EMPLOYMENT TRIBUNALS

Paying parties: **Mr Peter Byrne (1) and Mr Amila Wijesinghe (2)**

Receiving party: **CityBlock Lettings Limited**

Heard at: **Newcastle CFCTC on the papers** **On: 31 January 2023**

Before: **Employment Judge Arullendran**

JUDGMENT ON COSTS

Rule 78 of The Employment Tribunal Rules of Procedure 2013, as amended

The Judgment of the Employment Tribunal is as follows:

1. Mr Byrne is ordered to pay to the receiving party costs in the sum of £500.
2. Mr Wijesinghe is ordered to pay to the receiving party costs in the sum of £500.

REASONS

The facts

1. The paying parties, whom I shall henceforth refer to as the claimants, brought claims against the receiving party, whom I shall henceforth refer to as the respondent, on a claim form dated 20 December 2021. There was a third claimant who withdrew from the claim on 12 October 2022.

2. The claimants brought claims against the respondent under the Working Time Regulations 1998 for the failure to provide rest breaks and holiday pay. They also brought claims under the National Minimum Wage Act and associated Regulations for the failure to pay the minimum amount of wages payable during "working time", plus a failure to provide a statement of terms conditions of employment under the Employment Rights Act 1996. The claimants were all students and had entered into agreements with the respondent to provide their services as resident wardens which included providing an on-call service during the night on a rota. The claimants' claims were that they should have been paid wages at the minimum rate throughout each night they were on call, that

they were employees of the respondent and had set duties to perform at specified times, that the respondent failed to provide sufficient breaks between each shift and further failed to provide the correct amount of holiday pay and a section 1 statement. The respondent defended the claims on the grounds that the claimants were permitted to carry on with their daily lives, including sleeping during the night, and that they were paid more than the minimum wage for the periods of time they were awake and carrying out duties for the respondent. The respondent said that the claimants received holiday pay as part of their normal remuneration and that there was no entitlement to receive a statement of terms conditions of employment at the date the claimants entered into the contract with the respondent as they were workers, as opposed to employees.

3. The final hearing in this matter was listed to be heard in person over a period of three days from 31 October 2022 to 2 November 2022. At a telephone preliminary hearing on 8 March 2022, I recommended to the claimants that they should obtain independent legal advice given the complexities of the arguments in relation to the applicability of the law in respect to working time and how this is applied to the requirements to be available on call. It does not appear, on the face of it, that the claimants obtained any legal advice throughout the proceedings, as demonstrated by the email dated 30 October 2022 from the second claimant in which he states that he had not been able to obtain any representation, although they did alter their position on whether wages were payable to them when they were sleeping.

4. The second claimant sent an email to the Tribunal and the respondent on Sunday 30 October 2022 at 7:17 PM stating that he had decided to withdraw from the case because he could not obtain free representation, he did not have the resources to fund the case and he was unable to represent himself for personal reasons.

5. The first claimant sent an email to the Tribunal and the respondent on Monday, 31 October 2022 (the first morning of the hearing) at 8:01 AM stating that he was withdrawing his claim. The first claimant did not give any reasons for his withdrawal.

6. The respondent's head office is in Lancaster and the respondent's solicitors are also based in Lancaster. The claimants will have been aware of this from the correspondence between the parties and the Tribunal throughout the litigation. The respondent instructed counsel to attend the final hearing. He was required to travel from his home in Manchester on Sunday, 30 October 2022, in order to attend the Tribunal offices in Newcastle upon Tyne at 9:30 AM on the first morning of the hearing. The respondent and their solicitors also travelled from Lancaster to Newcastle upon Tyne on Sunday, 30 October 2022, in readiness for the final hearing. In the circumstances, the respondent, their solicitor and their counsel incurred travel costs and accommodation costs on 30 October 2022.

7. A witness for the respondent attended the final hearing on the morning of 31 October 2022 and incurred travel costs in the sum of £32.40.

