



EMPLOYMENT TRIBUNALS

Claimant: L J Marsh

Respondent: Callisto Wealth Management Limited

HELD AT: Manchester

ON: 4 February 2025
(in chambers)

BEFORE: Employment Judge Batten

REPRESENTATION:

For the Claimant: no attendance

For the Respondent: no attendance

JUDGMENT ON A COSTS APPLICATION

1. The respondent's application for costs is granted.
2. The claimant shall pay the respondent's costs of the proceedings, from 21 February 2023 onwards, the amount of which shall be assessed by the Tribunal if not agreed.

REASONS

Background

1. A preliminary hearing in this case took place over 3 days, on 2-4 October 2024. By a Judgment sent to the parties on 11 October 2024, the Tribunal held that the claimant was neither an employee nor a worker of the respondent and, as a result, dismissed the claimant's complaints of unfair dismissal and unpaid holiday pay.
2. On 18 October 2024, the respondent made an application for costs. The claimant submitted a detailed response to the respondent's application for costs on 7 November 2024 and sent information about her means to the Tribunal. There was then some delay in referring the matter to the Judge, for which the Tribunal apologises.

3. The parties have both agreed that the application shall be dealt with by the Tribunal considering the parties' written submissions and without the parties' attendance at a hearing. The Tribunal has taken the contents of the application and the response into account in reaching its decision.

Issues to be determined

4. The issues to be determined by the Tribunal in relation to the costs application are:-
 - 4.1 Whether the claimant had acted unreasonably in the bringing of the proceedings and/or in the way that the proceedings have been conducted;
 - 4.2 Whether the claim had no reasonable prospects of success;
 - 4.3 Whether in all the circumstances it would be appropriate to make an order for costs against the claimant; and
 - 4.4 If so, what amount of costs should be awarded. However, in its application for costs, the respondent has indicated that its total costs to date are £59,175.00 and that it seeks a detailed assessment of such, pursuant to rule 76(1)(b) of the 2025 rules, if the amount of costs payable by the claimant cannot be agreed between the parties. The Tribunal has therefore not dealt with the amount of costs in this judgment, in order to afford the parties time to resolve matters between themselves if possible.

The respondent's application

5. The respondent contended that the claimant brought claims of unfair dismissal and unpaid holiday pay which had no reasonable prospects of success because the claimant had at all material times chosen to set up and hold herself out as self-employed and she later operated in partnership with her husband. The claimant entered the relationship with the respondent on a self-employed basis; she never intended to be a worker, let alone an employee, such that her contentions as to employee and/or worker status were fundamentally misconceived and bound to fail.
6. The respondent also contended that the claimant had acted unreasonably in the bringing of the proceedings and the way that the proceedings had been conducted because, given the fact of her self-employed relationship with the respondent, the claimant must have known or believed that her contentions as to employee and/or worker status were without foundation. The respondent submissions referenced its efforts to persuade the claimant of the lack of merit in the claim and it warned the claimant of the prospect of a costs application from the outset, in the grounds of

resistance, paragraph 47, and in subsequent correspondence which highlighted the weaknesses in the claimant's case.

7. In the application for costs, the respondent has indicated that its total costs to date are £59,175.00 and that, if its application succeeds in principle and the amount of costs payable by the claimant cannot be agreed between the parties, the respondent seeks a detailed assessment of its costs, pursuant to rule 76(1)(b) of the 2025 rules. The application does not include an itemised schedule of the costs claimed nor how the figure has been arrived at.

The claimant's response to the application

8. The claimant resisted the respondent's application. The claimant contended that the claim had reasonable prospects of success because the claimant had considered herself to be fully integrated into the respondent's business such that the respondent's argument that the claimant operated as self-employed and then in partnership over simplified the complexities of employee status which requires a multi-factorial approach; the mere existence of a partnership would not preclude a finding of employee and/or worker status and the claimant was entitled to seek a factual determination.
9. In those circumstances, the claimant contended that it was reasonable to bring proceedings and that the mere fact of a costs warning did not make her conduct unreasonable nor justify costs, for which the threshold in the Employment Tribunal is high. The claimant relied on the fact that the legal complexities of employee and/or worker status meant that the claimant had a reasonable belief in the merits of her claim.
10. The claimant provided a statement about her means but no documents to support her contention that her outgoings exceeded her income by around £1,000 per month, albeit that she has savings and owns 5 rental properties subject to mortgages. The claimant also contended that her financial position had been severely impacted by the breakdown of relations with the respondent.

The applicable law

11. The Employment Tribunals Rules of Procedure 2025, provide as follows:

74. *When a costs order or preparation time order may or shall be made*

(1) A tribunal may make a costs 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 has no reasonable prospects of success.*

(c) ...

.....

75. Procedure

A party may apply for a costs order ... at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the tribunal may order) in response to the application.

76 The amount of a costs order

(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;*

...

82 Ability to pay

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.

12. Costs orders are the exception rather than the rule – Yerrakalva v Barnsley MBC [2012] ICR 420
13. The Tribunal's power to award costs is discretionary. The fact that a party has succeeded does not prevent the Tribunal from making an order of costs against that party based on unreasonable conduct. The Tribunal must first consider whether the party's conduct falls within rule 76 and, if so, whether it would be appropriate to exercise its discretion to award costs.
14. An award of costs is to be compensatory and not punitive and so there should be an examination of what loss has been incurred by the receiving party.
15. In determining whether to make an order in respect of unreasonable conduct, the Tribunal should look at the totality of the circumstances of the case, taking into account the nature, gravity and effect of a party's

unreasonable conduct: McPherson v BNP Paribas (London Branch) [2004] ICR 1398, CA.

