



EMPLOYMENT TRIBUNALS

Claimant: Mr J Davies

Respondents: 1. Martin McColl Limited
2. Sara's Group Limited

Heard at: Manchester

On: 24 October 2022
(in chambers)

Before: Employment Judge Ainscough

JUDGMENT

The judgment of the Tribunal is that the first respondent's application for wasted costs is successful.

REASONS

Introduction

1. On 22 February 2022 the first respondent made an application for wasted costs in accordance with rule 82 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

2. At a preliminary hearing on 13 April 2022 the first respondent and the claimant informed me that they had settled the dispute between them and that all that remained outstanding for the first respondent was a wasted costs application against the second respondent's representative. Orders were made to deal with the application without the need for a hearing.

The Proceedings

3. The claimant submitted an Employment Tribunal application on 5 July 2021 against both respondents, contending that he had been unfairly dismissed, was owed various statutory payments and that there had been a failure to consult during

a transfer of an undertaking. Within the claim form, the claimant asserted that he was employed by the first respondent because the second respondent had told him that he had not transferred as an employee of the undertaking.

4. On 6 August 2021 the first respondent submitted a response in which it asserted that the claimant's employment had transferred to the second respondent on the Transfer of Undertaking on 1 April 2021.

5. In an undated response, the second respondent asserted that there had been no transfer of the claimant's employment and it was unaware of the claimant's existence until 6 April 2021 when the claimant approached the second respondent to discuss his absence.

6. On 9 October 2021 the first respondent disclosed the sale of the undertaking documents to both the claimant and the second respondent. That document did not include any reference to the claimant but rather set out the general provisions of the sale of the undertaking.

7. On 11 October 2021 the first respondent sent to the claimant and the second respondent the employer's liability information document in which the claimant's name was included as those whose employment would be transferred to the second respondent. In a response on the same day, the claimant's representative confirmed that he already received that documentation from the second respondent but that the second respondent was disputing that the claimant had transferred because the first respondent had not disclosed that the claimant was subject to an active disciplinary procedure.

8. On 2 November 2021 the first respondent sent to the claimant and second respondent a copy of an email dated 24 March 2021 that had been sent by the first respondent's representative to the second respondent's representative during the transfer of undertaking attaching further details of the claimant's transfer of employment.

9. On 22 November 2021 the parties attended a case management preliminary hearing with Employment Judge Ross. During that hearing Employment Judge Ross recorded that the parties accepted that there had been a transfer, but the second respondent disputed whether the claimant was included within that transfer. As a result, Employment Judge Ross listed the matter for a preliminary hearing to take place on 23 March 2022 to decide whether the claimant had been included within the transfer. Employment Judge Ross also made orders for preparation of the evidence for that preliminary hearing.

10. On the same day the first respondent re-sent the employer's liability information to the second respondent and the claimant, and the second respondent's representative confirmed that she would take instructions.

11. On 2 December 2021 the first respondent sent a letter to the claimant stating that if the claim were to be pursued against the first respondent, it would seek costs.

12. On 6 December 2021 the first respondent sent a similar letter to the second respondent stating that the email of 24 March 2021 was evidence that the second respondent knew that the claimant's employment would be transferred to the

undertaking, and if the matter was continued against the first respondent then it would pursue wasted costs.

13. On 20 December 2021 the first respondent put the second respondent on notice that in the absence of the second respondent accepting liability it would pursue wasted costs.

14. On 17 January 2022 the claimant's representative emailed the respondents' representatives attaching a pdf with the title: "the sale of the business". I have not been provided with a copy of that pdf document. The second respondent's representative responded to the claimant's representative to say that she was taking instructions. The claimant's representative forwarded that response to the first respondent's representative, who had not been copied into the email.

15. On the same date the first respondent warned the claimant and the second respondent that the first respondent would not wait later than that week to prepare for the forthcoming preliminary hearing.

16. On 26 January 2022 the claimant chased the second respondent for a response.

17. By 31 January 2022 the first respondent contacted the second respondent directly in order to elicit a response. The second respondent was informed that if a substantive response was not received by 5.00pm on 2 February 2022, the first respondent would make an application to the Tribunal for wasted costs.

18. On 1 February 2022 the second respondent's representative emailed the first respondent's representative stating that she hoped to "get back to them tomorrow".

19. On 18 February 2022 the claimant made an application to have the second respondent's response struck out because of alleged lack of compliance with the Case Management Orders.

20. On 22 February 2022 the first respondent made an application for wasted costs against the second respondent's representative.

