EMPLOYMENT TRIBUNALS

Claimant: Mr K Brazier

Respondent: Oktra Limited

Heard at: London Central (via Cloud Video Platform)

Before: Employment Judge Joffe

Representation
Claimant: Represented himself
Respondent: Ms J Franklin, counsel

COSTS JUDGMENT

The respondent's application for costs is refused.

REASONS

1. I heard and dismissed the claimant's claims for unfair dismissal, unlawful deductions from wages and breach of contract on 7 March 2025. At the conclusion of the full merits hearing the respondent made an application for costs. The claimant resisted the application. I made provision for both parties to make further submissions in writing if they wished to do so and I subsequently received further written submissions.

Relevant chronology

2. The chronology of the proceedings is as follows:

   - 14 June 2024: Claim form presented. The claimant ticked the 'unfair dismissal' box. In box 9.1 the claimant wrote:
     Compensation: "I am seeking compensation for the bonuses that I lost due to being dismissed:

The Amp - Bonus Due 1% of profit: Project value £30,500,000.00 (agreed and paid final account), profit £5,316,082, Bonus due £53,160.00 (£23,000.00 previously paid)

LCCA - Bonus Due 1% of profit: Project value £1,886,139.94, profit £266,832.06, Bonus due £2,668.00

Merlin - Bonus Due 1% of profit: Project value £2,209,071.00, profit £544,328.99, Bonus due £5,443
Amount requested: £38271"
He also attached a document in which he disputed the reasons given to him for his dismissal;

- On 3 July 2024, the Tribunal sent the claimant strike out warning, asking him to give reasons why his unfair dismissal claim should not be struck out since he had less than two years service;
- On 8 July 2024, the claimant wrote to the Tribunal only saying that he might have selected the wrong option in the ET1 form. He said that he selected 'wrongful dismissal' as he was dismissed to avoid paying bonus / commission he was due;
- It appears that due to an administrative failure, an instruction to issue a judgment striking out the unfair dismissal claim was not actioned. There were some other administrative anomalies and the notice of claim was served on the respondent twice;
- 17 October 2024: response presented. In respect of the unfair dismissal claim, the respondent simply said that the claimant did not have two years service. As to the commission claim, the respondent said that payment was discretionary and 'there will be no entitlement to receive any commission if your employment has terminated or you are under notice of termination at the expected date for payment.;
- On 20 January 2025, I gave directions for the hearing which included disclosure by 27 January 2025, bundle to be prepared by 10 February 2025 and witness statements to be exchanged by 24 February 2025;
- On 24 February 2025, the respondent's solicitors sent the claimant a costs warning letter. They pointed out that they had not seen any response to the Tribunal's strike out warning and asked for a copy if the claimant had sent a reply. It appeared that the respondent had not received various documents from the Tribunal including my directions of 20 January 2025. It is possible that this was because the respondent was not able to access the Tribunal portal. The solicitors had only just been instructed. They pointed out that the unfair dismissal claim had no reasonable prospects of success as the claimant did not have two years service. In respect of the commission claims, they pointed out that the contract said that there was no entitlement to receive commission if employment had terminated or the claimant was under notice of termination at the date the payment would be due. Commission was due in the first available payroll after closure of a project. None of the projects which the claimant claimed commission for had closed. They asserted that these claims also had no reasonable prospects of success. They warned him that if he proceeded with his claims, the respondent would pursue an application for costs. The letter

also said this: 'To be clear, Oktra reserves its right to make an application for costs against you even if you were to withdraw your claims on or before Thursday 27 February. This would avoid Counsel's fee being due (and so Oktra would not seek Counsel's fee from you) but it would not avoid the majority of gunnercooke's fees. Given the imminent hearing date, we are not able to delay incurring fees';

- On 25 February 2025, the respondent applied to strike out the unfair dismissal claim and to vary the directions;
- On 27 February 2025, the claimant wrote to resist the application to strike out and variation of directions. The respondent asked him again for his response to the strike out warning;
- On 27 February 2025, the respondent disclosed its documents to the claimant;
- On 3 March 2025, the parties exchanged witness statements;
- On 6 March 2025, the respondent sent the claimant its skeleton argument and costs schedule.

