



EMPLOYMENT TRIBUNALS

Claimant: A

Respondent: B

Heard: On: 19, 20, 21, 24, 25 & 26 July
5 October
22, 24, 27 and 28 November 2017
6, 7, 8 and 9 March 2018
12, 13 and 16 December 2019 (in chambers)
4, 5, 6, 9, 10, 11 and 12 November 2020
23 March 2021
24, 25 and 26 March 2021 (in chambers)

Before: Employment Judge Brain

Members: Mrs M J Cairns
Mr D R Fields

Representation:

Claimant: A lay representative/written representations

Respondent: Ms K Nowell of Counsel/written representations

RESERVED JUDGMENT

1. The Judgment of the Employment Tribunal is that pursuant to Rule 76(1) and (2) of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 the claimant shall pay the respondent's costs of and occasioned by the adjournment of the hearing listed to take place upon 4 February 2021.
2. The parties having agreed the amount payable by her, the claimant shall pay the sum of £1140.

3. UPON the parties having agreed the mechanism for payment (subject to the Tribunal's judgment upon the issue) the claimant shall pay the sum of £1140 to the respondent by way of set off from the monies due from the respondent to the claimant.

REASONS

1. On 12 November 2020, the Employment Tribunal listed the case for the hearing of submissions. That hearing was listed for 4 February 2021.
2. In circumstances which the Tribunal shall now relate, the hearing listed for 4 February 2021 was adjourned. The respondent makes an application for the costs of and occasioned by them caused by that adjournment.
3. This is the final issue which arises in the course of this long-running litigation. Following 26 days of hearing, the Tribunal deliberated in chambers for three days upon 24, 25 and 26 March 2021. The Tribunal's Reserved Judgment upon merits and remedy was sent to the parties on 3 June 2021.
4. The Tribunal regrets the delay in dealing with the respondent's costs application. In the course of the chamber's deliberations at the end of March 2021, the Tribunal determined that the claimant should pay the costs of and occasioned by the adjournment of the hearing listed for 4 February 2021. The delay in promulgating Judgment confirming the Tribunal's decision is attributable to there being some uncertainty as to whether the respondent was pursuing the application. In the event, the respondent confirmed that they were doing so on 15 June 2021. There was then an unfortunate delay in the respondent's letter of that date being forwarded to the Employment Judge.
5. The claimant succeeded in part with her complaints before the Tribunal. As was agreed when the Tribunal last saw the parties on 23 March 2021 the Tribunal reached its conclusions in principle and left it to the parties to agree quantum.
6. On 9 July 2021, the claimant notified the Employment Tribunal that agreement upon quantum had been reached. On 16 July 2021, the respondent's solicitor confirmed that the information relayed in the claimant's email of 9 July was accurate.
7. The agreement reached between the parties was that the respondent should pay the agreed amount to the claimant less the amount of the costs claimed by the respondent pursuant to the costs application. *(The Tribunal notes that the respondent has effectively retained £950 pending receipt of the Tribunal's costs judgment. In the respondent's solicitor's email of 3 February 2021, the Tribunal was notified that the amount of the costs claimed is £950 plus VAT being the fees incurred for representation by counsel on 4 February 2021. The retention referred to by the claimant (and confirmed by the respondent's solicitor) is in the sum of £950 only. Doubtless, the parties may resolve the discrepancy around the VAT without the need to trouble the Tribunal further upon the point).*

