EMPLOYMENT TRIBUNALS

Claimant:	**Mr S Crowther**
Respondent:	**Denso Manufacturing Limited**
Heard at:	**Birmingham by CVP**
On:	**12 February 2021 and in chambers on 24 March 2021**
Before:	**Employment Judge Flood**
Appearances	
For the Claimant:	**No attendance or representation**
For the Respondent:	**Mr Roberts (Counsel)**

RESERVED JUDGMENT ON COSTS APPLICATION

The respondent's application for costs is dismissed.

REASONS

Background

1. The claimant's claim for unfair dismissal was presented on 11 June 2020 following early conciliation between 5 and 10 June 2020. The claimant's response was presented to the Tribunal on 11 August 2020 and was accompanied by an application for a preliminary hearing to determine whether the claimant's claim should be struck out (i) on the basis of jurisdiction (it being out of time), and/or on the basis that it has (ii) no reasonable prospects of success or in the alternative that (iii) the claimant be ordered to pay a deposit in order to proceed with his claim.
2. On 25 November 2020 Employment Judge Hughes listed the claim for an open preliminary hearing ("OPH") to decide:

   "Whether the Employment Tribunal has jurisdiction to hear this claim because it was presented out of time.

   This involves consideration of whether it is just and equitable to extend time I whether it was not reasonably practicable for the claim to have been presented in time and, if so, whether it was presented within such further period as was reasonable.

The Hearing will also consider the respondent's application to strike out the claim as having no reasonable prospect of success or to order a deposit if there are little reasonable prospects of success."

3. The parties were sent a Notice of Preliminary Hearing by Video on 25 November 2020 enclosing details about how to prepare for and join the video hearing. The claimant was ordered to serve witness statements and supporting documents to include medical evidence (limited to time limitation issues and ability to pay if a deposit is ordered) on the respondent by e mail by 8 December 2020. The claimant did not comply with this order and no documents were served nor was any contact made with the respondent. The respondent had prepared a preliminary hearing bundle which was sent to the claimant by recorded delivery and signed for on 6 February 2021.

4. The hearing was due to start at 9.30 am. The respondent joined the hearing but the claimant did not join and Mr Roberts confirmed that there had been no contact with the claimant since the ET1 was presented. I adjourned the hearing to see if any contact had been received from the claimant and to enable the clerk to make an attempt to contact him. Phone calls were made to the contact telephone number the Tribunal had for the claimant but it was not answered and appeared to be then turned off. No written communications had been received from the claimant by the Tribunal. The hearing was re-commenced at 9.50 a.m. I considered whether the claim should be dismissed for the claimant's non attendance under rule 47 of the Employment Tribunals (Rules of Procedure) 2013 ("ET Rules"). I decided having considered all the information available to me, and having made the enquiries above about the reason for the claimant's absence, that I would not dismiss the claim on this basis, but proceed with the preliminary hearing in the absence of the claimant.

5. I heard submissions from Mr Roberts on the issues set out at paragraph 2 above. Having considered the matter, I decided that the claim had been presented after the expiry of the statutory time limit and that time limit could not be extended because I was not satisfied that it was not reasonably practicable for the claimant to present his claim within that time limit. The claim was therefore dismissed.

6. Mr Roberts made an application for costs under rules 76 and asked for an Order for costs in the sum of £2500 plus VAT (which was the costs incurred by the respondent in instructing counsel to attend today's hearing). I heard submissions from Mr Roberts and decided to give the claimant the opportunity to make representations and to provide information on his ability to pay within 21 days.

7. By an Order dated 12 February 2021 I ordered that the claimant

   "*must send to the respondent and the Tribunal by e mail, any relevant information on his ability to pay any costs award that could be made including his current household income; savings and investments; and expenses/outgoings;*

8. I also gave the claimant the opportunity to make further submissions and provide information on the respondent's application for costs. The claimant did not provide the information on ability to pay as referred to above and did not make any submissions on the respondent's application for costs by the specified date or at all. The matter came before me for a reserved decision on 25 March 2021.

The Issues

9. The issues which fell to be determined by the Tribunal are:

   9.1. Did the claimant by bringing his claim and/or failing to comply with the Tribunal's Orders of 25 November 2020 or attend the preliminary hearing and/or otherwise act vexatiously, abusively, disruptively or otherwise unreasonably (rule 76 (1) (a) ET Rules)?

   9.2. Did the claim against the respondent have no reasonable prospects of success (rule 76 (1) (b) ET Rules)?

   9.3. Should, in the Tribunal's discretion, a costs order be made against the claimant of up to £2,500?

   9.4. If so, how much should be awarded?

The relevant law

10. References to rules below are to rules under **Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.**

11. Rule 76 provides

    (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.

    (2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

12. The relevant part of rule 78 provides:

    "*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;…."

13. Rule 84 provides:

    "*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."*

14. A Tribunal must ask whether a party's conduct falls within rule 76(1)(a) or (b) as applicable. If so, the Tribunal must then go onto ask whether it is appropriate to exercise the discretion in favour of awarding costs against that party. It is only

when these two stages have been completed that the tribunal may proceed to the third stage, which is to consider the amount of any award payable

15. **Gee v Shell UK Limited [2003] IRLR 82.** The Court of Appeal confirmed that that costs are the exception rather than the rule and that costs do not follow the event in Employment Tribunals.

16. **McPherson v BNP Paribas [2004] ICR 1398**. In determining whether to make an order under the ground of unreasonable conduct, a Tribunal should take into account the "nature, gravity and effect" of a party's unreasonable conduct.