16. Also, in McPherson, Mummery LJ confirmed that the Tribunal rules do not impose any requirement that the costs must be caused by, or proportionate to, the unreasonable conduct – it is not necessary to establish a direct causal link. The Tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of its discretion.

Determination

17. The Tribunal has determined the respondent's application in the following way.

Whether to award costs

18. The Tribunal first considered the substance of the complaints pursued. The claimant complained of constructive unfair dismissal and unpaid holiday pay. The unfair dismissal complaint requires the claimant to show employee status and the holiday pay complaint requires the claimant to show she was a worker. The Tribunal found that the claimant was neither an employee nor a worker.
19. The findings of fact which underpinned that decision are significant. In particular, the Tribunal found that: the claimant had been engaged on a self-employed basis, at her insistence; that she at all times held herself out as self-employed to third parties; she operated several business interests in partnership with her husband, with whom she shared her fees from the respondent, for tax purposes; the claimant invoiced the respondent at a rate agreed and which was increased from time to time at the claimant's request; the claimant was given free rein in the provision of management services, and also her hours and days of work, such that it could not be said that the respondent exercised any control over the claimant or the services she provided; and that irregular meetings between the parties were for the purpose of the claimant reporting to the respondent on what she had done and advising on action which the respondent might need to take.
20. In addition, the evidence was overwhelming. The Tribunal took account of the claimant's oral evidence on her status. She told the Tribunal candidly that she had no contract of employment because she was not an employee and that she never sought employment status. In essence, the claimant agreed that she was not an employee and that, although aware of holiday entitlement for workers, she had never considered such to apply to her. The claimant understood very well what employment or worker status meant and she determined that neither would apply to her. The claimant told the Tribunal that it was her choice to be self-employed and to operate in partnership with her husband. This was all consistent with the documentary evidence which showed that: in regulatory and other reports

for the respondent, the claimant described herself as self-employed; she wrote to a neighbouring business describing herself self-employed; her LinkedIn profile status throughout was of a self-employed business consultant; and the partnership arrangement with her husband suited the claimant - it had significant tax advantages for them both. In light of the above evidence (much of it from the claimant herself) the Tribunal considered that the complaints were bound to fail, and the claimant must or should have appreciated the significant weaknesses of her case.

21. The Tribunal also considered that the claimant was on notice of the significant weaknesses in her claim upon receipt of the lengthy and detailed response, filed on 6 February 2023, sent to the claimant by the Tribunal on 21 February 2023. The response sets out the fact that the claimant was engaged at all times on a self-employed consultancy basis and that the claimant had made it clear that she did not want to be employed by the respondent. The response also made clear that in the event of the claim failing, the respondent would seek its costs on the basis of the claim having no reasonable prospects of succeeding and also on the basis of the claimant acting unreasonably for pursuing the matter.
22. In light of the contents of the response, the claimant was afforded the opportunity to withdraw. She had the benefit of legal advice throughout. In those circumstances, the Tribunal considered that the claimant had had sufficient time to consider her position prior to the preliminary hearing. However, it was apparent from her approach that the claimant has failed to appreciate the risks in proceeding, despite the respondent spelling things out for her.
23. In light of the above, the Tribunal considered that the threshold in rule 74 had been met by the claimant's unreasonable actions in the bringing of and conducting of this claim, a claim that was wholly unmeritorious. Her failure to heed the warnings or take the opportunity to withdraw in early course amounted to further unreasonable conduct. The claimant's conduct has put the respondent to expense and inconvenience. The Tribunal has therefore concluded that it was appropriate to exercise its discretion to award costs against the claimant in this case.

The amount of costs to be awarded

24. There needs to be an examination of what loss has been incurred and when, by the respondent as the receiving party. However, the respondent has not tendered a schedule of the costs it claims and states only a total figure. It is therefore not possible for the Tribunal to determine, at this stage, what costs shall be payable by the claimant, having regard to the work done and claimed for by the respondent. The claimant is entitled to an opportunity to challenge such in any event.
25. Nevertheless, the Tribunal has decided that the respondent's costs shall be payable only for the period from 21 February 2023 onwards. That is from the date on which the claimant received the response and was

thereafter on notice of the significant weaknesses in her case and also the prospects of an application for costs. I understand that such a threat of costs was repeated in later correspondence, albeit to no avail.

Conclusion

26. The respondent has indicated that it seeks a detailed assessment of its costs pursuant to rule 76(1)(b) of the 2025 rules, in the event that the amount of costs payable by the claimant cannot be agreed between the parties. I have afforded the parties some time to resolve matters between themselves if possible, as follows.
27. Within **42 days** of the date this judgment is sent out, the parties must write to the Tribunal to confirm whether the matter of the costs payable has been resolved between them and, if not, (1) the respondent must at that time submit an itemised chronological schedule of the work done and claimed for, having regard to the nature of the work, hourly rate(s) charged and level of fee-earner(s) concerned; and (2) the claimant must serve a detailed statement of all her means – income and capital assets – accompanied by documentary evidence including a copy of her most recent tax return and/or that of the partnership as appropriate.
28. In the event that a detailed assessment is required, the Regional Employment Judge shall appoint a specialist costs Judge to conduct the assessment.

Employment Judge Batten
6 February 2025

JUDGMENT SENT TO THE PARTIES ON:
18 February 2025

.....
FOR THE TRIBUNAL OFFICE