Respondent's application

3. The respondent limited itself to unassessed costs of £20,000 although I was told that the respondent had spent a great deal more than that. The application was made on two bases:
    a. Unreasonable conduct of the proceedings under rule 74(2)(a) in relation to the unfair dismissal claim;
    b. No reasonable prospects of success in respect of all claims.

4. In respect of the unfair dismissal claim, there was no dispute that the claimant did not have qualifying service. He had been warned by the Tribunal but did not formally withdraw the claim. The respondent accepted that there appeared to have been a failing on the part of the Tribunal in not dismissing the unfair dismissal claim after receipt of the claimant's response to the Tribunal's strike out warning, however the claimant himself had acted unreasonably in not withdrawing the claim. The respondent had asked three times for a copy of the email he sent about why he was entitled to bring an unfair dismissal claim and he never shared that email.

5. When the respondent wrote to the Tribunal on 25 February 2025 making a strike out application, the claimant actively disputed the application but did not say why the unfair dismissal claim should proceed. Despite having been reminded of the need to copy in the respondent to all correspondence, he had not done so. This had caused significant additional correspondence and cost.

6. The claim for commission had never had any prospects given the terms of clause 5.2 of the contract of employment, the meaning of which the claimant had not disputed at the hearing. On the claimant's own case the earliest he should have been paid commission was at the end of April 2024, which was after the date of dismissal. So far as the argument that the claimant had been dismissed to avoid paying him commission was concerned, that claim was strikingly weak. The claimant did not actually think anyone involved had a ulterior motive. In his submissions he had said that had he not been

dismissed, he would have remained employed and received commission. He had candidly said that he was not sure that was a legal entitlement. Even litigants in person have a duty to research whether they have legal entitlements.

Claimant's submissions

7. The claimant said that he had responded to the Tribunal's strike out warning and not hear anything further. He had assumed that if a judge looked at his response and decided there was no case, he would hear about it. It was not unreasonable for him to carry on with his claims in those circumstances.

8. On 20 March 2025, the claimant sent in written submissions on the costs issue. He pointed out that the Tribunal's costs jurisdiction is more limited than that of the civil courts and that there is a three stage test for whether there are no reasonable prospects..

9. The claimant said that he believed that payment from the client in respect of The Amp/The Met/Trilogy project was received on 14 April 2024 before his termination on 18 April 2024 and not on 9 August 2024.

10. The claimant did not dispute the meaning of the contract. The case of Takacs v Barclays Services Jersey Ltd [2006] IRLR 877, QBD showed that it was arguable that a term could be implied that the respondent would not terminate the claimant's employment in order to avoid paying the claimant commission payments. The claimant said that he had contended that he was not guilty of conduct justifying termination and that this was an excuse not to pay him commission that either had or would fall due. This was a factual case that required a determination by the Tribunal.

11. Even if the first stages of the test were satisfied, I should not exercise my discretion to award costs. As the claimant had said in oral submissions, he had been expecting that the Tribunal would strike out his unfair dismissal claim if that were appropriate. In any event, he said that no material costs were caused by the unfair dismissal claim. The commission claim could not be said to have no reasonable prosects of success.

12. The costs warning was only given on 25th February 2025 some eight working days before the hearing. It is hardly surprising that faced with a five page very late costs warning letter, a claimant would need time to seek advice. The claimant said he sought advice from the Tribunal on 25 February 2025 but did not receive a response. He accepted this might have been the wrong course but he had sought advice. Witness statements were only disclosed on 3 March 2025. The factual position remained unclear prior to that and the respondent had advanced no positive case about the reason for the dismissal in the response.

13. As to his means, the claimant said that he had a salary of £128,0000. He has to support a family of four. The claimant's net pay was £5,662.27 pcm, his mortgage was £2,035.79 (interest only), his car loan was £450 and his council

tax £311. He said that he had no disposable income after his other expenses. He had £100 in savings and no assets other than the family home. He could not increase his mortgage. His bank statements showed:

- current account £2,833.18 overdrawn;
- savings account showing a balance of £100.54.

Credit card statements showed liabilities of £14,643.89, £3,257.28, £740.22, and £5,973.49.

