EMPLOYMENT TRIBUNALS

Claimant: Mr L Thornton
v
Respondent: Hercberg International Limited

Heard at: Nottingham (via CVP) **On:** 7 November 2024

Before: Employment Judge Fredericks-Bowyer

Appearances
For the claimant: Did not attend
For the respondent: Ms T Sandiford (Counsel)

RESERVED JUDGMENT ON COSTS

The respondent's application for the claimant to pay a contribution to its costs in this case, up to the amount of £20,000, is refused and dismissed.

REASONS

Background

1. This is my reserved judgment on the respondent's costs application. The claimant did not attend the costs hearing, citing ill health. I refused his application to adjourn this hearing, and he informed the Tribunal that he would not attend on the morning of the hearing before it commenced. I heard from Ms Sandiford in support of the application, and paid regard to the written submissions supplied by the claimant in correspondence.

2. I heard the claimant's complaint of (1) unfair dismissal, (2) wrongful dismissal, (3) claim for unpaid commission pay, and (4) claim for failure to pay holiday pay on 22 and 23 April 2024. The claimant was unsuccessful with his unfair dismissal claim, but was awarded £1,038.46 in respect of his holiday pay claim. The respondent

indicated an intention to make a costs application at the end of the hearing, and did so. The respondent asked for the application to be dealt with on the papers. The claimant did not agree to that, and asked for a hearing. By the time of the hearing, the claimant cited mental health difficulties which were keeping him off work as reason for non-attendance at the hearing.

Findings from the final hearing

3. I gave oral judgment at the hearing, and the core factual findings were accurately summarised in Ms Sandiford's submissions before me today. I repeat those findings here to give context to the application which was subsequently made:-

   3.1. The claimant's employment contract included terms that he would be paid 0.5% commission, £1,500 per vehicle, at the end of the month. Commission was paid on a 'sale', which was when ownership transferred, and not (as the claimant argued) when orders were placed. The claimant was paid commission on sales made at the start of his employment where orders had been placed before the employment commenced. It followed that the claimant was not owed the c£70,000 he contended he was owed in respect of orders placed but not completed when his employment ended.

   3.2. The claimant was able to claim business expenses, including for fuel for work travel with his company vehicle. He initially had a hybrid vehicle, and agreed that he would use the electric function for business and private use, but would not claim expenses for diesel cost arising from private use. He agreed to keep a separate record of private diesel mileage which he paid for himself. When the claimant took a diesel only company vehicle, there was no variation to the agreement as he alleged. I preferred the evidence of the respondent and considered it inherently unlikely that the respondent would agree to cover the open-ended cost of private mileage for the claimant's company camper-van vehicle at a time when the parties agreed there was commercial pressure.

   3.3. This meant that the respondent acted reasonably in considering that the claimant committed gross misconduct (which I found had been committed) when it discovered that he had been claiming expenses for private vehicle use. Dismissal was within the reasonable range of responses. The procedure used until the hearing of the claimant's appeal was unfair, but that unfairness was cured upon appeal which dealt with the procedure properly and re-examined the evidence and the decision to dismiss a-fresh, allowing the claimant to contribute fully. This was therefore a fair dismissal in all the circumstances of the case. There was no wrongful dismissal either because the gross misconduct was a repudiatory breach of contract which was accepted by the respondent when it dismissed him.

   3.4. The claimant was unpaid for nine days of holiday, which was the successful claim.

Costs in the Employment Tribunal

4. The general rule is that the Employment Tribunal is a 'costs neutral jurisdiction'. This means that the loser in proceedings does not automatically pay the winner's

costs, which is a divergence from proceedings which run in most of the civil court jurisdictions.

5. The rules relating to costs are found under *Rule 76 Employment Tribunal Rules of Procedure (2013)*:-

> *"76.—(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'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;*
>
> *(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.*
>
> *(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party."*

6. It is, therefore, a multi-stage determination to awarding costs. First, at least one of the 'gateways' outlined by *Rule 76(1)* and *Rule 76(2)* needs to be found to have been opened. In other words, I must be satisfied in this case that we have the ability to award costs.

7. If one of the gateways to award costs is opened, then I *may* award costs. There is a discretion. The next stage, therefore, is to decide whether or not this is a case in which I exercise my discretion to award costs, having in mind the circumstances of the case and the nature of the conduct that has led to the ability to award costs if decided appropriate (*Hossaini v EDS Recruitment Ltd [2020] ICR 491*).

