EMPLOYMENT TRIBUNALS

Claimant: Mr TK Brian

Respondent: Accrol Papers Limited

Heard at: Manchester **On:** 29 JULY 2021

Before: Employment Judge Sharkett

REPRESENTATION: - APPLICATION CONSIDERED ON THE PAPERS

JUDGMENT ON COSTS

(1) The Respondent's application for a cost award to be made succeeds.
(2) The claimant is ordered to pay to Respondent's costs in the sum of £1,800.

Reasons

1 The Respondent has applied for a cost award to be made pursuant to Rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the Rules). The application is submitted under Rule 76(1) (a) and (b) on the basis that:

a. The claimant throughout the proceedings has acted disruptively and/or unreasonably in the way the proceedings have been conducted, and

b. The claimant's claim for constructive unfair dismissal had no reasonable prospects of success.

2 The application is further made under Rule 76(2) on the basis that the claimant failed on several occasions to comply with case management orders of the Tribunal.

3 The Respondent requested that this application be considered on the papers and the claimant was invited to express his preference but did not reply to communication from the Tribunal. He was informed that if he wished the Tribunal to take his financial means into account when considering whether it was appropriate to make a cost award and if so in what amount. He did not reply to the communication from the Tribunal or provide any evidence of his financial means.

4 The claimant submitted his claim of constructive unfair dismissal by ET1 of 21 September 2017. The basis of his claim was that he had been bullied and harassed for a year and a half. The respondent denied the claims and whilst it accepted that the claimant had previously raised a grievance in 2016 the real reason that the claimant had resigned was because he had been suspended from work from 13 July 2017 pending the outcome of enquiries into allegations of serious misconduct and not in response to an alleged breach on the part of the respondent.

5 In October 2017 the respondent made a request to stay the proceedings before the Employment Tribunal were stayed pending a potential claim for personal injury that had been indicated by the claimant. Attempts were made by the Tribunal to obtain the claimant's instructions but when no response was received Regional Employment Judge Parkin Ordered that the proceedings be stayed for 12 months from 18 January 2018.

6 In November 2018 the claimant asked for the stay to be lifted. The Respondent's confirmed to the Tribunal that their insurers had closed the file on the claimant due to the claimant's repeated failure to respond to requests for information from the insurers but that the requisite limitation date had not yet passed so the claim had not formally concluded.

7 A Preliminary Hearing was held on 25 February 2019 at which Employment Judge Holmes lifted the stay and listed the final hearing for 27-29 November 2019. EJ Holmes noted the need for further information from the claimant and explained the concept of a constructive dismissal and the information he would need to provide in order to succeed in his claim. At that time the claimant expressed some difficulty because his documents relating to his claim had, some three days before, been stolen from his car. This difficulty was acknowledged and the respondent agreed to provide early disclosure of relevant documents to assist the claimant in producing the further details needed. EJ Homes set out in clear terms the information that was needed and he claimant was ordered to provide this by 15 April 2019. The claimant was also required to provide a schedule of loss by the same date and further case management orders were made up to 12 August 2019 when witness statements were to be exchanged. The claimant failed to comply with the

order for further information and the respondent made an application for the claimant's claim to be struck out unless he provided the information ordered. The respondent further sought an order for strike out/deposit on the basis that the claimant's claim had either no, or little, prospect of success.

8 The Tribunal wrote to the claimant enquiring if there was good reason for his failure to comply with the orders of the Tribunal or why an Unless Order should not be made. He was required to respond by 31 May 2019. In response the claimant sent documentation relevant to his claim which had already been disclosed to the respondent, but did not provide the information ordered by EJ Holmes. The respondent repeated its application to the Tribunal and complained at the further delay in being able to know the claim it had to answer and the additional and unnecessary expense it was put to. EJ Holmes issued an Unless Order on 16 July 2019, and afforded the claimant additional time to provide the necessary information. The time for compliance passed and on 16 August 2019, the claimant was afforded another opportunity to explain the non -compliance, notwithstanding the automatic consequences of an Unless Order. A response was received on 25 August in which the claimant accepted that he had not complied and EJ Homes confirmed his claims were struck out on 12 August 2019. He was informed that he had the right to apply to re-instate his claims but in doing so he would need to explain the reason why he had not complied with the previous order; he would also need to show that he had now provided the information. The claimant's application to re-instate his claim was allowed to proceed. In his email to the Tribunal of 10 January 2020 he explained that he had thrown all his paperwork away and considered that he had done everything that had been asked of him and did not know what else was wanted. By letter of 6 March EJ Holmes once again reminded the claimant of the information needed and referred him to the relevant correspondence from the Tribunal.

9 The Preliminary Hearing listed for 1 April 2020 was postponed because of the pandemic but by letter of 4 March 2020 the respondent put the claimant on notice of its intention to pursue an application for costs against the claimant should his application for re-instatement not succeed or if his claim was subsequently struck out because it had no reasonable prospect of success.

10 The Preliminary Hearing eventually took place 8 September 2020. Judgment and written reasons were promulgated refusing the claimant's application for re-instatement.

11 As has been indicated to the claimant the respondent has made an application for a cost award to be made against the claimant and has provided a comprehensive list of the behaviours relied on in making the application. I have had regard to these. I have also had regard to the findings of fact I made in the hearing of 8 September 2020 when I refused the claimant's application to have his claim re-instated.

The Law

12 Rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2017 Schedule 1 provides that:

(1) A Tribunal may make a costs order or a preparation time order and should consider whether to do so where it considers that:

(a) A party (or that party's representative) has acted vexatiously abusively, disruptively to otherwise unreasonably in either bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted;

(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.

13 Under rule 77 a party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the Judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.

14 Under rule 78 a Tribunal may:

(a) Order the paying party to pay the receiving party a specified amount not exceeding £20,000 in respect of the costs of the receiving party;

(b) Order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party with the amount to be determined in England and Wales by way of a detailed assessment carried out by either a County Court in accordance with the Civil Procedure Rules 1998 or by an Employment Judge applying the same principles or, in Scotland, by way of taxation carried out either by Auditor of Court in accordance with Act of Sederunt (fees of solicitors in the Sheriff Court) (Amendment and Further Provisions) 1993, or by an Employment Judge applying the same principles;

(c) Order the paying party to pay the receiving party a specified amount as reimbursement of all or part of a Tribunal fee by the receiving party.

15 Under rule 84, in deciding whether to make a cost (preparation time) or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or where a wasted costs order is made the representatives) ability to pay.

16 In **Barnsley Metropolitan Borough Council v Yerrakalva [2011] EWCA Civ 1255, [2012] IRLR 78**, the Court of Appeal held that when exercising its discretion to order costs a Tribunal must look at the whole picture and ask not only whether the party in question behaved unreasonably in bringing or conducting their case but also identify the relevant conduct, what was unreasonable about it and what effects it had.

17 In accordance with **Saka v Fitzroy Robinson Limited UKEAT/0241/00** the EAT held that a Tribunal may take into account previous failed claims when considering whether to make a costs order against the claimant depending upon all the circumstances and the claimant's understanding of his claim.

18 In accordance with **Lodwick v Southwark London Borough Council [2004] ICR 884 CA** the purpose of an award of costs is to compensate the party in whose favour the order is made and not to punish the paying party. It is therefore necessary to examine what loss has been caused to the receiving party.

19 In **Yerrakalva** the Court of Appeal held that costs should be limited to those reasonably and necessarily incurred. The Tribunal should have regard to the proportionality and reasonableness of the cost incurred and any award made should be limited to those reasonably and necessarily incurred.

20 Under rule 75(1) an order in respect of costs incurred by the represented party means fees, charges, disbursements and expenses incurred by or on behalf of that party, and the amount of the order must obviously reflect that. In addition, as noted by the EAT in **Sunken (UK) Limited and Another v Raghavan EAT 0087/09** the Tribunal must state:

(1) On what basis and in accordance with what established principles it is awarding any sum of costs;

(2) On what basis it arrives at the sum; and

(3) Why costs have been awarded against the party in question.

It is not appropriate to just simply pluck a figure out of the air without giving any adequate explanation as to why the Tribunal chose this figure.

21 The case of *Liddington v 2Gether NHS Foundation Trust UKEAT/0002/16/DA* expressly recognised that although the standard expected of a lawyer does not apply to unrepresented Claimants; this does not grant them immunity from costs order on account of unreasonable behaviour.

22 In reaching my decision I have carefully considered the background to this case and the fact that there have been factors delaying this case that are wholly unrelated to the claimant before the Tribunal. For example, the claim was initially stayed for one year at the request of the respondent pending the claimant issuing a potential personal injury claim. I have regard to the fact however that the insurer’s file on that matter was closed because of the claimant’s lack of engagement. However, behaviour in the conduct of a claim in a different jurisdiction cannot be relied on as unreasonable conduct in considering this application, notwithstanding the stay in place at the time. The Tribunal reminds itself that when the claimant initially applied for the stay to be lifted the respondent did not support such action. There has also been the pandemic and the effect that has had across all sectors of society. The length of time that has passed has therefore not been a primary factor in my decision making.

23 I also have regard to the respondent's argument that the claimant's claim of constructive dismissal had no reasonable prospects of success. In considering this aspect of the application I have regard to the fact that the claimant was a litigant in person who seemed to have difficulty grasping legal concepts. I also have regard to the fact of his previous grievances and his firm belief, whether or not well founded, that he had been badly treated by the respondent. In order to know whether his claim had any prospect of success it would have been necessary to hear evidence of both his complaints and his misconduct and must therefore have had some, if only little, prospect.

24 Turning to the claimant's continued failure to comply with the Orders of the Tribunal. I find that this amounts not only to non-compliance but unreasonable conduct. The claimant was afforded numerous opportunities to provide this information and was assisted with explanations of the law to enable him to better understand his claim. It may be that the claimant was busy at work or had other demands on his time. This did not relieve him from the duty to comply with the Orders of the Tribunal in order to progress his claim. As a result of his failure the respondent has incurred additional expense in pursuing responses from him and making applications to the Tribunal and in preparing for an additional Preliminary Hearing to consider the re-instatement of his claim.

25 In determining to make an award of costs on the basis of the claimant's non-compliance with Orders of the Tribunal and his unreasonable conduct in failing to do so, I have had regard to the fact that the claimant has not provided any evidence of his financial means. I have regard however to the information he offered at the Hearing of 8 September 2020 to the effect that he was in gainful employment, any further details of his means are unknown.

26 I have also had regard to the respondent's schedule of costs, which offers little explanation of the work carried out, although it does give the charge out rates for the fee earners working on the file. I consider that the additional expense the respondent has been put to, relate to the correspondence to the Tribunal following the claimant's failure to comply with the Orders and the preparation for the hearing of 8 September. I do not consider that the claimant should be required to pay the costs of the preparation for the postponed hearing because the postponement of that hearing was out of his control.

27 In respect of the hearing of 8 September 2020, I have regard to the fact that preparatory work had already been carried out in this case between the period of 1 and 30 March 2020. The Hearing itself lasted less than 2 hours and was not a hearing that was document heavy, not did it require the preparation or attendance of witness evidence. Overall, in reminding myself that an award of costs is not for the purpose of punishing the claimant, (although it may have a punitive effect), I consider a fair award for costs incurred as a result of the claimant's failure to comply with the Orders of the Tribunal and his unreasonable conduct in doing so is the sum of £1800. This sum is does not include vat which is not chargeable on this award.

Employment Judge Sharkett
Date: 8 August 2021

JUDGMENT SENT TO THE PARTIES ON
19 July 2022

FOR THE TRIBUNAL OFFICE

Note
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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