8. Rule 76 of Schedule 1 to the 2013 Regulations says as follows:
- (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*
 - (b) *Any claim or response had no reasonable prospect of success; or*
 - (c) *A hearing has been postponed or adjourned on the application of a party made less than seven days before the date on which the relevant hearing begins.*
- (2) *A Tribunal may also make such an order where a party has been in breach of any order or practise direction or where a hearing has been postponed or adjourned on the application of a party.*
9. By Rule 84, *“in deciding whether to make a costs ... order, and if so in what amount, the Tribunal may have regard to the paying party's ... ability to pay”*. No issue of inability to pay arises in this case given the agreement reached between the parties. Plainly, the claimant is able to pay from the compensation payable by the respondent and indeed the respondent is holding on to a part of the claimant's compensation to bide the event.
10. By reference to Rule 76, no issue arises that the claimant has acted vexatiously, abusively or disruptively or that her claim had no reasonable prospect of success. The respondent's costs application is not made upon any of these bases.
11. The issue that arises is whether the claimant (or her representative) acted unreasonably in the way in which the proceedings were conducted (particularly in late January and early February 2021) and whether the 4 February 2021 hearing was postponed or adjourned upon her application made less than seven days before the date upon which the hearing was due to take place. Further, the Tribunal may also make a costs order in circumstances where the claimant was in breach of an order of the Tribunal leading to a postponement or adjournment.
12. Rule 76(1) is couched in mandatory terms. In other words, the Tribunal shall consider whether to make a costs order where it considers (amongst other things) that a party conducted the proceedings unreasonably and/or that a hearing was postponed or adjourned on the application of a party made less than seven days before the date on which the relevant hearing was due to take place. Rule 76(2) is couched in discretionary terms.
13. The history of matters leading to the costs application requires us to go back to November 2020. It was between 4 and 12 November 2020 that some of the 26 days of hearing time occupied by this case took place. Various case management orders were made during the course of these hearing dates. These are recorded in the record sent out on 27 November 2020.
14. In particular, on 10 November 2020, it was directed that the parties would deliver oral submissions upon 13 November 2020. Then, on 12 November 2020, the Order was varied to provide that submissions would be made on 4 February 2021.

15. The Tribunal directed that written submissions should be exchanged no later than 4pm on 28 January 2021. These matters rested until 26 January 2021.
16. Upon that date, the claimant emailed the Tribunal and the respondent's solicitor. She sought an extension of time for service of the written submissions to 10 o'clock am on 1 February 2021. She cited the demands upon her time including the need to undertake home schooling as a result of the lockdown then in place and circumstances relating to the pandemic affecting her representative.
17. The respondent had no objection to the claimant's application. There was no further correspondence or communication between the parties (so far as the Tribunal is aware). So it was that the respondent's solicitor served the claimant with the respondent's submissions at 10 o'clock on the morning of 1 February 2021.
18. At 11.46 that day, the claimant emailed the Tribunal and the respondent's solicitor to say that there would be a delay in sending her written submissions due to ill health. Unsurprisingly, this generated a response from the respondent's solicitor protesting that the claimant's conduct was "*unacceptable*". The respondent's solicitor sent an email to this effect to the claimant and the Tribunal at 12.03 on 1 February 2021.
19. At 15.43 on 2 February 2021, the claimant wrote to the Employment Tribunal (with a copy to the respondent's solicitor). She said, "*This is to keep the Tribunal updated that the respondent's counsel's availability is being sought at present, in order to make a meaningful application (which includes a request to postpone the hearing scheduled to 4 February 2021).*"
20. At 17.22 the same day, the respondent's solicitor emailed the Tribunal (copying in the claimant). He observed the claimant had not yet made an application to postpone and then set out the respondent's position.
21. On 3 February 2021 (at 12 noon) the claimant made an application to adjourn the hearing listed for the next day and for there to be a variation of the case management orders handed down by the Tribunal. The claimant set out in some detail the family circumstances impacting upon the claimant's ability to prepare for the hearing and to finalise her submissions. This primarily concerned health issues which had affected her son from around Christmas time 2020. Also prayed in aid was the impact of the pandemic upon the claimant's lay representative who, it was said, had suffered from great stress and anxiety from around early January 2021 upon becoming aware of the existence of new variants of Covid-19.
22. The respondent's solicitor emailed the Tribunal (and copied in the claimant) on 3 February 2021 at 14.27. The respondent objected to the postponement application while acknowledging that were the hearing to proceed the next day it would have to do so without the claimant's written submissions. The respondent's solicitor rightly acknowledged that proceeding without written submissions in such a complex case was undesirable. The respondent's solicitor therefore said that, "*In the event that the Tribunal is minded to grant the claimant's late application for a postponement, we seek an order for costs.*" Later the same day, the respondent's solicitor confirmed that the additional costs to the respondent caused by a postponement associated with

a further fee for counsel was in the sum of £950 plus VAT. That is the amount of the order for costs now sought.

