EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A Collins	**v**	**A Fulton Co Ltd**

Heard at: Watford (by CVP) **On**: 16 November 2022

Before: Employment Judge R Lewis
Mr D Bean
Ms M Harris

Appearances

For the Claimant: In person
For the Respondent: Mr S Healey, Solicitor

JUDGMENT

1. The claimant is ordered to pay to the respondent costs of £1,500.00.

REASONS

1. The claimant asked for these reasons after judgment had been given.

2. Following the Tribunal's judgment of 5 July 2022, the respondent made a formal application for costs. The hearing had been listed in accordance with the Case Management Order made that day. Shortly before the hearing, and for administrative reasons, the hearing time was moved and the parties were asked to consent (which both did) to a remote hearing by video. The respondent sent the Tribunal by pdf a bundle of 192 pages, which included the claimant's reply to the application.

3. The application was made under Rule 76 which provides that the Tribunal may make a Costs Order where it considers that "a party or that party's representative has acted vexatiously, abusively, disruptively or otherwise unreasonably". As directed by the Tribunal at the July hearing, the respondent had advised the claimant of his right to place before the Tribunal information about ability to pay.

4. In considering a costs application, the Tribunal should follow three stages. The first stage has been called the threshold stage and addresses the question of whether the test set out in Rule 76, which is quoted in part above, has been met.

5. The second question is whether it is in the interests of justice for any Costs Order to be made. The interests of justice involve a balancing exercise between the right of the claimant to access the Employment Tribunal for workplace justice, a right which must be balanced with the requirement to safeguard respondents from unmeritorious claims, and the duty of the Tribunal to ensure that its finite resources are well used. Although the rule does not refer to exceptionality, the Tribunal should bear in mind that costs in the Employment Tribunal do not follow the event in the ordinary course.

6. At the final stage the Tribunal must consider whether to make a fixed figure award or an award for costs to be assessed, and in either event, how the award should be expressed.

7. In its written application, the respondent had expressed the first stage by two routes. The first route was to submit that the entirety of the proceedings was vexatious. It explained this by stating that its case was, put baldly, that the claimant had maliciously fabricated the allegations in this case in anger in response to dismissal. The second route was the one set out in our judgment of July, ie that the claimant had conducted the case unreasonably by ceasing to engage with the tribunal process.

8. We told Mr Healey, at the start of the hearing, that we would not hear an application based on the first route, unless he could show cause to do so in introductory submissions. The Tribunal formed that view on reading papers for two broad reasons. The simplest reason was that it was not necessary for us to reach that conclusion, because in July we had found that the case had been conducted unreasonably. However, the primary reason was that we could not reach a conclusion that the claimant had brought these proceedings vexatiously without having heard evidence. It would not in our view be right to read the witness statements and bundle, and draw on that material alone to reach that conclusion. After a short adjournment, Mr Healey agreed to confine his submissions to the unreasonable conduct identified in the July judgment, which he expressed in short as follows.

9. His submission was that in November 2021 the claimant had written to the respondent to say that he wished to withdraw. As set out in our earlier judgment, he had been told that he had in fact to write to the Tribunal if he wanted to withdraw; he never did so. The following March, 2022, he said that he wished to proceed, but did nothing to progress his case. The work of last minute preparation was therefore wasted and could have been avoided if the claimant had withdrawn properly. Mr Healey's application for costs was limited to costs of solicitors' preparation incurred after 9 November 2021 and did not include an application for Counsel's fees of attending on 5 July.

10. Mr Collins in reply was diffuse and unclear. He repeated that the claim had been properly brought, based on the conduct of the respondent. He used a phrase to the effect that the respondent "initiated proceedings against myself" and "the claim was pushed forward by the respondent". When asked to clarify this form of words, the claimant referred to what he said was a failure by the respondent to engage with mediation or through ACAS.

11. The claimant said that he had been unwell at the time in question, and when asked about this, of which there was no medical evidence, agreed that he had not seen a doctor or taken medication at any of the relevant period, ie between November 2021 and July 2022. As we understood it, his reason was that he felt he had not been well looked after by a doctor or doctors in previous episodes of the same difficulty. He said that he had had support from family and friends, but that not all of those who had supported him had been reliable, with the result that he had been given bad advice to write the withdrawal email on 9 November.

12. When asked by the Judge why he had not attended the hearing in July, the claimant said that he had been unwell, and had had a lot on his plate at the time. He said that he was in a depression, but was not seeing a doctor.

13. When we consider the interests of justice in light of these submissions, we make a number of allowances for the claimant. We accept the claimant's assertions that he sent the withdrawal email on advice which he later thought was bad advice; and we accept that when he wrote the email in March 2022 saying that he wished and intended to proceed, that genuinely reflected his intentions at the time. We accept that in July 2022 he was unwell but not receiving medical treatment, and we record our concern that that may have continued to be the position at this hearing.

14. While we have some sympathy with these points, we also find that the claimant's failure either to complete a withdrawal or prepare as directed placed a burden of cost and work on the respondent, as well as a burden on the Tribunal's system. It does not seem to us in the interests of justice that a party can simply neglect their own claim. We reject the claimant's use of language to the effect that the claim was initiated or progressed by the respondent. A failure or decision not to engage in dispute resolution does not mean that the respondent is the party driving the claim. It was the claimant's claim, and he was responsible for fighting and driving it.

15. The claimant's actions led the respondent to incur the costs of defending the claim. At a time of exceptional burden on the public services, including the Employment Tribunal, the time allocated by Tribunal staff and judiciary to the claimant's case could and should have been available to another member of the public, if the claimant were to proceed with his claim.

16. Drawing the above together, we find that a costs award is in the interests of justice in this case.

17. On ability to pay, the claimant had provided no documentation. He had written only that he is in receipt of Universal Credit and undertakes agency work. He repeated that that remained the position at this hearing. He said that his earnings from agency work were variable and could range between £240 and £1800 per month, and his Universal Credit was £1286. He said that he had no savings and pays rent of £846 per month. When asked what payments he could afford he said no more than £50 per month. (In giving judgment we explained that this Tribunal has no power to order instalment payments).

18. It seemed to us that our decision could not disregard the claimant's ability to pay, although we understand that the rule does not require us to do so. As said above, we were concerned about the claimant's health, and as is obvious, we met at a time of recession, and a cost of living crisis. We could not make any confident prediction about the claimant's further earning power, we have therefore made an award which is objectively modest, and indeed about one thirtieth (ie under 4%) of the respondent's total costs of defending these proceedings.

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Employment Judge R Lewis

Date: 29 November 2022

Sent to the parties on: 2.12.2022

GDJ
For the Tribunal Office