



EMPLOYMENT TRIBUNALS

Claimant

Mr T Reynolds

v

Respondent

First Customer Contact Limited

Heard at: Sheffield (on the papers)

On: 1 October 2024

Before: Employment Judge A James

Representation (in writing)

For the Claimant: Representations in writing from the claimant

For the Respondent: Representations in writing from Ms. K Hayes,
Burgess Salmon LLP

JUDGMENT

- (1) The claimant's conduct of the proceedings has been unreasonable; and/or his arguments in relation to misrepresentation had no reasonable prospects of success.
- (2) This is an appropriate case in which the discretion to award costs should be exercised. In all the circumstances, the Tribunal has decided that the appropriate award of costs is £6,000 (Rules 76 to 84, Employment Tribunal Rules of Procedure 2013).

REASONS

The issue

1. In written reasons dated 24 November 2023, following a hearing on the same date at which an oral judgement was delivered, the Tribunal set out its reasons why the claimant's application to set aside the COT3 agreement dated 9 June 2023 was refused.
2. At the conclusion of the hearing, the respondent informed the Tribunal of its intention to apply for costs. The parties indicated that they were content, in principle, for the application to be dealt with by the Tribunal on the papers. That remains their position. This decision has been made by the Judge in

chambers (i.e. without a formal hearing), on the basis of the written submissions and supporting information received.

The respondent's application

3. The basis of the respondent's application is that:
 - 3.1 the claimant 'has acted vexatiously, abusively, disruptively or otherwise unreasonably in the conducting of proceedings' - Rule 76(1)(a); or that
 - 3.2 the claimant's claim 'had no reasonable prospect of success' - Rule 76(1)(b).

Findings of fact

4. The claimant's claims to the Employment Tribunal under the above case number were settled at a Judicial Mediation hearing that took place on 9 June 2023.
5. Clause 1 of the COT3 agreement of the same date, clearly set out how the total compensation payment of £25,000 was made up; namely, a sum of £20,396.96, by way of compensation for loss of employment; a sum of £2,275.76 for contractual notice; and a sum of £2,227.28 for holiday pay. The latter two payments were subject to deductions of tax and NI. Hence the need to set those out separately in the agreement.
6. Clause 5, as noted in the judgment of the Tribunal dated 24 November 2023, states:

The terms of this Agreement are in full and final settlement of the Claims (and all or any other claims, complaints or rights of action that the Claimant has or may have now and/or in the future against the Respondent and any Group Company (or any of its or their officers, directors, shareholders, employees or agents or former officers, directors, shareholders, employees or agents) whether arising directly or indirectly out of or in connection with the Claimant's employment with the Respondent, its termination or otherwise and whether arising under common law, contract, tort, statute or otherwise, whether such claims are, or could be, known to the parties or in their contemplation at the date of this Agreement, and whether arising in the United Kingdom or in any other country in the world or any claim under any directive or other legislation which is applicable or enforceable in the United Kingdom by virtue of the United Kingdom's membership of the European Union and any other claim in respect of which a conciliation officer is authorised to act. This does not include any claim to enforce the terms of this Agreement; or in respect of any accrued pension rights; or any claim for latent personal injury (other than any claim for personal injury arising out of any discrimination claim) in respect of which the Claimant is unaware, and could not reasonably be aware, at the date of this Agreement. The Claimant warrants that, other than the Claim and the circumstances giving rise to the Claim, he is not aware of any facts or circumstances which do or may give rise to a claim for accrued pension rights and/or personal injury as at the date of this Agreement.