8. The final stage, if I decide to exercise discretion, is to decide the amount of the costs to award. Where evidence about a claimant's means is provided, this should be taken into account so long as I am satisfied I have an honest and full picture of the claimant's financial position. I must also consider the amount of costs requested in the application and decide whether or not the amount is appropriate, before deciding what amount should be paid towards those costs, or ordering that the whole of the costs are paid.

9. The assessment of the amount of costs to pay is a broad brush exercise and does not take the form of any sort of detailed assessment of cost. The assessment is made broadly in all the circumstances using our judgment of what would be reasonable in this case. Generally, I am trying to consider the proportion of costs incurred because of the criticised conduct.

10. Unreasonable conduct can include an "unreasonably distorted perception of matters" even where that perception is honestly held (*Brooks v Nottingham*

University Hospitals NHS trust UKEAT/246/18/JOJ). This extends to where that perception results in an over-inflated view of the value of the claim which results in an intransigent position being taken in settlement negotiations and the turning down of offers which emerge to be in excess of what is won in the hearing (*Power v Panasonic (UK) Limited UKEAT/439/04/RN*). In those situations, I may award costs but it is not an obligation or an automatic result (*Kopel v Safeway Stores Limited [2003] IRLR 753*).

11. A claim may be found to have had no reasonable prospects of success even if it appeared that evidence should have been heard to decide factual dispute. The focus should be on what information was available to the parties at the outset and again at any relevant juncture in proceedings (such as after disclosure or following exchange of witness statements) (*Radia v Jefferies International Limited UKEAT/7/18/JOJ*).

The costs application

12. The application for costs is founded on two broad submissions: (1) that the claimant acted unreasonably during the course of the litigation; and (2) that the unsuccessful claims had no reasonable prospect of success.

Unreasonable conduct

13. The respondent has provided without prejudice save as to costs correspondence to the Tribunal in support of the application. That shows that the claimant rejected an offer of £10,000 on 13 October 2023. This offer followed a letter sent on 6 June 2023, which sets out the evidential matters which did ultimately lead to my decision to dismiss the claimant's claims. The claimant rejected that offer, countering with a £65,000 settlement offer. The respondent submits this shows intransigent adherence to the claimant's overinflated value of his own claim (c.£150,000).

14. In addition, the respondent submits that it was unreasonable for the claimant to continue to litigate in the face of evidence which contradicted his case, which was pointed out to him by the respondent on 6 June 2023.

15. Finally, the respondent submits that the claimant made a data subject access request which was unreasonable in the circumstances, and which he refused to withdraw even after the time limits to bring his claim had long expired. It appears to me that the DSAR withdrawal was tied by the respondent to settling the claim.

16. To provide overall context, the respondent notes that it would have settled the holiday pay claim if the claimant had engaged in reasonable discussions. The failure to settle has led to the respondent incurring in excess of £20,000 to successfully defend all but £1,038.46 of the claims.

No reasonable prospect of success

17. The respondent submits that the claims for unfair/wrongful dismissal and commission pay had no reasonable prospects of success. It points to the fact that my judgment followed a near identical course to the respondent's analysis of the evidence and likely outcome to the case which it put to the claimant in its 6 June

2023 letter. The respondent notes that the claimant's core argument about the private fuel mileage was contradicted by his own contemporaneous e-mail where he said that he would change his tax code to reflect that he was no longer getting any private benefit from his company vehicle. The respondent submits that the claimant was aware that there was no agreement for private mileage to be covered by the respondent, and so there was no genuine evidence to support this key factual claim.

18. The claimant argued that he was dismissed for gross misconduct so that the respondent could avoid paying him redundancy pay if it made him redundant instead. This was not an argument which was pressed with evidence in the hearing, and the respondent considers this is because the allegation that this was not a conduct dismissal had no reasonable prospect of success.

19. The respondent submits that the claim for commission pay had no reasonable prospect of success because the contract and the course of dealing between the parties was abundantly clear. The respondent notes that any contrary position would require the commission pay clause to survive termination of the contract, which it plainly did not.

The claimant's written response to the application

20. The claimant's response raises concerns with the respondent's conduct of the litigation which are said to have inflated legal costs. This consideration is only relevant if I decide to award costs because I have the power to do so and choose to exercise my discretion.

21. In relation to grounds and discretion, the claimant notes that he obtained legal advice in relation to his claim which indicated that he had a greater than 50% chance of success with his claim. He says he trusted that advice, and has disclosed the advice letter which contains that conclusion.

