



EMPLOYMENT TRIBUNALS

Claimant: Mr D Ahern

Respondents: Bury's Solicitors Limited

HELD AT: Manchester

ON:

19 July 2024

BEFORE: Employment Judge Childe

REPRESENTATION:

Claimants: In Person

Respondents: Miss Gumbs (Counsel)

REASONS

Relevant Law

Costs

1. 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.
2. 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".
3. The circumstances in which a Costs Order may be made are set out in rule 76. The relevant provision here was rule 76(1) which 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.”

4. 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.
5. 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.”
6. 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 considered at the second and/or third stage.
7. 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*.
8. If there has been unreasonable conduct there is no requirement for the Tribunal to identify a precise causal link between that unreasonable conduct and any specific items of costs which have been incurred: *McPherson v BNP Paribas (London Branch) [2004] ICR 1398*. However, there is still the need for some degree of causation to be taken into account as the Court of Appeal pointed out in *Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78*:

“The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case, and in doing so to identify the conduct, what was unreasonable about it and what effects it had.”
9. It is not unreasonable conduct per se for a claimant to withdraw a claim before it proceeds to a final hearing. As the Court of Appeal in *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 failed. It further commented that withdrawal could lead to a saving of costs and that tribunals should not adopt a practice on costs that would deter claimants from making ‘sensible litigation decisions’. On the other hand, the Court was also clear that tribunals should not follow a practice on costs that

might encourage speculative claims, allowing claimants to start cases and to pursue them down to the last week or two before the hearing in the hope of receiving an offer to settle, and then, failing an offer, dropping the case without any risk of a costs sanction. The critical question in this regard was whether the claimant withdrawing the claim has conducted the proceedings unreasonably, not whether the withdrawal of the claim is unreasonable *McPherson v BNP Paribas (London Branch) 2004 ICR 1398, CA*.

Time Limits

10. Under section 23 (2) (a) of the Employment Rights Act 1996, the Tribunal shall not consider a complaint of unlawful deduction from wages unless it is presented within three months (plus time for early conciliation) from the date of the deduction from wages.
11. Under the Working Time Regulations 1998, regulation 30 (1) (b), a claim for unpaid holiday pay should be made within three months of the date on which it is alleged that the payment should have been made (plus time for early conciliation).
12. Under sections 7 (a) and (b) of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 any claim for breach of contract must be made within three months (plus time for early conciliation) of:
 - a. the effective date of termination of that contract of employment or where there is no effective date of termination;
 - b. with three months of the last day the employee worked in the employment which had terminated.
13. Under section 23 (4) of the Employment Rights Act 1996, in regulation 30 (2) (b) Working Time Regulations 1998 and in section 7 (3) (c) Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, the Tribunal has the jurisdiction to extend the time by which the claim can be submitted if it is satisfied it wasn't reasonably practicable for the complaint to be presented before the end of the relevant period of three months (plus time for early conciliation), and the Tribunal decides the claim was lodged within a further reasonable period.

Introduction

14. I had access to an agreed bundle. The claimant provided witness evidence for himself and was cross-examined on it.

Relevant Findings of Fact

15. Whilst it is not necessary for the Tribunal to make any primary findings of fact to determine a costs application, I set out below the matters relevant to the claimant's conduct of this case. Any further matters that are relevant to my findings are set out in the decision section below.
16. The claimant is a qualified solicitor.
17. In an email dated 11 July 2023 sent from the claimant to the respondent the claimant said "*I have not received payment for the £2675 outstanding from the April invoice or £2565 from the May invoice. The total amount outstanding is*

*£5240. If I do not receive payment by close of business on Friday 14 July 2023 you will leave me with no alternative than to **issue proceedings immediately** (my emphasis)."*

18. The date of receipt by ACAS of early conciliation notification was 9 October 2023.

19. The date ACAS issued the early conciliation certificate was 20 November 2023.

20. On 14 December 2023 the claimant lodged a claim with the Tribunal in which he brought claims for:

- a. Unpaid notice.
- b. A failure to pay the claimant holiday pay.
- c. Unauthorised deductions from wages (the "Claim Form").

