



THE EMPLOYMENT TRIBUNALS

Claimant Mr J Hobson
Respondent First Rail Holdings Limited
Heard at Newcastle upon Tyne by CVP video **On** 15 December 2023
Before Employment Judge Langridge

Representation:

Claimant In person
Respondent Mr G Airey, solicitor

JUDGMENT

The respondent's application that the claimant pay its costs under Rule 76(1) is refused.

REASONS

Introduction

1. At a Public Preliminary Hearing on 27 July 2022 the claimant's claim was struck out under Rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013, on the grounds that it had no reasonable prospect of success. The judgment was based on that that ground alone, not on the ground that the claimant had conducted the proceedings in an unreasonable manner; nor for non-compliance with the Tribunal's orders. In my reasons for striking out the claim, I did express

some reservations about the future conduct of the claim, had it been allowed to proceed. After the judgment and reasons were sent to the parties, the respondent applied for an order for payment of its costs under Rule 76(1).

Costs application

2. In its application dated 31 August the respondent relied on that fact that the claimant's claim had had no reasonable prospect of success, and alleged that it was misconceived and vexatious. The respondent said it had made its position clear in the Response to the claim, where it also warned the claimant that it may seek payment of its legal costs. That costs warning was later repeated in correspondence from the respondent's solicitor to the claimant. The respondent submitted at the costs hearing that the claimant wilfully disregarded these warnings, and had declined to seek legal advice on the issues.
3. The application further relied on the claimant's production of multiple versions of the Further Information which the Tribunal had ordered he produce in order to clarify his claim, and multiple versions of the agenda for the previous Preliminary Hearing. The respondent characterised this as vexatious, disruptive and unreasonable conduct, which put it to additional costs.
4. In his brief response to the costs application dated 2 October, the claimant asserted that he had had a genuine belief in the merits of his claim, and that he had understood costs would not be payable unless he pursued a hopeless argument. He raised the potential hardship to him if an order were made, though this was not pursued by the time of the costs hearing on 15 December.
5. In correspondence before the costs hearing the respondent sought to amend its application to include VAT on its legal costs, but accepted the Tribunal's response indicating that this was not recoverable as the respondent is VAT-registered and able to reclaim that sum. A schedule of the costs sought was provided to the claimant and the Tribunal in advance of the hearing. The total claimed amounted to £4,260, representing a reduction on the costs actually incurred by the respondent.
6. I directed that the costs application be dealt with at a hearing in order to obtain better information about the issues. The parties were reminded that costs are awarded by Employment Tribunals only rarely, as the starting point is that this is a costs-free jurisdiction. That said, the threshold for considering making a costs order had been met, in that the claimant's claim had been held to have no reasonable prospects of success, and so the application required consideration.

Costs hearing

7. At the hearing on 15 December I heard submissions from both parties. For the respondent, Mr Airey referred to the grounds in his application as summarised above, namely that the claim had no reasonable prospects of success, and the claimant had not heeded the costs warnings sent to him. The conduct relied upon as being vexatious, disruptive and unreasonable was the fact of bringing the claim coupled with the unnecessary creation of multiple versions of documents. He

mentioned the fact that the claimant had sought in his claim form to recover around £341,000 in losses despite being employed by the respondent for less than three months. The Tribunal had made efforts to have the claimant clarify and simplify his allegations but this had not been done. This had necessitated a Preliminary Hearing.

8. The claimant responded briefly to say that he had genuinely believed in his case that the respondent had failed to apply a “relevant framework” to his employment, and had dismissed him without complying with ACAS guidelines. Although he now accepts that his belief must have been mistaken, he did not know that at the time. As an unrepresented claimant he did not understand the legal issues or the processes to be followed, such as the drafting of an agreed agenda.
9. In response to questions from me, the claimant said he had done some research in relation to his claim, but had not taken legal advice. The respondent's failure to adhere to the ACAS Code had been a factor in his decision to make a claim. When asked, he had tried to explain his rationale. In relation to hardship, the claimant confirmed (having been directed to produce evidence of financial means if he wished that to be considered) that this was no longer an issue.

Conclusions

10. It is well understood that costs are generally not payable in Employment Tribunal claims, and such orders will be made against an unsuccessful party only in the limited circumstances prescribed by Rule 76(1):
 - (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; 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.*
11. In this case the respondent relied on Rule 76(1)(a) and (b). There is no doubt that the claim to have been unfairly dismissed for making a protected disclosure was unclear, unarticulated and insufficient to be allowed to proceed. The claimant's arguments about the “relevant framework” did not meet any of the statutory requirements of the Employment Rights Act 1996. The claim warranted being struck out under Rule 37(1)(a) because it had no reasonable prospect of success. However, that was the only ground upon which that decision was reached.

12. Having reached that conclusion, it was clear that the threshold for considering a costs order was met. It was therefore necessary for that question to be considered before exercising my discretion one way or another.
13. When making the decision to strike out, I did not feel there was sufficient evidence of the proceedings being conducted in an unreasonable manner. My expression of sympathy for that argument (under Rule 37(1)(b)) related to the possibility that the excessive production of amended documents might have on the future conduct of the claim, had it been allowed to proceed.
14. Following *Solomon v University of Hertfordshire UKEAT/0258/181*, it is not for me to substitute my own view for the claimant's decision to bring and proceed with his claim, but rather to review that decision and consider whether it was '*vexatious, abusive, disruptive or otherwise unreasonable*' such as to engage Rule 76(1)(a) in making a costs order. It is also important to look at the whole picture in weighing the discretion to order costs, to identify any unreasonable conduct and what effect it had – *Barnsley MBC v Yerrakalva [2012] IRLR 78*.
15. Where a claim has no reasonable prospect of success, the Tribunal must first consider whether that was the case when the claim began, and then consider whether the claimant knew (or ought reasonably to have known) that this was the case. Having directed that a hearing take place, I had the benefit of evaluating the claimant's explanations for bringing and pursuing his claim, and was satisfied that his belief in its merits was genuine even though mistaken. I saw nothing in the information before me which supported the argument that the claimant had acted vexatiously, abusively or disruptively. The essence of the concern here was about the reasonableness of the claimant's conduct, coupled with the reasonableness of the claim's prospects of success.
16. That the claim had no reasonable prospect of success was not clear to the claimant until the lengthy discussion at the Preliminary Hearing on 27 July 2022. Indeed, that is one of the purposes of holding such a hearing, as it is not uncommon for unrepresented parties to have little appreciation of the legal basis for their claims, or how to express them. It is part of the function of the Tribunal to assist both parties at a Preliminary Hearing to clarify their positions, and that review at the 27 July hearing was carried out.
17. The respondent complains that the Preliminary Hearing was necessary, but this would be inevitable where its objective was to have the claim struck out. That outcome was achieved for the respondent.
18. I have also considered the fact that the respondent's solicitors warned the claimant in writing, from the outset, that they may seek payment of their costs. Such warnings are not uncommon, though they can be overused. A claimant without access to legal advice cannot necessarily be expected to know whether that warning is fair, or – as the claimant saw it here – a litigation tactic. I am unable to conclude that the claimant ought to have known that his claim had no reasonable prospect of success. Access to legal advice is not realistically available to unrepresented claimants, not least for reasons of cost, and in this case the

claimant had been unemployed for some time before and after his short employment with the respondent.

19. For these reasons, I refuse the respondent's application.

Employment Judge Langridge

9 February 2023