Case No: 2415444/2020
Hearing Code V

EMPLOYMENT TRIBUNALS

Claimant: **Mr Simon Ditchfield**

Respondent: **Kenton Black North Ltd**

Heard at: Liverpool **On:** 15 March 2021

Before: Employment Judge Ord

Representation

Claimant: In person

Respondent: Mr A Khan (Solicitor)

RESERVED COSTS JUDGMENT

The respondent's application for a costs order is granted in full and the claimant is ordered to pay the respondent the sum of £10,285.90.

REASONS

The application and issues

1. Upon the claimant withdrawing his claim on the day of the final hearing on 9 February 2021, the respondent applied for a costs order under rules 75 and 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the Regulations) on the ground that the claimant acted vexatiously or otherwise unreasonably in the way that he has conducted proceedings.

2. The issues for the tribunal are:

    1) Whether either ground is established;
    2) If so, whether in the tribunal's discretion it ought to make a costs order; and
    3) If so, in what amount.

Evidence

3. The tribunal had before it a 115 paged costs bundle and a 3 paged supplementary costs bundle both submitted by the respondent, a list of legal authorities from the respondent, and a written submission from the respondent. I took evidence on oath from the claimant and Mr Bower (Managing Director of the Kenton Black group) and heard oral submissions from both the respondent and the claimant.

Facts

4. At the final hearing on 9 February 2021, which was held remotely by CVP, the claimant failed to attend. The tribunal clerk sent him an e-mail at 10.15 with the CVP link, requesting him to connect to the CVP room as soon as possible.

5. The claimant replied at 10.26 as follows:
"Good morning,
I should have received the log in details yesterday at the latest. I waited until 10am and nothing had come through. I am not now in a position to log into the hearing.
Under rule 51, please withdraw my claim.
Regards
Simon Ditchfield"

6. The proceedings were accordingly dismissed following the claimant's withdrawal of the claim.

7. The respondent made an oral costs application at the 9 February hearing, and a Case Management Order was made providing for the listing of a costs hearing on 15 March 2021, and setting out the essence of the respondent's submissions as follows:

   Summary of respondent's submissions

   a. The respondent contends that the claimant has acted vexatiously and unreasonably. His non-appearance is typical of his attitude towards the respondent in trying to cause the respondent maximum upset and inconvenience. The following illustrates how the claimant has been treating the respondent.

   b. The respondent has encouraged the claimant to abide by the tribunal orders in readiness for the final hearing, but the claimant has not done so. The respondent was in contact with the claimant on occasions from 15 December 2020 to attempt to agree the bundle for the final hearing and the simultaneous exchange of witness statements. Witness statements should have been exchanged on 11 January 2021.

   c. On 19 January the claimant e-mailed the respondent to say his witness statement would be with the respondent by 16.00 on 20 January. The respondent therefore sent its witness statement to the claimant on 20 January. The claimant acknowledged receipt but did

not send his. On 30 January the respondent spoke to the claimant to find out what he was doing about his witness statement. The claimant said he was not going to produce one.

d. On 7 February the claimant acknowledged the joint bundle sent to him by the respondent. Even as late as this, being last Sunday evening, the claimant gave no indication that he might withdraw his claim.

e. There is another matter, which illustrates how the claimant has tried to cause problems for the respondent. On 19 January the claimant sent the respondent a Data Subject Access Request, which was incorrectly referred to as a Freedom of Information Request. This was very widely drawn and required the respondent to produce large volumes of e-mails and various pieces of information.

f. In support of its claim, the respondent cited *ET Marler Ltd v Robertson* 1974 ICR 72 in which it was said that a hopeless claim brought out of spite was vexatious. The respondent submitted that this was what the claimant had done. He had made serious allegations against the respondent and when the respondent had attempted to negotiate, the claimant did not respond. If not vexatious, the claimant's conduct is at least unreasonable.

g. The claimant is in a well-paid job. He has considerable commercial experience and, through his work is well aware of employer-employee relationships. He has offered no reason as to why he chose to withdraw his claim at the last minute.

