



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr David Hosier

v

Tape Specialities Ltd

Heard at:

Watford

On: 21 October 2022

Before:

Employment Judge Forde

Appearances

For the Claimant: Miss Urqhart, Counsel

For the Respondent: Mr O'Dempsey, Counsel

RESERVED COSTS JUDGEMENT

1. This is a judgement in respect of the respondent's application for costs following the hearing that took place before me on 21 October 2022. At that hearing, the respondent indicated that it intended to make an application for costs. With the agreement of the parties, I reserved the respondent's application for costs to myself and the application to be dealt with on the papers.
2. The respondent's application for costs is set out in a letter dated 27 October 2022 and the respondent pursues the application on two bases, namely under rules 76(1)(a) and (b) of the tribunal's 2013 rules. The application summarises the basis upon which the claimant pursued his claim and points out that the claim provided an updated schedule of loss seeking payment of £131,250.00.
3. In its application the respondent criticises the claimant's conduct during the course of his cross-examination as being evasive, argumentative and unhelpful to the tribunal.
4. The point is made that the hearing of evidence in the claim started and ended with the claimant's evidence. Following the lunchbreak Miss Urquhart on behalf of the claimant informed me that the claimant was withdrawing his claim without hearing from the respondent's evidence.

5. The respondent's application goes on to provide some detail of the nature of the correspondence between the parties prior to the hearing and in which the respondent describes the claimant's tone of correspondence as "unreasonable" and cites reasons as to why it has formed that view of the claimant's correspondence.
6. In summary, the respondent relies on 10 grounds in support of its application for costs which are listed as follows:
 - a. The claimant knew that he had not been conducting relevant duties for the respondent for around 20 years; his cross-examination revealed that he did not know this and his demeanour in cross-examination was one of a person who sought to argue points of interpretation rather than trying to assist the tribunal with information;
 - b. He persisted with the meritless case when he had been presented with the essence (and details) of the respondent's case at a very early stage and drafted his case in light of the presentation of that clear and detailed explanation of the true position;
 - c. He changed his case entirely between his particulars of complaint and his witness statement without telling the respondent or seeking to amend the obviously false claim he was making;
 - d. He was advised throughout and the actions he took must be viewed on the assumption that this advice was competent; for whatever reason he chose not to attend to the advice that must have been given to him in favour of conducting an unreasonable campaign which he must have known would fail;
 - e. He chose not only to ignore the defence which was presented, but also the initial witness statements of the respondent's witnesses (with dealt with the pleaded case);
 - f. His lack of foreshadowing of a change in his case between pleading and witness statement necessitated further statements from the respondent's witnesses;
 - g. He was using the tribunal case as a collateral case to seek to apply pressure to the respondent in other defended actions or potential actions;
 - h. Knowing that he had a meritless case he did not withdraw at any of the points at which a reasonable litigant would have withdrawn, but waited until mid-way through the case to withdraw suddenly.
 - i. He is a man of means any suggestion he could not satisfy an order for costs (if made) will be fanciful. Should any such suggestion be made, the respondent will seek disclosure of relevant documents relating to the claimant's means and his family's means as

appropriate prior to the determination of this application by the tribunal.

- j. This case was plainly brought for commercial reasons, and there is no doubt why the claimant should not have to pay the respondent's costs in light of his conduct and the merits of the case. Should any such matters be relied upon as a matters that is alleged to have any impact on the tribunal's discretion, the respondent will reply to these.
7. The respondent goes on to detail that as a direct consequence of the claimant's actions the respondent has incurred considerable legal costs.
8. The claimant's response to the respondent's application is set out in Machin's letter to the tribunal dated 24 November 2022. That response is in large part an attempt to relitigate a matter which has already been determined against the claimant by way of his withdrawal of the claim. The response contains a detailed factual rebuttal of the respondent's proposition that it must have been known to the claimant that the claim that he was pursuing lacked merit. And in so doing, appears to present evidence of the relationship between the parties and a justification for the instigation of the claim. The response goes on to deny the application for costs on the basis that the claim was at least arguable and therefore it should follow that the claim had "some prospects of success".