21. In the Claim Form the claimant said his employment ended on 22 May 2023.

22. On 12 January 2024 the Tribunal wrote to the claimant and said:

"Employment Judge Slater orders that you write to the Tribunal by 26 January 2024 stating whether you assert that you were an employee as well as a worker and, if not, either withdraw your claim about notice pay or explain why you are not doing so. The Tribunal only has jurisdiction to consider complaints of breach of contract (which includes complaints about failure to give notice) for employees under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

The judge also orders that you explain why your complaints were not presented within the normal time limit."

23. The claimant wrote to the Tribunal on 17 January 2024 and said that he believed his claimant been lodged in time because he was informed on 11 July 2023 by the respondent that they were not going to pay his outstanding wages and pay in lieu of notice. The claimant said he was a worker and employee for the purposes of the Employment Rights Act 1996.

24. The respondent lodged their response on 6 February 2024. In this response the respondent said:

1. The claimant was engaged as a self-employed consultant solicitor and therefore not engaged as a worker for the purposes of section 230 Employment Rights Act 1996, was not an employee or worker for the purposes of the Working Time Regulations 1998, nor was he entitled to bring a claim for wrongful dismissal under the extended jurisdiction of the employment tribunal.
2. The claim was time-barred because *"the invoice dated 27 April 2023 was due for payment by 18 May 2023 and the invoice dated 24 May 2023 was due for payment by 14 June 2023. Time expired on 13 September 2023 which was prior to the Claimant contacting ACAS on*

9 October 2023. Thus, the early conciliation process did not operate to extend time.”

25. The respondent made an application to the Tribunal on 12 February 2024 that the case be listed for a preliminary hearing to determine whether the case should be struck out on the basis it had no reasonable prospects of success or alternatively whether the claim should be dismissed on the basis it had been lodged out of time and the employment tribunal had no jurisdiction to hear it (“the Respondent’s Application”).
26. On 14 February 2024 the Tribunal listed a preliminary hearing to take place on 8 May 2024 to determine the Respondent’s Application.
27. The claimant gave evidence that he withdrew his claim on 6 May 2024, after speaking to a former colleague on 2 May 2024, because he did not want to take the risk of losing at the preliminary hearing or getting a deposit order, due to a judge ruling he had issued his claim out of time, because it was reasonably practicable for him to issue his claim before 14 December 2023. The claimant said he decided to withdraw his claims so he could pursue a claim in the county court.
28. On 6 May 2024 at 20:17 the claimant withdrew his claims in the Tribunal, by email. The claimant made an application that the Tribunal did not issue a dismissal judgement under rules 52 (a) and (b) as he wished to reserve his right to issue proceedings for monies owed in the County Court.

The respondent’s application

29. The respondent makes an application for costs on two bases:
 1. Firstly, that the claimant acted unreasonably in the way proceedings were conducted and the very late withdrawal of the claimant’s complaints before the preliminary hearing on 8th May 2024. I will refer to this as the “Late Withdrawal Application”.
 2. Secondly, that the claimant’s claim had no reasonable prospects of success. I will refer to this as the “No Reasonable Prospects of Success Application.”

The claimant’s response to the respondent’s application

30. The claimant’s response to the No Reasonable Prospects of Success Application was that he believed he had reasonable prospects of establishing that he had either been an employee or a worker and was therefore entitled to unpaid wages or holiday pay.
31. The claimant’s response to the Late Withdrawal Application was:
 1. He withdrew his claim in good faith.

2. The claimant had been advised that his claims might be struck out by the Tribunal on 8 May 2024 because he had not brought them in time.
3. The claimant wished to withdraw those claims and pursue them in the county court where time limits are more generous.
4. The claimant said he withdrew his claims in a timely fashion and in doing so avoided the respondent incurring unnecessary costs. When asked why he withdrew on 6 May 2024 not before, the claimant said it was due to his reduced mental ability to focus on the claim.

Decision

Has the power to award costs arisen, whether by way of unreasonable conduct or otherwise under rule 76?

