



EMPLOYMENT TRIBUNALS

Claimant: Mr P Marshall

Respondent: Your Homes Newcastle Limited

Heard at: Newcastle CFCTC (on the papers) **On:** 29 June 2022

Before: Employment Judge Arullendran

JUDGMENT ON COSTS

The Judgment of the Employment Tribunal is that the respondent's application for an Order for Costs against the claimant is not well founded and is dismissed.

REASONS

1. This hearing was conducted on the papers with the consent of the claimant and respondent and I have taken into account the written representations made on behalf of both sides.
2. Following the Judgment on withdrawal by this Tribunal of the claims made by the claimant against the respondent, which was promulgated on 9 March 2022, the respondent made an application, by email dated 10 May 2022, to the Employment Tribunal for an Order for Costs against the claimant. The application for a Costs Order was made pursuant to Rule 76 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, Schedule 1 ("the Rules").
3. The respondent's application for costs is made on the following basis:
 - a. that the claimant acted unreasonably in the bringing of proceedings and the way the proceedings have been conducted in that he failed to take any legal advice despite being urged on two separate occasions given the time limit issues and breach of contract issues and in withdrawing his claim around one year and four months after it had been issued for no good reason - Rule 76 (1) (a) of the Rules;
 - b. the claimant's claims had no reasonable prospect of success because the claimant was still employed by the respondent but brought a breach of contract

claim disguised as an unlawful deduction from wages claim which was both hopeless and out of time - Rule 76(1)(b) of the Tribunal Rules;

- c. that multiple hearings have been postponed or adjourned on the application of the claimant made less than seven days before the date on which the hearings began – Rule 76(1) (c).

The Facts

4. The claimant submitted his claim to the Employment Tribunal on 7 December 2020 stating that he was owed holiday pay by the respondent. The basis of the claim, as set out at box 8.2 of the ET1 form, was that the claimant's contract of employment stated he was entitled to 8 bank holidays each year and that the respondent had subsequently advised him that this was incorrect and that he was only entitled to 5.5 bank holidays each year.
5. A telephone case management hearing was conducted by Employment Judge Green on 18 March 2021. The case management order records that there was a potential time bar issue which would have to be determined at the final hearing because the claimant did not know the date of the last bank holiday he was claiming payment for prior to submitting his claim to the Tribunal. The case management order also records that the respondent stated that the changes to the calculation was not due to come into effect until 1 April 2021 and therefore no losses had been incurred and the claim had been presented prematurely.
6. A further telephone case management hearing took place in front of the Employment Judge Morris on 18 May 2021. It is recorded in the case summary that there were two claims, firstly a claim in respect of the reduction in the number of bank holidays awarded and secondly an underpayment of holidays going back for a period of two years calculated at the rate of eight days per annum. However, I note that the claimant's ET1 form does not say that he was making a claim for an underpayment of holiday entitlement in addition to the claim for the reduction in bank holidays. At paragraph 34 of the case management order dated 18 March 2021, the Employment Judge has recorded that he was claiming an underpayment of holidays for two years but it appears that the underpayment relates to bank holidays in the way it has been expressed by the Judge. I note that there was no application to amend the claimant's claim and the reason why a second telephone case management hearing took place on 18 May 2021 was because two further claimants had bought claims against the respondent and they were combined with the claimant's claim
7. On 26 May 2021 the respondent provided further information, as ordered by the Tribunal. At paragraph 11 of that further information, the respondent stated that the disputed updated formula for calculating the claimant's entitlement to bank holidays would take effect from 1 April 2021 and that the claimant had not suffered any losses as a result. The claimant disagreed with the respondent's position, as set out in his email dated 29 May 2021.
8. A final hearing was listed to take place on 19 July 2021. This hearing was adjourned to a later date. The case management order from the hearing of 19 July 2021 records at paragraph 9 that it seemed unlikely any deductions will have been made from the claimant's wages prior to that hearing and, although the claim appears to have been issued prematurely, the Employment Judge was not minded to dismiss that element of the claim as the claimant would have to re-issue new proceedings. The Judge decided

to adjourn the hearing to the following year and make case management orders in order to try and achieve some clarity as to the specific amount and the relevant date of holidays between 2018 and 2021 as there was still a lack of clarity about the claim.

