Case number: 2405222/2019
By CVP

EMPLOYMENT TRIBUNALS

Claimant: Mr C Barton

Respondents 1. AM2PM Recruitment Solutions (Birmingham) Limited
2. GEFCO UK Limited

Heard at: Liverpool **On:** 6 November 2020

Before: Employment Judge Aspinall

REPRESENTATION:

Claimant: Mr Halson of Mark Reynolds Solicitors

1st Respondent: No appearance

2nd Respondent: Mr Jones, Counsel

JUDGMENT AND REASONS ON COSTS

The judgment of the Tribunal is that:

1. The second respondent's application for a costs order against the claimant succeeds. The claimant is ordered to pay £300.05 being the unnecessary costs incurred by the second respondent from 11 March 2020 until the claimant withdrew his claims on 26 October 2020.

2. The second respondent's application for a wasted costs order against Mark Reynolds Solicitors Limited succeeds.

3. Mark Reynolds Solicitors Limited SRA number 565106 whose registered office is at 75 Walton Vale Liverpool, L9 4RQ is ORDERED to pay the unnecessary costs incurred by the second respondent in the sum of £5262.00 being £1687 plus £1198 unnecessary costs, £1500.00

disbursements incurred for Counsel's fees plus vat of £877.00. The Tribunal gave judgment in principle and the parties agreed the amounts to be paid.

REASONS

Background

1. By a claim form dated 7 June 2019 the claimant brought claims for disability discrimination. He worked through the first respondent employment agency at the second respondent's site. He suffered from cardiomyopathy which made him unable to do manual work or heavy lifting. He was employed to work in a warehouse that required him to lift heavy boxes. He says he was told by the second respondent, when he said he couldn't lift, that he must leave the work site and that subsequently the first respondent failed to provide him with any other assignments.

2. The respondents filed their response forms and the case came to a case management hearing before Employment Judge Buzzard on 24 September 2019. Following discussion the case was listed for final hearing for three days before an Employment Judge and non-legal Tribunal members for three days beginning on 11 March 2020. The parties had agreed a short window of six months in which to get this case ready for final hearing. Case management orders were made by consent. The first date for compliance was 25 October 2019.

3. Mr Halson concedes that throughout the litigation Mark Reynolds Solicitors (MRS) communicated with the second respondent on only 4 occasions; 1) by a letter 27 December 2019 conveying apologies for failure to comply with case management orders 2) by a letter on 26 February 2020 opposing the second respondent's application to strike out the claim 3) by a letter sent the day before what was to have been the final hearing enclosing medical records and disability impact statement and 4) by the letter sent on 26 October 2020 withdrawing the claims. He accepts that otherwise there was a failure to comply with case management orders such that the final hearing could not proceed.

4. The final hearing on 11 March was converted to an open preliminary hearing to hear the second respondent's strike out application and to seek their costs. The claimant did not attend. Mr Halson represented the claimant. The claims were not struck. It could not be said that they had no reasonable prospect of success; there was a factual dispute and oral evidence was needed. Taken at their highest the claimant's claims had little reasonable prospect of success. A decision was made in principle to make deposit orders and to hear the costs application. A hearing was listed for April 2020 to take evidence on ability to pay from the claimant so that the deposit orders could be made and to hear the costs application. The case would then be relisted for final hearing and case management orders made.

5. MRS was on notice that it had a reasonable opportunity to make written representations or send a director of the firm, or equity partner, to make representations in response to the wasted costs application and on ability to pay.

6. The April hearing could not proceed because of the coronavirus pandemic and was postponed to be heard today.

7. On 26 October 2020, the claimant withdrew his claims.

Today's hearing

8. The claimant did not attend today. Mr Halson confirmed that the claimant is aware of the costs application against him and has chosen not to attend. Mr Halson represents the claimant in that application and represents MRS in defending the wasted costs application.

9. There is nothing before me to suggest that the claimant has waived his legal professional privilege. Mr Halson, is therefore in some difficulty in responding to the costs application made against his client, and the wasted costs application made against his firm.

10. Mr Jones had prepared a Schedule of Costs. Mr Halson responded to that schedule. I heard Submissions from both parties on the costs and wasted costs applications. Mr Halson, although entitled to under rule 84, and invited to make any final comment made no submission on behalf of his firm or the claimant on ability to pay.

Costs Application – Legal Framework

11. 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. Rule 74(2) makes it clear that legal representation in this context can include the assistance of a person who is employed by the party, such as an in-house lawyer.

12. 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".

13. The circumstances in which a Costs Order may be made are set out in rule 76, and 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."**

14. 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.

15. 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."**

16. It is also relevant in this context to refer to rule 39 which concerns Deposit Orders which are appropriate where a claim or response has little reasonable prospect of success. The relevant provision for these purposes is rule 39(5) which provides as follows:

> **"If the Tribunal at any stage following the making of a Deposit Order decides the specific allegation or argument against the paying party for substantially the reasons given in the Deposit Order**
>
> **(a) The paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76 unless the contrary is shown; and**
>
> **(b) The deposit shall be paid to the other party…otherwise the deposit shall be refunded."**

17. It follows from these rules as to costs that the Tribunal must go through a two stage procedure. 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; and secondly if so, to decide whether to make an award and of what sum.

18. 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**.

19. 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."**

20. As to the question of means or ability to pay, in **Arrowsmith v Nottingham Trent University [2012] ICR 159** the Court of Appeal commented in paragraph 37 that it was not inappropriate for a Tribunal to make an award which was more than the paying party appeared able to pay as long as it had had regard to that party's ability to pay in deciding what level of order to make. The Court commented in that case of the paying party that:

> **"Her circumstances may well improve and no doubt she hopes that they will."**

21. Also relevant is the decision in **Vaughan v London Borough of Lewisham & Others (No. 2) [2013] IRLR 713**. The EAT said

> **"The starting point is that even though the Tribunal thought it right to 'have regard to' the appellant's means, that did not require it to make a firm finding as to the maximum that it believed she could pay, either forthwith or within some specified timescale, and to limit the award to that amount. That is not what the rule says (and it would be particularly surprising if it were the case, given that there is no absolute obligation to have regard to means at all). If there was a realistic prospect that the appellant might at some point in the future be able to afford to pay a substantial amount it was legitimate to make a costs order in that amount so that the respondents would be able to make some recovery when and if that occurred. That seems to us right in principle: there is no reason why the question of affordability has to be decided once and for all by reference to the party's means as at the moment the order falls to be made, and it is in any event the basis on which the Court of Appeal proceeded in Arrowsmith, albeit that the relevant reasoning is extremely shortly expressed. It is necessary to remember that whatever order was made would have to be enforced through the County Court, which would itself take into account the appellant's means from time to time in deciding whether to require payment by instalments, and if so in what amount".**

22. Rule 80 provides for when a wasted costs order may be made:

> **80. (1) A tribunal may make a wasted costs order against a representative in favour of any party where that party has incurred costs:**
>
> **(a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative or**
>
> **(b) which in the light of any such act or omission occurring after they were incurred, the tribunal considers it unreasonable to expect the receiving party to pay**
>
> **costs so incurred are described as wasted costs.**
>
> **81. A wasted costs order may order the representative to pay the whole or part of any wasted costs of the receiving party. The amount to be paid must in each case be specified in the order.**

Submissions

23. Mr Jones submitted that the claimant has proceeded unreasonably throughout these proceedings, in the alternative the claimant proceeded unreasonably beyond the date of the response form. The respondent has been put to cost and Mr Jones said that the respondent was entitled to its full legal costs from commencement of proceedings to conclusion of today's proceedings.

24. Mr Halson submitted that MRS accept that unnecessary cost has been incurred by the second respondent but that not all of the costs incurred were wasted costs and that the claimant did not proceed unreasonably throughout. MRS accepted that it had been slow to bring about the withdrawal of the claim.