22. The claimant submits that I did not consider, in judgment, that the claimant had acted out of malice. In respect of the DSAR allegation, the claimant says that this was required to obtain documents for the final hearing in the respondent's possession which would have supported his claim. He says that these documents were not available in the hearing due to the delay at the respondent in dealing with the request. I consider it implicit that this means the claimant was dissatisfied with the respondent's disclosure process and saw the DSAR route as a means of securing additional evidence, even if this arrived after the hearing.

23. The claimant submits that he was justified in rejecting the offer to settle made on the basis the DSAR was withdrawn because he considers that the DSAR, if responded to properly, would have altered the prospects of his claim. He notes that, now complete, the respondent admits that some emails which might have been relevant to the DSAR have been lost. The claimant is not aware what e-mails existed which are now said to be lost.

24. In summary, the claimant resists the making of a costs application. He has not provided evidence about his means.

Discussion and conclusions

Do I have the power to award costs?

Unreasonable conduct

25. I make clear at the outset that I do not consider that the claimant acted with any malice or any intention of behaving unreasonably. In my judgment, the claimant gave evidence and pursued his claim with a genuine belief in the arguments he was presenting. This is a comment I made in judgment. There was one extremely significant divergence in fact about whether or not the parties agreed (over one conversation) that the claimant could claim private mileage expenses in respect of the diesel fuel van. I preferred, as summarised above, the evidence of the respondent – principally on the basis that it seemed to be an unlikely agreement to make in the commercial circumstances. The claimant's tax e-mail contributed to that preliminary view. I did not find that the claimant was being dishonest about the conversation or essentially lying about an agreement which he knew well had not been formed. It seems to me that there is ample space for misunderstanding about the arrangements, which is supported by the claimant's general contention throughout that he had not committed misconduct because of the agreement alleged.

26. However, as is noted in the authorities, a genuine belief held in good faith may still be found to be unreasonable where that belief is based on an unreasonably distorted perception. The claimant valued his own claim (even after removing the holiday pay element) at £150,000. On any view, that is far above what the claimant could have won even if successful with all of his claims. The compensatory element of his unfair dismissal claim would have been capped at one year's gross pay. The maximum which could have been awarded in respect of commission pay (which would follow a breach of contract claim) would be £25,000. These are caps to awards which should have been available to the claimant even if unrepresented. It does not appear that the claimant was advised about remedy but, nevertheless, I would expect some research to be done about remedy before a claimant becomes fixed to a value of a claim which it would be impossible to win even if they were right about everything they alleged.

27. In my view, the claimant's counter-offer of £65,000 is probably more proportionately alongside the maximum which could have been won if all of the arguments were to succeed, particularly in light of the commercial reality that the respondent might have something to gain from avoiding a the expense and publicity of a trial if they went on to lose that trial. Viewed through that lens, I do not consider that the claimant behaved unreasonably, in isolation, through countering with £65,000 as being the figure at which he was prepared to settle his claim. In my judgment, in reducing his ask from £150,000 to £65,000, he did not adhere slavishly to the over-inflated figure.

28. Of course, it is inescapable that the claimant then went on to win around £1,000 when he turned down £10,000. Where I do not consider that an unreasonable view of the value of the claim led to this decision, I can only consider whether that rejection itself was unreasonable given what went on to follow in the final hearing.

That would require me to consider that the claimant had an unreasonable view of the prospects of the claim based on the evidence available to the parties.

29. Given my comments about the motivation of the claimant and the room for misunderstanding over whether or not he had permission to as he did and make claims for private mileage, I do not consider he was unreasonable in pursuing the unfair and wrongful dismissal claims. He was entitled to test his understanding at trial, and there was always the possibility that his evidence could be preferred over the respondent's. I would add that the binary decision over whether or not the agreement was varied was not a straightforward one for me to answer when deliberating judgment.

30. I have a different view about the commission pay claim. The claimant appeared to me to accept that his interpretation was incorrect when the apparent facts were replayed back to him at the closing of the hearing. He accepted that he had benefitted from commission pay for unit orders placed prior to him starting his employment. He accepted the logic that he would not be paid for orders placed but not completed until after his employment ended. In my view, the claim was advanced out of upset at feeling cut out of money he would have earned if not for what he considered to have been an unfair dismissal. Again, I do not consider that the claimant knew this claim was bound to fail until that moment he had the realisation in the hearing. His realisation appeared to me to be genuine. He simply had not stepped back to consider the reality of the position in respect of that part of his claim, which he had valued at around £70,000, and which he had previously refused to resile from.

