EMPLOYMENT TRIBUNALS

Claimant: **Mr. Kapil Sangar**

Respondent: **Waterfield House Partners**

Heard at: **London South Croydon** **On:** **1 March 2019**

Before: **Employment Judge Sage**

Representation
Claimant: Did not attend
Respondent: Mr Bryan of Counsel

JUDGMENT having been sent to the parties on 26 March 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Requested by the Claimant on the 7 April 2019.

1. The history of this case was that Employment Judge Kurrein held a preliminary hearing on the 26 April 2018 and he listed the matter to be heard 'after the 4 June 2018' to consider a number of preliminary points, including whether the Claimant's claims should be struck out or whether a deposit order should be imposed as a precondition to continuing with the claim. The Claimant attended this preliminary hearing in person.

2. The hearing was subsequently listed to be heard on the 3 September 2018 (confirmed by a letter dated the 20 July 2018). This hearing unfortunately had to be postponed due to lack of judicial resources (by an email dated the 31 August 2018).

3. The Tribunal wrote to the parties on the 31 August 2018 asking for dates to avoid by the 7 September 2018 to relist the matter at the earliest possible date. The Claimant provided his dates to avoid on the 4 September 2018 and the Respondent provided their dates on the 6 September 2018.

4. The Claimant then emailed the Respondent and the Tribunal on the 11 September 2018 with the heading "CONTEMPT OF COURT!" In the body

of the emailed he described the Respondent as showing "*arrogant contempt to your Courts*". The thrust of his complaint was that he believed that there was no reason for the solicitor to provide what he felt was their unduly limited availability. He stated that he felt that the Respondent was "*laughing at you and you need to remind them to respect the authority of your court and the rule of law*". He suggested that in the alternative that the Tribunal should "*award me the case based on their outright lie of not being more readily available to attend. They are not Heart Surgeons or anything – they are only GP's for goodness sake*". The Claimant again suggested in the email that the Tribunal should "*award my case against them – by default- as its (sic) effectively uncontested*". He accused the Respondent of playing games and described them as "*prehistoric dinosaurs with matching mentality of attitudes and behaviours*". This email was referred to Employment Judge Baron, who decided that it was appropriate, in the light of the contents of this email, to list the matter for a telephone hearing.

5. The matter came before me at a telephone hearing on the 27 September 2018. The Claimant attended this hearing as did the Respondent's solicitor. The parties agreed for the matter to be listed for a 1-day hearing on the 1 March 2019. The case management order was sent to the parties by email on the 7 November 2018.

6. The Claimant failed to attend the hearing on the 1 March 2019. The clerk was requested to telephone the Claimant to see if he was on his way. The clerk informed the Tribunal that during this call the Claimant had said that he was busy and couldn't come to the hearing and he knew nothing about the hearing.

7. The hearing therefore proceeded in the Claimant's absence and the Respondent made the following oral submissions.

The Respondent's oral submissions.

8. In the Claimant's absence the Tribunal can consider the matter under rule 47, under that rule the claim can be dismissed. The only reason for the Claimant's non-attendance today was that he didn't know about the listing today. However, this is wholly unacceptable. There was a telephone preliminary hearing before you on 27 September 2018 which he attended. This hearing was to agree the date for the preliminary hearing and it was listed for one day. There was some discussion between the parties about dates to avoid and concerns were noted; those issues were to be discussed at this hearing. This hearing has been listed with the agreement of the parties and the notification was sent out by 7 November to both.

9. Under rule 90 it is deemed that service by post or email is determined to have been received on the date of the email, there is nothing to suggest was not received. My instructing solicitor corresponded with the Claimant this week with a copy of my skeleton argument and costs application. There was no suggestion that this communication was not received by the Claimant. It is unreasonable for him to suggest that he was not aware of this hearing today.

10. Under rule 47 there are two alternatives, firstly you can dismiss, and I invite you to do this. The Claimant has given no reason for his non-attendance and on the face of it, the Claimant's claims are unmeritorious. The claim for unfair dismissal is almost hopeless due to the lack of continuous service, there is no prejudiced to the Claimant in dismissing that claim. On the other hand, if you do not dismiss, the Respondent will have to continue defending the proceedings. There is no guarantee that any application would go in the Respondent's favour. If the matter is listed, it would cause the Respondent grave prejudice, their insurers are not funding their response, and this is coming out of the private practice's funds. The costs of instructing solicitors and counsel is significant. The balance of prejudice is in the Respondent's favour to dismiss the claims.

11. **The Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013**

47 Non-attendance

If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence.

74 Definitions

(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;

(b) is an advocate or solicitor in Scotland; or

(c) is a member of the Bar of Northern Ireland or a solicitor of the Court of Judicature of Northern Ireland.

(3) "Represented by a lay representative" means having the assistance of a person who does not satisfy any of the criteria in paragraph (2) and who charges for representation in the proceedings.

75 Costs orders and preparation time orders

(1) 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;

(b) the receiving party in respect of a Tribunal fee paid by the receiving party; or

(c) another party or a witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual's attendance as a witness at the Tribunal.

(2) A preparation time order is an order that a party ("the paying party") make a payment to another party ("the receiving party") in respect of the receiving party's preparation time while not legally represented. "Preparation time" means time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at any final hearing.

