



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr B Akyuz

AND

Kahya Opco Limited

HELD AT: London Central On: 23 January 2021

BEFORE: Employment Judge Nicolle in Chambers

JUDGMENT

1. The Respondent's application for costs succeeds in part. The Claimant is ordered to pay the Respondent £1,812.

REASONS

1. By a letter dated 24 December 2020 the Respondent applied for a costs order pursuant to Rule 76 (1) (a) Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 (the Rules) in the total sum of £7,310 plus VAT.

Background and Chronology of relevant events

2. By a claim form presented on the 9 February 2020, the Claimant, who was a manager of the Respondent's restaurant, brought complaints of unfair dismissal, a redundancy payment (subsequently withdrawn), notice pay, holiday pay, arrears of pay and other payments.

3. The Respondent says that the Claimant was only employed between 1 April 2019 and 30 September 2019 and did not therefore have the required two years' service to bring an unfair dismissal claim. In its Grounds of Resistance, the Respondent contended that the Claimant had insufficient service to bring a claim for unfair dismissal.

4. In an email of 31 August 2020, the Respondent complained that the Claimant had not complied with the Orders in the Case Management Order of Employment Judge Norris dated 15 June 2020 and specifically had not provided a revised schedule of loss before 28 August 2020 and had not complied with the requirement to complete mutual disclosure by 17 August 2020.

5. The Claimant explained his failure to communicate because of an issue with his computer and/or email address.

6. In an email of 11 September 2020, the Claimant said he was in the process of responding to the Respondent's request for an updated schedule of loss and the completion of his disclosure and he wanted more time to seek legal help. He repeated this on 22 September 2020.

Open Preliminary Hearing

7. An Open Preliminary Hearing (OPH) to consider the Respondent's application to strike out the claim under Rule 37 (1) (c) or (1) (d) had originally been listed for 19 November 2020 but because of a postponement application by the Respondent was relisted for 8 December 2020.

8. The parties were notified of the postponement of the hearing scheduled for 19 November 2020 and its relisting for 8 December 2020 in a letter sent by email at 15:43 on 18 November 2020. The email address used for the Claimant was a.brhn@protonmail.com but could not be delivered because of the recipient's mailbox being full. This email address represented the most recent one used by the Claimant in his communications with the Tribunal.

9. As the Employment Judge allocated to the hearing scheduled for 8 December 2020, I contacted the parties directly by email on 7 December 2020 to confirm their participation and to ascertain if there was an agreed bundle of documents. I initially used the Claimant's email address above but with the same response. A member of the Tribunal's administrative staff provided me with two alternative email addresses for the Claimant of burhanakyuz@hotmail.co.uk and b.kyz@hotmail.com and I re-sent the email to these addresses without a bounce back.

10. As a result of the Claimant's failure to respond, or join the CVP hearing, I phoned him on the number he had given on his Claim Form (07883086527), but the number rang without being answered before cutting off without providing the facility to leave a voicemail.

11. I therefore considered the Tribunal, and I had, used all reasonable endeavours to notify the Claimant of the hearing with a view to facilitating his participation.

12. I considered that the most appropriate course was to make an Unless Order providing for certain steps to be taken by the Claimant by no later than 4 PM on 22 December 2020 failing which the entirety of his claim would be struck out.

13. I reached this decision considering that the Claimant is a litigant in person, that the striking out of a claim is a draconian remedy and on the basis that there would be little real prejudice to the Respondent by adopting this

option given that if the Claimant did not comply with the terms of the Unless Order the outcome would be the same.

Unless Order

14. The Unless Order required the Claimant to take the following steps by 4 PM on 22 December 2020 failing which his claim may be struck out under Rule 37 (1) (c):

- a) provide an explanation as to why he did not participate in that day's hearing;
- b) confirm why he had not actively participated in the proceedings since the Case Management Order of Employment Judge Norris dated 15 June 2020;
- c) provide an updated schedule of loss containing a breakdown of all sums claimed together with details of mitigation, to include all earnings or benefits received subsequent to the termination of his employment by the Respondent;
- d) make disclosure of all documents he intends to rely on in the proceedings, to include those relating to a remedy and mitigation, or confirmation that there are no such documents in his possession which are relevant to his claim; and
- e) to provide confirmation of his current functioning email address and phone number.

15. At the OPH counsel for the Respondent gave notice that it intended to apply for a costs order by reason of the Claimant's none-compliance/non-prosecution of his claim to that date in the sum of £6,510.

16. The terms of the Unless Order, circumstances of the Case Management Hearing and attempts to contact the Claimant and the Respondent's costs application and amount claimed were recorded in my Case Management Order dated 8 December 2020 and therefore the Claimant would have been aware of the Respondent's position but has made no subsequent communication regarding the matters clearly set out.

