EMPLOYMENT TRIBUNALS

Claimant: Mr W Matthaus

Respondent: Equiniti Solutions Limited

Heard at: Manchester (by CVP) **On:** 12 December 2024

Before: Employment Judge K M Ross

REPRESENTATION:

Claimant: In person
Respondent: Ms Saroo, Counsel

RESERVED JUDGMENT ON APPLICATION FOR COSTS

The judgment of the Tribunal is that:

1. The respondent's application for a costs order pursuant to regulation 76(a) and regulation 76(b) Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 succeeds.

2. I order the claimant to pay the respondent £15,000 costs.

REASONS

Introduction

1. The claimant presented claims to this Employment Tribunal on 2 October 2023. His complaints related to a period when he had worked between November 2015 and September 2016. In his claim form he ticked the boxes for unfair dismissal, discrimination on the grounds of religion and belief, race and sex. He also claimed a redundancy payment and said he was owed notice pay, holiday pay and other payments. The claims were brought approximately seven years late.

2. I reminded myself that costs in the Employment Tribunal are still the exception rather than the rule. Unlike other courts, costs do not follow the event in the Employment Tribunal.

3. However, there are particular circumstances where an order of costs can be made.

4. I reminded myself that it is a fundamental principle that the purpose of an award of costs is to compensate the party in whose favour the order is made rather than to punish the paying party.

5. I must adopt a three stage process when determining whether or not costs should be awarded. First of all, I must consider whether the grounds in the application relied upon by the respondent are made out. If I find that one or any of the grounds are made out, I must then go on to consider whether or not to exercise my discretion to make an award of costs.

6. Finally, if I decide to exercise my discretion, I must determine the amount of the award.

The Facts

7. I turn now to the first ground. The respondent, in their application of 12 March 2024, stated that they wished to pursue an application on the basis that:

(1) The claimant acted vexatiously and unreasonably in bringing the claims (Regulation 76(a));

(2) The claimant acted vexatiously, unreasonably and disruptively in the way in which he conducted proceedings, thereby increasing costs (Regulation 76(a)); and

(3) The claims objectively had no reasonable prospect of success based on the pleaded facts and because the claims were substantially out of time (Regulation 76(b)).

<u>The allegation that the claimant acted vexatiously and unreasonably in bringing the claims (Regulation 76(a)) and the claimant acted vexatiously, unreasonably and disruptively in the way in which he conducted proceedings, thereby increasing costs (Regulation 76(a));</u>

8. In my Written Reasons for the Judgment at pages 401-407 of the bundle where I struck out the claims for being out of time, I recorded that it was “puzzling” why the claimant waited so long to bring a claim. I stated at paragraph 14: “The claimant said he did not bring any of his claims until he had a conversation with an ex-colleague (HB) in 2023, but admitted that he did raise concerns with Mr Roache that the data the respondent was relying on to ‘let him go’ was not accurate”, and that he must have flagged concerns that he was not being properly paid when his employment relationship ended back in 2016. I also found that the claimant was certainly well aware of his rights to bring a claim in the Employment Tribunal and any time limits because he brought a claim which was partially successful in the Cardiff Employment Tribunal in 2018.

9. The claimant at the hearing today explained that he had instructed counsel on a number of occasions.

10. The claimant knew that the claims he presented in this Tribunal were many years out of time at the time he presented them. As I stated in my original Judgment, the claimant is an intelligent man.

11. The claimant's claims were also confusing. Considerable time was spent at the case management hearing trying to identify his claims. The claimant wanted to bring a claim for breach of contract, a claim for an unlawful deduction from wages, a claim for direct discrimination on the grounds of race, a claim for direct discrimination on the grounds of religion or belief, a claim for discrimination on the grounds of sex, a claim for harassment related to religion or belief and/or race and a victimisation claim. His claim form also included a claim for a redundancy payment.

12. Prior to the hearing in February 2024 the Tribunal had identified to the claimant that two years' service was required for a redundancy payment claim. The claimant had also failed to follow the steps required under section 164 Employment Rights Act 1996 to obtain a redundancy payment as set out in paragraph 17 of my Judgment.

13. Finally, at the preliminary hearing the claimant said he wanted to add a claim for whistleblowing detriment and dismissal and made an application to amend, which I considered and refused.

