



EMPLOYMENT TRIBUNALS

Claimant: Mr Andrew Moleta

Respondent: Little Fair Nursing Home Ltd

Before: Employment Judge R F Powell

**27th January
2025**

JUDGMENT

The judgment of the Employment Tribunal is:

- 1. The respondent's application to strike out the claim had no reasonable prospect of success.**
- 2. It is just and equitable to order the respondent to pay to the claimant an amount, yet to be determined, with respect to the claimed legal costs and preparation time order.**

REASONS

1. By an application dated the 15th December 2023 the claimant in these proceedings sought orders pursuant to Rule 76(1)(b) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013.
2. Those orders are in respect of an application by the respondent to strike out the claimant's case because, as the respondent pleaded, the claimant was neither a worker or an employee at any material time and, the claim had been presented out of time.

3. The respondent's applications were heard at Preliminary Hearing, and dismissed following a two-day hearing in July 2022 and deliberations in chambers in August 2022). I found that the claim was within the tribunal's jurisdiction in all respects.
4. Judgment with reasons was promulgated in October 2022 and I understand the case is listed for a final hearing in October 2025.
5. The current application was referred to me in 2024 and I was, due to an extended period of absence, unable to attend to the matter until my return.
6. Whilst the substantive claim is on-going, I have been informed by the tribunal staff that the respondent has not replied to tribunal correspondence on this issue at all.
7. In particular when I invited the parties to indicate if they would be content for this application to be considered and determined on the papers the claimant agreed and the respondent did not comment.
8. In light of the above, I have decided to determine the merits, and any quantum, based on the papers before me which include my original judgment and documents which were before me in July and August 2022. Those documents exceeded 2,000 pages. 1,600 of which were received from the claimant, and about 450 (including late additions provided by Ms Johns, of counsel for the respondent).
9. I read four witness statements and I note that I found neither Mr Moreta nor Mr Sherard, the owner of the respondent, to be persuasive witnesses. Consequently, the content of the contemporary documentary evidence was the primary foundation of my decision making.
10. I also note that my reasons refer to the relevant documents in some detail and the cumulative number of those relevant documents amounted to a small proportion of the 2,000 pages produced.

The Claimant's Application

11. The claimant asserts that the contemporary documentary evidence, which was not disputed by the respondent, was wholly consistent with the claimant's assertion of employment/worker status and quite contrary to the respondent's denial of the same.

The basis of the claimant's argument was set out in the written submissions of counsel, Mr Howells. The respondent has not submitted any response or counter argument.

12. I will give an example from the reasons in my September 2022 judgment:

29. "Pertinent to the issue before me, Mr Sherard's comments of the 3rd October 2019 included the following [c449]:

"AM role - since Lily's passing Nick has appointed Andrew as COO and he will take direction from Nick but will be operating the business on the front line and will be looking at how we can improve the entire services, reduce waste, eradicate agency, fill the capacity of the Home and provide a dynamic and rewarding experience for all in the Home. Our exciting plans will be announced soon."

30. The above contemporary document, approved by Mr Sherard, fundamentally contradicts Mr Sherard's evidence before me.

31. A variant of the above text was published to staff and residents in a newsletter dated 10th October 2019; it referred to Mr Moleta; as:

"coming on board full time as our Chief Operating officer and will effectively be our manager until we recruit a new home manager" [c 502].

32. It further appears that Mr Moleta was described as the respondent's chief operating officer to the Care Quality Commission's inspectors and as part of the respondent's management [c 642] in early December 2019."

...

35. I also record that the emails from Mr Sherard in the period 16th December 2019 to and 10th January 2019 refer to Mr Moleta *"stepping down from his COO role"*, *"continuing in a new role akin to a non-executive director"*, *"potential transitioning to an advisory role"* and suggesting Mr Moleta removed himself from the respondent's pay roll.

36. The same correspondence also refers to Mr Moleta's; *"salary starting on 1st November 2019"* [c 614]."

13. The above is indicative of the degree to which the respondent's assertions that the claimant was not *"involved"* in the respondent's business was quite untenable in the context of the contemporary documentation which was either drafted, or approved by Mr Sherard; the sole shareholder and owner of the respondent.

14. The documents which were indicative of employment were equally compelling.

15. The respondent had pleaded the 19th December as the effective date of termination, but had not considered the effect of section 86(1) of the Employment Rights Act 1996, which in the absence of summary dismissal, would have entailed one week's statutory notice. Summary dismissal was not argued, or established, by the respondent.

16. Consequently, on the respondent's own position, the effect of section 86(1) meant that the claim had been presented within the time frame set out in section 111 ERA.

