



THE EMPLOYMENT TRIBUNALS

Claimant: Mr A Grayson

Respondent: Technowash Limited

Heard at: North Shields Hearing Centre **On:** Monday 25th February 2019

Before: Employment Judge Johnson sitting alone

Members:

Representation:

Claimant: No Attendance No Appearance

Respondent: No Attendance No Appearance

JUDGMENT ON COSTS APPLICATION

The respondent's application for costs against the claimant is well-founded and succeeds. The Tribunal is satisfied that the claimant acted unreasonably in bringing his proceedings out of time in circumstances where the claim which had no reasonable prospect of success. The claimant is ordered to pay to the respondent costs summarily assessed in the sum of £3,000.

REASONS

1. By a judgment promulgated on 13th November 2018, the Employment Tribunal found that the claimant's complaint of unfair dismissal was presented outside the time limit prescribed for doing so, in circumstances where it was reasonably practicable for it to have been presented within time. The Tribunal also found that the claims of unlawful disability discrimination were presented more than three months after the date of the acts complained of in circumstances where it was not just and equitable for time to be extended. All the claims were dismissed.
2. By letter dated 10th December 2018, the respondent made an application for costs pursuant to rule 76(1) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. The respondent alleged that the claimant had

acted unreasonably in bringing his proceedings out of time, knowing that it was his solicitors' admitted failure to submit his claims within the required time limit. Accordingly, the claimant's claims had no reasonable prospect of success. The respondent claimed solicitors costs of £2,992.80 and counsel's fees of £4,100. The respondent claimed VAT in each case.

3. By letter dated 13th December 2018, the claimant's solicitors opposed the application for costs, stating that claims had been brought only one day out of time and that as a result of the strike-out, the respondent did not have to defend the substantive allegation. The claimant alleged that it was not unreasonable to bring the claims for unfair dismissal and discrimination and to ask for the time issue to be determined by the Tribunal. The claimant did not accept that the claims had no reasonable prospect of success, as there was a possibility that the Tribunal may have accepted it was not reasonably practicable for the claims to have been presented in time and further that it was just and equitable for time to be extended in the discrimination claims. The claimant went on to state that the sums charged by the respondent were not reasonable in all the circumstances.
4. The Tribunal asked the respondent to provide a detailed breakdown of its costs, which it did so by letter dated 30th January 2019. The respondent claimed counsel's fees of £4,100 plus VAT, which included the following:-

• Review draft letter of response	£600.00
• Settling grounds of resistance	£350.00
• Brief on preliminary hearing	£750.00
• Brief on preliminary hearing	£2,500.00
	TOTAL £4,100.00
	VAT £720.00

The respondent's solicitors claim fees of £4,515.00, being £21.5 hours at £215.00 per hour.

5. The claimant's solicitors have accepted throughout these proceedings that they ought to have presented the claim form within the three-month time limit. The claim form was presented one day out of time. The explanation given by the claimant's solicitors at the hearing on the 29th October 2018, was that they had recently introduced a new key-dates calendar system on their computer and that there had been a misunderstanding as to the operation of the new system which caused the three-month time limit to be missed. That explanation was given to the Tribunal in a letter from the claimant's solicitors, which was given to the Tribunal by Miss Firth of counsel on behalf of the claimant. As is specifically mentioned in paragraph 9 of that judgment, no-one from the claimant's solicitors attended the Tribunal hearing to give evidence as to the circumstances surrounding the failure to present the claim form in time. At paragraphs 10-12 of the judgment, the Tribunal found that the claimant's solicitors had failed to provide any meaningful explanation for their failure to present the claim form in time. The claimant's solicitors did however accept unconditionally that the claimant himself was not at fault and that the solicitors were entirely to blame for the oversight.

6. The respondent's position in this costs application is that the claimant's solicitors conduct and their failure to provide any meaningful explanation, was such that it amounts to "acting unreasonably" in the bringing of the proceedings or the way they have been conducted and furthermore that the claim had no reasonable prospect of success.
7. I am satisfied that the respondent has shown that the claimant had acted unreasonably in issuing the claim out of time and also acted unreasonably in the conduct of the proceedings once it became apparent that the claim had been issued out of time. Time limits go to the jurisdiction of the Employment Tribunal. Bearing in mind those authorities referred to in the judgment of the Tribunal, this was always the case in which the claimant would find it difficult, if not impossible, to persuade the Tribunal that it was not reasonably practicable for the claim to have been presented in time. Similar difficulties would be encountered in seeking to persuade the Tribunal to extend time on the grounds that it was just and equitable, in respect of the discrimination claims.
8. I am satisfied that the respondent has overcome the hurdle of showing that this is indeed a case where costs should be awarded against the claimant. "Unreasonable conduct" should be given its ordinary established meaning, in that "unreasonable" describes conduct which does not permit of a reasonable explanation.
9. Rule 76 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) are being conducted; or
 - (b) any claim or response had no reasonable prospect of success.
10. I am satisfied that the claimant's solicitors were aware when the claim form was presented, that they had missed the three-month time limit. They were aware of the circumstances surrounding the presentation of the claim and must have been aware then that they would have considerable difficulty in persuading the Tribunal that it was not reasonably practicable for the claim to have been presented in time. It must have been apparent at that stage that the claim had little if any reasonable prospect of success. To continue thereafter once the issue had been identified by Employment Judge Garnon, also amounted to unreasonable conduct.
11. However, I am satisfied that the level of costs claimed by the respondent is entirely disproportionate and wholly unreasonable in these circumstances. Disproportionate costs, whether necessarily or reasonably incurred, should not be recoverable from the paying party. Their necessity does not render costs proportionate. The aim of a representative to obtain substantive justice for its

client must be tempered by the need for economy and efficiency and above all proportionately. Costs are proportionate if they bear a reasonable relationship to:-

- a) the sums in issuing the proceedings
- b) the value of any non-monetary relief in issue in the proceedings
- c) the complexity of the litigation
- d) any additional work generated by the conduct of the paying party
- e) any wider factors involved in the proceedings, such as reputation or public importance

12. The original claims in this case were of unfair dismissal and unlawful disability discrimination. There is nothing extraordinary in the claims themselves and certainly nothing which would justify the level of costs incurred to reach that stage in the proceedings where the claims were struck out as being out of time. It is particularly difficult for the Tribunal to comprehend how the respondent can say on the one hand that this was a case so bereft of merit that it had no reasonable prospect of success, but then go on to say that they have incurred legal costs of over £8,000 plus VAT in defending them.

13. There was a preliminary hearing on 27th September, which was listed for 90 minutes and a second preliminary hearing on 29th October, which was listed for 3 hours. The respondent instructed London counsel (Mr Khan) to attend both hearings. That was entirely disproportionate. I see no reason why local counsel could not have been instructed to attend both hearings. I am aware that experienced and competent local counsel could have attended those hearings on behalf of the respondent. I am prepared to allow £500.00 for the first hearing and £1,000.00 for the second hearing, totalling £1,500.00, for counsel's fees.

14. The respondent's solicitors charged £215.00 per hour. I do not consider that to be unreasonable. However, 21.5 hours is totally disproportionate in all the circumstances, particularly when reliance has been placed upon counsel. I am satisfied that the necessary preparatory work to complete the response form ET3 and to instruct counsel, would have taken no more than 8 hours, which comes to £1,720.00.

15. The total costs allowed are therefore £3,220.00. VAT should be added to that amount only if the respondent's solicitors certify to the tribunal and the claimant's solicitors that VAT as between themselves and the respondent cannot be offset by way of input tax.

EMPLOYMENT JUDGE JOHNSON

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON 8 March 2019**

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