



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr. J Oxley

**Respondent:** S G Petch Limited

**Heard at:** Kings Court Royal Quays North Shields **On:** 24 August 2018

**Before:** Employment Judge Johnson

## JUDGMENT

1 The Respondent's application for an Order for Costs against the Claimant is well founded and succeeds. The Claimant is ordered to pay to the Respondent the sum of £4,000 towards the Respondent's costs.

### REASONS

1. By claim form presented on 26 October 2017 the claimant brought complaints of constructive unfair dismissal and unlawful discrimination on the grounds of his sexual orientation. The respondent defended the claims.
2. At a preliminary hearing on 22 December 2017 Employment Judge Garnon made case management orders to ensure that the case was fully prepared for final hearing and also listed the final hearing for four days from Monday, 26 March to Thursday, 29 March 2018 inclusive. The hearing was to commence at 9:45 AM each day and the parties were ordered to attend by not later than 9:30 AM each day.
3. The claimant failed to comply with the case management order to provide a witness statement to the respondent, containing all of the evidence which he intended to give to the tribunal. The claimant failed to attend the tribunal on the morning of the first day of the hearing and did not inform the respondent or the tribunal in advance, that he would not be attending. By email timed at 12.46 on 26 March, the claimant stated that he had telephoned the tribunal office to inform them that he could not attend and requested a postponement. The claimant's explanation was "I have spoken to someone on the telephone to inform them I cannot attend and want to postpone. I am full of anxiety with this case and feel panicked and upset by it. Is it possible to have it postponed as per my telephone call as I don't feel up to the hearing currently."

4. Following submissions from Mr Hughes of Counsel for the respondent, the employment tribunal postponed the hearing until the following day. The claimant again failed to attend on that day, sending an email to the tribunal at 8.20 am stating, "I've woken this morning after a sleepless night and still feel I'm not up to the hearing. I have attached a letter from Dr Merrick explaining the potential risk of taking Varenline that causes agitation/low mood/suicidal thoughts. I have greyed out some areas that are personal and not related."
5. Despite the respondent's vociferous objections, the Employment Tribunal postponed the hearing, but ordered the claimant to send to the Tribunal and to the respondent by 20 April a statement setting out in detail his explanation for his failure to attend the hearing. The order required the claimant to attach to that statement supporting medical evidence, if he sought to rely upon a medical reason for his failure to attend.
6. Mr Hughes for the respondent made an application for costs on that occasion, but the application was postponed until such time as the claimant had been given a reasonable opportunity in which to comply with the Tribunal's orders and to explain both his absence and his failure to inform the tribunal or the respondent that he would not attend.
7. The claimant failed to comply with the orders made on 27 March, and by letter dated 25 April the respondent invited the Tribunal to issue an Unless Order to the claimant. By order dated 14 May 2018 the Tribunal informed the claimant that unless by 22 May he complied with the orders of 28 March then his claims would be struck out.
8. Nothing further was heard from the claimant and as a result he was informed by letter dated 26 May that, under the terms of the Unless Order, his claims were dismissed.
9. By letter dated 5 June 2018 the respondent made a formal application for costs against the claimant on the grounds that;
  - a) The claimant has acted vexatiously and/or abusively and/or disruptively and/or otherwise unreasonably in the bringing of proceedings.
  - b) The claimant has acted vexatiously and/or abusively and/or disruptively and/or otherwise unreasonably in the conduct of the proceedings.
  - c) There were further wasted costs as a result of the hearing being postponed on the basis of the claimant's non-attendance.

10 The respondent's application was copied to the claimant, who by letter dated 5 June stated that he had a letter from his doctor which she was willing to disclose to the Tribunal, but not to the respondent. The Tribunal inform the claimant that it would not consider any such letter, unless the claimant agreed to it being disclosed to the respondent.

11. The respondent submitted a schedule of costs totalling £12,555, including Counsel's fees. Following a request from the Tribunal, the respondent provided a detailed breakdown of those costs on 11 July 2018. That was copied to the claimant and following further correspondence from the Tribunal, the claimant submitted by letter dated 31 July his "financial information" for the tribunal to take into account when considering whether to make an order for costs and if so in what amount. The claimant has not submitted any evidence or argument to contradict the grounds of the respondent's application for costs. The respondent does not accept the accuracy of that financial information and criticises the lack of any

meaningful evidence to support it. The Respondent invites the Tribunal to assess the credibility of the claimant, based upon his failure to attend the main hearing, the inadequacy of his explanation and what they describe as a “redacted and dubious document” submitted by the claimant in support of his failure to attend.

12. The respondent has submitted to the Employment Tribunal copies of all the witness statements which it had prepared for the main hearing. Those statements had been disclosed to the claimant in the expectation that the main hearing would proceed. Those statements clearly support the respondent’s contention throughout these proceedings that the claimant was primarily responsible for all the inappropriate behaviour which formed the basis of the claimant’s complaints of discrimination on the grounds of sexual orientation.

### **13. THE LAW**

**Rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** states as follows;

- (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 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; or
  - c) a hearing has been postponed or adjourned on the application of a party made less than seven days before the date on which the relevant hearing begins.