The claimant's conduct

7. Despite the claim having been settled, the claimant sent numerous emails to the respondent's solicitors from 12 June 2023 onwards. The first asked for a breakdown of the £25,000 payment, despite that being clearly set out in clause 1 of the COT3 Agreement. The claimant then started raising an issue about pension contributions.
8. On 28 June 2023, the claimant first made a suggestion that a misrepresentation had been made to him, related to the COT3 agreement. He added as a PS to that email:

ps. Will ask Investor relations if Graham Shackleton fancies a photo of me handing laptop over to him (plus copy of Code of Ethics).
9. He continued to assert that a misrepresentation had been made. For example, on 5 July 2023, the claimant asserted:

Let's get this right. The £20,000 settlement means nothing to me if I've been (unethically) short-changed on my pension contribution.

I signed the COT3 agreement in 'good-faith' expecting my pension contribution to be met. [Judge's emphasis]
10. Then on 24 July 2023 an email was sent by the claimant to Ms Hayes in the following terms:

Burges and FCC left me no option but to take my pension protest to the Firstgroup AGM.

There was no pleasure in 'doorstepping' the Firstgroup board. The comments were recorded.

As a result Steve Montgomery is to review what pension element was withheld and why.

Pretty sure none of you expected me to actually attend the AGM.

It cost me about £500 to do so. London ain't cheap!

I shall be responding to the Court, to ask that the withholding of the pension part of my settlement be the reason for the judgement to be reviewed.

I urge Firstgroup to resolve this to my satisfaction and not to involve an already overburdened tribunal system. [Judge's emphasis]
11. On 28 August 2023, the claimant asserted to the Employment Tribunal that a misrepresentation had been made to him, prior to the COT3 Agreement being signed. The misrepresentation was said to be contained in an email sent at 12:09 on 9 June 2023. As a result, on 13 September 2023, the Tribunal listed a hearing for 24 November 2023, to consider the claimant's argument that a misrepresentation had been made and that the COT3 agreement should therefore be set aside.
12. On 15 November 2023, nine days prior to the listed hearing, the Claimant wrote to the Tribunal requesting that the hearing be delayed on the basis that he now believed the Respondent had underpaid his pension contributions from the outset of his employment. The respondent argues that this was a marked change to his position up to that point and entirely irrelevant to the

matters to be determined at the hearing on 24 November 2023. The Respondent incurred further costs responding to the Claimant's postponement application, which was refused by the Tribunal.

13. On 22 November 2023, a without prejudice save as to costs letter was sent to the claimant by Burges Salmon. In that letter, the claimant was warned that an application for costs would be made if he did not withdraw his allegation that there was a misrepresentation in the settlement. The letter explained why, on the respondent's case, the claimant's argument was bound to fail. He was warned that costs of approximately £20,000 plus VAT would be incurred, in relation to his allegation that the respondent had misrepresented the terms of its settlement offer and in connection with the preliminary hearing.

The respondent's legal costs

14. A cost statement put forward by the respondent shows costs excluding VAT of £10,489 pounds billed to date, and current work in progress as being £5,273. Council's brief fee for attendance at the preliminary hearing on 24 November 2023 was £1250 (excluding VAT). Judge James notes that the guideline County Court hourly rates are, for a fee earner with up to 4 years post qualification experience (PQE), £218, and for PQE of 8 years or more, £255. The rates applied are £305 per hour for Ms. Hayes and £410 for the partner conducting work on the file.

The claimant's means

15. The claimant receives the single male pension (approximately £12,000 pa). He has a Capita pension worth a total of £6,000. The total value of his First Group pension is £3,000 (approximately).
16. He has a bungalow worth about £360,000. He has long-term investments/ISAs worth about £125,000. He says that this money is to supplement his living costs by £12,000 pa to give him an annual living budget of £24,000 (£12000 pension + £12000 savings), increasing by £1000 pa. He has approximately £12,000 of publicly quoted shares.
17. In summary, his annual income in 2024 was £24,000; in 2025, it is due to be £25,000. He is paying £5,000 pa towards his daughter's Masters in Architecture at Manchester University) in 2024/2025 and expects to pay the same amount in 2025/2026.
18. In summary, the claimant says:

