



EMPLOYMENT TRIBUNALS

Claimant: Mr T Ndemera
Respondent: Great Northern Envelope Co Ltd
Heard at: Leeds **On:** 6 February 2017
Before: Employment Judge Rogerson
Members: Ms N H Downey
Mr J Simms

Representation

Claimant: In person
Respondent: Mr Sugarman, Counsel

COSTS ORDER

In accordance with Rule 76(1) of the Employment Tribunals Rules of Procedure 2013, the Tribunal orders the Claimant to pay costs to the Respondent in the sum of £5,000.

REASONS

1. The Respondent made a costs application by a letter dated 8 July 2016 setting out the grounds of that application. The application sets out and reviews the correspondence between the Claimant and the Respondent and the Claimant and the Tribunal and provides a detailed history of these proceedings. That history ends with the dismissal of the Claimant's complaint of direct discrimination by reason of the Claimant's non attendance at the hearing on 14 June 2016.
2. The Claimant has responded to that application, annotating the application with his responses in blue highlight on pages 62 to 64 of his bundle of documents.
3. Both parties produced their own separate bundle of documents for the purposes of this costs hearing. Both parties made oral representations which we considered before making our decision.
4. Mr Sugarman in his oral submissions invites us to make a Costs Order on a number of grounds. Firstly the unreasonable conduct by the Claimant in bringing and conducting these proceedings, secondly on the basis that these proceedings were not brought in good faith and are vexatious and demonstrate vexatious conduct on the part of the Claimant and thirdly because the claim had no reasonable prospect of success.
5. We were referred to and reminded of the Tribunal's Judgment which sets out the reasons for dismissing the claim based on Rule 47 of the Tribunal's Rules of Procedure 2013. In our Judgment we set out the background to the

hearing at paragraph 3 to 21 which we do not repeat but do rely upon in deciding this costs application.

6. It is unfortunate that in the Claimant's response he continues to make allegations of inappropriate conduct by the Respondent, its Solicitors/Counsel and the Tribunal in relation to those alleged forged documents, rather than focussing on his conduct, the costs application and his response to the application.
7. The Claimant has been told in very clear terms how that issue (alleged forgery) was to be dealt with during the course of these proceedings and prior to the final hearing which he did not attend. Employment Judge Maidment made it clear to the Claimant "that the veracity and genuineness of any particular document can be explored in questions to the relevant witness at the hearing scheduled to commence on 14 June 2016".
8. It is not uncommon in Tribunal hearings for minutes of meetings to be in dispute between the parties as to their creation or intent. The Claimant would have been better served by attending the final hearing and making those arguments where the relevant findings of fact could have been by the Tribunal once it had heard evidence from both sides. Instead of following that process the Claimant has proceeded on the basis that they are forged minutes and the Tribunal should accept that without any further process.
9. Mr Sugarman has very carefully and fairly taken this Tribunal through the relevant correspondence to support the costs application suggesting that we make allowances for the Claimant's as a litigant person but that that did not give the Claimant the license to act unreasonably without any cost consequences. We accept that lay people are likely to lack the objectivity and knowledge of the law and practice brought to bear by a professional legal adviser. However in this case the Claimant was given very clear guidance from the Tribunal as to what he should do about any disputed documents and he has chosen to ignore that guidance and not attend the hearing.
10. Even in relation to the bundle of documents for the hearing, on 12 May 2016 Employment Judge Maidment made it clear that the bundle should include all disputed documents, so that the Tribunal could determine their relevance at this hearing. Instead of accepting that guidance and following it, the Claimant's approach was not to cooperate with the Respondent to include documents he did not agree which was unreasonable. His conduct of the proceedings prior to the hearing was not to comply with directions, for example not agreeing the exchange of witness statements. Instead of focusing on the steps he still needed to comply with to prepare for the hearing the Claimant did nothing. It is clear from the chronology that the Respondent attempted to contact the Claimant to arrange a date for witness statement exchange prior to the hearing, without success which is why it applied for an Unless Order from the Tribunal.
11. His failure to attend the final hearing to explain any health issues or to provide the evidence he had been told was required to be provided is another example of his unreasonable conduct. As Mr Sugarman points out the Employment Tribunal is used to dealing with employees with disabilities and making any reasonable adjustments it needs to do to in order to accommodate any effects of disability. Therefore, it would not have been a problem for the Employment Tribunal to have accommodated any issues the

Claimant had in relation to his pain in his arm which he said was the reason for his failure to attend.

