



EMPLOYMENT TRIBUNALS

Claimant: Ms J Saimbi

Respondent: Jasmine Mirza t/a Saks Hair & Beauty

Heard at: Manchester **On:** 29 September 2017

Before: Employment Judge Porter

REPRESENTATION:

Claimant: Written representations

Respondent: No written representation received

JUDGMENT

The judgment of the tribunal is that:

1. the claimant's application for costs is successful in part;
2. the respondent is ordered to pay to the claimant legal costs in the sum of £6,414.00 (including VAT)

REASONS

Issues to be determined

1. This is an application for costs incurred by the claimant generally and, in the alternative, costs arising from the respondent's application for

reconsideration of a default judgment made under rule 21 of the Employment Tribunals Rules of Procedure 2013.

Background

2. The claimant presented a claim on 12 July 2016. The respondent failed to enter a response. A default judgment was entered on the Register and sent to the parties on 9 September 2016.
3. The respondent applied for a reconsideration of that judgment. By email dated 1 February 2017 the respondent asserted that:
 - 3.1 the respondent was unaware of the claim – the first she knew of it was after judgment had been entered and a court enforcement officer arrived to enforce the judgment;
 - 3.2 she had problems with the post because she shared an address, I Station Road, Urmston;
 - 3.3 the claimant was not employed by her but by another company, Salon at Chill Limited
4. A hearing was held on 13 April 2017 to consider that application for reconsideration. At that hearing the claimant was represented by her solicitor.
5. The application for reconsideration was refused. Judgment was sent to the parties on 20 April 2017 confirming that the default judgment sent to the parties on 9 September 2016 stands.
6. By email dated 18 April 2017 the claimant made an application for costs, including the costs incurred in attending the hearing of the application for reconsideration.
7. There was a delay in holding the costs hearing as the parties had reached agreement as to the payment of costs. However, that agreement fell through and the costs hearing was held on 15 August 2017. That hearing was adjourned at the request of the respondent.
8. An Order was sent to the parties on 22 August 2017 notifying the parties of the decision that the application for costs would be determined on the basis of the papers at this hearing in chambers. Orders included:
 - 8.1 The respondent is ordered to send to the tribunal and to the claimant, by no later than 29 August 2017, the medical evidence in support of her application to adjourn today's hearing, indicating the

medical condition which prevented the respondent from attending the hearing.

- 8.2 The claimant shall, by no later than 5 September 2017, send to the tribunal and to the respondent a copy of its written application for costs, including her application for legal costs arising from this adjournment, together with an up-to-date schedule of the total amount of costs claimed.
 - 8.3 The respondent shall, by no later than 19 September 2017, send to the tribunal and to the claimant a copy of her written response to the application for costs, together with a signed witness statement setting out the financial position of the claimant including her income, her outgoings, any savings and details of any property owned by her.
9. The respondent made no response to those orders, made no application for a variation of those orders, has failed to provide any response to the application for costs.

Submissions

10. Solicitor for the claimant relied upon written submissions set out in its application, confirmed by email dated 5 September 2017, which the tribunal has considered with care but does not repeat here.
11. The respondent has failed to respond to the application for costs.

Evidence

12. No evidence was heard for the costs hearing. The tribunal considered the application on the papers.
13. Evidence was heard at the hearing on 13 April 2017 from both the claimant and the respondent.

Facts

14. Having considered all the evidence the tribunal has made the following 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.
15. At the hearing on 13 April 2017 to consider the respondent's application for reconsideration of the default judgment the respondent gave evidence during the course of which:

- 15.1 the respondent accepted that she was aware of the claim, had received a copy of it at around the time it was sent to her by the tribunal;
 - 15.2 the respondent asserted that she had entered a response to the claim within the time required. The respondent did not bring to the tribunal any evidence of any such Response.
16. Enquiries were made of the administration at the hearing. The clerk confirmed that there was no record of any Response from the respondent on the tribunal file.
17. The application for reconsideration was unsuccessful because:
- 17.1 For the first time at the hearing the respondent asserted that she had received a copy of the claim form and had entered a response in a timely fashion;
 - 17.2 In her application to the tribunal for reconsideration the respondent asserted that she was unaware of the claim until the bailiffs sought to enforce the judgment. That was clearly an incorrect statement;
 - 17.3 The respondent did not present a response to the claim within the time limit for so doing;
 - 17.4 .The respondent's explanation for her failure to enter a response in time was unsatisfactory. No satisfactory evidence has been received as to why, if the respondent was aware of the claim, she failed to enter a Response within the time stated, why she took no action until the bailiffs attended her property to take action;
 - 17.5 Having considered the evidence the tribunal was satisfied that the claimant had named Jasmine Mirza t/a Saks Hair & Beauty as the correct respondent, the employer named in the Contract of employment, which was signed by the respondent.
18. There was a genuine dispute between the parties as to who was the claimant's employer. The claimant named the respondent as her employer because this was set out in her Contract of employment. The respondent asserted that the claimant was employed by Salon at Chill Limited, a company which ran the business at Chill Factore. The claimant accepted that she had worked in two salons, one at Urmston;, one at the Chill Factore, that she had received instructions from both the respondent and Mr Fiaz Khalide, a director of Salon at Chill Limited, and had received payments of her wages from Salon at Chill Limited. It was the claimant's

understanding that both salons were run jointly by the respondent and her husband, Mr Fiaz Khalide. The tribunal accepted the claimant's evidence that she worked in both salons, there was an exchange of products between the salons, the claimant was interviewed by, and received instructions from, the respondent.

19. The respondent provided the claimant with a Contract of Employment, naming the respondent as her employer. The contract was signed by the claimant and the respondent on 4 September 2015.
20. The tribunal rejects the assertion of the respondent that that Contract of Employment was given to the claimant, and signed by the respondent, in error.
21. On 28 March 2017 the claimant's solicitor placed the respondent on notice that her application for reconsideration was unreasonable and that the claimant would be seeking her legal costs should the respondent proceed with the application. In correspondence the claimant's solicitor made it clear that such costs would include preparing a witness statement for the hearing and travelling to and from the Manchester employment tribunal.
22. The costs application was made and a costs hearing was listed for 15 August 2017. The claimant's solicitor was in attendance. The respondent was not in attendance.
23. On 15 August 2017 at 09.19 the tribunal received an email from Kamran Dales, who identified himself as the respondent's brother-in-law, requesting an adjournment of the hearing. Extracts from that email read as follows:

Jasmine Mirza has a hearing today for costs. She is extremely unwell and has had severe viral symptoms and stress symptoms recently. She has been also been vomiting all night. Her young baby has also gone down with the virus

Currently she is under the care of Dr Chet Chande in Whitefield. Jasmine has a young baby and no current family support and cannot be assisted in recovery and childcare.

Jasmine is no longer employed and is currently having to use state benefits for day-to-day living. Her business closed earlier this year and has left in a terrible mental state ...

A letter can be sent to provide medical evidence of her current state of health.
24. The application was granted. The claimant was ordered to provide the medical evidence in support of her application for an adjournment but has failed to do so.

The Law

25. 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.
26. 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.
27. 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.
28. Under rule 76(2) Employment Tribunals Rules of Procedure 2013 an employment tribunal has the discretionary power to make a costs order where a hearing has been postponed or adjourned on the application of a party. This is a discretionary power. Costs should only be awarded against a party if he or she is at fault in applying for a postponement or adjournment.
29. In deciding whether to make a costs order the tribunal may take into account the paying party's ability to pay.