31. I would expect a claimant to carefully and critically consider the arguments they pursue to final hearing. In circumstances where the contract's language is clear, and where there is a clear precedent in practice at the respondent about the treatment of when the commission pay is earned and paid, this claimant really ought to have realised long before the final hearing that he would not succeed with this part of his claim. His continuing to pursue it through to the final hearing was, in my view, unreasonable, and therefore this conduct gives rise to a power for me to award costs for the claimant's unreasonable behaviour during the course of the litigation. The claimant has the right to test arguable claims in the Tribunal. That is not a right to chance an arm at a claim which is not actually arguable, in circumstances where that should have been realised.

32. I do not consider that the claimant has behaved unreasonably in respect of a DSAR. I accept that the claimant was concerned about the respondent's disclosure. I do not know why he did not make an application in these proceedings about that, and I have not been able to ask him. However, the wide sweep of a DSAR is a generally advised route for claimants to take where they are not confident that the 'relevance' filter through disclosure is being properly applied. I take the apparent loss of e-mails itself neutrally as a factor in this application, but I do consider it lends weight to the claimant's perception about disclosure being a reasonable response in terms of raising suspicion.

33. I do not accept that it was unreasonable to refuse to withdraw the DSAR even after the hearing. If new documents, not available to the claimant at the hearing, did arise from the DSAR, which were relevant and supported the claimant's case, then

he could have used those documents to apply for reconsideration or appeal of the judgment I delivered. The claimant's conduct is not, in my judgment, remotely improper in respect of this part of the respondent's costs application.

No reasonable prospects of success

34. It is not a surprise, given my analysis above, that I do not consider that the unfair or wrongful dismissal claims had no reasonable prospects of success. I keep ***Radia*** in mind, but this is something a bit beyond a weak looking claim with some divergence in pleaded facts. The core factual dispute about whether there was an agreement to do as the claimant went on to do with his expenses was one which was appropriate to be heard in the Tribunal. Where I have not found any dishonesty on the part of the claimant, this is also not the case where there is no genuinely given evidence supporting the claim. The claimant's evidence was genuinely delivered.

35. On the other hand, also following the analysis above, I consider that the commission pay claim did have no reasonable prospect of success. The best evidence supporting that claim was what the claimant understood the position to be. There was no evidence given to support that understanding other than the claimant's interpretation that the placing of orders could be considered as sales which triggered an obligation to pay commission pay. This interpretation, without evidence, flies completely in the face of all other documentary evidence and evidence drawn from how the parties conducted themselves throughout the employment relationship. I do not hesitate in finding that this element of the claim had no reasonable prospect of success, and this should have been obvious to anyone with any familiarity with the core facts in dispute. This, also, opens the gateway for me to make a costs award in this case.

Do I exercise my discretion to award costs?

36. Costs in the Employment Tribunal are an exceptional award. The jurisdiction is designed for the parties to bear their own costs and, even where there is a possibility that costs could be awarded under ***Rule 76***, they will only be awarded where I am persuaded to exercise my discretion to do so. The exercising of discretion is properly a filter to ensure that the general policy position that costs are the exception and not the rule is maintained.

37. In this case, the gateways were opened through the claimant bringing a commission pay claim which had no reasonable prospect of success and unreasonably continuing to pursue that claim when proper reflection ought to have resulted in the realisation that it could not reasonably be won. In my judgment, these matters arose through a regrettable lack of reflection and insight which I consider to be poor litigation practice. A litigant in person is expected to conduct themselves in a way which is reasonable. However, there was no further conduct or motivation which would serve to aggravate this regrettable course of action from the claimant.

38. In my view, it requires something more than what has transpired in this case for me to exercise my discretion to award costs. The claimant brought three claims. One was successful. One was not successful but properly brought. One should not have

been brought or pursued. In the balance, I consider that the claimant has not acted sufficiently unreasonably or brought the sort of wholly unmeritorious action which would cause me to make a costs award. I consider that I should not exercise my discretion to award costs in this case. I decline to do so.

Disposal

39. Although two conditions for me to exercise discretion to award costs are met, I have decided not to exercise my discretion in this particular case. Consequently, the application is dismissed and no order for costs is made.

Employment Judge Fredericks-Bowyer

Dated: 29 November 2024

Sent to the parties on:

…29 November 2024…….

For the Tribunal Office:

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