EMPLOYMENT TRIBUNALS

Claimant ***Respondent***

Mr L De Zoysa **AND** Rendall & Rittner Limited

HELD AT: London Central via CVP on 11-14 May 2021 and in Chambers on 11 June 2021

BEFORE: Employment Judge Nicolle

Members: Ms T Shaah
Ms L Jones

Representation:
Claimant: Mr R Bullock, of counsel
Respondent: Ms B Omotosho, solicitor.

Application for costs made by the Respondent in a written application dated 31 March 2021 and repeated at the above hearing and in written submissions dated 28 May 2020.

JUDGMENT

The Respondent's application for costs succeeds in part. The Claimant is ordered to pay the Respondent £720.

REASONS

1. By a letter dated 31 March 2021 the Respondent applied for costs pursuant to Rule 76 (1) (a) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the Rules) in the sum of £7,897.

2. At the conclusion of the hearing on 13 May 2021 the parties were invited to make submissions to include on the issue of costs. The submissions of Mr Bullock did not include any reference to costs.

3. Ms Omotosho included detailed submissions on the application for costs. There is no need to repeat what she had previously set out in the Respondent's application dated 31 March 2021. She did, however set out the

chronology of events after that application to include what she refers to as the continuing failure by the Claimant and Mr Bullock to comply with orders of the Tribunal up to and then during the full merits hearing.

Background and chronology of relevant events

4. The Claimant was employed by the Respondent between 5 November 2013 and 10 April 2019 as a concierge.

5. On 27 July 2019, the Claimant presented a claim to the Employment Tribunal for unfair dismissal, race and sex discrimination and an unauthorised deduction from wages.

6. The Respondent served its response on 6 November 2019.

7. The case was originally listed for a four-day hearing from 16 to 21 April 2020 but was postponed due to the initial lockdown.

8. On 14 July 2020, the Tribunal notified the parties that the case had been relisted for a hearing scheduled to take place in person from 18 to 21 January 2021.

9. On 7 and 13 January, the Tribunal wrote to the parties seeking confirmation as to whether they were ready to proceed and that this could take place by CVP (video).

10. On 13 January 2021, I introduced myself by email to the parties as the Employment Judge assigned to the case and requested confirmation from the parties that the matter could proceed by CVP and that they had access to the required technology for a remote hearing.

11. In an email of 11:03 on 14 January 2021 the Claimant responded setting out what he referred to as “major and bigger problems”. In summary this was his not having a suitable device or computer to participate properly in an online hearing. He went on to say that he was shielding but produced no documentary evidence to support this assertion or state why he was shielding.

12. On 14 January 2021, the Respondent’s representative offered to make one of the Respondent’s business premises available for the Claimant to access the hearing remotely.

13. In an email of 15:47 on 14 January 2021, I asked the Claimant for confirmation that he could proceed given the alternative offered by the Respondent.

14. At 16:47 on 14 January 2021 the Claimant responded ignoring my question and recommending that the matter should be relisted for the summer/autumn when both he and his witnessed would be available and able to attend.

15. I sent a further email to the Claimant at 17:01 on 14 January 2021 asking him or his representative to respond confirming if the matter could proceed remotely, given the alternative offered by the Respondent. I asked the Claimant or his representative to provide a full explanation if they did not consider this was possible.

16. In an email from the Claimant at 17:52 on 14 January 2021 he referred to the risk of travelling to the alternative site given that he was currently shielding. He also complained that the alternative site offered by the Respondent was not a "neutral venue".

17. In a further email of 17:58 on 14 January 2021, I asked the Claimant to provide details of why he was shielding, his medical condition and notification from the government that he was in an extremely vulnerable category.

18. In an email from the Claimant of 19:25 on 14 January 2021 he provided no evidence of why he was shielding but said that his witness was experiencing symptoms of Covid.

19. In an email of 5:54 on 15 January 2021, in the form of an unless order, I set out specific matters on which the Claimant needed to respond by 11:00 that day failing which all, or part, of his claim may be struck out for non-compliance. I asked the Claimant to:

a) confirm he could immediately exchange witness statements, if not why?

b) specify the medical condition he was shielding with, that this would prevent his travel to the proposed alternative site and to provide any medical evidence supporting this; and

c) provide the name of any witness shielding, what matters they are to give evidence in relation to, evidence of the medical condition and confirmation from GP, Department of Health, NHS or treating specialist confirming that the witness should shield and the extent to which they can leave home and for what purposes.