9. Employment Judge Martin set out at paragraph 10 of the case management order from 19 July 2021 that the second issue about the underpayment of holidays had not been properly pleaded by the claimant. She notes that such a claim could not be pursued as a claim of breach of contract in the Employment Tribunal as we do not have jurisdiction to hear such a claim where the claimant is still employed by the respondent. It could be pursued as a deduction from wages claim, although I note that Judge Martin did not order that the claimant had to make a formal application to amend his claim. Judge Martin noted that none of the three claimants had set out the details of how they calculated their claims of unauthorised deduction of wages and this information was not in any of their witness statement.
10. Employment Judge Martin has stated in paragraph 12 of her case management order from 19 July 2021 that she urged the claimant to take advice and that the hearing was adjourned to take place after the current holiday year had come to an end, giving the claimants time to further particularise their wages claims.
11. The adjourned hearing was reconvened on 24 January 2022 and the respondent sent a list of issues to the claimant on 23 January 2022 (around 3 months after it had been ordered). The first issue is listed as whether change to annual leave and bank holiday entitlement constituted a deduction of wages, with the respondent's contention that holiday entitlement did not constitute wages and ought to be brought in a breach of contract claim in the civil jurisdiction. Issue number four is whether the claims were brought in time and the respondent's contention was that there was more than a three-month gap between the holidays taken and that the earlier holiday claims were out of time.
12. The hearing of 24 January 2022 was adjourned and re-listed to be heard on 9 March 2022. The reasons why the case could not proceed, as recorded by Employment Judge Martin, were that the respondent had not provided hard copies of the supplemental bundle or the additional documents relied upon by the respondent and the claimant did not have electronic access to be able to view those documents on a second screen. Further, there had been a failure to agree the list of issues, as ordered on 19 July 2021, and the claimant's had not been able to access the electronic copy of the list of issues which had only been sent the previous evening.
13. At paragraph 4 of the case management order from 24 January 2022 Employment Judge Martin records that it had been previously been outlined to the claimants that they were pursuing claims of unlawful deduction from wages, not for breach of contract or a claim of holiday pay under the Working Time Regulations. At paragraph 5, Employment Judge Martin set out that a discussion took place about whether the claimants were pursuing their claims in the wrong jurisdiction and that the claims appeared to be about contractual

issues which should be pursued in the County Court. A copy of that case management order was sent to the claimant on 28 February 2022.

14. The final hearing took place on 9 March 2022. Prior to this hearing, the respondent had made an application to strike out the claimant's claim 16 February 2022. At the beginning of the hearing on 9 March 2022 I explained to the claimant that if his claim was struck out he would not be entitled to issue the claim in the County Court and, if the claim was not struck out but he was unhappy with the outcome of the substantive hearing, he would not be entitled to issue a claim in County Court on the grounds of estoppel. The claimant decided at that hearing to withdraw his claim from the Employment Tribunal on the basis that he intended to issue proceedings in the County Court. I issued an Unless Order dated 9 March 2022 that the claimant's claims would be dismissed unless he wrote to the Tribunal by 4 May 2022 to confirm that he had issued proceedings in the County Court. The reason for the unless order was that the respondent told me that the claimant had been told on more than one occasion by other Employment Judges that he appeared to be pursuing his claim in the wrong forum, that the claimant had failed to take legal advice and had failed to issue proceedings in the County Court despite the indications made by other Judges that in this should be done.
15. The claimant told me on 9 March 2022 that he was not aware that there were different courts and that it was the Tribunal which was at fault and that we had allocated his claim to the Employment Tribunal rather than the County Court. The claimant said that he had sought legal advice from Citizens Advice in the past on several occasions but that it was only on the telephone and that he did not have access to a trade union or any other legal advice, however he said he would obtain further legal advice from Citizens Advice with a view to issuing proceedings in the County Court.

