



EMPLOYMENT TRIBUNALS

Claimant: Mr E Neves
Respondent: JB Global Limited

Heard at: Ashford **On:** 11 November 2019

Before: **EMPLOYMENT JUDGE CORRIGAN**
Sitting Alone

Representation

Claimant: Mr J Neckles, Union Representative (attended London South)
Respondent: Mr O Holloway, Counsel

JUDGMENT

PTSC Union is ordered to pay the Respondent's wasted costs of £3,297 plus VAT (£3956.40 in total).

REASONS

1. The case was struck out due to the Claimant's failure to comply with the Case Management Order dated 5 November 2018.
2. The Respondent made an application for costs against the Claimant and wasted costs against the Claimant's representative (Mr John Neckles of PTSC Union). At the time the application was made on 21 December 2018 the costs claimed were £745.50 plus VAT. Today the costs claimed are £6,101.25 plus VAT (including a revised Counsel's fee of £1350).
3. The matter was listed today to consider the costs application. The Tribunal wrote to the parties on 11 February 2019 setting out the reasons a costs hearing was necessary which were that there was insufficient information in relation to the basis on which the Claimant's representative was acting for the Claimant and it was appropriate to have regard to the ability to pay.
4. Rule 76 of the Employment Tribunals Rules of Procedure states that:

"(1) A Tribunal may make a costs 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... the way that the proceedings...have been conducted...

(2) A Tribunal may also make such an order where a party has been in breach of any order ...”

5. Rule 80 states: “A Tribunal may make a wasted costs order against a representative in favour of any party ...where that party has incurred costs ...as a result of any improper, unreasonable or negligent act or omission on the part of the representative”. Rule 80(2) defines “representative” as being “a party’s legal or other representative or any employee of such representative” before stating that it does not include “a representative who is not acting in pursuit of profit with regard to the proceedings”. Rule 80(2) makes clear that those acting on a conditional or contingency fee basis are considered to be acting in pursuit of profit.
6. Rule 84 states that in deciding whether to make either a costs or a wasted costs order and the amount of any such order the Tribunal may have regard to the paying party’s ability to pay.
7. There is some discussion in Henry v London General Transport Services Limited 2301782/2015 (a case involving a wasted costs application against Mr John Neckles) as to who bears the burden of proving that a representative is not acting in pursuit of profit. In my view rule 80 is a general rule enabling costs to be ordered against someone representing another, on the basis of the way they conduct that representation. Rule 80 (2) provides the exception for those acting not for profit. That is something that is potentially only known by the representative and the person they represent. It seems to me that it must therefore be for the representative to show that they fall within the exception. It cannot be for the Respondent to prove that the Claimant’s representative was acting for profit.
8. The Claimant’s representative attended London South not Ashford. The Claimant did not attend. The Notice of Hearing was clear that the matter was listed in Ashford. No explanation was offered as to why the Claimant’s representative, an experienced representative, attended the wrong venue. He was nevertheless given the opportunity to come to Ashford today but declined. His paperwork was scanned by London South Employment Tribunal and emailed to Ashford and considered by the Employment Judge. This consisted of a 5 page witness statement for Mr John Neckles and 19 pages of documents (pages 1-18 and 6A). No statement was provided for the Claimant. Otherwise, Mr Neckles’ application to postpone (made orally to the clerk) was refused. No good reason was offered for his failure to attend the correct venue today and it would have been disproportionate to postpone the hearing and incur more costs and a further wasted costs application in respect of today.
9. The Claimant is represented by PTSC Union of which he is a Member. Mr Neckles describes PTSC Union as his employer and himself as the only Trade