<u>The application for costs</u>

8. The respondent made an oral application at the hearing on 31 October 2022 for the respondent's costs to be paid by the claimants under Rule 76 of the Employment Tribunals Rules of Procedure 2013 on the basis that the claimants' last-minute withdrawal amounted to unreasonable conduct as the respondent had already incurred its costs in attending the hearing. However, under the provisions of Rule 77 I was unable to determine the respondent's application for costs without hearing from the claimants, who were not present. Therefore, I indicated that the respondent could make an application for costs in writing within 28 days of being sent the Judgment on withdrawal.

9. On 12 December 2022 the respondent wrote to the Tribunal and the claimants, setting out its application for a costs order against both claimants. This is a seven-page letter, accompanied by a spreadsheet giving a brief breakdown of the costs incurred throughout each stage of the proceedings, with a total claim in the sum of £32,356. The respondent has intermittently referred to the 2013 Rules of Procedure and the 2004 Rules of Procedure throughout its application and, therefore, some of the references to the applicable rules is rather confusing. I have taken it that the references to the 2004 Rules is an error.

10. The respondent claims costs on the basis that the late withdrawals were unreasonable, along with the claimants' action throughout the proceedings. In particular, the respondent argues that the claimants failed to seek legal advice throughout the proceedings and failed to engage in constructive discussions with the respondent regarding settlement. The respondent argues that there was no reasonable prospect of success from the outset because the only time which falls to be considered as "working time" under the Working Time Regulations 1998 is the time when the claimants were actually performing work for the respondent rather than the whole of the on-call period, as claimed. The respondent argues that the claimants were not entitled to receive National Minimum Wage when they were asleep and that this claim had no reasonable prospect of success as the claimants failed to differentiate between the time they were awake for the purposes of working and the time spent asleep. The failure to provide a statement of terms conditions of employment did not apply to workers at the time the claimants began their employment as it was introduced on 6 April 2020 and, therefore, the respondent argues that this claim had no reasonable prospect of success. The respondent further argues that there was a failure by the claimants to comply with Tribunal orders dated 30 December 2021.

11. The costs claimed by the respondent in respect of both claimants are as follows:

    i. Solicitor's fees incurred prior to the third claimant's withdrawal: £25,473.50 plus VAT (£30,568.20).
    ii. Solicitor's fees incurred following the third claimant's withdrawal up to the final hearing: £1,690.00 plus VAT (£2,028.00)
    iii. Solicitor's fees for preparing and filing the costs application: £757.50 plus VAT (£909.00).
    iv. Disbursements for the final hearing including counsel's brief fee and expenses, together with trainee solicitor expenses: £4,402.60 plus VAT (£5,283.12)
    v. Andrew Lennox's expenses for attending the final hearing: £32.40.

12. The claimants replied to the respondent's application for costs on 15 December 2022 setting out the grounds for opposing the respondent's application. In summary, the claimants say that they made numerous efforts to resolve their disputes directly with the respondent prior to issuing proceedings in the Employment Tribunal, without success, and they continued to attempt to negotiate with the respondent via ACAS but the respondent refused to enter into negotiations, rejected all the offers put forward by the claimants and failed to make any counter-offers. The claimants say that they were unable to obtain independent legal advice throughout the proceedings because, as full-time students, they could not afford to pay for the legal advice and the various attempts they made to access free legal advice were unsuccessful due to a lack of resources available to the respective advice agencies. The claimants says that they had re-evaluated their claims on the basis of the discussion at the case management hearing on 8 March 2022 and they recalculated their entitlement to wages during the time they were awake for the purposes of working (as opposed to when they were asleep) and this was reflected in their conversations with ACAS. However, the claimants maintain that they were given specific work to do as employees and were entitled to be paid for the time spent carrying out those duties, as opposed to merely being available on-call.

13. All parties requested this application for costs to be determined on the papers.

The Law

14. Rule 76(1) of the Rules provides as follows:

> "A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that –
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> (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, …"

15. 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."

16. 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 he 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) under 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."

17. Rule 84 of the Rules states:

"In deciding whether to make a cost, 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."

18. Milan v Capsticks Solicitors LLP & Others UKEAT/0093/14/RN sets 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."

19. In Gee v Shell UK Ltd [2003] IRLR 82 the Court of Appeal reiterated that costs in the Employment Tribunal are the exception rather than the rule.