14. The respondent made further written submissions. It pointed out that the claimant had resisted the application to strike out his unfair dismissal claim and had failed to provide his earlier emails on request.

15. There were three projects on which he claimed commission although it was apparent that only one was arguable. Two of the projects were not near closure so it was not arguable that commission had come due. In relation to the Amp / Met / Trilogy project the claimant was aware that payment of commission was due in the next pay packet after closure and closure only occurred after the client had paid. He knew that the client had not paid before 14 April 2024 so the claimant would not have received the commission until the end of April 2024, after his dismissal. The contract made clear that the claimant had to be employed at the time commission otherwise came due for the commission to be payable.

16. Following receipt of disclosure or alternatively witness statements, it would have been obvious to the claimant that there was no evidential basis for his assertion that the reason for termination was to avoid paying commission. The bulk of the respondent's disclosure was completed on 27 February 2025 with seven additional documents disclosed on 28 February 2025 and one on 4 March 2025.

17. There were material costs incurred in defending the unfair dismissal claim. The respondent itemised the work involved, which included preparing a strike out application.

18. As to the claimant's means, his bank statement showed some disposable income as money was being spent on a TV subscription and Greggs bakery. Presumably the claimant was receiving commission in his new role since his evidence was that this was normal in roles he undertakes. He could reduce his pension payments to free up some money.

Law

19. The Tribunal Rules enable a represented party in employment tribunal litigation to make an application for a costs order and an unrepresented party to make an application for a preparation time order.

20. The test which the Tribunal must apply is the same in both cases and can be found in Rule 74. The relevant parts of the rule for the purpose of this hearing are 74(2)(a) and (b) which say:

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.

(b) any claim or response had no reasonable prospect of success

21. The Tribunal must consider an application in two stages:

- it must first decide whether the threshold test is met, ie in this case did the claim have no reasonable prospect of success / was the conduct of the proceedings unreasonable?
- if it is satisfied the test has been met, it should then decide if it should exercise its discretion to award costs.

Each case depends on the facts and circumstances of the individual case.

22. Although the 'threshold test' is the same whether a litigant is or is not professionally represented, the decision in AQ Ltd v Holden [2012] IRLR 648, EAT requires the Tribunal to take the status of the litigant into account.

23. The value of a costs order is determined by Rule 76(1) which says, so far as relevant to this application:

"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;

24. Awards are intended to be compensatory, not punitive *(*Lodwick v Southwark London Borough Council [2004] IRLR 554). This means that where costs are claimed because a party has acted unreasonably in conducting a case, the costs awarded should be no more than is proportionate to the loss caused to the receiving party by the unreasonable conduct. In other words, the party is entitled to recover the cost of any extra work that had to be undertaken because of the unreasonable conduct. The causal relationship between the conduct and the costs should not be subject to very minute analysis: Yerrakalva v Barnsley Metropolitan Borough Council and anor 2012 ICR 420, CA.

25. Rule 82 is also relevant. It says:

*"In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal **may** have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.'*

26. Affordability is not as such the sole criterion for the exercise of the discretion and 'a nice estimate of what can be afforded is not essential': Vaughan v London Borough of Lewisham and ors [2013] IRLR 713, EAT. In that case, the claimant was out of work and the questions which were reasonable for the Tribunal to ask were:
- was there a reasonable prospect of the claimant being able, in due course, to return to well-paid employment and thus to be in a position to make a payment of costs?
- if so, what limit ought nevertheless to be placed on her liability to take account of her means and of proportionality?

27. Where a costs application is based on the merits of the case, the Tribunal should take into account what the party knew or ought to have known about the merits of the case. A factor relevant to the exercise of the discretion may be whether there has been any warning of a risk of costs, but such a warning is not a prerequisite to the making of an order; nor is it a prerequisite that the receiving party must have put the paying party on notice of any application.

Conclusions

Unreasonable conduct

28. I considered first whether the claimant had behaved unreasonably in continuing with his unfair dismissal claim and in his response to the requests for a copy of his email to the Tribunal.