Subsequent knowledge

17. At 1130 on 8 December 2020, approximately one hour after the CVP hearing had concluded, I was advised by the Tribunal administrative staff that the Claimant was physically in attendance at the Tribunal. It was too late to reconvene the hearing, but the Claimant was nevertheless asked to explain

why he attended in person when the Tribunal's letter dated 18 November 2020 provided for a hearing via video.

Failure to comply with the Unless Order

18. The Claimant did not comply with the terms of the above Unless Order. The Respondent sent an email on 23 December 2020 requesting that the Claimant's claims be struck out under Rule 37.

19. The Tribunal sent an email to the Claimant on 5 January 2021 requiring him to comply with the terms of the Unless Order by no later than 4 PM on 12 January 2021 otherwise his claims would be struck out. Given the apparent difficulties experienced by the Claimant with his email addresses I also asked the Tribunal administrative staff to send the Claimant the email together with the Respondent's email of 23 December 2020 by post.

20. I confirmed with the Tribunal's administrative staff that the Claimant had not responded, and I therefore considered it appropriate that all his claims are struck out under Rule 37 (1) (c) for non-compliance with an Order of the Tribunal and (d) in that it has not been actively pursued.

21. The Claimant failed to make representations in writing why this should not be done or to request a hearing.

22. In the email from the Tribunal to the Claimant's on 5 January 2021 he was also invited to comment on the Respondent's cost application and provide evidence as to his means, savings and assets by 4 PM on 12 January 2021. He failed to do so.

The Law

23. 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.

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

25. 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).

26. 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).

27. 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).

28. 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

29. I take account of the fact that the Claimant is a litigant in person.

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

Breakdown of the Respondent's costs

31. I have aggregated the costs in the period 7 July 2020 until the postponed OPH on 18 November 2020 as phase one. These costs total £4,290 plus VAT. The question I need to consider is whether in the conduct of the claim in this period the Claimant had acted, abusively, disruptively or otherwise unreasonably under Rule 76 (1) (a). The Respondent's application is limited to Rule 76 (1) (a) and not Rule 76 (1) (b) and I therefore do not need to consider whether the claim had no reasonable prospect of success. Given that the Claimant was a litigant in person I do not find that his conduct in this period was such that it falls within Rule 76 (1) (a) in that it was "vexatious, abusive, disruptive or otherwise unreasonable". Whilst the claim, at least in part, may arguably have been misconceived and the Claimant's conduct and prosecution of his claim tardy and his apparent difficulties with his computer and/or email addresses perplexing I do not consider that during this period the high threshold for an award of costs was met.

32. Phase two involves the period from 30 November 2020 until the submission of the Respondent's application for costs on 23 December 2020. Total costs claimed in this period are £3,020 plus VAT.

33. I consider it appropriate to make an award of costs to the Respondent of 50% of the time incurred during phase 2 which gives a VAT inclusive figure of £1,812. I have reached this decision and decided on this amount for the following reasons:

- a) given the Claimant's previous conduct the Respondent was entitled to apply for a strike out;
- b) the Tribunal gave clear notice to the Claimant that the OPH on 8 December 2020 would be conducted by CVP but notwithstanding such notice the Claimant attended the Tribunal in person and did not respond to a telephone message to him during the hearing; and
- c) the Claimant failed to respond to matters set out in the Case Management Order dated 8 December 2020 or the Tribunal's email dated 5 January 2021 (also sent by hard copy in the mail) inviting him to comment on why his claim should not be struck out and to the Respondent's costs application and provide evidence as to his means.

34. In deciding that a figure of 50% of the Respondent's claimed costs in phase 2 would be appropriate I have adopted a balancing exercise between the Claimant as a litigant in person and his repeated failure to comply with basic orders from the Tribunal and follow clear instructions regarding the conduct of his claim. I nevertheless give the Claimant some credit that he did physically attend the Tribunal's offices on 8 December 2020 and take this into account in only awarding 50% of the costs claimed by the Respondent in respect of phase 2.

The Claimant's means

35. 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. However, as stated above despite being invited to do so the Claimant failed to provide any evidence as to his means, savings, assets and outgoings.

Conclusion

36. I do not consider that the Respondent's time or costs are unreasonable. I have considered the Claimant's ability to pay.

37. I have sought to determine my decision based on the extent to which 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.

38. The costs awarded are therefore £1,812.

Employment Judge Nicolle

Dated: **23 January 2021**

Reasons sent to the parties on:

29/01/21.

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For the Tribunal Office