21. At the same time, the first respondent made an application for costs against the claimant.

First Respondent's Application

22. The first respondent relied upon the claimant's application to strike out the second respondent's response as the chronology of the proceedings.

23. The first respondent also included the correspondence between the parties about the issue of costs. It was the first respondent's position that the second respondent's representatives could have prevented the first respondent from incurring costs complying with the Case Management Orders.

24. It was the submission of the first respondent that clear evidence had been sent to the claimant and the second respondent proving that the claimant's details had been included in the employer's liability information. The first respondent

contended that this had been acknowledged by Employment Judge Ross during the preliminary hearing on 22 November 2021.

25. The first respondent included a fixed fee document and asserted that the costs that had been incurred by the first respondent to date were £9,980 plus VAT.

Second Respondent's Response

26. On 25 April 2022 in accordance with the Case Management Order, the second respondent's representative provided a response to the wasted costs application.

27. In response the second respondent's representative accepted that the assertion in the ET3, that the second respondent had been unaware of the claimant until 6 April 2021, was an error on the second respondent's part. However, the second respondent's representative maintained that the second respondent and the first respondent were in dispute as to whether the claimant should have been included in the transfer of undertaking in light of an ongoing disciplinary investigation. The second respondent's representative acknowledged that this was a matter for the County Court.

28. The second respondent's representative also asserted that the fee earner dealing with the matter was a specialist employment practitioner, was inexperienced in the area of commercial litigation and that this had contributed to the delay in responding to the first respondent.

29. The second respondent's representative stated that the first respondent was complaining about inaction between November 2021 to January 2022 and a failure by the second respondent's representative to respond to three pieces of correspondence.

30. The second respondent's representative also contended that the preliminary hearing would have focussed mainly on the application to strike out the claim rather than the second respondent's inaction and the first respondent would always have been required to prepare for the preliminary hearing.

31. The second respondent's representative maintained that the first respondent had also caused a delay in providing its response to the claim and had not set out a proper Schedule of Costs.

32. The second respondent's representative also maintained that it was inappropriate for the first respondent to claim for all costs incurred because, despite the second respondent's position, the first respondent would have always had to respond to the claim brought by the claimant. The second respondent's representative asked the Tribunal to note that the first respondent had, at the case management preliminary hearing on 21 November 2021, agreed to prepare the documents for the preliminary hearing.

Relevant Legal Principles

33. Rule 80 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides the Tribunal with the power to make a wasted costs order:

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- (1) A Tribunal may make a wasted costs order against a representative in favour of any party (“the receiving party”) where that party has incurred costs—
 - (a) as a result of any improper, unreasonable or negligent act or omission on the part of the 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 the receiving party to pay.

Costs so incurred are described as “wasted costs”.

34. Rule 82 sets out the procedure for applying for a wasted costs order:

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“A wasted costs order may be made by the Tribunal on its own initiative or on the application of any party. A party may apply for a wasted costs order at any stage up to 28 days after the date on which the judgment finally determining the proceedings as against that party was sent to the parties. No such order shall be made unless the representative has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application or proposal. The Tribunal shall inform the representative’s client in writing of any proceedings under this rule and of any order made against the representative.”

35. The leading guidance on dealing with such an application was provided by the Court of Appeal in the case of **Ridehalgh v Horsefield [1994] CH205**, and the following three stage test should be applied:

- (1) Has the legal representative of whom complaint was made acted improperly, unreasonably or negligently?
- (2) If so, did such conduct cause the applicant to incur unnecessary cost?
- (3) If so, is it, in all the circumstances, just to award the legal representative to compensate the applicant for the whole or part of the relevant cost?

36. In the case of **KL Law Ltd v Wincanton Group Ltd and anor EAT 0043/18** the President of the EAT remarked that:

“A wasted costs order is an order that should be made only after careful consideration and any decision to proceed to determine whether costs should be awarded on this basis should be dealt with very carefully. A wasted costs order is a serious sanction for a legal professional. Findings of negligent conduct are serious findings to make. Furthermore, even a modest costs order

can represent a significant financial obligation for a small firm. Tribunals should proceed with care in this area.”

Discussion and Conclusions

Has the legal representative of whom the complaint was made acted improperly, unreasonably or negligently?

37. The second respondent was entitled to dispute that the claimant’s employment had transferred to the second respondent as part of the transfer of undertaking. It was accepted by Employment Judge Ross that this was an outstanding issue for which there needed to be a determination at a preliminary stage by an Employment Judge.

