



EMPLOYMENT TRIBUNALS

Claimant: Mr K Grzyb
Respondent: Lidl Ltd
Heard at: Leicester
On: 26 February 2018
Before: Employment Judge Ahmed
Member: Mr P Martindale

Representation

Claimant: In person
Interpreter: Mr Marcin Weclawiak
Respondent: Mrs G Williams, Solicitor

JUDGMENT ON AN APPLICATION FOR COSTS

The unanimous judgment of the tribunal is that the Claimant is ordered to pay to the Respondent £2,000.00 (net) by way of costs.

REASONS

1. This was a hearing on an application by the Respondent for costs following the substantive liability hearing held in October 2017, the reasons for which were sent to the parties on 25 November 2017.

2. At this hearing, Mrs Pattison who was one of the members of the tribunal at the substantive hearing, was unwell and not able to take part. Pursuant to section 4(1)(b) of the Employment Tribunals Act 1996, and with the consent of both parties (such consent being confirmed in writing) this hearing proceeded before an Employment Judge and a single member only.

3. The Claimant once again represented himself. The Respondent was again represented by Mrs Williams, a solicitor engaged as an independent consultant by Gregsons, a firm of solicitors. Mrs Williams provides legal services to Gregsons who then in turn invoice the client. We are satisfied that the Respondent has been "legally represented" within the meaning of Rule 74(2) of the Employment Tribunals Rules of Procedure 2013.

5. Prior to this costs hearing, the tribunal made an order for directions in a

letter dated 27 November 2017. They included an order that the Claimant should send to the Respondent evidence of his financial means at least 28 days before the costs hearing, for the parties to disclose all relevant documents in connection with the costs application, to agree a bundle before the hearing and to mutually exchange any witness statements.

6. Once again, Mr Gryzyb failed to comply with any of the orders and directions of the tribunal as was the case for the substantive hearing. Although a short bundle of documents was prepared by the Respondent there was no input from the Claimant. Mr Grzyb has not produced a witness statement. At this oral evidence he did wish to give evidence and was therefore cross-examined by Mrs Williams.

7. More significantly perhaps Mr Grzyb failed to send evidence of his income to the Respondent before the hearing. Instead, in an email timed at 08:43 and sent to the Respondent and tribunal on the day of the hearing, Mr Grzyb attached some bank statements, bank receipts and a copy of his final pay slip from GI Group Recruitment Ltd (an employment agency) dated 24 May 2017. The latter relates to Mr Grzyb's employment with the BMW which, according to the Claimant, ended in April 2017. There was no witness statement. A number of the consecutive pages from the bank statements were missing.

8. The Claimant has at least four separate bank accounts with Lloyds Bank, NatWest, HSBC and Barclays. All of them are current as opposed to savings accounts. With Lloyds, the only information which Mr Grzyb supplied during this hearing consisted of two receipts of payments which he made from his 'Classic Account' to KL Law Ltd, a firm of solicitors. The first payment was of £200 made on 7 October 2016 and the second a payment of £1,350 on 10 October 2016. The failure to supply any statements for the Lloyds account was the subject of criticism in cross examination. After closing submissions had ended, and whilst we were in deliberations, Mr Grzyb went to a local branch of Lloyds and obtained a more up to date statement which shows that at 22 February 2018 he had a credit balance in that account of £103.08. We took that into account but clearly it shows that such information could have been provided earlier if the Claimant had been minded to do so.

9. In respect of the NatWest account, Mr Grzyb merely provided a general summary statement of his balance and one copy of a statement numbered 77 which shows sums withdrawn and paid in between 24 November 2017 and 4 January 2018. It shows a credit balance of £1,124.51 at the end. Moreover, with this and with the other statements supplied the Claimant has redacted details of all of the payers and payees. It is however clear that on 29 November 2017, Mr Grzyb received £402.08 into this account which is agreed was his SSP payment from the Respondent. It is also agreed that a further payment of £387.18 paid on 4 December 2017 which was also SSP from the Respondent.

10. The details of the HSBC account are similarly unclear. Mr Grzyb chose only to disclose statements numbered 69, 70, 73 and 74. Unfortunately, the missing statements meant that we were unable to identify how the balance went from a small credit of £12.34 on 3 November 2017 to £692.57 on 6 December 2017. We can see from statement number 73 that the Claimant's expenditure from 6 December 2017 to 16 January 2018 left him with a final credit balance of £130.66 but it is not clear where any income was derived from. During the lunch break Mr Grzyb obtained statements 75 - 77 of the HSBC account which by close

of business on 16 February 2018 showed he had a debit balance of £245.81. We should say that these statements were obtained by the Claimant of his own volition as by that stage the tribunal was already in deliberations.