20. At 9:18 on 15 January 2021 the Claimant responded confirming that he could exchange witness statements. He said he had not claimed he has a medical condition and that he "must have misunderstood what is meant by shielding" and he only meant to say he was "shielding himself from Covid 19". He referred to another of his witnesses who had received a positive Covid test.

21. The Respondent was very keen that the hearing should take place if possible and objected to the various reasons put forward by the Claimant as to why this would not be possible.

22. I decided that the most appropriate course was to list a Closed Preliminary Hearing (CPH) by telephone at 10:00 on 18 January 2021 and

provided the parties with dial in details in an email of 15:34 on 15 January 2021. The purpose of the CPH was to consider whether the Full Merits Hearing (FMH) could proceed as scheduled.

23. Ms Omotosho, the Respondent's representative, together with the nonlegal members, joined the call but notwithstanding various attempts by email to facilitate the participation of the Claimant and Mr Bullock, his representative, I decided by 10:37 that we could not wait any longer and adjourned the CPH and postponed the FMH.

24. After the hearing had ended the Tribunal was contacted by the Claimant and Mr Bullock to say that they were now attempting to join the now concluded call. Given the time which had already elapsed, and the clear instructions to join by the number provided in my email of 15:34 on 15 January 2021, I did not consider that it would be beneficial to attempt to set up a further call.

25. Notice was given by Ms Omotosho that the Respondent would be making a written costs application in respect of the postponement of the FMH.

Case management order dated 18 January 2021.

26. Following the abortive hearing referred to above I sent the parties a case management order which included the provisions below:

ORDERS

Made pursuant to the Employment Tribunal Rules of Procedure

27. The Claimant and Mr Bullock are asked to provide an explanation by 16:00 on 25 January 2021 as to why they failed to join the telephone closed preliminary hearing between 10:00 and 10:37 notwithstanding the clear instructions given that the hearing would be held via telephone and not CVP given the objections raised by the Claimant to CVP.

28. The Claimant is asked to provide evidence by 16:00 on 25 January 2021 that his witnesses were respectively shielding because of a specified medical condition and had received a positive coronavirus test.

29. The Claimant responded in an email of 00:58 on 25 January 2021 (but not copied to the Respondent in accordance with Rule 92) in which he stated:

"In the afternoon on 15 January 2021 I received an email from Mr Zachary Epstein of the Employment Tribunal giving me new details of the link for the hearing. At around 9:50am, on Monday 18 January 2021, I clicked on the link the ET had emailed to me by Mr Epstein at CET in the belief this was correct but was not able to join the hearing.
These technical difficulties continued up to 10:40am.

During this time, emails were exchanged with the Respondent's representative, Ms Omotosho to confirm both myself and my Barrister Robert Bullock had tried to join in.
Please note, that he had successfully connected by telephone as well, but no one answered. I was told I had been disconnected; Conference host has not joined. Several attempts were made between 0950hrs and 1040hrs.
While attempting to login and updating the Judge via email, I found another link to phone in. Again, when I rang this, I was placed in a queuing system, with music playing in the background while I waited to be accepted on the call which never happened.
FYI: I attach screen shots to confirm that I did try to log in and the message I got on the screen. I also attach the evidence of Mr Edrisinghe's notification from the NHS of Covid positive test result and isolation dated 7 January 2021 and Mr Sheehan's notification of NHS shielding requirements due to his highly vulnerable status dated 7 January 2021."

The Law

30. Rule 76 provides:

> **When a costs order or a preparation time order may or shall be made**
>
> 76 (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.

31. The following propositions relevant to costs may be derived from the case law:

32. There is a two-stage exercise to making a costs order. The first question is whether a paying party has acted unreasonably or has in some other way invoked the jurisdiction to make a costs order. The second question is whether the discretion should be exercised to make an order (Oni v Unison ICR D17).

33. Costs orders in the Employment Tribunal are the exception rather than the rule (Gee v Shell [2003] IRLR 82, Lodwick v Southwark [2004] ICR 844).

34. While the threshold tests for making a costs order are the same whether or not a party is represented, in the application of the tests it is appropriate to take account of whether a litigant is professionally represented or not. Litigants in person should not be judged by the standards of a professional representative (AQ Ltd v Holden [2012] IRLR 648).

35. While a precise causal link between unreasonable conduct and specific costs is not required, it is not the case that causation is irrelevant. In Yerrakalva v Barnley MBC [2012] ICR 420 Mummery LJ said:

> "41. 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. The main thrust of the passages cited above from my judgment in McPherson's case was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the employment Tribunal had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission, I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances".

Conclusions on the Respondent's application

36. The Respondent says that explanations provided by the Claimant for his non-attendance were unsatisfactory and inconsistent. However, it is not clear whether the Respondent's representative had seen the Claimant's email of 25 January 2021.