32. I remind myself that that I must look at whether the claimant has conducted the proceedings unreasonably in all the circumstances, and not whether the late withdrawal of the claim was unreasonable.
33. I turn to deal with the respondent's No Reasonable Prospects of Success Application.
34. I have concluded that it was or ought to have been obvious to the claimant that his claims had no reasonable prospects of success by the end of February 2024 at the latest, because they were clearly out of time.
35. The effective date of termination was said by the claimant to be 22 May 2023. The final day by which the claimant's invoices were due was 14 June 2023. Accordingly, the time limit in this case ran from 22 May 2023 in all claims or arguably at the very latest from 14 June 2023 for the unpaid wages and holiday pay claims, which was the last date on which the claimant's invoices were due. Accordingly, the final date by which the claimant should have contacted ACAS was 13 September 2023, three months less one day from 14 June 2023.
36. The suggestion by the claimant that time ran from 11th July 2023, because that's when he alleges the respondent refused to pay the invoice, was wrong in law and had no reasonable prospect of succeeding.
37. Turning to the issue of whether it was reasonably practicable for the claimant to have submitted his claim in time. The evidence is it was reasonably practicable for the claimant to submit his claim within time. The claimant's explanation for why the claim was not lodged shortly after 14 July 2023 was due to his mental health and him avoiding anything that related to his personal needs. However, there was no medical evidence to support this assertion.
38. In fact, the evidence available was that the claimant was able to attend to his personal needs at this time. The claimant was able to chase his outstanding invoices with the respondent on 26 May 2023 and did send the 11 July 2023 email in which he said he would "*issue proceedings immediately*" if he did not receive payment by close of business on Friday 14 July 2023.

39. I conclude that the claimant was not credible on this point and this argument had no reasonable prospect of succeeding. The claimant plainly knew of his legal rights and knew of or ought to have been aware of the time limits in this case. There was no good reason that the claimant could not have submitted his claim in time.
40. I therefore conclude that the claimant had no reasonable prospect of persuading a tribunal to extend time in connection with any of his claims.
41. The claimant's claims were therefore bound to be dismissed at the preliminary hearing on 8 May 2024 as they were lodged out of time and it was reasonably practicable to submit those claims in time.
42. I have therefore reached the view that the claimant's claims had no reasonable prospects of success because they were lodged out of time.
43. I now consider the Late Withdrawal Application. I go on to consider whether the claimant conducted proceedings unreasonably by waiting until the evening of 6th May 2024 to withdraw his claim, ahead of the preliminary hearing that was scheduled to take place on 8th May 2024.
44. I find that had the claimant conducted proceedings reasonably, it would have been obvious to him by the end of March 2024 at the latest that his claims had no reasonable prospects of success and were all out of time. It follows that if the claimant wished to withdraw them to allow him to pursue those claims in the county court where the time limits are more generous, he should have done so by the end of March 2024 at the latest.
45. The reason I have reached this decision is because the Tribunal had written to the claimant to draw his attention to the time limit issue on 12th January 2024. The respondent had set out in their response why the claim was out of time on 6 February 2024 and had asked the employment tribunal to consider this as a preliminary issue on 12 February 2024.
46. The claimant was aware that his employment had come to an end on 23rd May 2023 and should have been aware that the final date the invoices he had submitted were due was on 14 June 2023, as it was clear from the respondent's response form and the claimant's own documentation.
47. There was no credible evidence to support the claimant's contention that the claim had been lodged in time because time ran from 11 July 2023 as this was when the respondent had said that they were not going to pay his outstanding wages and pay in lieu of notice.
48. The claimant is a legally qualified solicitor who I find could carry out research on the internet into time limits in the employment tribunal. In my judgment, it would have taken a very brief piece of research on the internet for the claimant to understand that the claim was out of time. This could have been done by the end of March 2024 at the latest. Alternatively, the claimant gave no reason why he couldn't have spoken to the individual he spoke to on 2 May 2024 about his case and the need to withdraw it, in February or March 2024.

49. The fact that the claimant did not withdraw his claim until 6 May 2024, over two months after I find it was reasonable for him to do so, is in my judgment unreasonable conduct of litigation. The claimant's claims had no reasonable prospects of success. The claimant has given no good reason why he waited this long to withdraw his case. I have not accepted the claimant's evidence that he was unable to deal with emails at this time for a medical reason or otherwise. No medical evidence was provided to support this contention. The evidence available to me was that the claimant was able to engage with this claim and correspond quickly. For example, the claimant was able to respond to the tribunal's request for further information on 12 January 2024, within five calendar days.