20. The EAT decided in Dyer v Secretary of State for Employment EAT 183/83 that "unreasonable" has its ordinary English meaning and is not to be interpreted as if it means something similar to "vexatious". It will often be the case, however, that a Tribunal will find a party's conduct to be both vexatious and unreasonable. Whether conduct is unreasonable is a matter of fact for the Tribunal to decide.

21. 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, Judge Richardson said in paragraph 33:

    "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."

22. Similarly, in Vaughan v London Borough of Lewisham & Ors (No. 2) [2013] IRLR 713, the EAT declined to interfere with a substantial costs order against an unrepresented party. Underhill J observed that "the basis on which the costs threshold was crossed was not any conduct which could readily be attributed to the appellant's lack of experience as a litigant".

23. In McPherson v BNP Paribas (London Branch) [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."

24. In Yerrakalva v Barnsley Metropolitan Borough Council and another [2012] ICR 420, CA Lord Justice Mummery held:

    "The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and ask whether there was unreasonable conduct by the Claimant in bringing and conducting the case and, in doing so, identify the conduct, what was unreasonable about it and what effects it had." That case also decided that although there was 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, that did not mean that causation is irrelevant."

25. 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.

26. 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

27. My starting point has been Rules 74 to 78 of the 2013 Rules of Procedure and I have taken the respondent's references to the 2004 Rules to be an error. There are three stages to be applied:

    a. finding whether the claimants have behaved unreasonably in either the bringing of the proceedings or the way the proceedings have been conducted
    b. whether it is appropriate to make a costs order
    c. whether I should exercise my discretion in making such an order.

28. Starting with whether the claims had no reasonable prospect of success, I find that, at the stage the proceedings were commenced, the claimants did not understand the relevant law in respect of what is classed as "working time" when a worker is on call outside what one might consider to be normal working hours. However, this was not the only claim brought by the claimants and some of the other aspects of the claims may have been arguable, although I am unable to predict their chances of success being any higher than merely a possibility. I accept that the claimant's altered their perception of the value of their claim after the preliminary hearing on 8 March 2022 once they had taken the opportunity of finding out about the relevant law for themselves. The question of whether the claimants were entitled to holiday pay, further wages or a statement of terms and conditions of employment could only be answered by examining the relevant evidence and, therefore, it cannot be said that those claims had no reasonable prospect of success. In the circumstances, it cannot be said that all of the claims had no reasonable prospect of success at the stage when they were submitted and I find that the claimants' did not act unreasonably in the bringing of the proceedings.

29. With regard to the way in which the proceedings were conducted by the claimants, although the claimants did not obtain independent legal advice, it is clear from their reply to the application for costs that they made considerable efforts to obtain such advice, without success. It is not unusual for litigants in person to experience difficulties in

accessing free legal advice and, in the circumstances, it cannot be said that the claimants have behaved unreasonably in the way that they have conducted the proceedings in failing to obtain such advice.

30. The withdrawal of the claims at the last minute is not, on the face of it, unreasonable conduct (applying McPherson v BNP Paribas (London Branch) as a high proportion of claims are settled in the Employment Tribunal, many of which can take place at the last minute. However, this is not a case where negotiations were taking place between the parties up to the last minute. It is clear from the claimants' response to the application for costs that, despite their attempts to make offers and to negotiate through ACAS, the respondent did not make any counter-offers and there is no evidence that negotiations were taking place between the parties over the weekend immediately prior to the final hearing. In those circumstances, there is no evidence in front of me that the claimants were not in a position to withdraw their claims on the Friday afternoon (28 October 2022) before the end of the working day which would have negated the requirement for the respondent, their solicitor and their counsel to travel to the north-east; nor is there any evidence that there had been any change in the claimants' circumstances between 28 October and 30 or 31 October 2022, respectively. The first claimant has not given any reason at all for why he withdrew his claim and there is no evidence in front of me that his reasons changed or only became apparent on 31 October 2022. The second claimant's reasons appear to be the lack of representation which he would have known about on 28 October 2022 and there is no evidence in front of me that he was waiting to find out whether representation would be available or that he only found out that it would not be available on the evening of 30 October 2022. The claimants will have known throughout the entirety of the proceedings that the respondent was based in Lancaster, as were their solicitors, and, in those circumstances, they should have been aware that the respondent and the representatives would be required to travel to Newcastle upon Tyne the day before the hearing was due to commence. Accordingly, I find that both claimants conducted the proceedings unreasonably by not informing the respondent or the Tribunal of their intention to withdraw on 28 October 2022 and by submitting their withdrawals after the respondent and their representatives had already embarked upon their journeys.

