



EMPLOYMENT TRIBUNALS

Claimant: Mr D Allen

Respondent: Instore Shop Fitters Ltd

CERTIFICATE OF CORRECTION Employment Tribunals Rules of Procedure 2013

Under the provisions of Rule 69, the Order sent to the parties on 15 November 2017, I hereby correct the clerical mistake in the Judgment sent by deleting that Judgment and substituting the attached Judgment.

Employment Judge W Beard

Date

SENT TO THE PARTIES ON

.....3 April 2018.....

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FOR THE TRIBUNAL OFFICE

Important note to parties:

Any dates for the filing of appeals or reviews are not changed by this certificate of correction and corrected judgment. These time limits still run from the date of the original judgment, or original judgment with reasons, when appealing.

determination the claimant did not respond. Despite being given more than one opportunity to provide submissions on paper the claimant did not do so. There is no indication as to whether the issue of conflict between the claimant and his representatives has been considered by them.

The Relevant Procedural Matters

4. The claimant brought claims of unfair dismissal and breach of contract (the latter claim being based on a failure to pay notice pay). He was dismissed by the respondent on the grounds of his alleged conduct. The claimant presented his claim on 23 November 2016. Whilst the claimant was assisted professionally in completing his ET1 claim form, the form was woefully lacking in detail. Upon acceptance of the claim case management orders were issued and a listing date for a final hearing was set down for 16 March 2017. The respondent provided a detailed response to the claim by 23 December 2016.
5. The claimant failed to comply with case management orders on the set dates and, in particular, had not complied with the order for disclosure set for 17 January 2017.
 - 5.1. The respondent wrote to the tribunal on 30 January 2017 asking for the claimant to be made subject to an unless order in respect of the failures to follow directions.
 - 5.2. Comments were sought from the claimant but no order was made.
 - 5.3. Some disclosure followed, however the respondent complained it was incomplete and that the claimant had still not provided a schedule of loss or a breakdown of the sums claimed (the case management orders required this to be done by 3 January 2017).
 - 5.4. The respondent wrote to the tribunal on 16 February 2017 seeking a postponement of the hearing on the grounds of the claimant's failure to comply with the orders and a consequent difficulty in preparing for hearing. Employment Judge Cadney postponed the hearing.
6. A preliminary hearing by telephone was arranged in order to make orders to progress the case.
 - 6.1. The telephone hearing took place on the 14 March 2017. I conducted that hearing the claimant failed to appear.
 - 6.2. I found that the respondent had attempted to engage with the claimant's representatives to little effect. There was no explanation for the claimant's failure to appear. I found that the claimant was failing to pursue the claim diligently and was failing to co-operate with the respondent as required by the overriding objective.
 - 6.3. I made unless orders requiring the claimant (a) to provide a detailed explanation for not participating in the telephone hearing; (b) to provide a list to identify and categorise the documents disclosed to the respondent and to provide responses to questions relating to further and better particulars posed by the respondent in an earlier letter date 22 February 2017. These orders were to be complied with by 21 March 2017.

7. The claimant did respond to the tribunal, however the respondent contended that the response was incomplete and did not comply with the orders made.
 - 7.1. A letter of explanation from the claimant dated 21 March 2017 and sent to the tribunal indicated that (a) the representatives organisation was a small community law centre with limited resources (b) that the person named as point of contact had not worked for the organisation since 16 October 2016 (this is despite the individual being named in the ET1 presented on 23 November 2016 and there having been no notification of a change of representative until this response) (c) that communications between the named representative and the representative organisation had failed because an individual was on annual leave and (d) that a list of documents had been provided to the respondent.
 - 7.2. The respondent argued that, the claim stood struck out on the basis of the existing order because of non-compliance. In particular the respondent contended that there had been no response to its questions set out in the letter of 22 February 2017, that the explanation provided lacked credibility because they had been in communication with the representative organisation.
 - 7.3. I arranged for a telephone hearing to consider whether the claimant had complied or not.
 - 7.4. That hearing was listed for the 3 May 2017 and there was no appearance by the claimant nor had the claimant provided any written contentions that the orders had been complied with.
 - 7.5. As no argument was advanced that the claimant had complied with the orders on the basis of the information before me I concluded that there had been no compliance and the unless order took effect. This meant that the claims had been struck out on 21 March 2017 for non-compliance with the orders of 14 March 2017, this was made clear in the tribunal's letter to the parties of 3 May 2017.
8. Following this indication the respondent made an application for costs and wasted costs in a letter date 30 May 2017, copied to the claimant (the letter set out that the relevant rules had been followed in copying this to the claimant).
 - 8.1. Because no response had been received to the respondent's letter I asked the claimant (and by extension the claimant's representative) to comment on the respondent's applications in an e-mail dated 17 June 2017.
 - 8.2. No response had been received by 24 June 2017 and the matter was referred to Employment Judge Cadney. On 24 June, following instructions from Employment Judge Cadney the claimant was informed by e-mail that if no response was received by 3 July 2017 it would be assumed that the respondent's application was not opposed.
 - 8.3. On 30 June 2017, the claimant's representative sent an e-mail to the tribunal indicating "*we wish to object to the application for costs made by the Respondents (sic) representative dated 30 May 2017*".
 - 8.4. On 29 July 2017, Employment Judge Cadney asked the parties whether they required a hearing or whether the matter could be dealt with on the papers, seven days was given for a response.