The Law

17. Mr Howell's written argument summarised the relevant legal matrix and I will not repeat that summary but I will note the following:

18. The power to award costs by the Employment Tribunal is contained within the Employment Tribunals Rules of Procedure Regulations 2013. Rule 76 specifically deals with the grounds for which a costs order can be made. Rule 78 deals with the 'amount' of a costs order and Rule 84 deals with the 'ability' of the paying party to pay a costs order.

19. Under Rule 76 (1) "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”.

20. Under Rule 78(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; (b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles

...”

21. Under Rule 84, 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.

22. In terms of general principles, I have reminded myself the following:

a. costs are the exception, not the rule;

b. costs are designed to compensate the receiving party for costs unreasonably incurred, not to punish the paying party for bringing an unreasonable case, or for conducting it unreasonably.

c. I should follow a three -stage process: first, I should decide whether the threshold in Rule 76 had been crossed. Secondly, I should then consider, as an exercise of my discretion, whether that conduct merited a costs order; it was not automatic that because I had the power, I should exercise it.

d. If I decided to make a costs order, I should consider the appropriate amount of costs incurred by the claimant in resisting the respondent’s applications.

Analysis

23. I first consider the effective date of termination. I consider the matters set out in my earlier judgment which are summarised above.

24. In addition, I note that Mr Howell’s written submission refers to the respondent’s account given to his insurers; that the dismissal of the claimant probably occurred around the 20th December. That is consistent with paragraph 25 of Mr Sherard’s witness statement (paragraph 105 of the 2022 judgment & reasons).

25. I also took into account that the respondent was represented by specialist and respected counsel, at the preliminary hearing.

26. From the above, I have concluded that the respondent was, or should have been, aware that its assertion, in Mr Sherard’s evidence, of dismissal on the 19th December 2019 was untenable because, the respondent knew, or should reasonably have been aware of the

effect of section 86(1) ERA and, in my judgment, the respondent knew that Mr Sherard's communications with the claimant on 19th December were deliberately unclear.

27. In the above circumstances, to argue and give evidence that the dismissal occurred before the 20th December had no reasonable prospect of success.

28. With regard to the claimant's status as worker or employee, the respondent's own documents demonstrated both the terms nature of the claimant's engagement. The written communications to staff and the respondent's regulator stated that the claimant was an integral, and senior officer with responsibility for managing the respondent's staff and the performance of the respondent's business. The respondent, through Mr Sherard, was the author and source of the documentary evidence which demonstrated the character of the claimant's working relationship with the respondent and his terms of employment.

29. By reason of the above, I have concluded that the respondent's application to strike out this aspect of the claim had no reasonable prospect of success.

Should the respondent be ordered to pay to the claimant any amount in respect of the claimed costs and preparation time orders?

30. I first note that the relevant rules include the following:

"A costs order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings. A tribunal may, if it wishes, decide in the course of the proceedings that a party is entitled to one order or the other but defer until a later stage in the proceedings deciding which kind of order to make."

31. The interpretation of the above was addressed in Duhoe v Support Services Group Ltd (In Liquidation) UKEAT/0102/15, at paragraph 23 the EAT stated:

"The Employment Tribunal is therefore not able to make both a costs order and a preparation time order. What is the position if it is faced with applications for both types of order in a case where, as here, the Applicant was represented for part of the time and unrepresented for part of the time? In my judgment, it should not require the Applicant to make a choice about which type of application to pursue. The Applicant is entitled to make both applications. The Employment Tribunal may decide the question of entitlement to each order and then decide which type of order to make."

32. The claimant's schedule of costs distinguishes the amounts sought by reference to the work done as a litigant in person from the costs incurred whilst instructing professional legal advisors.

33. In principle both may be awarded in this case.

34. The Respondent has not resisted the claimant's application nor asserted that it cannot afford to comply with an order in the claimant's favour.

35. In light of the reasons set out in the 2022 judgment and that which is set out above, I consider it just, and in accordance with the tribunal's overriding objective, to require the respondent to pay an amount in respect of the claimed sums.

The Quantum of Costs

36. The Claimant's schedule of cost relating to the two day preliminary hearing exceeds £13,000.00. This is an unusually large sum. It includes 158 hours of preparation by the claimant and £3,350.00 spent on legal advice. There is a further £900.00 in respect of this application.

37. I have some concerns about the relevance of a proportion of the documents before me at the preliminary hearing and it is unclear to me how the legal fees are all related to the respondent's strike out application.

38. On the information before me I am not able to deal with the quantum of costs in a just and fair manner. Consequently, I have set out directions in a separate order for an inter partes hearing, to be held via video format.

Employment Judge R F Powell

Dated: 29th January 2025

Judgment sent to parties on:

3rd February 2025

For the Tribunal Office