Findings of Fact

9. It is my finding that the claim was entirely misconceived. I make this finding solely on the basis of what I witnessed first had during the course of the hearing before me. While I do not necessarily agree with the entirety of the criticisms levelled at the claimant by the respondent in support of this application, it was nonetheless manifestly obvious to me that the claimant was either incapable of supporting his claim by oral evidence or that he was evasive to the point that he simply chose not to. It is a matter of some regret that I find myself writing about a party in such terms but the application does require me to address the claimant's wholesale inability to grapple with the fundamental evidential tenets of his claim. His inability to respond with any relevant detail to questions relating to the role he performed was difficult to witness and it came as no surprise when I was informed that claimant was withdrawing his claim and that the respondent was to be making a costs application as it was clear and obvious that the claimant had not been able to support his claim in evidence.
10. As the claimant had prepared written evidence in support of his claim as well as detailed grounds of claim, I found it extremely surprising that the claimant was unable to articulate in any detail any recent work that he undertook on behalf of the respondent so as to meet the test that he was an employee of the respondent and that he had a viable unlawful deductions claimant pursuant to section 13 of the Employment Rights Act 1996.

11. Accordingly, I find that there was a substantial disconnect between his claim, his written witness evidence, and the oral evidence he provided during the course of his cross-examination. The disconnect was substantial and the difference between the quality of the written documents provided in support of his claim and his oral evidence, stark and unexplained by the claimant's response to this application.

The Law

12. I have been asked to determine whether or not the claimant has acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing or conducting of the proceedings pursuant to rule 76(1)(a) or that the claim had no reasonable prospects of success pursuant to rule 76(1)(b).
13. I remind myself that the above grounds are discretionary i.e. the tribunal may make an order for costs if a ground is made out but it is not obliged to do so.

The Decision

14. In respect of the application made under rule 76(1)(a), I am unable to reach the view that the claimant pursued the claim either vexatiously, abusively or disruptively, however, I am able to form the view that the claimant's conduct was unreasonable in that it is clear that the quality and content of his evidence fell substantially short of that put forward in writing, namely in the form of his claim and in the form of his witness evidence.
15. Central to the claimant's case was his submission that he remained an employee of the respondent. However, in evidence before me, the claimant was unable to articulate, in any meaningful way, any of the duties he performed for the respondent and how he continued to be an employee of the respondent notwithstanding the respondent's case that he had ceased to be an employee over two decades previously.
16. Given this fundamental failing, I find that it is appropriate to find that the claimant's conduct was unreasonable in the bringing of these proceedings against the respondent.
17. Alternatively, I have the discretion to make a costs order where I consider that the claim had no reasonable prospects of success pursuant to rule 76(1)(b). Inevitably, I have reached the view that the claimant must have been aware that his claim did not enjoy reasonable prospects of success contrary to the arguments put forward by Machin's on his behalf, who postulate that the claim was at least arguable.
18. I find that the claimant's conduct falls within rule 76(1)(a) and in addition, I consider that it is entirely appropriate for me to exercise my discretion to order that costs be awarded against the claimant on the basis of my findings that I have set out in this judgement. This is an appropriate case in which I should exercise my discretion towards costs against the claimant.

Costs – to be decided

19. As I have set out above, I had agreed to deal with the application for costs on the papers. However, I have decided that I will need to hear from the parties before I can determine the amount of costs to be ordered against the claimant. I make no criticism of the respondent in this regard but the amount sought is not insubstantial and requires scrutiny by the tribunal and the claimant. For this reason I have ordered that there will be a further hearing to determine the amount of costs to be ordered against the claimant.

Employment Judge Forde

Date: 14 June 2023

Sent to the parties on: 14 June 2023

GDJ
For the Tribunal Office