Submissions

16. The respondent made its application for a costs order on 10 May 2022 which was more than 28 days after the judgement on withdrawal had been promulgated, however the respondent applied to extend the time limit under Rule 5 on the basis that it had waited until the expiry of the time limit for the Unless Order before making its application for costs and in order to assist the parties to enter into negotiations.
17. The claimant's claims were dismissed automatically by the Tribunal because the claimant did not comply with the terms of the Unless order.
18. The claimant objects to the application for costs on the grounds that he did take legal advice before submitting his claims and that it was the Court which decided which Court his claim should be heard in, rather than the claimant. The claimant submits that he withdrew his claim because he was advised it was in the wrong Court and that it was not for "no reason" as suggested by the respondent. The claimant submits that he has never been responsible for any of the postponements and he has not sought to waste anybody's time.
19. The claimant says he has a monthly income of £1920 and monthly outgoings of approximately £766, although he has failed to provide copies of his bank statements and payslips, as ordered.

20. The respondent is claiming counsel's costs for advice, drafting in conference and the sum of £1800, fees for preparing and attending the hearing on 19 July 2021 in the sum of £600, fees for preparing and attending the hearing on 24 January 2022 in the sum of £600 and fees for preparing and attending the final hearing on 9 March 2022 in the sum of £400. The total claimed by the respondent is £3400.

The Law

21. I refer myself to Rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1, which provides "(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 the proceedings (or part) have been conducted; or

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

(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins."

22. Rule 77 of the Rules states:

"A party may apply for a costs order or a preparation time 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."

23. Rule 78 of the Rules states:

"(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; or, in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment and Further Provisions) 1993, or by an Employment Judge applying the same principles;

(c) order the paying party to pay the receiving party a specified amount as reimbursement of all or part of a Tribunal fee paid by the receiving party;

- (d) order the paying party to pay another party or a witness, as appropriate, a specified amount in respect of necessary and reasonably incurred expenses (of the kind described in rule 75(1)(c)); or
 - (e) if the paying party and the receiving party agree as to the amount payable, be made in that amount.
- (2). Where the costs order includes an amount in respect of fees charged by a lay representative, for the purposes of the calculation of the order, the hourly rate applicable for the fees of the lay representative shall be no higher than the rate under rule 79(2).
- (3). For the avoidance of doubt, the amount of a costs order under subparagraphs (b) to (e) of paragraph (1) may exceed £20,000.”

24. Rule 84 of the Rules states:

“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.”

25. The Respondent makes no reference to the relevant caselaw in their application, however I refer myself to the guidance given in ***Gee -v- Shell UK Ltd [2002] IRLR 82*** it was stated that the first principle is that costs in the Employment Tribunal is still the exception rather than the rule.

26. In terms of the procedure to be adopted by this Tribunal, a two-stage process was set out in the case of ***Kriddle -v- Epcott Leisure Limited [2005] EAT/0275/05***: (i) A finding of unreasonable conduct and, separately (ii) the exercise of discretion in making of an Order for Costs. This two-stage procedure also applies to applications made under Rule 76(i)(b) on the grounds of no reasonable prospect of success. The EAT in ***Milan -v- Capsticks Solicitors LLP & Others UKEAT/0093/14/RN*** set out a structured approach to be taken in relation to an application for costs where the then President of the EAT, Langstaff J, described the exercise to be undertaken by the Tribunal as a 3-stage exercise at paragraphs 52:

“There are thus three stages to the process of determining upon a costs order in a particular amount. First, the tribunal must be of the opinion that the paying party has behaved in a manner referred to in [Rule 76]; but if of that opinion, does not have to make a costs order. It has still to decide whether, as a second stage, it is “appropriate” to do so. In reaching that decision it may take account of the ability of the paying party to pay. Having decided that there should be a costs order in some amount, the third stage is to determine what that amount should be. Here, covered by Rule [78], the tribunal has the option of ordering the paying party to pay an amount to be determined by way of detailed assessment in a county court.”