Applying the law

The costs application against the claimant

25. The power to make an award arises from the unreasonable conduct of both the claimant and his representative in not addressing the merits issues fully in March 2020. It was unreasonable of MRS not to have brought about an informed decision on withdrawal sooner. It was unreasonable of the claimant not to have prompted a full discussion and withdrawn promptly thereafter in March 2020. The delay in withdrawal from March 2020 to October 2020 was unreasonable and put the second respondent to cost.

26. I reject Mr Jones' submission that the claimant was unreasonable throughout the proceedings and his alternate submission that the claimant was unreasonable to proceed beyond the Response Form. There is a public interest in parties being able to bring their claims, even claims that may not later succeed and this was not a case where, at Response Form stage, it could be said that the claim had no reasonable prospect of success. The claimant was entitled to proceed with his claims.

27. The power to make an award arises from the unreasonable conduct. It is appropriate to make an award because that conduct put the second respondent to cost. There does not need to be a strict causal link between the unreasonable conduct of the claimant and his representative under rule 76 and the costs incurred. There is however the need for some causation. If the claimant had withdrawn in March 2020 the second respondent would not have been put to the costs incurred between March 2020 and 26 October 2020 in continuing to pursue deposit orders. I awarded £300.05 being the second respondent's costs claimed on the schedule. Following discussion the parties agreed that the work undertaken had been unnecessary and had been incurred as a result of the claimant's delay and had been incurred reasonably and at an appropriate rate.

The wasted costs application against MRS

28. Turning now to the wasted costs application. I reject for the purposes of Rule 80, the submission that the claimant's claim was a hopeless case. The

case was not fundamentally flawed from the outset. There was a factual dispute that meant on the merits it was not struck out in March 2020 and that, taken at its highest, the claims could have continued to final hearing. Both the claimant and MRS proceeded reasonably up to the point of the first non compliance with case management orders (CMO's) in late October / early November 2019. I cannot specify the exact date that non compliance first occurred as I understand that the date of 25 October 2019 was extended by the Employment Tribunal following a flood, possibly for 14 days but I did not see that extention order on the file. The parties were able to agree the amount of wasted costs so that my not being able to specify the exact date of first non compliance was not an issue.

29. MRS has been negligent in failing to comply with CMO's of EJ Buzzard from 25 October 2019 or shortly thereafter, in failing to flag that the case would not be ready for hearing by late December 2020 and in failing to seek to agree a postponement and variation of CMO's by early January 2020. It was unreasonable of MRS not to have kept the second respondent informed of their progress or lack of progress in the case and not to have worked cooperatively within the overriding objective in preparing the case for final hearing.

30. The negligent and unreasonable conduct of the litigation caused unnecessary cost to the second respondent. That cost included having to chase MRS for non compliance and having to correspond with the Tribunal in pursuing a strike out application and costs. The second respondent had to continue to prepare for final hearing and whilst that later proved to be unnecessary, at the time it was necessary in order to comply with the case management orders. There would have been residual value in the work that was done, if, for example, the case had gone off in March but been case managed to a final hearing later in 2020 then some of the work on documents and witness statements would have remained viable. Not all of the cost of the work done between non compliance and March 2020 was unnecessary work and so not all of that cost was wasted cost.

31. Finally, I must consider is it just to order part of the costs to be paid. This is a regrettable case in that it comes about because MRS did not manage the volume of its case load. Orders of the Tribunal were not complied with. The second respondents were put to cost in pursuing compliance with those orders and proper conduct of the litigation. Having regard to the overriding objective it is fair and just that MRS should meet the unnecessary cost to which its negligent and unreasonable conduct put the second respondent.

32. Having given that guidance in principle the parties were then able to agree the amount so that, following a short adjournment and a pragmatic approach taken by the representatives, the figure awarded for wasted costs of £5262 inclusive of vat is an agreed figure ordered to be paid by consent.

33. The claimant withdrew his claims on 26 October 2020. A separate dismissal judgment is issued with this Judgment and Reasons.

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By CVP

Employment Judge Aspinall

6 November 2020

REASONS SENT TO THE PARTIES ON
20 November 2020

FOR THE TRIBUNAL OFFICE

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