



EMPLOYMENT TRIBUNALS

Claimant: Mr S Wright

Respondent: Mrs Elizabeth Horne t/a WrightChoiceCare Agency

Heard at: Leeds

On:

8 August 2018
(in Chambers)

Before: Employment Judge D N Jones

REPRESENTATION:

Claimant: Did not attend

Respondent: Did not attend

JUDGMENT ON COSTS

The application of the claimant for costs is dismissed.

REASONS

1. By a letter dated 16 April 2018, the representatives of the claimant made an application for costs for legal fees in the sum of £9,595.32. The basis of that application was that the respondent had not made any settlement proposals or negotiated with the claimant and his solicitors to compromise the case. The letter referred to “without prejudice” correspondence and an offer which had been made. As the Tribunal pointed out in response, the correspondence referred to did not qualify the “without prejudice” terms in which it was sent, such as reserving the right to refer to the letter in evidence on the issue of costs. Rather, it stated expressly that because it had been marked “without prejudice” it could not be produced to the Tribunal or used in evidence. That privilege, being unqualified, could not subsequently be waived unilaterally by the claimant and the letter is inadmissible.

2. In a further letter, of 2 May 2018, the solicitors of the claimant added further grounds for the application in addition to that the respondent had not engaged in any settlement proposals. The claimant said the respondent had behaved unreasonably by continuing to defend a claim which had no reasonable prospects of success because it was a procedurally unfair dismissal. Additionally, it was said that the respondent had behaved unreasonably in her conduct of the proceedings, increasing

costs because the claimant's representative had to prepare the bundle of documents and the respondent produced an unserved supplementary bundle on 23 January 2018 containing undisclosed items and a large amount of inadmissible or irrelevant documents and statements.

3. The respondent has replied to the application by letters of 3 and 4 July 2018.

4. A Tribunal may order a party to pay costs, under rule 76. It shall consider whether to do so where a party has, amongst other defined criteria, acted unreasonably in the way that the proceedings have been conducted or where the response has no reasonable prospect of success. If either threshold is established the Tribunal then has a discretion to consider whether, having regard to all the circumstances, it is appropriate to make such an order. That will include consideration of a party's means and ability to pay (see rule 84).

5. All Tribunal rules must be considered by reference to rule 2, the overriding objective of dealing with cases fairly and justly. That includes ensuring as far as is practicable that the parties are on an equal footing, that cases are dealt with proportionately with the complexity and importance of the issues, avoiding unnecessary formality and seeking flexibility in the proceedings, avoiding delay so far as is compatible with proper consideration of the issues and saving expense.

6. I am not satisfied that the threshold in rule 76(1) of the Rules is made out. Whilst the Tribunal did find that the dismissal was unfair for procedural irregularity, it is not fair to characterise the defence as one of having no reasonable prospect of success. The respondent has established a potentially fair reason for the dismissal, contrary to the case advanced by the claimant. Procedural irregularities will not necessarily render a dismissal unfair but are one of a number of considerations to be taken into account under section 98(4) of the Employment Rights Act 1996. Although the respondent did not succeed, it was not unreasonable to pursue the claim to a hearing for the Tribunal to evaluate all factors under that statutory provision. She was not obliged to settle the claim before it came to a hearing.

7. Given that the claimant was legally represented, it would not be unusual for his representatives to take responsibility for preparing the bundle of documents. The respondent should have disclosed relevant documentation in accordance with the Order of the Tribunal, and it was not appropriate to produce additional documents when the case was first listed for hearing. However, the case was adjourned on that occasion for other reasons and, in the meantime, the claimant would have been able to give instructions to his solicitors in respect of the additional material produced. I am not satisfied it added significantly to the length of the hearing and therefore was of such significance as to constitute unreasonable conduct of the proceedings.

8. Even had the claimant established the threshold, I would not have awarded costs upon consideration of all the factors in the case. Bearing in mind that, so far as is practicable, the Tribunal should seek to ensure the parties are on an equal footing, regard has to be had to the fact that the claimant had the advantage of legal representation and the respondent did not. The late production of documents in those circumstances, although inappropriate, was understandable because of a lack of familiarity with Tribunal proceedings.

9. Mrs Horne has suggested that she has few resources to meet any order for costs made against her and any such order would jeopardise the continuance of the service provided to the clients. Having not heard any evidence under oath on that matter I do not make the decision on the basis of the respondent's ability to pay.

10. I recognise that the claimant has incurred a significant sum in legal expenses to achieve a finding in respect of his legal rights. Nevertheless, the normal rule is that the Tribunal is a costs neutral jurisdiction. I am not satisfied in this case that the circumstances warrant a departure from that position.

Employment Judge D N Jones

Date 8 August 2018

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