37. I consider that the Claimant's email of 25 January 2021 was sufficient to comply with the terms of the unless order contained in my case management order dated 18 January 2021.

38. I nevertheless consider that in respect of various elements of the Claimant's conduct, from 14 January 2021 when he referred to "major and bigger problems" up to and including the abortive hearing scheduled to commence on 18 January 2021, he was acting unreasonably under Rule 76 (1) (a). I reach this finding for the following reasons:

39. The Claimant provided inconsistent reasons for a postponement request. His reasons ranged from having a "major and bigger problem", of not having a suitable device and access to the Internet, to "shielding" and then to his witness having tested positive for Covid and needing to self-isolate.

40. Then despite clear instructions neither the Claimant nor Mr Bullock managed to join the scheduled telephone CPH, listed as a precursor to the scheduled FMH within 35 minutes of the appointed time on 18 January 2021.

41. On 31 March 2021, the Respondent submitted a detailed costs application and a strike out request together with a client ledger from 31 December 2020 until 3 March 2021. The strikeout application was considered at the beginning of the hearing on 11 May 2021 and dismissed but it was agreed that the costs application would be considered at the end of the hearing.

42. I had originally intended to address the costs application in writing and with a view to doing so I instructed the Tribunal administrative staff to send letters to the Claimant dated 19 April 2021 and 4 May 2021 seeking his confirmation that it remained his intention to actively pursue his claim, inviting him to make any representations in relation to the costs application and provide any evidence of his means. He failed to do so, and the matter had not been considered prior to the hearing on 11 May 2021.

43. At the hearing Mr Bullock's representations were primarily in respect of the respective strikeout applications but he did personally apologise for his oversight regarding the instruction to join the CPH by telephone on 18 January 2021.

<u>Mr Bullock's status as the Claimant's representative</u>

44. The Claimant appeared to state that Mr Bullock was acting on a pro bono basis and therefore would not constitute a "Representative" under Rule 80 against whom it would be possible for the Tribunal to make a wasted costs order against Mr Bullock.

45. I subsequently sought clarification from Mr Bullock as to his status and he clarified his position as follows:

a) He has at times in the proceedings, specifically in respect of some earlier hearings, waived charging the Claimant a fee, however, he has not said he is acting pro-bono in respect of the most recent hearing.

b) He acknowledges that the Claimant stated at the hearing that he has worked for free on his case, which is true regarding most of the previous hearings, and this was misunderstood to mean he is not charging any fee at all for this case.

c) He has not expressly agreed to waive any other fees in this case.

46. Given the circumstances set out above we are satisfied that Mr Bullock constitutes a Representative under Rule 80.

Breakdown of the Respondent's costs

47. We consider it appropriate to award part of the Respondent's costs to incurred in the preparation for the FMH scheduled to commence on 18 January 2021. We consider that an appropriate time in respect of which to make such an award is from 14 January 2021 up to and including work undertaken on 18 January 2021.

48. From the ledger provided by Ms Onotosho this gives a total of £2,880. We do not, however, consider that it would be appropriate for the entirety of this sum to be awarded as costs given that a significant proportion of the work undertaken in this period would almost certainly have been required to be undertaken at some point in any event, for example, the exchange of witness statements. It is not possible from the information provided to apportion on a precise basis between costs wasted and what would have been required in any event and therefore we consider that the award of 50% of £2,880 is appropriate giving a figure of £1,440.

49. The reason for determining that this sum in respect of this period is appropriate is the conflicting explanations given by the Claimant for his postponement applications and then failure to provide an entirely credible explanation as to the inability of both him and his representative to attend the CMH by telephone on 18 January 2021 despite no one else experiencing any technical difficulties. We consider that despite extensive efforts made by the tribunal, Employment Judge Nicolle, and the Respondent that the Claimant's approach was to find various reasons, not all of which we consider entirely plausible or consistent, as to why the hearing could not take place and it is this conduct which we consider having been unreasonable.

The full merits hearing between 11 and 14 May 2021.

50. We do not consider it appropriate to make a further order for costs in respect of the Claimant's conduct at the above hearing. Whilst the start of the hearing was delayed by his attempt to join the CVP from his iPhone, and he arrived approximately 45 minutes late on day 2 as result of travel difficulties, we consider that it would be a disproportionate to award costs in the circumstances. We are mindful that the Claimant would appear to have limited IT ability and consider that, at least in part, a costs award would be penalising him in circumstances where this would not have arisen had the hearing taken place, as would have been the case absent the pandemic, in person.

