



EMPLOYMENT TRIBUNALS

Claimant
Mr. B Randall

v

Respondent
Trent College Ltd

AT A COSTS HEARING CONDUCTED ON THE PAPERS

Heard at: Nottingham

On: 6th July 2021

Before: Employment Judge Heap (Sitting Alone)

Representation

Claimant: Written representations

Respondent: Written representations

JUDGMENT ON COSTS

The Respondent is Ordered to pay to the Claimant the sum of £900.00 in respect of his costs incurred in respect of a Preliminary hearing on 7th June 2021.

REASONS

BACKGROUND & THE ISSUES

1. This hearing was listed following a Preliminary hearing which took place on 7th June 2021 at which I indicated that I was considering making a costs Order against the Respondent as a result of their failure to comply with Orders made which had resulted in the substantive hearing having to be postponed.
2. At that hearing I Ordered the Claimant to set out Counsel's fees incurred in preparation for and attendance at the Preliminary hearing which was duly complied with. The costs incurred were in the sum of £750.00 plus VAT (or £900.00 inclusive of VAT).
3. I gave the Respondent the opportunity to make representations as to why a costs Order should not be made. Those representations were settled by Mr. Wilson of Counsel on 14th June 2021. I say more about that below.

4. However, before that stage it is necessary to rehearse what happened in the run up to the Preliminary hearing on 7th June 2021 and the adjournment of the substantive hearing.
5. There was a Preliminary hearing for case management which took place before Employment Judge Adkinson on 25th April 2020. At that stage the substantive hearing was listed to commence on 14th June 2021 for a period of 12 days and Orders were made, including for the exchange of witness statements which were due to be exchanged on 30th October 2020. A short extension of time was agreed between the parties until 13th November 2020. I understand that the Claimant had chased the Respondent's solicitors after that date on a number of occasions seeking to exchange witness statements but there was a lack of engagement and as such the exchange of statements could not progress. In short, it is plain that the Respondent was not ready to exchange its witness evidence.
6. On 25th May 2021 I held a further Preliminary hearing, the primary purpose of which was to discuss the fact that the Tribunal would not be able to sit on one of the days scheduled for the hearing to take place. However, at that hearing it was raised that there had still been no exchange of witness statements. Given the imminent hearing date that was now a pressing matter.
7. Counsel instructed by the Respondent for that hearing could give me no explanation at all about why witness statements had not been exchanged but he told me that the Respondent was still not in a position to deal with that and sought until 2nd June 2021 as a variation of Employment Judge Adkinson's Orders. That was opposed on the basis that the Claimant needed to instruct Counsel for the substantive hearing and that needed to be done sooner rather than later so that he had proper time to prepare. Having heard from the parties I was only prepared to afford the Respondent a modest extension of time to 4.00 p.m. on 28th May 2021. The Respondent, via Mr. Wilson of Counsel, made an application for reconsideration which I refused at that hearing and I made it plain that statements must be exchanged as had already been Ordered.
8. Despite that, the Respondent still failed to comply and, as the Claimant rather accurately put it in correspondence, "helped themselves" to the further time that they wanted by making a further application for an extension of time after the point that the exchange of statements had already passed. That application was made at 16.18 on 28th May 2021. Given the time that it was made, there was little option given to the Tribunal in regard to that application given the failure of the Respondent to comply but to ultimately grant it.
9. Even then, the Respondent has still failed to comply with the extension of time that they "helped themselves" to. There remains an outstanding witness statement in respect of a Mike Abraham which was the sole purpose, according to the application, of the need for an extension of time. Indeed, even at this stage the Respondent has not exchanged the witness statement of Mr. Abraham and there is no indication when in fact they propose to do so. The Claimant has invited me to refuse to admit that evidence, but I have dealt with that application separately.

10. I had directed that there would have to be a further Preliminary hearing which took place on 7th June 2021 because the Claimant had, understandably, raised that they were now prejudiced if the hearing went ahead because of a lack of time to prepare. When listing that hearing I directed that a full explanation for the failure over a period of 7 months to exchange witness statements needed to be given by the Respondent at that Preliminary hearing. Despite that, Counsel for the Respondent had not been given instructions on that issue and I still have no explanation at all for that state of affairs. I had also Ordered that the Respondent file a chronology setting out the steps that they had taken to obtain and finalise witness statements. That was not complied with either and I received no reasonable explanation from Counsel at the Preliminary hearing as to why that was the case.
11. The Respondent's persistent failure to comply with Orders made without any explanation led me to indicate that I was considering making a costs Order.

