



EMPLOYMENT TRIBUNALS

Claimant: Miss R Madzinga

Respondent: Department for Work and Pensions

Heard at: Manchester

On: 29 April 2021
and 4 May 2021

Before: Employment Judge Slater

Representation

Claimant: written representations

Respondent: written representations

JUDGMENT

The respondent's application for a costs order against the claimant is refused.

REASONS

Introduction

1. The Code P in the heading indicates this was a decision made on paper, without a hearing.

2. The claimant's claim of unfair dismissal and breach of contract was determined in the claimant's favour at a hearing on 4-5 January and 4-5 March 2021. The respondent had made an application for costs against the claimant at an earlier stage of proceedings, but a direction was given that it would be dealt with at the conclusion of proceedings. There was insufficient time to deal with the application on 5 March 2021, so case management orders were made for the application to be made and responded to in writing, unless the respondent decided not to pursue the application. The parties agreed that the judge should consider the application on the papers, without a hearing.

The respondent's application for costs

3. The respondent renewed its application for costs in writing on 19 March 2021.

The application relates to additional costs which the respondent asserts were incurred defending the claimant's allegations between January 2020 and March 2021. The respondent asserts that the claimant's conduct was vexatious, disruptive and/or unreasonable (rule 76(1)(a) of the Employment Tribunals Rules of Procedure 2013) and that the claimant was in breach of Tribunal orders, causing a hearing to be postponed and costs wasted.

4. The claimant opposed the application by letter of 9 April 2021. The claimant sent a further email on 10 April 2021 relating to her financial means.

5. The respondent replied to the claimant's arguments by an email dated 16 April 2021.

6. The claimant had not copied the email about her financial means to the respondent so a copy was sent to them by the Tribunal on 29 April 2021 and they were informed that the judge would not finalise her decision until after 4 p.m. on 4 May 2021, to give them an opportunity to respond to this information, if they wished to do so. The respondent took the opportunity to send further submissions relating to the claimant's financial means, on 4 May 2021.

Facts

7. The claimant presented her claim on 4 September 2019. Sean Nelson of the PCS was named as her representative on the claim form. Mr Nelson is an employee of the respondent and a local office PCS representative. It appears from the correspondence that he has certain work time allocated for trade union duties and at other times he does his work for the respondent.

8. Notice of a hearing on 14 and 15 January 2020 was sent to the parties by the Tribunal on 16 October 2019. It was sent to Mr Nelson on behalf of the claimant as her representative. The notice also contained case management orders to prepare the case for hearing.

9. Mr Nelson corresponded with the respondent's representatives in November and December 2019 about documents and agreeing a variation of the date to exchange witness statements. Mr Nelson disclosed documents to the respondent on the claimant's behalf.

10. The respondent's representatives provided Mr Nelson with an electronic version of the trial bundle on 2 January 2020 and asked for his and the claimant's agreement to the contents. They wrote that all the claimant's documents had been included in the bundle.

11. On 2 January 2020 at 10.38, Mr Nelson wrote to the respondent's representative to say that he was going to ask the Tribunal for a postponement and would let her know what response he got. He did not say on what grounds he was applying for a postponement.

12. Mr Nelson wrote to the Tribunal on 2 January 2020, requesting a postponement of the case. He wrote:

“I am assisting the Claimant in my role as a local office union representative with little experience or knowledge of Employment Tribunal proceedings. I had wrongly assumed that the Claimant would receive copies of any correspondence issued by the Tribunal, including the date of the hearing. The Claimant is currently abroad in South Africa and is not due back in the UK until 15/1/2020. I hope the Tribunal can be sympathetic to this request which is the result of a genuine misunderstanding.”

13. Mr Nelson did not copy the letter to the respondent as he was required to do and the Tribunal informed him, by letter dated 2 January 2020 that his correspondence would not be considered until he did so.

14. Mr Nelson sent a copy of the application to the respondent’s representative later that day and informed the Tribunal he had done so.

15. Mr Nelson sent a further document with an additional reason for postponement which was that he had not received the electronic bundle, although the respondent had sent this, and he had only received the hard copy of the bundle that day, on 6 January 2022. He said the bundle ran to 519 pages and his work commitments meant that he might be unable to give it the attention it warranted in preparation.

16. On 6 January 2020, the claimant emailed Mr Nelson to say she had missed his call that day, the network was very bad where she was, and could they keep in touch through email. She wrote:

“I have been in touch with the airline and I can’t amend my ticket I will have to book new flights altogether is there any word back from the tribunal in relation to the date changes?”

17. The respondent opposed the application to postpone, by an email dated 6 January 2020 sent at 17.25. The respondent made an application at the same time to strike out the claim on the grounds that the claimant was not actively pursuing this. They wrote that, if the Tribunal was minded not to order a strike out of the proceedings, they requested that the Tribunal proceed with the hearing in the claimant’s absence.