38. By the time of the case management preliminary hearing on 21 November 2021 the first respondent had provided details of the transfer of undertaking and the employer’s liability information. Despite this, and contrary to the first respondent’s assertion, Employment Judge Ross took the view that the matter was a live issue that needed to be determined at the preliminary hearing.

39. After the case management preliminary hearing on 22 November 2021 the second respondent’s representative was sent another copy of the employer liability information and agreed to take instructions. Thereafter, there were several pieces of correspondence between the first respondent, the claimant and the second respondent to which the second respondent’s representative did not respond until 17 January 2022.

40. The case of **Ridehalgh v Horsefield [1994] CH205** defined “improper” as conduct which would equate to removal from the representative from their profession. “Unreasonable” is defined as conduct which is vexatious or carried out to harass another party. “Negligent” amounts to a failure to act in a way that would be expected of a member of the profession. The second respondent’s representative’s failure to respond to this correspondence did not amount to improper or unreasonable conduct.

41. The second respondent was entitled to dispute the first respondent’s assertion that the claimant’s employment had transferred. At most, by the time that Employment Judge Ross listed the matter for a preliminary hearing, there were documents that included the claimant’s name. However, it was not until 6 December 2021 that there was evidence of correspondence between the two parties about the claimant’s transfer which put the second respondent on notice that it must have been aware of the transfer of the claimant’s employment prior to 1 April 2021.

42. It is the second respondent’s representative’s position that because the second respondent was considering action in the County Court for the losses incurred by the transfer of the claimant, the fee earner, inexperienced in commercial matters, was unsure about conceding that the claimant’s employment had transferred to the second respondent, in the Employment Tribunal proceedings.

43. The second respondent’s representative was negligent in not responding to the correspondence or complying with the Case Management Orders. There was an expectation that an experienced employment litigator would respond promptly to

correspondence and comply with case management orders regardless of her inexperience in commercial matters.

If so, did such conduct cause the applicant to incur unnecessary cost?

44. In **Mitchells Solicitors v Funkwerk Information Technologies York Ltd EAT 0541/07** the Employment Appeals Tribunal determined that in order to be successful with an application for wasted costs, it is necessary to establish that the conduct of the representative amounted to an abuse of process that caused the costs to be wasted.

45. The first respondent did not provide clear evidence that the second respondent would have been aware of the transfer of the claimant's employment until 6 December 2021 when it forwarded a copy of the email from 24 March 2021.

46. Following two costs warnings, in December 2021, the second respondent's representative did not respond.

47. However, on 17 January 2022 the claimant's representative sent a further document to the second respondent's representative entitled "Sale of Business pdf". I have assumed that this was further clarification about the sale of the first respondent's business to the second respondent.

48. It is therefore clear that even by 17 January 2022 the issue of the claimant's transfer that had been listed for a preliminary hearing by Employment Judge Ross, was far from settled.

49. The second respondent's representative was put on notice that the first respondent's representative required a response by 5.00pm on 2 February 2022. That response was unfortunately not forthcoming.

50. As a result, the first respondent incurred costs preparing for the preliminary hearing. I don't accept that the first respondent would have always had to incur such costs to deal with the application to strike out the claimant's claim. Had the second respondent conceded the issue of the claimant's transfer after receipt of the document on 17 January 2022, the claimant would have withdrawn his claim against the first respondent before the first respondent incurred the cost of preparing for the preliminary hearing.

51. The second respondent's representative applied for a postponement of the hearing on 23 March 2022 and the matter came before me on 13 April 2022 for case management.

52. The inaction of the second respondent's representative from 2 February 2022 until 23 March 2022 led to the first respondent preparing for the preliminary hearing. In accordance with the fixed fees provided by the first respondent, the costs incurred for that preparation was £1,980.

If so, is it in all the circumstances just to award the legal representative to compensate the applicant for the whole or part of the relevant cost?

53. Whilst the issue of the claimant's transfer remained outstanding until at least the 17 January 2022, the first respondent allowed the second respondent's representative further time to respond before costs were incurred in preparation for the preliminary hearing.

54. Despite this allowance, the second respondent's representative failed to respond and did not take any action until she applied for a postponement of the preliminary hearing on 23 March 2022. As this was the date of the preliminary hearing, the first respondent had incurred costs in preparing for that preliminary hearing.

55. I therefore determine that it would be just to make a wasted costs order against the second respondent's representative for the costs incurred by the first respondent of £1980.

Employment Judge Ainscough
Date: 19 January 2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON
20 January 2023

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