



EMPLOYMENT TRIBUNALS

CLAIMANT

RESPONDENT

Mr J Kowalski

JD Wetherspoon

JUDGMENT ON COSTS

The Claimant is ordered to pay £4,275 towards the Respondent's costs in defending these proceedings.

REASONS

Background

1. In a letter to the Tribunal dated 7 March 2019 the Respondent applied to the Tribunal for the Claimant to pay the Respondent's costs incurred in defending the above claim after 16th August 2018. Following an enquiry from the Tribunal the Respondent confirmed that the Claimant had been copied with the application, both electronically and in hard copy.
2. There having been no response from the Claimant, the Tribunal wrote to him on 29 April 2019 (by email and hard copy) referring to the costs application (a copy of which was enclosed), stating that the Tribunal proposed to deal with the application on paper, but that before doing so the Claimant was asked whether he wished to make any representations to the tribunal to resist the application for costs and/or whether he would prefer to make such representations at a hearing. The Claimant was given until 3rd May 2019 to ask for a hearing for to make any written representations but there was no response.
3. The application has been dealt with on paper¹.

History of the proceedings

4. The Claimant was employed for over 10 years for the Respondent latterly as pub manager of a pub in Tooting. He was dismissed on 4 September 2017 and presented a claim to the Tribunal for unfair dismissal and

¹ EJ Spencer apologises for the time it is taken to deal with this costs application. She transferred out of the London South region in April 2019. and the file was not referred to her until November.

disability discrimination on 12 December 2017. At that time he had legal representation through Downs Solicitors LLP.

5. A Preliminary Hearing (case management) took place on 8 March 2018, at which the Claimant was represented by his solicitor. The issues were identified and orders made for the provision of medical evidence. The case was set down for a 2 day hearing commencing on 16 August 2018. No formal orders were made for case management beyond an order for medical evidence to be provided, but the parties (who at that time were both represented) were to provide the tribunal with agreed suggested directions.
6. On 19th July 2018 Downs Solicitors LLP ceased acting for the Claimant, who thereafter was in person. The Respondent sought to exchange witness statements with the Claimant but was unable to do so.
7. The Claimant attended in person on 16th August 2018, assisted by a friend. As recorded in the order made by EJ Crosfill the case could not proceed. the Claimant had no witness statement, nor had he been supplied with witness statements from the Respondent. EJ Crosfill noted that the Claimant appeared to be out of his depth at the hearing and it was necessary to adjourn it. The case was re-listed for a 3 day hearing (to include the contested issue of whether the Claimant was a disabled person) commencing on 11 February 2019.
8. At that time EJ Crossfill refused the Respondent's application to strike out the claim. However further directions were made for a schedule of loss, for disclosure and inspection of documents, for a trial bundle, and for witness statements to be exchanged no later than 11 October 2018. The Claimant was encouraged to get legal advice, advised of the various sources of free advice, and reminded of the need to cooperate and comply with case management orders.
9. At the same time EJ Crosfill made an "unless order". This provided that unless the Claimant served upon the Respondent a witness statement in accordance with the orders made at that hearing he would not be permitted to give any evidence nor entitled to challenge, any factual assertions contained in the Respondent's witness statements.
10. The Claimant did not serve his witness statements or any expert evidence as to disability on the Respondent on 11th October. The Respondent did receive an undated hardcopy statement in the post on Monday 15th October. (The Respondent received no communication from the Claimant that a hardcopy version had been posted.) The Respondent had sent the Claimant, by recorded delivery, some additional numbered pages for the bundle on 10 September 2018 which were returned by the post office on 22nd October 2018 and the envelope was marked that it had not been collected.

11. On 13 December 2018 the Claimant wrote to the Tribunal to ask for an extension of time to 21 December 2018 to produce an expert's opinion as to disability. However, in the event no opinion was produced by that date.
12. The Claimant was notified by letter dated 8 January 2019 that the Unless Order had taken effect, and that he would not be permitted to give any evidence or to challenge the Respondent's factual assertions at the hearing.
13. On 11th February 2019 the Respondent attended with their witnesses, but the Claimant did not. Attempts to contact the Claimant by phone simply went to answer phone. The Tribunal issued a judgment dismissing the claim. Since then there has been no further contact from the Claimant to the Tribunal.