29. So far as the continued pursuit of the unfair dismissal claim is concerned, the claimant had had a standard strike out warning from the Tribunal. He had done the correct thing in responding to that warning. It was not his fault that the usual result – a judgment striking out the unfair dismissal claim – did not then follow. The respondent made the point that he could and should have researched the position. It is of course the case that there is a lot of information about employment law on the internet. It is also true that it is a large and complex field. In circumstances where the claimant would reasonably have believed that a judge had considered his correspondence and decided not to strike out his claim, it does not seem to me unreasonable for him not to have withdrawn that claim. Even if he had done some research of his own, he could reasonably have considered that there might be more nuance to the position since a judge had not struck out the claim.

30. As for his further conduct, I noted that, from his perspective, the respondent's solicitors had appeared on the record very close to the hearing and had sent him a costs warning letter which was written so as to suggest that, whatever he now did, he might be subject to an application for extensive costs. Prior to that, he had only the response from which he could glean the respondent's position. In order for there to be an effective trial, the directions now had to be complied with very rapidly and late. It was not the claimant's fault that the respondent had not had access to Tribunal documents.

31. In those circumstances, whilst it seems to me there is some unreasonableness in the claimant not providing the email requested to the respondent, I am not persuaded that it goes anywhere near to approaching the threshold at which a costs order would be appropriate. Over a very short period of time and in the immediate run up to the hearing, the claimant was faced with a respondent who appeared suddenly to have woken up and with a vengeance. He had the costs letter and the applications to strike out and vary directions presented to him at a point when he would have expected to be finalising the preparation for the hearing.

32. Furthermore, given that somewhat chaotic background, it is not clear to me what difference the production of the email would have made to the course of the proceedings or the costs incurred by the respondent.

33. In the circumstances, I do not find the threshold for costs was met. If I am wrong about that, this does not seem to me to be a case in which it is appropriate for me to exercise my discretion in the respondent's favour, particularly bearing in mind that the claimant was a litigant in person preparing for his full merits hearing in circumstances where the fact that significant preparation was having to be done very late was not his fault.

<u>No reasonable prospects</u>

34. Should the claimant have realised that his claims had no reasonable prospects of success at an earlier stage?

35. So far as the unfair dismissal claim is concerned, what I have said about whether the claimant's conduct was unreasonable is essentially another way of looking at the question of whether the claimant should have realised that the claim had no reasonable prospects. For the reasons I have set out above, I do not consider that he should have done.

36. As to the claim for commission, the respondent is correct that the express terms of the contract showed that none of the commission which the claimant claimed had fallen due at the date of his dismissal.

37. However, the claimant was claiming that he was dismissed in order to prevent the commission coming due. There is authority (Takacs) for the proposition that it can be arguable that there is in a particular contract an implied term to the effect that an employer will not dismiss an employee to avoid paying commission.

38. That of course does not of itself show that the claimant had a reasonably arguable claim based on such an implied term. During the hearing, the claimant candidly accepted that the health and safety report which formed the basis of his dismissal was an honest document and that Mr Gregory was entitled to rely on it in deciding to dismiss. I concluded that the correspondence leading up to the dismissal demonstrated that the dismissal was genuinely for the alleged health and safety breaches.

39. Should the claimant have been aware of these matters at an earlier stage and concluded that his dismissal was not effected in order to deprive him of commission? I bear in mind that he was summarily dismissed with no investigation or proper disciplinary process followed. In his claim form, he disputed the reasons he understood to have been put forward at the meeting at which he was dismissed. The respondent did not set out any substantive case as to why the claimant was dismissed in its response. The claimant would not have known what its case looked like until he received the documents and witness statements very shortly before the full merits hearing.

40. It therefore seems to me that it is difficult to say that there should have come a point in the rush before the hearing when the claimant could and should have looked with a cold eye at his prospects and realised they were not reasonable ones. If I am wrong about, the circumstances, including a costs letter which threatened him with substantial costs whatever course of action he took, seem to me to be such that it would not be appropriate to exercise my discretion to award costs against the claimant.

41. Had I been minded to award costs, the claimant's means, in particular what I accept is a lack of disposable income or ready capital, would have had a significant effect on the amount of any award.

Employment Judge Joffe

Date: 28 May 2025

Sent to the parties on:

29 May 2025

…….
For the Tribunal Office: