



EMPLOYMENT TRIBUNALS

Claimant
Ms L Platt

Respondent
Sugar Free Productions Ltd

COSTS JUDGMENT OF THE EMPLOYMENT TRIBUNAL

MADE AT NORTH SHIELDS
EMPLOYMENT JUDGE GARNON (sitting alone)

ON 17th January 2018

JUDGMENT

I refuse the respondents' application, under Rule 82 of the Employment Tribunal Rules of Procedure 2013 (the Rules) , for a costs order

REASONS

The Background Facts

1. In a claim presented on 26th July 2017 the claimant made claims of unfair and wrongful dismissal. For both she had to be an employee as defined in s230 of the Employment Rights Act 1996 (the Act) and for the former she needed to have two years continuity of employment , which she did not, unless an exception applied. The claim was listed for hearing on service and standard directions given. The response form said she was never an employee. On consideration of the file under Rule 26 I ordered a preliminary hearing (PH) which was listed for 9th October but postponed due to the claimant's ill health.

2. At all material times the claimant was struggling to find funding for solicitors. She represented herself at a telephone Preliminary Hearing I conducted on 2nd November, at which I gave her notice to show cause why her claims should not be struck out. I explained the problems she faced regarding employee status, said in my written reasons it appeared she had done work but “ *in the hope of becoming a director rather than in furtherance of obligations under a contract of service* , and that on the facts she had pleaded if she withdrew on the basis she intended to bring a County Court claim , I would accept there was a legitimate reason under Rule 52 not to dismiss the claim. On 14th November by email she withdrew on that basis. On the same day the respondent applied for costs

The Law

3. The Employment Tribunal Rules 2013 include as far as relevant

75. (1) A costs order is an order that a party (“the paying party”) make a payment to—
(a) another party (“the receiving party”) in respect of the costs that the receiving party has incurred while legally represented ...

76. (1) A Tribunal may make a costs 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 .. had **no reasonable prospect of success**.

77. ... 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.

Both parties have elected to have this application decided on written representations without a hearing.

4. The Court of Appeal and EAT have said costs orders in the Employment Tribunal:

(a) are rare and exceptional.

(b) whether the Tribunal has the right to make a costs order is separate and distinct from whether it should exercise its discretion to do so

(c) the paying party’s conduct as a whole needs to be considered, per Mummery LJ in Barnsley MBC v. Yerrakalva [2011] EWCA 1255 at para. 41:

“The vital point in exercising the discretion to order costs is 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.”

(d) there is no rule/presumption that a costs order is appropriate because the paying party lied or failed to prove a central allegation of their case, see HCA International Ltd. v. May-Bheemul 10/5/2011, EAT.

(e) even if there has been unreasonable conduct making it appropriate to make a costs order, it does not follow that the paying party should pay the receiving party’s entire cost of the proceedings. Yerrakalva at para. 53.

5. Several factors are relevant on withdrawals. If a party thinks she can avoid a possible costs order if her claim is withdrawn before the hearing that is wrong because costs may be incurred well in advance of the hearing. If a party allows preparations for the hearing to go on too long before abandoning an untenable case that party may be liable for costs on account of her conduct.

6. In awarding costs against a claimant who has withdrawn a claim, an employment tribunal must consider whether the claimant has brought or conducted the proceedings unreasonably in all the circumstances, and not whether the late withdrawal of the claim was in itself unreasonable, see McPherson v BNP Paribas (London Branch) 2004 ICR 1398, CA. In that case the claimant withdrew an unfair dismissal claim just over two weeks

before the hearing was due to take place, and some 19 months after the claim was presented. Upon withdrawal, the respondent claimed costs, arguing conduct of the claim in general had been unreasonable. The Employment Tribunal found there had been unreasonable conduct and ordered costs in relation to the whole claim. The Court of Appeal said it would be wrong if, acting on a misconceived analogy with the Civil Procedure Rules, tribunals took the line it was unreasonable conduct for claimants to withdraw claims, and if they did, they should pay costs. The Court pointed out withdrawals could lead to a saving of costs, and it would be unfortunate if claimants were deterred from dropping claims by the prospect of an order for costs upon withdrawal that might well not be made against them if they fought on to a full hearing and failed.

7. Before an order for costs is made, it must be shown the claimant's overall conduct of the proceedings has been unreasonable. In National Oilwell Varco (UK) Ltd v Van de Ruit EATS 0006/14 in which McPherson was cited a claimant had not acted unreasonably in withdrawing his claim on the day prior to a pre-hearing review.

The Issues

8. What I call the “threshold” issue is whether I am satisfied one of the circumstances in Rule 76 exists. The respondent says the facts pleaded by the claimant show

- (a) she acted unreasonably in **bringing** of the proceedings (or part)
- (b) her claim in whole or in part had no reasonable prospect of success.
- (c) she conducted the proceedings unreasonably in withdrawing later than she should

If the “ threshold “ has not been reached. I need decide no more ,

9. If it is, the “ discretion issues” are

- (a) whether it is proper to exercise my discretion to make a costs order
- (b) should it be for all or a specified part of the costs incurred
- (c) how much was properly incurred
- (d) should I order less because of the claimant’s ability to pay

Conclusions

10. The claimant’s case in a nutshell was that she was exploited by the respondent’s owner Mr Bate and did a great deal of work effectively for nothing. The status of people who do work for the benefit of others has taxed the highest courts for many years. Those of us steeped in the case law recognise arguments which have little or no reasonable prospect of success. Other people take a “layperson’s” view. The same can be said of the issue of when an exception to the two year qualifying period may apply.

11. The respondent correctly says there is little or no difference between what they put in a skeleton argument on 6th October 2017 and what I told the claimant on 2nd November. This is the most important point in my view. It is not unreasonable for a lay person to view with scepticism what expert solicitors instructed by her opponent say. When it came from a person she knows to be impartial , she listened then acted correctly and promptly.

12. The respondent is also critical of the time it took the claimant to secure her own legal advice and the interim advice she was given. I do not agree. Funding is a problem for many litigants who would ideally like legal help. Interim advice would always be to do nothing irrevocable to abandon an argument until it had been fully explored.

13. I cannot find the threshold for making an order is reached and , if it were, I would not exercise my discretion to make one against this unrepresented claimant.

T M Garnon EMPLOYMENT JUDGE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 17th JANUARY 2018