23. The Tribunal therefore directed that the hearing listed for 4 February 2021 be postponed to 16 February 2021. The claimant was directed to file and serve her submissions by 4pm on 10 February 2021.
24. Pursuant to Rule 76(1) it is mandatory for the Tribunal to consider whether to make a costs order where the Tribunal considers that a party has acted unreasonably in the way in which part of the proceedings have been conducted. In our judgment, the claimant did act unreasonably given the circumstances set out in these reasons.
25. The respondent's solicitor is correct to point out that the claimant produced no medical evidence at the time of her postponement application around the medical issues affecting her son. That said, the Tribunal accepts the truth of the claimant's account. The Tribunal also accepts the concerns that the claimant's lay representative had around the pandemic in the early part of 2021. These are understandable concerns shared by a great many people.
26. However, the claimant's issues with her son arose around Christmas 2020. Her representative's anxiety around the pandemic were acute in the early part of January 2021. This notwithstanding, the claimant did not notify the respondent of a potential difficulty until 26 January 2021. Matters were then compounded by the claimant not disabusing the respondent's solicitor of the notion that she would, as suggested by the respondent's solicitor, exchange written submissions with him at 10 o'clock pm on 1 February 2021. The claimant said nothing to the respondent's solicitor who, acting in good faith, sent the respondent's submissions to her. Even then, the claimant was not in a position to serve her submissions. This culminated in a very late application to postpone the hearing made on 3 February 2021.
27. Taking all of this in the round, the claimant's conduct around this time was unreasonable. A much earlier application for an extension of time for service of the submissions and/or for an adjournment could have been made. Instead, the claimant left matters very late in the day before notifying the respondent and the Tribunal of her difficulties and even after having done so continued to conduct the matter unreasonably. That is enough, in our judgment, to uphold the respondent's costs application pursuant to Rule 76(1)(a).
28. However, the respondent has more than one string to their bow. Pursuant to Rule 76(1)(c), it is mandatory for the Tribunal to consider whether to make a costs order where a hearing is postponed or adjourned on the application of a party made less than seven days before the date on which the relevant hearing begins. Here, the claimant's application for a postponement was not made until the day before the hearing scheduled for 4 February 2021. The application was made very late in the day and was successful. However, this caused the respondent to incur unnecessary costs. Therefore, pursuant to Rule 76(1)(c) the respondent's application succeeds.
29. Furthermore, Rule 76(2) gives the Tribunal a discretion to consider making a costs order where a party has (amongst other things) been in breach of any order or where a hearing has been postponed or adjourned on the application of a party. We have already determined that the hearing scheduled for

4 February 2021 was adjourned and postponed upon the application of the claimant in circumstances which give rise, in our judgment, to a costs liability. Further, the claimant was in breach of the Tribunal's order to serve her submissions by 4pm on 28 January 2021. Notwithstanding that an extension of time was effectively granted, the claimant then failed to serve her submissions by 10am on 1 February 2021. In the circumstances, we hold the claimant to be in breach of the Tribunal's order made on 12 November 2020 (as subsequently varied by agreement (and as notified to the Tribunal)).

30. For all of these reasons, in the Tribunal's judgment it is just that the claimant shall pay the costs of and occasioned by the respondent upon the postponement of the 4 February 2021 hearing limited to counsel's fees as claimed.

Employment Judge Brain

Date 1 September 2021