



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
Mr M Idowu

Respondent
George Eliot Hospitals NHS Trust

HELD AT Birmingham

ON 14 September 2017

EMPLOYMENT JUDGE Anstis (sitting alone)

Representation:

Claimant: No attendance or representation

Respondent: Mr R Powell (counsel)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Claimant is ordered to pay the Respondent (George Eliot Hospitals NHS Trust) £6,237.50 in respect of costs.

REASONS

Introduction

1. On 3 June 2016, the Claimant submitted a claim to the employment tribunal. The claim was against a number of respondents, including the George Eliot Hospitals NHS Trust. In the course of the claim, a further respondent was added to the claim. At various stages in this claim orders have been made in respect of the claims against various of the respondents. For the avoidance of doubt, in this order I am only concerned with the Claimant's claim against the George Eliot Hospitals NHS Trust, and where I refer to the "Respondent" in this judgment and reasons it is a reference to the George Eliot Hospitals NHS Trust.
2. The Claimant's claims were stated in his application to the tribunal to be claims of unfair dismissal, age, race, sex and marital status discrimination. He also claimed a breach of the Agency Workers Regulations and that he was owed holiday pay, arrears of pay and other payments.
3. A preliminary hearing was convened on 6 September 2016 for the purposes of case management. At that hearing the Claimant withdrew his claims for unfair dismissal and marital status discrimination. A further respondent was joined to the claim, and the Claimant was ordered to provide further particulars of his claim. He was given until 5 October 2016 to do that, with a further preliminary hearing listed for 12 January 2017.
4. At the hearing on 12 January 2017 the Claimant withdrew his claims for age and sex discrimination and unauthorised deductions from wages, along with his claim against the respondent who had recently been added to the claim. An order was made at the

hearing that unless the Claimant complied with the order in respect of further particulars his claim should be dismissed without further order.

5. At a hearing on 29 March 2017 I found that the Claimant had not complied with the “unless” order and that as a result his claims against the Respondent had were dismissed. Full reasons for this decision were given at the time.
6. On 27 April 2017, the Respondent made an application for costs. The original arrangements for hearing the case were varied so that the hearing was listed for today, with the Respondent to provide a schedule of costs claimed by 29 August 2017 and the Claimant to provide such documentary evidence as to his means as he wished the tribunal to consider by 7 September 2017.
7. The Claimant did not attend and was not represented at the hearing. Under rule 47 the tribunal can proceed in the absence of a party but before doing so shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party’s absence. After initially waiting 15 minutes for the Claimant, a tribunal clerk attempted to telephone him on both his landline and mobile, but without getting through. The Claimant had given no explanation for his absence, and I noted that on 21 August 2017 he has sent the tribunal documents which I took to be his response to para 2(b) of my case management order of 27 July 2017. This order had contained the hearing date and time, so it appeared that the Claimant was aware of the hearing date and time. Accordingly, I considered it just (bearing in mind the overriding objective) to proceed in the Claimant’s absence.
8. It appeared from the tribunal file that the Claimant had not provided the material contained in his email of 21 August 2017 to the Respondent, so prior to the hearing of the application I provided a copy of that to Mr Powell so that he was aware of it. For the sake of completeness I also told Mr Powell that I had read papers on the tribunal file in which the Claimant alluded to being £40,000 in debt.

The application

9. Mr Powell started by referring to the financial documents that had been contained in the Claimant’s email of 21 August 2017. These comprised two payslips from Staffline in March 2017, showing earnings of £400-£500 a week, followed by a Halifax bank statement from 27 February – 22 March 2017 and a Barclays account for 18 February – 17 March 2017. Mr Powell said that the Staffline payments did not appear in the bank statements, so that the Claimant had not been candid about his means. There were also payments noted in the bank statements which were not accounted for by the Staffline payslips. Mr Powell went on to say there was discussion at an earlier hearing about the Claimant working double shifts, and there had been no information given about the Claimant’s earnings from the legal practice that he seemed at various points to have been running.
10. On further discussion and examination of the materials, it appeared that the Halifax bank account was in a different name but at the same address to the Claimant, and showed payments in from the Claimant in respect of bills. It is possible that this was intended by the Claimant to show payments to his landlord, but in any event the bank statement put forward from Halifax was not the Claimant’s bank statement.
11. Mr Powell then took me through the conduct of proceedings by the Claimant, by reference to the bundle produced by the Respondent. He said that the costs claim started from the point at which the order for further particulars made by EJ Wynn-Evans expired – that is, 5 October 2016. This was in respect of a request for further particulars made in a letter dated 26 August 2016, so the Claimant had had 40 days overall to respond. He said that from 5 October onwards there was no reasonable explanation for the Claimant’s failure to comply with the order, and all progress on the claim had been stalled because of the failure to provide particulars.

