EMPLOYMENT TRIBUNALS

Claimant: Frank Rotheram

Respondents: NKT HVC Ltd
Andrew Groves
Will Hendrikx

Heard at: Manchester by CVP

On: 21 November 2024

Before: Employment Judge Liz Ord (sitting alone)

Representation:

Claimant: Andrew Halpin (solicitor)
Respondent: Kirsten Barry (counsel)

An oral decision having been given on 21 November 2024 refusing the claimant's costs application and the written record having been sent to the parties, subsequent to a request for written reasons in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Application, issues and documents

1. Upon the tribunal finding in favour of the claimant on preliminary issues regarding employment status and continuity of employment, the claimant made an application for costs, which was the subject of the tribunal's decision on 21 November 2024.

2. The application dated 4 July 2024 was based on two grounds:

   i) That the respondents' response that the claimant had a break in service and subsequently did not have the requisite two years continuous service needed to bring an unfair dismissal claim had no reasonable prospects of success.

   ii) The respondent acted unreasonably in the way proceedings were conducted.

3. The issues for the tribunal were:

i) Whether either ground was established;

ii) If so, whether in the tribunal's discretion it ought to make a costs order; and

iii) If so, in what amount.

4. The tribunal had regard to a costs bundle (200 pages), the claimant's written and oral costs submissions, the respondents' oral costs submissions, the preliminary issues bundle, the parties' preliminary issues closing submissions, the reserved preliminary issues judgment of 22 May 2024.

Law

5. The Employment Tribunals Rules of Procedure 2013 contain a discretionary power to award costs. The circumstances in which a costs order or preparation time order may be made are set out in rule 76(1), which relevantly provides:

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; or
(c) ….

6. Rule 76(1) imposes a two-stage test; first the tribunal must decide whether the threshold has been reached to fall within rule 76(1), and if so, it must consider whether it is appropriate to exercise its discretion in favour of awarding costs.

7. An award of costs is the exception rather the rule in employment tribunal proceedings.

8. The tribunal had regard to caselaw referred to by the parties in submissions.

Discussion

9. There were cogent arguments on both sides regarding the alleged break in service and employment status, as set out in the parties' closing submissions on these preliminary issues. Whilst the preliminary issues bundle contained documents supporting the claimant, it also contained documents favouring the respondents.

10. In brief, the respondents' case was that they intended that the claimant cease work on the completion of the sale of his business to the respondents, and the claimant knew that was their intention. The claimant however wanted to continue working there after the sale. Therefore, to get the deal

done, the respondents were prepared to give him a short term contract. Their case was that they did not intend it to last very long.

11. Unfortunately the paperwork was lacking in places and, in their hurry to conclude the sale, there were grey areas, which caused confusion.

12. For example, the claimant's resignation letter, drafted by the respondents, required him to resign as both a director and an employee, although the claimant crossed out the word "employee" before signing it, without getting the respondents' written agreement. It took a detailed consideration of the evidence to establish what this meant and what the claimant's status actually was post completion and going forward.

13. The tribunal heard two days of evidence and considered a volume of documentation. It reserved its judgment to enable a proper consideration of the evidence and the arguments. It was not a clear cut case and needed careful consideration. Taking account of the totality of the evidence, both parties had a reasonable case to argue on both preliminary issues.

14. The claimant seeks in paragraphs ii a-e of his application to highlight parts of the reserved preliminary issues judgment in support of his contention that the respondent acted unreasonably in the way proceedings were conducted. However, none of the paragraphs referenced demonstrate such unreasonableness.

15. At point a. the claimant suggests that the respondents and their witness, Mike Jones, attempted to re-write history. I reject this. The claimant refers to paragraphs 36-42 of the reserved judgment and in particular paragraph 37, where I found that the witness had somewhat evaded the question. However, this was oral evidence on the day, which I interpreted in a certain way. It was one aspect of a much wider issue and does not come close to reaching the necessary threshold for a costs order.

16. At point b. the claimant refers to paragraph 39 of the reserved judgment and the words in an email that referred to him continuing in role. He suggests that this contradicts the argument that there was a break in service, and is therefore unreasonable conduct.

17. However, this fails to consider the wider picture and the context in which the email was written. It was open to the respondents to put this argument and the email does not negate it. Nor does it demonstrate unreasonable conduct.

18. At point c. the claimant refers to paragraphs 40-41 of the reserved judgment where Mike Jones' oral evidence was noted that "it would appear" that the claimant had not resigned his employment prior to signing the consultancy agreement. The claimant says this contradicted the break in role and employment status arguments the respondents put forward.

19. Whilst I found, on the basis of this oral evidence, that Mike Jones was of the view that the claimant had not resigned his employment at that stage, this does not render the respondents conduct unreasonable. This was oral evidence on the day of the hearing. Concessions are often made in oral evidence, but this does not mean the arguments should not have been run.

Matters often appear different when tested at a hearing and this is just part of the process.

20. At point d. the claimant refers to paragraph 44 of the reserved judgment which finds that the claimant carried on being paid the same weekly salary via payroll both before and after the sale. He suggests that the respondents changed their position on this at closing submission stage when they said this was an error. I reference the "error" argument at paragraph 46 of the reserved judgment. The claimant says the earlier argument was that the respondents continued to pay him via payroll to assist him with his taxes.

21. I do not recall the "error" argument only being raised in closing submissions. I do not recall any new arguments being raised by the respondents in closings. Even if it were new, the claimant was not put to any expense because of it. Whilst two different explanations were given for the situation, this does not make the respondents' conduct unreasonable.

22. At point e. the claimant refers to paragraph 47 of the reserved judgment which records the respondents' argument that there was no obligation on the claimant to work at all and he was just undertaking his own personal projects. The claimant says Andrew Groves, the second respondent, contradicted this argument in its entirety and so this was a tactical and unreasonable position for the respondent to take.

23. Whilst Andrew Groves gave witness evidence that the claimant was very visible making tools and working with the shop floor personnel, this is not entirely contradictory to the respondents' stated argument. In any event, it is evidence on the day, which can often put a different reflection on matters, and this is not unusual. It does not render the conduct unreasonable.

24. Having considered the full content of the claimant's application, there is nothing within it that would render the respondents' conduct unreasonable, either taking each point separately or cumulatively.

25. The respondents put forward reasonable arguments. However, the tribunal found for the claimant. It cannot be said that there were no reasonable prospects of success.

Conclusion

26. The threshold required by the costs rules has not been reached on either ground.

27. The respondents' response regarding the two years continuous service did have a reasonable prospect of success. They had an arguable case and the tribunal's decision was based on a careful consideration of the reasonable arguments of both sides.

28. The respondent did not act unreasonably in the way proceedings were conducted. The tribunal rejects the claimant's contentions in this regard.

29. Therefore, the claimant's application for a costs order fails.

Employment Judge Liz Ord

Date: 1 March 2025

JUDGMENT SENT TO THE PARTIES ON

Date: 19 March 2025

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FOR THE TRIBUNAL OFFICE