



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr M Bentley

AND

London Borough of Ealing

HELD AT: London Central

BEFORE: Employment Judge Nicolle

Application, by agreement with the parties, determined in writing without a hearing.

JUDGMENT

1. The Respondent's application for costs succeeds in part. The Claimant is ordered to pay the Respondent £1,593.40.

REASONS

1. By a letter dated 7 April 2020 the Respondent applied for a costs order pursuant to Rule 76 (1) (a) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the Rules) in the total sum of £8,492.74.

Background and Chronology of relevant events

2. The Claimant was employed by the Respondent between 20 August 2007 and 14 June 2019. At all material times during the period mentioned in the ET1 the Claimant was employed by the Respondent as a Finance Business Advisor.

3. On 21 August 2019, the Claimant presented a claim form to the Employment Tribunal. The Claimant ticked the boxes in Section 8 stating that he was owed notice pay and other payments. He completed Section 8.2 as follows:

Notice period on leaving not honoured.

Careers progression scheme pay award from September 2018.
Decision not made after appeal

4. The Respondent served its response on 26 November 2019.

5. The Respondent rejected the basis of the claims presented by the Claimant. At paragraph 27 of the Particulars of Response it applied for the Claimant's claims to be struck out as having no reasonable prospect of success.

6. The Tribunal sent a letter to the parties dated 9 December 2019 which read as follows:

Employment Judge Glennie has requested that I write to you stating that you are directed, that by 16 December 2019, you must send to the Respondent, copied to the Tribunal, a written statement:

- The sums you are claiming
- The basis on which you say you are entitled to them.

7. The Claimant responded in an email at 20:40 on 9 December 2019 which included the following:

- Grade 11 mid point from September 2018 till my notice period on 12 July 2019; and
- My leaving date on 14 June 2019 was not agreed.

8. Under cover of an email on 20 December 2019 the Respondent made an application for an unless order under Rule 38(1) that the Claimant's claims in their entirety be dismissed without further notice or further order unless the Claimant:

- specifies the sums he is claiming; and
- specifies the basis upon which he states he is entitled to them, to the Employment Tribunal and the Respondent by no later than 4:30pm on Friday 10 January 2020.

9. The Respondent set out relevant background in respect of its application and referred to the case being listed for a two-hour final hearing on 17 January 2020. The Respondent requested that this hearing should be converted to a preliminary hearing.

10. In an email of 21:54 on 4 January 2020 the Claimant stated:

"I wish to note the Respondent is not cooperating with my request for their assistance to quantify the sum of the claim"

11. In a letter from the Tribunal dated 16 January 2020 the hearing scheduled for the following day (17 January 2020) was converted from a Full Merits Hearing to a Closed Preliminary Hearing (CPH) and the parties were informed that the Respondent's application for an unless order would be considered then.

12. I was the Judge listed to hear the CPH on 17 January 2020. In reading the file on the morning of the hearing which was scheduled to commence at 10am it became apparent to me that within an earlier email the Claimant had requested that the Tribunal make arrangements for a sign language interpreter. Unfortunately, this request had not been actioned by the Tribunal. It was then too late too late to arrange.

13. Given that the Claimant is profoundly deaf and is not able to lip read this meant that it was not possible to conduct the hearing. The only means of communicating with the Claimant were by handwritten notes passed between the parties. I therefore decided that the hearing should be vacated and rescheduled for 10am on 25 February 2020 and that arrangements would be made for the attendance of a sign language interpreter. It was suggested by the Respondent's representative, with which I concurred, that it would be prudent to list the hearing for the slightly longer period of three hours rather than two given that it would in all probability take longer than otherwise would have been the case with the presence of a sign language interpreter.

14. The re listing of the case for 25 February 2020 was confirmed to the parties in a letter from the Tribunal dated 21 January 2020.

15. I was again the Judge allocated to the hearing on 25 February 2020. The Respondent's representative was in attendance. However, the Claimant did not attend. The Tribunal staff attempted to contact the Claimant and sent emails to which no response was forthcoming. I directed that the commencement of the hearing should be deferred to 11am to provide the Claimant with every opportunity to attend if he had been delayed in transit.