12. Mr Powell then took me through the subsequent correspondence at pages 71, 90 – 91 and 113, noting the second and third bullet points in the letter of 12 December 2016 where the Respondent had said that the still did not understand the claim, and had not heard from the Claimant since September 2016.
13. Mr Powell proceeded to refer to the strike out warnings given by the tribunal on 20 December 2016 and 6 January 2017, and the Claimant's eventual response on 11 January 2017, which did not contain the necessary further particulars. Moving on from this, Mr Powell referred to the unless order issued on 12 January 2017, and that subsequent particulars which had been found not to comply with the terms of the unless order.
14. Mr Powell contrasted that with the Claimant having voluntarily supplied on 27 February 2017 a substantial response to the revised grounds of resistance submitted on 30 January 2017, when no such response was required. He said that this showed that the Claimant was well able to respond fully and in a short time when he chose to do so.
15. Mr Powell went on to refer to the Claimant's LinkedIn profile and other correspondence where he had held himself out as a legal practitioner. He said that matters such as the pre-action letter in his judicial review proceedings, and that associated request for disclosure showed that the Claimant was familiar with legal requirements and capable of applying legal concepts.
16. Mr Powell said that the Claimant's conduct of the case has been unreasonable following the expiry of EJ Wynn-Evans's order for further particulars in that:
 - a. All he needed to do in response to that order was to give basic details such as who, where and when, which was not a matter requiring legal skills,
 - b. In any even with his claimed legal skills it would have been easy for him to comply,
 - c. There had been no explanation for his non-compliance, and
 - d. The fact that his claim had been struck out under the unless order was itself some evidence of unreasonable conduct. If his conduct had been reasonable he would have complied with the order.
17. Mr Powell said that from 5 October onwards there had been no adequate explanation for non-compliance, which continued up to the date of my decision that the unless order had not been complied with. The Claimant had every opportunity to comply with the order.
18. In respect of the amount claimed, Mr Powell took me to the schedule of costs at page 14 of the costs bundle, and the materials that followed from that. He said that the hourly rates claimed for the solicitors were substantially below the usual guideline rates. He said that limiting the claim to the period from 5 October onwards meant that the time entry for 11 October was the first one claimed, and meant a deduction of £1,012.50 from the net amount of solicitor's fees on the schedule.
19. At my prompting, after a short break to take instructions Mr Powell confirmed that this client could reclaim the VAT on the costs, so he did not pursue any claim for the VAT. He said that in the relevant time, and including today's hearing, he had had to attend three hearings at a rate of £1,200 for each of them. Following discussion, he did not pursue the claim for £9.80 shown as "taxi for bundles" on the schedule.
20. Mr Powell also said that he was claiming for other disbursements not mentioned on the schedule, such as the cost of photocopying the tribunal bundles and of his solicitors' travel to take instructions from the client. The amount claimed came to £7,427.50, plus an unspecified amount for those miscellaneous disbursements.

The legal framework

21. Under rule 76(1)(a) I can make a costs award where a party has acted unreasonably in their conduct of the proceedings.
22. This requires separate consideration of whether the party has acted unreasonably, whether in those circumstances a costs award should be made, and if so, how much should be awarded.
23. Under rule 84 *"in deciding whether to make a costs ... order, and if so in what amount, the Tribunal may have regard to the paying party's ... ability to pay"*.
24. It is plain that in employment tribunal proceedings a costs award is to be considered the exception rather than the rule. There is nothing automatic nor even a presumption in these circumstances that a costs award should be made. It is the wording of the rules which set out the relevant test.

