



EMPLOYMENT TRIBUNALS

Claimant:
Mr S Wedlock

v

Respondent:
LHR Airports Limited

Heard at: Reading

On: 26 June 2020
(in chambers)

Before: Employment Judge Hawksworth (sitting alone)

JUDGMENT ON COSTS

The respondent's application for an award of costs is refused.

REASONS

The claimant's claim and liability hearing

1. The claimant's complaints of breach of contract relating to non-payment of notice pay and bonus were decided by me at a hearing on 9 August 2019. The claimant's complaints were dismissed.
2. The claimant did not attend and was not represented at the hearing on 9 August 2019. He made an application at 17.16 on the evening before the hearing which was described as an application for recusal. I considered the application and decided that I should not recuse myself. The claimant referred to his ill-health in his application although he did not say that he was unfit to attend the hearing and did not include any medical evidence. I considered whether the hearing should be postponed for any of the reasons referred to in the claimant's recusal application, and decided that it should not.
3. The hearing proceeded and I heard evidence from the respondent's witnesses. I gave judgment dismissing the complaints. Written reasons were requested; reasons dated 23 August 2019 were sent to the parties on 13 September 2019.
4. The claimant made an application for reconsideration of the judgment. This was refused because it was made more than 14 days after the decision was sent to the parties and the claimant gave no explanation for the delay.

The respondent's application for costs

5. On 11 October 2019 the respondent's solicitors made a written application for costs against the claimant. The respondent relies on rule 76(1)(a) of the Employment Tribunal Rules 2013; it says that the claimant should be ordered to pay costs because he acted unreasonably in the way in which he conducted proceedings.
6. The conduct of the claimant relied on by the respondent as unreasonable is:
 - 6.1. In his claim form issued on 15 March 2017, the claimant raised complaints which were unclear; he described his complaints as "wrongful dismissal or breach of contract" and said that he was seeking compensation for notice pay, unpaid salary, pay in lieu of holiday and bonus. He made reference to his dismissal being unfair and requested compensation for injury to feelings.
 - 6.2. There were three preliminary hearings. At the respondent's request, a hearing on 22 August 2017 was converted to a public preliminary hearing to clarify the claimant's claims and to consider an application made by the respondent to strike out the claimant's claim. The claimant did not attend this hearing.
 - 6.3. The second preliminary hearing took place on 11 December 2017. An application for postponement by the claimant was rejected by the tribunal. At this preliminary hearing the claimant's complaints of unfair dismissal and for holiday and arrears of pay claim were struck out.
 - 6.4. In March 2018 the claimant made an application to amend his claim to include discrimination claims. This was dealt with at a third preliminary hearing on 8 November 2018 which the claimant attended. The claimant's application to amend was refused.
 - 6.5. In November 2018 the respondent sent the claimant a letter which was "without prejudice save as to costs". This asked the claimant to consider his position and withdraw his claim, and said that if he did not do so the respondent would make an application to the tribunal for an order that the claimant pay all, or a significant contribution to the costs the respondent incurred in defending the proceedings from 6 December 2018.
 - 6.6. The claimant has written to the respondent's legal representatives and the Tribunal in June 2019, August 2019 and in November 2019 accusing the respondent and their representatives of GDPR breaches, discrimination, professional negligence and a failure to properly comply with disclosure, all of which are strongly denied by the respondent and their representative.
7. The respondent relies on a schedule of costs which show that the respondent's solicitors fees from 6 December 2018 were £15,448.71 plus

VAT and counsel's fees for the hearing on 9 August 2019 were £2,000 plus VAT.

The claimant's response

8. The tribunal sent the respondent's application to the claimant on 24 November 2019 and invited the claimant to give reasons why the application should not be granted.
9. The tribunal also asked the parties to give their view on whether the application should be decided with or without a hearing. The respondent replied on 9 December 2019 giving its view that the application should be decided without a hearing.
10. On 9 December 2019 the claimant sent objections to the respondent's application for costs. He did not make any comment on whether the application should be decided with or without a hearing. I decided that it would be proportionate and in line with the overriding objective to decide the application without a hearing. Both parties had sent written submissions. An additional hearing would add to the expenses of both parties.
11. In his objections to the respondent's application, the claimant said that the costs order should not be granted and:
 - 11.1. That he is a litigant in person;
 - 11.2. That he reserves the right to appeal against the decision of 9 August 2019 and that he does not expect any form of discrimination or professional negligence while pursuing and exercising his access to justice and rights to a fair hearing through the courts;
 - 11.3. That he has been severely affected psychologically (disabled) by the decision to continue with the hearing on 9 August 2019, the judgment and the refusal of his request for reconsideration;
 - 11.4. He would like to exercise his right to access justice without being subjected to judicial conflict of interest or lack of impartiality;
 - 11.5. That the tribunal or members of the judiciary are aware of his severe mental health condition due to his unfair dismissal and he does not expect any form of negligence that will further aggravate severe mental illness and injury to his feelings.
12. The claimant asked the tribunal to consider his objections in the interest of justice and under the principles of natural justice.
13. On 2 February 2020 a hearing in chambers was listed on 26 June 2020 for me to consider the respondent's costs application; the parties were informed that they did not need to attend.