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)

30. The respondent acted unreasonably in pursuing the application for reconsideration because:
- 30.1 The respondent initially misled the tribunal by asserting, in her written application for reconsideration, that she had not received a copy of the claim form and that the first she was aware of the claim was after the default judgment had been entered and the bailiffs attended her property;

- 30.2 It was the respondent's clear evidence before the tribunal that she had received a copy of the claim form, around the time it was sent to her by the tribunal, and in fact had presented a response;
- 30.3 The respondent gave inconsistent and unsatisfactory evidence before the tribunal: there was no satisfactory evidence to support her new assertion that she had in fact sent a Response to the tribunal. The tribunal rejects that assertion;
- 30.4 No satisfactory explanation was provided for the delay in providing a response to the claim
31. Had the respondent informed the tribunal, when making the application for reconsideration, that she had received the claim form when served by the tribunal, then it is more than likely that the tribunal would have rejected the application on the papers, without the need for a hearing, on the grounds that such application had no reasonable prospect of success.
32. The unreasonable conduct of the respondent led to the claimant incurring legal costs in the preparation for, and attendance at, the hearing on 13 April 2017.
33. The respondent has given no satisfactory explanation for her unreasonable conduct.
34. The respondent has given no satisfactory evidence as to her financial means. She has failed to comply with the orders of the tribunal set out at paragraph 8 above.
35. In all the circumstances it is appropriate to exercise the tribunal's discretion and to order the respondent to pay to the claimant the legal costs arising from the preparation for, and attendance at, the reconsideration hearing on the 13 April 2017 in the amount claimed - £3,350.00 plus VAT of £670.00, a total sum of £4020.00. The respondent has raised no objection to the amount of costs claimed, which amount appears to be reasonable and proportionate.
36. The respondent failed to attend the Costs hearing on 15 August 2017. Her brother-in-law applied for an adjournment of that hearing on the morning of the hearing itself, stating that the respondent was too ill to attend that hearing and that medical evidence could be provided to support that assertion.
37. The respondent has failed to provide that medical evidence despite being ordered to do so.

38. In these circumstances there is no satisfactory explanation for the failure of the respondent to attend the costs hearing. There is no satisfactory explanation for the failure to provide medical evidence. The respondent has acted unreasonably in requesting that adjournment.
39. In all the circumstances it is appropriate to exercise the tribunal's discretion and to order the respondent to pay to the claimant the legal costs arising from the preparation for, and attendance at, the costs hearing on 15 August 2017 in the amount claimed - £1,500.00 plus VAT of £300.00, a total sum of £1,800.00. The respondent has raised no objection to the amount of costs claimed, which amount appears to be reasonable and proportionate.
40. The respondent has acted unreasonably in the conduct of this costs application because:
- 40.1 the respondent has raised no defence to the cost application;
 - 40.2 the respondent originally agreed to pay at least part of the costs to avoid the need for further hearings;
 - 40.3 the respondent has not demonstrated any intention to raise an objection to the application for costs in a reasonable manner -- the respondent failed to comply with the order to provide written submissions for consideration by the tribunal
41. The unreasonable conduct of the respondent has led to the claimant incurring further legal costs in preparing written submissions for this application.
42. In all circumstances it is appropriate to exercise the tribunal's discretion and to order the respondent to pay to the claimant the legal costs for preparing the written submissions - £495.00 plus VAT of £99.00 , a total sum of £594.00. The respondent has raised no objection to the amount of costs claimed, which amount appears to be reasonable and proportionate.
43. It is not appropriate to order the respondent to pay the claimant's legal costs in pursuing the claim from the outset because:
- 43.1 Costs are not the norm in tribunal proceedings;
 - 43.2 there was a genuine dispute as to the correct identity of the claimant's employer;
 - 43.3 the claimant accepted that she worked in both businesses and that at times she followed instructions from Mr Khalid, director of Salon

at Chill Limited, and received payments of her wages from Salon at Chill Limited;

- 43.4 the determination as to who was the correct employer could only be determined after hearing the evidence;
- 43.5 without hearing that evidence it would not be possible to state that the response had no reasonable prospect of success.

Employment Judge Porter

Date; 2 October 2017

JUDGMENT SENT TO THE PARTIES ON
6 October 2017

FOR THE SECRETARY OF THE TRIBUNALS