- 8.5. On 2 August 2017, the respondent wrote indicating that it was content with a paper determination and made suggestions for the exchange of written submissions, once again this letter complied with the rules on informing the claimant.
- 8.6. There was no response from the claimant to either Employment Judge Cadney's enquiry of 29 July or the respondent's letter of 2 August. On 19 August 2017, a reminder letter was sent to the claimant asking for the comments on the necessity of a hearing, the claimant was given seven days to respond.
- 8.7. On 29 August 2017, the file was put before Employment Judge Davies, she ordered that the directions sought by the respondent on 2 August 2017 would be granted; this was communicated to the parties by e-mail dated 18 September 2017.
- 8.8. In a letter dated 11 October 2017 the respondent wrote indicating that as no submissions had been received in accordance with the tribunal's decision communicated on 18 September 2017 that the tribunal should proceed to a paper determination.
- 8.9. On the same date the claimant's representatives wrote, referring to the respondent's letter that *"we have not received any orders from the tribunal in this respect"*.
- 8.10. On 17 October 2017, in accordance with my instructions, the tribunal wrote to the parties in the following terms:
"The e-mail setting out the order was sent on 18 September 2017 at 16:10 to the email address from which the claimant has written on the 11 October 2017. This matter will be put before an employment judge to be dealt with on the papers.
1) By no later than 4pm on the 24 October 2017 the claimant shall provide any written submissions on the issue of costs/wasted costs to the respondent and the tribunal
2) By no later than 4pm on the 31 October 2017 the respondent shall, if so advised, respond to the claimant's submissions
3) In the absence of written submissions the employment judge will proceed to deliberate on the basis of the existing documents on the tribunal file."
- 8.11. Neither party wrote to provide additional submissions and the matter was referred to me for deliberation.

Other Relevant Facts

9. The respondent's letter applying for costs set out its arguments for a costs and a wasted costs order.
- 9.1. In arguing for a costs order the respondent made the following points:
- 9.1.1. That there had been repeated failures by the claimant to comply with tribunal orders. The respondent contended that the catalogue of failures demonstrated that the claimant *"had no intention of pursuing his claim"*.
- 9.1.2. That the claimant's claim had no reasonable prospects of success.

- 9.1.3. That on these grounds the claimant had acted vexatiously, disruptively and/or unreasonably both in bring the claim and conduction proceedings.
- 9.1.4. That the claimant had not heeded a costs warning letter sent by the respondent on 15 February 2017.
- 9.2. In arguing for a wasted costs order the respondent contended:
 - 9.2.1. There were significant and obvious weaknesses in the claimant's case which his representatives should have recognised and that the representatives presented a case which was bound to fail knowing as much and therefore this was an abuse of process.
 - 9.2.2. That the representative was negligent in presenting such a case and was also negligent in failing to ensure directions were adhered to by failing to carry out disclosure properly and failing to attend preliminary hearings.
10. The claim set out in the ET1 sets out the following matters as indicating unfair dismissal:
 - 10.1. That the decision to dismiss was taken at a hearing in the claimant's absence arguing this was unreasonable.
 - 10.2. That the respondent's investigation was not reasonable in all the circumstances.
 - 10.3. That the respondent could not have reasonably held the view that the claimant had committed an act of misconduct.
 - 10.4. That the claimant's employment record prior to those matters related to dismissal had been exemplary.
 - 10.5. That the reasons for dismissal of the claimant were unfounded.
claimant
11. Th basis of the wrongful dismissal claim was that there was no misconduct and that the claimant had not been paid notice pay. The claimant was contending that the reason for his absence from work was the illness of his wife, that the respondent had known this, and that the claimant had submitted medical certificates for his absence at the request of the respondent.
12. The respondent contended that the dismissal was reasonable, that it had followed correct procedure and therefore that there was no unfair dismissal. The respondent disputed that the claimant had an exemplary work record, that it had failed reasonably to investigate matters, and that it had been unreasonable in conducting the disciplinary hearing in the claimant's absence. It accepted that it knew of the illness of the claimant's wife but it denies that it had requested that the claimant obtain medical certificates to cover his absence when caring for his wife. It denied that there was a breach of contract indicating that the claimant was guilty of gross misconduct. It is clear that there were significant factual disputes based on the pleaded cases.
13. Neither the claimant or the claimant's representative provided any information on means. The only indication of any sort is that the claimant's representative is a charitable organisation and therefore would not be