h. The claimant's e-mail suggests it is the tribunal's fault that he could not attend the hearing because he did not receive the log-in details until after 10.00am today. The respondent received the link in good time and was able to log-in smoothly. The claimant ran out of patience quickly as he indicated in the e-mail that he only waited until 10.00am and then was not in a position to log into the hearing. That is a snub to the tribunal. Today's final hearing was listed for a full day. He should have kept the day free to attend.

i. For the above reasons, the respondent says that the first threshold in rule 76 has been triggered. The respondent understands that the tribunal must exercise its discretion carefully, but in this instance, it is submitted that costs should be awarded.

j. With respect to the claimant's ability to pay, he is in a new job in recruitment, earning a basic salary of £56,000 per annum. This is a high salary and it is submitted that the claimant can afford the costs. He has a tax code of 1250L which is a code for higher paid workers. His basic earnings are £790.07 net per week. The respondent submits that he has the opportunity to earn commission on top of this. The tribunal is asked to apply judicial knowledge of the recruitment consultancy industry where commission is the norm.

k. In terms of providing an indication of the respondent's costs to date, there are 26 hours of solicitor's fees prior to preparing for today's

hearing and two days hearing preparation at 6 hours per day, totalling 38 hours in all. The guideline hourly rate for a solicitor with over 8 years' experience is £217.00 per hour. The respondent's solicitor qualified in 1998 and claims this rate. Therefore, the total preparation costs to date amounts to £8,246.00 plus VAT at £1,649.20, equalling £9,895.20. In addition, there is today's hearing for which 1.5 hours is claimed, amounting to £325.50 plus VAT at £65.10 equalling £390.60.

8. At the costs hearing Mr Bower gave evidence to the effect that:
    a. The claimant's Data Subject Access Request was made only a couple of weeks before the final hearing. The claimant was just trying to make unnecessary work for the respondent on matters unrelated to the case.
    b. He first met the claimant in 1997. The claimant is well-versed in commercial matters and knew what he was doing. He was responsible for setting up and running operations with the respondent.

9. In final submissions, the respondent added that the claimant failed to disclose one of his bank accounts until the costs hearing despite being asked about ability to pay previously. It was indicative of the way he ran the case, which was unreasonable and vexatious.

10. The claimant did not challenge the respondent's evidence.

11. The claimant did not produce any written submissions. The essence of his oral submissions was:

    a. He brought the case on taking advice.
    b. He asked for documents from the respondent thinking they might contain information that would support his case.
    c. He agreed that he had been in conversation with the respondent's representative about witness statements, but understood that the respondent would wait.
    d. He did not feel he was vexatious.
    e. Whilst the respondent had attempted to contact him, the respondent was aware that he had booked a holiday.
    f. With respect to the hearing on 9 February 2021, he had received an e-mail but no access code. Whilst he eventually got access, he was only available until 10.30. This was an error of judgment for which he apologises.

12. The gist of the claimant's evidence in cross examination was:

    a. He agreed that he had received notification of the final hearing by CVP and that it was listed for one day.
    b. With respect to his e-mail withdrawing his claim, he had issues with the internet and by 10.26 he was not in a position to log in. He did not think to tell the tribunal. In hindsight it was a mistake and he should have asked for an adjournment.
    c. When asked about his attitude towards the respondent over the

dismissal, he said he was angry, confused and felt used.

d. When asked why he had requested five months' worth of e-mails from April 2020 to September 2020, that had nothing to do with his unfair dismissal claim, he initially said he did not recall, but later said it was to get information for the case. He did not feel the request was unreasonable but the timing was mildly unreasonable.
e. He admitted having conversations with the respondent in December 2020 about what should go into the bundle and understood the disclosure process.
f. He produced a witness statement and denied intending to withdraw his claim all along.
g. His remuneration is now £56,000 per annum. He has the opportunity to get commission after 12 months' service.
h. He has two accounts. The account he did not disclose has no money in it. The other has about £2,000 in it.
i. He owns a property in which his estranged wife lives. This has about £260 equity in it.

The Law

13. The Regulations contain a discretionary power to award costs and the relevant rules are set out in Schedule 1.

14. 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.

