EMPLOYMENT TRIBUNALS

Claimant: Mr P Arthur

Respondent: The Protector Group Ltd

Heard at: **Remotely by Cloud Video Platform ('CVP')**

On: **31st August, 1st, 2nd September and 4th October 2021**

Before: **Employment Judge Sweeney**
Lynn Jackson
Stephen Carter

Representation: For the Claimant: Andrew Webster, counsel
For the Respondent: William Haines, consultant

JUDGMENT ON COSTS having been given to the parties on 4th October 2021 and a written record of the Judgment having been sent on 20th October 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

REASONS

Background

1. By a Claim Form presented on **14 October 2020**, the Claimant brought complaints of direct race discrimination, unfair dismissal, detriment under sections 48 and 43B Employment Rights Act 1996 ('ERA'), wrongful dismissal and unauthorised deduction of wages/breach of contract. The complaint of race discrimination was dismissed upon withdrawal on **27 March 2021**.

2. The Final Hearing took place on **31st August, 1st and 2nd September 2021**. The Tribunal adjourned to **04 October 2021** for further deliberations and for judgment to be given orally in the afternoon.

3. The Claimant submitted a costs application in writing on **09 March 2021**. That application was said not to be dependent on the outcome of the Final Hearing. At the end of the day on **02 September 2021**, the Tribunal gave directions for the parties to send their respective written submissions to each other on **17 and 29 September 2021**. After the Tribunal gave its judgment on liability on **4 October**

2021, the parties made further brief oral submissions on the costs application and the Tribunal went on to determine that application that afternoon and gave oral reasons for its decision to award the Claimant costs in the sum of £2,000.

The basis of the application

4. The application was in two parts:

   4.1 The first part related exclusively to the Respondent's conduct of the proceedings in the run-up to a judicial mediation ('the mediation application' made in a letter dated **09 March 2021**);

   4.2 The second part related to the Respondent's conduct of the proceedings more widely ('the wider application' made in a letter dated **17 September 2021**);

Findings of fact

5. On **06 January 2021**, the parties agreed to engage in judicial mediation ('JM'). In preparation for that JM, the Claimant's solicitors sent to the Respondent a schedule of loss on **20 January 2021**.

6. The JM was listed to take place on Monday **01 March 2021**. On Friday 28 February 2021, at 2.15pm on the working day before the JM, the Respondent withdrew from the JM without providing any explanation. The Claimant had incurred fees, including counsel's fees by the date of the Respondent's withdrawal from the process.

7. In terms of the Final Hearing preparation, Employment Judge Aspden made case management orders on **06 January 2021** as follows:

   7.1 The Claimant was to serve a schedule of loss by **13 January 2021**;

   7.2 The Respondent was to serve a counter schedule by **27 January 2021;**

   7.3 Parties were to exchange lists of documents by **15 March 2021**;

   7.4 The Respondent was to prepare a paginated, indexed bundle by **29 March 2021**;

   7.5 The parties were to exchange witness statements by **12 April 2021**;

8. In preparation for Judge Aspden's hearing, on **22 December 2020**, the Claimant's solicitors sent a draft Agenda to the Respondent's representative with a view to agreeing the contents. They received no response despite chasing for one and filed the agenda with the Tribunal on **05 January 2021**.

9. Shortly before the date for exchange of documents on **15 March 2021**, the Respondent proposed an extension of time and the Claimant agreed an

extension until **06 April 2021**. However, the Respondent failed to meet this extended deadline and did not, in fact, provide documents until **22 April 2021**. It was readily apparent that disclosure was incomplete and the Claimant's solicitors were obliged to chase the Respondent a number of times. It took some 2 months to resolve matters. The first draft index was provided on **30 June 2021** Even then, there were some documents missing, which were not disclosed until the course of the hearing and which necessitated the recall of one of the Respondent's witnesses.

10. Of more concern, witness statements were due to be exchanged on 12 April 2021 but were not in fact exchanged until **25 August 2021**. The Claimant's solicitors had expressed in very clear terms their unhappiness and concern about the delay (and the other failures) to the Respondent and had to send reminders which were not responded to.