11. In relation to the Barclays account, the Claimant has supplied only two statements which do at least show a continuous state of affairs from 12 September 2017 - 11 January 2018. Those statements show that he had a starting credit balance of £503.89 on 12 September 2017 ending with a credit balance of £234.02 by 11 January 2018.

12. Mr Grzyb confirms that he has no other bank accounts nor does he have any savings. He is not married nor with a partner but says he has a female friend who occasionally lends him money. The amount of such loans could be between £1,000.00 to £2,000.00. There is no evidence of any such payments being paid into the Claimant's account. Mr Grzyb denies that he is undertaking any other work at the moment other than with Lidl, for which he is currently receiving SSP, having been off work due to problems with his shoulder. He expects to return to work soon.

13. In respect of the payments to KL Law, Mr Grzyb says that he instructed this firm of solicitors to act on his behalf but could not continue to instruct them due to cost. It is clear KL Law did not prepare the Claim Form on his behalf. They ceased to act at a fairly early stage in the proceedings.

14. We began with the Claimant's financial information recognising that the issue of ability to pay only arrives after a decision to make an order for costs is determined. What it demonstrates is unfortunately once again the Claimant's unwillingness to be open and frank and his continued failure to comply with orders of the Tribunal. Mr Grzyb was aware of the orders made for this hearing and as an intelligent individual knew what needed to be done within the relevant timescales. His approach in relation to the costs hearing is consistent with the way he has conducted himself in the events leading to this hearing and the merits hearing. That is to say there is a wholesale disregard of rules and procedures.

15. Rule 74 of the Employment Tribunal Rules of Procedure 2013, so far as is relevant, states:

(1) "Costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing). In Scotland all references to costs (except when used in the expression "wasted costs") shall be read as references to expenses.

(2) "Legally represented" means having the assistance of a person (including where that person is the receiving party's employee) who—

(a) has a right of audience in relation to any class of proceedings in any part of the Senior Courts of England and Wales, or all proceedings in county courts or magistrates' courts;

16. Rule 75(1) states of the 2013 Rules states:

"A costs order is an order that a party ("the paying party") make a payment to—

(a) another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while represented by a

lay representative;

17. Rule 76(1) and (2) of the 2013 Rules, so far as is material, states:

“(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—

(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.

(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.”

18. Rule 78 deals with the amount of a costs order and 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;

19. Rule 84 deals with the means of a party to pay and states:

“ In deciding whether to make a costs, 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.”

20. Costs orders in the tribunal are an exception rather than the norm (see **Gee v Shell UK Ltd [2003] IRLR 82**). They are also discretionary. Costs orders do not merely follow the event, that is to say it does not automatically follow that a loser must pay the winner’s costs. When considering whether to make a costs order a two stage process is followed: the Tribunal must first ask itself whether a party’s conduct falls within Rule 76 and if so it must then go on to ask whether it is appropriate to exercise the discretion to make an order for costs. In coming to our decision we take on board the fact that the Claimant is a litigant in person though he has had advice and representation in the early stages. We take into account his means insofar as that information is available and reliable.

21. We remind ourselves, and in doing so remind the Claimant, of some of the findings we made in the earlier substantive judgment on liability. In particular, we did not find the Claimant to be an honest, truthful or reliable witness (paragraph 30), we found that his suggestion that Mr Gokberk began a campaign to get him dismissed because he was Polish or because he was a Christian was not plausible (paragraph 39), we noted that Mr Gokberk had previously been a manager without any racial incidents at two Birmingham Aldi stores where there are a large number of Polish workers (paragraph 39.2), we found that there were several other Polish workers at the Oxford store at the time the Claimant was employed yet none of them had made any complaints or insinuations against Mr Gokberk of discrimination (paragraph 39.3), that the Claimant made allegations which were factually incorrect (paragraph 49), that the Claimant’s religious discrimination claim was largely based on the allegation that he was unable to attend Mass on Sundays as he was allocated shifts then yet Sundays was when the Claimant almost always made himself voluntarily available to work

(paragraph 53), that the Claimant brought these proceedings as a form of retaliation or retribution and as a vehicle to ventilate his grievances against Mr Gokberk (paragraph 57).

22. We are satisfied that the conduct mentioned in the preceding paragraph constitutes unreasonable as well as vexatious conduct.

23. In relation to conduct generally, the Claimant made very serious allegations against Mr Gokberk and others which we found to be wholly without any basis. We found the Claimant to be an unreliable witness on the previous occasion and he has been evasive in relation to his income today. His job with Aldi is a part time role and he has nearly always undertaken another part time job for the majority of the time whilst with Aldi. He is therefore likely to have employment in addition elsewhere as it is difficult to see how else funds would be coming into his accounts. His suggestion that a female friend, who is not his partner, has lent him large sums of money the details of which do not appear on any of the statements is not credible. He has not produced any witness statement from such a person.