<u>Annual outgoings in 2024</u>	<u>Annual outgoing increases 2025</u>
Council Tax: £2600	+ 10% £2860
Water/House insce: £1100	+ 20% £1210
Electricity/Gas: £2100	+ 20% £2520(no winter fuel allowance).
Telephone/Broadband: £360	+ 0% £360
Food/clothes/Tax: £4500	+ 10% £4950
Transport/Insce: £4000	+ 25% £5000
MBA contribution: £5000	+ 0% £5000
Totals: £20660	Totals: £22700

The Law

19. The respondent's application is made under Rule 76 of the Employment Tribunal Rules of Procedure 2013 ("the 2013 Rules"), the material parts of which are set out above.

20. Rule 76 requires the Tribunal to adopt a two-stage approach:

The Tribunal must first consider the threshold question of whether any of the circumstances identified in [what is now Rule 76] applies, and, if so, must then consider separately as a matter of discretion whether to make an award and in what amount." (Vaughan v London Borough of Lewisham (No. 2) [2013] IRLR 713 at [5])

21. In Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78 it was stated:

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." (Paragraph 41)

22. It remains a fundamental principle that the purpose of an award of costs is to compensate the receiving party, not to punish the paying party (Lodwick v London Borough of Southwark [2004] IRLR 554 CA).

23. If the Tribunal is satisfied that the claimant acted vexatiously or unreasonably, and/or that his argument had no reasonable prospect of success, it must then consider separately whether to make an award and, if so, in what amount. At this stage:

the Tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of its discretion ...

although the respondent is not required:

to prove that specific unreasonable conduct by the [claimant] caused particular costs to be incurred". (Kapoor at #15)

24. Rule 78 provides, in so far as relevant here:

(1) A costs order may—

(a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;

(b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998 ["the CPR"], or by an Employment Judge applying the same principles...

(3) For the avoidance of doubt, the amount of a costs order under subparagraphs (b) to (e) of paragraph (1) may exceed £20,000."

25. The relevant parts of Rule 84 provide:

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

Conclusions

26. in arriving at the following conclusions, I have considered the facts above, as well as paragraphs 32 to 34 of the written reasons provided following the Preliminary Hearing on 24 November 2023. Those paragraphs state:

32. The claimant being a litigant in person, no criticism whatsoever is intended, in stating that in my judgement, he misunderstood the terms of clause 5 of the COT3 agreement. Misunderstanding the meaning of a clause is not however the same as being misled by a misrepresentation. The facts set out above ~~could~~ do not lead me to conclude that there was any misrepresentation.

33. As for the email sent around midday on 9 June, this made it clear to the claimant that the global compensation figure included an amount in respect of the 'pension contribution', (singular). That email was sent in response to the claimant's query as to whether a not 'a pension payment' (singular) had been missed. Again, the claimant may have misunderstood what was being said. The meaning of the email sent at 12:09 is clear however. It could not reasonably be argued that the intention of that email was to mislead the claimant. On the contrary - a simple answer was given to a simple question.

34. Yet further, the claimant offered to settle for a global sum of £25,000 in full and final settlement of his claims, knowing that there may be an issue in relation to pension contributions. Again therefore, the clear legal effect of the COT3 agreement is that any such claims were settled, and any amounts owing in relation to underpaid pension contributions should have been understood by the claimant to be included in the global sum.

27. Bearing all this in mind, I turn to the three questions before me which are first, whether or not there are grounds under the Employment Tribunal Rules of Procedure 2013 to make a costs award; second, if so, whether my discretion to make a costs award should be exercised; and third, if so, in what amount. Those questions are dealt with in turn below.