Discussion and conclusion

25. The first question for me is whether the Claimant has been unreasonable in the conduct of his case against the Respondent for the period from 5 October 2016 onwards.
26. I accept Mr Powell's submission that the Claimant's conduct of the case for that period was unreasonable. Mr Powell properly limited his claim to the period when the Claimant was in default of tribunal orders. In respect of the original order of EJ Wynn-Evans, the Claimant did not ever attempt to comply with this, and did not enter into any communications about it – despite multiple letters from the tribunal and various respondents – until 11 January 2017, which was the day after his second strike-out warning had expired, and the day before a further preliminary hearing had been listed. He spoke at that point of medical difficulties, but no medical evidence has ever been produced to back this up.
27. There followed the unless order which was not properly complied with.
28. It is certainly not the case that any failure to comply with an unless order amounts of itself to unreasonable conduct, but in this case it is indicative of the Claimant's unreasonable behaviour in failing to properly set out his claim. Whilst due regard has to be given to his status as a litigant in person, I accept Mr Powell's submission that the Claimant holds himself out as someone who has legal expertise, and who is capable of working with legal concepts and structures.
29. The Claimant's claim was identified from the outset as not being properly particularised. He was given full opportunity to provide further particulars, but did not – apparently not engaging with the process at all for a period of three months from October 2016 to January 2017. In that time the Respondent was put to cost in attending a number of preliminary hearings, all occasioned by the Claimant's failure to properly set out his claim.
30. The evidence received from the Claimant as to his means is at best incomplete. As Mr Powell pointed out, it shows two payslips as earned but those do not correspond to the bank statements, and there are credit entries in the Claimant's bank statement which are not accounted for by the payslips. There is no material to support the suggestion elsewhere in the tribunal file that the Claimant is £40,000 in debt. The Claimant is earning at least £400/week. This is not a large income, but does indicate that he has at least some means to meet a costs award.
31. In those circumstances, I find that (i) Claimant's conduct of his case has been unreasonable, and (ii) I should make a costs award.

- 32. I have been through the detailed time entries provided by the Respondent's solicitors and do not find anything to object to in them. The hourly rates claimed are relatively modest. The follow-up work that needed to be done following the Claimant's failure to comply with the order was not straightforward, particularly given that for some of this time there were four respondents, each separately represented. The amounts claimed are appropriate and represent the loss caused to the Respondent by the Claimant's unreasonable conduct of his claim.
- 33. I do not accept Mr Powell's claim for unspecified miscellaneous disbursements. They were not set out in the schedule which I had ordered to be prepared, and there was no evidence that they had ever been charged to the Respondent.
- 34. Whilst not criticising Mr Powell's conduct of the claim on behalf of his client, I had some reservations about it being appropriate to claim as part of a costs award his full daily fee in the case of hearings which would have been scheduled for half a day. I suggested to him that I felt £800 would be more appropriate as the amount of any costs award and gave him the opportunity to make any further representations on the point. He left this as a matter for me, and accordingly I consider that £800 for each hearing is the appropriate amount of his fees to be considered for this costs award.
- 35. In considering the final award to make I may have regard to the Claimant's means. I do not, however, consider that that is a matter that can necessarily insulate a claimant from the consequences of their unreasonable conduct of a claim. I do not consider that in this case the Claimant's means are a matter which ought to mean any reduction in what would otherwise be payable. This is because (i) the Claimant has some means to meet a costs award, (ii) has only given incomplete information about his means, and (iii) in any event I would consider it appropriate not to make any deduction given the nature of his conduct.
- 36. Accordingly, I have decided to make no reduction in the amount of the order under rule 84.
- 37. The total amount of the order is £3,837.50 in respect of solicitors' fees and £2,400 in respect of counsel's fees, which comes to £6,237.50.

signed on 14 September 2017
Employment Judge Anstis

Sent to Parties on

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