(3) A costs order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings. A Tribunal may, if it wishes, decide in the course of the proceedings that a party is entitled to one order or the other but defer until a later stage in the proceedings deciding which kind of order to make.

76 When a costs order or a preparation time order may or shall be made

(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; [or

(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.]

(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.

77 Procedure

A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the

parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.

78 The amount of a costs order

(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;

(b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles; or, in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993, or by an Employment Judge applying the same principles;

(c) order the paying party to pay the receiving party a specified amount as reimbursement of all or part of a Tribunal fee paid by the receiving party;

(d) order the paying party to pay another party or a witness, as appropriate, a specified amount in respect of necessary and reasonably incurred expenses (of the kind described in rule 75(1)(c)); or

(e) if the paying party and the receiving party agree as to the amount payable, be made in that amount.

(2) Where the costs order includes an amount in respect of fees charged by a lay representative, for the purposes of the calculation of the order, the hourly rate applicable for the fees of the lay representative shall be no higher than the rate under rule 79(2).

(3) For the avoidance of doubt, the amount of a costs order under sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000.

90 Date of delivery

Where a document has been delivered in accordance with rule 85 or 86, it shall, unless the contrary is proved, be taken to have been received by the addressee—

(a) if sent by post, on the day on which it would be delivered in the ordinary course of post;

(b) if sent by means of electronic communication, on the day of transmission;

(c) if delivered directly or personally, on the day of delivery.

Decision

12. Having considered the Respondent's submissions I conclude that the appropriate course of action is to proceed under rule 47.

13. Before reaching this conclusion I firstly considered whether it was possible to proceed with the hearing which was listed to consider whether the claims should be struck out or whether it was appropriate to make a deposit order. The Claimant pursued his claim citing discrimination on the grounds of race, sex, sexual orientation and religion and belief, this was described by the Respondent as a kitchen sink approach to discrimination. The Respondent referred to the fact in their written submissions that the Claimant never made any complaints of discrimination during his short employment which lasted less than three months. It was also noted that most of the Claimant's claims for discrimination were out of time and his claim for unfair dismissal had no reasonable prospect of success due to insufficient qualifying service. As the Claimant has failed to provide any written submissions or documents in support of his case, I conclude that it was not possible to proceed with the hearing in his absence.

14. The other option available under rule 47 is to dismiss the claims.

15. The Claimant has provided no credible or consistent explanation as to why he had not attended today. Although he stated that he was not aware of the hearing today, that seemed to be highly unlikely as he attended a hearing before me by telephone on the 27 September. After checking the file, it appeared that the case management order confirming the date of the hearing was sent to the Claimant by email and was received. On checking the file, the email address used was the same email address used by the Claimant when communicating with the Tribunal. Rule 90 of the Tribunal rules as set out above state that we are entitled to conclude that service has been effective if it is sent to the correct email address. Having checked that the correct email address was used, and the notification of the hearing was sent, I conclude that service was effective. On the evidence before me I conclude that the Claimant had notice of the hearing.

16. I conclude therefore that the Claimant was served notice of the hearing which was listed with his agreement and he has provided no good reason for not attending. Under rule 47 I conclude that his claims shall be dismissed.

The Respondent's costs application.

17. Turning to the Respondent's application for costs, they confirm in their written submissions at paragraphs 23-25 that the costs are limited to what they described as the avoidable costs of attending the telephone preliminary hearing on the 27 September 2018.

18. The tribunal considered it was necessary to list this matter for a short preliminary hearing to consider the available dates of the parties. If the Claimant had simply provided dates to avoid there would have been no need for the telephone hearing. Although the Respondent acknowledged that the Claimant was a litigant in person and proceedings can be lengthy and at times frustrating, it did not excuse the tone and content of his email referred to above at paragraph 3 which was unreasonable.

19. Findings of fact concluded that the contents of the email were accusatory and offensive in nature and made unfounded allegations against the Respondent, accusing them of lying. It was also noted that the email twice asked for the claim to be found in his favour even though the claim was robustly defended. He made this demand even though the proceedings were at an early stage and had been listed for a hearing to consider a strike out or a deposit order of his claim form. This was unreasonable conduct.

20. I conclude that the Claimant acted unreasonably in both his communications with the Respondent and the tribunal which resulted in the Respondent incurring the additional costs of having to attend a telephone hearing. Had the Claimant acted reasonably in his communications with the Respondent and the Tribunal, the need for this telephone hearing would have been avoided.

21. The tribunal was satisfied that the Claimant had received due notice of the application for costs which was served on him by an email dated the 27 February 2019 and was sent to the Claimant's correct email address. This constituted a reasonable opportunity to make representations in response to the application. None have been received from the Claimant.

22. It is concluded that the Claimant's conduct was unreasonable and as a result he should pay costs in relation to the calling and attendance of the parties at a telephone hearing on the 27 September 2018.

23. Although the Respondent was claiming £882 in total, it was decided that this was rather high. The work carried out to prepare for that hearing would be unlikely to take the time was set out in the cost schedule. It was concluded that the reasonable costs involved in preparing for and attending the telephone hearing would be £500.

24. The Claimant is therefore ordered to pay to the Respondent their costs of £500 in respect of his unreasonable conduct.

____

Employment Judge **Sage**
Date: 1 August 2019