EMPLOYMENT TRIBUNALS

Claimant: K Jeyarasa

Respondent: Kentucky Fried Chicken Limited

Heard at: London South Employment Tribunal

Before: Employment Judge Burge

COSTS JUDGMENT

It is the Judgment of the Tribunal that the Respondent's application for wasted costs against David Benson Solicitors Ltd is refused.

REASONS

1. The Claimant brought claims of protected disclosure detriment and constructive unfair dismissal against the Respondent on 17 November 2021. On 30 November 2021 the Tribunal issued a strike out warning to the Claimant, saying that the Claimant had until 14 December 2021 to give reasons in writing why his claim of unfair dismissal should not be struck out. Both the Claimant and the Respondent were, and are, represented. The Respondent was told it did not have to respond to the Claimant's claim of unfair dismissal at that stage.

2. On 22 June 2022, EJ Khalil wrote:
   > "It appears that the Claimant's claim includes a claim for Unfair Dismissal under S.103A of the Employment Rights Act 1996. If so, a response will be required. The parties can comment within 7 days of the date of this letter [i.e. by 29th June 2022]."

3. The Respondent disagreed with EJ Khalil's view by letter dated 28 June 2022 and later chased for a response.

4. A three day final hearing was listed on 11 July 2022 for 8, 9, 10 February 2023.

5. On 25 October 2022 EJ Khalil wrote to the Claimant saying there had been no response from the Claimant to the letter and attached a copy. The Claimant was asked to reply by 1 November 2022.

6. The Claimant wrote, via his representatives David Benson Solicitors, on 4 November 2022 apologising for missing the deadline "due to our administrative oversight [that] occurred due to human error" and confirming that the Claimant's constructive unfair dismissal claim was brought under section 103A Employment Rights Act 1996.

7. The Respondent made an application to convert the final hearing to a preliminary hearing that was refused. Then on 12 December 2022 the Respondent applied for the final hearing to be converted into a preliminary hearing in relation to the disputed issue of the Claimant's s.103A ERA constructive unfair dismissal claim. This was granted by the Tribunal and the hearing was converted to a three hour Open Preliminary Hearing to identify the issues, deal with the strike out application and case management.

8. At the Open Preliminary Hearing I decided that the Claimant had brought a s.103A ERA constructive unfair dismissal claim, the Respondent's strike out application was refused, the claims were case managed and new hearing dates were provided. On why the Claimant had not responded to two Tribunal letters and had responded late to the third Tribunal letter, Mr Mariampillai, Solicitor at David Benson Solicitors Ltd said that it was due to administrative errors of the firm of solicitors, it was not the fault of the Claimant.

9. I gave permission for the Respondent to make a wasted costs application within 7 days and for David Benson Solicitors Ltd to respond to that application within 7 days. I indicated that I would decide the application on the papers.

10. The Respondent's application for wasted costs sought its costs of the Open Preliminary Hearing, namely for the attendance of its representative.

The Law

11. Rules 74 – 84 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1 contain the costs provisions. Rules 80-82 provide for the rules and procedures of wasted costs orders.

12. The test for determining if a wasted costs order should be allowed is set out in the case of *Ridehalgh v Horsefield* [1994] 3 All ER 848:
    i. Did the representative act improperly, unreasonably or negligently?
    ii. If so, did that conduct result in the party incurring unnecessary costs?
    iii. If so, is it just to order the representative to compensate the party for the whole or part of those costs?

13. The Court of Appeal said that:

i. "Improper" was said to cover, but was not limited to, conduct that would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty.

ii. "Unreasonable" described conduct that was vexatious, designed to harass the other side rather than advance the resolution of the case; and

iii. "Negligent" was to be understood in a non-technical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession.

Conclusions

14. In their written response, David Benson Solicitors Ltd provided no further explanation for why they had failed to reply to two of the Tribunal's letters and replied late to one of them. I concluded that it was, as they had set out in their letter, due to administrative oversight and human error. The way that David Benson Solicitors Ltd had conducted the litigation at that time was poor. Their failure to respond to two of the Tribunal's letters, and late to the third letter was negligent in the non-technical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession. Solicitors are expected to have systems in place so that failures of this kind do not arise.

15. The Respondent's application for wasted costs requests the costs of their representative attending the Open Preliminary Hearing. However, it was the Respondent who requested a preliminary hearing to strike out the Claimant's claim of constructive unfair dismissal. A preliminary hearing was indeed necessary given the dispute between the parties about whether or not it had been pleaded. The Respondent would therefore have incurred the costs of a preliminary hearing regardless of whether or not David Benson Solicitors Ltd had responded in a timely manner. The Respondent's application therefore fails due to causation – the negligent conduct did not result in the party incurring the unnecessary costs it is now claiming.

Employment Judge L Burge
27 April 2023