Grounds for a costs award

The Claimant's alleged unreasonable conduct

28. I conclude that the claimant's conduct of the proceedings, following the settlement of the claim at a judicial mediation hearing, by way of a COT3 agreement, has been unreasonable. I take into account in particular, the content of the email correspondence; the claimant's failure to engage with the respondent's arguments as to the validity and meaning of the agreement; his allegation that there had been a misrepresentation; and his application for a postponement of the 24 November 2023 hearing, in order to put together evidence which was not relevant to the issues to be considered at the hearing.
29. In relation to the arguments about misrepresentation, as I found in the judgment relating to the 24 November hearing, whilst the claimant could be forgiven for not fully understanding the scope of clause 5 in the agreement that is very different to establishing that the inclusion of clause 5 amounted to a misrepresentation. It was for the claimant, with the assistance of Acas, to understand the meaning of the clause. The claimant has not argued and nor

could he reasonably have argued, that anything said to him by the respondent's solicitors in relation to Clause 5, caused him to misunderstand its scope. The Tribunal takes judicial notice of the fact that Clause 5 is a standard clause in COT3 agreements.

30. Further, in relation to the claimant's argument that there was a misrepresentation contained in the email exchange that took place around midday on 9 June 2023 (see paragraphs 12 to 14 of the preliminary hearing judgement) then as set out in paragraph 33, while the claimant may have misunderstood what was being said, he could not reasonably argue that the intention of that email was to mislead him. A simple answer was given to a simple question. The claimant's attempts to argue that this exchange amounted to a misrepresentation was unreasonable conduct.

The claim had no reasonable prospects of success

31. For the same reasons relied on in relation to the unreasonable conduct issue, I conclude that the claimant's arguments that there had been a misrepresentation, had no reasonable prospects of success.

Discretion whether to make an award

32. Bearing in mind the above, I have concluded that the threshold requirements for making a costs award have been met. The next issue is whether this is a case where the discretion to award costs should be exercised in the respondent's favour.
33. In his response to the costs application dated 11 January 2024, the claimant made the following arguments. That the respondent could represent themselves; just as he had to do; that the Employment Tribunal had listed the preliminary hearing to consider whether a misrepresentation had occurred; that the claimant continues to believe that his questioning of clause 5 of the agreement will result in a clearer rewrite of it; and in relation to the previous costs order made against him in the case in 2021, he genuinely had no recollection of that (Case number 2415958/2020). (In passing, I accept the claimant's argument that his memory has been affected by strokes occurring in August and October 2021).
34. Bearing in mind those arguments, and those put brought forward by the respondent, I consider that this is a case where costs should be awarded to the respondent. The claimant's unreasonable conduct in pursuing an argument that had no reasonable prospects of success has caused the respondent to incur substantial legal costs. The purpose of the COT3 agreement arrived at during a judicial mediation hearing was to enable the parties to draw a line under these matters. The claimant's refusal to accept that position and continue to try and re-open these matters is unreasonable.

The amount of the costs award

35. Having decided that a costs award should be made, the next and final question is what amount should be awarded to the respondent. In relation to the cost of counsel attending the hearing on 24 November 2023, I have no hesitation in awarding those costs of £1,250, excluding VAT.
36. As for the respondent's solicitors costs, costs can only be awarded on the basis of the appropriate County Court rates, unless costs are being claimed on an indemnity basis. They are not being claimed on that basis here. If they were, I

would not in any event have concluded that there are reasonable grounds to do so.

37. As I have noted above, the hourly rate claimed is greater than that allowed in the County Court on an assessment of costs. Taking a very broad brush approach, and not knowing how many years qualified Ms Hayes is, that potentially reduces the total costs of around £15,000 to around £10,000.
38. I note that the claimant is of relatively modest means in relation to his income, which is being supplemented by his savings. Nevertheless, he does have access to savings. In all the circumstances, I consider that the appropriate award in relation to the respondent's cost is £4,750, excluding VAT. It is my understanding that VAT should not be added, because VAT can be claimed by back by the respondent.
39. The total costs award is therefore in the sum of £6,000, excluding VAT.

Employment Judge A James
North East Region

Dated 1 October 2024

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