24. We infer that the Claimant has income from other sources which he has failed to disclose. The missing bank statements give rise to such an inference given the fact that the Claimant had no income other than SSP from Lidl for some considerable time. According to his earlier evidence he was apparently laid off from BMW in April/May 2017 so no further pay would have come from that source after that date. It seems to us highly unlikely that Mr Grzyb would not have sought alternative employment when work with BMW ended. When discussing the situation with his GP he failed to mention the job with BMW. His conduct in failing to disclose his financial information until an hour or so before the costs hearing, when he was ordered to do so at least 28 days beforehand, is another example of his unreasonable conduct. By way of an explanation Mr Grzyb said that he was away in Poland for some of the time between the last hearing and this and so could not comply. Upon questioning it transpired that he was only in Poland over Christmas from 24 – 28 December 2017 and given that this hearing was listed for February it could not therefore have affected the situation.

25. Mr Gyzyb states that in commencing and continuing with these proceedings he relied upon advice given to him by a firm of solicitors and that he acted honestly, not appreciating either the risk of a costs order nor honestly believing that his claim had no reasonable prospect of success. We find it difficult to see how any competent solicitor would have advised the Claimant that he had a good case in circumstances where it had been listed for a preliminary hearing to consider a strike out or a deposit order. It is likely that it would have been explained to the Claimant that such hearings are comparatively rare and only listed where there are real concerns as to the merits of a case. As it turned out the preliminary hearing did not proceed because the Claimant did not attend claiming he was assaulted the day before. He did not provide any crime reference number nor any other supporting evidence save for a letter from his GP. The Respondent attended the preliminary hearing with Counsel but in the Claimant's absence took the somewhat pragmatic view that it was cheaper to proceed with the full hearing rather than re-list the preliminary hearing and incur further costs.

26. We cannot comment on the advice Mr Grzyb received from his solicitors.

Of course such advice is privileged and the Claimant has waived the privilege by providing evidence of such advice. We have only the Claimant's assertion that he was told he had a good case. If that advice was manifestly wrong his recourse is with his solicitors or the relevant regulatory bodies. Insofar as his own honest opinion is concerned, the Claimant is an intelligent individual who should have recognised the inherent weaknesses in his case. In some instances his primary motive has been of retaliation rather than to seek justice.

27. Mr Grzyb's failure to comply with the orders of the tribunal has nothing to do with advice or honest belief. He failed to comply with the most important orders and directions in the lead up to the full merits hearing. The same pattern was repeated at the costs hearing. He also redacted, without any prior permission of the tribunal essential information from his bank statements. His reasoning was that he did not wish to disclose how he spends his money, which of course is understandable, but at the same time it has led to a number of gaps in the information. His decision to email the financial information an hour or so before the hearing was clearly tactical.

28. The overall length of the hearing was affected by the Claimant's conduct of the proceedings. The case took much longer than it ought to have done partly because of the Claimant's conduct. We recognise there was an interpreter which slows down progress. But the Claimant identified new allegations at the start of the hearing and spent excessive amounts of time in cross-examination of the Respondent's witnesses. He has a propensity to argue every point no matter how trivial, inconsequential or unmeritorious. He made 18 separate allegations of discrimination all of which were dismissed. The complaint of discrimination by reason of religion or belief clearly had no reasonable prospect of success. In the circumstances we consider it appropriate to exercise our discretion to make an order for costs.

29. The Respondent's costs are approximately £12,000.00. Mrs Williams' charges as an independent consultant are in the region of £7,000 for conducting the liability and costs hearings. There were also Gregsons fees for general preparation and Counsel fees in attending the aborted preliminary hearing.

30. We are satisfied that the costs incurred are reasonable given the length of the hearing and the necessary preparation time it would have involved. The Respondent limits its costs application to £10,000.00

31. We have considered carefully the Claimant's means. He has appropriately £1,200.00 in his NatWest account, £234.00 in the Barclays account and £103.00 in his Lloyds account. He still has a job with Lidl and therefore good earning capacity. It is also highly likely he has other forms of undeclared income. Mr Grzyb clearly manages his finances well. Apart from being in debit on one account, he does not appear to have any credit card or other debts.

32. We consider that a costs order £2,000 net inclusive of any VAT would be reasonable. A large proportion of that consists of funds already accessible and available to him. The Claimant will be returning to work shortly after a period of sick leave and can pay the rest from income earned.

33. The Respondent confirms that it will be reasonable in terms of deducting sums from future wages. If not the Claimant can of course apply for a variation in the county court if there is any formal enforcement.

Employment Judge Ahmed

Date: 27 March 2018

JUDGMENT SENT TO THE PARTIES ON

27 March 2018

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FOR THE TRIBUNAL OFFICE

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