16. After the hearing I drafted a letter to be sent by the Tribunal administrative staff to the Claimant and copied to the Respondent. This letter dated 27 February summarised what had taken place on 25 February 2020. It included the following:

“Employment Judge Nicolle orders that by 5pm on 10 March 2020 that you provide written explanations in respect of the following:

Why you failed to attend today's preliminary hearing and why the Tribunal should allow your claim to proceed notwithstanding such non-attendance.

A response to the Respondent's request for details of your claim as set out below

- (i) Specify the sums you are claiming; and
- (ii) Specify the basis upon which you state that you were entitled to include;

- (a) the basis upon which you assert that you are entitled to be remunerated at salary Grade 11 from September 2018 to 12 July 2019; and
- (b) the reason why you state that you are entitled to any payment in relation to your notice period and specify the sum you are claiming.

You are required to provide the information above, failing which all, or part of your claim may be dismissed without further notice in accordance with Rule 38 (1).

Employment Judge Nicolle makes this unless order as he is concerned that absent such particulars the claim may have no reasonable prospect of success.

If you fail to provide any response, or that any response is considered unsatisfactory, Employment Judge Nicolle advises that he is considering striking out your claim under Rule 37 (1) (d) on the basis that it is not being actively pursued and/or 37 (1) (a) on the basis that it has no reasonable prospect of success.

The Respondent notified Employment Judge Nicolle that it reserved its position in respect of a cost application for £172 as a result of their abortive attendance at the hearing on 25 February 2020. Employment Judge Nicolle orders that you provide an explanation as to why you failed to attend, and why such costs should not be awarded in the Respondent's favour".

17. In an email to the Tribunal at 11:31 on 10 March 2020, (but not copied to the Respondent), the Claimant apologised for not attending the Tribunal hearing (he referred to 21 January but was presumably referring to the hearing scheduled for 25 February 2020) as he says he had been diagnosed with colorectal cancer that week. The Claimant attached a statement in support of his case together with various emails which he was going to send as attachments to subsequent emails (11 in total).

18. The Claimant's background statement was sent under cover of his email of 10 March 2020. It comprised of 22 pages in large font. Most of this document is not directly relevant to his pleaded claim. It does, however, include the following at page 81 in the bundle prepared for the purposes of this application:

Amount to claim

Grade 11 from September 2018 to 14 July 2019 – amount should be around £4,000 subject to NI, tax and pension contributions

Pay Notice

++ approximately £2,100 (Grade 10) from 14 June to 12 July 2019. In breach of the ERA 1996.

19. The case file was referred to me on 12 March 2020. I do not recollect that the file at that stage included the Claimant's email of 10 March 2020. I should explain that it sometimes takes some time for emails sent to London Central to be printed and linked to relevant case files. It therefore appeared to me at that point that there had been no response from the Claimant to the Tribunal's letter dated 27 February 2020.

My decision to strike out the claim

20. In a Judgment dated 12 March 2020 I struck the claim out on the basis that it had no reasonable prospect of success and was not being actively pursued. I stated that the Claimant had failed to make representations in writing or has failed to make any sufficient representations why this should not be done or to request a hearing.

21. Whilst I do not believe I had seen the Claimant's email of 10 March 2020 at the time I struck his claim out in my Judgment dated 12 March 2020 had I seen that email my decision would almost certainly have been the same. I reach this decision for the following reasons:

- a) the Claimant had failed to properly respond to the Tribunal's letters dated 9 December 2019 and 27 February 2020 asking him to properly particularise his claim;
- b) the Claimant had failed to provide advance notification as to his non-attendance at the hearing scheduled for 25 February 2020; and
- c) in his email of 10 March 2020, the Claimant referred to having been diagnosed with colorectal cancer "that week" but it is ambiguous from the Claimant's email whether he was referring to the week of the Tribunal's letter dated 21 January 2020 listing the hearing for 25 February 2020 or the week of that hearing. Further, no evidence was provided as to the date of diagnosis. In any event, notwithstanding the obvious distress to the Claimant of such a diagnosis I consider that it would have still been reasonable for him to have sent an email to the Tribunal and the Respondent to advise of this situation and requesting a postponement of the hearing listed for 25 February 2020.

22. The Judgment striking out the claim was sent to the parties by the Tribunal administrative staff under cover of a letter dated 16 March 2020. The letter contained the usual reference to a party being entitled to make an application for reconsideration within 42 days of the decision being sent to the parties. The Claimant made no such application.

23. Under cover of a letter sent under cover of an email on 7 April 2020 the Respondent made an application for costs. I refer to this letter in more detail below.