profit based. However, I have no information as to its funds, its funding sources or the effect on its services of any order.

14. The respondent has provided a basic statement of costs which sets out fees at £8,017.00 and VAT at £1,603.40. There are no disbursements. The breakdown does not differentiate between different time periods in the case. The fee breakdown shows that the lead solicitor (grade A) charges £250.00 per hour, the Cardiff standard rate is £217.00, the solicitor is also listed as grade A but is charged out at £190.00 per hour £2.00 below the Cardiff standard rate for a grade B. Finally, there is a grade D charged at £120.00 per hour £2.00 above that rate. The total of hours recorded is 38.4 with 12.5 hours of that being conducted by the grade A solicitor with 23.7 hours being dealt with by the grade B solicitor.

The Law

15. The **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** governs the costs jurisdiction of the tribunal.

15.1. Schedule 1 Rule 76 provides that a Tribunal may make a costs order and shall consider whether to do so where the Tribunal is of the view that a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in bringing or conducting proceedings or if the claim or response had no reasonable prospect of success.

15.2. Accordingly, it is apparent that there is a duty upon the Tribunal to consider making a costs order where one of the circumstances set out above has arisen, but then there is discretion whether to do so or not.

15.3. As is well known there is no general principle in the Employment Tribunal that costs follow the event, in other words that the losing party should pay the winning party's costs. It all depends on the exercise of the above discretion.

15.4. There are a number of authorities dealing with the issue of costs. However, it is important to appreciate that no statement by the appellate tribunals or the courts has the effect of putting a judicial gloss on the statutory tests in the rules.

15.5. Rule 80 provides, so far as it is relevant to this application that the tribunal may make a wasted costs order against a representative where a party has incurred costs as a result of improper, unreasonable or negligent conduct on the part of a representative.

15.6. Rules 77 and 82 dealing with the procedure for a costs and wasted costs application respectively provide for an application to be made up to 28 days after the judgment finally determining proceedings was sent to the party.

15.7. Rule 5 permits the tribunal to extend any time limit on its own initiative or as a result of an application.

16. In dealing with the question of whether a claim is misconceived or in the words of the rule had no reasonable prospect of success, I have to consider the matter on the basis of the case as it could be understood at the time when the defence was raised. The test for whether there is no reasonable prospect will be similar to that applied when considering

striking out a claim I therefore take account of what was said in *Ezsias v North Glamorgan NHS Trust* [2007] 4 All ER 940 by Maurice Kay LJ
“(T)hat what is now in issue is whether an application has a realistic as opposed to a merely fanciful prospect of success.”

17. Vexatious litigation is where an action is brought, regardless of its merits, for a collateral purpose. It may take the form of a primary frivolous lawsuit or may be the repetitive, burdensome, and unwarranted filing of meritless motions in a matter which is otherwise a meritorious cause of action.
18. In respect of wasted costs I have to apply a three stage test. First, I have to consider whether the representative has acted improperly, unreasonably or negligently. Secondly, I am required to consider whether that conduct caused the respondent to incur unnecessary costs. Finally, I have to consider whether it is just to order the representative to pay the whole or any part of the costs incurred.
19. The test for answering the first question is set out in *Ridehalgh v Horsefield* [1994] 3 All ER 848 in the Court of Appeal and approved by the House of Lords in *Medcalf v Mardell & Ors.* [2002] 3 All ER 721. Improper conduct covers, but is not confined to, conduct which would justify disbarment, striking off, suspension from practice or other serious professional penalty. Unreasonable conduct is vexatious, designed to harass the other party rather than advance resolution of the case. Negligent conduct should be approached on a non-technical basis and denote a failure to act with the competence reasonably to be expected of ordinary members of the profession. None of the above covers a representative acting for a party in pursuing a claim which is plainly doomed to fail (see *Mitchells Solicitors v Funkwerk Information Technologies York Ltd.* EAT 0541/07) what must be shown is that the representative assisted proceedings which amounted to an abuse of the courts process such as pursuing the claim for an improper purpose.

