EMPLOYMENT TRIBUNALS

Claimant: Mr M Selby

Respondent: John Lewis plc

Tribunal: London Central

Made by: Employment Judge E Burns (in chambers)

JUDGMENT

The Respondent's application for a costs order is refused.

REASONS

Background

(1) On 8 December 2021, following a period of early conciliation between 7 October and 9 November 2021, the Claimant presented a claim to the Employment Tribunal for unfair dismissal.

(2) The Tribunal issued a notice of hearing on 29 December 2021 for a final hearing on 9 and 10 June 2022. Accompanying the notice of hearing were standard case management orders requiring:

(a) the Claimant to send a schedule of loss to the Respondent by 12 January 2022;
(b) the parties to send each other copies of all the documents in their possession relevant to the claim by 28 April 2022;
(c) a hearing bundle to be agreed by both parties and prepared by the Respondent by 12 May 2022; and
(d) written witness statements to be exchanged by 26 May 2022.

(3) The Respondent presented its Response by the date it was due, namely 14 January 2022.

(4) On 19 May 2022, the Respondent wrote to the Tribunal to make an application that the Claimant's claim be struck out. According to the Respondent's letter and

attachments, the Claimant had failed to comply with the case management orders to date and was not responding to its correspondence sent since 28 April 2022. The letter did not address whether the Claimant had failed to comply with the order for the schedule of loss.

(5) On 24 May 2022, the Tribunal wrote to the Claimant asking for his comments on the Respondent's application. The letter warned the Claimant that if he did not respond by 31 May 2022, his claim would be struck out. The letter was sent by post and email.

(6) As the Claimant did not respond, on 8 June 2022, the Claimant's claim was struck out on the grounds that the that it had not been actively pursued. The hearing listed for 9 and 10 June 2022 was vacated.

(7) On 1 July 2022, the Respondent applied for costs under Rule 76 of the Tribunal Rules. The application was made on the basis that under Rule 76(1)(a), in his conduct of the proceedings, the Claimant acted vexatiously, abusively, disruptively or otherwise unreasonably. The letter highlighted the Claimant's failure to respond to the correspondence and case management orders and in addition, said that there had been further correspondence, to which he had failed to respond.

(8) The Respondent's letter states:

"The Respondent submits that the Claimant's conduct, as set out above, was vexatious, abusive, disruptive or otherwise unreasonable. The Tribunal and Respondent were required to spend unnecessary time chasing the Claimant to request compliance with directions, and the Respondent incurred additional unnecessary legal fees given that the Claimant did not actively pursue his claim or comply with the Tribunal's case management orders on disclosure, agreeing the bundle or exchange of witness statements, and ultimately the case was struck out due to the Claimant's vexatious, abusive disruptive or otherwise unreasonable behaviour."

(9) In addition, the letter records that the Respondent sent a without prejudice costs warning letter to the Claimant on 1 February 2022 informing the Claimant that the Respondent believed that the Claimant had no reasonable prospect of success and was acting unreasonably in pursuing his claims. The Respondent made an offer to the Claimant that if he withdrew his claims, the Respondent would not make any application for costs against him. The Claimant did not respond to the letter.

(10) The letter applying for costs attaches a schedule of costs. The Respondent has not claimed for its entire costs spent defending the claim, but for the fee incurred by reason of instructing Counsel to attend the hearing and the fees incurred preparing the costs application. The amounts were incurred as follows:

(a) 50% on 2 June - £1,500 plus VAT
(b) 50% on 6 June 2022 - £1,500 plus VAT
(c) Drafting the costs application - £1,000 plus VAT

(11) On 9 February 2023, the Tribunal wrote to the Claimant inviting him to comment on the Respondent's application by 24 February 2023. The letter was sent Claimant by email and post. The Claimant did not respond.

THE LAW

(12) The Tribunal Rules enable a legally represented party in employment tribunal litigation to make an application for a cost order.

(13) When considering whether or not to award costs, the relevant tests (known as the "threshold test") which the tribunal must apply are found in Rule 76 which says:

> *(1) "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) any claim or response had no reasonable prospect of success;*
>
> *…..*
>
> (2) *A Tribunal may also make such an order where a party has been in breach of any order ……..."*

(14) The Tribunal must consider an application in three stages:

- I must first decide whether the relevant threshold test is met.
- if I am satisfied the relevant threshold test has been met, I should then decide if I should exercise my discretion to award costs (the rules say "may" rather than "must").
- I should then decide the amount of the costs to be awarded.

Each case depends on the facts and circumstances of the individual case.

(15) A factor relevant to the exercise of my discretion may be whether there has been any warning of a risk of costs, but such a warning is not a prerequisite to the making of an order; nor is it a prerequisite that the receiving party must have put the paying party on notice of any application.

(16) Rule 84 is also relevant. It says:

*"In deciding whether to make a costs, 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 representative's) ability to pay." (emphasis added)

(17) I emphasise the word "may" in bold because the Tribunal is permitted, but not required to have regard to the means of the party against whom the order is made. A Tribunal can make an award even if the paying party has no ability to pay, provided that we have considered means. I must do this even when the paying party does not raise the issue of means directly and must say whether or not I have taken the paying party's means into account.

