



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms Lucy Steel

**v ISS Mediclean Limited
t/a ISS Facility Services Healthcare**

Heard at: Watford

On: 21 April 2021

Before: Employment Judge Alliott (Sitting alone)

Appearances:

Pursuant to a direction of Employment Judge Lewis made on 25 October 2020, this wasted costs application has been dealt with on paper

JUDGMENT

The judgment of the tribunal is that:-

1. The application for a wasted costs order is dismissed

REASONS

1. The claimant was employed by the respondent as a Domestic from 4 April 2009 until she was dismissed for gross misconduct, effective on 9 January 2019. By a claim form presented on 2 April 2019 the claimant brought complaints of unfair dismissal and a claim for notice pay. The claimant was represented by Mr S Martins of "The Employment Law Service".
2. The history of this matter is as follows:-
 - On 24 April 2019 notice of the hearing of the case was given and it was listed for 4 November 2019. Case management orders were made for a statement of loss (by 22 May 2019), list of documents (by 5 June 2019), preparation of bundle (by 19 June 2019), exchange of witness statements (by 3 July 2019) and, subject to both parties being professionally represented, preparation of a statement of issues (by 28 October 2019).

- The respondent presented its response disputing the claims on 22 May 2019.
- On 10 June 2019 the respondent applied for an unless order on the basis of the claim was not being actively pursued. The claimant had failed to comply with the case management orders for a schedule of loss and a list of documents.
- The application of the respondent for an unless order was considered by Employment Judge Lewis who caused the following letter to be sent to Mr Martins on 9 July 2019:-

“EJ Lewis is considering whether to strike out this claim on the grounds that it is not actively pursued and/or the claimant has failed to comply with the directions of letter dated 24 April 2019. If claimant wishes to object, she is to send any comments to the tribunal by 17 July 2019.”

- On 10 July 2019 Mr Martins responded stating –

“That this case is being actively pursued by the claimant, that compliance had been made in terms of producing both a schedule of loss and agreeing a list of documents and that a trial bundle was awaited.
- On 17 October 2019 Mr Martins notified the tribunal and the respondent that the claimant was withdrawing her claims.
- On 29 October 2019 the respondent submitted this application for wasted costs against the claimant’s representative Mr Martins.
- On 31 October 2019 Mr Martins informed the tribunal and the respondent that he no longer represented the claimant.
- By a judgment dated 4 November 2019 Employment Judge Loy dismissed the proceedings upon withdrawal.
- On 28 December 2019 the claimant was sent the respondent’s application for wasted costs.
- On 2 January 2020 the respondent pointed out that the costs application was against Mr Martins and not the claimant.
- On 10 February 2020 Employment Judge Lewis directed that the respondent send the wasted costs application and the email of 2 January 2020 to Mr Martins. Further, the respondent was asked if it agreed to the application being dealt with on paper without a hearing.

- The respondent complied with Employment Judge Lewis' direction and sent the correspondence to Mr Martins on 10 February 2020. On the same date the respondent confirmed that it wanted the application to be dealt with on paper.
- On 15 March 2020 the claimant and Mr Martins were asked if they agreed with the wasted costs application being dealt with on paper. A response was requested within 14 days.
- Due to no reply being received, the request originally sent on 15 March 2020 was resent to Mr Martins on 6 June 2020.
- No response was received from Mr Martins.
- On 25 October 2020 Employment Judge Lewis directed that the wasted costs application will be dealt with on paper unless by 4pm, 2 November 2020, the claimant makes a written request for a hearing. That document does not appear to have been served on Mr Martins.
- Accordingly, on 13 December 2020 the unless order was served on Mr Martins.
- No response was received from Mr Martins.

The law

3. Employment tribunals have the power to make a wasted costs order against a representative in favour of any party where that party has incurred wasted costs – Rule 80 Tribunal Rules 2013. Such an order can be made against a representative to recover costs incurred:
 - As a result of any improper, unreasonable or negligent act or omission on the part of the representative, or
 - Which, in the light of any such act or omission occurring after costs were incurred, the tribunal considers it unreasonable to expect the receiving party to pay.
4. An application for wasted costs involves a three-stage test:
 - First, has the legal representative acted improperly, unreasonably or negligently?
 - Secondly, if so, did such conduct cause the applicant to incur unnecessary costs?
 - Thirdly, if so, is it in the circumstances just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs?
5. Reasonableness is a matter of fact for the tribunal.

