



EMPLOYMENT TRIBUNALS

Claimant: Chris Hubbard

Respondent: Peter Swann

Heard at: Manchester

On: 13 January 2025

Before: Employment Judge KM Ross
(in chambers)

JUDGMENT ON APPLICATION FOR COSTS

The respondent's application for a costs order pursuant to rule 76(1)(a) and (b) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, now Employment Tribunal Rules 2024, does not succeed.

REASONS

1. The claimant brought a claim to this Tribunal for breach of contract in relation to notice pay and a claim for accrued but untaken holidays on termination of employment.
2. The claims were struck out for the claimant's failure to reply to one letter of tribunal correspondence and failure to comply with case management orders, on 31 August 2024. The respondent made an application for costs. The basis of the application was Rule 76 Employment Tribunal Rules of Procedure 2013, which since January 2025 have become Employment Tribunal Rules of Procedure 2024. They relied on several grounds. Firstly, that the claims had no reasonable prospect of success, secondly the claimant had made an error and sued the wrong respondent and finally that the claimant had acted unreasonably in the way he conducted the

proceedings by failing to respond to tribunal correspondence and to prepare for hearing.

3. I reminded myself that costs are the exception not the rule in employment tribunal proceedings. I also reminded myself that I must undertake a staged process when considering whether to award costs. Firstly I must consider whether the grounds are made out and secondly whether or not to exercise my discretion.

4. See **Barnsley Metropolitan Borough Council v Yerrakalva [2011] EWCA Civ 1255**.

Whether the claimant's claims had "no reasonable prospect of success" pursuant to rule 76(1)(b).

5. The Tribunal turned first to consider whether the claimant's claims had "no reasonable prospect of success" pursuant to rule 76(1)(b).

6. I am not satisfied that the claimant's claims for breach of contract and unpaid holiday pay had no reasonable prospects of success. The claim form makes it clear that the reason the claimant left suddenly without giving notice, were the poor conditions in which the claimant worked. Therefore, there was an arguable case that he was entitled to resign without giving notice and entitled to his statutory notice pay. If the breach of contract claim had proceeded to hearing, the tribunal would have had to hear evidence on this point, which is disputed by the respondent.

7. Secondly in relation to the claim for holiday pay, the respondent in its response appears to concede that the claimant was owed payments for accrued but untaken holidays on termination of employment. It seeks to argue that it was entitled to make a deduction from the claimant's wages for those holidays. Despite the clause in the claimant's contract, this is highly arguable. Case law suggests that an employer is not normally entitled to make a deduction by removing the claimant's holiday entitlement to which he is entitled pursuant to Regulations 14 and 16 Working Time Regulations 1998.

8. Therefore the respondent fails to satisfy me the claims had no reasonable prospect of success.

Has the claimant acted unreasonably and/or vexatiously in the way he brought and conducted proceedings -76(1)(a).

9. The Tribunal turns to the other limb: that the claimant has acted unreasonably and/or vexatiously in the way he brought and conducted proceedings.

10. The respondent says the claimant acted unreasonably in suing the wrong respondent. The claimant named an individual rather than the corporate entity which employed him. This is a common mistake by litigants in person. It therefore does not amount to unreasonable or vexatious conduct. The named individual respondent is a director of CoolFun Limited, the corporate respondent and in these circumstances

the Tribunal normally regards the mistake as a technical error and amends the name to the corporate name.

11. The respondent also relies on the claimant's failure to reply to tribunal correspondence and to prepare the case for hearing. This is potentially unreasonable conduct, but the claimant has already been sanctioned for this conduct by his claim being struck out.

Exercise of discretion

12. The Tribunal therefore turns to the second element of consideration in relation to making a costs award, and that is the exercise of discretion.

13. At this point the Tribunal reminds itself that costs remain the exception rather than the rule (see **Yerrakalva v Barnsley Metropolitan Borough Council [2012] ICR 420**). I also reminded myself of the guidance in **Salinas v Bear Stearns International Holdings & another [2005] ICR 1117**, that there is a high hurdle to be surmounted in ordering costs.

14. The Tribunal had regard claimant's ability to pay. The Tribunal had no information about this. The Tribunal took into account that the claimant's claims appeared to have had some merit, that his only real failing was to ignore the correspondence from the tribunal asking him for his dates of employment. This was information which became clear from the response (ET3). and was not directly relevant to the claimant's claims for unpaid wages and breach of contract.

15. The claimant is a litigant in person. If he had responded to the tribunal, his error in naming an individual rather than the corporate entity as the respondent could have easily been corrected. There was no prejudice to the respondent in the claimant failing to give his dates of employment to the Tribunal. If the claimant failed to comply with case management orders, new dates for compliance could have been issued.

16. For his failings in not replying to the tribunal and failing to prepare for hearing the claimant has already suffered the serious sanction of his claim being struck out. It is not proportionate to also make an award for costs as well.

17. For all these reasons the Tribunal declines to make an order as to costs.

Employment Judge Ross
Date 13 January 2025

JUDGMENT AND REASONS SENT TO THE PARTIES ON
23 January 2025

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.