24. In an email of 16:32 on 7 April 2020 the Claimant said that he was objecting to the Respondent's application.

25. I drafted a letter to be sent by the Tribunal to the parties. This letter which was dated 29 April 2020 provided the Claimant with a period of 14 days from receipt of the Respondent's detailed cost application to make written submissions. I invited the parties to make representations in writing as to whether they considered that the application could be determined by me in writing or whether an in-person hearing was required.

26. Under cover of an email of 15:37 on 29 April 2020 the Claimant sent a letter from NHS Hull and East Yorkshire Hospitals dated 21 April 2020 inviting him to attend chemotherapy and radiotherapy appointments on 7 May 2020. The Claimant did not make any written comments in the email to which this letter was attached.

27. In an email of 12:41 on 12 May 2020 the Respondent set out further details of its grounds for making a cost application. A further schedule of the costs claimed was attached.

28. In an email of 17:15 on 25 May 2020 the Claimant stated that his cancer diagnosis was the reason for his non-attendance at the hearing scheduled for 25 February 2020. He went on to say that it was not possible for him to make voice calls to lawyers and/or seek legal advice in person due to communication difficulties. He also said that he had to shield himself at home due to his cancer diagnosis. He said that he was not in employment and was in receipt of ESA and PIP.

29. In an email of 12:19 on 29 May 2020 I invited the parties to submit any additional documents which they wished me to consider by no later than 4pm on 3 June 2020.

30. The Claimant sent me numerous emails attaching multiple documents. From a brief perusal most of these documents did not appear relevant to either the Tribunal claim, the subsequent conduct of the proceedings or the Respondent's cost application.

31. In an email of 12pm on 1 June 2020 I ordered the parties to agree a consolidated bundle of documents and provide this to me as a pdf by 4pm of 12 June 2020.

The bundle of documents

32. The pdf bundle of documents comprised 351 pages. I consider that many of the documents included were not relevant for the purposes of this application. As a general observation from a high level review of the totality of the documents it is apparent that the Claimant had considerable grievances against the Respondent but most of these grievances did not appear to directly relate to the basis of his claim. For example, in his email to the

Tribunal of 17:15 on 25 May 2020 he complained that he had been denied having a leaving/farewell party after working for 12 years and making lots of friends with the Respondent. Further, the Claimant included a series of documents which appeared of no relevance to his claim to include at pages 216-319 the Respondent's statement of accounts for 2018/19.

The Respondent's application for costs

33. The Respondents application, as set out in their letter of 7 April 2020 and further developed in an email of 12 May 2020 can be summarised as follows:

- a) the claim had no reasonable prospect of success;
- b) the claim was misconceived because; the Claimant has never put forward a proper basis for his assertion that he was entitled to be rated at Grade 11;
- c) agreement had been reached to shorten the Claimant's notice period so that his last day of employment was 14 June 2019 and therefore there was no deduction from pay;
- d) the Claimant had never properly complied with the Tribunals Orders of 9 December 2019 and 27 February 2020 to quantify the basis of his complaints; and
- e) the Claimant failed to attend the preliminary hearing on 25 February 2020 and offered no reasons for this failure.

Claimant's response to the Respondent's application

34. This has been set out above.

The Law

35. Rule 76 provides:

When a costs order or a preparation time order may or shall be made

76 (1) 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.

36. The following propositions relevant to costs may be derived from the case law:

37. There is a two-stage exercise to making a costs order. The first question is whether a paying party has acted unreasonably or has in some other way invoked the jurisdiction to make a costs order. The second question is whether the discretion should be exercised to make an order (Oni v Unison ICR D17).

38. Costs orders in the Employment Tribunal are the exception rather than the rule (Gee v Shell [2003] IRLR 82, Lodwick v Southwark [2004] ICR 844).

39. While the threshold tests for making a costs order are the same whether or not a party is represented, in the application of the tests it is appropriate to take account of whether a litigant is professionally represented or not. Litigants in person should not be judged by the standards of a professional representative (AQ Ltd v Holden [2012] IRLR 648).

40. While a precise causal link between unreasonable conduct and specific costs is not required, it is not the case that causation is irrelevant. In Yerrakalva v Barnley MBC [2012] ICR 420 Mummery LJ said:

“41. 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. The main thrust of the passages cited above from my judgment in McPherson's case was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the employment tribunal had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances”.

