



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110827/2019(A)

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Held via telephone conference call on 27 March 2020

Employment Judge R Gall

10 **Mrs I Tierney**

**Claimant
Represented by:
Mrs A Maxwell-
Ferguson - Solicitor**

15 **Sky Subscribers Services Limited**

**Respondent
Represented by:
Mr M Leon -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the application for wasted costs in terms of Rule 80 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 is refused.

REASONS

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1. A case management Preliminary Hearing (“PH”) was held by way of telephone conference call on 27 March 2020. Mrs Maxwell-Ferguson participated for the claimant. Mr Leon participated for the respondents.

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2. At conclusion of the case management section of the PH, Mr Leon stated that he had intimated an application for wasted costs. Mrs Maxwell-Ferguson confirmed that she was aware of this application and that she was content that it be addressed by submissions on the telephone.

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3. This was a remote hearing which was been consented to. The form of remote hearing was category A, telephone conference call. This type of application would often be dealt with in this manner. Further, a face to face hearing was not held because it was not practicable due to the coronavirus pandemic.

4. I heard from both parties' representatives on their respective positions. Each was given the opportunity to comment upon the position of the other. I then stated that I would take time to consider the position and would issue a written Judgment. A Judgment is appropriate having regard to the terms of regulation
5 (3) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013. This is as the decision is one which finally determines a claim or part of a claim as regards costs, in this instance wasted costs.

Background

5. There was agreement as to the facts which had led to the application. A case
10 management PH had taken place on 12 December 2019. As a result of that a further case management PH had been set down for 13 February 2020. The PH in December 2019, once fixed, had been subject of a request from Mrs Maxwell-Ferguson to change its time so that it was held at 2PM.
6. Intimation of the PH set down for 13 February 2020 was sent to parties on 30
15 December 2020. At that point the offices of the firm for which Mrs Maxwell-Ferguson works were closed for the Christmas and New Year break.
7. When the firm for which Mrs Maxwell-Ferguson worked resumed work after
20 the Christmas and New Year break, emails received during the holiday period were gone through. The email from the Tribunal setting the PH for 13 February 2020 was noticed. An error was made however by Mrs Maxwell-Ferguson in that she omitted to diary this PH. There was no entry therefore made in the diary of the firm recording the fact that there was a PH set down for 13th February in this case.
8. Mrs Maxwell-Ferguson works one day per week for the firm representing the
25 claimant. When she attended her office on Thursday 13 February 2020, she noted an email from the Tribunal of 10 February 2020. This referred to the PH set down for 13 February 2020.
9. On seeing this email Mrs Maxwell Ferguson realised that she was unable to
30 attend the PH due to client appointments to which she was already committed on 13 February 2020. There are 2 solicitors at the firm for which she works.

One of those is the partner. He was on annual leave at this point. The other is Mrs Maxwell-Ferguson.

10. When the PH was due to proceed on 13 February 2020, Mr Leon was present. As there was no appearance on behalf of the claimant, the Clerk to the Tribunals telephoned Mrs Maxwell-Ferguson's office. As a result of that an email was sent to the Tribunal, copied to the respondents, by Mrs Maxwell-Ferguson at 10:07 stating that she had only opened the email intimating the PH that morning and that there was no one available to attend the PH. She requested that a later date be fixed.
11. It was in those circumstances that the PH had been set down for 27 March 2020.

Submissions for the respondents

12. Mr Leon said that the situation was regrettable. The email from the Tribunal had however been received intimating the hearing. The position was that the hearing had not been entered into the relevant diary. The failure to diarise it was, in his submission, an act of negligence, something which no solicitor of reasonable competence would do.
13. Mr Leon referred to the terms of Rule 80. That said that a Tribunal could make a wasted costs order against a representative in favour of any other party where that party had incurred costs as a result of any improper, unreasonable or negligent act or omission on the part of the representative. He referred to cases. Those were *Rider's v Horse field and others* 1994 3 All ER 848, CA, and *Godfrey Morgan Solicitors Limited v Cobalt Systems Limited* UKEAT/0608/10.
14. There was a 3 stage test, said Mr Leon. The required to have been actings which were improper, unreasonable or negligent. There required to have been unnecessary cost incurred and it required to be just to order compensation to be paid by the legal representative to the party who had incurred that cost, whole or part of the cost being awarded.

15. Applying those tests to this case, Mr Leon said that not diarising the PH was an act of negligence. There had been unnecessary cost incurred in that he had appeared at the PH on 13 February 2020 with that PH not then able to proceed due to absence of the representative of the claimant. It was, in his submission, just to order the representative to compensate the respondents. It was not right, he said that the respondents had been put to cost and had been prejudiced.
16. As far as quantifying the amount sought was concerned, he explained that the respondents had an arrangement whereby a fixed fee would be paid of £750 plus VAT to cover preparation for and attendance at the PH. Mr Leon accepted that preparation for the PH on 13 February 2020 had, to some extent, saved preparation for this PH. He sought that one half of the fee be awarded, namely £375.