31. The claimants did not comply with all the case management orders dated 30 December 2021. The respondent refers to the second claimant being a PhD law student and a barrister at law in its arguments that this failure was unreasonable. However, the second claimant was not practising as a barrister at the time of this litigation and the requirement to comply with the orders dated 30 December 2021 were superseded by the necessity to conduct a telephone case management hearing on 8 March 2022, because of the complexities of the claims, where further orders were made which were complied with. In those circumstances, I find that, judging the claimant's conduct as litigants in person, the failure was not so contumelious as to amount to unreasonable conduct.

32. Having found that some of the conduct on behalf of the claimants was unreasonable, there is no requirement for this Tribunal to award costs. There are a number of factors to consider, including the nature, gravity and effect of the unreasonable conduct, although there is no principle that costs should only be awarded where they can be shown to have been incurred by specific instances of unreasonableness.

33. In this case, I find that it is appropriate to award costs against the claimants in respect of their unreasonable conduct in communicating their last-minute withdrawals after the close of business on 28 October 2022 because it resulted in the respondent, their instructing solicitor and counsel travelling in their personal time and having to stay in hotel accommodation in order to attend a hearing which the claimants knew would not take place. This undoubtedly cause disruption to their personal and business lives and resulted in costs being incurred unnecessarily by the respondent.

34. In deciding whether costs should be awarded, I am permitted to take into account the claimants' ability to pay. However, neither claimant has made any submissions or submitted any evidence in respect of their individual ability to pay and, therefore, this does not affect my decision in finding that it is appropriate to award costs.

35. Having found that there was unreasonable conduct and that it is appropriate to award costs, I am still required to address my mind to whether I should exercise my discretion in awarding costs in this matter. In other words, I must decide whether it is just to exercise the power to award costs. The basic principle is that the purpose of an award of costs is to compensate the party in whose favour the order is made, not to punish the party ordered to pay the costs. Looking at all the evidence in the round, I find that is just to award costs in this matter given that the respondent, their instructing solicitor and counsel had to travel a considerable distance the day before the hearing and incur the cost of not just travelling but also hotel accommodation, all of which could have been avoided had the claimants withdrawn their claims on 28 October 2022. The respondent has incurred these costs unnecessarily as a direct result of the unreasonable conduct by the claimants and I find that it is appropriate and just to award some of those costs to be paid by the claimants.

36. As I have found the unreasonable conduct by the claimants took place on 28 October 2022, none of the costs claimed by the respondent prior to this date fall to be awarded against the claimants (applying McPherson). The respondent has not provided a breakdown of the individual expenses incurred by the respondent, instructing solicitor or counsel in travelling to Newcastle upon Tyne and staying in a hotel on 30 October 2022. The respondent has in the spreadsheet accompanying the application for costs merely expressed the cost of the preparation for the final hearing as Counsel's fee in the sum of £3250, "settlement" in the sum of £761.50 and the cost of the preparation of the cost application in the sum of £757.50. I have not been given any information and I am not satisfied that the respondent incurred the sum of £4011.50 for attending the Tribunal hearing on 31 October 2022 as that is the amount that would have been payable had a three-day hearing taken place. Given the lack of detailed information from the respondent about the specific costs incurred on 30 and 31 October 2022, I find that it is appropriate to award a global figure in the sum of £1000.00 which includes the expenses incurred for the attendance of the respondent's witness in the sum of £32.40, the costs incurred by the respondent, their instructing solicitor and counsel and the cost of preparing the application for costs in the sum of £757.50. VAT is not included in the award of costs.

37. As the costs are to be paid by both claimants, in the absence of any submissions made by either the respondent or the claimants on this issue and applying my discretion, I order that the costs awarded are to be divided between the two claimants and each claimant is ordered to pay the sum of £500 to the respondent.

Employment Judge Arullendran

Date: 31 January 2023