11. The Claimant's solicitors prepared a breakdown of their costs in this litigation. From that breakdown, some 77 letters referred to are additional letters and emails chasing the Respondent to comply with the directions and prompting it to ensure that the case was fairly and efficiently managed.

Relevant law

12. The tribunal's power to award costs is contained in the 2013 Tribunal Rules of Procedure and in particular within rules 75 to 84.

13. Under rule 76 (1) "a tribunal may make a costs order… And shall consider whether to do so where it considers that-

(a) a party (…) Has acted vexatiously, abusively, disruptively or otherwise reasonably either bringing of the proceedings (or part) for the way that the proceedings (or part) has been conducted;

14. It is well established that 76 (1) imposes a two-stage test: first of all the tribunal must ask itself whether the party's conduct falls within the grounds identified in rule 76 (1) ("the threshold" stage). Secondly, and if it does, the tribunal must ask itself whether it is appropriate to exercise its discretion in favour of awarding costs against that party (the 'discretion' stage).

15. In the decision of **Yerrakalva v Barnsley Metropolitan Council** [2012] I.C.R.420, the Court of Appeal emphasised that it was important not to lose sight of the totality of the circumstances. The tribunal must look at the whole picture when exercising the discretion to award costs or not. It must ask whether there has been unreasonable conduct in the bringing, defending or conducting the proceedings or part thereof and, in doing so, identify the conduct, what was unreasonable about it and what was its effect. Reasonableness is a matter of fact for the tribunal which requires an exercise of judgement.

Submissions on behalf of the Claimant

The Mediation Application

16. The Claimant submitted that the Respondent's conduct in unilaterally withdrawing from JM was unreasonable. Mr Webster referred to **Solomon v University of Hertfordshire** UKEAT/00258/18. In that case ET made costs order in respect of a number of things, one of which was withdrawal from JM day before. Mr Webster submitted that although the costs order was overturned, the EAT did not say that there was anything wrong in principle in ordering costs in such circumstances. Whilst acknowledging that a party could withdraw from JM without giving a reason, Mr Webster argued that fundamentally one could disaggregate the parameters of JM itself from the process of litigation management leading up to the JM. Parties are able to run mediations up to the day before and incur costs – however, he submitted that the mere fact that it is judicial mediation is not a reason not to recover costs where conduct is unreasonable.

The Wider Application

17. Mr Webster submitted that In respect of the wider application, the Claimant was seeking only those costs broadly linked to the Respondent's conduct. He submitted that the Respondent's approach has been unreasonable throughout and we were referred to some 10 emails/letters chasing or reminding the Respondent of the Claimant's concerns regarding non-compliance.

18. C was sympathetic to Mr Haines being ill during the run-up to the Final Hearing. However, Mr Webster submitted that Croner is a substantial organisation and should have something in place to make provision for events such as this.

19. Mr Webster submitted that the most extraordinary aspect was para 3 of the Respondent's letter of 29 September 2021 where it's position appears to be that non-compliance is irrelevant. Mr Webster referred to para 5 of the letter which refers to Mr Haines being on leave from 13 August 2021. However, as no one knew he was on holiday, the Respondent's argument there was, he submitted, unsustainable. Mr Webster submitted that the Respondent's letter only aggravates the issues in this case and underscores the Respondent's unreasonable conduct.

Submissions on behalf of the Respondent

The Mediation Application

20. Mr Haines submitted that JM is entirely voluntary and that he found out on Friday 26 February 2021 that it would not have progressed as previously thought. Therefore, the Respondent made the Tribunal aware as soon as possible so as not to go through a farce of mediation.

21. When asked by the Tribunal Judge why wait until the day before given that the Respondent had been in possession of the schedule of loss for some weeks, Mr

Haines could say only that the Respondent had been discussing matters with him and that when it got closer to the date of the JM, the Respondent came to the view that it would not be successful as the parties were very far apart. Mr Haines confirmed that there had been no attempt to settle matters outside JM.