15. The circumstances in which a Costs Order may be made are set out in rule 76. The relevant provision here is 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;

16. The amount of a costs order is set out in rule 78(1) which says:

17. "A costs order may—

(a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;

(b) order the paying party to pay the receiving party the whole, or a specified part of the costs of the receiving party..

18. 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."

19. It follows from these rules that the Tribunal must go through a three stage procedure (see paragraph 25 of *Haydar v Pennine Acute NHS Trust* UKEAT 0141/17/BA). The first stage is to decide whether the threshold has been reached for a party's conduct to fall within rule 76(1), whether by way of unreasonable conduct or otherwise; if so, the second stage is to decide whether it is appropriate to make an award; and if so, the third stage is to decide how much to award. Ability to pay may be taken into account at the second and/or third stage.

20. 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.

21. In *AQ Ltd v Holden* [2012] IRLR 648, The Employment Appeal Tribunal held that a tribunal should not judge a litigant in person by the standards of a professional representative. Lay people were likely to lack the objectivity and knowledge of law and practice brought by a professional legal adviser.

22. In deciding whether unreasonable conduct should result in an award of costs, the Court of Appeal held in *Barnsley Metropolitan Borough Council v Yerrakalva* [2012] ICR 420 that the tribunal should have regard to the nature, gravity, and effect of the conduct. The vital point in exercising discretion is to look at the whole picture, and in doing so to identify the conduct, what was unreasonable about it and what effects it had.

23. The position where claims are withdrawn at the start of a hearing was considered by the Court of Appeal in *McPherson v BNP Paribas (London Branch*) [2004] ICR 1398. Mummery LJ observed that the question was not whether the withdrawal was unreasonable, but whether the proceedings had been conducted unreasonably.

    "The crucial question is whether, in all the circumstances of the case, the claimant withdrawing the claim has conducted the proceedings unreasonably. It is not whether the withdrawal of the claim is in itself unreasonable…"

24. The meaning of the word, "vexatious" has been the subject of a number of reported cases. In *Attorney General v. Barker* [2000] 1 FLR 759, Bingham CJ described the hallmark of a vexatious proceedings was that it had:

    > "Little or no basis in law (at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and it involves an abuse of the process of the court, meaning a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process".

25. In *Ashmore v. British Coal Corporation* [1990] ICR 485 the Court of Appeal observed that whether a case was vexatious depended on all the relevant circumstances of the case.

26. In *ET Marler Ltd V Robertson* [1974] ICR 72, NIRC the National Industrial Relations Court stated that *"If an employee brings a hopeless claim not with*

any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive, he acts vexatiously."

27. In *Wharton v Leeds City Council* ET Case No.1800023/14 the tribunal found that the claimant had been using his tribunal claim as a vehicle for part of his wider campaign against the respondent. Among other things, the claimant had sent bogus e-mails to the respondent and made requests for disclosure of a large number of documents that were not relevant to the issues in his case. The tribunal found that the claimant's motives for seeking disclosure of those documents was not to assist the tribunal and his behaviour was vexatious, abusive and unreasonable, justifying an order for costs.

Conclusions

Vexatious and/or unreasonable behaviour

28. At the outset it is important to acknowledge that the claimant is a litigant in person and should not be judged by the standards of a legal representative. Nonetheless, he has worked in well-paid, responsible positions and has considerable commercial experience, including an awareness of employee/employer relationships. It is within this context that I make my findings.

29. There are two aspects of the claimant's behaviour which give particular cause for concern, namely 1) his non-appearance at the final hearing and withdrawal of his claim and 2) his attitude to disclosure.

Non-appearance at the final hearing and withdrawal of his claim

30. The claimant, who was representing himself, did not log in to the final hearing. Even if he did not receive the log in details the day before, the tribunal clerk sent the CVP link to him at 10.15 on the day of the hearing asking him to connect as soon as possible. He received that e-mail and responded to it at 10.29 saying he had waited until 10.00 and was not now in a position to log in.

31. He knew his claim had been listed for the full day and he should have made himself available. A reasonable claimant in such a position would have contacted the tribunal before 10.00 to enquire about joining the hearing.

32. No explanation was given as to why he was not in a position to participate. Whilst he gave evidence at the costs hearing that he had no internet connection, that was the first time he had mentioned it and I reject this part of his evidence. He was able on the day to send e-mails and he could readily have informed the tribunal that he was having internet difficulties, if that indeed was the case.