(18) Finally, when determining the amount of costs to be awarded, I can choose between awarding costs on the standard or indemnity basis. These terms come from the Civil Procedure Rules, Rule 44.3 which says:

"(2) Where the amount of costs is to be assessed on the standard basis, the court will –

(a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and

(b) resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party.

(3) Where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party."

DECISION

(19) The reason that the Claimant's claim was struck out was because he was not actively pursuing his claim. I determined this based on his failure to respond to correspondence from the Respondent and from the Tribunal and his failure to comply with the Case Management Orders. I did not strike the claim out due to the Claimant's vexatious, abusive disruptive or otherwise unreasonable behaviour.

(20) I do not know why the Claimant failed to respond to correspondence or comply with the case management order. I considered there were three possible explanations.

(21) The first of these was that he presented the claim simply to create trouble for the Respondent and never intended to comply with any orders. Such behaviour would be vexatious and abusive. The threshold for finding such behaviour is very high, however, and I considered there was no evidence to support such a finding. In addition, in my experience, vexatious and abusive litigants more commonly do not ignore correspondence, but tend instead to send voluminous and frequent correspondence.

(22) Another possible explanation for the Claimant's conduct was that the Claimant was unable to progress the litigation because of illness. Were this the case, I would have expected him or a relative of friend of his to have informed the Respondent and Tribunal. I considered I could not conclude that this was the likely explanation for his conduct in the absence of any evidence to support such a finding.

(23) The final possibility was that the Claimant did not receive the correspondence from the tribunal or the Respondent. Emails are sometimes not received because they end up in spam folders and the Claimant may have moved to a different address after submitting his claim. I considered this was the most likely explanation in the circumstances.

(24) Although an explanation for the Claimant's failure to respond to correspondence and comply with case management orders, it did not in my judgment excuse his conduct. When submitting a claim, a claimant must ensure that he provides the tribunal and the respondent with contact details that enable them to correspond with him. If those contact details change during the course of litigation, the claimant must update them. Not to do so constitutes unreasonable conduct in my judgment and therefore led me to decide that the threshold test in Rule 76(1)(a) for unreasonable conduct was met in this case.

(25) Having decided that the threshold test was met, I then considered whether it was in the interests of justice to make a costs award against the Claimant, taking into account all the circumstances in this case. I decided that, although finely balanced, making a costs award was not in the interests of justice for the following reasons.

(26) Employment tribunals are understood to be a no-costs jurisdiction. Costs can be awarded, but as an exception rather than the rule and this general position was in my mind when considering this matter. Even when a threshold test in Rule 76 (1)(a) is met, an award of costs does not automatically follow.

(27) In this case, I took into account that the Claimant was not represented. He was a long serving employee of the Respondent when he was dismissed, having worked there since 2006. I concluded that it was therefore unlikely that he had experience of employment tribunal litigation as a result and could not be expected to have knowledge of the tribunal's quite complex costs rules.

(28) Although the Respondent wrote to warn the Claimant of the risk of costs, in light of my finding that he did not respond because he did not receive correspondence, it follows that he did not receive the costs warning letter.

(29) In addition, the letter referred only to the costs risk associated with the likelihood that the Claimant's claim might fail based on its weak merits. As matters transpired, the Respondent's actual application for cost has been made on an entirely different basis. Based on my reading of the standard case management orders, the Claimant was not expressly warned by either the Tribunal or the Respondent that his failure to respond to correspondence or comply with the orders could result in a costs award being made against him.

(30) The final matter I took into account was that I had no information as to the Claimant's means to pay a costs award. I was aware that this did not prevent me from making such an award. I considered it weighed heavily in the balance against me doing so.

(31) I wish to add that had I decided the interests of justice question differently and moved on to consider the amount of the award, I would not have awarded the Respondent the costs sought in any event. The reason for this was that, in my judgment, the Respondent could have avoided incurring the Counsel's fees that were being claimed and that therefore they were not reasonably or necessarily incurred.

(32) Although the hearing was not officially vacated until 8 June 2022, after the costs were incurred, the Claimant had not been responding to any of the Respondent's representative's correspondence for a significant period of time. The Respondent was aware that on 24 May 2020, the tribunal had written to the Claimant with a warning that it was preparing to strike out his claim. It must have realised that the likelihood was that the Claimant would not respond.

(33) The Respondent could, at this point, have written to the tribunal explaining that it was due to incur counsel's fees on 2 June 2022 and asked for an urgent decision on whether the hearing would proceed or alternatively make a postponement application. If the tribunal had failed to respond in good time, it would be reasonable for the Respondent to have decided that it could not stand down counsel as the hearing remained listed. However, in this case, the Respondent did not even try to avoid the costs being incurred even though it was highly likely that the hearing would not proceed.

(34) Finally, with regard to the costs incurred in making the costs application, these were incurred by choice by the Respondent. The application has been considered and so the costs were not for work that was wasted, albeit that the application has not succeeded.

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Employment Judge E Burns
17 March 2023

Sent to the parties on:

17/03/2023

For the Tribunal: