EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Mr S McDonald	Asda Stores Limited
Heard by CVP	**On**: 14 December 2021

Before: Employment Judge Manley

Appearances

For the Claimant: Ms L Hatch, counsel
For the Respondent: Mr F Mortin, counsel

RESERVED
JUDGMENT ON COSTS

1 The respondent has acted unreasonably in the way it has conducted part of the proceedings and it is appropriate to make an order for costs.

2 The respondent is ordered to pay £8139 for legal costs and disbursements (with VAT of £1163.80 being 20% on legal costs of £5819), making the total sum payable to the claimant £9302.80.

3 No order for wasted costs is made.

4 The case proceeds to a hearing already listed for 5 days in October 2022 and orders are made in a separate summary in preparation for that hearing.

REASONS

Introduction and Issues

1 The claim form in this matter was presented on 21 January 2021. The claims are for unfair dismissal, disability discrimination and money claims. No response was presented and judgment on liability was entered on 26 July 2021 with a remedy hearing listed for 21 September 2021. Before that

hearing, the respondent's representatives made an application on 16 September 2021 for judgment to be set aside and to be allowed to present a response out of time. It was said that the claim form had been sent to email addresses at the respondent which had been deactivated. Details of what was said to have occurred is contained in the judgment sent to the parties after the September hearing.

2 At that hearing, in summary, the judgment on liability was set aside and the respondent was permitted to present a response out of time. It is not necessary to repeat here the findings made by Employment Judge Maxwell but I was referred to his written reasons by both parties and have taken into account his findings.

3 The matter was listed for a final hearing with case management orders made at that September 2021 hearing. The claimant's representatives indicated that they would be seeking costs for legal work carried out up to and including the hearing on 21 September 2021 and an application was made in those terms on 3 November 2021 with the respondent objecting to such an order by letter of 19 November 2021. The claimant's representatives provided a schedule of costs with a total sum claimed of £11,638 costs and disbursements of £2500, with VAT bringing the total to £13,965.60.

The hearing

4 This hearing was by CVP and was to determine the costs application and case management for the final hearing. Both representatives provided written skeleton arguments and referred to several cases with guidance on the application of the costs rule. Both representatives also made oral submissions and, given the pressure of time and the need to ensure all case management for the final hearing was completed, I decided to reserve judgment on the application for costs and wasted costs.

Law and submissions

5 The rules under consideration are Rule 76 and 80 Employment Tribunal Rules 2013. The relevant part of Rule 76 reads as follows:

"*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) –
c) –"

6 This rule is similar, but not identical, to previous costs rules in employment tribunals so that some of the authorities refer to older rules with slightly

different wording. There is a useful summary in Harvey on Industrial Relations and Employment Law in the Practice and Procedure division (1101). This extract reminds me of the initial two-stage process that I should adopt of deciding first, if there has been conduct as set out in Rule 76 (1) a) and, if there was, to decide secondly, if it is appropriate to make an order. Only after those decisions, can I move to the third stage to decide the amount payable. The representatives agree on much of the application of the Rule and I set out below where they differ. Both refer me to an extract from the case of Health Development Agency v Parish [2004] IRLR 550 (Parish) where the EAT said at paragraph 21:

"the employment tribunal's power in rule 14 is founded upon a finding as to the way a party has brought or conducted proceedings. In our judgment the conduct of party prior to proceedings or unrelated to proceedings cannot found an award of costs. In our judgment it is necessary for there to be a causal relationship between the conduct of party in bringing or conducting the proceedings and the costs which are awarded under rule 14".

7 The provision to make an award for wasted costs is in Rule 80 (1) which reads:

"*any costs incurred by a party:*

(a) As a result of any improper, unreasonable or negligent act or omission on the part of any representative, or
(b) Which, in the light of any such act or omission occurring after they were incurred, the tribunal considers it unreasonable to expect that party to pay"

The leading case on the application of wasted costs rules remains Ridehalgh v Horsefield [1994] 3 AllER 848. The claimant's application is made on the basis of an allegation that there was negligent behaviour by the respondent's firm of solicitors in the failure to make arrangements for the service of claim forms. As with Rule 76, there is again a three-stage test to decide whether to make such an order and in what amount.

Claimant's submissions

8 The claimant submitted that the threshold test in Rule 76 (1) is met in this case and that my discretion is not fettered by the need to link any award causally to particular costs. I was referred to McPherson v BNP Paribas (London Branch) [2004] ICR 1398 at paragraph 40 where Mummery LJ stated that the tribunal – "*must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion, but that is not the same as requiring the (receiving party) to prove that specific unreasonable conduct by the (paying party) caused particular loss to be incurred*". In Barnsley Metropolitan Council v Yerrakalva [2012] IRLR 78, LJ Mummery provided clarification to the effect that the exercise of discretion involves looking "*at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the (paying party) in*

bringing and conducting the case and, in doing so, identify the conduct, what was unreasonable about it and the effect it had".

9 The claimant's representative submitted that any suggestion in the Parish case that costs cannot be awarded before the receipt of the response is overtaken by the case of Sunuva Ltd v Martin UKEAT/0174/17 where it was decided that a causal connection was not necessary (following McPherson) and costs could be awarded with respect to work before the response. It was submitted that there was unreasonable conduct in this case as summarised in the judgment of Employment Judge Maxwell which was to the effect that email addresses which had been supplied to the employment tribunal for service of claims had been deactivated.

10 It was submitted by the claimant that legal costs had been incurred in preparation for a remedy hearing, including the schedule of loss, a bundle, a relatively lengthy witness statement for the claimant and then responding to the respondent's application. In the alternative, the claimant applies for wasted costs.

Respondent's submissions

11 The respondent opposes the application for costs. Whilst it makes apologies for the fact that there was no response in time, it nevertheless believes there was no unreasonable conduct (or negligent conduct for the wasted costs application). As indicated above, the respondent relies upon paragraph 21 of Parish where it is said that "*conduct of a party prior to proceedings…..cannot found an award of costs*". It is submitted that there was no unreasonable conduct as part of the proceedings because the failures to amend information about email addresses took place in 2020 when the solicitors left their secondments, which was before the claim was presented. It is further submitted that there can be no unreasonable behaviour before the respondent (and its representatives) knew of the proceedings which was not until 15 September 2021 and then they acted promptly.

12 The respondent submits that, even if there was unreasonable conduct, it is not appropriate to make an award of costs in this case because any failures were not malicious or wilful and that the inconvenience to the claimant was stated by Employment Judge Maxwell to be only a delay of about three months. Further it was submitted, and expanded upon in oral submissions, the amount claimed in the schedule of costs is excessive. It is submitted that many of the preparations made for the remedy hearing will be re-used and would be necessary, in any event, for the final hearing. Finally, it is submitted that there should be no wasted costs ordered as there is no conduct that amounts to negligence.

Conclusions

13 I consider first whether there has been unreasonable conduct by the respondent. I appreciate that the failures may have occurred because of arrangements made between the solicitor's firm and the respondent with

respect to dealing with employment law matters, including tribunal claims. I also appreciate the failures were almost certainly not deliberate or wilful. That does not prevent them being unreasonable conduct. The proceedings, as defined in Rule 76 must have begun when the claim form was presented. The fact that the respondent was not aware until many months later after the claim form was sent to email addresses which had been provided, does not mean the conduct to be assessed is not part of those proceedings. Respondents, and, in particular, large employers such as this respondent, must have robust procedures in place to ensure court and tribunal documents are received and dealt with. It is not necessary, in my view, to attribute blame to any individual but, when I consider the impact of the failures, it led to judgment being entered and the listing of a hearing for which the claimant's representatives quite properly prepared.

14 There was unreasonable conduct by the respondent in the way if failed to deal with the claim between it being sent to the email addresses in January and April 2021 up to its own application on 16 September 2021. It amounted to conduct of part of the proceedings.

15 I next consider whether it is appropriate to make an order for costs. In the circumstances of this case, I am satisfied that it is appropriate. The claimant is of limited means and work was done on his behalf which might not needed to have been done, if it had not been for the respondent's conduct. Although the delay to progressing the claim is relatively short, it has nevertheless been a delay which should not have occurred.

16 I turn then to the question of the amount of the award. Here, I am looking at the whole picture and assessing, as far as I am able, what legal costs have been incurred which otherwise would not have been. I accept, as did the respondent's representative, that the claimant's witness statement prepared for the remedy hearing is long and detailed. I also find that that work is not wasted. Of course, it will need updating by the final hearing but most of it will be relevant. The schedule of loss is also detailed but, again, a lot of the information will remain relevant for the final hearing. The same applies to the bundle of documents. The documents remain relevant but time will have to be spent on preparing another bundle. One part of the extra work carried out by the claimant's representatives related to the respondent's application to set aside the judgment and for the response to be presented out of time. That would not have been necessary if the respondent had received the claim form and responded in time.

17 Doing the best I can with the information before me, I have taken the view that about 50% of legal costs can be attributed to that extra work caused by the respondent's conduct. Much of the detailed work carried out by the claimant's representatives will be re-used in preparation for the final hearing. I find that the hourly rates charged are reasonable. Counsel's fees for the hearing in September will be awarded as they were incurred because of the conduct and the respondent's application to set aside the judgment and be allowed to present a response out of time. The amount awarded will be 50% of legal costs in the schedule (50% of £11,638 =

£5819) with VAT of £1163.80 and counsel's fees of £2500. The total as set out above is £9302.80.

18 I make no wasted costs order. Clearly, mistakes were made about information supplied to the employment tribunals about service of claim forms but I do not feel able to go so far as to say that amounts to negligence. Whilst I can see that there was a close connection between the respondent and its legal representatives, it is not clear to me where any fault lay for the failure to ensure claim forms came to the respondent's attention.

19 I then went on to make case management orders for the preparation for the final hearing which are contained in a separate document.

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Employment Judge Manley

Date: 20/12/2021

Sent to the parties on: 1/1/2022

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For the Tribunal Office