33. Rather than do that, he requested the tribunal to "Under rule 51, please withdraw my claim". No explanation was offered as to why he changed his mind and decided not to proceed. No reason was given for the lateness of his withdrawal. Whilst under cross examination he said he had made a

mistake and should have asked for an adjournment, this was never mentioned before and it did not appear that he had given this any consideration in reality.

34. The respondent had been in contact with the claimant only two days before the hearing and the claimant gave no indication then of any possibility of withdrawal. In withdrawing at the last possible moment without apparent good reason, he showed a blatant disregard for the work the respondent had undertaken in preparing to defend the claim.

35. Whilst the late withdrawal of a claim does not necessarily amount to unreasonable behaviour, in this particular case under these circumstances, I find the manner and timing of the withdrawal to be unreasonable.

Attitude to disclosure

36. The claimant understood the disclosure procedure and what was expected of him in relation to bundle preparation and timing. Despite the respondent liaising with him about the content of the bundle in good time, only three weeks before the hearing and without explanation or apparent good reason, the claimant made a widely drawn Data Subject Access Request for a large volume of irrelevant information from the respondent. The claimant has not suggested that he required this personal data for any legitimate purpose other than the employment tribunal proceedings, and I find that the Data Subject Access Request was part of the employment tribunal proceedings.

37. The claimant failed to give any specifics about why he wanted this information, and why he asked for it so close to the hearing. In fact he admitted that the timing was “mildly unreasonable”.

38. Under these circumstances and in the absence of any good reason, it appears to me that the real purpose of the request was to inconvenience and cause unnecessary expense to the respondent. This is an abuse of process and sufficient to reach the threshold of vexatious behaviour.

Other matters

39. I must consider the whole picture, and in this regard, I have the following observations. There is no challenge to the respondent’s submissions that the claimant failed to engage with the tribunal process in a timely manner and at times avoided communicating with the respondent, despite the respondent’s encouragement to engage. This is indicative of the disrespectful manner in which the claimant has treated the process overall.

Conclusion

40. For the reasons identified above, the claimant’s behaviour demonstrates an improper use of the tribunal process to cause significant upset and inconvenience to the respondent rather than pursuing a genuine claim. From the manner and timing of the withdrawal coupled with the lack of a credible explanation, I draw the inference that the claimant knew that his claim would fail.

41. Consequently, the tribunal finds that the threshold required by the rules for vexatious and unreasonable behaviour has been reached.

Appropriateness of costs award

42. In considering whether an award would be appropriate, I shall have regard to the claimant's means.

43. The claimant is in employment earning £56,000 per annum. He started that job very shortly after his employment with the responded ended (effective date of termination with respondent stated as 30/9/20). After 12 months he says he is entitled to commission on top of salary.

44. Taking outgoings into account, the claimant's average bank balance over the 12 months from February 2020 to February 2021 is around £2,170.

45. He also has equity of £260,000 in a property in which his estranged wife lives.

46. There is no evidence of any significant debts.

47. Consequently, the claimant has the means to satisfy a costs award.

48. There is nothing before me to suggest that an award of costs would be inappropriate and the claimant has not put forward any reasonable mitigating factors for his behaviour.

49. Therefore, I find that it is appropriate to order an award of costs in favour of the respondent.

Amount of costs award

50. The respondent claims the sum of £10,285.90 including VAT for solicitor's fees. A detailed schedule of loss has been submitted, which breaks down each item claimed. The solicitor's rate is £217.00 per hour, being the guideline hourly rate for a solicitor with over 8 years' experience. The schedule appears reasonable.

51. The claimant was given the opportunity to challenge the schedule but did not do so.

52. Under the circumstances there is no reason for me to reduce the amount claimed and therefore I make a full order for costs.

Employment Judge Liz Ord

Date 12 April 2021

JUDGMENT SENT TO THE PARTIES ON

12 April 2021

FOR THE TRIBUNAL OFFICE

Notes

1. The hearing code "V" in the heading to this judgment indicates that the hearing took place on a remote video platform. Neither party objected to the format of the hearing.