14. The claimant must have been aware that a claim for whistleblowing was doomed to failure. As I set out in my Judgment:

> "It is impossible to see how such a claim could succeed. The claimant's disclosures of information occurred *after* the alleged detriments and *after* he was told his engagement was terminated."

15. As I noted, "In those circumstances the claim is doomed to failure".

16. I find the claimant acted unreasonably in bringing claims that were almost seven years out of time when he knew (or should have known) the time limits. Even if the claimant did not know the time limits, which I find wholly implausible given the claimant had brought a claim in the Cardiff Employment Tribunal in 2018 (with legal assistance) the claimant was made aware by the respondent in their grounds of resistance.

17. I also find the claimant acted unreasonably in bringing a redundancy payment claim when he clearly did not have two years' service and acted particularly unreasonably in attempting to add a whistleblowing claim by way of amendment when such a claim was clearly hopeless. The claimant must have had a basic understanding of the relevant legislation because he had brought a whistleblowing claim in the Cardiff Employment Tribunal, and it is elementary that if one is complaining one has been dismissed for making protected disclosures or suffered a detriment for doing so, the disclosures must have happened before the dismissal and before the detrimental treatment.

18. For all these reasons, I am satisfied that the claimant acted both unreasonably and vexatiously not just in bringing the claims but also in the way that he conducted the proceedings. In bringing the claims (for the avoidance of doubt) it was because he brought the claims when they were so significantly out of time when he knew or must have known that they were. The claimant acted vexatiously and/or unreasonably by seeking to amend his claim to include a whistleblowing claim which was doomed to failure, and including a redundancy payment claim, which was also hopeless because the claimant failed to follow the required procedure and also did not have have two years' service as an employee.

19. When considering how the claimant conducted himself when bringing the proceedings and finding he acted unreasonably, I have also taken into account that the respondent's representative wrote to the claimant on 19 January 2024 offering an opportunity to exit the litigation without any adverse consequences. The claimant did not accept the offer and made an extremely unrealistic counter proposal of £277,000.

20. Counsel directed me to the claimant's behaviour in wider litigation which the claimant has brought. I am only concerned with this litigation and I have focussed my attention on how the claimant behaved in these specific proceedings.

21. I find further evidence of the way the claimant has acted unreasonably in pursuing an appeal against the judgment which found he had presented his claims seven years late, putting the respondent to additional cost. At present the appeal has been dismissed.

No reasonable prospect of success (regulation 76(b))

22. Finally, the respondent relied on rule 76(b) – that the claims had no reasonable prospect of success based on the pleaded facts and because the claims were substantially out of time. I rely on my reasoning above to find that the claimant's claims objectively had no reasonable prospect of success because they were presented (on the claimant's own evidence) seven years outside the time limit, and the claimant was well aware of that.

23. Time limits in the Employment Tribunal are strictly applied. The claimant never adduced any clear evidence as to why his claims were presented so late.

Discretion to order costs

24. The second issue is whether I should exercise my discretion to order costs.

25. I have taken into account a number of factors which are relevant to my discretion, including the claimant's ability to pay (or otherwise), the cost warnings made to him, the fact that he took legal advice and the fact that the claimant had brought at least one previous claim in the Cardiff Employment Tribunal.

26. I turn first to consider the claimant's ability to pay. The claimant's evidence on this point was rather opaque. The Tribunal made a detailed order on 9 July 2024 which stated:

> "Therefore within 21 days of the date of this letter, the claimant is ordered to disclose to the first respondent all evidence that he seeks to rely upon in respect of his means to pay a costs order. The Tribunal will have regard to the claimant's income and outgoings when considering his means. Therefore documents such as payslips or evidence of salary, bank statements, mortgage statements, tax returns, and any other financial document that is necessary for a fair disposal of the costs application in respect of the claimant's means to pay a costs order should be disclosed." (Page 410)

27. The claimant disclosed very few documents. He disclosed two statements from an HSBC bank account and two statements from a Starling bank account. The Starling bank account is in the name of "House of Gelato Limited". The HSBC account (545 and 676-7) contain very limited information. The HSBC account shows the claimant was in receipt of working tax credit in July and August 2024 and also in April and May 2024. They also show that the claimant was paying legal fees.

