



EMPLOYMENT TRIBUNALS

Appellant: Thomas Davin

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

JUDGMENT ON COSTS

1. The application by the respondent for costs in relation to the hearing on 5 November 2019 succeeds and the appellant is ordered to pay to the respondent costs in the sum of £1,344.00.
2. The application by the respondent for costs in relation to the adjournment of the hearing on 28 February 2020 fails. No costs order is made.
3. The application for costs made by the respondent in relation to the whole costs of the appeal, excluding the costs of the two hearings, succeeds and the appellant is ordered to pay to the respondent costs in the sum of £1,617.67.
4. The total figure payable by the appellant pursuant to these two costs orders is **£2,961.67**.

REASONS

Introduction

1. This judgment on costs was made without a hearing, hence the “Code P” which appears next to the case number. It was agreed at a hearing on 28 February 2020 that this decision should be made on the papers alone.
2. The appellant, Mr Davin, and his wife, Denise Davin, are the proprietors of Ashton Hall Equestrian Centre in Sale.
3. On 25 September 2019 the respondent served separate Prohibition Notices on Mr and Mrs Davin preventing them from using two wooden stable blocks because they were in a poorly maintained condition and there was a risk that parts might collapse or fall on someone.

4. Mrs Davin did not appeal her notice but Mr Davin appealed his on 10 October 2019. His appeal was listed for hearing on 5 November 2019.

5. At 6.14pm on 4 November 2019 Mr Davin withdrew his appeal by email to the respondent. The email was also directed to the Manchester Employment Tribunal but the wrong email address was used and it was not received.

6. That withdrawal did not come to the attention of the respondent's colleagues until the morning of the hearing. The respondent, her colleagues and counsel instructed on her behalf attended the hearing. Mr Davin did not attend. I dismissed the appeal on withdrawal in a Judgment which took effect 21 days after it was sent to the parties. The delay was necessary to give Mr Davin a chance to reconsider the withdrawal if he wished to do so. He took no action and the dismissal took effect.

7. At the hearing the respondent made an application for the costs incurred in attending on 5 November 2019 on the basis that the timing of the withdrawal had been unreasonable. In the Written Reasons issued with my Judgment I set out the basis for that application, the amounts claimed and made some further points about the nature of the application. I allowed Mr Davin 21 days from the date the Judgment and Reasons were sent out to the parties (25 November 2019) for him to respond.

8. I also recorded in the Reasons that the respondent envisaged making a further application for the costs of the whole appeal, excluding the costs of that hearing. That application was made in writing on 6 December 2019. The basis was that the appeal had had no reasonable prospect of success.

9. By a letter and email of 8 January 2020 the parties were notified that the costs applications would be considered at a hearing on 28 February 2020. Mr Davin was informed that if he wanted his ability to pay to be taken into account he needed to provide a statement of his financial position with supporting documents to the respondent not less than seven days before the hearing. No such statement was provided.

Hearing 28 February 2020

10. Mr Davin attended the hearing. The respondent was also present with counsel.

11. Mr Davin applied for the hearing to be adjourned. His wife was unable to attend due to anxiety caused by the hospitalisation of her elderly mother. In the course of the discussion both sides indicated that they would be prepared to proceed by way of written submissions. I decided to adjourn the costs hearing and made Case Management Orders for such written submissions to be made. Those Case Management Orders were sent to the parties on 5 March 2020.

12. Mr Hughes indicated at the hearing that the respondent might make a third application for costs in relation to that hearing. The basis was that if the Tribunal had been notified earlier in the week that Mrs Davin was not able to attend, the hearing could have been postponed and the cost of attendance avoided. That application

was subsequently made in writing on 3 March 2020. The amount sought was £1,152.00.