Conclusion on Respondent's application

41. I take account of the fact that the claimant is a litigant in person. I also taken account of the fact that he is profoundly deaf and the obvious difficulties that caused him in the conduct of the proceedings.

42. Turning to the second stage, is it reasonable to make an order?

Breakdown of the Respondent's costs

43. I have aggregated the costs in the period 31 October 2019 until the aborted hearing on 17 January 2020 as phase one. The question I need to consider is whether in bringing the claim, and then in its conduct, the Claimant had initiated and pursued a claim which had no reasonable prospect of success under Rule 76 (1) (b). I do not consider that the Claimant's conduct in this period was such that it falls within Rule 76 (1) (a) in that it was "vexatious, abusive, disruptive or otherwise unreasonable".

44. In considering this cost application it is not my role to determine the substantive claim. It is, however, relevant for me to consider the basis of the claim as pleaded and whether it presented a claim having any reasonable prospect of success. The Respondent's total claimant costs for phase one were £5,111.22.

45. I consider it appropriate to award part of the Respondent's costs in respect of phase one on the basis that it had no reasonable prospect of success under Rule 76 (1) (b). This is on the basis that the claimant has failed to provide any proper explanation as to his contention that there had been an unauthorised deduction from the wages to which he was contractually entitled as a result of his grading and as a result of an alleged failure by the respondent to properly pay him for his notice period as varied by the agreement and/or conduct of the parties. The claimant's failure to properly particularise and explain the basis of his claim was then compounded by his failure to properly engage with requests made by the Tribunal in letters dated 9 December 2019 and 27 February 2020 for him to properly particularise the basis for and amounts of his claim. I set out below the amount I consider appropriate once account is taken of the Claimant's ability to pay.

46. Phase two involves the Respondent's attendance at the aborted hearing on 17 January 2020. The sum of £596.84 is claimed. Given that the Claimant attended this hearing, and it was aborted as a result of the Tribunal failing to make arrangements for a sign language interpreter, I do not consider it would be appropriate to make any award for phase two.

47. What I describe as phase three is time incurred in the period between 18 February 2020 and the second aborted hearing on 25 February 2020. The Respondent claims £999.32 for this period. Given that the Claimant failed to attend the hearing scheduled for 25 February 2020, without any explanation until his email of 10 March 2020 which was not copied to the Respondent, and the Respondent incurred costs which could have been avoided had he had

done so, I consider it appropriate to award the Respondent costs (of the amount set out below) on the basis that the Claimant's conduct was otherwise unreasonable in the way the proceedings had been conducted in accordance Rule 76 (1) (a).

48. What I describe as phase four is time incurred in the period 27 February 2020 until 7 April 2020 which in effect involved the Respondent's application for costs. The total time incurred in what I describe as phase four was £1,785.36. Given that I have determined the application partly in the Respondent's favour I consider it appropriate that part of these costs (as set out below) are awarded to the Respondent.

The Claimant's means

49. In accordance with Rule 84 it is necessary for me to consider in deciding whether to make a costs order, and if so in what amount, the paying party's ability to pay. The Claimant says that he is not in receipt of any income. Given his disability, serious illness and the pandemic it is unlikely that he will find alternative employment in the foreseeable future. According to the Claimant his only sources of income are state benefits. The Claimant has failed to disclose any evidence as to his financial savings or assets despite being asked to do so.

50. Taking account of the circumstances set out above, and the limited evidence as to the Claimant's means, I have decided that it would be appropriate to award the following:

- a) Phase one the sum of £500;
- b) Phase two nothing;
- c) Phase three the Respondent's costs of a £593.40 in attending the aborted hearing schedule for 25 February; and
- d) Phase four £500.

51. In making this decision I have considered the overall conduct of the Claim and what I consider to be its misconceived premise. I have also considered the way the Claimant has conducted the proceedings. I do not consider that the Respondent's time or costs are unreasonable. I have considered the Claimant's ability to pay.

52. I have sought to determine my decision based on the extent to which particular elements of the Claimant's conduct were causative of the Respondent's costs. However, in a claim with different aspects to it such as this, this does not constitute a precise exercise.

53. The costs awarded are therefore £1,593.40.

Employment Judge Nicolle

Dated: 10 July 2020

Reasons sent to the parties on:

11/07/2020

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For the Tribunal Office