17. **Barnsley Metropolitan Borough Council v Yerrakalva [2012] ICR 420** - "*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.*"

18. **Oliver Salinas v Bear Stearns International Holdings UKEAT/0596/04/ DM.** The question of whether a costs order was exceptional or unusual was not significant, so long as the proper statutory tests were applied.

19. **Vaughan v London Borough of Lewisham & Ors UKEAT/0533/12/SM –** it was not wrong in principle to make a costs order even though no deposit order had been made and the respondents had made a substantial offer of settlement (on an avowedly "commercial" basis). Nor was it wrong in principle to make an award which the claimant could not in her present financial circumstances afford to pay where the Tribunal had formed the view that she might be able to meet it in due course.

Conclusion

20. Mr Roberts submitted that the claim never had any reasonable prospects of success. He firstly points to the fact that the claim is clearly presented out of time and the claimant has not shown anything which suggests it was not reasonably practicable for the claim to have been presented in time. He also suggests that even if the claimant had been permitted to pursue his claim, the issues before the Tribunal were straightforward as the claimant had admitted that he did carry out the conduct which led to his dismissal. He suggests that the only issue before the Tribunal was whether dismissal was within the range of reasonable responses. He submits that given the serious health and safety issues disclosed by the claimant's conduct there was no prospect that the claimant would be able to show that his dismissal was outside the range of reasonable responses. He points out that the claimant does not complain about the process other than pointing out the failure of the respondent to suspend him and he suggests this could not be a matter which affects fairness.

21. He also points out that the claimant has completely failed to engage with the claim he brought since the claim was presented. He has not complied with the orders of the Tribunal and has not engaged at all with the respondent or the Tribunal after submitting his complaint.

22. He asked me to award costs solely in respect of the costs incurred by the respondent in instructing counsel to attend the preliminary hearing on the issue of time, although additional costs have been incurred over and above this.

Have the tests within Rules 76 (1) (a) been met?

23. The initial question I must consider is whether the claimant acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings or the way that the proceedings have been conducted under rule 76(1)(a). The claimant has entirely failed to engage with the Tribunal process following the presentation of his claim on 11 June 2020. The claimant was sent a copy of the respondent's response and application made in August 2020 by the respondent, and also subsequently forwarded the same by the Tribunal. There is nothing to suggest he did not receive any of the correspondence sent to him by the Tribunal of 25 November 2020 notifying the parties of the preliminary hearing and what steps were required to be taken to prepare for it. I am informed that the claimant has also failed to respond to other attempts to make contact made by the respondent's representatives. On the morning of the preliminary hearing, the claimant did not answer his telephone and then that phone was switched off. This shows a complete disengagement from the proceedings that were commenced by him and which have necessitated all the actions that have taken place since that date with respect to his claim. Whilst I cannot conclude on the paucity of information before me that the claimant was acting vexatiously, abusively or disruptively, his failure to participate in the proceedings he instigated in an appropriate manner does in my view amount to acting unreasonably in the way the proceedings have been conducted.

24. Secondly, I must consider whether the complaint made by the claimant had no reasonable prospects of success. I have considered the submissions of the respondent. The respondent was successful in its application that the claim be dismissed because it was presented out of time. The claimant played no part in the preliminary hearing to consider this point so the Tribunal was not able to make any findings about the reasons why he did not present his complaint in time and so concluded that the claimant had not shown it was not reasonably practicable to do so. It was not necessary for the Tribunal to examine in any detail whether the claim had any prospects of success on its merits for this reason. The respondent's submissions on merits are persuasive and it may have been had the claim been permitted to proceed to final hearing (on the basis of an extension of time) that it may have succeeded in all its arguments. However, I am not able to conclude that the claim had no reasonable prospects of success. The respondent was ultimately successful in its arguments, but this is not a case which had no reasonable prospects of success from the outset. Had the claimant participated further in the proceedings he may have been able to adduce evidence and make arguments on the matters in dispute so as to further his case. It is therefore not possible for me to conclude that the claim had no prospects of success on the information before me.

Should a Costs Order be made?

25. Having found that the claimant's conduct falls within rule 76 (1) (a), I must then go onto ask whether it is appropriate to exercise the discretion in favour of awarding costs against him.

26. In considering whether a costs order should be made, in relation to the claimant's unreasonable conduct the claims brought by the claimant have clearly taken up

considerable time and involved effort being expended by the respondent in dealing with the claim. The respondent has incurred legal costs and management time. It is entirely understandable why the respondent feels that it should be compensated in part for the costs it has incurred. However I also take note that the respondent having noted that the claimant's complaint was presented outside the statutory time limits, quite appropriately made an application for a preliminary hearing to be held to determine the issue of time (as well as to consider a strike out/deposit order on prospects of success). The Tribunal agreed with this application and the matter was listed for a preliminary hearing. Even if the claimant had been fully engaged with the process, that hearing is likely to have taken place and the costs incurred by the respondent in preparation for it would have likely been the same (if not much more). Even if the claimant had not behaved unreasonably in failing to engage with the process, the preliminary hearing listed for 12 February 2021 was likely to have been the first "check point" when the claimant's claim could have been considered and potentially disposed of. This is ultimately what did happen and there is nothing to suggest that the outcome would have been different whether or not the claimant had engaged with the process. For these reasons, although I have sympathy with the respondent in its frustrations with the claimant's failure to engage, I do not exercise my discretion to make a costs order against the claimant.

Employment Judge Flood

22 April 2021

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