staff, service contracts and contracts for Directors.

34. None of the findings by the judge in the September 2022 hearing change my view that his argument was entirely speculative.

35. Notwithstanding that, by the time of the May hearing 2023, no positive evidence whatsoever had emerged to support the position he set out above in his application – i.e. **no** evidence of any transfer of IP, patents, clients, products, assets, staff, service contracts or directors' contracts - and that the second respondent continued to robustly assert that there was no transfer, he pressed on through to the end of the May hearing.

36. I do **not**, however, find that the claimant, seriously misguided as he was in terms of his interpretation of TUPE, acted vexatiously.

The second stage of the Haydar test – the exercise of discretion

37. I have considered the second stage, and the broad discretion available to me, and I have decided to exercise that discretion in the second respondent's favour and to make a PTO. My reasons are as follows:

    a. I recognise that costs remain the exception rather than the rule in the Tribunal and that the claimant was unrepresented.

    b. The claimant has, nonetheless pursued a very weak argument unsupported by any positive evidence, to a two-day hearing. He did not appear to take stock, as he ought to have done, of the lack of any evidence to support his case.

    c. The second respondent's enforced preparations for that hearing evidently took up a significant amount of its time. It attempted in vain to engage the claimant in terms of the weakness of his case and the lack of evidence.

    d. Whilst TUPE is not a straightforward issue, the unrepresented second respondent's directors had evidently been able to engage with the underlying law, whereas the claimant came to the hearing citing a number of cases, purportedly in support of his position, which were wholly irrelevant to the TUPE issue, and indeed irrelevant to employment law full stop.

    e. I have had regard to what the claimant says about his limited means but I do not consider that this mitigates against making a PTO. He continues to seek work and he may receive some funds from the RPS for his unpaid wages owed by the first respondent. He was also able to expend, in his own words, £58,000 in costs during the previous three years.

The third stage of the Haydar test

38. In considering how many hours to allow, mindful that the purpose of a PTO is to compensate the second respondent and not to punish the claimant, I have

considered Rules 79 and 84. The second respondent has provided information as to the time it says it spent but I must also make my own assessment of what is a reasonable and proportionate amount of time to spend on preparatory work for the hearing, with reference to such matters as the complexity of the proceedings, the number of witnesses and documentation required. I have also taken into account the claimant's apparent ability to pay, as I am entitled to do.

39. The correct hourly rate is £43 per hour and not £45 as claimed. I consider that a reasonable and proportionate amount of time for the various preparatory steps for the TUPE hearing, bearing in mind that the second respondent was not legally represented and TUPE is a complex area, is as follows:

    a. Considering the claimant's claim against the second respondent and preparing the ET3 response – 10 hours

    b. Familiarising themselves generally with the law on TUPE and ET procedure – 10 hours

    c. Preparing for the preliminary hearing in February 2023 – 5 hours

    d. Preparing their disclosure and considering the claimant's disclosure – 10 hours (the bundle was just under 300 pages)

    e. Considering the bundle – 2 hours

    f. Preparing second respondent's witness statements (which ran to over 30 pages) – 15 hours

    g. Considering the claimant's witness statement (22 pages) – 5 hours

    h. Preparing for the May 2023 hearing generally, including cross examination of the claimant and preparing closing submissions – 20 hours

    i. TOTAL: 77 hours @ £43 = £3,311

40. Time spent by the second respondent attending any hearings cannot be claimed and so has not been accounted for.

41. Mindful of the claimant's limited means as mentioned above, I further exercise my discretion and reduce the amount of the PTO to £2,500.

42. The second respondent's application therefore succeeds and the claimant is ordered to pay £2,500 to the second respondent in respect of its preparation time.

Employment Judge Cuthbert
20 September 2023

Sent to the parties on: 12 October 2023

For the Tribunal Office