6. As per the IDS Employment Law Handbook “Employment Tribunal Practice and Procedure” at 20.93:

“Improper, unreasonable or negligent

The Court of Appeal in Ridehalgh v Horsefield [1994] 3 All ER 848, CA, examined the meaning of “improper”, “unreasonable” and “negligent” – subsequently approved by the House of Lords in Medcalf v Mardell and others [2002] 3 All ER 721, HL – as follows:

- “Improper” covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious penalty.
- “Unreasonable” describes conduct that is vexatious, designed to harass the other side rather than advance the resolution of the case.
- “Negligent” should be understood in a non-technical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession.

A legal representative should not be held to have acted improperly, unreasonably or negligently simply because he or she acts on behalf of a party whose claim or defence is doomed to fail – Ridehalgh v Horsefield. The House of Lords in Medcalf commented that it is the duty of advocates to present their client’s case even though they may think that it is hopeless and even though they may have advised their client that it is. In Ratcliffe Duce v Gammer v L Binns (t/a Parc Ferme) EAT 0100/08, Mr Justice Elias (then President of the EAT) stated that the notion that a wasted costs order can be made against a lawyer simply because his client is pursuing a hopeless case is entirely erroneous. Such conduct does not of itself demonstrate that their representative has acted improperly or unreasonably. Clients frequently insist on pursuing a case against the best advice of their lawyers.”

The respondent’s application

7. The respondent’s application dated 29 October 2019 consists of a two-page letter with 10 attachments. In essence, the basis of the application is as follows:-

“The application is made on the grounds that Mr Martins acted improperly and unreasonably in submitting the claim which he knew had no foundation in law or fact and had no reasonable prospect of success and in failing to meet the requirements of the case management orders until the withdrawal of the claim only 17 days before the hearing knowing that the respondent would incur the time and costs of producing document lists, paginating the bundle and preparing witness statements.”

8. In support of the application the respondent points out that Mr Martins accompanied the claimant to a disciplinary hearing held on 20 November 2018 which the respondent says had to be adjourned due to the claimant appearing to be under the influence of alcohol. It is averred that Mr Martins

cannot possibly have had any proper or qualified belief that the claimant could be successful in these claims once the respondent's statements had been received.

The claimant's claim

9. The claimant's claim arose out of an incident that took place on 27 September 2018. The claimant was apparently late for work and was sent home. There is a dispute of fact as to whether the claimant was under the influence of alcohol at the time. It is the claimant's case that she was not under the influence of alcohol. It is the respondent's case that she was obviously under the influence of alcohol. An investigatory meeting was held on 24 October 2018 which resulted in disciplinary meetings on 20 November and 3 December 2018.
10. Clearly there is a dispute of fact between the parties which has not been resolved at a full hearing.
11. Further, in the claim form, the point is made that the claimant had served the business for over 10 years and that no steps were taken by the dismissal and appeal officer to consider options short of dismissal. A breach of contract claim is made for notice pay.
12. In my judgment, even if the claimant was found to have attended work on 27 September 2018 under the influence of alcohol and was rude and insulting to a manager, I do not consider that bringing this claim can be characterised as being doomed to failure. It would have been legitimate for the claimant to argue that the decision to dismiss her summarily for gross misconduct was outside the range of reasonable responses of a reasonable employer. On a previous occasion in 2017 when the claimant had attended under the influence of alcohol no disciplinary proceedings had been taken against the claimant and she had been referred for counselling in order to support her. The options available would have included terminating her contract of employment on notice and/or proceeding by way of a warning or further support counselling. I do not express a view as to the likelihood of these conclusions being arrived at but they are legitimate propositions of fact and law that could be advanced on behalf of the claimant.
13. In any event, it is not improper, unreasonable or negligent for Mr Martins to have advanced the claimant's case even if he considered it was doomed to fail.
14. Similarly, the failure to comply with the case management orders is not, without more, unreasonable conduct on the part of the legal representative. If the claimant's legal representative is without instructions or not in funds, then that will often result in deadlines being missed. Whilst Mr Martins has made no submissions, I cannot conclude that he acted other than professionally.

15. Accordingly, I do not find that it has been established that Mr Martins acted improperly, unreasonably or negligently and the application for wasted costs is dismissed.

Employment Judge Allcott

Date:21.5.2021.....

Sent to the parties on: 27.5.2021.....
THY

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For the Tribunal Office