EMPLOYMENT TRIBUNALS

Claimant: Miss K Watson

Respondent: Mr A Bladen (R1)
Peninsular Business Services Ltd (R2)

Heard at: Liverpool **On:** 28 September 2020

Before: Employment Judge T Vincent Ryan

REPRESENTATION:

Claimant: Written submissions
Respondent: Written submissions

JUDGMENT ON COSTS APPLICATION

The judgment and Order of the Tribunal is:

1. R1 has acted unreasonably in the way that the proceedings (or part) have been conducted;

2. R1 shall pay a contribution of £1,200 to the claimant's costs.

3. The respondent's representative is added as second respondent but only in respect of the claimant's wasted costs applications.

4. The claimant's application for a wasted costs order against R2 is dismissed.

REASONS

1. The claimant's costs application and application for a wasted costs order follow a preliminary hearing on 22 October 2019 in respect of which full written reasons have now been provided and upon which I relied in considering the background to the applications and the respondents' resistance to it.

2. The claimant makes an application for costs in the sum of £4,625, being an application for costs against R1 and/or a wasted costs order against R2.

3. In the absence of any timely Response to her claim, the claimant obtained a Rule 21 Judgment on liability; prior to the proposed remedy hearing, R1 made an application for an extension of time and acceptance of a late ET3 response which was refused; R1 made applications for postponements which were refused; I dealt with remedy and made an award to the claimant of £18,652.39 in a Judgment dated 23 October 2019 that was sent to the parties on 7 November 2019.

4. Mr Jones, counsel for the claimant, indicated at the 22 October hearing that there would be a costs/wasted costs application subject to further instructions, and in those circumstances the application was not dealt with on that occasion. The written application was made on 5 December 2019 and has been opposed in writing by the respondents.

5. I have refreshed my memory of the Judgment and the circumstances giving rise to it, including all the background events. I have considered the written submissions of both parties. Both parties make appropriate reference to relevant case law and statutory authority. I reminded myself of the costs provisions in the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 as recited respectively by the representatives, and quoted in their written submissions.

6. R1's handling of this claim has been poor to say the least. In each of the applications that I have already considered, up to and including this costs application, R1 and R2 have made numerous admissions of errors, mistakes and delays. There has been an apparent failure to engage appropriately in the litigation procedure, and this has caused some delay, albeit not a considerable delay between the first planned remedy hearing and the date upon which the Remedy Judgment was made. R2 relies on missing post, misunderstandings of instructions, inability to obtain instructions, inaccurate instructions, and there was apparent confusion.

7. That said, the claimant was entitled to take advice and to formulate a claim which reasonably involved a personal attendance upon her by her legal adviser. There would necessarily have been phone calls between the claimant and her legal adviser, who would then have reviewed documents, compiled a bundle and witness statement and a Schedule of Loss. A considerable amount of that work was almost inevitable. I note that, un-controversially, a rule 21 Liability Judgment was issued and the matter was listed for a remedy hearing which did not involve any additional work for the claimant. It was intended that the claimant would attend the remedy hearing in person and deal with it without advocacy. That hearing was aborted because the respondent was not in a position to proceed; there was a clear conflict between the instructions given and confirmed in the ET3 response and the documentary evidence that was available. There was therefore a further hearing which then had a number of applications to consider, being repeated applications by the respondent to postpone, subject to which an application for extension of time and postponement of any remedy consideration. Not surprisingly in the circumstances then pertaining, counsel was instructed to attend on behalf of the claimant and an advocate was deemed to be required to contest each of the applications made by the respondent, and to proceed to a remedy hearing; it had been believed that an award would have been made at the earlier hearing on 10 September 2019.

8. R1 was professionally represented throughout.

9. I take it from the various submissions made at each stage of these proceedings that R2 has given advice to R1 and there is repeated reference to efforts on the part of R2 to obtain instructions, often with little tangible effect. R2 has acted upon such instructions as it obtained, and in respect of the defence of the claims those instructions became more nuanced from an outright statement that the claimant was absent without leave and never suspended, which meant that she had fabricated documentation, to one where R1 had to accept the possibility that correspondence had been sent to the claimant suspending her; then the excuse was that the line manager had forgotten sending the letter out. During the hearing of 22 October repeated efforts were made by Ms Elmerhebi of R2 to obtain instructions. It was evident that little was coming back by way of instructions, but they were appropriately sought.

10. The second preliminary hearing, being the one on 22 October 2019, lasted from 10.00am to 12.10pm. From 10.10am to 11.35am the Tribunal was engaged on the respondent's applications, and only at 11.35am did it move on to consider the claimant's remedy. That breaks down to 1 hour 25 minutes spent on R1's applications and 35 minutes spent on remedy.

11. I consider that the conduct of the respondents contained, mentioned or referred to in my Reasons, and more or less confirmed in the R1's own submissions, amounts to unreasonable conduct of this litigation. R1 put forward an abusive defence in arguing that the claimant was absent without leave but never suspended and then in the face of clear evidence to the contrary arguing that the letter was fabricated and then ultimately that there was no recollection of it being sent. R1 has serially failed to provide full and adequate instructions to Peninsula (R2), and I accept the protestations of Ms Elmerhebi and set out in the written submissions for today's costs hearing to that effect. I am concerned at Peninsula's delay in making an application for postponement of 22 October until the day before that hearing when it clearly knew for some time of the respondent's hospitalisation, and I am critical of that delay, but the application was not granted in any event.

12. I note for the first time that, contrary to my understanding that Ms Walker had made arrangements for her birthday celebrations that she could not get out of, that the costs submissions made by the respondent refer (in paragraph 21) to Ms Walker's birthday in these terms: "So she probably would not want to attend either". Ms Walker, we are told, has power of attorney for R1. One or other of them was obliged to give instructions if they were to conduct this litigation properly. Those instructions would probably have meant also giving accurate witness statements but they appear not to have done so.

13. Taking all the above into account, in a situation where I must look at the whole context and the nature, gravity and effects of any conduct, I consider that fault lies most heavily with R1. It was R1's conduct that necessitated a second hearing, the bulk of which was taken up with its applications. It was R1's conduct that necessitated, in the eyes of the claimant, professional advocacy. The remedy part of the hearing on 22 October 2019 was relatively short, as it probably would have been on 10 September 2019 if R1 had acted properly, and it probably would not have required advocacy in the light of the claimant's written work.

14. Taking into account the work that was reasonably necessary in any event, the failure of R1's various applications and also the need for a second hearing, I consider that it would be appropriate for R1 to bear the claimant's costs of advocacy on 22 October 2019. This is on the basis of R1's unreasonable conduct of litigation. I do not consider it would be appropriate to make any further costs order nor a wasted costs order against R2.

15. R2 has asked me to take into account R1's means and ability to pay any award. In doing so it does not give me any details of R1's means but makes vague comments about R1 not being a business, receiving assistance from the Local Authority to pay for carers, and that he "does not rely on any fortune of his own". It is said that R1 has no future earning potential. R1 has not provided me with any details of his income, be it earned or investment income or from any other source. R1 has not given me any details of any benefits received. Peninsula has not provided me with any details of R1's capital or savings, liabilities or other financial commitments. I have taken into account the information such as it is with regard to R1's means to pay.

Employment Judge T Vincent Ryan

Date: 05.10.20

JUDGMENT AND REASONS SENT TO THE PARTIES ON

5 November 2020

FOR THE TRIBUNAL OFFICE