



EMPLOYMENT TRIBUNALS

Claimant: Miss A Daly

Respondent: Terence Paul (Manchester) Limited

HELD AT: Manchester **ON:** 8 February 2017

BEFORE: Employment Judge Porter

REPRESENTATION:

Claimant: Written representations

Respondent: Written representations

JUDGMENT

The application for costs is refused

REASONS

Issues to be determined

1. A Costs application was made by the respondent, as set out in its representative's email dated 22 September 2016.
2. This costs application follows a preliminary hearing on 27 June and 29 July 2016, and a reserved decision in chambers on 1 August 2016, when it was determined that the claimant was not an employee or worker within the meaning of the Employment Rights Act 1996, or the Working Time Regulations 1999. As a result, the claims of unfair dismissal, unlawful deductions from wages and failure to pay holiday pay were dismissed. Written reasons were sent to the parties on 26 August 2016 (hereinafter referred to as the Judgment with Reasons).

3. It was agreed that the costs application would be determined on a consideration of the papers. Orders were made for the exchange of written representations which the tribunal has considered with care, but does not rehearse here, together with all relevant documents and authorities referred to in the written representations.

Background

4. No evidence was heard. The tribunal has considered the judgment with reasons, together with notes of evidence made during the course of the preliminary hearing, and the correspondence and Orders on the tribunal's file. The tribunal notes in particular the following from the reading of the tribunal file.
5. The claimant, a litigant in person, presented her claim on 26 October 2015.
6. A preliminary hearing was listed, at the respondent's request, to determine whether the claimant was an employee or worker.
7. By letter dated 11 January 2016, the respondent's solicitor made applications for:
 - 7.1 an order for specific disclosure of the claimant's self-assessment tax returns for the years she claimed she was an employee of the respondent;
 - 7.2 an order that covert recordings by the claimant be excluded from the proceedings;
8. As a result the preliminary hearing was converted to a closed preliminary hearing to consider the respondent's applications.
9. The claimant had in her claim form, accepted that she was employed under a self-employed contract and in correspondence with the respondent's solicitors had confirmed that she had completed self assessment tax returns throughout the relevant period. It was agreed between the parties that the claimant had treated herself as a self employed hairdresser for tax purposes.
10. The claimant had taken covert recordings of certain conversations while at work and had quite properly disclosed these recordings in accordance with her duty to disclose what she understood to be relevant documents. Her email to the tribunal dated 12 January 2016 explained the claimant's understanding as to why the recordings were relevant evidence.

11. By letter dated 26 January 2016 the respondent's solicitor advised the tribunal that they were in receipt of the claim form for Emma Broadbent and made application for the two claims to be combined.

12. Both the claimant and Ms Broadbent objected to the proposed combination of the two claims and Ms Broadbent opposed the respondent's suggestion that she attend the preliminary hearing listed in the claim of Miss Daly because she was at work and had had insufficient (2 days) notice.

13. By letter dated 27 January 2016 the parties were advised that the application to combine the claims had been referred to EJ Holmes who had refused the request. The letter stated that the judge

“ has directed me to inform you that the two claims are not similar and do not appear to involve the same issues. The judge has also directed me to inform you that the fact that similar applications may be made in each claim is not a good enough reason to combine them. Further the claimants object to the request to combine.”

14. By email dated 19 February 2016 the claimant advised the tribunal as follows:

“I am writing to you regarding the tribunal order for my tax returns that Hill Dickinson requested. The date they were required by was today – 19 February 2016.

Upon looking for my self assessment tax returns I realised I hadn't got some of the requested dates in my possession. I have sent the tax returns that I do have to Hill Dickinson along with a letter explaining. I understand I have not given them everything they have asked for which I apologise for, but I have not intentionally withheld any information from them and I have given them everything regarding my tax returns that I have in my possession. I have been in contact with the HMRC tax office and have requested the tax returns that I haven't got. These are going to be sent to me in due course...I will send these to Hill Dickinson as soon as I possibly can.”

15. A preliminary hearing was held on 28 January 2016 before EJ Holmes. Orders included the following:

15.1 The claimant do give specific disclosure of her self assessment tax returns for the last three years by 19 February 2016;

15.2 The evidence in the form of a recording of two conversations on 8 September 2015 and 10 September 2015 was inadmissible;