18. Employment Judge Holmes refused the application for postponement and his decision was notified to the parties on 10 January 2020. He directed that the application could be remade at the start of the hearing on 14 January 2020 when the Tribunal would also consider the respondent’s application to strike out claims. The Tribunal wrote that the case remained listed for hearing on 14-15 January 2020.

19. From the Tribunal case file, I note that Mr Nelson sent a further email to the Tribunal, copied to the respondent, on 7 January 2020 at 10.10 a.m. but it appears that this was not referred to Employment Judge Holmes before he made his decision. It appears that the email may not have been linked to the case file until after the hearing on 14 January 2020. Mr Nelson wrote that, after consulting the claimant, they were now willing for the hearing to proceed “on 14th and 14th [sic] January in the Claimant’s absence. Accordingly I would like to respectfully withdraw the previous request for a postponement.” The second reference to 14th

January is presumably a typing error for 15 January.

20. On 7 January 2020 at 10.11, Mr Nelson emailed the claimant. He wrote: "The Department are willing to go ahead in your absence so I am going to ask if we can do that. The argument is about procedures mostly so it's not essential that you attend."

21. Mr Nelson attended the hearing on 14 January 2020. The claimant did not attend. Mr Tinkler of counsel represented the respondent.

22. It appears that, at the hearing on 14 January 2021, the application to postpone the hearing was pursued on the claimant's behalf by Mr Nelson. Employment Judge A M Buchanan postponed the final hearing and relisted it for 2-3 April 2020. The respondent made an application for costs by reason of the absence of the claimant. The judge directed that the application would be considered as part of the adjourned final hearing.

23. The judge noted in the reasons for his decision that the claimant was in South Africa on holiday until early evening on 15 January 2020 and was said not to have been aware of the hearing dates for 14 and 15 January 2020 until she left for that holiday. He noted that the claimant was said not to have been able to arrange for an earlier return when she was made aware of the hearing dates in mid-December 2019.

24. The judge recorded that Mr Nelson was not appearing as a representative of the claimant's trade union but as a lay representative. The claimant and her representative were to consider whether to ask for the claimant to be shown on the records of the Tribunal as acting in person which would mean all correspondence would be sent to her direct rather than to her representative. Unless and until such an application was made and granted the Tribunal would continue to correspond with Mr Nelson who, the judge noted, had an obligation to inform the claimant about the contents of that correspondence.

25. The application to strike out the claim was dismissed.

26. On 29 January 2020, Mr Nelson wrote to the Tribunal and the respondent to say he was no longer the claimant's representative and that any future correspondence should be sent directly to the claimant.

27. For reasons relating to the Covid-19 pandemic, the hearing listed for 2-3 April 2020 was postponed. It was eventually re-listed for 4-5 January 2021 when the hearing began. Mr Nelson had provided a witness statement but did not attend to represent the claimant or to give evidence.

28. The claimant asserts, in her email of 9 April 2021, that she was only informed by Mr Nelson about the hearing listed for 14-15 January 2020 when he called her around 4 January 2020 to ask to meet about the case. The claimant says she informed him that she could not attend as she was abroad at the time due to a family emergency.

29. The claimant has not provided evidence about when she went to South Africa

and when that visit was arranged. She provides no detail about the family emergency she refers to. However, this is not a case where the claimant says that, because of a family emergency, she had to apply for a postponement of pre-arranged dates. It is her case that she was not aware of the hearing dates until early January 2020.

30. The claimant has provided evidence of her flight back to the UK, leaving Harare on 14 January 2020 and arriving back in Manchester at 18.40 15 January 2020.

31. It is clear that Mr Nelson knew of the hearing dates from October 2019. From Mr Nelson's email to the Tribunal of 2 January 2020 and from what the claimant has written in her email of 9 April 2021, it appears to me more likely than not that Mr Nelson did not inform the claimant of the dates of the hearing until months after he had received notice of the hearing, wrongly assuming that she had received a copy of the notice of hearing directly and not realising that, as her named representative, it was his responsibility to notify her of the hearing dates and all other relevant information relating to the claim. It is unclear exactly when Mr Nelson informed the claimant of the hearing dates and when the claimant went abroad but, based on the correspondence of Mr Nelson and the claimant, I consider it more likely than not that the claimant was abroad by the time she was informed of the hearing. She looked into changing her return flight to be able to return in time for the hearing, but could not amend her ticket.

32. The claimant has provided some information about her financial means. She has provided some documentation about loans totalling £7585.87 which need to be repaid. The respondent was ordered to pay to the claimant compensation of £27,033.37 for unfair dismissal. The claimant may not receive all of this sum, due to the operation of the Recoupment Regulations, but I have no information as to how much of the award will be paid to the claimant ultimately. The claimant will not be able to claim any benefits due to receiving a lump sum payment above £16,000 so she says she will have to live off this amount after paying off the loans.