The Law

14. The power to award costs is set out in the Employment Tribunal Rules 2013. Under rule 76(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 (or part) have been conducted.”

15. Rules 74 to 78 provide for a two-stage test to be applied by tribunals in considering costs applications under Rule 76. The first stage is for the tribunal to consider whether the ground or grounds for costs put forward by the party making the application are made out. If they are, the second stage is for the tribunal to consider whether to exercise its discretion to make an award of costs, and if so, for how much.

16. In this case the respondent relies on unreasonable conduct as the grounds for the costs application. In determining whether to make an order on the basis of unreasonable conduct, a tribunal should take into account the ‘nature, gravity and effect’ of a party’s unreasonable conduct (*McPherson v BNP Paribas (London Branch)* 2004 ICR 1398, CA). However, it is not necessary to analyse each of these aspects separately, and the tribunal should not lose sight of the totality of the circumstances (*Yerrakalva v Barnsley Metropolitan Borough Council* 2012 ICR 420, CA). At paragraph 41 of *Yerrakalva*, Mummery LJ emphasised that:

“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 has.”

17. When considering whether the rejection of an offer of settlement amounts to unreasonable conduct, the tribunal should consider the position of the party whose conduct is said to be unreasonable, and then apply the ‘range of reasonable responses’ test, since there may be more than one reasonable course to take (*Solomon v University of Hertfordshire and anor* EAT 0258/18) EAT).
18. In costs applications, litigants in person may be judged less harshly than those who are professionally represented (*AQ Lted v Holden* 2012 IRLR 648 EAT).

Conclusions

19. I first need to consider whether there are grounds for an award of costs under rule 76(1). The respondent has applied for costs under rule 76(1)(a) on the basis that the claimant acted unreasonably in the way in which he conducted the proceedings.

20. I do not consider that the lack of clarity in the claimant's claim form and the allegations made in correspondence sent to the respondent's representative and the tribunal amount to unreasonable conduct. In reaching this conclusion I take into account in particular the fact that the claimant was a litigant in person and that he had difficulty in conveying the legal basis of his claims.
21. For the same reason, I do not consider that the claimant's failure to accept the respondent's without prejudice offer (to withdraw the claim or face a costs application) was unreasonable conduct. His decision as a litigant in person to continue with his claim to obtain a tribunal judgment was within the parameters of reasonableness.
22. However, I have concluded that two aspects of the claimant's conduct were unreasonable such that grounds for costs under rule 76(1)(a) are made out. These are:
 - 22.1. The claimant failed to attend the preliminary hearing on 11 December 2017 or to explain why he did not attend. I recorded in the judgment on liability that it had been explained to the claimant on 8 December 2017 that he had to provide a medical statement if he wanted to apply for a postponement on grounds of ill health, but he did not do so. The consequence of the claimant's failure to attend the preliminary hearing on 11 December 2017 was that the hearing was less effective. One of the matters to be dealt with at the preliminary hearing was the identification and clarification of the complaints being made; it was more difficult to do this without the claimant being present. The claimant's absence also meant that a further preliminary hearing was necessary, to consider an amendment application which it might have been possible to consider at the hearing on 11 December 2017 if the claimant had attended. As a consequence, additional costs were incurred by the respondent, and the proceedings as a whole took longer.
 - 22.2. The claimant also failed to attend the hearing on 9 August 2019. He made an application that the hearing should not go ahead, but this was made very late, at 17.16 the evening before the hearing, apparently prompted by the call from the tribunal administration to check his attendance. It was unreasonable to make the application so late. The claimant's application was long and it was unclear what he was asking the tribunal to do. The claimant referred to his ill-health in his application but he did not say that he was not fit to attend the hearing or include any medical evidence (as he had been told in December 2017 would be necessary). The effect of the claimant's conduct was that a significant part of the hearing was spent by the tribunal considering the application, hearing submissions from the respondent and deciding how to proceed. Further documents arrived mid-way through the hearing, and this necessitated reconsideration of the decision. As a consequence, the hearing was prolonged. Two of the respondent's managers had

attended the hearing to give evidence and had to spend longer at the tribunal while the application was considered.

23. For these reasons, I have concluded at the first stage that the grounds for costs to be awarded against the claimant are made out. I need to consider the second stage, that is whether I should exercise my discretion to award costs and if so what award I should make.
24. In considering whether I should award costs, I have taken into account the costs warning that the claimant was given by the respondent. However, the following factors suggest that I should not exercise my discretion to make an award of costs:
 - 24.1. orders for costs in the employment tribunal remain the exception rather than the rule;
 - 24.2. the claimant is a litigant in person;
 - 24.3. the claimant has referred to his severe mental health condition in his correspondence and, although he has not provided any medical evidence, this seems to me to be an important factor to take into account in the context of a costs application based on unreasonable conduct.
25. I did not take into account the claimant's ability to pay, as he did not provide any information about this.
26. After weighing up these factors, I have decided not to exercise my discretion to make a costs award. The respondent's application is refused.

Employment Judge Hawksworth

Date:29 June 2020.....

Judgment and Reasons

Sent to the parties on:19/8/20....

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For the Tribunal Office

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