Submissions for the claimant

17. Mrs Maxwell Ferguson said that there had been a genuine oversight on her part. It had been human error which had occurred. She had interacted with the Tribunal regarding rearranging the PH time for the December PH. She would normally respond to any communication from the Tribunal and would normally have diarised the PH. She explained that the offices of the firm for which she worked had been closed on 30 December 2019 due to the Christmas break. She explained, as detailed above, that on return to work after the festive period she had simply overlooked putting the PH for 13 February 2020 in the diary.
18. As she was only in the office on Thursday of each week, she opened the email from the Tribunals 10 February on 13 February 2020, the morning of the PH. That morning she was the only solicitor in the office, the partner being on holiday. She was committed to client appointments. Had she been able to attend or to send someone on behalf of the claimant to the Tribunals that morning she would have done so. On previous occasions where there had been any inability to attend any PH set down contact been made with the Tribunal prior to the day of the PH to seek rearrangement.

19. Mrs Maxwell-Ferguson urged that I did not award any sum by way of wasted costs.
20. I raised with Mrs Maxwell-Ferguson the terms of Rule 84. That rule provides that in deciding whether to make (relevant in this case) a wasted costs order and if so in what amount the Tribunal may have regard to the paying party's representative's ability to pay.
21. Mrs Maxwell-Ferguson explained that she was unsure of whether the firm would pay on her behalf or whether she would require pay any award personally. She had no information as to the ability of the firm to pay. She gave me information as to her own income and capital position. In light of the decision I have reached it is not necessary to set that out in this Judgment.

Discussion and decision

22. In addition to the cases to which Mr Leon referred, there are other cases which are of relevance as I see it. Those are *Cliffhanger Duce and Hammer v Inns (t/a PARC Fermi) and another*, EAT 0100/08 *Medical v Marvell and others* 2002 3 All ER 721, HL ("*Medical*") and *Mitchell Solicitors v Funkiness Information Technologies York Ltd* EAT 0541/07e ("*Mithell Solicitors*"). In *Mitchell Solicitors*, the principles applied in the decisions in civil courts are commended to the Employment Tribunal by the EAT.
23. The 3-stage test outlined by Mr Leon is indeed the correct test to apply. Even if a Tribunal is satisfied that elements 1 and 2 of the test have been met, it is appropriate that discretion is exercised and consideration is given to whether it is just to make an award of compensation in the circumstances.
24. The House of Lords in *Medical* confirmed that "negligent" should be understood in a non-technical way to denote failure to act with the competence reasonably to be expected of ordinary members of the solicitors' profession.
25. Failure to make an entry in the diary of an impending hearing at court Tribunal is extremely unfortunate. The task is an administrative one, but one which is of importance.

26. Mrs Maxwell-Ferguson was candid in saying that responsibility for the oversight lay with her. Her position, essentially, it seemed to me, was one of regret that the oversight had occurred, acknowledgement that attendance by Leon at the PH had taken place in circumstances where the PH could not proceed due to her absence, with the explanation being tendered of oversight which had occurred, my attention being drawn to her general diligence in this case in attending to correspondence with the Tribunal.
27. I understand the pressures which exist and the various tasks which require to be carried out by solicitors or by administrative staff on their behalf. It seems to me that the firm for which Mrs Maxwell-Ferguson should revise their practices given that she attends the office once per week and given the volume of correspondence which may build up from week to week. Some of that correspondence, as was the case in this instance, will contain important notification of, or concerning, hearing dates. In this instance the problem was compounded by the holiday break covering Christmas and New Year.
28. I have sympathy with Mr Leon in that he attended the PH on 13 February 2020 only to find that it was not possible to make any progress in the case due to the absence of Mrs Maxwell-Ferguson, that being in turn due to her failure to diarise the PH.
29. I have considered whether the failure to make the diary entry constitutes negligence, applying the definition referred to above. I am not persuaded that it does. It is a one-off instance. It is a straightforward oversight. It relates to an administrative, but important, matter. Its occurrence certainly highlights a deficiency in the diary systems within the firm for which Mrs Maxwell-Ferguson works. It is not however something which in my view is properly categorised as negligence.
30. On that basis the application is unsuccessful.
31. If I am wrong in my view and the oversight in failing to diary the date and time of PH was to be regarded as negligence, applying the third leg of the test, exercising my discretion as to whether it is just to make the order, I did not regard it as being just to make that order. This is on the basis that it is a one-

off oversight for which an expression of regret has been made. It has no doubt
been frustrating for the respondents to see a six-week gap between the PH in
February and that which is the subject of this Judgment. There is a degree of
inconvenience and expense through that, however progress in the case has
5 not been substantially slowed. That is not to say that the oversight and its
consequences can be treated lightly. It is far from ideal. Lessons should be
learned and applied in the diarising system of the firm for which Mrs Maxwell-
Ferguson works. Mrs Maxwell-Ferguson is no doubt in a position to tighten up
on the diarising system with a view to preventing a situation of this type arising
10 in the future.

32. For these reasons therefore had I been persuaded that the actions or
oversight of Mrs Maxwell-Ferguson constituted negligence, I would,
nevertheless, not have granted the application.

33. Had the application been granted, I did not regard the sum of £375 as being inappropriate. If I had been making an award in respect of wasted costs I would have made it in that amount.

5	Employment Judge:	R Gall
	Date of Judgement:	03 April 2020
	Entered in Register,	
	Copied to Parties:	03 April 2020