The Wider Application

22. Mr Haines referred to the Respondent's letter of 29 September 2021 and relied on the content of that letter in response to the applications. He submitted that Mr Webster was wrong to read paragraph 3 as he did, that the Respondent was merely making the point that these things had to be done whether on the date ordered or on any date.

Discussion and Conclusions

23. We have considered carefully both sets of submissions and have read the correspondence between the parties. These reasons are proportionate to the issues raised in the application.

24. The first question we have had to ask ourselves is whether the Respondent's behaviour met the required threshold: namely, did the Respondent act unreasonably in the way in which it conducted part of the proceedings.

The Mediation Application

25. We conclude that the Respondent did act unreasonably in leaving it until the working day before the JM to withdraw from that process. It was the circumstances of the withdrawal that led us to conclude that the Respondent had met the 'unreasonableness' threshold. The Respondent knew what the Claimant was seeking in his schedule of loss – it had been in its possession for some six weeks. It is perfectly reasonable to withdraw consent to mediation because a party takes the view that there is too much distance between the parties and that it would be futile, in such circumstances, to proceed with a JM. In this case, there had been no attempt to resolve matters outside the JM process, which might have afforded the Respondent an opportunity to explore whether any gap could be bridged. In a case where the parties are legally represented, it would be understood that legal fees would be incurred on the Claimant's part. What the Tribunal found to be unreasonable was that the Respondent did nothing between receipt of the schedule of loss and the withdrawal. It had weeks to appraise the Claimant's schedule of loss, yet left it to the day before the JM. The delay, accompanied by the knowledge that the Claimant would be incurring legal fees for the forthcoming JM is what we considered to be unreasonable.

26. Accordingly, rule 76(1) provides that we must ('shall') consider whether to make a costs order within the meaning of rule 75(1)(a). Although we must consider making a costs order, we are not obliged to do so. We retain a discretion.

27. Although this was very much a borderline situation, in the end we decided not to exercise our discretion to award costs incurred on the aborted mediation. The parties are told that they may withdraw from mediation at any point. Whilst we recognise the distinction between the process leading up to and the mediation itself, that is not something that is readily apparent to the parties. As far as the Respondent was concerned we can conclude that it believed it was free to enter into and to withdraw from the process without giving an explanation. Regrettable as it is, and unreasonable as we considered the conduct to be, we feel that to exercise our discretion on costs would undermine the integrity of the process of mediation and the voluntary nature of it.

The Wider Application

28. Turning now to the wider application. From our findings of fact, we are satisfied that the conduct of the Respondent in the proceedings reached the threshold stage. Some slippage in compliance might be expected or at least is not out of the ordinary in litigation. However, in these proceedings, the Respondent's approach to the time-frame and need to adhere to directions was outside the ordinary and was unreasonable. There were many occasions when there was simply no response to the Claimant's solicitors' correspondence. Either no explanations were provided at the time or where they were provided, they were not justifiable given the size of the representative organisation.

29. We agree with Mr Webster that the Respondent's persistent failure to adhere to important deadlines meets the threshold of unreasonable conduct, having regard to the overall circumstances. Essential to our reasoning is that the request for extensions by the Respondent was reasonably met by agreement by the Claimant but those extensions were themselves not met by the Respondent. It is of particular note that there was an unreasonable delay in the provision of documents, then an index, and then more seriously witness statements. Leaving it until more than 4 months after the original date for compliance and 3 days before a hearing considering serious issues such as those involved in these proceedings was in our judgement unreasonable conduct.

30. We do exercise our discretion in favour of awarding costs. We have considered the costs schedule. We were not prepared to order the full amount claimed, being £4,740) but felt that an award of £2,000 should be ordered to reflect the seriousness of the failures, the cost incurred by the Claimant and recognising that we did not have sight of all of the letters/emails said to emanate from the Respondent's conduct.

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Employment Judge Sweeney

22 October 2021