



EMPLOYMENT TRIBUNALS

Claimant: Mr A Severns
Respondent: DBG Contractors Ltd

COSTS JUDGMENT

1. The Claimant's application for costs is refused.

REASONS

Introduction

1. This costs application arises from the last-minute postponement of the original hearing of this matter by EJ Armstrong on 14 December 2020. The hearing was re-listed before me on 5 March 2021 and I dismissed the claim. At the conclusion of the hearing the Claimant's representative indicated that he wished to pursue an application for costs in respect of that postponement. All parties agreed that I should deal with the application in writing. I made case management orders for the Claimant to put his application in writing and for the Respondent to respond. The Respondent did not explain the reasons why it was unable to participate in the hearing in December, so I gave Mr Hall a further opportunity to put that in writing.

Issues

2. The issues to be decided are:
 - 3.1 Did the Respondent act unreasonably in conducting the proceedings by failing to prepare for or attend the hearing on 14 December 2020 or did it fail to comply with Tribunal orders or was the hearing postponed on its application?
 - 3.2 If so in any event, should the Tribunal make an order for costs?
 - 3.3 If so, for how much?

The facts

3. The claim was lodged in June 2020 and served on the Respondent. Because of the pandemic it was not listed for a hearing at that stage. The Respondent presented its response in August 2020 and provided an email address for correspondence. A notice of hearing for 14 December 2020 was emailed to that email address along with case management orders on 19 August 2020. There was further correspondence from the Claimant's representative and the Tribunal to the Respondent at that email address. The Respondent did not reply to any of the emails and did not comply with the Tribunal orders. On 9 December 2020 the Tribunal telephoned the parties to check whether there were any electronic documents for the CVP hearing. Mr Hall of the Respondent said that he did not know anything about the hearing. He had not

heard anything from the Tribunal or the Claimant. He emailed the Tribunal confirming that and requesting a postponement of the hearing. His request was copied to the Claimant for comment the following day. Out of office responses were received and no further action was taken before the hearing on Monday 14 December. At the hearing Mr Hall explained to the Judge that he had not received any communications from the Tribunal or the Claimant and was not aware of the hearing before the previous week. He had asked for a postponement but that had not been done. He was not prepared for the hearing. The Judge accepted what he said and decided that it was necessary to postpone the hearing in the interests of justice.

4. At the hearing before me, Mr Hall explained that he had not received any of the emails and had not found any emails from the Tribunal or the Claimant in his spam folder. There had been a change in email provider at some point. He explained that the system had rejected emails from the Claimant's representative. He was adamant that he had not seen any of the correspondence. I accept that the emails had gone astray and were not seen by the Respondent. The change of email provider may explain why they were not in his spam folder. That means Mr Hall was not aware of the hearing until the week before. When he found out about it, he took prompt action to request a postponement. Through no fault of his, that was not progressed. I note that he did not take steps between mid-August and December 2020 to chase the Tribunal to find out what was happening.

Legal principles

5. Rules 76 and 84 of the Employment Tribunal Rules of Procedure 2013 provide, so far as material, as follows:

76 When a costs order or a preparation time order may or shall be made

(1) 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; or

...

(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.

...

6. The Tribunal must decide, as appropriate, whether there was unreasonable conduct or whether there was breach of an order or a postponement on the party's application. If so, it must then decide whether it is appropriate to make a costs order. If it is, the Tribunal must decide how much. The Tribunal must remember that unrepresented parties are not to be judged by the standards of a professional representative - the Tribunal must make an allowance for inexperience and lack of objectivity: see *AQ Limited v Holden* [2012] IRLR 648 EAT. If the costs order is made on the basis of unreasonable conduct, the Tribunal must identify the unreasonable conduct, say what was unreasonable about it and say what its effect was: see *Yerrakalva v Barnsley MBC* [2012] ICR 420 CA.

Application of the legal principles

7. I do not consider that the Respondent behaved unreasonably in its conduct of the proceedings. Having accepted that neither the Tribunal's emails nor those from the

Claimant's representative were received by it, it was not unreasonable for the Respondent to be unaware of the hearing. Further, it is understandable that it did not take steps to chase the Tribunal during the four months prior to the hearing. Mr Hall runs a building contractor business and does not have experience in the Tribunal. Four months is not an excessively long period for a Respondent to wait, particularly against the backdrop of the pandemic.

8. Although there was clearly non-compliance with the Tribunal's orders, the Respondent was not aware of them. In those circumstances, it is not appropriate or in the interests of justice to make a costs order because of that non-compliance.
9. Finally, the hearing was postponed on the Respondent's application. However, he asked for the postponement as soon as he became aware of the hearing and apparently before counsel was instructed. It was through no fault of his that no decision was taken before 14 December 2020. Again, in those circumstances, it is not appropriate or in the interests of justice to make a costs order because the hearing had to be postponed in those circumstances.

Employment Judge Davies

7 May 2021

17 June 2021