Analysis

20. I should deal with the question of time limits for costs applications. Clearly the order bringing the proceedings to an end took effect on 21 March 2017; it was sent to the parties before that date. That means that on a purely technical reading of rules 77 and 82 the respondent's application could be considered as out of time. However, there was an extant dispute about whether the unless order had been complied with it was not until 3 May 2017 that this was resolved. On that basis, it seems to me that although final determination took place on 21 March 2017, that was not effectively "sent" to the parties as a judgment finally determining proceedings until 3 May 2017, making the respondent's application in time. Even if that analysis is wrong, in my judgment it would be just and equitable to extend time for the presentation of the applications pursuant to rule 5, and so far as it is necessary to do so I exercise that discretion on my own initiative.
21. Dealing first with the application for wasted costs.

- 21.1. The abuse of process argument appears to me to be unsustainable. There is no evidence before me that the claimant's representatives were acting for an improper purpose in advancing the claimant's claim.
- 21.2. In any event as I set out below I do not have the evidence before me which would allow me to conclude that the claimant's case was necessarily doomed to fail.
- 21.3. It appears to me that there is more substance to the argument insofar as it relates to failures by the claimant's representative to attend at the preliminary hearing on 14 March 2017. Even if the claimant's representative's explanation is accepted it shows the following failings:
- 21.3.1. That the tribunal were not informed of the correct point of contact with the representative.
- 21.3.2. That whatever the representative's knowledge about the telephone preliminary hearing on 14 March 2017, there was no proper explanation for why someone at the claimant's representative's office had not been allocated responsibility for the claimant's case file.
- 21.3.3. This meant that a case which was listed to be heard at tribunal in a substantive hearing and for which the claimant's representatives had responsibility for preparing was not ready to be pursued. In particular none of the tribunal's orders had been complied with.
- 21.3.4. It is normal and prudent for organisations representing parties at tribunal to ensure that they have systems in place to deal with difficulties such as the sudden illness or departure of an individual within the organisation.
- 21.3.5. In my judgment, no ordinary member of the legal profession would consider that the failings show reasonable competence had been exercised. These are significant and systemic failures which denote negligence on the part of the representative.
- 21.4. Whilst I am suspicious that later failings are also due to the negligence of the claimant's representatives I do not have any evidence which specifically indicates fault for failure to attend the telephone hearing on 3 May 2017 or for continued failings to comply with tribunal orders.
- 21.5. In my judgment, the costs incurred by the respondent arising out of the claimant's representative's failure to comply with orders and in the preparation for and attendance at a telephone preliminary hearing on the 14 March 2017 are costs which have been incurred because of the failings outlined above as negligence.

22. Now dealing with the issue of costs.

- 22.1. The respondent's primary argument is that the claimant's claims of unfair and wrongful dismissal are vexatious in that the claimant never intended pursuing the claim.
- 22.1.1. I take from this that the respondent means that the claim was not intent on pursuing the claim in substance whilst causing disruption to the respondent by bringing proceedings.