28. In cross examination the claimant admitted he had a personal Starling bank account and that he had not disclosed any statements for it. I find his explanation as to why he had not disclosed those statements to be unconvincing. The claimant suggested he had not realised from the Tribunal's order that those documents would be required.

29. The claimant was ordered to provide a witness statement in relation to his means. The document is at page 548. He also provided a list of outgoings at page 551. The claimant said his income was only tax credits of £60, as of 29 July 2024.

30. When questioned by the Tribunal the claimant said that he had a business selling ice cream which operated seasonally in the summer only. He said originally the business has premises in both England and Germany but that the business premises in England were now closed. The claimant said he had permanently relocated to Germany. He said his business in Germany was entitled "House of Gelato". He said he had one account only in Germany which was both a personal account and a business account, as under German law he could not have a separate business account. He confirmed he had not provided the statements for that account.

31. Counsel asked the claimant about Working Tax Credit. The claimant said he was no longer in receipt of that benefit.

32. I asked the claimant about his situation and whether he had any dependants in his household. He said he had no dependants. He said he had no income and that his business in Germany made a loss and that he had provided the accounts for it. There are accounts in the bundle for the business.

33. When I asked how the claimant lived given he appeared to have no income, he said he lived with his partner who was on a salary of approximately 3,000 Euro per month, but his answers were extremely vague. He said he lived in her house which was subject to a mortgage, but he did not know what the mortgage was. On page 551 the claimant listed outgoings as TV licence £18.36, utilities £470, medicine £5, public transport £5, business insurance £150, health insurance £718.16, accountant's fee £53.45, legal fees £400, food £200, internet £30, mobile £6, toiletries £20, State Pension contributions £21.66.

34. The claimant confirmed he had not provided any documentary evidence to support these costs.

35. From the answers to counsel's questions, it remained unclear which of these were personal or business expenses.

36. The claimant's evidence was concerning in other respects. Ms Saroo also stated that the Government website states that someone in receipt of Working Tax Credit is also in receipt of Child Tax Credit. She asked the claimant if he was in receipt of Child Tax Credit, and he said he was not. She also said that the website suggested a person in receipt of Working Tax Credit was working at least 35 hours per week. The claimant then said he worked a lot of hours.

37. There was a lack of clarity about the claimant's business assets at pages 647-648 (House of Gelato Limited accounts). In his witness statement the claimant said the only asset was a truck. When asked what had happened to the rest of the assets the claimant said that the business had been repossessed and other assets were fixtures and fittings, including equipment and a mirrored glass ceiling.

38. The claimant was also asked about other businesses for which he appeared to be a director (pages 604-605 "Fancy Joyice Limited"). The claimant said no had no knowledge of that company and thought he had been added fraudulently as a director.

39. Lastly, the claimant accepted that the Instagram existed for the House of Gelato (page 567) and that he had won an award for his ice cream.

Conclusions

40. In deciding whether to make costs order I reminded myself there is no obligation to take account of means but I consider it is wise for the Tribunal to do so, having regard to the case law (see **Doyle v North West London Hospitals NHS Trust [2012]**). I reminded myself that in **Abaya v Leeds Teaching Hospital NHS Trust EAT 0258/16** it was stated the Tribunal was in principle entitled to take into account a wife's income when ordering the claimant to pay costs. It noted the Tribunal's discretion in this regard must be exercised according to common sense and with a very real regard to the real world.

41. The claimant presented himself as a person now living in Germany running a business which is seasonal only and makes a loss, and therefore he is dependant on the income of his partner. In those circumstances I find it is relevant for me to have regard to the partner's income. I have also had regard to the fact that the claimant did not answer questions clearly about his income and failed to provide documentary evidence as required by the Tribunal's order. The answers as to why he had not done this were not plausible. It was not plausible that he did not understand what the Tribunal required him to do.

42. I have into account that the claimant was given a costs warning in this case from the respondent at an early stage. I have taken into account that although he is a litigant in person, the claimant has clearly had the benefit previously of extensive legal advice given the amounts his accounts show he is paying for legal fees. I have also taken into account he was given the opportunity to withdraw from this case at an

early stage with no order for costs and declined the opportunity to do so. I have also taken into account that he brought a previous successful (in part) claim in the Cardiff Employment Tribunal and cannot be wholly unaware of the way Tribunals operate. I am satisfied for all of these reasons that it is appropriate for me to exercise my discretion to make an award.