- Union Official with litigation and legal experience. Nevertheless, the Claimant's representative has not suggested in his statement that a costs order cannot be made against him in principle. He has not suggested that he is a representative who is not acting in pursuit of profit with regard to the proceedings within the meaning of rule 80(2). The Respondent's representative submits, and I accept, that the Claimant's representative would have been aware that rule 80(2) and the issue in respect of pursuit of profit was what was being referred to in the Tribunal's email of 11 February 2019 stating that the hearing was to address the basis on which he represented the Claimant, as he has been the subject of wasted costs applications before. I was referred to the case of Henry v London General Transport Services Limited 2301782/2015 where the issue of whether Mr Neckles was acting in pursuit of profit was examined in some detail. Nevertheless this issue has not been addressed in Mr Neckles' statement which proceeds to deal with whether his conduct justifies making a wasted costs order.
10. Mr Neckles accepts in his statement that he should have complied with the Order dated 5 November 2018 and did not, and that it was his omission and not the Claimant's. He suggests that this was unavoidable due to health issues, including a heart condition and diabetes, which he says impaired his ability to perform litigation services on behalf of the Claimant and others. The evidence provided shows he was in hospital in intensive care from 20-30 June 2018 for monitoring followed by a period of time on sick leave from 4 July to 1 October 2018. He returned to work after this but continued to experience symptoms such as fatigue. He also says that the medication he has been taking has been affecting his memory. His health is now much improved following surgery on 31 July 2019.
 11. The Claimant's representative despite his health conditions attended and participated in the telephone Preliminary Hearing on 27 September 2018 (during the period covered by his sick certificate) which led to the Orders made. He had wanted 28 days to comply with the Orders but the date ordered for compliance was 18 October 2018. He did not raise that he would need additional time to comply due to the health issues. There is no suggestion that he was signed off sick for the period after 1 October 2018. He communicated with the Tribunal to give dates to avoid on 4 October 2018 but at no stage said that he needed additional time to comply with the Orders or raised his health issues.
 12. The various Orders made at the preliminary hearing were in respect of the Claimant's schedule of loss, further and better particulars and disclosure in respect of time limits. As said above, the date for compliance was 18 October 2018. The issue of time limits was to be considered at a preliminary hearing to be listed after 1 January 2019. The Claimant's representative did not comply by 18 October 2019. The Respondent's representative sent a chasing email on 22 October 2019 stating if the Claimant's representative did not comply by 26 October 2019 the Respondent would apply for a strike out or unless order.
 13. There was no response at all by the Claimant or his representative and so the Respondent made the application on 31 October 2019. The Tribunal Order was then signed on 5 November 2019 in which time for compliance was

- extended for a further 14 days beyond that to 19 November 2019, due to the delay providing the written order. Unfortunately this was not sent to the parties until 4 December 2019. When it was sent it was accompanied by a cover email which responded to the Respondent's application confirming that the Claimant should have been complying with the orders whilst awaiting the written order but that the Claimant should ensure compliance with the new dates and that the Respondent's Representative should alert the Tribunal in the event of non compliance.
14. By 4 December 2019 there had still been no compliance with the Orders from Mr Neckles, nor an explanation or response. By this time 14 weeks had passed and he had not done what he had initially been ordered to do in 3 weeks. On 4 December the parties were also informed the Preliminary Hearing had been listed for 19 February 2019.
 15. On 11 December 2019 the Respondent's representative wrote again to the Claimant's representative requesting an update as there had still been no compliance. The Claimant's representative was warned that if the Respondent's representative did not hear from him by 14 December 2019 they would inform the Tribunal of his failure to comply. The Claimant's representative still had not complied with the orders by 21 December 2019. The Respondent's representative therefore wrote to the Tribunal requesting the claim be struck out and applying for costs of £745.50 plus VAT. Judgment striking out the claim was signed on 31 January 2019 and sent to the parties on 11 February 2019. There had still been no compliance by the Claimant or his representative. By this time, due to the proximity of the Preliminary hearing the Respondent had commenced preparation for the Preliminary Hearing. I agree with the Respondent that by this time there had been a repeated failure to comply with the Orders and silence for a number of months. There was no attempt to reply to the Respondent's representative's correspondence. Indeed the first communication from the Claimant's representative has been today. I agree that this amounts to improper, unreasonable and negligent conduct.
 16. The Claimant's representative has not presented a sick note from his GP for the period from 2 October 2018 to the date of the strike out on 11 February 2019. The Respondent presented information that suggests that he has continued to be actively involved in this case and those of other employees. The Claimant applied to the Respondent for a postponement of a disciplinary hearing on 31 October 2019. He said his representative (Mr Neckles) could not attend the hearing scheduled on 1 November 2019 but gave other available dates of 3 November and 15-17 November 2019. The request suggests that the Claimant had been in contact with Mr Neckles to discuss the dates to avoid. There is no suggestion that Mr Neckles was too ill to attend.
 17. A different employee who was also represented by Mr Neckles wrote to the Respondent on 17 December 2018 to postpone an appeal hearing dated 18 December 2018. This did say that Mr Neckles was unable to attend on 18 December 2019 due to sudden illness and again provided a list of some dates to avoid, but the implication is there were other dates Mr Neckles was available. There was no suggestion he was to be unfit to attend in the near future.