- 22.1.2. I do not consider that the evidence before me supports such a conclusion. The initial failure to deal with matters appears to relate to the conduct of the claimant's representatives in failing to communicate to the tribunal a change in representation. Albeit that there is evidence that steps were not taken to make disclosure or provide a schedule of loss within the dates set out in orders some disclosure was made. This does not indicate to me a settled intention not to pursue the proceedings but to cause disruption to the respondent by maintain the appearance of bringing proceedings.
- 22.1.3. I do not conclude that the claimant has acted vexatiously.
- 22.2. The Second argument advanced is that the claim was misconceived.
- 22.2.1. I have heard no evidence in support of this contention. The pleadings show a significant degree a factual dispute between the parties.
- 22.2.2. It is clear to me that the claimant's claim required clarification, however that does not mean that the claim was misconceived at the outset.
- 22.2.3. I cannot resolve the factual disputes without evidence as they are not so plainly unsustainable that such a judgment could be made.
- 22.2.4. On that basis, it is not possible to say that the claimant was unreasonable in commencing or pursuing this claim. Neither can it be said that the claimant's claim was misconceived from the outset.
- 22.2.5. The claim may have been a weak claim but cannot be said to be fanciful. If the claimant's evidence was accepted that he was instructed to obtain a medical certificate he could have established the unfair dismissal and wrongful dismissal claims.
- 22.3. The third aspect of the respondent's complaint is that the claimant has consistently failed to comply with orders of the tribunal and has therefore acted unreasonably in the conduct of proceedings.
- 22.3.1. There is obvious substance to this complaint. The lack of communication between the claimant and tribunal also between the claimant and respondent, falls well below what is expected of parties to litigation.
- 22.3.2. The failure to follow tribunal orders has led to the claimant's claim being struck out. This too shows that the claimant has been unreasonable in his approach to this litigation.
- 22.3.3. This level of failure to engage has even impacted on dealing with this costs application.
- 22.3.4. In my judgment, the necessary threshold to impose a costs order has been reached in accordance with rule 76.
23. Given my findings I must now consider whether it is appropriate to make an order for costs and or wasted costs.
- 23.1. In my judgment, the extent of failings shown by the claimant's representative are significant. The steps the representative organisation failed to take are basic and required the simplest of systems in place to avoid the failures arising.

- 23.2. The impact of those failings is, however, substantial. In this case it meant that a tribunal listing for a tribunal hearing had to be postponed. The consequent knock on was the arrangement of a telephone preliminary hearing, which itself meant that additional costs were incurred.
- 23.3. The claimant's representatives have advanced no reasons as to why a wasted costs order should not be made against them.
- 23.4. I see no reason why the respondent should bear these additional costs, and in my judgment, it is appropriate that the claimant's representative bear the wasted costs. This means the additional costs of unnecessary correspondence and preparation by the respondent for the aborted hearing and the preliminary hearing.
- 23.5. In respect of the claimant it is clear that the claimant can be made responsible for his own and his representatives failings. The level of non-compliance in this case is extensive and whoever is responsible.
- 23.6. Again, the claimant has advanced no reasons as to why a costs order should not be made. I cannot in good conscious ignore that in exercising the discretion as to whether to order costs.
24. I must now consider what costs and wasted costs should be ordered. I do so on a summary basis. I consider first what is reasonable.
- 24.1. This is a basic unfair dismissal case with no special elements in respect of legal or factual complexity.
- 24.2. One would expect that it could be dealt with mainly by a grade B or even grade C, I would expect the involvement of a grade A solicitor not to exceed 4 hours and any court attendances.
- 24.3. I am of the view that overall, without additional complications preparation for a case of this nature should occupy no more than 25 working hours in total. That means that 19 hours should be allocated to the grade B as in my judgment 2 hours is sufficient for the grade D work.
- 24.4. I recognise that there has been additional work in this case but I do not consider that an additional 13 hours was reasonable in the circumstances as some of the additional work would be offset by work that was not eventually done because the case was struck out. Overall before VAT on a summary assessment I conclude that a figure of £6,000 is reasonable as profit costs.
25. The wasted costs incurred seem to me to reflect correspondence to the claimant and the tribunal relating to the claimant's failure to comply with orders. The preparation for a substantive hearing with witness statements and a bundle for that hearing, the application to postpone the hearing and preparation for and attendance at the telephone preliminary hearings on the 14 March 2017 and 3 May 2017. I am of the view that should be reflected by the claimant's representative paying wasted costs summarily assessed at £2,000.00.
26. I am thereafter required to assess the appropriate sum in costs to be met by the claimant. I do not consider it appropriate to order the claimant to pay on a joint and several basis the wasted costs I have ordered. The

order of wasted costs reflects a failure in conduct of the representatives and although the claimant could be ordered to pay those sums I do not consider it would be just so to do. I consider that, of the remainder of the costs which I have considered reasonably incurred, it is just that the claimant be ordered to pay £4,000 and I so order.

Judgment posted to the parties on

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For the staff of the Tribunal Office



EMPLOYMENT JUDGE W BEARD
Dated: 6 November 2017