51. In any event we consider that it would be a difficult to specifically apportion any additional costs to the above delays given that the evidence was completed within the allotted 4 days and the Tribunal spent most of the delay on the opening day in reading the bundle and statements.

The Claimant's means

52. In accordance with Rule 84 it is necessary for us to consider in deciding whether to make a costs order, and if so in what amount, the paying party's ability to pay.

53. The Claimant under cover of an email from Mr Bullock of 21 May 2021 provided the following evidence as to his means:

List of Liabilities

Lloyds overdraft. - £982.35
Lloyds credit card. -£15,460.00
NatWest overdraft - £5743.56
Net west credit card- £688.17
RBS credit card. - £365.30
RBS Loan. - £28,338.00
Amex - £3,077.65
Landmark Loan. -£29,942.00
Landmark mortgage-£125000.00
Payments Landmark mortgage (interest only)-£497.97
Per month
Built in loan-£161.21 per month.
Total- £659.18
Secured Loan/ Mortgage Penalties/redemption/payment towards the property service change fee-21,133.57.
Childcare- £400.00 per month
Property service charge-£340.00 per quarter,
Outstanding at present- £1387.61
Some payments made towards the mortgage & secured loan with the help of friends & family to avoid legal proceedings.

Income (monthly)

Monthly wage -£ 1720.00

My average monthly income (take home pay) is less than £2000 pcm net and has only temporarily been over this level because of overtime due to temporary staff shortage.

Outgoings (monthly)

Electric- £80.00
Water-£40.61
Food -£120.00
Mortgage-£630.00
Service change-£112.00
Ground rent-£30.00
Council tax £120.00
TV license-£13.25

Car insurance-£61.00
Fuel -£120.00
Vehicle maintenance/MOT-£50.00
Road tax-£14.43
Child maintenance (Four children)-£400.00
Mobile contract-£21.10
Debt collection (£1.00 -£5.00 each minimum payments) Total -£11.00
Clothing-£30.00
Grooming- £20.00

54. In effect the Claimant is contending that he has very limited, if any, surplus income with an actual monthly surplus of income over outgoings of £126.61.

55. Taking account of the circumstances set out above, and the limited evidence as to the Claimant's means, we have decided that it would be appropriate to award £720.

56. In deciding on the above figure, we consider that under Rule 84 a figure equating to approximately 6 months of the Claimant's surplus income would be appropriate and that any award more than this would be disproportionate and unduly punitive.

Wasted Costs

57. She further says that Mr Bullock as the Claimant's representative should be personally responsible for wasted costs under Rule 80. This provides that a tribunal may make a wasted cost order against a representative in favour of any party ("the receiving party") where that party has incurred costs (a) as a result of any in improper, unreasonable or negligent act or omission on the part of the representative; or (b) which, in the light of any such act of omission occurring after they were occurred, the tribunal considers it unreasonable to expect the receiving party to pay.

58. It was established that Mr Bullock constitutes a "Representative" for the purposes of Rule 80(2) on the basis that he was acting on a contingency or conditional fee arrangement.

59. Under Rule 81 the effect of a wasted cost order is that the Representative may be ordered to pay the whole or part of any wasted cost of the receiving party or disallow any wasted cost otherwise payable to the representative, including an order that the representative repay to its client any costs which have already been paid.

60. Ms Omotosho referred to the guidance in Ridehalgh v Horsefield [1994] CH 205 namely:

- Has the legal representative of whom complaint is made acted improperly, unreasonably or negligently?

- If so, did such conduct cause the applicant to incur unnecessary costs?
- If so, is it in all the circumstances just to order the legal representative to compensate the applicant for the whole, or any part of, the relevant costs?

61. We do not consider it appropriate to make a wasted costs awarded against Mr Bullock. Whilst Mr Bullock candidly acknowledged that he was at fault for not following instructions are to join the closed preliminary hearing by telephone at 10 AM on 18 January 2021 we do not consider that his inadvertent failure to appreciate that the hearing had been converted from CVP to a telephone CPH was sufficient to warrant a wasted costs order. In any event we do not consider that that the Respondent necessarily incurred any additional costs as result of this failure as it would almost certainly have been the case that the full merits hearing would not have commenced in any event given the multiple reasons put forward by the Claimant as to why he and his witnesses could not participate in a CVP full merits hearing.

Conclusion

62. We do not consider that the Respondent's time or costs are unreasonable. We have considered the Claimant's ability to pay.

63. The costs awarded against the Claimant are therefore £720.

Employment Judge Nicolle

Dated: 17 June 2021

Reasons sent to the parties on:

18/06/21.

For the Tribunal Office