18. Mr Neckles himself wrote to the Respondent on 27 January 2019 on behalf of another employee asking for an appeal hearing to be brought forward to 9 February 2019 so he could attend or he would submit written submissions. Again there was no suggestion that he was not fit to represent the employee.
19. I agree with the Respondent that for the Claimant's representative's ill health to be a satisfactory excuse he would have needed to be too ill to comply or make any contact with the Respondent's representative or Tribunal, and he would have needed to be too ill to arrange for an alternative colleague or the Claimant himself to tell the Tribunal he was incapacitated. I agree that this is inconsistent with the documents.
20. No evidence has been provided in respect of either the Claimant or his representative's ability to pay an Order for costs, despite this being the express purpose of today's hearing in the email from the Tribunal dated 11 February 2019.
21. I do consider that it is appropriate to order wasted costs against the Claimant's representative due to his improper, unreasonable, and negligent conduct in failing to comply at all with the Tribunal's Orders or engage at all with the Respondent from 4 October 2019 until the matter was struck out. If I had not considered it appropriate to make a wasted costs order I would have made a costs order against the Claimant himself for the unreasonable conduct of his representative.
22. I discussed with the Respondent whether the Order should be against Mr Neckles or the PTSC Union. The Respondent requested the order should be against the Union and I agreed, given that Mr Neckles in his witness statement says the Claimant is represented by PTSC Union and says that the Union employs Mr Neckles. Both are named on the Claim Form as the Claimant's representative.
23. I considered whether I should limit the costs to those incurred after the date for compliance given in the written Order, but was persuaded that the improper, unreasonable and negligent conduct dated back to the original date ordered for for compliance at the hearing on 27 September 2018, namely 18 October 2018. I also considered whether costs should be limited to those incurred up to the strike out of the Claim but I was persuaded by the Respondent's representative that the Respondent was entitled to pursue the wasted costs as a matter of principle, given that they have other cases in which Mr Neckles represents employees and the seriousness of the failure to comply. I accept that as a result the wasted costs have increased.
24. I considered it appropriate to award the sum above as being the necessary basic costs incurred as a result of the Claimant's representative's failure to comply with the Order and pursuing the wasted costs against him. I considered that to be the £745.50 plus VAT incurred between 22 October 2018 and 18 December 2018 minus £90 which was incurred writing or contacting the Tribunal for updates. This gave a sum of £655.50 plus VAT. I also included the cost of preparing the bundle for this hearing (£551.25 plus VAT), instructions to Counsel and finalising the bundle (£367.50 plus VAT), a telephone call with

Counsel (£110.25 plus VAT) and research by the Respondent's solicitor (which the Respondent's representative indicated was in respect of researching the case of Henry which I have been referred to) (£262.50 plus VAT), and Counsel's fee of £1350 plus VAT. This gave a total of £3,297 and adding VAT at 20% gave £3956.40. For clarity in particular I did not consider it appropriate to order costs of preparing for the Preliminary Hearing prior to the Tribunal striking out the claim or chasing the Tribunal.

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Employment Judge Corrigan
29 November 2019