27. In the case of ***Barnsley Metropolitan Borough Council -v- Yerrakalva*** [2001] EWCA Civ 1255 guidance was given on the question of causation and I refer myself specifically to paragraphs 40 to 42 of that Judgment in which it was decided that the vital point in exercising the discretion to order costs was to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the Claimant in bringing and conducting the case and in doing so to identify the conduct, what was unreasonable about it and what effects it had. There is no requirement for the Tribunal to determine whether there is a precise causal link between the unreasonable conduct in question and the specific costs being claimed, but that did not mean causation is irrelevant.
28. In ***AQ Ltd -v- Holden*** UKEAT/0021/12/CEA His Honour Judge Richardson stated that a Tribunal cannot and should not judge a litigant in person by the standards of a professional representative. Justice requires that Tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life. Tribunals must bear this in mind when assessing the threshold tests. Even if the threshold tests for an order for costs are met, the Tribunal must exercise its discretion having regard to all the circumstances and it is not irrelevant that a lay person may have brought proceedings with little or no access to specialist help or advice. However, the Respondent highlighted paragraph 33 of Holden in which Judge Richardson says:
- “This is not to say that lay people are immune from orders for costs: far from it, as the cases make clear. Some litigants in person are found to have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity.”
29. In ***McPherson -v- BNP Paribas*** [2004] EWCA Civ 569 Mummery LJ stated:
- “[40] ... The principle of relevance means that the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion, but that is not the same as requiring BNP Paribas to prove that specific unreasonable conduct by Mr McPherson caused particular costs to be incurred.”
30. It was held in ***Dyer -v- Secretary of State for Employment*** UKEAT/0183/83 that the question of whether conduct is unreasonable is a matter of fact for the Tribunal to decide. Unreasonableness has its ordinary meaning.
31. I refer myself to the case of ***Mahler -v- Robertson*** [1974] ICR 72 in which it was held that the definition of a hopeless claim is where an employee brings a claim not with the expectation of recovering compensation, but out of spite to harass the employer or over some improper motive. I note that this is a serious finding to make against an applicant, where it would generally involve bad faith on his or her part and one would expect that discretion to be sparingly exercised.
32. In ***Lodwick -v- Southwark London Borough Council*** 2004 ICR 884, CA, the Court of Appeal determined that at both stages of the Tribunal’s discretion to make a costs award, the fundamental principle that costs awards are compensatory not punitive, must be observed.

33. I refer myself to the case of *Esziias -v- North Glamorgan NHS Trust [2007]* in which an example was given of a case which would have no reasonable prospect of success where “the facts ought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation”.

34. Paragraph 37 of *Arrowsmith -v- Nottingham Trent University [2012] ICR 159* states:

“...[T]he tribunal had regard to Ms Arrowsmith’s means, although ... it was not in fact obliged to do so... Ms Arrowsmith’s ability to pay was apparently extremely limited... and the tribunal had regard to that by making an order for the payment of a sum that, in comparison with the likely amount of costs that Nottingham would recover on an assessment, was probably little more than a token contribution... The fact that her ability to pay was so limited did not, however, require the tribunal to assess a sum that was confined to an amount that she could pay. Her circumstances may well improve and no doubt she hopes that they will.”

Conclusions

35. I accept the respondent’s submissions about the time limit for making the application for a costs order and I exercise my discretion under Rule 5 of The Rules to extend time in this case in respect of the respondent’s application for costs. It is entirely just to allow this extension of time given that the respondent entered into negotiations with the claimant and waited until the expiry of the time limit for the claimant to comply with the Unless Order before making its application for costs.

36. The Claimant was not professionally represented throughout the Tribunal process and I accept that he did make efforts to obtain advice and assistance from Citizens Advice on at least one occasion, if not more, throughout the proceedings.

37. I shall take the grounds for the costs order in reverse order from those set out in the respondent’s application.

38. I find that there was no application by either party to postpone or adjourn any of the hearings which have taken place. Each of the adjournments was initiated by the Employment Judge because the parties were not ready to proceed with the final hearing. In July 2021 Judge Martin noted that the claimant’s claims were not sufficiently pleaded and she made orders for further information to be provided by both sides and for a list of issues to be agreed by 18 October 2021. The list of issues was not agreed and was only sent by the respondent to the claimant on 23 January 2022, which was the day before the final hearing was due to take place on 24 January 2022. The claimant was unable to access the list of issues and had not been provided with a hard copy of the hearing bundle by the respondent and this led to a further adjournment on 24 January 2022. In all the circumstances, I have no hesitation in finding that the claimant was not responsible for any of these hearings being adjourned and there is no evidence that an application for an adjournment was made less than seven days before each of the hearings. Therefore, the respondent’s application for costs in respect of each of the adjourned hearings on 19 July 2021 and 24 January 2022 is not well founded and is dismissed.