50. I conclude that the power to award costs has arisen under rule 76 due to the claimant's unreasonable conduct in withdrawing his claim on 6 May 2024 and his claims having no reasonable prospects of success as they were all out of time.

Should an award of costs be made?

51. I find that an award of costs should be made.

52. Had the claimant acted reasonably in conducting these proceedings and withdrawn his claim by the end of March 2024, the respondent would have incurred no further costs in the Tribunal proceedings.

53. However, due to the claimant not withdrawing his claim until 6 May 2024, the respondent did incur costs in preparing their case for the preliminary hearing on 8 May 2024 and in preparing and presenting their case at the costs hearing on 19 July 2024.

How much should the award be?

54. The first time costs were incurred by the respondent after the end of March 2024, is 25th April 2024.

55. The claimant did not challenge those costs as unreasonable and from my review of them I find them to be unreasonably and genuinely incurred.

56. Those costs amount to **£8,718** inclusive of VAT. They comprise of:

a. Counsel's fees of **£2,750** as follows:

i. for the preliminary hearing on 8th May 2024, in the sum of **£1,250** and

ii. for the costs hearing on 19 July 2024 in the sum of **£1,500**.

b. Solicitor's fees preparing for those hearings, in the sum of **£4,425**.

c. VAT on the above fees of **£1,543**.

57. The claimant has asked me to consider his means to pay a costs award, when determining the level of award. The claimant's evidence about his means was less than satisfactory. In his witness evidence the claimant said he had an income of **£12,000** per year and outgoings **£10,000** per year leaving him with **£167** a month as disposable income.

58. Under cross examination it was plain that the claimant had not gone through a forensic exercise of accurately calculating his outgoings. In addition, the claimant had not been fully transparent about his sources of income. The

claimant accepted that he was a director and shareholder at Chapel Law. He claimed he carried out work for Chapel law such as attending London and meeting customers but did not get paid or receive a shareholding for this work. I find this claim that the claimant worked for Chapel Law without receiving an income incredible evidence and I do not accept it.

59. The claimant also accepted in cross examination that in addition to the income he disclosed in his witness statement, he owns a property at 25 Lonsdale Rd which is worth £110,000 and has a £75,000 mortgage on it and through which he receives rental income as a landlord of £650 a month. He owns a second property at 37 Jeffrey St which is worth £110,000 and has a £78,000 mortgage on it and through which he receives rental income as a landlord of £550 a month. He also owns Limbrick house which is worth £100,000 and has a £70,000 mortgage on it. He is also in partnership with a Mr Whitworth and owns five properties with a total value of £400,000 and which have a mortgage of £325,000 on them and three of which are currently up for sale.
60. I have heard evidence that the claimant has capital in several properties that he owns which he intends to release through the sale of those properties. The claimant is also in receipt of a rental income from some of those properties. I was not satisfied that the information the claimant provided about his income and outgoings was entirely accurate. The reason for this is that the claimant could not explain adequately how he had calculated his outgoings. The evidence the claimant provided about his income did not include other sources of income such as rental income.
61. I have concluded that the claimant did not provide the full picture of his means in his witness statement. It was only under cross examination that the true extent of his means came to light and even then, his evidence was less than satisfactory. I am certainly not able to conclude that the claimant does not have the means to meet the costs award of £8,718. I am satisfied that the claimant can meet the costs award either through the rental income he receives from the properties he owns, through the proceeds of selling the three properties that are currently for sale (once the mortgage is repaid) or alternatively the claimant can find paid income as a solicitor.
62. I therefore order that the sum of £8,718 is to be paid to the respondent by **26 January 2025** at the latest. I consider that this will provide him with sufficient time to either earn the sums required, receive the rental income required or alternatively to release the capital funds through the sale of the properties he owns, to pay the costs award.

Employment Judge Childe
11 September 2024

REASONS SENT TO THE PARTIES ON
16 September 2024

FOR THE TRIBUNAL OFFICE

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