**Rule 77** covers the procedure for submitting an application for costs, specifically requiring the paying party to be given a reasonable opportunity to make representations in response to the application. **Rule 78** provides that the tribunal may make an order that the paying party pay to the receiving party a specified amount not exceeding £20,000 in respect of the costs of the receiving party. **Rule 84** states that the tribunal may have regard to the paying party’s ability to pay when deciding whether to make a costs order and if so, in what amount.

14..It is now well accepted that, in considering an application for costs under Rule 76, the Tribunal should first of all consider whether any of the circumstances identified in Rule 76 (1) apply and if so, whether it would be appropriate to make an award in the particular circumstances of the case and then to go on to decide the amount of any costs. (**Power v Panasonic UKEAT/0439/04**). The award of costs is intended to be compensatory and not punitive. The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and in doing so, to identify the conduct, what was unreasonable about it and what effects it had. (**Barnsley MBC v Yerrakelva 2012 IRLR 78 CA**).

15. The Tribunal is satisfied that the claimant has indeed behaved vexatiously disruptively and unreasonably in his conduct of these proceedings. The numerous witness statements submitted on behalf of the respondent clearly support its contention that the claimant was primarily responsible for the instigation of the kind of behaviour about which he now complains

as being acts of unlawful discrimination on the grounds of his sexual orientation. The claimant has been given a more than fair and reasonable opportunity to challenge that evidence, but has failed or chosen not to do so. The claimant has failed on more than one occasion to provide any meaningful evidence in support of his failure to submit any witness statements to contradict those submitted on behalf of the respondent and, more importantly, his failure to attend the hearing on 26 March. The claimant has purported to submit what he describes as “medical evidence” to excuse his non-attendance, which neither the respondent nor the Tribunal found to be credible or persuasive. The Tribunal is satisfied that the respondent has easily overcome the hurdle of establishing that the claimant has behaved vexatiously and otherwise unreasonably in his conduct of these proceedings. Furthermore, his failure to attend the hearing on 26 March led to the postponement of a four-day hearing in circumstances where the postponement was necessitated less than seven days before the start of the hearing and in respect of which the claimant explanation was wholly unsatisfactory.

16. The Tribunal is satisfied that this is a case where an order for costs should be made against the claimant.
17. The total claim for costs is £12,555. Of that, £6510 is for Counsel’s fees and the remainder for solicitors costs. Of the solicitors costs, there are two different hourly charging rates. The first is for £250 per hour for a senior solicitor and £125 per hour for an assistant. No further information is provided about location, experience or appropriate charging rates. This is a case where serious allegations were raised by the claimant, in respect of which a detailed defence had to be prepared and several detailed witness statements taken. The Tribunal is satisfied that this was clearly a matter of considerable importance to the respondent, in terms of maintaining its reputation. However, costs must always be proportionate. Disproportionate costs, whether necessarily or reasonably incurred, should not be recoverable from the paying party. Their necessity does not necessarily render any costs proportionate. A party’s aim to obtain substantive justice must always be tempered by the need for economy and efficiency and above all, proportionality. Costs must bear a reasonable relationship to the issues in the proceedings, the value of any non-monetary relief in issue in the proceedings, the complexity of the litigation, any additional work generated by the conduct of the paying party and any wider factors involved in the proceedings, such as reputation or public importance. If parties wish to spend more than a proportionate amount in the pursuit of justice, they must appreciate that such sums will not be recoverable from their opponent.
18. Time recorded by the respondent’s solicitors is between 14 and 15 hours. The average charging rate is £187.50 per hour. Adopting a “broad brush” approach, I consider £2750 to be a reasonable figure for solicitor’s costs, to which must be added VAT of £481.25. Counsel’s fees total £5425 plus VAT. I consider that to be disproportionate. I see no need for the involvement of Counsel prior to the main hearing, particularly when the respondent seeks to recover charging rates for a senior solicitor. The hearing was of course vacated after two days and I have no evidence about whether Counsel was able to undertake any alternative work once the main hearing was postponed. Taking into account fees chargeable by

good, local, junior Counsel, I am satisfied that an appropriate and proportionate sum for Counsel's fees in this case is £2500 plus VAT of thank you £437.50. I find that proportionate costs in this case total £6168.75.

19. Turning now to the claimant's ability to pay, by letter dated 31 July 2018, the claimant listed an average monthly income of £2200 and average monthly outgoings of £2206. The respondent did not accept the accuracy of those figures describing in particular, his outgoings as "notional expenses", whilst criticising the lack of any documentary evidence in support of the list. The respondent again invited the Tribunal to consider the claimant's credibility, particularly in the light of his earlier behaviour.
20. Both parties have agreed to the Employment Tribunal considering the respondent's application for costs without the need for a formal costs hearing. The Tribunal therefore can only consider the information contained in those papers submitted to it by both sides. The Tribunal is satisfied that the claimant has again failed to properly engage in this process in that he has failed to provide any meaningful documentary evidence to support his description of his true financial position. The Tribunal is satisfied that this is a case where, having taken into account his ability to pay, the claimant should be ordered to contribute towards the respondent costs. In all the circumstances of the case the Tribunal is satisfied that the claimant should be ordered to pay £4000 towards the respondent's costs of these proceedings.

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Employment Judge Johnson

Date 24 August 2018

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.