33. I accept that the respondent incurred the costs set out in its Schedule of Costs in relation to the hearing on 14 and 15 January 2020 which was postponed on 14 January. Counsel's fees of £2,310 plus VAT were incurred for preparation and attendance at the hearing, since the case was prepared for hearing and counsel attended for half a day on 14 January 2020. A different barrister appeared at the hearing beginning in January 2021, so the work done by Mr Tinkler would not have resulted in any reduction in work by counsel in preparing for the re-listed hearing. Solicitors' costs were £2,934.35 plus VAT. These costs included instructing counsel and a conference with counsel. Since, at this stage, the respondent had to be prepared for the final hearing to proceed on 14 and 15 January 2020, I consider it likely that some of this work will have saved time on the preparation needed for the re-listed hearing.

The respondent's arguments

34. The respondent argues that the claimant should have taken reasonable steps to avoid booking or going on holiday during the hearing dates. The respondent submits that the claimant's failure to attend the hearing was abusive, tactical and/or deliberate. They argue the claimant had failed to provide any evidence to support her claim that she was abroad at the time. The claimant failed to attend the hearing without a prima facie legitimate reason as to why she could not attend. As a result, the respondent incurred additional costs arising out of the postponement of the hearing and rescheduling of the new hearing which it deemed to be unreasonable and unnecessary.

35. Following the claimant's letter of 9 April 2021, the respondent made further submissions. The respondent submits that the claimant has not submitted any evidence showing that Mr Nelson had not made her aware of the hearing until January 2020. They submit that Mr Nelson would not have made the application for a postponement on 2 January 2020 without the claimant's instructions. The claimant had not previously said she was in South Africa for a family emergency.

36. The respondent made further submissions in relation to the claimant's financial means in a letter dated 4 May 2021. These included that future ability to pay could be taken into account in deciding whether to make an award of costs and on the amount of any award.

The claimant's arguments

37. The claimant argues that she was only informed about the hearing around 4 January 2021. She argues that the respondent is punishing her for the fact that the judge saw merit in her case and ruled in her favour to postpone the case rather than strike it out as the respondent had requested on 14 January 2020. The respondent declined the first request to postpone the hearing. The respondent is asking her to pay for preparation which was then used for the re-listed hearing.

The Law

38. Rule 76(1) of the Employment Tribunals Rules of Procedure 2013 provide that a Tribunal may make a costs 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.”

Conclusions

39. The respondent's arguments as to why costs should be awarded were, in large part, set out before they read the claimant's arguments and saw the correspondence between the claimant and Mr Nelson which the claimant disclosed. It may be that, had they had a fuller picture of events before making the application, it would not have been made in the same terms.

40. I reject the respondent's argument that the claimant's failure to attend the hearing was abusive, tactical and/or deliberate. I do not consider that the evidence supports this argument. I conclude that it is likely the claimant is mistaken in asserting that she was not aware of the hearing dates until around 4 January 2020 but I have found that she was abroad by the time she was notified of the dates. I conclude that the claimant and her representative have not acted vexatiously, abusively or disruptively in the way the proceedings have been conducted.

41. I have to consider, however, whether the claimant and/or Mr Nelson's conduct of the proceedings was unreasonable. I conclude that the claimant was not herself unreasonable in her conduct of proceedings. I conclude that she was, at worst, perhaps naïve, in her reliance on Mr Nelson and in not asking Mr Nelson questions about whether a hearing had been arranged and, if so, when. In relation to Mr Nelson, I conclude that he failed to notify the claimant of the hearing dates in a timely manner through inexperience. Nevertheless, I conclude that his failure to do so, leading to the situation where there was a late postponement of the final hearing and the respondent incurring costs which were wasted, was unreasonable. I acknowledge that Mr Nelson is not a professional representative and is not a paid trade union official. I have no reason to doubt that Mr Nelson was acting out of the best of motives, seeking to assist the claimant with her claim. However, as a workplace PCS representative, advice from the union in conducting tribunal proceedings would be available to him. If he lacked knowledge and experience in acting as a representative in employment tribunal proceedings, he should have sought advice which would have avoided the late postponement of the hearing.

42. Given this conclusion, I have the power to make an award of costs against the claimant, even though the unreasonable conduct is that of her representative at the time. I have a discretion as to whether to make such an award. I conclude that, in the circumstances, it would not be appropriate to exercise my discretion to make an award of costs. I have concluded that the claimant herself was not at fault. Her representative at the time is not a paid representative who could be expected to reimburse the claimant for any award of costs made because of his failings in dealing with her case. I regret the additional cost caused to the respondent because of the unreasonable conduct of the claimant's then representative. However, I do not consider it would be in the interests of justice to order the claimant to bear the burden of these costs. I have not needed to consider the claimant's current financial means or likely future financial means in deciding that, as a matter of principle, I should not make an award of costs against the claimant.

Employment Judge Slater

Date: 4 May 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

6 May 2021

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