Material Before Me

13. Although the written case management orders made at the hearing on 28 February 2020 allowed Mr Davin to make a written response to the costs applications by 3 April 2020, no such response was received. Accordingly, when I came to make a decision on the costs applications I had the following material before me:

- (a) The notice of appeal;
- (b) The respondent's response to appeal with supporting documents which included the prohibition notices and some evidence about the state of the stables;
- (c) The Judgment and Reasons issued following the hearing on 5 November 2019;
- (d) The respondent's application for costs of the whole case supplied on 6 December 2019 with a supporting costs bundle, which included witness statements from the respondent and a colleague about the timing of the withdrawal of the appeal;
- (e) A written skeleton argument from Mr Hughes provided at the hearing on 28 February 2020, and
- (f) The further application for costs in relation to that hearing made by the respondent on 3 March 2020.

Relevant Legal Principles

14. The power to award costs is contained in the 2013 Rules of Procedure. The definition of costs appears in rule 74(1) and includes fees, charges, disbursements or expenses incurred by or on behalf of the receiving party.

15. Rule 75(1) provides that a Costs Order includes an order that a party makes a payment to another party "in respect of the costs that the receiving party has incurred while legally represented".

16. The circumstances in which a Costs Order may be made are set out in rule 76. The relevant provision here was rule 76(1) which provides as follows:

"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.”

17. The procedure by which the costs application should be considered is set out in rule 77 and the amount which the Tribunal may award is governed by rule 78. In summary rule 78 empowers a Tribunal to make an order in respect of a specified amount not exceeding £20,000, or alternatively to order the paying party to pay the whole or specified part of the costs with the amount to be determined following a detailed assessment.

18. Rule 84 concerns ability to pay and reads as follows:

“In deciding whether to make a costs, preparation time or wasted costs order and if so in what amount, the Tribunal may have regard to the paying party’s (or where a wasted costs order is made the representative’s) ability to pay.”

19. It follows from these rules as to costs that the Tribunal must go through a three stage procedure (see paragraph 25 of **Haydar v Pennine Acute NHS Trust UKEAT 0141/17/BA**). The first stage is to decide whether the power to award costs has arisen, whether by way of unreasonable conduct or otherwise under rule 76; if so, the second stage is to decide whether to make an award, and if so the third stage is to decide how much to award. Ability to pay may be taken into account at the second and/or third stage.

20. The case law on the costs powers (and their predecessors in the 2004 Rules of Procedure) include confirmation that the award of costs is the exception rather than the rule in Employment Tribunal proceedings; that was acknowledged in **Gee v Shell UK Limited [2003] IRLR 82**.

21. If there has been unreasonable conduct there is no requirement for the Tribunal to identify a precise causal link between that unreasonable conduct and any specific items of costs which have been incurred: **McPherson v BNP Paribas (London Branch) [2004] ICR 1398**. However there is still the need for some degree of causation to be taken into account as the Court of Appeal pointed out in **Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78**:

“The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case, and in doing so to identify the conduct, what was unreasonable about it and what effects it had.”

22. The position where claims are withdrawn was considered by the Court of Appeal in **McPherson v BNP Paribas (London Branch) [2004] ICR 1398**. Mummery LJ observed that the question was not whether the withdrawal was unreasonable, but whether the proceedings had been conducted unreasonably.

Ability to Pay

23. Mr Davin did not take the opportunity to provide me with any information about his ability to pay even though that was identified in the case management orders from the hearing on 28 February as one of the matters he might wish to

address. I had to consider each of the costs applications without any such information.

Costs of hearing 5 November 2019

24. The respondent argued that the timing of the withdrawal of the appeal was unreasonable. Had the appeal been withdrawn during the working day on 4 November 2019 the hearing the following day could have been cancelled. Mrs Davin had communicated with the respondent about the appeal by telephone and by email during the working day and said nothing about withdrawal. It was not withdrawn until after 6.00pm and therefore Mr Davin could not reasonably have thought that it would come to the attention of the respondent or her colleagues before the next morning, which was the day of the hearing.

25. I had no written response from Mr Davin to this application.

26. I was satisfied that although the withdrawal was a reasonable step, it was done unreasonably late. Mr Davin knew that the hearing was on 5 November 2019. No good reason was given as to why the appeal could not have been withdrawn any earlier. A withdrawal even two or three hours earlier would have enabled the hearing to have been cancelled and the respondent would not have incurred the costs of attending. The unreasonable timing of the withdrawal had resulted in costs being incurred unnecessarily. I was satisfied that the power to award costs had arisen.