12. Furthermore, it was clear from the GP's letter dated January 2017 which the Claimant relies upon at this hearing that a different health issue is identified. In it the GP indicates that sitting for long periods of time might have caused difficulty for the Claimant at the hearing. This would not have prevented the Claimant from attending the hearing, because breaks could have been incorporated to accommodate this issue. None of this information was provided to the Tribunal in circumstances where the Claimant had been told what information was required and why it was required. The consequence was that the Respondent prepared for and attended the first day of a three day hearing with witnesses ready to defend a claim of race discrimination which the Claimant unreasonably failed to attend. As a consequence the Respondent has incurred costs.
13. At this hearing the Claimant said it takes longer to get a letter from the GP rather than a sick note implying that he was unable to obtain that evidence in time for the hearing. We do not accept that was the case. If the Claimant knew in April 2016, that there were ongoing problems with his arm which were likely to impact on his ability to attend the hearing, he could have taken steps to obtain the evidence required earlier than he did. The real issue for the Claimant was that he was not getting the result that he wanted from the Tribunal in relation to the exclusion of the alleged forged documents and other disputed documents in advance of that hearing. We believe the Claimant had no intention of attending that hearing.
14. We found that the Claimant's conduct of these proceedings from 12 May 2016, was unreasonable.
15. Having decided that his conduct was unreasonable, we have to still consider whether or not to exercise our discretion under Rule 76(1) because 76(1) imposes a two stage test. First, a Tribunal must ask itself whether a party's conduct falls within Rule 76(1A), and if so, it must go on to ask itself whether it is appropriate to exercise its discretion in favour of awarding costs against that party.
16. In considering whether to exercise this discretion, an Employment Tribunal should take into account the "nature, gravity and effect" of a parties' unreasonable conduct. The Respondent in its costs application refers to the case of **Yerrakalva v Barnsley Metropolitan Borough Council** [2012] ICR 420 CA where the Court of Appeal commented that it was appropriate not to lose sight of the totality of the circumstances. The vital point in exercising the discretion to order costs is to look at the whole picture. The Tribunal has to ask whether there has been unreasonable conduct by the paying party in bringing, defending or conducting the case and in doing so identify the conduct, what was unreasonable about it and what effect it had. We have considered that conduct and the effects of that conduct on these proceedings above. We are conscious of the fact that Employment Tribunals must be careful not to penalise parties unnecessarily by labelling conduct as unreasonable when it may be perfectly legitimate depending on the circumstances.
17. In these circumstances although the Claimant might have been unclear prior to the Order of Employment Judge Maidment, about the process for challenging documents he believed were forgeries or irrelevant. After that he

knew exactly what the position was. He knew that issue was to be addressed at the final hearing which he decided not to attend. His conduct in not cooperating in relation to bundles and witness statement exchange was also unreasonable conduct. It all points towards someone who had made up their mind prior to the hearing that they would not attend. The difficulty for the Claimant is that once he decided that documents were forged/irrelevant he was not going to change his mind or allow any due process to decide that question for him.

18. Given that costs are compensatory in nature it is necessary to examine what loss has in fact been caused to the receiving party. The guidance by the Court of Appeal in **Yerrakalva v Barnsley Metropolitan Council** held that costs should be limited to those 'reasonably and necessarily' incurred. As noted by the EAT in **Howman v Queen Elizabeth Hospital Kings Lynn** EAT 0509/12 any Tribunal when having regard to a parties' ability to pay needs to balance that factor against the need to compensate the other party who has unreasonably been put to expense. The former does not necessarily trump the latter but it may do so.
19. In relation to the amount of costs sought, Mr Sugarman has quite sensibly not pursued the amount sought in the original application of £34,500 but has limited the amount to £10,000. We had indicated at the outset of this case that we didn't consider that £34,500 was a proportionate amount of costs to award for a case that had been listed for three days where the complaints of direct discrimination were limited to three alleged acts of direct race discrimination. It was not an unduly complex matter for the Respondent to have dealt with. That sum was in our view was disproportionate and Mr Sugarman quite sensibly agreed with that and restricted the claim to £10,000.
20. The Claimant was asked whether he had any comment on the amount of costs sought and whether he was advancing any sum which he wanted the Tribunal to consider might be more proportionate if costs were awarded. He said £5,000, although his primary position was that no costs should be awarded.
21. In relation to ability to pay in advance of this hearing I set out rules 76 and 84 of the Employment Tribunals Rules of Procedure for the Claimant so that he understood the matters the Tribunal could take into account.
22. At this hearing, the Claimant produced a document headed "Household Goods Assets and Other Expenses dated February 2017". In that document he lists his income and expenses. He lives in rented accommodation which he rents at a cost of £30 per week. He receives some Housing Benefit and he receives a Pension Credit in the sum of £159.35. He has savings of around £400. He has a loan from the Open University of around £3,500 to repay and he has a Costs Order from the County Court in relation to the defamation proceedings he unsuccessfully brought against the Respondent. That Order for costs was for £10,540 which he will be repaying. He does not own his own car or have a home and he has not obtained any alternative employment since his dismissal from the Respondent. He is optimistic about finding work in the future and is optimistic that he will earn a sum similar to that which he earned with the Respondent which was about £450 gross per week. He is a qualified and an experienced engineer who has also furthered those skills by undertaking a further course of study. He believes that is a reasonable level of income to anticipate in the near future. His current ability to pay any Costs

Order maybe limited given his regular outgoings for rent, food, heating, bills, but his position will hopefully improve in the future.

23. His ability to pay is one factor we have taken into account in deciding whether to award costs and the amount of costs. We also have to consider the information provided by the Claimant that he expects and has the ability to improve his means in the future
24. We considered the arguments made by Mr Sugarman and the authorities referred to in Mr Sugarman's grounds of the application. The Claimant has asked us to consider the fact that the Respondent never sent to him a costs warning letter or applied for a strike out or Deposit Order even though he had applied to strike out the defence. It was not a pre-condition of making a costs order that a costs warning letter was sent. If a letter had been sent it might have focused the Claimant's mind on the reasons why the Respondent was of the view that his claim had no reasonable prospect of success, at an earlier stage. We have not however made this decision to make a Costs Order on the basis of the 'prospects of success' it is made as a result of the Claimant's unreasonable conduct of these proceedings that has caused the Respondent to incur costs.
25. We considered that it was appropriate for us to exercise our discretion to award costs based on the unreasonable conduct of the Claimant from 12 May 2016 and that the appropriate and necessary amount of costs to award was £5,000. This would include Mr Sugarman's brief fee of £3,500 which was a disbursement paid by the Respondent for the hearing and some of the preparation costs incurred by the Respondent. This was a reasonable and proportionate sum to award having regard to the Claimant's ability to pay and the liability he already has to pay the costs in the defamation proceedings. Even though it may take some time to pay the award, the Claimant's means are likely to improve in the near future and the sum we have awarded is proportionate in the circumstances.

Employment Judge Rogerson

Date: 17 March 2017

Sent on: 21 March 2017