



EMPLOYMENT TRIBUNALS

Appellant: Thomas Davin

Respondent: Alison Acton (an Environmental Health Officer of Trafford Council)

Heard at: Manchester

On: 5 November 2019

Before: Employment Judge Franey
(sitting alone)

REPRESENTATION:

Appellant: Did not attend

Respondent: Mr L Hughes, Counsel

JUDGMENT

The appeal will be dismissed on withdrawal 21 days after this Judgment is sent to the parties unless before that time the appellant has confirmed in writing that he does not want this judgment to take effect.

REASONS

Background

1. On 10 October 2019 Mr Davin lodged an appeal under section 24(2) of the Health and Safety at Work Etc Act 1974 against a prohibition notice issued by the respondent on 25 September 2019 in her capacity as an Environmental Health Officer employed by Trafford Council. The notice related to the condition of wooden stables at the riding school and livery premises at Ashton Hall Equestrian Centre in Sale.
2. By letter of 21 October the parties were notified that the appeal would be heard on 5 November 2019
3. On 29 October 2019 Trafford Council provided written representations and witness statements, and confirmed in a covering letter that following a further visit to the premises on 25 October 2019, it considered that the prohibition notice had been complied with.

Withdrawal

4. At 6.14pm on 4 November 2019 Mr Davin sent an email to the email address Manchester@justice.gov.uk giving the case number for the appeal and saying that he wished to withdraw his appeal. He apologised for the late notification.

5. That email was not received by the Employment Tribunal. The correct email address is ManchesterET@justice.gov.uk. However, Mr Davin had copied his email to Ms Acton. She did not see it until the following morning, and at 7.36am on the morning of the hearing she forwarded the email to Trafford Council's solicitor, Ms Lenahan.

The Hearing

6. Ms Acton attended the hearing today together with the other witness, Nicola Duckworth. The instructing solicitor Ms Lenahan also attended to support counsel. There was no attendance by or on behalf of Mr Davin.

7. I was provided with a copy of Mr Davin's email at 9:30am. It was clear to me that the final hearing was no longer required, but the email had not been sent to the Employment Tribunal. The Tribunal had received it only through the respondent's representatives. I therefore considered it appropriate to dismiss the appeal on withdrawal but to delay that Judgment taking effect for 21 days.

8. If Mr Davin has no objection to the dismissal of his appeal then he need take no action and this Judgment will take effect.

Costs Application – This Hearing

9. At the conclusion of the hearing Mr Hughes applied for costs on behalf of the respondent. His application was about the costs of attending the hearing on 5 November 2019.

10. Rule 76(1)(a) empowers a Tribunal to make a costs order requiring one party to an appeal to pay the legal costs of the other, or the costs of a witness in respect of expenses incurred in connection with attendance at the Tribunal, where he has acted "disruptively or otherwise unreasonably" in the way part of the proceedings have been conducted.

11. Mr Hughes said that the timing of the withdrawal was unreasonable or disruptive. If Mr Davin had withdrawn the appeal by email during the working day on 4 November, or indeed in the week before the hearing, the Tribunal could have dismissed the appeal on withdrawal and cancelled the hearing. There would have been no need for any attendance.

12. The costs sought are as follows.

13. The solicitor for the respondent has spent two hours at £72 per hour dealing with and attending the hearing today. No VAT is chargeable on that figure of £144.00.

14. The fees for Mr Hughes for all preparatory work and his attendance today were £1,000 plus VAT, making a total of £1,200.00.

15. The witness expenses incurred are one hour each for Mrs Acton and Mrs Duckworth. Their time is charged at £79 per hour. That is a total of £158.00. No VAT is chargeable.

16. The total claimed by way of costs and witness expenses is therefore £1,502.00

17. On the face of it this application seems well-founded but there may be reasons why the appeal could not have been withdrawn any earlier. I will not make any decision on this application until Mr Davin has had a chance to respond to it within 21 days of the date upon which this Judgment is sent to the parties.

18. Any reply made by Mr Davin to the costs application must be copied to Trafford Council, and any further comments made by the council on such a response must be made within 14 days of receipt of it.

19. I will deal with the application on paper without a further hearing unless Mr Davin requests a hearing in his response.

20. To assist Mr Davin in considering this application I make the following points:

- (a) The focus of any response should be the justification for withdrawing the appeal after working hours on the eve of the hearing. The key issue is whether it could reasonably have been withdrawn any earlier in a way that would have enabled Trafford Council to avoid attending the hearing today.
- (b) Even if the timing of the withdrawal was itself unreasonable, it does not follow that all the costs and witness expenses were reasonably incurred. Mr Davin can challenge the reasonableness of any particular item or the amount claimed.
- (c) If he wants, the Tribunal can take into account the ability of Mr Davin to pay any award in deciding whether to make a costs order and if so in what amount. If Mr Davin wishes his ability to pay to be taken into account he will need to provide details of his financial position together with supporting documentation.

Possible Further Costs Application – Whole Case

21. Mr Hughes also indicated that the respondent was considering making an application for the costs of the whole case on the basis that it had enjoyed no reasonable prospect of success. The Tribunal has power to make an order in those circumstances under rule 76(1)(b).

22. If any such application is to be made it should be made in writing within 14 days of the date upon which this Judgment is sent to the parties. Full details of the basis for the application and the amount claimed must be provided.

23. Mr Davin will have 21 days to respond to that application before I give it further consideration.

24. I might be prepared to deal with any such application without a further hearing, but there will be a costs hearing if (a) either party requests such a hearing or (b) I consider such a hearing is appropriate.

Employment Judge Franey

5 November 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON
25 November 2019

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