Relevant law

14. The Tribunal has power under rule 76 (1) to make a costs order against a party in respect of legal costs where it considers that a party has acted vexatiously, abusively disruptively or otherwise unreasonably in bringing or in conducting the proceedings or if the claim or response had no reasonable prospect of success. If the Tribunal considers that the circumstances set out in rule 76 (1) apply it may (but does not have to) make a costs order against a party if it considers it appropriate to do so. This involves the application of a two-stage test, requiring the Tribunal first to enquire whether the conduct in question falls within the terms of the rule and, if it does, the Tribunal then asking whether it is appropriate to exercise its discretion in favour of awarding costs against that party.
15. An award of costs is the exception and not the rule in the employment tribunal. The tribunal may (but is not obliged to) take a party's ability to pay into account in considering whether to make a costs order or how much that order should be. Affordability is not the sole criterion for the exercise of the discretion on costs.
16. In considering unreasonable conduct for the purposes of costs, it is appropriate for a litigant in person to be judged less harshly in terms of his conduct than a litigant who is professionally represented. Lay people are likely to lack the objectivity and knowledge of law and practice brought to bear by a professional legal adviser.

Basis of application for costs

17. The Respondent applied for costs on a twofold basis. The first basis of their application was that the Claimant had behaved disruptively and/or unreasonably in his conduct of the proceedings. The second basis was that the claim had no reasonable prospect of success.
18. In relation to unreasonable conduct the Respondent submits that the Claimant's decision not to turn up for the full merits hearing on 11th

February 2019 was unreasonable. It says that they continued to be in contact with the Claimant up to and including the working day before the hearing. In addition, the Respondent also complained about the Claimant's participation in the management of the case generally, submitting that he had routinely ignored the Respondents correspondence and had breached the tribunal's case management orders on a number of occasions.

19. The second basis of their application was that the Claimant's claims had no reasonable prospect of success. The Claimant had permitted individuals to work at the pub without ascertaining that they had the right to work in the UK, without completing the necessary induction information about them or providing them with induction training. His actions were breaches of the Respondent's Operating Policies and were identified as gross misconduct in its employee handbook. The Respondent also argued that the Claimant's claim for disability discrimination had no reasonable prospect of success as the occupational health report of 2nd August 2017 demonstrated that the Claimant symptoms of stress and depression had resolved themselves within 4 months.
20. The Respondent had sent three "without prejudice save as to costs" letter to the Claimant inviting him to withdraw. The third letter, sent on 1st February 2019 invited him to withdraw by 5th February 2019 and warned the Claimant that should they be successful at the hearing or should he fail to attend they would make an application for costs totaling £10,000. Even if the Claimant did withdraw, they would limit the application for costs to £1,500. (The earlier letters undertook to make no application for costs should the Claimant withdraw).
21. A brief fee of £3500 was incurred on 11 February 2019.
22. The costs incurred from 16th August until 11th February amount to £4,650 to include a brief fee of £3,500 and time spent preparing the application for costs.

Conclusions

23. It was plainly unreasonable for the Claimant not to turn up to the hearing in February. The Claimant had not withdrawn and he made no attempt to communicate with the Tribunal or the Respondent (either before or after the hearing) to explain his non-attendance. He has not responded to the various letters sent by the Tribunal and the Respondent asking for his comments on this application for costs.
24. The Claimant is a litigant in person, but the process and the importance of orders had been explained to him clearly by EJ Crosfill at the hearing on 16th August. He had been warned of the consequences in costs if he failed to attend. The Claimant had been legally represented for at least part of the process. He has had 3 costs warning letters. He must have understood the importance of attending the hearing. If he had decided that, given the impact of the unless order, he was unlikely to succeed in his claim then the

proper course of action would have been to have applied for relief from sanctions in respect of the application of the unless order or to have withdrawn.

25. It would have been clear to him that simply not turning would cause inconvenience to the Tribunal, who had set aside time and judicial members to hear his case, and cost and inconvenience to the Respondent. His failure to attend or to explain his absence shows a disregard for the process of the law.
26. I therefore consider that this is unreasonable conduct which merits an award of costs. For that reason there is no need to consider the second basis of the Respondent's case, namely that the case had no reasonable prospect of success.
27. In considering the exercise of my discretion I note that costs in the Tribunal are the exception and not the rule and that the Claimant was a litigant in person.
28. There may have been grounds to excuse the earlier failures in compliance with Tribunal orders, but the Claimant has not given any explanation. Moreover, there is no excuse for his failure to attend the hearing or to notify either the Respondent or the Tribunal why he had not done so. The Claimant has been given an opportunity to make representations resisting the Respondent's application for costs but has not done so. As the Claimant has not participated in this process. I am unable to ascertain his means or to take them into account.
29. I order that the Claimant pay the Respondent £4,275 being its costs in defending these proceedings since 16th August 2018, (but excluding the costs incurred in drafting the costs application).

Employment Judge Spencer
22nd November 2019