43. I then turn to the last stage – the amount of the award.

44. Under the Tribunal Rules, rule 78(1)(a) provides that a Tribunal "may 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".

45. The alternative method is to require the costs to be determined separately by means of a detailed assessment in accordance with the Civil Procedure Rules 1988 (SI1998/3132 CPR). Under that jurisdiction the full amount of costs sought by the respondent can be recovered. The respondent has sought unassessed capped costs here. The bill provided by the respondent shows a total of over £31,000 but the respondent is seeking the maximum of £20,000.

46. I reminded myself, as guided by the EAT in **Sumukan (UK) Limited & Another v Raghavan EAT0087/09** that I must state:

- On what basis and in accordance with what established principles it is awarding any sum of costs;
- On what basis it arrives at the sum; and
- Why costs are being awarded against the party in question.

47. Once again I remind myself when deciding how much to award I should have regard to the relevant factors.

48. The respondent undoubtedly incurred the costs they have set out in their schedule. It is very unclear whether or not the claimant has the means to pay a costs order. However, whether or not the claimant can pay is not of itself a final determining factor. Even on his own evidence, the claimant is living with a partner who has a reasonable income. Unfortunately, the claimant's evidence was unclear in terms of what their outgoings actually are.

49. Although the accounts produced for the German business show that it is making a loss at present, the claimant clearly is talented at making ice cream. He confirmed that the award he received (as shown in the documentation) is genuine. There must be hope, therefore, that his German business will become profitable and although (if he is to be believed) he does not have the means to pay any costs order in full at present, he may be able to do so in the future.

50. The claimant relied on a number of reasons as to why he should not have to pay a costs order. He said that the respondent had disclosed the bundle late before the original costs hearing. However, this does not assist the claimant because he accepted that he had had the information for many weeks before this hearing took place. The costs hearing on 3 October 2024 was postponed and the claimant has had the bundle of documents since that time. The claimant has therefore had ample

opportunity to consider the documentation in the bundle, and indeed has contributed further documents since the original bundle was served on him. The claimant has had ample opportunity to provide documentation since the court order was made for him to disclose information on 9 July 2024.

51. The claimant also objected to the respondent referring to the COT3 in these proceedings. As counsel pointed out, the respondent is entitled to refer to the COT3 as required in certain limited circumstances. In the circumstances of this case, the respondent was entitled to refer to the COT3 in the Cardiff case. In any event ,it is not a matter I have taken into account directly when either determining whether or not to make an award of costs and the amount of costs.

52. The claimant also suggested that I should not make an award for costs because the respondent either might be insured or could write off their costs against tax. The respondent's response to this is that they are not insured for these costs and have not sought VAT on the legal fees and there is no ability to write off the costs against tax.

53. The claimant also sought to challenge elements of the specific bill, saying he considered it was excessive and unreasonable. If there are some elements of the bill that I might disallow as being excessive, for example at item 2, I have borne in mind the fact that the respondent is not seeking the full amount of costs because the full bill is over £30,000 and they are capped at £20,000.

54. I have had regard to the claimant's ability to pay. Even though he has been less than straightforward with the Employment Tribunal in answering questions and providing documentation, I have decided it is fair to reduce the bill having regard to his ability to pay. If he genuinely is living on his partner's earnings during the winter months and his business is running at a loss, he is likely to still have some difficulty in satisfying the award immediately.

55. As against that, there was no clear explanation as to what had happened to the fixed assets of House of Gelato between 2023 when assets of £189,000 showed in the accounts, and 2024 when assets showed as £0. Although the claimant says that business is insolvent, it is still showing "active" at Companies House.

56. Having regard to the fact that the respondent is seeking two thirds of the true costs and having regard to all the circumstances of this case, I am satisfied that it is appropriate to order the claimant to pay the sum of £15,000.

Employment Judge K M Ross
Date: 18 December 2024

JUDGMENT AND REASONS SENT TO THE PARTIES ON
30 December 2024

FOR THE TRIBUNAL OFFICE

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