39. With regard to the respondent's assertion that the claimant claims had no reasonable prospect of success, I note that there is a great deal of difference between a claim being utterly hopeless or having no basis in law as compared to one which may be arguable but is plagued by evidential difficulties. I note that Employment Judge Green, Employment Judge Morris and Employment Judge Martin have not stated in any of the orders they made that the claimant's claims had little or no reasonable prospect of success. The respondent has argued that the claimant had issued his claims prematurely and/or they had been issued in the wrong forum. However, I note that Judge Martin adjourned the hearing from July 2021 to January 2022 specifically so that evidence could be adduced by the claimant in respect of any losses incurred by him during the relevant holiday year. There was also an argument by the claimant that he had been subject to an underpayment of holiday pay for a period of two years, which, on the face of it, is a claim that this Tribunal has jurisdiction to hear. Whilst I accept that there is a chance that the claimant would not have been successful with his claims in the Employment Tribunal, because of the specific nature of the statutory framework and because breach of contract claims cannot be brought in the Employment Tribunal whilst an employee is still employed by the same employer, that is not the same as saying that the claims were totally hopeless or that they were brought under some improper motive or that they had no reasonable prospect of success, taking the pleadings at their highest. In light of this finding, I find that the respondent's application for costs in respect of the claimant's claim is having no reasonable prospect of success is not well founded and it is dismissed.
40. With regard to the conduct of the proceedings, the question is whether the claimant acted unreasonably either the bringing of the proceedings or the way that the proceedings have been conducted. The respondent argues that claimant failed to take legal advice about his claims despite been urged on two separate occasions to do so. The respondent argues that the claimant should have taken advice about time limits and the forum in which the breach of contract claim should have been issued. The respondent further argues that the claimant withdrew his claim for no good reason.
41. Dealing with the withdrawal of the claims from the Employment Tribunal, I find that the claimant had reasons for withdrawing the claim once I had explained that he could not issue in the County Court if his claims were either struck out or dismissed in the Tribunal. It is unclear from case management orders I have seen whether this was explained to the claimant in such clear terms prior to the final hearing. The respondent has not challenged the claimant's assertion that he did seek advice from Citizens Advice on at least one occasion, in fact they refer to the claimant having sought such advice and reporting to Judge Martin on 24 January 2022 that Citizens Advice could not help him. I remind myself of the guidance given in the case of **Holden**, above, in that I should not judge a litigant in person by the standards of the professional representative. The claimant is quite wrong in his assertion that it was the Tribunal who decided to accept his claim in this forum as it is not for this Tribunal to pass his claim on to the County Court. The claimant should have issued his claim for breach of contract in the County Court, as he has now done. It was the claimant's choice to issue his claim in the Employment Tribunal. However, I accept that the claimant had limited access to advice and assistance and he could only access telephone advice from Citizens Advice. I further understand that the technical issues about the choice of forum and correct forum in different types of claims might not be something that the claimant could not readily

access advice about on the telephone or through the Internet. Whilst a professional representative may understand that existing employees have to bring breach of contract claims in the civil jurisdiction, I cannot expect a litigant in person to have the same level of understanding or to be able to access the kind of specialist legal advice required to generate such an understanding. In all the circumstances, although I accept the respondent's frustration in the length of time and costs incurred in these proceedings, judging the claimant as a litigant in person I find that he has not acted unreasonably in either bringing the proceedings or in the way the proceedings have been conducted. Further, the respondent has not helped the situation by making an application to strike out the claimant's claims very late in the day when it may have assisted the parties and the Tribunal if that application had been made at a much earlier stage in the proceedings. Therefore, the respondent's application for costs on the grounds of unreasonable conduct by the claimant is not well founded and is dismissed.

Employment Judge Arullendran

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON
29 June 2022**

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