THE RESPONDENT'S POSITION

12. As I have indicated above, Mr. Wilson of Counsel has settled written representations as to the issue of costs. I have summarised those representations here but the parties can be assured that I have considered what has been said in detail.
13. Mr. Wilson's submission is that the focus should be on the Respondent's conduct between the Preliminary Hearing on 25th May 2021 and 1st June 2021. He submits that steps taken on behalf of the Respondent to obtain witness evidence were reasonable and that it was outside the Respondent's control to require Mr. Abraham to finalise his witness statement by the deadline of 28th May 2021 as I had Ordered. It is also submitted that there remained time for the Claimant to prepare before the hearing was due to commence in the eight working days before 14th June.
14. It is further submitted that the Respondent's conduct of the litigation following the making of the relevant case management orders on 25th May was reasonable and, that, accordingly that it would not be proper to make a costs order against them under Rule 76(1)(a) on the grounds of unreasonable conduct of the litigation. The delay in compliance with the original case management order for exchange of witness statements is, it is submitted, of much less relevance in this regard because if the Respondent had not encountered difficulties in complying with the relevant case management orders made on 25th May, then there would have been no need for the Preliminary Hearing on 7th June 2021.
15. It is also submitted that the substantive hearing could still have proceeded without significant prejudice to the Claimant and it is said that it would be wrong to conclude that the Respondent should carry the blame for the postponement and that they should not therefore be ordered to pay the Claimant's costs incurred on 7th June 2021 under Rule 76(2).

THE LAW

16. Rules 74 to 84 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("The Regulations") deal with the question of whether an Employment Tribunal should make an Order for costs.

17. Rule 76 sets out the relevant circumstances in which an Employment Judge or Tribunal can exercise their discretion to make an Order for costs and the relevant parts of that Rule provide as follows:

"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."

(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.

18. In short, therefore, there is discretion to make an Order for costs where a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing or conducting of the proceedings. Equally, the discretion is engaged where a party is in breach of Orders made by the Tribunal.

19. With regard to unreasonable conduct it is necessary for the Tribunal to consider *"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."* (**Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78**)

20. It should be noted that merely because a party has been found to have acted vexatiously, abusively, disruptively or unreasonably or where Orders have not been complied with, it does not automatically follow that an Order for costs should be made. Once such conduct or issue has been found, a Tribunal must then go on to consider whether an Order should be made and, particularly, whether it is appropriate to make one. When deciding whether an Order should be made at all and, if so, in what terms, a Tribunal is required to take all relevant mitigating factors into account.

21. In accordance with Rule 84, a Tribunal is entitled to have regard to the ability to pay any award of costs both in relation to the making of an Order at all, or the amount of any such Order. However, it is not a mandatory requirement that such consideration must automatically be given.

CONCLUSIONS

22. I begin by considering whether the tests contained within Rule 76(1) or (2) Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 are met.
23. I do not accept the submissions of Mr. Wilson that the focus of the Respondent's failure to comply should only be between the Preliminary hearing on 25th May 2021 and 1st June 2021.
24. It is telling that, despite an Order for a chronology of the steps taken to obtain witness evidence having been made that has never been complied with nor do Mr. Wilson's submissions deal at all with what happened in the intervening period of almost seven months between 13th November 2020 and 1st June 2021. Paragraph 2.3.1 of my Orders made on 7th June 2021 also required the Head of Department at Irwin Mitchell to confirm why the Order was breached to file that chronology. She did not comply with that part of the Order and I am still none the wiser as to when the Respondent actually took steps to take and prepare witness statements, let alone when they were sent to the relevant witnesses for approval. Again, that state of affairs is entirely unacceptable given the circumstances and the persistent failure to comply with Orders made.
25. The relevant period in my view is clearly between 13th November 2020 (the revised date for exchange) and 1st June 2021. The date for the exchange of witness statements had been Ordered at a hearing on 24th April 2020. That gave the Respondent's solicitors almost seven months to obtain and prepare statements from the relevant witnesses before they were due to exchange. That was a very generous period of time and more than sufficient for a Respondent who had instructed a national firm of solicitors to ensure compliance.
26. Given the unexplained failure to prepare the chronology and the failure to engage with correspondence from the Claimant about the exchange of statements, I can only infer that no or inadequate steps were taken during that seven month period from April to November 2020 to obtain and prepare witness evidence. That would have included the evidence of Mr. Abraham and as such it cannot be the case as Counsel suggests that it was outside the Respondent's control to have his statement prepared and approved so as to comply with either the Orders of Employment Judge Adkinson or, indeed, those which I made on 25th May 2021. By that stage, the Respondent had had almost 14 months to prepare, finalise and exchange witness statements. By any stretch it was entirely within their gift to comply.
27. I also do not accept the Respondent's submissions that the hearing could have proceeded despite their failure to comply with the Orders of 25th May 2021. The Claimant has a lay representative who needed to instruct Counsel for the hearing. He would have had to take instructions from the Claimant as to the content of the statements before briefing Counsel who would then have had to take time to prepare and most likely take additional instructions. It was inconceivable that all that would have been practicable within the 8 working days left before the hearing. The