27. I considered the amount claimed. Counsel's fees for preparatory work for attendance were £1,000 plus VAT making a total of £1,200. The respondent's solicitor had also spent two hours attending the hearing at £72 per hour, making a total of £144. In addition the respondent herself and her colleague, Mrs Duckworth, had attended to give evidence and their time was claimed at £79 per hour for one hour each. That was a total of £158.

28. If Mr Davin had acted reasonably the appeal would have been withdrawn over a week before the hearing. That is primarily because on 29 October 2019 the respondent wrote to him and explained that the prohibition notice was now lifted and invited him to withdraw the appeal. Had he done it at that stage counsel's fees would not have been incurred and there was no need for the solicitor to attend the hearing either. I was satisfied that the amounts claimed in respect of work by solicitor and counsel were reasonable and should be paid by Mr Davin.

29. As for the time of the witnesses, however, I considered that outside the scope of the rules. Rule 74(1) defines "costs" as meaning:

"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)."

30. In my judgment that is restricted to expenses (such as for travel) incurred by a witness. It might possibly extend to loss of earnings. It does not extend, however, to what is effectively a charge for the time spent by the witness.

31. I therefore decided that Mr Davin should pay the respondent costs in the sum of £1,344.00.

Costs of Hearing 28 February 2020

32. The application for costs in relation to the hearing on 28 February 2020 was made on the basis that Mr Davin had acted unreasonably in not applying in advance for the hearing to be adjourned. The fit note in respect of Mrs Davin which he produced at the hearing had been issued on 24 February 2020 and the respondent said that the application should have been made earlier in the week so as to avoid the hearing taking place.

33. Mr Davin did not take the opportunity of responding in writing to this application.

34. Having considered these points I decided that no costs award should be made. Mr Davin is not familiar with employment tribunal proceedings, and may not have appreciated that he could ask in advance for a postponement. In any event, even if he acted unreasonably in not doing so, a postponement would have meant a hearing would have been required at a later date. The respondent would have incurred those same costs then anyway.

Costs of the whole appeal

35. The respondent argued that the appeal had enjoyed no reasonable prospect of success. In support of that contention a number of points were made including the following:

- (a) There had been no appeal against previous prohibition notices in respect of the wooden stables in June 2018, and work had been done following those notices which meant that the prohibition notice was complied with by 7 September 2018;
- (b) The assertion in the notice of appeal that there had never been an injury to a horse or person did not undermine the view of the respondent, an experienced inspector, that there was a risk of injury;
- (c) That assertion was in any event untrue because there had been a serious incident at the centre in 2010 in which five animals died;
- (d) Mrs Davin had not appealed her prohibition notice;
- (e) Mr Davin had undertaken repair and maintenance work in respect of the stables by 25 October 2019, which was inconsistent with his assertion that no work was needed.

36. Mr Davin did not take the opportunity to respond to these points in writing.

37. The amounts sought by the respondent excluded attendance at the two hearings. The legal costs were preparation time of 12.3 hours by the respondent's

solicitor at an hourly rate of £72, making a total of £885.60, and 0.49 hours by a legal assistance at £43 per hour making a total of £21.07. The total claimed in relation to legal costs was £1,617.67. No VAT was claimed because the lawyers are employed by Trafford Council.

38. In addition there was a claim for time spent by Environmental Health Officers, but as indicated above it did not seem to me that these fell within the scope of the costs rules.

39. I was satisfied this appeal was unreasonably pursued, for the reasons given by the respondent (which Mr Davin did not seek to rebut). The respondent has incurred costs as a consequence of that unreasonable appeal. Taking into account all the circumstances I was satisfied that it was appropriate to make a costs order in the sum of £1,617.67.

Conclusion

40. Two of the three costs applications succeeded and the appellant is ordered to pay to the respondent costs which in total amount to **£2,916.67**.

Employment Judge Franey

8 June 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

09 June 2020

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