15.3 The evidence in the form of a recording between the claimant and Tom Scott on 8 September 2015 was admissible

16. Reasons were provided for those Orders and were sent to the parties on 23 February 2016. There is no reference in the Reasons to any application for costs by the respondent in relation to that application, no finding by EJ Holmes that the claimant acted vexatiously in the making of the covert recordings.
17. By email dated 21 March 2016 Hill Dickinson advised the tribunal that the claimant had not complied in any meaningful way with the order for disclosure of tax returns, that some documents were missing, aspects of some documents were illegible and in some instances missing completely. Hill Dickinson acknowledged that the claimant had told them that she had sent to them everything in her possession and that the claimant had “advised that there were bits missing but there was nothing she could do about it.”
18. The respondent made application for:
 - 18.1 an Unless Order in relation to disclosure of the full self-assessment Tax Returns; or, in the alternative
 - 18.2 an order requiring HMRC to disclose the claimant’s self-assessment tax returns
19. By email dated 22 March 2016 the claimant opposed the order asserting that she had sent everything she had in her possession, including the tax returns that HMRC had sent her.
20. The application for an Unless Order was refused by EJ Sherratt on the grounds that he would not do so in circumstances where the claimant says she has already provided all the information in her possession. The respondent was advised that if it wished to pursue its application it must do so at the preliminary hearing.
21. A preliminary hearing was conducted in the claim of Ms Emma Broadbent on 18 March 2016. before EJ Feeney who, by letter dated 29 March 2016, advised the parties that she was of the opinion that the claims of the claimant and Ms E Broadbent should be considered together. The parties were given the opportunity to object to the proposal. The claimant did object to the proposal by email dated 30 March 2016, referring to the fact that another judge had already rejected the respondent’s application to combine the two cases.
22. By email dated 30 March 2016 Hill Dickinson:
 - 22.1 consented to the proposed combination;

22.2 pursued its application for an order for disclosure against HMRC;

22.3 sought a postponement of the preliminary hearing in the claimant's case on the grounds that it could not prepare for the case until those documents had been received

23. By email dated 30 March 2016 the claimant objected to the requested postponement on the grounds that the respondent had all the relevant documentation and one of her witnesses had already booked time off to attend the tribunal and may not be able to attend a subsequent hearing.

24. EJ Feeney granted the respondent's applications and ordered that the claims be combined.

25. By email dated 15 June 2016 Hill Dickinson confirmed that it had received the claimant's tax returns from HMRC via the claimant.

Facts

26. The tribunal relies on the Findings of Fact as set out in the Judgment with Reasons. Having considered all the evidence the tribunal has made the following additional findings of fact. Where a conflict of evidence arose the tribunal has resolved the same, on the balance of probabilities, in accordance with the following findings.

27. During the course of the preliminary hearing before this tribunal there was no satisfactory evidence to support a finding that the claimant had deliberately withheld documents or parts of documents which were subsequently received from the HMRC

28. The claimant sought to obtain secret recordings of meetings to record her genuine understanding of the true nature of the relationship between her and the respondent. She had genuine concerns that no notes were made of meetings and she needed evidence of what was said between her and the managers/owners of the business. She genuinely believed that those recordings were relevant evidence and disclosed them.

The Law

29. Under rules 73 and 75 Employment Tribunals Rules of Procedure 2013 a tribunal may award a costs order where a party has in either bringing the proceedings or in the conduct of the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably; or the claim or response had no reasonable prospect of success.

30. The Rules impose a two stage test. The tribunal must ask itself whether a party's conduct falls within rule 73. If so, it must then ask itself whether it is appropriate to exercise its discretion to make the award.
31. The tribunal, in deciding whether to exercise its discretionary power under rule 75 should consider all relevant factors including the following;-
- costs in the employment tribunal are still the exception rather than the rule;
 - the extent to which a party acts under legal advice;
 - the nature of the claim and the evidence;
 - the conduct of the parties.

Determination of the Issues

(Including, where appropriate, any additional findings of fact not expressly contained within the findings above but made in the same manner after considering all the evidence)

32. The respondent makes its application on two grounds:

32.1 the bringing of the proceedings was misconceived;

32.2 the claimant acted unreasonably in the conduct of the proceedings.

33. The tribunal does not accept that the claim was misconceived. Whether or not the claimant was an employee or a worker depended upon the determination of the facts, after hearing all the evidence. Cases such as these are fact sensitive. There was considerable conflict of evidence in this case. The tribunal made its findings of fact as set out in the Judgment with Reasons. Until the tribunal heard all the evidence and made those findings it was not possible to determine whether the claim had no reasonable prospect of success or was misconceived. The fact that the parties had signed an agreement describing the claimant as self employed, the fact that the claimant declared her income to HMRC as a self employed person, and claimed allowances and tax relief consistent with that declaration, are not by themselves conclusive evidence as to the employee/worker status of the claimant. That was only part of the evidence which the tribunal had to consider in reaching its decision. The claimant was reasonable in pursuing her claim until a determination had been made on her employee/worker status at the preliminary hearing. It is not appropriate to make any award for costs under this head.
34. The respondent asserts that the manner in which the claimant has chosen to pursue her claim has been vexatious, disruptive and unreasonable. It raises four separate examples of this alleged behaviour,

which the tribunal has considered separately. It is noted that no assertion is made about the conduct of the claimant at the preliminary hearing before this tribunal, other than her reliance on covert recordings and her evidence as to holidays.