Claimant was placed in a very difficult position given that he had wanted the hearing to proceed but was prejudiced in preparation given the inaction of the Respondent.

28. In addition, the Claimant was faced with an uncertain position as to whether Mr. Abraham was to be called at all and whether a potential application for a witness Order was going to be made either at the start of or at some unspecified point during the hearing itself.
29. The failure of the Respondent to comply firstly with the (albeit revised) Orders of Employment Judge Adkinson and my Orders of 25th May 2021 directly resulted in the postponement of the substantive hearing. I have received no explanation – let alone a reasonable explanation - about that position and why statements could not have been taken and finalised in the almost 14 months after the hearing on 24th April 2020.
30. Moreover, the Respondent misses the point that the costs issue relate to the costs incurred at the Preliminary hearing which had to be listed entirely because they had failed to comply with Orders made. Given the earlier Preliminary hearing in May 2021, there would have been absolutely no need for the additional 7th June 2021 hearing but for the Respondent's continued non-compliance.
31. I remind myself that the Respondent has instructed a national firm of solicitors with significant resources to represent them. That is to be contrasted with the Claimant who has lay representatives but who have been ready – and indeed have chased – to exchange statements for several months now.
32. The failure – without any excuse let alone reasonable excuse – to comply with the Orders of Employment Judge Adkinson and myself amounted both to unreasonable conduct within the meaning of Rule 76(1)(a) of the Regulations and also falls within the provisions of Rule 76(2).
33. The conduct was plainly unreasonable given that the Respondent was aware of the Orders of Employment Judge Adkinson; failed without excuse to comply with them; ignored correspondence from the Claimant seeking to ready the claim for hearing; failed to comply at the eleventh hour with Orders that I had made to ensure that the substantive hearing could still proceed and that conduct resulted in a further Preliminary hearing that would not have been otherwise necessary having to be listed and the disruption to the Claimant and to the Tribunal of having to postpone a long since listed 12 day hearing.
34. The first limb of the test for making a costs Order is therefore more than satisfied. However, that is not the end of the matter and I must now consider if such an Order should be made. That includes considering if there are any mitigating factors which weigh against the making of an Order. There are none, or at least none that I have been made aware of.
35. As I have already observed, I do not accept that the focus should be on the period between 25th May 2021 and 1st June 2021. Any difficulties in getting Mr. Abraham to finalise his statement would therefore appear to result from him being sent that at a very late stage (again that is my inference absent the chronology as I have already said above) and could

have been entirely avoided had the Respondent taken prompt, proper and reasonable steps to obtain and prepare their witness evidence. As I have already observed, they had almost 14 months to have done so from the Preliminary hearing before Employment Judge Adkinson.

36. There are therefore no mitigating or other factors which weigh against the making of a costs Order and I therefore exercise my discretion, of my own volition, to do so.

37. I should finally observe here that the sorry picture painted above and the somewhat cavalier attitude to compliance with Orders made – including those made which called for an explanation for non-compliance – is one which the Tribunal will not expect to encounter again in these, or indeed any other, proceedings. The Respondent and their solicitors will therefore have to ensure that all further Orders are complied with to the letter.

THE AMOUNT OF THE COSTS ORDER

38. The Respondent accepts that the sum claimed by the Claimant is not unreasonable nor do I consider them to be for Counsel's preparation and attendance at the Preliminary hearing.

39. Moreover, there is no suggestion that the means of the Respondent are not such to meet the costs claimed.

40. I therefore make an Order in the sum of £900.00 in respect of Counsel's fees incurred at the Preliminary hearing on 7th June 2021.

Employment Judge Heap

Date: 7th July 2021

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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