35. The respondent asserts that the claimant's objections to having her claim joined with that of Emma Broadbent were "patently absurd" and, in hindsight "appear to have been no more than a deliberate attempt to disrupt proceedings and/or behave unreasonably with a view to causing the respondent vexation." Having considered all the circumstances the tribunal finds that there is no merit in this assertion. The tribunal notes in particular as follows:

35.1 the claimant was a litigant in person;

35.2 Employment Judge Holmes had initially refused the request to combine;

35.3 it was reasonable for the claimant, a litigant in person, to object to the proposed combination on that basis – that the claims were not similar;

The claimant did not act unreasonably. Further, it is difficult to understand how and in what way the respondent's right to a fair hearing was prejudiced by the claimant's actions or how, if at all, it thereby incurred extra costs in the conduct of the proceedings by reason of the claimant's objections to the proposed combinations. It is not appropriate to make any award of costs under this head.

36. The respondent asserts that the claimant acted unreasonably in seeking to rely on covert recordings. The tribunal has considered all the circumstances and notes in particular as follows:

36.1 the claimant, a litigant in person, sought to obtain recordings to record what she understood to be the true nature of the relationship between her and the respondent. She had genuine concerns that no notes were made of meetings;

36.2 the claimant, a litigant in person, genuinely believed that each of the recordings was relevant to the issues to be determined by the tribunal and therefore disclosed them in line with her duty to disclose all relevant documents;

36.3 it was the respondent who opposed the inclusion of the covert recordings in to the evidence and made its

application to exclude them, raising objections on the grounds that the recordings were not relevant and/or were a breach of privacy under the Human Rights Act;

- 36.4 that application was considered by EJ Holmes. The application was successful, in part. There is no reference in EJ Holmes' reasons to any application for costs by the respondent in relation to that application, no finding by EJ Holmes that the claimant acted vexatiously in the making of the covert recordings;
- 36.5 One recording and transcript, of a meeting between the claimant and Mr Tom Scott, was found to be relevant and was included in the evidence before this tribunal;
- 36.6 This tribunal was prepared to accept, on the balance of probabilities, after hearing the evidence, the explanation of Mr Scott for the words used by him in that secret recording. The tribunal did not, on balance, accept the claimant's interpretation of those words.

In all the circumstances the tribunal finds that the claimant did not act unreasonably in seeking to rely on the secret recordings, part of which were found to be admissible. The claimant, as a litigant in person, cannot be expected to have a detailed knowledge of the law of privacy and the Human Rights Act. On the face of it the recording of her conversation with Mr Tom Scott was evidence in support of her assertion that she was not truly self-employed. The significance of that evidence could only be determined after hearing all the evidence.

- 37. The respondent asserts that the claimant failed to supply her tax returns. There is no satisfactory evidence to support the respondent's assertion that the claimant failed to provide copies of all relevant documents in her possession power or control at any given time. There is no satisfactory evidence to support a finding that the claimant deliberately withheld documents or parts of relevant documents which were in her control power and possession and which were subsequently received from the HMRC. The claimant accepted from an early stage that she had declared her income as being from self-employment. The tax treatment of the claimant is only one factor to be considered by the tribunal. It did not by itself preclude the tribunal from concluding that the claimant was an employee or a worker within the meaning of the Acts. Indeed, it was part of the claimant's case that the respondent had insisted on treating stylists as self-employed but that this did not reflect the true nature of the relationship. The fact that she declared her income in this way does not

mean that the claimant was unreasonable in pursuing her claim. The claimant did not act unreasonably.

38. The tribunal rejects the respondent's assertion that the mere fact that the claimant had taken more than 20 days holiday in one year defeated her claim and made it unreasonable for her to pursue it. Many employees or workers obtain the consent of their employer to exceed their holiday entitlement in any one year. The question before this tribunal was whether the claimant needed the permission of her managers to take the extended holiday in January/February 2015. On balance the tribunal accepted the evidence of Mr Kirk and Mr Scott that the claimant did not seek their permission. That decision could only be made after hearing all the evidence. The documentary evidence tended to support the claimant's evidence that she was restricted to taking 20 days holiday a year, was restricted to the number of Fridays and Saturdays she could take off. The tribunal needed to hear all the evidence before making its determination of the facts on the balance of probabilities. The claimant did not act unreasonably in adducing evidence relating to the taking of holidays.
39. As stated above, this was an extremely fact sensitive case and the determination by the tribunal was dependent upon the tribunal making findings of fact on the balance of probabilities after hearing all the evidence and deciding on the considerable conflict of evidence. The fact that, for the large part, the tribunal accepted the evidence of the respondent's witnesses does not mean that the claimant was unreasonable in the conduct of the case.
40. There is no satisfactory evidence in support of the respondent's assertion that the claim was misconceived and/or that the claimant was unreasonable in pursuing the claimant and/or in the conduct of the claim.
41. The application for costs is without merit and is refused.

Employment Judge Porter
Date: 28 February 2017

JUDGMENT SENT TO THE PARTIES ON
2 March 2017

FOR THE TRIBUNAL OFFICE